

There is a special and important program to assist police departments to improve technology and their ability to communicate with other agencies through COPS technology grants. Do you know what happens if there is an emergency in one area? What we have found out is, our police departments, our fire departments, our first responders do not have the equipment they need. They do not have the communications equipment. They cannot talk to each other.

The Senate, in a bipartisan way, passed authorizing legislation to say we need to help connect these departments with one another. Because suppose something happens on a railroad track, and one sheriff sees it, and there is a disaster, and he needs to get on the line immediately to all the other agencies in the area; they cannot do it right now. They need to move toward the ability to do this. It seems shocking that we have not done that already in America, but that is the truth. What does the President do? He cuts that program. He eliminates it.

Now, the President also creates a new program. He wants to extend the No Child Left Behind to high school. Well, how about fully funding his first No Child Left Behind? I wrote the part with Senator ENSIGN that deals with afterschool programs. It has been frozen for 3 years. There are millions of kids who want to get into afterschool programs.

We know it works. Law enforcement loves the program. The teachers love the program because the kids get to do their homework. They stay out of trouble. The FBI loves the program. The FBI has told us the vast majority of juvenile crime occurs right after school until the parents come home. We did not need the FBI to tell us that. We kind of figured that out. But this is key.

So here we are with a new program to extend No Child Left Behind to high school kids when we have not fully funded the afterschool program and many of the other programs that were promised to our people in the first No Child Left Behind. That is \$1.4 billion, folks. This is not small change. This is \$1.4 billion for this new program. There are no revenues in there from Iraqi oil.

This is also the first administration not to back a polluter-pay fee. When polluters cause these superfunds, where we have toxics all over the ground seeping into the water, it costs a lot of money to clean it up. This is the first administration, Republican or Democratic, not to support this polluter-pay fee. That would bring billions in over 5 years.

There are ways for us to pay for things the American people need. I am looking forward to getting into more of the fine print of this particular budget. I used to be on the Budget Committee. I can tell you, I loved being on the Budget Committee because it was a way to look at the big picture. When I went on the Commerce Committee, I

had to give up the Budget Committee. It was a sad decision for me. But I look forward to hearing from KENT CONRAD and I look forward to hearing from the Republican chairman, who was PETE DOMENICI, and I am not sure if it has changed or not. Because I want to hear their take on this budget.

But we see new initiatives in this budget that obviously are not paid for when we are shorting probably 150 programs, according to the President. We see nothing in here about getting any revenues from the Iraqi oil that were promised to us: \$50 to \$100 billion over the course of the next 2 or 3 years we were told by this administration in 2003. I believe in holding people accountable when they say things. I think it is important. That is what they said, and we do not see any evidence of any of this in this budget.

So we have the budget to deal with. We have the class action lawsuit legislation, which I hope we can do in a way to protect the important lawsuits that need to be heard and need to be resolved. Because if they are heard and they are resolved, our people will be safer, our people will be stronger, our people will feel they have been given justice.

We have the Social Security, what I call, repeal. Not a penny has been put into this budget to reflect any of that.

I understand my time is up. There is no one on the floor so I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

CLASS ACTION FAIRNESS ACT OF 2005

The PRESIDING OFFICER. Under the previous order, the hour of 3 p.m. having arrived, the Senate will proceed to the consideration of S. 5, which the clerk will report.

The assistant legislative clerk read as follows:

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

Mr. SPECTER. Mr. President, I was about to note that the hour of 3 o'clock has arrived. According to the previous order, the Senate is to take up the legislation on class action. This is legislation which has been crafted over a considerable period of time. It had some difficulty in achieving 60 votes for so-

called cloture to cut off debate so that the Senate would take up the issue. It had been negotiated among a number of Senators in the past to get the requisite 60 votes, and it is represented that if the bill is passed in its current form in the Senate, it will be agreeable to the House of Representatives. When I choose my words carefully—that has been represented; you never know until it gets to the other body and see what they do—but that has been the expectation.

When the issue was negotiated, there were a number of Senators who were satisfied with the structure of the bill. But all 100 Senators had not assented, agreed to it, including this Senator. We customarily are not all involved in negotiations as to the bill so that there is obviously latitude, when the matter comes before the Senate, for individual Senators to exercise their right to either offer amendments or to join in amendments which are offered.

I support class action reform. I do so essentially to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases. Regrettably, the history has been that there are some States in the United States and even some counties where there is forum shopping, which means that lawyers will look to that particular State, that particular county to get an advantage.

Diversity jurisdiction was established in the United States so that if there was litigation between citizens of different States, there was a certain amount in controversy, a jurisdictional amount—that amount has risen over the years; when I started the practice of law it was \$3,000, now it is \$75,000—the diversity jurisdiction of the Federal courts was established to see to it that if a litigant from California, illustratively, came to Pennsylvania and might be in the State court, that there would be perhaps some predisposition on the part of State court judges to look more favorably upon the local litigant. And the Federal courts were viewed as being more impartial. And that thread remains to this day.

The legislation will leave in State courts, if the matter is predominantly a State court issue, where there are some two-thirds of the class in that State. If there is one-third or less, then the matter would go to the Federal court. And if it is between one-third and two-thirds, then it will be up to the discretion of the Federal judge on a series of standards which have been worked out through the leadership of Senator FEINSTEIN of California.

The bill came before the Judiciary Committee last Thursday. And it was my request of the Judiciary Committee members at that time that amendments not be offered because if you have controversial amendments offered in committee, they are customarily taken up again on the Senate floor. And the majority leader, Senator FRIST, had asked me in my capacity as

chairman of the committee to get the bill out last Thursday so that it could come to the floor today.

As is well-known publicly, the class action legislation is a priority of the President's. It has been the intention of the majority leader to put the matter on the agenda at an early time—obviously, February 7 is an early date—and reserve sufficient time so that Senators have a full opportunity to offer amendments, and we can move through to completion of the bill.

There is an amendment which has been discussed involving a proposal by the Senator from New Mexico, Mr. BINGAMAN, which would make certain that substantive rights which are now present in State courts would be retained after the enactment of this legislation. State courts use State law, and that is substantive law, in certifying class actions. And while I have stated my support for moving cases to the Federal court for the reasons I have already said, I have made a claim in the past and repeated it in the Judiciary Committee meeting last Thursday that in moving the cases to the Federal courts, I do not want to see changes in the substance of the rights of consumers or other class action litigants; that the objective which I think we ought to obtain is that the same substantive rights would remain; that this bill should not be a vehicle for modification of substantive rights, but this bill should provide the reform which will take the cases out of State courts, where there has been a record of prejudice to defendants, and take them to the Federal courts where, in the historical tradition of diversity litigation, to take them to the Federal courts where there is a better opportunity for an objective determination.

When this bill was in committee in the past, I had a concern about certain of the provisions as to mass actions. The advocates of reform legislation were concerned that mass actions might be tried in the State courts altogether and provide a procedural context where there could not be a fair or appropriate adjudication. That is a highly complex subject, and it may be the matter of some concern as we move forward on this bill.

It is my hope that we will not have so-called extraneous amendments, that we will focus on issues of class action related to this subject matter so that we can have a full debate on the subject. Senators may have an opportunity to offer their amendments and the determination of the Senate can be made as to what ought to be done on this very important litigation matter.

I seek recognition today to open debate on the Class Action Fairness Act of 2005. This bill embodies a carefully balanced legislative solution that responds to abuses of the class action litigation device in our State courts.

A key provision in the bill amends the Federal diversity jurisdiction statute to allow Federal courts to hear large multi-party, multi-State class

action disputes. Existing law prevents national lawsuits from seeing the inside of a Federal courtroom by virtue of a glitch in the way that courts have interpreted the Federal diversity jurisdiction statute—a statute that the Congress passed back in 1789.

Let me illustrate this fundamental problem by looking at two hypothetical cases. In the first case, you have a resident of, say, my State of Pennsylvania, slip and fall while filling up her car at a New Jersey gas station. The plaintiff sprains her ankle, misses work, and has medical bills. And her damages total \$76,000. Under the existing diversity jurisdiction statute, if a plaintiff and a defendant hail from two different States, and if the amount in controversy exceeds \$75,000, as in this example, then the case can be brought in Federal district court.

Diversity jurisdiction for Federal court exists because the Framers of our Constitution wanted to encourage interstate commerce, and they wanted cases affecting interstate commerce to be adjudicated in our Federal courts. They knew that State judges can sometimes play favorites, and that if out of State defendants were unable to access the neutral forum of a Federal court, that could have a chilling effect on interstate commerce.

