I am honored to join your family and friends and colleagues in wishing you every success as you embark on your next journey; serving on the Physician Payment Review Commission.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of H.R. 956, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 956) to establish legal standards and procedures for product liability litigation, and other purposes.

The Senate resumed consideration of the bill.

Pending:

(1) Gorton amendment No. 596, in the nature of a substitute.

(2) Dole modified amendment No. 617 (to amendment No. 596) to provide for certain limitations on punitive damages.

(3) Dorgan amendment No. 619 (to amendment No. 617) to establish uniform standards for the awarding of punitive damages.

(4) Shelby/Heflin amendment No. 621 (to amendment No. 617) to provide that a defendant may be liable for certain damages if the alleged harm to a claimant is death and certain damages are provided under State law.

(5) DeWine amendment No. 622 (to amendment No. 617) to provide protection for individuals, small business, charitable organizations and other small entities from excessive punitive damage awards.

(6) DeWine amendment No. 623 (to amendment No. 617), regarding asset disclosure.

The PRESIDING OFFICER. Under the previous order, there will be 1 hour for debate equally divided and controlled by the Senator from Washington [Mr. GORTON] and the Senator from South Carolina [Mr. HOLLINGS] or their designees, prior to any votes ordered on or in relation to the Dole amendment No. 616.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent to speak as in morning business for 4 minutes.

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

BUDGET DELAY

Mr. FEINGOLD. Mr. President, I add my voice of concern over the delay in action of the Federal budget. It is now May 3. That is over a month after the April 1 deadline for the Budget Committee to report a concurrent resolution on the budget. It is also nearly 3 weeks after the April 15 deadline for Congress to have completed its work on that concurrent budget resolution.

I raise my concern, Mr. President, knowing that not every budget deadline has always been met, nor do I suggest that the task facing the Budget Committee is an easy one. It is a very tough one. But by this time, during the two sessions of the 103d Congress, we had considered and passed a concurrent budget resolution through the Senate.

In 1994, we passed the Senate version of the concurrent budget resolution on March 25, and agreed to a conference report on May 12.

Moreover, those concurrent budget resolutions contained politically tough deficit reduction provisions, and were submitted, debated, and passed at a time when a new administration was taking office—the first Presidential party change in 12 years.

Mr. President, many of us on this side of the aisle are ready to help craft a budget that will eliminate the Federal deficit.

We have demonstrated that we are willing to vote for politically unpopular proposals to lower the deficit.

In 1993, when we were the majority party, we developed and passed a $500 billion deficit reduction package.

We are still very sorry that no member of what was then the minority party decided to support that package, though it was certainly the right of each Senator to vote as they saw fit.

Beyond the individual right of minority members, though, during the 103d Congress it was our responsibility as the majority party to advance a budget, not the responsibility of those on the other side of the aisle who were in the minority at the time.

Mr. President, it is the responsibility of the majority party to propose, refine, and pass a budget, with or without the help of members of the minority. We want to be a part of that process and to cooperate. But it is first the responsibility of the majority.

It is the privilege of the minority party to respond, offer alternatives, and, when conscience requires, to dissent from the budget proposal.

Such is the political dynamic of our legislative process.

And our colleagues on the other side of the aisle exercised their privilege as the minority party in 1993, and refused to join us in making that tough deficit reduction vote.

Mr. President, the two parties have exchanges roles in the 104th Congress, but the duty of the majority party remains unchanged.

It is the majority party that sets the agenda, proposes a budget, and finds a way to pass that budget.

By contrast to the last Congress, however, I know a number of us in the minority are willing to support a budget resolution that reduces the deficit.

We will help shoulder the burden of passing a budget that reduces the deficit.

But, Mr. President, before we can provide that cooperation, we must have a budget to work with.

The choices that face us are already extremely difficult.

Each day we delay they become even harder.

We are all very much aware of how our budget problems are accelerating, and what delay means in lost fiscal opportunities.

But delay also risks the political consensus that must be achieved if we are to make significant progress on the deficit.

Mr. President, without public support, we cannot hope to find the votes for a balanced budget.

I don't mean to suggest that we can only pass a budget if the American people are enthusiastically behind every provision.

That is not going to happen when doing spending cuts.

If we could find such a proposal, we would have balanced the budget a long time ago.

Nor do the American people expect or even want such a budget.

They rightly are skeptical of those who promise easy solutions.

Mr. President, what the American people do want is to feel that their elected Representatives are being straightforward and open with them about what they propose.

They will not support a budget that is the product of closed-door meetings, held in the dead of night.

But they will support a budget that is openly debated.

They are willing to sacrifice if they feel that the process has been open and fair.

Mr. President, this budget delay really amounts to a budget blackout.

The longer the delay, the longer the blackout, and the less likely that we will be able to build the political consensus with the American public that we will need to balance the budget.

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

Mr. HEFLIN addressed the chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Mr. President, I would like to address the Dole amendment and its relationship to other parts of the bill.

The Dole amendment, of course, extends the provisions of this proposed bill to all civil actions involving interstate commerce. That includes almost every automobile accident, and every conceivable type of accident, not just product liability cases. And, as we know, the language ''interstate commerce'' has been so liberally construed up until the very recent Lopez case that it includes almost any situation. There are many examples, too numerous to cite here, that can demonstrate the liberal construction of the interstate commerce clause.

Let me first recite the provision not only in the Dole amendment but in the overall bill pertaining to punitive damages, that if you seek punitive damages and any party can call for a bifurcated trial which means that at the request

of any party, the trier of facts, the jury, shall consider in a separate proceeding as to whether punitive damages should be awarded. By the way, bifurcated proceedings will result in an increase in transitional costs which is somewhat ironic in as much as the proponents of this legislation have maintained that one of the bill's objectives is to reduce, not increase, transactional costs.

If there is evidence of punitive misconduct, it is inconceivable to me that any defendant would not take advantage of a bifurcated trial. So, all punitive damage cases will have two trials. In the first trial, which is the trial in regard to underlying liability, compensatory damages will be sought, which includes noneconomic damages and economic damages, and all of its component aspects. There is this provision in the Dole amendment, and also in the overall bill—it is just a repetition put here—that evidence relative only to the claim of punitive damages as determined by applicable State law shall be inadmissible—not admissible, but inadmissible—in any proceedings to determine whether compensatory damages are to be awarded.

That means that in an automobile accident case or in a truck/automobile case, you could prove negligence in the trial in chief, but you could not prove gross negligence. Basically, what that means—and every defendant who would come along would argue—yes, you can argue that the truck that caused the accident, that did the wrongdoing, crossed the center line and hit an individual. But you could not prove that the driver had three beers or had a pint of whiskey, because that issue would go to the punitive damage aspect of the case. You could not prove basically that the owner of the truck knew, under these circumstances, that that driver had been convicted four times before of drunk driving. You could not prove in the trial in chief that the driver of that motor vehicle—and it was known to the owner of the truck, the truck company, that defendant had been convicted twice of reckless driving. You could not go into any aspect that would be evidence relating punitive damages and punitive misconduct.

Now, you could not prove in the Pinto automobile cases that there was a memorandum to the effect that a company will come out financially better rather than having a recall because of the location of the fuel tank and the certain danger that would result in the case of a rear end collisions. The memorandum in question showed that the company would come out better financially and with less expense to just pay off the claims that might arise from rear end collisions.

Now, how does this relate also to the Snowe amendment which is in the Dole amendment? We have to go in and look to several liability for noneconomic loss. Under the Snowe cap, the cap on punitive damages is twice the amount of economic and noneconomic damages.

Section 109 of the bill on the matter of several liability reads

> Each defendant shall be liable only for the amount of noneconomic loss allocated to the defendant in direct proportion to the percentage of responsibility of the defendant determined in accordance to the harm to the plaintiff with respect to which the defendant is liable.

Therefore, in a motor truck and automobile accident, if a person were suing for punitive damages in a particularly egregious situation and trying to prove noneconomic damages, such as pain and the suffering, for example, and being aware of the basis for the cap of the Snowe amendment, that person could not prove against the owner of the truck that the owner knew of four convictions of drunk driving and two convictions of reckless driving in his efforts to establish the several liability of the driver and the owner of the truck.

How can a person establish under not only the Dole amendment but under the bill as a whole the amount of noneconomic damage, for example, against the owner of the truck?

Now, that is just one example, and there are probably a multitude of other examples. There are other aspects, but these two relate together in that, together, they put an injured party at a terrible disadvantage. It in effect says, regardless of the injury or the human element in this, we are interested in profits.

To me, as I look at all of this, and every time I see more and more instances which raise serious questions in my mind, there are all sort of provisions throughout this particular bill that just really shock the conscience as regards to the issue of fairness.

I am deeply concerned that people do not really understand how the provisions interrelate and what ultimate impact the bill will have on the individual and his or her rights to seek fair redress for injuries he or she may have received.

How much time is remaining on our side?

The PRESIDING OFFICER. Sixteen minutes.

Mr. HEFLIN. I reserve the balance of my time.

Mr. GORTON. Mr. President, how much time does the Senator desire?

Mr. MCCONNELL. Mr. President, 7 or 8 minutes.

Mr. GORTON. I yield 8 minutes to the Senator from Kentucky.

Mr. MCCONNELL. Mr. President, the amendment I offered yesterday to broaden this bill to include medical malpractice reform, which the Senate approved, may have been the shot heard around the civil justice system, but the amendment we will be voting on offered by Senator DOLE to extend punitive damages reform to all civil cases in the country is really the beginning of the revolution.

The Dole punitive damages amendment, together with an Abraham-McConnell amendment on joint and several liability, which we will offer shortly, are the true tests of whether the Senate is going to provide meaningful and comprehensive civil justice reform for every American.

Let me explain why the Dole amendment is so important to restoring justice to our civil justice system. Economic and noneconomic damages are awarded to compensate an injured party, to make the person whole in every possible way. That is a fundamental purpose of civil liability and one which I strongly support.

Punitive damages, on the other hand, are assessed to punish the responsible party for conduct that is almost criminal in its recklessness, deliberateness, or malice. Since we assign liability for economic and noneconomic damage on the basis of fault, it is clear that punitive damages are meant to punish something much more than mere negligent conduct. Such damages are to be sought in extreme and unusual situations, not as a bonus, in every case, Mr. President.

However, as any students of the tort system can say, the distinction between the two types of civil damages have become seriously blurred, making a mockery of the different purposes these damages are meant to serve.

Claims and large awards for punitive damages have become routine. Plaintiffs who are fully compensated for their injuries throughout economic and noneconomic damages get an extra windfall that bears no relation whatever to the harm that they have suffered.

The lawyers who represent these plaintiffs are stuffing their pockets with the money, as many plaintiffs lawyers will take up to half and even more of the total amount of these lucrative damage awards.

Often, Mr. President, the potential for such enormous punitive damages awards entices people to sue in the first place. Plaintiffs, egged on by their lawyers, will sometimes turn down offers to compensate all their harm in the hope of scoring big with punitive damages or extorting a much larger settlement out of a defendant, who is understandably reluctant to play punitives roulette.

In other words, what was once intended as a very narrow remedy lying somewhere between civil and criminal law has now become a gold mine that is exploited without regard to the considerations of justice and due process. The Dole amendment is designed to restore the concept of punishment to punitive damages.

If we accept the principle that the law of punitive damages must be reformed in product liability and medical malpractice, it follows that such reform should be extended to other civil actions as well.

Punitive damage reform will not limit an injured party's right to be

fully compensated for any harm. Instead, it will give relief to consumers in the form of lower prices at the checkout counter and lower insurance costs for their homes and businesses. To confine that relief to product liability and medical malpractice gets only part of the job done.

Now, who is hurt by excessive punitive damages awards? The list is almost endless. Cities, counties, park districts, nonprofit agencies, charities like the Girl Scouts and the Little League and small businesses.

For example, the Girl Scouts in Washington have to sell 87,000 boxes of Girl Scouts cookies just to pay their liability insurance premium. In southern Illinois, they must sell 41,000 boxes to cover insurance liability. Girl Scout camps can no longer afford to offer horseback riding because of excessive risk. They have no diving boards in the swimming pools—too much exposure to litigation.

Cities spend $9 billion on liability judgments and settlements every year. An employee of the Smithsonian won a $400,000 award—$390,000 in the form of punitive damages because his supervisor called him an unflattering name. I guess that proves that sticks and stones may break my bones, while names earn a lawsuit.

For small businesses, one lawsuit can mean bankruptcy, even if it is won. The huge fee and time spent away from the businesses has literally wiped out mom and mop enterprises despite the fact that they win the suit. No wonder so many small businesses cave in to legal extortion rather than risk court costs, legal fees, disruption of the business, harm to their reputation, and exposure to the most expensive lottery in America—punitive damages.

The National Federation of Independent Business, which has been one of the true heroes on civil justice reform, brought to my attention the case of Hunt Tractor in my home State of Kentucky. They have been sued in two cases involving product liability allegations. In one case, the equipment operator was obviously negligent; and in the other case, the owner had modified the equipment to make it unsafe.

While Hunt won both cases, it cost the company and its insurance carrier more than $100,000 to defend, and countless hours entangled in legal proceedings.

Domino's, the chain of pizza delivery restaurants, was found liable for the injuries of a woman harmed when one of its pizza trucks was rushing to meet Domino's promised 30-minute-delivery deadline. Regardless of whether you believe Domino's had some share of the responsibility, the damages awarded in the case were astonishing. Out of a total award of $79 million, close to $78 million was punitive damages.

Some of my colleagues have mentioned the situation in Alabama, a State I have a great deal of interest in. I was born there and lived the first 8 years of my life in Alabama. In Alabama, plaintiffs routinely recover punitive damage awards. In three counties studied by Prof. George Priest, of the Yale Law School, he found that punitive damages were awarded in 72 to 95 percent of all cases in these three counties in Alabama—all cases.

It is hard to imagine that in all these cases defendants have behaved so egregiously as to warrant an assessment of punitive damages. Clearly, we need to bring punitive damages under control and relate them to punishment—not another routine part of every case. That is what this debate is about. It is not, as the opponents of reform have claimed, about taking money away from victims. It is about bringing some certainty to civil punishment, just as we do for criminal defendants.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. Who yields time?

Ms. MOSELEY-BRAUN addressed the Chair.

Mr. HEFLIN. Mr. President, I ask for the yeas and nays on the Shelby amendment.

Mr. GORTON. Excuse me, will the Senator withhold?

Mr. HEFLIN. All right, I yield to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Ms. MOSELEY-BRAUN. Mr. President, I know that I do not have a great deal of time, but I would like to discuss very briefly why I believe it would be a mistake for the Senate to adopt the Dole amendment on punitive damages. I know that the sponsors of this amendment are confident that their amendment, as drafted, will ensure that no limitations are placed on the ability to recover punitive damages in Federal civil rights cases. I am not sure that I agree with their assessment; however, even if it were correct, the pending amendment will have disastrous consequences in numerous cases that are brought pursuant to State law, including cases to vindicate civil rights. I have here a letter from Morris Dees, chief trial counsel for the Southern Poverty Law Center, which states:

> The Southern Poverty Law Center has used both Federal and State laws to cripple a number of white supremacist and neo-Nazi groups during the past 10 years. If a Senate bill that limits punitive damages is enacted, these judgments would not be possible.

A description of some of the types of cases that would be impacted by the Dole amendment illustrate the major harm that broadening the limitations of punitive damages to cover all civil litigation would create.

In 1990, the Southern Poverty Law Center won a $12.5 million judgment against the White Aryan Resistance and its leaders—Tom Metzger and his son John—for the beating death of a black student in Portland, OR. Of that award, $2.5 million was for compensatory damages, while the remaining $10 million was for punitive damages, a punitive award that was four times the amount of compensatory damages.

During the trial for civil damages, it was demonstrated that Mr. Metzger and the Ayran Resistance had for years preached that nonwhites were ''God's mistakes,'' and that Jews were the progeny of Satan. Tom Metzger and his son, John, sent agents to Portland, OR, to organize the East Side White Pride, a youth division of the Aryan Resistance. At the organizational meeting, members were encouraged to commit violent acts against blacks, a fact that had disastrous consequences for a 28-year-old black Ethiopian immigrant named Mulugeta Seraw. While walking home, Mr. Seraw was attacked with a baseball bat by three skinheads who had attended the White Ayran Resistance meeting. Mr. Seraw—who had come to America to attend Portland State University, and who shipped money from his part-time job to his family back in Ethiopia—didn't stand a chance. He was dead before he ever reached the hospital.

Mr. President, I mention this case because it was brought not pursuant to Federal civil rights laws, but pursuant to a State wrongful death statute, the very type of civil action that will be impacted by the Dole amendment. And it is not the only lawsuit of its kind that the Dole amendment would limit.

Consider this case: In 1987, a wrongful death claim was brought against the United Klans of America for the lynching death of 19-year-old Michael Donald, a masonry student at Carver State Technical College in Alabama. The case resulted in a $7 million judgment against the Klan. Again, as this is exactly the type of claim that would be impacted by the Dole amendment, I will briefly describe the facts.

While walking home from his sister's house one evening, Michael Donald was kidnapped by two Klan members, Henry Hays and James ''Tiger'' Knowles. After driving to a deserted woods, Michael was ordered out of the car. A newspaper account describes what happens next:

> Henry Hays pulls a knife. Michael Jerks free. He runs. They chase him. He grabs a fallen tree limb. They knock it away. Hays has the noose. They wrestle it over Michael's head. Michael pulls on the rope, running in circles. Knowles holds the other end and beats him, again and again, with the tree limb. Michael collapses. Henry Hays pushes his boot into Michael's face and pulls the rope tight. They drag him through the dirt to the car. They lift him into the trunk. Knowles asks Hays if he thinks Michael is dead. ''I don't know,'' Hays replies, ''but I'm gonna make sure.'' He cuts Michael's throat three times. They drive back to Henry Hays' house and throw one end of the rope over the limb of a Camphor tree across the street. Then they lift Michael by the neck—high enough to swing. From the porch, the rest of the Klansmen can see. As Knowles steps back up to join them, he feels a friendly punch. ''Good job, Tiger.''

Mr. President, Tiger Knowles and Henry Hays were convicted of crimes for their role in Michael Donald's brutal death, which some people may feel

is sufficient punishment. But for civil rights activists in the deep South, it was not. They recognized that this behavior was part of a pattern and practice of conduct by the Klu Klux Klan, designed to deprive minorities of their civil rights under law. So these activists sued the Klan, not pursuant to Federal Civil Rights Laws, but pursuant to State wrongful Death Statutes.

At trial, evidence was presented to show that on the evening of the murder, Tiger Knowles and Henry Hays had been told by their local Klan leader ''get this down: if a black man can kill a white man, a white man should be able to get away with killing a black man * * * .'' The jurors were shown a Klan newspaper, that had a drawing of a black man with a noose around his neck, a drawing that Tiger Knowles testified had influenced his behavior. Jurors were informed of countless other, similar incidents in which the United Klan had been involved. And ultimately—and quite wisely, I would assert—they awarded Michael's mother, Beulah Mae Donald, $7 million.

Perhaps there are some who feel a lower award would be appropriate in this case. Again, I will quote from a newspaper account which describes that amount of the award:

The Klan cannot pay. It has nowhere near that kind of money. So, in addition to a quarter of the wages some of the klansmen will earn for the rest of their lives, and in addition to titan Bennie Hays' house and farm, Beulah Mae Donald accepts every penny of the several thousand dollars that the United Klans of America has to its name, and the deed and keys to its national headquarters. She shuts it down.

Mr. President, I have outlined two examples of punitive damages in wrongful death cases, but these are not the only types of State law cases that would limited by the Dole amendment. In 1988, the Southern Poverty Law Center won $1 million from two Georgia Klan groups who attacked marchers celebrating Dr. King's birthday. Or consider a recent award of $7 million in punitive damages against a law firm that tolerated sexual harassment—a claim that was brought pursuant to California's Fair Housing and Employment Act, not Federal civil rights law.

As I stated at the beginning of debate on this legislation, I hope to be able to vote for cloture on a narrow, moderate product liability bill. I support reforms such as a statute of repose, or limitations on vicarious liability, or limitations of recovery if drug or alcohol use caused the injury. But I will never support any legislation that would, in the guise of civil justice reform, make it more difficult to bring civil rights claims under State law. I would never vote for an amendment that will restrict the ability of civil rights groups to sue the Klu Klux Klan. I urge my colleagues to reject the Dole amendment, and I ask unanimous consent that the text of the letter from the Southern Poverty Law Center, as well as the article describing their work, be printed in the RECORD following my remarks.

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

THE SOUTHERN POVERTY
LAW CENTER,
Montgomery, AL, April 25, 1995.

Senator TOM DASCHLE,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR DASCHLE: The Southern Poverty Law Center has used both federal and state tort laws to cripple a number of white supremacist and neo-Nazi groups during the past ten years. If a Senate bill that limits punitive damages is enacted, these judgments would not be possible.

In 1987, the Center got a $7 million judgment against the United Klans of America for the lynching death of a black teenager. The judgment bankrupted this violent hate group whose members had previously bombed the Sixteenth Street Baptist Church in Birmingham, Alabama, killing four young girls.

