adopted during the Committee's consideration of the bill, to exclude parents, but only parents, from the threat of criminal prosecution and civil suit.

The purported goal of this bill, to foster closer familial relationships, will not be served by threatening to throw into jail any grandmother or aunt or sibling who helps a young relative travel out-of-State to obtain an abortion without telling her parents, as required by her home State law. The real result of this bill will be to discourage young women from turning to a trusted adult for advice and assistance. Instead, these young women may be forced then into the hands of strangers or into isolation. In fact, a 1996 report by the American Academy of Pediatrics, cites surveys showing that pregnant minors who do not involve a parent in their decision to have an abortion, often involve other responsible adults, including other relatives.

Keep in mind what this bill does not do: it does not prohibit pregnant minors from traveling across State lines to have an abortion, even if their purpose is to avoid telling their parents as required by their home State law. Thus, this bill would merely lead to more young women traveling alone to obtain abortions or seeking illegal ''back alley'' abortions locally, hardly a desirable policy result. Young pregnant women who seek the counsel and involvement of close family members when they cannot confide in their parents—for example where a parent has committed incest or there is a history of child abuse—would subject those same close relatives to the risk of criminal prosecution and civil suit, if the young woman subsequently travels across State lines for an abortion.

Threatening an FBI investigation and a criminal prosecution of any loving family member who helps a young pregnant relative in distress to go out of state to obtain an abortion, would be a short-sighted and drastic mistake.

In addition to close family members, any other person to whom a young pregnant woman may turn for help, including her minor friends, health care providers, and counselors, could be dragged into court on criminal charges or in a civil suit. The criminal law's broad definitions of conspiracy, aiding and abetting, and accomplice liability, in conjunction with the bill's strict liability, could have the result of indiscriminately sweeping within the bill's criminal prohibition a number of unsuspecting persons having only peripheral involvement in a minor's abortion—even if they were unaware of the fact that a minor was crossing state lines to seek an abortion without complying with her home State's parental involvement law. As a result, the law could apply to clinic employees, bus drivers, and emergency medical personnel.

I also fear that the bill may have the unintended consequence of encouraging young women in trouble to abandon their family, friends and homes. If they are willing to travel across State lines to obtain an abortion, will this bill effectively force them to move their domicile across State lines to avoid engendering criminal and civil liability? If becoming a resident of another State will eviscerate the hold of a home State's restrictive parental consent law, moving, or running away from home may be the only choice that passage of this bill may leave to them if a young woman is determined not to tell her parents. And, what of those young woman who intend to move or those who tell others that they intend to move, does that defeat the claims the bill is intended to create to deter abortions?

No law—and certainly not this bill—will force a young pregnant woman to involve her parents in her abortion decision if she is determined to keep that fact secret from her parents. Indeed, according to the American Academy of Pediatrics, the percentages of minors who inform parents about their intent to have abortions are essentially the same in States with and without notification laws. Yet, while doing nothing to achieve the goal of protecting parental rights to be involved in the actions of their minor children, S. 1645 would isolate young pregnant women forcing them to run away from home or drive them into the hands of strangers at a time of crisis, and do damage to important federalism and constitutional principles.

Finally, because the bill imposes significant new burdens on a woman's right to choose and impinges on the right to travel and the privileges and immunities due under the Constitution to every citizen, constitutional scholars who have examined the proposal have concluded that it is unconstitutional.

I am particularly struck by Harvard University Law School Professor Laurence Tribe's statement that that ''the Constitution protects the right of each citizen of the United States to travel freely from state to state for the very purpose of taking advantage of the laws in those states that he or she prefers.'' He concluded.

A vote against this bill is a vote for preserving a young woman's ability to turn to a close relative or friend, in what may be the toughest decision she has ever faced, without fear that her trusted grandmother, stepparent, or best friend would be fined or jailed. A vote against this bill is a vote for preserving the important federalism principles.

Mr. ABRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. ABRAHAM. I want to acknowledge that the Senator from Vermont and others on the Judiciary Committee, who are on the minority side, have worked with us. I think we did have, as the Presiding Officer knows, a very fair and I think thoughtful debate about the Child Custody Protection Act in committee. Let me just make a couple of points as to where, it seems to me, the situation currently stands.

First of all, we have had a list of potential amendments submitted. We have not seen language for any of those that are new. Some were in fact offered in committee. But the new ones we have not seen, and it would be very helpful, from the standpoint of moving the process forward, if we could get a better sense of what those are and how many, therefore, might be acceptable.

Second, I point out to all Members that amendments that were offered in committee, a number of which constitute the list we have seen, would remain relevant amendments postcloture on the bill because in fact they would stay in play. So even if cloture were invoked on the bill, it would not preclude those amendments from being considered and voted on here.

The fundamental problem is the Presiding Officer and, frankly, all Members are aware that what we confront now is a time problem. And if we can come up with an agreed upon list of amendments with reasonable time limits, I think we can move forward on this bill in the same productive way here in the full Senate that we did in the committee. But I think to get there we really require a couple of things. One is a little more information about some of the amendments that have been offered, particularly those that do not appear to be relevant amendments, and then some cooperation with respect to reaching an agreement on time limits for the amendments.

I do not think this is a situation that has to go to a cloture vote if we can resolve some of this. I again urge my colleagues to note, to the extent of the amendments that have been proposed, at least the ones we do know about because of they having been offered in committee, they will remain relevant amendments postcloture.

