working with my Senate colleagues to take on other crucial challenges. I will be an active participant in the Social Security debate because we have a duty to the American people to ensure that their Social Security money is protected, not just for the current generation of retirees but for future generations as well. That is why I introduced my version of the Social Security lockbox last week and why I support the innovative idea of secure personal retirement accounts.

This week I will participate in the debate on class action reform in support of the Senator from Iowa, and I am hopeful we will not stop here. In the near future the Senate needs to address the problem of frivolous lawsuits that are driving more and more doctors out of business and robbing so many rural communities of access to the most basic health care.

I will also keep up the fight against Louisiana corruption and cronyism that still costs us jobs back home. As the folks back home know, I have gotten a few scars from this battle in the past but that is OK; I am ready to continue this fight in the Senate because it is a fight about doing right by Louisiana.

I look forward to working with Senator LANDRIEU on key Louisiana projects that will protect and strengthen our Louisiana economy. By working together we will be able to secure the funding needed to preserve our coast, finish the construction of I–49, and protect our State's vital military installations.

Every morning that I wake up at home in Louisiana, I help my wife Wendy get our four children up and ready for school and for life. Then I view what flows naturally from that. I look for new ideas and innovative avenues to improve the lives of every child in Louisiana. And now in doing so I look for new ways to work with every Member of this great body to build that brighter future.

Mr. President, I thank you and I yield the floor.

Mr. MCCONNELL. Mr. President, I say briefly to the junior Senator from Louisiana, thank you for a marvelous opportunity to hear your first policy speech in the Senate. On behalf of all of our colleagues on both sides of the aisle, we welcome you here, and it is a pleasure to listen to your priorities not only for Louisiana but for the Nation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. I thank the Chair. I rise to say a few words to congratulate my colleague, a gentleman I have known for many years and so many in Louisiana and around the Nation have come to admire and respect for his energy and commitment. I can only say the only disappointment in his maiden speech is that he did not call for the Mardi Gras to be a national holiday. The two of us are going to join forces and continue to work on that. I think most of our colleagues would readily sign that resolution, so we will see.

But let me in seriousness thank him for joining the effort and putting his shoulder to the wheel to lower prescription drug costs for the people of Louisiana and our Nation. There are many critically important and urgent issues before the Congress but that ranks among the top. I believe his expertise in that area is going to be called on often in the next few months as this debate continues.

Also, I would need to mention that I thank him for his efforts in mentioning and fighting for, both in his time in the House and the Louisiana Legislature, the issue of coastal erosion. I see our good friend, the Senator from Arkansas, in the Chamber, and I was joking with his colleague, Senator LINCOLN, last night, saying if we are not successful in our efforts against coastal erosion, they, too, will have the great benefit of representing a coastal State because Louisiana may not be there if we do not address this issue.

On accountability in education, this Congress has made remarkable progress, and our State, you may not realize but as Senator VITTER knows, is leading the Nation in both accountability and also requirements in those new standards, and on transportation. I look forward to working with him.

He has two excellent committee assignments on Commerce and EPA. He will follow in the great footsteps of Senator John Breaux who served so ably on the Committee on Commerce in the area of fisheries as well as coastal issues on that committee, and on Transportation.

So I say to Senator VITTER, welcome to the Senate. Your energy, your enthusiasm, and your vision are going to mean a great deal to strengthen this already august body. Thank you and God bless you in your term.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

CLASS ACTION FAIRNESS ACT OF 2005

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 5, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 5) to amend procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Pending:

Durbin (Modified) Amendment No. 3, to preserve State court procedures for handling class actions.

The PRESIDING OFFICER. Under the previous order, the pending amendment is set aside and the Senator from Arkansas, Mr. PRYOR, is recognized.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, parliamentary inquiry: We are proceeding now to go to the class action bill?

The PRESIDING OFFICER. The Senator is correct.

Mr. SPECTER. And the next order of business is the Pryor amendment?

The PRESIDING OFFICER. That is correct.

Mr. SPECTER. I see the Senator from Arkansas on the floor, so I will yield the floor.

AMENDMENT NO. 5

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

The PRESIDING OFFICER (Mr. GRAHAM). The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Arkansas [Mr. PRYOR], for himself, Mr. SALAZAR, and Mr. BINGAMAN, proposes an amendment numbered 5.

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

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

The amendment is as follows:

(Purpose: To exempt class action lawsuits brought by the attorney general of any State from the modified civil procedures required by this Act)

On page 5, between lines 2 and 3, insert the following:

''(1) ATTORNEY GENERAL.—The term 'attorney general' means the chief legal officer of a State.

On page 5, line 3, strike ''(1)'' and insert ''(2)''.

On page 5, line 5, strike ''(2)'' and insert ''(3)''.

On page 5, line 12, strike the period at the end and insert the following: '', but does not include any civil action brought by, or on behalf of, any attorney general.''.

On page 5, line 13, strike ''(3)'' and insert ''(4)''.

On page 5, line 17, strike ''(4)'' and insert ''(5)''.

On page 5, line 21, strike ''(5)'' and insert ''(6)''.

On page 6, line 1, strike ''(6)'' and insert ''(7)''.

On page 6, between lines 5 and 6, insert the following:

''(8) STATE.—The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States.

On page 14, strike lines 20 and 21, and insert the following:

(1) by striking subsection (d) and inserting the following:

''(e) As used in this section—

''(1) the term 'attorney general' means the chief legal officer of a State; and

''(2) the term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States.''; and

On page 15, line 7, insert '', but does not include any civil action brought by, or on behalf of, any attorney general'' before the semicolon at the end.

Mr. PRYOR. Mr. President, I rise to offer an amendment to S. 5, the Class

Action Fairness Act of 2005, to ensure that State attorneys general elected by the people of their States as the chief law enforcement officer will still be able to do their business and protect the people of their States.

My amendment simply clarifies that State attorneys general should be exempt from S. 5 and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government.

I know that S. 5 is intended to fix problems around class action law in America, and I think most agree that the attorneys general are not part of the problem. In the simplest terms, this amendment allows them to seek State remedies to State problems. I hope we can all agree infringement on State rights should not be a result of this bill.

I believe class actions remain an important tool for enforcing shareholder and employee rights, for cracking down on telemarketing fraud in attempts to prey on the elderly, and in forcing companies to improve product safety both in the manufacture of unreasonably dangerous products and in drugs. We need to make sure class action reform does not unnecessarily restrict the ability of citizens to seek redress for legitimate claims.

While we all may not agree with those in Congress that we need to improve the class action process, we should all agree that it should not be done by shutting State attorneys general out of the system. I believe to do so would circumvent the intent of our Founding Fathers in recognizing that State sovereignty should not be dismissed by Federal action so easily. To that end, I offer this amendment in an attempt to quash ambiguity about the authority of State attorneys general that may exist in this bill.

It should be known that this commonsense amendment in no way impairs the class action reforms as intended in this bill, nor does it in any way expand the authority of State attorneys general. What this amendment does is clarify the existing authority of State attorneys general.

I have heard in the hallways, and as I have gone through the corridors in the Senate in the last few days, that there are some who do not want any amendments to this bill. This amendment, if accepted, I believe is very consistent with the intent of the bill. I believe the authors of the bill did not intend to shut out State attorneys general. So even though some do not want amendments—I think we ought to consider all amendments; some of the amendments are very worthy of consideration. Although some do not want amendments, I think they can vote for this with a clear conscience that this will not change the intent of the bill.

I am a former State attorney general. I understand the important work they do for consumers and the most vulnerable in our society. It is not just my opinion that this amendment is needed. I offer this amendment on behalf of a bipartisan group of 46 State attorneys general who have expressed that it is critically important to all their constituents, especially the poor, elderly, and disabled, that provisions in this legislation be clarified so as not to compromise the traditional law enforcement authority.

I have a letter. Interestingly enough, in the first paragraph of the letter, it says—and these are 46 State attorneys general:

> We take no position on the act as a general matter and, indeed, there are differing views among us on the policy judgments reflected in the act.

This is very clear. The attorneys general are split on the underlying act, but they are not split on their authority being called into question with this act.

They say:

> Clarifying the act does not apply to and would have no effect on actions brought by State attorneys general on behalf of their respective States and citizens.

I want to talk in just a minute about how State attorneys general are different from private sector lawyers. I will get to that in a minute.

I ask unanimous consent to print in the RECORD this letter signed by 46 State attorneys general, Democrats and Republicans, collectively representing more than 90 percent of the country, who are very concerned that this legislation as it is written will stop them from doing an important part of their jobs.

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

NATIONAL ASSOCIATION
OF ATTORNEYS GENERAL,
Washington, DC, February 7, 2005.

Hon. BILL FRIST,
Senate Majority Leader, U.S. Senate, Dirksen Building, Washington DC.

Hon. HARRY REID,
Senate Minority Leader, U.S. Senate, Hart Building Washington, DC.

DEAR SENATE MAJORITY LEADER FRIST AND SENATE MINORITY LEADER REID: We, the undersigned State Attorneys General, write to express our concern regarding one limited aspect of pending Senate Bill 5, the ''Class Action Fairness Act,'' or any similar legislation. We take no position on the Act as a general matter and, indeed, there are differing views among us on the policy judgments reflected in the Act. We join together, however, in a bipartisan request for support of Senator Mark Pryor's potential amendment to S. 5, or any similar legislation, clarifying that the Act does not apply to, and would have no effect on, actions brought by any State Attorney General on behalf of his or her respective state or its citizens.

As Attorneys General, we frequently investigate and bring actions against defendants who have caused harm to our citizens. These cases are usually brought pursuant to the Attorney General's parens patriae authority under our respective consumer protection and antitrust statutes. In some instances, such actions have been brought with the Attorney General acting as the class representative for the consumers of the state. It is our concern that certain provisions of S. 5 might be misinterpreted to hamper the ability of the Attorneys General to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm.

The Attorneys General have been very successful in litigation initiated to protect the rights of our consumers. For example, in the pharmaceutical industry, the States have recently brought enforcement actions on behalf of consumers against large, often foreign-owned, drug companies for overcharges and market manipulations that illegally raised the costs of certain prescription drugs. Such cases have resulted in recoveries of approximately 235 million dollars, the majority of which is earmarked for consumer restitution. In several instances, the States' recoveries provided one hundred percent reimbursement directly to individual consumers of the overcharges they suffered as a result of the illegal activities of the defendants. This often meant several hundred dollars going back into the pockets of those consumers who can least afford to be victimized by illegal trade practices, senior citizens living on fixed incomes and the working poor who cannot afford insurance.

We encourage you to support the aforementioned amendment exempting all actions brought by State Attorneys General from the provisions of S. 5, or any similar legislation. It is important to all of our constituents, but especially to the poor, elderly and disabled, that the provisions of the Act not be misconstrued and that we maintain the enforcement authority needed to protect them from illegal practices. We respectfully submit that the overall purposes of the legislation would not be impaired by such an amendment that merely clarifies the existing authority of our respective States.

Thank you for your consideration of this very important matter. Please contact any of us if you have questions or comments.

Sincerely,

Mike Beebee, Attorney General, Arkansas; Mark Shurtleff, Attorney General, Utah; Gregg Renkes, Attorney General, Alaska; Fiti Sunia, Attorney General, American Samoa; Terry Goddard, Attorney General, Arizona; Bill Lockyer, Attorney General, California; John Suthers, Attorney General, Colorado; Richard Blumenthal, Attorney General, Connecticut; Jane Brady, Attorney General, Delaware; Robert Spagnoletti, Attorney General, District of Columbia; Charlie Crist, Attorney General, Florida; Thurbert Baker, Attorney General, Georgia; Mark Bennett, Attorney General, Hawaii; Lawrence Wasden, Attorney General, Idaho; Stephen Carter, Attorney General, Indiana.

Tom Miller, Attorney General, Iowa; Greg Stumbo, Attorney General, Kentucky; Charles Foti, Attorney General, Louisiana; Steven Rowe, Attorney General, Maine; Joseph Curran, Attorney General, Maryland; Tom Reilly, Attorney General, Massachusetts; Mike Cox, Attorney General, Michigan; Mike Hatch, Attorney General, Minnesota; Jim Hood, Attorney General, Mississippi; Jay Nixon, Attorney General, Missouri; Mike McGrath, Attorney General, Montana; Jon Bruning, Attorney General, Nebraska; Brian Sandoval, Attorney General, Nevada; Kelly Ayotte, Attorney General, New Hampshire; Peter Harvey, Attorney General, New Jersey.

Eliot Spitzer, Attorney General, New York; Roy Cooper, Attorney General, North Carolina; Wayne Stenehjem, Attorney General, North Dakota; Pamela Brown, Attorney General, N. Mariana Islands; Jim Petro, Attorney General, Ohio; W.A. Drew Edmondson, Attorney

General, Oklahoma; Hardy Myers, Attorney General, Oregon; Tom Corbett, Attorney General, Pennsylvania; Roberto Sanchez Ramos, Attorney General, Puerto Rico; Patrick Lynch, Attorney General, Rhode Island.

Henry McMaster, Attorney General, South Carolina; Lawrence Long, Attorney General, South Dakota; Paul Summers, Attorney General, Tennessee; Rob McKenna, Attorney General, Washington; Darrell McGraw, Attorney General, West Virginia; Peg Lautenschlager, Attorney General, Wisconsin; Patrick Crank, Attorney General, Wyoming.

Mr. PRYOR. Mr. President, I have served with some of these attorneys general, and I can say they come from different ideological points of view and different ways of practicing law. As a whole, they are not taking a position on the bill, but as you can see by this letter, the vast majority of State AGs agree on one point: As the chief legal officers for their respective States, there must be clarification in the bill to make sure they can continue to represent the citizens of their States and carry out their duties as elected officials.

As we all know, attorneys general frequently investigate and bring actions against defendants who have caused harm to their citizens. These cases are usually brought pursuant to the attorneys general parens patriae authority under their respective consumer protection and antitrust statutes. This is an important point. Not all States have parens patriae authority. In fact, the State of Arkansas, when I was attorney general, had very limited parens patriae. In fact, one could argue none at all. We always had to pursue our actions under the Deceptive Trade Practices Act, which is a State statute, and we had specific authority in that statute.

I heard some people say, again, in the hallways here, that all States have parens patriae and therefore we do not need this amendment. But that is not the case. In some instances, such actions have been brought with the attorney general acting as the class representative for consumers in the State. It is my concern, as well as those of 46 attorneys general, that certain provisions in S. 5 might be interpreted to hamper their ability to bring such actions, thereby impeding one means of protecting their citizens from unlawful activity and resulting harm.

It is important to all consumers, but especially to the poor, elderly, and disabled, that the provisions of the act not be misconstrued and that attorneys general maintain the enforcement authority needed to protect them from illegal practices.

I know there are many people who want this body to pass class action reform this year and do not want to ruin its chances by adding too many amendments to the underlying bill. But, as I said a few moments ago, in this case, with this particular amendment, we are not changing the intent of the bill.

I would like to address a falsehood about the amendment that I have heard, and that is that some people have said this amendment would create a major loophole because suits could be brought on behalf of State attorneys general, that some attorneys general may allow their friends to use their names to avoid moving the case to Federal court.

The notion is incorrect and, quite frankly, it is offensive. Let me be clear.

No one can add a State attorney general without his or her express consent or permission. Moreover, attorneys general are statewide elected officials accountable to the same citizens who vote for us. They work hard and take their responsibility as chief legal officers very seriously. State attorneys general would not expend the resources or their reputations to take up a class action they did not believe was worthy of protecting their citizens.

In addition, it should be noted that in many cases, attorneys general are not after the check or the payment in litigation. They are not eyeing the big settlement, although in some cases there are large settlements at the end of the horizon. The primary objective of State attorneys general is not chasing the money but bringing about reform.

Let me be clear on this point. I alluded to this a few moments ago. State attorneys general are fundamentally different from private attorneys. Private attorneys have clients, and they are out there doing what their clients want: trying to get a recovery and trying to make their clients whole. I understand that. That is a good thing. I do not have any problem with that.

State attorneys general are different. Generally speaking—maybe not in every single case but generally speaking, when the State attorney general becomes involved, there is a matter of public policy in the litigation. In fact, I said a few moments ago that the State attorneys general are elected officials. That is not true in every single case. I think there are about 35 elected attorneys general. There are a couple selected by the supreme court or by the State legislature, and some are appointed by the Governor.

Nonetheless, attorneys general have a level of accountability that you do not find in private practice because they are accountable to the people, either the people who elected them or appointed them or selected them for the office. And attorneys general, more than private lawyers, are sensitive to criticism.

I can assure you, the last thing an attorney general wants to read is an opinion by a judge who is criticizing the attorney general for bringing a frivolous lawsuit, criticizing the attorney general for going too far. That is the last thing the attorney general wants to read in the paper.

Also, there is the court of public opinion. The attorney general does not like bad editorials to be written about him or her. They do not like to be out on the street and people questioning their integrity or their sense. So attorneys general have a level of accountability that just does not exist in other areas of practice.

That is an important distinction. As I mentioned a few moments ago, normally cases brought by States involve a matter of public policy, and we can go through a long list of cases and show where the public policy is in the cases and also show how a lot of these cases would not be profitable for the private sector to bring.

Oftentimes there is a matter of fairness and not a matter of money involved in these cases. There are several major examples where State attorneys general have filed a cause of action in State court to protect their citizens or bring reform. However, if we do not act to clarify S. 5, I am concerned this legislation would make it much harder for the attorneys general to do their jobs.

Back in the 1990s, the attorneys general around the country pooled together and sued the tobacco industry for reimbursement of State moneys as a result of disease brought about by smoking. I know in some quarters that is still a very controversial decision. Let me very respectfully remind the Congress that the Congress a year, two or three before this settlement occurred had the chance to enter into a federally mandated global settlement of all claims. That did not happen. The States pursued their case after the Congress failed to act.

This tobacco case resulted in a historic global settlement that drastically altered the way our Nation views and approaches smoking. Money from these settlements was used by the States for youth smoking prevention, to improve health care, educate citizens on the dangers of smoking, and an increased level of treatment for smoking-related illnesses. My State of Arkansas has spent every penny of the tobacco money it has received on health-related issues—every single penny.

Back to the point about the difference in the private sector attorney representing the individual or representing a class versus the attorney general representing the State's interest and the citizens of the State, when you look at the settlement agreement between the tobacco companies and the State, if I recall right, it was about 147 pages long. It was very detailed, very negotiated, a very hard-to-reach settlement.

I believe it was 147 pages long without the attachments, and 91 of those pages, that is two-thirds of the pages approximately, were about the public policy and changing the tobacco industry's practices. Here again, in private litigation it is about getting recovery for one's client, and we understand that, but when the attorney general is involved it is a materially different type of litigation.

I have never seen a private settlement in which two-thirds of the settlement document requires the industry

or the company to change its practices, but that is the type of litigation the attorneys general enter into.

Each State in the tobacco case filed individual suits in their respective State's court alleging fraud. In our particular State, we alleged the Deceptive Trade Practices Act violations and also a number of common law claims. Due to the nature of the claims, if this legislation as it is written would have existed at the time of this case, it may have presented hurdles to the attorneys general that could have prevented a resolution.

In 2001, several State attorneys general took on Ford and Firestone for failure to disclose defects in Firestone tires used on Ford SUVs, of which they should have been aware. These cases were brought again in Arkansas, and other States have similar laws, under our State's Deceptive Trade Practices Act, fraud and consumer protection laws.

Let us make this point in another case. In private causes of action, and there were many relating to the Ford and the Firestone litigation, the parties' and the lawyers' primary concern was trying to make the plaintiffs whole. That is the nature of that type of litigation.

In the attorney general actions, we established a restitution fund and a long series of injunctions against the companies in the way they marketed their products. In fact, some people may have noticed they have seen some new Ford Explorer ads on television in recent weeks. These Ford Explorer ads are due to the attorney general lawsuit, and they deal with the safety of Ford Explorers. All this goes back to the way Ford Explorers were marketed originally. The buyers bought them thinking they were safe under pretty much all conditions, but practice has taught us differently. So I make that point one more time to show how different State litigation is versus private litigation.

Ultimately, the Ford case was settled. However, had these States been required to file separate State cases under their own consumer protection laws, as could be required under this class action bill, those States would have been removed to Federal court. The Federal court would then have been required to become an expert in each State's diverse consumer laws and remedies.

State litigation is different from private litigation, and I think to some degree this amendment is a matter of States rights. In 2000, 26 attorneys general from 26 States brought suit against Publishers Clearinghouse claiming that the company was intentionally preying on the elderly by misrepresenting their sweepstakes award. My colleagues may remember that for years people used to get mail with pictures of celebrities, and in big bold letters it would have your name and say: You have won X number of millions of dollars. Or it would say: Congratulations, millionaire.

Think about it. We do not get those letters anymore. Why? Because the States intervened. The States came in under consumer protection laws and looked at how deceptive those ads were. In fact, in Arkansas when I was in the attorney general's office I would talk to an adult child of a deceased person or an adult child who had put their parents in a nursing home and they would clean out the closets and the living room or whatever and they would find stacks and stacks of magazines that had been ordered through these sweepstakes companies.

Even if one reads everything in great detail, they would find in the fine print that ordering does not increase their chances of winning. Most people do not read all the fine print. Most people thought that ordering did increase their chance of winning, and what happened was people would order the same magazine. People would tell me they would find 10 copies of the same Sports Illustrated or 10 copies of the same Newsweek or Good Housekeeping because these senior citizens ordered to try to win the sweepstakes.

It is sad and unfortunate, but they saw this as a chance they were willing to take to leave a lot of money to their children and grandchildren. So we came in as States and put a stop to that. I think it was 26 States that banded together and put a stop to that.

It was alleged that Publishers Clearinghouse was profiting from this fraud at the expense of the vulnerable elderly. I can recall that these individuals had spent their life savings on these fraudulent sweepstakes. When we got inside of the cases, we found many seniors in Arkansas who had spent hundreds, maybe thousands of dollars trying to win sweepstakes.

Is there someone here who thinks the actions of the attorneys general are out of step with common sense and fairness? In this bill we should make sure we do not take away any existing authority of the attorneys general.

These are just a few examples of the very hard and worthy work by the State attorneys general where they are trying to protect the citizens of their States. I challenge my colleagues to deem the work they do as frivolous or as junk lawsuits because attorneys general around the country have a layer of accountability that does not exist elsewhere. They are accountable to the people. They are accountable to the legislature that makes their budgets. They are accountable to the Governor. They are accountable in the court of public opinion.

I ask my colleagues to support this amendment to this bill for several reasons. One is that the overwhelming majority of State attorneys general, our States' chief legal officers, are concerned about the language of this bill, and we should be concerned about it. Remember, these attorneys general represent the citizens in all of our States. They try to get out there and do the right thing for their citizens.

Secondly, by making this change, we are not obstructing the intent of the bill, but I believe very strongly we are clarifying the authority that already exists.

Third, we should allow our attorneys general to seek State remedies to State problems. I think this is an important piece of this. It goes back to States rights. It goes back to local control and people trying to do things the way they want to handle them in their own States.

So I implore all of my colleagues who are champions of States rights or who want to protect the integrity of the bill and want to leave the tools that currently exist with the State attorneys general, to vote for this amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, a time agreement has been worked out. I ask unanimous consent that the vote in relation to the Pryor amendment occur at 12:15 today, with the time equally divided in the usual form prior to the vote, with no amendment in order to the amendment prior to the vote. Further, the time to be divided begins from when the amendment was sent to the desk. So to amplify that, the time for the Democrats would begin when Senator PRYOR started to speak.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SPECTER. I know the Senator from Delaware, Mr. CARPER, has another engagement, so I will speak very briefly as the lead opponent of this amendment.

I do oppose the amendment. I appreciate the experience of Senator PRYOR having been attorney general of the State of Arkansas. I did not hold such a lofty position. I was just a district attorney, but I appreciate the reasons he has put forward for the amendment.

It is my suggestion that it is not necessary. When the Senator from Arkansas has enumerated a number of situations where attorneys general protect the interests of the citizens of their State, that can be accomplished even if this bill is adopted. In the first place, the bill provides that if two-thirds of the parties involved are citizens of the State, it stays in the State; if one-third, it goes to the Federal court; and between one-third and two-thirds, it is up to the discretion of the judge.

So even within the confines of the language of the bill, the interests that the Senator from Arkansas has articulated will be protected.

Next, the attorneys general have authority under parens patriae statutes enacted by the many state legislatures to represent the citizens of their State. They are the lawyer for everybody in the State. The Latin phrase of parens patriae has been adopted and that gives them sufficient standing to undertake whatever is necessary.

