with the simple and time-proven formula method, which is now the norm between the States. In my judgment, this interpretation by the Treasury Department is wrong-headed and is ill-advised.

I believe that the Federal Government is losing billions of dollars in revenues because the IRS uses the so-called arm's-length method to enforce our corporate tax laws. In my judgment, this IRS enforcement tool is unworkable and results in massive tax avoidance by international firms operating here. It keeps our tax officials in the Dark Ages as they work to ensure that multinational firms doing business here pay their fair share of U.S. taxes.

There is evidence to suggest a massive hemorrhaging of tax revenues because of transfer pricing abuses and because of the flawed arm's-length pricing method employed by the IRS. The General Accounting Office [GAO] has reported that more than 73 percent of the foreign firms doing business in this country pay no U.S. taxes, despite generating hundreds of billions of dollars in revenues every year.

There are also several independent studies of the problem that estimate U.S. revenue losses ranging from $2 billion to $40 billion a year. I happen to think that this country is losing between $10 and $15 billion in revenues from foreign-based firms alone. But I recognize that there hasn't been a comprehensive and official government study that attempts to pinpoint the true size of the U.S. tax gap caused by transfer pricing abuses and to map out the best approach to plug the gap.

I have in recent days been working with Treasury officials on this matter. In response to my request, Treasury Department has now agreed to formally conduct a joint conference and study with the State governments to evaluate the U.S. tax revenues lost due to transfer pricing abuses, especially from foreign firms doing business in the United States. In addition, this initiative will examine the issue of implementing a Federal formulary apportionment system to enforce our international tax laws.

This joint Treasury/State initiative will, I hope, finally answer the questions of how much money we are now losing from transfer pricing abuses, and how we can take steps to prevent it.

COSPONSORSHIP OF S. 1120, AS AMENDED

Mr. DOMENICI. Mr. President, I ask that my name be added as a cosponsor to S. 1120, the Work Opportunity Act of 1995. I want to congratulate the distinguished Republican leader and his chief of staff for all the hard work and effort they have devoted to producing a welfare reform bill this year.

Many years ago a distinguished professor wrote a book entitled: ''Why Welfare is so Hard to Reform.'' That was nearly 25 years ago. Reforming our welfare system has not gotten any easier over that time period as the Republican leader has surely discovered.

Let me be clear, I know that there are issues that still have not been fully resolved in Leader DOLE's bill. I continue to be concerned about some of those issues and during the upcoming recess I will meet with New Mexicans who have, like I, concerns about child care and other provisions in the bill. I reserve the right to recommend further changes to the bill and offer amendments to it when we begin consideration in September.

But I support the major principles embodied in the leader's proposal and therefore am pleased to cosponsor the legislation today. I support first and foremost the principle that we must break the cycle of dependency in our current welfare system, and we should strive to help those who are trapped in this system break the bonds of dependency.

I support the principle that States should be provided flexibility in designing programs that best serve needy individuals and families in their individual States.

I support the principle that those who receive assistance should seek work and that employment of welfare recipients should increase significantly from the low levels that now exist in many States. I support the principle that States should be allowed to terminate benefits when those who are required to work—refuse work.

I support the principle that single parents with young children should not be penalized if they are unable to find work and particularly if affordable child care services are not available to them. I support the principle that individuals seeking to better their lives through vocational education and training should be encouraged in their vocation in order to avoid dependency later in their lives.

I support the principle that the Federal Food Stamp Program and School Lunch Program should continue as Federal entitlement programs so as to provide a basic nutrition safety net to all low-income families and their children.

Finally, I believe that we can reform our welfare system based on these principles, protect those most in need of assistance, and at the same time do this while achieving some savings to hard-pressed State and Federal budgets. The Dole bill does all these things and at the same time begins a down payment on the Federal deficit. A Federal deficit that is the biggest sign of dependency and the biggest threat to the creation of jobs for all Americans—particularly the poor. We will not turn our backs on those down on their luck, but we will not give a handout when what is needed is a hand-up.

Welfare reform is a contentious issue. What we do here needs to be done carefully, and that is why I have made recommendations to the leader and others to modify S. 1120 in ways that I think will improve it. I may have other recommendations once I meet with people in my State. But for today I congratulate the Republican leader and offer my support to reform the welfare system based on the broad principles encompassed in the Work Opportunity Act of 1995.

SECURITIES LITIGATION REFORM SETTING THE RECORD STRAIGHT

Mr. DOMENICI. Mr. President, in June, we passed S. 240, the Private Securities Litigation Reform Act of 1995 by a 69-to-30 margin. It started out as a Domenici-Dodd bill with 51 cosponsors and then Chairman D'AMATO and the Banking Committee worked hard to improve it. It is a bill supported by Senators with vastly differing political philosophies. Senators KENNEDY, MIKULSKI, HARKIN, HELMS, GRAMM, and LOTT were among the 69 Senators voting for the Senate bill.

Mr. President, I am going to spend time discussing some of the misstatements about this bill, but first I want to tell you that 69 Senators voted for this bill because it is good for our economy and job creation, for our capital markets and all investors.

Mr. President, S. 240 creates a better system for investors 12 ways:

First, S. 240 requires that investors be notified when a lawsuit has been filed so that all investors can decide if they really want to bring a lawsuit. Frivolous shareholder suits hurt companies by diverting resources from productive purposes, and thus, harm shareholders. The shareholder-owners of the company, not some entrepreneurial lawyer, should decide if a lawsuit is necessary. Most investors know that stock volatility is not stock fraud, yet a stock price fluctuation is all that lawyers need to file a case.

Second, the bill puts lawyers and clients on the same side. By changing the economic incentives behind bringing and settling these suits, investors will benefit.

Third, it reforms an oppressive liability so that companies can attract capable board members, and hire the best accountants, underwriters, and other professionals. The two-tier liability system contained in the bill is perhaps the most misunderstood provision of the bill. I will go through the details later in my speech.

Fourth, the bill prohibits special $15,000 to $20,000 bonus payments to named plaintiffs. These side-agreements between lawyers and their professional plaintiffs are unfair to shareholders not afforded the opportunity to act as the pet plaintiff. By prohibiting bonus payments, the bill will put more money in the pockets of all aggrieved investors. It stops brokers from selling investors' names to plaintiffs' lawyers. This practice is at least unethical, and should not be part of our judicial system.