I think the majority leader and the full Senate understand the limited time we have. We cannot have this legislation on the floor for too long a period of time given all the other important pieces of legislation that demand our attention. But if we can limit the time and move to the amendments, I think it is possible to move forward. But even if we were to invoke cloture, it would not preclude many of these amendments. It would presumably eliminate some that truly are not relevant to the bill. And this is, I think, where we find ourselves.

So our staff, certainly on the majority side, is anxious to continue working with the ranking member and his staff to see if we can come to some agreement, hopefully, by the end of the day on Tuesday.

Mr. President, I yield the floor.

CONSUMER BANKRUPTCY REFORM ACT OF 1998

Mr. NICKLES. I ask unanimous consent that the Senate resume consideration of the bankruptcy bill.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1301) to amend title 11, United States Code, to provide for consumer bankruptcy protection, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Lott (for Grassley/Hatch) amendment No. 3559, in the nature of a substitute.

Mr. NICKLES addressed the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. For the information of all of our colleagues, the Senate has resumed consideration of the bankruptcy bill and will hopefully make some progress on the remaining amendments to that bill. However, no further votes will occur during today's session. The Senate, as previously ordered, will have a tabling vote on the minimum wage issue on Tuesday. That vote will occur at 2:20 p.m. The vote at 2:20 on Tuesday will be the first vote of the week in observance of the Jewish holiday, Rosh Hashanah, which occurs on Monday. It is my hope that other amendments will be stacked in sequence to occur after the 2:20 p.m. vote. I appreciate all of my colleagues' consideration.

AMENDMENT NO. 3602 TO AMENDMENT NO. 3559

(Purpose: To ensure payment of trustees' costs under chapter 7 of title 11, United States Code, of abusive motions, without encouraging conflicts of interest between attorneys and clients)

Mr. FEINGOLD. Mr. President, I rise to offer this amendment for myself and Senator SPECTER, and I send the amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD] for himself, and Mr. SPECTER, proposes an amendment numbered 3602 to amendment no. 3559.

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

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

The amendment is as follows:

On page 5, strike Section 102(3)(A) on lines 18 through 25.

On page 5 on line 17 after ''bad faith,'' insert:

''(3)(A) If a panel trustee appointed under section 586(a)(1) of title 28 brings:

(i) a motion for dismissal under this subsection and the court grants that motion and finds that the action of the debtor in filing under this chapter was not substantially justified, the court shall order the debtor to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees; or

(ii) a motion for conversion under this subjection and the court grants that motion the court shall award reasonable costs in prosecuting the motion, including reasonable attorneys' fee, which shall be treated as an administrative expense under Section 503(b) in a case under this title that is converted to a case under another chapter of this title.''

Mr. FEINGOLD. Mr. President, section 102(A)(3) of S. 1301, the section of the bill that would make a debtor's attorney responsible for the costs and the fees of the trustee if the attorney loses a 707(b) motion and the chapter 7 filing if it is found not to be ''substantially justified'' is a very troubling provision.

As we know, a 707(b) motion does allow the court to dismiss or convert a bankruptcy petition. This is an important safeguard that protects the bankruptcy system from having abusive chapter 7 filings. There certainly is some abuse by some debtors' attorneys. However, this provision does not punish the attorneys. It actually punishes their clients.

This provision, Mr. President, in effect, will deny debtors their right to be represented by counsel. What it will do is deny debtors any meaningful access to chapter 7 of the bankruptcy code. Therefore, ultimately, this provision will have the effect of denying debtors equal access to justice.

This bill makes the debtor's attorney responsible for the costs and fees of the trustee—not if the bankruptcy filing was brought in bad faith, not if the bankruptcy was frivolous, but only if the motion was ''not substantially justified.''

I believe this is unprecedented in American law. Parties—not their lawyers—are sometimes assessed fees under fee shifting statutes that are designed to level the playing field or encourage certain types of suits. However, unlike section 102(A)(3), every other provision in which lawyers are assessed fees requires affirmative wrongdoing by the lawyer. In every other case the lawyer has to be found to, in effect, have been guilty of affirmative wrongdoing.

As we all know, the standard of ''not substantially justified'' is a significantly lesser standard than a ''frivolous'' standard. Indeed, the Supreme Court held in Pierce v. Underwood that ''not substantially justified'' is a standard ''greater than general reasonableness,'' but a standard which ''falls short of that necessary to issue sanctions for frivolousness.''

Given the vaguely defined contours of this standard, it is likely that cases would be dismissed in which there was a good-faith argument that the chapter 7 filing was proper. Indeed, in other contexts, courts have interpreted that the ''not substantially justified'' standard is widely varying.

The impact in this provision will be, in effect, to eliminate the filing of chapter 7 cases by debtors' attorneys except in the most clear-cut cases, regardless of whether a chapter 7 filing would actually be in the best interest of the client. Obviously, very few, if any, debtors' attorneys are likely to put their own finances and welfare on the line for such a filing. Or if a few debtors' attorneys do continue to handle such cases, they will likely raise their fees to account for this tremendous risk, thereby pricing themselves out of the market except for the most wealthy of debtors. It is an oxymoron to talk about the wealthiest of debtors.

In the end, the result of this attorney's fees provision is that many debtors will be denied the benefit of counsel if they wish to file for chapter 7. In other words, many chapter 7 debtors will be forced to proceed pro se. As we have recently seen in the well-publicized abuses by Sears and others, many pro se debtors, due to their lack of knowledge about the system, suffer abuse under existing bankruptcy law.

The bill, as a whole, supplies potentially unprincipled creditors with many new tools to take advantage of pro se debtors. The bill would allow an unscrupulous creditor to make threats of 707(b) motions, threats of discharge ability complaints, and threats of repossessing household goods, which may ultimately result in debtors signing ill-advised reaffirmation agreements.