But to understand how diversity jurisdiction has been misused, let's look at a second case in the class action context. Let's assume there are 1,000 plaintiffs who form a class. Let's also say they claim \$100 million in damages against 300 different plumbing operations from around the country alleging that the defendants overcharged for plumbing services. And let's assume further that while these plaintiffs are spread across all 50 States, at least one of the 1 plaintiffs and one of the defendants reside in the same State. Although there is little doubt that this hypothetical lawsuit affects interstate commerce, especially given the number of parties spread throughout the country, this case would stay in State court.

In 1806, the Supreme Court in *Strawbridge v. Curtis* interpreted the diversity jurisdiction statute to require what is known today as "complete diversity". In other words, for diversity jurisdiction to exist, all of the named plaintiffs must be citizens of different States from all of the defendants. While the complete diversity rule makes sense in the context of a relatively smaller lawsuit, it has been used to defeat Federal jurisdiction for large interstate class actions lawsuits.

Throughout the years, the Judiciary Committee has received compelling evidence showing that certain plaintiffs' lawyers avoid Federal jurisdiction by simply naming a defendant in a complaint—such as a local pharmacy—to match the citizenship of a local plaintiff. This is done despite the fact that the real defendant and vast majority of plaintiffs hail from different States.

It is this awkward result that the bill seeks to fix. Section 4 of S. 5 amends the current diversity statute to allow larger interstate class actions to be heard in Federal court by granting original jurisdiction in those class actions where any member of a proposed class is a citizen of a different state from any defendant. To be eligible for Federal jurisdiction, the class action must cover at least 100 plaintiffs and involve an aggregate amount in controversy of at least \$5 million.

While this provision represents the general rule, the bill contains certain exceptions that balance a state's interest in adjudicating local disputes. First, if two-thirds or more of the class members are from the primary defendant's home State, the lawsuit will remain in State court. Conversely, class actions filed in the home State of the primary defendant are subject to Federal jurisdiction if less than one-third of the proposed class members are citizens of that State. For cases brought in a defendant's home State in which between one-third and two-thirds of the class members are citizens of the forum State, a Federal district court judge is given discretion to exercise jurisdiction based on consideration of enumerated factors. This three-tiered test is known as the Home State Exception and represents a provision championed by Senator FEINSTEIN during committee markup on the bill in the 108th Congress.

Second, the bill contains the Local Controversy Exception—a provision that enables State courts to adjudicate truly local disputes involving principal injuries concentrated within the forum State. To fall within this exception, a class action must meet the following four criteria: 1, the class must be primarily local, meaning that two-thirds of the class members reside in the forum State; 2, the lawsuit must be brought against at least one real in-state defendant whose alleged conduct is central to the class claims and from whom the class seeks significant relief; 3, the principal injuries caused by the defendants' conduct must have occurred within the forum state; and 4, no other similar class actions have been filed against any of the defendants in the preceding 3 years. This exception is intended to ensure that State courts can continue adjudicating truly local controversies involving defendants that are out-of-State corporations.

I believe that modifying the current diversity jurisdiction statute is a sensible solution towards minimizing the class action abuses that we have witnessed throughout the years. Since the 105th Congress, this body has received evidence showing an extraordinary concentration of large interstate class action lawsuits in a handful of our State courts—certain county courts to be precise.

The evidence further shows that these courts operate in a manner that deprives the rights of truly injured individual plaintiffs and defendants. In

many cases, courts approve settlements that primarily benefit the class counsel, rather than the injured class members. Indeed, it has become all too common for certain State courts to approve proposed settlements where class members receive little or nothing of value, such as a meaningless coupon, while their attorneys receive substantial fees. In addition, multiple class action lawsuits asserting the same claims on behalf of the same plaintiffs are routinely filed in different State courts, thus creating judicial inefficiencies and encouraging collusive settlement behavior.

Unfortunately, the injuries caused by these abuses are not confined to the parties who are named in the class action complaint. Rather, they extend to everyday consumers who unwittingly get dragged into these lawsuits as unnamed class members simply because they purchased a cell phone, bought a box of cereal, drove a car fitted with a certain brand of tires, or rented a video. What we are really talking about here is a system that impacts the vast majority of people who live in this country.

The time has now come for its full consideration of class action reform by the Senate. The bill maintains strong bipartisan support in this Chamber and has brought many members from both sides of the aisle together. Indeed, just last week, the Judiciary Committee reported this bill favorably to the floor on a strong bipartisan vote of 13-5. In this regard, I would like to applaud my colleagues Senators GRASSLEY, HATCH, CARPER, and KOHL for their tireless efforts in building consensus throughout this body.

S. 5 balances State and Federal interests in adjudicating disputes. This said, we must not lose sight of the fact that we be mindful of the substantive rights of individual plaintiffs caught in this balancing act—rights that guarantee a citizen access to jury trials for injuries sustained at the hands of wrongdoers. In the coming days, I anticipate amendments and thoughtful arguments from my colleagues relating to this issue. As such, I look forward to the debate and the Senate's full consideration of this important legislation.

PHILADELPHIA EAGLES

Mr. President, I note the presence of my distinguished colleague, the ranking member, the first Democrat ever elected in the State of Vermont.

Mr. LEAHY. Only.

Mr. SPECTER. Before yielding, let me make one other comment; that is my congratulations to the New England Patriots. As a long-standing Philadelphia Eagle fan, going back to the days of Franklin Field, as those in Philadelphia would understand, where the Eagles played in the confines of the ballpark of the University of Pennsylvania and the features were Jimmy Brown running for the Cleveland Browns, tackled most of the time by Chuck Bednarik of the Philadelphia Eagles, in the great championship

game of 1960, which the Eagles won 17 to 13. The glory days were recounted again in the New York Times. You have to go back to 1960 to find glory days for Philadelphia football. But it is recounted how Chuck Bednarik tackled Jim Taylor, the great running back of the Green Bay Packers, and sat on him until time had expired, and the Eagles also won 17 to 13.

Franklin Field seated a few over 60,000. It is now reputed that about 900,000 people were there; 900,000 people claim to have been there to have seen that game. I was there and am prepared to say so in open court and even take an affidavit on it.

It was a thrilling game yesterday. I was in Jacksonville. It was reported by one of the local firms that there were some 60,000 Eagle fans in Jacksonville who did not have tickets. And when you moved through the city, the green was everywhere, with "5" for Donovan McNabb and 81 for Terrell Owens. Owens had a spectacular game, recovering from an ankle injury in a very short period of time, catching nine passes, six in the second half, taking one high over his shoulder and doing a 270-degree pirouette, a 30-yard gain. But to the credit of Coach Bill Belichick and Quarterback Tom Brady, New England is an outstanding team.

We take great pride in what the Philadelphia Eagles have done and what Donovan McNabb has done. He had a high number of completions yesterday, but too many of them went to the Patriots, with some three interceptions—too many picked off.

They coined the phrase in Brooklyn decades ago: Wait til next year. Wait til next year. But for this year, my congratulations to the New England Patriots. My congratulations also to a fighting group of Philadelphia Eagles. Wait until next year.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I have been in the Senate for 31 years. This is one of the most enjoyable colloquies I have ever had.

I hope that the Philadelphia Eagles and actually all of their fans recognize what a great fan they have in the distinguished senior Senator from Pennsylvania. We all know him as one of the most knowledgeable and best lawyers ever to serve in the Senate in either party. But we saw another side of him today. Anybody who can recount effortlessly—I say for those reading the RECORD, it was without a single note—the history of the Eagles and give a play by play recounting, this recounting was a tour de force of the first order. For Eagles fans, I want you to know his legal expertise is every bit as good.

I grew up with a different sport—baseball—in Vermont, where my home is only a couple hours' drive from Fenway Park. The distinguished Presiding Officer knows what that is like because he is even closer. We all will wait for next year and the Red Sox.

As a child growing up, my father, who had some interest in politics, used to say there will be a day when Vermont will actually elect a Democrat to the U.S. Senate. Everybody told him this would never happen in his lifetime. I am delighted that it did.

I was thinking about my father today. It was 21 years ago today that he left this Earth. He got to see this one and only Democrat, and he got to be there twice on election night and twice to see me sworn into this body, which even after six times is still one of those moments one will never forget.

We waited in Vermont from 1918—my father was 18 years old when the Red Sox won the championship—until this past year. There was some celebration. I might mention that I thought maybe there was some inspiration from Paul McCartney, who performed in the halftime show. I was very disgusted with the halftime show last year—at something nobody even noticed until the next day, when people talked about it on Web sites. The photographs of Miss Jackson became the most visited Web site in America, which gives you some idea of what our priorities are. What I found disgusting at that halftime show was Kid Rock ripping a hole in the American flag and wearing it as some kind of a poncho and then throwing it on the ground at the end of his song. I found that to be very offensive.