Fifth, S. 240 contains several provisions which will put the investors with a real financial stake in the company, and not the lawyers, in control of these cases in an effort to restore the traditional lawyer-client relationship that currently does not exist in securities class actions.

Under the current system lawyers hire individual professional plaintiffs who own a few shares of stock to act as the lead plaintiff in these cases. These individuals own a few shares in every company publicly traded on the various stock exchanges so they can always be a plaintiff. These individuals sell their names of the class action lawyer in exchange for a $15,000 or $20,000 bonus payment. These pet plaintiffs then allow the attorneys to exercise complete control over the litigation. Because there is no real plaintiff-client to exercise control over the lawyer, settlements in these cases are often extremely generous to the lawyers. According to SEC Chairman Levitt, the current system is characterized as one where ''class counsel may have incentives that differ from those of the underlying class members.'' According to Chairman Levitt, this means that class action lawyers ''may have a greater incentive than the members of the class to accept a settlement that provides a significant fee and eliminates any risk of failure to recoup funds already invested in the case.'' Chairman Levitt is absolutely correct, and S. 240 will realign the interests of the lawyers with those of their clients, the class of investors.

In these multimillion dollar class action cases, S. 240 requires the court to appoint a willing investor with a significant financial interest in the outcome of the litigation as the lead plaintiff. The objective is to have real clients with real financial interests making the decisions about these cases. I view this as a little adult supervision over these entrepreneurial lawyers.

As such, S. 240 encourages institutional investors—the people who we trust to mange pension funds and mutual funds on behalf of thousands of retirees and small investors—to take charge of these multimillion dollar cases. This doesn't mean that the small investor will not be able to file a securities suit on their own behalf. Under S. 240, anyone still may file a securities class action. However, if a case is going to be a class action suit, the people we trust to manage the pension funds will be encouraged to take a more active role in these cases, instead of the plaintiffs' lawyers. Why? Because they have a fiduciary duty—a very high level of trust—to look out for the best interest of all the investors and retirees. Because they have the greatest responsibility in these cases, institutional investors will be in a position to maximize the amount of money made available to compensate the group of investors. Because they can negotiate fees up front, attorneys' fees will be reasonable, leaving more money for the people who should benefit from these cases—the investors. Because they have the greatest interest in the outcome, institutional investors will closely scrutinize settlement offers and they will reject the ones that benefit lawyers to the detriment of shareholders. This will lead to larger awards for investors when a case has merits.

Sixth, the bill provides for simpler disclosure of settlement terms to investors, including how much investors will receive on a per share basis, and how much the lawyers have requested in attorneys' fees and costs. Currently settlement disclosures are shrouded in boilerplate legalese, making them difficult for investors to understand.

Seventh, the bill prohibits settlements under seal, where attorneys can keep their fees a secret. Investors should know how much they have paid for legal services, and should be able to challenge them if they are excessive.

Eighth, the bill also limits attorneys' fees to a reasonable percentage of the settlement fund as a result of the attorneys' efforts. Currently, courts and attorneys use a confusing formula called the lodestar.

Ninth, S. 240 creates an environment where CEO's or chairmen of the board can, and will, speak freely about their company's future without fear of lawsuits if their predictions do not materialize. This will put more information in the hands of investors, who seek forward-looking projections in order to make informed investment decisions. This is another provision that has been misunderstood.

Tenth, S. 240 provides a uniform rule about what constitutes a legitimate lawsuit. The pleading reforms will ensure that cases filed in different parts of the country will be subject to the same rules. Predictability and uniformity are two hallmarks of an effective justice system, and the pleading reforms make the system more effective and predictable.

The bill includes litigation cost containment provisions. A typical tactic of plaintiff lawyers is to request an extensive list of documents and to schedule an ambitious agenda of sworn testimony-taking that distracts the company CEO and other key officers and directors. These discovery costs comprise 80 percent of the expense of defending a securities class action lawsuit. To minimize the in terrorem impact of the frivolous cases, the bill would require the court to limit requests for documents during the pendency of any motion to dismiss unless factfinding is needed to preserve evidence or prevent undue prejudice. A stay of discovery puts such requests for documents and deposition taking on hold until the judge rules on whether the case should be kicked out of court.

Eleventh, S. 240 will weed out frivolous cases while giving lawyers and judges more time to protect truly defrauded investors. By ending the race to the courthouse, cases are often filed within hours of when a company's stock price falls, this bill will ensure that the frivolous cases are dismissed quickly, giving companies more time and resources to focus on running the company. Investors will get higher stock prices and bigger dividends.

The bill's attorney sanctions for filing frivolous securities fraud suits builds upon the existing rules of the Federal courts. Frivolous securities suits filed with little or no research into their merits can cost companies millions of dollars in legal fees and company time. According to a sample of cases provided by the National Association of Securities and Commercial Law Attorneys [NASCAT], 21 percent of the class action securities cases were filed within 48 hours of a triggering event, usually the announcement of a missed earnings projection.

Innocent companies pay millions of dollars defending these frivolous cases. Even when firms are exonerated they have large defense attorney's bills to pay. Our current system is a winner pays system.

Attorneys should be required to exercise due diligence before they file these expensive lawsuits. They should be sanctioned if they fail to exercise proper care. Accordingly, the Senate bill requires the judge, at the end of the case, to make specific findings regarding whether attorneys complied with the Court's rules, specifically, rule 11(b) of the Federal Rules of Civil Procedure. Rule 11 provides sanctions for filing frivolous lawsuits. The bill requires the judge to discipline lawyers if the judge finds that the lawyer violated the rule. Under the bill, the judge would require an offending attorney to pay all the reasonable attorney's fees and costs of the innocent party as the consequence for filing a frivolous lawsuit if the case is kicked out of court on a motion to dismiss. This is the first step a defendant could take when he things the lawsuit is frivolous. For the defendant to win, the judge must rule that: first, the complaint failed to state a claim upon which relief can be granted and second, the complaint is frivolous on its face. The judge can sanction a defense lawyer who files frivolous motions.

Twelfth, the bill will make the merits matter so that strong cases recover more than weak cases. It will ensure that people committing fraud compensate victims. It will ensure greater detection of fraud by requiring that professional advisors report corporate crime.