In addition, the attorney's fees provision, because it will compel many debtors now to file pro se, will likely result in a number of debtors having their petitions dismissed for even trivial or procedural mistakes.

As you know, pro se cases are frequently dismissed because debtors file papers incorrectly and cannot correct them quickly enough. And, of course, this bill, by forcing more and more debtors to go with pro se representation, simply exacerbates this problem.

Mr. President, Section 303 of the bill creates a presumption of bad faith when a case is dismissed for failure to file the required papers in the proper form. This provision, coupled with the fact that significantly more debtors will be forced to file pro se, will mean that many people who filed in good faith will have their petitions dismissed and, thus, will never receive their rightful bankruptcy relief.

Moreover, in this the bill's current attorney's fees provision is maintained; it will have the perverse effect of increasing abuses in this area. As previously noted, this provision will cause attorney fees to increase; therefore, more people will be unable to pay attorneys. In addition to catalyzing the pro se problems that I have already discussed, the provision will also cause nonattorney petition preparers to proliferate and they—much more so than debtors' attorneys—have, unfortunately, historically been the No. 1 source of the abusive bankruptcy filings, which this entire bill is so focused upon.

Indeed the nonattorney petition preparers have always been most prevalent where bankruptcy attorney's fees are the highest, notably in southern California and, to a lesser extent, in cities like New York. Very few pro se debtors actually prepare their own papers. Most have to seek help from these petition preparers who sometimes do a terrible job for them, give faulty legal advice, and file cases that often prejudice the debtor as well as landlords, mortgage companies, and other creditors.

Mr. President, in the end, on an issue like this, we have to be honest with ourselves. These attorney fees provisions are designed to intimidate lawyers into counseling against a chapter 7, plain and simple; that is the goal. This is inherently troubling, but such a provision, Mr. President, creates a blatant conflict of interest between the debtor's attorney and his or her client. What if the client has a valid chapter 7 case and would be better served by a chapter 7? Under this new rule, if we don't change it with this amendment, the attorney will have the perverse incentive to counsel his or her client to enter into chapter 13 in order to protect the attorney's financial interests.

This issue was actually raised at one of the hearings called by the Senator from Iowa, Senator GRASSLEY. A powerful and troubling example was offered to illustrate the dilemmas that bankruptcy lawyers will potentially face under this bill.

The scenario presented was that of a client who supports an elderly relative. Since a lawyer could not be sure if supporting an elderly relative would be considered a ''reasonable living expense,'' the lawyer would be taking a risk, a personal risk, by filing for chapter 7 and zealously arguing—as the attorney is required to do—her or his client's case. Indeed, rule 1.7(b) of the Rules of Professional Conduct specifically prohibit a lawyer from handling a case ''if representation of that client may be materially limited by the lawyer's * * * own interests.'' Mr. President, this bill would institute a scenario in which a debtor's attorney would arguably violate this rule whenever chapter 7 is at issue.

The amendment I am offering aims to prevent the inevitable conflicts of interest, perverse incentives, and harm to vulnerable good-faith debtors that this provision would create. My amendment would simply make all reasonable costs of prosecuting a 707(b) motion incurred by a trustee an administrative expense. Characterization of trustees' fees as an administrative expense would then ensure that the trustee receive reimbursement if the debtor's case is dismissed or converted; but what it would do, also, is prevent the conflict of interest specifically prohibited by the Rules of Professional Conduct that I just mentioned.

Senator SPECTER and I offered in committee an amendment that would have amended the bill to provide that the debtor's attorney would only be liable if his or her chapter 7 filing was frivolous. This amendment would have simply placed debtors' attorneys in the same position as all other attorneys. That is, they would only be held personally liable if they engaged in some kind of affirmative wrongdoing.

This proposed amendment was, however, defeated in committee, but it was defeated by a 9–9 vote. Those Senators who voted no on our amendment claimed they were doing so because they wanted to maintain the financial incentive for panel trustees to challenge allegedly abusive chapter 7 filings. We have carefully, and in response to that, recrafted our amendment to retain this financial incentive. Under this amendment, the panel trustee who successfully challenges a chapter 7 filing will be rewarded for their efforts.

In addition, if the debtor's attorney does file a frivolous chapter 7, that attorney will be punished. Just as every other attorney can be sanctioned for frivolous filings, the bankruptcy code already provides for sanctions to be assessed against an attorney who has actually acted in bad faith.

So, Mr. President, in sum, my amendment seeks to equitably reimburse the panel trustee if he or she is forced to prosecute a party who inappropriately filed for chapter 7; but it also tries to strike the right balance by striving to protect a debtor's right to counsel. Nothing is more fundamental to our legal system than the right of every American to be represented by a qualified and zealous attorney. We should not risk compromising this right, particularly for vulnerable parties who often seek protection under the bankruptcy system.

I strongly urge my colleagues to make this change, which I think would be in the spirit of improving this piece of legislation that both the Senator from Iowa and the Senator from Illinois have worked so diligently on.

I yield the floor.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I thank the Senator from Wisconsin for bringing this issue up. It is one that had a close vote in the committee. I presume it has a legitimate place in discussion on the floor of the Senate because of the very close vote. However, I opposed it in committee, and I intend to oppose it here on the floor of the Senate.

I would say that in this area, Senator DURBIN and I have tried to respond to some of the concerns that Senator FEINGOLD has had. We did include in our legislation, as a result of his proposals in committee, that when a lawyer was substantially justified in feeling that this person should be placed in chapter 7, the penalties that we have in the bill otherwise applicable to lawyers who would put people in 7 that should be in 13, would not be applicable if the judge found so.

