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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

The PRESIDENT pro tempore. The Senate will be led in prayer by the Senate Chaplain, Dr. Lloyd John Ogilvie.

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Gracious God, thank You for Your love that never gives up on us. Help us discover the power of resting in You and receiving assurance and encouragement of Your amazing grace. Here we are at the beginning of another day. You know our needs and are prepared to meet those needs with exactly the right gift of Your spirit. You are present, impinging with inspiration to lift our spirits; hovering with hope to press us on. All through this day there will be magnificent moments when we overcome the temptation of trying to make it on our own strength, and instead, yield to the inflow of your wisdom, insight, vision, and guidance. Our souls are meant to be containers and transmitters of Your power. We thank You in advance for a stunning day in which we are blessed by being carried by Your presence rather than being bogged down by trying to carry our problems. In the Lord's name. Amen.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

The able Senator from New York is recognized.

SCHEDULE

Mr. D'AMATO. Mr. President, we will consider the conference report, as was indicated, to H.R. 1058, the securities litigation bill. There is an 8-hour time limitation on the conference report.

We will recess from 12:30 to 2:15 for the weekly policy conference meetings.

Following the securities litigation, we will resume consideration of H.R. 1833, the partial-birth abortions bill. Rollcall votes, therefore, will be expected during today's session.

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995—CONFERENCE REPORT

Mr. D'AMATO. Mr. President, I submit a report of the committee of conference on H.R. 1058 and ask for its immediate consideration.

The PRESIDING OFFICER (Mr. FRIST). The report will be stated.

The legislative clerk read as follows:

> The committee on conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 1058) to reform Federal securities litigation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of November 28, 1995.)

Mr. D'AMATO. Mr. President, today, the Senate will vote on the conference report to H.R. 1058, the Private Securities Litigation Reform Act of 1995.

This legislation has been 4 years in the making. It is a thoughtful and carefully crafted bill. The provisions in the conference report are balanced to make the legal system fairer and better for investors. The current system does not protect investors, it exploits them. Now, the system is not fair to investors and is not fair to American business. Plaintiffs' lawyers know that and take advantage. It is time to reform the securities class action litigation from a moneymaking enterprise for lawyers into a better means of recovery for investors.

The present system is a feeding frenzy for plaintiffs' lawyers who prey on companies with volatile stock prices, eat up the companies' profits with a strike suit and move on to the next victim. Lawyers are now able to file a baseless securities class action lawsuit against a company, claiming millions of dollars in damages, and coerce huge settlements. About 300 securities class action lawsuits are filed each year. The same lawyers, and in some cases the same plaintiffs, the world's unluckiest investors, show up in these lawsuits time after time.

Frequently, the same complaint comes out of a word processor barely changed. In one infamous case, a lawsuit against Philip Morris claimed fraud in the "toy industry." In other words, the forms are set, the stock price drops, and bang, the suit is filed with the same plaintiffs hired—in many cases, the plaintiff owns only 10 shares of stock. We have seen some cases where the same plaintiffs appears in as many as 13 lawsuits. They are professional plaintiffs.

A drop in a public company's stock price, a failed product development project, or even adverse market conditions that affect earnings, can trigger one or more securities fraud lawsuits. Many times the complaint simply alleges that management's predictions about the company's future did not come true.

Once discovery begins, plaintiffs' counsel begins a fishing expedition for evidence. One witness told a securities subcommittee that his company produced 1,500 boxes of documents during discovery in this type of case. The discovery ended up costing the company $1.4 million.

The threat of a protracted securities class action lawsuit is powerful. Companies pony up huge settlements rather

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

than face the time and expense of a class action lawsuit. The lawyers do not just go after the money in the company's pockets, they also name other deep pockets—the company's lawyers, accountants, underwriters and directors—as defendants to assure a hefty settlement will be paid out. The plaintiffs' lawyers are rarely disappointed. Almost 93 percent of the cases settle at an average settlement cost of $8.6 million.

In 1994 alone, companies or their insurers paid out $1.4 billion to settle these cases. The so-called victims of the fraud recover pennies on the dollar and the lawyers pocket the rest. While the lawyer's share is taken out, the class members get about 6 cents on the dollar. Frequently, the only egregious offense is committed when the company's shareholders are forced to pick up the tab.

The conference report reforms the system for securities litigation.

First, the conference report makes it harder to file frivolous complaints and sanctions attorneys who do.

The conference report stops abusive securities litigation before it starts. It will help to weed out frivolous complaints before companies have to start paying enormous legal bills.

The legislation creates a uniform standard for complaints that allege securities fraud. This standard is already the law in New York. It requires a plaintiff plead facts giving rise to a strong inference of the defendant's fraudulent intent.

The conference report also provides a strong disincentive for lawyers to file abusive lawsuits. The legislation does not contain a loser pays provision, which would go too far. Instead, the bill requires courts to make findings about whether an attorney filed a frivolous complaint, motion or responsive pleading and to sanction attorneys who do.

Second, the conference report makes sure that the victims of securities fraud bring the lawsuit—not professional plaintiffs.

The conference report puts control of the lawsuit into the hands of the victims. Right now, there often is no victim, just a professional plaintiff whose name appears in lawsuit after lawsuit.

Professional plaintiffs are paid well for their services, usually in the form of a bounty payment. News accounts report that one individual, a retired lawyer, appeared as lead plaintiff in 300–400 lawsuits. Last year, an Ohio judge refused to permit class certification, noting that the lead defendant had filed 182 class actions in the last 12 years.

The conference report discourages the use of professional plaintiffs by eliminating bonus payments to name plaintiffs and prohibiting referral fees.

The conference report encourages real investors, especially pension funds and other institutional investors, to take control of the lawsuit. It provides that the plaintiff with the largest financial interest in the outcome of the case should be the lead plaintiff.

Third, the conference report allows companies to talk about the future of the company without the threat of a lawsuit.

The conference report will get more information to shareholders about the future prospects of a company. The conference report codifies existing law to provide a safe harbor to companies that make forward-looking statements accompanied by meaningful cautionary statements.

Now, corporate management is afraid to make statements about the future of the company, knowing that incorrect projections will inevitably lead to a lawsuit. One study found that over two-thirds of venture capital firms were reluctant to discuss their performance with analysts or the public because of the threat of litigation.

The conference report includes a safe harbor that fairly balances the need for a free flow of information to the marketplace and the need for investor protection.

The conference report creates a two-pronged safe harbor. The first prong gives safe harbor protection if there is a good enough warning about why the forward-looking statement may not come true.

The safe harbor does not give a license to lie. The second prong does not give safe harbor protection when forward-looking statements are made with actual knowledge that the statement is false or misleading.

The conference report safe harbor does not cover areas where there is potential for abuse. For example, the safe harbor does not cover IPO's, financial statement information, penny stocks or limited partnerships. There is no safe harbor for brokers.

The conference report safe harbor is balanced. The conference committee worked with the SEC to make sure the safe harbor is safe for investors as well as companies. I would like to include in the RECORD as if read in its entirety, a letter from the SEC to me, dated November 16, 1995, supporting the safe harbor provision.

Fourth, the conference report modifies the system of liability so that deep pocket peripheral defendants cannot be coerced into paying more than their share of the damages.

The conference report reduces the coercive effect of unlimited liability by making peripheral defendants liable only for the share of damages they caused. Now, all defendants are on the hook for 100 percent of the damages—even if they are only responsible for 1 percent.

In class action lawsuits with hundreds of plaintiffs, the potential liability can be staggering. Deep pocket defendants who may only be 1 percent liable routinely settle for much more rather than face paying 100 percent of the damages.

The conference report changes that by requiring peripheral defendants to pay for only the share of damages they caused under a system of proportionate liability.

This bill does not leave small investors out in the cold. Small investors are always compensated for 100 percent of their damages if they have a net worth of $200,000 or less.

The conference report does not change the system of liability for defendants who knowingly commit securities violations. Anyone who has knowingly committed a securities violation will still be liable for 100 percent of the damages. That's fair.

Fifth, the conference report improves the settlement process by getting more information to investors about a proposed settlement and restricting the amount attorneys may recover in fees.

The conference report enables the plaintiffs to receive a favorable settlement rather that the attorneys. All too often, plaintiffs' lawyers take the money and run. The legislation requires counsel to the class to inform investors about the terms of a proposed settlement and to be available to answer questions about the settlement.

The conference report also restricts the percentage of the recovery that goes to the lawyers. Lawyers fees now sometimes add up to more than 50 percent of the entire settlement. This legislation puts more of the settlement money into the pockets of investors by limiting the lawyers portion to a reasonable percentage of the settlement amount.

Sixth, the conference report also contains other provisions that make the system for securities litigation reform fairer and better for investors.

The legislation requires auditors to be on the lookout for wrongdoing and report any evidence of fraud to the SEC. The conference report also reinstates the SEC's authority—which the Supreme Court put into question in the Central Bank of Denver case—to bring actions against defendants who knowingly aid and abet securities fraud.

The bill prohibits document destruction by making it unlawful for a party to destroy documents once a complaint is filed. Finally, the bill makes sure that small investors are always compensated for 100 percent of their damages if they have a net worth of $200,000 or less.

In summary, the bill will put a stop to abusive securities litigation. It will curtail the use of professional plaintiffs. It will empower real investors, especially pension funds and other institutional investors, to take control of the lawsuit.

This legislation is aimed at weeding out frivolous cases by making it harder to file factually baseless complaints. It also provides that each defendant is liable for only his or her fair share of the damages, making it more difficult for lawyers to coerce settlements from the deep pocket defendants—that is, the defendant that has some assets or money. At the same time, it will make accountants report fraud to the authorities.

Finally, this bill creates a safe harbor from private lawsuits about forward-looking statements. The legislation will solve the problem of abusive securities litigation without preventing investors from bringing meritorious lawsuits.

I congratulate my Senate colleagues for all the time and effort they have put into this important legislation. I particularly would like to thank Senators DODD and DOMENICI, who introduced this legislation more than 4 years ago.

I thank Senator GRAMM, the chairman of the Securities Subcommittee, for his leadership. And I thank the staff who has worked so hard on this bill. Our staff director, Howard Menell; the Banking Committee staff: Laura Unger, Bob Giuffra, Wayne Abernathy, Mitchell Feuer, and Andrew Lowenthal; Senator DOMENICI's staff: Denise Ramonas and Brian Benczkowski, and the other key staff members, including Robert Cresanti, Dave Berson, Peter Hong, and Carol Grunberg, who have been indispensable to this process.

I also want to thank the SEC, the Security and Exchange Commission, its staff, and the judicial conference, and all the others who have made this piece of legislation successful.

The conference report is balanced. It hits the bullseye of the target, curtailing abusive securities litigation, while allowing investors to bring meritorious lawsuits. Once this bill becomes law, investors will have a system of redress that serves them and not entrepreneurial lawyers.

Mr. President, let me take the time now to indicate that on November 15 I received a letter from the Securities and Exchange Commission, signed by Chairman Levitt, and Steve Wallman, a Commissioner. And let me ask that I be permitted to read the letter into the RECORD.

DEAR MR. CHAIRMAN: As we approach the end of the long road traveled on securities litigation reform, you have asked we provide our views of the current draft of the legislation. At the outset, let us express our appreciation for your willingness to heed the concerns of the Commission regarding the draft conference report October 23, 1995. Together we have sought to achieve the most responsible reform possible.

While the Commission has raised a number of concerns about earlier versions of this legislation, we believe the draft conference report dated November 9th responds to our principal concerns. We understand the need for a greater flow of useful information to investors in the markets and we share your desire to protect companies and their shareholders from the costs of frivolous litigation.

The safe harbor provisions of the draft bill have been of particular interest to us. While we could not support earlier attempts at a safe harbor compromise, the current version represents a workable balance that we can support since it should encourage companies to provide valuable forward-looking information to investors while, at the same time, it limits the opportunity for abuse. The need of legitimate businesses to have a mechanism for early dismissal of frivolous lawsuits argues in favor of codification of the ''bespeaks caution'' doctrine that has developed under the case law. While the trade-off requires that class action attorneys must have well written and carefully researched pleadings at the outset of the lawsuit, we feel this is necessary to create a viable safe harbor, given that it does not prevent Commission enforcement actions, and excludes the greatest opportunities for harm to investors.

Outside of the safe harbor provisions, we have consistently advocated reversal of Supreme Court decisions of Lampf and Central Bank. It is unfortunate that Congress has not restored these investor protections that were removed by the Supreme Court; however, we recognize that amendments on both subjects were defeated in the course of this legislative effort, thereby making it difficult to include such provisions in the bill. The conference bill raises other minor issues, but the language in the conference report hopefully will prevent any unintended consequences. We remain grateful to you and your staff, as well as the other members and their staffs, for the willingness to engage in a dialogue with us aimed at getting a better deal for investors.

Thank you for your consideration.

Signed Arthur Levitt, chairman.

Mr. President, I ask unanimous consent that this letter be printed in the RECORD.

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

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, November 15, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As we approach the end of the long road traveled on securities litigation reform, you have asked that we provide our views of the current draft of the legislation. At the outset, let us express our appreciation for your willingness to heed the concerns of the Commission regarding the draft conference report dated October 23, 1995. Together we have sought to achieve the most responsible reform possible.

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Thank you for your consideration.

Sincerely,

ARTHUR LEVITT,
Chairman.
STEVEN M.H. WALLMAN,
Commissioner.

Mr. D'AMATO. Mr. President, let me conclude by simply saying that this bill may not be the perfect solution and, indeed, there may be some unintended consequences that create problems. This Senator and, I know, Senator DODD and Senator DOMENICI and all of my colleagues are ready to deal with any problems that may come about.

But let me say this, too. First, in this bill we go after the greatest abuse that is taking place, which is lawyers who do not represent the general public but represent themselves. They have for hire plaintiffs who are not really aggrieved, who own minimal, in some cases as little as 10 shares, of stock. As soon as there is a price variation, these lawyers race to the courthouse so that they can file a claim so they will control the case. There is little regard for the company, little regard for the real aggrieved investors. We have changed that significantly. No longer will there be permitted professional plaintiffs.

Second, for the first time we say that the court shall look at the facts as they relate to the questions: Is there a pension fund? Is there a large investor involved whose interests should be protected? The court will look at these questions as they relate to the lawyer's representation so that we have lawyers, who really represent the aggrieved investors, controlling the case, not a string of professional, sharks, sharks for hire.

Third, we have made it more difficult to bring suits that are aimed at forcing settlements.

Fourth, we answer questions which are long overdue. Should we hold somebody responsible for the total loss, if there is a loss, if they have been minor participants and if they have been responsible for 1 or 2 or 3 or 4 percent of the loss, because they are wealthy or have a member of the board of directors who has deep pockets? Do we want to encourage people to participate in corporate governance, or do we want to discourage it; do we want to make it impossible for large firms to come in and use their expertise because they are afraid of being sued so they say, ''No, I do not want to audit your books; the exposure is too great''?

Do we really want to have a system where people are forced—forced—to give up and settle a case because if there is even the slightest doubt as it relates to liability, they may be facing huge, huge losses. These companies, therefore, are forced to settle even when they know they have not committed any tortious acts, but the risk of the jury finding any evidence in the way of negligence, even a small, minute amount, might jeopardize the company with huge claims?

So what you literally have is a group of bandits who force companies into settlements of millions and millions of dollars. Is that fair to those companies? Is that fair to the shareholders? I do not think so. What we have said in this conference report is, if you are negligent, if you have committed a tortious act, you should be held responsible for the percentage of losses due to your tortious act, not that the full consequences of somebody else's actions should fall on you simply because you are a person who has some money and some resources. That is wrong. That is not fair.

If you are intentionally defrauding investors? That is a different matter. You will be held. I think this is fair. I think this is reasonable.

I understand that there are some provisions that some of my colleagues have some differences with, but I think overall we have moved forward in a very conscientious manner in the attempt to have a fair and balanced system, so that those who truly have committed tortious actions will be held accountable for their actions, and they will not be held accountable for other people's actions, nor will they be forced to make settlements that are indeed unfair. We have eliminated a terribly unscrupulous practice that I believe is a stain on the legal profession.

I have stood up and I have battled on behalf of litigants and on behalf of the attorneys who represent them, so that they may have a level playing field. But the law as it exists today is not a level playing field. And there have been and there are a handful who have abused the system. We are attempting to deal with those abuses.

I want to thank my colleagues for their participation. I certainly want to thank Senator BENNETT for his job in terms of working with us. I urge my colleagues to vote in favor of the final passage. And I thank the Chair.

Mr. SARBANES addressed the Chair.

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

Mr. SARBANES. Mr. President, later today the Senate will vote on the final version of the securities litigation bill which has been brought back from conference. Supporters of the bill argue that it is a balanced response to a widespread problem; namely, frivolous securities litigation. What should be clear to all Senators, however, is that this bill is not—is not—a balanced response to that problem.

This legislation will affect far more than frivolous suits. When the arguments are made for the legislation, the examples that are always cited are examples of frivolous suits. And I do not know of any difference in here, that we ought to find ways to get at those and that those are an abuse of the system. But this bill goes way beyond that. This bill will make it more difficult for investors to bring and recover damages in legitimate fraud actions—legitimate fraud actions.

As the editors of Money magazine concluded, this legislation hurts investors. In fact, the December editorial of Money magazine warns, ''Now only Clinton can stop Congress from hurting small investors like you.''

At every stage of the legislative process, this bill has been amended to make it more difficult for investors to bring legitimate suits. As it has moved through the process, provisions favorable to investors have been taken out. Balanced provisions in the legislation have been made harmful to investors. Individual investors, local governments and pension plans all will be hurt by this legislation. All will find it more difficult to bring fraud actions and to recover full damages as a result of the measure now before the Senate. That is why this bill is opposed by a broad coalition of regulators, State and local government officials, labor unions, consumer groups and investor organizations, and by literally dozens and dozens of editorials in major newspapers and magazines across the country.

I want to review just some of the areas in which this negative trend took place in the course of the legislative consideration of this legislation.

First, the statute of limitations. The process of hurting investors began in the Banking Committee when it deleted the extension of the statute of limitations. The bill originally introduced by Senators DOMENICI and DODD, who have had a keen interest in this matter, Senate bill 240, that original bill as introduced by them extended the statute of limitations for security fraud suits—that is, the period of time available to investors to discover that they have been defrauded and to file a claim. This was in fact the one clearly proinvestor provision in that bill introduced by Senators DOMENICI and DODD. It responded to the experts in this area—the Federal and State securities regulators—all of whom agree that the current statute of limitations is too short to protect investors.

For over 40 years, courts held that the statute of limitations for private rights of action under section 10(b) of the Securities Exchange Act of 1934, the principal antifraud provision of the Federal securities laws, was the statute of limitations determined by applicable State law. While these statutes varied from State to State, they generally afforded securities fraud victims sufficient time to discover that they had been defrauded and sufficient time to bring suit.

In 1991, in the Lampf case, the Supreme Court significantly shortened the period of time in which investors may bring securities fraud actions. By a 5-to-4 vote—in other words, a very closely divided Supreme Court—the Court held that the applicable statute of limitations is 1 year after the plaintiff knew of the violation and in no event more than 3 years after the violation occurred. These time periods are shorter than the statute of limitations for private securities actions which existed under the law of 31 of the 50 States.

Regulators have testified unanimously that this shorter period does not allow individual investors adequate time to discover and pursue violations of securities law. Testifying before the Banking Committee in 1991, SEC Chairman Richard Breeden stated, and I quote,

> The timeframes set forth in the [Supreme] Court's decision is unrealistically short and will do undue damage to the ability of private litigants to sue.

Chairman Breeden pointed out that in many cases, and I quote, ''events only come to light years after the original distribution of securities and the cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse.'' In other words, if the perpetrator of the wrong can conceal it long enough under this very shortened statute of limitations, the victim will have no remedy.

The FDIC and the States securities regulators joined the SEC in favor of overturning the Lampf decision. What happened to this provision that was in the legislation as originally introduced by Senators DOMENICI and DODD? It disappeared when the Banking Committee met to consider this bill. Despite the fact that all the securities regulators recommended it, despite the fact that Senators DOMENICI and DODD had included it in their original bill, despite the fact that the Banking Committee had approved this provision before in 1991, despite the fact that it was the one clearly proinvestor provision in the bill, the provision was dropped.

Let me make clear that the statute of limitations issue has nothing to do with frivolous cases. The current statute of limitations keeps worthy cases from the courthouse. Both Republican SEC chairmen and Democratic SEC chairmen have told us that the statute of limitations imposed by the Supreme Court in 1991 is too short. It allows con artists to perpetrate frauds, and it prevents defrauded investors from seeking restitution.

When the statute of limitations provision disappeared from the bill, the bill moved down the path of being an unbalanced effort. At that point, the bill began to tilt away from individual investors, away from pension funds and county treasurers, in favor of corporate insiders and the attorneys and accountants who advise them.

When the Banking Committee dropped the lengthening of the statute of limitations provision, it went beyond deterring frivolous lawsuits and began hurting investors.

I want to underscore that because that is the basic point that must be understood about this conference report. Again and again it goes beyond deterring frivolous lawsuits and hurts investors.

Let me turn now to another example of this proposition, that is, the aiding and abetting issue. Failure to include the extension of the statute of limitations removed the balance from this bill and tilted it toward corporate wrongdoers. The Banking Committee could have added some balance to the bill by restoring the ability of investors to sue the accountants and attorneys who aid and abet securities fraud. This was recommended by the SEC, the State securities regulators, and various bar associations. Again, however, the committee hurt investors by leaving this key provision out of the bill.

Prior to 1994, courts in every circuit in the country had recognized the ability of investors to sue aiders and abettors of securities frauds. Most courts required that an investor show that a securities fraud was committed, that the aider and abettor gave substantial assistance to the fraud, and that the aider and abettor intended to deceive investors or behaved recklessly toward the fraud. In other words, the investor had to show that the aider and abettor either intended to deceive the investors or behaved recklessly toward the fraud. Aiding and abetting liability was most often asserted against lawyers, accountants, appraisers, and other professionals whose assistance is often crucial to perpetrating a fraud.

In 1994, in the Central Bank of Denver case, the Supreme Court eliminated the right of investors to sue aiders and abettors of securities fraud. Writing for the four dissenters—this was another 5-to-4 opinion—Justice Stevens criticized the five-member majority for ''reach[ing] out to overturn a most considerable body of precedent.'' While the issue was not directly before the Court, Justice Stevens warned that the decision would also eliminate the SEC's ability to pursue aiders and abettors of securities fraud; in other words, not only a private cause of action, but the SEC's ability as well.

One of the lead sponsors of this legislation, Senator DODD, stated at a Securities Subcommittee hearing in May 1994, and I quote:

> Aiding and abetting liability has been critically important in deterring individuals from assisting possible fraudulent acts by others.

Testifying at that hearing, the Chairman of the SEC stressed the importance of restoring aiding and abetting liability for private investors, and I quote:

> Persons who knowingly or recklessly assist the perpetration of a fraud may be insulated from liability to private parties if they act behind the scenes and do not themselves make statements directly or indirectly that are relied upon by investors. Because this is conduct that should be deterred, Congress should enact legislation to restore aiding and abetting liability in private actions.

The North American Securities Administrators Association, the Association of States Securities Regulators, and the Association of the Bar of the City of New York also endorsed restoration of aiding and abetting liability in private actions.

This bill, unfortunately, restores only the SEC's ability to go after aiders and abettors of violations of the securities laws and then only in part—only in part. The provision in the bill is limited to violations of section 10(b) of the Securities Exchange Act and to defendants who act knowingly. It ignores the recommendation made by the SEC, the States securities regulators and the bar association that aiding and abetting liability be fully restored for the SEC and private litigants as well. By ignoring the needs of individual investors, the committee further tilted this bill toward the corporate insiders and their professional advisers who abuse the investor.

The effort in the Banking Committee, which I have alluded to with respect to the statute of limitation and the aiders and abettors provision, which tilted this bill away from the investor, that effort was continued in the conference committee. Consider what happened in the conference committee to the provision that directly addresses the filing of frivolous cases.

Rule 11 of the Federal Rules of Civil Procedure is the principal sanction against the filing of frivolous lawsuits in the Federal courts. Rule 11 requires all cases filed in the Federal courts to be based on reasonable legal arguments and supported by facts. That is the requirement of rule 11. The case is to be based on reasonable legal arguments and supported by facts.

As passed by the Senate, this bill required the courts to include specific findings in securities class actions regarding compliance by all parties and attorneys with rule 11(b) of the Federal Rules of Civil Procedure. That is the way the Senate passed it. If a court found the violation of rule 11 by either the plaintiff or the defendant, the court was required to impose sanctions. That provision was balanced. The sanctions would have applied equally to plaintiffs and to defendants. It was intended as a deterrent to frivolous cases, and it might well have worked in an efficacious manner.