There is a provision in the Pryor amendment which broadens it substantially by providing that any civil action brought by or on behalf of the attorney general in a State would be excluded so that there would be latitude for the attorney general to deputize private attorneys to bring their class actions and to find an exclusion, which is a pretty broad exclusion, not to use pejorative terms, but a pretty broad loophole.

Those are the essential arguments. I could expand on them, but we have limited time. The Senator from Texas has been in the Chamber since we started the debate, but as I understand it, he has agreed to yield to the Senator from Delaware.

Mr. CORNYN. It is my understanding Senator CARPER would like to speak for about 5 minutes. I ask unanimous consent that I be recognized immediately after Senator CARPER, and then Senator SALAZAR be recognized in that sequence.

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

Mr. SPECTER. I thank the Senator from Texas, and I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware is recognized for 5 minutes.

Mr. CARPER. Mr. President, I thank Senator SPECTER for yielding to me. I say to my friend and colleague from Arkansas, he knows how fond I am of him and how highly I regard him, both in his previous role as attorney general and as a colleague in the Senate.

When I heard of the amendment he was preparing to offer, I stopped and I said to my staff, let's find out if this is something I can support. As many of my colleagues know, we have endeavored to improve this bill over time, and the legislation before us today is a far different bill than was first proposed 7 years ago or even was debated 2 years ago and reported out of committee.

Senator SPECTER has spoken of the option that is available to most attorneys general, an approach called parens patriae, which I understand means ''government stands in the place of the citizen.'' For most attorneys general who wish to file a case on behalf of their citizens against some defendant, they have the opportunity to use parens patriae. For those who do not, in my judgment, they still have the opportunity to use the class action lawsuit.

What we have sought to do over the last couple of years in modifying this bill is to make sure that the class action lawsuits brought by an individual in a State, if they are of a national scope, they would be in a Federal court. If they are not, if they are more of a local issue involving residents of that State, a defendant in that State, or even where there are multiple defendants, but a defendant in that State who has a principal role as a defendant, not just somebody who was sort of pulled out of the air, to make sure there is a real defendant with a real stake in it that has a real financial ability to pay damages, then the legislation that is before us actually permits an attorney general or, frankly, any attorney, plaintiff's attorney, to bring that kind of class action.

The legislation that is before us says if two-thirds of the plaintiffs in a class action lawsuit are from the same State as the defendant, it will stay in the State court, no question. The legislation before us says that if anywhere from one-third to two-thirds of the plaintiffs on whose behalf the class action is brought meet certain standards that are set out in the bill, that can stay in State court as well.

The legislation that is before us today provides exemptions as well for incidents involving a sudden single accident. The legislation before us today also provides exemptions under the Dodd-Schumer-Landrieu language that provide even further opportunities to proceed with a class action lawsuit if the matter that is being discussed is truly a local matter, if most of the people involved both as plaintiffs and defendants are within that State.

The last thing I would say is there are plenty of people on both sides of the aisle who would like to offer amendments. My fear is if any of those amendments were adopted, we invite the House of Representatives to come back and to offer quite a different bill than the compromise that is before us today. To those of us who seek reasonable, modest reforms—and this is a court reform bill, not a tort reform bill—but to those who seek moderate reforms incorporated in this legislation, I did not support this amendment because I think it would simply invite the adoption of other amendments and, frankly, put us in the situation which will end in a conference with the House of Representatives with a bill that is frankly far different than this one and will provide an end product not to my liking and I suspect even less to the liking of those who are opposed to this compromise.

I reluctantly oppose this amendment with that in mind, but it is not something I do easily or lightly.

I thank my friend Senator CORNYN for making it possible for me to have this time.

The ACTING PRESIDENT pro tempore. The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I first want to say how much I respect and admire the author of this amendment, Senator PRYOR. He and I served together as State attorneys general, he in Arkansas and I in Texas, for 4 years. Our careers overlapped. I agree with him about the important role that attorneys general play when it comes to protecting a State's citizens and a State's consumers. But I think where I part company with my friend Senator PRYOR is, No. 1, this amendment is not necessary to preserve the authority of the State attorney general to protect the State's consumers, and, second, this amendment as worded—and I know this is not his intention—would create a potential loophole big enough to drive a truck through, that could cause substantial mischief that is intended to be prevented by this very bill.

Finally, as Senator CARPER has said, this is a negotiated bill. There are amendments I would like to offer that I think would make it a better bill. But I think we all realize that after many Senators have labored long and hard to try to get us to the point today where we literally have bipartisan support for this compromise, to offer any amendments, and particularly one like this and others that have been filed but not yet called up, would threaten our chance of success. I think that would be a shame because we all agree that the class action abuses we see are very real and are something that do not benefit the American people or consumers in general.

We have seen that some of these egregious abuses of the class action procedure have been used to make certain entrepreneurial lawyers very wealthy when the consumers literally get a coupon worth pennies on the dollar.

I am not opposed to lawyers. Let me say up front I happen to be a lawyer. But I do think that all lawyers, all people, anybody with common sense—some may say that excludes lawyers—but I like to think anybody with common sense recognizes the very real abuses that have occurred in the class action system. We have heard a lot about that. I will not repeat all of that now. I think we all take that as a given.

First, let me allude to the letter signed by—the Senator from Arkansas said 46 State attorneys general from the National Association of Attorneys General, an organization of which I used to be a member and for which I have a lot of respect, both for the people who help run that organization as well as the attorneys general who make up its membership.

I point my colleagues to paragraph 2 in this letter, which I believe makes my initial point which is that this amendment is not necessary to preserve the authority of State attorneys general. Indeed, in the last sentence in the second paragraph these 46 attorneys general say:

> It is our concern that certain provisions of S. 5 might be misinterpreted to hamper the ability of attorneys general to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm.

In other words, these 46 lawyers, the chief law enforcement officers of these States, make no claim that in fact this bill would impede their authority but, rather, that it might be misinterpreted.

I think it is fair to say that any law that has ever been written is capable of being misinterpreted. That is why we have the court system. But we certainly do not need an amendment like

this to protect the States or the attorneys general against a potential misinterpretation of S. 5, the Class Action Reform bill. That is the function, that is the role of the courts. I think it is very plain that no power of the State attorney general is impeded by virtue of S. 5, or will be once it is signed into law.

Indeed, the Senator from Arkansas alluded to statutes that are typical of every State—deceptive trade practice acts and consumer protection statutes—which in my State and I believe in virtually every other State specifically authorize the attorney general to seek remedies on behalf of aggrieved consumers. This bill certainly would not encroach on that authority. Indeed, he also alluded to common law claims that are asserted by the attorneys general in pursuit of justice for their State's citizens.

We heard the Senator from Delaware talk about the parens patriae doctrine, which is generally recognized as providing the authority to the attorney general to sue on behalf of his State's citizens. I acknowledge, as he said, there are some variations in terms of the court's interpretation in each State about the scope of that doctrine and how much or what kinds of actions might be authorized. But clearly, when State law and the State Constitution specifically provide for the right of an attorney general, a State attorney general, to sue on behalf of his State's citizens, then this bill, when made a law, will not in any way impede that endeavor.

Finally, in terms of the lack of necessity of this bill, the Senator from Delaware pointed out that where a substantial number of a State's citizens are party to a class action and are located in one State, they are carved out by the very terms of this bill so that the case will remain in State court if that is where it was originally filed.

But the real danger in this amendment—and here again I am not suggesting that anyone intended this, but I think it does show the potential for mischief with amendments that have not been the subject of long debate and negotiation—is the language that says:

> . . . does not include any civil action brought by or on behalf of the Attorney General of any State.

I am very sensitive to that particular phrase in the amendment because of a, frankly, very tragic experience I had as attorney general of my State. It is a fact that my predecessor as attorney general in the State of Texas is currently in the Federal penitentiary. He is in the Federal penitentiary because he was convicted, based on his own confession, of mail fraud and other violations of law primarily related to his attempt, almost successful, to backdate outside counsel contracts with an old buddy of his, that would potentially entitle his friend to $520 million out of the taxpayers' recovery in the Texas tobacco litigation.

I take no pleasure in bringing this up but merely make mention of it to point out the potential for mischief—not when cases are brought by an attorney general, somebody who is elected by the people, whose future, frankly, is dependent on their dutiful discharge of their obligations and faithful discharge of their duties—but when you carve out suits brought on behalf of the attorney general, which could include any lawyer who any attorney general might choose to hire as outside counsel and, of course, who is unelected and unaccountable to the people. Here, we see the potential for grave abuses.

As I have pointed out, this example was part of the Texas tobacco litigation that was part of a nationwide set of litigation, one which ultimately involved settlements on behalf of several individual States. I want to say, if my memory serves me, that Florida, Mississippi, and Texas filed their individual lawsuits and had individual judgments rendered. But the remainder of the States, including, I believe, the States of the Senator from Arkansas and the Senator from Colorado—they will correct me if I am wrong—they had a collective judgment rendered against the tobacco industry of almost $250 billion, a sum we would recognize, even here in Washington, as being significant.

The problems presented by outside counsel performing the duties of an attorney general under an exception like this just go on and on. My own experience is, again, where outside counsel of the State of Texas claimed the right to $3.3 billion out of the Texas tobacco lawsuit recovery, which by any reasonable measure was an extraordinary fee, one that, when calculated by the hours of work actually put into the lawsuit, has been described as scandalous and unconscionable. The ultimate concern must be the public interest. By accepting an amendment that would place outside the scope of this bill someone bringing a lawsuit on behalf of the attorney general, somebody unelected by the people, not accountable at the polls, we would be creating an environment ripe for fraud.

Let me tell you this: I recall that many of the States' attorneys general believed in good faith that the tobacco industry was responsible for contributing to the death and the illness of hundreds of thousands of Americans each year. Indeed, that is a fact. We lose 400,000 people each year in this country as a result of consuming tobacco products. But the lawsuits brought, which were ultimately settled by the tobacco industry, were brought under the guise of protecting children and protecting the American consumer. We now see that almost $300 billion was paid out but not a single tobacco company is out of business today. Indeed, they continue to make their product, not only in this country but worldwide. There has been no decrease in the number of people who get sick or die as a result of consuming tobacco products in this country each year.

I just have to ask whether it is wise—I suggest it is not—to create an exception, to place outside the protections of the bill not the attorneys general per se but those who seek to bring suits on the attorney general's behalf. I suggest to you the evidence in my State—and perhaps nationwide—indicates that the lack of accountability to the voters, the lack of concern for ultimate welfare of the consumer, and the potential presence of an immediate personal self-serving motive to maximize a huge attorney fee, creates enough opportunity for mischief under this well-intended amendment that it should be voted down on that basis, if no other.

Finally, let me say in conclusion that I know the Senator from Arkansas has filed this amendment in good faith and certainly does not intend any of the results I have suggested here today. But I reiterate what the Senator from Delaware has said, and what I have been told both privately and publicly. If I were to offer amendments which I believe would make this bill better, it would be a poison pill for this litigation. Indeed, I believe that no matter how well intended the amendment offered by the Senator from Arkansas is, it would have that same effect. I don't believe that is in anyone's interest.

I thank the Chair. I thank my colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. SALAZAR. Mr. President, I rise in support of the amendment which has been offered by the Senator from Arkansas. I have a great deal of respect for the National Association of Attorneys General. I also served in that position in the past, as well as the Senator from Texas and the Senator from Arkansas.

Let me very quickly make three points.

First, as has already been alluded to by both the Senator from Texas and the Senator from Delaware, the intent of this bill is to have no effect whatsoever on the powers and duties of the attorneys general to enforce their consumer protection responsibilities. I believe that point should be very much a part of the legislative history of this legislation as it moves forward.

Second, the powers and duties of the attorneys general in our States are very important powers and duties. Those are in those cases powers and duties that result from elections of the people of their States who elected individuals to serve in the capacity of attorney general.

In the context where we are limiting the ability for class actions to be brought under S. 5, that ability of the attorneys general to protect vulnerable consumers is all the more important. It is important for us to make sure as this legislation is being considered that we all understand it is going to have no impact on the powers and duties of the attorneys general.

The letter that came in from our 46 of our former colleagues, interestingly, is an accumulation of almost all of the attorneys general from around the country. It includes Democrats and Republicans alike. It includes Republicans such as my successor, John Suthers, from the State of Colorado, and Democrats such as Tom Miller from the State of Iowa. I think their letter and Senator PRYOR's amendment with respect to some of those are indeed just an effort to make sure the legislative intent that has been talked about here would impact the legislation; that is, that this legislation, S. 5, is not going to have any diminishing effect whatsoever on the powers and duties of the attorneys general to proceed forward under the laws of their States, both constitutionally and also consumer protection laws.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I have been working on this legislation for five Congresses, and I would like to get this legislation to the President without any amendments. We have heard from the highest levels of the House of Representatives that if we can pass this bill without amendments, we will be able to get it to the President without going to conference; in other words, the House will adopt it the way we do.

I don't know how many times I would like to have heard that in the House of Representatives. I don't know when I have ever heard that in my entire career. I hope everybody in the Senate has a strong heart. If I didn't have a strong heart, I wouldn't say that. And if I heard it, I wouldn't believe it. I would pass out if the House was going to take something the Senate did without question. We ought to grab the ball and run with it.

Regardless of the merits of the amendment by the Senator from Arkansas, I hope we can defeat that amendment. This amendment would exclude this language from the bill: ''Any action brought by or on behalf of the Attorney General of any State.''

I ask my colleagues not to be fooled. Although this amendment sounds good, and there was a good presentation made by the authors of the amendment, it is potentially harmful and could lead to gaming by class action lawyers. I will explain what I mean by gaming.

First, before I do that, in my judgment, the amendment is not necessary. I will explain. State attorneys general have authority under the laws of every State to bring enforcement action to protect their citizens. Sometimes these laws are parens patriae cases, similar to class actions in the sense that the State attorney general represents the people of that State. In other instances, their actions are brought directly on behalf of that particular State. But they are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes.

One reason this amendment is not necessary is because our bill will not affect those lawsuits. Our bill provides class actions under that term ''class action'' as defined to mean any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action removed to a district court that was originally filed under State statute or rule authorizing an action to be brought by one or more representatives as a class action.

The key phrase there is ''class action.'' Hence, because almost all civil suits brought by State attorneys general are parens patriae suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition. That means that cases brought by State attorneys general will not be affected by this bill.

The supporters of this amendment say it is necessary because State attorneys general can bring class actions and those cases might become removable to Federal court. That possibility does not make this amendment necessary. That is because State attorneys general are not required to use class actions to enforce their State laws. If State attorneys general want to recover on behalf of their citizens, they can always bring actions as parens patriae suits under statutes that authorize representative actions or even as direct enforcement actions. Again, such lawsuits will not be subject to this bill.

In addition, our bill has been drafted so as to distinguish between solely truly local class action lawsuits and those that involve national issues. That compromise, which was not part of my original bill, was reached with Senator FEINSTEIN on the home State exception provision as well as further compromises made with Senators DODD, SCHUMER, and LANDRIEU, dealing with the local controversy exception. As a result of these compromises, they will keep then truly local cases where they ought to be—in State court.

Another concern with this amendment is that it is worded in such a way to exclude class actions, not just by State attorneys general but also, in their words, on behalf of State attorneys general. The way this provision is drafted would allow plaintiffs' lawyers to bring class actions and simply include in their complaint a State attorney general's name as a purported class member, arguably to make their class action completely immune to the provisions of this bill. Plaintiffs' lawyers could simply ask State attorneys general to lend their name to a class action lawsuit so as to keep them in the State court.

That creates a very serious loophole in this bill. We should not risk creating a situation where State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of this bill. Our bill would put an end to class action abuses without diminishing the ability of State attorneys general to protect their citizens in State court. This is another way for lawyers to keep cases in State courts.

This is what this bill is all about, to make sure that cases that have national significance are not determined by some county judge in one of our 50 States that end up having national implications. Those cases should be in Federal court and, for the most part, under our legislation will be.

This amendment would seriously create a loophole in the reforms we are trying to accomplish with this bill. I urge my colleagues to join me in opposing this amendment.

Mr. HATCH. Mr. President, I rise in opposition to the amendment offered by my colleague from Arkansas. At best, this amendment is unnecessary. At worst, it will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court.

Before I go into more details about the problems with the amendment, I would like to point out that the National Association of Attorneys General does not endorse this measure, nor has it pushed for its inclusion in the class action bill. One would expect that if the current bill somehow impairs the ability of State attorneys general to bring lawsuits on behalf of their citizens, we would have a position from them by now. But we do not, and the association's silence speaks volumes about the merits of this amendment.

Let me first note that this amendment, which excludes from the scope of this legislation any ''civil action brought by or on behalf of, the Attorney General of any State,'' is unnecessary. Let me explain why.

State attorneys general have authority under the laws of every State in this country to bring enforcement actions to protect their citizens. These suits, known commonly as parens patriae cases, are similar to class actions to the extent that the attorney general represents a large group of people.

But let me be perfectly clear that they are not class actions.

There is no certification process, there are no representative class members named in the complaint, and plaintiffs' attorneys who stand to gain millions of dollars in fees. Rather, they are unique lawsuits authorized under State constitutions or State statutes that are brought on behalf of the citizenry of a particular State. These actions are brought typically in consumer protection matters under State law and usually involve local disputes. As such, S. 5 in no way affects these lawsuits.

To underscore, I direct my colleagues to section 1711(2) of the bill which explicitly defines a ''class action'' to mean any civil action filed in a district court of the United States under rule

23 of the Federal Rules of Civil Procedure, or any civil action that is removed to a district court of the United States that was originally filed under a State or rule of judicial procedure authorizing an action to be brought by one or more representatives as a class action.

This statutory definition makes it perfectly clear that the bill applies only to class actions, and not parens patriae actions. Class actions being those lawsuits filed in Federal district court under rule 23 of the Federal rules of civil procedure or lawsuits brought in State court as a class action. Neither of these conditions are met when compared to the nature of a parens patriae action, and consequently, are excluded from the reach of this bill.

What I think the proponents of this amendment are really concerned about is the impact of this bill on State attorneys general if they choose to pursue an action other than a parens patriae action. But this possibility does not make this amendment necessary.

First, attorneys general are not required to use class actions to enforce their State laws and protect their citizens. To the contrary, their main weapon has been, and continues to be, the parens patriae action authorized under State statute.

Second, this legislation has been carefully crafted to distinguish between truly local suits and those that involve national issues. Thus, if an attorney general brings a class action, and that class action involves matters of truly local concern, it will certainly fall under one of the bill's exceptions. On the other hand, if the lawsuit is aimed at an out-of-State corporation for conduct that affects citizens in multiple States, or if the lawsuit is interstate in nature, then that suit should be removed to Federal court. Removal of such a case is particularly appropriate because there would likely be similar suits brought in a number of courts, and one of the central purposes of this legislation is to promote judicial efficiency and fairness by allowing copy-cat class actions to be coordinated in one Federal proceeding.

As I noted earlier, this amendment is not only unnecessary, it actually creates opportunities for gaming. If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of S. 5 is to persuade a State attorney general to simply lend the name of his or her office to a private class action. In other words, plaintiffs' lawyers will try to keep interstate class actions in State court by simply naming that State's attorney general at the end of complaint as a cocounsel or of-counsel. Undoubtedly, we will see arguments that if an attorney general merely sends in a letter saying that he/she is sympathetic 10 the action, the lawsuit will be exempt from the bill's provisions. I think this is the very type of forum shopping that S. 5 is supposed to eliminate and we should not be encouraging it now.

Indeed, to give the potential gaming some real life perspective, I direct your attention, Mr. President, to an article from the Boston Globe which reports that the Massachusetts attorney general had made arrangements with private plaintiffs' attorneys to prosecute a consumer-oriented class action against the drug store chain Walgreens. Under the arrangement, the plaintiffs lawyers pocketed hefty fees while the state AG's office received a portion of the settlement money.

But the article reports that this privatization arrangement has drawn criticism because the settlement did very little to benefit consumers. The article reports that too little of the settlement money actually went to consumers, but rather to groups such as Public Citizen, the American Lung Association, and Massachusetts Bar Association. Perhaps more troubling about the article is the alleged campaign contribution ties between the private attorneys who prosecuted these cases and the State attorney general office.

Given the close ties between this State AG and private attorneys, I find that this amendment will only encourage these types of arrangements in the future that do not benefit consumers.

We do not want to risk creating a situation in which State attorneys general can be used as pawns so that class action lawyers can remain in one of their magic jurisdictions and avoid the import of this bill. S. 5 would put an end to class action reform without diminishing in any way the ability of State attorneys general to discharge their duty to protect their citizens—and to do so in State court. I urge my colleagues to vote against this amendment.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. I thank my colleagues for their attention to this amendment. I am encouraged in one way because I know they have spent time with the amendment and studied it, analyzed it. What encourages me is all four who spoke against this—in fact, every Senator who spoke against the amendment—have said that this bill as currently drafted will not alter or limit the existing rights of any State attorney general. That is very good news.

I don't agree with that interpretation. In fact, there are 46 attorneys general, Democrats and Republicans from all over the country, who have written a letter saying they do not agree, or at least they have concern with that interpretation.

I hope when this law, if it passes, S. 5, is challenged, and it will be at some point or be litigated at some point, and a State attorney general tries to pursue some sort of action and there is a challenge saying the State cannot do it, I hope the courts will recognize the legislative history we developed today. The intention of this Senate and the conference is not to limit any existing rights or any existing abilities of the State attorneys general in pursuing cases they may deem appropriate to pursue.

In addition, a number of the opponents, maybe all, have focused on some language in the bill. We need to clarify that language so when we vote on this we will be able to vote from an informed position. The language is ''but does not include any civil action brought by or on behalf of any Attorney General.''

Chairman GRASSLEY and others have pointed to that language and indicated they have some concern with that. I respect that concern.

Let me flesh that out, if I may. In virtually every State, and probably every State, the work of the attorney general's office is too large for one person to do. In other words, the AG himself or herself cannot sign every pleading, cannot attend every hearing, cannot participate in everything. They cannot do it. There are not enough hours in the day and the workload is too heavy. Again, I think every State law does this routinely. I don't know of any exception. What that means is every attorney general in America has an assistant attorney general or deputy attorney general or some other titled person in their office who every single day routinely does things on behalf of the attorney general. It has to be that way.

Under the laws of the States, the attorney general is the one who is ultimately responsible. When a pleading is signed, that signatory—whichever deputy or assistant or attorney general it may be—that person is binding the State's attorney general to certain things in the pleadings.

The attorney general is the officer of the court. The attorney general has ethical responsibilities and ethical duties. I would argue that these ethical duties are above and beyond what is in the private practice of law because that lawyer, as the attorney general, is representing the State he or she was elected or selected to represent. Also, some are concerned that the phrase ''or on behalf of'' may mean that a private sector law firm could be retained by the State to pursue a matter. That is true. That is existing law today. And everybody has said the intention of S. 5 is not to limit or alter or change any authority of the States' attorneys general.

So all that is true. However, in every State I am aware of—I cannot promise this is true in every State, but in every State I am familiar with, there is a process which States' attorneys general have to go through in order to hire outside counsel. I think if we spent 30 minutes looking at various States and the needs of various States, probably 100 percent of the people in the Senate would understand that there may be cases where it might be appropriate to hire outside counsel under certain circumstances.

But there is a process. For example, in Arkansas, we had to go to the State legislature. We had to go to the State legislative committee and get approval to hire outside counsel. We also had to have the Governor sign off on the approval. So we had both the legislative and the executive branch signing off on that decision. Again, I cannot promise every State has that same process, but every one I am familiar with has some sort of process they go through and do that.

The United States is a union of States. We should not think of these attorneys general as attorneys. I tried to make this point several times. They are different than private practice attorneys. These attorneys represent the State. They are the mouthpiece for the State. They do the will of the legislature of the State in all of its various capacities.

Mr. President, may I ask how much time I have?

The PRESIDING OFFICER (Mr. THUNE). Fifteen seconds.

Mr. PRYOR. Mr. President, after the 15 seconds, what will happen? Can I ask unanimous consent to extend it for another, say, 10 minutes?

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. PRYOR. Thank you, Mr. President.

But the only point I was going to make on that is, we are a union of States. We should always see the States' attorneys general as being a little different than private sector lawyers. There is nothing wrong with private sector lawyers. Like I said many times during the course of this debate on this amendment, they are doing their job. They are representing their clients, and that is great and fantastic. That is the way the system works. But the State's attorney general does more. The State's attorney general has more responsibility. When they speak, they speak on behalf of the State. It is kind of like us being here in Washington. Certainly we are everyday citizens like everybody else, but we are elected to come here and represent our States in this great body.

So I will ask my colleagues to try to see States' attorneys general in a different light, in a materially different light, not a slightly different light but in a materially, substantially different light than you see your ordinary attorneys in private practice.