But this amendment—and I apologize to the distinguished Senator from Wisconsin—just goes too far. I think we need to look at some of the basic reasons why we have legislation. Not everybody would agree with my long list of reasons that we ought to have legislation; but, obviously, I have talked about the lack of personal responsibility.

Second, we have had Congress for 30 years setting a bad example for the individuals of America because we have had 30 years of deficit spending. What sort of a signal does that send to the people of this country? If the government can do it, surely they can do it. Hopefully, we will get over that hurdle this year. For the first time in 30 years, we will have a balanced budget. Hopefully, I think we are going to pay down something like $63 billion on the national debt, and hopefully even more than that.

We also have the credit card industry that we have talked about here in the last several days on this bill. Maybe they are not careful enough about who they encourage to use credit cards and go into debt with the credit card purchase of goods and services. But we have a very aggressive bar. That is my feeling—that the bankruptcy bar is not counseling their clients like they used to of whether or not they could go into bankruptcy. We even hear that it isn't the lawyer that can get people into bankruptcy, it is a legal aid, a legal assistant, who can, through the forms that are made and the electronic filing of collecting a fee, very quickly get people into chapter 7. We are trying to deal with the behavior of the bankruptcy bar in the sense that we want them to get to the point where they are counseling people. Should they be in bankruptcy at all? And, second, should they be in chapter 7, or chapter 13?

So, obviously, if we feel that there has been some abuse of the present practices of the bar, we want to make sure that we have disincentives for people to go into 7, if they go into 13. And we have used disincentive penalties against the legal profession, if they should have been in 13 against the lawyers, I should say, who advise.

We have responded to some of those concerns that Senator FEINGOLD has already raised. But we can't respond to all of them.

I strongly oppose this amendment, because one of the key features of our bill is that it holds debtor lawyers accountable for their actions. We do this by imposing fines when they steer clients into chapter 7 who otherwise can repay their debts.

We all have heard stories about the bankruptcy mills which recklessly send people into bankruptcy and process people in bankruptcy like sometimes we process cattle. Any meaningful reform must address the issue. The Grassley-Durbin bill does that—S. 1301, the bill before us.

This amendment by Senator FEINGOLD, in my estimation, would effectively nullify the new financial incentives for debtor lawyers to act responsibly. This amendment completely takes away the fines that bankruptcy lawyers must pay when they recklessly steer people to have the ability to repay their debts into chapter 7 and away from chapter 13. These fines will be an effective and meaningful way to ensure that lawyers advise clients responsibly.

If adopted, this amendment will allow bankruptcy mills to continue

turning out knew bankruptcy cases. Under this amendment, a debtor's lawyer who is deliberately ignorant of a debtor's ability to repay his debt gets off scot-free. Perhaps we should call this amendment the ''Bankruptcy Mills Protection Act.''

I oppose this amendment and urge my colleagues to do so.

The amendment will not provide true financial incentives for chapter 7 trustees to go over all of the filings that are in chapter 7 and find out which ones can be removed to chapter 13, because this work of the public trustees—chapter 7 trustees—is one of the two major tools that we have to make sure that people who have the ability to repay debt do it rather than getting off scot-free, as most often happens in chapter 7.

The Feingold amendment won't provide a penny when a 707(b) motion is acceptable and the case is then dismissed. In that case, there won't be a chapter 13 case to allow trustees to collect expenses.

I ask my friends to help us keep this bill tightly written so that there is, in fact, a change of behavior among bankruptcy lawyers to advise clients to be responsible for debt—to maybe not go into bankruptcy at all, or if bankruptcy would be charted to chapter 13 as opposed to chapter 7.

I yield the floor.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I enjoy and appreciate working with the Senator from Iowa on many issues, and I have enjoyed all of his remarks except for the suggestion that somehow this is going to be a bad-faith attempt to try to improve the bill, or somehow attempt to benefit attorneys.

I feel like I identified some very specific arguments that are real and that are important to the legal system; and, that, although I share the concerns of the Senator about the general system, in fact I think there are abuses in chapter 7. There is no question about that. But what I tried to do is craft an amendment that creates a fair balance. I am not trying to prevent punishment of an attorney who does something wrong.

But let me just quickly review the arguments about why this is a reasonable amendment and I don't think was responded to.

First of all, I heard nothing about my argument that this creates a conflict of interest. A lawyer has a responsibility under the rules of professional conduct to zealously advocate on behalf of their client. Therefore, it is very rare that our legal system would function well and that attorneys would zealously advocate for their clients if they are afraid that their family and their house could possibly be taken away because they might be assessed with the entire cost of litigation. That is the conflict of interest that this creates.

The Senator suggested in an attempt to suggest that we are going to leave no opportunity to punish a wrongdoing lawyer that there is nothing left. That isn't true. Under the Federal Rules of Civil Procedure and under the Bankruptcy Code there are rules about filing frivolous claims. In fact, I remember when I was a young attorney. The first thing I learned when I came into the office as a young associate was you had better not file a pleading that is frivolous or you might be personally assessed for having done so. That is applicable to these situations and would be effective.

There is no truth to the suggestion by the Senator from Iowa that the attorney can go off scot-free, if he brings up a ridiculous claim.

Furthermore, in fairness to the Senator from Iowa, he did make a point about whether a trustee would be protected in getting his fees in a situation where the case is dismissed. We sent a modified version of this to the desk which addresses that issue. We understood the point of the Senator from Iowa. We listened to him and modified our amendment from committee, because it was pointed out in that there was a conversion from a chapter 7 to a chapter 13; that in that case the trustee would be protected, but not if the chapter proceeding was actually dismissed. That is a fair point. We changed it. It applies to both the dismissal as well as the conversion.