What happened to this balanced provision, between plaintiffs and defendants, in conference? The balance was removed so that it now applies more harshly to investors than the corporate insiders. The Senate bill had contained a presumption that the appropriate sanction for failure of the complaint or the responsive pleading or motion to comply with rule 11 was an award of reasonable attorneys' fees and other expenses incurred as a direct result of the violation. That was the presumption: An award of reasonable attorneys' fees and other expenses incurred as a direct result of a violation. That applied, in the bill passed by the Senate, both to the plaintiff and to the defendant.

The conference changed this presumption so that it no longer applies equally to plaintiffs and defendants. Under the conference provision now before us, if the defendant substantially violates rule 11, he pays only reasonable attorneys' fees and other expenses incurred as a direct result of the violation; namely, the provision that was in the Senate-passed bill. But now under the conference-reported measure, if the plaintiff substantially violates rule 11, he pays all attorneys' fees incurred in the action, not just those resulting from the violation.

Disparate treatment. The bill, as sent out of the Senate, had balanced treatment with respect to plaintiffs and defendants. Now we have this disparate treatment, and there is no justification for it. Its true purpose, I think, is to scare investors from bringing meritorious fraud suits. When the conference removed the balance from this provision, it was not deterring frivolous lawsuits, it was hurting investors.

The conference further hurt investors by changing the pleading standard provision of the bill. Pleading standard refers to what an investor must show in order to initiate a securities fraud lawsuit. The bill reported by the Senate Banking Committee codified the pleading standard adopted by the U.S. Court of Appeals for the Second Circuit. This standard says investors who seek to file securities fraud cases must ''specifically allege facts giving rise to a strong inference that the defendant acted with a required state of mind.'' This standard, it should be noted, is more stringent than the Federal Rules of Civil Procedure and is the minority view among the circuit courts. Nevertheless, that was the standard adopted by the Banking Committee.

When the bill came to the Senate floor, the Senate adopted an amendment to this provision offered by the distinguished Senator from Pennsylvania, Senator SPECTER. Senator SPECTER's amendment codified into the legislation additional second circuit holdings clarifying the standard they had earlier enunciated. These additional holdings state that a plaintiff may meet the pleading standard by alleging facts showing the defendant had motive and opportunity to commit fraud, or constituting strong circumstantial evidence of state of mind. In other words, the second circuit laid down this standard and then had subsequent opinions that elaborated upon it and developed it, and Senator SPECTER said that if you are going to include the second circuit standard as initially enunciated, you should also include the further holdings by the second circuit clarifying this standard.

This, I think, was the one proinvestor amendment adopted on the Senate floor. What happened to this amendment in conference? It disappeared. It was dropped from the legislation. This is part of this process that I have been outlining here of now you see it, now you don't. Of course, the person who bears the brunt of that is the investor.

The draft conference report deleted the Specter amendment, leaving investors without the protection of the additional second circuit holdings. Once again, a proinvestor provision that would have provided some balance to the bill was removed.

Let me turn briefly to the proportionate liability provisions of the bill, which reduce the amount of damages that defrauded investors can recover from people who have participated in committing the fraud. This provision is not targeted at frivolous suits and never has been. It affects even legitimate securities fraud suits and, therefore, is harmful to all investors. The conference found a way, though, to tilt the legislation even further away from the investor and toward the corporate insider.

The legislation changes the rule for liability for securities fraud from joint and several liability to proportionate liability. Under the current rule of joint and several liability, all fraud participants are liable for the entire amount of the victim's damages—both fraud participants who intended to mislead investors and fraud participants whose conduct was reckless. The rationale for this in the law, which has been the traditional holding over the years, is that a fraud cannot succeed without the assistance of each participant, so each wrongdoer is held equally liable.

Let me just observe that the recklessness standard for liability is a very demanding standard, and it is one usually applied to a company's professional advisers, such as accountants, attorneys, and underwriters.

The bill limits joint and several liability under the Federal securities law to certain defendants, specifically excluding defendants whose conduct was reckless. The bill, thus, reduces the accountability of accountants and attorneys whose conduct is found to be reckless. This change will hurt investors in cases where the principal framer of the fraud is bankrupt, has fled, or otherwise cannot pay investors damages. In those cases, the innocent victims of fraud will be denied full recovery of their damages.

Unfortunately, this provision became even worse in conference for the investors. The bill passed by the Senate did nothing to disturb liability under the securities law for reckless conduct. The conference, however, added language that could call liability for reckless conduct into question. The language of the conference report could be read as inviting the courts to eliminate all liability for reckless conduct under the securities fraud provisions. The conference further added language that could be read as applying the new proportionate liability rules not just to suits brought under the antifraud provisions of the Securities and Exchange Act of 1934, as under the bill passed by the Senate, but to suits brought under the Securities Act of 1933, as well. So the conference, again, took this bill down the path of reducing protections and remedies for investors and providing an additional sheltered area for those who practice corporate fraud and abuse. In the areas, then, of the statute of limitations, aiding and abetting liability, rule 11 sanctions, pleading standards, and proportional liability, this legislation before us hurts the investor, and it has been made significantly worse by the actions in the conference.

Before I conclude the discussion of the substance of the bill, let me now turn to the so-called safe harbor provision, and I underscore ''so-called.'' This bill creates a statutory exemption from liability for forward-looking statements. Forward-looking statements are broadly defined in the bill to include both oral and written statements. Examples include projections of financial items such as revenues and income for the quarter or for the year, estimates of dividends to be paid to shareholders, and statements of future economic performance, such as sales trends and development of new products. In short, forward-looking statements include precisely the type of information that is important to investors deciding whether to purchase a particular stock.

The SEC currently has a safe harbor regulation for forward-looking statements that protects specified forward-looking statements that were made in documents filed with the SEC. As originally introduced, the bill could have allowed the SEC to continue its effort to conduct a comprehensive review of safe harbor regulations. However, the committee abandoned this approach in favor of enacting a statutory safe harbor.

I am aware of the letter that the chairman read from the SEC about the safe harbor provision, but I remain concerned that the safe harbor provision before us today will, for the first time, provide protection for fraudulent statements under the Federal securities laws. For the first time, fraudulent statements will receive protection under the Federal securities laws.

The American Bar Association wrote the President last week that the safe harbor ''has been transformed not simply into a shelter for the reckless, but for the intentional wrongdoer as well.'' Projections by corporate insiders will be protected no matter how unreasonable, no matter how misleading, no matter how fraudulent, if accompanied by boilerplate, cautionary language.

Let me just take a moment to explain this. It is claimed by its supporters that this draft codified the legal doctrine applied by the courts known as bespeaks caution.

Now, as I understand it, all courts that have applied this doctrine have required that projections be accompanied by disclaimers specifically tailored to the projections. The courts have not accepted boilerplate disclaimers. They have required that the projections be accompanied by disclaimers specifically tailored to the projections. If companies want to immunize their projections, they must alert investors to the specific risks affecting those projections.

The bill before the Senate today does not include this requirement of specific cautionary language to alert investors. The Association of the Bar of the City of New York warned of this provision:

> The proposed statutory language, while superficially appearing to track the concepts and standards of the leading cases in this field, in fact radically departs from them and could immunize artfully packaged and intentional misstatements and omissions of known facts.

That letter was signed for the bar association by Stephen Friedman, a former SEC Commissioner. Under this bill, fraud artists will be able to shield themselves from liability simply by accompanying their fraudulent statements with general cautions that actual results may differ. I predict that this provision will come back to haunt us in the years to come.

Because this bill hurts investors, because it makes it harder for defrauded investors to bring suits, because it makes it harder for defrauded investors to recover losses, dozens and dozens of newspapers around the country have expressed their opposition. From the Bangor Daily News to the Miami Herald, from the Minneapolis Star Tribune to the San Francisco Chronicle, editorial pages have argued this bill is a bad deal for investors and urged a Presidential veto. The headline of the Wisconsin State Journal editorial sums up the argument nicely: ''The Securities Reform Act goes too far.'' I ask unanimous consent to have printed at the end of my remarks some sampling of these editorial comments.

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

(See exhibit No. 1.)

Mr. SARBANES. A New York Times editorial last week stated:

> The securities bill that Congress is about to pass addresses a nagging problem, frivolous lawsuits by investors against corporations, but in such cavalier fashion that it may end up sheltering some forms of fraud against investors. President Clinton should veto the bill and demand at least two fixes to protect truly defrauded investors.''

Citing the failure to extend the statute of limitations and to restore aiding and abetting liability, the Times warned that ''provisions threaten to shut off valid suits'' and suggested that ''a well-targeted veto might force this bill back on the right track.''

No publication has editorialized more strongly against this bill than Money magazine. For 4 months in a row, Money magazine has devoted editorial columns to this bill. In September 1995, Money magazine warned ''Congress aims at lawyers and ends up shooting small investors in the back.'' In October, they urged ''Let's stop this Congress from helping crooks cheat investors like you.'' In November, they were hopeful that ''Your 1,000 letters of protest may stop this Congress from jeopardizing investors.'' This month they stated:

. . . the new bill jeopardizes small investors in several ways. . . . The bill helps executives get away with lying. . . . Investors who sue and lose could be forced to pay the winner's court costs. . . . Even accountants who okay fraudulent books will get protection.

Investors around the country agree with Money magazine's analysis that this bill hurts investors and are voicing their opposition. The National Council of Individual Investors, an independent membership organization of individual investors, has written to the President to ''express opposition to the recent draft report,'' saying, ''The draft conference report fails to treat the American investor fairly.''

The labor movement has said, ''This bill tips the scales of justice in favor of the companies and at the expense of stockholders and pension plans.''

The Fraternal Order of Police wrote the President urging him ''to reject a bill which would make it less risky for white collar criminals to steal from police pension funds * * *.''

A coalition of consumer groups, including the Consumer Federation of America, Consumers Union, USPIRG, and Public Citizens also oppose this bill.

But perhaps most telling about this bill is the opposition of hundreds and hundreds of State and local government officials. The National League of Cities, the National Association of Counties, and the Government Finance Officers Association all oppose this legislation.

Keep in mind that State and local investors issue securities—State and local governments raise money through bond issues. As issuers of securities, it is asserted by the supporters of this legislation, they would stand to benefit from the bill. Why, then, do they oppose it? Because they also purchase securities as well. They invest taxpayers' money and retirees' money in securities and sometimes are victimized by unscrupulous brokers.

Orange County, CA, lost over $2 billion in leveraged derivative investments. In my own State of Maryland, Charles County lost nearly $3 million in derivatives. Orange County is currently suing the brokers who sold it these securities. When such scandals occur again, and they will, this bill will make it harder for taxpayers to bring securities fraud actions and recover losses.

Let me quote further from the letter of these government officials who are seeking meaningful remedies in case they are defrauded:

The following are the major concerns State and local government have with the latest ''draft conference report'':

Despite changes in the safe harbor provision relating to forward-looking statements, there are still loopholes in that provision that would allow false predictions to be made and that will shield a company from liability.

Aiders and abettors of fraud would still remain immune from civil liability and would not have to pay back fraud victims for the losses they suffer.

The ''draft conference report'' maintains the short three-year statute of limitations that will allow a wrongdoer who can conceal his fraud to be completely let off the hook.

Eleven State attorneys general wrote to express their opposition. They said, ''If enacted, this legislation would severely curtail our efforts to fight securities fraud and to recover damages for our citizens if any of our State or local funds suffer losses due to fraud.'' They went on to say, ''This is unwise public policy in light of rising securities fraud and substantial losses suffered by States and public institutions from high-risk derivatives investments.'' The American Bar Association and the Association of the Bar of the City of New York oppose this bill as well.

When this measure originally came to the Senate floor, I received a communication from the securities commissioner of the State of Maryland, Robert McDonald. I expect that most Senators received similar letters from their State securities commissioners.

In that letter, Commissioner McDonald opposed the bill, writing:

Our financial markets depend not so much on money as on public confidence. The confidence that investors have in the American financial marketplace will be shattered if they believe that they have little recourse against those who have committed securities fraud.

Now, the managers of this bill in their conference report state at the outset,

The overriding purpose of our Nation's securities laws is to protect investors and to maintain confidence in the securities markets, so that our national savings, capital formation, and investment may grow for the benefit of all Americans.

So, they pick up the first part of Commissioner McDonald's statement about ''our financial markets depend not so much on money as on public confidence,'' but the supporters of this bill ignore the second part of Commissioner McDonald's warning that the confidence of investors will be shattered ''if they believe they have little recourse against those who have [committed] securities fraud.''

The editors of Money magazine wrote, ''this bill will undermine the public's confidence in our financial markets. And without that confidence, this country is nowhere.''

By making it harder for investors to bring legitimate securities fraud suits, by reducing investors' recoveries when they win securities fraud suits, by consistently hurting investors and helping corporate insiders and their accountants and attorneys—in other words, by going way beyond anything necessary to deal with the frivolous lawsuits—this bill will end up rewarding con artists and punishing America's individual investors, pension funds, and local governments.

For all of the reasons I have described, I oppose this legislation and I urge my colleagues to vote against this bill.

EXHIBIT 1

[From the New York Times, Nov. 30, 1995]

OVERDRAWN SECURITIES REFORM

The securities bill that Congress is about to pass addresses a nagging problem, frivolous lawsuits by investors against corporations, but in such cavalier fashion that it may end up sheltering some forms of fraud against investors. President Clinton should veto the bill and demand at least two fixes to protect truly defrauded investors.

The bill seeks with good reason to protect corporate officials who issue honest but unintentionally optimistic predictions of corporate profitability. In some past cases, opportunistic shareholders have waited for a company's stock price to fall, then sued on the grounds that their money-losing investments were based on fraudulent misrepresentations of the company's financial prospects. Their game was to use these ''strike'' suits to threaten companies with explosively expensive litigation in the cynical attempt to win lucrative settlements.

Such suits are a real, if infrequent, problem that can discourage responsible management from issuing information that investors ought to know. The bill would stymie these suits in part by immunizing predictions of corporate profitability that are accompanied by descriptions of important factors—like pending government regulatory action—that could cause financial predictions to prove false. But the language is ambiguous, leading critics to charge that it would protect corporate officials who knowingly issue false information. The President should ask Congress for clarification.

Some provisions of the bill would protect investors by, for example, requiring accountants to report suspected fraud. But other provisions threaten to shut off valid suits. The bill would prevent private litigants from going after lawyers and accountants for inattention that allows corporate fraud. Worse, the bill limits the authority of the Securities and Exchange Commission to use accountants and others for aiding fraud. The bill would also provide a short statute of limitation that could easily run out before investors discover they have been victimized.

Mr. Clinton should demand that Congress extend the statue of limitations so that investors will have time to file suit after they discover fraud. He should also demand that the bill restore the S.E.C.'s full authority to use accountants who contribute to corporate fraud. So far, Mr. Clinton has been curiously restrained. A well-targeted veto might force this bill back on the right track.

[From Money, December 1995]

NOW ONLY CLINTON CAN STOP CONGRESS FROM HURTING SMALL INVESTORS LIKE YOU

(By Frank Lalli)

The debate over Congress' reckless securities litigation reform has come down to this question: Will President Clinton decide to protect investors, or will he give companies a license to defraud shareholders?

Late in October, Republican congressional staffers agreed on a so-called compromise version of the misguided House and Senate bills. Unfortunately, the new bill jeopardizes small investors in several ways. Yet it will likely soon be sent to Clinton for his signature. The President should not sign it. He should veto it. Here's why:

The bill helps executives get away with lying. Essentially, lying executives get two escape hatches. The bill protects them if, say, they simply call their phony earnings forecast a forward-looking statement and add some cautionary boiler-plate language. In addition, if they fail to do that and an investor sues, the plaintiffs still have to prove the executives actually knew the statement was untrue when they issued it, an extremely difficult standard of proof. Furthermore, if executives later learn that their original forecast was false, the bill specifically says they have no obligation to retract or correct it.

High-tech executives, particularly those in California's Silicon Valley, have lobbied relentlessly for this broad protection. As one congressional source told Money's Washington, D.C. bureau chief Teresa Tritch: ''High-tech execs want immunity from liability when they lie.'' Keep that point in mind the next time your broker calls pitching some high-tech stock based on the corporation's optimistic predictions.

Investors who sue and lose could be forced to pay the winner's court costs. The idea is to discourage frivolous lawsuits. But this bill is overkill. For example, if a judge rules that just one of many counts in your complaint was baseless, you could have to pay the defendant firm's entire legal costs. In addition, the judge can require plaintiffs in a class action to put up a bond at any time covering the defendant's legal fees just in case they eventually lose. The result: Legitimate lawsuits will not get filed.

Even accountants who okay fraudulent books will get protection. Accounts who are reckless, as opposed to being co-conspirators, would face only limited liability. What's more, new language opens the way for the U.S. Supreme Court to let such practitioners off the hook entirely. If such a lax standard became the law of the land, the accounting profession's fiduciary responsibility to investors and clients alike would be reduced to a sick joke.

Moreover, the bill fails to re-establish an investor's right to sue hired guns, such as accountants, lawyers and bankers, who assist dishonest companies. And it neglects to lengthen the tight three-year time limit investors now have to discover a fraud and sue.

Knowledgeable sources say the White House is weighing the bill's political consequences, and business interests are pressing him hard to sign it. ''The President wants the good will of Silicon Valley,'' says one source. ''Without California, Clinton is nowhere.''

We think the President should focus on a higher concern. Our readers sent more than 1,500 letters in support of our past three editorials denouncing this legislation. As that mail attests, this bill will undermine the public's confidence in our financial markets. And without that confidence, this country is nowhere.

[From the Banger Daily News, Nov. 30, 1995]

DO NO HARM

Among the most dramatic but least discussed spin-offs of the Contract With America is securities litigation reform legislation, which earlier this year quietly passed both houses of Congress in different forms, but this week could become part of a public spectacle, highlighted by a presidential veto.

House Republicans argued in the contract, which set the tone for the early months of this session, that accumulated legal abuses cost American consumers $300 billion a year. Proponents characterize H.R. 1058 and S. 240, the two bills on which a conference compromise of the Securities Litigation Reform Act is expected to be voted on this week, as antidotes to costly, frivolous lawsuits pursued by greedy lawyers.

Opponents believe the critical elements of both bills, but especially as reflected in the conference version, are destructive of consumer interests. In the best Washington hyperbole, they refer to it as ''The Crooks and Swindlers Protection Act'' because of the manner in which it tilts the courtroom in favor of corporate defendants in securities and fraud cases.

From the perspective of those who are interested in Congress making good choices in the public interest, the act has two more problems. It is an extremely complex area of policy—one that can cause the eyes of a CPA to glaze over—and it is an extension of the catechism of the contract. Consequently, it is an issue that has been exposed to very little sunlight in open debate and it will be defended as political gospel by some Republicans.

Sen. William Cohen voted against the Senate version of the act. Sen. Snowe supported it. As a result, the campaign to persuade the delegation is focused on her office. Critics of the act make excellent arguments against specific provisions, including loser-pays, which will discourage aggrieved small investors from filing suit; and restrictions on legal standards of liability, which limit plaintiffs' opportunities to fully recover legitimate damages.

Another example, the provision of the act narrowing the time window for bringing suit, was the target of a letter from Stephen L. Diamond, securities administrator for the state's Bureau of Banking to Sens. Cohen and Snowe. ''A good portion of the several million dollars in restitution we have obtained for Maine citizens during my tenure,'' Diamond wrote in June, ''would have been irretrievably lost if we had been subject to a three-year limitations period.''

Diamond pointed out that under Maine law, there ''is no absolute outside limit'' for commencing a suit for securities fraud.

The Securities Litigation Reform Act has the potential to save consumers nothing, protect white-collar criminals and add to the burden of the victims of fraud.

It could have serious consequences for Maine taxpayers, investors and retirees. On record opposing the House version are municipalities of all sizes, from the small, Clifton and Berwick, to the state's largest, Portland and Lewiston.

The CMO (collaterized mortgage obligation) disaster that struck Auburn, concern about the integrity and solvency of government and private pension accounts and 401k plans, and public awareness of the threats to the security of investments of an aging population all are reasons for members of the Maine delegation to treat this issue with utmost respect, and caution: do no harm. This one could hurt.

[From the Miami Herald, Nov. 14, 1995]

LIARS' BILL OF RIGHTS?

While most of the country is paying attention to the feud over the federal budget, a sinister piece of legislation is making its way through Congress unnoticed. This bill lets companies report false information to investors. That's right, it essentially licenses fraud. It has passed both houses in slightly different forms. A compromise bill will be written soon. If it passes, President Clinton ought to slay it in its tracks.

This bill is a story of good intentions. Some companies have been plagued by frivolous lawsuits from investors who aren't happy with the company's performance. The investors allege, in essence, that the company had forecast good results and then didn't deliver. That, say the plaintiffs, constitutes fraud.

Well, often it doesn't. Investing has risks, including market downturns. When investors sue over mere bad luck, they cost companies money, clog courts, and drain profits from other investors.

Trouble is, by trying to stop this abuse, Congress mistook a simple answer for the right answer. Its solution, in plain terms, was to declare virtually all promises by all companies to be safe from legal challenge. Under this ''remedy,'' company executives now can promise investors anything they like, with not so much as a nod to reality.

They can't legally lie about the past, but if their claims are ''forward-looking,'' they can promise you the moon to get you to invest, and no one can sue them later for being misleading.

Well, almost no one. The bill would allow legal action in the case of egregious, deliberate fraud, but you'd have to prove that it was intentional. And you'd have just three years to discover the fraud and furnish your proof.

It's rare enough to prove outright intent under the best circumstances, but under this bill, if executives can stiff-arm you for just 36 months (not a big challenge), they'd be home free. And then—in another hair-raising provision of the bill—you'd be stuck for the company's entire legal bill. Facing such a risk, no small investor, no matter how badly cheated, would ever dare sue.

This bill evidently struck many members of Congress as a simple answer to a nagging problem. It's nothing of the kind. The problem is real enough, but its solution isn't simple. And it certainly doesn't reside in a law authorizing phony statements to investors.

President Clinton should veto this blunder. Then, when the fight over the budget is over, Congress can take time to think up a more rational solution to the problem.

[From the Star Tribune, Nov. 17, 1995]

SECURITIES BILL

Give Sen. Richard Bryan, D-Nev., credit for being a good friend to American investors. Since late October, Bryan has stymied passage of ill-designed legislation that would curb investors' rights to sue for securities fraud, Bryan's move is buying time to marshal enough opposition to give the bill the fate it deserves—either significant alteration or death. What opponents need most, though, is support from the top—President Clinton.

At first glance, the legislation appears reasonable. The bill seeks to protect public companies and their underwriters from frivolous lawsuits by disgruntled investors. It would provide legal protection for companies whose earings forecasts turn out to be inaccurate, and would limit the liability of accounting firms, legal advisers and others who fail to detect fraud. The bill also would ban ''professional plaintiffs'' who repeatedly sue companies for even minor losses.

Proponents argue that more and more investors are forsaking the win-some-lose-some attitude of investing, opting instead to sue if they lose money because of unexpected events, particularly sudden and steep drops in stock prices. Recent high-profile securities court cases seem to prove their point. From the ongoing Orange County fiasco to Piper Jaffray's stumblings a year ago, many investors, both government and private, have gone to court to recoup losses.

However, securities cases gain notoriety mainly because they rarely occur. The number of securities class-action lawsuits nationwide has fallen to 290 in 1994 from 305 in 1974. In fact, such cases represented little more than 1 percent of new federal civil cases filed last year. The statistics show that curbing investors' rights to sue amounts to a solution in search of a problem.

Indeed, there would be problems if this legislation passed unaltered. The bill would eliminate the current legal standard of joint-and-several liability, which holds even those peripherally involved in fraud to a high degree of liability. Thus, firms providing accounting and other services to corporate clients would have less incentive to be alert to wrongdoing. In addition, this legislation would have a chilling effect on even many valid complaints; it would require a plaintiff who lost a case to pay the defendant's court costs.

The bill's opponents have begun to make a stink. A couple of weeks ago, Minnesota Attorney General Hubert Humphrey III joined 13 other attorneys general in asking Clinton to veto the bill in its current form. A day earlier a coalition representing hundreds of state and local government officials announced its opposition. Consumer groups have fought the legislation all summer.

But the opponents need help. Though the Senate passed the bill by a veto-proof margin, a veto threat from Clinton could prompt needed changes in the measure. That threat should come now, while political momentum favors the opposition.