Like I said, some say this amendment is unnecessary because it honors the integrity of the bill. I like that in terms of legislative history. But I also say the counterargument there is: If it is unnecessary and if it does not change the impact of the bill, why not vote on it and allow the amendment to make sure we are all protecting the ability of our States to pursue litigation in the way they have always been able to do that.

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

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. PRYOR. Mr. President, I yield the floor.

Mr. GRASSLEY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SPECTER. 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. SPECTER. Mr. President, the time of 12:15 having arrived, we are set for the vote. I move to table the Pryor amendment No. 5, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. McCONNELL. The following Senator was necessarily absent: the Senator from New Hampshire (Mr. SUNUNU).

[Rollcall Vote No. 5 Leg.]

YEAS—60

Alexander	DeWine	Martinez
Allard	Dodd	McCain
Allen	Dole	McConnell
Bennett	Domenici	Murkowski
Bond	Ensign	Nelson (NE)
Brownback	Enzi	Roberts
Bunning	Frist	Santorum
Burns	Graham	Schumer
Burr	Grassley	Sessions
Carper	Gregg	Shelby
Chafee	Hagel	Smith (OR)
Chambliss	Hatch	Snowe
Coburn	Hutchison	Specter
Cochran	Inhofe	Stevens
Coleman	Isakson	Talent
Collins	Kohl	Thomas
Cornyn	Kyl	Thune
Craig	Lincoln	Vitter
Crapo	Lott	Voinovich
DeMint	Lugar	Warner

NAYS—39

Akaka	Durbin	Lieberman
Baucus	Feingold	Mikulski
Bayh	Feinstein	Murray
Biden	Harkin	Nelson (FL)
Bingaman	Inouye	Obama
Boxer	Jeffords	Pryor
Byrd	Johnson	Reed
Cantwell	Kennedy	Reid
Clinton	Kerry	Rockefeller
Conrad	Landrieu	Salazar
Corzine	Lautenberg	Sarbanes
Dayton	Leahy	Stabenow
Dorgan	Levin	Wyden

NOT VOTING—1

Sununu

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 60, nays 39, as follows:

The motion was agreed to.

Mr. SPECTER. Mr. President, I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SPECTER. Mr. President, the Senator from Missouri has requested some time in morning business, which is acceptable to the managers. Senator BOND will take 10 minutes in morning business. Then we will proceed to amendments.

I see our colleagues on the other side of the aisle who have risen, who are ready for amendments, so after Senator BOND's 10 minutes we will proceed with the laying down of an amendment.

Mr. KENNEDY. Reserving the right to object, my intention was just to call it up. If I could have the attention of the leader? It was just to call it up, have it before the Senate. We have other Senators who want to speak. Then I will speak on it later, after my colleagues speak.

Could I have the opportunity to call up my amendment and just have it before the Senate?

Mr. SPECTER. Do I understand the Senator from Massachusetts wants 2 minutes?

Mr. KENNEDY. That will be plenty.

Mr. SPECTER. Does the Senator from Missouri agree?

Mr. BOND. I am agreeable.

AMENDMENT NO. 2

Mr. KENNEDY. I ask unanimous consent the pending amendment be set aside and call up my amendment, No. 2, which is at the desk.

The PRESIDING OFFICER. Without objection it is so ordered. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY], for himself, Ms. CANTWELL, Mr. BIDEN, Mr. LEAHY, and Mr. CORZINE, proposes an amendment numbered 2.

On page 15, strike lines 3 through 7, and insert the following:

''(B) the term 'class action'—

''(i) means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action; and

''(ii) does not include—

''(I) any class action brought under a State or local civil rights law prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, or other classification specified in that law; or

''(II) any class action or collective action brought to obtain relief under State or local law for failure to pay the minimum wage, overtime pay, or wages for all time worked, failure to provide rest or meal breaks, or unlawful use of child labor'';

Mr. KENNEDY. Mr. President, because of other Members' schedules, they want to address this and other issues at this time. I intend to come back and have a more complete statement.

This is about discrimination. It is also about a worker's rights. Those were issues that were never intended to be included in this class action legislation.

I will have more to say about it, but it is an extremely important amendment. I will address the Senate on this issue in a very short period of time.

I thank the floor managers for their courtesies in letting us get this matter up. Hopefully, we will have a chance midafternoon to have a vote on it.

Mr. BOND. Mr. President, I ask unanimous consent I may be permitted to speak as in morning business for up to 10 minutes.

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

(The remarks of Mr. BOND are printed in today's RECORD under ''Morning Business.'')

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the senior Senator from California is on the floor to offer an amendment, titled the Feinstein-Bingaman amendment, which has been the subject of considerable discussion.

As I have said in the earlier portions of the discussion on this bill, I believe class action reform is necessary to move cases into the Federal courts, but I think it is important that there not be any substantive law changes, as I indicated previously on the floor. I had been in support of the Bingaman amendment. The management in opposition will be handled by Senator HATCH.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I thank the Senator from Pennsylvania.

I ask unanimous consent that the pending amendment be set aside.

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

AMENDMENT NO. 4

Mrs. FEINSTEIN. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. BINGAMAN, proposes an amendment numbered 4.

Mrs. FEINSTEIN. 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:

(Purpose: To clarify the application of State law in certain class actions, and for other purposes)

On page 24, before line 22, insert the following:

(c) CHOICE OF STATE LAW IN INTERSTATE CLASS ACTIONS.—Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—

(1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied;

(2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law; and

(3) the district court shall—

(A) issue subclassifications, as determined necessary, to permit the action to proceed; or

(B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.

Mrs. FEINSTEIN. Mr. President, what I would like to do is say a few words on behalf of this amendment which is submitted on behalf of both Senator BINGAMAN, who will be on the floor shortly to speak on it, and myself.

As the legislation has been debated, Senator BINGAMAN has raised, I think, a reasonable, valid, and a real concern about whether certain national class action cases may be caught in a catch-22 when they were prohibited from having their cases heard either in State or Federal court, leaving the case to reside in oblivion.

This problem was best described by the Bruce Bromley Harvard Law Professor Arthur Miller in a letter he sent to Senator BINGAMAN. It is a lengthy letter, but I will read one part:

Under current doctrines, federal courts hearing state law-based claims, must use the ''choice-of-law'' rule of the State in which the federal district court sits. These procedural rules vary among states, but many provide that the federal court should apply the substantive law of a home state of a plaintiff, or the law of the state where the harm occurred. In a nationwide consumer class action, such a rule would lead the court to apply to each class member's claim the law of the state in which the class member lives or lived at the time the harm occurred. As noted, most federal courts will not grant class certification in these situations because they find the cases would be ''unmanageable.''

That is the catch-22. You send a consumer class action to Federal court, the judge says it is unmanageable, will not certify it, the case cannot go back to State court and it sits in oblivion. Senator BINGAMAN and I have worked to address this problem. I believe we have.

The original solution proposed by Senator BINGAMAN was a bit too broad because it could impact consumers in States with strong consumer protection laws such as my State of California. What we tried to do, and did, was develop a compromise amendment that provides Federal judges with guidance on how to proceed in these cases, while leaving the judges with the discretion they need to manage their court dockets.

This ensures that national class actions will be heard. They will be certified and claimants in those cases will be more likely to receive the benefit of his or her own State's law.

Let me quickly go over the amendment. The amendment basically provides that:

Notwithstanding any other so-called choice of law rule [which is what is involved here] in any class action over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—

Here is the amendment:

(1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied.

That solves the problem of the kind of unanswered question in this bill, Can a class action remain uncertified? The answer is, clearly, no.

(2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law; and

(3) the district court shall—

(A) issue subclassifications, as determined necessary, to permit the action to proceed; or

(B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.

This provides guidance to the judge. Secondly, it requires these cases receive certification in the district court.

We believe this is a good solution. It is a significant solution. I hope this Senate will accept that.

Let me say something about this bill as a supporter of a class action bill. This bill is not perfect. It represents the best that can be done to solve what is a real problem in our legal system. I have tried to spend a good deal of time on this issue through Judiciary Committee hearings, personal hearings with both sides, and research and analysis.

As I said in the Judiciary Committee when we marked up the bill, I had a kind of epiphany in one of the hearings a few years ago when a woman named Hilda Bankston testified before our committee. She was the owner of a small pharmacy, with her late husband, in Mississippi. The Bankstons were sued more than 100 times for doing nothing other than filling legal prescriptions. The pharmacy had done nothing wrong, but they were the only drugstore in the county, a county that was so plaintiff friendly that there are actually more plaintiffs than residents. So she, in effect, became a person to sue in that county to enable the forum shopping process to take place.

I will read a letter from her because it is indicative. Let me say this: This bill is not anti-class action as some would have Members believe. This bill tries to fix a broken part of class action which is the ability to venue or forum shop and to make that much more difficult. The Bankston case is a reason for doing that. So many people such as Hilda Bankston, innocent people who have done nothing wrong, get caught up in how these class actions are put together.

Let me quickly read what she told us in committee:

For 30 years, my husband, Navy Seaman Fourth Class Mitchell Bankston, and I lived our dream, owning and operating Bankston Drugstore in Fayette, MS. We worked hard and my husband built a solid reputation as a caring, honest pharmacist . . .

Three weeks after being named in the [first] lawsuit, Mitch, who was 58 years old and in good health, died suddenly of a massive heart attack . . .

I sold the pharmacy in 2000, but have spent many years since retrieving records for plaintiffs and getting dragged into court again and again to testify in hundreds of national lawsuits brought in Jefferson County against the pharmacy and out-of-state manufacturers of other drugs . . . I had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify.

I endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And, I spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it . . .

This lawsuit frenzy has hurt my family and my community. Businesses will no longer locate in Jefferson County because of fear of litigation. The county's reputation has driven liability insurance rates through the roof.

No small business should have to endure the nightmares I have experienced.

This amended Class Action Fairness Act goes a long way toward stopping forum shopping by allowing Federal courts to hear truly national class action lawsuits. The Constitution itself states that the Federal judicial power ''shall extend . . . to controversies between citizens of different States.''

Yet an anomaly in our current law has resulted in a disparity wherein class actions are treated differently than regular cases and often stay in State court. The current rules of procedure have not kept up with the times. The result is a broken system that has strayed far from the Framers' intent.

I believe this bill is a well-thought-out, reasoned and an easily read bill. I have actually read it three times—as solution to this problem it does a number of things.

First, the bill contains a consumer class action bill of rights to provide greater information and greater oversight of settlements that might unfairly benefit attorneys at the expense of truly injured parties.

For instance, the bill ensures that judges review the fairness of proposed settlements if those settlements provide only coupons to the plaintiffs. It bans settlements that actually impose net costs on class members. It requires that all settlements be written in plain English so all class members can understand their rights. And it provides that State attorneys general can review settlements involving plaintiffs.

All these things are important guarantees for the plaintiff, for the individual, for the aggrieved party. I believe it makes the class action procedure much sounder for the consumer.

Secondly, the legislation creates a new set of rules for when a class action may be so-called removed to Federal court. These diversity requirements were modified in committee and again since then to make it clear that cases that are truly national in scope should be removed to Federal court. But equally important, the rules preserve truly State actions so that those confined to one State remain in State courts.

Now, the original bill that came to the Judiciary Committee said all class actions where a substantial majority of the members of the class and the defendants are citizens of the State would be moved to Federal court. We changed this. I actually offered an amendment in committee that changed this definition to split the jurisdiction into thirds. Now there is less ambiguity about where a case will end up, and more cases will actually remain in State court.

I think that is important to stress: more cases will actually remain in State court. This is an important compromise.

If more than two-thirds of the plaintiffs are from the same State as the primary defendant, the case automatically stays in State court.

If fewer than one-third of the plaintiffs are from the same State as the primary defendant, the case may automatically be removed to Federal court. Remember, this happens only if one of the parties asks for removal. Otherwise, these cases, too, remain in State court.

In the middle third of the cases, where between one-third and two-thirds of the plaintiffs are from the same State as the primary defendant, the amendment would give the Federal judge discretion to accept removal or remand the case back to the State based on a number of factors which are defined in the bill.

I would hope Members would take the time to read the bill. I think it is an important bill. I think to a great extent it has been maligned in that people have chosen to interpret it as anti-class action. I think if those of us—and it is interesting that some of us on this bill are not attorneys; Senator GRASSLEY, Senator KOHL, certainly myself from the Judiciary Committee—I think if you are not an attorney, you can look at the forest and not really get caught up in some of the process trees of that forest, and you can make an assessment whether the forest well serves class action cases.

I think these changes, and particularly the diversity requirement changes, make this a much sounder way to make a decision as to whether a class action should remain in State court or is truly national in scope and, therefore, should be heard by the Federal court.

I commend to this body the consumer bill of rights. It is very clear in reading the bill that protections are given for coupons. There is review for settlements. The consumer is taken very seriously. I think the system is improved.

Now, let me speak just for a moment to this business: Well, you have to take the bill as is or forget it, there is not going to be a bill. There is an arrangement with the House to take the bill if it is exactly as is.

Well, in many complicated issues, there are dilemmas or problems or issues or corrections that need to be made which appear as the legislative process takes place. And that is what has happened with this bill. In certain areas of concern, where the law may be silent, and case law may be conflicting, I think it is important to clarify the law. That is what the Feinstein-Bingaman amendment does. There is a hole there. The issue is governed by old case law. What we do is, in essence, codify that so we make clear the discretion that the judge has.

Most importantly, we make clear that a bona fide class action going to Federal court is not going to fall into oblivion because a judge is going to say, Oh, my goodness, there are so many State laws at issue here I can't possibly manage the case, and, therefore, that judge does nothing and the case goes nowhere.

So I think we have worked out a good solution. I know Senator BINGAMAN was here on the Senate floor. I would say to the Senator from Pennsylvania, I know he is desirous of saying a few words. So perhaps if his staff is listening, they will urge him to come to the floor. Otherwise, Mr. President, I thank the Chair, and I thank the chairman.

I yield the floor.

Mr. GRASSLEY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BINGAMAN. 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. BINGAMAN. Mr. President, I rise to express my strong support for Senator FEINSTEIN's amendment. The amendment will provide courts with guidance as to how to manage large multistate class actions in Federal court. This amendment addresses a flaw in the underlying legislation that, if left uncorrected, could leave many properly filed multistate consumer class actions without a forum in which those cases could be heard.

I had prepared an amendment that would have reaffirmed the discretionary authority of a judge to select the law of one State, as is currently permissible under the Constitution, and reaffirm the right of the judge to do that instead of denying certification for large multistate consumer class actions. There were some concerns raised by my colleagues, and I have agreed to withhold that amendment and lend my support to the Feinstein compromise approach. I believe the Feinstein compromise will accomplish what I intended to address in my amendment; that is, to make sure injured consumers have their day in court.

By amending the diversity jurisdiction rules, the Class Action Fairness Act of 2005 will give almost exclusive jurisdiction to the Federal courts to hear class action cases. The proponents of the legislation argue that such changes are necessary due to abuses that are occurring in a handful of State courts. Although the bill makes changes to other aspects of class action litigation, such as coupon settlements, this procedural removal of cases from State court to Federal court should be the focus of our scrutiny. This goes to the core of the 10th amendment of the Constitution that preserves the right of a State to protect its citizens. While this shift may be necessary in certain cases, it should not be taken lightly, as we will be taking away the ability of States to hear cases involving injuries to their citizens that are in violation of the State law. This is clearly a fundamental change in jurisprudence.

Class action suits have long provided a means for individuals to band together to seek a remedy when they have collectively been damaged in a manner that is significant but would not be economical to advance on their own. These actions empower those citizens who would be left without redress, absent the collective effort of others. This system has provided a necessary balance to a system weighted toward those with the means to defend their actions in court. The suits also take much of the pressure off of a State attorney general. The State attorneys general are not able to investigate and seek remedies for all the citizens who have been damaged or hurt by business in and outside of a State. Class actions reduce the need for overly burdensome regulations and laws that would be necessary if it were to be forced to limit the discretion given to businesses to operate in a responsible manner.

Finally, class action litigation protects our citizens from future injuries by putting an end to certain acts of corporate malfeasance and negligence. Although there have been abuses on occasion, the benefits of class action litigation should be evident. Under current law, an individual has the right to participate in a class when a number of people have been injured in a similar fashion by the same defendant. Once the class has been created, if the injury is based on a violation of State law—and many are, as there are really no general consumer protection laws—the class representative generally has the option of filing either in State court or Federal court. In this respect, a class action is similar to any action that is filed in court; that is, the plaintiff is the master of his or her claims.

The proponents of this legislation have argued that the basic goal of the legislation is to move these large class actions to Federal court. For instance, Stanton D. Anderson, executive vice president and chief legal counsel for the U.S. Chamber of Commerce, wrote in the Philadelphia Inquirer, dated February 27, 2004, that:

> [t]he Class Action Fairness Act would simply allow federal courts to more easily hear large, national class action lawsuits affecting consumers all over the country.

Similarly, in testimony before the Judiciary Committee on July 31, 2002, Walter Dellinger stated:

> [t]he principal purpose and effect of the [class action] bill is undeniably modest: it merely adjusts the rules of diversity jurisdiction so that certain large multi-party cases—those with true nationwide compass, affecting many or even all states at once—will be litigated in the federal courts rather than in the courts of just one state (or county) or another.

Suffice it to say, the new Federal diversity statute for purposes of class action will accomplish this as very few, if any, cases will meet the standards necessary to remain in State court. The operative question is, then, What will happen to these cases once they are in the Federal court system? If we look at the past decade or so, we note an interesting pattern. Although some State courts have certified these large multistate class actions, the Federal courts have not. In fact, six U.S. circuit courts of appeal—the Third Circuit, the Fifth Circuit, the Sixth Circuit, the Seventh Circuit, the Ninth Circuit, and the Eleventh Circuit—and at least 26 Federal district courts have denied class certification in multistate consumer class actions. Except for a 1986 Third Circuit decision which has since been narrowed to only its facts, no U.S. circuit court of appeals has granted class certification in such a case. At the same time, at least seven different States have certified large multistate consumer class actions.

Under rule 23(b)(3) of the Federal Rules of Civil Procedure, an action ''may be maintained as a class action if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.''

Because class action lawsuits involving fraud and deceptive sales practices or sales of defective products allege violations of State consumer protection statutes or common law, there is always a possibility that the laws to be applied will be different. If a court determines that they must apply the laws of different States to different members of a class action, they often find that questions of law common to the members of a class do not predominate. That renders the adjudication of the case as a class action unmanageable, and they deny class certification. This denial is effectively the end of the action. It is not hard to understand why State courts are the forum of choice for these large class actions.

The proponents of this legislation are aware that Federal courts do not certify these large class actions. In fact, in most cases, they argue this very point in court.

For example, in re Simon, the second litigation, which was before the U.S. Court of Appeals for the Second Circuit, the Chamber of Commerce opined:

> . . . it is nearly a truism that nationwide class actions in which the claims are subject to varying State laws cannot be certified because they are simply unmanageable.

Obviously, these arguments have been persuasive before the Federal courts. In re the Ford Motor Company ignition switch products liability litigation that was in the U.S. District Court for New Jersey, that court stated:

> [P]laintiffs' first cause of action contends that Ford breached an implied warranty of merchantability under each of the many States' laws that govern this action. Variations among these States' laws, however, preclude classwide adjudication of plaintiffs' claims.

This case involved a defective ignition switch that caused it to fail. It has been claimed that this failure may have resulted in as many as 11 deaths and 31 injuries, not to mention almost a billion dollars spent by consumers to replace the defective product. The case was ultimately settled, but it was only settled after a State court in California agreed to certify a class.

Senator FEINSTEIN's amendment makes sure that by moving these cases to Federal court, we are not pushing them into a forum that will fail to hear those cases because too many State laws apply.

The amendment requires the parties to submit plans as to how the case could be managed by dividing it into subclasses based on the similarity of the State laws that would need to be applied. The judge would then have the discretion to divide the class into subclasses or use some other manner that ensures that the plaintiffs' State laws are applied.

Under the Feinstein amendment, the Federal court is not required to divide the class into subclasses; it is simply discretionary. It can still follow the State's choice of law rules, or use any other means permissible to ensure that the plaintiffs' State laws are applied to the extent practicable.

If we are going to take away the right of State judges to hear a class action, it is incumbent upon us to make sure the Federal judge is not able to not certify the class because too many State laws would apply. That would be an unfair result.

I have heard many Members argue that a deal is a deal; therefore, Members who support the bill, including those who were able to get changes made to the bill before it was brought to the floor, should be precluded from supporting any amendment, including this amendment. I remind my colleagues that although this legislation has been around for years, there has not been a single amendment to improve this legislation that has been voted on on the floor of the Senate prior to this week.

The stated intention of the proponents of this bill is to avoid conference with the House and to have that Chamber pass the bill exactly the way it passes the Senate. While they argue this is a reason to not support

amendments, I would argue the opposite. Because we know this is the only opportunity for any Member of Congress to amend this legislation, it is imperative that we remain openminded to the few amendments that are going to be offered and debated on the bill.

In the 22 years I have been in the Senate, I do not recall a single piece of legislation that could not have benefited from input from all interested Members of the Senate. The Founding Fathers of our country created a legislative branch that is intentionally deliberative and subject to the repetitive processes of debate and amendment.

I remind my colleagues of the language included in last year's nonamendable Omnibus appropriations bill that would have allowed staff from the appropriations committees to review taxpayers' tax return information. That one provision almost derailed the entire spending bill for our country. Clearly, if Members had been presented with an opportunity to review the bill on the floor, to amend that bill, we could have avoided that problem.

As elected officials, we have a responsibility to the public to do our best to improve legislation before it becomes law, which I believe argues for Members to consider each amendment with an open mind. If my colleagues disagree with this amendment, then I encourage them to vote against it. However, if they agree with me that this catch-22, which is in the current bill, should be corrected, then I hope they will vote for this Feinstein amendment, regardless of whether you previously stated support for the overall bill.

I would like to acknowledge and thank the chairman of the Judiciary Committee, Senator SPECTER, for his support of my amendment and what I understand to be his support of the Feinstein amendment. No one could debate the chairman's dedication to getting this bill passed. Yet he agrees that the legislation would be improved by correcting the problem we have identified.

Substantively, one of the arguments that was raised by proponents of the bill is that courts have been certifying classes in these large multistate class actions, even though all of the circuits I mentioned before in numerous district courts have denied certification on the ground that the case is unmanageable. The cases enlisted by proponents of the bill in defense of their claim that cases have been certified are cases involving a Federal question or certifications of a class for purposes of settlement. These types of certifications are entirely different than the cases we are referring to; that is, cases involving violations of State law for purposes of a trial. The only way these cases are going to get to the settlement phase is if there is the possibility that a case could be taken to trial, if necessary. It is an important distinction.

Again, I point to this in re Simon II litigation where the Chamber of Commerce argued against certification, stating that it is nearly a truism that nationwide class actions in which the claims are subject to varying State laws cannot be certified because they are simply unmanageable.

As I mentioned before, this is not just an abstract situation. There are over 300,000 homeowners in Mississippi, Louisiana, Florida, and Texas who have been compensated for defective siding they had purchased for their houses. When this case was brought before the Federal court, it was not certified, in part because the court could not ''imagine managing a trial under the law of 51 jurisdictions on the defectiveness of masonite siding.'' Because an Alabama State court agreed to certify the case for trial, the case was settled, and these homeowners were compensated for their damages.

Proponents of the legislation also argue that a class denied certification would be free to refile its cases in either State or Federal court. Based on the underlying legislation, the State court cases, almost without exception, would be removed again to the Federal court, and once in Federal court, the case would be sent to the same Federal court that failed to certify the class in the first place due to the procedure for consolidation and the operation of the multidistrict litigation panel.

This MDL, multidistrict litigation panel, streamlines large, unwieldy multidistrict litigation involving the same parties and the same facts when those cases are filed in Federal courts. This panel of seven judges appointed by the Chief Justice of the Supreme Court determines which cases pending in Federal court should be transferred to a single district court for purposes of hearing and ruling on pretrial matters, including the matter of class certification.

The proceedings can be initiated by the MDL panel or by any party involved in one of the actions pending in a district court. All cases of a similar nature in Federal court, including those filed after the consolidation, are affected and subject to being transferred. Once a transferee court has been selected, it rules on all pretrial motions, including class certification, but will send the cases back to the transferor courts for trial, assuming that the case has not settled or been dismissed. All future cases involving similar claims and similar parties are automatically sent back to the same transferee court for any future actions.

Class actions by their very nature are large cases and they are affected by the ability of the MDL panel to consolidate, as there are generally different cases pending in district courts throughout the country. Under current law, a class based on claims of State law violations can avoid this consolidation by remaining in State court, but this will no longer be the case after this bill becomes law. Instead, plaintiffs who go through the consolidation process and are not certified will not refile these cases since they would ultimately be back before the same judge who failed to certify the class in the first place.