In 1990, the Center got a $12.5 million judgment against the White Aryan Resistance and its leader Tom Metzger for the death of a black student in Portland, Oregon, at the hands of Skinheads. Most of the judgment was punitive damages. The group we sued is now virtually out of business.

In 1988, the Center got $1 million judgment against two Georgia Klan groups for their assault on a group of marchers celebrating Dr. King's birthday. Almost all of this amount was punitive damages. We bankrupted both groups and took property from several members.

We presently have a civil damage suit pending against Rescue America and its Florida leader, John Burt. Our client is the family of slain abortion doctor David Gunn. Without a large punitive damage award, a favorable judgment would not be significant or effective.

Senator, this is a bad bill that is being proposed in the frenzy of political change. I urge you to vote against cloture on any bill or amendments that limit the ability of our civil justice system to punish those people and organizations that inflict unspeakable injuries on our friends, neighbors, family members and communities.

Sincerely,

MORRIS DEES,
Chief Trial Counsel.

[From the Los Angeles Times magazine, Dec. 3, 1989]

THE LONG CRUSADE

(By Richard E. Meyer)

When Morris Dees was 4, his daddy gave him his only whipping. He used a belt, and he whipped him all over the barnyard. It was for speaking with disrespect to a black man.

It made an impression, but nothing like the impression his daddy left a few years later, when Morris Dees was old enough to tote water. It was summer in Alabama, mercilessly hot. He carried the water in a bucket out to his daddy's workers, hoeing cotton in the fields.

One of them was Perry Lee. She was black. She kept a big dip of snuff in her cheek. One day, as Morris Dees handed her the water dipper, his daddy drove up. Perry Lee tucked a finger behind her teeth, flicked out her snuff and took time to drink. Morris Dees' daddy did two things his son never forgot.

With Perry Lee's hoe, he kept up her row, so she would not worry about falling behind.

Then he took the same dipper and drank.

Morris Dees grew up with a golden touch. He sold cotton mulch in high school, birthday cakes in college and mail order books after law school. By the time he was 32, he and a partner had sold the business for $6 million.

He lent the touch to raise money for Democratic presidential candidates—and, at the same time, Morris Dees, his daddy's son, put the touch to work for people like Perry Lee. In 1971, he co-founded and funded by directmail appeals the Southern Poverty Law Center in Montgomery, Ala., a nonprofit group of attorneys who use the law like a sword.

The law center recently unveiled a civil-rights memorial designed by Maya Lin, creator of the Vietnam Veterans Memorial. But its real importance is its litigation on behalf of the underdog. The center has challenged employment discrimination, hazardous working conditions, denial of voting rights, shoddy education, tax inequities and the death penalty. Its battles against the Ku Klux Klan are legendary—so successful that Morris Dees is a man marked for assassination.

He is praised as a courageous klan-buster, but he also gets crticized—even among those who share his goals. His critics say that some racists are toothless and that he busts them to impress the center's donors.

Now Morris Dees is coming West—to take on California's own Tom Metzger, of Fallbrook, and his White Aryan Resistance (WAR). Dees has sued Metzger, charging him with inciting neo-Nazi skinheads who killed a black man. He wants the courts to order Metzger and his organization to pay damages to the victim's family. His tactic is to ruin Metzger financially—as he has empires of the klan—and put him out of business.

If he succeeds, he will undo one of the most important white supremacists still operating.

Morris Seligman Dees, 52, is a soft-spoken man with light blue eyes and sandy hair. He is informal, given to wearing open shirts and loafers with no socks. He is wealthy enough to retire. But he does not.

What is it like to do what he does?

Why, with the inherent danger, does he keep on doing it?

It is spring of 1981, a Wednesday might in Mobile, Ala. Out in the suburbs, members of United Klans of America, the biggest, most secretive and arguably most violent of the Ku Klux Klans, are meeting at Bennie Hays' place. Usually they talk about klan business in Bennie's barn, then watch TV over at his house. But by most accounts—testified to, published or simply told—their meeting this night marks the beginnings of something that becomes extraordinary.

They are preoccupied by what they consider an outrage. A white policeman has been killed in Birmingham, 85 miles from Montgomery. A black has been charged with the murder. And it looks like the jury is deadlocked. Bennie Hays, 64, titan in charge of Klavern 900, commands everyone's attention. Although he will deny it later, two klansmen swear that Benny Hays declares to the meeting assembled; ''Get this down: If a black man can kill a white man, a white man should be able to get away with killing a black man . . .''.

Klansman James (Tiger) Knowles, 17, borrows a 22-caliber pistol. Then Knowles, fellow klansman Benjamin Franklin Cox, 20, and Henry Hays, 26, who is Bennie Hays' son and a member of the klan as well, go to Cox's home and pick up a rope. They tell Cox's mother they need it to tow a car.

They listen for word. On Friday night, Knowles and Cox go to Henry Hays' home to catch the 10 o'clock news. In the car, Tiger Knowles knots a hangman's noose. As they pull up chairs in front of Henry Hays' TV, a newscaster announces that the jury in the black man's case has, indeed, deadlocked. If the black man is not retried, he will go free.

Henry Hays and Tiger Knowles burst for the door. They drive straight to a black

neighborhood. They see an elderly black man, but he is too far from their car. Besides, he is on a public telephone—he could appeal for help.

Not far away, Michael Donald, 19, the youngest son of Beulah Mae Donald, 61, is walking home from his sister's house. A masonry student at Carver State Technical College, Michael Donald works part time in the mail room at the Mobile Press Register. He is quite, broad-shouldered and well-mannered. He likes music, plays basketball on a community team, dates two or three girls.

As he detours to a corner gas station to buy cigarettes, Henry Hays and Tiger Knowles pull up.

They motion him over.

Knowles asks the way to a nightclub, and Michael Donald starts to direct him.

''Come closer,'' Knowles says.

Michael Donald leans over. Knowles pulls out the pistol.

''Be quiet,'' Knowles says.

They order him into the car and drive across Mobile Bay and into the woods.

''I can't believe this is happening,'' Michael Donald pleads. ''I'll do anything you want. Beat me; just don't kill me. Please don't kill me.''

The car stops. They order him out. Knowles holds the pistol. Michael Donald grabs him. All three scuffle for the gun. It goes off.

The bullet whines into the air.

Henry Hays pulls a knife. Michael jerks free. He runs. They chase him. He grabs a fallen tree limb. They knock it away. Hays has the noose. They wrestle it over Michael's head. Michael pulls on the rope, running in circles. Knowles holds the other end and beats him, again and again, with the tree limb.

Michael collapses.

Henry Hays pushes his boot into Michael's face and pulls the rope tight.

They drag him through the dirt to the car. They lift him into the trunk. Knowles asks Hays if he thinks Michael is dead.

''I don't know,'' Hays replies. ''But I'm gonna make sure.''

He cuts Michael's throat—three times.

They drive back to Henry Hays' house and throw one end of the rope over the limb of a camphor tree across the street. Then they lift Michael by the neck—high enough to swing.

From the porch, the rest of the klansmen can see.

As Knowles steps back up to join them, he feels a friendly pinch.

''Good job, Tiger.''

In the dead of night, two of the klansmen drive downtown to the Mobile County courthouse. Out front, they set flame to a cross. And in the cool of the early morning, the city finds Beulah Mae Donald's son, hanging from the camphor tree, bruised, broken, dead.

Despite the rope and the burning cross, the Mobile County district attorney declares that race—much less the Ku Klux Klan—does not seem to be a factor in Michael Donald's death.

But the black community calls it a lynching.

Beulah Mae Donald's attorney, state Sen. Michael Figures, says it is clear to him that, at the very least, white extremists of some kind are involved.

Whites accuse Figures, who is black, of stirring up racism.

The police investigate, but they do not question the klan. Instead, they look into a theory that Michael Donald might have been involved with a white woman at the Press Register and gotten killed in a love triangle. Than they investigate a theory that he might have gotten killed in a drug deal. They arrest three men they describe as junkies. But when the case goes to a county grand jury, it tumbles apart.

Thousands of blacks march in protest.

All Beulah Mae Donald wants, she says, is ''to know who really killed my child.''

Michael Figures' brother, Thomas, an assistant U.S. attorney in Mobile, asks for a second investigation—this time by a federal grand jury.

And this time, Tiger Knowles cracks.

He plea-bargains. In return for his testimony, Knowles gets life—and Henry Hays gets death.

There the matter of Michael Donald might remain—but for the district attorney, who continues to maintain the klan's innocence. ''I'm not sure this as a klan case,'' the district attorney says. Rather, he declares, this was a case in which members of the Ku Klux Klan just happen to have been involved.

Morris Dees simply does not believe it, and he cannot ignore it.

From what he can plainly see, Tiger Knowles and Henry Hays did not act in a vacuum. Dees calls Michael Figures and suggests that Beulah Mae Donald and the NAACP filed a civil suit against the United Klans of America, headed by Robert Shelton, its imperial wizard. Dees proposes to prove that the killers carried out a policy of violence for which the klan is responsible—just as a corporation is liable for the actions of its employees when they carry out its policies.

Although individual klansmen—Tiger Knowles and Henry Hays—were prosecuted, nobody has ever tried suing United Klans as a whole for damages. The idea, Dees says, would be to win a financial judgment large enough to bankrupt it.

Beulah Mae Donald approves.

On her behalf, Morris Dees sues United Klans of America in U.S. District Court in Mobile for $10 million.

The klan sees trouble.

Even before jury selection, it consents to a broad injunction against harrassing blacks. Then, as the trial gets under way, Morris Dees calls Tiger Knowles to testify.

Flanked by federal marshals, Knowles walks into court, pest Beulah Mae Donald at the plaintiff's table.

Already a turncoat for testifying against Henry Hays, today he will add to the vengeance the klan feels against him. He walks past former fellow klansmen, seated at the defense table. Next to them is Shelton, their imperial wizard. Not a defendant, he is there as the chief officer of United Klans.

Morris Dees questions Knowles softly, Knowles tells how it was that Michael Donald died.

''We got the gun,'' Tiger recalls, ''and then later . . . I tied the hangman's noose in Henry's car.''

Throat cut, face bruised, clothing in disarray, wounds on the hands. Was that his work?

''Yes.''

Dees holds up a drawing from a klan newspaper edited and published by Shelton. It shows a black man with a noose around his neck.

Had Tiger seen the drawing before he killed Michael?

''Yes.''

Had it influenced him?

''Yes, it did.''

Tiger steps down to show how Michael Donald was strangled.

Beulah Mae Donald sobs softly.

John Mays, the klan attorney, asks Tiger if he had heard Shelton order violence.

No, Tiger replies, but ''he instructed us to follow our leaders.''

Tiger recalls how Bennie Hays had suggested that if a black man could get away with killing a white man, then a white man ought to be able to get away with killing a black man.

''Mr. Hays is who I took orders from . . . He took his orders from Mr. Shelton. . . .

''All I know is I was carrying out orders.''

Mays concedes that Michael's murder is a ''horrible atrocity''—but he tries to portray the klan as a political organization. Shelton tells the jury that white supremacy is a political goal—nothing more. He says that nothing in the klan bylaws approves of violence. He says that he does not advocate violence.

Shelton adds triumphantly: ''I'm not ashamed to be a white person.''

In America, Mays says, ''we don't punish the organization. We punish the individuals.''

But Dees counters with a tutorial in klan history. With testimony from some former klansmen and depositions from others, he shows how Shelton personally directed the infamous Mother's Day attack in 1961 on Freedom Riders at the Trailways bus station in Birmingham; how a United klansman was convicted of bombing Birmingham's 16th Street Baptist Church in 1963, killing four black girls as they prepared to participate in the 11 o'clock service; how four klansmen killed Viola Liuzzo, a white civil-rights worker, in 1965 after hearing Shelton say, ''If necessary, you know, just do what you have got to do,'' and how in 1978, just 2½ years before Michael Donald was killed, Shelton told a group of klansmen, ''Sometimes you just got to get out there and stop them,'' after which the klansmen fired shots into the homes of blacks, including the state president of the National Assn. for the Advancement of Colored People.

Ku Klux Klan policy is hardly politics, Dees declares. Make no mistake, he says, it is violence.

Finally, Dees calls klansman William O'Connor to the stand. On TV news tape the day that Michael died, Bennie Hays had been pictured walking up to the camphor tree to look at his body. O'Connor tells the jury that Hays had said it was ''a pretty sight.''

Hays, acting as his own lawyer, calls O'Connor a liar. He says he had no knowledge of any plans to kill Michael Donald—and that anybody who says anything to the contrary is lying.

''I have never in my life heard anybody talk about a hanging,'' he tells the jury. He says lynching talk was a ''no-no'' during klan meetings. And, Bennie Hays says, Henry, his convicted son, still maintains that he is innocent.

As both sides wind up their cases, Tiger Knowles summons Morris Dees to his jail cell. Although he has been testifying for the plaintiffs, Tiger is a defendant—and he wants to offer a closing statement of his own.

''Say what you feel,'' Dees counsels.

When court resumes, Tiger Knowles, one of the killers of Michael Donald, stands in front of the jury box.

He won't take long, he says. He knows people have tried to discredit his testimony, but everything he has spoken is true. ''I've lost my family, and I've got people after me,'' he says. ''I was acting as a klansman. I hope people learn from my mistakes, learn what it cost me.''

He turns to the jurors, ''Return a verdict against me,'' he says, beginning to shake, ''and everything else.''

Then he turns to Beulah Mae Donald. He pauses.

He is in prison for life—but he is alive. Her son is dead. Trembling, then sobbing, Tiger Knowles apologizes. Jurors are crying, Judge Alex T. Howard, Jr., wipes his eyes. Tiger tells Beulah Mae Donald that he has nothing to pay her, but if it takes the rest of his life

to make amends, he will—for any comfort it may bring. As for her son, he says, ''God knows, if I could trade places with him, I would.''

Softly, from her chair, Beulah Mae Donald forgives him.

The members of the jury deliberate for four hours. In the end, they award her $7 million.

The klan cannot pay. It has nowhere near that kind of money. So, in addition to a quarter of the wages some of the klansmen will earn for the rest of their lives, and in addition to Titan Bernie Hays' house and farm, Beulah Mae Donald accepts every penny of the several thousand dollars that the United Klans of America has to its name—and the deed and keys to its national headquarters.

She shuts it down.

Before, during and after victory, retribution from the klan and other white racists is a worry for Dees and his staff—sometimes a big one.

One night in the summer of 1983, a man stops his pickup on South McDonough Street, not far from an entrance to the Montgomery city sewer system. Two younger men step out of the truck. Silently they drop down into the sewer, out of sight.

The older man drives off.

He is Joe Garner, 37, a convenience store operator. The younger men are Tommy Downs and Charles (Dink) Bailey, both 20, who rent a room from Garner behind one of his stores, out in the county near Snowdoun. Besides being their landlord, Garner has become an influence on their lives.

For their mission of the moment, Garner has given Downs and Bailey a flashlight, a pair of brown gloves, some silver duct tape, a garden sprayer and a container of gasoline. They carry these items, in an old canvas bag, down into the sewer. One block north, on Hull Street, they climb out of the sewer and slip along Hull to the Southern Poverty Law Center. They dash into some bushes in back.

Earlier the same evening, Morris Dees has returned to the law center from northern Alabama, where he gave federal investigators evidence against members of the Invisible Empire, Knights of the Ku Klux Klan. This particular arm of the klan had attacked the president of the Southern Christian Leadership Conference and other blacks during a civil-rights march in Decatur, and Dees' evidence—including the identities of many of the assailants—eventually will lead to the conviction of several klansmen, including a former grand wizard.

After the criminal trial, Dees will sue the Invisible Empire, Knights of the Ku Klux Klan, winning an $11,500 settlement for the marchers and a ban against further harassment. And—more galling still—he will win a court decree ordering seven klan members to sit down with civil-rights leaders, who will teach them race relations.

Hours before Tommy Downs and Dink Bailey arrive at the law center, Dees and his investigators have locked the front door and gone home.

Tommy Downs eases out of the bushes. By his signed account to investigators, he sticks some of the duct tape to a back window, then taps along the tape with a tire tool. The glass cracks silently under the tape, and he lifts it out.

He runs back to the bushes and listens for a burglar alarm. There is none. Someone has forgotten to set it.

Downs fills the sprayer with gasoline. Then he slips through the broken window. With Dink Bailey standing guard outside, Downs sprays the carpet with gasoline. He sprays around the desks and around the filing cabinets, then opens a few drawers and sprays inside. He lights the gasoline—and crawls back outside.

Downs and Bailey run along Hull Street and climb back down into the sewer. They wait.

A smoke detector alerts the fire department. From an opening in the sewer, Downs and Bailey watch as fire trucks and police arrive. Then they duck down and make their escape.

At the law center, the gasoline vaporizes quickly, and the fire follows the vapor straight up. It scorches the carpeting and the file cabinets and causes $140,000 worth of damage to the walls, frame and ceiling. But virtually all of Dees' evidence against the klan—in the file drawers—survives.

When Dees arrives, the fire is still burning. On the wall, the law center clock is melted to a halt: 3:48 a.m.

Morris Dees has a hunch.

About a month before, he remembers, he had summoned Joe Garner to the law center for a deposition in the Decatur case. Garner had denied being a klan member—but Joe Garner sounded like someone who might carry a grudge, even against being questioned.

Dees checks into Garner's background—and into the past of his two renters. He discovers that when Tommy Downs moved from a previous address, he left behind a certificate that declared him to be a member of the klan. And the klan certificate is signed by none other than Joe Garner.

Within weeks, a law center investigator finds, a photo showing Tommy Downs marching at a klan rally—and Joe Garner marching in front of him. Both are wearing klan robes. On the arm of Garner's robe, just above the wrist, are the stripes of an exalted cyclops.

Dees brings the certificate and the photo to the Montgomery County district attorney.

The district attorney summons Tommy Downs before a grand jury and points out that lying could mean jail for perjury. Downs begins to cry. He confesses that he torched the Southern Poverty Law Center. It was Joe Garner, he says, who wanted it done—to destroy all of Dees' evidence against the Ku Klux Klan. And Tommy Downs reveals that Joe Garner has more in mind.

He wants to blow up downtown Montgomery.

Civil-rights leaders are planning a march. Downs says Garner wants to plant dynamite in the sewers beneath the streets—and touch it off as the civil-rights leaders pass overhead. The district attorney investigates—and finds 123 7-ounce sticks of dynamite and 8 pounds of plastic explosive. That, says a bomb expert with the Alabama Department of Public Safety, is enough to destroy an entire city block.

In addition, Downs says, Garner wants to set explosives on Morris Dees' car and blow it up one day when Dees drives to work.

The authorities arrest Joe Garner. He, Downs and Bailey plead guilty to a variety of state and federal charges. Joe Garner is sent to federal prison for 15 years. Downs and Bailey get lesser sentences.

Often, retribution is aimed solely at Morris Dees.

In one of his early fights, he wins a court order ending harassment of Vietnamese fishermen along the Texas Gulf Coast. The order is against a group of Texas fishermen—and a band of klansmen headed by Louis Beam, the Texas grand dragon of the Knights of the Ku Klux Klan.

Worse for the Knights, Dees wins a second court order that disbands Beam's Texas Emergency Reserve—a group of paramilitary klansmen organized into what amounts to a private army. During the legal proceedings, Beam calls Morris Dees an Antichrist Jew and holds out a Bible and cross to exorcise his demons.

And Louis Beam never forgets his humiliating defeat.

He leaves Texas and goes to Hayden Lake, Ida., where Richard Butler heads the Aryan Nations, an umbrella group of hard-core white racists. From Hayden Lake, Louis Beam writes to Dees and challenges him to a ''dual [sic] to the death—you against me. . . .

''If you are the base, despicable, lowdown, vile poltroon I think you are—you will of course decline, in which case my original supposition will have been proven correct, and your lack of character verified . . .'' Beam writes, ''Your mother—think of her, why I can just see her now, her heart just bursting with pride as you, for the first time in your life, exhibit the qualities of a man and march off to the field of honor. (Every mother has a right to be proud of her son once). . . .''

When he gets no reply, Beam goes to Montgomery. He meets with Joe Garner, who has just come under investigation for the law center fire. An FBI report, recounting an agent's interview with Garner, says that Beam tells Garner he thinks Dees is ''scum.''

According to the report, Garner introduces Beam to one of Dees' cousins—who does not like Morris Dees and shows Beam where Dees lives. The report says Beam videotapes Dees' property, including details of his home. Then Beam talks his way into the lobby of the Southern Poverty Law Center. An investigator throws him out.

At about the same time, another white supremacist who frequents the Aryan Nations compound in Idaho takes up what is now becoming a growing cause: killing Morris Dees.

He is Robert Mathews, who organized the Order, which seeks to wrest large portions of the United States away from its ''Zionist Occupied Government,'' and to establish a nation for whites only. The Order has in mind banning all other races, whom it calls ''God's mistakes''—and it wants to kill all Jews, whom it considers the seed of Satan.

Mathews formulates six steps to accomplish this. Step Five is the assassination of ''racial enemies''—and Dees in at the top of Mathews' hit list.