[From the San Francisco Chronicle, Nov. 27, 1995]

OPENING THE DOOR TO FRAUD

If a House-Senate conference committee meeting tomorrow does not result in significant changes to legislation regarding investment fraud lawsuits, President Clinton should quickly veto the bill.

Compromise has softened some of the anti-consumer aspects of the legislation, which has the stated goal of eliminating frivolous class-action securities fraud lawsuits. But despite the worthwhile aim, the provisions of a draft conference report on H.R. 1058 and S 240 go far beyond curbing trivial court actions and instead would wipe out important protections against hustlers of fraudulent securities.

In a letter asking Clinton to veto the bill, San Francisco's chief administrative officer, Bill Lee, noted that the legislation would "erode investor protections in a number of ways: it fails to restore the liability of aiders and abettors of fraud for their actions; it limits many wrongdoers from providing full compensation to innocent fraud victims, by eroding joint and several liability; it could force fraud victims to pay the full legal fees of large corporate defendants if they lose; it provides a blanket shield from liability for companies that make knowingly fraudulent predictions about an investment's performance and risks; and it would preserve a short, three-year statute of limitations for bringing fraud actions, even if fraud is not discovered until after that time."

Securities fraud lawsuits are the primary means for individuals, local governments and other investors to recover losses from investment fraud—whether that fraud is related to money invested in stocks, bonds, mutual funds, individual retirement accounts, pensions or employee benefit plans.

As the draft report stands, investors would be the losers. And their hopes of receiving convictions in suits similar to those against such well-known con men as Michael Milken and Ivan Boseky would be severely hampered.

In the name of the little guy, Clinton should not let that happen.

AMERICAN FEDERATION OF LABOR, CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, DC, November 29, 1995.

DEAR SENATOR: The AFL–CIO opposes the conference agreement on H.R. 1058, the Securities Litigation Reform Act of 1995. The conference agreement significantly weakens the ability of stockholders and pension plans to successfully sue companies which use fraudulent information in forward-looking statements that project economic growth and earnings. There is a new "safe harbor" provision in this conference agreement that allows evidence of misleading economic information to be discounted in court if it is accompanied by "appropriate cautionary language."

The AFL–CIO believes this compromise will vastly increase the difficulties that investors and pension plans would have in recovering economic losses. Similarly, the joint and several liability provisions in this bill provide added, and unwarranted, protection for unscrupulous companies, stockbrokers, accountants and lawyers.

In short, this bill tips the scales of justice in favor of the companies and at the expense of stockholders and pension plans. Both of these latter groups are forced to rely exclusively on information provided by these companies when evaluating a stock, but this information would not be able to be used in court to recover economic damages for misleading information.

The Congress should reject the conference agreement on H.R. 1058.

Sincerely,

PEGGY TAYLOR,
Director.

SECURITIES AND EXCHANGE COMMISSION,
Washington, DC.

DEAR CHAIRMAN LEVITT AND COMMISSIONER WALLMAN: On behalf of a coalition of state and local government officials, the above organizations wish to express our concern over your November 15, 1995, letter to Senator Alfonse D'Amato regarding your views on the most recent "draft conference report" on securities litigation reform. Our organizations have worked closely with the Commission over the years on numerous issues of importance to the securities markets. Although your letter did not specifically endorse the "draft conference report," proponents of this legislation are already representing your letter as an SEC endorsement. We remain opposed not only to the latest version of the safe harbor provision in the legislation, on which your letter focused, but to several other provisions in the bill which are critical to us and which we understood were critical to you as well.

We support efforts to deter frivolous securities lawsuits. We believe, however, that any legislation to accomplish this must also maintain an appropriate balance that ensures the rights of investors to seek recovery against those who engage in fraud in the securities markets. We believe that H.R. 1058, S. 240, and the various versions of the "draft conference report" all fall short in achieving this balance, and erode the ability of investors to seek recovery in the cases of fraud.

The following are the major concerns state and local governments have with the latest "draft conference report:" Despite changes in the safe harbor provision relating to forward-looking statements, there are still loopholes in that provision that would allow false predictions to be made and that will shield a company from liability. Deliberately false forward-looking statements are still immunized under this draft as long as they are accompanied by cautionary language.

Aiders and abettors of fraud would still remain immune from civil liability and would not have to pay back fraud victims for the losses they suffer. If aiders and abettors are immune from liability, as issuers of debt securities, state and local governments would become the "deep pockets," and as investors they would be limited in their ability to recover losses. In Chairman Levitt's letter of May 25, 1995, to Chairman D'Amato and members of the Senate Banking Committee, he indicated that failure to resolve this issue was one of two "important issues" for the Commission. We are disappointed that you have not unequivocally stated that this is still a serious concern to the SEC, as it is to state and local governments.

The "draft conference report" maintains the short three-year statute of limitations that will allow a wrongdoer who can conceal his fraud to be completely let off the hook. The current statute of limitations is widely regarded as too short. Despite the May 25, 1995, statements to the Senate that this too was an "important issue" for the Commission, the most recent draft does not include an extension.

The latest draft adds language opening the way for the Supreme Court to eliminate any implied private right of action under the federal securities laws for victims of fraud by imposing a "rule of construction" stating that nothing in the legislation "shall be deemed to create or ratify any implied right of action." Given the historic role of private suits in keeping the markets honest, and the SEC's previous support for such actions as a complement to its own enforcement activities, we are surprised that no objection was raised in your letter to the inclusion of this new language.

The pleading standard has been changed in the new draft from requiring that the complaint "specifically allege" facts giving rise to a state of mind—an already harsh standard—to a "state with particularity" standard. This is a much more difficult standard and will make it even more difficult for plaintiffs to bring suit. Combined with the deletion of the Specter amendment, this raises the pleading standard to one different from that employed by the Second Circuit.

Under the newest draft, fraud victims face a potential "loser pays" sanction and a possible bond requirement at the beginning of a case, which could discourage many investors from seeking a recovery of their losses. In addition, the victim will now have to show that a shift of full attorneys' fees and costs to the plaintiff would impose an "unreasonable burden" on the plaintiff or his attorney and that the failure to shift fees would not impose a greater burden on the defendants.

The strength and stability of our nation's securities markets depend on investor confidence in the integrity, fairness and efficiency of these markets. To maintain this confidence, investors must have effective remedies against those persons who violate the antifraud provisions of the federal securities laws. In recent years, we have seen how investment losses caused by securities laws violations can adversely affect state and local governments and their taxpayers. Indeed, you, Chairman Levitt have addressed many of our members personally over the past year to underscore just this concern about the markets.

Access to full and fair compensation through the civil justice system is an important safeguard for state and local government issuers and investors alike and is a strong deterrent to securities fraud. Because of the importance of this issue, we are requesting a meeting with you to discuss your recent letter to Senator D'Amato and to convey our concerns about the unwise public policy outlined in the "draft conference report." We stand ready to work with you in vigorously opposing this legislation, particularly in light of other efforts—budgetary and statutory—to further weaken the regulatory protections provided to state and local government investors and others. Betsy Dotson of GFOA will follow up on our meeting request with your staff.

FRATERNAL ORDER OF POLICE,
NATIONAL LEGISLATIVE PROGRAM,
Washington, DC, November 29, 1995.

Hon. WILLIAM JEFFERSON CLINTON,
President of the United States,
Washington, DC.

DEAR PRESIDENT CLINTON: On behalf National the Fraternal Order of Police, I urge you to veto the ''Securities Litigation Reform Act'' (HR1058/S240). The recently released draft of the House/Senate conference report clearly reflects a dramatic reduction in the ability of private, institutional and government investors to seek redress when victimized by investor fraud.

As a matter of fact, the single most significant result of this legislation would be to create a privileged class of criminals, in that it virtually immunizes lawyers, brokers, accountants and their accomplices from civil liability in cases of securities fraud.

This bad end is reached because of several provisions of the legislation: first, it fails to restore the liability of aiders and abettors of fraud for their actions; second, it limits wrongdoers from providing full compensation to victims of fraud by eroding joint and several liability; third, it could force fraud victims to pay the full legal fees of corporate defendants if the defrauded party loses; and, finally, it retains the short three year statute of limitations for bringing fraud actions, even in cases where the fraud is not discovered until after three years has elapsed.

Mr. President, our 270,000 members stand with you in your commitment to a war on crime; the men and women of the F.O.P. are the foot soldiers in that war. On their behalf, I urge you to reject a bill which would make it less risky for white collar criminals to steal from police pension funds while the police are risking their lives against violent criminals.

Please veto HR1058/S240.

Sincerely,

GILBERT G. GALLEGOS,
National President.

ATTORNEY GENERAL OF NEW MEXICO,
Santa Fe, NM, October 27, 1995.

Hon. WILLIAM J. CLINTON,
The White House,
Washington, DC.

DEAR PRESIDENT CLINTON: As Attorneys General of our respective states, we strongly oppose H.R. 1058/S240, the Securities Litigation Reform Act. The ''draft conference report,'' which is the basis of agreement between the House and Senate bills, would severely penalize victims of securities fraud—consumers, workers, senior citizens, state and local governments. The principal effect of this legislation would be to shield wrongdoers from liability for securities fraud committed against an unsuspecting public.

Any securities litigation reform must achieve a balance between protecting the rights of defrauded investors and protecting honest companies from unwarranted litigation. Abusive practices should be deterred and sternly sanctioned. However, Congress must keep open the doorway to the American system of civil justice for investors to seek recovery of what has been wrongfully taken from them.

If enacted, this legislation would severely curtail our efforts to fight securities fraud and to recover damages for our citizens if any of our state or local funds suffer losses due to fraud. There are several provisions in both bills that would make it exceedingly difficult, if not impossible, for consumers and state and local governments to use the federal courts to recoup losses due to fraud:

Broad immunity from liability for fraudulent corporate predictions and projections; Failure to reinstitute liability for ''aiders and abettors'' under private actions, thereby fully immunizing them from any responsibility for their wrongful actions; A ''loser pays'' provision imposing a significant risk of fraud victims having to pay the defendants' full legal fees;

Severe restrictions on the joint and several liability of wrongdoers, making it impossible for many victims to fully recover their losses; Preservation of an inadequately short statute of limitations (one year after discovery and three years after the fraud was committed); Highly onerous pleading standards; and Elimination of liability under the federal racketeering statute, except after a criminal conviction.

Such extraordinary limitations on our states' ability to recover citizens' tax dollars is of grave concern to us.

As our states' chief law enforcement officers, we cannot countenance such a weakening of critical enforcement against white-collar fraud. Private actions, as a complement to government enforcement, have proven to be extremely effective in deterring securities fraud and in compensating injured investors. This longstanding practice has deterred even greater fraud in the markets and has reduced the burdens that would otherwise accrue as a result of the government having to fully police the markets.

If investors are limited in their right to initiate private causes of action, we fear that victims will turn more and more to the state enforcement agencies, such as the Attorney General, for solutions. There will be more demands on our offices to pursue wrongdoers for fraud, thus increasing the burden on our taxpayers' resources. The legislation would simply force another unfunded mandate on the states.

Effective private enforcement of securities fraud rests on the ability of defrauded investors to take legal action against wrongdoers. Yet there is little, if anything, in the draft conference report that would enhance the ability of defrauded investors to seek redress in the courts, provide enhanced protection for investors or ensure the continued honesty and fairness of our markets. The major provisions of the draft pose significant obstacles to meritorious fraud actions.

While H.R. 1058/S240 would achieve its goal of affording a measure of protection to large corporations and accounting, banking and brokerage firms, it goes so far beyond what is necessary for that goal that it would likely result in a dramatic increase in securities fraud as the threat of punishment declines. This would hurt our entire economy as investors lose confidence in the integrity of our financial markets. This is unwise public policy in light of rising securities fraud and substantial losses suffered by states and public institutions from high-risk derivatives investments.

As custodians of the tax dollars of our citizens, our states have a vested interest in keeping the securities markets safe and secure for investors. The stakes could not be higher for consumers since it is often their retirement savings that are lost in securities frauds. Moreover, the states' economic health, tied inexorably to the nation's economy, depends on continued investor confidence. There must be appropriate recourse to the courts for all investors.

We join the federal and state securities regulators, the state and local government finance officers, mayors and other public officials, labor groups, and all major senior citizen and consumer groups in opposing H.R. 1058/S240.

Given the draft conference report released on October 24th, we strongly urge you to veto the legislation if it is presented to you without substantial amendment to the provisions outlined above.

Sincerely,

TOM UDALL,
Attorney General of New Mexico.

WINSTON BRYANT,
Attorney General of Arkansas.

ROBERT A. BUTTERWORTH,
Attorney General of Florida.

TOM MILLER,
Attorney General of Iowa.

HUBERT H. HUMPHREY III,
Attorney General of Minnesota.

JEREMIAH J. NIXON,
Attorney General of Missouri.

JOSEPH P. MAZUREK,
Attorney General of Montana.

FRANKIE SUE DEL PAPA,
Attorney General of Nevada.

HEIDI HEITKAMP,
Attorney General of North Dakota.

CHARLES BURSON,
Attorney General of Tennessee.

JAMES DOYLE,
Attorney General of Wisconsin.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I understand the Senator from Nevada wishes to speak. I will not take a great deal of time. I do want to respond, however, while the walls are still ringing with the oratory of my friend from Maryland, to some of the particular points that he made. Then I will allow the Senator from Nevada to proceed.

I come at this with some background because I have been the CEO of a company that has been involved in litigation, and I have members of my family who have been involved in this circumstance. I also am not a lawyer and have a little difficulty following the twists and turns of the lawyers talking about the intricacies of rule this or rule that.

The overall point that I think has to be made here is simply this. There is no division between companies and investors. Investors own the company. That which damages the company, damages the owners of the company, who are the investors. So, when the Senator from Maryland talks about pitting investors against the company, he is talking about pitting people against themselves. He implies that this bill helps the company to the detriment of the investors. That, frankly, is impossible. If the company thrives, who gets the money? The investors, the stockholders. If the company survives a market problem and becomes stronger as a result, who benefits? The stockholder, the owner of the company. The two are not separate, in spite of the fact that we have had all of this rhetoric implying that they are.

The most significant problem, from my perspective, with this whole issue has been the attempt to divide the two and imply that the company is doing something to damage the investor and doing it deliberately for the benefit of the company. It simply does not wash. It simply does not track.

Where have these lawsuits come from? They have come from lawyers who have not sought to protect investors and not sought to help the company, but to enrich themselves. I will give you one example that demonstrates the power of this circumstance. Let us say we have a company with 100 shares. Let us keep it very simple. We have a company with 100 shares. We have an investor who owns 1 of those 100 shares. We have another investor who owns 99 of those shares. Keep it very, very simple.

The lawyer would rush to court and file a class action suit on behalf of the shareholder who owns one share on the grounds that the company has been damaged. And when the shareholder who owns 99 shares shows up and says, ''I would like to have a say in how this suit is prosecuted because it is going to damage my 99 shares,'' under the present law we are told, no, the investor with the one share got to the court before you did and he controls the suit and therefore he can make all kinds of claims he wants to in favor of the shareholders.

The shareholder who owns 99 percent of the stock says, ''Don't do me any favors. Don't stand there and file this suit; it is going to damage my interests and, frankly, damage the interests of the shareholder who has one share as well, proportionately.'' Ah, but it does not matter, because the shareholder who has one share as well has a side deal with the lawyer and he is a professional plaintiff and the lawyer will pay him for filing the suit so the lawyer will get the settlement. That is inevitably what happens.

Finally, the company says, ''It is going to cost us $1 million to fight this case.''

''OK,'' says the lawyer, ''you don't want to spend the $1 million? That is fine with me. Let us settle it out of court for $750,000.''

Management says, ''We are not in the business of fighting lawsuits; we are in the business of producing products. Faced with that kind of blackmail, we have to do the best thing—for whom? We have to do the best thing for our shareholders. It will damage our shareholders $1 million to go to court. We can save them $250,000 if we pay this guy his blackmail and send him on his way.''

So they pay the $750,000. The lawyer takes his contingency fee, pays off his professional plaintiff on the side deal, and walks away saying, ''I have protected shareholder rights,'' when what he has really done is looted the company.

What this bill says, what this conference report says, is in a circumstance like that the shareholder with 99 of those 100 shares can go to court and say, ''I am in control of this suit, not the one who has one share, and I move to dismiss.'' And the issue is over.

Who is damaged by this bill under that scenario? The lawyer. Not the shareholder, not the investors; they are benefited by this bill.

One other point I will make and then we can hear from the Senator from Nevada. This bill says there will be a proportionate liability, saying if someone was involved in a loss that was 3 percent that someone's fault, that someone is only liable for 3 percent of the damages.

Oh, that is terrible, we are told. What a chilling effect that will have. Why, accountants and lawyers supporting the company will be immediately up to their eyeballs in fraud because they know they are only liable for a proportionate amount.

That makes for interesting rhetoric on the floor of the Senate. It has little or no relevance to the real world. Let me give an example out of my own experience.

I was an investor in a company that was trying to develop a particular mining project in the Western States. Unfortunately for me and my fellow investors, we did not do very well. For a variety of reasons, a variety of problems, we ultimately had to close down the operation. In the process of doing that whole activity we engaged the services of a very fine lawyer in Los Angeles, one of the premier lawyers of Los Angeles. And he gave us sound legal advice. He helped us through.

A disgruntled supplier working with us on that circumstance kept trying to find some way to drag the lawyer who was helping us into a management role. He kept pushing and probing. I could not understand why. What in the world did he want to get the lawyer involved in the management kinds of decisions of this company that did not go anywhere?

Finally, the fellow leveled with me. He said, ''If we can get into that lawyer's errors and omissions policy and prove that somehow he was involved in a management decision we think was a mistake, his insurance company will pay us a big payoff just to keep it out of court.''

The lawyer we were dealing with was careful enough that did not happen. But that was the motivation. Not to try to solve the problem, but to tap into the deep pocket of the insurance company for errors and omissions insurance that this lawyer prudently carried for his firm.

So they were looking for every possible technicality to get past the management of the firm—the firm, being bankrupt, had no money to offer—and into the errors and omissions policy and the insurance policy of the lawyer. As I say, fortunately he was not successful. But that kind of attitude is the kind of attitude that causes lawyers to say, ''I will not help you,'' which causes his accountant to say, ''I will not take your account, I will not give you the expert advice you will need because I will get caught up in this.'' And it is to protect who? It is the investors who need the services of that lawyer and who need the services of that accountant that this bill is written as it is.

So, Mr. President, I intend to come back to this theme often as we go through this debate. Let us not lose sight of what it is we are trying to do here. We are trying to protect the investor, and the investor, by definition, is the person who owns the company. Anything that damages the company damages the investor. Anything that chills the company's access to sound legal advice and sound accounting counsel damages the investor. Anything that causes the company to pay blackmail, out-of-court settlements damages the company, which damages the investor.

So let us understand through this whole debate what the conference report does, what the bill does, what the committee approach does is to protect the investor. As we listen to rhetoric, saying let us protect the investor and punish the company, let us always keep that basic principle in mind: The owner of the company is the investor.

With that, 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. BRYAN. 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. BRYAN. I thank the Chair. I reserve to myself such time as I may need at this point.

Mr. President, the Senate today is considering the legislation that may well have dramatic consequences for the operations of our securities markets. America's securities markets are the envy of the world. Our markets are the safest, and they enjoy universal investor confidence.

American companies have been able to prosper in large part because of their ability to raise capital in our financial markets. We should all be proud of these markets, yet, at the same time, we must be extremely careful not to jeopardize this investor confidence.

Even though our securities markets are the world's safest, we still have our share of bad apples. There will always be people who feel it is necessary to cut corners, or that they can get away with financial wrongdoing. We have not seen the last of the Keatings, the Boeskys, the Milkens, the Icahns of the 1980's, who penalize the American public by their commitment to greed and avarice, and with horrendous cost to the investors, to the public, and to public institutions as a result of their actions.

The legislation we are considering today will make it more difficult, in my judgment, to bring legitimate fraud cases and will make it more difficult to recover stolen assets.

That having been said, Mr. President, let me be clear that the legislation before us today, although it purports to deal with the issue of frivolous lawsuits, is in point of fact a smokescreen, if you will, the Trojan horse, as I have characterized it, to really get at the heart and substance of this legislation, which is to insulate and immunize perpetrators of fraud from legitimate investor recovery. If this legislation were about frivolous lawsuits, sign me up; count me as being on board. There are some provisions that enjoy universal support. They are incorporated in this bill. Let me mention a couple of them.

There are included in the provisions a requirement that plaintiffs certify individually in each of these securities actions that the actions are brought in good faith, that they are not acting in a frivolous fashion, that, indeed, they are not part of the referral process, all of which I think make a lot of sense and deal with some of the concerns that have been raised by my colleagues on the other side of the aisle.

There are further provisions that prohibit the payment of referral fees to brokers. That, in my judgment, is legitimate and is designed specifically to deal with the issue of potential frivolous lawsuits. The concern is that we should not give stockbrokers, or anyone else, incentives for referral of potential securities fraud cases, and, indeed, these actions ought to be prohibited and the legislation does that.

The legislation also deals with the issue of banning bonus payments to class plaintiffs, and I think this, too, deals with the issue of frivolous lawsuits. It requires the lawyer who has an interest in securities, who brings the action, to have his actions reviewed for potential conflict of interest. That, I think, is highly appropriate, and it calls for improved settlement notice to class members in terms of the proposed terms of the settlement. It contains provisions that limit attorneys fees.

In the original version of this bill, as it passed the Senate, it dealt with the sanction provisions of rule 11, saying that those persons, whether they be attorneys on behalf of plaintiffs or defendants, who take frivolous actions, can, indeed, have the full sanction of the law brought against them.

And this was done in an even and fair-minded way. That, Mr. President, in my judgment, deals with the bona fide, legitimate question of frivolous lawsuits. If that is what this legislation was all about, we would not be having this debate on the floor today. I concur and I suspect that all of my colleagues want to work to eliminate some of the abuses that have occurred in the system. But, Mr. President, that requires a laser-like action to specifically craft legislation that deals with some of the practices that have been abused.

The referral fees to brokers, the bonus payments, the potential conflicts of interest, the improved notice to class members of the terms of a settlement, the limitation of attorney fees and the strengthened sanction provisions of rule 11. That, my friends, is what frivolous lawsuit legislation reform ought to be about. But this goes so much further and, in my judgment, is more about protecting misconduct and fraud than it is about frivolous lawsuits.

Let me point out first, for those who may not be familiar with what is involved in bringing a securities action, let me make a disclosure at the outset I have neither been plaintiff, defendant, nor as a lawyer have I represented anyone in a securities action. But this is what is involved in bringing a securities fraud case.

First, a person must prove that he or she actually purchased the securities. The person must prove that the fraud, the manipulation or deception was in connection with the purchase or sale of a security. The person must prove that a defendant acted with scienter, that is, an intent to deceive or a reckless disregard for the truth or the falsity of the statement.

It needs to be emphasized that negligence, simple ordinary negligence, is not the kind of misconduct that is a predicate for a securities action. So anyone who makes a statement inadvertently or is involved in negligent action does not come within the purview of the provisions of the Securities Act of 1934.

A person must prove a defendant's misstatement or nondisclosure was material, not just incidental, but material. A person must prove that he or she reasonably relied on the defendant's misstatement. A person must prove how he or she was damaged. And, finally, a person must prove a defendant's conduct caused the damages.

Now, those are reasonably difficult things to prove. And they ought to be. They ought to be. I do not have any quarrel with that. These actions ought not to be taken lightly. Our colleagues point out that there is a great expense involved in defending class actions. I acknowledge that. But that is the burden of proof that plaintiffs must submit themselves to under the current law. And it is a rather substantial burden of proof, Mr. President. As I have indicated, with respect to frivolous actions this Senator has no sympathy, and the full provisions of rule 11 under the Federal rules, as strengthened by the version passed by the Senate before this bill went into conference, appropriately deals in a balanced fashion when there has in fact been a finding that a lawsuit has been filed frivolously by a plaintiff or actions by defendants' attorneys are frivolous.

Let me talk for a moment about what is happening in the market. And I would invite my colleagues' attention to a recent Wall Street Journal article. We are not just talking about some remote contingent fraud that may occur in the marketplace. We are dealing with the reality in which, as the Wall Street Journal fairly recently pointed out in a May article earlier this year, in a front page story, the title of which is ''How Career Swindlers Run Rings Around SEC and Prosecutors,'' and the subhead of the story ''White-Collar Crooks Serve Little Jail Time, Leave Billions in Fines Unpaid, The Bad Guys Are Winning.''

