Thereupon, at 1:41 p.m., the Senate recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. KYL).

Mrs. HUTCHISON addressed the Chair.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that I be allowed to proceed as if in morning business.

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

T. OSCAR TREVINO, JR., 1995 TEXAS SMALL BUSINESS PERSON OF THE YEAR

Mrs. HUTCHISON. Mr. President, I want to recognize the leadership of a small business person in my State who is being honored today by the Small Business Administration as the Small Business Person of the Year in Texas.

Mr. Oscar Trevino, Jr. is president of J.L. Steel, Inc. He is what America is all about, Mr. President. He took a company, J.L. Steel, from $400,000 in revenues in the first year, in 1989, and built that company to over $13 million in revenues last year. It is the fifth fastest growing Hispanic-owned company in the United States.

I am really proud of this Texan. He has really added to the economic vitality of our community in that he now has 140 employees that are working and paying taxes and are good citizens of our State. I am very pleased to honor him today.

Mr. President, I ask unanimous consent that his biography be printed in the RECORD.

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

BIOGRAPHY OF T. OSCAR TREVINO, JR.

It was 1989, and Oscar Trevino was comfortable with his company care and steady paycheck. He and neighbor Jan La Point were chatting on the lawn after dinner, while the kids played out front. It seems that Jan was having trouble expanding her two-year-old company, and Oscar was interested.

Before he realized it, he had worked out a business plan on his computer, and they were in business as J.L. Steel. Oscar borrowed against his retirement account, his credit cards and from family to become 51 percent owner of the firm. From $400,000 in revenues that first year, J.L. Steel has grown to nearly $13.6 million in revenues last year, making it the fifth fastest-growing Hispanic-owned company in the United States, with an annual growth rate of 235 percent.

J.L. Steel installs reinforced steel in highways, bridges and buildings. The firm competes for government and private contracts in Texas, Oklahoma and Louisiana, and satisfies its customers with reliable estimates, quality workmanship and attention to detail in the reams of accompanying paperwork. The firm has called on the SBA twice: in 1992 for a loan guarantee to finance growth and again in 1993, when it was certified as an 8(a) contractor, allowing it to compete for jobs from the federal government.

Oscar himself started out as a laborer, working summers for a major general-contracting firm while he earned a civil engineering degree from Texas A&M. He stayed with the firm after he graduated in 1978, advancing to become project manager by 1989. He hasn't forgotten how difficult it can be for others, and J.L. Steel has an aggressive equal-opportunity policy.

Oscar supports fledgling companies by helping them with marketing, construction practices and subcontracting opportunities. His tireless advocacy work on behalf of minority- and women-owned businesses includes work on various boards and committees, including the Dallas Minority Business Enterprise Advisory Committee and the Disadvantaged Business Enterprise Support Services program of the Texas Engineering Extension Service. He also helped the Association of General Contractors of Texas develop and promote fair and equitable goals, and training and apprenticeship programs for minorities and women.

(The remarks of Mrs. HUTCHISON pertaining to the introduction of S. 743 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mrs. HUTCHISON. Mr. President, I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The 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.

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

Mr. GORTON. Mr. President, having completed work on all of the amendments relating to medical malpractice, the floor of the Senate is now open for other amendments to the product liability legislation. I understand that serious amendments are to be proposed extending the punitive damages provisions of this bill to all litigation and extending the rules related to joint liability to all litigation. At the same time, there are a number of other amendments, both those which would broaden the legislation and those which would narrow it, which is appropriate and is relative to be discussed in connection with this bill.

I do hope at this point, after more than a week of debate, that proponents and opponents to these amendments will be willing to consider adequate, but relatively brief, time agreements, so that we can move the legislation forward. As Members come to the floor to present their amendments, I intend to make that suggestion to them, and we can have first-rate debate and votes and perhaps fewer quorum calls than we have had for some time.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader is recognized.

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

The PRESIDING OFFICER. It is amendment No. 596 to H.R. 956.

AMENDMENT NO. 617

(Purpose: To provide for certain limitations on punitive damages, and for other purposes)

Mr. DOLE. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Kansas [Mr. DOLE], for himself, Mr. EXON, Mr. HATCH, Mr. MCCONNELL, Mr. ABRAHAM, Mr. KYL, Mr. THOMAS, Mrs. HUTCHISON, and Mr. GRAMM, proposes an amendment numbered 617.

Mr. DOLE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 19, strike line 12 through line 5 on page 21, and insert the following:

SEC. 107. PUNITIVE DAMAGES IN CIVIL ACTIONS.

(a) FINDINGS.—The Congress finds that—

(1) punitive damages are imposed pursuant to vague, subjective, and often retrospective standards of liability, and these standards vary from State to State;

(2) the magnitude and unpredictability of punitive damage awards in civil actions have increased dramatically over the last 40 years, unreasonably inflating the cost of settling litigation, and discouraging socially useful and productive activity;

(3) excessive, arbitrary, and unpredictable punitive damage awards impair and burden commerce, imposing unreasonable and unjustified costs on consumers, taxpayers, governmental entities, large and small businesses, volunteer organizations, and nonprofit entities;

(4) products and services originating in a State with reasonable punitive damage provisions are still subject to excessive punitive damage awards because claimants have an economic incentive to bring suit in States in which punitive damage awards are arbitrary and inadequately controlled;

(5) because of the national scope of the problems created by excessive, arbitrary, and unpredictable punitive damage awards, it is not possible for the several States to enact laws that fully and effectively respond to the national economic and constitutional problems created by punitive damages; and

(6) the Supreme Court of the United States has recognized that punitive damages can produce grossly excessive, wholly unreasonable, and often arbitrary punishment, and therefore raise serious constitutional due process concerns.

(b) GENERAL RULE.—Notwithstanding any other provision of this Act, in any civil action whose subject matter affects commerce brought in any Federal or State court on any theory, punitive damages may, to the extent permitted by applicable State law, be awarded against a defendant only if the claimant establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct by the defendant that was either—

(1) specifically intended to cause harm; or

(2) carried out with conscious, flagrant disregard to the rights or safety of others.

(c) PROPORTIONAL AWARDS.—The amount of punitive damages that may be awarded to a claimant in any civil action subject to this section shall not exceed 2 times the sum of—

(1) the amount awarded to the claimant for economic loss; and

(2) the amount awarded to the claimant for noneconomic loss.

This subsection shall be applied by the court and the application of this subsection shall not be disclosed to the jury.

(d) BIFURCATION.—At the request of any party, the trier of fact shall consider in a separate proceeding whether punitive damages are to be awarded and the amount of such an award. If a separate proceeding is requested—

(1) evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded; and

(2) evidence admissible in the punitive damages proceeding may include evidence of the defendant's profits, if any, from its alleged wrongdoing.

(e) APPLICABILITY.—Nothing in this section shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by the United States, or by any State, under any law;

(2) create any cause of action or any right to punitive damages;

(3) supersede or alter any Federal law;

(4) preempt, supersede, or alter any State law to the extent that such law would further limit the availability or amount of punitive damages;

(5) affect the applicability of any provision of chapter 97 of title 28, United States Code;

(6) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or

(7) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum.

(f) FEDERAL CAUSE OF ACTION PRECLUDED.—Nothing in this section shall confer jurisdiction on the Federal district courts of the United States under section 1331 or 1337 of title 28, United States Code, over any civil action covered under this section.

(g) DEFINITIONS.—For purposes of this section:

(1) The term ''claimant'' means any person who brings a civil action and any person on whose behalf such an action is brought. If such action is brought through or on behalf of an estate, the term includes the decedent. If such action is brought through or on behalf of a minor or incompetent, the term includes the legal guardian of the minor or incompetent.

(2) The term ''clear and convincing evidence'' means that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The level of proof required to satisfy such standard shall be more than that required under preponderance of the evidence, and less than that required for proof beyond a reasonable doubt.

(3) The term ''commerce'' means commerce between or among the several States, or with foreign nations.

(4)(A) The term ''economic loss'' means any objectively verifiable monetary losses resulting from the harm suffered, including past and future medical expenses, loss of past and future earnings, burial costs, costs of repair or replacement, costs of replacement services in the home, including child care, transportation, food preparation, and household care, costs of making reasonable accommodations to a personal residence, loss of employment, and loss of business or employment opportunities, to the extent recovery for such losses is allowed under applicable State law.

(B) The term ''economic loss'' shall not include noneconomic loss.

(5) The term ''harm'' means any legally cognizable wrong or injury for which damages may be imposed.

(6)(A) The term ''noneconomic loss'' means subjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.

(B) The term ''noneconomic loss'' shall not include economic loss or punitive damages.

(7) The term ''punitive damages'' means damages awarded against any person or entity to punish such person or entity or to deter such person or entity, or others, from engaging in similar behavior in the future.

(8) The term ''State'' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.

(h) EFFECTIVE DATE.—This section shall apply to any civil action in which trial has not commenced before the date of enactment of this Act.

Mr. DOLE. Mr. President, this is a bipartisan amendment—Senator EXON is a cosponsor, as are Senators HATCH, MCCONNELL, ABRAHAM, KYL, THOMAS, HUTCHISON, and GRAMM.

This is an amendment that offers needed protections from lawsuit abuse to every American—small business or large; volunteer or charitable organizations. The spectre of lawsuit abuse hangs over us all, and our amendment would expand the protections in the Gorton substitute to ensure that every American is covered.

The bill as it now stands calls for limiting punitive damages in product liability cases to three times economic damages, or $250,000, whichever is greater.

This amendment makes two changes: It would extend the limits on punitive damages beyond product liability to all civil cases; and it would provide a rule of proportionality that limits punitive damages to two times compensatory damages; that is, any economic and noneconomic damages combined.

This amendment is needed because our Nation desperately needs broadly based relief from lawsuit abuse.

America's litigation tax—the tort tax—hurts every American; at least every American who is not a personal injury lawyer.

Anyone who cares about middle-class American families, consumers, and workers would want that litigation tax reduced.

We all know the numbers: $20 in the cost of an ordinary $100 step ladder goes to the litigation tax, as does one-sixth of the price of an $18,000 pacemaker and $8 of an $11.50 DPT childhood vaccine.

The litigation tax is a national ''value subtracted'' tax—$1,200 on every American, rich or poor, with nothing received in return.

And where does that money go? According to a 1986 Rand Corp. study, less than half ends up with those who are suing. Most goes to trial expenses and particularly to lawyers.

In other words, the litigation tax takes income right out of the middle-class family's pocket and puts it into the pockets of one of the wealthiest groups in America—personal injury lawyers.

Even worse, just the fear of litigation has led to the canceling of life-saving research and product improvements in many fields. Companies are afraid of being sued over anything that is new and this has made America less safe.

In other words, the biggest cost of the litigation tax may be measured, not in dollars, but in lives.

The underlying bill goes a long way toward reducing the abuses we currently suffer. But, in my view, it leaves many deserving organizations and small businesses outside its protective scope.

The litigation tax is paid, not just by consumers who buy products, but by every nonprofit organization, every small business, every municipality in the Nation—and those who depend on the services they provide.

This amendment will free our nonprofit organizations, small businesses, and local governments to serve America without first serving up a tribute to personal injury lawyers.

We do not have to look far to count the costs of the litigation tax to nonprofits, small businesses, and municipalties—and to the rest of America.

For example, the head of the Girls Scout Council of the Nation's Capital Area wrote this to House leaders during the debate over there:

> Locally, we must sell 87,000 boxes of cookies each year to pay for liability insurance. We have no diving boards at our camps. We will never own horses. And, many local schools will no longer provide meeting space for our volunteers.

The chief executive officer of Little League Baseball, Dr. Creighton Hale, has issued a similar plea.

Writing in the Wall Street Journal recently, Dr. Hale reported that, as he put it:

> In recent years, litigation has been the end result of two boys colliding in the outfield [the two picked themselves up and sued the coach]. * * * In still another case—

He continued:

> A man and woman won a cash settlement when the woman was hit by a ball a player failed to catch. The player was her daughter.

Dr. Hale says:

> The costs of this litigation lunacy score out * * * in bewildered dads calling our offices asking about personal liability, and volunteer coaches waking up to the fact that they're taking major league risks.

And he added:

> It's a problem common to all nonprofit organizations and the volunteers they depend on.

This is not even close to being in the ballpark of what most people think of when we think of justice in America.

Mr. President, legal speculators have declared war on American volunteerism, entrepreneurship, and local government—the institutions that make for strong communities and a better America.

Expanding the limits on punitive damages to all civil suits will help end the legal speculators' war on these institutions. It will help return justice to the law. It will reach into every home and school and town board and small business and community group in the Nation.

It will tell them that they need not fear for their financial security when they venture outside their home to help a neighbor or open a small business.

It will tell them the siege is over.

Mr. President, it seems to me that this is a very, very important amendment to the substitute. It is one that I hope my colleagues will look at very, very carefully.

I would certainly be willing to enter into a time agreement on this amendment. We would like to finish action on the punitive damage amendment today, as well as a joint and several liability amendment. I hope we can reach some time agreement. I state that now so that my colleagues on the other side of this issue, perhaps we can negotiate a time agreement later this afternoon.

I yield the floor.

Mr. HATCH addressed the Chair.

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

Mr. HATCH. Mr. President, I am pleased to be a cosponsor of the amendment to S. 565.

This amendment would, in effect, extend the punitive damage provision of S. 565 for product liability actions to all civil actions. The subject matter affects interstate commerce brought in State or Federal courts.

Our system of civil justice is broken, in the eyes of many people. The American people do deserve better. They deserve change. They deserve some common sense in our legal system.

I hope we can pass this amendment, along with some others, and send S. 565 to the President for his signature.