Finally, the proponents of the bill have argued that taking away the right of a judge to deny certification based on too many States' laws is a violation of due process and is anticonsumer. It seems implausible to me that an amendment that would ameliorate the impact of denying States the right to hear certain cases could be considered either a violation of due process or anticonsumer. I believe the amendment of the Senator from California is fair. It is a reasonable approach to dealing with a serious problem created in the underlying legislation.

As Chairman SPECTER stated earlier in the week, this legislation is intended to change the procedure for class actions and not the substantive law. Without Senator FEINSTEIN's amendment this bill could effectively limit the substantive rights of citizens to obtain a remedy for modest damages when a defendant has injured many in a similar fashion. I hope my colleagues will join me in supporting the Feinstein amendment.

I have a letter I received from Professor Arthur Miller at the Harvard Law School. He has been very helpful to me and to other Senators in trying to help us understand the seriousness of the issue and the importance of remedying this through proposals such as the Feinstein amendment. I ask unanimous consent that the letter be printed in the RECORD at the end of my remarks.

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

HARVARD LAW SCHOOL,
Cambridge, MA, June 17, 2005.

Hon. JEFF BINGAMAN,
U.S. Senate,
Washington, DC.

DEAR SENATOR BINGAMAN: I am happy to respond to your letter of June 14 asking for my views of your proposed ''choice of law'' amendment to the proposed ''Class Action Fairness Act'' (S. 2062). After decades of teaching, practicing, writing, and serving the Judiciary in various public service capacities in the fields of civil procedure, complex litigation, and class actions, I very interested in any federal legislation affecting class action lawsuits, and particularly, in the possibility of making this particular legislation fairer and more balanced.

In general, S. 2062 would place in federal court most class actions that involve more than $5 million in losses and more than 100 class members, and in which any defendant is a citizen of a state that is different from that of any member of the plaintiff class. In effect, the proposed legislation would federalize all class actions of any significance. I believe that this radical departure from one of the most basic, longstanding principles of federalism is a particular affront to state judges when we consider the unquestioned vitality and competence of state courts to which we have historically and frequently entrusted the enforcement of state-created rights and remedies. I recognize, however, that apparently a majority of the Senate supports the idea of moving most class action lawsuits from state to federal court. If

that is the case, your proposed amendment is essential to ensure that, once class actions were moved into the federal courts, these cases not be consigned to oblivion. That real possibility goes beyond the just mentioned intrusion on federalism principles and raises legitimate concerns about the fairness and balance of S. 2062.

Proponents of S. 2062 argue that federal courts are the more appropriate forum for lawsuits involving plaintiffs from multiple states. They assert that the goal of the bill is to ensure that nationwide cases will ''be litigated in the federal courts rather than in the courts of just one state (or county) or another.'' Of course, that statement ignores the fact that state courts have been trusted to adjudicate multi-state controversies since the foundation of the Nation. Moreover, the truth is that these cases are not litigated in federal court; most commonly they are denied class certification. The proposed legislation would magnify that reality.

Federal courts have consistently denied class certification in multi-state lawsuits based on consumer laws as well as other state laws. This fact is acknowledged by most class action practitioners and experts, regardless of their position on class action policy issues. Just last year, the U.S. Chamber of Commerce—the leading proponent of S. 2062—filed an amicus curiae brief in the U.S. Court of Appeals for the Second Circuit urging the court to overrule a distinguished district court's class certification decision because ''. . . federal courts have consistently refused to certify nationwide class actions in product defect cases because the need to apply the laws of many different states would make such a sprawling class action unmanageable.'' The Chamber went on to conclude, ''. . . it is nearly a truism that nationwide class actions in which the claims are subject to varying state laws cannot be certified because they are simply unmanageable.'' On this point, the Chamber is correct—not a single Federal Circuit Court has granted class certification for such a lawsuit, and six Circuit Courts have expressly denied certification.

It is not surprising that federal courts are reluctant to grant certification to multi-state class actions based on state consumer protection laws. After all, these are laws with which the federal courts generally are not familiar or comfortable. Imagine the discomfort of a federal judge, then, when confronted with a case involving tens of thousands of individuals from all fifty states and state laws that at least superficially appear to be different. Moreover, our federal courts have limited resources and are responsible for adjudicating a tremendous array of substantive matters. State courts, on the other hand, are far more comfortable handling cases involving state contract or tort law and are, therefore, more inclined to try to find a way to hear and resolve those cases.

Your proposed amendment will provide guidance to federal judges that will enable more multi-state consumer class actions to be certified in federal court and, hopefully, resolved on their actual merits. If S. 2062 is enacted without the amendment, class action lawsuits brought on behalf of consumers who have been defrauded or injured because of corporate misconduct that affected people in multiple states will continue to be non-viable.

The following is a brief description of how federal courts currently treat class actions based on different state laws. It will elucidate the need for an amendment like yours in the event that Congress does indeed give federal courts exclusive jurisdiction over class actions that involve solely state law claims.

The rationale that many federal courts use for refusing to certify consumer class actions that involve solely state law claims on behalf of citizens from different states rests on the requirement of Federal Rule of Civil Procedure 23(b)(3), which governs most consumer class actions brought in federal court. Rule 23(b)(3) says, in pertinent part: ''An action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'' When courts feel compelled to apply the laws of different states to different members of a class action, they often find that questions of law common to the members of the class do not predominate, leading them to conclude that proceeding on a class action basis would prove to be unmanageable, and they deny class certification.

Federal courts often conclude they must apply the laws of different states to different members of a class action after they engage in a complex ''choice of law'' analysis to determine which state's law to apply to the claims of the class members. Under current doctrines, federal courts hearing state law based claims must use the ''choice-of-law'' rule of the state in which the federal district court sits. These procedural rules vary among states, but many provide that the federal court should apply the substantive law of the home state of the plaintiff, or the law of the state where the harm occurred. In a nationwide consumer class action, such a rule would lead the court to apply to each class member's claim the law of the state in which the class member lives, or lived at the time the harm occurred. As noted, most federal courts will not grant class certification in these situations because they find that the classes would be ''unmanageable.''

Your amendment would allow a federal court to choose not to follow the choice-of-law rule of the state in which the court is located. The federal judge could instead make the case more manageable by choosing the law of one state with sufficient ties to the underlying claims to meet the choice of law requirements that the Constitution demands be met. That state often will be the state in which the defendant's headquarters is located, or where the product was designed or manufactured, or where the marketing materials were conceived, or where the particular business practice being challenged was developed or executed.

If the federal district judge chooses to reject the option of applying one state's law to the case, your amendment ensures that the judge does not deny class certification on the sole ground that the laws of more than one state would apply to the action. This protects consumers from being caught in the ultimate Catch-22 situation—their lawsuit is in federal court because the class includes people from many states and Congress has said that is the only place the class can go, but then, the federal court will not grant class certification precisely because the class involves citizens from multiple states. That simply violates the most basic principles of citizen access to the courts. I believe that your amendment strikes the appropriate balance among the interests of the class members, defendants, and the courts. Most important, it will ensure that S. 2062 does not lead to the unintended consequence of robbing from consumers their only avenue to seek redress from corporations that violate the law.

If S. 2062 passes without your amendment, the only outlet for injured consumers will be single-state class actions. But that would fly in the face of what the proponents of the bill are apparently trying to achieve, which is to consolidate nationwide class actions in one forum, federal court, so that businesses do not have to face multiple lawsuits throughout the country. What is worse, the only plaintiffs who will he represented and compensated through single state actions are those from highly-populated states, where the damages suffered by the class members will be large enough to finance a costly and typically risky class action lawsuit. This may be a practical and viable solution for those who live in a state like California or Texas. But it will leave millions of consumers who have been harmed in less-populated states, such as your home state of New Mexico, without relief.

Your amendment effectively and efficiently allows multi-state class actions in consumer cases to be certified in federal court. It actually accomplishes what the bill purports to achieve—giving harmed consumers from multiple states one federal forum in which to seek relief. Under your amendment, the federal judge will have the discretion to apply one state's law, as long as that is constitutionally permissible. Or the judge may choose to manage the case in a different way, perhaps by grouping states together that have similar laws into subclasses or by using exemplar or test cases or by resorting to the increasingly sophisticated tool chest of management procedures our courts have developed. In any event, the judge may not dismiss a case on the ground that the litigation is unmanageable simply because multiple state laws apply. The judge does, of course, maintain the discretion to refuse to certify the class on other grounds. The amendment is quite modest, but it does restore some balance and fairness to the bill by increasing the likelihood that citizens will have access to the courts to present their grievances.

Your letter to me notes that proponents of the bill are portraying this amendment as anti-consumer. Such a characterization could not be further from the truth and is little more than rhetoric. Indeed, in my judgment, it is S. 2062 that is anti-consumer.

As noted above, under current practice, federal courts rarely certify nationwide consumer class actions. In almost every instance in which allegations of wrongdoing injuring large numbers of consumers have been brought, the decision to deny class certification will eviscerate any opportunity for the victims to seek redress. The individual members of the class simply will not suffer losses large enough to justify bringing suit solely on one person's behalf. It is hardly anti-consumer to provide a mechanism to enable federal courts to certify cases and afford consumers an opportunity to have their grievances heard.

Thus I believe your amendment provides a balanced solution. It allows injured consumers a better chance of getting their day in court. And it provides federal judges with a reasonable way to manage multi-state class actions based on consumer laws.

You also note that proponents of the legislation have suggested that this amendment is unconstitutional. There is no basis for such an assertion.

Your amendment expressly honors the Constitution by stating, ''the district court may apply the rule of decision of one state having a sufficient interest in the claim that the application of that state's law is permissible under the Constitution.'' Although the amendment allows a federal judge to apply one state's law, it does so only when that is constitutionally acceptable.

The constitutional limitation on applying a single state's law to a multi-state action is derived from *Phillips Petroleum Co.* v. *Shutts et al.*, 472 U.S. 797 (185), a case that I argued on behalf of Phillips Petroleum Co. before the Supreme Court. The Court held that ''for a State's substantive law to be selected in a constitutionally permissible manner, that

State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'' Id. at 818 (internal cite and quotations omitted). Thus, as long as there are ''significant contacts'' and the choice of law is not ''arbitrary'' or ''fundamentally unfair,'' then a single state's laws may apply to a multi-state class action. Neither party can object to that.

Because your amendment effectively codifies Shutts, it is constitutional. If there is a multi-state class action in which no single state's law meets the constitutional standard set forth in Shutts or if the judge does not choose to apply a single state law that does meet the constitutional criteria, then the judge may follow the choice of law rules of the state in which the district court sits. Part (b) of the amendment does not implicate the Constitution in any way. It merely provides that if the judge does not apply a single state law, then he or she may not deny certification under Rule 23 on the narrow ground that multiple states' laws apply to the case and make it unmanageable. It encourages federal judges to try to go forward and reach the merits of the dispute.

Thus, your amendment gives federal judges appropriate guidance about how to address multi-state consumer class action lawsuits. It does not mandate a result or tie their hands. This ability to make a case more manageable will allow at least some multi-state consumer class actions to be heard, rather than to be denied certification. As the California State Supreme Court aptly recognized, defendants should not be able to keep ill-gotten gains ''simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.'' *State* v. *Levi Strauss & Co.*, 41 Cal.3d 460 (1986). Yet that is where this bill as written will lead us, and that is extremely bad policy.

Unless the Senate wants to enact legislation that, as a practical matter, eliminates multi-state class actions, it should not pass S. 2062 as it is written. Under S. 2062, multi-state class actions in consumer law cases, a vital mechanism for promoting social justice, giving people access to the courts and dealing fairly with our citizenry, will become an artifact, a thing of the past. At a minimum, the Senate would be wise to adopt your amendment, which would allow plaintiffs to have their day in federal court; after all, the proponents of the legislation argue that is the goal of the bill.

Thank you again for your willingness to address this important issue. If you have any additional questions about S. 2062 or the benefits of your amendment, I would be happy to assist you further.

Sincerely yours,

ARTHUR R. MILLER,
Bruce Bromley Professor of Law.

Mr. BINGAMAN. I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

The Senator from Iowa is recognized.

Mr. GRASSLEY. Mr. President, when I spoke prior to Senator PRYOR's amendment, I made a pitch that I want to repeat about the opportunity we have now, after four Congresses—this is the fifth Congress—to get this bill to the President. It has passed the House so many times, and we have never been able to get it to finality in the Senate. We have the House in position now, even after all of these compromises we have made which have diluted the bill more than I would have liked to have done, of passing a bill the leadership in the House of Representatives tells us they will take the way we pass it and send it to the President as long as there are no changes, and this assurance about no changes comes from two standpoints.

One, in the previous Congress we made compromises to get Democratic votes with the idea that once those changes were made and we got this bill through the Senate, they would not be changed in the House. We also got the assurance from the House that they would not change it, even though the House has passed much stronger legislation a couple of times. So there is an assurance in this body for people who would rather not pass strong legislation but they know there needs to be some changes in class action regime, to make some modest changes, and make sure that what they agree to will be what gets to the President, and then the House saying now for a new Congress they will pass this legislation without amendment.

So every Democrat who has made a compromise with us so we can get this bill behind us can be satisfied that they will not be nickeled and dimed to death.

Obviously, not all Democrats are satisfied with this sort of agreement and that is their right as individual Senators to try to change it more. But as I said before, any changes in this bill negate both promises that have been made. It means the promise to go through the House will not be kept because the bill has been changed in the Senate, and then for those Senators who got the assurance from me that this bill would not be changed in the House so that they were not nickeled and dimed away with their compromises are going to lose the opportunity of getting what they want without the assurance that somewhere else in the legislative process, probably conference, there might be a much stronger bill than they want.

This bill was originally introduced in the 105th Congress, then the 106th Congress, then the 107th Congress. We moved it in the 108th Congress. Now we are here in the 109th Congress. Almost everybody seems to believe there is some reform that needs to be done in the class action tort regime. This bill is it.

Now we have amendments. We defeated the amendment of Senator PRYOR. We had an amendment by Senator BINGAMAN that we were going to deal with, that would have destroyed this compromise. There must have been a belief on the part of the people behind the Bingaman amendment that it would not go, so instead of the Bingaman amendment we have in front of us a Feinstein modification of the Bingaman amendment.

I am in the same position I was with the amendment of Senator PRYOR, asking people to defeat the Feinstein-Bingaman amendment. I will be very precise why that needs to be done. But the substance of the amendment and my arguing against the substance of the amendment should not carry as much weight with my colleagues as my pleading with them that we defeat all amendments because this bill has been compromised to satisfy a supermajority of Senators—not a bare majority, a supermajority.

So I take this opportunity to speak out against the Feinstein-Bingaman ''choice of law'' amendment, and I urge my colleagues to oppose it. Pure and simple, this amendment blows a hole in the bill and guts the modest reforms we are finally going to be able to get to the President.

This amendment would require the Federal courts to certify a class that does not meet basic class action requirements. In addition, what the amendment does is a contravention of the requirements of rule 23 of the Federal Rules of Civil Procedure, which rule says you have to have similar law in fact in order to certify a class. The net result of this amendment is that it would require Federal judges to hear dissimilar claims that do not belong together as a class action, and would not be allowed to proceed as a class action under current law. Requiring courts to subclass does not make this amendment any better.

This amendment would require Federal judges to not follow the requirements for certifying class under rule 23. Why do the proponents of this amendment want to do that? They have given reasons for their amendment and I think, whether this is their intention or not—and I should not question the motives of people—but the end result is perpetuating the abuses that were already seen in the magnet courts, these infamous judicial hellholes which have been referred to. I remember only one out of dozens throughout the country, but one was in Madison County, IL.

The purpose of class actions is obvious: to enable courts to decide large numbers of similar claims and to do it fairly and to do it in an efficient manner. Different claims cannot be pulled together as a class action because that would be unfair and it would violate the due process rights of both plaintiffs and defendants. But the Feinstein-Bingaman amendment would require judges to do just that. As you know, that is exactly what the problem is all about, what our bill was trying to correct: judges certifying classes that should never have been certified in the first place. Rules are in place as to what should or should not be certified,

and the Feinstein-Bingaman amendment blows those rules off. The efficiency and the rationale of that rule should not be followed.

The Federal courts should undertake a review to determine whether multistate class actions involving State law claims should be certified. They need to determine that the legal claims are sufficiently similar to warrant class certification. Most State courts make the same kind of determinations as well. The magnet State courts, on the other hand, do not make this determination and that is why they certify huge classes that involve claims that are completely dissimilar, to the detriment of both plaintiff and defendant. That ends up being a due process problem.

In addition, this amendment before us ignores how diversity jurisdiction works, and it eviscerates the reforms that are contained in our bill.

Another argument for this amendment by Senator FEINSTEIN and Senator BINGAMAN is allegedly that Federal courts refuse to certify nationwide class actions. That sort of presumption is plain wrong. That is not the case. There are numerous examples of where Federal courts have certified multistate class actions based on State law claims. There is not a rule against nationwide class actions. Federal courts do certify nationwide class actions where the laws that govern the claims are similar.

Class actions are also certified when the plaintiffs' lawyers organize the claims in a manner so that they may be litigated fairly, even under differing State laws, where they appropriately organize the claims into subclasses. But this amendment does not give the courts any choice to determine whether it is appropriate to subclass.

So for a third time during this period that I am standing, I remind my colleagues again about the extensive efforts on the part of Senator KOHL of Wisconsin, Senator HATCH of Utah, and this Senator from Iowa, getting to this version of the Class Action Fairness Act. No one can question that we negotiated in good faith with our colleague Senator FEINSTEIN, as well as our colleagues Senators DODD, SCHUMER, and LANDRIEU, to make changes to address concerns they had about the original bill introduced.

The bill we have now will keep many class actions in State court under the Feinstein home State exception. That was accepted in committee, way back there in early 2003, in the 108th Congress. Also under the local controversy exception we crafted with Senators DODD, SCHUMER, and LANDRIEU, that will stay in State court.

So I hope I get us back in an understandable way, and what people think is rational after all these compromises, so that there is no further need to change this bottom-line compromise. Again, the purpose of this amendment is to gut the modest, commonsense reforms contained in this bill. This is an attempt to legitimize the class action abuse we have been seeing in the magnet State courts. It is an attempt to legalize the problem by putting it into the rule.

All I can say is, that is not all right. It is not OK. If we are serious about putting a stop to class action abuse, I urge my colleagues to oppose this amendment.

Mr. President, I ask unanimous consent to have printed in the RECORD the letter by Walter Dellinger.

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

O'MELVENY & MYERS LLP,
Washington, DC, February 4, 2005.

Re Proposed Choice-of-Law Amendment to Class Action Fairness Act (S. 5).

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write concerning the ''choice-of-law'' amendment that Public Citizen has been suggesting should be offered to the Class Action Fairness Act. As I understand it, this amendment would encourage or require federal court judges, faced with multi-state or nationwide class actions, to either: (1) apply the laws of one state to all the claims in the case; or (2) certify the class action despite the manageability problems created by conflicting state laws.

I strongly recommend rejection of this seriously flawed proposal for several reasons.

The Public Citizen amendment violates basic principles of federalism and would extend ''magnet'' state court abuses to federal court. Many consumer protection cases now proceed on a nationwide basis in federal court in those instances in which Congress has determined that a single national law ought to govern. This has been the case with laws such as the Truth in Lending Act (TILA) and the Real Estate Settlement Practices Act (RESPA). Frequently, nationwide class actions are brought and tried to successful conclusions under laws such as these.

Where Congress has chosen not to enact uniform national legislation under which citizens can bring suit, however, it has left the legal issues to be resolved by each state adopting its own law. Allowing each state to decide for itself and for its citizens is the essence of federalism. Instructing a federal judge to pick out one state's law and impose it on other states is a profound violation of federalism principles. Congress is elected by all the people of the United States. When it is acting within its constitutional power under Article I, Congress can decide to impose a uniform rule on the states. It is a far more serious intrusion into the autonomy of the States when a single judge, not Congress, acts to set aside the laws of all of the states (but one) by choosing whichever particular state law the judge likes best and imposing that law on all of the other states.

For example, in *Avery* v. *State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242 (Ill. App. 2001), the sate court decided that Illinois law could be applied to a nationwide class of policyholders, and held that State Farm's use of ''non-original equipment manufactured'' automobile service parts violated Illinois law. Yet many other states' insurance laws either expressly or implicitly permitted or even required insurance companies to use non-OEM parts as a way to reduce insurance costs. Avery has been uniformly recognized as an example of judicial excess—the Illinois court exceeded its authority by purporting to dictate the insurance laws of 49 other states. Nonetheless, the proposed amendment would tell federal courts to do precisely the same thing. It would, in effect, recreate in federal court the very state-court problem that precipitated the introduction of this legislation.

The amendment would reverse the decisions of numerous state supreme courts that have rejected application of their laws extraterritorially. Opponents of S. 5 have argued that this amendment is necessary because ''state courts . . . are far more comfortable handling cases involving state contract or tort law.'' Aside from certain magnet courts, however, many state courts have strongly rejected what Public Citizen proposes: i.e., nationwide application of individual states' laws. In fact, the proposed amendment would eviscerate a number of decisions by state supreme courts, refusing to apply one state's consumer protection laws in nationwide class actions. Among the state court decisions that could be reversed by the proposed amendment are the following:

Goshen v. *Mutual Life Insurance Company of New York*, 774 N.E.2d 1190 (N.Y. 2002), (explaining that to ''apply the [New York consumer] statute to out-of-state transactions in the case before us would . . . tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws.'').

Compaq Computer Corp. v. *Lapray*, 2004 Tex. LEXIS 435 (Tex. May 7, 2004) (''The putative class members are domiciled in fifty states and the District of Columbia. All these fifty-one relevant jurisdictions are likely to be interested in ensuring that their consumers are adequately compensated for a breach of warranty. Texas law may not provide sufficient consumer protections in the view of the other states . . . The differences in state law outlined above cannot be concealed in a throng.'').

Zarella v. *Minnesota Mutual Life Ins. Co.*, 1999 R.I. Super. LEXIS 161 (R.I. Super. Ct. 1999) (the court found that there were substantial variations on issues such as statutes of limitations and burdens of proof, which ''plaintiffs have not adequately addressed'').

Ex parte Green Tree Financial Corp., 723 So. 2d 6, 11 (Ala. 1998) (the Alabama Supreme Court expressed ''grave concerns as to whether any national class of plaintiffs in an action involving the application of the differing laws of numerous states can satisfy the requirements'' for certifying a class action).

Dragon v. *Vanguard Indus.*, 277 Kan. 776, 789 (Kan. 2004) (reversing certification of a nationwide class of property owners alleging defective plumbing due to, inter alia, ''wide variance in the laws of various states'' on relevant issues).

State ex rel. Am. Family Mut. Ins. Co. v. *Clark*, 106 S.W.3d 483, 487 (Mo. 2003) (''The trial court abused its discretion in certification of the class with respect to insureds whose contracts are subject to the laws of states other than Missouri'').

Henry Schein v. *Stromboe*, 102 S.W.3d 675 (Tex. 2002) (decertifying a class of some 20,000 purchasers of software products on theories of fraud, breach of express warranty, negligent misrepresentation, promissory estoppel, and deceptive trade practices because class could not demonstrate that Texas law should apply to individual issues of reliance and trial court was required to look to the laws of all fifty states to adjudicate the claims).

Philip Morris, Inc. v. *Angeletti*, 358 Md. 689, 747 (Md. 2000) (denying certification of a proposed tobacco class because, inter alia, Maryland ''conflict of law principles necessitate that the [lower court] engage in individualized assessments for each class member'').

Washington Mutual Bank v. *Superior Court*, 24 Cal. 4th 906, 926 (Cal. 2001) (reversing the

certification of a nationwide class and holding that ''a class action proponent must credibly demonstrate, through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance'').

Stetser v. *TAP Pharm. Prods. Inc.*, 598 S.E.2d 570, 586 (N.C. Ct. App. 2004) (reversing trial court's certification of a nationwide class of persons alleging the defendant companies had inflated prices and defrauded patients and insurance companies) (''Because this case is composed of plaintiffs nationwide, the remaining forty-nine states' laws, as well as the law of the District of Columbia, must be analyzed to determine whether it conflicts with the law of North Carolina.'').

Linn v. *Roto-Rooter, Inc.*, 2004 Ohio 2559, P57 (Ohio Ct. App. 2004) (reversing trial court's decision to certify a nationwide class ''because of the widespread reluctance to certify nationwide class actions involving consumer protection, fraud, and unjust enrichment claims, and due to the variances in these laws which would render a nationwide class unmanageable . . . the trial court abused its discretion in certifying the class which entails litigants from 35 states'').