Mr. President, this does not appear in the American Trial Lawyers Association Journal. This appears in one of the icons of the business publications in America, the Wall Street Journal. In effect, there is more investor fraud, not less. And even with the resources available at the SEC, this article concludes that the bad guys, in fact, are winning. I offer this as a somber and hopefully sobering assessment that there is massive fraud out there and that we have not seen the last of the Ivan Boeskys and the Mike Milkens or the Charles Keatings. Those are not just some part of a historic record that no longer concerns us in America. There are folks out there every day who, through whatever artifice and device, continue to perpetrate investor fraud. And that ought to suggest to us in this deliberative body that we ought to proceed with some caution as we approach securities litigation reform.

Mr. President, I ask unanimous consent that the Wall Street Journal article of Friday, May 12, 1995, be printed in the RECORD.

Mr. BRYAN. Let me just also invite my colleagues' attention, in a similar vain—here is a similar business publication called Crain's New York Business, the date of which is December 4th through the 10th, 1995. It cannot be much more contemporary than that. That is this very week. And its headline indicates ''New Scams for a new generation.'' The subhead is, ''Driven by high-tech rip-offs, financial fraud is soaring.'' That, Mr. President, is a publication of this very week, ''financial fraud is soaring.'' And I again ask unanimous consent that this publication be printed in the RECORD.

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

[From the Wall Street Journal, May 12, 1995]

HOW CAREER SWINDLERS RUN RINGS AROUND SEC AND PROSECUTORS

(By John R. Emshwiller)

SANTA MONICA, CA.—For more than a quarter century, Ramon D'Onofrio has been playing games with the law—and mostly winning.

The 67-year-old Mr. D'Onofrio, operating out of a modest office suite at the airport here, is a master stock swindler. He is responsible for fleecing the public out of tens of millions of dollars in the course of numerous stock manipulations, say officials who have tangled with him in about 20 civil and criminal investigations. A federal appeals court once referred to him as ''ubiquitously criminal.''

Mr. D'Onofrio has been convicted of fraud-related crimes five times and is once again under investigation, people familiar with the case say. Yet he hasn't spent a day in prison in the past 20 years—and he served only about a year behind bars before that. His most recent criminal conviction came in 1991; he received probation. While the Securities and Exchange Commission has ''permanently'' enjoined Mr. D'Onofrio from future violations of securities laws, it has done so *seven* different times. Meanwhile, he has left unpaid about $11.5 million in fines and civil judgments.

BILLIONS IN UNCOLLECTED FINES

Mr. D'Onofrio isn't alone. Hundreds of career swindlers, many of whom have infiltrated legitimate industries ranging from securities to health care, are laughing all the way to the bank—with other people's money. ''If you have the aptitude and you're enough of a sociopath, there are few places where the pickings are as easy'' as swindling, says Scott Stapf, investor-education adviser for the North American Securities Administrators Association, a group of state regulators.

Data gathered from government agencies show that it takes far longer to bring white-collar criminals to justice than perpetrators of other crimes. Once apprehended and convicted, swindlers generally receive light sentences—frequently nothing more than probation and a fine. Often, as with Mr. D'Onofrio, they aren't compelled to pay back what they have stolen; extraordinarily, about $4.48 billion in uncollected federal criminal fines and restitution payments is currently outstanding.

While nobody argues that high-priority battles against drugs and street crime should be neglected, many white-collar-crime investigators contend that the devastating impact of fraud isn't sufficiently appreciated. Rough estimates by government agencies and others indicate that white-collar crime costs Americans more than $100 billion annually. And increasingly, free-lance stock swindlers are joining forces with organized crime, to the benefit of both.

VICTIM COMMITTED SUICIDE

''These are people who are stealing millions from working-class Americans. These are people who ruin lives,'' says John Perkins, until recently Missouri securities commissioner. The former regulator still recalls a Thanksgiving Day nearly 20 years ago when a local farmer, after having mortgaged his property and lost the money in an investment swindle, committed suicide by shooting himself in the head. Quinton Darence Cloninger, who was convicted of helping run that swindle, was out of prison after three years—and back in the investment business. He couldn't be located for comment.

Over the years, Mr. D'Onofrio and his ilk have benefited richly from the fact that civil authorities don't have much enforcement clout without the backing of the criminal-justice system. Criminal prosecutors, in turn, aren't always interested in white-collar offenses—and may be becoming less so.

Consider the SEC civil injunctions that Mr. D'Onofrio and others so often ignore. Violations of such injunctions—which often bar the individual from working in the securities industry—can lead to criminal-contempt charges and jail time. But, SEC officials concede, contempt is a rarely used weapon. Records supplied by the SEC show that only a handful of criminal-contempt cases have been brought in the past five years.

RELUCTANT PROSECUTORS

For one thing, the agency has to persuade a U.S. attorney's office to prosecute a contempt case. The chances of that happening are usually ''slim to none,'' says one SEC attorney, particularly since criminal-contempt cases usually don't produce long sentences. Many prosecutors are loath to put in time on a case where the potential payoff is small.

In 1990, at the SEC's request, the U.S. attorney's office in Salt Lake City did bring a criminal-contempt case against Mr. D'Onofrio. According to a complaint filed in federal court there, Mr. D'Onofrio violated a 1982 court injunction requiring disclosure of his significant stock holdings, an order that resulted from an earlier SEC lawsuit over stock manipulation. Mr. D'Onofrio pleaded guilty, was given probation and continued his career unimpeded.

Mr. D'Onofrio declined numerous requests for an interview for this article. ''Some people do talk to the press and some people don't,'' says his attorney, Ira Sorkin, the former head of the SEC's New York regional office. Mr. D'Onofrio ''falls into the latter category,'' adds Mr. Sorkin, who won't talk about his client either. (As an assistant U.S. attorney in New York 20 years ago, Mr. Sorkin helped prosecute a criminal case in which Mr. D'Onofrio was an unindicted co-conspirator.)

Contempt isn't the only criminal charge available in swindling cases; frequently, scam artists can be prosecuted criminally under fraud or racketeering laws. But Philip Feigin, a Colorado regulator and current president of the North American Securities Administrators Association, bemoans a ''vicious cycle'' in which securities regulators, investigators and prosecutors often relegate criminal statutes to an ''afterthought.''

BURIED BY DOCUMENTS

One reason is that white-collar criminal cases often eat up enormous amounts of time and resources. Stewart Walz, a veteran federal prosecutor and former head of the criminal section of the U.S. attorney's office in Salt Lake City, recalls one complex white-collar case several years ago that required a quarter of his section's attorneys for a five-month trial. Although multiple convictions resulted, Mr. Walz asks: ''How many other cases went unprosecuted?''

On average, it takes more than 10 months for a white-collar criminal case to be filed in court from the time it is referred to a federal prosecutor's office, according to national statistics gathered by the Transactional Records Access Clearinghouse at Syracuse University in New York. That is nearly three times as long as for the average drug case. Complex, document-laden white-collar cases frequently take years to complete.

When prosecutors do bring fraud charges, they often end up disappointed with the sentences that result. The latest federal prison statistics show that the median jail term for fraud is just 12 months; even violators of pornography and prostitution laws receive 33 months behind bars, while drug traffickers are sent away for a median of 60 months. A check of state sentencing statistics in California and Florida, two centers of white-collar crime, also shows large disparities in sentences between fraud and drug trafficking.

James Sepulveda, a prosecutor in the district attorney's office of Contra Costa County in Northern California, says he has helped convict hundreds of white-collar criminals during the past 14 years. Some 90% of them, he estimates, received probation: ''The bad guys are winning,'' he says.

Such experiences have made prosecutors increasingly reluctant to take on many potentially promising cases. These days, if a case is worth less than $1 million, some big-city prosecutors won't even touch it, experts say.

A major factor is the nation's war on drugs, which has been overwhelming prosecutors' offices, courts and prisons. In 1985, for instance, only 34% of the federal prison population was serving time for drug-related crimes. Today, the figure is 62%. As recently as the early 1980s, the average federal prosecutor handled about the same number of white-collar and drug cases each year, according to the Syracuse University group. By 1993, that same prosecutor was handling nearly twice as many drug matters as white-collar cases.

Of the thousands of white-collar cases filed by the federal prosecutors annually, only several dozen involve alleged securities fraud, according to records of various government agencies. The SEC keeps only what an agency spokesman terms a ''spongy'' count of such cases.

POOR RECORD KEEPING

Though Justice Department officials agree that drug cases have been getting more and more attention, they insist that the agency's commitment to prosecuting white-collar cases hasn't diminished. They note that in recent years the department has focused increasingly on particularly complex and time-consuming white-collar cases. While not great in number, these prosecutions tend to have a significant impact, they say.

Nonetheless, the scarcity of government record keeping in this area seems to underscore the relatively low priority given to white-collar crime. The Federal Bureau of Investigation, for example, annually gathers from more than 16,000 local and state law-enforcement agencies detailed statistics on crime ranging from murder to auto theft. That survey doesn't include fraud, for which much less detailed information is assembled. FBI officials say they are working on a new reporting system that will gather more information on white-collar crimes, but they don't expect it to be in place before the end of the decade.

For its part, the SEC has established no formal system for identifying or tracking repeat offenders. Nor does it always know their whereabouts. During a recent interview, Thomas Newkirk, an associate director for enforcement, proclaims that Thomas Quinn is safely ensconced in a European jail. But Mr. Quinn, one of the major stock manipulators of the 1980s—who regulators say was responsible for as much as several hundred million dollars in investor losses worldwide—has been out of jail for months and is living on Long Island, N.Y. Mr. Quinn says he isn't involved in the securities business and ''never will be again. I am just trying to get on with my life.''

William McLucas, the SEC's enforcement chief, says there ''should be a place in the system'' to deal ''harshly'' with securities-law recidivist, and that the agency does its best to make sure they are brought to justice. But he also notes that the SEC has to regulate thousands of public companies and investment advisers and a vast mutual-fund industry. ''We have a whole lot of market realities we are trying to keep pace with,'' he says. ''So we must make some hard judgments about where to put resources.''

CASES MOVE SLOWLY

Some of these judgment calls have made life easier for Mr. D'Onofrio. The two most recent SEC lawsuits against him—one filed in Los Angeles federal court in 1993, the other in New York federal court last September—were years in the making and involve alleged stock manipulations that occurred, in some cases, more than a half-decade earlier.

Such time lags aren't uncommon, SEC officials say. The continuing criminal investigation, which involves some of the same activities as the two civil cases, also seems to be moving at a glacial pace. Hovhanness ''John'' Freeland, an alleged D'Onofrio confederate in one of the civil cases, pleaded guilty to criminal stock fraud in a related case in New York federal court. He entered that plea more than two years ago but hasn't been sentenced yet. Mr. Freeland, who is back in the business world, declines to be interviewed, and prosecutors won't comment on the criminal case.

When charges are brought against Mr. D'Onofrio, he is as likely to quit as to fight.

Indeed, Mr. D'Onofrio's success with the law has stemmed partly from his willingness to cooperate when caught. This has helped keep his incarceration time to a minimum, even though by the early 1970s he was clearing as much as $1 million annually in stock manipulations, according to one court ruling.

In one early instance of cooperation, Mr. D'Onofrio agreed to be the main witness against his former business associate and onetime state-court judge, Joseph Pfingst, in a bankruptcy-fraud case in Brooklyn, N.Y. Mr. D'Onofrio was sentenced to probation after helping get Mr. Pfingst convicted; the former New York judge got a four-month term.

MAKING ''A LOT OF MONEY''

In another case against an alleged co-conspirator, Mr. D'Onofrio testified readily to his own role as a ''manipulator of stocks'' who causes ''the price of the stock to rise by fraudulent means and in the process makes a lot of money,'' according to a federal-court opinion. But Mr. D'Onofrio has always been extremely secretive concerning anything that might interfere with his continuing prosperity. In one case, he was jailed 22 days for contempt rather than discuss his overseas bank accounts.

Lately, Mr. D'Onofrio has been dabbling in new business ventures, aided by a 1990 SEC rule change. ''Regulation S'' allows a company to sell stock overseas without going through the time-consuming and expensive disclosure procedures normally required to sell new stock in the U.S. The idea is to give companies a tool for raising capital. Such is the latitude of Regulation S that the SEC doesn't even track which firms do such transactions.

Law-enforcement officials say they believe Mr. D'Onofrio and others have been using Regulation S to obtain millions of shares of stock, which they fail to pay for or buy at a deep discount, then resell to the public before the price of the stock crashes.

The SEC has voiced concern about possible Regulation S abuses but has done little to curb them. In 1991, the agency did file suit in Washington, D.C., federal court against several defendants in a Regulation S transaction involving a small Tucson, Ariz., company, Work Recovery Inc. The SEC obtained injunctions and disgorgement orders against the defendants, whom the agency charged with failing to pay for 1.5 million Work Recovery shares and then illegally selling a substantial number of these shares to U.S. investors.

Though one of Mr. D'Onofrio's firms was Work Recovery's investment banker, the SEC didn't name him or the firm in its suit. The agency declines to say why. Work Recovery later sued Mr. D'Onofrio and others in Denver federal court and won a default judgment of nearly $9.5 million in April 1993. It remains unpaid.

In a 1992 interview, Work Recovery President Thomas Brandon recalled being impressed by Mr. D'Onofrio's plush office suite, chauffeured limousine and seeming dedication to helping small companies such as his raise capital through Regulation S transactions. Mr. Brandon said the pitch ''was almost evangelical in tone.''

Mr. D'Onofrio and his associates recently latched onto another small publicly traded company, Madera International Inc., a Calabasas, Calif., firm with a bizarre past that included plans for an automatic-weapons factory in China. By last year, Madera had a new business—exporting timber from Nicaragua—and a new investment banker, First Capital Network Inc.

Mr. D'Onofrio has been operating from First Capital's Santa Monica office. According to several individuals who have done business with the firm, he was involved in financing and stock transactions for First Capital, despite an outstanding court order barring him from ''acting as a promoter, finder, consultant, agent or other person who engages in . . . the issuance or trading of any security.'' Repeated requests for comment from company officials, left by phone and in person at the firm's office, received no response.

MADERA STOCK COLLAPSED

Madera Chairman Daniel Lezak says of Mr. D'Onofrio that ''it was my impression that he helped run the firm.'' Mr. Lezak says, and SEC filings confirm, that First Capital arranged the transfer of millions of new shares of Madera stock to itself or offshore buyers at no cost or at deep discounts through Regulation S and other transactions. Mr. Lezak says he believes much of that stock was quickly dumped in the U.S., a move he believes contributed to Madera stock's dropping to about 10 cents a share from a high last year of more than $3. Mr. Lezak says he fired First Capital as Madera's investment banker, but says he still sometimes consults with firm officials,

Mr. D'Onofrio has had serious heart problems of late, law-enforcement officials say. But he appears to be passing his accumulated knowledge to others, including his 34-year-old son Mark, who for the past several years has been working with his father.

Already, the younger Mr. D'Onofrio has been the subject of three SEC injunctions for alleged securities-law violations. He recently pleaded guilty in connection with federal conspiracy and fraud charges filed in Los Angeles federal court as part of the criminal investigation that also involves his father. Mark D'Onofrio remains free pending sentencing, scheduled for later this year. His attorney, Mr. Sorkin, says the son, like the father, doesn't talk to the press.

But Mr. Brandon, the Work Recovery executive, recalls a dinner conversation where Mark D'Onofrio talked of how he ''was proud of his father's doggedness'' and wanted ''to follow in his father's footsteps.''

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

[From Crain's New York Business, Dec. 4–10, 1995]

NEW SCAMS FOR A NEW GENERATION

DRIVEN BY HIGH-TECH RIP-OFFS, FINANCIAL FRAUD IS SOARING

(By Judy Temes and Geri Willis)

John Chilelli believed in two things: technology and radio talk show host Sonny Bloch.

Looking for a way off the rough-and-tumble docks of Bayonne, N.J., the longshoreman, 37, plunged nearly half his savings—$22,000—into a high-tech investment in paging systems last fall. His dream was to earn enough to leave his 90-hour-a-week job operating a crane to buy a Pizza Hut franchise.

''I figured if Bloch had his own show all these years, and he's telling people to buy this, it's gotta be on the up-and-up,'' explains Mr. Chilelli.

But federal authorities say Mr. Bloch lined his own pockets working in collusion with a number of advertisers to hustle ill-advised and fraudulent high-tech investments to loyal listeners, ultimately stealing $21 million.

Mr. Bloch says he is innocent of any wrongdoing, but today he sits in jail awaiting trial.

The Bloch case is emblematic of how technology has unleashed an unprecedented wave of investment fraud that is ripping off consumers for billions of dollars. Investors are attracted to technology because they have seen the way it has changed their own lives. Many are also searching for the next Microsoft Corp. Instead, they are being lured into phony deals in interactive video, mobile telephones, pager systems and wireless cable.

Technology is not only transforming the products sold by these investing hucksters; it is also dramatically changing how they do business. Today's snake oil salesmen are reaching more people than ever by broadcasting their message over the Internet, as well as radio and television. They bounce their offers off satellites and communicate via conference calls, 900 numbers and late-night infomercials.

Carefully mimicking legitimate providers of investment advice, scam artists have mastered direct mail techniques, lifting new headlines and even stories to make their appeals sound authoritative.

Mr. Bloch went one important step further. He co-opted legitimate media, employing 200 radio stations, satellite technology and a telemarketing operation to broaden his reach. Once in investors' living rooms, he studded his show with noted experts. A string of book titles and frequent public appearances cemented his credibility with listeners desperate for a trustworthy, accessible financial adviser.

By some estimates, people like Mr. Bloch are costing Americans $100 billion a year. The Securities and Exchange Commission's caseload has climbed 30% in five years, while at the same time, criminal convictions by state regulators have quadrupled. Investment fraud complaints to state and federal agencies are soaring, with 50,000 logged by the Federal Trade Commission in the past three years.

AMERICANS FACE LIFE WITH FEWER FINANCIAL GUARANTEES

Behind this rise in financial fraud is a sea change in personal investing patterns. A new generation of Americans is facing life with fewer financial guarantees. Many no longer believe that Social Security will provide for their retirement. Medicare programs are under siege. The number of workers with fully company-funded pensions is dwindling. Home values, once the foundation of a typical family's net worth, are eroding.

Facing the prospect of outliving their savings, more people are buying stocks, bonds and mutual funds—one in three American families, compared with only one in 17 in 1980. Each week, these newly minted investors plow some $9.6 billion into mutual funds alone.

But most are ill-prepared for this new burden. Lacking investing skills, the postwar generation confronts an array of complex products and is dazzled by thousands of options. For example, there are now twice as many mutual funds—5,600—as there are stocks listed on the New York Stock Exchange.

Investors are confused because even legitimate firms can't be entirely trusted. Big brokerages still pay incentives to salesmen to hype products. The media adds to this charged environment by tantalizing investors with the possibility of high returns. ''Quit young and enjoy the rest of your life,'' beguiles a recent Money magazine cover.

''Investors are clearly more vulnerable,'' says Arthur Levitt, chairman of the SEC.

At stake is nothing less than the future prospects of millions of investors: their retirement funds, their children's college education money and the resources to care for their aging parents.

The longshoreman, Mr. Chilelli, has been forced to put his dreams on hold. ''I feel foolish,'' he says. But, he asks, ''How do you tell what to invest in? Who do you trust?''

TECHNOLOGY BLINDS INVESTORS

Bob Shifman was getting a sick feeling in the pit of his stomach as he listened to a slick promoter pitch wireless cable television to a roomful of retirees last June.

Richard Horne described wireless as the cellular telephone of the 1990s, a technological miracle capable of providing better service at lower costs. Why, he asked, would reasonable people invest in an unpredictable stock market or in real estate with such a ''tremendous opportunity'' available?

''This is an excellent place to park your money,'' Mr. Horne concluded.

Even as the room erupted into applause, Mr. Shifman thought of the $15,000 in savings he had sunk into the enterprise. The Jersey City retiree had planned to give the money to his two adult children and six grandchildren.

Eleven months later, the U.S. Attorney's office filed an indictment charging the operators of the wireless venture, known as Greater Columbia Basin, with defrauding consumers of a total of $21 million.

Among those implicated were Sonny Bloch, James Barschow, Joseph Glenski, Bruce Schroeder and Milton Sonneberg. Five others have pleaded guilty to felony charges that they worked with Mr. Bloch, including Steven Wiegner. Mr. Wiegner, who was president of Mr. Bloch's Independent Broadcasters Network, pleaded guilty last week and is cooperating with the government.

Mr. Horne, meanwhile, has been named as a defendant in an investor suit against Columbia, but lawyers representing investors have been unable to track him down.

Crooks are selling schemes and products with a high-tech spin to a generation that has eagerly watched laptop computers, cellular phones and interactive multimedia change the way people work and play.

Con artists use this fascination to lure investors into a variety of ploys that use interactive video, mobile telephones, pager systems and wireless cable. But the smartest ones don't stop there. They pitch Wall Street's own computer-based products and trading techniques—derivatives and arbitrage—to a gullible public eager to emulate the securities industry's savviest traders.

''Technology has the interest of people,'' says Stephen Gurwitz, an attorney at the FTC. ''The schemes follow the headlines.''

PERSONALLY ENDORSED BY SONNY BLOCH

Wireless cable fraud alone costs investors half a billion dollars each year, the FTC estimates. The SEC has filed 21 wireless cases in the past three years. The FTC, which investigates instances of misrepresentation, has filed 14 high-tech cases since 1990, five this year alone.

Such a scam cost Ray LaCava $30,000—money he received from a car accident that disabled him for life. Well invested, Mr. LaCava thought, that money could buy his daughter an annuity, or perhaps even set her up in business.

A paging license seemed ideal. The Long Island resident had made a successful high-tech investment before; he says he netted half a million dollars a decade earlier on a cellular phone license.

''I knew paging was up and coming,'' recalls Mr. LaCava. ''I was noticing more and more people with beepers.''

When salesmen from Manhattan-based Breakthrough Technologies Inc. called last fall, Mr. LaCava was primed to listen. For $7,400 per license, Breakthrough would conduct engineering studies and file an application for Mr. LaCava to ensure him of a prime operating area. The company was personally endorsed by Sonny Bloch, who described Breakthrough President Michael Taylor as his ''good friend.'' Says Mr. LaCava. ''That clinched it for me.''

Salesmen from Breakthrough took Mr. LaCava and a dozen other investors to a legitimate conference at the Newark Marriott hotel held by paging equipment manufacturer Motorola, which knew nothing about Breakthrough. A limo ride and dinner were part of the package.

Mr. LaCava forked over $22,200 that night in a five-for-three deal, buying licenses in Kansas City, Mo., Louisville, Ky., and three other cities.

BIG FEES FOR USELESS LICENSES

He never received the licenses. Principal Michael McGuinness, using the name Michael Taylor, put off Mr. LaCava for two months, cancelling meetings and blaming the delays on government bureaucrats. Investors finally stopped buying the excuses and reported Breakthrough to postal inspectors last December. Mr. McGuinness pleaded guilty to charges of mail fraud earlier this year.

Like Mr. LaCava, many investors have made millions off such new technologies as cellular telephones, heightening interest in high technology. Holding out the promise of similar huge returns, hustlers charge unsophisticated investors as much as $7,500 to file a license application that could be filed with the Federal Communications Commission for as little as $50. They justify the expense by promising engineering, and population studies.

Often, the studies are never delivered. When they are delivered, they usually prove worthless. And that's just the beginning of the subterfuge.

Investors are often misled about the capability of the technology or simply the location of the licenses that they apply for. Little is said about the heavy responsibilities that accompany the ownership of a license, such as a requirement that owners build transmission towers and stations costing hundreds of thousands of dollars.

Investors in Manhattan-based Metropolitan Communications Corp. were told that their specialized mobile-radio licenses would become part of a nationwide wireless telephone network, according to an FTC complaint. For an initial investment of $7,000, investors were allegedly told, they could make as much as $58,000 a year before expenses.

In less than two years, roughly 2,500 investors funneled $28 million into the deal. About half of them signed separate agreements to lease their licenses to a manager, expecting the manager in turn to pay them a stream of income that would resemble an annuity.

The manager was really a sister company of Metropolitan. Both companies, authorities say, lacked the capital to properly build the towers that would make the system work.

The company tired to mislead regulators by building at least 300 temporary towers, according to Danny Goodman, who was appointed by the U.S. District Court to take over the company last year. In each location, the company would broadcast for a day or two, pull down the tower, shove it into a van and move it to the location of the next license, where workers would go through the same motions.

''Metropolitan thought it would fool investors,'' says Mr. Goodman. It did—until the FTC stepped in. The agency filed a complaint against Metropolitan in January 1994 and froze the assets of its central players.

Metropolitan principal Sheldon Jackler signed a consent order last year agreeing to cease operations. But he has since decided to fight the government's case and disputes some of the government's claims. His lawyer, Stephen Hill, says Metropolitan had every intention of making the system operable, but its plan was interrupted by the court-imposed receivership.