I hope it is clear from the Record that the Senator's comments about that provision relates to the amendment we originally proposed, but not the amendment that was sent to the desk.

Finally, Mr. President, let's talk for just one second about the real effect of this.

The provisions that are in the bill relate only to ''counsel''—an attorney, a licensed attorney. If this goes through and attorneys feel a fear of being assessed these fees in a case where they can't bring a case that they know is airtight, and they don't represent the client, who do they go to? They go to these petition preparers. These petition preparers are the very people who are most likely to do a sloppy job and not care if they bring a frivolous proceeding.

But guess what, Mr. President? The petition preparer isn't responsible. The petition preparer would not be under this standard. So what you are doing is pushing these debtors from legitimately licensed attorneys, who know what they are doing, hopefully, to people who are basically in many cases scamming people, and they would have no responsibility at all. That is bad for the debtor. It is bad for the creditor. That is bad for the legal system. That is bad for the congestion in the courts as a result of the bankruptcy system. For all of these reasons, we have a frivolous standard.

We make sure that the trustee is protected, whether it is a dismissal, or a conversion. And we try to address the inherent conflict of interest that exists when an attorney has to wonder if their own personal finances are going to be affected because they think they have addressed the best interests in arguments on behalf of a client but they are not certain. This goes too far, and I really hope in good faith that the Senator takes a look at these arguments and the modifications we have made, and considers that this really is a reasonable balance in the context of the larger bill.

I yield the floor.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER (Mr. KYL). The Senator from Alabama.

Mr. SESSIONS. I thank the Chair.

I thank Senator GRASSLEY and Senator DURBIN for the great work they have done in building bipartisan support for this bankruptcy bill. I think this is a historic step forward in bringing integrity and fairness and efficiency to the bankruptcy system. It came out of the committee with a 16-to-2 positive vote, and I think that reflects the strong bipartisan support this bill has.

With regard to Senator FEINGOLD's concerns about this provision, it is not for punishment of a lawyer who files these bankruptcy petitions. It simply defines the standard of care they ought to adhere to. We are always having the plaintiff lawyers tell us that they cannot do anything to reduce the standard of care on the part of private businesses. For example, they argue that we must not lower the standard of care for doctors because it might result in a patient or user of their product being injured or somehow being harmed. Nothing can reduce that, but yet at the same time the bar will take as much protection as they can get for anything they do in their professional capacity for which they were hired.

Bankruptcy lawyers are not mere clerks, although the truth is, for those of us who know what is going on, most of the bankruptcy filings in America are done by lawyers who run bankruptcy mills, who advertise in phone books and newspapers and on television and radio, which just a few years ago lawyers could not do. In fact, there is some indication that the dramatic rise in bankruptcy is derived more from attorney advertising and the encouraging of people to file bankruptcy than any other factor. Particularly this appears to be true in light of the fact we have more bankruptcies in a time of strong economic growth and prosperity in this country.

So I say to you, these lawyers have to comfort to some standard of care.

What does Senator GRASSLEY's bill say? It says they ought to be substantially justified in filing their bankruptcy under chapter 7. That is all. What is bad about that kind of standard? And if they are not substantially justified, what happens?

Take for example, a person with a $100,000 income, and let's assume someone sues that person for an automobile accident and wins a $25,000 judgment

against them. Although the judgment need not be that high, it could be any amount that the person does not want to pay. So they go to their lawyer and ask him how they can get out of paying it, and he says ''file bankruptcy.'' This will wipe out the debt, although he could have paid it on the income level he has.

When the case comes to the bankruptcy court, they file under chapter 7, which would eliminate all debts. The chapter 7 trustee objects, and they hold a hearing. They present evidence, and they say: ''No, you should go into chapter 13 because you do not qualify for chapter 7.'' And then the judge must go further. Under the Grassley version, the judge must find not that the lawyer made a mistake but he was not substantially justified in filing the petition under chapter 7. Then he can assess the attorney the cost of that hearing—not huge amounts of attorney's fees, just the cost of the hearing that had to be held on the complaint of the chapter 7 trustee.

Let me ask you—it comes down to this—who pays? Who pays for the expense of having to challenge this chapter 7 petition which was not substantially justified? Under Senator FEINGOLD's proposal, it would be an administrative expense. That sounds OK, but we know in this country that there ''ain't no free lunches.'' You have heard that saying. Somebody always pays. Who pays, in this case, the administrative expense? The people who pay will be the ones who are owed money, the creditors, the ones who have not and probably will not be paid all they are owed, and it comes out of the money that goes to them. They pay for the lawyer filing a petition that is substantially unjustified.

When we come down to the choice of who ought to pay, I say the lawyer ought to pay. He ought to be sure of what he is doing when he files the petition. He should know where it ought to be filed. I do not think that presents a conflict of interest. I understand that you could conjure that up as some theoretical possibility, but the truth is, under ethical rules of practice today, a lawyer cannot file a complaint he does not believe to be justified. He is required to do some preliminary work before he files it.

So I do not believe that this would be contrary to the standards that are required currently of lawyers in what they do. And, again, it requires the action of a judge. And a bankruptcy judge knows these lawyers. There is usually a small group of lawyers that file the overwhelming number of bankruptcy cases in their courts, and many are not going to be unfairly abusing these lawyers. However, when a judge sees one who is consistently filing chapter 7 petitions that ought to have been filed in chapter 13, and his trustee has to have hearings and challenge it, and there are not sufficient facts to justify it, then he is going to have the opportunity under this bill to assess some costs against that attorney.