Liggett Group Inc. v. *Engle*, 853 So. 2d 434, 448, 449 (Fla. Dist. Ct. App. 2003) (decertifying a statewide class of smokers because, inter alia, the ''highly transient population'' of Florida would ''require examination of numerous significantly different state laws governing the different plaintiffs' claims'') (matters under review by the Florida Supreme Court, see 873 So. 2d 1222 (Fla. 2004)).

Although proponents of the amendment say that its purpose is to protect state law, its real effect would be to overrule an established body of state law.

I would also note that these state supreme court decisions are no less binding on federal courts than on lower state courts. The reason is because, in ''diversity'' cases, federal courts look to the choice-of-law rules of the state in which they sit to decide what substantive state law should apply. Thus, a federal court confronting a nationwide class action would currently defer to the decision of the highest appellate court of that state declining to allow that state's law (or any other single state's law) to govern the claims of consumers residing throughout the nation. But the ''choice-of-law''' amendment would change that. As its proponents concede, the ''amendment would allow a federal court to choose not to follow the choice-of-law rule of the state in which the court is located.'' That is another serious distortion of federalism principles.

The amendment could hurt consumers from states with strong consumer protection laws. Another problem with the proposal is that, in their effort to make sure that a single state's law may be applied even in a nationwide class action, critics of S. 5 have not thought through the consequences of what would happen if federal courts actually did apply a single state's law. To pose the question bluntly: which single state's law? If the choice-of-law amendment were adopted, that question—the ''which state'' question—likely would be the source of considerable mischief, often to the detriment of consumers.

For example, assume that someone brings a nationwide class action alleging that the defendant company participated in fraudulent sales behavior. State consumer protection statutes vary widely, but the court may decide to apply Alabama law to all claims. That would be bad news for the class members living in California and other states with strong consumer protection statutes, because the Alabama statute prohibits the assertions of consumer protection claims on a class basis. Thus, the claims of all class members presumably would be subject to dismissal. In short, consumers with valid claims under their home state laws, adopted by their own state legislatures and courts to protect their interests, may have their claims obliterated (or, at least, rendered much less beneficial).

Even its proponents appear to acknowledge this problem. Professor Arthur Miller, for example, has suggested that one state whose law would ''often'' be applied in a nationwide class action would be ''the state in which the defendant's headquarters is located.'' See Letter of Prof. Arthur Miller to Sen. Bingaman, June 17, 2004, at 3.

The amendment, in short, is a radical attempt to avoid the fact that in some areas Congress has chosen to leave the decision of what substantive law should govern conduct to the legislative process of each state. By having judges dismiss the laws of all states but one, the Public Citizen amendment violates fundamental principles of federalism.

The amendment is based on the false premise that federal courts never certify multi-state classes based on state law. It is worth noting that neither federal nor state courts have any hard-and-fast rule against the certification of nationwide or multi-state classes asserting state law claims. To the contrary, federal ''[c]ourts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit.'' In re *Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 315 (3d Cir. 1998). Indeed, the two leading proponents of the Public Citizen amendment—Prof. Arthur Miller and Prof. Samuel Isaacharoff—have themselves succeeded in persuading federal courts to certify such nationwide class actions.

The main reason why courts, state and federal, often refuse to certify nationwide classes is because attorneys too often propose classes that overreach—classes that encompass too many people with too many disparate facts asserted under too many different laws. See, e.g., *Chin* v. *Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998) (''Plaintiffs could have reduced or simplified the case . . . by the creation of a smaller and more clearly defined proposed class. Instead, Plaintiffs have asked this Court to certify the largest class possible . . . on the basis of mere promises that a manageable litigation plan can be designed . . . for five causes of action under the laws of 52 jurisdictions''). That, I submit, is a necessary consequence of respect for federalism. There is no reason to exalt the need for nationwide class actions in every case above the basic principles of federalism.

The amendment, which would ignore the manageability problems engendered by varying state laws, would violate due process rights. If a federal court decided that a single state's law cannot be applied over all claims in a nationwide class action without violating the Constitution, the choice-of-law amendment would allow a federal court to apply several states' laws to the claims at issue. But in that circumstance, the proposed amendment would then forbid the court from denying class certification (even ''in part'') on the grounds that applying those several states' laws would render the case one devoid of common legal issues that could not be tried fairly on a class basis.

The amendment would distort traditional and prevailing class action practice in a way that raises serious due process concerns. The basic reason is that it would instruct federal judges that, even if they truly believe that the fact that several (or even all 50) states' laws must be applied in a particular case means that the case cannot possibly be fairly adjudicated as a class action, they must simply ignore that true belief and grant class certification anyway.

In deciding whether to certify a class, for example, a federal court must inquire into (a) whether ''common questions of law'' will ''predominate'' and (b) whether the class action is ''superior'' to other methods, both of which require consideration of any ''difficulties likely to be encountered in the management of the class action.'' Fed. R. Civ. P. 23(b)(3). What that means is that a party objecting to the proposed class action can argue that various state's laws must be applied in the case; that those state laws differ in important ways (indeed, they may even conflict); and that those variations (or conflicts) will make it impossible to adjudicate the class action fairly on a class basis—and will make it impossible for one jury to decide those different or conflicting laws in one trial. In the parlance of Rule 23, the party objecting to the proposed class may argue that the differing state laws are reasons why common questions of law do not ''predominate'' and that the multi-state or nationwide class action is not ''superior'' to other methods of resolving the case (including a statewide class action).

Again, the Avery case makes for a good example. If the court had (correctly, in my view) concluded that many states' laws would need to be applied to resolve that nationwide class action, that determination would in all likelihood have also led the court to conclude that it would not have been fair to try before one jury the legality of the use of non-OEM parts nationwide. After all, how could a single jury hearing that the practice is illegal in Illinois, legally required in other states, permitted in other states, and not addressed at all by still other states, render a fair and coherent verdict? Especially when one keeps in mind that some class actions involve dozens of claims, nationwide class actions would in some cases require literally hundreds of different decisions for a single jury to make.

These Rule 23 requirements have due process underpinnings. Class actions serve an important public function: they allow numerous, similarly situated individuals whose relatively small claims might otherwise be shut out of the legal system to aggregate their claims and obtain collective relief. At the same time, the purpose of the class action device is to allow the aggregation of only some—not all—lawsuits. Indeed, as the U.S. Supreme Court has noted, there is a strong presumption in our legal system that claims will be litigated individually; class actions are an exception to that general rule. Thus, lawsuits seeking damages in which common questions of questions do not ''predominate,'' and in which the class action is not ''superior'' method of resolving the dispute, are denied class treatment for the very reason that the court concludes that it would not be fair to resolve the whole case in one trial. In other words, a class cannot be certified at the expense of ''procedural fairness.'' *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); see also *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (holding that the benefits of aggregated litigation ''can never be purchased at the cost of fairness''). This principle is as important for protecting the plaintiffs (that is, the unnamed class members) as it is for protecting defendants. See id.; see also *Hansberry* v. *Lee*, 311 U.S. 32, 40–42 (1940).

The proposed amendment violates this principle by elevating the class certification decision over ''procedural fairness.'' Whereas the fact that different state laws would need to be applied to a multi-state or nationwide class action is unquestionably a valid factor to consider in deciding whether a class should be certified, the proposed amendment would dictate to federal judges that they cannot consider that factor at all. For example, under the facts of the Avery case, the

choice-of-law amendments would require the federal court to ignore the central fact that the 50 states have made fundamentally conflicting policy choices over the legality of the conduct at issue. The court would be required not to consider the obvious fact that it might be procedurally unfair for the same jury to decide whether the use of non-OEM parts is legal in all of the different states.

I am not suggesting that, in every multistate class action, the laws of every state must be applied as a matter of due process. That depends upon the particular case, and upon the connection that any one state might have to a proposed class action. Rather, what I am suggesting is that in cases in which federal courts themselves decide that due process requires the application of numerous states' laws, it is a serious due process problem to tell those same federal courts that they may not deny class certification on same basis—to tell those federal courts that they must certify a class despite their firmly held relief that the differing state laws will make use of the class action device fundamentally unfair.

For all of the foregoing reasons, I find the proposed choice-of-law amendment to be constitutionally suspect (both from a federalism and due process standpoint) and wrongheaded as a public policy matter. It should be rejected.

Sincerely,

WALTER E. DELLINGER.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. FRIST. Mr. President, for the information of our colleagues, we are making good progress on the class action bill. I appreciate everyone's participation in coming to the floor and offering and talking about their amendments. I want to keep the pace going.

The Democratic leader and I have been in discussions over the day. We want to complete this bill at the earliest possible time this week.

I will shortly be asking unanimous consent that the vote on the Kennedy amendment be this afternoon at a time which I will state. After that we will be proceeding to the Feinstein amendment. We will at that time divide the time accordingly.

At this point, I ask unanimous consent that the vote occur in relation to the Kennedy amendment No. 2 at 4 p.m. today; provided further that following that vote the Senate proceed immediately to a vote in relation to the Feinstein amendment No. 4; provided further that the debate until 4 be equally divided in the usual way, and that no amendments be in order to either amendment prior to the votes.

Finally, I ask unanimous consent that there be 2 minutes for debate equally divided following the first vote. I further ask unanimous consent that 15 minutes of minority time be reserved for Senator KENNEDY.

Mr. REID. Mr. President, I have no objection to the unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. FRIST. Mr. President, while the Democratic leader is here, I mentioned as he was returning to the floor that we are all working very hard to complete the bill on class action. I understand there are several other amendments to be considered. But I reflected our commitment to stay on the bill and complete it at the soonest time possible.

Mr. REID. It is my understanding that the distinguished Republican leader has indicated we will finish this bill this week. Is that right?

Mr. FRIST. Mr. President, that is right.

Mr. President, again I encourage our colleagues to focus on the bill before us today and tonight and tomorrow, and we will be staying on the bill until we complete the bill. I appreciate everybody's consideration.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SESSIONS. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

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

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, Senator FEINSTEIN has offered an amendment to S. 5, the Class Action Fairness Act of 2005, to address the opponents' claim that Federal courts routinely deny certification of multistate or nationwide classes that involve different State laws. Under this amendment, that would change the underlying bill we are considering here. Federal courts would be required to certify class actions, even if the claims were brought under State law.

The amendment further provides that courts faced with nationwide classes involving different State laws should either create subclasses to account for variations in State law or, if such subclasses are impractical, to attempt to apply the proper State law to the class members claims only to the extent doing so is practical.

The proposal would toss State laws and procedural fairness out of the window for the sake of allowing a nationwide class action. It would reverse nearly 70 years of established Supreme Court case law that requires Federal courts to apply the proper State law when they hear claims between citizens of different States.

It would reverse numerous decisions about State supreme courts rejecting the application of one State's law to class action claims that arise in 50 States, and it would seriously undermine the ability of plaintiffs and defendants alike to have a fair trial.

Most importantly, it would have the perverse effect of perpetuating the very magnet court abuses that the legislation seeks to end.

Here is why the latest choice-of-law amendment should be rejected. First, the premise of the amendment is false. Federal courts do not have a hard and fast rule against certifying multistate class actions. Rather, both Federal and State courts—except for certain magnet jurisdictions—conduct a careful inquiry before certifying a class to ensure that common legal issues predominate, as required by the Federal rules governing class actions.

The reason for this requirement is self-evident. The whole point of a class action is to resolve a large number of similar claims at the same time. If the differences among the class members' legal claims are too great, a class trial will not be fair or practical.

In some circumstances, Federal courts have found that the law of different States was sufficiently similar that a class action could go forward. In other cases, they have found the differences were too great to have a fair class action trial.

If the laws under which the liability is founded are significantly different, you can't try them in the same trial. If they are not that much different, you can make it work.

The proposed amendment would take away the discretion of Federal judges to make these important decisions as they always have.

Proponents of the amendment conveniently ignore the fact that Federal law on this issue is quite consistent with the approach taken by numerous State supreme courts, which have refused to certify cases where the differences in State law would make it impossible to have a fair or manageable trial. In fact, the proposed amendment would reverse decisions by the Supreme Court of California, Texas, New York, and numerous other States that have rejected nationwide classes in such circumstances as these.

Second, Federal courts already use subclassing where appropriate. Subclassing basically means dividing a class into a couple of smaller classes where claims may be more similar to one another. In rule 23 of the Federal Rules of Civil Procedure, the nearly 40-year rule governing class actions explicitly gives courts the option of using subclasses to account for variations in the class as long as the trial would still be manageable and fair.

For example, if a case involved State laws that can be easily divided into three or four groups, subclassing would be appropriate if the trial would otherwise be manageable. At the same time, if subclassing were used in every situation that involved different State laws, in some cases there would be so many subclasses it would be impossible to have a manageable or fair trial.

Under the current law, Federal judges have the discretion to decide when subclassing makes sense. That approach is working. Why change it? If it ''ain't'' broke, don't fix it. We have not had serious problems, and it is better to allow the discretion with the judge than for us to try to anticipate and put in hard law requirements involving complexities in the future we cannot anticipate fully today.

Third, the amendment would hurt consumers by subverting State laws.

The proposed amendment suggests that if subclassing will not work, the court should simply respect State laws ''to the extent practicable.'' What does that mean? How does the court partially carry out State law? Judges are responsible for carrying out the law, not for carrying out the law to the extent practicable. It would be a dangerous empowerment and an erosion of our classical commitment to following law.

By suggesting that Federal courts should ignore variations in State laws when respecting State law is impractical, this provision would perpetuate the very problem the class action bill is trying to fix. For example, in the notorious Avery v. State Farm case, a county judge in Illinois applied Illinois law to claims that arose throughout the country, ruling that insurers could not use aftermarket parts in making auto accident repairs even though several States had passed laws encouraging, even requiring the use of these more economic parts to keep down the cost of insurance premiums. The approach taken by the Avery judge and condoned by the proposed amendment actually hurts consumers by denying them the protection of their State's laws.

Some State legislatures have adopted particularly strong laws in certain areas because their citizens have expressed strong feelings about these issues; for example, privacy or consumer fraud. Under this amendment, the citizens of such States would not be entitled to the protection of their State's laws in nationwide class actions. Instead, their claims would be subject to some compromise law created by the judge in order to carry out a class action.

These are some thoughts I share about this legislation. We do have a need for class action reform. The legislation before the Senate is sound. We know if we stay firm, if we do not willy-nilly amend this bill, if we keep it clean and send it forward to the House, they will approve it, we will make this law, and for once pass a serious tort reform legislation that will improve justice in America and reduce costs.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CARPER. 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. CARPER. Mr. President, I would like to take a couple of minutes today to speak to the amendment being offered by Senators FEINSTEIN and BINGAMAN. I don't think we will find on either side of the aisle a Democrat or Republican more thoughtful than either of them, or more fair-minded. Senator FEINSTEIN, in particular, has been heroic in her efforts to try to bring about consensus on class action so we end up with legislation to make sure little people who are harmed by big companies are able to bind together and be made whole; to ensure that the companies that are accused know if they step out of line there is a price to pay for that; legislation that will also make sure that the defendant companies, large or small, have the opportunity to have a fair trial for whatever they are accused of in the litigation; and our last goal is to make sure the Federal judiciary is not overwhelmed with litigation that could be in State courts, ought to be in State courts, and is needlessly moved to Federal courts.

Those are the objectives we all share, Democrats and Republicans, whether we like or do not like the bill. I am in support of the legislation.

Most consumer laws that end up in courts are laws that are adopted by our States. There are some areas where the Federal Government has laws in place to protect the consumers, but the lion's share of the consumer protection laws are written by the various States.

The effort by Senators FEINSTEIN and BINGAMAN is laudable; that is, to make sure that when State laws have been violated, particularly when State laws have been violated in a number of States, that whoever has violated those laws is going to be held accountable. The question is, If you have a class action case that is brought forward based on the laws of 10, 20, or 30 States or more, under whose State law do we argue in court the class action litigation? Is it in a State that has fairly weak consumer protection laws or a State that has very strong consumer protection laws?

I am not a lawyer by training, and I come at this as a lay person simply trying to figure out what is the right and fair thing to do. As I understand class action litigation, I will use the example of where we have maybe 21 States that have been bound together in a class action filed in a particular State court, one of those 21 States, and in particular, a State where the litigation is brought, the effort might be to apply that State's laws to all the other States that are part of this. Senator SESSIONS talked about a situation in a case involving class action with State Farm, where the suit alleged that consumers were being harmed because in the car repair business, when replacement parts were used, some of the States allowed the use of non-original equipment replacement crash parts, sometimes referred to as generic parts. In this case, Avery v. State Farm, an Illinois judge applied the Illinois Consumer Fraud Act to a 48-State class, even though there were significant differences in the States' consumer protection laws and vast differences in the laws of the different states on the use of these types of parts. Most States explicitly authorize their use and a few States even require their use to reduce costs for consumers.

As I have looked into this matter, I have learned when there is an effort to move a class action litigation on consumer issues from a State court to a Federal court, the Federal judge has a number of decisions to make as to whether they want to receive it and hear it at the Federal level.

One, they can say, yes, on the basis of the law that is in question here, and the facts, this is one that makes sense to be heard at the Federal level and to go forward.

The Federal judge can say—again, using the example of 21 States because the math works easily—let's divide those 21 States into three subgroups, and each of those 7 States have laws that are fairly similar but distinct and apart from the other two subgroups. So a Federal judge could say, we are going to go forward with this class action litigation. We will do it as one case, but we will have three subcategories of subgroups.

A third alternative that is available to a Federal judge would be to say, we are not going to have one case; we will have maybe three cases. In those instances where the laws of the States are pretty similar, we will group those seven, and the same would be true for this seven and that seven. And we will hear three separate cases, not one.

If none of that works, the Federal judge is always free to say this is a State matter. The laws and the facts are in such disarray that it is difficult to try them as one case.

Some States have very strong consumer laws, some not. There is a whole big range in between where the laws and the facts are just too disparate and different, and the judge can simply remand it back to the States.

If the Federal judge declines to hear that consumer class action, then it can be tried in State court. Whoever the plaintiffs are, in those instances, will have their day in court. If you happen to be from California, the latter course is not a big deal because you have so many people, 30 million people, and it is not as difficult to put together a meaningful class and to be able to attract an attorney to represent your case. If you happen to be from a smaller State, with fewer people, then it can be more of a challenge to put together a large enough plaintiff class in that State to pay for an attorney to represent the interests of consumers in that State. I acknowledge that.

Having said that, my overriding concern with this legislation is this. I mentioned the four principles earlier, but my overriding concern with this legislation is that we not begin to pick apart this carefully balanced compromise on which we have worked. I have been here 4 years. We have worked on it for almost those 4 years I have been in this Senate. I know people worked on this 3 years before that. We have come so far from where this legislation began in 1997.

This is not tort reform, as a lot of people like to think of it. This is, as

others have said today, court reform. Our goal is to, again, make sure if people get harmed, they have an opportunity to be made whole, to band together into similar groups to make sure the accused and the defendants in the case have a chance to be fairly defended in a courtroom. It is a fair shot.

My fear is, to the extent this amendment would be adopted, it invites amendments of others who may not like this bipartisan compromise because it does not go far enough.

Earlier this month, in the House of Representatives, their bill, which passed by a fairly wide margin in the last Congress, was reintroduced. There are some people in the other Chamber, as well as some in this body, who would like nothing better than to be able to change this bipartisan compromise and move it, frankly, a lot closer to where the House bill is.

Eventually, my friends, we are going to pass a class action bill this year. My own view is it is not going to get any better or more balanced or fairer to plaintiffs and defendants than the compromise we have worked out here this year. As a result, I will oppose, albeit with some reluctance, the amendment offered by Senators FEINSTEIN and BINGAMAN. I know they have put a lot of time and energy into this amendment. Frankly, my staff and I have as well, trying to find a way to accommodate the concerns they have raised. In the end, I do not believe we can, and I must reluctantly oppose the amendment.

I yield back my time.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Vermont.

ATTACKING THE DEMOCRATIC LEADER

Mr. LEAHY. Mr. President, I am going to speak in favor of the commonsense amendment brought to us by Senators BINGAMAN and FEINSTEIN. Before I do, though, if I could make a couple personal comments.

I have been in the Senate for 31 years. I came at a time when there was a real effort for Republicans and Democrats to work together, and for White Houses to do so. I have been here during the administrations of President Ford, President Carter, both terms of President Reagan, President George H.W. Bush, both terms of President Clinton, and now into the second term of President George W. Bush.

I have seen terrific majority leaders in both parties, leaders in both parties. Senator Mansfield, Senator Scott, Senator BYRD, Senator Baker, Senator Dole, Senator Mitchell, obviously Senator Daschle. I think of all the times they would work so closely to bring people together. The President, whoever the President was, would do the same.

I can remember times Senator Dole, a partisan, tough-minded Republican, would reach a point as majority leader when he would call Senators from both parties into his office and say: OK, boys, let's see where we go from here. How do we get this legislation done?

Senator Baker would do that. Senator Mansfield was famous for coming out on the floor during evening sessions and picking a few Senators from both sides of the aisle and saying: Come up to the office. We have to chat and work things out. Senator Baker had the ability to do that. He would go down and speak to President Reagan and suggest to him which Democrats, which Republicans, he might call to make things work out.

You also had, during that time, the practice where the two great parties, the Democratic Party and Republican Party, would keep from attacking the leaders of the other party's caucus in either body. They did it because they knew that, while they might oppose each other on one issue today, they were going to have to work together for the betterment of the country the next day.

Now it has broken down. For some reason, something I never thought I would see, nor, I suspect, did any of those leaders I mentioned from either party ever think they would see, it stopped last session when the leader of one party went to the home of the leader of the other party and attacked him in a political campaign, and attacks were then mounted by the national party. I think it was a mistake.

In the years I have talked about, the 31 years of both Republicans and Democrats running the Senate—we have seen it go back and forth a half a dozen times since I have been here—it has worked very well, where you fight for your party, you fight for your majority or minority, but you do not go after the leaders.

I was hoping the last election might be an aberration. Now I see a difference when the Republican National Committee has come out with the most scurrilous, outrageous attack on the Democratic leader, Senator REID.

It makes no sense whatsoever. Senator REID spent his years as the deputy Democratic leader helping to get legislation through this place. He worked very closely with two different Republican deputy leaders, both when he was in the majority and in the minority, to move legislation through.

I can think of dozens of times, hundreds of times on this floor when legislation looked like it might not get through, and both Republicans and Democrats were going to HARRY REID as the deputy leader to say: How can we work this out?

He would say: Why don't you leave off these amendments, and I will talk to the Republicans and they will leave off these amendments. We will get it through.

It always worked. The legislation we have before us is not one that Senator REID favors, but he worked in good faith with the Republican leadership to bring it up. Almost a day after he does that, he gets attacked by the Republican National Committee, a day or so after the President of the United States in his State of the Union message said how we must all work together, and on the day when the President invites Senator REID down for a cordial family dinner, which is, of course, showing how bipartisan we can be, the Republican National Committee—controlled, of course, by the White House—sends out this scurrilous attack on Senator REID.

It is a mistake. I would say the same thing if the Democratic Party was doing it to the Republican leadership. It is a mistake because ultimately the Senate consists of only 100 men and women who have the privilege to represent 290 million Americans at any given time. There are so many things we need to get done. We should be working together.

An example: During President Reagan's term, we were facing a real crisis—not a manufactured crisis but a real crisis in Social Security, not the manufactured one we see today, a real one—and we were stuck here on the floor. Neither side seemed to budge, and efforts to do something that might save Social Security seemed lost when two giants of the Senate—I know this for a fact because I was standing right here on the floor—Senator Daniel Patrick Moynihan of New York and Senator Robert Dole, the leaders on the Finance Committee where Social Security reform now seemed founded, were talking, and Pat Moynihan walks over to Bob Dole and says: We have to give this another try. It is far too important to let this fall apart in partisan bickering. Let us make this work. You know the two of us can do it.

I and a couple others who were standing there said: We are all with you.

When I say ''I and a couple others,'' Republicans and Democrats said: We are all for you. You can do it.

They went down and saw President Reagan, talked with him and said: Look, we are going to take another try at it, if you will work with us.

He said: Fine.

And they did. As a result of that, in the 1980s, Social Security was put in solvent standing for 70 years. If we do nothing with Social Security now, it will still be solvent in the year 2045, 2050.

Wouldn't it be nice if we went back to the days of giants in the Senate and Presidents of both parties who wanted to work with the Members of the House and Senate who actually want to get something done, not for partisan gain but for American gain, not for one political party but for all Americans?

Those who came up with the bright idea of attacking HARRY REID, a man who will get reelected his next term, I suspect by even a greater margin than the last landslide he had, ought to step back. They might raise money this way. They might stir up some of the true believers this way. They do nothing for the country. They do nothing for the Nation. All they do is deepen the divides instead of healing them. It would be nice if we could have leaders

who would try to be uniters, not dividers. We haven't had that for a few years. I wish we could.