TARGETING THE SAVINGS OF RETIREES

Some investors are so mesmerized by the promise of high-tech products that they even entrust their retirement money to these products.

In an elaborate ruse, Jerry Allison and Qualified Pension Investments Inc. of Scottsdale, Ariz., convinced retirees to sign over their entire retirement accounts to the ''IRA approved'' pension administrator.

''There is no such legal statement as 'IRA approved,' '' says Kenneth Lench, SEC branch chief, whose Washington office filed a QPI complaint.

QPI should have acted as a disinterested third party in administering the accounts. Instead, Mr. Allison's company allowed backers of phony wireless cable operations to mail QPI brochures to prospects alongside their own promotional materials. In return, the Scottsdale company stuffed those retirement accounts full of worthless wireless cable investments. The company took in $270 million of retirement money from 14,500 people nationwide between 1991 and 1994.

Mr. Allison faces a trial on the SEC complaint that he misappropriated at least $4.5 million in retirement funds. A subsequent receiver's report shows that as much as $9.5 million may be missing.

SCAM ARTISTS IMITATE WALL STREET

Scam artists also have followed Wall Street into complex financial instruments. Chuckles Kohli of Princeton-based Sigma Inc. said he could make investors returns of 10% a month using derivatives and exchange-traded options to develop lucrative currency arbitrages.

''All the banks are getting rich doing swap derivatives,'' an elderly investor later told authorities. ''I wanted to share in it.''

Another individual pumped more than $100,000, just about all of his retirement fund, into a portfolio managed by Mr. Kohli.

''There were these people I knew who were living a lot better than I was, driving nicer cars, without the income I had,'' says the 52-year-old father of three. ''I said, 'Oh shoot, I could live like that, too.' ''

Mr. Kohli took in about $40 million from investors, according to court documents filed by the Commodity Futures Trading Commission and the U.S. Attorney's office in Newark.

He allegedly violated a host of securities rules: He never registered as a commodity pool operator, and he mingled investor dollars. During his four years in business, he never filed a single tax return. And to top it all off, he lost $20 million of investors' money while telling them they were reaping huge returns.

He squandered another $5 million on expenses, which included a personal limo driver, go-go dancers and a strip bar.

He was indicted for mail fraud and is now in jail awaiting trial.

THE UNDERSIDE OF THE INTERNET

Forget the old boiler rooms were high-pressure swindlers pitched penny stocks and other risky investments. Today's hustlers have jettisoned the phone banks for computers, modems and the Internet to broaden their audience and lower their costs. They're using computer-generated mailing lists, satellite transmissions and radio networks to appeal to millions of potential targets.

The new scam artist appears on late-night television and uses desktop technology to produce pitches that mimic those of legitimate personal investing experts.

These tools have made financial fraud so easy to perpetrate that one search for cybercrooks nabbed a 19-year-old hacker peddling an investment in eel farms. His tools: a personal computer and an active imagination.

Nowhere does the possibility for abuse loom larger than on the Internet and on-line services, where investor chat lines burn 24 hours a day with stock tips and ideas.

While activists criticize on-line services for their unwitting role as purveyors of pornographic pictures, the real smut is often financial. A recent visit to America Online found these dubious offers:

Stop Paying Income Taxes Legally . . . Get a letter from the IRS stating: ''You are not liable for income taxes.'' This is honest, legal and REAL.

$250,000 by Christmas or Sooner!!! Call the World's Most Profitable Number.

Get out of the DEBT Cycle! . . . Stop putting your banker's kids through school or paying for his new swimming pool!

Investors who would be wary of a telemarketer are less suspicious of an electronic pitch—particularly when it is personalized.

''There is a clubby mentality. It's like hanging out at the campfire at Malibu,'' says Mark S. Herr, New Jersey consumer affairs director.

A recent SEC case shows how electronic schemers get close to their prospects. The initial hook was an ad on Compuserve, where subscribers were promised ''High Returns for Investors!!'' last July. People who responded to that pitch were mailed an authentic-looking contract describing a $12,000 ''prime bank'' investment.

Gene Block, a Durham, N.C., business consultant, gained the trust of investors by chatting with them through e-mail. He promised that their investments would double in just six months and were protected by top bank guarantees, says the SEC in a complaint.

But Mr. Block was really a member of an international ring that marketed these phony investments, scoring $1 million for their efforts. So far, the SEC has recovered $250,000 from the bank accounts of the scheme's originator, Renate Haag, who is believed to have fled to her native Germany.

But the scheme is noting new. The SEC has 24 other prime bank cases on the books, and more are on the way.

''In the old days, you had the boiler rooms where you had to hire 20 people to make thousands of phone calls to sell fraudulent securities. Now one person can do this by the push of a button,'' says James B. Adelman, former head of enforcement of the SEC's Boston office.

Mr. Block faces a trial on the SEC complaint. His attorney, Paul Prew, doesn't deny that his client participated, but says, ''He was used as a pawn by people who knew better or should've known better.''

Con artists are combining PC power with other technology. Richard Welch, formerly the operator of a fantasy telephone sex line, drew on his knowledge of 900 numbers to develop a Ponzi scheme in which people were invited to invest in a worldwide lottery service said to be sponsored by North American Indian tribes.

The con was a one-two punch that started with telephone and fax solicitations. Early investors in the ruse then used e-mail and computer bulletin boards to recruit others, according to a complaint filed by the SEC.

By harnessing the power of these technologies, Mr. Welch and his coconspirators drew in 20,000 people in a four-month period. The agency is still trying to locate Mr. Welch, who has not responded to the complaint.

SCAM ARTISTS DIALING FOR DOLLARS

But crooks don't have to be experienced Net surfers to benefit from technology: Simple PC desktop publishing software allows stock front-runners, for example, to design professional-looking newsletters to push up the prices of the stocks they hold.

Others are also using computers to find and track good targets. In one of the fastest-growing telemarketing ploys, ''recovery rooms,'' fraud artists use computers to build lists of people who have already been defrauded so they can be tapped again.

According to an FTC complaint, Meridian Capital Management Inc. promised to recover money that victims had lost in telemarketing schemes, sometimes passing itself off as a regulatory agency. For 10% of their original loss, the Las Vegas firm told investors, it would launch a class-action suit, or tap a performance bond said to be posted by the first round of crooks.

''The idea was to entice consumers to send good money after bad,'' says FTC staff attorney James Reilly Dolan.

Meridian collected $1.6 million from 800 people, many of them New Yorkers, in just eight months.

Acting on a request from the FTC, a court froze Meridian's assets in August, and the company is no longer in business.

Mr. Dolan says such pitches are particularly convincing because the swindlers know details about the victims, often including the exact amounts they have lost.

Lists of potential targets cost $5 a name for initial leads, but $15 for the names of people who've already been fooled once.

Hackers' use of technology is also giving them a leg up in evading their trackers. Once a cyber-huckster gets a hint that someone is on his tail, he can easily move on.

''You cancel your account with your online service and vaporize,'' says Richard Lee, assistant regional director in the SEC's New York office.

Regulators lack the tools to go after some of the more subtle misrepresentation that occurs on the Internet. Investor bulletin board postings are singed only by names similar to CB handles. Because of the anonymity, people can easily camouflage their identities. A stock touter, for example, can be a broker, a savvy penny-stock promoter or even the president of the company.

Mr. Herr, the New Jersey consumer affairs director, concedes that regulators are playing catch-up.

''We are in the embryonic stage,'' he says. ''Right now, the bad guys are ahead of the good guys.''

Mr. BRYAN. With that background, one might rightly inquire, why should the Congress be considering legislation that makes it more difficult for defrauded investors to bring and win cases? The simple answer is that those who advocate this conference report in its present form, in my judgment—and I say this with all due respect—are legislating by anecdote and clearly lawyer bashing.

I understand that lawyers are a difficult group to love. I fully acknowledge that some of my lawyer friends have been guilty of misconduct and that there are indeed frivolous lawsuits filed. But in our effort to focus on frivolous lawsuits, in my judgment, the provisions of this piece of legislation effectively emasculate private investor protection.

During the debate today, we will hear repeatedly how often our high-technology companies are sued. What we will not hear a lot about is suits brought by one company against another. Mr. President, this legislation does nothing and says nothing about one company's right to sue another company. The sole focus of this legislation is lawsuits brought by private investors as part of a class action proceeding.

Let me again invoke the Wall Street Journal, if I may. This was an article that appeared in December 1993. Its premise was ''Suits by Firms''—that is other companies—''Exceed Those by Individuals.'' Let me just read one paragraph, if I may, that I think illustrates the thrust of this article.

Preliminary data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court.

Let me repeat that because I know that it tends to run counter to the prevailing myth about what is actually occurring in the so-called litigation explosion.

Preliminary data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court.

I know that is not the accepted view, and it goes contrary to the conventional wisdom that is being espoused on the floor that there is this explosion of class action lawsuits. But that is what the Wall Street Journal has to say.

Mr. President, I ask unanimous consent that the Wall Street Journal article to which I have made reference, of Friday, December 3, 1993, be printed in the RECORD.

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

[From the Wall Street Journal, Dec. 3, 1993]

SUITS BY FIRMS EXCEED THOSE BY INDIVIDUALS

(By Milo Geyelin)

Businesses may be their own worst enemies when it comes to the so-called litigation explosion.

Preliminary data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court. Trailing behind are personal-injury suits and product-liability cases brought by individuals.

This result—while limited to federal courts—seems to challenge companies' frequent claims that personal-injury plaintiffs' lawyers are the main engines of litigation in America. And it may force some companies to review their own penchant for using the courts to resolve commercial disputes.

The finding is part of an ongoing study by University of Wisconsin sociologist Joel Rogers and RAND Institute for Civil Justice senior researcher Terence Dunworth. Ultimately, by looking at 1,908 companies that have been ranked among the Fortune 1000 from 1971 to 1991, the study will chart federal trends industry by industry and company by company.

The results so far, presented in draft form at a symposium at the University of Wisconsin's Institute for Legal Studies two weeks ago, also show that the once-steady annual increases in overall legal filings involving Fortune 1000 companies peaked in 1987 and have declined 21% since then. Similarly, business litigation involving smaller companies and individuals peaked in 1986 and has since dropped 12%.

When cases are broken down by category, the study shows that labor and civil-rights claims have increased in recent years. So have filings involving a single product such as asbestos-related injuries. Otherwise, product-liability suits against Fortune 1000 companies have actually dropped, from a high of 3,500 in 1985 to 1,500 in 1991.

''I know that business doesn't want to hear that, but these data don't seem to lie,'' says Mr. Rogers.

The reasons for the various litigation patterns are far from clear, however. For example, says Mr. Rogers, the high incidence of commercial legal disputes among businesses may be the result of their litigiousness or may just reflect the increase in the number of contracts in effect—and thus potentially subject to dispute—in a growing economy.

In either event, the results suggest that by pointing the finger at plaintiffs' lawyers, business leaders and advocates of legal reform may be bypassing other contributors to the overburdened civil-justice system, at least in the federal courts.

In response to the study's finding, legal-reform advocates voiced skepticism about what the federal-court results may mean. ''The overwhelming majority of product-liability claims are filed in state courts,'' says Victor Schwartz, a lawyer-lobbyist in Washington, D.C., who represents backers of a proposed federal law to rein in some product-liability claims.

State courts are generally regarded by plaintiffs' lawyers as friendlier forums for personal-injury and product-liability claims than federal courts, and most suits against local businesses and manufacturers would more likely be filed in local courts. But comprehensive state-court data are nearly impossible to compile. So studies of state systems have been confined to a limited number of courts. Thus, few useful comparisons can be made with the federal numbers.

Responds RAND researcher Mr. Dunworth: ''It's better to light a candle than to curse the darkness. Even if that's all you're doing by looking at federal courts, you're further ahead than you were.''

Messrs. Rogers and Dunworth relied on a computer database of more than four million federal lawsuits between 1971 and 1991 to identify 2.48 million suits that involved at least one business entity. Fortune 1000 companies were involved either as plaintiffs or defendants in 457,358 of those suits, or nearly 20%, according to the study. Not surprisingly, they were defendants in virtually all personal-injury cases (95%) and in most labor and civil-rights cases (85%). In contract disputes, Fortune 1000 companies sued each other as often as they were sued.

To get a more detailed look at how Fortune 1000 companies compared with other litigants—such as other businesses, governments and individuals—the study examined 405,908 cases that landed in federal court solely because the parties came from different states, thus creating so-called diversity of jurisdiction. Since 1985, records in such cases have indicated whether either party is a corporation, large or small.

According to these records, 43% of the civil lawsuits involving Fortune 1000 companies between 1985 and 1991 were contract disputes. For smaller corporations, the percentage was even higher—51%. Taken together, business disagreements, whether among individuals, companies or corporations, made up nearly half of all federal litigation in this sample. Federal suits over contracts outpaced any other single category of litigation.

Yet even these cases are on the decline now. Contract lawsuits peaked at 10,253 in 1987 and dropped 30% to 7,182 in 1991. A key reason, corporate legal experts say, is companies' growing willingness to settle disputes through arbitration and mediation. ''When you have businesses suing businesses,'' says Shelby R. Rogers Jr., general counsel for the Texas Medical Association, in Houston, ''you find that getting to the courthouse takes a number of years . . . and as a result we see many more businesses going to different forms of alternative dispute resolution.''

But Mr. Rogers, of the Texas Medical Association, says he is yet to be persuaded that federal litigation trends bear any relation to what's happening in jurisdictions such as the Texas state courts, long regarded as among the most pro-plaintiff in the country. And even Mr. Dunworth concedes there's ''a great deal of uncertainty about what's taken place in state courts.'' But he adds: ''if there are significant trends at work (generally), they surely must be evident in federal courts.''

Lawyers at big firms nationwide rank Cravath, Swaine & Moore as their toughest competitor, followed by Skadden, Arps, Slate, Meagher & Flom and Wachtell, Lipton, Rosen & Katz. The three New York-based firms are followed by Wilmer, Cutler & Pickering, of Washington, D.C.

The survey of about 1,300 large-firm lawyers at 158 firms was conducted by Global Research, an arm of London-based Euromoney Publications PLC, as part of a larger study of law-firm management practices.

In addition to leading the overall rankings, Cravath was first choice in three of the 19 subspecialties in which respondents also were asked to nominate blockbuster competitors. The hard-charging Wall Street firm, whose partners have been known to boast that its cafeteria is as crowded at dinner as it is at lunch, was seen as dominating in tax, securities and asset finance.

Skadden eclipsed others in mergers and acquisitions, while Wachtell led in banking; the second-ranked firm in both categories was New York-based Shearman & Sterling. Other champions included Fulbright & Jaworski, Houston (arbitration and litigation); Weil, Gotshal & Manges, New York (bankruptcy); Simpson, Thacher & Bartlett, New York (antitrust); O'Melveny & Myers, Los Angeles (corporate); and Sidley & Austin, Chicago (environment).

(Mr. CAMPBELL assumed the chair.)

Mr. BRYAN. Mr. President, there are a number of reasons why I oppose this legislation, and I would like to very briefly make reference to some of the primary reasons. My colleague, Senator SARBANES, indicated in a very thoughtful and very comprehensive statement why he was opposed, and I share and associate myself with his comments.

If this was designed to be balanced legislation, something that fairly dealt with the frivolous lawsuit problem in America, and yet at the same time protecting private investors who have been defrauded, I think it would be very easy to craft a piece of legislation.

Every regulating body that I know of, from the Securities and Exchange Commission to the North American Association of Securities Administrators, all have urged upon us to deal with a serious problem concerning an unduly restrictive and shortened statute of limitations. The Lampf case of 1991 shortened the statute of limitations for class action suits to 1 year from the point of discovery, a 3-year bar. Everyone who is involved in protecting investors from fraud acknowledges that this is too short, and, indeed, when we discussed changes in this legislation in 1993, my colleagues on the Banking Committee said, ''Yes, we would be willing to go along with this change in the statute of limitations, but it must be done in the broader context of overall reform.''

Mr. President, that is what we are purporting to do today. Disagree as I may with the thrust of much of which, in my judgment, undermines the ability of innocent private investors to recover from fraud, this is a comprehensive review, but I think it is indicative of the bias that infects this legislation, that this has nothing to do with protecting investors, this purports in no way to be fair and balanced. This is simply designed to immunize perpetrators of wrongdoing from legal responsibility, from their reckless misconduct that has caused great loss to individual investors, to pension funds, to securities portfolios held by cities, counties, States, and universities and colleges in America, because although we have tried, there has been an unwillingness, a refusal to right the statute of limitations problem.

That has nothing to do with being frivolous—nothing to do with being frivolous. The statute of limitations bar that currently operates prevents the most meritorious of cases from being brought if it exceeds the current 1 year from the point of detection, 3 years overall bar. The Securities and Exchange Commission has testified that even with the enormous resources brought to bear by the Federal Government, all of the investigators, all of the staff, that it takes them more than 2 years to conduct such an investigation before they are prepared to bring an action involving investor fraud under the Securities Act. How much longer does it take a private investor without all of the resources available to the Federal Government to, indeed, conduct such an investigation and make a determination whether individually or as a class they have been subjected to investor fraud.

Aiding and abetting. The great case, and we will say more about this later this afternoon, but the Keating case is one that has become a symbolic case involving the amount of investor fraud by Mr. Keating's actions. Ultimately, $262 million was recovered in that case on behalf of investors. That is recovered. That means that there has been a determination that, indeed, investor fraud occurred and that the individuals bringing that action were, indeed, damaged to that extent.

Seventy percent of the recovery in that case—70 percent—was by those who are aiders and abettors. Mr. Keating himself, having become bankrupt, or judgment proof, was unable to respond in damages. That is, plaintiffs filing against him could not recover from Mr. Keating because he did not have any money, and yet there were those who were involved in this very crafty, complicated, extensive, comprehensive and pervasive fraud—lawyers, accountants, and others—whose actions substantially contributed to this fraud who would be aiders and abettors who, under this legislation, are now immunized.

We sought to restore the provisions of aiding and abetting, having nothing to do, Mr. President, with a frivolous lawsuit. We are talking about individuals who have been determined to have been guilty of reckless misconduct that caused damage to private investors; they are now going to be immunized from this liability. That has nothing to do with the frivolous action, the proportionate liability that Senator SARBANES talked about extensively.

Again, the whole theory of our system of American jurisprudence is one of balancing the scales of justice. On one hand, we are talking about individuals who are totally innocent. All they did was to respond to an entreaty or a sales approach to buy securities, subsequently finding themselves defrauded as a result of the purchase of those securities, and, subsequently, it is determined that individuals who are reckless in their actions—ordinary negligence, there is no liability for ordinary negligence. So those simple mistakes, mishaps that all of us are aware of in life, we are not talking about that kind of conduct. We are talking about reckless misconduct.

We are now saying that in terms of balancing, who should accept the benefit, who should bear the burden, we are now saying, Mr. President, that those individuals who are guilty of reckless misconduct, that their liability is limited only to the proportion that the court finds them to be responsible.

The practical consequences of that, as in the Keating case, for example, where you have the primary perpetrator bankrupt, is that the innocent investor is unable to secure full recovery, because what we are talking about in this legislation is to limit that liability to the proportionate amount.

So if the determination is made that there is only a 20-percent liability or fault found with respect to the reckless defendant and that the 80-percent liability under this hypothetical would be the primary defender and the primary defender is bankrupt, that is it. That is it, even though it is the conduct of the reckless defendant that contributed to the loss. That, Mr. President, has absolutely nothing to do with a frivolous lawsuit. That is a value judgment as to who ought to be protected: the innocent investor or the individual whose reckless conduct contributed to the loss.

For eons of time under the common law, in those situations the public policy has always been weighing these scales of justice that the burden ought to fall on the individual whose reckless conduct contributed to the loss rather than to have that burden borne by the innocent investor who was not responsible in any way at all. Again, this has nothing, absolutely nothing, to do with a frivolous lawsuit.

Rule 11 is the provision under the Federal Rules of Civil Procedure that is available to sanction lawyers who bring frivolous lawsuits. I believe that the proponents of this legislation, in the Senate version, hit it right on the mark. Whether one is a plaintiff's lawyer or a defendant's lawyer, if that lawyer is involved in frivolous action, the full sanction of the law ought to attach, and that lawyer ought to pay the cost as a result of undertaking that frivolous action. I have no quarrel with that at all. That is the way it was when it left the Senate, Mr. President. But what has occurred is part of this ongoing and skewing process, having nothing to do with frivolous lawsuits. Everything is weighted in this legislation toward protecting those who perpetrate fraud and those attorneys who represent them, because now the full force of the sanction only applies to plaintiffs' lawyers. Defendants' lawyers who are guilty of frivolous actions are not subjected to the same standard. It has been pointed out by Senator SARBANES that the pleading requirements are more difficult. That, too, has nothing to do with frivolous lawsuits.

Finally, although it is a bit arcane, are the so-called safe harbor provisions. I want to comment for a moment on safe harbor. Prior to 1979, one could not make what is called a forward-looking statement—that is, predictive conduct about the security because such and such is going to happen next week, next month, or next year. The reason why that is the rule is that because those kinds of future predictions have been the subject, historically, of overstatements, making it very easy to mislead people by false encouragement: "Buy this stock and you are going to be a big-time winner"—that type of thing.

In 1979, for the first time, they permitted forward-looking statements. I do not come to the floor as a Member of this institution as an expert in securities law. Whether that was a good provision in the law, I do not know. But in doing so, the SEC did recognize that there was great risk and great danger because those people who sell and offer these securities oftentimes get carried away and make such optimistic and rosy predictions that people are misled. And so the standard that was employed was that you could make these forward-looking statements and you were protected from liability if your statements were made, first, in good faith and, second, with a reasonable basis.

As I say, I am not an expert in this area, but that strikes me as being a pretty reasonable standard. There is no liability, even though the statements may be inaccurate or misleading, if they were made in good faith and with a reasonable basis.

Now, Mr. President, as a result of the action taken by the conference, even statements that are false, totally false—we are not talking about misleading or inaccurate; we are talking about totally false statements—are protected. That is, those who offer those statements now enjoy no liability if they simply add cautionary language. "Yes, this stock is going to triple, but there may be a contingency out there in the future that if the economy goes sideways on us, that may not happen." Just cautionary language. That is pretty outrageous, in my view, once again, this having nothing to do, in my view, with frivolous lawsuits but having everything to do with protecting those individuals who make statements that turn out to be inaccurate and misleading and immunizing them from liability.

Now, our securities investor protection system in America is really predicated on three individual pillars—two of them governmental, one in the private sector. Clearly, the Securities and Exchange Commission at the Federal level has the ability to assist in protecting the marketplace from fraud and to provide the measure of investor confidence that has characterized the American securities market. Many of my colleagues who have had State experience know that each of the States have securities offices which also serve as an adjunct to protect the public from investor fraud. But recognized as being extremely important in policing the market and providing for that investor confidence that characterizes and distinguishes the American securities market as no other securities market in the world is the ability of private investors, through class actions, to bring cases themselves. The SEC fully acknowledges that, and so it is that protection which is being undermined by this legislation.

In fact, the Congressional Budget Office, which is invoked with a level of respect and devotion that I have not seen in my previous 6½ years here in this institution, has estimated that as a result of what this piece of legislation does in terms of preventing access by private investors who are victimized by fraud, it would require another $25 to $50 million a year in addition to the existing budget of the SEC to offset that loss. That is, it is recognized under the current system that the SEC cannot adequately police the securities market, and its philosophical predicate is that the private investor, through the class action mechanism, is a very important function. We now, in my judgment, render that private class of action much less viable in protecting the marketplace. Some 11 attorneys general have complained about these changes and have characterized this as an unfunded mandate.

We hear repeatedly, and we will hear during the course of the day, that this legislation is absolutely necessary because the mainspring of the private enterprise system that all of us respect and acknowledge as having created the highest standard of living for us in America, or anyplace in the world, is that as a result of these lawsuits, private investor actions, the securities market has been limited in terms of the ability of the entrepreneur, the startup company, to generate the kind of capital needed to bring new products and services into the marketplace. We will hear that ad nauseam.

Here are the facts. The Dow Jones industrial average recently exceeded the 5,000 mark. In 1995, we have seen the Dow Jones rise higher in 1 year than at any previous year in its history. Initial public offerings—that is, the mechanism used to generate this capital by new companies and other companies who are wishing to develop a new product or service—have risen by 9,000 percent in the last 20 years. The capital raised as a consequence of those new offerings has increased by 58,000 percent. That is good news for Americans. I am pleased to hear it. I think all of my colleagues should be. But it does not make the argument that the proponents of this bill assert that this legislation—to immunize this whole category of malefactors—is necessary in order that businesses can generate the kind of capital needed to bring new products into the marketplace.