Let me be clear: The pending amendment helps volunteer organizations, towns, cities, counties, States, farmers, small businesses, transportation companies, convenience stores, blood banks, school boards, as well as product manufacturers. This amendment is proconsumer.

The pending amendment focuses on one aspect of our civil justice system: Punitive damages. Punitive damages are not awarded to compensate a victim of wrongdoing. These damages constitute punishment in an effort to deter future egregious misconduct.

Punitive damage reform is not about shielding wrongdoers from liability, nor does such reform prevent victims of wrongdoing from being rightfully compensated for their injuries or for their damages. Safeguards are needed to protect against abuse in the form of punitive damages.

In a 1994 opinion authored by Justice Stevens, the Supreme Court noted that punitive damages pose an acute danger of arbitrary deprivation of property. That was the Honda Motor Co. case.

More than that, our current punitive damage system harms consumers. I wish all of my colleagues could have heard the testimony of George L. Priest, who appeared before the Judiciary Committee on April 4 of this year. Mr. Priest is a professor of law and economics at the Yale Law School and has taught in the area of tort law, product liability and damages for 21 years, for the last 15 years at Yale.

Since 1982, he has been the director of the Yale Law School program in civil liability. He has studied jury verdicts extensively, and he did not appear before the committee on behalf of any client, interest, or group.

Professor Priest testified, ''The reform of punitive damages alone, even reforms that would cap punitive damages or introduce a proportionality cap, will help consumers.''

I note that the amendment before Members embodies a proportionality principle for punitive damages. I will return to Professor Priest's remarks later in my remarks and to this point later.

Let me give examples of what is wrong. This past September, an Alabama Supreme Court upheld a multimillion dollar punitive damage award against an automobile distributor who failed to inform a buyer that his new vehicle had been refinished to cure superficial paint damage. The amount expended to refinish this automobile, $601, was less than 3 percent of the vehicle's suggested price. A number of States do not require disclosure of repairs costing below a 3 percent threshold. Indeed, Alabama later adopted such a minimum threshold statute after the events which occurred in this case.

The victim was a purchaser of a $40,000 automobile. Nine months after his purchase, he took his vehicle to Slick Finish, an independent automobile detailing shop, to make the car look ''snazzier'' than it normally does—to use his terms. He was not then dissatisfied with the vehicle's look and had not previously noticed any problems with the car's finish. It was then that he was told by the detailer of the partial refinishing.

As a result of the discovery, he sued the automobile dealer, the North American distributor, and the manufacturer for fraud and breach of contract. He also sought an award for punitive damages. He won and he did hit the jackpot.

At trial, the jury was allowed to assess damages for each of the partially refinished vehicles that had been sold throughout the United States for a period of 10 years. The jury returned a verdict of $4,000 in compensatory damages. It also returned a verdict of $4 million in punitive damages.

On appeal to the State Supreme Court, the punitive damages award was reduced to $2 million, applicable only to the North American distributor. The U.S. Supreme Court has accepted this case for review of the constitutionality of the $2 million punitive damage award.

There is some indication that the law, though, did not permit that type of an award but the court decided anyway that they would halve the award from $4 million to $2 million.

My colleagues want to know why Americans are fed up with the civil justice system? I defy any Member of this body to read the opinion in this case and tell the American people that justice was done.

Why does it matter? In this case, it is not the purchasers of $40,000 automobiles that I am so concerned about, although they are consumers too. But the North American distributor of this automobile, spending tens of thousands of dollars in fees to defend a lawsuit over a $601 paint refinishing, and subject to a ridiculous $2 million punitive damage award, employs our constituents. Many of those employees cannot afford such expensive cars—nor can they afford such ridiculous results from our legal system. If the cost of business goes up, that cost will get passed on, and a business can only raise prices so far before its product becomes uncompetitive. At some point, that business will have to reduce its payroll. Who makes out like bandits from this case? The purchaser of a car with a $601 refinished paint job and, of course, his lawyer. I mean, punitive damages, for this case? And 2 million dollars' worth?

I should also note that this same defendant can be sued again and again for punitive damages by every owner of a partially refinished vehicle. In fact, according to defense counsel, the same plaintiff's attorney has filed 24 other similar lawsuits. No surprise there.

As a further note about this fiasco, in one of those other cases, the jury awarded no punitive damages. The very same conduct by the defendant and in one case, it is socked with $2 million in punitive damages and in another case zero punitive damages. Who knows what the litigation lottery will bring in the other, similar cases.

Let us look at another example. The September 26, 1994, National Law Journal, has a headline reading: ''Blockbuster Busted for $123.6 Million.''

A Dallas, TX, judge ordered Blockbuster Entertainment Corp., Video Superstores Master LP, and an individual to pay $14.7 million in damages and interest and $108.9 million in punitive damages to an individual investor. Why?

In 1986, the investor invested in the first Blockbuster franchises, and according to his attorney, ''he was supposed to be included in the sale when the general partner sold.'' But the

plaintiff-investor was not informed when such a sale was made. He charged the three defendants with breach of fiduciary duty and fraud. Aside from the $14.7 million in damages and interest, as mentioned earlier, the judge assessed just over $36 million in punitive damages to each of the three defendants, or an astonishing $108.9 million in punitive damages assessed against the defendants.

If the defendants in this case did breach their fiduciary duty and commit fraud, the plaintiff should be made whole. The pending amendment would not alter anyone's right to such a recovery.

But is this a case where punitive damages should also be imposed for the wrong? Moreover, after over $10 million in actual damages and nearly $4 million in interest, is there a further deterrent effect by imposing punitive damages? I do not have all of the facts, and I understand the case is under appeal. But even if punitive damages are appropriate, is it sensible to impose nearly 109 million dollars' worth, or over 7 times the award of damages and interest? I might add, if this plaintiff could meet the substantive standard of the pending amendment, the amendment itself would allow over $30 million in punitive damages. Frankly, that is an astronomical award itself, yet critics of this amendment argue that it is penurious.

My colleagues should understand, as the American people do, such awards impose costs. Prices on goods and services can be affected, wages and benefits paid to employees and the level of employment itself can be affected. The availability of goods and services can be affected.

Let me go back to Alabama, for yet another case, demonstrating the lack of common sense in our current civil justice system giving rise to this amendment. Indeed, this example is so outrageous, I will simply quote, at some length, the well-considered testimony of Professor Priest, at our April 4, 1995, hearing. This is from his written statement:

In the case *Gallant* v. *Prudential,* decided this past April 1994, Iran and Leslie Gallant sued Prudential Life Insurance Company based on the actions of a Prudential agent. The Gallant's had purchased a combination life insurance-annuity policy with a $25,000 face value at a monthly premium of roughly $39.00. At the time of sale, the agent had told them that the value of the annuity was roughly twice what in fact it was; the agent had added together the table indicating ''Projected Return'' with the table indicating the lower ''Guaranteed Return.'' A jury found this action fraudulent and held the agent liable and Prudential separately liable for failing to better supervise the agent.

Professor Priest goes on to say:

Fortunately, the problem was discovered before either the policyholder had died or had retired to receive the annuity. Thus, to the time of trial, there was no true economic loss beyond the failed expectation of the larger future return. I have carefully read the transcript of the testimony, and the Gallants testified that, between the time that they discovered the misinformation and Prudential called them to offer a remedy (Prudential offered to return their premiums or to discuss adjusting the policy), they had suffered roughly two weeks of sleepless nights and substantial anger at having been misled. That was the extent of their ''mental anguish''.

Twenty years ago, I taught cases of this nature in a course entitled Restitution, in which the appropriate remedy was restitution of all paid premiums or out-of-pocket costs. On very rare occasions such as especially egregious actions by a defendant, some courts considered awarding plaintiffs the benefit of the bargains, say, by increasing their annuity benefits.

Our modern world has changed: After a one and one-half day trial, an Alabama jury awarded the Gallants damages equal to $30,000 in economic loss; $400,000 in mental anguish; and $25 million in punitive damages.

Again the face value of the policy was only $25,000, and they had not yet qualified to receive that. Think about it. A $25,000 policy, the agent made a mistake, they have 2 weeks of alleged sleepless nights, they were angry for much of that time, and they got $30,000 in economic loss, $400,000 for their 2 weeks of sleepless nights and anger, and $25 million in punitive damages.

Professor Priest said:

I do not wish to minimize the harm to the Gallants, especially the indignity of the misrepresentation, nor to condone the fraudulent actions of the agent, apparently perpetrated on several other Alabama citizens who recovered separately. Nevertheless, there is not a single person to whom I have described this case—not an attorney, whether plaintiff or defendant; not a liberal or a conservative; not even a radical or idealist Yale Law student (or faculty member)—who has not been shocked by the outcome or who could defend it as a rational or sensible verdict in the context of the harm. Again, many defenders of punitive damages argue that exceptionally large verdicts are usually overturned on appeal. Alabama provides a review procedure for punitive damages verdicts that the U.S. Supreme Court has approved. In the Gallant case, however, the judge conducting the review affirmed the $25 million award in its entirety, though directing part of the amount to be paid to the State.

What will be the effect of a punitive damages verdict of this nature? The Gallants appear to be persons of modest means (before the verdict). Does a verdict of this nature help middle- or low-income consumers? Totally, the opposite. The insurance policy in question—face value, $25,000—was the cheapest form of life insurance annuity available on the market; again, its monthly premium was only $39.00. Obviously, at such a premium, the insurance carrier could not be expecting to make a substantial profit on the policy. Indeed, an expert in the case estimated that over the entire life of the policy, the premiums net of payouts paid by the Gallants would increase Prudential's assets by only $46.00. Prudential, like most other life insurance companies, profits more substantially from large dollar, rather than small dollar policies. The expert estimated that the verdict reduced dividends to every Alabama policyholder . . . by $323.

That points out the ridiculousness of this.

Priest goes on to say:

How do we analyze a case like this in terms of whether punitive damages serve a necessary deterrent effect? In his closing argument, the . . . attorney for the Gallants asked the jury to determine a level of damages that would send a message to the giant Prudential Life Insurance Company that fraudulent behavior on the part of an agent will not be tolerated. What kind of damages message is necessary to achieve that effect? Obviously, if the insurer stood to gain no more than $46 over the life of the policy, any damages judgment greater than $46 sends the insurer a message by making the policy unprofitable. (Of course, I ignore entirely Prudential's defense costs plus the reputational harm from the lawsuit.) The jury in the Gallant case went substantially beyond that amount, however, in awarding compensatory damages of $30,000 for economic loss and $400,000 for the mental anguish of the two weeks' lost sleep and anger. It certainly cannot be argued that the jury has undervalued the Gallant's compensatory loss—indeed, the $400,000 for the mental anguish award is extreme. Furthermore, there is no reason to think that the agent's behavior in other contexts would go undetected. (Prudential later settled other cases brought by the agent's clients.) As a consequence, there is no justification for a punitive damages award whatsoever.

What will be the effect of punitive damages verdicts such as that in the Gallant case? In the face of such a verdict, what is the rational response of an insurer like Prudential or other insurers selling similar policies? Regrettably, but necessarily in a competitive industry, the rational response is to quit selling such low value policies altogether. It makes little sense to expose the company and its policyholders to the risk of such a damages verdict given the very small gain from the sale of such a policy.

Is this the type of product that our civil liability system should drive from the market? Obviously, not, and low-income consumers in Alabama are directly harmed as a result. Here, the dramatically differential effects of such verdicts on high-income versus low-income consumers are made clear. In my own view, it is far more important to our society to have our insurance industry provide life insurance coverage to low-income citizens, since the relatively affluent of our society have other means of providing financial security for their families. The availability of financial protection and security at relatively low cost will be substantially diminished if such low premium policies, as here, are no longer available.

More generally, where expected punitive damages verdicts are added to the price of products and services, the first to feel the effect will be low-income consumers. And where the magnitude of punitive damages verdicts rise, imperiling the continued provision of the product or service, the first to be affected will be those products and services with the lowest profit margins, most attractive to the low-income. The Gallant case provides a dramatic example of the effect. Following Gallant and other large punitive damages verdicts, several insurers have quit offering coverage in Alabama altogether.

I understand this case settled for an undisclosed sum. I urge my colleagues to take a close look at the concerns raised by Professor Priest.

The consequences of our current civil justice system can be felt in many ways.

The July 17, 1992, Science magazine reported that Abbot Laboratories put off testing for a drug that might prevent the spread of AIDS from infected pregnant women to their newborns. Why? According to the article, ''Abbott officials announced that testing its

HIV hyperimmune globulin (HIVIG) * * * would make the company too vulnerable to lawsuits.'' This action touched off some controversy. The Science article continued:

In spite of the uproar, National Institute of Health officials agree with Abbott that liability is a significant issue in AIDS vaccine and therapy research. A recent investigation by Science (April 10, 1992, page 168) revealed that fear of lawsuits has led several HIV vaccine developers to delay or even abandon promising projects.

Creighton Hale, chief executive officer of Little League Baseball, wrote about lawsuits filed against coaches over the ordinary mishaps of a baseball game in the February 13, 1995, Wall Street Journal. He noted, ''from my spot in the bleachers, the costs of this litigation lunacy [result in] bewildered dads calling our offices asking about personal liability, and volunteer coaches waking up to the fact that they're taking on major league risks.'' He went on to say significantly, ''It's a problem common to all nonprofits and the volunteers they depend on. Little League Baseball has seen its liability insurance skyrocket 1000 percent—from $75 dollars per league annually to $795—in a recent five year period. Good Samaritans are caught in a suicide squeeze.''

Mr. Hale urged Congress to extend common sense legal reform beyond products liability cases to cover volunteers and others. I note that Ms. Jan A. Verhage, executive director of the Girl Scouts Council of the Nations Capital, which also serves the surrounding Maryland and Virginia communities, wrote to Speaker GINGRICH on February 13, 1995. She asked that legal reform legislation be extended to include organizations like the Girl Scouts.