By constructing a system which put investors, not the lawyers, in control of these cases and by making a greater share of the settlement fund available to defrauded investors, S. 240 will put an end to the current class action system that consumer rights advocates have called a joke and the Wall Street Journal called a Class Action Shakedown.

I would like to talk about some of the stories that appeared about this bill and set the record straight. The press has a very important role in reporting. As Justice Brandeis once said:

The function of the press is very high. It is almost holy. It ought to serve as a forum for the people, through which the people may know freely what is going on. To misstate or suppress the news is a breach of trust.

As this bill moves to conference, I hope that the press will take a more careful look at this bill so that the people can know freely what is going on with securities litigation reform. This bill will benefit investors, and they ought to know it.

If some press accounts about the bill were true no Senator would have cosponsored it. But 51 Senators did cosponsor S. 240, and 69 Senators voted for it. These numbers are evidence that some press accounts must have missed the point on S. 240.

In fact, during the debate on the floor my colleague, the chairman of the Banking Committee Senator D'AMATO noted with some consternation that if we held the press to the same recklessness standard that we hold participants in our capital markets, then the press would not be able to print anything about our bill.

If you read some of the articles printed during the floor debate on S. 240, you would think that the bill completely repealed the Federal securities laws. In actuality, the bill's primary focus is changes to a totally court-created type of lawsuit—the implied private right of action under section 10(b) of the Securities and Exchange Act. The courts created the private lawsuit under section 10(b) and yet recently, every time the Supreme Court has had a section 10(b) issue before it, the Court has scaled back the amount and scope of litigation that could be brought. I read the recent Supreme Court cases to be saying, ''Congress, we, the Supreme Court, created this type of lawsuit, but after several decades of experience we don't like how our court-created law is being abused, so fix it, Congress.'' That is what S. 240 does. It stops some of the abuses.

On June 23, a Denver Post editorial said: ''Senate bill would give free ride to securities fraud.'' This editorial also stated that ''If S. 240 goes into effect, Americans will no longer have the option of suing cheats who run sophisticated investment schemes.'' S. 240 neither alters who can sue nor the standard of liability under the Federal securities laws. None of the 69 Senators who voted for this bill would give a free ride to securities fraud. The Sacramento Bee made a similar mistake in its July 13 editorial, and the Baltimore Sun repeated the mistake on June 26.

Under current law, people who engage in securities fraud are jointly and severally liable. If a person is 1 percent responsible he can be required to pay for 100 percent of the damages. Former SEC Chairman Richard Breeden called joint and several liability inverted disproportionate liability. Former SEC Commissioner Carter Beese said that joint and several liability is unfair. The bill creates a two-tier liability system. It retains joint and several liability for people whose conduct is knowing. The bill goes a step further and requires that small investors be made whole.

Those individuals found incidentally involved, are proportionately liable. For example, if a person is fond to be incidentally involved and 5 percent liable, he/she must pay 5 percent of the damages. This is called proportionate liability. Every former SEC Commissioner who testified at our hearings supported the concept of proportionate liability. Breeden testified, ''Paying your fair share, but no more than your fair share, of liability is hardly a radical proposal.''

We created the two-tier system to stop plaintiffs' lawyers from naming people as defendants merely because they are deep pockets. We learned at our hearings that if a professional, like an accountant or underwriter is named as a defendant it adds one-third to the settlement value of the case regardless of whether or not the professional did anything wrong. Naming a lawyer, or an outside director also adds to the settlement value regardless of their role.

A lot was said about Charles Keating. His name was mentioned over and over and over on the Senate floor and in the media during the debate on S. 240.

On July 28 a St. Louis Post-Dispatch editorialized that under S. 240, Keating and his advisors would have gone free while investors would get no relief. The Post-Dispatch printed that under S. 240, ''joint and several liability would be abolished, which means that if the deceiving company has gone bankrupt, investors can't recover damages from the accounting firms, lawyers or stockbrokers who helped perpetrate the fraud.'' This is one statement with three errors. Error 1, the two-tier liability system does not abolish joint and several liability for people who commit knowing fraud. Error 2, accounting firms, lawyers, and others who are incidentally involved in the fraud will have to pay their share of the losses that their conduct caused—proportionate liability—the second tier of S. 240's liability scheme. Error 3, involves bankrupt codefendants. The bill provides that in the case of a bankrupt codefendant, the other codefendants are required to contribute an extra amount up to an additional 50 percent of their share to make up the uncollectible share. The bill also makes small investors whole.

The St. Louis Dispatch editorial also states that ''accountants who detect fraud and keep quiet about it also would be helped'' by S. 240. The opposite is true. S. 240 requires auditors to speak up and expose corporate fraud. The bill requires accountants to report corporate fraud to the top management of the companies they audit. If management fails to expose and correct the fraud, the bill requires auditors to report the fraud to the Securities and Exchange Commission of face liability.

This bill has nothing to do with Keating. No one in the Senate would support a bill that would allow an individual like Keating to get away with fraud. Keating knowingly lied and told investors that the junk bonds he sold were backed by the Federal Government. He should have been punished, and he was punished. Nothing in S. 240 would prevent that from happening. It is also important to note that Keating was sued under many provisions of both Federal and State law—laws untouched by S. 240.

Instead, this bill has everything to do with a small coterie of securities class action attorneys who have become very rich by filing securities lawsuits against high-technology and other high-growth companies whenever their stock price drops or the company announces that it will be unable to meet analysis' earnings projections. Information provided during the 12 congressional hearings on this issue showed that there are approximately 300 securities lawsuits filed each year and that these suits normally settle for around $8.6 million each. Currently, the lawsuits take at least one-third of the settlement fund in the typical case, making the securities class action business a $2.4 billion industry for these entrepreneurial lawyers.

If you don't believe in that these lawyers are entrepreneurs, just look at how the typical securities class action suit gets started. Unlike the typical lawyer-client relationship, the lawyers hire their clients. These lawyers maintain a list of professional plaintiffs or pet plaintiffs who own a couple of shares of every stock traded on our stock exchanges. The lawyer agrees to pay the pet plaintiff a bonus of $10,000 or $15,000 if the person agrees to let the lawyer file the case on his/her behalf. Often within hours after a stock's price drops as a result of a missed earnings projection, these lawyers file a lawsuit on behalf of a pet plaintiff. Some of these pet plaintiffs have appeared over and over again in these cases. By using these professional plaintiffs, the lawyers, not the investors, maintain control of the case. The lawyers decide who to sue, when to sue and when to settle. No wonder one of the most prominent securities class action attorneys told Forbes magazine ''I have the greatest practice of law in the world, I have no clients.''

