of these murders were committed with firearms and many with handguns.

Democrats and Republicans in Congress, together, tried to do something about this disturbing trend when we enacted the gun-free school zones legislation in 1990. Today, a slim majority of the court has shot Congress down, and in so doing, put America's children at greater risk.

Now, because we reenacted and perfected the Gun-Free School Act last year as part of the crime bill, the current law may still be constitutional. Indeed, we may yet be able to ensure the constitutionality of the law with a technical amendment, and I plan to introduce a bill to do that next week.

Broadly interpreted, however, the reasoning of the majority in this case could have far-reaching consequences that may undermine a variety of crucial Federal laws, like the Drug-Free School Zones Act on which the Gun-Free School Zones Act was based, or the bans on cop-killer bullets, or our Federal wetlands laws, and many of our civil rights statutes.

Mr. President, I agree with the strong dissent by Judge Souter, joined by Justices Ginsburg, Stevens, and Breyer, who labeled this ruling today by the Supreme Court a step backward.

I again want to express my disappointment with today's decision.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

Mr. FEINGOLD. Mr. President, I rise today to express my strong opposition to S. 565, the Product Liability Fairness Act of 1995. It is because I really see it as the worst of both worlds.

First, I think it is a bill that has been shown to have little, if any, demonstrated need; second, I think it will have drastic and undue effects on some of our most vulnerable citizens in this country.

Those who support this legislation have stated over and over that the bill is to everyone's benefit. It supposedly will benefit manufacturers, investors, business owners, workers, and consumers, they say.

Yet, I have still not heard of a single major U.S. consumer organization that has endorsed this legislation. The legislation is, in fact, opposed by virtually every group in the country representing working people, consumers, children, and the elderly.

The Product Liability Fairness Act says that it seeks to set uniform Federal standards for product liability legislation that would override certain existing State laws.

It is not really a bill that provides uniformity at all. Those State laws that are more protective of injured consumers are preempted under this bill while those State laws that go beyond what this bill would do in terms of shielding negligent manufacturers are left intact. They are left the same. It is not a bill that has anything to do, really, with uniformity.

In addition, Mr. President, it establishes a heightened—that is, more difficult—conscious and flagrant standard for the rewarding of punitive damages in product liability cases, and it would arbitrarily cap damage awards for punitive damages at $250,000, or three times economic damage.

Again, those State laws with higher caps or no caps are preempted. Those States with lower caps or no punitive damages awards are left completely untouched.

The bill would also set a 20-year statute of repose, unless, of course, a State law has a lower statute and is, therefore, left alone and also a 2-year statute of limitation.

Finally, Mr. President, this legislation would eliminate joint liability for noneconomic damages and create new standards for seller liability.

There are several reasons why I oppose this bill. Before I talk about the specific flaws of this legislation, I think it is important to note the larger context that the issue of product liability reform fits into. That is why, as I look at this whole bill, I oppose the whole approach. It is not a question of fixing this and fixing that. I think the whole concept driving this bill is an error and should be defeated.

For the past several months, all of us, Republicans and Democrats, have, of course, been trying to interpret the meaning of the November election. Many of our Republican colleagues have interpreted those elections as being a statement against big, inefficient and bureaucratic government. I disagree with a lot of the statements that have been made about what the November elections have been about. But I think that maybe is one legitimate interpretation of the elections, to say that people have had it with big government. And I think in many cases that is a legitimate complaint that our constituents have, and that they did express on November 8.

It would make no sense to argue that all Government programs should be run by Washington, DC, or that all Government programs should be run by the States. Some programs do address underlying problems that are national in scope, across State borders. But others are more local in nature and are best left to the local and State governments to determine how they can best address problems that they are more familiar with than are the folks that work in Washington, DC.

With regard to this matter I, for one, strongly believe that there are many issues that should clearly be left to the State and local governments to address. One of the reasons I opposed last year's crime bill was precisely because it shifted power away from our State and local courts and the law enforcement officials there, who have been dealing with crime problems in their own regions and are best equipped with the knowledge and creativity to solve those problems. So that is one reason why I opposed the crime bill, because I did not think we should have an overarching Federal Government controlling all aspects of that issue.

Many on the other side of the aisle have been among the strongest proponents for the so-called States' rights issue. Indeed, our distinguished majority leader has stated repeatedly this year his intention to dust off the 10th amendment and give greater control over local problems to the State governments. It was the Speaker of the other body who stated the following in his address to the Nation on April 7, about the intent of the congressional Republicans in the 104th Congress. He said:

> We must restore freedom by ending bureaucratic micromanagement here in Washington. This country is too big and too diverse for Washington to have the knowledge to make the right decision on local matters. We've got to return power back to you, to your families, your neighbors, your local and State governments.

Given those statements, how does this square with the legislation we are considering today? What happened to the need to address local problems on the local level? All this talk about States' rights is about to go right out the window, as we usurp over 200 years of State control over their tort systems. It seems a very odd trend indeed.

It should come as no surprise that this legislation is vehemently opposed by the American Bar Association, the National Conference of State Legislators, and the Conference of State Chief Justices. But those who support this legislation do not want to listen to State legislators or State judges or consumer organizations. They do not even want to listen to those individuals who have been tragically maimed or injured by the negligence of a small but powerful group of manufacturers.

Of course, those who support this legislation justify the bill by saying that such drastic action is needed to curb the so-called litigation explosion that has supposedly resulted in a court system totally bogged down in product liability litigation. Let us take a quick look at just how bogged down are our courts with product liability claims. The Department of Justice, using data compiled by the National Center for State Courts, recently released a study of 378,000 State tort cases which apparently represents about half of all tort suits completed between July 1991 and June 1992. According to the study, only 3 percent of all tort claims involve product liability, just 3 percent of all tort claims. The bulk of the tort claims

come in the form of automobile accidents and premises liability.

This study also found that in 1993 tort claims comprised only about 10 percent of all civil case filings. That means that the so-called massive usurping of State sovereignty because of a so-called explosion is occurring to address an area that represents less than 1 percent, actually less than a half a percent of all civil case filings. So, this is no panacea for our civil justice system.

Despite these statistics supporters continue to claim that our small business and manufacturing communities are suffocating under the burden of liability insurance and the constant threat of litigation. Yet just 2 years ago the National Association of Manufacturers—clearly one of the biggest backers of this legislation—announced their own results of a survey they had conducted of their own members in which they asked their members what specific issues were of concern to them and what problems in their minds pose the largest impediments to growth in the manufacturing industry. The results are very interesting and I think somewhat at variance with the claims of those who are so strongly supportive of this bill.

Somewhat incredibly, given the rhetoric, just 8 percent of the respondents listed product liability as a major problem in the manufacturing industry, only 8 percent. This is not a survey of the whole public. This is a survey of manufacturers. In fact, almost three times as many of the respondent manufacturers listed the Federal budget deficit as undermining the growth of the manufacturing sector.

So who is on the side of the manufacturers here? Those who support reforming the legal system, which less than 1 in 10 manufacturers listed as a major impediment to growth in investment? Or those of us who have consistently been out here voting for legislation that slashes Government spending and reduces the deficit, such as the President's 1993 budget bill that has cut our annual projected deficits by almost $100 billion.

I guess I am a little surprised at the eagerness of those on the other side to usurp the authority of the States to address a problem that has traditionally been a State issue. Unfortunately, though, I am no longer surprised at the continued pecking away at the provisions and principles contained in our Constitution. In this case I think this has something to do with some of the principles embodied in the Bill of Rights. I think it is astonishing the number of different efforts underway in this Congress that would dramatically alter the U.S. Constitution. Let us just start with the proposed constitutional amendments.

We had the balanced budget amendment, which was thankfully defeated in this body. We had a constitutional amendment being proposed for line-item veto authority. Soon we will apparently be considering term limit constitutional amendments, which in my view represent a profoundly undemocratic viewpoint, that we need to limit people's voting rights by telling the voters back home for whom they can and cannot vote.

There are other things this Congress apparently has in store for rewriting, redrafting, and in my view gutting the Bill of Rights. Constitutional amendments have been introduced on school prayer and flag desecration which, to my knowledge, would mark an unprecedented historical event by amending the first amendment. And in the Judiciary Committee recently, Mr. President—you sit on that committee as well—the Republicans have all but stated their intention to toss out the exclusionary rule, a key legal principle derived from the fourth amendment, on unlawful search and seizures. Perhaps we will soon be holding hearings in the Judiciary Committee on the eighth amendment and what may be obsolete principles, according to some, of excessive bail and cruel and unusual punishment.

In a sense I think this bill unfortunately turns us to another provision of the Bill of Rights, the seventh amendment. This product liability legislation in my view really, at least in principle, contradicts an important legal principle that has been the cornerstone of our judicial process for the last 200 years, and that is the right to trial by jury. True, there have been no proposals in the 104th Congress, at least not yet, to eliminate an individual's right to a jury trial. But I am concerned about it, especially after the senior Senator from West Virginia has described the efforts of some in this Congress to relegate the Constitution to the rare book room of the library.

But I think it is clear what a tremendous emphasis our Founders placed on the notion of allowing a panel of your peers to determine your fate, and that it is the jury, representative of the American people as a whole, that is best equipped to hear the facts of a case, filter out the truth, determine who is at fault in a case, and then finally determine the appropriate degree of punishment. That is a jury function in our common law tradition, not a judge function, traditionally, and certainly not the function of the Federal Government as embodied in the U.S. Congress in Washington.

I will speak in more detail about this at a later time but I view this measure as nothing more or less than an assault on the concept of trial by jury.

Mr. President, in addition this legislation is riddled with complications and contradiction. Let me discuss this cap on punitive damages for a moment. Under this legislation, punitive damages are capped at $250,000, or three times a plaintiff's economic damages, whichever is greater.

First, I find it interesting that those who support this legislation claim that it provides uniform Federal standards with respect to product liability. How can they even stand up with a straight face and say that? It is simply not true because, if this was truly a uniform standard, that would mean the punitive damages would be capped at $250,000, or three times economic damages in all of our 50 States. But that is not the case. Those States that currently prohibit punitive damages would be permitted to continue to completely prohibit punitive damages. They would not have to comply with this new Federal standard of allowing at least up to $250,000 or three times economic damages in punitive damage awards.

So let us be clear about what this means. This is the opposite of uniformity. If two individuals living in States with different sets of product liability laws are injured by defective products produced in those respective States the two individuals have substantially different legal rights and remedies available to them. But that is not all. One of the foremost purposes of punitive damage awards is not only to punish those manufacturers who deliberately and willfully market a product they know to be effective and dangerous, it also is to deter other manufacturers from engaging in such practices. I would presume that the reason some punitive damage awards are permitted under this bill—at least I hope this is the view—is because the supporters of this bill presumably agree that punitive damages have at least some sort of role, some purpose to play in deterring such abuses and protecting consumers.

Mr. President, this just does not add up. Under this bill, those States that currently prohibit punitive damages would be able to continue to completely prohibit punitive damages. That means consumers, children, and the elderly living in different States with different sets of laws will have substantially different protection from injuries and defective products.

So much for this notion that this bill is all about uniform Federal standards, and so much for the idea that this bill is fair, equitable, and beneficial to consumers. But again, I assume that most of the supporters of this legislation do have a feeling of supporting some concept of punitive damages, recognizing that there are clearly a set of cases where punitive damage awards are appropriate and necessary to sanction a manufacturer who has been willfully negligent.

Mr. President, I ask: Why do we not force those States that currently have this absolute rule prohibiting any punitive damage awards to change their laws and to meet this new Federal standard that is proposed in this bill?

I guess I am going to have to take a crack at predicting the answer to that question. I presume that the answer would be that we here in Congress should defer to the State legislatures that have made the determination that there should be no punitive damage awards in their State's product liability cases.

But how does this rationale justify the preemption of State laws, such as those in my home State of Wisconsin, that allow punitive damage awards where appropriate? Why do we not respect the State of Wisconsin enough to defer to the wisdom and judgment of its legislature and its Governor on this matter?

It appears to me to be completely contradictory to say that you support uniform Federal standards for product liability laws, and also support the notion that States can have different standards for punitive damage awards. The bottom line for those on the other side of this aisle is clear: Giving more power to the State and local governments is a great idea, but only when you agree with the principles and policy that those entities are pursuing.

Second, I assume that those who support limiting punitive damages do so because they believe that these awards are out of control and that limiting punitive damages will allow us to somehow simultaneously improve our productivity and innovation and somehow continue to constrain the abuses—sometimes very willful abuses—of manufacturers who market defective products.

I would like to now examine those premises. First, with regard to the frequency and size of punitive damage awards, I think that the evidence that has been presented thus far has made it clear that punitive damage awards have been grossly mischaracterized. They are not out of control. They are not adversely affecting the competitiveness of American manufacturers.

Recently, the Senate Judiciary Committee on which I serve held a hearing on punitive damage. At that hearing Dr. Stephen Daniels of the American Bar Foundation reported findings of a study that he completed of over 19,000 civil jury verdicts in 89 counties in 12 States plus the entire States of Alaska, Idaho, and Montana for the years 1988 through 1990.

Not only did this study find that punitive damages are awarded in a small percentage of all civil cases—that figure was roughly 4.8 percent—the study also excluded that punitive damage awards were modest and more often awarded in financial property harm cases than in product liability cases. This study was consistent with an earlier study of Dr. Daniels of punitive damage awards in the early 1980's. That study at that time produced very similar results.

The bottom line is that in recent years there has been virtually no proliferation in the size or frequency of punitive damage awards.

As has been cited by others as well, another study by Professors Michael Rustad and Thomas Koening found that during the years 1965 through 1990, a 25-year period, there were a total of just 355 punitive damage awards in both State and Federal courts. Roughly a quarter of these awards were reversed or remanded upon appeal. Mr. President, 91 of these cases were related to the asbestos issue. That means excluding asbestos cases there has been an average of about 10 punitive damage awards a year in both Federal and State courts for the past 25 years.

Clearly these studies and others demonstrate the inaccuracy of claims that punitive damages are increasing in size and frequency. Those who believe we need to cap punitive damage awards in product liability cases, as this bill prescribes, should understand that we are only talking apparently about roughly 10 cases per year.

What will happen to the quality of American-made products under this legislation? How concerned will multi-million-dollar corporations be about the safety and quality of their products when they are most likely to face a punitive damage award that would only be equal to a fraction of their profits in one day—just a fraction of one day's corporate profits? It does not sound like much of a deterrent.

Just last year, a California jury ordered Dow Corning Corp. to pay $6.5 million in punitive damages for knowingly manufacturing faulty silicone gel breast implants. This verdict was upheld by the ninth circuit court of appeals that found that Dow Corning knew that the product had possible defects and exposed thousands of women to a potentially painful and debilitating disease.

Under this legislation, that punitive damage award would have been reduced to three times economic damages, or about $1.4 million. It would have been a 78-percent reduction in that judgment. Measured against Dow Corning's assets of $1.4 million, punitive damage award for these acts would have only represented about 0.04 percent of that corporation's assets; just four one-hundredths percent.

What does this mean? It means that a corporation was able to knowingly market a product that they knew to be defective, and they knew it threatened the health of thousands of women. And yet under this bill they would only have had to pay a penalty of four one-hundredths of 1 percent of their assets of a huge corporation.

That is what happens when you replace the jury's knowledge and familiarity with the particulars of a case and replace it with an arbitrary cap on certain damage awards. That clearly illustrates just who stands to benefit from this legislation and demonstrates the absurdity of the notion that anyone could say that this bill is fair to consumers.

I also want to discuss the elimination of joint liability for noneconomic damages under this legislation. Opponents of the principle of joint liability make a pretty compelling case. I have to concede that on the surface it is one you really have to examine in order to counter it. It is hard to understand. Why should someone who is held to only 50 percent, or 25 percent, or even 10 percent liable for an individual's injury be forced to assume a much greater burden of compensatory damages if another liable party is financially unable to pay the damages? Certainly there is a force behind that when you just look at it on the surface. Why should a party that is held to be partially liable for an injury be forced to pay an entire damage award if the other party or parties are unable to pay?

Some believe this is a good argument for supporters of this bill. It sounds good; it sounds fair, unless, of course, you are a 10-year-old child who has lost his vision for the rest of his life because of the negligence and irresponsibility of a manufacturer who is held not entirely but the manufacturer is held partially liable for the damages. The manufacturer is partly responsible for the horrible thing that has happened to this 10-year-old.

Suppose in this case the manufacturer is held 60 percent liable while the large multi-million-dollar retail chain that sold the product is held 20 percent liable, and other parties involved make up the remaining 20 percent. Suppose the manufacturer then files for bankruptcy. What happens then? Sure, the child's family will be reimbursed for their hospital bills and maybe for the lost wages of the 10-year-old for the lawns he used to mow or the driveways he used to shovel.

When we talk about noneconomic damages—noneconomic damages—the child under this law, under this bill before the Senate, will only get a fraction of that to which he is entitled.

I notice that the interests that support this legislation have cleverly chosen to highlight kids in that age group, using the Little League of America as an example of the need for tort reform. But what about the baseball games that this 10-year-old boy could no longer participate in because of his loss of vision? What about the fact that this 10-year-old boy could no longer even watch a baseball game either at a stadium or on television? Baseball is finally back, as of yesterday and today. But this bill cuts out those considerations and caps them for a child such as this.

Is it fair that supporters of this legislation are more concerned about the manufacturer who is 10 or 20 or even 30 percent liable for an accident, partially liable, more concerned about that manufacturer than the child who is zero percent responsible, zero percent responsible, and completely innocent of any wrongdoing? Is that the right balance?

Of course, those corporate interests backing this legislation are not terribly concerned about those questions. They are preoccupied with stock reports and profit margins. You have to recognize that asking the retailer to pay more is much more fair than forcing an injured child who is 100 percent innocent of any wrongdoing to receive only a fraction of the compensation that will allow him to return to as

close a life as possible before the accident, which the retail chain is partially to blame for, actually occurred. And I think this provision, this provision that I am discussing now—and it is hard to choose because there are a lot of bad ones in the bill—more than any other one in the bill as revealing the outlandish proposition that this bill is fair. It is this provision that changes the complexion of our legal system.