I would hope that some of the keepers of morality in this country, who have had a wonderful time sending out fundraising letters based on something nobody really saw until the next day and spending just as much time trying to sell patriotism to everybody, would say how disgusted they are at the actions of a rock singer who would so desecrate the American flag—to the roaring cheers of too many people in the audience. I thought that was outrageous. Perhaps we needed somebody from the United Kingdom to come over here and give us a rousing halftime show, which it was. Actually, the game got better after that. Maybe that is in the eyes of the beholder, too. But I appreciate what the Senator from Pennsylvania said.

I also note that in my 31 years here, it is the first time I heard the unanimous consent request Senator SPECTER made. Perhaps it was made before. I have to think that when future historians go back into the RECORD and find that Senators actually did that, they would probably applaud that we know what the RECORD is.

I recall my days in law school having a summer job and researching the CONGRESSIONAL RECORD for the then-Federal Power Commission, which later became the Department of Energy, and trying to figure out what was actually said and what was not said, what order it was said in, and why some Senators appeared to have said the same thing twice. When I came to the Senate, I must admit some of the Senators—no longer with us, God rest their souls—would tend to say the same thing

twice, but that was not intentional on their part, or at least they were unaware of it. But I commend the Senator from Pennsylvania for making a unanimous consent request that actually will make sense for those who read the RECORD.

Mr. SPECTER. If the Senator will yield, Senator LEAHY and I are very concerned about the RECORD, having been former district attorneys. We are very concerned about the RECORD. We know that every word we say is going to be in black and white and be there for a long time, so we like it to be accurate.

Mr. LEAHY. I thank my friend.

Mr. SPECTER. I thank my colleague for his kind comments. It is not inappropriate to note that on Monday afternoons, when we are not going to be taking up amendments but having opening statements, this is a little time on the Senate floor for banter and colloquy. Perhaps those who see C-SPAN might pause a moment or two longer to hear about Paul McCartney or the Patriots or about the Eagles. I was waiting in an elevator to go to my seat yesterday at around 5 o'clock, and an enormous group came and preempted about 100 fans, including this fan, who were waiting to go up so that Paul McCartney and a small group could be escorted in. He looked good for an oldtime Beatle.

Mr. LEAHY. I might say, I worked with Sir Paul and his wife on the issue of landmines and landmine removal. I must admit that he has aged better than some of us who were Beatle fans when he first started. He has his own hair, among other things.

The Senator is correct to say that sometimes on Monday afternoon, we digress. I give fair warning to the Senator from New Hampshire, now presiding, that one of these digressions in about 3 or 4 weeks when the maple syrup crop comes in, I will be extolling the virtues of Vermont maple syrup being the finest in the world. I will also compliment those from our neighboring States who do a pretty good job with their maple syrup.

Mr. LEAHY. Today, we are considering the first of several bills that I am afraid are advanced not with an interest of what is best for the American consumer but advanced by corporate special interests to dramatically limit the public's access to their courts. I am going to oppose this so-called Class Action Fairness Act for a very simple reason: it is not fair.

This legislation would make it harder for citizens to protect themselves against violations of State civil rights or consumer, health, or environmental protection laws—things we take seriously in my own State and most others do in theirs. It will make it harder because these cases will be forced out of the local State courts. Aside from being convenient, State courts have experience with the legal and factual issues involved in these important cases. This legislation sweeps these

cases into Federal courts, erects new barriers to lawsuits, and places new burdens on the plaintiffs.

Let me give you an example. In the case of legal rights it would take from the citizens of my own State, this legislation would deprive Vermonters the right to band together to seek relief in their State courts—even if the harm occurred in Vermont and the principal defendant has a substantial presence in Vermont. That is a highhanded override of the rights of the American people. You have to ask who it would benefit. Obviously, it benefits the wealthy and powerful special interests.

This legislation also overrides the laws and legislatures in our State governments. I find it interesting that many colleagues who have spoken over and over again on how we have to stand up for the rights of our States are so willing, when some of their corporate backers come up with legislation like this, to simply slam the door on their own States. Indeed, the National Conference of State Legislatures wrote to us last week to note that this bill “undermines our system of federalism, disrespects our State court system, and clearly preempts carefully crafted State judicial processes which have been in place for decades regarding the treatment of class action lawsuits.”

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

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

NATIONAL CONFERENCE OF
STATE LEGISLATURES,
Washington, DC, February 2, 2005.

U.S. SENATE,
Washington, DC.

DEAR SENATOR: On behalf of the National Conference of State Legislatures (NCSL), I am urging you to oppose passage of S. 5, the “Class Action Fairness Act of 2005.” This legislation will federalize class actions involving only state law claims. S. 5 undermines our system of federalism, disrespects our state court system, and clearly preempts carefully crafted state judicial processes which have been in place for decades regarding the treatment of class action lawsuits. The overall tenor of S. 5 sends a disturbing message to the American people that state court systems are somehow inferior or untrustworthy.

S. 5 amends the Federal Rules of Civil Procedure to grant federal district courts original diversity jurisdiction over *any* class action lawsuit where the amount in controversy exceeds \$5,000,000 or where any plaintiff is a citizen of a different state than any defendant, or in other words, any class action lawsuit. The effect of S. 5 on state legislatures is that state laws in the areas of consumer protection and antitrust which were passed to protect the citizens of a particular state against fraudulent or illegal activities will almost never be heard in state courts. Ironically, state courts, whose sole purpose is to interpret state laws, will be bypassed and the federal judiciary will be asked to render judgment in these cases. The impact of S. 5 is that state processes will be preempted by federal ones which aren't necessarily better.

NCSL opposes the passage of federal legislation, such as S. 5 which preempts established state authority. State courts have traditionally and correctly been the repository

for most class action lawsuits because state laws, not federal ones, are at issue. Congress should proceed cautiously before permitting the federal government to interfere with the authority of states to set their own laws and procedures in their own courts.

NCSL urges Congress to remember that state policy choices should not be overridden without a showing of compelling national need. We should await evidence demonstrating that states have broadly overreached or are unable to address the problems themselves. There must be evidence of harm to interests of national scope that require a federal response, and even with such evidence, federal preemption should be limited to remedying specific problems with tailored solutions, something that S. 5 does not do.

I urge you to oppose this legislation. Please contact Susan Parnas Frederick at the National Conference of State Legislatures at 202-624-3566 or susan.frederick@ncsl.org for further information.

Sincerely,
Senator MICHAEL BALBONI,
New York State Senate, Chair, NCSL
Law and Criminal Justice Committee.

Mr. LEAHY. Here the National Conference of State Legislatures is saying to us: Why are you being so heavy-handed that you feel the 100 Members of the Senate can just wipe out the legislatures of all 50 States on matters of their States' laws?

Fourteen State Attorneys General wrote to our Senate leaders today to express their collective view that “despite improvements over similar legislation considered in prior years, [they] believe S. 5 still unduly limits the right of individuals to seek redress for corporate wrongdoing in their State courts.”

Again, they are saying: What gives you such wisdom in the U.S. Senate that you can completely throw out 50 States and say, We know far better than they could ever know in their years and decades of experience? The letter urges passage of amendments to be offered by Senators BINGAMAN, PRYOR, and KENNEDY. This letter is signed by the Attorneys General from New York, Oklahoma, California, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Vermont, and West Virginia. I ask unanimous consent that it be printed in the RECORD.

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

STATE OF NEW YORK, OFFICE OF THE
ATTORNEY GENERAL, THE CAPITOL,
Albany, NY, February 7, 2005.

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

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

DEAR MR. MAJORITY LEADER AND MR. MINORITY LEADER: On behalf of the Attorneys General of California, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oklahoma, Oregon, Vermont and West Virginia, we are writing in opposition to S. 5, the so-called “Class Action Fairness Act,” which will be debated today and is scheduled to be voted on this week. Despite improvements over similar legislation considered in

prior years, we believe S. 5 still unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts. We therefore strongly recommend that this legislation not be enacted in its present form.

As you know, under S. 5, almost all class actions brought by private individuals in state court based on state law claims would be removed to federal court, and, as explained below, many of these cases may not be able to continue as class actions. We are concerned with such a limitation on the availability of the class action device because, particularly in these times of tightening state budgets, class actions provide an important "private attorney general" supplement to the efforts of state Attorneys General to prosecute violations of state consumer protection, civil rights, labor, public health and environmental laws.

We recognize that some class action lawsuits in both state and federal courts have resulted in only minimal benefits to class members, despite the award of substantial attorneys' fees. While we support targeted efforts to prevent such abuses and preserve the integrity of the class action mechanism, we believe S. 5 goes too far. By fundamentally altering the basic principles of federalism, S. 5, if enacted in its present form, would result in far greater harm than good. It therefore is not surprising that organizations such as AARP, AFL-CIO, Consumer Federation of America, Consumers Union, Leadership Conference on Civil Rights, NAACP and Public Citizen all oppose this legislation in its present form.