Despite the fact that these lawyers admit that they have no clients, whenever Congress attempts to address the abuses the class action lawyers claim that if Congress enacts any legal reform, future Keatings could not be sued for damages. But as one plaintiff told us, she felt ripped off twice—once by the company and again by the class action lawyer.

In the typical case, the real victims receive around 6 cents on the dollar of their claimed loss, while the lawyers take the lion's share of the settlement fund as their fee award.

In an interview with "CNN," a prominent class action attorney, the same one who said he had no clients, settled a case for $12 million and asked for the entire amount as his share. When asked whether he had a responsibility to his clients to justify his fee request, he responded "no." Instead, he said that he has a responsibility to the court to justify the request.

The Boston Globe stated that "S. 240 requires that plaintiffs pick up the costs of the defendant companies if a suit fails." S. 240 contains no such English rule, no loser pays provision, or no fee shifting provision. Under the Senate bill, no investor could be required to pay the legal fees of an innocent company in the event that the judge determines that the suit lacked merit. Instead, the bill, as passed by the Senate, builds on the existing rules of the court, in particular rule 11 of the Federal Rules of Civil Procedure. The bill requires judges to sanction attorneys who bring frivolous cases. In the most egregious situations the judge could require the attorney to pay the companies fees. This incrementally addresses the current winner pays system, which requires innocent companies to spend millions of dollars to get frivolous cases dismissed. At one point in legal history it was against the law for lawyers to promote unnecessary litigation and this attorney sanction provision takes a step toward ensuring that lawyers will only file cases which possess some merit.

The Las Cruces Bulletin in my home State of New Mexico stated that Domenici's bill contains a provision which restricts the rights of small investors by setting financial standards for who may or may not file class action suits. Nothing in S. 240 as introduced, or as passed by the Senate limits the right of anyone to bring a securities lawsuit. Under S. 240, as under current law, anyone may bring a securities suit.

Most small investors are senior citizens and support the reforms contained in S. 240. A National Investor Relations Institute Study, in March 1995, found that 81 percent of senior citizens would like to see mandatory penalties for lawyers who bring frivolous lawsuits. The bill does this. Seventy-nine percent say defendants should only pay damage awards according to their percentage of fault. The bill does this, but retains joint and several liability for fraud instigators and if necessary to fully compensate small investors; 87 percent are concerned that companies are spending millions of dollars defending themselves in lawsuits—money that could be spent on further research of new products. The current system does this, but the bill should weed out the cases lacking merit. And 88 percent are concerned that even when the lawsuits are settled, it is not the consumers who benefit but the attorneys. S. 240 seems to be on the same waive length as these senior citizen investors.

On June 26, during the floor debate, the Miami Herald charged that S. 240 grants a safe harbor to all statements of a forward-looking nature and essentially tells companies and brokers: Go ahead, lie about the future. As long as you're not misrepresenting the past, you can fleece investors in any way that your imagination allows. This statement is good prose but bad reporting. Nothing in S. 240 gives executives, brokers or anyone else connected to publicly traded companies safe harbor protection if they intentionally lie about the corporation's future prospects.

There is, however, a problem with the flow of information in the marketplace particularly information in the form of predictions about the future. CEO's who make predictions about the future get sued if their predictions don't materialize—regardless of the reason. After news that an earnings projection won't be met, the stock price drops for a couple of weeks and the lawsuit gets filed. Consequently, CEO's are making fewer and fewer predictions. This is a very serious problem—not only for high-technology company CEO's, but also for our securities markets. Our securities laws are based on disclosure of information, yet the chill on information about the future caused by these lawsuits is undermining the efficiency of our markets.

These lawsuits divert resources from companies' research and development budgets to their legal departments. One of these lawsuits costs as much as developing and bringing to market a high-technology product line. Jobs that should have been created aren't created, and we lose out to our international competitors. The race to innovate becomes a race to the courthouse. It is a costly detour increasing the cost of capital, professional services, and officers and directors' liability insurance. Some have called it a litigation tax.

S. 240 restores the ability of CEO's to make available information about their companies' future. It protects from lawsuit abuse predictions about the future made by the company as long as the statements are clearly identified as forward-looking projections—a Miranda warning to investors: "This is a prediction about the future and because the future is uncertain it may not come true"—and were not made with the purpose and intent to deceive investors. Simply put, the Senate bill's safe harbor protects only the good guys and encourages disclosure. It is neither a license to lie, nor a license to steal. It is an opportunity to disclose for the company and restores the investors right-to-know. The bill does recognize that a projection about the future is a prediction, not a promise, or an adequate basis upon which to bring a multimillion dollar lawsuit. The bill does take away the class action lawyers' license to extort a settlement when a prediction about the future doesn't quite materialize.

My good friend and fellow Democratic sponsor of this bill, Senator DODD, recently had to endure an op-ed in his home State's Hartford Courant in which a well-known consumer advocate condemned him for supporting securities lawsuit reform. The same piece alleged that the bill changed the standard of liability, when, in fact, the Senator had been the champion for retaining the current law standard.

Mr. President, people can disagree on whether we need more lawsuits or more investors but we can all agree that we need more good reporting. I hope I have clarified what this bill does and does not do.

Mr. President, I ask unanimous consent that op-eds written by Carter Beese, Ed McCracken, Jonathan Dickey, Robert Gilbertson, and J. Kenneth Blackwell appear in the RECORD following my remarks.

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

[From the New York Times, June 27, 1995]

STOP CHOKING WALL STREET

(By J. Carter Beese)

WASHINGTON.—A bill to reform the nation's securities litigation system is moving toward a vote in the Senate. Critics argue that it will allow corporate America to take small investors to the cleaners. Nothing could be further from the truth.

As a former commissioner of the Securities and Exchange Commission, I believe that strict enforcement of securities laws is vital for investors and the integrity of the market. But today's litigation machine harms the very investors that opponents of reform profess to help.