Now, she was not speaking for the national organization. But her comments are very telling: ''Locally we must sell 87,000 boxes of these Girl Scout cookies each year to pay for liability insurance. We have no diving boards at our camps. We will never own horses, and many local schools will no longer provide meeting space for our volunteers.''

Paul A. Crotty, the top lawyer for New York City, wrote to Commerce Committee Chairman LARRY PRESSLER on April 5, 1995, on behalf of New York City and Mayor Guiliani. He urged that the punitive damages provision in the underlying products liability bill be extended to all cases. He wrote, ''Although punitive damages generally cannot be imposed against cities, they generally can be imposed against governmental employees. Excessive awards against individuals providing government services can be as destructive as large awards against businesses that manufacture or sell products.''

This is all just the tip of the iceberg.

STATISTICS

Let me say a word about the battle of statistics that rages over punitive damages. Supporters and opponents of this amendment can rely on various studies about the number and dollar amount of punitive damages awards. We heard reports on some such studies in the Judiciary Committee. There is no single definitive study.

But let me say this: anyone with even a passing familiarity with our civil justice system knows that the likelihood of a punitive damages award, justified or not, is far greater today than 40 years ago. Moreover, and this is the crucial point, even beyond the increase in the frequency and amount of actual awards over that time, the mere threat of punitive damages affects volunteers, school boards, businesses of all sizes. The mere inclusion of a claim for punitive damages in today's litigation climate boosts the settlement value of a case, regardless of the case's merits. Insurance premiums go up, products and services are curtailed, innovation is stifled, consumer prices go up, and payroll costs rise, adversely affecting employment.

Professor Priest states,

Forty years ago, punitive damages verdicts were exceptionally rare and were available against only the most extreme and egregious of defendant actions. The world of civil litigation is severely different today. Both the number and, especially, magnitude of punitive damages judgments have increased dramatically, indeed the frequency of claims for punitive damages has increased to approach the routine. These claims affect the settlement process, both increasing the litigation rate and, necessarily, increasing the ultimate magnitude of settlements even in cases that are settled out of court.

The terrible, irrational consequences of these developments are easy to see. Take the $601 paint refinishing case in Alabama that mushroomed into a $2 million litigation bonanza. If the plaintiff knew punitive damages were not a real possibility, the case could have settled. How utterly wasteful to the economy to have such a minor case, the equivalent of less than a fender-bender under any rational view, actually proceed through depositions and discovery, let alone actually be tried and then go through the appeals process. For heaven's sake, this paint refinishing case is now before the Supreme Court of the United States. What a waste of the company's resources which go to its lawyers and to court costs, and of scarce judicial resources. Only the plaintiff and his lawyer, if on a contingent fee, benefit from this windfall.

A civil justice system where all of this can happen is broken. One of the problems which needs fixing is the lack of meaningful control over punitive damages.

DETERRENCE

The cost of our current civil justice system might be offset at least somewhat if it actually does deter egregious wrongdoing. Here again, listen to the testimony of Professor Priest:

I have never once seen a careful study in a specific case showing that a punitive damages judgment of some particular amount was necessary to deter some particular wrongful behavior.

* * * forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been that ever-increasing civil liability verdicts, including punitive damages verdicts, would serve to reduce the number of accidents. That view, however, has been totally discredited today, and I know of no serious tort scholar publishing in a major legal journal who could maintain it. Instead, it is widely accepted—and it is a routine proposition of a first-year modern torts course—that compensatory damages—economic losses and pain and suffering—serve a complete deterrent purpose in addition to their role in compensating injured parties. Compensatory damages impose costs on defendants who wrongfully fail to prevent accidents, costs equal in amount to the injuries suffered * * *.

He also testified that adverse publicity is another powerful deterrent to wrongdoers.

Let me stress that the pending amendment, of course, by no means eliminates punitive damages. Indeed, it allows punitive damages in an appropriate case, in an amount up to three times economic damages or $250,000, whichever is greater.

Actually, that was the old rule. Senator SNOWE's language allows two times the total of compensatory and noneconomic damages.

CONSUMERS

Do punitive damages help consumers? Here, again, is the testimony of Professor Priest: ''The central problem of punitive damages, however, is that except in the rare cases of jury undervaluation of damages or underlitigation, punitive damages settlements and verdicts affirmatively harm consumers, ands low-income consumers most of all.

Where punitive damages become a commonplace of civil litigation as in Alabama, or even where they become a significant risk of business operations, consumers are harmed because expected punitive damage verdicts or settlements must be built into the price of products and services. The effect of the greater frequency and magnitude of punitive damages recoveries of modern times has been to increase the price level for all products and services provided in the U.S. economy.

Indeed, Mr. President, as mentioned earlier, a punitive damage award in a case like Gallant versus Prudential, involving a combination life insurance-annuity policy with a $25,000 face value and $39 monthly premium, can only make insurance less available and more costly for middle- and low-income people.

Mr. President, the problems with the current punitive damages regime in this country are national in scope. Only Congress can fix these problems.

The pending amendment would require that the claimant establish by clear and convincing evidence that the harmful conduct was carried out with conscious, flagrant indifference to the rights or safety of the claimant before winning an award of punitive damages. It would then place a proportional limit on punitive damages of up to two times the sum of a plaintiff's economic loss and noneconomic loss.

Any party to the action could obtain a separate proceeding for the consideration of whether punitive damages are to be awarded and the amount of such award. Our amendment does not supersede or later any Federal law. It does not deny States the right to enact punitive damages provisions, consistent with this amendment, or to place further limits on such awards. These are worthy provisions.

I urge support for the Dole amendment.

I yield the floor.

Mr. KYL addressed the Chair.

The PRESIDING OFFICER (Mr. ABRAHAM). The Senator from Arizona.

Mr. KYL. I speak in support of the Dole amendment. The comments of the Senator from Utah just given really portray I think in the most thorough way the basic thrust of this amendment and the arguments for it. I will very briefly just add at the margins some information which I think helps to flesh out the arguments that have just been made by the Senator from Utah.

As he pointed out, this amendment would extend the product liability punitive damage limitation in the Gorton-Rockefeller bill to be set at two times the economic damages in all civil actions involving interstate commerce. The exception is the civil rights and environmental laws. Therefore, at the margin, this amendment makes the underlying bill even better than it is.

Historically, as has been noted, punitive damages were awarded in only the rarest and most egregious cases in order to punish, to make an example of the defendant when that defendant's conduct fell below a certain standard. According to Prof. George Priest of Yale Law School, who has already been quoted here, 65 to 78 percent of all tort actions over the last fiscal year include punitive damages in the pleadings. So what was originally designed to be a recovery in the very most narrow situation has now become part of the pleadings in a majority, even exceeding three-fourths, of the cases. Although punitive damage awards represent a relatively small part of the overall awards, the amount of the average award continues to increase.

For example, according to Investors Business Daily, in an article of April 3 of this year, a study of jury awards between 1965 and 1984 shows that the average inflation adjusted damage award increased 1,595 percent, Mr. President. These awards clearly are skyrocketing, and they need to be reined in. Punitive damage awards have in effect become a lottery in which the jackpot is continuously doubling. The lawyer's incentive to file suit is the 30 percent of the settlement amount and the 40 percent of most trial judgments that he or she realizes. The plaintiff's incentive is the often outrageous jury verdict.

Two well-publicized examples will be recalled by most people: The nearly $1 million awarded to the McDonald's customer who put hot coffee between her legs while driving and, unfortunately, was burned; and the Alabama case in which actual damages totaled only $1,200 but the jury awarded $4 million in punitive damages.

I said that punitive damages were skyrocketing a moment ago. Those were not my words. Those were the words in an opinion of Justice Sandra Day O'Connor, who said in a 1993 Supreme Court opinion that they were ''skyrocketing.'' She was addressing a lower court ruling which upheld a $4.3 million award, Mr. President, to a convicted felon who, in the course of violently robbing a 72-year-old subway passenger, was shot and paralyzed by a transit authority police officer. The case was McCummings versus New York City Transit Authority, 1993.

This is outrageous, Mr. President. It is the kind of cap that we need to place into law. These outrageous punitive damages create a tort tax paid by consumers in the form of higher prices, higher insurance premiums, and reduced market choice and quality.

It is a regressive tort tax paid disproportionately by citizens on the lower end of the economic spectrum because higher prices, of course, hit them the hardest.

Do punitive damages serve as a necessary deterrent? Sadly, Mr. President, in many cases, no.

Again, according to Richard Posner, the best theory is that full compensatory damages generate exactly the optimal level of deterrent.

Mr. President, punitive damages are a quasi-criminal remedy. They are the product of a bygone era when the resources of public prosecutors were slim.

Today, public prosecutors are better able to serve the public interest in a certain level of punishment. To the contrary, plaintiffs and their lawyers seeking huge punitive damages awards often initiate litigation without consideration of the public interest, but of their own interest. That is why these damages need to be controlled.

Let me cite just a few of the examples. The Senator from Utah cited some egregious examples a moment ago.

Another example: A juror in a punitive damages case said that his fellow jurors discussed a damage award of between $100,000 and $8.5 million before deciding on $10 million. Later, when asked why $10 million was chosen, this juror said, ''Quite honestly, I think it had something to do with finding a round figure. We were given no guidelines.''

There was a recent article in USA Today, March 6, 1995, which I think had some interesting points to make and some other examples to cite. I will cite just a couple quotations from the article.

> The court system that's supposed to assure fair compensation for people harmed through the fault of others looks at times more like a gambling casino than the house of Justice. Some injured individuals are walking away with pots of money—far, far beyond any actual losses they've suffered.

Here are some of the horror stories that the USA Today story cited.

> The Alabama woman awarded $250,000 in punitive damages even though she wasn't injured and wasn't even present when a gas water heater malfunctioned.
>
> The San Francisco mugger who won a $24,595 judgment for leg injuries when a cab driver pinned him to a wall with his taxi to keep the criminal from escaping.
>
> The Miami woman awarded $250,000 after she, having used cocaine and alcohol and splashed herself with gasoline, was severely burned trying to light a barbecue.
>
> The Florida theme park ordered to pay 86 percent of a woman's award for injuries received on its ''Grand Prix'' ride, even though the jury found the park only 1 percent at fault and the woman's husband—who rammed his car into hers—85 percent at fault.
>
> The tricycle manufacturer who settled out of court for $7.5 million rather than risk an even more generous jury award over the color of its trikes.
>
> According to one five-state study, the dollar volume of punitive-damage awards against business alone is up 89-fold over a 20-year span.

I want to quote just one other thing from this USA Today article before I close, Mr. President.

> Given the emotional pull of tragic personal injuries or honest businesses driven to bankruptcy, few opportunities to exaggerate have been missed by either side. But there is at bottom an undeniable sense: The system doesn't operate fairly. And that sense of unfairness invites opportunists to try to cash in—looking for a jackpot on the chance that the system's unfairness will work in their favor:

And then this article goes on to note a couple other cases.

> Like the Michigan man who lost an eye when a July 4 skyrocket exploded in his face and then sued his parents for letting him set off fireworks when he was drunk.
>
> Or the 305-pound man who had a stomach-stapling operation and sued the hospital because he was allowed near a refrigerator and ate so much he popped his staples.

Mr. President, these examples would be humorous if the problem were not so serious. The problem is that we are all paying for this, for this jackpot, this lottery that is called punitive damages. It is time to rein it in. It is time to put a modest cap on these punitive damages.

That is all the amendment of the majority leader does. It is time that we adopt this kind of approach to the liability reform that is before us today and, hopefully, that we will be voting on later this afternoon. I urge my colleagues to support this amendment.

I yield the floor.

Mr. ROCKEFELLER. Mr. President, I suggest absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum has been noted. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. ROCKEFELLER. Mr. President, I rise again to report to my colleagues on our situation and to make a reflection.

This morning, we conducted a series of rollcall votes. I believe there were eight. They all had to do with something called malpractice reform, which is not part of the product liability reform.

We were able to accept two amendments, which means that we did not accept others. Those were on fairly minor issues, I might say.

Of the eight amendments that required votes, the Senate adopted three by sort of an interesting variety of margins. The net result is that the product liability bill, which is the sole focus of the concern of the Senator from West Virginia, as well as the Senator from the State of Washington, now includes the malpractice proposal as offered by the Senator from Kentucky, which prevailed with 53 votes.

So that means we now have a bill which has product liability in it, has malpractice reform in it. I have indicated before that I think at some point Senators are going to have to make a choice. I do not think when it comes right down to it, we are going to be voting on a bill that has these two elements in it. We may be voting on no bill that has, therefore, nothing in it. Or we may be voting on a bill that has both elements in it which causes both elements to lose, products and malpractice, which is in nobody's interest. Now we found another one. I say this with all respect and without anything but respect. But we are debating an amendment by the majority leader, with a number of other Senators as cosponsors, to limit punitive damages in all civil actions, not just product liability. So now this comes from the House.

This, again, opens up an entire new range of problems and possibilities for product liability and the chances of passage. This is opening the whole thing up. It is all civil torts. I recognize the basis of the amendment. There is a very impressive array of organizations, including municipalities, small businesses, nonprofit groups—they want to curb the costs—and problems associated with punitive damages in our legal system. They have that right in a democracy, and they are exercising that right. And now we are seeing the results of that.

I am not going to get into the substance of the amendment or into the merits of the amendment. I simply want to indicate that this is not product liability as it has been introduced. It is, again, trying to open it up so that other things can be attached to it. Some may think that helps it. Some may think that by adding other extraneous areas it shows that they are abreast of everything that is going on in the House and fighting with equal vigor, and I understand that; I understand it politically, substantively, and every other way.