1. *Class actions should not be "federalized"*

S. 5 would vastly expand federal diversity jurisdiction, and thereby would result in most class actions being filed in or removed to federal court. This transfer of jurisdiction in cases raising questions of state law will inappropriately usurp the primary role of state courts in developing their own state tort and contract laws, and will impair their ability to establish consistent interpretations of those laws. There is no compelling need or empirical support for such a sweeping change in our long-established system for adjudicating state law issues. In fact, by transferring most state court class actions to an already overburdened federal court system, this bill will delay (if not deny) justice to substantial numbers of injured citizens. Moreover, S. 5 is fundamentally flawed because under this legislation, most class actions brought against a defendant who is not a "citizen" of the state will be removed to federal court, no matter how substantial a presence the defendant has in the state or how much harm the defendant has caused in the state.

2. *Clarification is needed that S. 5 does not apply to state Attorney General actions*

State Attorneys General frequently investigate and bring actions against defendants who have caused harm to our citizens, usually pursuant to the Attorney General's *parens patriae* authority under our respective state consumer protection and antitrust statutes. In some instances, such actions have been brought with the Attorney General acting as the class representative for the consumers of the state. We are concerned that certain provisions of S. 5 might be misinterpreted to impede the ability of the Attorneys General to bring such actions, thereby interfering with one means of protecting our citizens from unlawful activity and its resulting harm. That Attorney General enforcement actions should proceed unimpeded is important to all our constituents, but most significantly to our senior citizens living on fixed incomes and the working poor. S. 5 therefore should be amended to clarify

that it does not apply to actions brought by any State Attorney General on behalf of his or her respective state or its citizens. We understand that Senator PRYOR will be offering an amendment on this issue, and we urge that it be adopted.

3. *Many multi-State class actions cannot be brought in federal court*

Another significant problem with S. 5 is that many federal courts have refused to certify multi-state class actions because the court would be required to apply the laws of different jurisdictions to different plaintiffs—even if the laws of those jurisdictions are very similar. Thus, cases commenced as state class actions and then removed to federal court may not be able to be continued as class actions in federal court.

In theory, injured plaintiffs in each state could bring a separate class action lawsuit in federal court, but that defeats one of the main purposes of class actions, which is to conserve judicial resources. Moreover, while the population of some states may be large enough to warrant a separate class action involving only residents of those states, it is very unlikely that similar lawsuits will be brought on behalf of the residents of many smaller states. This problem should be addressed by allowing federal courts to certify nationwide class actions to the full extent of their constitutional power—either by applying one state's law with sufficient ties to the underlying claims in the case, or by ensuring that a federal judge does not deny certification on the sole ground that the laws of more than one state would apply to the action. We understand that Senator Jeff Bingaman will be proposing an amendment to address this problem, and that amendment should be adopted.

4. *Civil rights and labor cases should be exempted*

Proponents of S. 5 point to allegedly "collusive" consumer class action settlements in which plaintiffs' attorneys received substantial fee awards, while the class members merely received "coupons" towards the purchase of other goods sold by defendants. Accordingly, this "reform" should apply only to consumer class actions. Class action treatment provides a particularly important mechanism for adjudicating the claims of low-wage workers and victims of discrimination, and there is no apparent need to place limitations on these types of actions. Senator Kennedy reportedly will offer an amendment on this issue, which also should be adopted.

5. *The notification provisions are misguided*

S. 5 requires that federal and state regulators, and in many cases state Attorneys General, be notified of proposed class action settlements, and be provided with copies of the complaint, class notice, proposed settlement and other materials. Apparently this provision is intended to protect against "collusive" settlements between defendants and plaintiffs' counsel, but those materials would be unlikely to reveal evidence of collusion, and thus would provide little or no basis for objecting to the settlement. Without clear authority in the legislation to more closely examine defendants on issues bearing on the fairness of the proposed settlement (particularly out-of-state defendants over whom subpoena authority may in some circumstances be limited), the notification provision lacks meaning. Class members could be misled into believing that their interests are being protected by their government representatives, simply because the notice was sent to the Attorney General of the United States, State Attorneys General and other federal and state regulators.

Equal access to the American system of justice is a foundation of our democracy.

S. 5 would effect a sweeping reordering of our nation's system of justice that will disenfranchise individual citizens from obtaining redress for harm, and thereby impede efforts against egregious corporate wrongdoing. Although we fully support the goal of preventing abusive class action settlements, and would be willing to provide assistance in your effort to implement necessary reforms, we are likewise committed to maintaining our federal system of justice and safeguarding the interests of the public. For these reasons, we oppose S. 5 in its present form.

Sincerely,

Eliot Spitzer, Attorney General of the State of New York; W.A. Drew Edmondson, Attorney General of the State of Oklahoma; Bill Lockyer, Attorney General of the State of California; Lisa Madigan, Attorney General of the State of Illinois; Tom Miller, Attorney General of the State of Iowa. Gregory D. Stumbo, Attorney General of the State of Kentucky; G. Steven Rowe, Attorney General of the State of Maine.

J. Joseph Curran, Jr., Attorney General of the State of Maryland; Tom Reilly, Attorney General of the State of Massachusetts; Mike Hatch, Attorney General of the State of Minnesota; Patricia A. Madrid, Attorney General of the State of New Mexico; Hardy Myers, Attorney General of the State of Oregon; William H. Sorrell, Attorney General of the State of Vermont; Darrell McGraw, Attorney General of the State of West Virginia.

Mr. LEAHY. I know class action issues have been raised by Senators KOHL, FEINSTEIN, SCHUMER, DODD, CARPER, LANDRIEU, and others. While I may disagree with them on some parts of this, I do so respectfully because I know how hard they have worked.

In the last Congress, they were able to negotiate some procedural improvements. They reined in some of the worst aspects of previous class action bills. One improvement was to restrict the use of worthless coupon settlements. I strongly support this improvement, which is a targeted provision that goes after a real class action abuse, not one that is just made up by special interests.

Unfortunately, there are other aspects that fail to achieve their intended goals. For example, two narrow exceptions have been negotiated to allow a few local controversies to remain in State court. But the exceptions to removal to Federal court touch on only a thin sliver of the class action cases this bill would affect—only when plaintiffs and primary defendants are from the same State—and even then it will do more harm than good with the complicated formula that will cause costly and time-consuming litigation. So this just increases the cost and increases the litigation.

Another provision seeks to reduce the delay plaintiffs can experience when a case is removed to Federal court by setting a time limit for appeals of remand orders. But no measure

is included in the bill to set a timeline for the district court to rule on the actual remand motion. What this means in layman's terms is a party can pluck one of these class actions out of State court and put it in Federal court, and if the Federal court rules against you on a remand, you have a right to appeal. But what do you do if they never rule? The case could sit there year after year and with no resolution. Litigants could die. People who have been harmed could die. People could move away, and nothing happens.

Senator FEINGOLD is going to offer an amendment to set a reasonable time limit for the district court to rule on remand orders. It does nothing to change the bill. It says you cannot pocket veto a case by sticking it away in a federal court docket somewhere. You have to rule one way or the other. We should all embrace that common-sense improvement.

I am also concerned that this bill will deny justice to consumers and others in class actions that involve multiple State laws. The recent trend in Federal courts is not to certify class actions if multiple State laws are involved. This bill, therefore, could force nationwide class actions to Federal court. Once they are removed to Federal court, you have a Catch-22. They have to be dismissed because they involve too many State laws.

If this legislation is really about transferring class actions to Federal court instead of being a pro-business vehicle for simply dismissing legitimate class actions, then the supporters of this legislation should want to solve this real Catch-22 problem. Senator BINGAMAN has an amendment to do just that. He is a former attorney general. He understands this. I look forward to debating this issue on the Senate floor.

Of course, the legislation covers more than just class actions. Individual personal injury actions, consolidated by State courts for efficiency purposes, are not class actions. Despite the fact that a similar provision was unanimously struck from the bill during the markup of class actions legislation in the Judiciary Committee last Congress, despite the fact that every single Republican, every single Democrat voted to strike this provision, now mass torts are again included in the bill. Again, that makes no sense. Federalizing these individual cases will delay and possibly deny justice for victims suffering real physical injuries. It will be a boon to the makers of Vioxx, but certainly will not help those who took Vioxx.

Mass tort cases are not class actions. They have not been analyzed under rule 23's standards or State law equivalents to rule 23. They are an important means by which groups of injured people have long been able to pursue remedies against those who have harmed them.

Mass tort cases address injuries to citizens' health from dangerous medical products, injuries to their property

and their health from environmental disasters, and injuries to their rights and liberties from widespread mistreatment in the workplace. There are entirely different procedural vehicles to reach justice in class actions. They should not be lumped in with class actions. Senator DURBIN has an amendment that would leave mass tort actions in State courts where they belong.