A majority of the high-tech firms in the Silicon Valley have been sued at least once by vociferous plaintiffs' lawyers in class-action fraud lawsuits. One of the every eight companies on the New York Stock Exchange is sued for securities fraud every five years. Is fraud really that rampant among our most successful public companies? Or is the system allowing, even encouraging, the initiation of litigation, even when there is no evidence of wrongdoing?

Under current law, there is little downside to frivolous litigation, while the potential rewards are enormous—the deep pockets of corporations and their advisers.

The prevailing legal doctrine of joint and several liability, which makes all defendants fully liable for what may or may not have been their wrongdoing, adds to the potential pot.

Meanwhile, the huge costs of litigation give defendants an equally powerful incentive to settle. Though there may be a high probability of winning in court, settling is often a bottom-line business decision made in the best interest of investors.

As a result, most cases are settled on a formulaic basis, with plaintiffs collecting a small fraction of their alleged loss and with legal fees consuming the remainder of the settlement account.

The ultimate costs are passed on to all investors in lower earnings and lower share prices. These costs also weigh heavily on productivity and competitiveness. Every dollar spent on frivolous litigation is a dollar less for research, innovation, capital investment and jobs.

The critics of this bill claim that its main purpose is to protect corporate officials who peddle overly optimistic predictions of profitability. Under today's rules, however, any positive forecast that does not materialize can and will be held against you in court. Companies have thus become reluctant to disseminate forward-looking projections crucial to investment decision-making.

The changes in securities law before the Senate would not prevent defrauded investors from seeking redress. They would simply require any action involving misleading statements to specify each such statement, thereby eliminating the vague, sweeping claims that characterize so many meritless cases.

They would begin to hold plaintiffs' lawyers accountable for the lawyers' actions by requiring the court to make specific findings about whether the suit was frivolous.

Finally, they would establish legal protections for forward-looking information unless that information was misleading or fraudulent.

These measured reforms are surely a better deal for investors and the economy. By addressing the imbalance in our system, separating the serious from the frivolous, we will have a tort system that provides protection from fraud without subverting fairness and free enterprise.

[From the San Francisco Chronicle, June 28, 1995]

THE NEW THREAT TO HIGH-TECH FIRMS

(By Ed McCracken)

William Weinberger looked like any other retiree in Pompano Beach, Fla. No one would have guessed that he was part of an effort to undermine California's high-tech industry.

But by the time he died in 1992, he had set a remarkable record: He had been the plaintiff in an astounding 90 lawsuits in just under three years. Weinberger was what is known as a ''professional plaintiff,'' merely a consenting name on a lawsuit instigated and filed by a law firm chasing dollar signs rather than principle. The pieces of litigation filed in his name were securities or ''strike'' suits, in which one profits from a company's misfortune—that is, a down-turn in the stock market.

This new breed of corporate raider claims stock fraud when there is little or no evidence of wrongdoing—that is, deliberate false or misleading statements by the company about its potential—then tied a company up in litigation long enough to force a profitable settlement. It is a practice that costs people jobs and divert millions from research and development, and California has felt the impact more than any other state.

The high-tech firms of Silicon Valley and the Bay Area's bio-tech companies are the No. 1 target of these schemes, because cutting-edge research and the risks inherent in development make their stock prices volatile.

The facts speak for themselves: More than one-third of the state's computer companies have been sued at least once. And while the list of victims reads like a who's who of California's high-tech industry—Intel, Hewlett Packard, Sun Microsystems, Apple, Silicon Graphics Computers—some of the smaller, startup firms that are the growth companies of tomorrow are being driven into bankruptcey.

Silicon Graphics has over the years been the subject of no less than four securities class-action lawsuits. None of these suits had merit. Of the four, two were dismissed one resulted in summary judgment in Silicon Graphics favor after years of litigation, and one was settled for a nominal amount after having been initially dismissed. By way of example, the last suit was trigged by a disappointing quarter caused by the short-tem economic upheaval arising from the Gulf War.

These cases have cost Silicon Graphics well above $5 million in expenses, and countless hours of management time has been diverted. The wasted time and money could have been devoted to increasing business and adding jobs at a faster pace.

To end this kind of abuse, the U.S. Senate has stepped forward with a bipartisan bill, The Securities Litigation Reform Act. John Kerry, Democrat-Mass., has declared that ''speculative suits based on no evidence of wrongdoing are an unwarranted threat to young growth companies.''

Congress recently heard testimony stating that only a handful of strike suits ever actually come to trial because most companies cannot spend the time and money to defend their innocence, and are ultimately forced to settle instead. The people behind the suits know this, and are happy to walk off with unfair bounty. It is what one prominent CEO has called ''legalized extortion.''

The new bill, if passed, would make it more difficult to bring such suits without just cause. We applaud the efforts of the senators and others who have worked to bring this bill forward, and we urge California Senators Dianne Feinstein and Barbara Boxer to join in supporting it.

If the bill passes, attorneys filing securities suits without proper evidence would be subject to sanctions, their fees would be limited and profit-seeking plaintiffs would be discouraged. Still, some have voiced concern over the bill and worry that it limits the ability of investors to bring suit in the event of actual stock fraud. It does not. The bill makes any and all who engage in securities fraud fully liable. It also explicitly protects the small investor—anyone with a net worth under $200,000—leaving intact the full range of options for seeking damages from fraudulent companies. What this bill takes away, however, is the incentive for a greedy few to launch frivolous lawsuits.

Meanwhile, the bill's passage will enable California's high-tech companies to freely pursue the ground-breaking technologies and new products that launched them to the forefront of the industry. Our entrepreneurs will have one less worry as they make their way in the marketplace. And the money saved could be put into the jobs and opportunities Californians so desperately need, which is far better than losing millions to the wallets of a wealthy few.

[From the San Francisco Examiner and Chronicle, July 23, 1995]

FINAL INNING FOR ''STRIKE SUITS''?

(By Jonathan Dickey)

Securities fraud ''strike suits'' have overrun Silicon Valley in the past decade—and for the past two years, Silicon Valley has been fighting back. Now, legal reforms curtailing these ''strike suits'' are about to become a reality.

