

carry on the legacy of Representative Bono.●

THE SECURITIES LITIGATION  
UNIFORM STANDARDS ACT OF 1998

● Mr. REED. Mr. President, I speak today about passage of the conference report on the Securities Litigation Uniform Standards Act of 1998, S. 1260. Recently, the report was agreed to by both chambers of Congress and sent to the President for his signature.

I supported the Private Securities Litigation Reform Act of 1995 as well as S. 1260. I did so because I recognize the national nature of our markets as well as the need to encourage capital investment. I am pleased that we have been able to further these goals through this legislation. However, I am concerned by the attempt of a few to lessen the obligations owed investors.

Particularly troubling has been the incorrect use of legislative history to imply that a defrauded investor, now barred from discovery prior to the adjudication of a motion to dismiss, must include, in a pleading, evidence of conscious attempts to defraud by the defendant. First, no such implication was made by the 1995 bill. Second, no bill would have passed if such implications were included in the 1998 legislation. Thus, allegations of motive, opportunity, and recklessness, as well as conscious fraud, continue to satisfy the requirements of a 10b(5) pleading. This is the rigorous, but time-tested standard for pleading which has been applied in the Second Circuit. This is the standard that we adopted in 1995, and the national standard created by S. 1260.

The legislative history most frequently cited incorrectly is the Presidential veto message which accompanied his rejection of the 1995 bill; a veto which was overridden. I cannot understand why any weight would be given to the President's interpretation of a bill he vetoed. The purpose of any veto message is to portray the bill as negatively as possible, to avoid a veto override. Accusations the President made about the pleading standard were not only overblown, they were specifically rejected during debate after the veto and prior to the veto override.

Mr. President, as the Senate considered partially preempting state law, many Senators, including the primary sponsors of the bill, made clear that preemption would only occur if the federal standard insured investors protections from fraud. Most importantly this means a proper pleading standard and scienter requirement. This view was shared by Chairman Levitt of the Securities Exchange Commission. This is reflected in Chairman Levitt's testimony before Congress, in correspondence between the SEC and the Senate sponsors of the bill, as well as in statements by Banking, Housing and Urban Affairs Committee Chairman D'AMATO and the Ranking Member of the Securities Subcommittee, Senator DODD.

Recent events in foreign markets have made all too clear the havoc that results when investors are not fully apprized of substantial risks and rewards associated with investments. The Senate made clear that, in enacting partial preemption, it would not tolerate implementation of untested standards concerning the obligations owed investors. Nor, might I add, did industry proponents of the bill ask for a lessening of these standards.

In order to better illustrate this point, Mr. President, I ask that a letter I sent to Members of the Conference Committee on S. 1260 be printed in the RECORD.

The letter follows:

U.S. SENATE,  
Washington, DC, October 2, 1998.  
Chairman ALFONSE M. D'AMATO,  
Committee on Banking, Housing, and Urban Affairs,  
Washington, DC.

DEAR MR. CHAIRMAN: I write to you as a conferee on the Securities Litigation Uniform Standards Act of 1998, S. 1260. As you know, I supported passage of this legislation, and voted to override the President's veto of the Private Securities Litigation Reform Act of 1995. While class action suits are frequently the only financially feasible means for small investors to recover damages, such lawsuits have been subject to abuse. By creating national standards, such as those in S. 1260, we recognize the national nature of our markets and encourage capital formation.

However, it is essential to recognize that preemption marks a significant change concerning the obligations of Congress. When federal legislation was enacted to combat securities fraud in 1933 and 1934, federal law augmented existing state statutes. States were free to provide greater protections, and many have. Many of our colleagues voted for the 1995 legislation knowing that if federal standards failed to provide adequate investor protections, state law would provide a necessary backup.

With passage of this legislation, Congress accepts full and sole responsibility to ensure that fraud standards allow truly victimized investors to recoup lost funds. Only a meaningful right of action against those who defraud can guarantee investor confidence in our national markets. Recently, on the international stage, we have seen all too clearly the problem of markets which fail to ensure that consumers receive truthful, complete information.

Therefore, my support for this bill rests on the presumption that the recklessness standard was not altered by either the 1995 Act or this legislation. I strongly endorsed the Senate Report which accompanies this legislation because it stated clearly that nothing in the 1995 legislation changed either the scienter standard or the most stringent pleading standard, that of the Second Circuit. This language was central to the legislation receiving the support of Chairman Levitt of the Securities and Exchange Committee. It was also central to my support.