I am old enough to remember the civil rights battles of the 1950s and 1960s and the impact of class actions in vindicating basic rights through our courts. The landmark Supreme Court decision in *Brown v. Board of Education* was the culmination of appeals from four class action cases—three from Federal court decisions in Kansas, South Carolina, and Virginia, and one from a decision by the State supreme court of Delaware.

Only the supreme court of Delaware—the State court, not the Federal court—got the case right by deciding for the African-American plaintiffs. The State court justices understood they were constrained by the existing Supreme Court law but, nonetheless, held that the segregated schools of Delaware violated the 14th amendment. Before any Federal court did so, a State court rejected separate and unequal schools.

Today we take that for granted, but it was not because those cases went into Federal court that the civil rights of African Americans were determined; it was because they were in State court. Indeed, many civil rights advocates, including the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, and the National Asian Pacific Legal Consortium, have written to Senators in opposition to this legislation and in support of Senator KENNEDY's amendment to exempt civil rights and wage and hour cases from the bill. I am proud to cosponsor his amendment, and I look forward to the debate on it.

The legislation has also been criticized by nearly all the State Attorneys General in this country. I understand that at least 43 of the 50 State Attorneys General have expressed concern that S. 5 could limit their powers to investigate and bring actions in their State courts against defendants who cause harm to their citizens because in certain instances they file suit as the class representative for the consumers of their State.

I expect Senator PRYOR, a distinguished former State attorney general himself, to bring this issue to the floor with a clarifying amendment.

Some special interest groups are distorting the state of class action litigation by relying on a few anecdotes in an ends-oriented attempt to impede plaintiffs from bringing class action cases. We should take steps to correct actual problems as they occur. Simply transferring most suits into Federal

court will not correct the real problems faced by plaintiffs and defendants.

In fact, this Congress and past Congresses have federalized so many criminal cases that used to be in State courts and dumped them into the Federal courts that it is increasingly difficult to even get a civil case heard in Federal court. So many things are handled by local prosecutors, such as Senator SPECTER and myself when we were prosecutors, by local law enforcement, but because they are interesting matters, we have succumbed to the temptation to federalize case after case that State authorities have always handled very well. These criminal cases are now in the Federal courts, and the Federal courts are overloaded with them. Now we are going to transfer a whole lot more cases into Federal courts.

Defrauded investors, deceived consumers, victims of defective products and environmental torts, and thousands of other ordinary people have been able to rely on class action lawsuits in our State court system, and there they have sought and received justice. We all know that without consolidating procedures such as class actions, it might be impossible for victims to obtain effective legal representation.

Companies tend to pay their defense lawyers by the hour. They are well paid. Plaintiffs' lawyers in class actions tend to work without pay for the possibility of obtaining a portion of the proceeds, if they are successful. It may well prove uneconomical for counsel to take on cases against governmental or corporate defendants if they must do so on an individual basis. It may be that individual claims are simply too small to be pursued.

Sometimes that is what the cheaters count on; it is how they get away with their schemes. Cheating thousands of people just a little is still cheating, or millions of people just a little creates millions of dollars for one person with nothing to stop them from doing it. Class actions allow the little guys to band together to afford a competent lawyer to redress wrongdoing.

Whether those regular citizens are getting together to force manufacturers to recall or correct dangerous products, or to clean up after devastating environmental harms that endanger their children or their neighborhoods, or to vindicate the basic civil rights to which they are entitled, they are using class actions. Why make it more difficult or costly for them to right those wrongs?

As the *New York Times* noted in an editorial last week opposing this bill, the real objective of this legislation is "to dilute the impact of strong State laws protecting consumers and the environment and to make it harder for Americans to win redress in court when harmed by bad corporate behavior."

We have very strong environmental laws in Vermont, and we are very

proud of them. Now we see this Congress about to say to the Vermont Legislature: We can apply much lesser standards; we will just take it away from any enforcement you already have.

I ask unanimous consent that the New York Times editorial be printed in the RECORD.

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

[From the New York Times, Feb. 2, 2005]

CLASS-ACTION LAWSUITS

Tort reform is in the eye of the beholder. In the name of reforming the nation's civil justice system, and with scant public debate, President Bush and Congressional Republicans are racing to reward wealthy business supporters by changing the rules for class-action lawsuits. Their real objective is to dilute the impact of strong state laws protecting consumers and the environment and to make it harder for Americans to win redress in court when they are harmed by bad corporate behavior.

The proposed legislation, the so-called Class Action Fairness Act, will be taken up by the Senate Judiciary Committee on Thursday, with a vote by the full chamber expected as early as next week. Under the bill's sweeping provisions, nearly all major class-action lawsuits would be moved from state courts to already stretched federal courts. New procedural hurdles and backlogs would be destined to delay or deny justice in many cases, and to discourage plaintiffs and plaintiffs' lawyers from pursuing legitimate claims in the first place.

The proposed lunge to federal courts is so extreme that cases would be removed to federal courts even when a vast majority of the plaintiffs were from one state, the claimed injuries occurred in the state and involved possible violations of state law, and the principal defendant had a headquarters elsewhere but did substantial business in the state.

In a revealing but disappointing move last year, the measure's proponents rejected a balanced compromise that would have broadened federal jurisdiction while preserving the role of state courts in cases that are more local than national in flavor. Despite some useful provisions aimed at genuine abuses, the bill would reduce the accountability of corporations that violate laws protecting employees, consumers and the environment.

The measure died in the Senate at the close of the last session. But with President Bush now actively campaigning for its passage, the juggernaut may be unstoppable, particularly since some key Democrats, like Senators Charles Schumer of New York and Christopher Dodd of Connecticut, switched sides last year to back the bill in exchange for some modest revisions. The new Judiciary Committee chairman, Senator Arlen Specter, should at least be willing to entertain a handful of improving amendments. The most crucial would fix the bill's Catch-22: plaintiffs filing class-action suits could be refused a hearing in state court if they came from several different states, and then bounced out of federal court because their complaint called for applying the laws of multiple states.

The ability of ordinary citizens with similar injuries to band together to take on powerful corporate interests by utilizing the mechanism of class-action lawsuits is one of the shining aspects of the nation's civil justice system. That reality tends to be overlooked amid all the overwrought spinning by the president and others who are trying to

drum up concern about a litigation "crisis" and to pressure Congress to usurp proper state authority and weaken important protections for ordinary Americans.

Mr. LEAHY. This so-called Class Action Fairness Act falls short of the expectation set forth by its title. It will leave many injured parties who have valid claims with no avenue for relief, and that is anything but fair to ordinary Americans who look to us to represent them in the Senate.

I seem to have a touch of laryngitis which is an occupational hazard for Senators. I will not speak further, but I will come back to this issue in the future. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

UNANIMOUS CONSENT AGREEMENT—S. RES. 38

Mr. SPECTER. Mr. President, I ask unanimous consent that at 5 p.m. today the Senate proceed to the consideration of a resolution regarding the Iraqi elections, which is at the desk; provided further, that there be 30 minutes for debate equally divided between the leaders or their designees, and that there be no amendments to the resolution or preamble. I further ask unanimous consent that at 5:30 p.m., the Senate proceed to a vote on the adoption of the resolution, and that following that vote, the preamble be agreed to, without intervening action or debate.

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

Mr. SPECTER. Mr. President, I further ask unanimous consent that following the comments of the distinguished Senator from Utah I be recognized to speak briefly on the asbestos reform issue.

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

Mr. SPECTER. I shall be off the floor for a few moments while Senator HATCH speaks, but I will return shortly after he completes his remarks.

Mr. LEAHY. Mr. President, I ask unanimous consent that I be included as a cosponsor of S. Res. 38.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Utah.

Mr. HATCH. Mr. President, I appreciate my two colleagues and their remarks on this very important bill. I rise to express my strong support for S. 5, the Class Action Fairness Act of 2004. This bipartisan bill represents a carefully crafted legislative solution in response to the rampant abuses of the class action litigation device currently in our State courts.

The American public will benefit from a system that fairly compensates these injured people by those who are injured by unsafe or defective products. No one disputes this. We all want a system of compensation, but we must make sure the system is fair, reasonable, and equitable.

As well, this legislation helps protect against unfair recoveries because, in the end, the public pays when defendant companies are forced to pay exces-

sive claims and sometimes must increase prices, decrease employment, or even become bankrupt or go out of business. We ought to all understand that we all pay for that, and that is why it is important we get the laws right and that we correct injustices and distortions of the law.