We will also hear that investors invariably sue every time the stock drops to any degree, regardless of their reasons. Let me again make the point, Mr. President, that the evidence simply does not support this.

In fact, the University of California study of 589 stocks that dropped more than 20 percent in 5 days showed that only 3 percent were sued by investors. This is a far cry from the perception that proponents of this legislation will try to paint.

We will also hear investor suits are filed just to get a quick settlement. Here again, the evidence is to the contrary. The SEC testified that surveys show most judges in these cases believe frivolous litigation is not a major problem and could be dealt with adequately through prompt dismissals.

We have also heard there has been an explosion of these class actions. Mr. President, that is simply not true. Of all of the civil actions brought in the Federal court system—all of them, from soup to nuts, all of them—about 0.1 percent involve class action security cases—0.12 percent is the precise number.

If you look at a table over the last 20 years from 1974 to 1993, you will see that the number of cases filed have remained essentially the same. This is a document prepared by the Office of the U.S. Courts, indicating that about 270, 260 are actions filed a year—no change—even though in the past 20 years the population in America has grown substantially.

Of the 14,000 companies listed on the exchange, about 120 each year find themselves being sued; about 120.

I think we just need to put that in perspective as we go through legislation here that radically changes the system that has worked essentially well for us in America, admittedly requiring the fine tuning I alluded to in those provisions that, in my opinion, deal legitimately with the frivolous lawsuits.

This is a meat ax approach. Make no mistake, its purpose is not to protect against frivolous lawsuits. It is to limit liability or to insulate liability from a whole category of persons whose conduct caused the investor loss.

The conference report would preclude many consumer institutions and State and local governments from recovering their losses in Federal courts when they are defrauded in the financial market.

The conference report takes the worst features of the Senate bill and combines them with many of the most dangerous provisions in the House version.

This legislation will harm consumers, consumers who have savings in retirement funds, stocks, bonds, mutual funds, or other investments. In fact, it will harm taxpayers who depend on the financial stability of their State and local governments in places like Orange County, as an example.

That is why, notwithstanding the efforts of the proponents of this bill to portray this—if you are for starting entrepreneurial companies, if you are for eliminating frivolous lawsuits in the marketplace, you should support this legislation; if you want to help the trial lawyers, you should be opposed to it. That is not what this is all about.

That is why the National Association of State Financial Officers—those would be the State treasurers, comptrollers, however the State financial portfolio is managed—the national association of these groups has expressed its strong opposition. So, too, has the National Association of County Treasurers and Financial Officers. The national association that deals with municipal financial officers and the national association that deals with the portfolios and securities managed by America's universities and colleges also oppose this legislation.

Also, the National Council of Senior Citizens, the National League of Cities, the National Association of Counties—I will not belabor the record with all of these—the Fraternal Order of Police, all have expressed their strong opposition, and for the same reason that I have alluded to, because it is far, far beyond what is needed to address the legitimate concern of frivolous lawsuits as it relates to securities actions.

I know there are a number of my colleagues who need to speak. I will just be very brief. Let me say I will comment in more detail. Some of you who voted for this legislation when it passed the Senate—some said on the floor and to a number of us, ''Look, if this thing moves in the wrong direction in conference, I will reconsider my position.'' To those of my colleagues who voted albeit somewhat reluctantly for this legislation when it passed the Senate, let me say that it is materially worse now than it was as it left the floor of the Senate.

With respect to the provisions dealing with the safe harbor provisions, the pleading requirements, the balance of equity and fairness of rule 11, the proportionate liability provisions have been made much more onerous. All of these provisions, including the RICO provisions which, as the bill left the Senate, concluded that, if any individual were convicted of a RICO fraud, then all that were involved would be subject to RICO sanctions in terms of the measure of damages that can be recovered—that has been greatly eliminated.

Perhaps even more perniciously, the provision that left the Senate dealt with the Securities Act of 1934. Now we have brought in the Securities Act of 1933 which deals with a whole different category of actions and we have applied many if not all of the provisions of that. I invite my colleagues' attention to that.

I yield the floor.

Mr. BENNETT. Mr. President, I will allow my colleagues to proceed, but I did want to respond briefly to some of the comments made by the Senator from Nevada, having been on the floor through his entire statement. I think there are a few points we need to make and then I will sit down and let my colleague proceed.

As I took notes from the comments of the Senator from Nevada, his first point listed how difficult it is to prove fraud. He gave us seven things he said are hard to prove. I agree with him completely. These are hard to prove. They are also very easy to allege and an alleging of these things is what leads to the settlements out of court that are the problem for many of the companies we are dealing with.

Second, he quotes from the Wall Street Journal. He quotes from Crain's, saying fraud is soaring; the Wall Street Journal headline, ''The Bad Guys are Winning.''

My only comment is if indeed that is so, why are not the Bill Lerach's of this world going after those bad guys instead of conducting the kind of practice that we have seen described here on the floor in the previous debate?

Third, he makes the point that the biggest number of suits are between companies, not class action suits on behalf of the individual investors. He says this bill does not address that.

I agree with him, this bill does not address that. If he feels that is a problem that needs to be addressed, he can file a bill that addresses that. The fact this bill does not address that does not mean that the issues the bill does address are not meritorious and need not be addressed.

Then he talks about the statute of limitation. There has been a lot of debate about that. I only make the point that this bill does not change the present level of the statute of limitation. We are not talking about putting a heavier statute of limitation burden than currently exists. We are talking about allowing the current law to continue.

Fifth, he talks about the great loss to cities and pension funds that cannot be recovered if we cannot go after the aiders and the abettors. Earlier in his statement he said we are being given evidence by anecdote on the part of those of us in support of this bill, but he gives us no anecdote to show the great loss by cities and pension funds except the anecdote that we hear again and again—and he brought it up under these circumstances—of Charles Keating.

Well, I take some time to make the record very clear on Charles Keating, because we hear that again and again as the anecdote of what we will lose if this bill is passed. I will make these points, Mr. President.

Most of the losses from the savings and loan scandal did not result from securities fraud. They resulted from outright criminal activity and looting the assets of the companies. They do not fall under the purview of this bill at all. They are simply irrelevant to this discussion. Even those S&L losses that did result in part from securities fraud would have been recoverable under this bill. It does not in any way, ex post facto, go back and say, if this bill had been in law at the time, you could not have gotten this recovery, you could not have gotten this recovery.

Why do I say that? Here are the reasons. Statements by Keating and his cohorts would have failed every one of the stringent preconditions in the conference report safe harbor provision for forward-looking statements. Every one of Keating's statements and his people's statements would have been actionable had this report been law.

Second, the conference report would not have immunized the alleged aiders and abettors because the conference report authorizes the SEC to take enforcement action against aiders and abettors, and the Keating investors would have recovered fully even without those aiding and abetting claims.

Third, the conference report would not have rendered Keating's actions time barred. It would have no impact on the statute of limitations in those areas because, as I say, it does not change current law, and all of the actions under Keating were brought within the applicable timeframe. Therefore, the Keating thing does not apply there as an anecdote.

We must understand that Keating's fraud did not apply to forward-looking statements. They made flat statements of error about the past. They lied flat out about what had been done. This bill does not protect anybody who is going to lie flat out about the past.

The conference report would not have empowered Keating's cohorts to control the litigation. Under this bill, they would be as liable as they were in previous law. It would not have delayed or imposed any obstacles to the actions that were taken. The conference report does not, as some claim, inflexibly require courts to stay discovery every time a motion to dismiss is filed. It would have had no effect if this bill had passed—it would have no effect on the damage awards. Joint and several liability would still have been available under the fact circumstance of Keating.

I could go on and on. The point I want to make is very clear. It is a red herring in this debate to talk about Charles Keating and the S&L disaster because this legislation would have had no impact whatsoever on the Government's ability to proceed in criminal action or an individual investors' ability to proceed in class actions against Charles Keating.

The comment was made that the safe harbor will now allow people to lie. No, it will not. If you make a false statement, the one referred to as an example by the Senator from Nevada, ''The stock is going to triple,'' this bill does not protect you because you cannot make a prediction about what is going to happen to the stock under current SEC regulations and not be called in violation of those regulations for that.

What you can say is we believe we will be able to make the marketplace with our widget on such and such a date, and that we will have X numbers of copies of that widget.

But why would any executive make that statement if he did not believe it were the case? Nothing could be more damaging to his company or his reputation or his credibility as an executive than for him to make that kind of statement, meeting in front of securities analysts at the time of an IPO. You want to be very careful to preserve your credibility with the investment community.

No, this is not the problem, CEO's making statements to securities analysts. I will tell you what the problem is and why we need a safe harbor. Let us say, within your company you have two engineers who are examining your product. Engineer A says, ''I do not like the way this thing works. I would like to fine tune it.'' Engineer B says, ''I disagree with you. I think it works just fine and it is ready for market.'' Along comes one of these strike suits and the discovery starts and the lawyer gets ahold of engineer A's position and immediately he stands up and says, ''Mr. Chairman,'' speaking to the CEO of the company, ''you have within your files a document where one of your employees told you absolutely this product was defective.'' He is quoting engineer A. He conveniently does not quote engineer B, who disagrees with him. And, there you are, you have made a false statement. And, ''If you did not know the product was defective, you should have known the product was defective.''

That is the problem. That is the kind of thing that happens over and over again in these circumstances, and that is why people settle. We are not talking about CEO's standing up and predicting the stock will triple when we talk about a safe harbor. We are talking about safe harbor for people who make statements that they believe are true at the time and then will get trapped in this kind of activity that I have described later on.

Finally, we come to the point where the Senator from Nevada says there is no need for this. There has been no explosion of these strike suits. This is not a phenomenon that has suddenly hit us.

I close by quoting. He quotes from appropriate publications. I have a few that I would like to quote from. The first one, the Washington Post on the 18th of November, 1995. Referring, in an editorial, to this bill it says:

> The bill was a response to a genuine outrage. A small number of lawyers have developed a technique of pouncing on any company whose stock price suddenly drops sharply. They then comb through past statements by the company to find the conventional expressions of hope for the future—and sue on grounds that those statements have misled and defrauded investors. That's a highly strained definition of fraud, but the present state of law makes this kind of suit very dangerous to a company. Although these are nominally shareholders' suits, they generally are instigated and controlled entirely by the lawyers. The companies most vulnerable to this destructive tactic are a particularly valuable kind—small, recently established high-tech firms whose stock prices tend to be volatile.

And then from the Economist magazine dated December 2, 1995, in another editorial, ''Suits or Straitjackets,'' the subhead says ''The American Congress wants to make it harder for some shareholders to sue companies for fraud. This would be a good thing.''

The editorial says the following:

> Class-action lawsuits, in which a bunch of investors join together to sue a firm whose shares have fallen sharply, are a growing problem for America's high-tech companies. More than 650 such suits have been filed in the past four years alone, including ones against each of the ten biggest firms in Silicon Valley. There is nothing wrong with investors using the courts to protect their rights. But a growing number of these suits are being brought by those who are victims not of corporate misinformation, but of their own (and their lawyers') greed. As a result, many managers now hesitate to offer investors any predictions at all, lest they end up in court.
>
> That is why Congress is about to pass a measure that would make frivolous securities lawsuits harder to bring. Among other things, the bill, which should clear both the House and Senate easily, does three things. First, it allows firms to issue forecasts to investors providing that they list all of the important factors—a change in interest rates, say, or a slump in the consumer-electronics industry—that could affect them. Second, a defendant's auditors and equity underwriters would no longer be liable for the full extent of shareholders' losses, but only for those that are caused by their own misbehavior. Third, the bill encourages judges to slap fines on lawyers who bring groundless suits.

The final paragraph of the editorial summarizes it very well. It says:

> As a general rule, it is a good idea to allow shareholders to protect themselves. This would not change under the proposed legislation. And in exchange for reform, they would

get more (and better) corporate information on which to base their investment decisions. Mr. Clinton faces a choice. Either he can veto the bill on the mistaken ground that he is protecting shareholders' rights, or he can sign it and help put more money in their pockets.

Mr. President, I ask unanimous consent that the full text of both editorials be printed in the RECORD.

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

[From the Washington Post, Nov. 18, 1995]

ANTIDOTE TO THE STRIKE SUIT

It started off last winter as a flamboyant ideological statement. But the bill to curb shareholders' strike suits has now been whittled and sanded by many hands into a truly useful piece of legislation. An intemperate initiative is turning out to be much more promising than seemed possible last March, when the House originally passed it.

The bill was a response to a genuine outrage. A small number of lawyers have developed a technique of pouncing on any company whose stock price suddenly drops sharply. They then comb through past statements by the company to find the conventional expressions of hope for the future—and sue on grounds that those statements have misled and disfrauded investors. That's a highly strained definition of fraud, but the present state of the law makes this kind of suit very dangerous to a company. Although these are nominally shareholders' suits, they generally are instigated and controlled entirely by the lawyers. The companies most vulnerable to this destructive tactic are a particularly valuable kind—small, recently established high-tech firms whose stock prices tend to be volatile.

The new Republican majority in the House rushed to defend them. It was one of the promises in the Contract With America. But they overdid it. In their zeal to do away with constraints on the entrepreneur, they wrote sweeping language that would have protected a lot of real fraud—and would also have protected those lawyers and accountants who earn fees by turning a blind eye to it.

The Securities and Exchange Commission objected vigorously. To their credit, the congressional Republicans slowed down and took another look. After months of negotiation the SEC's chairman, Arthur Levitt, has now given his assent to a much-modified version of the bill. It would succeed in making spurious fraud suits much riskier to the plaintiff, but without hampering investors who have real grievances.

Before President Clinton signs it, the administration needs to address one remaining point. The statute of limitations in these cases is now only three years. With highly complex investments increasingly common, it can easily be a matter of years before customers discover a fraud. Five years is a more reasonable limit. With that further improvement, this bill would make securities law much fairer both to companies and to shareholders.

[From the Economist, Dec. 2–8, 1995]

SUITS OR STRAITJACKETS?

It is a familiar story. Soaraway Shares Inc, a budding Silicon Valley firm, launches a sexy new software product for the Internet. Its managers predict booming sales and boundless profits. Suitably impressed, investors pile in and the firm's share price takes off. But a year later the product flops, the shares plummet—and disgruntled investors head for the nearest courtroom.

Class-action lawsuits, in which a bunch of investors join together to sue a firm whose shares have fallen sharply, are a growing problem for America's high-tech companies. More than 650 such suits have been filed in the past four years alone, including ones against each of the ten biggest firms in Silicon Valley. There is nothing wrong with investors using the courts to protect their rights. But a growing number of these suits are being brought by those who are victims not of corporate misinformation, but of their own (and their lawyers') greed. As a result, many managers now hesitate to offer investors any predictions at all, lest they end up in court.

That is why Congress is about to pass a measure that would make frivolous securities lawsuits harder to bring. Among other things, the bill, which should clear both the House and Senate easily, does three things. First, it allows firms to issue forecasts to investors providing that they list all of the important factors—a change in interest rates, say, or a slump in the consumer-electronics industry—that could affect them. Second, a defendant's auditors and equity underwriters would no longer be liable for the full extent of shareholders' losses, but only for those that are caused by their own misbehaviour. Third, the bill encourages judges to slap fines on lawyers who bring groundless suits.

Although the bill has broad support in Congress, President Clinton may still be tempted to veto it, party because it is bitterly opposed by two of his biggest supporters: consumer advocates and trial lawyers. Not only will the bill give managers a license to lie, these groups say, but firms' auditors and underwriters will no longer have any incentive to catch them in the act. The bill's critics also fear that when shareholders do have a legitimate gripe against a company, lawyers may be deterred from bringing the case by the threat of a penalty if it is ultimately thrown out.

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These fears sound reasonable enough. But they ignore a crucial fact: financial markets thrive on information. The more investors know about what managers are thinking, the better they are able to gauge the risk of investing, and to commit their resources accordingly. They need not (and should not) treat the views they receive as gospel. Indeed, firms' shareholders have proven time and again that they can be better than managers at deciding what is important. The problem with the explosion of frivolous lawsuits is that it is discouraging companies from giving out much-needed information. As a result, the entire market suffers.

Admittedly, striking the right balance between protecting shareholders' rights and encouraging more openness is tricky. But the bill's trade-off is a good one. Although the reforms make it harder to bring groundless lawsuits, they do not prevent regulators from prosecuting swindlers. Nor do they let auditors and underwriters off the hook—though by limiting their liability they make it harder for class-action lawyers to win settlements from firms that have simply fallen on hard times. A mere drop in a company's share price usually is not evidence of fraud but the consequence of plan bad luck.

As a general rule, it is a good idea to allow shareholders to protect themselves. This would not change under the proposed legislation. And in exchange for reform, they would get more (and better) corporate information on which to base their investment decisions. Mr. Clinton faces a choice. Either he can veto the bill on the mistaken ground that he is protecting shareholders' rights, or he can sign it and help put more money in their pockets.

Mr. BENNETT. Mr. President, I thank the Chair. I thank my colleagues. The distinguished Senator from Connecticut, one of the original cosponsors of this bill and one of leaders of this fight for more years than I have been in the Senate, is now on his feet, and I am delighted to yield to him such time as he may require.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, first of all, I would like to thank my colleague from Utah for his eloquent statement in response to some of the charges that were raised about this piece of legislation and the inclusion of editorial comment and note of major publications about the worthiness of this legislation.

Mr. President, let me begin by laying out for our colleagues some idea of the amount of labor and work that has gone into this bill. We are here today debating a conference report, the final step in the legislative process before this bill is either sent to the President for his signature or veto. I think it is important to note how much effort and how much work have gone into producing this bill that our colleagues will be asked to vote on later today.

Mr. President, Senator DOMENICI and I began this effort more than 4 years ago. In fact, the effort and discussion began even earlier than that, but the first bill was introduced 4 years ago, and the House bill was introduced at roughly the same time. So we have been at this for some 1600 days, if you want to put it in category of days. This is not something that just sort of came up a few weeks ago. I know that it was mentioned in this so-called Contract With America, but the bill has a history that predates that by several years. It has been considered, in fact, Mr. President, in three Congresses now. This will be the first time in three Congresses we are actually going to vote on a bill that will allow it to go to the executive branch.

We have had 12 congressional hearings on the bill before us. We have heard from almost 100 witnesses on this legislation. We have almost 5,000 pages of testimony that have been accumulated. We have had a total number of six staff reports totaling 300 pages. We have had some 103 submissions to the record, and we have had testimony from eight Members of Congress both pro and con on this. The SEC, the Securities and Exchange Commission, has testified on 13 different appearances. The Chairman of the Securities and Exchange Commission has testified four times and his predecessor has testified four times.

So, Mr. President, what we are talking about here today is a piece of legislation that has been considered in great detail. The bill passed the U.S. Senate by a vote of 69 to 30 several months ago and by a vote of 325 to 90 in the other body after extensive hearings there. And obviously, with those vote totals, it was passed on a bipartisan basis in both Chambers.

So I think it is important for our colleagues and the public at large to know that this is how the Congress ought to do its business. This bill has been changed, it has been worked upon, it has been reformed, it has been analyzed, and in 1,000 different ways, over the past 4 years.

We have put a great deal of time and effort into producing a bill that we think—those of us who have authored it and supported it—by and large deals with what everyone now admits and acknowledges is a serious problem. Prior to this, Mr. President, when we first offered the legislation, there was the threshold debate of whether or not there was any problem at all. In fact, many of the people who have spoken here today against this bill argued initially very strenuously that there was no problem at all—none whatsoever.

So I am encouraged at least that we have put aside the debate and discussion about whether or not we are addressing a legitimate problem. Even the opponents of this legislation now admit that there was a serious problem that needed to be addressed. They disagree with certain provisions here. Most of their disagreements deal with what we were not able to include in the legislation. I will get to this in more detail in a moment.

But as one who offered a number of the suggestions, two particularly that did not make it into the bill, you do not make the good the enemy of the perfect here. We have a very sound piece of legislation that deals with a legitimate issue, and that does not deal with every single problem Members would like. But there is certainly no reason whatsoever to disregard and to reject this legislation in its entirety. That would be a huge mistake. Even editorial comment that disagrees with the bill, Mr. President, acknowledges the tremendous work product and the positive things included in this legislation.

So, Mr. President, again, because at the end of these debates sometimes the people who have done such a tremendous amount of work are rarely noted or recognized, let me begin by thanking my colleague from New Mexico with whom I have worked so very, very closely on this legislation, our colleague and the chairman of the Banking Committee, Senator D'AMATO, for his leadership on this and moving aggressively in this Congress to see to it that we complete the hearing process and the legislative business of the Senate, and, of course, my colleague from Utah, who has been tremendously helpful on this bill as well.

Let me also compliment and thank my colleagues who disagree with us. Senator SARBANES has been tremendously cooperative and helpful in seeing to it that we would have a debate and has not engaged in the kind of procedural tactics that were available to him to delay consideration of this legislation. Senator BRYAN, whom our colleagues had the privilege of hearing just a few moments ago, while he disagrees with this bill, has brought very worthwhile ideas and suggestions and note to the legislative process; Senator BOXER of California, as well, who disagrees with the bill but who has offered some positive insight as to how we might proceed.

I also would be remiss if I did not recognize those people who work for these Members, who spent literally hundreds of hours in negotiations. I mentioned the amount of time spent at hearings and pages of testimony. I cannot even begin to calculate the number of legislative staff hours spent in negotiations and efforts to work on this product that now is before us in this conference report. Certainly, Andy Lowenthal of my office, who is seated to my left, has done a tremendous job on this bill, along with Diana Huffman of my office and Courtney Ward; from Senator D'AMATO's office, Howard Menell, Bob Guiffra, and Laura Unger have done a tremendous amount of work; and Senator DOMENICI's office, Denise Ramonas and Brian Benczkowski have done tremendous work; Mitchell Feuer in Senator SARBANES' office, along with Brian McTigue in Senator BOXER's office.

There are many others. I apologize for not referencing all of them, but I want our colleagues to know and others that, again, in addition to the work the Members do, the staff's participation and involvement has been significant.

So, Mr. President, I am very pleased to be standing here this morning as the Senate begins the final consideration of the conference report on S. 240 and the House companion bill, H.R. 1058, the Private Securities Litigation Reform Act. This legislation is fundamentally important not only for thousands of American businesses, but more importantly I think to literally tens of millions of American investors. That is what this bill is all about. It is not about the businesses. It is not about the trial bar. It is about the investors, the people who take their hard-earned money and invest it in American business and industry that provide the quality of life and growth in this country that we have seen over the past number of decades.

Passage of this legislation, we believe, will help restore integrity and fairness to the country's private securities litigation system. And through this reform, Mr. President, the bill will defer, we believe, abusive and frivolous lawsuits that needlessly drain millions—in fact, billions—of dollars out of our emerging industries, the biotech industries, the high-tech firms that are the businesses and industries that drive the engine of this country's economy in the 21st century.

These are not just small questions. Each dollar that a company must spend on responding to America's meritless securities lawsuits, known as strike suits, is a dollar that could instead go to improving investor return, increasing research and development, expanding plants and, most importantly, creating the jobs in this country, the good-paying jobs that are critical for the health and well-being of this Nation.

In other words, Mr. President, the consequences, in my view, of failing to approve this conference report could not be higher. Mr. President, we have gone well beyond the day, as I said earlier, when we must argue about whether the securities litigation system is broken. It is painfully clear, Mr. President, to almost everyone, including the opponents, that the idea that there are no problems is just wrong, and there are massive flaws in the system as it is currently operating.

In fact, just last January, Mr. President, Arthur Levitt, the Chairman of the Securities and Exchange Commission stated—this is last January at one of our hearings: ''There is no denying,'' he said, ''that there are real problems in the current system—problems that need to be addressed not just because of abstract rights and responsibilities but''—listen to this, Mr. President—''because investors in markets are being hurt by litigation excesses.''

The problems in private securities litigation have become so deep, Mr. President, and so deep rooted that we do not have the luxury, in my view, of idly waiting for the courts or some regulatory body to fix them for us. Everyone who knows anything about the present system—everyone—will tell you it must be changed, that it does not work, except for a few of the attorneys who benefit as a result of the current system.

One of the core problems, Mr. President, afflicting private actions under rule 10(b) is that such actions were never expressly authorized by the Congress. This is not based on some laws we passed here but instead have been construed, if you will, and refined by the court systems in this country, with Congress sort of going along because we never acted to change it. It was not as a result of legislation passed through long and extensive debates but rather interpretations by the courts over the years.