Late last month, 70 members of the United States Senate joined a broad coalition of industry trade groups, Silicon Valley CEO's, securities industry representatives, and institutional investors to finally bring sanity back to our federal securities laws. The reform of those laws is aimed at preventing further proliferation of ''strike suits'' alleging securities fraud against public companies.

In these suits, plaintiffs' lawyers make millions by bringing frivolous securities claims with a high ''ransom'' value to the companies forced to defend them. In just two years, these strike suits have generated settlements totaling over $1.3 billion, a huge percentage of which was paid by California-based high-tech companies.

The action in the Senate followed a lopsided vote earlier this year in the House of Representatives approving a similar reform bill, where Republicans and Democrats joined together in large numbers to reject amendments offered by lobbyists for plaintiffs' lawyers designed to weaken the bill, or kill it altogether. Similar eleventh-hour lobbying efforts occurred during the Senate debate.

Contrary to many stories circulating in the business press, the securities law reform legislation will not open the floodgates to fraud, or deprive investors of their day in court in cases of real fraud. In fact, the legislation passed by the Senate contains several ''proinvestor'' provisions, including:

Restoring SEC authority to pursue ''aiders and abettors.'' It used to be common practice to sue individuals, accountants, and legal and financial advisors whose indirect involvement in a company's securities offerings was alleged to have made the company's ''fraud'' possible. Last year, the U.S. Supreme Court ruled that the SEC did not have the power to bring such claims under the main statute of the Securities Exchange Act. The Senate bill would expressly authorize such suits.

Authorizing auditors to report accounting irregularities to the SEC. Under existing accounting rules, auditors who discover irregularities in a company's financial statements are required to report such items to the company's audit committee, but not to the public. The Senate bill would allow auditors to ''blow the whistle'' to the SEC if the company's board of directors fails to take corrective action when irregularities are reported.

Preventing companies from destroying critical evidence. The Senate bill includes a ''preservation of evidence'' provision which would make it a violation of federal law if a company that is sued subsequently fails to preserve company records relevant to the suit.

Allowing courts to sanction lawyers who engage in bad faith tactics in litigation. Investors sometimes complain about the long wait for a case to be resolved. Defense lawyers who engage in conduct which is found by the court to unnecessarily delay or needlessly increase the cost of the litigation may be forced to pay the plaintiffs' lawyers' legal fees.

Giving investors the right to determine who should represent their interests in any litigation. Currently, plaintiffs' lawyers engage in an unseemly ''race to the courthouse'' to be the first to sue a company which reports an earnings surprise. The first lawyer to sue normally gets the ''lead counsel'' position, and the lion's share of the fees. The Senate bill would abolish this practice, and authorize investors to decide who their legal representative should be.

Protecting small investors by requiring ''joint and several'' liability if the target defendant is bankrupt. The Senate bill adopts a ''proportionate fault'' standard of liability, which says that where multiple defendants are sued, each will pay according to his or its share of the blame. But the Senate bill will protect small investors if the main ''bad guy'' is bankrupt, and will require the solvent defendants to make up the difference.

Likewise, the House bill passed earlier this year—part of the "Contract with America"—contained several "pro-investor" provisions, including:

Establishing plaintiff "steering committees" to supervise litigation. The House bill allows shareholders with a significant financial stake in the company to form a committee, and make decisions on the conduct of the case. Right now, plaintiffs' lawyers make all these decisions by themselves.

Eliminating any legal requirement that investors need to prove reliance on fraudulent statements. The House bill would codify the so-called "fraud on the market" doctrine, which presumes that everything a company says is absorbed by the market, and reflected in the stock price. Investors can't be thrown out of court because they haven't read a company's press releases, analyst reports, and the like.

Setting a standard of liability which requires only proof of recklessness, not actual intent to defraud. The House bill also codifies a rule that investors don't have to prove actual fraud. They only have to establish that a company departed from "standards of ordinary care" in some extreme way.

What is it, then, that makes business groups, and Silicon Valley in particular, so happy about the reform legislation? As a lawyer who defends technology companies in these suits, I see three major benefits to the legislation:

Stronger protection to companies which issue earnings projections or other "forward looking" statements.

A higher standard for pleading fraud claims in court, requiring courts to give more careful scrutiny to borderline cases, and to dismiss those that are clearly frivolous.

A more national standard for determining damages in these cases, instead of the wide-open, "anything goes" manner in which losses are currently computed.

Will the legislation end securities strike suits? Not entirely. What the legislation hopefully will do is level the playing field, and allow companies to litigate appropriate cases, instead of settling cases out of fear of catastrophic, runaway jury verdicts.

Ironically, some of the stronger criticisms of the reform legislation have come from lawyers who defend companies in these suits. Nationally, technology companies wonder about this. In their view, lawyers who defend public companies should embrace these reforms.

Personally, I support any reform which will change the current litigation climate, which forces many boards of directors to spend millions of dollars to settle these cases rather than gamble with a jury. The current laws foster this climate by allowing too many meritless cases to be brought. Although the legislation now pending in Congress is far from perfect. I am convinced it will substantially reduce the number of strike suits brought against technology companies which experience momentary—and innocent—stock price declines. At the same time, the legislation still will allow legitimate fraud cases to be brought.

Although the plaintiffs' lawyers so far have struck out in Congress, the game isn't over. The Senate and House still have to work out a compromise bill to send to President Clinton for signature. No one should underestimate the possibility that back-room politics will undo some of the more important reforms before they reach the president's desk. The next few months will see plaintiff's lawyers "swinging for the seats" as the strike suit game heads into the final innings.

[From the Hartford Currant (CT), July 13, 1995]

YES: BILL WOULD PROTECT GROWING COMPANIES

(By Robert G. Gilbertson)

For investors and businesses, the Senate's overwhelming 69–30 vote for the Domenici-Dodd bill to crack down on frivolous securities lawsuits is a light at the end of the tunnel.

For too long, baseless lawsuits have eroded earnings potential and restricted business expansion by diverting money from productive resources to legal fees and by cutting off options for raising capital.

Too many publicly traded companies have been sued for no greater offense than that their stock price dropped. Virtually all these lawsuits were filed by a small group of law firms. Virtually none of the lawsuits came to trial, but fighting such lawsuits distracted managers and cost millions of dollars in legal fees.

The threat of frivolous securities lawsuits has been one of the biggest obstacles to growth for many ambitious companies.