After a stop in Denver, where he and his men kill Alan Berg, a radio talk-show host who likes to bait racists, Mathews heads south. A resident of Birmingham who belongs to the Aryan Nations says Mathews asks him to gather all the information he can on Dees—but he refuses because he does not want to become involved.

Finally, Mathews tries to send a confederate, who is actually an FBI informant, south to finish Dees off.

The informant says that Mathews orders him ''to kidnap [Dees], torture him, get information out of him, kill him, then bury him in the ground and put lye on it.''

Within days, the FBI surrounds Mathews' hide-out on Whidbey Island in Puget Sound in Washington state. The FBI wants Mathews for a variety of crimes that include the slaying of Alan Berg and the $3.8 million robbery of a Brinks truck to finance the Order's incipient white racist revolution.

On Whidbey Island, Mathews and the FBI shoot it out. Night falls. It is a standoff. FBI agents fire flares. The flares ignite Mathews' house, and he is burned to death.

One of the last of his men to be captured is Bruce Pierce, fingered by others as the Alan Berg triggerman.

FBI agents arrest him in Rossville, Ga. In his van, the agents find cash, weapons and several news articles, including one about Morris Dees.

The next day, agents stop Pierce's wife. She is in Dees' state—Alabama. In her trailer, the FBI finds nine weapons and several books:

''Hit Men: A Technical Manual for Independent Contractors.''

''Assassination: Theory and Practice.''

Volume 1–5 of ''How to Kill.''

In August, 1989, the FBI opens an investigation into information from Georgia that some klansmen are yet again plotting to kill Morris Dees.

The information comes as Dees takes legal steps to collect a judgment he won for 75 civil-rights marchers attacked by the klan in Forsyth County, Ga., two years ago.

The judgment totaled $1 million. It was a crushing blow to both the Invisible Empire and the Southern White Knights.

''We think,'' Dees says, ''it got them riled up.''

More people are likely to get riled up as Morris Dees moves against Tom Metzger and his White Aryan Resistance.

Metzger, 51, is a one-time member of the John Birch Society who became the California grand dragon of the Knights of the Ku Klux Klan. As a klansman, he ran for Congress in 1960 from California's 43rd District. It reaches across northern and eastern San Diego County, Imperial County and part of Riverside County.

In the 1980 primary election, Metzger attracted 33,071 vote—enough to win the district's Democratic congressional nomination.

Although he ultimately got swamped, his primary election success gave him what he called ''great exposure.'' In 1982, he ran unsuccessfully for the U.S. Senate—then founded the White Aryan Resistance.

Today Tom Metzger, a TV repairman, runs the White Aryan Resistance from Fallbrook, in San Diego County. He is the host of ''Race and Reason,'' a TV interview program available to subscribers on more than 50 cable systems in at least a dozen states. The White Aryan Resistance publishes a newspaper. Metzger is linked by computer to white supremacists across the nation.

Like members of the Order, Metzger has held to racist tenets over the years, including the belief that non-whites are ''God's mistakes'' and that Jews are the progency of Satan.

Metzger has a 21-year-old son, John, who heads his youth recruitment. John Metzger runs an organization known as the White Student Union, the Aryan Youth Movement, the WAR Youth or the WAR Skins.

As the latter name implies, the Metzgers are hospitable to skinheads, young thugs who shave their skulls and favor military-style clothing. Skinheads strut about in heavy boots with steel toes, known as Doc Martens—and they sometimes carry clubs. Often the clubs are baseball bats. Tom Metzger supplies the skinheads with his White Aryan Resistance newspaper. Its comics feature the killing of blacks and Jews.

In a lawsuit filed in October, Dees and lawyers for the Anti-Defamation League of B'nai B'rith accuse Tom and John Metzger of sending agents to Portland, Ore., to organize and guide a particular group of skinheads called the East Side White Pride. ''The agents reported regularly to . . . [the Metzgers] concerning their organizing efforts,'' the suit says. ''The agents also urged . . . [the skinheads] to call . . . Tom Metzger's telephone hot line to receive aid, encouragement and direction.''

One night a year ago, the suit says, Metzger's agents and the East Side White Pride held an organizational meeting of particular interest. ''At that meeting,'' according to the suit, ''the agents . . . in accordance with the [Metzgers] directions . . . encouraged members of the East Side White Pride to commit violent acts against blacks.''

And on that same night, in southeast Portland, two friends drop off Mulugeta Seraw, 28, a black Ethiopian immigrant, in front of his apartment.

It is 1:30 a.m. Seraw works for Avis Rent-A-Car at the Portland airport. He sends money home to his parents, a son and five brothers and sisters in Ethiopia, where he hopes to return after attending Portland State University. Mulugeta Seraw goes to work at 7 a.m. Bedtime is long past.

He does not make it to his door.

Three skinheads attack him. One has a baseball bat.

Mulugeta Seraw's two friends, also black jump from their car. They are beaten back.

''Kick them!'' scream two teen-age girls, watching nearby. ''Kill them!''

Three minutes later, Seraw is lying in the street, bleeding, broken.

Neighbors call the police. Mulugeta Seraw is taken to a hospital. Doctors pronounce him dead.

Working with descriptions provided by witnesses, police track down Kenneth Mieske, 23, a performer of ''hate metal'' rock music who uses the name Ken Death; Kyle Brewster, 19, and Steven Strasser, 20. All are members of the East Side White Pride.

Mieske pleads guilty to murder and Brewster and Strasser to manslaughter. Mieske gets a life sentence, which carries mandatory imprisonment of 20 years. Brewster gets a 20-year sentence, with a minimum of 10 years' imprisonment. Strasser plea-bargains for a sentence of 9 to 20 years.

In their lawsuit, filed on behalf of Mulugeta Seraw's uncle, Engedaw Berhanu, who is the executor of his estate, Dees and the Anti-Defamation League charge the Metzgers, their White Aryan Resistance and skinheads Mieske and Brewster with wrongful death and conspiracy to violate Seraw's civil rights.

''The actions of the Oregon defendants in attacking Seraw were undertaken pursuant to the custom and practice of the defendant WAR of pursuing its racist goals through violent means,'' the suit says. Moreover, it says, the actions were undertaken ''with the encouragement and substantial assistance of the California defendants.''

Without specifying an amount, Dees and the Anti-Defamation League ask for punitive and compensatory damages to punish the Metzgers and to deter ''further outrageous conduct of this kind.''

Legally, this lawsuit is similar to the lawsuit in which Beulah Mae Donald won the last pennies in the coffers of the United Klans of America and the keys to its headquarters. And this is just what Morris Dees and the ADL have in mind.

But unlike the United Klans of America, Tom Metzger says, he will win. ''They lost more because of the UKA's incompetence than anything else,'' Metzger says. ''And because the UKA failed to appeal.

''There is absolutely no basis for this suit,'' Metzger says. ''I don't have agents. We are not into telling anybody to go down out on the streets and get anybody and beat on them. Anybody who says that my son or I have said that is lying.''

About his chief adversary, Metzger says: ''Morris Dees is a clever fellow, and he's had some success. So we don't take this lightly. ''But I am not exactly a pushover, either.''

For his efforts. Morris Dees gets awards—from civil-rights groups, Common Cause, bar associations and the like. But he also gets criticism—from writers in magazines such as the Progressive and the Other Side, a liberal publication that prints a giver's guide to charitable foundations.

The criticism focuses on the Southern Poverty Law Centers focuses on the Southern Poverty Law Center's $27-million endowment and its $3-million annual budget. The center has a stylish new building. Wags call it the Poverty Place. When Dees and the center attack racists, these critics say, they attack a foe who is no longer an important threat—but they do it anyway to improve donors and make the center's endowment grow.

Dees makes no apology for resources. It takes money, he says, to win lawsuits—and to provide the security that the center and its four lawyers need.

And certainly, Dees says, the klan is not the threat it once was. His own experts at the law center say that klan membership is down to one of its lowest levels in history. Credit goes to good times economically. In bad times, poor whites tend to take out their frustrations on blacks. Credit also goes, the experts say, to police work—as well as to antiklan groups.

So why does Morris Dees keep on doing what he does?

He is a multimillionaires. He does not need his law center salary of $79,600—more than what many of the 35 members of his staff earn, but less than the six-figure salary his top staff attorney makes.

Why does he keep putting himself in bam's way?

He leans back, crosses a soakless loafer over one knee and pauses.

First, the threat of racist terror may have eased some, but it has not ended. ''If you don't think skinheads are any threat, then go ask the Seraws if their son is alive.''

Second, he has always liked a good fight, ''I've had my ass whipped, and I've whipped a few. . . . We absolutely take no prisoners. When we get into a legal fight, we go all the way. . . . Ever since I've been a kid, I've always liked a good challenge.''

Third, although he was raised a Baptist, he feels a kinship with Jews. ''My middle name is Seligman, and my family may have some Jewish connections. . . . You know, years ago, nobody took the threat to the Jews seriously. I am not saying that Louis Bearn and his crowd will duplicate what happened in Nazi Germany. I would think that this country is quite different. But I do see it as just a personal responsibility to do what I can to stop just a little bit of this happening right here. . . . And with the legal training I've got and what we've put together here, we're in a unique position to do it. . . .

Like Morris Dees daddy, when he took Perry Lee's hoe. . . .

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, I yield 7 minutes to the Senator from Nebraska.

The PRESIDING OFFICER. The Senator is recognized.

Mr. EXON. Mr. President, I am pleased to be an original cosponsor and leading Democratic advocate for the Dole amendment to limit punitive damage awards in civil liability cases.

As a former small business person, I understand the need for businesses to plan for contingent liabilities. The litigation explosion since the 1970's when I left the private sector and entered public life has made the job of running a small business more difficult today than it was when my wife and I started our own successful small business. The Dole amendment will restore some degree of certainty to business, personal and charitable risk management and

planning; all of which help facilitate commerce in this great Nation.

Punitive damages are a wild card in today's legal system. These awards are unpredictable, unrelated to the level of harm caused by a defendant and potentially they are unlimited. A particular injury, a particular lawyer, and a particular jurisdiction can mean a big recovery for the plaintiff and his lawyer and the end of business for the unlucky defendant.

The real cost of the current system is not only measured in the number of punitive awards won, but also the legal cost of defending against such suits, as well as the increased insurance and product costs for all Americans.

Certainly, no one wants to create a legal system which will encourage wrongdoing or careless behavior. The problem is that the relationship between punitive damage awards and safe behavior is not proven. One could argue that the current punitive damages system creates a bounty for the litigators to hunt for the right combination of facts, law, jury, and injury.

This uncertainty has led honest business people to settle even unworthy cases in order to avoid risking a spin at litigation and the roulette wheel mentality that goes with it.

The greatest expense of the current uncertainty is the contempt it generates from average citizens. They hear about unexplainable cases involving cups of hot coffee, or spilled milk shakes and their faith in the legal system is shaken. Our hallowed courts could some day take on the image of a legal casino.

A handful of States, including the State of Nebraska, do not even permit punitive damages. In the State of Nebraska the total absence of punitive damages has not created an unsafe environment or careless manufacturers or increased wrongful conduct. What the State of Nebraska does have are insurance rates which are more affordable to all citizens.

Under the Dole amendment, States which want to keep punitive damages can continue to have such a system, if that is their will. In those States, punitive damages would simply need to be related to the actual compensatory damages suffered by an injured party. Nothing in this amendment would require States to adopt punitive damage systems.

Mr. President, I am pleased to cosponsor and support the Dole amendment. To those who predict the end of American jurisprudence, I say come to Nebraska, Washington, or other States where punitive damages are not part of the State's legal system. You will see a high quality of life, affordable cost of living, and court systems a little less jammed with frivolous lawsuits.

Although not as dramatic as the course chosen by the State of Nebraska, I am confident that the Dole amendment is a step in the right direction to restore a degree of confidence and predictability to our legal system.

I thank the Chair. I thank my friend from Washington for yielding. I yield any remaining time of the 7 minutes originally allotted to this Senator.

Mr. GORTON. Mr. President, I yield 5 minutes to the Senator from Utah.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I want to pay tribute to the distinguished Senator from Nebraska for his fine statement and for his support of this amendment on this floor. I think many people in this country are grateful for his leadership in this matter.

Let me spend a few seconds on some of the comments made by one of my dear friends, Senator HEFLIN, when he was here. He made reference to what evidence may be inadmissible in the compensatory damages phase of the trial.

It must be emphasized that the evidentiary restrictions on the Dole-Exon-Hatch amendment are based on State law. The relevant language is section 107(d)(1).

> Evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be admissible to determine whether compensatory damages are to be awarded. Whether particular evidence is admissible or inadmissible, therefore, depends on the facts of the case and the law of the State in which the action is brought. Moreover, if evidence is relevant only to punitive damages, there is no reason to object to excluding it in the compensatory damages case, and indeed such exclusion accords with the traditional rule . . . that irrelevant evidence is inadmissible.

I must mention that bifurcated proceedings in punitive damages cases are required or permitted under current law in almost all jurisdictions that permit claims for punitive damages.

Let me turn to the Dole-Exon-Hatch amendment. Naturally, I support this amendment. It is an amendment worthy of adoption. Unlike the Dole amendment, several other amendments have been offered that, in my view, weaken our efforts to reform punitive damages abuses. Thus, I cannot support those weakening amendments such as an amendment to remove limits on the award of punitive damages.

Yesterday I came to the floor and spoke at length about curbing the abuses in our punitive damages laws and the need for meaningful reform in this area. I would like to consider another example of out of control punitive damages and their impact. Consider the case of *Sherridan* v. *Northwest Mutual Life Insurance*, 630 So. 2d 384 (Ala. 1993). The insurance company in this case undertook a background check and numerous interviews of a person who became an agent for the company.

Moreover, in that case, the company, once it became aware that its agent had defrauded some policyholders, arguably did everything it could to rectify the situation. In fact, it was Northwestern Mutual that first notified the plaintiffs that payments made to an agent to pay for life insurance premiums were retained by him. The agent fled after he was confronted by the company. The company then offered to refund money with 10-percent interest and to reimburse them for any fees and expenses they may incur related to the money taken by their agent. The company appeared to do everything it possibly could do to make the victims whole for any and all loss.

Despite their effort to screen out wayward job applicants and a good faith effort to resolve this most unfortunate incident, the company was ultimately sued for compensatory and punitive damages. I should also mention that the policyholders, owners of a small business, whose original loss was $9,000, were the only policyholders out of 40 who held out and sued, rather than settle the case. Reportedly, at trial there were many repeated and exaggerated references to the wealth of the company, yet the jury was not allowed to hear of Northwestern Mutual's efforts to resolve the claim.

The Alabama jury—again an Alabama case, a State where tort law seems to be running out of control—awarded the plaintiff $400,000 in compensatory damages and $26 million in punitive damages. The Alabama Supreme Court reduced the punitive award to $13 million.

So they have the award. They are prone to do this.

Now let us think seriously about this case. The owners of a small automotive business were defrauded of $9,000 and, in response, the courts turned these individuals into multimillionaires. How anyone can defend a system that would allow such an injustice is beyond me. It really requires some world class rationalization.

Our legal system is in danger of losing all credibility in the eyes of the public as an institution where justice is served. It is unfair to American business, to American consumers, and the American public. Look. The people who are benefiting primarily by these types of outrageous awards and by the lack of restraint in this area are attorneys. Not all attorneys, however, should not be maligned because of these abuses by a few trial lawyers. Our profession is being hurt by trial lawyers who want to win it all at all costs, who will win at all costs, who are buying judges, who are influencing judges by contributions and who literally are denigrating the whole legal profession.

A competent lawyer can still win big damage awards by getting good economic damage awards and good noneconomic damage awards. A good lawyer does not need to allege and recover punitive damages to serve his client well. In fact, when I practiced law up to 19 years ago, we used to get big awards for both economic and noneconomic losses.

Let me just say this: There is plenty of room to recover a significant damage award by arguing persuasively and doing a competent job as a trial attorney. We do not need to have runaway

juries and runaway courts of law and runaway attorneys upping runaway punitive damage awards. These abuses are what we are trying to correct here through our amendment. Punitive damages needs to be corrected because our country is being dislocated by these out-of-control approaches to the law.

So I hope that our colleagues will vote down some of these amendments. I hope that they will vote for this Dole-Exon-Hatch punitive damages amendment. I think that it will correct some of the difficulties of our current system, while at the same time provide for a continuation of good, fair, reasonable laws in our country.

Keep in mind, this judgment affects policy holders and insurance rates throughout the country, not just in one state. While this case arose in Alabama, the cost of these excessive judgments are passed on to all its customers throughout the United States.

Moreover, the very fact that a jury could award such an outrageous amount of punitive damages cannot go unnoticed by those who make and sell goods and services in this country. An award like this adds to the overall litigation climate in this country. It fuels the understandable perception that the system is a lottery with more and more jackpots. And those who can get socked with such awards by run away juries have to take that into account as they price their goods and services—to the detriment of consumers.

Mr. President, I have heard a number of my colleagues who are opposed to punitive damage reform claim that there is no increase in reported punitive damage awards, and thus no need for reform. The figure they repeatedly cite is a figure from one study that found 355 punitive damage awards granted by juries in product liability cases in the period 1965–90. On that basis, they claim that there is no problem with punitive damages in this country and that, consequently, no legislative solution is required.

This could not be further from the truth. I have been well aware of that study, as have many others. However, what I have learned in studying punitive damages, and in listing to experts testify at hearings I chaired in the Judiciary Committee is that no one has a precise handle on the number of these awards. That data is simply not available. In fact, those who cite to the study seem to have missed an enlightening statement on the second page of that study. On that page, it is acknowledged:

> The actual number of punitive damage awards in product liability litigation is unknown and possibly unknowable because no comprehensible reporting system exists. [See Michael Rustad, ''Demystifying Punitive Damages in Product Liability Cases'' (1992), at p. 2.]

In addition, testimony in the Judiciary Committee by Victor Schwartz indicated that other research demonstrated that, in just 5 States since 1990, 411 jury verdicts have awarded punitive damages. Punitive damage awards are certainly more frequent than opponents of this measure are willing to admit. And, of course, the Dole amendment covers all civil actions. There have also been a number of punitive damages awards outside the product liability context.

Perhaps what is by far the most important factor to keep in mind, however, is that excessive punitive damage awards have a harmful effect regardless of the number of reported cases on punitive damages. The number of reported cases bears no relationship to the detrimental impact of punitive damages because most cases are settled before trial. A mere demand for punitive damages in a case raises the settlement value of the underlying case and delay settlement.

The end result is that plaintiffs' trial lawyers begin to include exorbitant requests for punitive damages in the most routine cases. Data presented to the Judiciary Committee by Prof. George Priest, of Yale Law School, showed that in certain counties in Alabama between 70 and 80 percent of all tort cases filed include a claim for punitive damages. Unfortunately, using punitive damage claims as a threat in litigation is incredibly commonplace.

The allegation of punitive damages makes settlement nearly impossible because it is difficult to place a value on the claim for punitive damages. It also makes the prospect of a huge loss a real risk for defendants. That artificially inflates the cost of settlement.

Further, liability insurance costs in turn must rise. The bottom line is that these costs are passed on through the economic system, where consumers and workers ultimately pay the price. That occurs regardless of the precise number of punitive damage awards that juries in fact granted in any particular period.

I also urge my colleagues to support Senator DEWINE's amendment to offer small businesses some further protection against punitive damages. In my view, small businesses are the engine that drive our economy and provide much of our new employment opportunities. They truly deserve our support. Many small business owners are forced to live in constant fear of losing their entire investment and livelihood as a result of one lawsuit. That fear puts an enormous strain on their businesses, and more importantly, on the lives of their family members. This amendment offers our small business some modest relief from abusive claims.

Finally, I had intended to offer an amendment concerning the important issue of multiple punitive damage awards. I will pursue that issue on another day.

THE MULTIPLE PUNITIVE DAMAGES PROBLEM

Mr. HATCH. Mr. President, I rise today to discuss one of the most serious problems facing our civil justice system today—the imposition of multiple punitive damage awards against a party for the same act or course of conduct. The multiple imposition of punitive damages is simply unfair and undermines the public's confidence in our system of civil justice. Earlier this year, I introduced the Multiple Punitive Damages Fairness Act, S. 671, which addresses the fundamental unfairness of a system that allows a person to be sued again and again, sometimes in different States, for the same wrongful act. I had intended to offer the substance of my legislation as an amendment to the Products Liability Act, but have decided to withhold my amendment at this time.

Punitive damages, as we are all aware, are not awarded to compensate a victim of wrongdoing. These damages constitute punishment and an effort to deter future egregious misconduct. Punitive damage reform is not about shielding wrongdoers from liability, nor does the multiples bill prevent victims of wrongdoing from being rightfully compensated for their damages.

The people of Utah and the rest of the Nation have known for a long time that our system of awarding punitive damages is broken and in need of repair. State and Federal judges have repeatedly called upon the Congress to address this important issue. The American Bar Association House of Delegates, in a resolution approved in 1987, called for appropriate safeguards to prevent punitive damages awards ''that are excessive in the aggregate for the same wrongful act.'' Although their recommendation suggests this action should be taken at the State level, there is no practical way to implement meaningful reform addressing multiple awards at the State level. The multiple imposition of punitive damages is one area where a Federal response is clearly justified.