As the Senate Banking Committee recognized at his second confirmation hearing, Chairman Levitt has a lifetime of experience as both an investor and regulator of markets. That experience has led him to be the most articulate advocate of the need for a recklessness standard concerning the scienter requirement. In October 21, 1997 testimony before a Subcommittee in the House of Representatives, Chairman Levitt said, "[E]liminating recklessness . . . would be tantamount to eliminating manslaughter from the criminal laws. It would be like say-

ing you have to prove intentional murder or the defendant gets off scot free. . . . If we were to lose the recklessness standard we would leave substantial numbers of the investing public naked to attacks by . . . schemers."

In testimony before a Senate Banking Subcommittee, on October 29, 1997, Chairman Levitt further articulated his position regarding the impact of a loss of the recklessness standard. He said, "A higher scienter standard (than recklessness) would lessen the incentives for corporations to conduct a full inquiry into potentially troublesome or embarrassing areas, and thus would threaten the disclosure process that has made our markets a model for nations around the world."

The danger posed by a loss of recklessness to our citizens and markets is clear. We should not overrule the judgement of the SEC Chair, not to mention every single Circuit Court of Appeals that has adjudicated the issue. I would assume that the motives which led to SEC and the Administration to insist on the Senate Report language concerning recklessness would also apply to their views of the Conference Report.

With regard to the pleading standard, some Members of Congress, and, unfortunately, a minority of federal district courts, have made much of the President's veto measure of the 1995 legislation. Specifically, some have pointed out that the President vetoed the 1995 bill due to concerns that the Conference Report adopted a pleading standard higher than that of the Second Circuit, the most stringent standard at that time. As I, and indeed a bipartisan group of Senators and Representatives, made clear in the veto override vote, the President overreached on this point. The pleading standard was raised to the highest bar available, that of the Second Circuit, but no further. In spite of the Administration's 1995 veto, this preemption gained the support of Chairman Levitt. It is, therefore, difficult to understand how some can argue that the 1995 legislation changed the pleading standard of the Second Circuit.

The reason for allowing a plaintiff to establish scienter through a pleading of motive and opportunity or recklessness is clear. As one New York Federal District Court has stated, "a plaintiff realistically cannot be expected to plead a defendant's actual state of mind." Since the 1995 Act allows for a stay of discovery pending a defendant's motion to dismiss, requiring a plaintiff to establish actual knowledge of fraud or an intent to defraud in a complaint raises the bar far higher than most legitimately defrauded investors can meet.

Firms which advocate for S. 1260 do so based on the need to eliminate the circumvention of federal standards and federal stays of discovery through state court filings. They do not argue for a lessening of the obligations owed investors. I am concerned that should the conference committee include language which could be interpreted to eviscerate the ability of plaintiffs to satisfy the scienter standard by proof of recklessness or to require plaintiffs, barred from discovery, to adhere to a pleading standard requiring conscious behavior, the bill will lose the support of Chairman Levitt and many Members of Congress. I urge the Conference to support language included in the Senate Report and move forward with a bill that a bipartisan group in Congress can support and the President can sign.

Sincerely,

JACK REED,  
U.S. Senator.

Mr. REED. Mr. President, I respectfully point out that the letter was sent during the Conference Committee negotiations on the bill and illustrates

the fact that the Senate was unwilling to alter positions it established in Senate passage of S. 1260. I appreciate the opportunity to clarify the debate surrounding this issue. I commend Chairman D'AMATO and Senator DODD for their work on this bill. They have furthered the goal of capital formation while ensuring proper protections for consumers.●

#### TRIBUTE TO STATE REPRESENTATIVE MORRIS HOOD, JR.

● Mr. LEVIN. Mr. President, earlier this month, a powerful voice for fairness and compassion fell silent with the untimely death of State Representative Morris Hood, Jr.

Representative Hood served in the Michigan House of Representatives for 28 years, representing a part of the City of Detroit, my home town. He was the Chairman of the House Appropriations Committee. He distinguished himself in that role by fighting to make education accessible to all people. He strove to give everyone the opportunity to go to school, to obtain a job and earn a living. He was the primary founder of the King-Chavez-Parks initiative, which has provided thousands of dollars in scholarship money to deserving minority students. He was a believer in a positive role for government in our society. He once said, "There are some things government is meant to do. One of the them is to take care of those who can't take care of themselves."

Morris Hood, Jr. recognized the painful effects of discrimination and sponsored legislation to give small and minority owned businesses the ability to compete for state contracts. Foremost of all, Morris Hood was a promoter of the City of Detroit. He saw in Detroit a community full of possibilities, inhabited by people full of potential. He saw as his responsibility to use government as one means to unlock that potential. That is why he was such a strong supporter of Focus: HOPE, an organization that is near and dear to my heart. His voice will be dearly missed. Our hearts go out to his children, Denise and Morris III.