This legislation will alter the precept of our legal system to say that a victim of wrongdoing and negligence is no longer the principal concern of the tort law. The principal concern will now be the profits and economic health of a business interest that has been convicted by a jury of negligence in the manufacture, sale, and use of a defective product. This is about companies that have been adjudicated guilty of making something that did not work right and that can hurt people. This is not about companies that have been found to be innocent. This legislation is grounded in a belief that it is more important for our business and manufacturing communities to remain prosperous, very prosperous in many cases, and shielded from liability than it is to return an innocent victim of a defective product back to a state as close as possible to their well-being before the accident occurred.

So, Mr. President, I look forward to returning to discuss a lot of the specific amendments and issues in the bill. Let me just conclude my opening statement by saying that I believe these choices here are fairly clear, the lines are fairly well drawn, and that bill is a bill that definitely deserves to go down to defeat in the Senate.

I thank the Chair and I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, first I ask unanimous consent that the Senator from North Carolina [Mr. FAIRCLOTH] be added as a cosponsor both to S. 565, the Product Liability Fairness Act of 1995, and to the Gorton substitute amendment to H.R. 956.

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

Mr. GORTON. Mr. President, I think perhaps at this point in the debate, it may be appropriate to speak not so much to the broad nature of the bill but to two or three arguments advanced by the last two opposing Senators, the distinguished Senators from Wisconsin and from California.

Together with Senator HOLLINGS, the Senator from Wisconsin was somehow or another implicating the seventh amendment right of trial by jury into this debate and has implied at least that the bill before us somehow or another restricts that constitutional right to trial by jury.

This is a curious, perhaps a bizarre argument. It is an argument which is equally applicable to every statute, State or Federal, which sets legal parameters which juries must follow in reaching verdicts. To say somehow or another that a limitation on punitive damages is a violation of the seventh amendment is to say that a jury instruction limiting actual damages to those that have really been suffered by a victim is somehow unconstitutional, that any instructions to any jury as to what the law is under any circumstances are unconstitutional.

Even more strange, more bizarre to this Senator, is the proposition coming from Members of this body who when we are dealing with the criminal code want very strict legal limitations on sentences that can be imposed on convicted criminals. I have not heard either of these Senators argue that a jury which finds an individual guilty of a misdemeanor under Federal law should be permitted to impose life imprisonment on that convict, and yet that is exactly the proposition for which they argue here in connection with a civil case.

They argue that as a form of punishment, punitive damages, a jury's discretion should be absolutely unlimited, no matter how egregious the conduct; no matter whether we are dealing with an individual, a small company, or a large corporation, the jury's discretion should be untrammeled, and that the jury should be permitted to impose punitive damages of whatever limit.

Mr. President, that is analogous to saying a jury ought to be able to sentence a jaywalker to hanging if for some reason or other the discretion of the jury should reach that point.

Why is it—this is one question I have not heard answers to, directly or indirectly. Why is it that in our entire criminal code we have as a protection against convicted defendants limits on sentences, but in civil actions in which proof does not need to be adduced beyond a reasonable doubt but only by a preponderance of the evidence in many States, and by clear and convincing evidence should this bill pass, why here alone should that discretion be absolutely unlimited?

It is a question I would like to have answered by those who oppose any kind of limitations. A debate against the specific limitations of this bill and adjustment, a feeling that we can do better, is something that I know both the Senator from West Virginia and I are both open to. We may not have gotten the formula exactly right.

But the proposition that there should be some kind of limit seems to me to be obvious and has even moved the Supreme Court of the United States to say, without coming up with what those limits are, that there may be some constitutional limits, with the clear implication that Congress could make just exactly such a decision.

The next point that I should like to clear up at this stage, Mr. President, is the confusion, I think—and I can only ascribe it to that—which is the inevitable result of listening to opposition speakers about whether or not there is some kind of limitation in this bill on the recovery of all of the damages which an individual actually suffers as a result of the negligence of a manufacturer.

Mr. President, the only limitations in this bill are limitations on punitive damages, which by definition are not direct compensation for losses suffered as the result of an accident or of someone's negligence. No limitations are imposed by this bill on the recovery of actual damages—loss of wages, medical expenses, and the like. No limitations are included in this bill on the recovery of noneconomic damages. ''Pain and suffering'' is the usual phrase for such damages. There are those who propose such limitations, but they are not included in this bill, and this Senator does not intend to vote for any. And I believe I also speak for the Senator from West Virginia in that connection.

So no individual, none cited by the Senator from California, none cited by the Senator from Wisconsin, none cited by the Senator from South Carolina, will be deprived by the passage of this bill of his or her right to recover all economic and all pain and suffering damages which a jury determines they have suffered in a product liability action.

The only limitations are on the amount of punishment to which a negligence defendant can be subjected. And there, as I have already said, we have the curious argument that in the civil courts that punishment should be unlimited while in the criminal courts it should be subjected to very, very real limits.

I also found interesting and somewhat curious the argument of the Senator from Wisconsin with respect to joint damages. He said—and I believe I am paraphrasing him correctly—why should an innocent victim be deprived of all of the damages that victim suffered even from a party not responsible for all of those damages? That, if a retailer, for example, is responsible for only 30 percent of the losses of an individual plaintiff, the plaintiff should nonetheless be able to collect 100 percent of his total damages from that retailer.

Well, why not from you or me, Mr. President? Under those circumstances, what difference is there? Once we have determined the defendant is responsible for more than what that defendant was responsible for, there really is not any distinction between one citizen and another.

Should we, for example, in the Criminal Code, when two brothers, one wealthy and one not wealthy, are sentenced for a crime, each, in addition to a jail sentence, is fined $100,000, say that the wealthy brother should pay the other brother's fine because the other brother cannot pay it? Well, of course not. We would never think of doing that in a criminal case. And yet we do that constantly in connection with joint liability.

That is not justice, Mr. President. And if we feel that the victim should always be fully compensated, then perhaps that is a duty of society as a whole, but it should not be imposed on one party not responsible for the particular harm for which compensation is being sought.

I want to congratulate the Senator from West Virginia on his marvelously logical answers to the Senator from California on research and development of new products. Of course, if you look only at a particular victim, that victim and that victim's attorneys want the maximum possible recovery. But when the net result of the system which causes that tells one very large company that it should logically give up AIDS research or contraceptive research lock, stock, and barrel because the flame is not worth the candle, that there are simply too many risks in the development of a new product, it is not an answer to say that there are other companies that are still engaged in research. We in our society want the maximum possible number of people, of individuals and of companies, to attempt to deal with all of the ills which afflict the human race.

We were not advantaged, to take another example, when 20 years ago 20 companies made and developed football helmets and now only two are left. That is not an advantage.

Mr. INHOFE. Will the Senator yield?

Mr. GORTON. The Senator is happy to yield.

Mr. INHOFE. That is a good point to yield on.

If you will forgive me for this observation. I have been watching the debate on this most significant bill. It seems as if we have been hearing from no one except lawyers. And I do not want to lose sight of the fact that this bill is not so much a legal reform as a potential of being the largest jobs bill passed in probably a decade.

When the Senator talks about the football helmets, there are so many products that used to be produced exclusively in America that are not produced here any more for that one very reason. You mentioned football helmets. I could name a number of things.

But what comes to my mind, in the real world, I was in the field of aviation. In fact, I have the distinction of being the only Member of Congress to ever fly an airplane around the world.

I remember, when I did that, going across Europe and seeing where all of the aircraft are being made today that used to be made in America. Prior to 1980, we manufactured about 17,000 single-engine aircraft each year. In the last 4 years, we have averaged about 400 a year.

And there is not any big mystery as to why that happened. It happened because you cannot be globally competitive and offset the costs of product liability.

In fact, in the other body, when I was in the Aviation Subcommittee, we had a bill up that we were successful in getting passed finally this last year, the Aviation Revitalization Act of 1994. We had testimony from Beech Aircraft that the average cost to offset the exposure of product liability was $83,000 a vehicle. Obviously, if you are talking about a large jet aircraft, that $83,000 is not all that significant. But when you are talking about a single-engine plane or a four-passenger aircraft, you cannot be competitive.

We actually had the repose bill that I think you remember and you were participating over on this side on it.

I remember when Russ Meyer, who is the president of Cessna Aircraft, testified before our committee. Now this is a product liability bill that did one thing. It said that once a manufacturer of an aircraft or of aircraft parts had had that aircraft or those parts functioning as they were designed to function for 18 years, beyond that point they could not be held liable for something that went wrong with the product.

They had some exceptions to it. That seemed to be very reasonable. Russ Meyer, the president of Cessna Aircraft, said on the record, ''INHOFE, if you pass that bill, we at Cessna Aircraft will start manufacturing single-engine aircraft which we quit manufacturing in 1986 and we commit that we will manufacture 2,000 airplanes in the first year after the bill is passed after our tooling up.''

That is exactly what has happened. You might remember when Piper Aircraft went into bankruptcy. There was a news conference. The president of Piper said that the reason they went into bankruptcy was because they could not be competitive on a global basis. In fact, they even suggested they could move their tooling up to Canada and make the same airplanes and make a profit, while they could not in this country.

Anyway, as a result of all that, we were successful in passing that bill. I remember when it started out as being a 12-year repose and then went to 15 years. When they finally agreed to settle on 18 years, I went to the underwriting community and said, ''I think that is too long.'' They said, ''No.''

The point is there has to be some point in the future in which lawsuits cannot be lodged against manufacturers. It is now a reality. Since that time, Cessna Aircraft has done what they said they would do, they are producing aircraft.

I have heard estimates as to how many jobs will be created nationwide, and it is in excess of 25,000 jobs, just in one industry where product liability reform was the cause of the increase in jobs.

We know in Kerrville, TX, Mooney is now increasing their production rate by 40 percent. We know that Unison is now making electronic ignition systems. In my State of Oklahoma, there is a single-engine manufacturer whose first model will be coming off the assembly line in the next few weeks. It is a composite single-engine airplane. We know in Nowata, OK, they are making cylinders, all because of one thing. We reformed product liability in one industry and that industry happened to be the aircraft industry.

So I think sometimes when we become too theoretical and try to guess what the future will bring if we do this, this is an actual case as to how many jobs in America are being created as a result of product liability reform only in one industry.

I was very glad to be a part of that, and you were, too. I certainly think that is the most convincing evidence that we should expand that to other manufactured items.

Mr. GORTON. Mr. President, I thank the Senator from Oklahoma for that eloquent statement. It does seem to me that the experience of just the past year, since the passage of that small aircraft statute of repose, indicates much more graphically than can any theoretical argument the actual positive impact on jobs, on the availability of new products, of American competitiveness. We do not have to argue theory anymore. We can now argue from fact, and the burden of proof, it seems to me, is on those who say ''that far and no further'' is overwhelming.

I must tell you, when the Senator from California stated that she felt that no changes were needed in our product liability laws, and when we got the same implication from the Senator from Wisconsin, I looked up their record last year in voting on that aircraft bill expecting to find they voted against it, but they voted for it. So their position must be that aircraft is the only thing where any kind of reform is needed. Nothing else. It was the only industry adversely affected by product liability litigation.

Of course, that proposition is insupportable. If a statute of repose alone could have such a dramatically positive impact on the small aircraft industry, it is obvious that balance changes, such as these are which, as I already said, does not restrict anyone's right to recover all of their actual provable damages in any product liability case, that the positive impact of change is going to be dramatic and significant.

For those who look back and say here are terrible things that happened and we want an absolutely risk-free society in any and all circumstances, they see, I think quite erroneously, one set of consequences. Those who feel that we have not developed all of the products that we ought to develop in the history of the United States, that we should encourage new developments and that we should encourage competition, and that while those who make serious mistakes, purposeful or negligent mistakes, should be responsible for the consequences of those mistakes, we are not going to add to that responsibility, absolutely unlimited, unfettered by any discretion, punishment without any of the protections of the

criminal code that we should do that, seems to me, as I believe it does to the Senator from Oklahoma, overwhelmingly obvious.

As I said in the beginning, and as the Senator from Oklahoma said so eloquently, we now have one very positive example of how this kind of legislation works. Now let us do more of it, and I think we will see an even more dramatic recovery in many industries which have been constricted on the part of many companies that have abandoned lines of products and many new companies, entrepreneurs who would like to go into new businesses and who are discouraged from doing so by the specter of lawsuits.

Mr. ROCKEFELLER addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, during the course of the discussion this afternoon, it seems that the debate has centered on the premise that somehow there isn't anything wrong with the present system.

Let me try to lay out some of the reasons why we need to change the product liability system, not radically, but change it in a way which makes it fair to consumers and to businesses.

Let us just start out by saying the consumers lose often under the current system. They receive inadequate compensation through product litigation. Severely injured consumers only recover about a third of their actual damages, while their mildly injured counterparts recover approximately five times their economic losses. There is a disparity there which is not good.

Consumers wait forever. They have to wait 2½ years to receive their compensation because of the whole process of a trial and depositions and then appeals, particularly where punitive damages are concerned, which can force people to wait even longer. So an injured person can be forced to wait between 2½ to 4 years to get compensated for something that happened to them, let us say in a machine shop where their hand was mangled which puts them in a position of having to depend entirely on their own resources, worker's compensation, and health insurance, if they have any health insurance. The consumer pays heavily for our current product liability system, and that is because the costs of liability insurance increase the costs of products that people need. Consumers also suffer because manufacturers decide not to introduce needed new products, and thus the consumers do not get the products they need. Consumers may be paying 50 percent of the cost of the ladder in insurance costs for liability. For some pharmaceuticals it is up to 95 percent. Under our system, consumers can pay outrageous costs.

The current tort system pays more to lawyers and transaction costs than it does to claimants. That is really a quite remarkable statement. How can we have a product liability system where somebody is injured and the lawyers on both sides end up getting more money than does the injured person? I do not understand why that is not something that somebody would want to change and make better. I think the consumer loses on that.

The consumer also faces a closed courthouse door under the current law, and that is because in some States the statute of limitations simply does not allow the consumer to take his or her request for due process into the courtroom because it is already closed; the door is closed. And we are saying in our bill that, in fact, we are going to make sure that anybody who has been injured, but may not even know it at the time because it may be a toxic injury or a chemical injury of some sort, will still be able to be compensated. Under our bill, injured persons will still be able to seek compensation 15 or 20 years after they have been injured if they do not discover that injury until that much time has elapsed. This is called the discovery rule, and it applies not only to the discovery that the individual is sick, but also to the cause of the illness, and once that has been discovered, the statute of limitations for 2 years begins to run.

This is a very proconsumer change, particularly in the world that we are moving into, which has so many toxic chemicals that can threaten the health of consumers.

I think, also, because we have talked about consumers—and this is meant to be a balanced bill so let us also talk about manufacturers. I think manufacturers lose under the current system.

Liability stifles research, and it stifles development. This has been amply recorded in the literature. Many businesses spend a lot more on litigation than on research and development. That may not be the only reason. Companies tend to be pulling back on R&D anyway. But the fact that they spend more on litigation—many do—than on R&D does not sound to me like an American sort of system. Well, that is our current system. I would think people would want to make it a better one. Liability makes successful products unmarketable.

I have already talked this afternoon about Bendectin, the antinausea medication, different AIDS-related and pre-AIDS-related vaccines and medicines, football helmets, and others. They simply are not made available because it is decided they are too big a risk and therefore Bendectin, which is available in Canada and has been for years, is not available in the United States, and thus our consumers and our manufacturers lose under this because they are precluded from doing something for fear of litigation.

Liability decreases funding. That is fairly obvious. The fear of product liability has diminished investment in basic scientific research. Now, that is important because you have basic research and you have applied research leading to commercialization of a product, and they are very different. Basic research is sort of the seminal research. That is the kind of thing where you really have to have a sense of stability and predictability and confidence in the future, and that is now way down, and part of the reason for that is the fear of product liability litigation.

I think that the United States itself, as a country, loses under the current system of product liability. Insurance rates disable manufacturers. American manufacturers pay 10 to 50 times more product liability insurance rates than do their foreign competitors. Well, at some point, when you are fighting over every nickel in a car or in some vaccine, or something else, these things matter, and the foreign country wins out and we lose out. So America loses out.

In fact, in Texas, in a single year, they have estimated that the liability system has cost the State of Texas 79,000 jobs. I cannot prove that, but that is what has been said. Texas stands behind that. Seventy-nine thousand jobs in West Virginia would be as if a substantial part of the population simply moved out. And then the funny thing also is that there is no real proof that the current product liability system does not enhance product safety. It is interesting that the number of tort suits rose dramatically in the 1980's, even though consumer injury rates declined steadily. Tort goes up, injuries go down, and now that was not just in the 1980's but also in the 1970's. For 20 years, injuries were going down and tort actions were going up.

Let me spend a moment discussing the costs of the tort system in the United States. Estimates of the cost of tort litigation, of which product liability litigation is part, range from $80 billion to $117 billion a year. Concerning the need for uniformity, the United States has 51 separate product liability systems. The European Economic Community, which is 13 countries, has one product liability system. Japan has one system. I have worked very hard in Japan. For years we had something called the structural impediment talks with the Japanese, and we would tell each other what we thought each country ought to do to improve their performance so that our trade deficit would get better and theirs would get less better, and one of the things the Japanese kept saying to us was that you ought to get more uniformity into your product liability laws because you are getting eaten alive by a lot of countries, including ourselves.

This is staggering, and I hope that those who hear my voice will listen to this. Nearly 90 percent of all companies in the United States of America can expect to become a defendant in a product liability case at least once. It has been suggested that there were only 11 cases in which punitive damages were awarded in 1990. But if 90 percent of all businesses can expect to be sued at some point, this is the so-called

chilling effect. Are 90 percent of American businesses doing the wrong thing each day?

Manufacturers today can be sued for products that were manufactured in the 1800's. I do not think that is the American way.

Companies can be forced to pay damages to persons whose abuse of alcohol and illegal drugs caused their injuries. That is wrong; that is unfair. In 1994, the Gallup survey said that one in five small businesses reported that they have decided not to introduce a new product or not to enhance an existing one out of concern for potential product liability. That is 20 percent of all small businesses saying we are not going to improve our product, or we are going to withdraw the products we are about to introduce.