Likewise, the American College of Trial Lawyers, a group comprised of both plaintiff and defense counsel, in a strongly worded report on punitive damages discussed the problems associated with the multiple imposition of punitive damages for both plaintiff and defense counsel. They wrote:

> From the Defendant's standpoint, there is a very real possibility that the punitive awards will be duplicative and therefore result in punishing the defendant more than once for the same wrongful conduct. This obviously offends basic notions of justice. Conversely, a plaintiff runs the risk that prior awards may exhaust the defendant's resources, and that, not only will there be insufficient funds from which to pay the plaintiff's punitive award, but the funds will be inadequate to pay a compensatory award.

More recently, Judge William Schwarzer, Director of the Federal Judicial Center, wrote abut the problems with multiple punitive damages. He concluded: ''Congress needs to adopt legislation that creates a national solution, invoking its power over commerce. The repeated imposition of punitive damages for the same act or series on a firm engaged in interstate commerce surely constitutes a burden on interstate commerce.''

Let me be very clear about what this amendment does. This amendment does not in any way affect a person's ability to be fully compensated for their economic and noneconomic damages. A plaintiff remains entirely able to recover their full compensatory damages if this amendment is enacted. Likewise, this amendment does not in any way limit the amount of punitive damages that may be awarded against a defendant.

Judge Friendly, a highly respected circuit court judge, first recognized the difficulties of the multiple imposition of punitive damages in several States in a 1967 opinion, *Roginsky* v. *Richardson-Merrell*, [378 F.2d 832 (2nd Cir.)] where he wrote:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into the tens of millions. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

My amendment goes to the heart of the fundamental unfairness so eloquently described by Judge Friendly.

The defendant and consumers are not the only ones hurt by excessive, multiple punitive damage awards. Ironically, other victims that the system is supposedly intended to protect, may be most seriously impacted by multiple punitive damage awards that precede their case. Funds that might otherwise be available to compensate them for their compensatory damages can be wiped out at any early stage by excessive punitive damage awards.

As mentioned, safeguards are needed to protect these later victims against the abuses inherent in the early award of multiple punitive damages. The conflict between current litigants seeking punitive damages and potential litigants seeking merely compensatory damages was addressed in a recent case, *Edwards* v. *Armstrong World Industries*, [911 F.2d 1151 (5th Cir. 1990)]. In that case, the court reluctantly affirmed a lower court decision awarding punitive damages explained its misgivings in the decision:

> If no change occurs in our tort or constitutional law, the time will arrive when Celotex's liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future asbestos claimants will benefit from this death by attrition.

Incidently, just 1 month after Judge Jones wrote those words, Celotex, already liable for $33 million in punitive damages, and faced with a potential quarter of a billion dollars in additional punitive damages as the result of an ongoing trial involving 3,000 additional claims, in which it had been decided that punitive damages would be calculated at two times the amount of compensatory damages, Celotex filed for bankruptcy protection under chapter 11, where it remains today.

Let me give another example that illustrate several of the concerns with multiple punitive damages. The Keene Corp. also illustrates how a company can be hit with so many punitive damage suits that they eventually declare bankruptcy.

In the late 1960's, the Keene Corp. purchased a subsidiary company for $8 million. Unfortunately, the subsidiary had made thermal insulation that contained about 10 percent asbestos. When the asbestos danger came to light in 1972, Keene closed the subsidiary. The company has only sold about $15 million in products while they owned the subsidiary.

From 1972 onward, Keene has had 50 punitive damage verdicts returned against it. Most of these verdicts involve claimants who were exposed to asbestos 25 years before the Keene Corp. was formed. The Keene Corp. has paid out over $530 million in damages as a result of that purchase, much of it to lawyers, and it still faces numerous lawsuits.

Ultimately, Keene was forced into bankruptcy just last year. And, as a result, victims who might have been entitled to receive compensatory damages may be left out in the cold. Keene filed papers in every case that asked for punitive damages, calling on the courts to disallow further awards since they no longer served any deterrence value or public policy purpose.

Obviously, the multiple imposition of punitive damages for Keene's wrongful conduct served no legitimate purpose. The company had already stopped selling the alleged harmful product and the $530 million paid out in damages was surely a sufficient punishment and deterrent.

This imposition of multiple punitive damages awards in different States for the same act is an issue that can only be addressed through Federal legislation and, thus, necessitates a congressional response. State and Federal judges have no authority to address the clear inequities confronting these defendants. In *Juzwin* v. *Amtorg Trading Corp.*, [718 F. Supp. 1233, 1235 (D.N.J. 1989)], the court vacated its earlier order striking, on due process grounds, the multiple imposition of punitive damages. In arriving at this decision the court noted:

> [T]his court does not have the power or the authority to prohibit subsequent awards in other courts. . . . Until there is uniformity either through Supreme court decision or national legislation this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.

Let me remind my colleagues that it is the courts, and not just private interests, that are calling for reform of multiple punitive damages.

My legislation addresses precisely the problems inherent in a system that allows every State to punish a defendant separately for the same wrongful act or conduct. More important, it is straightforward and simple. The legislation prohibits the award of multiple punitive damages based on the same act or course of conduct for which punitive damages have already been awarded against the same defendant.

This legislation also allows some flexibility. It allows some discretion to the court to allow subsequent cases to proceed to the jury on the issue of punitive damages, if there is new and substantial evidence that justifies the imposition of additional such damages, or if the first award was inadequate to punish and deter the defendant or others.

Under the first exception, if the court determines in a pretrial hearing that the claimant will offer new and substantial evidence of previously undiscovered, additional wrongful behavior arising out of the same course of conduct on the part of the defendant, other than injury to the claimant, the court may let the jury decide to award punitive damages.

The second exception included in this amendment was not contained in S. 671. This exception gives the court discretion to determine in a pre-trial proceeding whether the amount of punitive damages previously imposed, was insufficient to either punish the defendant's wrongful conduct or to deter the defendant or others from similar behavior in the future. If, after a hearing, the court makes specific finding that the damages previously imposed were not sufficient to punish or deter the defendant or others, the court may permit the jury to make an additional award of punitive damages. In both instances, the judge will deduct the amount of the prior award from the award in this subsequent case.

Moreover, my legislation will not preempt State law where a State prescribes the precise amount of punitive damages to be awarded. Thus, if a State desires to fix the amount of punitive damages for a specific egregious act, they may do so under my amendment. Likewise if a State desires to make an award of punitive damages proportional to the compensatory damages awarded, they may do so through State legislation. This provision is intended to preserve the discretion of States to legislate on this aspect of punitive damages in this limited fashion.

Finally, my legislation makes it clear that a defendant's act includes a single wrongful action or a course of conduct by the defendant affecting a number of persons. In applying this act, the phrase ''act or course of conduct'' should be interpreted consist6ent with our legislative objective of eliminating multiple punishment for what is essentially the same wrongful behavior.

I have looked at the problem of multiple punitive damages for some time and have concluded that a federal response is the only way of effectively addressing this issue. My legislation is a small step in addressing the larger problem of excessive punitive damages,

but a needed beginning. I hope Senators join me in supporting this important legislation. It allows the unfettered imposition of punitive damages by a jury to punish and deter those who offend our community. However, with limited exception, we punish the defendant only once for his misconduct. I believe this is a fair way to proceed on this issue.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER (Mrs. HUTCHISON). The Senator from Alabama.

Mr. HEFLIN. Madam President, how much time is remaining on our side?

The PRESIDING OFFICER. Eleven minutes.

Who yields time?

The Senator from Alabama.

Mr. HEFLIN. Madam President, again, let me address some of the things that I think have escaped the attention of people—the interrelationship with the Dole amendment and the underlying bill, the underlying Gorton substitute—which deal with the issue pertaining to the calculation on each defendant of the noneconomic damages, and then its relationship to the Snowe amendment which basically sets the cap on punitive damages at twice the noneconomic damages, and the economic damages.

The underlying bill and the Dole amendment provide for a bifurcated trial—that is, two—where punitive damages are sought. If punitive damages are sought, then any—and I read from the Dole amendment, which is the exact language as in the bill —

> . . . evidence relative only to punitive damages as determined by applicable State law shall be inadmissible in any proceedings to determine whether compensatory damages are to be awarded.

Compensatory damages include noneconomic damages so therefore you cannot prove gross negligence; you cannot prove recklessness; you cannot prove wantonness; you cannot prove intentional conduct pertaining to the compensatory damage trial. The Dole amendment includes all civil actions, including automobile accidents that I talked about. It would also include this matter of the issue pertaining to rental cars.

Take, for example, a company decides there is need of a recall of certain cars, and therefore in the recall of those cars there is an immediate danger. But they continue to lease those cars. Then, in effect, you could not prove it where you sought also punitive damages.

Now, the noneconomic damages as it relates to section 109, which is several liability for noneconomic damages, provides, and I read:

> Each defendant shall be liable only for the amount of noneconomic loss allocated to defendant in direct proportion to the percentage of responsibility.

For the harm, in other words, the percentage of fault. Therefore, if you seek punitive damages, then under the underlying bill and the Dole bill, you cannot prove in the compensatory damage lawsuit in the trial in chief those elements of fault which constitute elements that would go to the proof of punitive damages. You are precluded. It is inadmissible.

So how can you prove the percentage of fault that may rest on defendants that have been guilty of punitive damage conduct, wantonness, conscious, flagrant indifference? How can you prove that and how can there be any logical sense way of determining what the noneconomic loss is? And in its relationship here, it makes it an impossibility. Therefore, when it comes to the case, as I pointed out, of a motor vehicle, where the company knew that the man had been convicted of four drunk driving charges, two reckless driving charges, and they continued to allow him to operate and drive trucks, you could not prove any of that in the case in chief. Therefore, you could not go toward the establishment of the percentage of harm of noneconomic damages towards that defendant.

And then in the punitive damages, it can only be twice the amount that might be allocated to him in the overall situation.

So it seems to me that the relationship of this and the punitive damages, particularly with the Snowe amendment really, have so many consequences. I have just thought of a few. There are a multitude of consequences that occur relative to this matter.

So I wish to point out that this is a situation which ought to be carefully considered, and I just do not believe even the authors of the bill and the authors of the Snowe amendment recognize the dangers that they are getting into relative to these matters.

How much time remains?

The PRESIDING OFFICER. The Senator has 3 minutes 40 seconds.

Mr. HEFLIN. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. How much time remains to my side?

The PRESIDING OFFICER. Eleven minutes 15 seconds.

Mr. GORTON. Madam President, we are discussing here several amendments dealing with the concept of punitive damages in the court systems of the United States, a healthy discussion, and it is one that I do not believe has been previously debated on the floor of the Senate in spite of the invitation to do so extended by the Supreme Court of the United States.

Before we get into any of the details, I believe it important for Members and for the public to understand the peculiar nature of punitive damages. Punitive damages by the very title are a form of punishment imposed by juries on defendants in civil litigation. All other forms of punishment under our judicial system come as a result of criminal trials, in which case defendants have a wide range of constitutional protections and very particularly have the benefit of a limitation on punishments—a series of sentences set out by statutes either in specific terms or within ranges, together with the proposition that their guilt must be proven beyond a reasonable doubt. With respect to punitive damages, not only is the standard of proof lower but there are literally no limits on the amount of punishment, the fines, the damages, which can be imposed.

I must say that I find it peculiar that any Member of the Senate defends such a system which presents to juries, without any guidance or any limitation whatsoever, the right on any basis whatsoever to award any amount of punitive damages whatsoever, without even the slightest degree of relationship to the actual compensatory damages suffered by such a defendant. Over a century and a quarter ago, a judge in a New Hampshire court said:

> The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence deforming the symmetry of the body of the law.

We might not use exactly that language today, Madam President, but I believe that my friend, the Senator from Nebraska, was entirely correct when he pointed out that his State and mine, lacking authority for punitive damages in civil cases, do not have discernibly more negligent, more outrageous, more unreasonable people engaged in business, whether that business is in making and selling products or in providing nonprofit services. There simply is not any real indication that this form of unlimited punishment has an actual impact on the economy other than discouraging people from getting into business in the first place, from developing and marketing new products, and other than causing them to withdraw perfectly valid products from the marketplace.

More recently, the Supreme Court of the United States has taken up this issue itself and in effect has invited us to move into this field. The majority opinion in a recent case, Pacific Mutual Life Insurance Company versus Haislip, in 1990, says:

> One must concede that unlimited jury discretion, or unlimited judicial discretion for that matter, in fixing punitive damages may invite extreme results that jar one's constitutional sensibilities.

And that is exactly what the case is right now. These jar one's constitutional sensibilities.

Justice O'Connor, in a dissent in that same case, said:

> In my view, such instructions—Instructions that the jury could do whatever it thinks best.
>
> Are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive

damages, I see a strong need to constrain juries with standards to restrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

Madam President, this bill does not abolish the concept of punitive damages. It does, however, provide some limit on the sentences which juries can impose in the way of punitive damages—a sentence not to exceed twice the total amount of all of the economic and noneconomic damages which the juries have already found. To me, that seems eminently reasonable.

And I literally fail to understand why there is such a passionate defense of a system of absolutely unlimited liability, absolutely unlimited punishment, in the American system.

One would think at the very least that the opponents would come up with alternative standards upon which to make judgments with respect to punitive damages and other limits if they do not like the limits that are here. But we have one second-degree amendment before us that, once again, says there are absolutely no limits, absolutely no limits. And the opposition to the Dole amendment is that in every case which it covers beyond those already covered by the bill there should continue to be absolutely no limits on punitive damages. Madam President, that is simply wrong.

The PRESIDING OFFICER. Who yields time?

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Straight to the point in the limited time available here, Madam President, it is totally misleading to state that there is no test, to say that in criminal law, we have a test, but in civil litigation, punitive damages, there is no test whatever.

To the contrary, there is a stipulation going right straight down the line of cases that, in awarding punitive damages, Madam President, you have to look at the ability to pay. There is a listed group of tests that are included. You have to look at the willfulness. These damages have to be found on willful misconduct, and right on down the line.

I want to get right to the McDonald's case, when they say there is no limit, that these punitive damages punish.

Then in that McDonald's case, I heard the foreman of that particular jury in an interview say she thought it was a frivolous charge at first until they found out there were some 700 cases and that McDonald's had cost-factored out, on a cost-benefit basis, the hotter the coffee, the more coffee you received out of the coffee bin. So they just wrote it off. They could keep taking the 700 claims and give third-degree burns over a sixth of the body and keep them 3 weeks in the hospital and everything else.

But punitive damages were awarded in that McDonald's case for $2.7 million. The court itself reduced it to $480,000.

There are limits in every jurisdiction. And punitive damages, if you go right to the automobile cases, caused in the last 10 years 72,254,931 cars to be recalled. That is wonderful safety on the highways of America. Why? Because of punitive damages? It has been proved from the Pinto case on down in all of these automobile cases. Had it not been for the punitive damage portion of the award, none of these would be recalled because the manufacturers could put it in the cost of the car.

We have garage door openers redesigned, we have cribs withdrawn, we have Drano packaging redesigned, firefighters' respirators redesigned, Remington Mohawk rifles recalled, the production of harmful arthritis drugs ceased, charcoal briquets properly labeled, steam vaporizers redesigned, heart valves no longer produced by Bjork-Shively, hazardous lawnmowers redesigned, hotel security strengthened, surgical equipment safely redesigned. On and on down the list, punitive damages have proved their worth to society.

And to come now and say in criminal cases we have sentencing guidelines, but there are no guidelines whatever in punitive damages cases is totally misleading. In fact, they have gone to the U.S. Supreme Court and the U.S. Supreme Court has upheld in the several States the punitive damages awards that have been made.

So we go right on down each one of the cases over and over again and again and we find, for example, in the leading case to ensure that a punitive damage award is proper, one, the defendant's degree of culpability, which must be willful misconduct; two, duration of the conduct; three, defendant's awareness of concealment; four, the existence of similar past conduct; five, likelihood the award will deter the defendant or others from like conduct; six, whether the award is reasonably related to the harm likely to result.

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

Mr. HOLLINGS. I thank the Chair.

The PRESIDING OFFICER. The Senator from Washington has 4 minutes and 30 seconds remaining.

Mr. GORTON. Was not the order for voting at 11:15?

The PRESIDING OFFICER. That was the original intent of the order. The Senator may yield back his time, if he wishes.

Mr. GORTON. This Senator can make one very, very brief comment. He finds it curious that his friend from South Carolina, who is the leading member of his party and the former chairman of the Senate Commerce Committee, on which this Senator serves, and a cosponsor or a supporter of all of the automobile safety legislation which has gone through that committee in the last 15 years, which is the primary cause of a greater safety, should ascribe all changes in safety to product liability litigation. If that is true, he and I have certainly been wasting our time on hearings on automobile safety and passing laws respecting seat belts and air bags and side impact protection and the like.

Mr. DORGAN. Madam President, will the Senator yield?

My amendment will be the first amendment voted on when we begin this series of votes. I wonder if the Senator would yield 1 minute to me.

Mr. GORTON. Do I have a little bit more than a minute remaining?

The PRESIDING OFFICER. The Senator has 2 minutes and 40 seconds remaining.

Mr. GORTON. I will finish this thought and I will yield the remainder of my time to the Senator from North Dakota.

In any event, even the Senator from South Carolina has not come up with any parallel with respect to punitive damages and the criminal code. In the criminal code, maximum sentences for all offenses right up to and including the most aggravated forms of murder are set out in the statutes, ranges on which sentences can be imposed. With respect to punitive damages, there are no such limits. This proposal in its present form has such limits tied logically enough to the amount of damages which the person has actually suffered. This is the appropriate way to go.

I yield the remainder of my time to my friend from North Dakota.

Mr. DORGAN. How much time remains?

The PRESIDING OFFICER. The Senator from North Dakota would have 1 minute and 40 seconds.

AMENDMENT NO. 619

Mr. DORGAN. Madam President, the amendment that will be voted on immediately following my 1 minute or so will be the amendment I offered that strikes the limitation or the caps on punitive damages.

I want to explain why I offered this amendment. As I do so, let me say is that I have supported the notion of product liability reform. I voted for this bill coming out of the committee, although I had a problem with this section. I likely will vote for this bill going out of the Senate with respect to product liability reform.

But the standard is that you must prove that a company, that there is clear and convincing evidence that the harm was carried out with a conscious, flagrant indifference of the safety of others. If you have proven that standard of a company that they moved forward with a conscious, flagrant indifference of the safety of others, why on Earth would you want to put a cap on punitive damages?

The whole notion of punitive damages is to punish a company that would do that. We have very few punitive damages awarded in this country. It is not a crisis. Yes, I think we should have some product liability reform, and I support that. But the bill last year that was brought to the floor of

the Senate reforming the product liability laws had no cap on punitive damages; none at all. Now this year they bring a bill to the floor with this cap. This cap should be stricken.

I hope that Members of the Senate will support my amendment. Again, the standard is conscious, flagrant indifference to the safety of others. If a corporation or a company has demonstrated that, then we say to them, ''By the way, when someone tries to punish you for conscious, flagrant indifference to the safety of others, we won't let them punish you very much. We will put a cap on that.''

Why would we do that? That is absurd. That makes no sense. It was not done last year; it should not be done this year.

I hope Members will support my amendment to strike that cap.

The PRESIDING OFFICER. The time of the Senator from North Dakota has expired.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Madam President, has all time been utilized?

The PRESIDING OFFICER. All time has expired.

Mr. GORTON. Madam President, I ask unanimous consent that all votes in the stacked sequence, following the first vote, be reduced to 10 minutes in length.

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

Mr. GORTON. I also call for the regular order which would make the voting sequence begin with the Dorgan amendment, with one exception.

I ask unanimous consent that the Shelby amendment be the last of the second-degree amendments to the Dole amendment considered.

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

Mr. GORTON. What is the pending business, Madam President?

The PRESIDING OFFICER. Amendment No. 619, the Dorgan amendment, will be the first amendment to be voted on.

Mr. GORTON. Madam President, I move to table the Dorgan amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

VOTE ON MOTION TO TABLE AMENDMENT NO. 619

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table amendment No. 619. The yeas and nays have been ordered. The clerk will call the roll.

The bill clerk called the roll.

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

The result was announced—yeas 51, nays 49, as follows:

[Rollcall Vote No. 145 Leg.]