But it does not help product liability to pass. I would remind Senators, as I have on a number of occasions and I will continue, that the underlying amendment here is the Product Liability Reform Fairness Act of 1995. For both those who oppose it and who favor it and who have invested a lot of time in it, it is this bill which we want to see acted upon.

So I just make this point at the beginning of the debate. And I am perfectly willing to have a time agreement. I understand the majority leader will be very amenable to a time agreement. I think that is being shopped on both sides. I do not expect this debate to go on for a very long time. But, again, it is an extraneous amendment. I simply point that out. It hurts the possibilities of product liability reform. I think it has almost no chance of passing. Of course, a vote will tell that, but I forecast that. Thus, I wonder what it is in fact we are accomplishing by all of this.

I thank the Chair and yield the floor.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. I turned on the TV in the office and was amused to see a series of whining and moaning and groaning with respect to punitive damages. This contract crowd is going in two different directions. Under the contract now, the welfare recipient is to show more responsibility. Under the contract, we have a family. They do not want Government in anything, but they want it in everything. They want it in the family. I would think that would be the last thing, to get into the family. But the contract crowd wants a family bill. And, of course, fundamental to the family is that we punish the child when it misbehaves. We spank the baby and teach it some discipline when it misbehaves and teach it how to do right as opposed to doing wrong.

But when it comes to large corporate America and manufacturers, there should be no spanking. All of a sudden, it costs consumers. Mr. President, whoever thought for a second that this bill is in the interests of consumers? It is the biggest fraud that ever tried to be perpetrated on this august body. Every consumer organization in the United States of any size, care, or responsibility is absolutely opposed to the bill.

And with regard to the better legal minds of the American Bar Association, the State supreme court justices and their Conference of Chief Justices of the several State supreme courts, the Conference of State legislatures, the attorneys general, oh, yes, they are going to look out for them? Uh-uh, no, they are looking out for manufacturers. Look at the section in here that exempts the manufacturer. They have all of these great provisions in here because they say they are so concerned about consumers, except when you mention manufacturers. They say, by the way, manufacturers should be exempt from this bill.

Now, come on. I will read several things about punitive damages, and I will go right to the heart of the issue. It is not saving consumers' pocketbooks and costs. This crowd knows the cost of everything and the value of nothing. The truth of the matter is on account of product liability in this country of ours, we have the safest products and we are saving our citizenry from injury, from maiming, from blindness, from being killed over and over again by the millions. Why do you think there were over 19 million car recalls in the last 10 years? We went to the Department of Transportation and we summed up all these automobile recalls. And if you think the big automobile companies—not only in the United States, but Toyota in Japan, and others—are recalling defective automobiles to save consumers money—they are doing it to save themselves money on account of product liability, because they are going to get nailed. And so to save themselves money, they save lives and injury to the consuming public. It is not the pocketbook that we are involved with here. On the contrary, it is the safety of products and the safety of our citizenry.

So let us quit bringing all of these cases, one by one, out here, and say, oh, what a terrible punitive damage verdict this is and thereby we have a national problem. Not so.

The States have handled this. And rather than going into this case or that case—I do not countenance for a second that there are not some mistakes. There are mistakes everywhere in the administration of the law. That does not call for national legislation. But, in a general sense, if you take all the product liability verdicts in the last 30 years—and this is what we asked when we saw the witness take the stand in the Commerce Committee. We asked Jonathan S. Massey, an expert who had defended punitive damages before the U.S. Supreme Court, allegedly the most experienced attorney. I said, yes, but I still get these anecdotal incidents of what we would call outrageous punitive damage findings.

I said, ''Could you please go and get into the record exactly all the punitive damage verdicts for the last 30 years, since 1965, and find out just exactly how many there were, and what were the amendments and then add them all up?'' With respect to that, I ask unanimous consent to have this material printed in the RECORD.

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

APRIL 13, 1995.

Hon. ERNEST F. HOLLINGS,
U.S. Senate Committee on Commerce, Science and Transportation, Washington, DC.

DEAR SENATOR HOLLINGS: At the hearing on April 4, 1995 before the Consumer Affairs, Foreign Commerce, and Tourism Committee of the Committee on Commerce, Science,

and Transportation on S. 565, the Product Liability Fairness Act of 1995, you asked me to compare the $3 billion in punitive damages awarded in the Pennzoil v. Texaco case with the sum of punitive damage awards in all product liability cases since 1965.

The attached pages show that punitive damage awards in products liability cases since 1965 come to a fraction of the $3 billion figure. For products liability cases in which the punitive damage award is known, the total comes to $953,073,079. There are 109 additional cases in which the punitive damage award was not reported by the court or either party, most likely because it was not large. If one were to extrapolate for those 109 cases by taking the average award in cases in which the punitive award is known—which would err on the side of the inflating punitive damage awards in products liability cases—the total of punitive damage awards in all products liability cases since 1965 would come to only $1,337,832,211—less than half the award in Pennzoil v. Texaco.

I hope this information is of assistance.

Sincerely,

JONATHAN S. MASSEY.

PRODUCT LIABILITY PUNITIVE AWARDS, 1965–PRESENT

Alabama—20 cases—$58,604,000; 9 additional cases with unknown amounts.

Alaska—2 cases—$2,520,000; 1 additional case with unknown amounts.

Arizona—6 cases—$3,362,500; 3 additional cases with unknown amounts.

Alabama—1 case—$25,000,000; 0 additional cases with unknown amounts.

Alaska—1 case—$1,000,000; 0 additional cases with unknown amounts.

Arizona—2 cases—$6,000,000; 3 additional cases with unknown amounts.

California—17 cases—$35,854,000; 9 additional cases with unknown amounts.

Florida—1 case—$1,000,000; 0 additional cases with unknown amounts.

Connecticut—1 case—$688,000; 0 additional cases with unknown amounts.

Florida—1 case—$519,000; 0 additional cases with unknown amounts.

California—4 cases—$3,618,653; 0 additional cases with unknown amounts.

Florida—1 case—$750,000; 0 additional cases with unknown amounts.

California—3 cases—$2,425,000; 0 additional cases with unknown amounts.

Colorado—3 cases—$7,350,000; 1 additional case with unknown amounts.

Connecticut—0 cases—$0; 1 additional case with unknown amounts.

Delaware—2 cases—$75,120,000; 0 additional cases with unknown amounts.

Florida—26 cases—$40,607,000; 9 additional cases with unknown amounts.

California—1 case—$30,000; 0 additional cases with unknown amounts.

Florida—2 case—$3,500,000; 0 additional cases with unknown amounts.

Georgia—10 cases—$43,378,333; 3 additional cases with unknown amounts.

Hawaii—1 case—$11,250,000; 0 additional cases with unknown amounts.

Idaho—0 cases—$0; 1 additional case with unknown amounts.

Illinois—16 cases—$44,149,827; 3 additional cases with unknown amounts.

Minnesota—1 case—$7,000,000; 0 additional cases with unknown amounts.

Illinois—3 cases—$5,000,000; 0 additional cases with unknown amounts.

Indiana—1 case—$500,000; 0 additional cases with unknown amounts.

Iowa—1 case—$50,000; 2 additional cases with unknown amounts.

Kansas—7 cases—$47,521,500; 1 additional case with unknown amounts.

Kentucky—2 cases—$6,500,000; 0 additional cases with unknown amounts.

Louisiana—2 cases—$8,171,885; 0 additional cases with unknown amounts.

Maine—3 cases—$5,112,500; 0 additional cases with unknown amounts.

Maryland—3 cases—$77,200,000; 2 additional cases with unknown amounts.

Michigan—2 cases—$400,000; 0 additional cases with unknown amounts.

Minnesota—4 cases—$10,000,000; 1 additional case with unknown amounts.

Mississippi—4 cases—$2,790,000; 1 additional case with unknown amounts.

Missouri—9 cases—$20,785,000; 1 additional case with unknown amounts.

Montana—2 cases—$1,600,000; 1 additional case with unknown amounts.

Nevada—1 case—$40,000; 1 additional case with unknown amounts.

New Jersey—4 cases—$900,000; 5 additional cases with unknown amounts.

New Mexico—4 cases—$1,715,000; 1 additional case with unknown amounts.

New York—7 cases—$6,019,000; 6 additional cases with unknown amounts.

North Carolina—2 cases—$4,500,000; 0 additional cases with unknown amounts.

Ohio—6 cases—$4,393,000; 1 additional case with unknown amounts.

Oklahoma—6 cases—$15,390,000; 1 additional case with unknown amounts.

Oregon—3 cases—$62,700,000; 0 additional cases with unknown amounts.

Pennsylvania—5 cases—$16,298,000; 8 additional cases with unknown amounts.

Rhode Island—1 case—$9,700,000; 0 additional cases with unknown amounts.

South Carolina—5 cases—$2,945,500; 4 additional cases with unknown amounts.

Rhode Island—1 case—$100,000; 0 additional cases with unknown amounts.

South Dakota—1 case—$2,500,000; 0 additional cases with unknown amounts.

Tennessee—4 cases—$4,720,000; 3 additional cases with unknown amounts.

Texas—38 cases—$217,098,000; 19 additional cases with unknown amounts.

Utah—1 case—$300,000; 0 additional cases with unknown amounts.

Virginia—2 cases—$340,000; 0 additional cases with unknown amounts.

West Virginia—3 cases—$2,433,100; 4 additional cases with unknown amounts.

Wisconsin—7 cases—$10,622,000; 4 additional cases with unknown amounts.

Florida—1 case—$2,500,000; 0 additional cases with unknown amounts.

Wisconsin—2 cases—$26,000,000; 0 additional cases with unknown amounts.

District of Columbia—1 case—$2,500,000; 0 additional cases with unknown amounts.

Grand total—270 cases—$953,073,079; 109 additional cases with unknown amounts.

Average punitive award: $3,529,900.

Extrapolated total of all awards: $1,337,832,211.

Mr. HOLLINGS. Mr. President, the pages show that punitive damage awards in product liability cases since 1965 come to a fraction of $3 billion. To be exact, they come to $1,337,832,211.

Why does this Senator say ''a fraction'' of $3 billion? If we go to the Pennzoil versus Texaco case, of businesses suing businesses, what do we get? We get almost a $12 billion verdict that included what? It included a finding of punitive damages in the amount of 3 billion bucks.

In other words, of all the product liability punitive damage findings in the last 30 years amounting to $1.3 billion, we have one business-against-business case of $3 billion. Or another one, since they are picking out cases, I will pick the *Exxon Valdez* case, a case where Exxon was sued and they came in with a verdict of what in punitive damages? Mr. President, $3 billion.

I cannot find out the amount for businesses, there are so many of them. But it is up into the billions and billions of dollars. If this Congress was really interested in lowering the verdicts in tort cases, they would go right to the businesses suing businesses. They would go right to the automobile accident cases. They would go to all the other kinds of tort cases.

The fact is that, of all the civil findings in the United States of America, tort filings only amount to 9 percent of the total amount of civil findings; and of the 9 percent, product liability amounts to 4 percent of the 9 percent or .36 of 1 percent.

Another problem solved by the States. The Supreme Court Justices and legislatures say we handle it, and I will go right, for example, to my own State of South Carolina with respect to punitive damages.

In a recent case of the State versus Rush, but the heading would be Gamble versus Stevenson, an appeal of the Southern Bell Telephone Telegraph.

Now, I read from the opinion of the Supreme Court as follows: ''In South Carolina punitive damages are allowed in the interest of society.'' Listen to that. We would think punitive damages was the most heinous offense that ever occurred without any relation in the world to the good it has done.

Why do we fine motorists for speeding and disobeying our motor vehicle laws in America? We fine them. Why do we fine the others for their various crimes? To make certain they do not commit them again. Similarly, with manufacturers.

Punitive damages—fine them, to make absolutely sure that they do not repeat their wrong.

They would say we cannot lose, we are making money. So why has Chrysler recalled 4 million cars to fix the back latch on the door? Not on account of the cost. They could get by with that. They would leave it there, but they know that there are chances now brought to the attention of the public that they are not only going to be verdicts against them in compensatory damages but in punitive damages. No longer can they factor it in the cost of product because of punitive damages.

This is the very element that is bringing about the safety—not taking care of the parties involved but taking care of society, generally—that is the point to be made here.

The first sentence:

In South Carolina, punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve as an indication of private rights when it is proved that such have been wantonly, willfully, or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damage. In the instant case the trial judge's jury charge concluded the degree of recklessness

requisite to punitive damage award, that such an award was to punish a defendant or deter and stop it and others from similar conduct in the future, that is, to make an example of the defendant.

That is an affirmative action program, to make an example. Everybody is interested in affirmative action. Here it is. Make an example of the defendant, the wrongdoer. ''That it must find actual damages before awarding punitive damages and that in calculating the amount of such damages, it may consider the defendant's ability to pay.''

Now, Mr. President, to ensure that a punitive damages award is proper, the trial court shall conduct a post trial review and consider the following: one, the defendant's degree of culpability; two, duration of the conduct.

Mind you me, Mr. President, this is not the jury, the runaway juries, the same people that elected Members in Congress, all of a sudden impanelled and with a sworn oath, to find unanimously by a preponderance of the evidence, willful misconduct. And all 12 having found such, that same crowd that elects and sends Members, all of a sudden, they have lost their minds, their judgment. They are runaway and now have to be restricted by national restrictions. For what? For manufacturers, that is for what, and for less safety in America.

Let me read that again:

To ensure that punitive damages award is proper, the trial court shall conduct a posttrial review that may consider the following:

1, defendant's degree of culpability; 2, the duration of the conduct; 3, the defendant's awareness or concealment; 4, the existence of similar past conduct; 5, likelihood the award will deter the defendant or others from like conduct; 6, whether the award is reasonably related to the harm likely to result from such conduct; 7, defendant's ability to pay; 8, as noted in Haslip case, ''other factors'' deemed appropriate.