Interestingly, the Brookings Institution found no link between lawsuits and the safety of products. That is an important statement. And they documented many instances where safety improvements are not made, again, because of the fear of litigation. That being, if they made an improvement, it would imply that the previous iteration was somehow not safe and therefore they might get sued.

The United States is the only nation in the world that allows a safety improvement to be admitted as evidence that the preceding product was less safe. We do it legally. Therefore, companies have reason to be afraid.

I note that it is 5 o'clock. I yield the floor.

The PRESIDING OFFICER (Mr. BROWN). Under the previous order there will be 1 hour of debate equally divided between the Senator from Michigan and the Senator from South Carolina.

Mr. HOLLINGS. Mr. President, the Senator from Michigan would amend his amendment to provide not just ''claimant'' but ''parties''—which would be both the plaintiff and the defendants.

Therein, Mr. President, goes right to the reason—one of the big reasons—I put in my amendment to his. It was quite obvious to me, quickly reading on last evening the amendment of the distinguished Senator from Michigan, that here they were getting plaintiffs' lawyers. In my amendment I wanted to get at all lawyers.

Now, right to the point, in this limited time, once again what we have, Mr. President, is an issue that searches for justification, or a solution looking for a problem that has been going on for some 15 years.

It started, of course, back in the Ford administration whereby they said it was a national problem, and President Ford appointed a commission. The commission found it was not a national problem and recommended leaving it to the States.

They were not satisfied with that, Mr. President. They came in and said insurance was impossible to obtain. We, of course, refuted this argument, and they do not even contend for it today.

Otherwise, they came with the claim that there was a litigation explosion and we needed massive product liability reform in order to confront the national litigation explosion, which, of course, was decreasing not increasing.

Then they came and said they were not developing certain products out of fear of litigation, this was particularly true in the drug and chemical industry. Of course when we were debating NAFTA and GATT these industries proclaimed that they were world class and could compete with anybody in the world. So then they came with competitiveness. There was a buzz word that went on around here for about 5 years, that the market—by the way, which now we will leave everything to the market forces—the market was insufficient and what we needed was a Congress to pass a law to make us competitive, and that unless we legislate product liability we could not be competitive.

Of course, we pointed out in our own backyard we had some 100 German industries, 50 Japanese industries, blue-chip corporations of America, who all were coming to my State and never once complaining about product liability.

I have been the Governor and the Senator there now for numerous years, and the attraction of industry and we can relate industry after industry almost get a habit of asking the question. So it was not competitiveness.

Then they started with various gimmickry with respect to the Little League. They said, no, they were not involved. And then they went, of course, to the matter of the Girl Scouts. The Girl Scouts said, ''Wait, wait. That is not the case at all. We do not have a problem with product liability.''

Then they had a little TV show where a former colleague, Senator George McGovern of South Dakota, came on and said he went broke on account of product liability. Now they have quit running that because that is not the case at all.

Still a solution searching for a problem, now they place their ace card—lawyers, aha. Any time we take a poll in America, immediately the disdain for lawyers. So they say, if we cannot get this bill passed on lawyers, it will never pass.

It talks here in the amendment, as I was just reading it, of ''equity in legal fees.'' I challenged the distinguished Senator from Kentucky and the Senator from Michigan on last evening to bring me the series of product liability cases where somehow the clients had been done in by the plaintiff's lawyers.

Of course, the amendment by the Senator from Michigan termed it ''claimants.'' Now I guess he would like to say, just a minute, we will change ''claimants'' to ''parties'' and get attorneys on both sides.

But there is not any question that these men are very erudite and very learned and have written books in law and everything else of that kind, and they knew what they were doing until, of course, we put up our amendment, and said, wait a minute, we will bring into focus the real issue here, and that is not product liability, but lawyers.

Now, if I could put in a bill to solve the lawyers problem, I would do it. However, I do not know that we are that good here in the Senate of the United States.

Be that as it may, the idea is, as was said in Henry VI ''Kill all the lawyers.'' Take any poll, and if we can convince the individual Members, who are busy on so many different issues, to come now and vote whether for or against lawyers, they will vote against the lawyers, and we will get this bill passed.

I think of the saying:

> Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? . . . I know not what course others may take, but give me liberty or give me death.

Patrick Henry, the lawyer.

We can see, Mr. President, that young leader sitting with his bill in hand, crafting the Declaration of Independence, Thomas Jefferson, the lawyer, or the father of the Federalist papers.

> But what is government, save the best of reflections on human nature? If men were angels, the government would not be necessary. And if angels governed man, there would be no need for controls over the government. So the task in formulating a government to be administered by man over man is first, frame that government with the capacity to control the government and thereupon oblige that same government to control itself.

James Madison, father of our Constitution.

Again, going up all Presidents right on up to Abraham Lincoln. We can see him, ''equal justice under law,'' signing the Emancipation Proclamation. Abraham Lincoln, the lawyer.

Or the darkest days of the Depression, people searching for hope. ''All we have to fear is fear itself.'' Franklin Delano Roosevelt, a lawyer.

I can see now in December 1952, standing before the Supreme Court of the United States.

> But your honor, if the State-imposed policy of separation by race is removed, the young children will have the freedom to choose their school and their own classmates and play together.

The beginning of the end of segregation in this land. Thurgood Marshall, of the NAACP, a lawyer.

Even today, we find Ralph Nader crusading for safety and health. On last evening's TV Morris Dees down in Alabama, working around the clock—or Mississippi, I forget. I know Morris but I have forgotten. I just came back from Mississippi, but I know he has this Southern policy on poverty, Southern law center on poverty where he has been tracking that Ku Klux Klan. And

now the Michigan Militia and the others, against terrorism, at the risk of his own life; Morris Dees, a lawyer.

We begin to wonder, if these lawyers had been silenced what we would have in this land? Obviously I am very proud to be an attorney at the bar and I am not going to join in this derision, save of those who just really are fixers rather than lawyers at the bar, and Heavens knows this city of full of them—60,000 lawyers and the majority of them come now to fix us, the jury, on billable hours.

Pat Choate wrote his book, ''Agents of Influence,'' how the Japanese have those attorney firms, over 100, retained at a cost of over $110 million. The country of Japan, by pay, is better represented than the people of the United States in Washington. The consummate pay of 535 House Members and Senators is only $71 million. But they are all over us, and that is the genesis of this thing that has been going on for 15 to 16 years—the power of the lobby. Because the problem does not exist. It is not a national problem. We do have product liability; 46 of the 50 States have reformed their product liability laws in the last 15 years. But now comes the ace card, if we can play this with respect to the equity of legal fees. What is the equity? That is the most amazing thing, to this particular Senator, to have the parties sponsoring this legislation and trying to amend it talking in terms of the consumer, how they are looking out for the consumer. Every consumer organization in the country is absolutely opposed to this bill. The American Bar Association, they do not have lobbyists up here. The Association of State Legislators, they do not have lobbyists up here. The Association of State Supreme Court Justices, they do not have lobbyists up here.

But yes, the Business Round Table, the Conference Board, the National Association of Manufacturers, the chamber of commerce—yes, they keep big buildings full of lobbyists. So we got this legal reform movement going and it has been a faltering point. So now they will bring in equity in legal fees on last evening—of course for plaintiff and not for the defendant. Now the distinguished Senator says, ''I want to make it for both sides.'' That is what my amendment said.

Billable hours—we are paid at $133,000. I figured it out. If we could have, rather than a minimum wage, have a maximum wage for these fixers, we would have a $50 a billable hour limitation. If they work 51 hours, I would give them $133,000 a year and then if they work some on the weekend they could go on up to a couple of hundred thousand dollars—pretty good. But I figure we ought to pay them as much as we pay the Senators, and that would be a goodly plenty and I think it would clear out 30,000 of the 60,000—if we want to get rid of the lawyers. If we want to get rid of the lawyers.

So there is the amendment to bring into focus the absolutely empty nature of this particular initiative. And it is lobbyists moved, organized, financed, motivated, committed for in the campaigns. Yes, when I ran in 1992 I had the different groups come to me: ''Can't you help us this time on product liability?'' I said, ''They just passed the reform here in South Carolina. What is the problem? Ask the judges; go to talk to our judges. Most of them are Republicans, obviously, in South Carolina. They had been appointed by President Nixon, President Reagan, President Ford, President Bush. They will tell you in a flash it is not a problem.'' But they have to find some reason. Now they are playing the ace card, and that is why I put up this particular amendment.

I do not guess I will be able to control them. I would like to. But, be that as it may, we have had our time at bat to expose the nature of this particular amendment and the nature of this particular legislation. It is absolutely not in the interests of consumers, not in the interests of good law. We have the professors, 121 professors at law have come as a group to attest against this particular measure. They do not have lobbyists up here. No, it was not considered in the Judiciary Committee where fundamental law is considered. There was a quick 2-day turn, adding on amendments in the evening, destroying any idea of uniformity.

That is what they started with. At least they had the good conscience to change the title. I thought maybe it was a gimmick, but I will give them credit for conscience. You will find this bill over on the House side, ''To regulate interstate commerce by providing for a uniform product liability law.'' But when you get over to the Senate side it is some kind of fairness act they call it now. They at least got away from the uniformity, not trying to continue that particular charade. ''This act may be cited as 'The Product Liability Fairness Act Of 1995.' ''

So we have the amendment relative to fees and instituting regulatory measures—bureaucracy at its worst. I have time to practice law but not to keep all the records. I have a simple, clear-cut contingent fee. I assume all the costs, assume all the expenses, assume all the bills for the doctors, the witnesses, assume all the printing measures for the transcript of the record, the appeal record and everything else of that kind going up to the court—I assume all of those. And when I get through, if we win then we get the third. If we lose we get nothing and I have paid all the bills.

It goes right to the heart of the misunderstanding of the distinguished Senator from West Virginia, Senator ROCKEFELLER, when he talks about delays, the trial lawyers delay. Heavens above, you get 10 or 15 of these cases you have backed up in the office thousands of dollars of cost and hours spent and never paid for. Billable hours? I never had a client with billable hours in 20 years of law practice, but you got that backed up. It is in my interests to bring that to a conclusion. I have to move on these cases. We are not trying to delay.

The ones who can sit up in the ivory tower on the 32d floor with the mahogany walls and Persian rugs and all the secretaries running around and all the investigators and you press buttons and say ''Well, yes, I am having this coffee but mark it down as thinking. Give me another billable hour.''

Come on. You are worried about lawyers and their fees? Let us get to the defense counsel that is running up the majority of the costs. He is absolutely wrong. He is not for the consumers, the Senator from West Virginia. They are getting their money. They are not complaining. And they are getting the majority of it. When it comes to who gets the majority of the fees, plaintiff or the defendant, the defendants do. The national insurance study, we put it in the committee report, shows they are the ones running up the costs. We have no time or interest in running up any kind of costs whatever.

It is a proud thing in America that the poor and middle class can get competent representation. It has worked. It continues to work. It is not a national problem. They never have had a hearing in any particular body about lawyers' fees. But if that is the game, then when we take up medical malpractice we will go into doctors' fees. And we will try these amendments and initiatives that they have because they cannot prove their case otherwise. I wait for the distinguished Senators from Kentucky and Michigan to show me the series of cases in product liability where there was not any, as the title says here, ''equity in legal fees.''

I retain the remainder of my time.

The PRESIDING OFFICER. The distinguished Senator from South Carolina retains the remainder of his time. It is 11 minutes.

The distinguished Senator from Michigan is recognized.

AMENDMENT NO. 597, AS MODIFIED, TO AMENDMENT NO. 596

Mr. ABRAHAM. Mr. President, I yield myself such time as I desire.

Mr. President, following discussions with my colleague from South Carolina, and the managers, I ask unanimous consent to modify the underlying first-degree amendment. I send the modification to the desk.

The PRESIDING OFFICER. Is there objection to that modification?

Mr. HOLLINGS. No objection.

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

The amendment (No. 597), as modified, to amendment No. 596, is as follows:

At the end of the amendment add the following new title:

TITLE III—EQUITY IN LEGAL FEES

SEC. 301. EQUITY IN LEGAL FEES.

(a) DISCLOSURE OF ATTORNEY'S FEES INFORMATION.—

(1) DEFINITIONS.—For purposes of this subsection—

(A) the term ''attorney'' means any natural person, professional law association, corporation, or partnership authorized under applicable State law to practice law;

(B) the term ''attorney's services'' means the professional advice or counseling of or representation by an attorney, but such term shall not include other assistance incurred, directly or indirectly, in connection with an attorney's services, such as administrative or secretarial assistance, overhead, travel expenses, witness fees, or preparation by a person other than the attorney of any study, analysis, report, or test;

(C) the term ''party'' means any person who retains an attorney in connection with a civil action arising under any Federal law or in any diversity action in Federal court;

(D) the term ''contingent fee'' means the cost or price of an attorney's services determined by applying a specified percentage, which may be a firm fixed percentage, a graduated or sliding percentage, or any combination thereof, to the amount of the settlement or judgment obtained;

(E) the term ''hourly fee'' means the cost or price per hour of an attorney's services;

(F) the term ''initial meeting'' means the first conference or discussion between the party and the attorney, whether by telephone or in person, concerning the details, facts, or basis of the claim; and

(G) the term ''retain'' means the act of a claimant in engaging an attorney's services, whether by express or implied agreement, by seeking and obtaining the attorney's services.

(2) DISCLOSURE AT INITIAL MEETING.—

(A) IN GENERAL.—An attorney retained by a party shall, at the initial meeting, disclose to the party the party's right to receive a written statement of the information described under paragraph (3).

(B) WAIVER AND EXTENSION.—The party, in writing, may—

(i) waive the right to receive the statement required under subparagraph (A); or

(ii) extend the 30-day period referred to under paragraph (3).

(3) INFORMATION AFTER INITIAL MEETING.—Subject to paragraph (2)(B), within 30 days after the initial meeting, an attorney retained by a party shall provide a written statement to the party containing—

(A) the estimated number of hours of the attorney's services that will be spent—

(i) settling or attempting to settle the claim or action; and

(ii) handling the claim through trial;

(B) the basis of the attorney's fee for services (such as a contingent, hourly, or flat fee basis) and any conditions, limitations, restrictions, or other qualifications on the fee the attorney determines are appropriate; and

(C) the contingent fee, hourly fee, or flat fee the attorney will charge the client.

(4) INFORMATION AFTER SETTLEMENT.—

(A) IN GENERAL.—An attorney retained by a party shall, within a reasonable time not later than 30 days after the date on which the claim or action is finally settled or adjudicated, provide a written statement to the party containing—

(i) the actual number of hours of the attorney's services in connection with the claim;

(ii) the total amount of the fee for the attorney's services in connection with the claim; and

(iii) the actual fee per hour of the attorney's services in connection with the claim, determined by dividing the total amount of the fee by the actual number of hours of attorney's services.

(B) WAIVER AND EXTENSION.—A client, in writing, may—

(i) waive the right to receive the statement required under subparagraph (A); or

(ii) extend the 30-day period referred to under subparagraph (B).

(5) FAILURE TO DISCLOSE.—Except with regard to a party who provides a waiver under paragraph (2)(B) or (4)(B), a party to whom an attorney fails to disclose information required by this section may withhold 10 percent of the fee and file a civil action for damages in the court in which the claim or action was filed or could have been filed.

(6) OTHER REMEDIES.—This subsection shall supplement and not supplant any other available remedies or penalties.

(b) EFFECTIVE DATE.—This title shall take effect and apply to claims or actions filed on and after the date occurring 30 days after the date of enactment of this Act.

Mr. ABRAHAM. Mr. President, the distinguished Senator from South Carolina indicated, as we discussed the effect of the modification, it is to correct the transpositional error that took place when we took language from another piece of legislation and created this amendment. My intent was, and remains, to apply the amendment that I offered initially, not just to the clients of plaintiffs' attorneys but to the clients of defense attorneys as well. That is the purpose of the modification, to fundamentally change the word from ''claimant'' to ''party'' so it would apply to all cases.

Mr. President, what I would like to do is talk briefly about why this amendment was offered initially and to clarify some ambiguities and some misunderstandings that appeared to exist and comment a little bit about the merits of the amendment.

First of all, let me begin by saying that I am an attorney, as is the Senator from South Carolina and many other Members of this body. I respect my colleagues who are lawyers. I respect the attorneys who practice in my State and those who practice in the other States. I believe most lawyers are doing an outstanding job, and I think that consequently the amendment I am offering is not going to really have much effect on the overwhelming percentage of attorneys in America. In fact, the goal of my amendment is essentially to eliminate bad practices undertaken by some attorneys who do not attempt to keep their clients well informed as to the arrangements into which they enter.

Often we have, particularly in cases where clients who are less experienced in the legal system, clients who are unsophisticated about the ways in which attorney-client relationships work, we have situations where clients are less informed than they should be about the arrangements they are entering into. Such is the case when I go to have my television or my automobile repaired and inquire ahead of time for some assessment of what the cost will be and what is wrong with the car or the television set. I think many clients of attorneys need similar help to make informed decisions about the types of arrangements that they will enter into.

That is basically the purpose of my amendment. People are unhappy in my State and elsewhere with respect to the way the current system of legal fees is entered into.

Just to mention a couple of cases in point, I recently received a letter from a Michigan resident who wrote that the U.S. District Court for the Northern District of Illinois had just notified him that he was included in a class action case, and the court soon would be holding a hearing whether to give final approval to a settlement with Chrysler Corp. under the proposed settlement. Under the alleged defect in the Chrysler credit leases, each class member was going to be paid between $2 and $2.50. The attorney who brought the case would be paid up to $175,000. Under this agreement, the lawyer would get enough money to buy a big, new house. The victims would get enough to buy a Big Mac.

That struck me as hardly the kind of appropriate practice that we should tolerate without the clients having full information as they become engaged in the matter. That is the reason a number of organizations that represent consumers have called for the kind of amendment which I am offering here today.