YEAS—51

Abraham	Frist	Lugar
Ashcroft	Gorton	Mack
Bennett	Gramm	McCain
Bond	Grams	McConnell
Brown	Grassley	Moynihan
Burns	Gregg	Murkowski
Campbell	Hatch	Nickles
Chafee	Hatfield	Nunn
Coats	Helms	Pressler
Cochran	Hutchison	Robb
Coverdell	Inhofe	Santorum
Craig	Jeffords	Smith
DeWine	Kassebaum	Snowe
Dole	Kempthorne	Stevens
Domenici	Kyl	Thomas
Exon	Lieberman	Thurmond
Faircloth	Lott	Warner

NAYS—49

Akaka	Feinstein	Moseley-Braun
Baucus	Ford	Murray
Biden	Glenn	Packwood
Bingaman	Graham	Pell
Boxer	Harkin	Pryor
Bradley	Heflin	Reid
Breaux	Hollings	Rockefeller
Bryan	Inouye	Roth
Bumpers	Johnston	Sarbanes
Byrd	Kennedy	Shelby
Cohen	Kerrey	Simon
Conrad	Kerry	Simpson
D'Amato	Kohl	Specter
Daschle	Lautenberg	Thompson
Dodd	Leahy	Wellstone
Dorgan	Levin	
Feingold	Mikulski	

So the motion to lay on the table the amendment (No. 619) was agreed to.

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

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

The motion to lay on the table was agreed to.

VOTE ON AMENDMENT NO. 622

The PRESIDING OFFICER. The question is on amendment numbered 622, offered by the Senator from Ohio [Mr. DEWINE].

Mr. GORTON. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. ABRAHAM. Mr. President, the amendment I have offered with the distinguished Senator from Ohio [Mr. DEWINE], is extremely important for small business owners across the country. This amendment protects small businesses and other small entities with 25 employees or less from excessive punitive damage awards over $250,000. Individuals, including small businesses organized as sole proprietors, whose net worth does not exceed $500,000 would also be protected.

Let me make it clear that small business owners support requiring someone to make restitution when they cause injuries. However, under our current liability structure businesses can be bankrupted by the addition of punitive damage awards that are vastly in excess of the business' ability to pay. The result is fewer small businesses and lost job opportunities. Our amendment will not limit plaintiffs from receiving full compensation for their economic and noneconomic damages.

Mr. President, this small business punitive cap amendment will be rated by the National Federation of Independent Business as a key small business vote for the 104th Congress. This amendment is also strongly supported by the 739,000 members of the National Restaurant Association. I ask unanimous consent that letters of endorsement by the NFIB and National Restaurant Association be printed in the RECORD. I yield the floor.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
Washington, DC, May 2, 1995.

Hon. SPENCE ABRAHAM,
U.S. Senate,
Washington, DC.

DEAR SENATOR ABRAHAM: On behalf of the more than 600,000 members of the National Federation of Independent Business [NFIB], I commend you for offering an amendment that would protect small business owners from excessive punitive damage awards.

Small business owners support requiring someone to make restitution when they cause injuries. However, our current liability rules can mean that businesses can be bankrupted by the addition of punitive damage awards that are vastly in excess of the business' ability to pay. Because of the potential for such an outcome, many small business owners are, in effect, forced to settle out of court. This results in higher insurance premiums, higher consumer prices, and worst of all, increased disrespect for our legal system.

Your amendment does not mean that plaintiffs will not be compensated; they will still be able to recover unlimited economic and non-economic losses. It merely means that punitive damage awards over and above actual restitution will be capped at a level that permits many small businesses to survive a lawsuit.

Thank you for offering this important common sense small business amendment. Passage of your amendment along with the underlying Dole amendment will be Key Small Business Votes for the 104th Congress.

Sincerely,

JOHN J. MOTLEY III,
Vice President,
Federal Government Relations.

NATIONAL RESTAURANT ASSOCIATION,
Washington, DC, May 3, 1995.

Hon. SPENCE ABRAHAM,
U.S. Senate,
Washington, DC.

DEAR SENATOR ABRAHAM: On behalf of the National Restaurant Association and the 739,000 units the foodservice industry represents, I want to express our support for your amendment providing protection for small businesses from excessive punitive damage awards.

In an industry dominated by small businesses—72% of all eating and drinking establishments have sales of $500,000 per year or less, and experience profit margins in the 3 to 5% range—an excessive damage award can force a restaurant to close its doors. This hurts not only the business owner and his/her family, but the employees and their families as well.

Everyone agrees that citizens should have the right to sue and collect reasonable compensation if they are wrongfully injured.

However, common sense legal reform is needed to bring balance back into the system. Your efforts in this regard are greatly appreciated.

Again, thank you for your efforts to protect America's small businesses.

Sincerely,

ELAINE Z. GRAHAM,
Senior Director, Government Affairs.

Mr. BAUCUS. Mr. President, I want to voice my support for two amendments offered by Senator DEWINE to S. 565 that were passed by voice vote today. The first amendment places a $250,000 cap on the amount of punitive damages that can be awarded against small businesses that have a net worth of less than $500,000. The second amendment allows juries to consider a defendant's assets when determining the appropriate amount to award for punitive damages.

I oppose S. 565. I believe that this bill extends the reach of the Federal Government into an area that properly belongs to the States. And rather than slowing litigation, I believe S. 565 will create confusion and therefore more litigation. Under this bill you will have 50 different State courts interpreting the impact on this law on existing State case and statutory law. It is a result that only the lawyers will benefit by.

At the same time, I recognize just how hard small businesses struggle to stay afloat. And, I am well aware that Montana law recognizes the need to appreciate small business concerns. For example, Montana allows small companies to operate as ''limited liability'' companies. By doing this, small companies are able to limit their liability exposure to the amount of capital invested. Montana also requires to look at a defendant's financial resources in determining punitive damages awards.

To the extent that we are going to enact Federal legislation governing certain aspects of tort law, I believe it is important to include provisions that are specifically targeted to small businesses. For this reason, I support the DeWine amendments as offered.

Mr. GORTON. Madam President, this amendment and the next amendment have been worked out by the two managers and can be agreed to by voice vote.

The PRESIDING OFFICER. The question is on agreeing to the amendment numbered 622, offered by the Senator from Ohio [Mr. DEWINE].

So the amendment (No. 622) was agreed to.

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

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

The motion to lay on the table was agreed to.

VOTE ON AMENDMENT NO. 623

The PRESIDING OFFICER. The question is on amendment No. 623, offered by the Senator from Ohio [Mr. DEWINE].

If there be no further debate, the question is on agreeing to the amendment.

The amendment (No. 623) was agreed to.

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

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

The motion to lay on the table was agreed to.

AMENDMENT NO. 621, AS MODIFIED, TO AMENDMENT NO. 617

Mr. SHELBY. Madam President, I send to the desk a modification of the amendment I have at the desk.

The PRESIDING OFFICER. Without objection, the amendment is so modified.

The amendment (No. 621), as modified, is as follows:

At the appropriate place insert the following:

SEC. . LIABILITY FOR CERTAIN CLAIMS RELATING TO DEATH.

In any civil action in which the alleged harm to the claimant is death and, as of the effective date of this Act, the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages without regard to this section, but only during such time as the State law so provides.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Is the Shelby amendment now the pending business?

The PRESIDING OFFICER. The Shelby amendment as modified is the pending business.

Mr. GORTON. Madam President, this is worked out with the two Senators from Alabama who are opponents to the bill but who nevertheless have a legitimate question about a quirk in Alabama law. The amendment applies only to certain cases in Alabama, and is acceptable.

THE PRESIDING OFFICER. If there be no further debate, the question is on agreeing to the amendment.

The amendment (No. 621), as modified, was agreed to.

Mr. SHELBY. Madam President, I move to reconsider the vote.

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

The motion to lay on the table was agreed to.

VOTE ON AMENDMENT NO. 617, AS AMENDED

The PRESIDING OFFICER. The question is on the Dole amendment, No. 617, as amended.

Mr. GORTON. Has a rollcall been ordered?

Madam President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to amendment No. 617, as amended. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

The result was announced—yeas 51, nays 49, as follows:

[Rollcall Vote No. 146 Leg.]

YEAS—51

Abraham	Frist	Lott
Ashcroft	Gorton	Lugar
Bennett	Gramm	Mack
Bond	Grams	McCain
Brown	Grassley	McConnell
Burns	Gregg	Murkowski
Campbell	Hatch	Nickles
Chafee	Hatfield	Nunn
Coats	Helms	Pressler
Cochran	Hutchison	Santorum
Coverdell	Inhofe	Simpson
Craig	Jeffords	Smith
DeWine	Kassebaum	Snowe
Dole	Kempthorne	Stevens
Domenici	Kerrey	Thomas
Exon	Kyl	Thurmond
Faircloth	Lieberman	Warner

NAYS—49

Akaka	Feinstein	Moynihan
Baucus	Ford	Murray
Biden	Glenn	Packwood
Bingaman	Graham	Pell
Boxer	Harkin	Pryor
Bradley	Heflin	Reid
Breaux	Hollings	Robb
Bryan	Inouye	Rockefeller
Bumpers	Johnston	Roth
Byrd	Kennedy	Sarbanes
Cohen	Kerry	Shelby
Conrad	Kohl	Simon
D'Amato	Lautenberg	Specter
Daschle	Leahy	Thompson
Dodd	Levin	Wellstone
Dorgan	Mikulski	
Feingold	Moseley-Braun	

So the amendment (No. 617), as amended, was agreed to.

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

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

The motion to lay on the table was agreed to.

Mr. GORTON. Mr. President, is there now an order in which the Senator from Tennessee [Mr. THOMPSON] is to offer the next amendment?

The PRESIDING OFFICER (Mr. THOMAS). That is correct.

Under the previous order, the Senator from Tennessee is recognized.

Mr. GORTON. Mr. President, I will shortly suggest the absence of a quorum. But, Mr. President, with the cooperation of the other side of the aisle, we will seek time agreements on future amendments and will hope to stack votes on any amendments which are ready to vote for sometime late in the afternoon so Members are not called back and forth willy-nilly.

While we look for that and wait for the Senator from Tennessee, I suggest the absence of a quorum.

Mr. FORD. Mr. President, we could not understand the distinguished Senator from Washington. May we have order?

The PRESIDING OFFICER. We will have order in the Senate. The Senator is exactly right.

Will the Senator repeat his statement?

Mr. GORTON. Under the previous order, the Senator from Tennessee, who is now present, has the right to offer the next amendment. I was suggesting that we attempt to get time agreements on as many amendments as possible in the future, but at the same time, to stack votes for sometime later

this afternoon, if it is possible to do so, so that again we can bring Members here for votes, perhaps more than one vote, but not interrupt their schedules every hour or so.

Mr. HEFLIN. Mr. President, might I say, before we agree to that, we would have to see what the amendments are.

Mr. GORTON. I fully agree. This is simply a suggestion. I hope it will work. If it does not, we will proceed to the regular order.

Mr. President, I see the Senator from Tennessee is present. I yield the floor.

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. Under the order, the Senator from Tennessee has the floor.

Mr. THOMPSON. Thank you, Mr. President.

AMENDMENT NO. 618 TO AMENDMENT NO. 596

(Purpose: To limit the applicability of the uniform product liability provisions to actions brought in a Federal court under diversity jurisdiction)

Mr. THOMPSON. Mr. President, I call up an amendment numbered 618, which is at the desk, and I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee [Mr. THOMPSON] proposes an amendment numbered 618 to amendment No. 596.

Mr. THOMPSON. 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:

In section 102(a)(1), after ''commenced'' insert the following: ''in a Federal court pursuant to section 1332 of title 28, United States Code, or removed to a Federal court pursuant to chapter 89 of such title''.

In section 102(c)(6), strike ''or'' at the end.

In section 102(c)(7), strike the period at the end and insert ''; or''.

In section 102(c), add the following new paragraph:

(8) create a cause of action or provide for jurisdiction by a Federal Court under section 1331 or 1337 of title 28, United States Code, that otherwise would not exist under applicable Federal or State law.

Mr. THOMPSON. Mr. President, we are now engaged in a national debate on an issue that is important to the future of this country. The issue before us essentially is should the U.S. Congress federalize certain portions of our judicial system that, up until now, have been under the province of the States? And, if so, should we make major changes or more modest ones?

I cannot think of a more important subject for us to consider than our system of justice. The judicial system is a bedrock of our free society. It must be fair. It must be perceived to be fair. Our citizens must have confidence in it. As we continue our deliberations, we must do so with the purpose in mind of striving for a system that is most likely to achieve justice in most cases. It is serious business, and our decisions should not depend upon whose favorite ox is being gored at the moment.

At the outset, I must say that we could do this process a service by refocusing the terms of this debate. It seems that we have in large part gotten off to a somewhat rocky start, and have been spending too much time arguing about which side is the most greedy and which side has contributed the most to which party's political campaigns.

Most of the literature, most of the press, and a lot of the conversation has had to do with those subjects, and it is an all-too-easy refuge for those who really do not understand the issues or who do not care and are simply trying to win the debate.

As far as the debate going on between the private interests of each side of this legislative battle, I have not noticed that either side is going against its own economic interest.

They are all sophisticated and well financed.

It seems that nowadays the debate on important issues is going the way of political campaigns: concentrating on grossly distorted anecdotes, sound bites, and 30-second commercials designed to appeal to ignorance and emotion. That is fine for the contestants in this matter to engage in if they choose to do so, but this body has a duty and a different function.

First, we need to address the issue of federalism. At the outset, I must state that I have great concern with any proposal that imposes a Federal standard in an area that has been left up to the States for 200 years. I would remind many of my Republican brethren that we ran for office and were elected last year on the basis of our strong belief that the government that is closest to the people is the best government; that Washington does not always know best; that more responsibility should be given to the States because that is where most of the creative ideas and innovations are happening. Whether it be unfunded mandates, welfare reform, or regulations that are strangling productivity, we took the stand that States and local governments should have a greater say about how people's lives are going to be run, and the Federal Government less.

People have different notions about the importance of philosophical consistency. But let there be no mistake about what we are doing if by legislative fiat we usurp significant areas of State tort law, passed by State legislators, elected in their own communities. We are going against the very fundamentals of our own philosophy which has served as our yardstick by which we measure all legislation.

In the Contract With America, every provision, in one way or another, has to do with limiting the power or authority of the Federal Government or one of its branches with regard to the States or individuals except one: the change in the legal system. That provision has nothing to do with limiting or changing the rules with regard to the Federal Government—but, rather, with the Federal Government changing the rules between two private parties, the very thing we have been so critical of in the past. I would say to my friends who are conservative in all matters except this one: If and when we are no longer in the majority, we will stand naked against our opponents as they rewrite our tort law for America to fit their wishes and constituencies because we will have lost the philosophical high ground.

It is ironic that all of this is occurring at a time when the philosophical battle that we have been fighting for so many years is finally being won. Several recent Federal court decisions, including the recent Supreme Court decision in the Lopez case, have finally begun to place some restrictions on Congress' use of the commerce clause to regulate every aspect of American life. Conservatives have been complaining for years that congressional expansion into all areas, with the acquiescence of the Federal courts, has resulted in rendering the restrictions of the commerce clause meaningless. Now the courts have let Congress know that there are limitations to Congress' authority to legislate in areas only remotely connected to interstate commerce. And yet as we won the war, we take the enemy's position. We are now the ones who seek to legislate and regulate medical procedure in every doctor's office in every small town in America. And we are the ones who now seek to legislate and regulate the fee structure between a lawyer and his client in any small town in America.

It is not as if the States have abdicated their responsibilities in this area. Many States have tougher and more restrictive laws than those advocated before this body.

Four States have no punitive damages. Some States have caps on punitive damages. Most States have gone from a preponderance of the evidence standard to a clear and convincing standard for punitives. My own State of Tennessee has a 10-year statute of repose while the products bill before us allows 20 years. And as was recently pointed out by the National Conference of State Legislatures, ''Each of the 50 State legislatures, many configures by a fresh influence of Republican tort reformers, is considering some type of overhaul of the legal system.''

It is not as if State legislatures wish to be relieved of the burden of dealing with the subject of tort reform. As the president of the National Conference of State Legislatures recently said:

As you know, NCSL regards the unjustified preemption of State law as a serious issue of federalism, comparable in many ways to the issue of Federal mandates. Federal mandates erode the fiscal autonomy of States, while Federal preemption erodes the legal and regulatory authority of States. Every year Federal legislation, regulations, and court decisions preempt additional areas of State law, steadily shrinking the jurisdiction of State legislatures.

NCSL opposes Federal preemption of State product liability law, strictly on federalism grounds. Tort law traditionally has been a State responsibility, and the imposition of Federal products standards into the complex context of State tort law would create confusion in State courts. Without imposing one-size-fits all Federal standards, States may act on their own initiative to reform product liability law in ways that are tailored to meet their particular needs and that fit into the context of existing State law.

However, we are told that, while all of the above may be true, the system has totally gotten out of hand. It is said that our Nation is smothering under an avalanche of litigation and frivolous lawsuits; that our legal system is nothing more than a lottery system and that the lawyers are the only ones who really win the lottery. Well let us examine all of that.

In the first place, I want to say that in any system run by human beings there are going to be abuses and miscarriages of justice and our legal system is no exception. For example, there is no question but that some frivolous lawsuits are filed. However, it should be understood by the American public there is not one thing about any of the substantive legislative proposals we have considered or will consider that will in any way diminish the possibility of frivolous law suits. No proponent of reform will argue that there is. There is simply no way to prejudge a case before it is filed. What we can do and should do is impose a penalty upon the litigants and the lawyers once a court has determined that a lawsuit is frivolous. The Brown amendment, which strengthened rule 11 in Federal cases, does that. I voted for it, and I hope it finds its way into any legislation that is finally adopted.

Also, I am convinced that some industries in some States are being hit especially hard. I am very sympathetic to those that produce products or render professional services, that provide jobs for working people, and that make the wheels go around in our economy. That is why I am working to help relieve the burden of regulation that they face and the tax burden that too often penalizes investment and productivity.

My own personal opinion is that the number of lawsuits brought in this country is too high and that it is a reflection of more serious things going on in our society.

However, nothing in the proposed legislation would cut down on the number of lawsuits, and I do not think anyone believes that it is Congress' role to place a quota on the number of lawsuits that can be filed in this country.

We have reached a point where a lot of people would support any legislation if they thought it would hurt lawyers. And there is no question that lawyers are often times their own worst enemy. My own opinion is that the profession has become too much like a business, too bottom line oriented, that lawyer advertising has hurt the profession that some of the fees being reported from Wall Street and other places over the last decade or so have caused the public's regard for the legal profession to fall dramatically. Frankly that is something that the U.S. Congress should be able to appreciate. So we have an imperfect system in an imperfect world.

However, there is another side to the story. The fact of the matter is that all things considered, the system has served up pretty well for a long period of time. Our State tort system has provided us with a form of free market regulation. Goals like achieving product safety are reached without additional and intrusive government mandates that other countries have imposed as a substitute for a tort-based compensation system.

Also, in the State courts during 1992, all tort cases amounted to 9 percent of the total civil case load. In the Federal courts, product liability claims declined by 36 percent between 1985 and 1991, when one excludes the unique case of asbestos. Since 1990, the national total of State tort filings has decreased by 2 percent. If this trend continues in the next 10 years, State courts will experience a decline of 10 percent in State tort filings. As a matter of fact, the primary cause of the surge in litigation in Federal courts has been disputes between businesses. Contract cases, which make up only one type of all commercial litigation, have increased by 232 percent over the period of 1960 through 1988.

And there is a lot going on that does not meet the eye that has to do with self regulation in a free society. Every day all over the country lawyers are telling clients that they do not have a winnable case, or that, although they have a pretty good case, the expense involved is not worth the potential recovery. You see, lawyers do not make money on frivolous lawsuits. Insurance companies learned a long time ago that paying off on frivolous cases in order to avoid potential litigation expense does not pay off. And the plaintiff lawyers know that the insurance companies will not pay extortion.

Also going on every day in this country are cases which are settled where a person was wrongfully injured and received a reasonable amount of compensation. That is most cases. They do not make the newspapers.

Also going on every day in this country are decisions by insurance companies not to settle with the plaintiff even though he is clearly entitled the recovery because he is a little guy and stretching it out for a couple of years and causing his lawyer to have to bear the burden financing the depositions and other expenses will make the plaintiff and his lawyer more amenable to a lower settlement later on. Besides, they know that they can put the settlement money to good use for that 2-year period and make money on that money. On balance, it more than makes up for their own attorneys' fees.

Also, going on quite often, are situations where a large corporate defendant is caught having committed outrageous conduct which resulted in tremendous injuries to innocent people. Often these cases are settled even before suit is filed because the plaintiffs do not want to go through a lawsuit and defendants know what might be in store for them if the plaintiffs get a mean lawyer who knows what he is doing.

This is the real world. This is the rest of the iceberg of our legal system that most people do not see. It is free market, give and take, sometimes rough and tumble, and sometimes produces injustices. But we have always believed in America that, with all its faults, the best way to resolve disputes is not at 20 paces but with a jury from the local community who hears all the facts and listens to all the witness and who is in the best position of anybody in America to decide what is justice in any particular case. Then you have a judge who passes on what the jury did and then you have at least one level of appeal to pass on what the judge did. And I can assure you—and anybody who has ever been there knows this—that you do not find much run-away emotion left by the time you get to the appellate level in most State courts.

So if we are determined to ring out the injustices that slip through the State system here at the Federal level, what are we going to replace it with?

What are we going to replace it with? A one-size-fits-all standard? One standard that would apply to mom and pop and to General Motors? One standard that would cover both the frivolous lawsuit and the lawsuits involving gross misconduct by the defendant? In our haste to correct one problem, are we not running the danger of creating greater problems?