I digress somewhat. I see the distinguished Chair, a man I knew before he came here, admired in his work as a member of the Cabinet. We are benefited by having him here. I hope that he might be one of those who will come in not with preconceptions but his enormous talent of bringing people together and work with us. I say this somewhat unfairly because under the rules he cannot respond, of course. I hope I have not damaged him irreparably with the Republican Party in Florida, but he has known me long enough to know I mean what I am saying.

This Bingaman-Feinstein amendment is a commonsense amendment. It seeks to rectify one of most significant problems of the class action legislation under consideration by the Senate. As we all know, this class action bill is going to sweep most class actions into Federal court. But then many of the Federal courts refuse to certify multistate class actions because the court would be required to apply the laws of different jurisdictions to different plaintiffs, even if the laws of those jurisdictions are quite similar.

Without this balanced amendment, members of important class actions that involve multiple-State laws may have no place to receive justice. In other words, they get removed from the State court to Federal court, but then the Federal court says: Well, because the State laws may be different, we can't do anything. But you can't go back to State court because you are removed here. It is probably as classical a legal Catch-22 as one could see.

According to 14 of our State attorneys general:

> [I]n theory, injured plaintiffs in each state could bring a separate class action lawsuit in federal court, but that defeats one of the main purposes of class actions, which is to conserve judicial sources. Moreover, while the population of some states may be large enough to warrant a separate class action involving only residents of those states, it is very unlikely that similar lawsuits would be brought on behalf of residents of many smaller states.

The Feinstein-Bingaman amendment would help citizens of States such as my own of Vermont. We have smaller populations. We are only the size of one congressional district, 610,000 people. But it would allow us to join with other injured plaintiffs from other States to have their day in court. Federal courts should be allowed to certify nationwide class actions by applying one State's law with sufficient ties to the underlying claims in the case. This amendment would give Federal judges that power and make it clear that they should not deny certification on the sole ground that the laws of more than one State would apply to the action.

If the Senate is truly interested in passing class action legislation that gives injured citizens from every State a place to seek relief, then all Senators should embrace this commonsense amendment. I hope my colleagues will support this important amendment.

I thank Senators BINGAMAN and FEINSTEIN for their hard work on the amendment.

SAD NEWS FOR VERMONT

On another issue, I spoke of my small State. I was born in Vermont, a precious State. We have had Leahys there since the 1850s. It is in my heart and soul. I read with pride but with sadness an article on the front page of the Washington Post today about Vermont and the number of our brave men and women who have been called up in the Guard and Reserves. Two States have the highest per capita callup in the Nation—Hawaii and Vermont, two of the smaller States. We also have the very sad distinction of having the most fatalities, the most soldiers killed per capita of any State in the Union.

I mention this because in our State, everybody knows everybody else. If one person dies, everybody in the State feels it. I have been to those funerals where I have seen people with whom I was in kindergarten, people I grew up with, neighbors of mine or my sister's, people my parents knew. You go to the funeral, you walk into a church, not as a member of the congressional delegation from Vermont—we have all done that—but you go as a friend and neighbor, and that is what you see, friends and neighbors. I will later today put the full article in the RECORD.

It struck me as to what this means. We have one small town that is about the size of a small town in which my wife and I live in Vermont. They have one country store. It is a small store, but it is important to the town. Everybody goes there. A mother and a son run the store. The son gets called up. He goes bravely, of course. The mother cannot handle the store by herself, and the store closes. The community in many ways has lost its center.

These are the realities of what is happening. Several of us met earlier today from both bodies, both parties, to introduce legislation to increase health benefits for those in the Guard and Reserves who are called up, to improve their retirement situation, make sure they stay healthy, make sure if they have a solely owned business and they get called up, they can at least have health care for their family.

I mention this again not because it is apropos to the legislation—I do not see anybody else seeking recognition; I am not taking away from others' time—but I hope those who are watching or listening to this will read this article about what happens in rural America with these callups.

In my State, the largest community is only 38,000 people. The town I live in has about 1,500 people. They know everybody. I live on a dirt road on the side of a mountain with magnificent views. Again, everybody is on a first-name basis. When somebody gets called up, you know it, you feel it.

This is not a question about whether somebody is for or against the war. In my State, everybody has supported those who have gone. Even though I would suspect the majority of the people in Vermont are opposed to the war, they are all supportive of our troops. But it hurts. It is real. I hope we can bring them home soon.

I was heartened by the elections in Iraq. I was heartened by the efforts of those who would brave in some cases death to go out and vote. I hope those of us in our country who say it is going to be a hard time to vote today because it is raining or it is snowing or it is cold or it is hot or it is inconvenient to go those extra five blocks, or whatever the reason, look at what they did.

I hope that country will soon be able to take care of itself. We are going to spend huge amounts of money in this budget to build schools, improve police forces, build communications, roads, and hospitals all in Iraq. We have those same needs at home. I hope soon they can be on their own. I hope soon our men and women can come home, as many safely as possible.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BURR). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HATCH. 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. HATCH. Mr. President, I would like to take a moment to demonstrate just how out of balance the class action has become and to underscore why we need to get this bill passed.

Before I do, I want to make it clear that I do not object to class lawsuits. Legitimate class action lawsuits are helpful, when they are legitimate, when there is a good cause of action, when people really have been abused.

Legitimate cause of actions do not have to seek out these favorable jurisdictions where the law is stacked against the defendants, which is what this bill helps to cure. When they are legitimate and brought in the best interest of the class members, class action lawsuits are a vital part of our judicial system. They can serve as a means to ensure that injured parties who might otherwise go unrepresented have the opportunity to have their injuries redressed.

However, in recent years we have witnessed a disturbing trend where some lawyers are bringing and settling class action lawsuits in which the chief interests actually being served appear to be those of the lawyers and not the people for whom they are bringing the actions. Too often the plaintiffs' attorneys recover millions of dollars in attorney's fees while the class action members get little more than a coupon, if that.

While we must acknowledge that there have been a few isolated instances of abusive settlements in the Federal courts, these are the rare exception. By contrast, numerous examples of abusive class action settlements

originate from the State courts. As we have noted in the Judiciary Committee report in the 108th Congress, the Class Action Fairness Act is a ''modest, balanced bill to address some of the most egregious problems in class action practice.'' It is not, however ''intended to be a panacea that will correct all class action abuses.''

This bill is the result of intense bipartisan negotiations and is our best effort to address a problem that is pervading our State court system. Abuse of the class action system has reached a critical point, and it is time that we as a legislative body address the problem. The public is increasingly aware of the system's unfairness. News programs, such as ABC's ''20/20,'' have covered the rise in class action jurisdictions in certain magnet jurisdictions, magnet meaning jurisdictions where these extortionate suits are brought because they can get a tremendous advantage regardless of whether they are right or wrong.

Scores of editorials have called for actions in newspapers all across this country. Abuse of the class action system has even become the inspiration for popular literature. In 2003, the author, John Grisham, released a book entitled ''The King of Torts.'' Grisham's novel takes its reader into the world of the mass tort/class action lawyer where clients are treated like chattel and bargaining chips. The value of a potential action is not measured by the merit of the claim but on the number of class members that can be rounded up. The end game is not the pursuit of justice for the class members and clients, but in the pursuit of a hefty attorney's fee.

Although Grisham's book is intended as fiction, it is hard to distinguish it from the facts of our broken class action system.

Let me read a few passages:

> Nobody earns ten million dollars in six months. . . . You might win it, steal it, or have it drop out of the sky, but nobody earns money like that. It's ridiculous and obscene.

Now this quote may come from a fictional story, but it is too often too close to the truth. This short novel written by Grisham demonstrates the problems with our class action system all too well. As his book shows, with drug manufacturers the sad but inevitable fact is that people are injured every day in this country by products they buy, and justice does require that they receive just compensation for their injuries.

Frequently, class actions are the best way to compensate large groups of injured consumers. Yet, Grisham's novel, ''The King of Torts,'' also shows that the financial reward of a settlement is so great that the class action system has attracted a small group of unscrupulous lawyers who will do anything, say anything, and sue anything or anybody—not to help their clients but to line their own pockets.

We keep hearing this is not a crisis, that not everyone is gaming the system. Everyone in this body knows, however, that a few bad apples can spoil the bunch. In this case, these few lawyers are hurting our civil justice system. This reform is one small step toward restoring some balance to that system. What I have read in this work of fiction is too often fact today. Everybody knows it. Without question, many of today's class actions are nothing more than business opportunities for some lawyers to strike it rich and too often they have little, if anything, to do with fairly compensating the injured class members.

Some law firms make no secret of this. One law firm actually states on its Web site that it has brought over 24 nationwide class actions in Madison County, IL, a court notorious for approving settlements that benefit the lawyers, and that it specializes in class actions that seek less than $500 in damages for class members. Plaintiffs beware.

I am told, for example, of a law firm that explicitly acknowledges that the more potential class members there are to a claim, the more the case is worth their while. Specifically, the ''frequently asked questions'' section of their firm's Web site states:

> More claimants means greater potential liability for defendants. Because there is greater potential liability, these lawsuits become worthwhile for lawyers to prosecute on a contingent-fee basis.

Worthwhile, indeed. Worthwhile for the lawyers.

A small handful of wealthy lawyers is profiting from the class action system. According to an article appearing in the 2001–2002 edition of the Harvard Journal of Law and Public Policy five firms accounted for nearly half of the class action lawsuits filed in Madison County, IL, and Jefferson County, TX.

Of the lawsuits filed in these districts, many allege the same causes of action, represent the same class of plaintiffs that are brought against many of the same parties within an industry.

While these lawyers might have something to gain, the same cannot clearly be said with respect to plaintiffs, consumers, and those employed by defendant companies, who lose their jobs as a result of these types of lawsuits.

It is evident that a few key courts have been singled out by a small group of legal players in the class action world. This point is reinforced by a 2003 study conducted by the Institute for Civil Justice/RAND and funded jointly by the plaintiffs and defense bar to determine who gets the money in class action settlements. The study found that in State court consumer class settlements, it is the class counsel and not their clients who often walk away with a disproportionate share of the settlement.

What do their clients get? Well, quite simply, not enough. I believe that the many hard-working and honest class action lawyers should be compensated for their hard work and efforts. The overwhelming number of lawyers are honorable people. They are honest. They are hard working. Only a few are causing the lion's share of trouble. The majority of the honest ones are not searching for jackpot jurisdictions where the judges and the lawyers are in cahoots and somehow always find against the defendants.

I also believe such compensation should be reconcilable with a fair recovery for the client. I have supported large recovery for trial lawyers when I thought it was justified. Quite honestly, it is simply not right when our judicial system allows lawyers to walk away with millions of dollars while in some cases their clients walk away with nothing more than a coupon good toward a future purchase of the very product that was the subject matter of the class action to begin with.

I do not know about my colleagues, but when I have a problem with a product, sometimes the last thing I want to do is buy that product or have anything to do with the company or firm that makes that particular product. Frankly, keep your coupon and show me the money. If the coupons were so good, one would expect the lawyers would request that they be paid in coupons, not money.

In real life, we are too often reminded of the legendary fictional case Jarndyce v. Jarndyce of Charles Dickens' ''Bleak House'' in which legal fees ate up the whole estate so that the intended beneficiaries could not benefit.

Consider the case of Degradi v. KB Holdings, Inc., in Cook County, IL. The suit alleged that KB Toys, one of the Nation's largest toy retailers, engaged in deceptive pricing practices in some of their products. Specifically, the suit alleged that the prices of certain products were marked to appear reduced when in fact the apparently reduced price was the market price.

In the settlement with KB Toys over these allegedly deceptive pricing practices, the toy store paid attorney's fees and costs of $1 million and not one dime of cash to class members. As part of the settlement, the store held an unadvertised 30-percent-off sale on selected products. That is laughable. Under the terms of the settlement agreement, the toy retailer agreed to offer a 30-percent discount on selected products between October 8 and October 14, 2003. In other words, they held a week-long sale that was not even publicly advertised. By the time most of the class members learned about the sale, their opportunity to recover under the terms of the settlement had passed.

In fact, an independent analyst stated that KB Toys would likely benefit from the settlement because they were driving traffic. What did the class counsel get? They got $1 million. Good work if one can get it, but not necessarily a good outcome for their clients.

Then there was the 1998 class action filed in Fulton County, GA, alleging

that Coca-Cola improperly added sweeteners to apple juice. In this Coca-Cola case, in the settlement of a class action lawsuit alleging that Coca-Cola improperly added sweeteners to apple juice, it was the lawyers who got a sweet deal—$1.5 million in fees and costs. Unfortunately, class members came up empty again, receiving 50-cent coupons but no cash. So each of them got 50-cent coupons while the lawyers walked away with $1.5 million in attorney's fees.

As my colleagues know, I am a lawyer. In my practice, I represented both plaintiffs and defendants. I have watched some of the greatest lawyers appear in court when I started to practice law in Pittsburgh, PA, such as James McArdle. When Jimmy McArdle tried a case, the courtroom was always filled with young and old lawyers who wanted to watch a master at work. He brought one of the first cases against the tobacco industry.

He lost that one, but it was the case that paved the way to clean up the tobacco industry in this country.

I supported many of the tobacco class action lawyers because I thought what they did was in the best interests of their clients and the American public. But this current class action system is out of whack and needs to be fixed. I understand many of these classes are comprised of hundreds if not thousands of members, and I do not begrudge class action attorneys a reasonable fee award. But when the class member gets a 50-cent coupon and the lawyers get $1.5 million because the company has to settle rather than take a chance of going on and getting killed in a forum-shopped court, then you can see why I am upset about this.

There is also the case of Scott v. Blockbuster, Inc. Blockbuster Video was named as a defendant in 23 class action lawsuits brought by consumers, alleging that they were charged excessive late movie return fees. In 2001, Blockbuster agreed to enter into a settlement agreement. Under the terms of the settlement, which was approved by a Jefferson County, TX, State court, the class attorneys received approximately $9.25 million in attorney's fees while the class members received—you guessed it—coupons. Each class member got a $1-off, or buy one get one free coupon. Experts have predicted only 20 percent of the class members will even redeem these coupons.

I am pleased the bill before us at least ties legal fees to the actual amount of redeemed coupons. If only 1,000 people redeem those $1 coupons, the attorneys would be entitled to a percentage of that $1,000 but not $9.25 million.

I have described a few of the many class action settlements streaming out of our State court system. Many State courts appear at times to be nothing more than rubberstamps for the lawyers' proposed settlement agreements. This is not civil justice.

In that Jefferson County case, the company, Blockbuster, had to settle. They could not risk going to trial in that particular jurisdiction because of the outrageous verdicts that are granted by jurors who appear to be compromised.

This is akin to legalized extortion. Too often it appears that the chief interests served by these settlements are those of the class counsel and not the class members. This bill does not prevent class action suits, but it does stop some of these excesses.

The Class Action Fairness Act would alleviate many of the problems present in the current class action system by allowing truly national class actions to be filed in or removed to Federal court. Some of our colleagues have indicated the consumer will be lost here because they will not be able to bring these cases. Give me a break. Of course they will be able to bring these cases. But they have to be brought in a legitimate way, in Federal court where it is much less likely that they will be hammered by political judges who are in cahoots with the plaintiffs' lawyers in that jurisdiction. Federal courts as a general rule will adequately dispense justice in these matters. So the suits can be brought. This will level the playing field that has become tilted in many jurisdictions in the last few years.

It also reforms the way Federal courts would approve proposed settlements with basic requirements such as a hearing and a finding by the court that the settlement is fair, reasonable, and adequate.

This is the second time the Class Action Fairness Act has come to the Senate floor, but we have been working on it for 6 years. When we failed to achieve cloture by one vote in the preceding Congress—by one vote we failed to achieve cloture—we sat down with several Democratic Senators to reach bipartisan agreement on a bill. We know it is difficult for them to work on this bill because the largest hard money contributor to Democrats in the Senate happens to be the American Trial Lawyers Association. Some people believe Democrats are owned by them. I do not believe that. I know there are many wonderful lawyers in the American Trial Lawyers Association. Most are decent, honorable people, and I know many of them. But there are some who are unscrupulous, and they are the ones who have been fighting this reform. And they have the means to do so since they have become billionaires as a result of these coupon cases won in jackpot jurisdictions.

The bill we are considering today is the result of all of these negotiations. S. 5, the Class Action Fairness Act of 2005, presents this Congress with an opportunity to correct some of the dubious practices currently found in the class action system, and to protect the average consumer.

The first response I have is that this amendment is based on a faulty premise. Federal courts do not have a hard and fast rule against certifying multistate class actions. Rather, both Federal and State courts conduct a fair, full inquiry before certifying a class, to ensure that common legal issues predominate, as required by the Federal rule governing class actions. Put simply, this Bingaman-Feinstein amendment, as amended by Senator FEINSTEIN, would toss State laws and procedural fairness out the window for the sake of allowing nationwide class actions. It would reverse nearly 70 years of established Supreme Court case law that requires Federal courts to apply the proper State laws when they hear claims between citizens of different States.

It would reverse numerous decisions by State supreme courts rejecting the application of one State's laws to class action claims that arise in 50 States, and it would seriously undermine the ability of plaintiffs and defendants alike to have a fair trial.

Most importantly, it would have the perverse effect of perpetuating the very magnet court abuses that this legislation seeks to end. The reason for this requirement is self-evident. The whole point of a class action is to resolve a large number of similar claims at the same time. If the differences among class members' legal claims are too great, a class trial will not be fair or practical. In some circumstances, Federal courts have found that the law of different States was sufficiently similar that a class could go forward. In other cases, they have found that the differences were too great to have a fair class trial.

The proposed amendment would take away the discretion of Federal judges to make these important decisions. It is as though we do not trust our Federal judges. In this case, we can trust them.

Proponents of the amendment conveniently ignore the fact that Federal law in this issue is quite consistent with the approach taken by numerous State supreme courts which have refused to certify cases where the differences in State law would make it impossible to have a fair and manageable trial.

In fact, the proposed amendment would reverse decisions by the Supreme Courts of California, Texas, New York, and numerous other States that have rejected nationwide class actions under such circumstances.

Second of all, Federal courts already use subclassing where appropriate. Subclassing basically means dividing a class into a couple of smaller classes whose claims are similar. Rule 23 of the Federal Rules of Civil Procedure, the nearly 40-year-old rule governing class actions, explicitly gives courts the option to use subclasses to account for variations in a class as long as the class would still be manageable and fair—for example, if a case involves State law that can easily be divided into three or four groups, subclassing would be appropriate if the trial would otherwise be manageable. At the same time, if subclassing were used in every

situation that involves different State laws, in some cases there would be so many subclasses that it would be impossible to have a manageable or even a fair trial.

Under current law, Federal judges have discretion to decide when subclassing makes sense.

This approach is working. Why would we change it?

The amendment not only changes it but makes it even worse.

Finally, the amendment would hurt consumers by subverting State law. The proposed amendment suggests that if subclassing will not work, the courts should simply respect State laws to the extent practical. What does that mean? How does a court partially carry out a State law? Judges are responsible for carrying out the law, period—not for carrying out the law to the extent practical.

By suggesting the Federal courts should ignore variations in State laws when respected State law is impractical, this provision would perpetuate the very problem that the class action bill is trying to fix. For example, in the notorious Avery vs. State Farm case, a county judge applied Illinois law to claims that arose throughout the country, ruling that insurers could not use aftermarket parts in making auto accident repairs even though several States had passed laws encouraging and even requiring the use of these more economical parts to keep down the costs of insurance premiums. The approach taken by the Avery judge—condoned by the proposed amendment—hurts consumers by denying them the protection of their State laws.

Some State legislatures have adopted particularly strong laws in certain areas because their citizens have expressed strong feelings about those issues—for example, privacy or consumer fraud. Under this amendment, citizens of such States will not be entitled to the protection of their States laws in nationwide class actions. Instead, their claims will be subject to some compromise law created by a judge who allowed for a class action trial. That is not justice. That is not good law. That is not a good way to approach things. That is not good procedure.

For all of these reasons I urge our colleagues to vote against the Bingaman-Feinstein amendment and keep this bill intact. We also know that should that amendment pass, this bill is dead. One more time, it will be dead. I hope we have enough Senators who realize the importance of getting this bill through and getting these egregious harms straightened out to pass this bill without amendment.

Let me refer one more time to Dickie Scruggs' comments which he made at a luncheon—''Asbestos for Lunch''—which was a panel discussion at the Prudential Securities Financial Research and Regulatory Conference on June 11, 2002, in New York.

I happen to admire Dickie Scruggs. He is very sharp. He is smart. He has made a billion dollars from practicing law, and I think he has made it legitimately—mainly in the tobacco cases. I have worked very closely with the attorneys in those cases. I have a lot of respect for him. He is an honest man.

When this honest man, a top trial lawyer, one of the best in the country, who is a plaintiffs' lawyer, who has brought class actions, who understands the whole system better than those lawyers, says this, I think we ought to pay attention to it. Here is what he said at that luncheon, and he is one of the leading plaintiffs' lawyers in the country. He said:

> [w]hat I call the ''magic jurisdictions'' . . . [is] where the judiciary is elected with verdict money.

What does he mean by that? He means the attorneys make so much money that they in turn can give a small percentage of that money to these judges so they can get elected and reelected. So there is an interest in the courts in making sure the attorneys make a lot of money so they can get their share to be reelected.

Let me start at the beginning again. It is best heard in full. Here is what Dickie Scruggs said:

> [W]hat I call the ''magic jurisdictions, . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money . . . The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

He said it better than anybody on this floor has said it. And he is a trial lawyer. He said it is almost impossible to get a fair trial if you are a defendant in some of these places. He is talking about Madison County, IL, Jefferson County, TX, jurisdictions in Mississippi, and other jurisdictions throughout the country. I do not want to name them all. The fact is that is what he is talking about. It is impossible to get a fair trial.

I wonder. I have heard my colleagues come on the Senate floor and say there were only two cases a year in Madison County. Come on. That ignores all the threatened cases, demand letters, and settled cases for what are basically defense costs—whatever it costs the company to hire their law firm to defend them because they cannot afford to go to a verdict in that particular jurisdiction because that verdict money is what supports the judges to begin with. They are as interested as anybody in making sure that those verdicts are big, even if they are unjust.

That is what this is all about—and the Bingaman amendment, as amended by my dear friend, Senator FEINSTEIN from California, continues to perpetuate this system.

This is not an overwhelming antilawyer bill. This is not an overwhelming bill that takes away consumers' rights. In fact, it is not a bill that takes away consumers' rights at all. This is not a bill that is unfair. This is a bill that will straighten out these egregious, wrongful actions by some of these jurisdictions by putting these important cases in courts where it is much more likely that justice will prevail. That is what this bill does. It will not prevent anybody from suing. It will not prevent anybody from recovering. It is just that these cases will be tried in Federal jurisdictions in these very prestigious Federal courts, as they should be because of the diversity problems that are presented by these cases, and it is much more likely that we will have less fraud, less unfairness, less jackpot justice in the Federal courts than lawyers are allowed to forum shop them in remote counties with little attachment to the parties.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

AMENDMENT NO. 2

Mr. KENNEDY. Mr. President, I urge all of my colleagues to support this amendment to exclude civil rights and wage and hour cases from the bill's provisions on removal of cases to Federal court. Working Americans and victims of discrimination seeking justice under State laws don't deserve to have the doors of justice slammed on such claims, but that is exactly what this bill will do.

All of us know that families across the country are struggling to make ends meet. We cannot ignore that they are too often hurt by the denial of a fair wage, or by unfair discrimination. We cannot tell the victims of these practices that Congress does not care about this enormous problem.

This amendment is needed, because the harm suffered by plaintiffs in State civil rights and labor cases is real, devastating, and personal—not the sort of harm that results in a few dollars of damages or a coupon settlement.

We have been told that this bill was designed to correct the problem of class actions in which plaintiffs get only a few dollars for minor claims, while elite attorneys earn million-dollar fees. We have yet to hear one example of that happening in a civil rights case or a labor case. We certainly haven't heard anything to suggest there is a major problem in those areas.

Some have said it is too late to raise these concerns about civil rights and workers' rights. We have been told that

too much work has gone into this legislation to consider these issues now. But it is always the right time to stand up for principle.

In its current form, this bill is just another example of the administration's misguided priorities—putting the interests of big companies ahead of America's working families. Why should Congress protect companies that violate State laws by engaging in discrimination or exploiting low wage workers, while making it harder for victims of those practices to get relief in court? Those are the wrong priorities, and we cannot ignore that problem.