Bill Pride, the executive director of an organization of Americans who are for legal reform—and the only consumer group, I might add, that has publicly stated that it accepts no money from big business, supports disclosure of attorney fees, and the sort of approach I am taking with this amendment—recently testified before the House Judiciary Subcommittee on Courts and Intellectual Property. He stated that because of its complexity and expense of lawyers, the legal system is inaccessible to more than half the population when they have legal problems. For low-income people, legal help is almost nonexistent except for the most poor, who qualify for legal aid. Millions of middle-income people cannot get any help from lawyers for simple remedies because of the complex and expensive and intimidating procedures established by the legal profession.

He went on to indicate the need for reform. One of the reforms that his organization supports is the kind of fee disclosure proposal which I am offering here today because of its potential value to the clients as they enter into legal relationships and negotiate fees.

So indeed there are people who are not satisfied with the information they have with regard to entering into legal arrangements and who are not sophisticated enough in dealing with entering into those relations to enter into them in a knowledgeable way, or to even know what their options are.

My coming here today is not to argue that fees are too high or too low or wrong or right. I did not come before the Senate with this amendment to affect the fees that are paid. What I came here for was to try to provide a system by which fee arrangements would be

entered into by the less sophisticated among us on a knowledgeable basis.

The requirements I am suggesting in the amendment I believe are both simple and fundamentally fair. Without going into all of the details again, as I did yesterday, basically the amendment requires attorneys—and under the modification, this will be for the defense as well as for plaintiffs' counsel—prior to the entering into an arrangement to provide the potential client with information as to an estimated amount of time that would be involved in handling the matter with an explanation of the various options available as far as the nature of the arrangements that would be entered into, whether it would be hourly billing, or a national fee, or a contingent fee, and then an explanation as to the type of fee as well as the specific amounts that would be employed; in other words, the per-hour amount, the contingent percentage, or the national fee. Following completion of the matter, a similar kind of accounting would take place in which the actual hours would be made available to the client, the amount of the fee which was ultimately calculated or charged, and then the computation of what the hourly rate would be.

I recognize that for some small law firms, this may be more burdensome than for others. But like the Senator from South Carolina, who I gathered was in a small firm at one time in his career, I began my legal career when I left law school in a small firm in Lansing, MI. We did not have a lot of fancy computer equipment or access to accountants. But we did maintain a pretty good recordkeeping of our own efforts and the hours that we put in on matters, regardless of the nature of those matters because, simply, we thought it was to be able to operate our offices in an efficient fashion, as well as to serve our clients better and to be able to satisfy requests of this sort if they were to come from clients who knew their rights included the ability to make such requests. But I will add a few other points.

The amount that I am offering has several options in it. One is a waiver option. Clients may, under the amendment, waive their rights to this information either preliminary to or following the transaction of a legal matter. It does not require, therefore, that in each case the attorney provide this information.

Second, I think it is very consistent with a recent formal opinion, formal opinion No. 94–389, addressing attorneys' contingent fees, which was recently entered into by the American Bar Association Standing Committee on Ethics and Professional Responsibility. That section, at page 7, said that, among other things, regardless of whether the lawyer and the prospective client, or both, are initially inclined toward a contingent fee, the nature and details of the compensation arrangement should be fully discussed by the lawyer and client before any final agreement is reached.

It went on to say that among the factors that should be considered and discussed are the following: The likelihood of success, the likely amount of recovery or savings if the case is successful, the possibility of an award exemplary or multiple damages, and on and on. And included in the things that were recommended was the amount of time that is likely to be invested by the lawyer.

In other words, the proposal I am making is not the only one that I think many lawyers already follow. It is also something which the American Bar Association, which may be on different sides of other parts of this pending legislation, has in its own recent opinion suggested ought to be followed.

Finally, I will just say that we are not in this legislation telling the States what to do. This amendment is limited to actions within the Federal court; in short, within the purview of what I believe is the appropriate purview of this Congress in determining the areas in which we might apply these types of regulations; in short, the matters before our Federal courts.

So I would just conclude by saying that when I proposed this and brought it to the floor, I really did it with a belief it essentially was a matter which would give consumers more information, a right to know what the legal fees they were entering would be like, what they should anticipate, what their options were, an accounting for those fees. In no way was it my intention to cast aspersions on the legal profession. Certainly it was not my intention to be critical of the many fine lawyers who are referenced by the speech of the Senator from South Carolina. I hope that was not the case.

We are always hearing in the Congress the concerns that virtually all of us have I think about consumers, about the interest of consumers, about the interests of people who are frequently finding themselves in a disadvantaged position with respect to big business, with respect to big Government, with respect to other big institutions. Many of those individuals find themselves from time to time in circumstances where they would like to litigate a concern or defend one. If they are not well informed, it seems to me they are at an even greater disadvantage, and I believe that this amendment provides a chance to help them and at the same time improve the legal system.

It is the case that there is a lot of criticism about lawyers and the way the legal system works. One of the reasons this legislation on product liability was generated obviously was because of concerns about the system. I do not want to kill all the lawyers. I wish to improve the legal system. I think by eliminating from the many concerns people have the concern that they are brought into legal arrangements without the full knowledge of their options, without the full accounting of the time and the dollars involved, that it would substantially improve the system and the way it functions.

Finally, as I said a little earlier, I think we are asking here lawyers to do nothing more than we ask of many other professionals in many other service parts of the economy. As I mentioned, when I go to the auto shop with a car problem, I am given information as to what is likely to be wrong, what the likely cost of repairs are, and so on, so that I can make an informed decision whether I wish to pursue repair.

We are told that it is harder to do that in this context because it is a more complex area, and I agree it is more complex. But I think, because of its complexity, because it is a more difficult area, that is all the more reason why we should try to get the people who come into this often intimidating setting the sort of information that would allow them to make knowledgeable decisions. That is the purpose of my amendment.

At this time, Mr. President, I reserve the remainder of whatever time I have remaining.

The PRESIDING OFFICER. The Senator from Michigan has 17 minutes remaining.

Who yields the Senator from West Virginia time?

Mr. ROCKEFELLER. Mr. President, I yield myself time.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, at 6 o'clock, we are going to have two votes, and as the Democratic manager of this bill I wanted to alert colleagues on both sides as to the plan that the Senator from Washington [Mr. GORTON] and myself have, what we are going to do so that Senators might be appraised of the situation.

The PRESIDING OFFICER. Will the Senator suspend for a moment. Since we are under a time agreement, the Chair asks who yields the Senator from West Virginia time?

Mr. ROCKEFELLER. I yield myself 3 minutes.

The PRESIDING OFFICER. The time remaining is divided between——

Mr. ABRAHAM. Mr. President, I so yield.

The PRESIDING OFFICER. The Senator from Michigan yields the Senator from West Virginia time. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Again, I want to let my colleagues know of the situation and what Senator GORTON and I will do at 6 o'clock. We are here to consider repairing something called the product liability bill. We are not here to determine the hourly rates of lawyers. We are not here to do a variety of other things.

Therefore, the Senator from Washington will move to table the amendment of the Senator from South Carolina, and I will move to table the amendment of the Senator from Michigan.

We are not here, again, to determine how lawyers' fees should be publicized. That is my reason. I understand the interest that both Senators have in raising these questions. But I want the Senate to consider a bill that has been the subject of hearings, close scrutiny, and careful work, and that is called the product liability bill. I do not think this bill is the bill to use as a vehicle for regulating the fees of lawyers, telling them how to publicize their fees or intervening into the lawyer/client relationship.

In moving to table these amendments, the managers and authors of this bill want to make a point, however. We are discouraging, actively discouraging amendments outside the scope of the product liability bill itself. We welcome constructive revisions to this bill within the context of the bill, but we do not welcome the phenomenon of loading up on this bill for the purpose of making points, some of which might be valid, but we just do not want to do that. And we do not want to have amendments scoring points against lawyers.

So we are here to do the serious work of the product liability bill, and I want my colleagues to be informed as to how the managers will proceed.

I thank the Senator from Michigan and I thank the Presiding Officer.

The PRESIDING OFFICER. The Senator from Michigan retains 14¾ minutes. The Senator from South Carolina has 11 minutes remaining.

Who seeks recognition? The Senator from South Carolina is recognized.

Mr. HOLLINGS. I thank the distinguished President.

Mr. President, I am trying to find—I thought we had found it. After the day was over last evening, I went back to my office and I said on that airline case, several airlines really of overcharging, and the lawyers steamed up a class action, and as the distinguished Senator from Michigan reported in a letter to the colleagues, the lawyers got some $16 million and others got coupons worth $20 or $25, one of my secretaries said, ''Yes, that got lost in the mail. You had a chance to do it.'' But I said I never heard it, but I had plenty of money left on the table, I guess, because I never knew anything about the case. So a young attorney in my office said, ''Well, I denied knowing anything about the case, but I got $150 when I got notice.'' I said, ''Well, who are the lawyers?'' He said, ''I don't care. I do not know who the lawyers were and don't care. They got me some money.''

Now, no one is complaining about the lawyers and no one is inventing equity. The truth of the matter is we had some 15 years ago, I say to the Senator from Michigan, a big debate about the Federal Trade Commission coming in and regulating attorneys and attorneys' fees and everything else of that kind.

And we can have the hearings again and come back and go over that thing. But in the last dozen years we have not had hearings on this. The best the Senator from Michigan refers to is a letter from Michigan about a class action and one gentleman over on the House side who testified supporting disclosure of fees. I hope he does support disclosure of fees. All of us at the bar do.

Here I hold in my hand ''Model Rules of Professional Conduct and the Code of Judicial Conduct'' from the Center of Professional Responsibility of the American Bar Association. And we practice under this. And it has on page 18 rule 15 about the fees and it runs down—I do not want to spend all my time, but it has not only the time and labor required, much better than the amendment of the Senator from Michigan, the amount involved, the time limitations, the nature and length of professional relationship, the experience, whether the fee is fixed or contingent, right on down, all in writing.

I never have found that client—I guess that is the nice experience of mine—complain to me about the handling of product liability.

And we have had it up five times before the Commerce Committee, five times with hearings, five times the report and we had every ramification that you can think of on product liability, and here we come again and without ever having any testimony whatsoever or the subject raised about fees, a Senator or a couple say, well, let us go to lawyers. We cannot get them on the Girl Scouts or the Little League. We cannot get them about their former colleague going broke.

There is no litigation explosion. The only explosion is businesses suing businesses. And after all, remember, we are representing consumers. Now, if anybody believes that, I happen to represent the consumers in this instance and not the manufacturers. They are trying to take advantage here, when we are talking about welfare reform, making the recipients more responsible, we are going backward and saying manufacturers be more irresponsible. We have got a long litany in this debate about the good in America for the safety of products. We can count on it. It redounds to our safety and our health; we almost take it for granted. Where there have been some adjustments, the States have taken care of it. But fees, the equity in fees, to assume that there is not any and that you need to pass a law in Congress to get it is ludicrous, really laughable.

I mean any lawyer go down here, or anybody else, to my billable hours friends. They will tell you the American Bar and everything else like that. They do have an understanding with the billable hours. They like it. The phone rings. ''Wait a minute.'' ''There is another $25. I answered the phone.''

''You got a copy of that? Twenty-five cents for every copy. Run some extra copies. We have to pay for the copy machine.''

''Put a little fee on the computer.''

Senator ABRAHAM and I can get computers now. Put fees on those. Little internal fees for computers, like these MRI's at the hospitals, paid for five or six times. They have bought every computer downtown 10 or 15 times with little fees on the computers.

Lawyers know how to look at these. I am one trying to look out for the clients. Let us not diminish the rights of the clients.

I can tell you now, yes, in Henry VI, Dick the butcher says, yes, that the first thing we must do is kill all the lawyers. That was not, in a sense, a demeaning or pejorative term. He was saying, if tyranny was to succeed, the tyrants must first kill the lawyers. And if demagoguery is going to persist and succeed, then we are going to have to get rid of all the lawyers who are going to expose the demagoguery that is going on in our Government today.

I can tell you here and now, I am proud of that expression ''Kill all the lawyers,'' because it is the best of all compliments. We stand in the way of the takeover of the big business and the clients that have kept this going for 15 years, again and again and again and again, with commitments and elections and everything else working. And it is that poor, injured client in middle-class America, they cannot pay any billable hours, so they come in.

And, yes, you know, no matter how thin the pancake, there are two sides to every pancake and every question. And you do not have a sure shot. You have to get all 12 jurors. You do not try a case and get a majority vote as we do in the Senate. You have to get a unanimous vote by the greater weight of the preponderance of the evidence, or for punitive, willful misconduct, by the greater weight of the preponderance of the evidence.

Do not act as though there is a problem out there with respect to the trial of cases. If there is runaway verdicts, it is businesses suing businesses upon suing businesses upon suing businesses. They love to come all dressed up and go in the boardroom and say, ''Well, take them on.'' Of course, the lawyers, billable hours, ''Hot dog. That will take care of the family and send my boy through college during the next 4 years. Billable hours, whoopee. We had a board meeting today, and let me tell you who we are going to sue. I have no idea if they are going to win it, but it will take care of me.''

That is what has been going on in the courtroom and cluttering it up, and not these tort claims because, yes, they are more safe. There is less injury, and if there is less injury, there is less tortuous injury.

I cannot understand the logic of the Senator from West Virginia, who uses his hands up and down, whatever it is. It is not relevant whatsoever, or not responsive.

I retain the remainder of my time.

The PRESIDING OFFICER. The Senator from South Carolina retains the remainder of his time. He has a little over 2 minutes remaining.

Who seeks recognition?

Mr. ABRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. ABRAHAM. I yield myself such time as I desire.

Mr. President, I just want to reiterate a couple of points I made. The purpose of the amendment which I have offered is not defined to affect legal fees. In fact, it is the second-degree amendment that the Senator from South Carolina has offered which would attempt to put constraints on those fees.

Again I express, all I am trying to do is provide information, both before as well as after the entering into of a legal arrangement between clients and their attorneys.

I think the descriptions of such an amendment as being overly bureaucratic and so on is really inconsistent with several facts. First, the fact is that whether it is the distinguished Senator from South Carolina or other Members of this Chamber who are attorneys that I have spoken to on this or heard from about it—and I have heard from several—virtually to a person, they indicate that in one way or another they already perform the function of information and transmission that we are talking about.

The attorneys in my State who have talked to me prior to the offering of this amendment and since have likewise said that in their current arrangements, they provide similar information. But they all acknowledge, at least the ones in my State, that there are people in the practice of law who do not. And the people who are unfortunate victims in these situations are the less knowledgeable, the people who are less familiar with the legal process and what their rights are when they enter into these kinds of arrangements. They frequently are in a disadvantaged position because they are the victim of an injury or a harm and in a disadvantaged position because they are intimidated entering into the legal process itself.

Again, I stress that this is really, in my judgment, a choice between helping consumers or inconveniencing those attorneys who do not follow the various American Bar Association and State bar association guidelines that both the Senator from South Carolina and I have referred to or the practices of most attorneys.

It seems to me that to inconvenience those attorneys who do not feel it is their responsibility to at least inform their clients as to the kind of fee arrangements they are going to enter into and the likely amount of time involved, as well as to inform them after the fact of what the costs are and how much time was involved, to worry about inconveniencing them rather than worrying about protecting those consumers of legal services that are at least the victims I am trying to help with this legislation is to have the balance struck the wrong way.

So, for that reason, I believe the amendment makes sense.

I would also just reference back to the example we used yesterday that was in a letter we sent around regarding the airline matter. It was brought to my attention by an article in the Washington Post. The article was written from the perspective of one of the various people who were part of the class of people that were affected and received these awards. It was not a complimentary position that was taken by that plaintiff. It was a position of somebody who apparently was representative of a lot of other plaintiffs that were not happy. They were unhappy with the outcome. That is often the case. I think it is particularly the case when people have no information as to what the fee structures will be. And for that reason, I think the amendment that I am offering, as I say, will help consumers.

It may prove to be an inconvenience for some attorneys, but those attorneys who will be inconvenienced are the ones who are not following the kinds of practices and recommendations of the bar association as are those of the profession who I think are doing an outstanding job.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Michigan reserves the remainder of his time. He has 10 minutes and 42 seconds remaining.

Who seeks recognition?

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. HOLLINGS. Mr. President, just in the minute or so that I have remaining, I ask unanimous consent to have printed in the RECORD the full text of this Monday edition.

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

[From the Washington Post, Mar. 20, 1995]

IN SETTLING WITH AIRLINES, THERE'S NO FREE RIDE; COUPONS FOR TRAVELERS, $16 MILLION FOR LAWYERS

(By Anthony Faiola)

When a number of the nation's major airlines agreed to settle a price-fixing lawsuit by offering passengers discount coupons on air fares, it looked as if the flying public was getting a plum.

But passengers soon discovered, after the coupons arrived in January, that there would be no free rides because the terms of the settlement limited savings on any one trip.

Meanwhile, the airlines—defendants in the class-action lawsuit that led to the settlement—found themselves with a wonderful marketing tool. Although the coupons had a total face value of $438 million, they could be redeemed only a few dollars at a time.

And the lawyers who represented the members of the class in the suit were the ones to make real money—$16,012,500.

The legal fees and the limited benefits to the flying consumers have led many travel and legal experts, including the federal judge in Atlanta who signed the settlement, to label this a ''lawyers' case.''

''Defendant and plaintiff attorneys have learned to fall in line with each other'' in class-action cases, said Cornish Hitchcock, an attorney with Washington consumer activist group Public Citizen. ''A sweet settlement deal for the defendants can be cut, and the plaintiffs can get their huge attorneys' fees, then everyone is happy. Everyone, that is, except for the class,'' he said. Hitchcock was among those who argued for lower legal fees in the case.

The 4.2 million plaintiffs in the airline case had little choice in who represented them. Thirty-seven law firms nationwide raced to file antitrust suits on behalf of air travelers, then went in search of a class of clients.

Five firms, in particular, came away with the most in fees, court documents showed. They included the offices of the four lawyers who chaired the steering committee representing the plaintiffs and the Atlanta firm that oversaw the administration of the case.