Before I begin discussing the legislation, I commend the distinguished majority leader, Dr. FRIST, for bringing this bill up so early in the Congress. I also commend President Bush for recognizing the importance of this issue in his State of the Union Address. Senators GRASSLEY, KOHL, and CARPER also deserve recognition for all the time and effort they have devoted to this particular bill over the last several Congresses, and without their tireless work, we would not have the bipartisan compromise bill that we have in S. 5.

Finally, I must recognize Chairman SPECTER for placing this bill on the Judiciary Committee agenda and reporting this legislation last week.

Over the past decade, it has become painfully obvious that class action abuses have reached troublesome proportions in our civil justice system.

It has become equally clear that the true victims of this epidemic have been everyday consumers who represent the silent majority of unnamed class members. It has become too common an occurrence for plaintiff class members not to be adequately informed of their rights or of the terms and practical implications of a proposed class action settlement.

Making matters worse, judges too often approve settlements that primarily benefit class counsel, the personal injury lawyers, rather than the class members—in other words, the victims.

Efforts to reform our class action system are nothing new to the Senate. The Senate Judiciary Committee conducted hearings in the 105th, 106th, and 107th Congresses, reporting a similar bill from the committee in the 106th on a bipartisan basis. Since then, we continue to receive substantive evidence demonstrating the drastically increasing injustice caused by class action abuses.

After working extensively with numerous legislative proposals throughout the various Congresses, we are now on the verge of taking final action on a balanced bill that I would like to spend a little bit of time explaining further.

When I say a balanced bill, I refer specifically to the operation of the bill's grant of Federal jurisdiction over interstate class actions. This key provision is located in section 4 of the bill and corrects a flaw in the current application of the Federal diversity jurisdiction statute that now prevents most interstate class actions from being adjudicated in Federal courts.

Specifically, section 4 of the bill grants the Federal district courts original jurisdiction to hear interstate class actions if, one, any member of the proposed class is a citizen of a different

State from any defendant; two, the amount in controversy exceeds \$5 million; and, three, the class action lawsuit involves a class of 100 or more members.

Although I believe the three conditions I have noted are more than sufficient to achieve the right balance between Federal and State interests, S. 5 goes a step further by incorporating two additional provisions to accommodate the States' interests in adjudicating local disputes.

First, pursuant to an amendment offered by Senator FEINSTEIN during a markup last Congress, Federal jurisdiction would not extend to any case in which two-thirds or more of the proposed class members and the primary defendants are residents of the State where the action was filed.

This exception keeps in the State courts those class actions that are prosecuted by a locally dominated plaintiffs' class with grievances against local defendants. In other words, a locally dominated lawyer-judge set of relationships that seems to be continually resulting in unjust treatment in the courts.

Similarly, the Feinstein amendment also provides that Federal courts may, based on a number of carefully proscribed factors, decline to exercise jurisdiction in middle tier cases in which two-thirds of the proposed class members and the primary defendants are residents of the same State.

To be sure, as part of the recent compromise reached last November with Senators SCHUMER, DODD, and LANDRIEU, we further modified the Feinstein amendment by adding an additional factor for the Federal courts to consider for the middle tier of cases specifically whether there is a substantial nexus between the claims and the court selected by the plaintiffs.

I will refer to the Feinstein chart. That chart makes it very clear, in my eyes, that tier I, two-thirds or more of the proposed class members, are in-State versus in-State primary defendants. That would stay in State court.

Tier II, between one-third and two-thirds of the proposed class members are in-State versus in-State primary defendants, and one can go to either State or Federal court, subject to the judge's discretion.

Tier III, where there is one-third or fewer of the proposed class members in-State versus in-State primary defendants, those cases go to Federal court.

Although I believe the three conditions I noted are more than sufficient to achieve the right balance between Federal and State interests, section 5 goes a step further by incorporating these additional principles to accommodate States' interests in adjudicating local disputes.

The second point I was making is that States' interests in adjudicating local disputes on behalf of their citizens are further preserved through a newly created exception to Federal ju-

isdiction for truly local controversies. This provision, which we negotiated on a bipartisan basis last November with the three new Democratic sponsors of this bill, keeps in the State courts those class action lawsuits that satisfy the following four criteria which I will discuss in greater detail so there is no confusion on this issue.

Criterion 1, the proposed class must be primarily local, where more than two-thirds of the class members are citizens of the State where the suit was filed. This formulation resembles the two-thirds test in the Feinstein amendment I just discussed and essentially requires a large majority of the injured claimants reside within the State.

Criterion 2, the class action must be brought against at least one real defendant. The local defendant cannot be peripheral. Rather, the lawsuit must be brought against at least one defendant with a significant basis of liability and from whom significant relief is sought. This provision essentially precludes personal injury lawyers from evading Federal jurisdiction by simply naming a local defendant such as Hilda Bankston, who was unmercifully dragged into scores of class action lawsuits simply because her small family-operated pharmacy sold the diet drug phen-phen. That was the only reason she was brought in, but the real reason was because she was a pigeon sitting in the State and they used her as a device to bring all of these suits by many people who had nothing to do with the State, nothing to do with her.

Criterion 3, the principal injuries must have occurred locally. In other words, the total extent of the injuries complained of must be concentrated within the forum State. By way of an example, a nationwide drug lawsuit involving injuries spread throughout the country would certainly not qualify for this criteria. On the other hand, this criteria would be satisfied by a class action lawsuit involving a factory explosion affecting a confined geographic area.

Criterion 4, no other similar class actions can have been filed during the preceding 3 years. This criterion is intended to ensure that the exception does not apply to those class actions that are likely to be filed in multiple States based on the same or similar factual allegations against any of the same defendants.

When applying all four criteria, the local controversy exception will enable State courts to hear local class actions alleging principal injuries confined to the forum State and where the lawsuit involved litigants who predominately reside within that State. I refer to the local controversy provision chart.

As my colleagues can see, that chart for these tier III people keeps truly local claims in State court. With regard to plaintiffs, if two-thirds or more of the proposed class members are in the State and with regard to the defendants at least one in-State defendant from whom significant relief is

sought—not the Hilda Bankston who was ruined by these false suits—and alleged conduct forms a significant basis of claims, and the nature of the claim's principal injuries were incurred in the State as a result of the alleged significant conduct, then those cases can be heard in State court.

I was interested in the comments of the distinguished Senator from Vermont about justice and injustice. The injustices are all on the side of those who do not want this bill because they are protecting personal injury lawyers rather than the individual claimants.

The individual claimants will have a right to go to court. It just may be that they have to go to Federal court rather than State court.

Given the addition of Senator FEINSTEIN's three-tiered jurisdictional test and agreed-upon local controversy exception, I find it puzzling that some have represented this bill will somehow move all class actions into Federal court. We just heard some comments like that. Nothing could be further from the truth.

I urge these colleagues to read section 4 of the bill. If they cannot find comfort in this language, I urge them to look at studies showing that the bill will do nothing of the sort. If they are still skeptical, I urge them to talk to the cosponsors of the bill, including our Democratic partners, for a completely candid assessment on whether the legislation will move all class actions into Federal court. It simply will not.

These actions will be able to be brought, but there will not be the same ability to forum shop into favorable jurisdictions that act outside the law and allow unjust verdicts such as we have today.

I think the answer is perfectly clear. This bill moves to Federal court larger interstate class actions while keeping in State court local matters that are more suited for the States. Although I have focused on two provisions in S. 5, I think it is important to note that this bill contains many other changes we included so that we could build a bipartisan consensus.

After we fell one vote shy of invoking cloture the year before last, three Democratic Senators who voted against proceeding on the bill presented us with a detailed list of issues they wanted resolved before they could support class action reform legislation. After extensive discussions in November of 2003, we responded to each and every concern raised by these Senators and made the appropriate changes that are now embodied in S. 5.

As my colleagues will see, the points we have made show each Democratic concern that was raised and how we addressed those concerns.

S. 5 is a modest bill that will help to put an end to class action abuses occurring in some of our State courts. Contrary to the arguments from the bill's opponents, S. 5 does not sweep

into Federal court every conceivable class action. The bill more than adequately accommodates the States' interests in adjudicating local disputes.

I might add that the argument we are going to deprive consumers from their day in court is pure bunk. The fact is, under certain circumstances, they will have a right to be in State court or have a right, through the judge, to be in State or Federal court, and under certain circumstances that are much more fair to all litigants concerned, they will have to go to Federal court.

There is nothing wrong with going to Federal court. In fact, when I practiced law we loved to have cases that went to Federal court because people thought they were more important cases. Frankly, in most cases they were. When these cases are important, they will be tried in Federal court as well.

One thing we are concerned about, we think we have a better chance of having real justice in these cases in Federal court than to have the Hilda Bankstons of this world put out of business under what are false pretenses and manipulation of the Federal judicial system.