We all know what that leads to, Mr. President. It is precisely the lack of congressional involvement that has created conflicting legal standards for bringing such actions and has created so many holes within the foundation of the private action that it threatens the very system itself—unequal justice, a patchwork. Just watch where a lot of the lawsuits are brought, and you will understand exactly what I am talking about.

There is forum shopping going on all over the country because the trial bar in this particular area of law knows that in certain jurisdictions they are favored and others they are not. So you have this tremendously unequal system all over the country because we have not acted over the years to try and clarify the situation as to how investors ought to be treated regardless of where they live in this country. That is one of the core problems that we attempt to address with this legislation, for us as a body, the legislative body, to speak clearly and intelligently as to how this system ought to work across the country.

So, I would submit, Mr. President, to my colleagues, that Congress is the only institution that is equipped to comprehensively address these myriad problems in a thoughtful and moderate manner. My confidence in the legislative process, Mr. President, is borne out by this conference report before us today and the years we have spent in putting it together. This legislation carefully and considerably balances the needs of our emerging high-growth industries with the rights of investors, large and small, Mr. President.

I am proud of the spirit of fairness and equity that permeates this bill. In order to understand why so much time and effort is being expended to fix the securities litigation system, I think it is important to remember the vital role that private securities litigation plays in ensuring the integrity and success of America's capital markets. And I take no back seat to anyone in my determination to see to it that the private litigation system is maintained, because it is a vital ingredient to protecting consumer and investor confidence.

The private securities litigation system is far too important to allow a few entrepreneurial lawyers to manipulate—that is what they do—to manipulate and abuse the system to the degree that they have done over recent years.

Let me be clear, Mr. President: Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely on Government intervention. It is precisely, Mr. President, because of this important role that the legislation does not impinge on the ability of legitimate aggrieved investors to file suits and, if successful, collect judgments or settlements from the parties that defrauded them.

I have maintained from the outset, Mr. President, of this reform effort that securities lawsuits brought by private investors are critical to ensuring public and global confidence in our capital markets. That is not the issue here. And it is to this high standard which this conference report seeks to return private securities litigation actions.

But, Mr. President, the current system has drifted. It has drifted so far from its original goal that we see more opportunistic lawyers profiting from abusive suits that take advantage of the system than we see corporate wrongdoers exposed by it. While some have charged that the beneficiaries of this legislation are just thousands of American companies, the people who will be most harmed by our failure the enact reforms will be the millions of investors who do not participate in these class action lawsuits.

As Kenneth Janke, president of the National Association of Investors Corp., which I might point out represents more than 325,000 individual investors, said recently in a letter to President Clinton, ''Too many times, class action suits are initiated against companies which result in filling the coffers of lawyers with little or no benefit to shareowners. Those types of 'nuisance' suits,'' he says, ''do little to enhance a return for shareowners.'' He says, ''The money spent by corporations on frivolous lawsuits would better serve all shareowners if it remained in the company, resulting in higher net profits and earnings per share.''

Or take, if you will, Mr. President, the statement of Ralph Whitworth of the American Shareholders Association, who told the Securities Subcommittee more than 2 years ago in his testimony, ''The winners in these suits are invariably the lawyers who collect huge contingency fees, professional 'plaintiffs' who collect bonuses, and, in cases where fraud has been committed, executives and board members who use corporate funds and corporate-owned insurance policies to escape personal liability. The one constant,'' he says, ''is that the shareholders pay for it all.'' And that is what we try to stop here.

Even institutional investors, Mr. President, who invest on behalf of millions of individual Americans—in fact, most investors invest through their institutional investor—these individuals, municipal, State, or private pension funds, have expressed their concerns as well.

Mary-Ellen Anderson of the Connecticut Retirement & Trust Funds testified before our committee that the participants in the pension funds—and I quote her here:

> . . . are the ones who are hurt if a system allows someone to force us to spend huge sums of money in legal costs . . . when the plaintiff is disappointed in his or her investment.

Our pensions and jobs, she says, depend upon our employment by and investment in our companies. If we saddle our companies with large unproductive costs, ''* * * we cannot be surprised if our jobs and our raises come up short as our population ages.''

(Mr. ASHCROFT assumed the chair.)

Mr. DODD. Mr. President, one of the biggest vulnerabilities of the securities class action lawsuits is that plaintiffs' attorneys appear—appear—to control the settlement of the case with little or no influence from either the named plaintiffs or the larger class of investors. For example, during the extensive hearings on the issue before the Subcommittee on Securities, a lawyer for one of these firms cited one case, and I quote him, as ''a showpiece''—those are his words, not mine—''a showpiece of how well the existing system works.''

This particular case settled before trial for $33 million, Mr. President. The lawyers asked the court—they asked the court—for $20 million, the lawyers did, of the $33 million settlement. Remember, this is a lawyer saying this is a showpiece case. He picked this one out. I did not pick it out. This is the attorney talking now. And $33 million was in the settlement. They asked the court for $20 million of the $33 million. That is what they asked for. And they are claiming this is a system that does not need to be fixed.

My God, what are they talking about here? So $20 million in request of $33 million. They got $11 million, by the way. That is what the courts gave them: $11 million. They asked for $20 million but got $11 million. Of course, the attorneys for the defense, they got $3 million. The investors recovered 6.5 percent of the recoverable damages—6.5 percent—and this is a case identified by the trial bar as a showpiece example of how well the system works. That is the best piece of evidence they may offer, that is what they think. This kind of settlement might well be satisfactory for the entrepreneurial attorneys, but it does little to benefit companies, investors, or even the plaintiffs on whose behalf these suits have been brought.

The second area of abuse is frivolous litigation. Companies, particularly in the high-technology and biotech industries, face groundless securities litigation days or even hours after announcements are made. In fact, the chilling consequence of these lawsuits is that companies, especially new companies, in emerging industries, in my view the industries of the 21st century in this country, frequently only release the minimum of information required by law so that they will not be held liable for any innocent forward-looking statements that the corporation may make.

These predatory lawsuits—and there is no other way to describe them—have had the result of thwarting 15 years of efforts by the Securities and Exchange Commission to encourage companies to provide more information about their future expectations for earnings and products. I refer my colleagues to the comments made by our colleague from Utah in talking about the importance of these forward-looking statements. It is precisely this kind of information that is demanded, and rightfully so, by investors who are looking to make the most prudent investment decisions.

The conference report, we think, provides a mechanism for investors not only to obtain this positive information but to also obtain information about what the company views as its important risk factors in the coming months of their plans.

Let me quote the recent comments of J. Kenneth Blackwell, the State Treasurer of Ohio. I might point out since the Presiding Officer—excuse me, the Presiding Officer is not from Ohio, he is from Missouri. That is the second time I made that mistake, but he may be interested in this. J. Kenneth Blackwell manages more than $105 billion in pension funds. These are his statements. He said:

Intelligent investment strategy requires maximum possible disclosure, and if I'm not offered frank assessments of various companies' potential, how can I rest assured that Ohio's pensioners' money is being invested wisely?

That statement, I think, deserves being listened to. In fact, the safe harbor for forward-looking statements contained in the conference report is strongly supported by the Securities and Exchange Commission itself.

Let me quote a letter which we received from Arthur Levitt. It says:

The current version of this bill represents a workable balance that we can support since it should encourage companies to provide valuable forward-looking information to investors while at the same time it limits the opportunity for abuse.

The Supreme Court, in Blue Chip Stamps versus Manner Drugstore, has also voiced serious concern about the vulnerability of securities class action suits to abusive practices. Let me quote from the Supreme Court decision in that case:

In the field of Federal securities laws governing disclosure of information, even a complaint which by objective standards may have very little success at trial has a settlement value—

Has a settlement value.

to the plaintiff out of any proportion to its prospect of success at trial.

The decision goes on to say:

The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

Mr. President, a third area of abuse is that the current framework for assessing liability is simply unfair and creates a powerful incentive to sue those with the deepest pockets, regardless of their relative complicity in the alleged fraud.

The current system of joint and several liability encourages plaintiffs' attorneys to seek out any possible corporation or individuals that may have extensive insurance coverage or deep pockets. That is why they are brought in. It is not because even the plaintiffs' attorneys think they are necessarily culpable, but it is because they have the deep pockets, they have the insurance behind them that they are brought into the lawsuits. That is why they are brought in—there is no illusion about it—even if they have nothing to do with the claimed alleged fraud.

Although these defendants could frequently win the case if it were to go to trial, the expense of protracted litigation makes it more economical for them to settle with plaintiffs' attorneys. That is what they do, they settle, because going to court would be far more costly down the road over an extended period of years.

One example was chronicled in a recent Wall Street Journal just this past June. I quote from that story:

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

The court ruled in their favor. And what was this about? It was about a $15,000 contract that Peat Marwick had to do some accounting for a business—a $15,000 contract to do some accounting for the firm. They ended up expending $7 million to defend themselves against a $15,000 contract. Of course, what has happened is these accounting firms are not taking on these clients any longer. So you do not get the accounting from the big seven or reputable accounting firms because of this kind of problem. The minute they take on a client for $15,000, they can look to end up paying a bill of $7 million, or more in some cases.

The current Chairman of the SEC, Arthur Levitt, as well as two former Chairmen, Richard Breeden and David Ruder, have all spoken out against abuses of joint and several liability. Chairman Levitt said at the April 6 hearing of our committee that he was concerned ''about accountants being unfairly charged for amounts that go far beyond their involvement in particular fraud.''

Again, this is borne out in a recent article in the Wall Street Journal which chronicled the stunning number of audit clients dropped by the big six accounting firms over the past few years. I quote the article:

Peat Marwick, the fourth largest American accounting firm, is dropping approximately 50 to 100 audit clients annually, up from zero 5 years ago. . .

Arthur Anderson has either dropped or declined to audit more than 100 companies over the past 2 years.

Does anyone believe that is sound, that is good, that is the way we ought to be doing business, how to encourage these accounting firms to be involved with these new industries starting up? I hope not.

Again, the current system has devolved to the point where it favors those lawyers who are looking out for their own financial interests over the interests of virtually everyone else.

As was the case with S. 240 that was passed by this body, the conference report contains a number of significant and balanced initiatives to deal with these complex problems. Let me address what we attempt to do with this bill.

First, the conference report empowers investors so that they, not their attorneys, have the greater control over the class action cases by allowing the plaintiffs with the greatest claim to be named plaintiff and allowing that plaintiff to select their counsel.

What an outrageous and radical thought this is, the idea that we might insist that at least to offer—you do not have to force it—but you offer to the plaintiff who is going to be most affected by the lawsuit to have an opportunity to become the lead plaintiff. All you have to do is offer it, Mr. President. We are not demanding, we are encouraging, and they might be able to decide which law firm would represent them.

That is considered a radical idea here, needless to say opposed by the trial bar. They do not want that to happen at all.

Second, this legislation enhances existing provisions designed to deter fraud and restores enforcement authority to the Securities and Exchange Commission. That was lost, Mr. President, in the 1994 Supreme Court case, the Central Bank case. We, in this bill, restore what the Central Bank took away from the SEC here.

Third, the conference provides a meaningful safe harbor for legitimate forward-looking statements so that issuers are encouraged to—instead of discouraged from—make much-needed disclosures.

Fourth, it makes it easier to impose sanctions on those attorneys who violate their basic professional ethics.

Fifth, it rationalizes the liability of deep-pocket defendants, while protecting the ability of small investors to fully collect all damages awarded them through a trial or settlement.

Let me go over the points in a little more detail. First, on empowering investors. The conference report—this bill—takes a number of steps to guarantee that investors, not their marauding attorneys, decide whether to, one, bring a case, two, whether to settle the case and, three, how much the lawyer should receive. Again, I do not think it is a terribly radical idea that we would allow them to decide whether or not to bring a case—after all, they are the injured parties, we are being told—or whether they want to settle it all or not. Maybe they do not want to settle. Maybe they think they have such a good case they would like to go to trial. That ought to be their decision, not the lawyer's.

Third, how much the lawyers get, rather than being decided by the lawyers, let the plaintiffs decide what their attorneys should be receiving.

The conference report strongly encourages the courts—''encourages,'' I emphasize that—to appoint the investor with the greatest financial interest in the case—often an institutional investor like a pension fund—to be the lead plaintiff. After all, they are the ones who are at the greatest risk. If there is real fraud, they have the most to lose. If the lawsuit is frivolous and millions are going to be spent to defend the suit, they lose as well. This plaintiff will have the right to select their own counsel and to pursue the case on behalf of the class.

So for the first time in a long time, Mr. President, securities litigation attorneys will have a real client to answer to. We are beginning to end the days when a plaintiff's attorney can crow—again, I will quote such a plaintiff's attorney. In Forbes magazine, listen to what this attorney said: ''I have the greatest practice of law in the world because I have no clients.'' ''I have the greatest practice in the world,'' he said, talking about securities litigation cases, ''because I have no clients.'' ''I bring the case,'' he says. ''I hire the plaintiff. I do not have some client telling me what to do. I decide what I want to do.'' That is what this is all about. That is why this bill is important. That is what we want to stop here—we want to stop these situations in which a bunch of attorneys decide what they are going to do, and we want to have the aggrieved plaintiffs deciding what they are going to do. That is why this bill is important. Of course, this presumption can be challenged, as I said earlier—the presumption of the most injured plaintiff being the lead plaintiff, if other class members feel that the lead plaintiff is not fairly or accurately representing the class. So we are not insisting or legally requiring it. We are just asking the courts to step forward and ask the most injured party to come forward.

This change, we feel, Mr. President, will also end the unsavory practice of rushing to the courthouse. That is what happens under the present system. The first person to show up in the courthouse gets the case—the first person. This is a hallmark of the current system of the securities class action litigation.

Last June, I received a letter from Raytheon Co., one of the Nation's largest high technology firms. Raytheon, Mr. President, made a tender offer of $64 a share for E-Systems, Inc., another company. That is a 41 percent premium over the closing market price. Putting aside whether or not you think that is fair or not, nonetheless, most people thought it was a pretty fair offer. But I am not here to argue the fairness or unfairness of the offer. Let me allow, if I can, Raytheon to explain what happened next in a letter that I received from them:

> Notwithstanding the widely held view that the proposed transaction was eminently fair to E-System's shareholders, the first of eight purported class action lawsuits was filed within 90 minutes after the courthouse doors opened on the day that the transaction was announced.

An hour and a half later, one of eight lawsuits was filed in court. I do not care how good a lawyer you are, you do not go around and find plaintiffs in an hour and a half with a public announcement about an offer to buy another company. That is exactly what we are talking about here, racing to the courthouse. Do not look at the facts and examine whether or not it is right or wrong; file the lawsuit and immediately trigger the kind of costs associated with it. What about investors in that case, Mr. President? What happens to them in that case—the investors in Raytheon, the investors in E-Systems? Do the lawyers think about them at all, or the cost to those particular firms, and just answer the pleadings once a lawsuit is filed? Does anybody care about them at all under the present system? It does not appear so.

Mr. President, the conference report requires notice—a radical idea here again—of settlement arrangements that are sent to investors, who must clearly spell out important facts, such as how much investors are getting or giving up by settling, how much their lawyers will receive in the settlement. Again, let me emphasize here, in many cases, settlement is the wrong conclusion. An aggrieved plaintiff may want to go to court. They ought to have the right, these investors. Plaintiffs ought to have the right to decide whether or not they want a settlement and make the decision themselves after listening to intelligent arguments about what is the best course of action.

This means, under this bill, plaintiffs will be able to make an informed decision about whether or not the settlement is in their best interest or in their lawyer's best interest. Currently, the actual plaintiffs only receive, on average, 14 cents or less of every settlement dollar. But the plaintiffs' attorneys receive 33 cents, on average, of each settlement dollar. That is 14 cents for the shareholders, the investors, and 33 cents for the lawyers. You do not need to be a rocket scientist to understand that this system is broken, when plaintiffs, investors, are getting that minor return in these cases and the lawyers are collecting more than twice what they are getting.

The conference report puts an end to this outrageous practice, called the ''lodestar'' approach, by encouraging courts to award attorney's fees based upon a reasonable percentage of the total amount of the settlement or judgment.

The New York Times stated just 2 weeks ago in an article entitled ''Math of Class Action Suits; Winning $2.19 Cents Costs $91.33.''

It says:

> Many class actions end with plaintiffs winning meager awards, while their lawyers walk away with millions of dollars in fees.

Taken together, Mr. President, these provisions should ensure that defrauded investors are not cheated a second time by a few unscrupulous lawyers who skim their exorbitant fees right off the top of any settlement. One of the areas of the conference report that has received too little attention, in my view, is the effort to deter fraud. We have been talking about how you deal with it when fraud has arisen, when there is an allegation of fraud. What we try to do with this bill that we have worked on for more than 4 years now, through the number of hearings we have held and the witnesses we have heard from, is determine how we deter fraud from occurring in the first place so that investors are really protected? One of the areas, as I said, that received very little attention, in the midst of all of the hot air blowing from the plaintiffs' bar are those provisions that provide new protections, Mr. President, that have never existed before for investors against fraud.

I commend my colleague, Senator DOMENICI, and others, for really working to see to it that we have these provisions in the bill. For the first time, Mr. President, auditors, under this bill, are required to take additional new steps to detect fraud, and if they find fraud, they must—not may, but must—be reported to the Securities and Exchange Commission. They must look for the fraud—the auditors, the private companies—and if they find any, they have to report it. That has never been required before. That is a new standard, a new bar that we have raised here to try and deter fraud in the first instance. Nobody has mentioned that part. If they do, it is in just a passing way.

The conference report maintains current standards of joint and several liability just for those persons who knowingly, Mr. President, engage in a fraudulent scheme, thus keeping a heavy financial penalty for those who would commit knowing securities fraud.

Perhaps most significant, the bill restores the ability of the Securities and Exchange Commission to pursue those who knowingly aid and abet securities fraud. My colleagues who oppose this bill talk about our failure to get all of the aiding and abetting back in it. I do not disagree.

But what we have been able to do in this bill which could not get done—you would not get it done if you just had a freestanding aiding and abetting provision. I do not think it would pass. I disagree with that. I think we should.

To hear my colleagues say how bad this bill is because we do not deal with all of the things they would like in aiding and abetting, yet we get the class actions covered after the Supreme Court rules against us. Instead of denouncing this bill, they ought to be adding far more support to what we were able to accomplish here and make a major step forward.

This is a power diminished by the Central Bank decision of last year's Supreme Court case. In fact, some recent SEC enforcement actions have been dismissed, Mr. President, because Federal courts are ruling that the Commission had its aiding and abetting authority taken away by the Central Bank decision. We are restoring that in this bill and giving the SEC the power that they are being denied by lower court rulings around the country.

The conference report clarifies current requirements that lawyers should have some facts—again, a radical idea here—should have some facts to back up their assertion of security fraud by adopting most of the reasonable standards established by the U.S. Second Circuit Court of Appeals.

This legislation, therefore, is using a pleadings standard that has been successfully tested, Mr. President, in the real world. This is not some arbitrary standard pulled out of a hat. Again, this is a standard that has been used and tested and been tried. We include that in this bill, as well.

Mr. SPECTER. Will the Senator yield?

Mr. DODD. Let me finish my remarks, and I will be glad to yield. I am almost through.

Furthermore, Mr. President, the bill requires the court's settlement to determine whether any attorney had violated rule 11 of the Code of Civil Procedure, which prohibits lawyers from filing claims that they know to be false or frivolous.

Of course, the lawyers want the status quo for business and no standards at all for themselves in this area.

In the event of a violation of the complaint, the bill requires that the court find a substantial violation of rule 11 to have occurred in order for any sanctions to be triggered.

Mr. President, let me emphasize what this does. This is in the filing of a lawsuit. It turns out it is a tough standard to meet. But if the court determines that the attorneys knew that this was a frivolous lawsuit, that the allegations are false, then it can go after those attorneys that bring the lawsuit.

Now, the same standard applies in the defense attorneys' response to the pleadings. And they say that is unfair. It is not unfair at all. It is the plaintiff's attorneys that are bringing the case in the first instance. We are saying that if, in fact, the lawyers knew this was frivolous and false, then they ought to be held accountable for doing that. If attorneys on the other side in the filing of pleadings also engage in any false or frivolous allegations, then, they, too, will be held accountable for those statements. We think this is a fair and adequate standard to be applied to the attorneys.

The conference report does not change existing standards of conduct. It does put some teeth, however, into the enforcement of these standards. I point out what has happened over the years. While the rules have existed, nothing has ever been done with them in the past. In fact, they have been sitting there almost as idle pieces of paper with no real meaning at all.

The conference report provides a moderate and thoughtful statutory safe harbor for predictive statements made by companies that are registered with the SEC.

Mr. President, this is one of the most contentious parts of the bill. It provides no such safety for third parties, like brokers, or in the case of merger offers, tenders, rollups or issuance of penny stocks. That is not where the safe harbor applies.

By adopting this provision, the Senate will encourage responsible corporations to make the kind of disclosures about projected activities that are currently missing in today's investment climate.

Since the safe harbor has been the subject of so much attention, Mr. President, it is worth spending a little time to delve into the details of these provisions.

This reconfigured safe harbor that is in this conference report has two parts to it. The first is that any forward-looking statement may be accompanied by ''meaningful cautionary statements that identify important factors that could cause'' the prediction not to come true, or if a company or officer fails to meet that test, all that a plaintiff must do is prove that the person actually knew that the statement was false or misleading.

Mr. President, that is the very scienter standard written by our good friend and colleague from Maryland, Senator SARBANES, and proposed by him during the Senate floor consideration of S. 240 in June.

Quite honestly, it is hard for this Member to envision how anyone could lie in their predictive statements and still be covered by this safe harbor; this insulation from abuse is no doubt a key reason why the safe harbor is strongly supported by the Securities and Exchange Commission in their letter of support of this bill.

As the Commission stated:

> The need of legitimate businesses to have a mechanism for early dismissal of frivolous lawsuits argues in favor of a codification of the bespeaks caution doctrine that has developed under the case law. While the tradeoff requires that class action attorneys must have well written and carefully researched pleadings at the outset of the lawsuit, we feel this is necessary to create a viable safe harbor. Given that it does not prevent Commission enforcement actions, and excludes the greatest opportunities for harm to investors.

The idea that this conference report contains any license to lie is simply and totally untrue and, particularly in light of the strong support of the Securities and Exchange Commission, represents just a last, in my view, desperate attempt by opponents of this legislation to derail the process.

The legislation before us, Mr. President, preserves the rights of investors whose losses are 10 percent or more of their total net worth of $200,000. These small investors will still be able to hold all defendants responsible for paying off settlements regardless of the relative guilt of each of the named parties.

This is the modification for the joint and several sections. This threshold, I think, should more than protect the vast majority of individual investors participating in the markets today.

Let me tell you why I say that. A 1993 census report stated that the average net worth, Mr. President, of an American family was about $47,000. That is their net worth, $47,000. While in 1990, the New York Stock Exchange study found the median income—the income, now, the median income—for individual investors was $43,800 a year, which, according to the census data extrapolates to a net worth of roughly $150,200.

Let me explain that again. The words can be confusing. The average American family has a net worth of something in excess of $47,000 a year; the average of the median investor in the New York Stock Exchange has an income of $43,000 a year; the Census Bureau extrapolates an income of $43,800 to a net worth of those investors of $150,000.

That is why we chose the $200,000 level and below, so that the majority of investors—the majority of investors, the small investors—would not be adversely affected by the proportional liability standards included in the bill. We tried in this bill to see to it that those smaller investors would not be adversely affected.

While the bill will fully protect small investors so they will recover all of the losses to which they are entitled, the bill establishes a proportional liability system to discourage the naming of the deep pocket defendants that I talked about earlier.

The court would be required to determine the relative liability of all the defendants, and thus deep-pocket defendants would only be liable to pay a settlement about equal to their relative role in the alleged fraud. What a radical idea that is as well. A defendant who is 10 percent responsible for the fraudulent actions would be required to pay 10 percent of the settlement amount. That is just fair. That is equitable.

I would say, quickly, again, we protect smaller investors. We say, for them we are going to have a different standard, but for those who are above that line, to go after someone who is only fractionally involved and say that you ought to pay the whole amount here ought to strike every person in this country as fundamentally unfair, and that is what we try to change in this bill. However, as I said, in the event of an insolvent defendant, all the other defendants would be required to contribute as much as an additional 50 percent of their proportional share of a settlement to ensure that investors receive as close to 100 percent of their just settlements as possible. By creating a two-tiered system of both proportional liability and joint and several liability, the conference report preserves the best features of both systems.

Having spent so much time on what is in the conference report, let me briefly spend a few minutes, if I can, discussing a few of the things the conference report does not do.