That is, the court, not only the 12 impaneled jurors, but the court itself, shall review and study.

Now, generally, this is a law that applies in 45 of the 50 States but, of course, due to the Conference Board, due to the Business Advisory Roundtable, due to the National Association of Manufacturers' lobbyists that have been going on for years and they come and report at every election time, ''Now, Senator, we have to do something about tort reform or product liability reform.''

The average Senator or candidate, not aware of the ramifications, not having attended any of the hearings or otherwise, might say, ''Oh? I am trying to get votes. Reform?'' They get caught. Words do mean things in our society. And they say, ''Heavens, I can get the support of this strong crowd. I can even get financial contributions if all I have to say is yes, yes, I am for reform. Product liability? Put me down.''

They put them down. Then they come here and they get embarrassed because they finally hear the truth of the matter here. And I sort of get embarrassed for them.

The reason I get embarrassed for them is just this. I got a letter today from my distinguished colleague and friend, Drew Lewis, the chairman of Union Pacific Corp., dated April 27. He is a former Secretary of Transportation. He did an outstanding job. I do not speak in criticism or derision. Rather, I speak—and this is the factual dismay that I have—because I know he knows better. It is a short letter and I know why he is writing it.

Union Pacific urges your support for S. 565, the Product Liability Fairness Act legislation. The U.S. legal system is out of control. The high cost of litigation and large damage awards translate into higher prices for consumers. Typically less than half the money awarded in product liability cases goes to compensate the claimant. The winner is the trial attorney, not the American consumer. If American business is going to succeed in the global marketplace and American jobs are to grow, your vote is critical. Please vote for cloture and final passage of S. 565.

Sincerely, Drew.

Let us take that little letter here and see it exactly. I know this gentleman knows better. He is the most sophisticated of former public servants and corporate executives and he has been around. I know his entities. The Business Roundtable and the National Association of Manufacturers and all got him to write this thing and it was ground out.

He calls it the ''Fairness Act.'' He picked up the title. That is not what they called it over on the House side. It started off—if you get the title of the bill itself on the desk here, you will find out—''To establish legal standards and procedures for product liability litigation.'' At least it was straightforward in the House. Applesauce in the U.S. Senate. Fairness? Fair to whom? Not consumers. This crowd does not represent consumers. I have; they have not.

When I asked the distinguished Chair where was the record here whereby trial lawyers had done in their clients, under the Abraham amendment, he had one letter from a constituent in Michigan. I knew that there were not a big wave of clients being done in. In fact, had it not been for the trial lawyers, they would not have received anything.

After all, these manufacturers do have a team of attorneys, investigators, adjusters, local attorneys and otherwise, and they readily, on any kind of claim or letter they get, immediately zoom in and, generally speaking, settle the case or claim. It is good business judgment that they do; it is good business judgment they do. They do not want to be claimed to have unsafe products.

It is only when they deny an obvious claim that should be compensated that it comes to the trial lawyers. We do not scare up cases—except, of course, in these class action suits, like asbestosis. But that is what had to be done. That is exactly what was done with respect to the example of the Senator from Michigan in his letter with the Senator from Kentucky relative to the airlines. They had to go and get all the airlines together, get law firms all over the country, and assemble 2.1 million clients.

In the letter to the colleagues, under the Abraham-McConnell letter, it appeared that, heavens above, quoting the Washington Post, the lawyers got $16.1 million in fees and the client got a $25 gift certificate for travel. I knew that the client just getting $25 and the lawyer getting $16 million would not be approved by any court. So we went back to the record.

Yes, in a class action of that kind, what was the number of clients? It was 2.1 million. What was the amount of the verdict? It was $438 million. How many law firms? They had 37 law firms all over the country, and the average fee was not a third, or 33⅓ percent, or 25 percent, or 20 percent, or 10 percent, or 5 percent, or 1 percent. The average fee of the attorneys involved was less—less than 1 percent. Had they not correlated all that, it would not look so garish and enormous to us unstudied witnesses here.

But this is the Fairness Act, they say. Then the next sentence, ''The United States legal system is out of control.''

That is sheer nonsense. If it is out of control, it is on account of businesses suing businesses. It certainly is not a litigation explosion. We have proved that. We have proved time and again that product liability cases, as the Senator from West Virginia, the principal sponsor of the measure, says—when we engaged in looking at product liability cases, we find the entity in the testimony before the Commerce Committee, unquestioned—no one has proved otherwise—unquestioned, that there are less filings and less verdicts and less plaintiffs' victories all the way across the board. So if the legal system is out of control, it is out of control for other reasons but not product liability.

''The high cost of litigation and large damage awards translate into higher prices for consumers.'' I just reread that my way: The high cost of litigation and large damage awards translate into higher safety for the consuming public of America. That is what it translates into. And it ought to go into the costs. It is a minimal cost to them to put out safe products. And the best of manufacturers want to do that and they brag about the quality now of their particular manufacture. They brag about their quality of manufacture. So it is not high cost translating into high prices but, let us say, a higher degree of safety.

''Typically, less than half the money awarded in product liability cases goes to compensate * * *'' We find that is incorrect. There was a study by the National Insurance Foundation to the effect that, yes, the claimant did not get the majority of the money, but the majority of the money was going to the defendants' attorneys.

You ought to see these billable hours. That is why the Senator from South Carolina wanted to limit billable hours around this town to $50 an hour. I could catch the thrust of the movement earlier last week, when they came in, about the money going to the claimant as compared to the money going to attorneys. And the thrust was that they had given up on Girl Scout cookies and they have given up now on Little League baseball and all these other things they tried to raise, competitiveness and otherwise. Now they say, ''Well, let us kill all the lawyers.''

I say, if you want to get rid of half the 60,000 lawyers in this town, if you want to get rid of 30,000 lawyers, just put not a minimum wage but put a maximum wage, a maximum wage of $50 an hour which will give them the salary of a U.S. Senator. If they worked any overtime, like we do work overtime as Senators, they could easily make $200,000 a year. But that is where the compensation is going. It is just like the situation, if you had a $100 finding, you would find that $40 would go to the defendant's attorneys, $20 would go to the plaintiff's attorneys, and $40 to the claimant.

(Mr. THOMPSON assumed the Chair).

Mr. HOLLINGS. Mr. President, the rationale of this simple statement is get rid of or kill all of the lawyers; get rid of the trial lawyers because—the next sentence is—''The winner is the trial attorney, not the American consumer.'' If you think this crowd is interested in consumers, just get all the consumer legislation and look at their votes on that.

But going right back to the report, in the 103d Congress, I knew we had this when we had the hearings. In a 1977 survey conducted by the Insurance Services Office, for every dollar paid to claimants, insurers paid an average of an additional 42 cents in defense costs; while for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents of that dollar. Thus, in cases in which the plaintiffs prevail, out of each $1.42 spent on litigation, half of that goes to attorney fees, with the defendants' attorneys on average paid better than the plaintiffs' attorneys.

That is the national insurance consumer organization finding that the attorney for the insurance companies received on the average close to one-third more than the average attorney's fee paid to plaintiffs' attorneys. I am glad I quoted that for the record, but that is not the way this letter reads. ''The winner is the trial attorney.'' We are not winners or losers. But if you are going to characterize, as my distinguished friend, Mr. Drew Lewis, does here in the letter about the winner, he says, ''The winner is the trial attorney, not the American consumer.'' Absolutely false. We have all the facts and all the hearings proving otherwise.

Going now to the final two sentences, ''If American business is going to succeed in the global marketplace, and American jobs are to grow, your vote is critical.'' What is the inference there? The inference regarding the global marketplace is that product liability costs and the burden on American production is a cost and a burden not suffered by foreign production. We will go right to the heart of that matter.

In addition, working over the years—and I have had a delightful experience, I have to immodestly acknowledge, with respect to the attraction of industry to my own State, and I will be glad to meet with anybody and we will compare the records. We will compare the endeavor, and we will compare the results. I have had the experience of working at the local level on the attraction not only of the American blue chip corporations, but those in the global marketplace. Admittedly, of course, many of the blue chips are in the global marketplace. But let us go directly to the ones we know. Let us say German industries and Japanese industries.

In our great State of South Carolina, we have over 100 German industries. I made the first trip over there with the Governors, to the various communities in Germany, with an industrial group to attract investment in South Carolina in 1960. So that is 35 years ago. We just got, of course, BMW. BMW, by the way, in Spartanburg, stands not for Bavarian Motor Works, but BMW stands for ''Bubba Makes Wheels.'' We have a wonderful system down there.

I was with the Vice President this last Friday at a luncheon. We put out 20,000 and some BMW automobiles this year from Spartanburg, SC. Do they have a problem with product liability? Not at all. I went to Bosch not long ago. They came in making fuel injectors for all automobile manufacturers, and more particularly now have become expert in antilock brake manufacture. They have a 10-year contract with General Motors for all the antilock brakes on their cars. They have the contract for Toyota and Mercedes Benz. I turned to that manufacturer. I said, ''What about product liability? How many product liability claims?'' He said, ''What is that?'' I said, ''Product liability? You know, where you have a defective antilock?'' ''Oh, no, no, no,'' he said, ''We will not have that.'' He went right over on the line and he picked up one of the antilock brake devices.

He said, ''See. See that serial number.'' He said, ''We have a serial number on every antilock brake that comes out of this factory. We would know immediately by that number if there was a defect where it occurred. But we haven't had any of that occur down here, and we are not going to have any of that occur.'' And he was proud—proud—not whining and crying through political representation up here in the national Congress about saving consumers money. He was proud of putting out an absolutely safe product.

Can you imagine one of those antilock brakes not working and the other three working on an automobile? It would turn it over into a tailspin in a minute. They know it. So they are super careful in their manufacture. That goes into the cost of the product. And, yes, it costs consumers, and consumers welcome paying that higher price for the antilock brake and safety.

Mr. President, it goes to the safety, not the cost. But what happens in Germany? In Germany, they come with Mercedes Benz down in Alabama where, incidentally, both Alabama Senators are opposed to this bill. Both Alabama Senators are opposed to this bill. Mercedes Benz says, ''We love Alabama, and we are putting our new manufacturer down there.'' BMW says, ''We love South Carolina and its product liability law,'' just like Mercedes Benz likes Alabama's product liability law, and they put a factory there. I have over 100 German factories liking the product liability law in my State. I have over 50 Japanese industries liking the product liability law in my State. But they are not a member of the Business Roundtable.

So what you have here is this mailing out of absolutely unfounded conclusions, which is an embarrassment to this Senator. Specifically, you look at what they put out in their advertisements when it comes to punitive damages and product liability. Here is the ad they are running in newspapers. This is an easy one to carry. It is entitled, ''Let's Put an End to the Lawsuit Lottery.''

You know, my conservative friends, when they get this rap music, say, ''You have to cut out that rap music. It teaches violence.'' There was one that I remember even President Clinton as a candidate took to task, about ''kill all the cops,'' the ''cop-killer'' one. He complained then. The American public went along with him and voted for candidate Clinton to become President because those words mean something. They want to cut all of that out. Now that they are blowing up buildings in America, and some people say, ''Oh, no. Words don't mean anything.''

The truth of the matter is, Mr. President, my colleagues on the other side of the aisle have a school where they teach them to use words. I think this is a good time, since this is the thrust of the measure here, if I have it here in one of these files. With respect to the words, they come in and they hold a school. I know they attend a school, these newcomers to public office. I will see if I cannot find that, generally speaking, so that the colleagues can be educated about what is really going on. But this is a school that the distinguished Speaker has been running for years. He tells all the candidates that have come in. I know when a new Republican is elected from South Carolina, he has to attend a school to find out how to talk. And, in fact, if they can get them ahead of time, they tell them how to campaign and how to use words that inflame, words that stir up.

It was put into the RECORD some time ago; I think back in 1990, if I am not mistaken. But we had the meaningful words. I certainly would like to be able to refer to that, because what happens is that they call this—that is, the Government here in Washington, and this is reported in the David Broder column. They reported that the Government in Washington is the ''corrupt, liberal, welfare state.''

These are the handouts in the schools that they give to my Republican colleagues and say you ought to all join in. And they list the word ''corrupt.'' They list the word ''liberal.'' They list the word ''welfare.'' So the revolution, according to Speaker Gingrich in his courses, is against the corrupt, liberal welfare State. And that is the way they refer to it.

Mr. President, let us go to the words here about the lawsuit lottery. There is not any lottery, I can tell you that right now. All you have to do, if you defend a product liability case, is convince one juror. That is all you have to do, raise a doubt in one juror's mind because it has to be a unanimous verdict by the greater weight of the preponderance of the evidence.

But here is the mailout that they put in the advertisements that they have going now for the past several weeks. ''Let's Put an End to the Lawsuit Lottery. It's sad,'' this article says, the advertisement, ''but the civil justice system in America has become nothing more than a legal lottery.''

That is outrageous nonsense. It is embarrassing to see things being sponsored by responsible business entities that have buddied up together here in what they call the Product Liability Coordinating Committee.

It goes on to read, ''With juries returning one outrageous award after another, it's not surprising that the number of product liability suits is skyrocketing.''

Absolutely false. We have had hearings upon hearings upon hearings, and the filings and the suits themselves are less and less each year. The awards given are less and less and the number of plaintiff victories are less and less. But this ad says they have skyrocketed—no basis in fact.

''There are 51 separate laws, one for each State and the District of Columbia, governing product liability.''

There are 51 separate laws, Mr. President, governing insurance companies. Do you see them up here complaining? They have to file every one of their policies they want to sell in any one of the States. Get these casualty companies together and ask them when are they going to complain about filing all of these policies here, 50 to 60 different policies that they have now, in each one of the 50 States. They are not complaining about that. In fact, they want the McCarran-Ferguson antitrust exemption so they can get together. They want to continue. I have suggested maybe we ought to federalize it because they are in interstate commerce. ''Oh, no, no, no, we don't want that. We don't want you to see our records.''