In Washington, the firm Cohen, Milstein, Hausfeld & Toll received $326,912,08. In Philadelphia, considered by legal experts as the power center of class-action firms, Fine, Kaplan and Black received $155,685.75; Cohen, Shapiro, Polisher, Shiekman and Cohen received $261,117.03; and Kohn, Nast, Savett, Klein & Graf received $382,277.14. In Atlanta, the firm Carr, Tabb & Pope received $504,980.16, according to court records.

Attorneys calculated the awards based on an estimate that 2.3 million travelers would request coupons. Instead, almost double that number responded, which led to lower awards for all plaintiffs.

FRUSTRATION FOR TRAVELERS

The coupons cannot be used for flights during certain blackout dates and cannot be pooled for significant discounts. The largest discount on a $240 ticket, for instance, is $10.

Travelers such as Adams Morgan resident Geraldine Triana, one of 4.2 million passengers who gathered years-old flight receipts in the hopes of gaining an award, said the case amounted to frustration and wasted time.

Triana, who flies primarily between Long Island and Washington on fares of less than $200, doubts she'll get much use from her four coupons, each valued at $25. To get a full $25 credit, she has to buy a ticket worth at least $250.

''Where is the justice in that?'' she said.

The coupons do offer sufficient incentive that consumers want to use them, making them an effective marketing tool for the airlines. In fact, Alaska Airlines, one of the few large carriers not named in the original case, asked to be a defendant when it learned of the coupon program and was accommodated.

''The airlines using those coupons are going to see substantial additional ticket sales because of them,'' said Louis Cancelmi, a spokesman for Alaska Air. ''We asked to be named in the case because, once we saw the settlement, we realized it was to our competitive disadvantage not to do so.''

Spokesmen for the other defendant airlines—American, Continental, Delta, Northwest, TWA, United and USAir—cited the court-approved agreement that provided the coupons and declined to comment further. Under the agreement, the defendant airlines did not admit fault. Eastern and Pan American World Airways, both now defunct as operating entities, also were among the original defendants.

In her Philadelphia office, Dianne Nast, one of four lawyers who served as co-chair of the plaintiffs' committee, said that the 4.2 million plaintiffs ''should be satisfied'' with what they got. Coupons, she said, ''are better than nothing.''

''Just because a settlement may benefit a defendant doesn't mean it won't benefit the plaintiff; that's not logical,'' said Nast, a partner in Philadelphia's Kohn, Nast, Savett, Klein & Graf. She now is working on class-

action cases against tobacco and silicon-breast implant manufacturers.

BEST JOB POSSIBLE

Nast said she and her colleagues expended thousands of hours of legal time wrangling against some of the best corporate attorneys in the business. Class-action cases, she said, remain the best way to bring together scores of people commonly wronged, but who could never gain retribution on their own.

''Considering the circumstances, we did the best job possible,'' Nast said. ''I don't feel the fees were too high. In fact, in this case, I would say they were low.''

The lawyers had asked for $24 million in fees and expenses. The federal judge in the case lowered that amount to slightly more than $16 million.

The case started in the shadow of Washington Dulles International Airport, where the Airline Tariff Publishing Co. (ATP) has its headquarters.

The company is owned by 30 domestic and international air carriers and was created by the airline industry to distribute fares to travel agencies through one database.

But in 1989, the U.S. Justice Department was alerted by reports in the aviation trade press of suspicions that the database was being used for electronic fare negotiations among its member carriers.

Mark Schechter, deputy director of operations for the department's antitrust division, said an investigation was begun in the summer of 1989. Schechter said the Justice Department believed the airlines were comparing fares through the computer system before they were listed on travel agents' computers.

For example, according to Justice Department interrogatories filed in connection with its case, United Airlines inserted a ''proposed'' fare into the ATP computer on Dec. 15, 1988, that would increase prices by $15 between Chicago and several cities. Two weeks later American, Braniff, Continental, Delta, Northwest, TWA, USAir and Piedmont, which later merged into USAir, also posted ''proposed'' increased fares in the computer, matching United's and essentially ratifying its increase. On Jan. 14 all these airlines implemented the suggested $15 increase.

On Dec. 21, 1992, the department filed a civil antitrust suit against most major airlines in U.S. District Court. The Justice Department settled its case with the airlines last March. The airlines agreed to stop using the database to compare fares but did not admit fault.

''This was a major case, probably the most important civil antitrust case brought since AT&T,'' Schechter said. ''It was hotly contested and hotly litigated, there were nine defendants out there and each of them had top legal talent, they were very well represented and ready for a fight.''

On June 28, 1990, long before the Justice Department settlement, lawyer Nast read about the department's investigation in the Wall Street Journal. She immediately asked her Philadelphia firm's researchers to begin investigating.

Dozens of other lawyers saw the Journal story too and launched their own investigations. In Washington, Philadelphia, Atlanta, San Francisco and more than a dozen other cities, firms specializing in class-action litigation rushed in.

''I had heard some things, you know, some hints at Washington parties, that this airline case was brewing,'' said Jerry Cohen, a Washington lawyer who was co-lead counsel on the case. Cohen is a former member of the Senate antitrust and monopoly subcommittee and his firm, Cohen, Milstein, Hausfeld & Toll, played a key legal role in the Exxon Valdez case. The tanker Exxon Valdez ran aground in 1989 in Alaska's Prince William Sound, spilling 10 million gallons of oil.

''But when we saw the Journal article, we assigned a couple of people to look into it, and we prepared a complaint. Before we filed, we talked to several other law firms to find out how they were going to handle it.''

By August, 37 firms had filed suits.

The attorneys, Cohen said, used a complicated formula to quantify the airlines' liability, and came up with a total of $3 billion.

''These lawyers don't waste their time on the small stuff,'' said Laurance Schonbrun, a San Francisco attorney who argued before the court that the plaintiffs' attorneys should be paid in coupons, not cash, because that's what they won for their clients.

When the suits were filed, attorneys listed specific individuals as plaintiffs. These plaintiffs were, in many cases, friends or pre-existing clients of the law firms, said Federal District Judge Marvin Shoob, who presided over the case in Atlanta.

The 42 named plaintiffs took home as much as $5,000 each, for a total of $142,500. They were the only members of the plaintiffs to receive money, court records show.

Judah I. Labovitz, also a co-chair in the case, said the 42 plaintiffs ''are more than just names on a piece of paper.'' His law firm's plaintiff was a longtime friend and client, Labovitz said. ''He dug up his travel records and gave a deposition. The entire class benefited from his actions, why shouldn't he get some money?'' Labovitz said.

In September 1990 the cases were consolidated in Atlanta and a steering committee was established to coordinate the efforts of the 37 law firms. Some of the largest and best-known firms became the leaders and Nast, Labovitz, Cohen and Philadelphia attorney Allen D. Black became co-chairs.

COUPONS, NOT CASH

Several factors pushed the parties toward a settlement with coupons rather than cash, attorneys for both the airlines and the plaintiffs said.

The airline industry was in financial chaos in the midst of a recession that would see it lose more than $10 billion over three years. If the case were won and cash settlements were huge, it could bankrupt the industry, lawyers for both the plaintiffs and the airlines agreed.

Meanwhile, the plaintiffs' lawyers faced the prospect of proving electronic collusion in front of a jury that might not have the patience for a technical trial potentially lasting three years or more.

''You've got to have a little common sense. All the airlines were in serious trouble at the time,'' Cohen said. ''They literally had no money. Eastern and Pan Am had already gone belly up, and Continental, Northwest and TWA were in serious trouble.''

But opponents, primarily consumer activists, cried foul. ''It would have been better for the plaintiffs if the lawyers took the case to trial,'' said Edward M. Selfe, a corporate attorney from Birmingham who filed a motion to stop the settlement on the grounds consumers should receive rebates, not coupons.

However, plaintiffs counsel had invested considerable time and effort in developing the case, with no guarantee they could win and recover even their costs, much less their legal fees.

$16 MILLION IN LEGAL FEES

So the settlement was reached: $438 million worth of coupons to an unknown number of passengers for up to a maximum of 10 percent of the cost of their air fares, and $16 million in legal fees to plaintiffs' counsel.

Each individual plaintiff, however, did not receive even as many coupons as originally expected because there were many more applicants than the settlement presumed, and there was a ceiling on the payout.

The plaintiffs' lawyers had estimated that 2.3 million people would seek coupons, Shoob said. The plaintiffs' attorneys formulated that number based on the advice of experts, and relying on the history of plaintiffs' response in similar cases.

The number of travelers responding came in at 4.2 million. Included were huge corporations, such as International Business Machines Corp. and AT&T Corp., which entered claims of more than $1 billion and ended up getting most of the coupons. However, AT&T and several other companies now say the coupon restrictions make them extremely difficult to redeem.

''Obviously, we were surprised,'' Nast said. ''We believe it was due to all the publicity the case received.''

The miscalculation had the effect of making the settlement appear more lucrative then it actually was, Shoob now said. The minimum payback per person worked out to $73 in coupons, with a limit per flight of a 10 percent discount. Earlier projections had put the minimum payback at almost $140 in coupons per person, he said.

''I based my approval on the belief that claimants would get much more back than they actually did,'' Shoob said. ''I believe [the attorneys made] an honest mistake—there was no attempt to purposely mislead the court. But it was a mistake nonetheless.''

Nast said: ''We looked at the historical response to this type of situation to calculate—but this was an extraordinary case. I feel it's a comment on how good a job we did for the class that so many people responded.''

Shoob said, ''in this case, even in the event of a cash settlement, chances are, each person in the class would have received an extremely small amount of money in comparison to the return to the lawyers.''

''I think [class-action] cases are absurd,'' he said. ''So many are generated by lawyers not to benefit the class, but to generate legal fees. The lawyers are just doing their job under the law. The flaw is with the law that allows it.''

Mr. HOLLINGS. The amount of money in that case referred to by the distinguished Senator in the justification for his amendment, the airlines case, with the total verdict of $438 million, that is where the lawyers got $16 million. There were 4.2 million plaintiffs. They had law firms racing all over; 37 law firms were racing around. They have all the law firms listed.

But rather than a third or 20 percent or 10 percent or 5 percent or 1 percent, it is less than 1 percent that the lawyers got.

Now, you have all of those clients in there. I knew that this particular fee, even though it sounded outrageous in the news story, was based in reason by the court. The court would not approve giving the clients $25 and giving the lawyers $16 million. That is the garish nonsense that you find going on as justification for product liability reform.

On that basis, if Senators want to vote on that basis not only for the amendment of the distinguished Senators from Michigan and Kentucky, but on product liability, let them do

that. But that is how extreme they have gotten.

Now, here is the case. I hope everybody will read about the 37 law firms and the 4.2 million plaintiffs and the $438 million obtained, to be divided up. And the lawyers, all those 37 law firms, got $16 million. I rest my case, Mr. President.

I hope you do not table our amendment. If we can get a good vote on this amendment, it will bring attention to the really fanciful nature of this entire exercise on product liability.

We have welfare reform, we have the budget, we have telecommunications, we have terrorism, we have a crime bill to come up, we have more work to do that is good work of national significance, rather than manufacturing amendments through halfway stories in the Washington Post.

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator yields back the remainder of his time. There are 10 minutes 42 seconds remaining to the Senator from Michigan.

Who seeks recognition?

Mr. ABRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. ABRAHAM. Thank you, Mr. President. I just will make several comments.

One, in the case the Senator from South Carolina and I have been discussing, I just will point out, again, this is a quote from the media, the judge in that case actually later said that he regretted having approved of the fees that were involved for the reasons that he believed they were inappropriate.

Again, my point is not to talk about excessive fees or fees that are inadequate. I have not yet encountered any attorney who says they did not earn the fees that they charged, and since they feel that way, my guess is they should not object to the requirements of this amendment, which would simply ask that prior to and following the conclusion of matters, accountings be made and the fees, as well as the hours involved, be tabulated.

I would also stress though, as I did earlier, the amendment provides a waiver provision so that those attorneys who feel this is too burdensome and cumbersome can at least seek to have their clients waive this right to have both prior- as well as post-litigation or settlement accounting occur.

But basically, again, Mr. President, I think that the thrust, at least of my underlying amendment, is one of disclosure, it is one of providing consumers with the right to know the kind of legal arrangements that they are getting into, and the right to know what has transpired and how the fees that they are paying will be structured.

I believe it is pro-consumer. I believe the only people who might find this inconveniencing are those attorneys who are not following the common practice that is outlined by so many legal organizations of calling upon attorneys to provide that sort of information.

Mr. President, at this time, 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. GORTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 598 TO AMENDMENT NO. 597

Mr. GORTON. Mr. President, what is the pending business?

The PRESIDING OFFICER. The pending business before the body is now the amendment by the Senator from South Carolina.

Mr. GORTON. Has all time for debate expired?

The PRESIDING OFFICER. All time has expired for the debate.

Mr. GORTON. Mr. President, I move to table the Hollings amendment.

Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

VOTE ON MOTION TO TABLE AMENDMENT NO. 598

The PRESIDING OFFICER. The question is on the motion to lay on the table amendment No. 598, by the Senator from South Carolina.

All those in favor of the tabling motion will vote aye, those opposed will vote no.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Missouri [Mr. BOND] and the Senator from Oregon [Mr. HATFIELD] are necessarily absent.

Mr. FORD. I announce that the Senator from Nebraska [Mr. EXON] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 94, nays 3, as follows:

[Rollcall Vote No. 134 Leg.]

YEAS—94

Abraham	DeWine	Johnston
Akaka	Dodd	Kassebaum
Ashcroft	Dole	Kempthorne
Baucus	Domenici	Kennedy
Bennett	Dorgan	Kerrey
Biden	Faircloth	Kerry
Bingaman	Feingold	Kohl
Boxer	Feinstein	Kyl
Bradley	Ford	Lautenberg
Breaux	Frist	Leahy
Brown	Glenn	Levin
Bryan	Gorton	Lieberman
Bumpers	Graham	Lott
Burns	Gramm	Lugar
Byrd	Grams	Mack
Campbell	Grassley	McCain
Chafee	Gregg	McConnell
Coats	Harkin	Mikulski
Cochran	Hatch	Moseley-Braun
Cohen	Heflin	Moynihan
Conrad	Helms	Murkowski
Coverdell	Hutchison	Murray
Craig	Inhofe	Nickles
D'Amato	Jeffords	Nunn
Packwood	Santorum	Stevens
Pell	Sarbanes	Thomas
Pressler	Shelby	Thompson
Pryor	Simon	Thurmond
Reid	Simpson	Warner
Robb	Smith	Wellstone
Rockefeller	Snowe	
Roth	Specter	

NAYS—3

Daschle	Hollings	Inouye

NOT VOTING—3

Bond	Exon	Hatfield

So the motion to lay on the table the amendment (No. 598) was agreed to.

Mr. GORTON. Mr. President, I move to reconsider the vote.

Mr. ROCKEFELLER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LEVIN. Mr. President, I am generally a supporter of disclosure requirements, but I will vote to table the Abraham amendment for two reasons.

First I believe that the States are more familiar with the issues raised by this amendment and that it is inappropriate for us to take over this area of the law in a floor amendment which has not even been considered in committee.

Second, the amendment would impose a cumbersome new regulation on attorneys—not just in product liability cases, but in all cases in Federal court. Attorneys would have to send not one, but two notices of fees to each client in a case. That may sound simple, but the chief case that has been cited as the basis for this amendment was a class action brought on behalf of some 4.2 million individuals. That means, presumably, that 8.4 million separate notices would have to be mailed out in that case alone.

Moreover, the amendment would require attorneys to calculate hourly fee rates even in cases where the client is being charged on a basis other than hourly rates—such as a contingent fee or a flat fee. That means that every attorney would have to keep records of every hour spent on every case, even in cases where those hours are not the basis for the attorney's fees, and the actual basis for those fees is fully disclosed to the client. That is a huge new paperwork requirement, the cost of which would inevitably be borne not by lawyers, but by their clients.

I believe that we should avoid these cumbersome new requirements and leave requirements for disclosing attorneys' fees in the hands of the State governments unless and until a clear need is shown for the Federal Government to take over.

I also intend to vote to table the Brown amendment to revise rule 11 of the Federal Rules of Civil Procedure. The Rules Enabling Act delegates to the Supreme Court the power to prescribe rules of procedure for the Federal district courts. The courts have far greater expertise in rules of judicial procedure than does the Congress. Accordingly, I do not believe that we should step in and overturn the courts'

decision without hearings and without a clear showing of need.

VOTE ON MOTION TO TABLE AMENDMENT NO. 597, AS MODIFIED

The PRESIDING OFFICER. Under the previous order, the question now occurs on amendment 597, as modified, offered by the Senator from Michigan.

Mr. ROCKEFELLER. Mr. President, I move to table the amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from West Virginia [Mr. ROCKEFELLER] to table the amendment of the Senator from Michigan [Mr. ABRAHAM]. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Missouri [Mr. BOND] and the Senator from Oregon [Mr. HATFIELD] are necessarily absent.

Mr. FORD. I announce that the Senator from Nebraska [Mr. EXON] is necessarily absent.

The PRESIDING OFFICER (Mr. GRAMS). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 45, nays 52, as follows:

[Rollcall Vote No. 135 Leg.]

YEAS—45

Akaka	Gramm	Moseley-Braun
Biden	Harkin	Moynihan
Bingaman	Heflin	Murray
Breaux	Hollings	Nickles
Bryan	Hutchison	Nunn
Bumpers	Inouye	Pell
Byrd	Jeffords	Pryor
Cochran	Johnston	Reid
Cohen	Kennedy	Rockefeller
D'Amato	Kerrey	Roth
Daschle	Kerry	Sarbanes
Dodd	Leahy	Shelby
Ford	Levin	Simon
Gorton	Lieberman	Specter
Graham	Mack	Thompson

NAYS—52

Abraham	Faircloth	McCain
Ashcroft	Feingold	McConnell
Baucus	Feinstein	Mikulski
Bennett	Frist	Murkowski
Boxer	Glenn	Packwood
Bradley	Grams	Pressler
Brown	Grassley	Robb
Burns	Gregg	Santorum
Campbell	Hatch	Simpson
Chafee	Helms	Smith
Coats	Inhofe	Snowe
Conrad	Kassebaum	Stevens
Coverdell	Kempthorne	Thomas
Craig	Kohl	Thurmond
DeWine	Kyl	Warner
Dole	Lautenberg	Wellstone
Domenici	Lott	
Dorgan	Lugar	

NOT VOTING—3

Bond	Exon	Hatfield

So the motion to lay on the table the amendment (No. 597) was rejected.