At a time when Connecticut has lost so many jobs, we need to encourage companies to expand jobs and opportunities. The legal system has the exact opposite effect. Many companies have even decided to forgo the capital that could be raised by selling stock to the public for fear of being caught in a senseless legal system that can bankrupt emerging companies even though they have done nothing wrong.

Now—thanks to U.S. Sen. Christopher J. Dodd, the initial cosponsor of the Senate bill, and his colleagues in both parties—our economy may soon be free from meritless securities lawsuits. That means businesses such as mine can again consider selling stock to the public to finance expansion. It also means shareholders' investments will rise and fall on their own merits—without fear that a frivolous lawsuit will cramp growth.

I know. I am chief executive officer of CMX Systems, a small high-tech company in Wallingford that manufactures precision measuring devices for the disk drive and semiconductor industry. By any objective measure, CMX has been ripe for expansion for some time.

We grew more than 2,000 percent in the four years from 1990 through 1993, and our sales exceeded $8.6 million in 1993. To continue this extraordinary growth, CMX needed to sell stock to the public in early 1994 to finance a $4 million research-and-development plan. However, we were deterred from this option after watching other small companies get whiplashed by frivolous securities lawsuits.

Therefore, we were forced to scale back in 1994. This cost jobs, profits and taxes to Connecticut and the U.S. government.

Most new public companies, especially in the volatile high-tech industry, experience wide swings in profitability. The sharp moves in revenues and earnings often lead to similar volatility in stock prices.

Under the existing securities litigation system, those stock-price movements have been the signal for a small group of specialized lawyers to file class-action lawsuits alleging fraud. Filed without any evidence of wrongdoing other than stock-price movements, these lawsuits expose the companies to millions of dollars impossible damages. In addition, fighting even the weakest lawsuit requires staggering legal fees that can themselves reach or exceed the $1 million mark.

Pursued to trial, such lawsuits can run for years—drawing hundreds of thousands of dollars from the corporate treasury and thousands of hours of management time. Faced with that reality, most companies find it cheaper to pay large settlements to make the lawyers go away.

The Domenici (Sen. Pete Domenici, R-N.M.)-Dodd bill, approved by the Senate on June 28, would greatly reduce the probability of such frivolous lawsuits—and free companies such as mine to enter the equity markets for needed investment capital. That means economic growth and more jobs in Connecticut and throughout the United States.

The bill bans the bounty payments that some lawyers use to entice shareholders to file lawsuits. It requires lawsuits to include specific evidence of fraud. It empowers judges to terminate frivolous lawsuits before enormous legal fees exhaust the resources of small companies. Finally, it restores vital investor protection by giving control of class-action lawsuits to shareholders.

Where real fraud exists, shareholders will retain the ability to pursue legal redress. But where the only winners are likely to be plaintiffs' lawyers (who have taken in as much as $250 million a year in questionable securities lawsuits), the Senate bill gives shareholders the power to pull the plug on that kind of frivolous litigation.

Connecticut business leaders and investors owe a debt to Dodd for having the courage to consider the merits of securities litigation reform—and not discard it for solely partisan reasons. All Americans owe thanks to the senators of both parties who put common sense ahead of partisanship and voted to restore sanity to the securities litigation systems.

[From the Washington Times, June 28, 1995]

THE URGENCY OF SECURITIES LAW REFORM

(By J. Kenneth Blackwell)

Orange County's recent bankruptcy is making the nation's public funds and pension-fund managers mighty concerned about the riskiness of their investments. I know; I'm one of them. In 1988, I was a trustee for the $800 million Cincinnati Employees Retirement System Fund. And today I'm Ohio's State Treasurer with custodial responsibilities covering five state pension funds valued at more than $105 billion.

But the kind of bad investments that devastated Orange County isn't what keeps me up at night. What worries me—and what should worry the millions of retirees who have money in stock funds—is what might happen to the good investments of public-pension-fund managers. Those stocks, and the sound, well-managed companies they represent, are increasingly vulnerable to frivolous and baseless lawsuits. Which is why the Senate is now debating securities litigation reform: to protect such companies—and their ordinary investors. It's good, necessary legislation. I hope it passes.

The securities litigation system was initially designed to protect investors from corporate fraud. In percentage terms, it produces only a small fraction of the nation's multi-million-dollar lawsuit annual federal caseload. But as a financial and administrative matter, securities class-action suits filed against public companies are a monster. One of every eight stocks traded on the New York Stock Exchange has been subject to class-action challenge. Most high-tech firms in California's Silicon Valley—companies that produce a disproportionate share of America's job and profit growth, making them obviously attractive pension fund investments—have been targets of such lawsuits.

Defending such a lawsuit is often a nightmare. Securities litigation is unusually complicated. The discovery process it involves is long and arduous. Individual cases can take years to resolve in court, and even when a sued company wins, its liability insurance premiums generally go up—a lot. So it's become standard practice for securities class-action defendants to settle these lawsuits pre-emptively, in a struggle to avoid massive legal expenses and business distractions.

Settlement still hurts, of course. A study by the National Venture Capital Association found that companies embroiled in securities litigation—whether they settle or go to court—must spend an average of nearly $700,000 and 1,055 hours of management time. But they really have no choice, because the merits of an individual securities class-action suit are, at least under current law, essentially irrelevant. Innocence is no protection against a lawsuit. And real fraud too often goes unpunished; genuinely guilty companies are encouraged to settle, too.

Rules of legal standing in the securities field are very broad—and very thin. Acceptable evidence of corporate wrongdoing barely extends beyond an unexpected stock price change; roughly 20 percent of securities suits are filed within 48 hours of a major stock decline. Or a stock increase, for that matter—since it's not unknown for lawyers to file suite against a company whose market position has improved, claiming that information about a merger or expansion has been fraudulently withheld.

Given such juicy opportunities for standing, it's no surprise that speculative securities litigation has become a lucrative subspecialty in the American plaintiffs' bar. The small group of lawyers who concentrate on such law made a 1994 average of $1.4 million in fees and expenses on every case. But America's pension funds who are shareholders in these companies and in whose interest our securities laws are intended to protect, get stuck with the short end of the stick.