Mr. President I ask my Senate colleagues to join me in honoring the memory of a passionate legislator, State Representative Morris Hood, Jr.●

#### OUR UNFINISHED WORK TO PROTECT PRIVACY RIGHTS

● Mr. LEAHY. Mr. President, the American people have a growing concern over encroachments on personal privacy. It seems that everywhere we turn, new technologies, new communications media, and new business services created with the best of intentions and highest of expectations also pose a threat to our ability to keep our lives to ourselves, to live, work and think without having giant corporations or government looking over our shoulders, or peeking through our keyholes.

The current national media obsession with the Monica Lewinsky scandal has focused attention on abuses of power by independent counsel Kenneth Starr. I have been a prosecutor, and I am intimately familiar with the enormous power prosecutors wield. This power is generally circumscribed by a sense of honor and by professionalism, and for those for whom this is not enough, by the Bar's canons of ethics and disciplinary rules and, for federal prosecutors, the rules and regulations of the Department of Justice.

Mr. Starr has a different view of these obligations, and privacy has been the first casualty. He began his investigation into the President's personal life by using the results of an illegal wiretap. The State of Maryland protects its residents from having private conversations tape recorded without their knowledge or consent. Mr. Starr condoned the deliberate flouting of that law by granting the perpetrator immunity and then using the illicit recordings to persuade the Attorney General to expand his jurisdiction.

That was just the beginning. In February, Prosecutor Starr forced a mother to travel to the country's Capital to sit before a federal grand jury, with no right to have counsel present, and reveal the most intimate secrets of her daughter. That led me to introduce legislation to develop Federal prosecutorial guidelines to protect familial privacy and parent-child communications in matters that do not involve allegations of violent conduct or drug trafficking.

Mr. Starr issued subpoenas to bookstores to pry into what we read and further encroached upon our First Amendment rights with subpoenas to reporters, at every step acting contrary to Justice Department guidelines. He intruded into the attorney-client privilege, and even required Secret Service agents to gossip about those whom they are sworn to protect, and whose privacy they have safeguarded for decade upon decade. Then all of the private information he gathered, all of the excruciating details of personal life, appeared almost contemporaneously in the public press, attributed to unidentified sources, despite the command of the law that all matters before a grand jury remain secret.

The independent counsel law was passed with the best of intentions, with my support. I never imagined that the power would be so abused, and privacy so ignored. But that is the point. We must act to prevent abuses of privacy.

Mr. Starr, by his gross excesses, has become a symbol of the threat to privacy and the threat to individual liberty from abuse of power and information. That threat has been amplified by the unseemly haste with which the Republican majority on the House Judiciary Committee voted to plaster the mud from Ken Starr's report all over the Internet, so that literally all the world would have a chance to peek through the keyhole. This intemperate

action, in an unabashed effort to gain political advantage at the expense of privacy and dignity, should be a lesson to the American people that we need additional legal protection to protect their privacy.

The far more pervasive problem is the incremental encroachment on privacy through the lack of safeguards on personal, financial and medical information about each of us that can be stolen, sold or mishandled and find its way into the wrong hands with a push of a button.

The right of privacy is one of the most vulnerable rights in the information age. The digitalization of information and the explosion in the growth of computing and electronic networking offer tremendous potential benefits to the way Americans live, work, conduct commerce, and interact with their government. But the new technology also presents new threats to our individual privacy and security, in particular, our ability to control the terms under which our personal information is acquired, disclosed, and used.

The threats are there, but so are the solutions, if we only take the time to look for them. For example, this Congress passed legislation that will make the United States government more accessible and accountable to the citizenry by directing Federal agencies to accept "electronic signatures" for government forms that are submitted electronically. When the bill was reported out of committee, it established a framework for government use of electronic signatures without putting in place any privacy protections for the vast amounts of personal information collected in the process. I was concerned that citizens would be forced to sacrifice their privacy as the price of communicating with the government electronically. Senator ABRAHAM and I corrected this oversight by adding forward-looking privacy protections to the bill, which strictly limit the ways in which information collected as a by-product of electronic communications with the government can be used or disclosed to others.

As I remarked when the bill passed, however, this is just the beginning of Congress's efforts to address the new privacy issues raised by electronic government and the information age. Congress will almost certainly be called upon in the next session to consider broader electronic signature legislation, and issues of law enforcement access to electronic data and mechanisms for enforcing privacy rights in cyberspace will need to be part of that discussion.

The government also holds tens of millions of medical records of individuals covered by Medicare, Medicaid and other federal health programs. This information is routinely released by the government in individually-identifiable form for purposes such as medical research or in order to ferret out fraud