Let me give you another example from real life. A lot of people are concerned about frivolous lawsuits against the medical profession. I share that concern. There have been good physicians wrongfully sued in this country. I think the system pretty well takes care of the problem in the end, but I regret that they have to go through that process. I am sure most of them were very displeased with me—my good friend and his supporters—when I could not go along with a $250,000 punitive cap on their exposure. I wish I could have gone along with it. But I could not. Because, not only do I have grave reservations about Congress legislating in this area, but in addition, the same cap that would legitimately and properly help them in some cases would unfairly hurt others in other cases. That is the problem with the one-size-fits all approach in Washington.

Let me tell you a little story. David and Tammy Travis from Nashville, TN, came to see me last Wednesday, April 26. They have been following this debate and they wanted to tell me about their daughter Amanda. Amanda was a 5-year-old girl who was scheduled to

have a routine tonsillectomy at a medical clinic in Nashville. Amanda arrived at the clinic at 6 a.m. A nurse, not an anesthesiologist, administered the anesthesia and he administered the wrong anesthesia. Also, Amanda was hooked up to the wrong intravenous solution, as well.

The errors continued as Amanda was given demerol even though she was not complaining and was not even awake. When Amanda began throwing up blood, the nurse informed the family that this was normal. By 2 o'clock that afternoon Amanda was lethargic. The nurse told the family that a doctor wanted to keep Amanda overnight, which was represented to be normal. However, the nurse had not contacted the doctor and had made that decision herself.

Later in the afternoon, Amanda could not breathe. The short-staffed hospital had only a nurse and a sitter on duty. In fact, the nurse who administered the anesthesia was a drug addict, who subsequently died of an overdose while preparing to go into an operating room for another patient. The clinic had known that the nurse had this drug problem.

When Amanda was hooked up to emergency equipment, her head blew up like a balloon, and she began to bleed out of her mouth, as her father used his handkerchief to try to stop the flow. The nurse ran off to get more equipment to open the airways. By this point, Amanda was getting so little oxygen that Mrs. Travis pleaded that 911 be called. Someone at the clinic did call 911 and the paramedics rushed Amanda to Vanderbilt Hospital. By this point, Amanda was essentially dead, although the paramedics did their best to revive her.

After Amanda died, her parents were not given timely copies of her records from the clinic. Amanda's parents did, however, obtain the records from Vanderbilt. When they received the clinic's records, it was obvious that the clinic had altered the records to cover up their errors. The clinic tried to make it look like Amanda had been fine when she left the clinic, and that it was the paramedics who had messed up.

The case went to trial about 2 years after the lawsuit was brought. The Travises are people of modest means. Their lawyer, Randy Kinnard of Nashville, financed 48 depositions and other expenses out of his own pocket over the 2-year period. The case was settled during trial for $3 million, an amount that reflected the clear liability of the clinic and availability of punitive damages. The lawyer's fee, incidentally, was 30 percent.

The Travises traveled to Washington with their story even though Mrs. Travis was under doctor's orders not to travel as a result of recent knee surgery. They came to my office with Mrs. Travis in a wheelchair. The Travises have no further financial interest in any of this legislation. They simply want to ask me to try to help make sure that we did not do anything up here that would make it more likely that other parents would lose their little girls the way they did; that we did not do anything to make it more economically feasible for hospitals or large companies to hire on the cheap or to cut corners.

The question presented to me is whether or not I am going to be a part of a process that tells Tennesseans that they cannot award this family $3 million if a jury in Tennessee, after hearing all the evidence, gives them that amount, or a company, realizing that they are finally at the bar of justice, coughs up that amount. I will not be a party to that.

We had another situation in Hardeman County in rural west Tennessee a few years ago that is instructive. A chemical company contaminated the region's groundwater. Residents exhibited various forms of disease: cancer, liver damage, kidney, skin, eye and stomach ailments, and nervous, immune, and reproductive system disorders. The jury found the chemical company had knowingly and recklessly dumped the chemical waste at its landfill site, failed to make the dumping site leakproof, disregarded the warnings of contamination by one of its own senior employees, failed to warn residents or government officials of the dangers, and attempted to cover up evidence when an investigation was initiated. Residents of Hardeman County recovered $5.3 million in compensatory damages and $7.5 million in punitive damages. Do I think that Congress should tell Tennesseans that they cannot allow the jury who heard the case to award those damages? I do not.

I get the feeling that there are cross currents running through the Senate at this point in our deliberations. I believe that there is a strong and understandable feeling that we should pass some tort reform measure in this session of Congress. I think, however, that there is another feeling that we are not quite sure of what we ought to pass and we fear that we do not fully appreciate or understand the effect of what we may be about to do.

It seems to me that the responsible thing to do is to take a second and harder look at the proposals before us and try to respond to a legitimate Federal interest while resisting the temptation to federalize 200 years of State law that has undergone substantial reform and is still being reformed as we deliberate. I suggest that because of the interstate nature of the activity that there is a legitimate Federal interest in the products liability laws of this Nation. Approximately 70 percent of all manufactured goods in this country travel in interstate commerce. I believe that this is one area under consideration that would pass the commerce clause test. Furthermore, not only do the products travel in interstate commerce but the litigants in product litigation are often also interstate in nature in that they are citizens of States different than that of the manufacture, thereby creating diversity jurisdiction, and are able to avail themselves of the Federal court system. Therefore, it would seem reasonable to legislate in an area involving interstate commerce with regard to litigation involving our Federal court system.

Therefore, I am offering on behalf of myself, Senator COCHRAN, and Senator SIMON an amendment to limit the bill's application to cases in Federal court. If my amendment were adopted, and a plaintiff filed a case in Federal court under diversity of citizenship jurisdiction, this Federal legislation would govern the case. If the plaintiff filed this suit in State court, State law would control. However, if the defendant successfully removed a case filed in State court to Federal court, this Federal law would apply.

My amendment would restore the federalism that the bills currently drafted would threaten. At a time when the American people overwhelmingly believe that the Federal Government has obtained too much power at the expense of the people and the States, we should not adopt a Washington-knows-best approach to tort law.

Particularly troubling is the selective preemption H.R. 956 creates. States cannot provide less protection to defendants than the bill mandates, but States are not prohibited from providing more. It is the bill's selective preemption that guarantees that it will not produce a uniform response to a supposedly national problem. The preemptive features of the bill overlook that Americans are unique individuals. Moreover, States have their own right to determine the law that should be applied to their own special situations.

My amendment is based not only on theories of federalism, it also recognizes the enormous practical problems the bill, as currently drafted, would cause to State-Federal relations.

Because State law would still govern tort cases to the extent that the bill did not preempt it, there would be numerous questions to litigate concerning the relationship between the Federal law and existing State laws. New, different, and inconsistent interpretations of the Federal law and the State laws would result. Under the underlying bill, Federal courts of appeal would resolve these issues. Those courts, not State courts, would ultimately determine the scope and meaning of State law as it interacts with this bill. To my mind, Federal courts should be bound by State court decisions on the meaning of controlling State law. By contrast, this bill would make State courts follow Federal court interpretations of controlling State law. Such a regime turns federalism on its head.

As I previously stated, my amendment recognizes that interstate commerce is the justification for a Federal tort reform bill. And it is interstate commerce that justifies Federal court

jurisdiction in cases brought by citizens of one State against citizens of another State. I believe that the commerce clause rationale of the bill corresponds precisely with the reasons underlying Federal diversity jurisdiction. Moreover, by adding this amendment, the bill would actually provide a uniform law in Federal court to resolve the tort cases to which it applies. The existing bill would not achieve that result.

Despite the claims made, no one truly knows the effect that this underlying bill will have on the ability of injured persons to recover adequate compensation for their injuries. Nor will anyone know whether competitiveness of American businesses will be enhanced or insurance premiums will fall if H.R. 956 is enacted. At the same time, the bill would displace 200 years of law based on actual experience. If the bill failed to achieve its objectives, there would be almost no means of unscrambling the federalized egg. By contrast, applying the bill only to Federal court cases would provide an opportunity to experiment. If the bill's ideas work, States can adopt these rules as their own. Potentially, a preemptive approach might then make sense. But if the bill created numerous practical problems, well-tested State law would remain undisturbed while Congress acted to fix the problems in the Federal law.

The practical effect of the amendment would be that defendants sued out of State in many instances would be able to remove their cases to Federal court and obtain the Federal rule. Defendants sued in their home State courts would not be able to remove the case to Federal court. Thus, those defendants would be governed by their State law as applied by their own State court. I believe that this is a much more sensible approach than the one now before the Senate, and one consistent with the Federal system and the Constitution.

Mr. President, we should protect the right of the States we represent to maintain their core function of crafting law designed to compensate injured persons. We should also permit Federal courts to apply Federal law to those cases that represent truly national concerns. We should certainly be careful before we displace many years of law based on experience. My amendment would accomplish all those goals. I strongly recommend its adoption.

AMENDMENT NO. 618, AS MODIFIED, TO AMENDMENT NO. 596

Mr. THOMPSON. Mr. President, I send the amendment to the desk.

The PRESIDING OFFICER. The Senator from Tennessee has sent up a modification. Is there objection to the modification? Without objection, it is so ordered. The amendment is so modified.

The amendment (No. 618) as modified, is as follows:

On page 9, line 3, after ''commenced'' insert the following: ''in a Federal court pursuant to section 1332 of title 28, United States Code, or removed to a Federal court pursuant to chapter 89 of such title''.

On page 10, line 19, strike ''or'' at the end.

On page 11, line 4, strike the period at the end and insert ''; or'' and add the following new paragraph:

(8) create a cause of action or provide for jurisdiction by a Federal Court under section 1331 or 1337 of title 28, United States Code, that otherwise would not exist under applicable Federal or State law.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

CHANGE OF VOTE

Mr. LAUTENBERG. Will the Senator yield for a unanimous-consent request? I have just a short unanimous-consent request to make.

Mr. President, on vote 139 that took place yesterday, I voted ''yea.'' It was my intention to vote ''no.'' It does not change the outcome of the vote in any way. I ask unanimous consent that that be recorded as a ''no.''

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

Mr. SIMON. Mr. President, I will be very brief, I say to my friend from Washington, because I have a satellite TV feed to high school students in Illinois that is going on right now.

Mr. GORTON. This Senator simply wanted to inquire about a time agreement.

Mr. SIMON. I will be very brief.

Mr. President, I strongly support and am pleased to cosponsor this amendment. It is right in theory. It is in line particularly with the Court decision that was made the other day about guns in school. I happen to disagree with that Court decision, but that is the law of the land. But it is right practically.

What we are doing without this amendment is massively overturning two centuries of tort law and tort decisions. What this amendment says is, ''Let's move a little slowly. Let's apply this in the Federal courts but not in the State courts.''

So we can learn, and maybe we will want to, after we have had a little experience, apply it to the State courts. I think it is a sound amendment. I am pleased to support and cosponsor the amendment of my colleague from Tennessee.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, first, I should like to inquire of the Senator from Tennessee, and those who support his amendment, whether or not we might reach a time agreement for the disposition of this amendment.

Mr. HEFLIN. Will the Senator yield?

Mr. HOLLINGS. Not at this time.

Mr. HEFLIN. I do not think so at this time. I think we want to ask some questions and do some things and have a clearer understanding of what the Thompson amendment does. I want to engage in a colloquy at least and so forth relative to the matter. So I would think at this time we ought to know.

The PRESIDING OFFICER. The Senator from Washington has the floor.

Mr. GORTON. If that is the case, I obviously will defer asking for such a unanimous-consent but will hope that with support of the amendment we will agree to one. The debate will ultimately be terminated, perhaps, or at least dealt with by a motion to table. But if we can plan the afternoon and evening, it will be helpful.

Mr. EXON. Will the Senator yield for a question?

Mr. GORTON. Yes, I will.

Mr. EXON. Since there is a time deadline of 1 p.m., I would like to ask my friend from Washington whether or not there could be general agreement on the passage of an amendment that he and I have worked out with regard to product liability that I think has been cleared on both sides of the aisle. We have been trying to find an appropriate time to do that. If possible, I think we can do it in 2 or 3 minutes if we can get unanimous-consent and if that is the will of my friend from Washington, the manager of the bill.

Mr. GORTON. Parliamentary inquiry. Is the rule that all amendments must be filed or formally introduced by 1 o'clock?

The PRESIDING OFFICER. Rule XXII requires that they be filed.

Mr. GORTON. This Senator is perfectly willing to deal with the amendment of the Senator from Nebraska, with which he is familiar. I am not sure that the other Senators here are, however. So I do not know that it is cleared yet.

Mr. EXON. I thought it had been cleared.

Mr. GORTON. I suggest the Senator file it and discuss it with the principal opponents to the overall bill, and perhaps we can do it in 1 or 2 minutes. It looks to me that they do not know what it is about.

Mr. HEFLIN. Mr. President, as I understand it, he is filing it with the idea of meeting the post-cloture requirement. In the event of that, all he has to do is file it at the desk and we can do it. Is that not all he has to do is file it at the desk?

The PRESIDING OFFICER. The amendment must be timely filed to be germane.

Mr. HEFLIN. All right.

Mr. EXON. Mr. President, I will comply with the wishes of my colleagues.

Mr. HEFLIN. In order to clarify, I think if there are amendments people have, if there is no objection, I think it may be extended until 3 o'clock or something like that, if people have them. I do not know of any more I am going to file myself.

The PRESIDING OFFICER. The Senator from Washington has the floor.

Mr. HEFLIN. Are there any objections to that?

Mr. GORTON. Mr. President, I do not think I am authorized to make that distinction at this point. The Senator

can file it right now, and then, if we settle it later, we can take it up and dispose of it promptly, which I hope will be the case.

Mr. President, I find myself in a somewhat paradoxical situation. With almost all of the remarks and policy positions presented by the Senator from Tennessee, I find myself in agreement. Yesterday, for example, I voted with him against a limit on noneconomic damages in the medical malpractice portions of this bill, at least in part for the very kind of reasons that he outlined. I also found most forceful and persuasive—having used it myself—his arguments that the strongest case for congressional legislation in this field rests in the field of product liability, because we deal, almost without exception, with products manufactured in one State, sold in interstate commerce in a national market.

I lost him, however, on the last turn—that that very forceful argument for greater uniformity in the rules under which product liability litigation was conducted therefore meant that we should apply this bill only to litigation conducted in Federal courts, whether it be product liability or presumably other forms of litigation which have now been adopted as a part of this bill. In that, I profoundly disagree with him and find it somewhat surprising that he and other good, thoughtful lawyers and former judges in this body would countenance this amendment, even if they oppose this bill overall.

Now, one set of my reasons is purely pragmatic. The other is academic and theoretical, but nonetheless vitally important, perhaps more important than the practical reasons. The practical reasons are that 95 percent of product liability cases are filed in State rather than in Federal courts. Ninety-five percent. That is not unlike the proportion of all cases in State and in Federal courts. Overwhelmingly, legal disputes are decided in State courts, not in Federal courts themselves.

So, if interstate commerce is a justification, at least for the product liability provisions of this bill, why should the rules of this bill be limited to litigation conducted in Federal courts? That is to say, 5 percent of such litigation. The interstate commerce impacts of the development, the production, the distribution, and the use of products, is not affected in the slightest by the location of the court in which disputes or problems in connection with those products arise. If the interstate commerce clause is justification for any Federal rules in this field, it is justification for such rules in State courts to exactly the same extent that it is justification for such rules in Federal courts. There simply is no difference.

The interstate commerce is not the lawsuit, it is not the litigation, Mr. President; the interstate commerce is the travel of the product, the fact that the product is produced in one place, sold in another, perhaps developed in a third and used by a particular individual in a fourth State, or maybe in 10 or 20 States if it is a movable product. If we are going to have a set of rules with respect to product liability litigation, obviously, they should apply in all courts.

Let us go beyond that. We have said that, at the present time, the distribution of these cases is approximately 95 percent to 5 percent. We also have opposition to this bill primarily on the grounds that it will make some litigation more difficult or will limit the recovery of punitive damages. So the choice now of any lawyer representing a plaintiff in any case which does not have more severe limits on this litigation than are contained in this bill will be to bring that litigation in State court. In fact, if a lawyer who has a choice between the two brought it into Federal court, that lawyer would probably be guilty of malpractice. What earthly reason would there be to bring such a case in Federal court?

So instead of 5 percent of all cases in Federal court, would it be 1 percent? Would it be less than 1 percent? For all practical purposes, it would approach zero. We would gain no experience in finding which set of rules were better by the passage of this amendment.

In fact, what we are learning with the present experimentation is some States have more product liability litigation and some have greater punitive damage awards than others do.

Now, of course, this amendment applies not only to litigation which is commenced in Federal Court but litigation which is originally commenced in the State court and removed to Federal court. And, Mr. President, to oversimplify the case, getting into the Federal court with a product liability case like this is almost always going to be based on what is called ''diversity of citizenship.'' That is to say, the claimants, the plaintiff; in one State, the defendant is from another State, or a certain amount is in issue.

If that is the case, and the original action is brought at a State court, it can be removed by the defendant to a Federal court. This right, however, does not exist when the parties are from the same State or when there is more than one party and there is a complete and total diversity of citizenship.

Again, Mr. President, given the way in which claimant lawyers operate in these situations, always suing or almost always suing not just the manufacturer but the retailer, sometimes the wholesaler, the developer, and the like, again, almost any competent lawyer can prevent the existence of diversity jurisdiction.

Mr. President, I would predict, I think there is not much opportunity to be contradicted, we would not have 1 percent of this kind of litigation actually conducted in Federal courts if this amendment were passed. We would not get this experimentation. We would simply see to it that the relatively small handful of such lawsuits now conducted in Federal courts ended up being conducted in State courts.

Even more troubling to me, at least, Mr. President, is the proposition that this so profoundly changes the nature of diversity litigation in Federal courts, and gives such a reward to those who game the system to find the best place in which to sue, that it has been exactly the opposite role that has obtained for a minimum of 60 years in this country.

Everyone in this body now who went to law school, or were at one time in law school, is familiar with the case in the Supreme Court of the United States called Erie Railroad Co. versus Tompkins in the year 1938.

The Supreme Court, as long ago as that year, found lawyers gaming the system, figuring out if a more favorable rule of law were going to be applied in the Federal court than the State court, they would try to get in to the Federal courts.

So the Supreme Court quite wisely said ''Look, you bring one of these product liability lawsuits in Federal court or remove it to Federal court, we are going to apply exactly the same legal rules that State courts in that State would apply.''

So we cannot get a better deal, a more favorable law, a more favorable rule by going into Federal court. A person would get exactly the same rules. That, of course, has been the law of the country ever since. It is that Supreme Court case that this amendment would overturn.

I do not mean to say it would be unconstitutional; certainly it would be constitutional. That is simply a ruling by the Supreme Court on these relationships. But if Congress wants to create an entirely different rule, it can do so.

In fact, this Congress has always in the past followed the rule of Erie versus Tompkins. When Congress does create Federal rules of tort law—and it does in the Federal Employees Liability Act and the Federal Longshore and Harbor Workers Compensation Act, and the Merchant Marine Act—it always says that those rules are going to be applied in any court wherever it is located in which such an action is brought, so that the system cannot be gamed.

It would be utterly improper, Mr. President, to depart from that wise set of rules and to move to a system in which consciously we set up one set of rules for actions in Federal court and another completely different set of rules for actions in State courts.

Nor does anything in the bill criticized by the Senator from Tennessee on the relationship between State and Federal courts, undercut or contradict that. If I understood him correctly, the Senator from Tennessee, said that this bill would have Federal courts interpreting State law through the circuit courts of appeal. Not so.

I will read the section that has to do with that relationship from the current bill. It says, ''Notwithstanding any other provision of law, any decision of a circuit court of appeals interpreting a provision of this title,'' that is to say, Federal law if we pass this ''this title shall be considered a controlling precedent with respect to any subsequent decision made concerning the interpretation of such provision by any Federal or State court within the geographical boundaries of the area under the jurisdiction of the Circuit Court of Appeals.''

This does not change the law. This is the law right now—Federal courts have priority in the interpretation of Federal law. At least at the Supreme Court level, that determination is binding on State courts when State courts interpret Federal law.

Nothing in this section gives Federal courts of appeal the right to interpret State laws. It only gives them the right to interpret this law, assuming that we pass it, which is something in my view that we did not have this section in the bill itself.

But to return to the argument, the argument is presented very forcibly by those who do not want the Congress legislating in this entire field, who are content with 50 to 53 different jurisdictions on tort law. They have a lot of precedent on their side. This has been, by and large with the exception of certain Federal statutes, the way in which these relationships have been conducted in the past.

The impact of changes in the legal system, more litigious system, higher judgments, greater risks to research and development of products, has created an urgency, I think a sufficient urgency, to move cautiously into this field. It can certainly be properly argued as it is on the other side that, no, we should not interfere at all.