This legislation has been crafted and drafted through close bipartisan cooperation with several Members on the other side of the aisle, and as a result now commands a simple majority of support of this body. Despite this support, we are still faced with the obstructive tactics from a small minority that will do anything to appease the powerful and well-funded personal injury trial bar. I find this unfortunate and hope these colleagues can look beyond these special interests and do what is right for the country's ailing civil justice system.

I have always belonged to the trial bar and I think most trial lawyers are people of dedication and decency who want to do what is right, but we have seen in recent years a real subversion of the law by some trial lawyers who are interested only in money. In many respects, they are not worried about clients but worried about their own compensation system. The fact is, we need to do what is right for our country's ailing civil justice system.

The Class Action Fairness Act addresses an abuse of the class action system that has grown substantially in the past few years. I am referring to the gaming of the judicial system by unscrupulous lawyers to evade Federal diversity jurisdiction. In some cases, the filing and settling of class action lawsuits has become a virtual wheel of fortune with every spin of the wheel potentially worth millions of dollars. However, class members do not benefit from these spins of the wheel. Rather, it is the class counsels who receive millions of dollars in attorneys' fees who are the real winners of this gaming situation and of the game.

It is the sad but true fact that the most class members can expect to receive, which is an ironic twist, is a cou-

pon good for the future purchase of the very product that was the basis of their claim to begin with.

Again, under the current tort system, it is the class action lawyers who are the real beneficiaries. They are the ones who walk away from a class action with millions in their pockets while the class members walk away with little or nothing at all but these coupons. Before I turn to some specific examples of class action lawyers gaming the system to the detriment of their clients, let me explain just how this game works.

It starts with a few class action attorneys sitting around a table, thinking of an idea for a class action lawsuit. While this idea may come from any numbers of sources, it is usually formulated and solidified after an examination of the deepest pockets in the corporate world. Naturally, they want to make money.

Once an idea for a class action is formed, it is time to find a lead or named plaintiff. The named plaintiff will inevitably be someone who is a citizen of the same State as the defendant. Why? This keeps the case in State court.

Why is this essential to winning the game? Because if the suit is in State court, the class counsels can file multiple class actions, alleging similar claims against similar defendants in multiple districts. They do this in search of a judge willing to quickly certify the class.

And because the State courts do not have a method of consolidating identical claims like we have in the Federal system, all of those claims remain pending in the various State courts around the country. The filing of multiple class actions in multiple districts gives the class counsel tremendous leverage to play hard ball with the defendant companies. By bringing class action upon class action against a company, the company is left with no other option but to settle. The alternative is to be bled dry by legal fees and face the uncertainty that one of the many courts will destroy the company by delivering a jackpot award against it.

While I suppose the class counsel would like to think of it as a game of hardball, to companies it must feel a lot like execution; and it must feel a lot like what it really is: extortion.

The real kicker is this: in some cases, many believe the only interests served by these settlements are those of the class counsel. Again, they will walk away with hundreds of thousands and sometimes millions of dollars. And what do the class members recover? Perhaps a worthless coupon.

There you have it, a successful gaming of the State tort system by the class action lawyers.

This is an intolerable practice and one that the Class A Action Fairness Act will curb.

I used to be a plaintiff's attorney. I was a defense lawyer as well. I am in no way indicting the actions of all

plaintiff attorneys or class action attorneys. In many cases, plaintiff attorneys play a vital role in protecting the legitimate interests of injured consumers.

For example, I supported the efforts of the Castano group of plaintiff attorneys in the class action case against cigarette companies.

Despite the fine efforts of many, many plaintiffs' lawyers, the actions of a powerful minority of plaintiffs' attorneys have created the situation we need to remedy with this situation.

To demonstrate how class action lawyers have manipulated the tort system to their benefit, let us take a spin at the wheel and see what we come up with.

Spin the wheel again and we come to the 2003 Cook County, Illinois court-approved settlement of *Degradi v. KB Holdings, Inc.*

This class action alleged that KB Toys, one of the largest toy retailers in the country, manipulated toy prices to lead customers to believe that they were paying discounted prices. Specifically, the suit alleged that certain products contained an inflated reference price that was marked through in red with a lower selling price next to it.

To settle the suit, the company agreed to hold what amounted to a week long sale with a thirty percent discount on selected products. However, the company was not obligated under the terms of the settlement to advertise the discount. As a result, many of the class members eligible to receive the discount were not aware of it until long after the sale was over.

How did the game turn out for the class counsel? They won a whopping \$1 million in attorneys' fees. And according to an independent analyst, KB Toys actually stood to benefit from the settlement because they were able to drive traffic into the store on the days of the discount.

All told, this was not a bad spin at the wheel for all parties concerned. That is, all parties except for the class members—in other words the people who were allegedly injured.

If you spin the wheel again you land on the in re Microsoft Litigation Settlement.

The wheel has landed on in re Microsoft Litigation Settlement.

Microsoft has been involved in multiple antitrust class action alleging that the computer giant used its control of certain programs to price gouge its customers. Ten of the class actions have been settled, including the suit brought in Johnson County, KS.

Under the terms of the settlement, class members who purchased Microsoft hardware will receive a \$5 or \$10 voucher toward the future purchase of particular computer hardware or software products.

If these settlement terms some like something less than a big victory for the consumers, wait until you hear about the onerous process they have to

endure in order to redeem the vouchers.

First, to even receive a voucher, a class member must first download a form from a website established for the purpose of handling the settlements, fill it out and mail it in. Then, to redeem the voucher itself, the class member must mail in the voucher with a photocopy of the original receipt and UPC code.

So the class members got some hard to redeem \$5 and \$10 coupons. Who then came out the big winners in the game? You guessed it, once again it was the class counsel. In these cases, they have received a mind-boggling sum in attorney's fees to the tune of hundreds of millions of dollars.

With a spin of the wheel, we come to *Ramsey v. Nestle Waters North America*.

This class action is better known as the Poland Springs Water class action. Let me refer to this Poland Spring Chart—this blue section which has \$1.35 million on it.

The Ramsey suit alleged that Poland Spring water does not come from a spring deep in the woods of Maine as was advertised. Under the terms of the settlement approved by the Kane County, IL State court, the named plaintiff received \$12,000 while the class members received discounts or free Poland Spring water of the next 5 years. The company, which denied any wrongdoing, agreed to enhance its quality control and make approximately \$2.75 million in contributions to charities.

So in this round of the game, the class members got some free water. What about the class counsel? They were sitting pretty at the end of the game with \$1.35 million in attorney's fees.

As Roger Parloff put it in the *Forbes* magazine article entitled "Springtime for Poland," the settlement was "pretty standard: next to undetectable benefits for us—some discount coupons and whatnot and \$1.35 million cash for the plaintiffs' attorneys."

That is right. Class action settlements have become so abusive that it is now standard and accepted practice for class counsel to receive millions of dollars for getting class members a bottle of water.

Now we come to the Register.com settlement, approved by the New York County, New York State Supreme Court, and affirmed by the New York Superior Court in 2003.

Register.com is the second largest domain registration company for the Internet. Those wishing to register a domain name through the company may do so for a \$35 fee. But if the main name is registered, the company holds the Internet address and redirects the link to a "Coming Soon" page featuring promotional advertisements for Register.com and other companies until the domain nameholder develops a Web site of its own.

Michael Zurakov, serving as lead plaintiff for the class action, claimed

that upon developing his own Web site, Register.com delayed in switching over the purchased domain name to him and continued to redirect the link to the promotional "Coming Soon" page for several months to sell advertisements. When the class counsel moved to certify the class, it was estimated that the class was comprised of approximately 3 million members.

Under the terms of the court-approved settlement, class members received \$5 coupons to use. Each one got a \$5 coupon to use with Register.com, assuming that the class member registered with the company again. Meanwhile, the lawyers received \$642,500 in attorney fees—lawyer fees.

To quote an article appearing in *Domains Magazine*, "The munificence of this reward may reflect that fact that the claim, while perhaps not utterly without a shred of merit, was not exactly the most compelling ever heard."

However weak the suit, the class counsel had a good day at the game, taking home winnings of \$642,500, especially compared to the \$5 coupons each class member, so-called, got. That was the right to redeem, if they went to Register.com, and registered a name.

Cases such as this only further encourage the filing of frivolous claims by opportunistic class action counsel who are solely motivated by quick settlements that benefit only them.

Let me go to the Ameritech settlement for \$16 million. This is a settlement approved by the notorious Madison County, IL, State court, one of the most abusive settlements I have ever seen.

You need to know about Madison County. Madison County is where a lot of these class actions go so they can make demand letters and get settlements as defense cases. Madison County has judges who seem to be in the pockets of the trial lawyers in Madison County who become cocounsel in these cases, and, of course, have an instant entree to the courts, and almost a guaranteed, outrageous award every time they go into court. Most of the time they don't go to court. You will find in the end very few actual cases are filed. But the demand letters are made. And these companies are so frightened over Madison County, because they know they are going to get killed if they go to court, that they almost automatically settle as a result of the demand letters. They settle for what it would cost them to defend these types of cases rather than go through the jackpot justice problem of getting slammed in a jurisdiction where apparently justice is not a measured factor.