We have had hearings upon hearings upon hearings. We never, in the 15-year period of handling this problem, have been able to get from the casualty insurance companies their costs and profits, their records. Even the Senator from West Virginia has put on an amendment, which I am constrained to submit later on when we get to the actual bill itself, to say that they file these reports. They never have. They do not want to.

The reason we asked for these facts way back almost 15 years ago, they said it was impossible to obtain insurance, impossible to obtain. They have plenty of insurance. It is easily obtainable. And we wanted to find out, as was later found out in other hearings, if they, like the S&L's and all, had made bad investments in real estate and where their losses came from—not from a product liability litigation explosion but, rather, sorry investments in real estate and supermarket and shopping center developments. They made the same mistake that all of these banks and insurance companies and savings and loan institutions had made.

But this says 51 separate laws. If you did not know what you were reading, you would say, ''Good golly, Moses; let's get uniformity.'' They do not want uniformity even under this. If they wanted uniformity, they would give you a Federal cause of action. That is why, one of the big reasons, the American Bar Association says this adds complexity; this is not uniformity. You have words of art: requirements, findings, measures of evidence, exemptions of evidence, all to be interpreted by 50 separate supreme courts and the circuit court of appeals here in the District of Columbia.

Now, try that on for a lawyers' full employment act. Come on. Everyone knows that if they really wanted uniformity, they would have required a Federal cause of action and they would have uniformity and that would have at least cut down on some of the multiplicities—the appeals, the interpretations, the motions and everything else of that kind in the 51 separate laws and separate jurisdictions governing product liability.

''But today the outcome of a lawsuit can depend more on geography than the merits of the case.''

They know that. Their commercial code, the Uniform Commercial Code, is anything but uniform. You can sit up there in New York. You can sell a product made in Canada and solicit down in Alabama and deliver it, by gosh, to the factory site in North Carolina, and you can say, ''Under my interpretation of this particular contract, I select the New York law.''

You have got what they talk about, forum shopping. The manufacturers do just that. They know about that. But unless you have diversity of jurisdiction—and I do not go over to Alabama, I never have heard of a South Carolina lawyer going over and suing in Alabama. They act like all we have to do is go over there and file the case in Alabama.

''The current product liability system with its patchwork of local laws''—patchwork. Who has given us patchwork? Read this bill. ''* * * with its patchwork of local laws got its start at the turn of the century when businesses were all so local, but times have changed.''

They are trying to give a sense of history to this. This is absolutely false. During my 20 years of law practice before I came to the Senate, I never heard of any of this, ever. And they continue to do business under different laws in the 50 different States under the interstate commerce clause and it is not about times have changed.

''American-made products now travel across State lines''—well, they have always traveled across State lines.

I will never forget Henry Grady and the funeral in the days just after the Civil War. The Senator from Tennessee would remember it. I think they said that he was a poor man, buried, let us say, in South Carolina. He was buried with a New Jersey frock and some New York shoes, and the buttons were made in Minnesota, the wood for the shovel had come from New Hampshire, the steel had come from Pennsylvania, and they went on and on down there about the caskets and all. They said the only thing South Carolina furnished was the hole in the ground.

Now, tell me about traveling in the different States. That is Henry Grady 100 years ago. They say no, times have changed now and all products travel across State lines. ''Unfortunately, so do plaintiffs and their lawyers seeking the most favorable State for their claim.'' Unless you have diversity, you do not run around and seek anything of that kind. And you have the client in the community where the client is injured. I can tell you now, having tried these cases, that you go try it in the vicinity of the client where they can understand and know the injury and we might get a friend on the jury or an acquaintance or whatever it is. Sometimes the blind hog picks up an acorn. You might get a break. If I go to another State, that immediately cuts me down to next to nothing with respect to the fee, if I have to go and get the lawyers who know the local law there, let us say, if I went to Birmingham, AL, I would have to give all the moneys to the lawyers in Birmingham.

I am not a passthrough for lawyers in Birmingham. I am trying my clients' cases in my own State.

This is outrageous hogwash here and they know it.

''Unfortunately, so do plaintiffs and their lawyers seeking the most favorable state for their claim. This not only hurts competitiveness, it stifles innovation, eliminates jobs and hurts all Americans.

How can we stop the lawsuit lottery? We need a uniform, modern national product liability law.

But it's time for Congress to act. When it comes to the lawsuit lottery no one wins.

They do not say that for automobile accident cases, where there is a far, far higher number of different laws, different highway speed laws, degrees of care, comparative negligence, contributory negligence, go right on down the list, all the automobile accident cases and, in this case, automobile product liability cases.

They do not say that here with respect to medical malpractice or the securities or anything else.

Then they have a little thing like they are even trying to mimic Oliphant: ''Less than half of all money awarded in a lawsuit goes to the victim.'' Like they are for the victim.

It is clever. But it is outrageous blasphemy, I can tell you right now, to put this kind of thing out to the unknowing public and perhaps to the unknowing Congressman and Senator. We know better.

What we have is a solution looking for a problem. What we have here is trying to find justification for a lobbying effort that has been going on with the AMA, the Business Roundtable, and the Conference Board for 15 years, where they seek out the candidates and ask for a commitment and, generally speaking, get that commitment without any hearing.

And certainly if they are newcomers to this particular Senate, they have not had any hearings in the Commerce Committee. We had 2 days because we were told we had to agree to it, because we had to move, we had to catch up with the Contract With America. We did not have hearings in depth. We had them by reference. I had to include other hearings that we had with respect to the law professors that oppose this measure, with respect not only to the American Bar Association now but the American Bar Association in each one of the five hearings that we had over the 15-year period, and all the other entities that went into depth on this matter.

And that is what they hope to do here with this fix that is on in the U.S. Senate. And do not come up with, ''Oh, we are looking out for consumers.'' They have the audacity in the same instrument here to say they look out for consumers when they exempt the manufacturers. The unmitigated gall of that provision is just so offensive it gets me stirred up.

How we ever got good, right-thinking folks on the floor of the U.S. Senate proposing this measure, saying that they are proposing it for the consumer, I do not know. Show me that consumer. What is that saying—''Let them come to Berlin.'' Well, show me that consumer. Heavens above.

The Consumer Federation, Consumers Union, Public Citizen, all the consumer groups again appear in opposition to this particular measure, particularly with respect to punitive damages.

One more time. On punitive damages, go ahead and cite your two or three little cases that sound outrageous. I do not have the time to run down and search out every one of the cases to find out whether the amount of the verdict was cut, whether it was changed.

Just like the McDonald's coffee case. Once we searched that out, we found out, yes, there were third-degree burns over one-sixth of the injured woman's body, 3 weeks in the hospital. After 700 calls and an offer to settle for $20,000, they totally ignored it and said we put this in the cost of the product, because the hotter we make the coffee, the more coffee we produce.

It is money, money that concerns these manufacturers on product liability. That is the one thing, the bottom line. It is not the safety of the citizenry in America, but it is the money that they are interested in.

But of all the product liability cases, what we have found, as they sum up over the last 30 years, is some $1.333 billion. One verdict in business suing business, Pennzoil versus Texaco, a $3 billion punitive damages finding in just one case, is twice the number of the consummate sum total of all product liability punitive findings in the last 30 years. Or take *Exxon Valdez,* another $3 billion in punitive damages.

At the court level, I do not think the courts of this land have gone crazy. They have been all the way up to the Supreme Court to question the constitutionality of punitive damages. And each State either avoided it or it is measured or it is rescinded and sent back with a cut or total elimination.

Look under the steps that I have read here with respect to the South Carolina law. I can go down some other States laws if they are interested.

As a matter of punishment, we spank the baby when the baby misbehaves, that crowd that wants the family bill. What we are trying to do is spank the manufacturer when the manufacturer misbehaves and tell them, ''Don't repeat this. Don't you do this again.''

And when you tell that manufacturer, you have to look at his size, you have to look at his income, you have to look at his culpability, you have to look at his willfulness, whether it was mere neglect or whether it was a willful act, whether they had any warnings or disregarded or heeded the particular warnings, whether it was a mistake or exactly what. And you have to prove all that by the greater weight of the preponderance of the evidence to all 12 jurors and to the trial judge.

I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, nominally, at least, the issue before the Senate at the moment is the Dole amendment. The Dole amendment, which incorporates the limitations on punitive damages proposed by the Senator from Maine [Ms. SNOWE], and accepted earlier here today, would extend those limitations from the product liability sections of this bill and the now medical malpractice sections of this bill to all actions. In other words, we would have one uniform standard of limitations and relatively one uniform definition of the degree of proof required for punitive damages in all States which have fewer limitations at the present time or no limitations at all.

Mr. President, the majority leader has outlined some of the persuasive reasons for this extension. The primary reasons being the impact on small businesses which now live under the Damocles sword of a punitive damage judgment which can literally put them out of business and the increasing and adverse impact of punitive damage awards or potential punitive damage awards on nonprofit organizations, including charities, including, as the majority leader pointed out, the Girl Scouts, Little League, and the like.

I find these reasons to be persuasive reasons. I find it easy to be persuaded because it has been my view, almost from the time that I began to practice law, that the rule with respect to punitive damages in the State I represent, the State of Washington, which prohibits punitive damages for all practical purposes in all civil litigations, to be the appropriate rule.

Punitive damages are just exactly that. They are a form of punishment. In our society and American tradition, punishment by the Government or at the hands of the Government is traditionally reserved for the criminal code. The criminal code carries with it privileges against self incrimination, a requirement that the prosecution prove its case beyond a reasonable doubt and, of course, explicit statutory limitations and definitions of what punishment is appropriate in connection with a particular crime. None of these projections exist with respect to punitive damages. Juries decide them on an ad hoc basis, generally speaking, on whether or not the same conduct or product resulted in punitive damages.

There is, of course, no self-incrimination. The standard of proof in many States is a preponderance of the evidence, and even in this bill it is clear and convincing evidence, which falls short of the beyond a reasonable doubt standard. And most significantly of all, there are absolutely no limitations on the amount of punitive damages, thus the degree of punishment which can be imposed on a given defendant in civil litigation.

The Supreme Court of the United States has heard several appeals of large punitive damage judgments, appeals based on constitutional protections through the 14th amendment. The Supreme Court has never come up with a standard, with a maxim, by any means, although there have been hints

that punitive damage awards that exceed four times the actual damages come close to reaching some potential constitutional limitation.

So from my perspective, I believe that it is both constitutional and appropriate for the Congress to deal with these issues and for the Congress to adopt the rule of the minority of the States—my own included—that say punishment should be reserved for the criminal code and that civil litigation should make a claimant whole, a wronged claimant whole, but do no more. As a consequence, I find it easy to support the relatively mild limitations which are included in the amendment proposed by Senator DOLE, the majority leader of this body.

My friend from South Carolina, with whom I have engaged in debates on this subject in the Commerce Committee and here on the floor, is most eloquent on the other side of this issue. Whatever his point about a political organization which trains its candidates in rhetoric may have been, it is very clear that he does not need any lessons in how to present a case forcefully and well. He does it here on this floor in this connection and in many others. But I must admit to being puzzled by at least some elements of the point that he makes. He says that because certain foreign companies—in this case in the automobile business—are willing to locate their factories in Alabama, that must mean they love the Alabama laws with respect to product liability.

Well, Mr. President, there is no connection between the two. Just because the market for manufactured products is nationwide, the location of a particular factory is absolutely irrelevant. Those automobile companies can be sued, for all practical purposes, in any State because they sell their automobiles in every State, whether it is the State in which their factory is located or some other. In fact, if there might be any possible motivation created by product liability laws, which I doubt, it would be to locate your factory in the most notorious plaintiff-minded State because at least the judgments in that State would not be against an out-of-State manufacturer but an in-State one, which might create the tiniest degree of sympathy for the manufacturer. But the location of a place at which a manufacturer operates and the product liability laws of that State simply have no relevance to one another at all.

The question before this body is whether we are dealing with product liability or with medical malpractice or, for that matter, with tort litigation in general. Do we have a system at the present time that appropriately balances the interests of claimants, people who have been injured or claim injury as a result of the use of products or as a result of the quality of health care they have received, or as a result of any other kind of act; do we properly balance their rights in court with other undoubted purposes of our society?

In the case of product liability, have we properly balanced it with our desire that our companies spend large amounts on research and then develop new and improved products and then market those products or market existing products—sometimes for dangerous occupations where inevitably someone using the product is going to be injured? Or do we have a system which is so unbalanced that perfectly legitimate products are taken off the market, not because they are unsafe but because they simply cannot create profits enough to run the risk of litigation, even of successful litigation.

Incidentally, Mr. President, very little has been said here on the floor about the impact of unsuccessful litigation in these areas. The attorney's fees, the expert witness fees, the cost in time and effort on the part of employees is every bit as much when the claim is rejected, when there is a verdict in litigation for the defendant, as it is when the litigation lottery turns out exactly the other way. Any intelligent individual or company is going to say, ''I know I am going to get sued and even if I am successful, I am going to spend more money than I can possibly make by marketing the product or engaging in the activity.'' That individual is going to say, ''Why bother?'' Even if that individual or that company has produced something good for society or is a part of the medical profession that is frequently sued or, for that matter, is a Little League volunteer or Red Cross volunteer, that volunteer figures he or she has a good chance of being sued, and it hardly matters whether they calculate that they will lose or win the lawsuit. They are going to say, ''I do not need the aggravation.''