This is not going to bankrupt the attorney. I know of attorneys in Alabama who are running advertisements, who are making $1,000 per bankruptcy case and filing 1,000 cases a year. They are making big bucks off this system. Maybe they are justified in doing that, but they ought to on occasion, when they make the point to go to great expense to hold a hearing, have the trustee challenge what they have done, and then find out they are not substantially justified—they ought to pay.

I hope we will keep the Grassley amendment. The other alternative is to keep the present standard of assessing costs against an attorney, and that is the standard of frivolousness. That is a very high standard, and the net effect of the frivolousness standard is that nobody will ever recover, because it is just very, very difficult to meet that standard.

The bankruptcy judges are not going to abuse these attorneys. It will give the bankruptcy judges a little leverage, a little power to say to these attorneys who are filing cases recklessly without enough thought, causing the creditors to lose money and otherwise abuse the system, that they can bring a little integrity to and have some watchfulness over the system and maintain discipline on the lawyers who practice there.

I understand the Senator's concern about it, but I do not see this as an extreme position at all. I think it is quite consistent with the bankruptcy court. I believe it will help, as Senator GRASSLEY said, make sure people file their petition right the first time. If it is chapter 13, they ought to file in chapter 13, not in chapter 7 on a theory that, well, we will just have a hearing and maybe we will win or maybe they won't object. We need it filed right the first time so we will have fewer proceedings to transfer the action. That is the purpose behind this and I think the Feingold amendment would undermine that purpose.

I thank the Chair for this time. I yield the floor.

Mr. FEINGOLD. Mr. President, it is fairly easy to try to make the words ''not substantially justified'' sound like a reasonable standard. But what really is going on here is an intrusion into the attorney-client relationship that is very dangerous.

I practiced law for several years before running for the Wisconsin State Senate, and I remember always when looking at a client's argument—first of all, I obviously didn't think I could file any argument that was frivolous. That was prohibited both under the Federal Rules of Civil Procedure and under the Wisconsin Rules of Civil Procedure. But there would be a number of occasions where we would have two or three possible arguments to make. One we might think was our strongest argument, and then another might be our sort of middle argument, and then there might be a third legal argument where it was a long shot but we thought the facts were strong. Any good lawyer would bring all three of those arguments, in most cases, because if a judge found any one of the three to be persuasive, that could be the basis.

I like to think I would have had the courage as a young attorney to go forward with that third argument, even with this provision. But I didn't have any money, and if I thought that bringing that third argument could cause me to be assessed with attorney's fees that would make it impossible for me to pay my mortgage—I am human. I wonder if I would have done what is right, which is to counsel that client: This one is about a 25-percent possibility, but under the right facts, and I think you might have the right facts here, sir, you ought to bring it.

Lawyers should not be put in a position where they believe, except for cases where there is a frivolous claim, that bringing an argument will cause them to have personal harm come to them. That destroys the whole notion of zealous advocacy. This is a serious problem for the relationship between attorney and client, and I really do think to suggest that the ''not substantially justified'' standard is simply a reasonable restraint does not show an understanding of what really goes on in a situation where a lawyer and client sit down and try to come up with the best argument possible. So I reject that suggestion and again urge the adoption of the amendment.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, might I inquire of the proponent of the amendment, and the floor manager on the Democratic side, how much more time will be consumed on the bankruptcy matter this morning? I have a speech which I should have gotten up and offered 15 or 20 minutes ago, before we started this.

Mr. FEINGOLD. Mr. President, I am merely responding to arguments made in response to my arguments. When that ceases, I will cease. I was asked to come down here and offer two amendments this morning. This is the first. If it is in the interests of the Senate that I defer the second to next week, I will be happy to do that, as long as I am assured my opportunity to present it at that time.

I have nothing further to say on this amendment, unless somebody wants to debate it further.

Mr. DOMENICI. I have no desire to prolong the amendments. I will come when you are all finished. I will be here today.

The PRESIDING OFFICER. Who seeks recognition?

Mr. DOMENICI. Mr. President, I ask unanimous consent that when the amendments are complete I be granted 15 minutes for a floor speech.

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

Mr. DOMENICI. I thank the Chair and thank the Senator.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I rise to offer another amendment for myself and Senator SPECTER.

The PRESIDING OFFICER. Without objection, the first amendment offered by the Senator will be set aside.

AMENDMENT NO. 3565 TO AMENDMENT NO. 3559

(Purpose: To provide for a waiver of filing fees in certain bankruptcy cases, and for other purposes)

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 bill clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD], for himself and Mr. SPECTER, proposes an amendment numbered 3565 to amendment No. 3559.

Mr. FEINGOLD. 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:

At the appropriate place in title IV, insert the following:

SEC. 4___. BANKRUPTCY FEES.

Section 1930 of title 28, United States Code, is amended—

(1) in subsection (a), by striking ''Notwithstanding section 1915 of this title, the parties'' and inserting ''Subject to subsection (f), the parties''; and

(2) by adding at the end the following:

''(f)(1) The Judicial Conference of the United States shall prescribe procedures for waiving fees under this subsection.

''(2) Under the procedures described in paragraph (1), the district court or the bankruptcy court may waive a filing fee described in paragraph (3) for a case commenced under chapter 7 of title 11 if the court determines that an individual debtor is unable to pay that fee in installments.