Mr. GORTON. Mr. President, I move to reconsider the vote.

Mr. ROCKEFELLER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question is now on agreeing to the Abraham amendment.

So the amendment (No. 597) was agreed to.

Mr. DOLE. I move to reconsider the vote by which the amendment was agreed to.

Mr. ABRAHAM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 599 TO AMENDMENT NO. 596

Mr. GORTON. Mr. President, what is the pending business?

The PRESIDING OFFICER. Amendment numbered 599.

Mr. BROWN. Mr. President, I believe the next item for consideration is amendment numbered 599, which is an amendment that I proposed which would restore the deterrence against bringing frivolous actions and frivolous lawsuits.

Mr. President, it is my personal feeling, and I believe the feeling of the distinguished senior Senator from Alabama, that this debate could be concluded fairly quickly, perhaps as short as 20 minutes on each side; and then it would appear that it is the will of Senators to move to a vote at that point.

Mr. President, rule 11 is a very important part of civil procedure. Rule 11 changed in 1983 to provided strong admonishment against attorneys bringing frivolous actions.

It was changed again in December of 1993. It was changed, unfortunately, not through a vote or deliberation of this body, but by our failure to act.

Tragically, that automatic change in the Federal Rules of Civil Procedure resulted in the gutting of the protection against frivolous actions embodied in rule 11. The new rule 11 now allows someone to allege facts, bring facts before the court without knowing that they were true or without having fully investigated the facts.

This amendment restores parts of the old rule 11 that more effectively deter frivolous action. I will be dealing with rule 11 in detail in a few minutes. I wanted simply to alert Senators that we will be moving to a vote on this, I believe, within 40 minutes or so. This vote is about discouraging frivolous action and frivolous lawsuits.

Our hope is that this amendment will play an important part in this bill, because stopping inappropriate actions and frivolous lawsuits is very much an essential ingredient, I believe, in reform of the judicial process. I yield the floor.

Mr. HEFLIN. Mr. President, I rise in opposition to the Brown amendment.

Let me first explain a little bit about the procedure, what happens regarding the Federal Rules of Civil Procedure, which include rule 11.

There has been controversy over the history of this country as to how courts ought to take care of its rule making authority. The prevailing view is that the judiciary—and this includes the States—has inherent power to determine its own rules.

However, Congress felt it had a role, and so it adopted the Rules Enabling Act by which rules of procedure would be changed by first having a committee appointed by the Judicial Conference of the United States, to study any proposed change or changes.

After the committee made its report to the Judicial Conference, which is a body composed of judges from all levels of the judiciary, the Judicial Conference would study any proposals and then make recommendations to the Supreme Court of the United States. Then the Supreme Court of the United States would consider the issue and make recommendations to Congress. Under the Rules Enabling Act, Congress has 6 months to either adopt the recommendations, to modify them, or to delete them.

This particular rule 11 that came up was submitted to the Congress and the 6-month time period expired prior to Congress taking any action, and so all of the proposed Rules of Civil Procedure, including rule 11, went into effect on December 1, 1993. We knew toward the end of the Congress in 1993 that if any changes had to be made, they had to be made before December 1, 1993.

If a Senator was interested in making a change to a rule, he or she could introduce a bill, but no bill was introduced proposing to change rule 11.

During that 6-month period in 1993 in the House or in the Senate, if there were reasons for change, a bill could have been introduced in the House or the Senate.

In all fairness to Senator BROWN, he said that he did not like rule 11, but he never took the steps to modify the proposed changes, and now he is now belatedly taking steps on this particular bill, which is unrelated and not germane to the pending legislation.

My colleague from Colorado raises issues about frivolous lawsuits and let me say that this has been considered by many concerned groups of people. The Brown amendment is completely opposed by the civil rights community. The Brown amendment is opposed by the Department of Justice. Six members of the Supreme Court approved rule 11 that is now in effect. Senator BROWN quoted from Justice Scalia's dissent. There are always going to be dissents over at the Supreme Court, but if you have a 6 to 3 vote in the Supreme Court of the United States, that is a pretty good vote.

As I have listened to the criticisms of the new rule 11 from Senator BROWN and others, I do not agree with them. I have before me a memorandum from the Administrative Office of the U.S. Courts which says:

> I am writing to address criticism raised during the markup of H.R. 2814 that the amendments to Rule 11 of the Federal Rules of Civil Procedure will eviscerate the rule's effect on parties filing frivolous proceedings and papers.

The amendments to Rule 11 retain the rule's core principle to ''stop and think'' before filing: By broadening the scope of Rule 11 coverage and tightening its application, the amendments reinforce the rule's deterrent effect and also eliminate abuses that have arisen in the interpretation of the rule. Although the amendments strike a balance between competing interests, the changes strengthening the rule have been neglected by those critical of the amendments and need to be highlighted.

First, the amendments expand the reach of the rule by imposing a continuing obligation on a party to stop advocating a position once it becomes aware that that position is no longer tenable.

What they would like to go back to under the old rule, as I interpret it, would be to allow ''a party to continue advocating a frivolous position with impunity so long as it can claim ignorance at the time the pleading was signed, which could have been months or years ago.''

Second, the amendments specifically extend liability to a law firm rather than limiting the liability to the junior associate who actually signs the filing.

Third, the amendments specifically extend the reach of Rule 11 sanctions to individual claims, defenses, and positions, rather than solely to a case in which the ''pleading-as-a-whole'' is frivolous. Some court decisions have construed the rule to apply only to the whole pleading, relieving a party of the responsibility for maintaining a single or several individual frivolous positions.

So rule 11 that went into effect on December 1, 1993 was designed to strengthen this matter.

Fourth, the amendments equalize the obligation between the parties by imposing a continuing obligation on the defendant to stop insisting on a denial contained in the initial answer. Frequently, answers are general denials based on a lack of information at the time of the reply. The amendments impose a significant responsibility on the defendant to act accordingly after relevant information is later obtained.

It is also important to highlight the provisions of the rule that the amendments retain. A party must continue to undertake ''an inquiry reasonable under the circumstances'' before filing under the amendment. In those cases where a party believes that a fact is true or false but needs additional discovery to confirm it, the amendments allow filing but only if such ''fact'' is specifically identified. The provision does not relieve a party of its initial duty to undertake a reasonable prefiling investigation. In cases of abuse, the court retains the power to sanction sua sponte and the aggrieved party can seek other remedies, e.g., lawsuit for malicious prosecution.

The existing rule does not require a court to impose a monetary sanction payable to the other party. Instead, the rule does provide a court with the discretion to impose an appropriate sanction, including an order requiring monetary payments to the opposing party and to the court.

Now, as to the hearings that we had in the Judiciary Committee, the old rule 11—that is one that was in effect before December 1 of 1993—had language that said that signature to a pleading demonstrated that the pleading ''is well grounded in fact.''

Senator BROWN at the subcommittee hearings on July 28, 1993, grilled the chairman of the Rules Advisory Committee that had proposed to the Judicial Conference this aspect of the rule change.

Senator BROWN claimed that under the new rule 11, a party ''no longer has to research a claim and know that it is true.'' He feels that a party ''no longer has to know his facts'' before bringing a lawsuit.

Well, what Senator BROWN ignores from the testimony and the response the chairman of the committee, Judge Sam Pointer, gave is that the new rule 11 ''still calls for and demands that attorneys have made a reasonable investigation under the circumstances.''

As Judge Pointer demonstrated, oftentimes a party does not get all the facts until the discovery is finished, and the new rule does, indeed, require high standards and is not an egregious loosening of standards.

The point is that under this new rule 11, ''if a plaintiff is going to make an allegation that he does not have hard support for, the plaintiff should say, I do this on information and belief, and be under a responsibility to withdraw that or not continue to assert it, if after reasonable opportunity for discovery, it turns out there is no basis for it.''

Now, the new rule 11 has changes from the old rule in that if a violation regarding a pleading is found, then the court may impose sanctions.

Under the old rule, the language was that a court must impose a sanction if it found a violation of the rule.

As Judge Pointer demonstrated in his testimony, a court needs the flexibility or discretion to impose sanctions because a complaint, or for that fact an answer or motion to dismiss may contain a technical violation, but the rest of that pleading could be perfectly acceptable. Why, then, should a court be required to impose a sanction? Such discretion would not, in my judgment, giveaway to mass, irresponsible pleading.

Obviously, those who are purporting to change rule 11 raise the possibility that a party could intentionally bring a frivolous action and, upon a finding of such by the court, might escape a penalty. The response to that concern is that well, yes, there could be no penalty, but in that type of egregious intentionally frivolous pleading a court will most likely impose a sanction.

Under the new rule—

[I]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

Also, a court on its own initiative may begin a show-cause proceeding as to whether a party has violated the rule. This should take care of concerns by Senator BROWN that plaintiffs could irresponsibly plead, claim, et cetera. The court has its own power to initiate an inquiry as to whether rule 11 has been violated.

As the Senate can clearly see, this is a highly technical matter that we are being called upon to consider, and it is attempting to be amended onto an unrelated bill without the Members of this body having an adequate opportunity to study the issues. For us here in Congress to have to consider this amendment on an unrelated bill seems to me to be an irresponsible way of legislating.

So it is my opinion that we ought not to be involved in this at this time. The Judiciary Committee had hearings, and there was ample opportunity for action to be taken. But no action was brought forth through the form of a bill being introduced to make any changes to rule 11.

There are always efforts to look at matters and matters can always be considered by this body. But the Judicial Conference is designed and is much better equipped than this body to make the decisions pertaining to that matter.

It seems to me that it is just improper and an inappropriate time to bring this matter up at such a late stage as this. If there had been a real sincere effort, it could have been done within the 6-month time period allowed pursuant to the Rules Enabling Act. It seems to me that we ought not to be dealing with this amendment at this time on this unrelated bill.

It may be that a bill could be introduced later, if they wanted to, and at other times go through the process.

But I feel that the new rule is a flexible rule and has provisions that strengthen—not weaken—the efforts to prevent frivolous lawsuits. The new rule is expected to reduce the number of inappropriate motions requesting sanctions, thereby allowing courts to focus more attention on legitimate sanction requests.

Mr. President, let me read from Rule 11 as it now exists. This is about representations in a pleading.

By presenting to the court, whether by signing, filing, or submitting, or later advocating a pleading, a written motion, or other paper, the attorney or unrepresented party is certifying to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that it is not being presented for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase in the cost of litigation. The claim, the defenses, and other legal contentions therein are warranted by existing law, or by nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of the new law. The allegation and other factual contentions have evidentiary support, and if specifically so identified are likely to have evidentiary support of a reasonable opportunity for further investigation or discovery. The denials of fact show contentions are warranted to the evidence, and, if specifically so identified, are reasonably based on a lack of information or belief.

This is strong language. I want to point out basically what the difference is. The current rule 11 allows a judge some discretion rather than making sanctions mandatory.

That is the guts of the rule, whether or not a judge ought to have some discretion pertaining to a matter or whether, on the other hand, it ought to be absolutely mandatory.

This is being opposed by the civil rights community and by a number of others.

I ask unanimous consent that a letter that was addressed to the Honorable George J. Mitchell, from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Judge Alicemarie H. Stotler, be printed in the RECORD.

I ask unanimous consent that a letter from the Alliance for Justice relative to this issue also be printed in the RECORD.

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, DC, March 15, 1994.

Hon. GEORGE J. MITCHELL,
Majority Leader, U.S. Senate,
Washington, DC.

DEAR SENATOR MITCHELL: I am requesting your assistance in opposing Senator Brown's amendment (No. 1496) to S. 4, the ''National Competitiveness Act of 1993.'' Senator Brown's amendment would change certain parts of the amendments to Rule 11 of the Federal Rules of Civil Procedure, which became effective on December 1, 1993. The Rule 11 amendments were submitted to Congress in May 1993 only after extensive scrutiny by the bench, bar, and public in accordance with the Rules Enabling Act.

Serious consideration of amendments to Rule 11 began about four years ago. The rule had been the subject to thousands of decisions and widespread criticism since it was substantially amended in 1983. In an unusual step, the Advisory Committee on Civil Rules issued a preliminary call for general comments on the operation and effort of the rule. It also requested the Federal Judicial Center to conduct two extensive surveys on Rule 11.

After reviewing the comments and studies, the committee concluded that the widespread criticisms of the 1983 version of the Rule, though frequently exaggerated or premised on faulty assumptions, were not without merit. There was support for the following propositions:

Rule 11, in conjunction with other rules, has tended to impact plaintiffs more than defendants;

It occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery to determine if the party's belief about the facts can be supported with evidence;

It has too rarely been enforced through nonmonetary sanctions, with cost-shifting being the normative practice;

It provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in law, or in fact; and

It sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.

The draft amendments broadened the scope of the obligation to ''stop-and-think'' before filing or maintaining a position in court, but placed greater constraints on the imposition of sanctions. The amendments were later revised by the advisory committee and the Standing Committee on Rules and approved by the Judicial Conference of the United States and then adopted by the Supreme Court, with two justices dissenting.

The amendments strike a fair and equitable balance between competing interests, remedy the major problems with the 1983-version of the rule, and should reduce both the extent of court-involvement with Rule 11 motions and the time spent on frivolous claims, defenses, and other contentions.

The amendments represent the end product of a rigorous public rulemaking process that worked as contemplated by Congress under the Rules Enabling Act. The issues were fully aired in a public forum. Interested individuals and organizations were provided, and responded to, opportunities to comment on the changes. The language of the amendment was meticulously drafted only after the Judicial Conference committees, which consist of prominent lawyers, law professors, and judges, had the benefit of this public examination.

Senator Brown's amendment to Rule 11 would undercut the Rules Enabling Act process frustrating not only the intent of the Act but also the participants in the rulemaking process, including the public and many advocates of Rule 11 change. Your leadership in maintaining the integrity of the Rules Enabling Act would be greatly appreciated.

Sincerely yours,
ALICEMARIE H. STOTLER.

ALLIANCE FOR JUSTICE,
April 26, 1995.

U.S. Senate,
Washington, DC.

DEAR SENATOR: The undersigned organizations urge you to oppose the changes to Federal Rules of Civil Procedure 11 that have been offered as an amendment to the Products Liability Fairness Act. This amendment poses a grave threat to civil rights and public interest litigation.

The proposed changes would roll back advances in Rule 11 that were recently enacted following careful and thoughtful discussion involving all concerned parties across the political spectrum. We know from experience that returning to the old Rule 11 will be particularly devastating to underrepresented Americans.

Under the old rule, threats of sanctions quickly became the standard ammunition in the arsenal of defense counsel. The result was an avalanche of satellite sanctions litigation that occupied a great deal of judicial resources and was often as frivolous as the litigation Rule 11 was designed to eliminate.

The old rule had a particularly harsh effect on civil rights and public interest organizations and their clients. As the Judicial Conference's Advisory Committee on Civil Rules found:

(1) Rule 11 . . . has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported by the evidence; [and] (3) it has too rarely been enforced through nonmonetary sanctions.

Noting these concerns, the Judicial Conference offered amendments that made sanctions permissive; created a 21-day ''safe harbor'' period; and made clear that the purpose of sanctions was to deter frivolous claims. These amendments garnered broad support among judges, bar associations, legal scholars, litigators and the Department of Justice, and were ultimately adopted by Congress.

The safe harbor provision was a particularly significant and welcome change. Once a party raised a Rule 11 objection to a pleading, the opposing party has 21 days to consider the objection and, if warranted, withdraw the challenged claims—drawing the courts into further litigation.

The Rule 11 amendment threatens to roll back these achievements and resurrect the very problems that prompted the Judicial Conference, the Supreme Court and many others to take action. The amendment would have an especially heavy impact on plaintiffs, placing the cost of litigation beyond the reach of ordinary Americans, particularly public interest and civil rights litigants. It compromises the very notions upon which our legal system is based—fairness and equity.

We urge you to reject any amendments to Rule 11.

Respectfully,

NAN ARON,
Alliance for Justice.
LOU BOGRAD,
American Civil Liberties Union.
LESLIE HARRIS,
People for the American Way Action Fund.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I want to commend the distinguished Senator from Alabama for his thoughtful comments. He is a delight to work with even when we do not always see eye to eye. This is an area where we do not see eye to eye.

I wanted to comment briefly on his remarks. First of all, there was the implication that these suggested changes have only been considered for a short period of time and we have not had a real opportunity to look at what effect they would have on the rules. That would not be my assessment of them. Let me explain why.

The rule changed originally in 1983 from having permissive sanctions for a violation of the rule to having mandatory sanctions for a violation of the rule. That is, when someone has brought a frivolous action prior to 1983, the rule was as it is now: that is, you did not have to have mandatory sanctions.

So the fact that this has not been tried before really does not square with our experience. The fact is we did try this permissive approach to sanctions prior to 1983. I think one could reasonably ask what were the results of that experiment when the sanctions were not required? There was a study done of that, and it studied the reaction of practitioners and judges in changing from permissive to mandatory sanctions.

Here are the results of that study.

I might mention that this study was conducted of both lawyers and judges in the northern district of California, which is part of the ninth circuit. The questionnaire was sent to 17 judges, 7 magistrates, and 107 attorneys, all of whom had been involved in rule 11 proceedings, so these were not inexperienced people. They were people who had understood the process and worked with it.

Sixty-eight lawyers, 46 percent of them, responded; 12 judges and magistrates, 50 percent, responded to the survey, so there was a good response. Here is the response: 46 percent of the respondents indicated that they had engaged in additional prefiling factual inquiry when the sanctions were mandatory. That is, when sanctions were mandatory, it resulted in the attorneys doing additional prefiling factual inquiry.