We can't turn our backs on victims of discrimination such as Kathleen Rudolph. She and other working women in Florida brought a class action alleging sexual harassment. These women provided health care and other services to inmates in State prisons. They told the court they had suffered almost daily sexual harassment from male inmates, and prison officials failed to stop it. What sense does it make to force a case like that to go to a Federal district court?

The same principle applies to wage and hour laws. A fair day's work deserves a fair day's wage. State wage-and-hour laws provide basic protections to workers, particularly now, as companies continue to improve their bottom lines by pressuring workers to work off the clock. A recent New York Times article described the growing phenomenon of low-wage workers in many fields, including hairstylists, supermarket cashiers, and call center workers, being forced to work without recording their full hours.

These workers are denied overtime pay, and in many cases, working extra hours means they don't even earn the minimum wage. Many of these workers refuse to underreport their hours, and they are punished for not doing so. One manager interviewed by the New York Times admitted:

> Working off the clock was a condition of a call service representative's employment. Hourly workers who complained were weeded out and terminated.

Professor Eileen Applebaum of Rutgers University emphasized that workers have little choice but to go along. She said, ''One big reason for off-the-clock work is that people are really worried about their jobs.''

Congress should not take away the right of these workers to recover the wages they are owed. Locking the courthouse door against them will hurt people such as Nancy Braun and Debbie Simonson, who worked at a national discount chain in Minnesota. They were constantly forced to work through their meal breaks and work off the clock. They and workers like them would not be able to recover their wages without a class action. We should not put more barriers in the way of their pursuit of justice.

The new Federal overtime rule that takes away overtime from so many Federal workers means that State-law overtime protections are more important than ever. This is particularly true in States such as Illinois, which have wage-and-hour laws similar to the Federal law, and have explicitly rejected the new Federal regulations.

With 8 million Americans out of work, and so many other families struggling to make ends meet, cutbacks in overtime are an unfair burden that America's workers should not have to bear. Overtime pay accounts for about 25 percent of the income for those who work overtime, and workers denied that protection routinely end up working longer hours for less pay.

Employers are all too ready to classify workers as not eligible for overtime. Warren Dubrow and Sam O'Lear discovered that problem when they worked in Orange County, CA, as service mangers at an automotive chain.

They often had to work more than 50 hours a week. Yet they were denied overtime pay because their employer called them ''managers.'' Never mind that they spent most of their time on nonsupervisory tasks like greeting customers, filling out order forms, and even changing tires. In State court, they and thousands of their fellow service managers won the right to overtime pay under State laws providing that workers who spend more than half their time on non-managerial tasks are entitled to overtime. Why should a Federal court be required to hear a case like that?

This isn't just a matter of moving civil rights cases and labor cases to a different forum. The real effect is much more harmful. Too often, moving these cases to Federal courts will mean they are never heard at all because strict Federal rules for class certification will prevent the plaintiffs from being approved as a class. If a Federal court decides not to certify the class, that is probably the end of the case, because many members of class action lawsuits can't afford to pursue their cases individually. Extended litigation in Federal court is too expensive for low wage workers and victims of discrimination, many of whom live paycheck to paycheck. Defendant companies are eager to throw sand in the gears of the law, and Congress shouldn't be encouraging them.

There has been some confusion during this debate about whether the class action bill would really move cases involving local events into Federal courts. Yesterday, the distinguished Senator from Utah questioned whether cases based on truly local events would really be affected by the class action bill. Let there be no doubt, it will happen if the current bill isn't modified.

If 100 Alabama workers bring a class action case under Alabama law for job discrimination that took place in Alabama, the employer can still use this bill to drag the case into Federal court if the employer company is incorporated outside the State. The same is true if low-wage workers are denied fair pay in their home State. As long as an employer is incorporated out of State, that employer can move the case into Federal court.

Section 4 of the bill allows a case to stay in State court only if a primary defendant is a ''citizen'' of the same State as the plaintiffs who brought the case. Companies are citizens of the State where they are incorporated, regardless of where they do business. As a result, plaintiffs who file a case in State court against a company with offices in their home State could quickly find their case in Federal court if the company is incorporated somewhere else.

That will affect a huge number of State law cases. To show the scale of this problem, let's look at the figures. More than 308,000 companies are incorporated in Delaware, including 60 percent of the Fortune 500 firms and 50 percent of the corporations listed on the New York Stock Exchange. Most of these companies also do business in many other States. But plaintiffs in those other States will not be able to file cases against these companies without being dragged into Federal court. That result violates basic fairness and common sense.

The Senator from Utah also suggested that this amendment isn't necessary to protect victims of discrimination because Federal courts have traditionally been defenders of civil rights.

Federal courts do perform the important job of protecting civil rights under Federal law and the U.S. Constitution. No one is questioning that. This amendment wouldn't change the fact that Federal civil rights claims can be decided by Federal courts. Nor would it exempt Federal civil rights or Federal wage and hour cases from the other requirements of this bill, such as the requirement that appropriate Government officials be notified of class action settlements.

This amendment does only one thing. It leaves in place the current rules governing removal of civil rights and labor cases filed under State or local laws. When States are ahead of the Federal Government in giving their citizens greater protection than Federal law—as several States have done in the area of genetic discrimination and discrimination based on marital status—State courts, not Federal courts, should interpret those laws.

The Senator from Utah suggested that this amendment isn't necessary because civil rights cases are filed under Federal laws. That is not accurate. There are many Federal class actions, but there are also many emerging areas in which victims of discrimination are seeking relief through State law class actions.

Sexual harassment cases are often brought in State courts under State law, like Kathleen Rudolph's case which I mentioned earlier.

Many civil rights class actions can only be brought under State law because there is no Federal law on the

particular issue involved. That is true for genetic discrimination. It is true for discrimination based on marital status, parental status, and citizenship status. Those types of discrimination are prohibited under many State laws, but not yet under Federal law.

If we don't let State courts develop these emerging protections under State laws, we are stacking the deck against workers and victims of discrimination. That is because Federal courts have said, time and time and time again, that they will interpret State laws narrowly.

The Court of Appeals for the Seventh Circuit, faced with opposing interpretations of State law, has ruled that it will ''choose the narrower interpretation that restricts liability.'' The First and Third Circuits have made similar rulings. There is no question that Federal courts are more likely than State courts to rule against plaintiffs in interpreting State law. Federal judges have said so themselves. Moving these cases into Federal courts will put a Federal thumb on the scale in favor of companies that violate the law.

We can't let that happen. I urge all of my colleagues on both sides of the aisle, and on both sides of the class action debate, to support this amendment. This legislation is supposed to reduce class action abuses, not add new abuses.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SESSIONS. 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. SESSIONS. Mr. President, I rise in opposition to the Kennedy amendment that would exclude labor class actions from the scope of S. 5. At the outset, I have serious problems with any of the carve-out amendments to S. 5. These amendments are part of an effort by opponents of the bill to mischaracterize S. 5 as anticonsumer and to make it appear that some of these carve-outs and exceptions are necessary to prevent injustice. But, Mr. President, S. 5 is a good deal across the board. It is going to improve class actions for consumers, for workers, for our economy, and for businesses. Why should American workers be denied its benefits? Why would people who have a labor dispute not want to have that dispute settled in a Federal court under these superior procedures?

S. 5 will keep most labor cases in State court, anyway. The act includes two exceptions—the home State exception, and the local controversy exception—that are intended to keep most local class actions in State court. That means if local residents sue a local employer, the case will probably stay in State court, anyway.

Second, any labor class actions that will be removable to Federal court under the bill would still be governed by State law. This is not unusual. It is done all the time in Federal court. Nothing in the act changes substantive law in any way. It does not strip any worker of any right to seek redress for a labor violation. It creates no new defense for corporate defendants in time-shaving cases or otherwise. In short, workers who bring State labor claims after the Act passes—and I expect that it will—will have the exact same rights they have now.

Third, Federal courts have frequently certified overtime class actions. Some critics have said they are worried about Federal courts refusing to certify employee claims, but that is not true.

A recent study by the Federal Judicial Center found that class actions generally ''are almost equally likely to be certified'' in State and Federal court.

Certification, of course, is when a Federal court agrees that a class action should be tried as a class action. A lawyer can't go in and declare, I am representing a whole class of people, without some finding that there is a class that has been similarly wronged, or there is a similar litigation issue at stake.

A review of these decisions in Federal court found numerous examples of Federal judges certifying wage-labor class actions. For example, a Federal court in New York recently certified a State labor law class action on behalf of employees of a chain of natural food stores, many of whom were immigrants, who claimed they were not properly compensated for their overtime claims. The Federal judge accepted that case.

A Federal court in New York also certified a class of delivery persons and dispatchers at a drugstore chain who alleged they were not paid the minimum wage or overtime in violation of New York law. That was already accepted under current law, and it certainly would not change under this.

We made some efforts to improve the overtime laws in the Federal rules with regard to it. I have personally, as a private practitioner, represented two clients in wage cases involving overtime. The reason those cases were litigated is because the laws are not clear about what overtime is and what it is not. Nor is the law clear as to who is entitled to overtime and who is not. That needs to be clarified, and I salute the President for his attempt to do so. That is a parenthetical comment.

In a multidistrict litigation proceeding in the Federal court in Oregon, a Federal court certified seven State law classes brought by claims representatives against an insurance company, alleging they were improperly classified as exempt. In a case in Federal court in Illinois, the judge certified a class of employees who said their employer violated State law by failing to pay them for time spent loading trucks and driving to sites.

So the judge certified a class of employees who were making a claim in Federal court for violation of State labor laws. Judges will try that case based on whether it violated State law.

In a case in Washington State, the district court certified a class of meat processing plant employees who accused their employer of failing to pay them for work at the beginning and end of each day when they were on meal breaks. This is a constant source of litigation in these types of cases.

I would suggest that the argument that Federal courts will not certify class actions in wage and hour cases is not correct.

Finally, Mr. President, contrary to what has been suggested today, Federal courts have a long record of protecting workers in employment class actions. Congress has passed strong laws, such as title VII, that were specifically crafted to give workers access to Federal courts so they could bring employment discrimination cases in a fair forum.

We have always believed Federal court is a fair, objective forum for people who have been discriminated against, whether they claim employment rights or civil rights.

As a result, Federal courts already have jurisdiction over most employment discrimination and pension claims, and their record is in sharp contrast to courts such as in Madison County, IL, and Jefferson County, TX.

Which courts system oversaw the Home Depot gender discrimination case settlement that paid class members about $65 million? Which courts oversaw the $192 million Coca-Cola race discrimination settlement in which each class member was guaranteed a recovery of at least $38,000?

The answer to both is these were Federal court cases, not magnet State courts that to often look out for lawyers instead of consumers.

In sum, the only class of workers that will be negatively affected by S. 5 is the trial lawyers who will no longer be able to bring major nationwide class actions in their favorite county court. For everyone else, S. 5 is a win-win proposition that will put an end to class action abuse while protecting consumers who seek to bring legitimate class actions.

I urge my colleagues to reject this amendment and those other carve-out amendments that are being introduced.

Senator KENNEDY has also added to his amendment, the employer-worker rights cases, the civil rights carve-out. I would like to make a few points about the civil rights cases.

The amendment, as I understand it, would exclude from the reach of this bill all class actions involving civil rights—all of them. It should be defeated for several reasons.

First, an amendment that would affirmatively exclude civil rights cases from Federal jurisdiction would be contrary to a long tradition of encouraging the availability of our Federal courts to address civil rights claims.

Indeed, we have on the books several statutes that are intended to ensure that Federal civil rights cases can be heard in Federal courts. It has long been recognized that Federal courts, by virtue of their independence from political pressure, provide a more objective, hospitable forum for civil rights cases than State courts.

One statute that permits removal to Federal court for a broad range of civil rights actions is 28 U.S.C. 1443. A second statute, 28 U.S.C. 1343, provides broad Federal jurisdiction over a whole host of civil rights claims. For example, any action ''for injury to person or property or because of the deprivation of any right or privilege of a citizen of the United States,'' any action ''to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.''

Indeed, that section provides original Federal jurisdiction over any action ''to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens.''

Would this amendment take those from State court? I do not think that is healthy, and I do not think that is what we should do.

Second, contrary to the sponsor's assertion, the bill will not discourage people from bringing class actions by prohibiting settlements that provide named plaintiffs full relief for their claims. The answer to this contention is simple: There is no such provision in the bill. Indeed, the bill does not contain any provisions that will change claimants' substantive rights to recovery in any respect. The ''consumer bill of rights'' provisions of the bill used to include a section that prohibited the payment of excessive ''bounties'' to class representatives. The rationale for that provision was to protect the class members. However, because of concern from the civil rights community about that provision being potentially misused, we have deleted that provision from the bill.

Finally, contrary to the position of the amendment's proponents, the bill will not impose new, burdensome and unnecessary requirements on civil rights litigants and the federal courts.

The provision of the bill requiring that certain public officials be notified about proposed settlements will not delay the approval of settlements. The period allowed for commentary from public officials is consistent with the time that it normally takes to get settlement notices to class members and conduct the ''fairness hearing'' process to obtain judicial approval of a proposed settlement.

The whole purpose of this additional requirement is to ensure that proposed settlements are fully scrutinized to protect the interests of the unnamed class members.

This bill protects the rights of civil rights plaintiffs.

It should not be amended.

The PRESIDING OFFICER. The Senator's time has expired en bloc.

Mr. SESSIONS. I thank the Chair. I urge the amendment be defeated. I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, how much time remains?

The PRESIDING OFFICER. Three minutes remain.

Mr. KENNEDY. I yield myself such time.

Mr. President, a point has been raised by those who are opposed to this amendment that there have been examples where issues affecting working conditions have been considered in the Federal courts and, therefore, we should not be so concerned. That misses the point.

The fact is, we know of a number of cases that have been referred to Federal courts and the Federal courts have been uncertain as to which way to rule. Therefore, they have made a judgment consistently to have the narrowest possible interpretation. Narrowest possible interpretation means workers are going to get shortchanged on wages and working conditions. That is what it means.

Why take it away from the local jurisdiction? We know the same argument with regard to civil rights. We all understand and respect the fact that when it comes to constitutional rights or interpreting the laws that have been passed here with Federal guarantees there is going to be Federal jurisdiction. But that ignores the basic fact that in a number of the States there have been enhancements of civil rights. The States have made those judgments. Judges understand that. They understand what has been considered by the legislature. They know what the temperament of the legislation is all about.

Why take away those protections? This legislation does so. Quite frankly, those areas of workers' rights and civil rights were never really thought about as being the major reason for this legislation. They represent about 10 percent of the total class action, but they do involve protecting workers and workers' rights and they do involve protecting the basic civil rights which the States have enhanced over the Federal laws.

Why are we going to take away from the States the opportunity, the power, the authority, to go ahead and interpret that? That is going to be unfair to those individuals who ought to have the protection. This is going to provide less protection for workers, less protection for their wages and their working conditions, and it is going to put at risk the kinds of protections that States have decided should be there to protect their citizens in the area of civil rights. It makes no sense, and I would certainly hope that our amendment would be accepted.

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the hour of 4 has arrived. Pursuant to the previous order, we will now vote on the Kennedy amendment with a stacked vote on the Feinstein-Bingaman amendment to follow immediately.

The PRESIDING OFFICER (Mr. COBURN). Under the previous order, the question is on agreeing to amendment No. 2 offered by the Senator from Massachusetts.

Mr. SPECTER. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from New Hampshire (Mr. SUNUNU).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 40, nays 59, as follows:

[Rollcall Vote No. 6 Leg.]

YEAS—40

Akaka	Feingold	Murray
Baucus	Harkin	Nelson (FL)
Bayh	Inouye	Obama
Biden	Jeffords	Pryor
Bingaman	Johnson	Reed
Boxer	Kennedy	Reid
Byrd	Kerry	Rockefeller
Cantwell	Landrieu	Salazar
Clinton	Lautenberg	Sarbanes
Conrad	Leahy	Schumer
Corzine	Levin	Stabenow
Dayton	Lieberman	Wyden
Dorgan	Lincoln	
Durbin	Mikulski	

NAYS—59

Alexander	DeWine	Martinez
Allard	Dodd	McCain
Allen	Dole	McConnell
Bennett	Domenici	Murkowski
Bond	Ensign	Nelson (NE)
Brownback	Enzi	Roberts
Bunning	Feinstein	Santorum
Burns	Frist	Sessions
Burr	Graham	Shelby
Carper	Grassley	Smith
Chafee	Gregg	Snowe
Chambliss	Hagel	Specter
Coburn	Hatch	Stevens
Cochran	Hutchison	Talent
Coleman	Inhofe	Thomas
Collins	Isakson	Thune
Cornyn	Kohl	Vitter
Craig	Kyl	Voinovich
Crapo	Lott	Warner
DeMint	Lugar	

NOT VOTING—1

Sununu

The amendment (No. 2) was rejected.

AMENDMENT NO. 4

The PRESIDING OFFICER. Under the previous order, there are now 2 minutes of debate equally divided prior to a vote in relation to the Feinstein amendment No. 4.

The Senator from California.

Mrs. FEINSTEIN. Mr. President, I understand I have 1 minute to discuss

the amendment before the Senate. This amendment is on behalf of Senator BINGAMAN and myself. It essentially deals with an issue that emerged in the consideration of the class action bill.

I am a supporter of the class action bill. However, there is a loophole. That loophole is with class action consumer-related cases. They could go to a Federal judge, and the Federal judge could say the various laws of the 50 States are so complex he cannot decide on a given law. Then the class action remains in limbo. It cannot go back to State court.

This is a compromise between Senator BINGAMAN and myself. It essentially says the judge can either issue subclassifications as determined necessary to permit the action to proceed or, if that is impractical, look at other courses, including the plaintiff's State laws.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, there is no loophole in this bill. This amendment would force the Federal courts to certify dissimilar and unmanageable claims, which is the problem occurring in certain magnet State courts right now. This is a fairness and a due process problem. This is not really a compromise at all. It defeats the purpose of the bill.

The amendment tells courts to ignore State law and forget about fairness just so a class can be certified. It would require courts to subclass even where it would be unwieldy and impractical.

If you want to stop the abuses and pass class action reform, you will oppose this amendment. This underlying bill is the compromise.

Mr. CARPER. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the amendment.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from New Hampshire (Mr. SUNUNU).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 38, nays 61, as follows:

[Rollcall Vote No. 7 Leg.]

YEAS—38

Akaka	Feingold	Nelson (FL)
Baucus	Feinstein	Obama
Biden	Harkin	Pryor
Bingaman	Inouye	Reed
Boxer	Johnson	Reid
Byrd	Kennedy	Rockefeller
Cantwell	Kerry	Salazar
Clinton	Landrieu	Sarbanes
Conrad	Lautenberg	Schumer
Corzine	Leahy	Specter
Dayton	Levin	Stabenow
Dorgan	Mikulski	Wyden
Durbin	Murray	

NAYS—61

Alexander	DeWine	Lugar
Allard	Dodd	Martinez
Allen	Dole	McCain
Bayh	Domenici	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Nelson (NE)
Brownback	Frist	Roberts
Bunning	Graham	Santorum
Burns	Grassley	Sessions
Burr	Gregg	Shelby
Carper	Hagel	Smith
Chafee	Hatch	Snowe
Chambliss	Hutchison	Stevens
Coburn	Inhofe	Talent
Cochran	Isakson	Thomas
Coleman	Jeffords	Thune
Collins	Kohl	Vitter
Cornyn	Kyl	Voinovich
Craig	Lieberman	Warner
Crapo	Lincoln	
DeMint	Lott	

NOT VOTING—1

Sununu

The amendment (No. 4) was rejected.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, very briefly, a number of Members have inquired about the schedule. It is my understanding that shortly Senator FEINGOLD will be offering his amendment, and then we will debate that amendment tonight. We will have the vote on that amendment tomorrow at some time. We will have discussions with the Democratic leadership and Senator FEINGOLD in terms of time. Thus, we will have no more rollcall votes tonight. The next rollcall vote I expect will be on the Feingold amendment sometime tomorrow.

With that, the prospects of finishing this bill tomorrow at a very reasonable time—hopefully, midafternoon or early afternoon—are very good, very positive. There are lots of other discussions and issues that have to be dealt with, and I encourage they be dealt with later this afternoon and into the evening, tonight, and tomorrow morning so we can bring this bill to closure.

We were just remarking, it has been a real pleasure, in terms of the approach of this bill—a bipartisan bill, amendments being debated in a timely way, people being able to express themselves—but bringing the bill to closure at an appropriate point, to me, is very constructive and very positive. I thank my colleagues for that.

Thus, the next rollcall vote will be tomorrow at some point. No more rollcall votes tonight.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the pending business be set aside.

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

AMENDMENT NO. 12

Mr. FEINGOLD. 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 Wisconsin [Mr. FEINGOLD] proposes an amendment numbered 12.

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

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

The amendment is as follows:

(Purpose: To establish time limits for action by Federal district courts on motions to remand cases that have been removed to Federal court)

On page 22, strike line 22 and all that follows through page 23, line 4, and insert the following:

''(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that—

''(A) not later than 60 days after the date on which a motion to remand is made, the district court shall—

''(i) complete all action on the motion; or

''(ii) issue an order explaining the court's reasons for not ruling on the motion within the 60 day period;

''(B) not later than 180 days after the date on which a motion to remand is made, the district court shall complete all action on the motion unless all parties to the proceeding agree to an extension; and

''(C) notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.''

Mr. FEINGOLD. Mr. President, if we are going to pass this bill, I think we should do all we can to ensure citizens get their day in court promptly, whether it is in a Federal court or a State court. We are all familiar with the adage that justice delayed is justice denied. So we cannot let this bill become a vehicle for delay.

The bill includes complicated requirements for determining which cases can be removed to Federal court. We need to make sure the cases that belong in State court under this bill do not get caught up in some kind of procedural wrangling that would effectively deny justice to the plaintiffs through delay.

Current Federal court practice allows a case filed in a State court to be automatically removed to Federal court by the filing of a notice of removal. If a party believes the case does not belong in Federal court, it can then remove in Federal court to remand or return the case to the State court.

Under current law, when a Federal district court decides to grant a motion to remand the case back to State court, right now that order is not appealable. S. 5, the bill before us, makes such orders appealable for the first time in over a century. Due to the efforts of Senator SCHUMER, Senator DODD, and Senator LANDRIEU, the bill requires the court of appeals to decide appeals of remand orders within 60 days unless the parties agree otherwise. This 60-day time limit recognizes that there is a potential for delay that these newly permitted appeals could cause and that there is a need for courts to resolve quickly at the appellate level the issue of where a case will be heard.

I strongly support this idea of a time limit for decisions on appeals. But it

also highlights another great potential for delay that is caused by this bill. Before that 60-day clock begins to run on an appeal, the district court must first rule on the motion to remand the case to State court. Unfortunately, some courts take a great deal of time to decide motions to remand. The result is simply putting a case in limbo.

Take, for example, the case of Lizana v. DuPont. In this case, cancer victims in Mississippi allege they became sick because they lived next door to a DuPont manufacturing plant. DuPont then removed the case to Federal court on January 21, 2003, and the victims then moved to remand the case to State court. The Federal district court finally granted the victims' motion, a year after the motion to remand was filed.

In an Oklahoma case called Gibbons v. Sprint, a group of consumers filed a case against Sprint for installing cable lines across their land without giving proper notice or paying compensation to the landowners. Sprint then removed the case to Federal court. A remand motion was filed on October 4, 1999, and was granted, but only after a delay of nearly a year.

These are real-life examples of how an improper removal can end up delaying a case for a significant period of time. By rewriting diversity jurisdiction rules in this bill, we are handing defendants a tool for delay, even if they do not actually qualify to have their cases removed. So we need to make sure that in cases that are removed from State courts as a result of this bill, remand motions are decided promptly. At the very least, we should require that the courts review these motions and decide them quickly, if they can.

The amendment that I offered in the Judiciary Committee would have placed a 60-day time limit on district court consideration of motions to remand. This is the same limit that the new bill places on courts of appeals when decisions on motions to remand are appealed.

My committee also adopted the other components of the bill's provision on appeals. It allowed all parties to agree to an extension of any length and allows the court to take an additional 10 days for good cause shown. If courts of appeals are going to be required to rule on appeals of decisions on motions to remand in short order, I thought we should require district courts to make those decisions just as quickly. That way, we could be sure that removals will not be used as a tool for delay.

On Monday, the Judicial Conference sent a letter to the chairman of the Judiciary Committee concerning my amendment. Not surprisingly, it opposes the amendment. The Judicial Conference historically has opposed, as it says in its letter, ''statutory imposition of litigation priority, expediting requirements, or time limitation rules in specified types of civil cases.''

In other words, judges do not like being told by Congress how to prioritize their cases or how quickly they should do their work. And I do not blame them. But we do it when we think it is important. And here we are sending a potentially large new number of cases to Federal court. We are increasing the workload of the Federal courts, making it more likely cases will be delayed because of crowded dockets.