It seems to me that it is almost beyond arguing that we have constricted the activities, restricted the activities, of individual volunteers. We have caused physicians with many productive years left in their careers to abandon those careers and to retire when they become reasonably financially comfortable. We have caused companies to abandon promising areas of research and development. We have caused the removal from the market of significant products by the threat of litigation, by the lottery of litigation—not just litigation that is going to be lost, but litigation which, more often than not, is won.

We have done this all in the name of a system which produces only a relatively moderate percentage of the dollars that go into it for claimants who actually establish their claims. A claimant who loses the case, of course, ends up with nothing. But claimants taken collectively who win these cases, at least in the fields of product liability and medical malpractice, win less than half the cost of the system.

Sixty percent, roughly, of the dollars that go into the system go to the lawyers and insurance adjustors and hired expert witnesses—all of the transaction costs of the system.

So we have a system which not only penalizes volunteers and restricts the operation of our health care system and restricts research and development and the production and sale of goods, but one which is extraordinarily inefficient in compensating the actual real victims of breakdowns in the system itself.

To say, as opponents do, that somehow or another this presents no national issue whatever just seems to me to beg the question. There is a problem. In a national economy, it is appropriate that at least there be a partial national solution to the problem.

Yes, we have not attempted to move all of these cases into Federal courts with the requirement that we probably double the number of our judges and courthouses. We have not made an entirely uniform system.

However, we have created in this bill a considerably greater degree of uniformity than there is now. We have even, in one section, said that the interpretation of this statute by circuit courts of appeals are going to be strong precedents for all State courts and all other Federal courts in those given circuits.

So the degree of uniformity as a result of this bill will not by any means be 100 percent. It is not designed to be 100 percent. However, it will be far greater than it is at the present time, and the predictability of the result will be greater than it is at the present time, and the lottery aspects of the business will be fewer than they are at the present time.

If we learn from the experience of this bill that greater uniformity is not necessary, we can go ahead and change it in the future. This is not an unchangeable law, by any stretch of the imagination.

We can at least find out, by this cautious and partial experiment, whether or not the evils ascribed in this legislation are true, but whether or not there is a cure or a partial cure as a result of this legislation.

I come back to one initial point, Mr. President. We have already tried this solution in one modest area of our Nation's economy: The reforms we made just a year ago in connection with the manufacture and sale of piston-driven aircraft. It is now clear beyond any argument that that business, that manufacturing business, was for all practical purposes destroyed by product liability litigation.

The production of such aircraft declined 95 percent in the United States of America over a 20-year period, ascribed by the manufacturers to product liability litigation.

Those manufacturers said that there would be a recovery if we reformed the system. We did reform the system a year ago, more modestly than the product liability system is reformed here, but in a significant fashion.

Already, there has been a significant recovery, including the planning and construction of new plants and an increase in the production and sale of U.S.-built piston-driven aircraft.

This side in the debate is able to argue not from theory but from experience. That experience would, it seems to me, give extraordinarily heavy weight to saying that if we expand it, if we expand it to other areas, we will have a similar, if perhaps not so striking, increase in the creation of jobs in this country, in the development and marketing of new products, of voluntarism, if the DOLE amendment passes and the like.

I hope we will be able to go forward, Mr. President, and cast votes on these various amendments and the other amendments before the Senate, and reach a positive conclusion to this debate within the immediate and foreseeable future.

Mr. HOLLINGS. Mr. President, I thank the distinguished Senator from Washington.

I mention once again the Girl Scouts, because I want to try to clean up the RECORD here. What I will read here is the Associated Press report:

When advocates of tort reform went looking for sympathetic symbols, they thought they had found a winner—the Girl Scouts of America. The story spread quickly among tort reform lobbyists and their supporters on Capitol Hill, and it was compelling. Girl Scouts in the Nation's Capitol have to sell 87,000 boxes of cookies each year just to cover the cost of their liability insurance. The lobbying and public relations machinery went into high gear. The U.S. Chamber of Commerce produced a radio ad using the information, and a business coalition began planning a television spot showing a Girl Scout trudging door to door with a basket of Thin Mints and S'Mores. But when the Girl Scouts got wind of it, they called a halt. The 87,000-box statistic was undocumented, they said. The Girl Scouts do not consider damage suits much of a problem. The local council in Washington has never been sued, and the National Accounting Organization takes no position on tort reform legislation. ''They found an easy and emotional issue that they could get hold of,'' said Sandra Jordan, spokeswoman for the Washington Area Girl Scouts. People will take a sound bite on easy image over hard information.

Therein, Mr. President, is my position in referring not only to Girl Scouts, but to the sound bites here with respect to ''Let's put an end to the lawsuit lottery.''

Now, we are not talking about product liability reform or uniformity or, more correctly, any kind of abuses of the law. They immediately call it a lottery and skyrocket, and all these words that have been used; ''The lottery wins, and the consumer loses,'' and that kind of thing.

I referred a moment ago to the matters of words with respect to these words being used here. I know some in this Congress are very sensitive about it. However, it has had its effect.

A former colleague here had introduced this, and we had it received otherwise back in 1990, because I am referring to the one who is disassociating himself from his GOPAC movement, because here is a GOPAC movement that I will read out, and I will say how it has had an effect in my State with respect to the Government being the enemy.

This is a GOPAC letter, signed by NEWT GINGRICH, and it is addressed:

Dear friend: The enclosed tape is another in the regular series of GOPAC audio cassettes, but is more than just another tape. This is a special lecture I delivered just a few weeks ago on August 22, 1990, to the third-generation group at the Heritage Foundation.

I am sending you this tape in the belief that it contains a timely and extraordinary message that could be of help to you in the coming months. While most activists and legislative candidates are not asked to give your views on Iraq, the Mideast crisis, the budget conference, and the state of the economy, it is critical that you have the tools available that will help you take the offensive and define the agenda of the campaign based on our values rather than falling into the trap of merely answering the news releases.

I have also included a new document entitled ''Language, a Key Mechanism of Control,'' drafted by GOPAC political director Tom Morgan. The words in that paper attest to language from a recent series of focus groups where we actually tested ideas and language.

I hope this proves useful in writing speeches and other campaign communications. My personal wish for the best of luck in your campaign and everything else.

Then, the GOPAC language is here, ''A Key Mechanism of Control.''

As you know, one of the key points in the GOPAC tapes is that language matters.

I will repeat that sentence. Here is the Speaker himself now saying back 5 years ago, practically:

As you know, one of the key points in the GOPAC tapes is that language matters.

In the video ''We Are a Majority,'' language is listed as a key mechanism of control used by a majority party along with gender, rules, attitude, and learning. As the tapes have been used in training sessions across the country and mailed to candidates, we have heard a plaintive plea: ''I wish I could speak like Newt.'' That takes years of practice, but we believe that you could have a significant impact on your campaign in the way you communicate if we help a little. That is why we have created this list of words and phrases.

This list is prepared that you might have a directory of words to use in writing literature and mail, in preparing speeches, and producing electronic media. The words and phrases are powerful. Read them. Memorize as many as possible. And remember that, like any tool, these words will not help if they are not used. While the list could be the size of the latest college edition dictionary, we have attempted to keep it small enough to be readily useful yet large enough to be broadly functional. The list is divided into two sections, the optimistic governing words to help describe your vision, contrasting words to help you clearly define the policies and record of your opponent in the Democratic Party.

Then, ''Please let us know of your suggestions.''

Now, Mr. President, listen to these words amongst others. We will put them all in the RECORD:

Sick, lie, liberal, betray, traitors, devour, corrupt, corruption, cheat, steal, criminal rights.

I ran into this in my campaign for reelection in 1992. I never heard such expressions before, and I wondered where in the world my opponent was getting all these blase references and words that really, in my judgment, were out of order.

Now let us bring it up to date in two instances. The Speaker himself uses these words. You look in David Broder's column here just about 10 days ago and you will see where Speaker GINGRICH, talking of his revolution, says we have a revolution against the Washington Government. But he does not call it the Washington Government. He calls it—and he has the buzz words, the key words, ''the corrupt, liberal welfare state.''

If these are not inflammatory, I do not know what are. They have had that effect in my State of South Carolina.

I went home to a 600-member State Chamber of Commerce seminar where they bring in the congressional delegation and we answer these questions as they go along. It so happened the distinguished colleague from the 4th district in Greenville, SC, BOB INGLIS, had answered a question and ended up by saying:

Yes, abolish the Departments of Commerce, Education, Energy and Housing.

My turn came immediately afterwards and I said:

Wait a minute. You don't mean to say that the Chamber of Commerce wants to do away with the Department of Commerce?

Yes. Yes.

A good number of them, I would say, a fifth of them, started smiling and putting their hands together. And I said to Dick Riley, the former Governor, popular Governor, Secretary of Education—he was there and I said:

Dick Reilly, do you want to do away with the Department of Education?

Yes, yes, yes.

And HUD and Energy both? All four of them?

Yes.

Half of them clapping and all, standing up. That is what is happening about this ''corrupt, liberal welfare state.'' They feel, irrespective of the functions and the need for these various departments, that the dickens with it. ''The Government is the enemy,'' they say. ''Get rid of the Government. That is the only way. Tear it down, rip it out. Abandon it, abolish it. And then let us start all over again and to be sure none,'' as they say, ''get corrupted. Be sure nobody serves over 6 years, or 12 years in this body.'' That is what you have going on in this land.

I can tell you here and now, words do count. And they count with respect to this, which is a total mislead as to the actual hearings, the facts that we had before us about the lawsuit lottery, who wins and who loses, and about the rights of consumers and everything else. It is entirely different. It is the

safety of consumers. It is the defendants' lawyers on billable hours that are winning, sitting up there just grinding out, trying their own case.

It is a matter not of a lottery but a sworn jury to listen to the facts, reviewed by the trial judge and reviewed by the appellate court. And all back to the issue at hand, punitive damages, a sum total of $1.333 billion, the whole sum total of all punitive damage findings in the last 30 years, which is less than half of one business verdict against another business verdict in punitive damages, in two cases, not only the Pennzoil case but in the Exxon case.

I yield the floor.

Mr. DORGAN addressed the Chair.

The PRESIDING OFFICER. The Senator from North Dakota.

AMENDMENT NO. 619 TO AMENDMENT NO. 617

(Purpose: To strike the punitive damage limits)

Mr. DORGAN. Mr. President, I rise to offer a second-degree amendment to the Dole amendment that is now pending. I send the amendment to the desk and ask for its immediate consideration.

The legislative clerk read as follows:

The Senator from North Dakota [Mr. DORGAN] proposes an amendment numbered 619 to amendment No. 617.

Mr. DORGAN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 1, beginning with line 3, strike through line 2 on page 8 and insert the following:

SEC. 107. UNIFORM STANDARDS FOR AWARDS OF PUNITIVE DAMAGES.

''(a) GENERAL RULE.—Punitive damages may, to the extent permitted by applicable State law, be awarded against a defendant in a product liability action that is subject to this title if the claimant establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct that was carried out by the defendant with a conscious, flagrant indifference to the safety of others.

''(b) BIFURCATION AT REQUEST OF EITHER PARTY.—At the request of either party, the trier of fact in a product liability action that is subject to this title shall consider in a separate proceeding whether punitive damages are to be awarded for the harm that is the subject of the action and the amount of the award.''

Mr. DORGAN. Mr. President, the amendment I have offered deals with the cap on punitive damages in the bill, S. 565, that was reported out by the Senate Commerce Committee. I voted for this legislation because I think, on balance, there is reason for us to legislate in this area. I think there is a problem with product liability legislation. And I think the approach that is taken is generally a reasonable approach. Therefore, I cast a ''yes'' vote. I did say in the committee, however, I was concerned about the punitive damage section and intended to offer an amendment on the floor of the Senate to respond to my concerns. That is what brings me to the floor today.

It occurs to me as I listen to the debate on product liability, as well as the debate on tort reform in general, that this is another one of those cases where there is truth on both sides of this issue. I listened to the Senator from South Carolina, who has spoken not just this year but in previous years on this subject and speaks with great passion and eloquence on this issue. He feels very strongly that it is a mistake for Congress to move forward and to enact Federal legislation in this area. I understand what he says and why he says it.

On the other hand, I hear others in the Chamber stand up and speak with great persuasiveness about the need for Federal product liability legislation to restrain the number of suits that are filed.

My sense is we are a country that litigates too much. We have lawyers all over our country filing suits for virtually everything. I would like to see us litigate a little less in this country. I would like to see judges throw out frivolous lawsuits and sanction those who bring them. I would like to see us back away from this excessive litigation.

Excessive litigation puts many small businesses and others at risk. I talked with a business owner recently and she said, ''They have jacked up my insurance cost to $500 a month. I pay $6,000 a year now for liability insurance to protect me against lawsuits.'' I asked, ''Have you ever been sued?'' ''No, never had a suit against me. But, I have to pay these tremendous costs because somebody might decide to sue me.'' This is a real problem for many.

Some might say this is a problem with insurance companies. That may be, I do not know. I do know we have too many lawsuits in this country and too many people who want to sue. Excessive litigation has an effect on people trying to run small businesses who have to shell out money month after month in order to protect themselves.

On the other hand, there are enterprises in this country that provide products that they know are unsafe. They make these products available to consumers figuring they can make a bunch of money. These corporations accept the risk that a product might hurt somebody in order to make a profit. In most cases their profit will exceed their potential risk for damages. There are plenty of lawsuits that exemplify this.

I think there are merits on each side of this issue. I think we need to pass a Federal standard with respect to product liability. But, let us go back to last year's legislation on the issue of punitive damages. The bill that we reported out of the Senate Commerce Committee last year had no limit on punitive damages. We do change the standard or the threshold. We raise the bar. We require clear and convincing evidence that the harm caused was carried out with a conscious, flagrant indifference to the safety of others. That is the bar you have to get over in order to prove that you are entitled to punitive damages and that this enterprise should be punished for its behavior.