Now, if you favored more factual inquiry before filings are made, you are going to want mandatory sanctions because that is what mandatory sanctions resulted in. If you do not care about the additional prefiling inquiry, if that is not one of your objectives, then you will not want the mandatory sanctions and you will want the rules as they currently stand.

The survey also indicated that 33 percent indicated additional prefiling legal inquiry when the rule in effect employed mandatory sanctions. That is, before they filed, they did additional work to make sure they were right on the law before they filed.

Is that not what we want? Is that not what we should be hoping for, that people take the time to find out what the facts are and find out what the law is before they bring the lawsuit?

The survey indicated clearly that having sanctions required resulted in additional legal work and additional factual work before lawsuits were brought. That is the essence of mandatory sanctions and mandatory sanctions are the essence of this amendment.

So the suggestion that this is some wild idea that has never been tried does not square with the pre-1983 and post-1983 experience. The fact is we had permissive sanctions prior to 1983, and it resulted, at least according to the survey, in less legal research before you filed and less factual research before you filed.

Mr. President, it was alleged earlier that the issue of rule 11 could have been brought up earlier, but it was not, somehow implying that the people who are concerned about the gutting of rule 11 had been dilatory.

Mr. President, let me be very clear about that. I did introduce a bill, but that bill was not brought up for a vote.

What happened is that the Supreme Court transmitted to us the rule changes and made very clear in that transmittal that they were not necessarily endorsing them—let me read it because that is a serious comment, a serious charge. The letter from the Chief Justice of the Supreme Court, William Rehnquist reads:

> Transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

It cannot be more clear than that.

The reality is that this was not voted on before, and the reason it was not voted on before was because we could not get it put on the agenda and we could not get a recorded vote. But a bill was introduced, and I did do all I knew how to have the issue come before the Senate. That is why it has to be brought up here.

Now, when you do not allow a vote on a bill, to say somehow the proponents of that position have been dilatory I think raises real questions. What actually happened here is that these changes became law because we did not have a vote. And the Supreme Court's own documents say that their transmittal of it does not necessarily mean they agree.

Now, Mr. President, for those who have read the report, Justice White also commented on this, and he made a very important point. He made a point that the practice of the Court has generally been—except for two Justices, the practice of the Court has generally been not to interfere with this process, to simply transfer proposed changes on, because they have some questions as to whether or not it is a proper role for the Court to draft these changes.

Justices felt so strongly about this that three of them did dissent, which is highly unusual in this matter, and let me read to the Senate from that dissent. This is a dissent by Justices Souter, Thomas, and Scalia. All three of them dissented. Remember, Justice Rehnquist indicated it was not necessarily endorsement; they passed it on, and remember Justice White's comments as well. But here is a quote from the dissent.

> In my view, the sanctions proposed will eliminate a significant and necessary deterrent to frivolous litigation.

That is a direct quote out of the Justice's comments.

The dissent goes on:

> Under the revised rule, parties will be able to file thoughtless, reckless, and harassing pleadings secure in the knowledge that they have nothing to lose.

Mr. President, that is it in a nutshell. If we fail to address this question, it is very clear what the new rules do. Let me read what he said.

> Under the revised rule, parties will be able to file thoughtless, reckless, and harassing pleadings secure in the knowledge that they have nothing to lose.

Now, Members of this body are going to have a chance to go on record to see whether or not they favor allowing the filing of ''thoughtless, reckless, and harassing pleadings secure in the knowledge that they have nothing to lose.''

Lastly, Mr. President, it was suggested on this floor that there are people who would object to my motion.

Let me assure this body I have personally sought out the groups that were discussed. I have called them repeatedly. I have asked for meetings. I have asked for their suggestions. They have not been willing to respond or meet with us. And this happened not just once but on many occasions.

If Members have questions about this amendment, I hope it is not on the basis that this Senator was not willing to go out and ask for advice, was not willing to contact the parties that might have concern, and was not willing to try and work with them, because I did. I did ask for their advice. I did offer to work with them. And as a matter of fact, the measure that is before the Senate is not a full restoration of the old rulings but willingly adopts a number of the measures that were proposed.

Mr. President, I could not come to this body and acquiesce, as the dissent says, in revised rules that will enable parties ''to file thoughtless, reckless, and harassing pleadings'' or acquiesce in allowing them to do so ''secure in the knowledge that they have nothing to lose.'' That would be wrong. And these new rules are wrong.

Now, it has been suggested that this amendment will eliminate a judge's discretion with regard to sanctions. The facts are these. The old rules and the amendment that I offer this body does restore the requirement that you have sanctions when someone is guilty. This is not a game where you blow the whistle and say start over. When you are wrong and your actions impede the process in the court, I think sanctions are important. But to suggest that we eliminate judge's discretion is not accurate. The judge retains discretion under the rules to decide what type of sanction is appropriate as well as how substantial the sanction is.

Mr. President, I say that because I think it is important to take care of the questions that were raised.

I simply want to ask the body three questions that I think come full circle on this issue of frivolous lawsuits and capture the essence of it.

Should filings be grounded in facts or not? If the Members of this body feel filings in Federal court should be founded in facts, they should vote for this amendment. If they do not think it is necessary that the filing should be founded in facts, they will want to vote ''no.''

Two, should sanctions be required if you file frivolous actions? I believe if you file frivolous actions and they are found to be frivolous actions that sanctions should be required. But if you do not think there should be sanctions if you file frivolous actions, then you will want to vote ''no.''

Mr. President, finally, should an injured party be compensated for the costs or not? That is, let us say someone files a frivolous action, a party is injured because they have to respond and they have to pay for attorneys' fees and expenses. The question before us is, should the injured party be compensated for costs or not?

I think they should be. But if you do not think they should be, or if you think that priorities should be given to having the sanction go to the court and not to the injured party, which is what the new rules give priority to—the new rules give priorities to having the sanction, if there is any, go to the court instead of the injured party. If you think

the injured party should not be compensated or that should be the low priority, then you are going to want to vote ''no.''

Mr. President, the summation of the concern of the Justice who dissented in the transmittal closes with this quote.

It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand.

Mr. President, it cannot be said better than that. If Members of this Senate think that our times demand that you ought to eliminate sanctions for frivolous action, then vote no. But I agree with the Justice when he says:

It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand.

Mr. President, it is wrong to bring frivolous actions. It is wrong to file and not know the facts. It is wrong and I believe personally it is unethical for an attorney to bring frivolous actions before our courts. That is what the question is in this amendment. Do we favor frivolous filings or do we think there ought to be some sanctions for them?

I yield the floor, Mr. President.

Ms. MOSELEY-BRAUN addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Ms. MOSELEY-BRAUN. Thank you very much.

Mr. President, the Senate is currently engaged in what is, in my opinion, a constructive debate on the subject of product liability. The pending amendment, unfortunately, is destructive. It is destructive, certainly, of the relationship between the Congress and the courts, a relationship established pursuant to the Rules Enabling Act, that has worked and is working. And it is destructive of efforts to craft a product liability bill under the guidance of the Commerce Committee.

Mr. President, the fact is that the Brown amendment is, as you can no doubt tell from the ''legalistic'' nature of the debate, a Judiciary Committee issue. To the extent that this issue should be taken up and debated, it should be done under the auspices of the Judiciary Committee.

I know the distinguished Senator from Colorado feels strongly about this. But the question is whether or not it belongs as part of our effort to address the issue of product liability reform. I want to strongly express my opinion that it does not. This amendment does not belong on a Commerce Committee bill.

In the first instance, Mr. President, the whole argument that we should make rule 11 sanctions for the filing of frivolous pleadings mandatory—and overturn what was established pursuant to the Rules Enabling Act, and what has been accepted by the legal community—presumes that there is a single definition of what is frivolous.

I submit to my colleagues that there is no single definition of what is frivolous. Indeed, in many instances, what one person may consider to be frivolous another might not.

I would remind my colleagues that there have been instances in our history, instances that we look back with some pride at this point, which, at first blush, might have been considered frivolous claims. Under a mandatory sanctions regime similar to the one being proposed by the pending amendment, those cases may not have ever been brought, due to the chilling effect of mandatory sanctions. These novel, but legitimate, cases may never be given an opportunity to be heard if this type of amendment were to be passed willy-nilly, without the reasoned consideration that I believe it ought to have.

I remind my colleagues that it is often necessary to come up with novel theories in cases in the areas of civil rights and discrimination cases. Rule 11, as amended, reduces this incentive to filing novel pleadings. If you think back in the history for a little bit, I think this issue becomes clear. When Thurgood Marshall filed the Brown versus Board of Education case, to challenge the notion of ''separate but equal,'' the plaintiffs relied a great deal on psychological arguments—the so-called Brandeis brief. The plaintiffs in Brown relied on psychological and sociological evidence that proved the devastating impact our separate educational systems were having on the educational and human development of minority youths. Who is to say that at first impression someone might have said, ''Well, this is a silly argument. This is a silly idea.'' Who is to say that Thurgood Marshall might not have been intimidated from ever bringing the Brown case under a mandatory sanctions regime.

But because there was not the prospect of mandatory sanctions, because Linda Brown could file her novel claim without the threat of satellite litigation over whether the claim was frivolous, the doctrine of separate but equal was struck down. I could cite several examples of that sort of thing happening.

And so I believe that it makes sense for Congress to allow the court discretion in sanctioning parties for the filing of frivolous pleadings.

Mr. President, Congress has established a procedure to amend the Federal Rules of Civil Procedure, and that procedure is called the Rules Enabling Act.

Under the Rules Enabling Act, the Judicial Conference appoints a committee to consider proposed changes to the Federal rules. The committee recommends any necessary changes to the Judicial Conference, which then studies the issue and then decides whether or not to transmit those proposed changes to the Supreme Court.

The Supreme Court then decides whether or not to transmit those changes to Congress, to us, and then we then have 180 days either to reject or modify those changes. If Congress does nothing, then the changes go into effect.

Mr. President, the changes to rule 11 that Senator BROWN opposes were adopted by the Supreme Court on April 22, 1993. Congress had until December 1, 1993, to reject or modify the rule 11 changes. The Senate Judiciary Committee, on which I served with Senator BROWN, held a hearing on this issue on July 28, 1993. Yet in that time Congress took no action to reject the rule 11 provisions. I believe that Congress should take no action now.

There is no evidence to indicate that the revised rule 11, which will be thrown out by this amendment, has had an adverse impact on Federal litigation. Preliminary indications are that it has produced cost savings by decreasing the amount of ''satellite litigation''—litigation on the side—as to what is frivolous, and by encouraging parties to withdraw frivolous pleadings within the 21-day safe harbor.

It is not as though the 1993 amendments to rule 11 completely repeals the rule. The amendments gave attorneys the 21-day safe harbor in which to withdraw challenged pleadings and made sanctions discretionary in the judges, not mandatory.

In addition, sanctions would normally be paid to the court in the form of a fine, rather than to opposing counsel in the form of compensation.

Mr. President, these changes have been strongly supported by the civil rights community. As I stated earlier, it is often necessary to come up with novel theories in order to pursue civil rights cases. This proposed change, I think, would have an extremely detrimental effect.

In fact, I have a correspondence here from the NAACP Legal Defense Fund in which they state that, ''The Brown amendment would be extremely detrimental to civil rights litigation.''

But, again, to get back to what the studies say, the studies back up the claim that the rule, as amended, is working.

A Federal Judiciary Center study demonstrated that, under the mandatory sanctions regime, sanctions were imposed in a disproportionately higher percentage of civil rights cases than in tort or contract cases. Inherent in this problem, of course, is the vagueness of the term ''frivolous.''

In the same study, a group of judges asked to study a complaint divided evenly over whether or not the complaint was frivolous, prompting one commentator to observe that ''one man's frivolous complaint is another man's serious question.''

And so, Mr. President, I would argue this afternoon that while the Senator from Colorado has obviously a concern in this area, this is the wrong forum and the wrong time. He spoke about the timeliness of the issue. This is the wrong time to take this issue up, and

certainly this is the wrong bill on which this issue should be taken up.

If, indeed, further changes, further debate about whether or not judges should have discretion with regard to rule 11 issues, if that debate is to happen, then it should happen in the context in which we can make a judgment about it that is a sensible judgment and not just a rush to judgment.

I submit to my colleagues that the effect of this amendment would not only be to limit the kind of cases that can be filed but also to limit the court's discretion, because in this instance, with this amendment in place, all that a judge could do would be to choose an either/or—either the case is frivolous and thrown out altogether, or he has to apply mandatory sanctions.

That is not the direction in which to go. That is going to increase the cost of litigation. That is not going to help the process to work, and certainly I come back to my original point, that will then create a further imbalance and a further disruption in a relationship that has been established giving the courts a process for deciding on amendments to the Rules of Civil Procedure. That relationship will have been greatly impaired by this kind of rush to judgment.

So I reluctantly, again—understanding that I serve on the Judiciary Committee with the Senator from Colorado—submit to my colleagues, at this point in time, on this legislation, this amendment is ill founded, and I ask my colleagues to reject it.

Thank you.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I say to the Senator from Iowa, I am going to be literally 2 minutes.

I just want to explain the position of the manager of the bill on this, and for the benefit of my colleagues who are listening to this debate and their staff who are listening.

We are now considering an amendment of the Senator from Colorado, Senator BROWN, that tries to repeal part of the Federal Rules of Civil Procedure dealing with rule 11 and the way it serves to inhibit so-called frivolous pleading.

This rule was modified as a result of action taken in 1993 following the work of the Federal Judicial Conference. I have listened to the concerns expressed by the Senator from Alabama and the Senator from Illinois, and others, pointing out this amendment is outside the scope of the bill before us, which is the product liability bill. From my previous tabling motions and votes, I think my colleagues know that I am dead serious about trying to keep this bill limited to the bill, unloaded, unadorned with amendments that are not directly related to it.

I think that every Senator would agree that frivolous lawsuits should be curbed, but I just want to say that at the proper time, I will move to table the amendment. It was received very recently and one would hope there could be full hearings on the amendment. I wanted people to understand what my plan was.

Mr. BROWN. Will the Senator yield?

Mr. ROCKEFELLER. Of course.

Mr. BROWN. Mr. President, I just simply will say to the Senator, I am very sensitive to the remarks he made. I understand fully his concerns. He has a very important bill that he has brought forward. I want to assure the Senator that it would be the last thing I would want to do, to somehow burden his bill so that it could not pass. I want to assure the Senator, in the event it is adopted but proves later to be a burden for the Senator in terms of getting his underlying measure passed, that I will work with him in that regard.

Mr. ROCKEFELLER. I am thoroughly grateful to the Senator from Colorado.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, when is it time to take up an amendment in the Senate? When is it appropriate to discuss any amendment? Everybody knows the rules of the Senate. Almost any time in the Senate is a time to discuss anything that you can get before the body. Particularly in the case of this approach, it seems to me very appropriate now because we are talking about an underlying piece of legislation that is basic to making the courts a more effective tool for the settlement of disputes.

In the particular case of the underlying piece of legislation, it is to establish some standards in the courts so that those cases that are going to be considered by the courts will have some continuing thread running through them from State to State to make sure the cases are fairly heard. And this issue that is before us, that is presented by Senator BROWN, is such an amendment as well, an amendment that is going to make the Federal courts a more effective body for the determination of disputes.

It has become otherwise because courts can be very easily loaded down with frivolous suits. The Brown amendment, which I support, is about making the courts serve the intent of the Constitution writers, to be an impartial body for the settlement of disputes, but not just any suit that might come to people's minds, very serious suits.

So I want to associate myself with this amendment, and I want to say to my dear friend from Alabama, we very seldom disagree. This is one of those times because I think it is time now to restore the effectiveness of rule 11. A strong, effective rule 11 is one of the most important tools that the courts have to fight frivolous, baseless, and even sometimes harassing lawsuits.

A strong effective rule 11 preserves judicial resources for litigants who truly need access to our court system, and to give a swift action against frivolous lawsuits and claims is, in the end, going to save time and going to save money and, by the way, that happens to be taxpayers' dollars, and it is going to, most importantly, promote public respect for the integrity of the Federal courts.

Now, on the other hand, the current version of rule 11, the one that Senator BROWN wants to modify, the current version is of little value as a deterrent to baseless lawsuits. It actually allows attorneys to file allegations without knowing them to be true. It allows lawyers to make assertions without having any factual basis and before any research is done.

In short, the current version of rule 11 encourages the kind of baseless suits and claims that rule 11 was originally enacted to prevent.

The current rule eventually says ''Sue first and ask questions later.''

Senator BROWN's amendment puts teeth back into rule 11. It does so by making sanctions for frivolous suits mandatory, as they once were. In fact, Mr. President, rule 11 was amended years ago to make sanctions mandatory because rule 11, up to that time, was ineffective when sanctions were discretionary, as they are under the current version of the rule.

This amendment thus forces people who come into court to present the facts and to present the law in a reasonable and honest way. It deters frivolous claims and frivolous suits by denying litigants the opportunity to overreach with unresearched facts and to shoot for the Moon with unresearched law.

This amendment also provides the courts with a variety of tools to defer frivolous suits, from attorney's fees and expenses to court penalties to nonmonetary sanctions. It also accounts for the innocent party who has to spend time and money defending against baseless claims, which the current version of the rule fails to do.

This amendment would enable the court to make the moving party whole for the money spent defending against frivolous lawsuits or claims.

Let me use a very specific example. The milkshake case that Senator HATCH talked about yesterday. A driver, as we recall, bought a milkshake at a McDonald's restaurant and placed it between his legs. When he reached for something, he squeezed the milkshake and it spilled into his lap. He became distracted and drove into the car of another driver who sued the milkshake purchaser and McDonald's. His attorney's theory was that McDonald's failed to warn the driver of the danger of eating and driving at the same time.

Now, in reality, he was after McDonald's deep pocket because the driver who caused the accident was uninsured. This case was thrown out of trial court but was appealed up to the New Jersey Supreme Court—consuming, if we can believe this, 3 years of the court system's time, and thousands and

thousands of dollars of McDonald's money for defense of a baseless action.

Now, when McDonald's asked for reimbursement for these fees, the judge refused, saying of the plaintiff, ''He's creative and imaginative and should not be penalized for that.''