What the committee amendment did was to require the courts to quickly assess whether a case belongs in Federal court, whether this bill applies to it. I do not think that amendment of mine was unreasonable at all.

On the other hand, I am sympathetic to the concern expressed by the Judicial Conference that in some cases 60 days may not be enough time to decide the motion. Its letter points out that, in some cases, an evidentiary hearing might be required and the time to fully brief the motion may exhaust a portion of this 60-day period. My committee amendment allowed for an automatic 10-day extension and an extension of any amount if both sides agree.

I have read the letter from the Judicial Conference and I am trying to come to a reasonable solution. I accept the possibility that the changes I have made to date perhaps are not enough. So I am not wedded to the 60-day period itself. What I am wedded to is the idea that these motions should not be permitted to languish unexamined for months and months. I have made further modifications to the amendment that I offered in committee in the hope that the sponsors of the bill would be willing to work with me to reach an accommodation on this issue.

The amendment I have proposed on the floor requires the district court to do one of two things within 60 days of a motion to remand being filed. First, the court can decide the motion. I hope many, if not most, motions to remand could be decided that quickly. But under my amendment before the body, the court has another option under this amendment. It can issue an order within a 60-day time period indicating why a decision within that time cannot be made. Perhaps the reason is that the factual record cannot be completed within that time, or that other pressing matters must receive priority in light of the court's full docket. The amendment does not presume to specify what reasons are good or adequate reasons. The justification is entirely within the court's discretion, but it must give some explanation, some reason in an order that would be issued within this 60-day period.

If such an order is issued, the court is then allowed, under the amendment before the body, to issue a decision up to 180 days after the filing of the motion. That gives the court a full 6 months to make a decision. I argue that should be enough time for even the most complex of remand motions. Once again, an extension of any length is permitted if all the parties to the case agree.

I believe these changes more than address the concerns raised by the Judicial Conference, but they also make sure that a remand motion will not languish for more than 6 months because the court simply has not gotten around to it.

My hope is that the requirement that an order be issued within the 60 days will make it more likely that the court will devote enough time to the motion to realize that it is possible for a final decision to be reached within that time. If more time is needed, 180 days should be more than sufficient.

A 6-month time limit will not cause undue hardship to our Federal courts. For those who doubt that removal will become a tool for delay, let me call their attention to testimony before the House Judiciary Committee by legal scholar Theodore Eisenberg of Cornell Law School. Professor Eisenberg testified that his research has found that even though the number of class action lawsuits is declining, efforts to remove cases are not. More importantly, he found that remand rates are increasing over time.

In recent years, more than 20 percent of diversity tort cases removed to Federal court have been remanded to State court. Now, that means that one out of five removals are improper. We have no way of knowing what will happen under this bill. Perhaps some of the 20 percent will now be properly removed to Federal court. But given the complexity of the bill's new requirements, I think it is safe to assume that a significant number of removals will still turn out to be improper.

Once a district court decides to remand a case, that remand order will almost certainly be appealed. Plaintiffs with legitimate class actions in State court therefore need the additional protection provided by my amendment in order to avoid being unfairly harmed by this bill. Some time limit on district court consideration of remand motions in class action cases is critical to minimize the denial of justice to citizens who legitimately turn to the State courts, even under this bill, to have their grievances heard.

I know there is tremendous opposition to any attempt to perfect this bill on the floor because of concerns about the other body, but I implore my colleagues who support the bill to not let their no-amendment strategy prevent them from taking a hard look at this problem. Do we want to leave unaddressed the possibility that a case could sit in Federal court with a motion to remand pending for a year or more, only to have the case properly returned to State court once the court finally takes a look at the motion? Is that a just result?

I am convinced that we can work at something if my colleagues will simply take a quick look at this issue with an open mind. This amendment does not even come close to blowing this bill up. It is certainly not a poison pill. It is just an effort to make the bill work better, and surely the supporters of this bill should have the flexibility to do that.

This bill is called the Class Action Fairness Act. To be fair to people seeking justice from courts, we should ask the courts to act quickly on remand motions at both the court of appeals and district court levels. So I urge my colleagues to support this amendment.

I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DODD. 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. DODD. Mr. President, I begin by thanking the leadership. I thank Senator REID of Nevada particularly because, as my colleagues know, the minority in this institution, even a minority of 1, can make life difficult for a majority even of 99.

The Framers of the Constitution created an institution that would make sure that the rights of minorities would be protected in this body. Contrary to his own substantive feelings about the matter before us, the distinguished Democratic leader has made it possible, because of the unanimous consent agreement entered into with the distinguished majority leader, for this matter to proceed. I also thank Senator FRIST, the majority leader, for working out that arrangement so that we can deal with the matter before us.

As someone who a year and a half ago negotiated an agreement that was satisfactory to many, not to all, I am pleased that we are within a day or so of adopting this very important legislation. We would not be able to do that were it not for the leadership shown by the minority and the majority in allowing this amendment process to go forward. So I begin there.

I commend my colleagues who have offered amendments. They have offered germane and relevant amendments to this bill that have at the very least some kernels of sound judgment and good ideas to them. I regretfully disagree with my colleagues substantively and have expressed that in the RECORD. I know my colleague from Delaware, Senator CARPER, who has spent a lot of time on this legislation, has been more deeply involved in this question than almost anyone in this body and has listened very carefully to all of those who have argued their amendments and considered them thoroughly. So I thank them for offering these ideas. I do not suggest that I would necessarily be opposed to all of these amendments under different circumstances, although I think there are substantive arguments against them.

I say to one of my dearest friends in this body—and I know we call each other good friends, but RUSS FEINGOLD is one of my best friends in the Senate, and it is a rarity when he and I are on different sides of an issue. I am not comfortable disagreeing with my friend from Wisconsin because I admire him so much, but there is a substantive disagreement over having mandatory time requirements.

The Judicial Conference of the United States, in a letter dated February 7, addresses specifically this amendment and urges our colleagues not to impose a time certain. The Senator from Wisconsin makes a strong argument on having some predictability, and I agree with him about predictability for all involved, for defendants and plaintiffs, but there is a danger in making the predictability so certain that it makes it difficult for the judicial process to necessarily work in a fair and balanced way. Because there are so many extenuating circumstances which can complicate a given mandatory time requirement, it can actually work adversely to plaintiffs or defendants in the case, and I know my colleagues are aware of that.

A sound case can be made for Senator FEINGOLD's amendment. There was a sound argument on the other side as well as to why this can be dangerous. The Judicial Conference has come down rather strongly in a letter in opposition to a mandatory time requirement. Rather than go through and read this whole letter, I ask unanimous consent that the letter from the Judicial Conference dated February 7 be printed in the RECORD.

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

JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, DC, February 7, 2005.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, 224 Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I write on behalf of the Judicial Conference of the United States, the policy-making body for the federal courts, to express the judiciary's opposition to the amendment offered, and later withdrawn, by Senator Russ Feingold to the Class Action Fairness Act of 2005 (S. 5) during the Senate Judiciary Committee's business meeting on February 3, 2005. That amendment would require the district court to complete all action on a motion to remand a class action case not later than 60 days after the date on which such motion was made, unless ail parties agree to an extension or the court grants an extension up to 10 days for good cause shown and in the interests of justice. As further explained below, the Judicial Conference opposes the imposition of mandatory time frames for judicial actions. Because the amendment may be considered further as S. 5 moves to the floor of the United States Senate, I wanted to provide you with these views as soon as possible.

The Judicial Conference strongly opposes the statutory imposition of litigation priority, expediting requirements, or time limitation rules in specified types of civil cases brought in federal court beyond those civil actions already identified in 28 U.S.C. 1657 as warranting expedited review. The Conference also strongly opposes any attempt to impose statutory time limits for the disposition of specified cases in the district courts, the courts of appeals, or the Supreme Court. (Report of the Proceedings of the Judicial Conference of the United States, September 1990, p. 80.) Section 1657 currently provides that United States courts shall determine the order in which civil actions are heard, except for the following types of actions that must be given expedited consideration: cases brought under chapter 153 (habeas corpus petitions) of title 28 or under 28 U.S.C. §1826 (recalcitrant witnesses); actions for temporary or injunctive relief; and actions for which ''good cause'' is shown.

The expansion of statutorily mandated expedited review is unwise for several reasons. Individual actions within a category of cases inevitably have different priority requirements, which are best determined on a case-by-case basis. Also, mandatory priorities and expediting requirements run counter to principles of effective civil case management. In addition, as the number of categories of cases receiving priority treatment increases, the ability of a court to expedite review of any of these cases is necessarily restricted. At the same time, district courts must meet stringent deadlines for the consideration of criminal cases, as required by the Speedy Trial Act.

From a practical standpoint, it may be difficult in many situations to meet the 60-day deadline under Senator Feingold's amendment. The filing of a remand motion following a notice of removal pursuant to 28 U.S.C. §1447 would trigger the 60-day period. Under current local rules of practice in the district courts, a motion to remand may not be fully briefed and ready for court consideration until a substantial portion of the 60-day deadline has expired. In addition, the district court must consider the criteria listed as a threshold for federal court jurisdiction under S. 5 before deciding the motion to remand, which may require the court to hold an evidentiary hearing with witnesses.

The judiciary shares Senator Feingold's desire to facilitate the consideration of cases. However, for the reasons stated above, the judiciary believes the amendment is unwise. Nevertheless, if Congress determines that a specific reference beyond 28 U.S.C. §1657 is appropriate, then the following alternative language is suggested for the Committee's consideration as a replacement for subsection (A) on pages 1 and 2 of Senator Feingold's amendment:

''(A) the district court shall complete all action on a motion to remand as soon as practicable after the date on which such motion was made; and''

OR

''(A) the district court shall expedite all action on a motion to remand to the greatest extent practicable; and''.

Similar language has been used by Congress in other legislation and is now found within the draft asbestos bill being discussed in your Committee. It has reminded federal judges of the importance Congress has given to the resolution of the particular matter without precluding a fair hearing of the issues underlying the motion or action.

Thank you for your consideration of the above comments. If you have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs, at 202–502–1700.

Sincerely,

LEONIDAS RALPH MECHAM,
Secretary.

Mr. DODD. I am not going to go through each and every amendment, but the amendments offered by my friends, Senators KENNEDY, BINGAMAN, and FEINSTEIN, also make good points, but as the Senator from Delaware and others have pointed out there are substantial and substantive reasons why those amendments are even incorporated already under the legislation

and thereby covered or that would undo what we have attempted to achieve in this legislation.

I pointed out the other day that back in the fall of 2003—I believe in October—a group of us who objected to the cloture motion and provided the margin of difference that day from invoking cloture provided the necessary votes to secure passage of the then as written class action reform bill. I think we were right in doing so. That bill, I believe, was excessive. There was a real danger it would have undone a lot of good law in this country which made courts accessible to legitimate class action plaintiffs.

We were asked, a small group of us who were willing to work on this issue, to try to come up with some compromises, and we did. We submitted a letter to the majority leader saying there were four items that we thought needed to be addressed in that bill. We then sat down and negotiated not only the 4 items but 8 items additional to the 4, so we came back with 12 improvements to that bill, far more than we were asked to do by those concerned with legislation. I am not suggesting that covered the universe. Obviously, other ideas occurred in the last year and several months since that was struck. I was disappointed we didn't bring up the reform bill in January of last year, as the leader announced we would do. We lost an entire year on this matter, where we could have had the same arrangement we agreed to over a year ago. Nonetheless, we are back here with that same agreement.

Across the country, those who have had a chance to look at this legislation have spoken very extensively in favor of it. In fact, some 109 editorials across the Nation, from publications, daily publications literally across the Nation in virtually every jurisdiction of the country, have come out and strongly endorsed this compromise package. I have a list of the 109 editorial comments made in support of this legislation, from publications that have reputations of being center, right, and left. It transcends the traditional ideological differences one might find in our daily newspapers. It is instructive to those of us anxious to know what those editorials have to say about this bill.

I ask unanimous consent that list be printed in the RECORD.

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

109 EDITORIALS SUPPORTING CLASS ACTION REFORM

The Washington Post

Get Tort Reform Right—January 10, 2005
Reforming Class Actions—June 14, 2003
Making Justice Work—November 25, 2002
Restoring Class to Class Actions—March 9, 2002
Actions Without Class—August 27, 2001

The Wall Street Journal

Tort Reform Roadmap—January 27, 2005
Class-Action Showdown—July 8, 2004
Class-Action Showdown—June 12, 2003
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Class-action reform a must—May 27, 2002

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Lawsuit reform seems necessary—July 8, 2003

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Crimes against consumers—May 19, 2003

Stop these corrupt suits—April 6, 2002

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Reform Class Actions—September 7, 2003

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Madison County: Bush in the ''hellhole''—January 5, 2005
Feathering the Legal Nest—April 6, 2004
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The Lawyers Win Again—October 24, 2003
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Lawsuit heaven—January 13, 2003

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Time for a tad of tort reform—July 16, 2003

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Class Action Bill Needs Action Now—July 20, 2004
Unclassy Action in Need of Reform—September 3, 2003

Times Union (Albany, NY)

Class Action Victory—December 3, 2003
Class Action Showdown—November 10, 2003
Fix class-action law—July 28, 2002

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Small firms new target in lawsuit abuse crisis—June 23, 2003

Vero Beach Press-Journal

Class-action reform delayed by Democrats' stalling tactics—July 14, 2004
No Class—October 24, 2003

Washington Times

Ushering thru tort reform—July 7, 2004

Wisconsin State Journal

Put Fair Limits on Group Lawsuits: Class-Action Abuses Enrich Lawyers While Yielding Pennies for Plaintiffs—June 7, 2004

Mr. DODD. As a source of some parochial pride, I ask unanimous consent the entire editorial in the Hartford Courant of Hartford, CT, be printed in the RECORD supporting this legislation. It is entitled ''Reining In Class-Action Abuses.''

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

[From the Hartford Courant, Feb. 8, 2005]

REINING IN CLASS-ACTION ABUSES

Congress finally appears ready to curtail the worst abuses in class-action lawsuits.

The House and Senate have debated the issue for a decade. Now the Senate is prepared to vote, possibly this week, on a bipartisan compromise engineered by Democratic Sen. Christopher Dodd of Connecticut and others. President Bush has indicated he will sign the measure.

Lawyers long have had a field day with class-action lawsuits. They sometimes solicit clients and then shop for friendly state courts with reputations for handing down huge monetary awards. Too often, though, plaintiffs end up with pennies, while the lawyers take home millions of dollars.

Under a bill that cleared the Senate Judiciary Committee last week, most interstate class-action lawsuits in which claims total more than $5 million would appropriately be moved to federal courts.

Truly local lawsuits involving plaintiffs and defendants within a state would properly remain in local courts.

The bill, known as the Class Action Fairness Act, has other useful provisions, such as tighter controls on so-called coupon settlements, in which consumers receive discount coupons instead of cash. Also, there would be better scrutiny of settlements in which class members actually lose money.

Critics say the bill would unfairly penalize consumers because federal consumer-protection laws are weak. There still is time to address this shortcoming. But lawmakers must resist the temptation to add extraneous amendments—such as one to increase the salaries of federal judges—that would doom the bill.

The measure enjoys broad support in the House, which gave it overwhelming approval last year but which must vote again.

Once Congress acts on class-action lawsuits, it can turn its attention to two other urgent lawsuit abuses—medical malpractice and asbestos.

Mr. DODD. Let me say again to my colleagues here, many of whom I know have offered amendments that have not succeeded in the past, I know it can be disappointing to work on the amendment and not get the necessary votes. But let me remind my colleagues, those who believe—and that is most of us here—that clearly the class action situation in this country cries out for reform, that this bill is a court reform bill rather than a tort reform bill. No courts are closing their doors to class action plaintiffs at all. But the situation had gotten out of hand. I think most of us here agree with that.

We have written an improved bill—from both a plaintiff's perspective as well as a defendant's perspective. We can have access to courts, get good judgments, and see to it that victimized plaintiffs will receive the compensation they deserve as a result of a class action decision in their favor.

I suggest to those who would have liked to have us add additional amendments here that there was a very real danger indeed that had we not stuck with the agreement reached almost a year and a half ago, the original bill would have come back or a bill adopted in the other body would have been the vehicle chosen as the vehicle for class action reform. I believe that would have been a mistake.

I know there are colleagues who are disappointed that some of us did not support them in their efforts. I state there are substantive reasons that we did not, but also there is the reason that had we done so, this matter would have been opened and the results would have been a bill that would have been dangerous. I would have opposed it, but I think the votes are here to carry it. It is always a tough call, and I am not going to suggest otherwise. Those are the kinds of decisions you have to make in a legislative body with 99 other colleagues, 435 in the other body, and a President. We are dealing with a legislative form of government. Unfortunately, as much as we would like to write our own bills and have everybody go along and agree with our ideas, that is not the way the process works.

We think we have a substantially improved piece of legislation, one that I heartily endorse. We will discover in time if there are any shortcomings, but by and large I believe we have written a good bill.

I mentioned in his absence my friendship with the Senator from Wisconsin, talking about his amendment. As I said earlier, there is more than just a kernel of truth in what he suggests. There is an argument on the other side that I know my colleague, as a very distinguished member of the bar, will appreciate. I will not be able to support his amendment, but nonetheless I appreciate the point he is making about certainty and predictability, which is not an irrelevant issue when it comes to our courts.

For those reasons, I appreciate the fact that a majority of us here in a bipartisan way—not overwhelmingly bipartisan but a bipartisan fashion—have rejected the amendments offered by our colleagues today. My hope is that a similar result will occur with remaining amendments, that we can have final passage of this bill, that the leadership of the House will do what they said they were going to do, and that is to embrace this compromise package, and that we will be able to send this bill to the President for his signature and make a major step forward in reforming our courts so that class actions can proceed in the way the Framers intended in the Constitution, which is fair to plaintiffs and defendants alike.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, let me say I appreciate the comments of my friend from Connecticut, as I always do. I just want to point out that the amendment I have offered, as opposed to the one I offered in committee, has increased the time for deciding these motions from 60 days to 180 days. Surely 6 months is plenty of time, even in a complicated motion. So I believe the concerns of the Judicial Conference have been addressed, unless we in the Congress are going to go along with the idea there should be no time limit at all.

At this point I simply leave it at that, hoping that prior to the time of actually voting on the amendment tomorrow I would have a few minutes to repeat and reiterate my position on this amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Mr. President, while Senator DODD is still on the floor, and Senator FEINGOLD as well, let me first of all say to Senator DODD that we would not be here today with this compromise, which is good public policy but also something Democrats and Republicans, not all, can support—and I know we will get the support of the House and the President. I want to say a special thank you for your leadership. I have learned a lot in the last 4 years watching you and listening to you. Certainly in this instance it is no exception, but thank you.

I want to say to Senator FEINGOLD, we had a number of amendments that have been presented to us today, all thoughtful amendments by some of our

very finest Members. I was not able to support any of them.

The one amendment that I have literally worked, as he knows, behind the scenes to try to get included in a managers' amendment is this amendment or some variation of this amendment. I think the underlying point you make—if a class action is filed in a State court and that is turned down and there is an effort to move it to Federal court, that is turned down, and then there is another effort to move that class action from State court to Federal court, we limit the second time through. There has to be a response in 60 days to the appeal by the Federal judge on the appeal. That would sort of beg the question, Should not there maybe be some kind of time limit as well on the first time there is an attempt to remove the case to the Federal court? That strikes me as something that makes common sense and seems fair and reasonable. As he knows, I have reached out as recently as last night with some of the people involved in the Judicial Conference and the Rules Committee to see if there is a way to strike the balance, and I believe you have moved toward that balance.

My hope is that we could take this amendment or something similar to this amendment and include it in a managers' package. You have heard Senator DODD and me and others say there is a very delicate compromise here, and there is a concern if we change one piece of the bill we invite friends on the other side, who have a different view about the balance and would like to take the bill in a different direction—we unleash them to feel free to come forth with their amendments and set the bill back.

Having said that, I still think this amendment as you have redrawn it would actually be a good addition to a managers' amendment. I learned today there is not going to be a managers' amendment. As a result, I am not going to be able to support this amendment.

I discussed this this morning with Senator SPECTER; he finds favor with your amendment. I think he mentioned that at the Senate Judiciary Committee hearing. He said to me—and he has no reason to say this, but I think it is just in his heart—he thinks you are onto something here and would like to take the Senator's approach on this provision and include it in another bill that he is working on and presumably will have hearings on.

I think this idea, if it does not pass tomorrow and does not get included in the underlying bill, is going to live for another day and we will be back to where we can hopefully all support it.

I thank the Senator for a real thoughtful approach and for his willingness to compromise and try to find some middle ground. I think he has found it. I think his efforts will ultimately be rewarded.

Mr. FEINGOLD. Mr. President, I thank the Senator from Delaware for his kind remarks and for his genuine efforts to try to reach an accord. It is a shame when we have the chairman of the committee admitting that this ought to be dealt with, and one of the great advocates of this legislation admitting that this is just a question of fixing something, we can't get it done. There is something wrong with the way we are proceeding when we can't fix something that basically nobody is really against if we do it right.

I recognize what is likely to happen in the vote. But I take the Senator at his word that he is hoping we can resolve it. Perhaps this is something that can still happen on this bill. If not, we have to resolve it another way. But I thank him for his sincere efforts to solve this problem.

I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative 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. Without objection, it is so ordered.

MORNING BUSINESS

Mr. FRIST. Mr. President, I ask unanimous consent that there now be a period for morning business with Senators permitted to speak for up to 10 minutes each.

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

MODERATE ISLAM MOVEMENTS

Mr. BOND. Mr. President, 2 weeks ago when I talked about relief for the victims of the tsunami in Indonesia and what we are doing there, I said there was much more I wanted to call to the attention of my colleagues and the people of the United States. One area that is extremely important is the enormous effort that is underway in Indonesia's mainstream, moderate Muslim population to promote a moderate, pluralistic, democratic Islam, both in Indonesia and throughout the region.

Unlike the Middle East, in Indonesia and Southeast Asia, Islam and Muslim organizations have been at the forefront of the country's struggle for a democratic society.

And Muslim groups and leaders in Indonesia have been among the world's pioneers in driving inter-faith dialogues.

During my recent visit to Indonesia, I met Yenny Zannuba Wahid, one of the latest leaders in this movement. Yenny is the daughter of His Excellency Abdurraham Wahid; a Muslim cleric, a leader in promoting religious tolerance in Indonesia and one of Indonesia's first democratically elected presidents.

Yenny has founded the Wahid Institute, an organization dedicated ''to bringing justice and peace to the world by espousing a moderate and tolerant view of Islam and working for the welfare of all.''

As Yenny noted in a recent speech, Islamist parties gained a sizable vote in the 1999 and 2004 Indonesian elections; these developments present the question of what role Islamic forces will play in setting the direction of social and political evolution in today's Indonesia. Will Indonesia, a democracy with Muslim population of over 200 million, remain on the path of a moderate, pluralistic democracy or will a small but increasingly influential minority of fundamentalistic Islamists steadily gain ground with the masses?

Through the creation of the Wahid Institute, Yenny has chosen not to allow these currents to flow without resistence. To be precise, the goal of the WI is to expand on the intellectual principles of Gus Dur to development of moderate Islamic thought that will promote democratic reform, religious pluralism, multiculturalism and tolerance amongst Muslims both in Indonesia and around the world. The institute has set out to create a dialogue between the highest spiritual and political leaders in the West and Muslim world.

The Wahid Institute has embarked on an impressive agenda of programs, including an effort to facilitate communication between Muslim and non-Muslim scholars on Islam and Muslim society and on the subjects of Christianity, Judaism, Hinduism and Buddhism; through conferences, discussions, publications and its website—wahidinstitute.org.

The Wahid Institute has plans to build a Muslim library, to serve scholars, researchers, activists, built on the library and life work of President Wahid. It is also planning to link Muslim NGOs and committed individuals to build a network of individuals and groups dedicated to promoting these ideals.

Just an importantly, the Wahid Institute will focus on the education of young people, supporting opportunities for promising young men and women in Indonesia to focus on progressive and tolerant Muslim thinking.

But the Wahid Institute is the latest of the groups committed to promoting moderate Islam. The Liberal Islam Network and International Center for Islam and Pluralism have been hard at work at promoting a peaceful and progressive Islam for sometime. I encourage all to become familiar with these groups.

In neighboring Malaysia, a country with a majority Muslim population of 18 million Muslims, recently elected Prime Minister, Abdullah Badawi, has emerged as a strong voice in promoting ethnic and religious tolerance and equality for women.

His own country struggled through times of violent race riots and has made ethnic and religious tolerance an