That is an appropriate place to establish burden of proof. You have to prove that there is clear and convincing evidence that the harm is carried out with a conscious, flagrant indifference to the safety of others.

Once you have done that, we should not say to the largest enterprises in this country, those with billions and billions of dollars, do not worry—even though you knew that product was going to harm them, could have killed them, we have put a limit on punitive damages. It does not make any sense to me.

Let us take punitive damages as an issue. The punitive damage section of tort law is to punish or deter a defendant's egregious conduct. There is no litigation crisis with respect to punitive damages. According to a survey, from 1965 to 1990, 355 punitive damages were awarded in State and Federal product liability lawsuits nationwide, an average of 14 a year. Of these awards, only 35 were larger than $10 million. All but one of these awards were reduced, and 11 of the 35 were reduced to zero. This was in a 25-year span.

It is hard for anyone to make the case that punitive damages represent some sort of crisis in the area of product liability. That is not supported by the facts. Congress should decide to raise the bar and create a new, higher standard, higher threshold over which someone who was injured must cross in order to prove punitive damages. To restrict it even further by placing a limit, a substantial limit on what someone can collect on punitive damages, is not justified. I think in rare cases where punitive damages should be or can be awarded, if this test is met, the test of conscious, flagrant indifference to the safety of others, then it is inappropriate for this Congress to provide this limitation.

My amendment would allow the States to debate this and provide their own limitation. Some States have limits. My amendment will not affect those States. But it will say that the underlying bill, S. 565 will not establish a new national standard that will replace every other State that has a limit and replace those specific limits. Or, in cases where States do not now have a limit, tell those States, ''Here is your new limit on punitive damages.'' That is inappropriate.

I hope that Congress will support the amendment that I am offering today, which strikes those provisions in the punitive damages section that limit caps.

I come from a State that is largely a State of small businesses. We have some industry and a few larger enterprises. I have visited with many North Dakotans who have told me of their

view of and their circumstances with respect to product liability. The case they make warrants this kind of legislation. But, it does not warrant a cap that has been placed on punitive damages.

I would like to include in the RECORD some examples of punitive damage cases. I will not go into them. But most of us understand where and when punitive damages have been awarded in this country, and in most of these instances they were warranted and necessary. The fact is the awarding of those punitive damages deter and persuade other corporations from taking the same risk. Corporations who suffered those damages may be more careful in the future.

I think that many safety improvements on products have been made not because of the benevolence of those making the products but because they worry about the consequences of putting an unsafe product on the market. Especially because other large enterprises which put unsafe products on the market knowing they were not safe suffered some very substantial punitive damages.

That has helped this country and the people in this country produce products that are safer and more reliable and products that consumers could purchase without fear of being hurt by the product. I hope that we will have an opportunity to allow others to discuss my amendment. My understanding is that they are seeking some kind of unanimous consent in which we would stack some votes tomorrow. I would like the opportunity to have others discuss the issue of lifting the cap on punitive damages in the underlying bill.

Let me again reemphasize. I am not amending the Dole amendment that deals with issues other than product liability. My amendment will deal with the underlying bill, and the cap on punitive damages in S. 565.

My hope would be that we will continue to debate this issue. As we discuss punitive damages, this Congress ought to consider the option of returning to the language in the product liability reform legislation considered last year with respect to punitive damages. Under last year's legislation a Federal standard would have been established without a cap on punitive damages. The legislation we are considering this year not only changes the standard but imposes a cap. It seems to me this cap is not necessary and inappropriate.

Last year, I was upset about another provision. The legislation that was brought to the floor included an FDA defense, whereby, a product that was approved by the FDA would be immune from punitive damage liability. Last year, I said I will not support that, and I will not vote for cloture until that is stripped out. I voted against cloture, until I was assured that the FDA defense would be stricken. I decided to vote for cloture at that point.

The FDA provision was not included in this year's provision, but, they put in another cap on punitive damages which they did not have last year. That makes no sense to me. I hope that this Congress will come to the same conclusion that I have come to, that this bill is worth advancing, that we should pass a product liability reform bill, but that it should be enacted without the section that includes a cap on punitive damages. I think a cap is unwarranted, unfair and unwise.

With that, I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER (Ms. SNOWE). The Senator from Washington.

Mr. GORTON. Madam President, I thank the distinguished Senator from North Dakota for offering and defending his amendment. It moves this process forward, and as he said we are seeking at this point a unanimous-consent agreement under which we can deal with punitive damages today and tomorrow morning the way in which we dealt with medical malpractice yesterday and this morning, by gathering all the amendments together, debating them tonight and for a while tomorrow morning and then voting on them all in a row.

AMENDMENT NO. 620 TO AMENDMENT NO. 596

(Purpose: To limit the amount of punitive damages that may be awarded in a health care liability action.)

Mr. GORTON. Madam President, at this point I send an amendment to the desk on behalf of the distinguished Senator who now occupies the Chair and ask for its immediate question.

I ask unanimous consent to set aside the pending amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the amendment.

Mr. GORTON. This is an amendment to the Gorton substitute, so I ask to set aside the Dole amendment as well for the purposes of considering this amendment.

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

The bill clerk read as follows:

The Senator from Washington [Mr. GORTON], for Ms. SNOWE, proposes an amendment numbered 620 to amendment No. 596.

Mr. GORTON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 19 strike line 22 through page 20 line 4, and insert the following new subsection:

(b) LIMITATION ON AMOUNT.—

(1) IN GENERAL.—The amount of punitive damages that may be awarded to a claimant in a product liability action that is subject to this title shall not exceed 2 times the sum of—

(A) the amount awarded to the claimant for economic loss; and

(B) the amount awarded to the claimant for noneconomic loss.

(2) APPLICATION BY COURT.—This subsection shall be applied by the court and the application of this subsection shall not be disclosed to the jury.

Mr. GORTON. Madam President, for the information of the Senate, this is identical to the Snowe amendment on punitive damages which was adopted as a part of the medical malpractice amendment which now, as a result of our last recorded vote, is a part of this bill. It differs only in that it is an amendment to the underlying Gorton substitute and imposes the same rule with respect to punitive damages, that is to say, two times the combination of economic and noneconomic damages for the original limitation on punitive damages included in the Gorton substitute.

I have discussed this next request with the distinguished Senator from North Dakota because it is a milder version than his, I think logically assuming that we get the votes tomorrow, that it be voted on before his amendment, and I ask unanimous consent that it be placed on any future agreement to a vote ahead of the Dorgan amendment.

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

Mr. DORGAN. Reserving the right to object.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. And I do not expect we will object, but I wanted to clear that with our side of the aisle, so if the Senator will withhold momentarily.

Mr. GORTON. I will withhold it momentarily.

Madam President, I briefly explained this amendment. I would expect that it would be adopted by voice vote because there was a rollcall vote earlier today on precisely this amendment, and I doubt that the body needs that vote repeated. It is in my view a preferable formula to that proposed by the Senator from North Dakota, which, of course, would remove all limitations and essentially all Federal controls over punitive damages. And it is punitive damages, of course, which is the subject not only of the Dole amendment but of much of the original product liability bill, and it is a formula with respect to punitive damages proposed by the occupant of the chair as accepted by a unanimous vote this morning.

Mr. DORGAN. Madam President, I withdraw my reservation. I have no objection.

Mr. GORTON. I repeat the unanimous-consent request.

The PRESIDING OFFICER. Would the Senator from Washington repeat the unanimous-consent request?

Mr. GORTON. Assuming there is later today an order for votes on all amendments dealing with punitive damages, that the Snowe amendment be voted on immediately prior to the Dorgan amendment.

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

Mr. GORTON. Madam President, I wish to repeat once more that I understand there are additional amendments to be proposed by the Senator from Tennessee [Mr. THOMPSON], the Senator from Arizona [Mr. KYL], the Senator from Utah [Mr. HATCH], the majority leader, the Senator from Kansas [Mr. DOLE], and the Senator from Alabama [Mr. SHELBY], from this side of the aisle and perhaps additional amendments on punitive damages on the other side of the aisle. We have no unanimous consent on the subject yet. I hope that Members who want to speak to the subject of punitive damages and introduce amendments on the subject of punitive damages will do so as promptly as is convenient to them.

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

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

AUTOMOTIVE TRADE WITH JAPAN

Mr. BYRD. Madam President, America's trading relationship with Japan is now reaching a historic, serious phase in what has been a long history of innumerable initiatives and negotiations to gain access for American products into her market. Strong action will very likely need to be taken by the administration, and the support of the Senate and American industry will be important.

The United States and Japan are nearing the end of over a year and a half of negotiations on automotive trade, aimed at reducing our $66 billion trade imbalance with Japan by opening major elements of her closed domestic market to our products. The issue, access to Japan's automobile market, including to her dealerships for American cars, and to the lucrative auto parts market, is reaching a critical juncture. The issue this time involves, once again, more than the securing of commitments by the Japanese in a written agreement to try to do something to open her market. It goes to the heart of America's strategy on how to gain the actual results of opening the Japanese market.

The question is whether we, including both the executive branch and the Congress, along with American industry are all prepared to stick to our guns and take action against Japanese imports if the auto market in Japan remains essentially closed to our cars and our spare parts. Specifically, are we willing to take retaliatory action and impose trade sanctions on her products, under section 301 of the 1974 Trade Act? I say to my colleagues that now is the time to change the paradigm in our trading relations with Japan. If we are not prepared to take retaliatory actions under the law, in a situation which is about as perfectly suited as is possible to the intent of the law as it was written, then we may be looking at a continuation of these deficits in perpetuity.

Madam President, if anyone doubts the persistence of unfair barriers in Japan to her marketplace, then they ought to take a look at the 1995 National Trade Estimate Report on Foreign Trade Barriers, which provides an annual inventory of the most important foreign barriers affecting U.S. export of goods and services, foreign direct investment, and protection of intellectual property rights. The latest report dedicates some 44 pages of material to the subject on Japan alone, far more than to any other country, far more than to the second place, the European Union, most of the important countries of Western Europe combined, which takes up 28 pages, and double that of China, with which country we run our second largest annual trade deficit—44 pages, much of it dedicated to the automobile trade.

How important is the auto trade for America's current account balance and for the American economy? The answer is: as important as any single sector can be. America's trade deficit with Japan in 1994 reached another record high, at $65.7 billion, up 10 percent from 1993, when it totaled $59.3 billion. Of that amount, the bilateral automotive trade deficit accounted for about $37 billion, or 56 percent of the total, so most of our deficit with Japan can be attributed to cars and to auto parts. More than that, the auto trade deficit with Japan constituted some 22 percent of our entire trade deficit with the world. The policy announced by our Trade Representative, Ambassador Kantor—according to his testimony before the Finance Committee on April 4, 1995—is that this deficit is the result of unfair Japanese practices, that it is unacceptable, that he will use every tool at his disposal to correct it, and that, in general, he will use a practical, market-based, results oriented approach to dealing with these non-market barriers. I strongly support this approach, and I believe that the Senate as a whole does as well.

As far as the impact on the American economy is concerned, a strong auto sector is crucial. Two million, two hundred thousand people in the United States are employed in the parts industry alone—such vital industries as aluminum, steel, glass, rubber, electronics, semiconductors, machine tools, and many others. This is on top of the some 700,000 people employed by the Big Three auto manufacturers themselves, the Nation's largest manufacturing industry. Sales of cars and trucks constitute some 4.4 percent of our gross domestic product.

Negotiations with Japan have reached a crucial stage regarding the auto industry's attempts to deregulate the Japanese auto parts market. Negotiations on access to the Japan auto business began as a result of the agreement reached by this administration with the Government of Japan in July of 1993, the so-called Framework for a New Economic Partnership. This framework established a general set of results to be used in specific negotiations, and refocused the criteria for progress away from the process of removing trade barriers to actual results in the way of real economic progress in market penetration. After 18 months of negotiations on automobile negotiations—including access to the motor vehicle market by breaking into Japan's dealerships, the purchase of original parts by Japan's automakers from United States suppliers, and the regulation of the auto parts aftermarket, which is repair parts—Ambassador Kantor has concluded that ''there has been virtually no progress.'' One result has been the initiation by the Trade Representative, on October 1, 1994, of a section 301 investigation of Japan's replacement auto parts market, which is virtually closed.

The difference between the United States and Japanese markets in this area could not be more dramatic and more symbolic of our troubled trade relationship: A Department of Commerce study in 1991 estimated that Japanese vehicle manufacturers controlled about 80 percent of the parts market, while in the United States the situation is the reverse, and independent replacement parts producers account for 80 percent of the market. So, while the United States market is wide open, the Japanese market is closed. To make the situation more unfair to us, the Japanese closed market allows their manufacturers to run the prices up on their own consumers for repair parts. Another U.S. Government survey has concluded that their aftermarket repair parts cost, on average, some 340 percent higher than comparable parts in the United Sates.

This tremendous windfall of billions of dollars in extra profits helps subsidize the Japanese car industry, so that it can compete more effectively in the international market, subsidizing lower costs for Japanese cars here in the United States, Europe, and elsewhere. Therefore, it's a triple whammy: Our parts manufacturers cannot sell effectively in the Japanese market; Japanese consumers get gouged; and the whole thing results in cheaper, more competitive Japanese cars worldwide.

The ''Karetsu'' system of interlocking and cozy exclusive relationships among suppliers, manufacturers, and dealers serves as an effective blocking action against market penetration, and I am advised that the powerful Japanese Government bureaucracy serves to abet this exclusivity in supporting a regulatory framework not conductive to easy access. Japan's competition law, known as the Antimonopoly Act, which prohibits unfair trade practices has, according to the 1995 Foreign Trade Barriers report, a ''weak and ineffective'' enforcement history. The