Now, how ridiculous can we get when we talk about frivolous suits? This case shows that far from discouraging frivolous litigation, the current rule actually encourages it.

Senator BROWN's relatively modest changes will restore the deterrence value of rule 11 and will have a positive impact on the ability of the Federal courts to deal with the ever-increasing onslaught of litigation, because cases delayed is justice denied for some people who have a legitimate suit.

I support and I ask my colleagues to support the needed change suggested by Senator BROWN.

Mr. SPECTER addressed the Chair.

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

Mr. SPECTER. Mr. President, I have sought recognition to have a brief colloquy or discussion with the proponent of this amendment, the distinguished Senator from Colorado, Senator BROWN. I have already talked with him about the matter, and I think it is useful to make it a matter of record as to the meaning of this amendment, which I think is reasonably apparent from the language.

There is always a consideration as to legislative intent as derived from these discussions, but I think that it is especially appropriate when we have an amendment to have the view of the author of the amendment.

As I understand the amendment, it essentially restores the old rule 11 which was in existence prior to its amendment. In general terms, is that true?

Mr. BROWN. Yes, it restores the rule that was in effect prior to December 1, 1993.

Mr. SPECTER. As I understand the interpretation of the old rule, it provided some reasonable flexibility with respect to the imposition of sanctions. My question to Senator BROWN is, does his amendment leave it to the discretion of the court as to what sanctions would be imposed?

Mr. BROWN. It does leave to the discretion of the court as to what sanctions are appropriate.

Mr. SPECTER. So that there is no requirement that there be an imposition of attorney fees or a loser-pays rule for a violation of the rule arising from this amendment to rule 11?

Mr. BROWN. That is correct.

The fact is, in the past, before December 1, 1993, there were occasions on a number of times when the judges would find that it would be inappropriate to award those fees although they found—

Mr. SPECTER. It would be appropriate?

Mr. BROWN. It would not be appropriate to award those fees, even though they did find a frivolous action.

Mr. SPECTER. Although the language is mandatory that there has to be some sanction, the scope of the sanction is up to the judge? That is, it is discretionary with the court?

Mr. BROWN. That is correct.

Mr. SPECTER. And the amendment does not require that attorneys fees be paid or that the rule of loser pays be a consequence of a violation of the rule under the amendment that is being offered?

Mr. BROWN. That is correct.

Mr. SPECTER. Mr. President, this, I think, is something which is important to have clear, which we have now clarified.

It is my sense that the adoption of the tightening provisions by Senator BROWN achieves a purpose of further discouraging frivolous litigation. That is already discouraged to some extent, under the existing rule 11, but it further discourages frivolous litigation.

There is legislation in one of the bills passed by the House which would impose the loser-pays rule, which is not in the House product liability legislation, but their companion bill and it might be applicable to all litigation so that it might apply to product liability cases.

It is my sense, given the concern about whether there is frivolous litigation or the extent of frivolous litigation, that there is merit to try to reduce frivolous litigation to the extent that we can, and to discourage some more drastic, draconian measure, which I think would be presented by a loser-pays rule.

The United States has had a tradition throughout the judicial experience we have had, that a loser-pays rule is not appropriate for our society. Without getting into the pros and cons and the extent of what may or may not be the rule in Great Britain, loser pays has not been our rule.

My experience as a practicing attorney has demonstrated to me that we ought not to make that kind of a drastic rule which would, in effect, close the courts.

What Senator BROWN has done here in proposing a tightening of the rule against frivolous lawsuits, it seems to me, would tend to discourage any more drastic approach in this field.

I wonder if my colleague from Colorado would agree with that generalization?

Mr. BROWN. I might say that I concur in the view of the Senator.

It seems to me if there is a reasonable and a fair procedure to discourage frivolous actions in place, that will act as the strong deterrent to go to the loser-pays provision that, for example, England has incorporated.

On the other hand, if the rule stays without significant restrictions against frivolous lawsuits, my guess is there will be much greater strength in this country of movement to go to loser pays.

Mr. SPECTER. I thank my colleague. Moving on to the one other provision I wanted to discuss, with respect to the knowledge of the attorney who prepares the pleadings.

As I understand the amendment of Senator BROWN, and I pose this question to my colleague from Colorado: does the amendment permit a good-faith interpretation as to what the attorney for the plaintiff knows; that it is to the best of the person's knowledge, information, and belief, as the language says, formed after an inquiry, reasonable under the circumstances.

So in essence, it is a good-faith representation by the attorney who signs the pleadings.

Mr. BROWN. Indeed, that is correct. Rule 11 before and after my amendment allows filings for which the party has a reasonable belief that it is true. The basic notice pleading system is not affected. One can still make a general, encompassing pleading, and then conduct discovery.

I might add, the proposals in the new rule which were meant to discourage rule 11 proceedings are retained in this amendment. In other words, 21-day safe harbor that is part of the new rules, I retain.

What that does is require someone who is going to bring rule 11 proceedings to identify what they think is frivolous, then allow the person who has brought the action to correct that within 21 days, and indeed if they do it ensures that they are totally free from sanctions.

That safe harbor provision, that I think is protection against rule 11 proceedings, was retained. I retained it basically because I thought that part of the change seemed to have merit and could be helpful.

Mr. THURMOND. Mr. President, I rise today in support of the amendment offered by my good friend from Colorado, Senator BROWN. This amendment is appropriate to restore rule 11 of the Federal Rules of Civil Procedure to its proper role. Rule 11 is an important weapon to prevent the filing of frivolous claims and contentions in Federal courts. Significant alterations to rule 11 went into effect on December 1, 1993, and several of these changes are not desirable.

This is not an issue of favoring one party or group over another, but relates to the standards of veracity which apply to all advocates in Federal courts. The issue is whether we in the Congress are going to accept changes in rule 11 which lower the standards that attorneys must satisfy when filing claims and assertions in Federal court.

This is an issue which is of importance to the American people, too many of whom already hold lawyers and our system of justice in low regard. The Congress is ultimately responsible for both the laws and the procedures under which our Federal courts operate. We simply should not accept the

lower standards in Federal courts which are made by the 1993 changes to rule 11.

The amendment by Senator BROWN will correct undesirable changes in rule 11, while maintaining other changes in the rule which improve the administration of justice. The most critical correction made by the Brown amendment would require all factual contentions made in writing to a court to have evidentiary support or be well grounded in fact. The 1993 changes in rule 11 permit a party to make contentions which are likely to have evidentiary support after further investigation or discovery. It is important to correct this change in rule 11 to prevent litigants from making broad assertions in the hope that they will be able to support them through future discovery. On the other hand, I am pleased that Senator BROWN agreed to my suggestion to incorporate the long-standing standard that contentions must be well grounded in fact, because requiring every contention to have evidentiary support prior to discovery might be too high a standard and preclude claims and assertions that should be permitted.

Mr. President, I consider the Brown amendment to be desirable to restore the standards of rule 11. I urge my colleagues to support this amendment.

Mr. SPECTER. Mr. President, I would further inquire of my distinguished colleague from Colorado, whether the legislative intent here is to allow discovery as to matters that a plaintiff could not know about? So that when there is language here which says that, ''by presenting to the court * * * an attorney * * * is certifying * * * the allegations and other factual contentions have evidentiary support or are well-grounded in fact,'' if a plaintiff makes representations to the attorney which the attorney has reason to accept, that that would be a sufficient evidentiary basis for the allegations in the complaint?

Mr. BROWN. Yes, I believe the Senator has said it correctly. All rule 11 requires is an objectively reasonable belief that it is true. Certainly the case the Senator has outlined would fit that.

Mr. SPECTER. If there is something which plaintiff does not know about, which the attorney does not know about, there would be an opportunity for discovery to ascertain facts which are not within the knowledge of the plaintiff before there could be a challenge that there was a violation of rule 11?

Mr. BROWN. It is my understanding of the workings of this rule that it is quite clear that you can still make general encompassing pleadings and then conduct discovery.

Mr. SPECTER. Because a plaintiff would know on many matters what had happened, but if there were some technical matter, some defect in a mechanism, for example, in a product, that could not be within the knowledge of the plaintiff, it might require some discovery. But you have to state a sufficient claim to withstand a motion to dismiss, or perhaps just notice pleading. There would be an opportunity for an attorney to undertake discovery before there would be a basis for seeking sanctions under rule 11?

Mr. BROWN. Yes. It would be my feeling that this could well come under the general pleadings and all it would require is a general belief it was true. And it would, under those circumstances, allow the discovery.

Mr. SPECTER. I thank my colleague from Colorado. It is my intention to support this amendment and I do so because I think the experience under the old rule—if I might ask the specifics of Senator BROWN, when was the old rule in effect specifically?

Mr. BROWN. The provision that required sanctions if indeed someone had made frivolous filings was adopted in 1983 and lasted through December 1, 1993.

Mr. SPECTER. Within the 10-year period, I think that rule had sufficient flexibility to deter frivolous suits but was not so rigid and burdensome as to make it impossible to work in a reasonable fashion. And by returning to the old rule, which had been in effect for that period of time, it is my sense that there will be a tightening of the legal procedure and that it will make an improvement and satisfy those who are concerned about the filing of frivolous lawsuits.

It is my sense generally that in seeking congressional changes in rules governing judicial proceedings that we have to proceed with substantial caution. In my comments on Monday I pointed out some of my experience. As a practicing lawyer, I represented both plaintiffs and defendants in personal injury cases and had a major piece of litigation, which I had discussed on Monday, and have a sense that, as we have had accretion or encrustation by the courts since the early 19th century on the rules of law, where the cases are very, very carefully analyzed and considered—I have read many of those cases personally in connection with the litigation which I handled many years ago, described in some detail in my earlier presentation—that the courts have a much better opportunity to handle changes in the law than we do in Congress, where frequently only one or two Senators may be present at a hearing and our markups do not have the kind of careful and close analysis of an issue which judicial decisions have.

So that when Senator BROWN seeks to return to a rule which had been in effect for 10 years, which tightens the procedures and which may well foreclose a more drastic or draconian change on loser pays, I think it is worth enacting. So I compliment my colleague from Colorado and I also compliment my colleague from Alabama, who has no peer here in terms of his knowledge of the judicial system and of judicial temperament. We do not always agree, but Senator HEFLIN and I have been on the Judiciary Committee for 14-years plus together and we have agreed most of the time.

I might say we are going to miss you, Senator HEFLIN. But on this one I must respectfully disagree and decide with Senator BROWN.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I ask unanimous consent to add Senator Abraham as a cosponsor of the amendment.

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

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Mr. President, first let me apologize to Senator BROWN, when I said that he had not filed a bill on this. It was my understanding—I was told that, that was done after a reasonable search. My staff or someone, must not have done it.

That sort of illustrates why there ought to be discretion in regards to facts, sometimes, that might be stated or alleged. You ought to have an opportunity to correct a mistake. There ought to be discretion when a party makes an honest mistake.

But basically this is an issue on whether or not we should return to a rule that was in effect for 10 years from 1983 up until December 1, 1993. The Judicial Conference, through an advisory committee, looked at the way rule 11 then was operating and it felt that there ought to be some changes made. So they proposed changes and the Judicial Conference of the United States agreed that there ought to be some changes made in rule 11, and that the rule ought not to be mandatory, but should be discretionary.

It went to the Supreme Court and six out of the nine members of the Supreme Court, agreed with the Judicial Conference and the Supreme Court recommended the changes to the Congress. And the 6-month deadline went by and therefore the new rules of civil procedure, including rule 11 went into effect because there was no vote trying to amend them or trying to prevent them from going into effect.

So we have a situation in which I feel we ought to see how rule 11 is going to work. The judiciary studied it for 10 years, the 10 years that the old rule operated and basically this amendment attempts to take us back to the old rule. Basically, the Brown amendment has a lot of different language but it really comes down to whether or not rule 11 ought to be mandatory in every instance or whether it ought to be discretionary with the judge.

Senator GRASSLEY talked about the milkshake case. There are bad cases. They say bad cases make bad law. You will have, probably, 1 out of 1,000 bad cases, but that ought not to necessarily be the controlling factor relative to a determination of whether or not the

rule ought to be mandatory or whether it ought to be discretionary.

I think the procedure that was followed by the judiciary was a very deliberate procedure. It involved a studied approach, and scholars spent hours and days considering this issue. And here we are going to consider this bill on the floor of the Senate, highly technical in nature, in about 1 hour and 10 minutes and are going to vote on it. It seems to me that the proper course that we ought to follow is to follow what the advisory committee of the Judicial Conference did, and what the Supreme Court recommended to the Congress.

So, in my judgment I feel it is a mistake to adopt the Brown amendment.

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. ROCKEFELLER addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I wanted to note that I previously indicated that I wanted to have a tabling motion to establish the fact that I want this bill to be kept a product liability bill alone and not to have outside material added to it. But the prevailing sentiment of the chairman clearly is for an up-or-down vote, and I have yielded to that.

The PRESIDING OFFICER. Is there further debate on the amendment. If not, the question is on agreeing to the amendment of the Senator from Colorado. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Missouri [Mr. BOND] and the Senator from Oregon [Mr. HATFIELD] are necessarily absent.

Mr. FORD. I announce that the Senator from Delaware [Mr. BIDEN], the Senator from Arkansas [Mr. BUMPERS], the Senator from Nebraska [Mr. EXON], the Senator from Massachusetts [Mr. KENNEDY], and the Senator from Arkansas [Mr. PRYOR] are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 56, nays 37, as follows:

[Rollcall Vote No. 136 Leg.]

YEAS—56

Abraham
Ashcroft
Baucus
Bennett
Brown
Bryan
Burns
Chafee
Coats
Cohen
Conrad
Coverdell
Craig
D'Amato
DeWine
Dole
Domenici
Dorgan
Faircloth
Frist
Gramm
Grams
Grassley
Gregg
Helms
Hutchison
Inhofe
Johnston
Kassebaum
Kempthorne
Kerry
Kohl
Kyl
Lott
Lugar
Mack
McCain
McConnell
Murkowski
Nickles
Nunn
Packwood
Pressler
Reid
Robb
Roth
Santorum
Simpson
Smith
Snowe
Specter
Stevens
Thomas
Thompson
Thurmond
Warner

NAYS—37

Akaka
Bingaman
Boxer
Bradley
Breaux
Byrd
Campbell
Cochran
Daschle
Dodd
Feingold
Feinstein
Ford
Glenn
Gorton
Graham
Harkin
Hatch
Heflin
Hollings
Inouye
Jeffords
Kerrey
Lautenberg
Leahy
Levin
Lieberman
Mikulski
Moseley-Braun
Moynihan
Murray
Pell
Rockefeller
Sarbanes
Shelby
Simon
Wellstone

NOT VOTING—7

Biden
Bond
Bumpers
Exon
Hatfield
Kennedy
Pryor

So, the amendment (No. 599) was agreed to.

MORNING BUSINESS

Mr. SANTORUM. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 5 minutes each.

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

APOLOGY TO THE GOVERNOR OF THE STATE OF NEW YORK

Mr. MOYNIHAN. Mr. President, as the senior senator from the State of New York, and as a Democrat, I rise to offer an apology to our Governor, George E. Pataki, for the inexcusable conduct of the national chair of the Democratic National Committee yesterday in Albany.

As has now been reported, and not disputed, Mr. Donald L. Fowler referred to our Governor as a ''quasi-Governor''. This, he said, is self-defining. ''It means almost a governor, a governor who's not quite there, a governor who doesn't quite have it together * * *'' Later he volunteered to reporters, ''You know what 'quasi' means. It means half-assed.''

In the annals of political invective, there has been yet more vulgar calumny, but in this already sufficiently raucus time, this will serve. But will not be allowed to stand.

Mr. Pataki is our duly elected Governor; a person of manifest ability and quiet dignity. It defies reason that the national chair of the Democratic Party should journey to the State capital for the purpose of summoning New Yorkers to support President Clinton in the next election, whilst simultaneously insulting the person New Yorkers chose to be Governor in the last election.

I am sure Mr. Fowler regrets his remarks. I await his apology. And, to say again, tender my own on behalf of the great majority of Democrats who would not wish to be associated with what has now taken place, and who will insist that it not occur again. The President's task in New York will be difficult enough; that would make it impossible.

WAS CONGRESS IRRESPONSIBLE? THE VOTERS HAVE SAID YES!

Mr. HELMS. Mr. President, before contemplating today's bad news about the Federal debt, let's have that little pop quiz again:

Question: How many million dollars are in $1 trillion? While you are arriving at an answer, remember that it was the U.S. Congress that ran up the Federal debt that now exceeds $4.8 trillion.

To be exact, as of the close of business Tuesday, April 25, the total Federal debt—down to the penny—stood at $4,842,767,648,608.66—meaning that every man, woman, and child in America now owes $18,383.23 computed on a per capita basis.

Mr. President, again to answer the pop quiz question, How many million in a trillion? There are a million million in a trillion; and you can thank the U.S. Congress for the existing Federal debt exceeding $4.8 trillion.

IN MEMORY OF MARY BINGHAM

Mr. FORD. Mr. President, I would like to take a few moments to express my sadness over the passing of Mary Bingham, philanthropist and former owner of the Louisville Courier-Journal.

It has been said that ''we are defined by those we have lost,'' and this could not be more true than with Mary Bingham and the city she called home for over 60 years.

Her husband, Barry Bingham Sr., brought her to Louisville, and though they forged a partnership that gave the city a spark it had not known before, her personal contributions both to the newspaper and to the community at large, stood alone.

The Louisville Courier-Journal wrote that ''for those who understood the remarkable partnership that shaped this region's intellectual, political and cultural climate for a century, Mary Bingham's own stature and contributions were never in doubt.''

And while Mary Bingham was not a native Kentuckian, she quickly embraced the place she would live out her life and we were proud to call her our own.

Throughout the years, she was always the picture of grace and loveliness, a charming hostess and much-in-demand guest. But Mary Bingham was not afraid to reveal the fierce fighter within, when it came to battles on issues most important to her from the environment to high education standards.

And if those passionate beliefs placed her at odds with the powers that be, than so be it—whether they were foes