Here we have the Ameritech settlement approved by the Madison County, IL, State court. This is one of the most abusive settlements I have ever seen.

Two suits were filed in Madison County, IL, by the same firm on behalf of customers in Michigan, Ohio, and Wisconsin, alleging that Ameritech wrongly charged customers for a wire

maintenance program without informing them that the service was optional.

The settlement didn't provide customers with refunds for wrongful charges. Instead, it gave each class member a \$5 pay phone card that could only be used at pay phones owned by SBC, the parent company of Ameritech, to make local and limited long distance calls within the State. Many of the class members complained that the cards were worthless to them because there were no SBC pay phones in the area. Other class members complained that the cards were worthless to them either because they did not use pay phones or because the cards contained so many restrictions that they were essentially unusable.

This was not exactly a sweetheart deal for these consumers. But how did the class action counsel come out in this round of the game?

They had a good spin of the wheel by any measure, winning \$16 million in lawyer fees, while the class of people, alleged consumers who were supposedly abused, really got nothing.

We can no longer sit idly by and allow abusive settlements to continue. What will S. 5 do to help curb the gaming of our tort system?

First, the bill gives the Federal courts diversity jurisdiction over large, national class actions with at least 100 class members seeking an amount-in-controversy of \$5 million.

They can still bring their suit, but it will be in Federal court where it is much more likely that justice will occur, fairness will occur, and decent treatment will occur.

As a result of the provision, large and national class actions may either be originally filed or removed to Federal court, a forum that is better equipped to handle these kinds of cases—and to do so fairly. They are not going to be deprived of their rights. They are just going to have to make their cases, and they are not going to be able to go to Madison County where they will have an automatic win absolutely guaranteed in the eyes of most companies which will be outrageous in nature as a general rule—or an automatic settlement for defense costs—which is as close to distortion as you can get because the companies can't afford to go to court in that particular jurisdiction with the judges the way they are, the attorneys the way they are, and all in cahoots the way they are.

Second, S. 5 contains provisions for the review and approval of proposed coupon settlements before a Federal court. It doesn't mean you can't have coupon settlements, but you are sure going to have to get the judge's approval. So these phoney coupons are going to be much fewer and much more far in between.

The bill provides that a Federal judge cannot approve a proposed coupon settlement until conducting a hearing with a written finding that the terms of the settlement are fair, reasonable, and equitable to the class members.

You would think that would be something every court in the land would want to do, but, unfortunately, we have had far too many of these class actions where that hasn't been the case, or where counsel are the ones who are basically mistreated in the end.

Our courts will no longer be used as a rubberstamp for proposed settlements. This provision ensures that the true beneficiaries of a settlement are the class members and not the lawyers who drew up the settlement.

It doesn't cost any more money to go to Federal court than it does State court. It isn't a tremendous inconvenience; it is just that you can expect the Federal judges not to be judges who are sustained by financial support by the local lawyers.

Third, this legislation requires that attorneys' fee awards be based on the actual recovery of the class members in coupon settlements. In other words, contingency fees must be based on the value of coupons actually redeemed by class members. This will give the attorneys an incentive to ensure the class members actually get something in the settlement they can use.

If you are going to get bottles of water, then the attorneys can get fees based upon how many bottles of water are gotten. I don't think many lawsuits would be brought on that basis anymore. Or, if you are going to get a coupon, they can get fees based upon how many coupons are redeemed. Or, in the case of the SBC coupons, they can get fees only to the extent that those coupons are viable and can be utilized, and how many of them are actually requested.

Practically speaking, class counsel will no longer look for a quick and hefty attorney fee settlement for themselves in which the class members recover relatively worthless coupons.

The time has come for us to put an end to this unfair system. I have heard many of my colleagues on both sides of the aisle decry the state of the current tort system. I ask my colleagues to recognize this bill as the opportunity that it is, an opportunity to end the abuses of the current tort system, or at least to make a start to ending the abuses of the current tort system and restoring confidence in our justice system.

Real good lawyers, the honest lawyers, if they bring class action lawsuits, will bring suits of viability, suits that mean something, suits that are deserving of the awards that are given, not suits just for the benefit of the lawyers involved. We have spent literally years now negotiating the provisions of this delicate compromise bill. The time has come to pass it.

I might add, this bill has evolved over a number of Congresses. We have negotiated with virtually everybody who has wanted to negotiate on this bill. We have made change after change after change. It is not a major change in our law, but it certainly will bring greater justice in our law and greater

fairness and greater treatment in our law.

The fact is, we need this bill to remain intact. The House has indicated they will take this bill, if we pass it in its current form, and it will become law. There will be some attempts with amendments that may have merit that I may even like, but this bill is a result of a huge series of compromises that have taken years to achieve. We know if any amendment is added to this bill, it is very unlikely the House will take it. We are faced with the proposition of the need to vote down all amendments on this bill.

The distinguished Presiding Officer has a number of amendments he would like to add to this bill, as a distinguished former supreme court justice from the State of Texas, that would improve this bill. But he knows if we are going to pass this bill, we cannot take any amendments, including his. If we are going to take other amendments, we will have to take his. The fact is, we urge all amendments be voted down so we can pass this bill and, hopefully, get it to the House and get it passed so justice can occur.

Any Member who stands in the Senate and says consumers are going to be hurt by this bill, that we are not allowing suits to be brought, has not read the bill or is deliberately distorting what is going on. The fact is, suits can be brought, legitimate suits can be brought, there will be awards that will be made in legitimate cases, as they should be, and we all will be better off as a country if we get the tort system so that it does justice, rather than jackpot justice for a few, and in a number of instances I have been citing, for lawyers only. Unfortunately, we have people gaming this system to such a degree that this bill needs to pass. We need to straighten out the mess.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I congratulate my distinguished colleague, Senator HATCH, for the outstanding work he has done on so much legislation during his tenure as chairman of the Judiciary Committee, including the class action bill, as he has spoken of in some detail.

ASBESTOS REFORM

Mr. SPECTER. Mr. President, I have sought recognition to talk about asbestos reform, which is legislation that Senator HATCH had shepherded, along with Senator LEAHY and Senator FRIST, with substantial contributions by Senator Daschle, as well.

Today, I am going to submit for the record a bill which is a discussion draft. I had intended to submit this legislation late last week, but I was asked by the majority leader to defer for a week so that further consideration could be given today by the majority leader and by members of the Judiciary Committee, including the Presiding Officer.

We have reached a critical stage in the analysis and presentation of this legislation. It has had a long history. In July of 2003, more than 19 months ago, the Judiciary Committee passed out a bill, which all agreed had a great many problems, but it was passed out of committee largely along party lines. I voted for it, in order to move the bill along.

As it is generally known, I then enlisted the aid of a senior Federal judge, Judge Edward R. Becker, who recently was the chief judge of the Court of Appeals for the Third Circuit, to undertake discussions, called mediation, and for 2 days in August of 2003, Judge Becker and I sat in his chambers with the so-called stakeholders representatives of the manufacturers, representatives of labor, AFL-CIO, representatives of the insurance industry, and representatives of the trial lawyers. That has been followed by some 39 separate meetings which have been convened in my conference room.

In addition to numerous discussions Judge Becker has held with interested parties and which I have held with interested parties, we have come to a point in our work where we have found agreement among the parties on many items. We have found the stakeholders very close together on other items.

As might be expected, it has been necessary to make judgments, which is the responsibility of this Senator and which I have done in collaboration with many other Senators, about what this bill represents, which in my considered judgment is an equitable bill.

In early January, I circulated a discussion draft which had certain blanks until we had a hearing, which was held on January 11. I have also had an eye to trying to get the bill completed so that the majority leader could take it up at an early date. If that is not done, and the bill languishes into the season where we take up the appropriations bills, it simply will not be taken up. The asbestos issue is a crisis in the United States today. There is general agreement on that, with some 74 companies having gone into bankruptcy, and with thousands of asbestos victims suffering from mesothelioma, which is a deadly disease, and other deadly diseases and not collecting because their employers have gone bankrupt.

We have found other very difficult issues on so-called "mixed dust." We held a hearing last week, and I think we have worked through the scientific evidence on that proposal so that we are now in a position to know when someone comes forward with a claim, whether it is from asbestos, which has already been covered under the trust fund, or whether it is from silica, which would be a separate cause of action.

The essential provisions of this legislation create a trust fund. In order to collect from the trust fund, victims—people exposed to asbestos—must establish certain levels of disability.