Lead attorneys—usually the first lawyer to sign up a single ''defrauded'' shareholder and rush his papers to the courthouse—are generally granted wide latitude over pretrial procedure. They're allowed to set settlement terms and establish their own contingency fee rates with minimal consultation and judicial supervision. After all expenses are accounted for, plaintiff shareholders, even ''successful'' ones, generally receive just a tiny fraction of the market loss their lawyers claim for them: pennies on the dollar, in fact. And when the process is concluded, shareholder investments are very often in worse shape then when it began. The companies involved are out big money, and their business plans have been distorted by a tortuous legal entanglement.

The life of a careful fund manager is seriously complicated by the frivolous securities lawsuit phenomenon. If lawyers are so broadly encouraged to seize on predictive corporate earnings statements as ''evidence'' of an intention to mislead, corporate officers will have a huge incentive to dumb those statements down—or stop talking about future profits at all. In Silicon Valley in particular, for example, the trend is minimal disclosure. But intelligent investment strategy requires maximum possible disclosure. And if I'm not offered frank assessments of various companies' future potential how can I rest assured that Ohio's pensioners' hard-earned money is being invested wisely?

My fiduciary responsibility compels me to act. And the U.S. Senate also should act. As the final days of this debate wind down, trial lawyers are digging in their heels and calling in old chits. Securities litigation remains a fat chunk of their practice, one they dearly want to protect. But Congress is charged with protection of the public interest generally. And the public interest, in this case, is best advanced in simple and straightforward fashion.

We must make deliberate acts of corporate fraud clearly illegal, and easier and less costly to pursue. And we must make high-dollar, meritless securities lawsuits—legal devices that are threatening the retirement savings of millions of ordinary Americans, and acting as a brake on the engine of American economic growth—vastly more difficult to pursue.

The American system of law should be our country's greatest treasure. But one part of that treasure is now mortgaged to the narrow financial interest of a small group of specialized attorneys. Enough is enough. The Senate reform legislation has 50 co-sponsors from both parties. Not one of them should waver.

FRENCH NUCLEAR TESTING IN THE SOUTH PACIFIC

Mr. THOMAS. Mr. President, as the chairman of the Senate Subcommittee on East Asian and Pacific Affairs, I come to the floor today to respond briefly to French President Jacques Chirac's decision to conduct a series of underground nuclear test explosions in the South Pacific between September of this year and May 1996.

I strongly believe that President Chirac's decision to conduct these tests will be damaging to international efforts to curb the proliferation of nuclear weapons. The Soviet Union began a test moratorium in October 1990; France initiated its own in April 1992, although it had not exploded a device since 1991, and the United States and Great Britain have similarly observed a moratorium since 1992. Continuing the trend toward minimizing the nuclear threat, in May of this year the world's five declared nuclear powers extended indefinitely the Nuclear Non-Proliferation Treaty [NPT].

On June 13 of this year, however, President Chirac—citing the need to check the reliability and safety of France's existing nuclear arsenal—announced that country would conduct eight nuclear tests at its site at Mururoa Atoll in the South Pacific. That decision is unfortunate for three principal reasons. First, it is likely that a resumption of testing by France will result in the disintegration of the current testing moratorium and a renewal of underground testing by other states. Moratoria are like truces—they are only good as long as all the parties to them observe their provisions. Second, it calls into serious question France's commitment to the NPT extension. In May, the world's five nuclear powers—the United States, France, Russia, China, and Britain—persuaded the rest of the world to extend indefinitely the Nuclear Non-Proliferation Treaty. To win that consensus, the five countries promised to sign a comprehensive test ban treaty by the end of next year. The resumption of French nuclear testing though, only 4 months after France signed this agreement, I believe calls into question France's commitment to the CTBT and consequently undermines these international efforts to curb the proliferation of nuclear weapons. Japan's Prime Minister, Murayama Tomiichi, has accused France of betraying nonnuclear countries, while Minister of Science and Technology Tanaka has stated that ''Nations that possess nuclear weapons must show their wisdom and set an example to countries that do not have nuclear weapons.''

Third, Mr. President, the French decision to test is vehemently opposed by most, if not all, of the countries along the Pacific rim, most of which have publicly condemned the decision. I have been visited by the Ambassadors of Australia, New Zealand, Papua New Guinea, Micronesia, among others, all of whom have conveyed their Governments' opposition to nuclear testing in their ''backyards.'' Australia's Prime Minister recently summed up his country's position in an article in the German daily Die Welt:

> Australia and its citizens, and the peoples and governments of many other countries, are outraged about the French Government's announcement that it intends to resume nuclear testing in Mururoa. I believe the French people will understand such feelings very well.
>
> The mood in the South Pacific countries is general: If France has to test these weapons, it should do so on its internal territory. Whatever the French Government intends to achieve with these actions, they are seen by the overwhelming majority of the people in this region as a big nation's attack on the rights of smaller ones. The decision to resume the tests is inevitably regarded as a return to old colonial attitudes. This is all the more tragic since most recently France's relations with the countries in the region have become much more positive and fruitful.
>
> Neither Australia nor the other countries in the region want France to withdraw from the Pacific. On the contrary, we want to cooperate closely and well with it. However, it is one of the lamentable consequences of this decision that many people in the region now doubt the legitimacy of France's role.
>
> * * * * *
>
> Australia's concern is increased further by the additional responsibility that arises this year from our role as chairman of the 15 members in the South Pacific Forum. In this function we speak on behalf of all countries in the region; many of them are small and economically vulnerable and all of them have a deep material and spiritual relationship with the Pacific Ocean.
>
> I am convinced that I speak for the members of the Forum when I continue to urge France to rescind its decision and when I stress that in this case it would gain considerable prestige not only in the South Pacific countries but among all the peoples in the world.
>
> The French Government has mentioned the safety of the environment with regard to the tests in Mururoa. However, we are most deeply concerned about the possibility of accidents. And no one can foresee the long-term dangers that arise from a potential destruction of the sensitive atoll structures during the tests.
>
> Australia's reaction is neither precipitate nor a mere reflex. Australia can point to a long history of responsible diplomatic efforts with regard to nuclear issues. Together with the other South Pacific countries, in the 1970's Australia opposed France's atmospheric tests and, upon our initiative, the South Pacific nuclear-free zone was established in 1985.
>
> Australia has also been active regarding nuclear issues in the United Nations and in