I think it is that argument that ought to be made, Mr. President, that we should not involve ourselves in these issues, that we should defeat this bill. I do not think we should do it by presenting an amendment, first, which will not have any effect because there will be so few cases brought; and, second, reverses a wise decision of the Supreme Court of almost 60 years in age designed to prevent forum shopping, by saying whatever court a person is in they will abide by the same rule which this bill is consistent and which this amendment is not.

I hope we can get on to debating the merits of the entire bill, product liability, medical malpractice, rules relating to punitive damages and the like.

As I say, the Senator from Tennessee illustrated the fact that we have a problem, that we have a problem that crosses State lines. I believe we should do something about that problem, but I would rather see Members do nothing than to totally change the relationship between the State and the Federal courts in the manner which would be accomplished by this amendment.

Mr. COCHRAN addressed the Chair.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. Mr. President, let me, first of all, compliment the distinguished Senator from Tennessee for bringing this issue to the Senate in the form of this amendment. I think it highlights the frustration that many Members feel at this point in the consideration of this legislation.

The Senator from Washington very correctly points out that this may be an amendment on which reasonable scholars, even, could disagree in terms of its impact on this bill before the Senate.

I think it speaks to a frustration that we have seen so many amendments adopted now, and have been rejected, that seek to enlarge considerably the subject matter which was first presented to this Senate in this product liability bill.

I think it is clear that there is a sound jurisdictional basis for the Congress to legislate in this area under the commerce clause—at least that is my opinion—but it does not necessarily extend to all of the subjects that have been debated on this floor after the bill has been called up.

We have now undertaken to fully explore the Federal role in limiting or modifying or writing new rules for professional liability of physicians and others in the health care area, why not insist that there be included a title on architects and engineers who are also professionals and who are held to a higher standard of conduct because they are professionals, but they are not included.

Are we going to permit, then, the legislation to proceed and have all other professionals excluded because of this omission? Even lawyers are professionals in the view of most. I mean, they are held to the same high standard of conduct as professionals. So when they breach their duty to provide skilled and thoughtful and professional assistance for pay to some member of society, they are held liable if they breach that duty, under the standards that are written into the law, just as physicians are, or hospitals, or others. So I think what the Senator from Tennessee is pointing out is that we are out into the deep water now in an effort to comprehensively reform the civil justice system of the United States, piecemeal, on the floor of the Senate.

We have committees that have jurisdiction over some of these areas. The Labor Committee, for example, had a markup session and reported out a bill dealing with malpractice liability and reforms in that area. As I understand it, that was the basis of the amendment of the Senator from Kentucky, Senator MCCONNELL, on medical malpractice, which the Senate has now adopted.

I understand the Banking Committee also is considering reporting out legal reform legislation dealing with securities transactions where class action suits are brought against companies or brokerage houses for various alleged acts of negligence or breaches of duty to the general public with respect to the value of securities or the conduct of officers and board members with respect to running the companies in a skilled way, or at least up to that standard that is owed to the investor who might buy stock in that company.

There has developed, as I understand it, a sort of cottage industry in some legal circles of bringing these kinds of actions, and now there is a cry for reform and restraint and restrictions on those kinds of actions. The Banking Committee has taken that up. They are considering it, and I understand they are going to report out a bill. If we are going to reform comprehensively the civil justice system of this country, why not await the advice of the Banking Committee on that subject and include that as a title in this bill or some bill?

I understand the Judiciary Committee has now before it a proposal by the chairman of that committee, Senator HATCH from Utah, which includes suggestions for other reforms in the civil justice system of the country.

My concern, which is reflected in this amendment of the Senator from Tennessee, is that we have gone so far now, we need to stop and say: ''Wait a minute. This is not a civil justice reform bill. It is not all-inclusive,'' and try to narrow the application and the scope of this legislation to something that more narrowly fits the purpose of the bill that was brought to the floor by the Commerce Committee.

This bill relates to products liability. While some of us disagree about some of the provisions—we might want to change it, amendments ought to be considered—nonetheless, it had a fairly narrow application that was firmly based upon the commerce clause of the Constitution giving the Congress the power to legislate in this area. Some of these arguments that I have heard have absolutely nothing whatsoever to do with the Federal role in our society.

When they were talking about setting the lawyers' fees in certain contingent cases, I thought back to the time when I remember organized professional groups pleading with the Congress to do something about the Federal Trade Commission because they were about to get into the fee schedules of local professional organizations. Do you remember that? Several years ago there was a great hue and cry by the—well, I am not going to name the groups. They might get more attention than they want.

But the point is, we were arguing that the Federal Trade Commission did not have anything to do with the setting of fees at the local level by professionals. That was something that was regulated by professional societies, or State laws, or other entities—not the Federal Government. And now here we are being asked to pass judgment on a

fee charged by a lawyer to his client in a purely local action maybe. It does not have anything to do with the Federal Government. And the Federal Government should not have anything to do with that. If you want to read and give effect to the Constitution, that separates the Federal role from State governments' roles in these areas.

So I am troubled about where we are now. I think at some point we may have an opportunity to consider whether this bill should be modified in a way that puts it more nearly back to where it started and that is dealing with product liability rather than an effort to comprehensively fix or modify every conceivable area of civil justice procedure or substantive law that strikes a Senator in a moment of serious concern that needs to be addressed on this bill, and we have seen those amendments come up now, and I guess we will see many others.

So I again compliment the Senator from Tennessee for trying to put in perspective what we are doing here and what we ought not to be doing here.

I intend to vote for his amendment.

The PRESIDING OFFICER (Mr. DEWINE). The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, we had the occasion to attend the funeral of our distinguished former colleague, Senator Stennis. Time and again the visiting Senators who had served with him talked about his wisdom. My only comment is the wisdom of that distinguished gentleman is not lost to the Senate when you hear the Senator from Mississippi, Senator COCHRAN, talk. He does talk with professionalism. He does talk of trying to act professionally with respect to a Federal legislative body, and his statement on the amendment of the distinguished Senator from Tennessee is music to my ears.

This has been sort of a run-amok situation. When the Senator from Mississippi says it is not the intent to reform the whole civil justice system, we started on product liability—that is what he thought and that is what I thought but that is not what the contract calls for. I do not want somebody to say I had gotten partisan on this thing, because I am welcoming the bipartisanship with respect to the amendment of the Senator from Tennessee. But the RNC talking points show they do not have any idea of product liability. But they do have the civil justice. The contract calls for that. And you have seen what has been provided, Senator, on the House side, which is very, very disturbing.

Right to the amendment of the Senator from Tennessee, and particularly his address, which has really been music to my ears. It is like a drink of water in the desert, because he talks professionally of the duty and responsibility here of the U.S. Congress and the Federal Government. We do not find—and I agree with the Senator from Tennessee—the need for the Federal Government to start preempting local jury trials and the handling of tort cases at the local level. So what he is saying is, to try to keep step with the theme upon which he was elected—and incidentally it has been the theme upon which I have been elected for 28 to 29 years—is that the government that is the best government—the Jeffersonian phrase most often quoted—''is that closest to the people'' and the local folks decide these things.

As I have said time and again here, you have a solution looking for a problem, because product liability cases are on a diminishing scale. There is no Federal problem with respect to the lawyers' fees nationally with respect to their clients.

It is only to deter and enhance and enrich the manufacturer that we even had the Abraham-McConnell amendment. But what the Senator from Tennessee does, as I read this amendment, is sort of bring a little order out of chaos. With respect to applicability, and in diversity cases under title 18 what we have is a jurisdiction and a responsibility.

So this would apply to the provisions of this bill, and diversity only in those cases that have been removed from the State courts to the Federal system. Yes. We have in Federal court a responsibility at the Federal level. And let us apply whatever they desire, which is almost open sesame now around here. I cannot tell what the next thing is coming up. But like the sheepdog can taste the blood, they are going to gobble up all the rights of the individuals back home because all of a sudden we, who have been elected by the people back home—think the people back home have totally lost judgment. We have to tell them how, why, where, and when. You can put in this evidence but you cannot put in this.

If that is necessary, the Senator from Tennessee says, let it apply in those diversity and removal cases, and then we will have fulfilled our responsibility. I hate to talk longer on the amendment because you become identified with your position in these matters. Somebody would say—I can hear them now—''Well, HOLLINGS is for the Senator from Tennessee's amendment, you had better vote against it.''

I am trying to laud the distinguished Senator from Tennessee, particularly his comments. I just listened as he went chapter and verse right down the line. That is the first address of which I had the occasion to hear the distinguished Senator from Tennessee. I listened to him through his client, Senator Howard Baker, years ago in earlier proceedings. But now he is speaking in and of himself. I find that solid. When they talk about common sense, that solid common sense is coming through with respect to this particular issue of product liability and the amendment of the Senator from Tennessee. So I heartily endorse the attention, particularly of my colleague from West Virginia, one of the leading sponsors on this bill.

When it comes down to law, yes. We have a responsibility on the Federal side—diversity and removal. And let us apply whatever everybody decides by a majority vote is necessary to occur. But let us not in the context of simplicity and uniformity come back in and jumble this whole thing into the 50 jurisdictions with the 50 different interpretations and bring it up to the Federal system for even further interpretations and appeals and say that what we have now is uniformity.

The Senator from Tennessee gives us uniformity. There is no question about it in this particular amendment. I heartily endorse his initiative and his amendment.

I hope we can sort of calm down now without all of the little amendments of interested parties. They are on a roll—you can see by the way the votes are going—to affect all civil cases with respect to punitive damages. You would never think that would occur on the floor of the U.S. Senate because punitive damages had a salutary effect in our society. All I have heard is about runaway juries and the legal system as a lottery; these catcalls you might call it. It is almost like an athletic event up here. The deliberative body is the cheerleading section. The Senator from Tennessee says let us get out of the stands, get out of the chair, and get down on the field of responsibility and act like Senators and legislate where we have that responsibility, and leave the States and the local folks to their own judgments, their own considerations.

It is not a national problem. There have been problems arising. States have treated it differently. They have all revised practically all of their product liability laws in the last 15 years. These State legislatures come up and say, ''For Heaven's sake, leave us alone.'' They testified before the Commerce Committee. The Association of State Supreme Court Justices, a bipartisan group says,

> For Heaven's sake, let us not put this thing in where we have to take all of these words of art and interpretation in the 50 States. Leave us alone.

The American Bar Association, a bipartisan group if there ever was one, and a study group of lawyers said we studied it again. It is totally off base. We oppose this bill. Mr. President, 123 legal scholars have come forward and said now you really, in an effort to give what you call common sense or uniformity or fairness—to get the buzzwords going—what you have really done is given the highest degree of unfairness, the highest degree of complexity that you could possibly imagine. They testified. The attorneys general testified against this measure. There it is.

How do I get that over to my colleagues? Well, thank heavens. I know a lot of them would listen to the leadership of the Senator from Tennessee,

and I hope they will on this particular score.

I yield the floor.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Mr. President, I certainly join Senator HOLLINGS with regard to the remarks that have been made by the distinguished Senator from Tennessee and the distinguished Senator from Mississippi.

The Senator from Mississippi talked about the fact that here we are really going with this, a product liability to, in effect, change all civil actions; changing the tort laws. All of a sudden, we have adopted the Dole amendment which extends to all civil actions affecting commerce. Of course, under the laws pertaining to commerce, it does not say ''interstate commerce.'' It says ''commerce.'' I mean some people resent the decision pertaining to the Lopez case that was handed down. But this does not say ''interstate commerce.'' It says affecting ''commerce''—the language in the Dole amendment.

I wonder, how far does this go? Of all civil actions? Civil actions, if there are civil rights cases, based on State law? Is it covered by this? Does this apply to that? If there are civil rights cases under Federal law, are they affected by this? There are so many questions that are raised. There have been, for example, longstanding railroad laws pertaining to FELA cases. Are they affected by that? There are longstanding admiralty laws which are civil cases; are they affected by these amendments? Is the Jones Act, which is another matter pertaining to seafarers, affected by this act? There are so many things that just immediately come to mind that raise concerns in my mind.

Consider, for example, the antitrust laws that are enacted by States. You have the standard of three times damages, and as the bill is now amended, it is reduced down to two times.

Economic? If there are no noneconomic damages, then it is reduced down to twice. Are we changing the antitrust laws in reducing the penalties pertaining to those?

Senator COCHRAN mentioned that here we are attempting to change all of these laws on the floor of the Senate.

I said there have been groups that have studied the tort law. There is the American Law Institute that has published the restatement of torts. They have published the restatement of a great number of various fields of law. This product liability bill, the underlying bill, has no resemblance to that study group which has over the years included defense counsel, plaintiff's counsel, professors, scholars, and people who have worked on the concept of tort law, including product liability law. But this has been written by lawyers that are interested in trying to save themselves money, and they are trying to save themselves money at the expense of injured people. And now it is being extended to all civil actions.

Now, I am not exactly sure what the Thompson amendment does, and I would like to sort of engage in a colloquy and ask the Senator some questions pertaining to it.

From what I have been able to read and in listening to my colleague speak, really the Senator's amendment, as I understand it, limits the application of the underlying bill as now amended to Federal courts only. Is that correct?

Mr. THOMPSON. That is correct, I say to the Senator.

Mr. HEFLIN. In other words, it is not controlling on actions that are tried in State courts, such as the Senator's State and such as Senator COCHRAN's State.

Mr. THOMPSON. That is correct.

Mr. HEFLIN. It does not impose any of those provisions that are in the underlying bill, as amended, upon the State of Tennessee, the State of Mississippi, the State of Alabama, the State of New York, or any other State—it does not impose those provisions on them; is that correct?

Mr. THOMPSON. That is absolutely correct.

Mr. HEFLIN. All right. Now, the provision dealing with the interpretation of the court of appeals, which is in the underlying bill, the court of appeals that might interpret a district court and the Federal courts, that decision that is made relative to the underlying bill, as amended, would not affect proceedings in a State court?

Mr. THOMPSON. Under my amendment, that is correct.

Mr. HEFLIN. As I understand it, the Senator's amendment does not create a new cause of action or a Federal cause of action. Is that correct?

Mr. THOMPSON. That is exactly correct.

Mr. HEFLIN. In other words, the Senator's amendment, in effect, says that the provisions of the underlying bill—you have provisions dealing with punitive damages; you have provisions dealing with misuse and alteration; you have standards that are created relative to punitive damages; you have provisions dealing with intoxication and defenses on that——

Mr. THOMPSON. In the medical area also.

Mr. HEFLIN. You have the biomaterials provision and all of that in the product liability bill. Are those provisions limited strictly to cases that are tried in Federal district courts?

Mr. THOMPSON. That is correct.

Mr. HEFLIN. All right. So, now, if I understand it from the Senator's speech and also Senator SIMON's speech, the Senator's idea is that this would be an experiment, in effect a pilot program for a period of time in which you would determine how it would work, and from it, State courts could use the experience. State could learn from that experience? And, of course, Congress could look at the same thing and learn from the experiences that might be contained therein; is that correct?

Mr. THOMPSON. Yes, that is correct.

It occurs to me on that point that States have learned, for example, from the Federal Rules of Civil Procedure and I believe also perhaps the Federal Rules of Criminal Procedure. Federal courts adopted rules that proved to be effective, and after a period of time States like Tennessee and others adopted State rules that resemble very much or in some cases are identical to the Federal rules, because over a period of time they proved to be salutary and desirable.

Mr. HEFLIN. All right. The distinguished Senator from Tennessee, I am sure, knows of the doctrine which came out of a case in the Supreme Court called Erie versus Tompkins. Now, Erie versus Tompkins basically says that State law prevails in diversity cases and prevails in Federal cases in the event that the Federal law is not written to approach it. In other words, if there is a void in Federal law, then the concept is that State law will be followed under the doctrine of Erie versus Tompkins in the Federal courts.

Mr. THOMPSON. Yes. The Federal court can follow the substantive law of the State.

Mr. HEFLIN. The Senator is correct in regard to substantive law. So if this particular bill, as amended, is silent relative to a State law and is not preempted, then a Federal court would continue to apply State substantive law in a case brought in the Federal courts? Is that correct?

Mr. THOMPSON. That is absolutely correct. In other words, in other diversity cases not covered by the provisions of this amendment or the underlying bill, Erie would apply and the substantive law of the States as always would still apply in those cases.

Mr. HEFLIN. Basically, I have a reservation on the philosophical viewpoint. I think, No. 1, as the bill presently stands, as it is amended, the Senator's amendment is an improvement. I do have reservations as to whether or not from a philosophical viewpoint we ought to be legislating in an area that has been left to the States for many years. And so it is a question of federalism. I am in somewhat of a conflict as to whether or not I would support the Senator's amendment, and that is something I am going to think about and give a little more thought to.

Mr. THOMPSON. If I could respond to that point just a moment, I think the Senator is reflecting a conflict that is going on within a lot of us. A lot of us understand the concern of our constituencies that businesses, and so forth, have legitimate complaints. A lot of us are also concerned about this rush to judgment, where the U.S. Congress and the Federal Government are on the verge of supplanting 200 years of State law, at a time when many of us are saying in other areas, whether it be welfare reform, regulatory reform,

taxes, or unfunded mandates, we are all saying get the Government out of the States' business. States are where the innovation is going on. Let them take care of themselves. So we are all engaged in that conflict.

Product liability has been discussed in the Chamber of this body for many years, long before I arrived. The Senator, I am sure, has engaged in those debates over the years. I think there is a feeling that this is an area wherein there is more justification for our involvement on the Federal level because of the inherent interstate nature of the activities. Seventy percent of all manufactured goods now travel in interstate commerce.

If I had my desire, if I could write the legislation, or I could come to the conclusion, perhaps this is not where I would be. But I see the freight train going down the tracks, and I think we at some point have a responsibility to at least try to make sure that we wind up in as good a position as we can. And for me, that is carving out an area and saying, look, if we are going to do this, let us not go all across the board. Let us not usurp all State laws across the board dealing in these areas without knowing what we are doing.

The Senator from Alabama mentioned and in 5 minutes raised a dozen questions that nobody knows the answers to. The answers will be decided through reams and reams and reams of court decisions throughout this Nation over the next several years. We will create more lawyer work than we ever dreamed of because of what is going on here.

So what I am saying is, let us take the basic part of the original underlying legislation, which has to do with products liability, which has more of an interstate nature to it than what goes on in some small law office, what goes on in some accountant's office, what goes on in some doctor's small office or any of these other areas, and couple that with the interstate nature of most of products litigation, and that is diversity cases.

Incidentally, I disagree with my distinguished colleague from Washington concerning the number of diversity cases filed in Federal courts. Last year, the Administrative Office of the U.S. Courts reported that 22,000 products cases were filed—tried or disposed of—in Federal courts. That represents approximately 45 percent of all products cases.

So, close to half of all products cases, under my amendment, would get the benefit of this new Federal rule and legislation that we are proposing. But at least we would not be, in one fell swoop, supplanting all of the State law that has been developed over 200 years.

I believe that it is justified and it makes some sense in this area and would allow us to take a deep breath and look and see what we have wrought, whether or not it is working, whether or not insurance rates are being affected, whether or not this is something that States want to emulate or something that we, as the U.S. Congress, want to backtrack on and say we made a mistake. Under this, we could unscramble the Federal egg a whole lot better than if we changed all the laws in the States, got years of decisions, new decisions based on those laws, learned that we were wrong, got a new group in the majority in this body and in the House and had them come in and impose their will and their concept of justice and respond to their clients and their constituents.

I think it would be a mess. I think we are asking for a real mess down the road. What I am trying to avoid with this amendment is that kind of result, which I think would wreak havoc with our court system in this country.

(Mr. HATCH assumed the chair.)

Mr. HEFLIN. Mr. President, the Senator keeps using the word ''interstate.'' As I read the language that we have now adopted, it is applied in regard to punitive damages in any civil action whose subject matter affects commerce, not interstate commerce, but commerce. Actually, it seems to me that commerce is affected almost by every conceivable type of action if there is a transaction. That, to me, under this language that is now in here, makes it so broad. It affects commerce and affects that aspect of it.

Now, under the Senator's amendment, he would allow for actions that are transferred, removed from the State courts to the Federal courts. And that is what is known as a removal action.

It is my understanding today that I think we passed in the Senate some bills that would enlarge the jurisdiction. But the present jurisdiction is that if the suit is for $50,000 or less, you cannot remove it from the State court to the Federal court. So, therefore, those types of cases of a frivolous nature seeking small damages relative to this matter would stay in the State court if they are $50,000 or less. Does the Senator interpret it that way?

Mr. THOMAS. Yes, I do.

Mr. HEFLIN. Now, if you are seeking punitive damages, you are limited in the amount that you claim with regard to the removal. So, chances are, you are not going to have many punitive damage cases that are affected, since there is a limit in the amount of money that you sue for, in the removal of those small type cases. Does the Senator agree with that?

Mr. THOMPSON. I am sorry, I missed that.

Mr. HEFLIN. I was just saying that, looking at punitive damages, we look upon that as being in big figures. But if the suit is only for $50,000, then the amount that you sue for includes if you seek punitive damages and it puts a cap on it. You cannot recover more than you can sue for and if you do not sue for more than $50,000, then you stay in the State courts and it is not removable to the Federal court.

Mr. THOMPSON. I think that is correct.