''(3) A filing fee referred to in paragraph (2) is—

''(A) a filing fee under subsection (a)(1); or

''(B) any other fee prescribed by the Judicial Conference of the United States under subsection (b) that is payable to the clerk of the district court or the clerk of the bankruptcy court upon the commencement of a case under chapter 7 of title 11.

''(4) In addition to waiving a fee described in paragraph (3) under paragraph (2), the district court or the bankruptcy court may waive any other fee prescribed under subsection (b) or (c) if the court determines that the individual is unable to pay that fee in installments.''.

Mr. FEINGOLD. Mr. President, when I heard that bankruptcy was the only Federal Court proceeding in which a poor person is not entitled to file an in forma pauperis petition, I thought there must be some mistake. I found it somewhat surprising, counterintuitive, that bankruptcy, which by definition deals with people who are broke or have very limited funds, does not provide even the poorest of debtors a waiver of the filing fee.

The filing fee for consumer bankruptcy is $175. Mr. President, $175 is more than the take home pay of an employee working 40 hours a week at the minimum wage. Tell me, how are the indigent—those who desperately need bankruptcy protection—going to afford $175 simply to file for such protection?

Congress acknowledged that the bankruptcy system may need an in forma pauperis proceeding when it directed the Judicial Conference to implement a pilot program in six judicial districts around the nation. This pilot program operated from October 1, 1994, through September 30, 1997, in the following six districts: the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah. The pilot program was clearly a success. Many of the judges who administered the program, and who were initially skeptical, now support it. In particular the pilot program revealed the following information:

An application for waiver of the filing fee was filed in only 3.4% of all Chapter 7 cases, and the large majority of those waivers were granted. Indeed, the U.S. Trustees Office filed objections to less than 1% of the applications. In other words, only those very few individuals who really needed the fee-waiver applied for it.

The fee-waiver program enhanced access to the bankruptcy system for indigent single women more than any other group. We have heard a great deal about how this bill, S. 1301, will hurt women and children. We cannot strike another blow against single mothers and their children by denying them access to the bankruptcy system because they cannot even afford the filing fee.

The nature of the debt for those who filed for the fee-waiver differed from that of other debtors in that their debts more often related to basic subsistence—education, health, utility services and housing. Moreover, 63 percent of the housing-related debts of those who filed for the fee-waiver owed their debts to public housing authorities. Only one of the debtors who owed a debt to a housing authority did not file for a fee waiver. These findings show that indigent debtors were not filing bankruptcy to escape paying for their boats or their fancy entertainment systems. They were filing bankruptcy merely to subsist. Oftentimes these people use the bankruptcy system simply to prevent homelessness.

There was only a minimal increase in the number of filings, and there was no indication that debtors filed for Chapter 7 rather than Chapter 13 just to obtain the benefit of the fee-waiver program. Simply stated, the debtors typically did not abuse the system.

A nation-wide program would cost between $4 and $5 million in lost filing fees. Projections state that there will be 1.5 million Chapter 7 filings next year. We can, therefore, off-set the cost of a nation-wide program by merely raising the price of Chapter 7 filings by between $2.70 and $3.40. If we increase filing fees for all bankruptcy filings we can reduce that cost to about $2 per filing fee—a negligible amount.

In short, the pilot program was a resounding success.

I offered this amendment in committee, where it was defeated by a 9–9 vote, with all the Democrats supporting it. One concern articulated by Senators who voted against the amendment in committee involved the possibility that, if we implement a fee waiver program, unscrupulous lawyers would advertise ''free filings'' and make a profit. However, under the program, debtors cannot obtain fee waivers if they can pay their lawyers; therefore, private lawyers would have no incentive to encourage in forma pauperis cases.

Let me repeat that point: debtors who can pay their lawyers cannot obtain fee waivers. Only truly indigent people, those who need bankruptcy protection the most, can have their fees waived.

The Specter-Feingold amendment would build upon the strong foundation established in the pilot program, and direct the Judicial Conference to establish a nation-wide in forma pauperis program for the bankruptcy court system. If we examine the findings of the pilot program we find that: (1) only those who really needed the assistance of the program used it; (2) that there was little to no abuse of the fee-waiver program; and (3) that the program in large measure helped those who needed it to subsist and, in many cases, avoid homelessness.

Given these findings, how can we choose not to implement a nation-wide program? Why did we direct the Judicial Conference to conduct a pilot program if we were not going to use the results to shape public policy? How, in good faith, can we deny bankruptcy relief to those who truly need it—those who cannot even afford the filing fee? I urge my colleagues to support this amendment to restore some fairness in the bankruptcy filing process for the most financially strapped filers. I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I rise in strong support of this amendment by the Senator from Wisconsin. He is correct. We tried this across the United States in, I think, six different jurisdictions, to see what would happen. What is at issue here is a person is about to file for bankruptcy and is so penniless that they cannot even afford the filing fee of $175, then in these six different court jurisdictions we waived it. That is what this is all about. We found as a result of that experience they didn't open the floodgates to people coming in filing for bankruptcy. In fact, just the opposite was true. A lot of very serious cases, and those called out for justice, were served by this program.

One of the judges in my home State of Illinois, the southern district, who tried this, Judge Meyers, has written a letter to me and said it was quite a success and he encouraged it be done on a national basis.

If there is anything that distinguishes American jurisprudence from some other countries, it is the fact that we have basically said the court system is open to the rich and poor alike. It is an oddity in our law that we don't allow those who are truly poor to have a waiver of the filing fee so that they can come into bankruptcy court.

Senator FEINGOLD has a good amendment. I was happy to support it in committee. I hope now, because of the evidence of its success across the country that has been shared on both sides of the aisle, it ultimately will be adopted.