The PRESIDING OFFICER. The Chair will advise the Senator from Connecticut, under the previous order, the hour of 12:30 having arrived, the Senate would stand in recess until 2:15 p.m.

Mr. DODD. Mr. President, I ask unanimous consent to proceed for 5 additional minutes, if I could, to complete the statement.

The PRESIDING OFFICER. Is there objection?

Mr. SPECTER. Reserving the right to object, under the procedural statement, I ask unanimous consent that debate on the bill be extended for 15 minutes beyond. I know that is an imposition on the Presiding Officer. I have 15 minutes reserved, and I have been here for most of the morning, a good part of the morning, waiting to speak.

The PRESIDING OFFICER. Is there objection?

Mr. FEINGOLD. Reserving the right to object, I ask if we could extend that to 25 minutes so we could go straight to 1 o'clock?

Mr. LEAHY. Reserving the right to object, and to make life easier for the distinguished Presiding Officer, I ask unanimous consent that unanimous-consent request be amended to allow me to be recognized for no more than 6 minutes at 2 o'clock, which I understand is the time we are coming back in?

The PRESIDING OFFICER. The hour of 2:15 is the previously agreed upon time.

Mr. LEAHY. I ask unanimous consent that unanimous-consent request be amended so that I am recognized for 6 minutes at 2:15.

The PRESIDING OFFICER. Is there objection? Hearing no objection, the following will be the order: an additional 5 minutes will be extended to the Senator from Connecticut, and then 15 minutes will be extended to the Senator from Pennsylvania, after which 10 minutes will be extended to the Senator from Wisconsin, and, at 2:15, 6 minutes will be extended to the Senator from Vermont.

Mr. BRYAN. Mr. President, I have no objection, just a parliamentary inquiry. Those who are speaking with reference to the pending matter, that will be in accordance with the practice that those speaking on behalf, their time will be charged to the distinguished Senator from Utah, the time of those speaking in opposition will be charged to the time remaining of the Senator from Nevada; is that correct?

The PRESIDING OFFICER. That is correct.

The Senator from Utah.

Mr. BENNETT. Mr. President, I ask unanimous consent the unanimous-consent agreement be modified further, that Senator HATCH be recognized to speak following Senator LEAHY when we come back after lunch, for 15 minutes.

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

The Senator from Vermont.

Mr. LEAHY. Mr. President, for clarification, my 6 minutes will be as in morning business, so it will not be charged to either side.

The PRESIDING OFFICER. Without objection, it is so ordered. The unanimous consent is so modified.

Mr. DODD. Mr. President, I think I just lost my 5 minutes so I will ask you to be slow with that gavel.

First and foremost, Mr. President, here is what the bill does not do. It is nothing like the legislation that was adopted in the House. Let me say, had the House bill come back in this area, I would have voted against it and spoken vehemently against it. This bill was much closer to the bill that passed this body earlier this year and, in fact, strengthens the legislation, as I mentioned earlier, with the inclusion of language by our distinguished colleague from Maryland, Senator SARBANES. In my view, the House bill would have been a tragedy.

For instance, we do not have loser pay provisions here. My colleagues know what that means. We took that out of the bill. That was part of the House bill. The House legislation established pleading standards that were so high, I would say—and I know my colleague from Pennsylvania is interested in this—that it would have been impossible to bring a suit, in my view, had the House language been adopted. We, as I said earlier, adopt the Second Circuit Court of Appeals standard.

The House legislation contained no safety net for small investors. As I have just described, we do. The conference report maintains joint and several liability for small investors and requires, even in proportional cases, where you have a totally insolvent plaintiff, the conference report requires that defendants pay a total of 150 percent of their proportionate share in the event of insolvent people. The House legislation had a safe harbor provision that, frankly, you could have parked the entire 7th Fleet in, if you had wanted to. That is not the case here. We have strengthened safe harbor. The conference report creates a narrow safe harbor that is strongly supported by the Securities and Exchange Commission.

So, this conference report is a far cry from the intemperate measure passed by the House. Instead, it reflects the moderate and balanced approach adopted by the Senate when it passed this body by a margin of 69 to 30. In fact, a dramatic change from the original House bill was recently noted in an editorial by the Washington Post, which is entitled ''Antidote to the Strike Suit.''

''It started off,'' the editorial said, ''last winter as a flamboyant ideological statement. But the bill to curb shareholders' suits has now been whittled and sanded by many hands into a truly useful piece of legislation. An intemperate initiative is turning out to be much more promising than seemed possible last March when the House originally passed it.''

So I think we put together a good package here. I urge my colleagues to support this legislation. We are not writing the Ten Commandments here. We are trying to address a serious problem. Time will tell whether or not particular provisions here have done everything we would like them to do. But, clearly, the system is broken and it needs to be changed.

This bill has been well thought out. It has been worked on in a bipartisan way. We have listened to the best experts in the country who helped us put it together. And the Securities and Exchange Commission endorses this bill and has worked with us to make it a good bill.

So, Mr. President, I urge my colleagues to be supportive of it. I urge the President to sign it. I know he is considering whether or not to lend his pen to this bill. I think he will sign it. I think we can make a strong case that we have put together a sound piece of legislation that will truly make a difference, particularly for those businesses which must be the future economically for our country in the 21st century, those high-technology firms, those startup industries that are the ones who are the prey of these attorneys who go out and take advantage of their being in flux, that they are not quite stable yet, that they are getting their legs. They are the ones that are preyed upon. That is what we need to stop here. This bill does that, we think, in a significant way, and I urge its adoption.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I had sought to ask my distinguished colleague from Connecticut a question relating to the pleading standard when he had said, in his presentation, that the standard in this statute is a tested standard. Then, later in his presentation, he made reference to this Senator on the pleading issue.

The question that I have for my colleague from Connecticut turns on what the pleading standard of the bill is, as having come back from conference, which is significantly different from that which left the Senate. The amendment which this Senator offered had incorporated into the statute the second circuit language which would have clarified the language in the Senate bill, which provided that, ''In any private action arising under this title, the plaintiff's complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.''

That was the tough second circuit standard. This Senator offered an amendment, which was accepted on the Senate floor, to incorporate what the second circuit said was the way of establishing that strong inference, to provide it by ''alleging facts to show the defendant had both motive and opportunity to commit fraud, or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.'' The conference report struck out the language which my amendment had inserted which would have given guidance to how plaintiffs could meet that very stringent standard.

In addition, the conference report added that these facts had to be ''stated with particularity,'' which is an even tougher standard than the language which had gone from the Senate bill.

So when the distinguished Senator from Connecticut talks about, in his words, and he referred to the House measure as ''intemperate''—I will not seek to characterize it, but I do know his characterization of the House measure was ''intemperate''—contrasted with what he said the Senate action was, ''moderate,'' that the bill that has come back from conference is a lot different than the bill which the Senate sent out. I think there is an enormous difference.

So the question that I have for my colleague from Connecticut is, where has this language in the conference report on the pleading standard for state of mind been tested in light of the fact that the toughest standard in existence to this moment is the second circuit standard, and this conference report toughens up the second circuit standard in two important respects by striking out the way you plead that tough state of mind standard and also by adding the requirement of pleading with particularity?

Mr. DODD. Mr. President, let me respond to my colleague. I know he has a great deal of interest in this whole area of competing standards. Basically, what we intended to do here was to codify the second circuit's pleadings standards, not to indicate disapproval of each individual case that came before it. What we were driving at here was to insist that facts be pleaded, that there be an explanation of where these facts come from in these lawsuits that are being brought.

Indeed, the Banking Committee reported with its bill—and included similar language in support—and said the committee does not intend before we consider the bill to codify the second circuit's case law interpreting this pleading standard, although courts may find this body law instructive.

So, in response to my colleague from Pennsylvania, even before we brought the matter up, we made it quite clear that we were, as I say, taking every case that had come before the second circuit but rather applying the pleading standard requirements there. That had been tested.

Mr. SPECTER. I challenge that.

Mr. DODD. Let me respond. Even my colleague's amendment goes beyond that in a sense. So you cannot, on the one hand, have us stick with it rigidly and have the Senator's in the amendment.

Mr. SPECTER. I challenge that. If I have the floor, I challenge that.

In what respect does my amendment go beyond this? That simply is not true.

What my amendment does is to take the second circuit language under which a plaintiff can meet the tough state of mind standard, and put that in the statute. This body agreed to that. And now it has come back from the conference report deleted.

In what respect did my language go beyond the second circuit?

Mr. DODD. The Senator's amendment adopted the guidance of the second circuit, but the amendment of the Senator from Pennsylvania completely omits a critical qualification in the case law. The courts have held that ''where motive is not apparent, a plaintiff may plead scienter by identifying circumstances'' indicating wrongful behavior, but ''the strength of the circumstantial allegations must be correspondingly greater'' from the number of cases. If I may respond, the Senator's amendment seriously, in the view of the——

Mr. SPECTER. From where is the Senator reading? In a circuit court opinion?

Mr. DODD. The Senator's amendment seriously—

Mr. SPECTER. Where is the Senator reading from? Is it in a circuit court opinion?

Mr. DODD. Yes.

Mr. SPECTER. From where?

Mr. DODD. There are several here.

Mr. SPECTER. Tell me where the citation is, because I have the opinions here. I challenge that any language appears from the second circuit opinion which was not incorporated in my amendment.

Mr. DODD. I am quoting here three different cases.

Mr. SPECTER. Tell me where.

Mr. DODD. The Three Crown Limited Partnership versus Caxton Corporation.

Mr. SPECTER. What page?

Mr. DODD. Does the Senator want to go to 817 Federal Supplement 1033, Beck versus Manufacturing Hanover Trust? There are two right there.

Mr. SPECTER. Mr. President, the language handed down by the second circuit was articulated by Chief Judge Jon Newman as follows:

> These facts or allegations must give rise to a strong inference that the defendants possess the requisite fraudulent intent. A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

The amendment which this Senator offered and was adopted by the Senate followed the pleading requirement by saying that the required state of mind may be established either by alleging facts to show the defendant had both motive and opportunity to commit fraud or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

I submit that the amendment which I offered and was adopted by the Senate tracked the second circuit's language directly, and that by striking the amendment which the Senate agreed to, by conceding to the House, the conference report omits a very critical factor in giving guidance as to how a plaintiff meets this tough standard for pleading state of mind.

I would ask my colleague from Connecticut whether it is not true that the conference report came back with an additional toughening factor requiring that the facts going to state of mind be pleaded with particularity.

Mr. DODD. I say to my colleague, what we are attempting to do here, again, I think, is instead of trying to take each case that came under the second circuit, we are trying to get to the point where we would have well-pleaded complaints. We are using the standards in the second circuit in that regard, then letting the courts—as these matters will—test. They can then refer to specific cases, the second circuit, otherwise, to determine if these standards are based on facts and circumstances in a particular case. That is what we are trying to do here.

I say to my colleague that I supported my colleague's amendment when he offered it here in on the floor of the Senate back when the bill was considered. Again, as I say, personally, it says the statute of limitations and a few others. But we are dealing in conference here, and the bulk of what came back from the conference report was what was in the Senate bill.

My colleague would have preferred, I know, to have his amendment kept in its entirety here. We are trying to strike a balance. As he knows, he has been to conferences as often as I have been in the past and knows the nature of well-pleaded complaints. That is the standard we are trying to hold to that came out of the second circuit, not on a case-by-case basis where they differed in some degree in interpretation.

The PRESIDING OFFICER. Does the Senator from Pennsylvania reclaim his time?

Mr. SPECTER. I do.

The PRESIDING OFFICER. The Senator has 4 minutes and 50 seconds.

Mr. SPECTER. I thank my colleague from Connecticut for responding. When you have a dialog in debate it is invariably more instructive than the speeches we make, however eloquent our individual speeches may be. But I have very limited time remaining.

The point that I wanted to make is that regardless of what the conference report intends—and the Senator from Connecticut talks about what we are trying to accomplish—the plain truth of the matter is that this is an impossible pleading standard, that where you take what was a tough standard by the second circuit on pleading state of mind, and then you delete the ways you prove state of mind, and then add in addition a particularity requirement, you simply do not have a way that a plaintiff realistically can go into the Federal court under the securities acts and have a fair chance to state a case.

I say that with some substantial experience in the practice of law, as a trial lawyer for some 10 years in the civil field and with substantial practice in the criminal field, which has some bearing, and my work in the past 15 years on the Judiciary Committee, that where you have a situation here where there is a mandatory stay of discovery when a motion to dismiss is filed, that you simply do not give an opportunity to plaintiffs to go into court and have a chance to articulate a case.

We are dealing here, Mr. President, with enormous sums of money. In 1993, the most recent year available from the New York Stock Exchange and NASDAQ, there was some $3.6 trillion traded, not even taking into account the American Stock Exchange, more than half of the gross national product of the United States. And we have had an enormous number of very, very important fraud cases. The Keating case involved some losses in excess of $4.4 billion. The Drexel Burnham case, the Quorum case, the tremendous matter now pending involving the losses incurred by Orange County.

So we are talking about gigantic interests. The bill that has come back from conference, Mr. President, virtually forecloses a realistic opportunity to bring a suit under these pleading standards. And what we are not trying to do is what specifically has been done here. The standard of review is especially problemsome in the context of the mandatory rule 11 review required by the conference report.

In earlier argument on June 27 of this year, at page S9165 of the RECORD, I put in an extensive listing of letters from judges who did not want to have this mandatory rule 11 review, the Federal judges who practice in it.

Then the conference report has a presumption that, after the mandatory review, if there are sanctions against the complaint, the costs of litigation and lawyers' fees will be imposed upon the plaintiff. This is realistically more than a chilling effect. It will have the effect really to virtually discourage litigation in an important field where these private lawsuits have had a very important impact on policing the field. The Securities and Exchange Commission cannot possibly undertake it by themselves. The distinguished Senator from Connecticut concedes that in his speech about the importance of private rights of action to enforce the securities laws. But I am concerned, as a person who has had experience in the field in representing, under the Securities Act, defendants as well, that this bill in its present form simply is unrealistic and unreasonably restrictive——

Mr. DODD. Will my colleague yield on this point?

Mr. SPECTER. Not on my time. I will be glad to if we can get an extension.

Where you have especially the problem compounded by the short statute of limitations, which is 1 year from discovery and 3 years from commission. Efforts were made to extend the time to 2 and 5 years, favored by the Securities and Exchange Commission, but they failed. And where you have the safe harbor provisions which have come back here contrary to what has been asserted here, that there is no liability for forward-looking statements with cautionary statements no matter what the intent. The Senate bill said, if there was a knowing misstatement, that it not be covered by the safe harbor. That has been turned around by the conference report. What has come before us, Mr. President, I submit, is unreasonable, unrealistic, and imposes restraints which do not protect investors. It does not strike an appropriate balance.

I would be glad to yield to my colleague from Connecticut.

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

Mr. DODD. I thank my colleague. I was going to point out with regard to my colleague——

The PRESIDING OFFICER. The Senator from Wisconsin has 10 minutes.

Mr. DODD. Will my colleague yield for 30 seconds?

The point we made from ''particularity'' to ''specificity''—we can lose an audience here quickly in debate—that was recommended by the judicial conference. They are really responding to what they thought was a better use of language there than what we incorporated in the bill. It was not a slight at all intended to be aimed at our colleague from Pennsylvania. The judicial conference recommended that word change. They felt it would be better. That is why we adopted it.

Mr. SPECTER. If my colleague would yield to me.

When you talk about particularity, it may not mean a lot on the Senate floor, but it means a lot in litigation, and billions can be affected by that kind of a pleading change.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. I rise in opposition to H.R. 1058, the Private Securities Litigation Reform Act, and do so because voting against the conference report, I think, is in the best interests of the average investor, not only in my home State of Wisconsin but all across the country.

Mr. President, I think it is important to note that this bill was proposed with the worthy goal of trying to limit frivolous litigation. In particular, the goal was to stop the so-called strike suits that we have heard so much about. I think there is no question that trying to stop that is a legitimate goal that we can all support. However, the evolution of this bill starting from its introduction to its modification and initial passage in this body, to the conference report before us today has, Mr. President, been marked by a steady and unwarranted erosion of the basic protections the average investor in this country expects and, in my opinion, deserves.

Simply calling this or any other piece of legislation a reform act does not make it so. The term ''reform'' implies that change is taking place that will serve the greater good. Sadly, this measure fails to achieve this worthy goal. In fact, when one looks closely, it becomes evident to me that this bill will work to the detriment of hard-working Americans who depend upon the securities laws to protect their savings and retirement and investments.

As many of my colleagues have noted, this bill seemingly gets worse with each subsequent version that is placed before us. For example, the conference report expands the already flawed safe harbor provision which passed this body in July. The language of this bill protects forward-looking statements by insulating the maker of those statements from liability even if they are deliberately false, provided the statement is accompanied by what is termed ''cautionary'' language. Therefore, in the face of a disclaimer, investors will be left with no recourse against a corporate insider who makes predictions which were deliberately false.

Furthermore, the conference report includes language contained in the House bill which explicitly states that there is absolutely no duty for any individual to update a forward-looking statement. What that means is even if it becomes apparent that a previously made forward-looking statement is false, the person who made the statement has no legal obligation to inform anyone of this new knowledge. It is difficult to imagine that this provision can provide the average American investor with any level of comfort or confidence.

Mr. President, beyond this baseless inequity, the bill also fails to remedy the inadequate statute of limitations period for bringing these very complex cases of securities fraud. The failure to extend the statute of limitations in the face of evidence that these cases often take a great deal of time to discover and develop and prosecute is, in my view, counter to the notion that securities law exists to protect the investor.

The practical result of this failure will be that legitimate plaintiffs, through no fault of their own, will be turned away at the courthouse door. This again, is hardly the kind of result you would expect from something that has the label ''reform.''

There are other flaws in this legislation as well, including the failure to hold liable those professionals, such as lawyers, accountants and underwriters, who aid and abet in the perpetration of securities fraud.

Additionally, the bill sets forth pleading thresholds that are very difficult to attain. The effect is to require the establishment of certain facts at the outset of a case, although the plaintiff, Mr. President, has had no opportunity to conduct any discovery. In setting this unusual standard, the conference elected to drop an amendment offered by my colleague from Pennsylvania, Senator SPECTER, which passed this body with 57 votes. It would have clarified that what was required to constitute a well-pleaded complaint was evidence that the defendant had motive and opportunity to defraud, not actual proof of intent at that point.

The conference report, in making the plaintiff prove the case even before the case has begun, goes a lot further than eliminating frivolous suits. What it will do is have an adverse and potentially detrimental effect on legitimate cases as well.

The fee-shifting provisions of this bill will actually establish a harsher consequence for plaintiffs than for defendants who violate the Federal rules.

As Ed Huck, the director of the Alliance of Cities, in the Wisconsin State Journal, said:

> Imagine city or county officials being swindled out of millions of taxpayer dollars—and learning that they'll have to risk millions more if they want to pursue a lawsuit. That's what the "loser-pays" provision of this legislation means—And, in a word, that's "intimidation" of crime payers.

Mr. President, we should be wary of any legislation that has the effect of intimidating victims of fraud.

In short, Mr. President, this bill is unbalanced, misguided, and will harm thousands of Americans who bear no relation to the frivolous lawsuits that this bill is supposed to target.

There is no doubt that frivolous litigation, in any area of the law, is detrimental to our system of justice and to the society at large. However, the answer to these types of suits is not to foreclose the ability of legitimate plaintiffs to protect themselves against fraud, nor is it to deprive them of the right to seek recovery in court when they are defrauded.

In my opinion, the negative consequences of this unbalanced bill will be significant and far reaching.

Mr. President, I note that the report that accompanied the original S. 240 pointed out the simple, but important, goal of American securities law, and that is to promote investor confidence in the securities market. Sadly, the provisions of this bill fall very short of attaining that fundamental goal.

We must be vigilant in our efforts to seek out and eliminate frivolous litigation. However, equally as important is our obligation not to lose sight of the average American investor, the person investing for retirement or to put children through college or simply to have a little better quality of life.

In our zeal to reform, it is protection of these people which must guide and inform our efforts.

So it is unfortunate that the provisions of this bill provide little more than hollow comfort to the American investor, but such is the case with H.R. 1058. In my opinion, the bill offers its alleged reform at a price that cannot be justified. Protecting the American investor should not be sacrificed in the misapplied name of "reform."

The securities laws of this Nation are essential to hard-working men and women all across America. Given that this conference report fails to uphold the tradition of protecting these hard-working men and women, I simply cannot support it. I intend to vote against this conference report.

I thank the Senator from Nevada for his strong leadership on this issue. I yield back the remainder of my time and yield the floor.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I understand that under the previous order, we now stand in recess for lunch?

The PRESIDING OFFICER. We stand in recess until 2:15.

UNANIMOUS-CONSENT AGREEMENT

Mr. BENNETT. Mr. President, prior to that action, I ask unanimous consent that following Senator HATCH's presentation this afternoon, that the senior Senator from South Carolina, Senator THURMOND, be recognized for 15 minutes on a nongermane matter. This, I might note, is the senior Senator's 93d birthday, and he has asked for this time. I think anyone who lives to that age and retains the faculties that the senior Senator from South Carolina has ought to be given whatever it is he asks for on his birthday.

The PRESIDING OFFICER. Is there objection?

Mr. BRYAN. Mr. President, I have no objection, but I would further like to amend the unanimous-consent request that following the 15 minutes of the distinguished senior Senator from South Carolina, to put Senator BOXER for 30 minutes, I am told, although it is not on our time. And I just seek to clarify, Senator REID has sought time.

Mr. BENNETT. I ask unanimous consent to include Senator REID for 15 minutes following Senator BOXER.

The PRESIDING OFFICER. The Chair inquires, is the time of Senator BOXER and Senator REID to be charged against——

Mr. BRYAN. Senator BOXER's time will be charged to the Senator from Nevada; Senator REID's time, as I understand, will be charged to the Senator from Utah.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BENNETT. I ask the Chair, how much time remains on each side?

The PRESIDING OFFICER. There are 2 hours and 24 minutes remaining for the Senator from Utah; 2 hours and 13 minutes remaining for the Senator from Nevada.

Mr. BENNETT. I thank the Chair.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate will now stand in recess until the hour of 2:15 p.m.

Thereupon, at 1:03 p.m., the Senate recessed until 2:14 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. KEMPTHORNE).

The PRESIDING OFFICER. Under the previous order, the Senator from Vermont [Mr. LEAHY] is recognized for up to 6 minutes.

TELECOMMUNICATIONS CONFERENCE PROPOSALS FOR REGULATING SPEECH ON THE INTERNET

Mr. LEAHY. Mr. President, in some ways parody is becoming reality. I refer to the debate that is going on in the telecommunications conference over how we are to impose Government regulation over constitutionally protected speech on the Internet.

Last year, the magazine PC Computing published an April Fool's parody. Let me tell you a little bit about it. It said that I introduced a bill, No. 040194—for April 1, 1994—to ban drinking on the information superhighway. According to the article, this bill that I supposedly introduced would prohibit anybody from using a public computer network while intoxicated. They also said there was a rider on this bill to make it "a felony to discuss sexual matters on any public access network, including the Internet, America Online, and CompuServe." Senators were chided for thinking there is a physical highway and that a permit was required to "drive" a modem on the information highway. The article noted that complaints about the imaginary bill are "getting nowhere" because "who wants to come out and support drunkenness and computer sex?"

The parody concludes on a gloomy note, with the following words:

> There is nothing to stop this bill from becoming law. You can register your protests with your Congressperson or Ms. Lirpa Sloof in the Senate Legislative Analyst's Office. Her name spelled backwards says it all.

I enjoy using a computer, as a lot of us do, but sometimes some who use them do not have a tremendous sense of humor, just as some Members of Congress do not. They did not notice that the name spelled backward is "April fools." The bill number was April 1, 1994. It should have told somebody something. But some actually thought this was real, and I started getting calls over the phone and messages over the Internet to my office saying, "What are you doing about this drunk driving on the information superhighway bill?" But that was then, and that was a joke. Today, unfortunately for all Internet users, the debate taking place in the telecommunications conference about imposing far-reaching new crimes for indecent speech over the Internet is not a parody but very real.

The conferees have been meeting and going over this enormous task determining how parts of telecommunications would work, how you regulate cable operators, wireless systems, and how you protect universal service. You would think they would not have time to look at something like cyberporn, but that seems to be one major consideration they have. Even though there are no members of the Senate Judiciary Committee at that conference, they are trying to figure out how to make new Federal crimes as part of the telecommunications bill.

The Senate, of course, passed the Exon-Coats Communications Decency Act, which would punish with a 2-year jail term any Internet user who posted a message with indecent language or used a four-letter word in a message to