I yield the floor.

The PRESIDING OFFICER (Mr. GORTON). Who seeks recognition?

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MCCONNELL. 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. MCCONNELL. Mr. President, I ask unanimous consent that Senator KERREY of Nebraska and I be allowed to proceed for 10 minutes as in morning business.

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

A MESSAGE FOR CANDIDATES IN BOTH PARTIES AND THE AMERICAN PEOPLE

Mr. MCCONNELL. Mr. President, I note for my colleagues that the chairman of the Democratic Senatorial Committee and the chairman of the Republican Senatorial Committee are on the floor at this moment, and we have a message for candidates in both our parties and for the American people.

Having served as chairman of the Senate Ethics Committee during the Packwood investigation, and having offered the first resolution of expulsion in the history of the Senate in a case involving sexual misconduct, I am well aware of the bright line that exists between private failings and public wrongs. And, of course, that line is blurred, as it was in that case, and is again in the allegations made against President Clinton when one's public office is used to pursue private misconduct and shield it from legal inquiry.

But if we start turning every instance of past personal misconduct into cannon fodder for our political campaigns, we risk turning our democracy into a nuclear waste dump of slander, gossip, innuendo, and cheap moralizing about other people's problems.

Even without this threat, the multifaceted scandal that currently engulfs the White House represents a crisis of national and constitutional proportions. Our only hope of guiding this country through the next several months without a major catastrophe in our Government, or in our financial markets, or in the world, absolutely depends on our ability to resist the subtly escalating arms race of dirt digging, garbage searching, mudslinging, and poison leaking that is currently swirling around the Nation's Capital.

Where that awful trend must be resisted first is in our political campaigns. For better or for worse, campaigns are the most direct expression of our Government that people see.

This election, let's make it for the better, not for the worse. Everyone in this body certainly knows that I believe in robust, pointed, hard-hitting campaigns. And I believe those kinds of campaigns are good for our democracy and good for the voters, but only when political campaigns are focused on issues and not on purely private behavior.

So to set the standard, I want to make it clear that the national Republican Senatorial Committee will not fund—will not fund—any candidate who engages in personal attacks on the private problems and past failings of his or her opponent. Digging through their record is one thing, digging through their garbage is quite another. Criticizing someone for their vote on the marriage tax is fair game. Attacking someone for a failed marriage certainly is not.

Let us prove over the next 6 weeks at least that this Congress is capable of fairly and responsibly executing the solemn constitutional duty that may await us in the months ahead.

Mr. President, I yield the floor. I note the presence of my friend and colleague from Nebraska.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, I come to the floor, as the distinguished Senator from Kentucky said—as chairman of the Democratic Senatorial Campaign Committee—to make the same commitment that the Senator from Kentucky just made, that our committee will not fund any candidate who uses the personal problems or past failures of their opponent to win their election.

The objective in a campaign is not just to win an office. And we all know in campaigns that there is a temptation to justify every means by the end that is in sight. As the Senator from Kentucky described himself, I describe myself the same way. I am not reluctant or shy to have full contact sport when it comes to campaigns, but I do believe that the ultimate objective of the candidate needs to be to not just acquire the office, but also to serve the larger good of preserving our Democratic institutions, in this case the U.S. Congress.

I have been asked many times, and suspect the Senator from Kentucky has as well, Is this going to have a negative impact on your chances in the fall? He has probably been asked more times, Is this going to have a positive impact on your chances in the fall?

But my answer has always been that my chief concern is that there are good men and women in America today who have thought about running for office—it may be the Senate or a local school board—and they have said, ''Gosh, I don't want to go through what I see HENRY HYDE going through. And if I run for office, that is exactly what is going to happen to me. I don't want everything that I have done since I was an infant to be drug out and paraded before the people of my district or the people of my city or the people of my State.''

Far be it from me to say that any vote or statement or belief I have should be withheld. They should not be withheld and should be subject to the review and debate and discussion of the people. But my concern and why it is important that my colleague from Kentucky, whose suggestion this was, and I do this in this campaign is that if we do not exercise restraint and show American citizens that we will not fund candidates who use personal problems or past failures to win their office, the institutions of democracy will suffer.

Forget the impact upon political parties. Neither party is going to do very well if citizens increasingly turn off and withdraw and say that ''I may do many things for my country, but one of them will not be to be a candidate for any office'' because of the fear that they have that something that happened 30 years ago or 40 years ago or 20 years ago—that is irrelevant to the campaign itself and that they have dealt with their family and their friends and their God, in whatever way that they felt was necessary—now becomes drug out into the open.

So I join enthusiastically in making the commitment that we will not fund any candidates who do that. I appreciate that very much because what the Senator from Kentucky suggested serves the interests of democracy, and I am willing, as well, on the part of the DSCC to do the same.

Mr. MCCONNELL. I commend my friend from Nebraska for his statement. We see this matter precisely the same. As for my side of the aisle, I intend to convey this statement to our candidates, both incumbents and challengers, this afternoon with the message that I mean every single word of this statement.

I thank my friend from Nebraska.

I yield the floor.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

CONSUMER BANKRUPTCY REFORM ACT OF 1998

The Senate continued with the consideration of the bill.

AMENDMENT NO. 3565

Mr. SESSIONS. Mr. President, with regard to the Feingold amendment that deals with the waiver of filing fees for those who file bankruptcy, I think we need to be very cautious about that amendment. It has very serious implications. It has been considered by this Senate numerous times and rejected.

It has been the argument that this is somehow unfair and denies access to