Mr. HEFLIN. All right.

Now, I am not sure that I understand this provision, the last one, which is No. 8. It reads:

> In section 102(c), add the following new paragraph:
>
> (8) create a cause of action or provide for jurisdiction by a Federal Court under section 1331 or 1337 of title 28, United States Code, that otherwise would not exist under applicable Federal or State law.

Now, that provision in there, I believe, is in the bill that was introduced. That is to prevent saying: ''Create a Federal cause of action,'' and therefore leaves it strictly to the preemption that is in this bill as amended and does not create a separate cause of action at the Federal courts; is that correct?

Mr. THOMPSON. That is correct.

Mr. HEFLIN. I thank the Senator. I appreciate the distinguished Senator from Tennessee responding to my questions relative to these matters. I have a better understanding relative to what his amendment attempts to do.

I might just ask him, too, in this regard, I believe if we look at the Federal law and the Federal Rules of Civil Procedure that apply, the distinction between equity and civil cases is now combined into civil cases.

So in the Federal law that we have today under the Federal Rules of Civil Procedure, cases that we used to make a distinction between—we used to have really three types of cases. You would have criminal cases, you would have civil cases, and equity cases.

But the Federal Rules of Procedure, of course, which are not affected by Erie versus Tompkins, are now combined and you have equity and civil cases in it. So, basically, under the present Dole amendment, basically what we are looking at are really two types of cases—criminal cases and civil cases.

Under this, in regard to the Dole amendment as to punitive damages, in other words, the only thing it really excludes is criminal cases. Would the Senator agree with that?

Mr. THOMPSON. That seems to be the result of it.

Mr. HEFLIN. I yield the floor.

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I, too, share the concern of the Senator from Alabama concerning the application of the commerce clause to some of the amendments that we have already adopted. I suppose the courts will have to determine whether or not there is sufficient interstate commerce with regard to some of these matters in the future.

In response to some of the comments made by the Senator from Washington, I have already pointed out that according to the American Bar Foundation, which is an independent body, separate from the American Bar Association,

that if you include all the product liability cases filed in Federal court, plus those removed to Federal court—in other words, the subject of this amendment—you have approximately 45 percent of the product liability cases that were filed last year. So this is not a situation where only a handful of cases would be brought in Federal court.

Second, the amendment which I propose is not, as it has been characterized, a killer amendment designed to oppose any kind of reform. We started off early on in this body dealing with frivolous lawsuits. The only provision in any of this debate that actually deals with frivolous lawsuits is the one Senator BROWN proposed concerning rule 11. I supported that. We need a stronger rule 11 to take care of frivolous lawsuits.

Beyond that, it would be easy enough to simply oppose any legislation because it interferes with States' legitimate rights in these areas. We are not doing that. We are trying to strengthen this and come up with something that not only will pass but will not cause us to regret our actions later. Our amendment will give us an opportunity to see whether or not these broad-range measures work in the Federal court system, which is the system that we ought to be concerned with and with which we can legitimately deal.

The question arises: Why would anybody ever file a lawsuit in Federal court anymore under the Thompson amendment? There are several reasons. For example, the underlying bill, I believe, has a 20-year statute of repose. Tennessee has a 10-year statute of repose. If it is past 10 years since the product was manufactured, you would certainly bring the case in Federal court, not State court, because you would want to get the benefit of that statute of repose.

Also, the State of Washington and other States have no punitive damages at all. A plaintiff would certainly not want to bring a case in State courts in Washington if he had an opportunity to do otherwise.

On the preemption of State law, perhaps we are just passing in the night, as far as our conversation is concerned, but the underlying bill certainly preempts State law with regard to the subject matter covered by the underlying bill. So you have a Federal circuit determining what the interpretation of that law is and then the States have to follow that Federal court interpretation of that Federal law in cases that are decided before them.

On the question of forum shopping, under the underlying bill, you could have 50 different sets of rules in 50 different States. For example, with regard to caps, they are only caps. States are free to do more restrictive things if they are within those caps. They cannot do more liberal things, as far as plaintiffs are concerned. They can do more restrictive things.

You can have 50 different sets of rules. You can have plaintiffs shopping through 50 different States in some situations under the underlying bill. At least under this amendment, there will be many cases that are properly removable to Federal court. When those cases are removed, we will have one Federal standard.

So, Mr. President, I respect my distinguished colleague from Washington and what he is trying to do in his strong fight for a products bill. I suggest to him that what we are doing here, in the long run will strengthen his efforts instead of diminish them. I certainly hope this amendment gets full consideration in this body. Thank you. I yield the floor.

Mr. HATCH addressed the Chair.

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

Mr. HATCH. Mr. President, I am proud the Senator from Tennessee is on the Judiciary Committee working with us on many issues. With regard to this amendment, I am very concerned about it because I believe this amendment would undermine much of what our tort reform efforts on the floor of the Senate really are about and undermine what we have been trying to do this week.

Senator Thompson's amendment, as I view it, would strictly limit the coverage of tort reform legislation and, in my opinion, would take the whole substance out of this legislation.

Only 4 to 5 percent of tort cases are filed in our Federal courts. That is still a significant number, but it is still only 4 to 5 percent. That is according to the Department of Justice figures. Thus, under the Thompson amendment, the vast majority of litigation abuses in this country would go unchecked if his amendment is adopted. Plaintiffs would be able to sue in State courts to avoid having their suits subject to the Federal law. Although in some cases defendants might be able to remove State-filed cases to Federal courts, plaintiffs' lawyers will surely plead their cases in ways to prevent removal to Federal courts. The end result is that defendants may be subjected to vastly different substantive legal standards, depending on the whims or designs of plaintiffs, and that simply is not fair.

Under the Thompson amendment, parties would be uncertain about what laws would apply to their conduct. If sued in State court, one rule would apply. If sued in Federal court, an entirely different set of laws could apply. That uncertainty will not address the harmful effects on our economy today and the harmful effects that this bill is trying to cure. For example, higher liability insurance rates have been a problem in this country for years due to abusive litigation. Under the Thompson amendment, insurance companies will not be able to significantly reduce liability insurance rates because they will have no idea what risks they are going to face. They will have no idea where businesses and other groups they insure will be sued. The rates will continue to remain high, and all of those higher rates will continue to be passed on to you and me as consumers.

So the people who really lose, if we do not pass this tort reform legislation, this product liability legislation, as amended in its current form, will be every consumer in this country. Consumer losses amount to trillions of dollars over time, and I think it is time for us to face up to these problems.

Look, I have been a trial lawyer. I have tried hundreds of cases in my legal career, many of which are cases involving torts. I have to tell you that I think much good is done by trial lawyers who try to stand up against some of the evils in society by bringing litigation with regard to torts that are committed. However, we really in this country have gone way over to one side to the point where the deck is stacked. This bill is an attempt to try to bring our laws back to the middle where people are treated fairly, where lawyers can still win their cases, where lawyers can still win substantial verdicts, but where lawyers no longer get these runaway verdicts. These runaway verdicts really are happening in this country with greater frequency.

I might add, this kind of legislation, as evidenced by the Thompson amendment, is highly unusual. It is one thing to apply different procedural rules to cases brought in Federal or State courts. It is entirely another question to apply a different substantive rule. Ever since the landmark decision in Erie versus Tompkins, it has been clear that Federal courts sitting in diversity cases apply the substantive rules of State law.

This amendment would present a striking, perhaps even unprecedented, application of a Federal law. The very same tort case would proceed in State court under one substantive law, but if removed to Federal court in the same State, because of diversity, a different substantive law would apply to it. In my view, this does not make sense.

Senator THOMPSON acknowledges that the commerce clause clearly empowers Congress to act over product liability cases. This is not an area in which Congress ought to stay its hand, because the high cost of litigation abuses cross State lines and because they are a serious problem. I personally believe this is an area in which a limited Federal solution is amply justified.

Now, I have had judges all over this country come to me and say, ''You must do something about punitive damages''—from the highest courts of this land—because they try not to be activist judges and do not believe that they can resolve this problem, and it is going to take congressional enactment to do so.

In the last amendment, the Dole-Exon-Hatch amendment, we made a great effort—and it did pass—to try to

resolve some of these punitive damage problems. I think that amendment will help us to get those problems resolved. If we bifurcate the system saying that amendment only applies to the Federal courts and not to the State courts, we will continue this runaway system of punitive damages that is hurting everybody in America. And in the process, we will be hurting the Federal courts as well and the right of people to go to Federal court.

As a trial lawyer, I went to both State and Federal courts on a regular basis. I have to say that I enjoyed both of them, and I found competent people in both courts. But there were areas of the law where the Federal courts were better. There were areas of the law where the State courts were better. I tried, in the interest of my clients, to do the best I could by bringing the cases, when I could, in either of the courts and made the choice.

As a trial lawyer in those days—true, I am arguing for a time past, 19 years ago as a trial lawyer—our major claims were for economic and noneconomic damages, compensatory or noneconomic damages. We were able to get substantial verdicts by presenting our cases on those two theories. You very seldom alleged punitive damages unless there was egregious or intentional or willful conduct that justified punitive damages. But in this day and age, it is almost malpractice to not plead punitive damages, even in simple negligence cases in some of these States where the laws have gone awry and where the courts have in essence been captives of certain trial lawyers who literally are hurting the practice of law throughout this country by their voracious desire to make money at all costs, under the guise that they are helping consumers and those who are injured, when in fact the people who are primarily being helped are really those particular trial lawyers who have been doing this.

I can remember in one State, in a contest over a Supreme Court nomination, where there was a reformer running for the Supreme Court and the other person was a total captive of certain trial lawyers in that State. In one evening, 15 trial lawyers raised over $1½ million for their clone, for their captive, for the person who would rule for the plaintiffs no matter what the law said, or no matter what the law meant. Now, that is wrong. We are trying to resolve these problems with this particular bill.

My colleague from Tennessee is very sincere in this amendment. I have some feelings about it myself, because I personally do not want to see injured parties unable to receive adequate compensation for the injuries they suffered. On the other hand, I do not want to see everybody else in America irked because we will not curtail some of the abuses that really go on in trial practice every day.

I am also very concerned because I think some of these lawyers are really hurting my beloved profession. To some of them, these problems do not mean anything. It is just a voracious desire to make money at the expense of really virtually everybody. I think it is time to get some system that works, that is fair, that still protects the injured parties, but does not run away, like our current system has been doing in a great number of States.

Now, there are few States where it is just outrageous, and in a great number of States we are finding outrageous punitive damage awards from time to time. In some States, it is almost all of the time. As I said, it has become a rule rather than an exception to plead for punitive damages, even in cases where formerly there would be no real claim at all. I think it is time to do something about this. I hope our colleagues will vote against this amendment, as sincere as it is, and as well argued as the distinguished Senator from Tennessee has done it.

I respect him, I respect what he is trying to do, I respect our profession, and I respect trial lawyers. Most trial lawyers are very decent, honorable people who want to do the job for their clients. They want to do what is right. But there are a few who are distorting the profession and I think making a mockery out of trial law and out of the damages system of this country. That is what we are trying to resolve and trying to solve with this legislation. There is no simple way of doing it. This is the best way I know how.

To that degree, I want to praise the two leaders on the floor, Senators ROCKEFELLER and GORTON, for the excellent efforts they have made in order to try to keep this bill together, get it passed, and to get legislation that might help solve some of these vicious tort problems in our society today.

I yield the floor.

Mr. ROCKEFELLER. Mr. President, I thank the Senator from the State of Utah for his very nice closing sentence and also his general argument.

Mr. President, I have been—in case nobody has noticed—trying to enact what I call moderate product liability for many years—8 or 9—because I am convinced that consumers and businesses alike are ill served by the current disjointed State-by-State legal system.

Under this patchwork system of State laws that we have—glorified by those who propose this—victims are forced to wait far too long for compensation after their injury, and far too often it is the lawyers who benefit more from the awards, the settlements received, than the victims, which is not what I thought America was about.

This is simply unjust. I am absolutely convinced that the flow of goods in interstate commerce is severely hampered by the patchwork of product liability laws across this Nation. Businesses of every size and type simply have no way of knowing, under the current system, what rules they need to follow. How could they? They have 50 States to deal with. Businesses are hard pressed these days, small businesses in particular. This is especially onerous on those same small and start-up enterprises which, in my State of West Virginia and most of the rest of the Nation, are in fact the backbone of the economy. I daresay that the Presiding Officer would say that that is true for his State of Montana.

The amendment by the Senator from Tennessee, the very distinguished Senator THOMPSON, seeks to limit the bill's application to only those cases brought in Federal court. Make no mistake about it, this amendment would effectively kill product liability reform. It is a bill killer.

The reasons we must reject this amendment are the very same reasons we need product liability reform in the first place. I have stated that many times during the debate. The overwhelming majority—and this was said more ably by my colleague from the State of Washington, Senator GORTON—about 95 percent of product liability cases, are brought in State courts now. He suggests that number might go down closer to 1 percent. They would be totally untouched if this amendment were approved.

Additionally, it is very likely that even fewer cases would be brought in Federal courts because plaintiffs would keep their options open for forum shopping, as we call it, for better rules in some other State courts.

Consumers lose under the current system and that would not change if the Thompson amendment were adopted. Why do they lose? Consumers lose because they receive inadequate compensation under current State law. Consumers lose because they have to wait far too long to receive compensation.

Far too often, injured consumers are forced into poverty while waiting for their cases to be resolved. They have to depend on their own insurance or their own individual resources, if they have any.

Consumers lose because they are forced to pay outrageous legal fees under a State-by-State system. Consumers also lose because the patchwork of State statutes of limitation are so severe under the current law and result in barring legitimate claims. That is the subject I will discuss in a moment.

The underlying bill would correct these problems by replacing the State-by-State patchwork with a far more uniform system. The Thompson amendment would completely unravel that new uniform system.

In earlier debate, I have also set forth why manufacturers lose under the current State-by-State system. But I think this bears repeating. Manufacturers lose simply because they face unpredictable and escalating costs of litigation. These stifle research, these stifle development, they prevent investment, they cause products to be withdrawn, they cause products not to

be improved, and they cost—guess what—jobs.

We have been working hard, very hard. The Senator from Washington and Senators on his side of the aisle and Senators on my side of the aisle have been working very, very hard to find the right balance.

Senator GORTON is not an extremist. The Senator from West Virginia is not an extremist. We are trying to find the right balance between consumers, plaintiffs, and businesses, with a special attention to small businesses, which is the majority of our businesses. We have been working very, very hard to find that right balance, to assure that the rights of the injured are fully protected while we meet the needs of business to manufacture and to invest.

We need both in this country. A person cannot just say, well, it is only consumers that count and business does not count, because if we did not have business, nobody would work. They would have no income. It is also equally silly to say it is only business that counts, because then that might take America back to a day when business practiced differently than they do today.

We have developed, I think, in America, a system whereby we try to protect consumers, and we do in the bill that the Senator from Washington and I suggest. The Gorton-Rockefeller substitute strikes that important balance for consumers and business. The Thompson amendment, I say again, would destroy that balanced solution.

The amendment of the Senator from Tennessee has a familiar and, I think, a very curious ring to it: Familiar because so far, the only suggestion concerning the problems of the product liability maze that I have heard from the opponents to this bill is the idea embodied in this amendment; curious because where is the logic in limiting the surgery proposed in our product liability bill to the equivalent of only one finger, when the problem plagues both hands?

We should face it. This amendment is based on a refusal to acknowledge the ridiculous cost, delays, and burdens of a very big problem called the patchwork of 55 sets of product liability rules and laws across the States and the territories.

I might add at this point that in earlier years, in hearings in the Commerce Committee, those opposing product liability reform always said that there will be this massive confusion if we have some kind of uniformity at the Federal level in certain areas, everything else being reserved to the States, which we do in this bill.

They always say, well, imagine a higher court trying to interpret 50 sets of laws. It is a specious argument. It needs to be said that it is a specious argument.

Right now, we are plagued by the 50 sets of laws, all different, to all States. So people forum shop, and I guess it is fairly well-known that if a person wants to go for punitive damages, there are three States to go to, and that is where most of the amount of the punitive damages come from. If they can find a way to drag somebody in—and Alabama is one of those States, curiously, ironically, interestingly—then people go there and they get very good results. There are two other States, in particular, also.

The point is that the Federal courts will not take very long—and a Federal judge pointed this out a couple of years ago—to figure out when we get uniformity and they have to take these 50 State laws, that there will now only be one law in a certain area and 50 laws in other areas.

It will not be confusing very long. It is permanently confusing now because everybody is running all over the place. Judges are smart folks. They do not get there because they cannot pass an SAT test; they get there because they are smart and they have to figure things out quickly. They will be able to do it.

This will actually make the whole process of interpreting State laws easier, more efficient, and better. Let that be said, because it has not been said in this debate. The argument that uniformity somehow confuses this by throwing open all of these State laws is specious. I pick that word for no particular reason.

I suggest to the Senators opposing the bill before the Senate and supporting this amendment, they should both vote against the amendment of the Senator from Tennessee.

Face it: This amendment guts the purpose of this product liability reform bill. We are trying to respond to problems that States on their own simply cannot fix themselves. What can the State legislature of West Virginia, for example, do about the fact that most of my State manufacturers sell their products in other States, where the rules dealing with punitive damages, with joint and several liability, with the statute of limitations, et cetera, come in every conceivable form? It is chaos.

I hear the Senator from Tennessee talk about innovation in the States, and I want to get on to the subject of innovation, since we do not have a time agreement on this. And I think the Senator from Washington and I would be glad to agree to a time agreement if any person shows any interest.

Let me discuss a little bit about product liability. I think the reason why the bill needs to pass and why I think the bill will pass, is that consumers lose, Mr. President, under the current system. Consumers receive inadequate compensation. That is, people who are injured, through product litigation, severely injured people—consumers—only recover about one-third of their actual damages.

Just think about that, severely injured, chewed up in a machine, or something of that sort, and they end up averaging only about a third of what they should actually get. While those who are mildly injured, who are also important, recover approximately five times their economic losses. That is totally unjust. And anyone on this floor who would defend that should choose not to.

Consumers have to wait a long time to get any kind of justice under the current system. Injured consumers in need of assistance must suffer through approximately 3 years of litigation before they receive a nickel of compensation. That is not the American way. And where we can improve it we ought to do so.

Consumers pay outrageous costs. To put it another way, the current tort system which rules the Nation at this point, and which the Senator from Washington and I are trying reasonably and in a balanced fashion to change, pays more to lawyers than it does to claimants. It pays more to lawyers than it does to claimants? Yes. That is wrong. This is America—that is wrong.

If there are those on this floor who choose to defend that and say that is good for injured people, that is good law, that is exactly the way we should leave the law, that we should leave that entirely unfettered so that lawyers make more off of this than do the people who are injured whom they purport to be defending, then let them defend that. Let them defend that. I am interested in their argument. They always talk about something else. They bring up Victor Schwartz, or they bring up some little thing here or there, but they never defend these things because they cannot, because they are dead wrong and they know it.

Another reason we need to change the product liability system in this country is because consumers face closed courthouse doors. What do I mean by that? A lot of people who are injured in this country by a product cannot file a claim because of something called the statute of limitations. I am not a lawyer, but I at least know what that means. And if, for example, I am injured in Virginia, my time for filing a claim runs out after 2 years from the time that I am injured.

I have had several debates with the Senator from California, Senator BOXER, about DES. She has said anybody involved with DES hates this bill. She has used that word many times—hates this bill. Hates the bill. Hates the product liability reform bill the Senator from Washington and I are trying to get passed.

What I cannot seem to make clear enough is that under our bill, anybody who faced the kind of problems that somebody who faces DES faces, or somebody who faces asbestos, or somebody who faces some other kind of toxic harm or chemical harm—the Persian Gulf war syndrome, agent orange, all of this—wherein they do not discover they are injured for maybe 4 years, 5 years, 6 years, 7 years, 12

years, in our bill we say the statute of limitations, that is the time you can make application to file suit against the manufacturer, that person who injured you or that company that injured you—the two year limitation—should not start until you know that you are injured and you know what caused your injury. Which means all the DES people would have been fine under our bill, while they are completely cut off under the current law if the State has a statute of limitations which runs out, as most of them do, before DES would have been discovered.

I posit that, as lawyers say. I posit that. It is fact. People can say it is not true, I do not like the bill. There is a mindset around here on this whole subject which is very surprising and disturbing to me. I think this is not true—reasonable people, I am just looking at the Senator from Tennessee whom I consider a very reasonable person. I think he is thoughtful, he weighs things. But a lot of people in the fighting of this battle over the years have become so hardline that any kind of a change, any suggestion of a new fact, any suggestion that maybe the law could be improved, brings 100 percent disapproval and anger.

It is like somebody just puts out an idea and somebody is afraid the idea might be good so they immediately squash the idea. They just pound it down into the ground with their fists and crush the idea for fear it might be good or develop into something which is good and useful for the American people and for business.

It is a tendency which I regret in this body, which I do not consider worthy of the U.S. Senate. It is encouraged, I think, by a sort of hard-line mentality, and a lack of civility even, in discussing all of this.

Again, we want to open the courthouse doors through the statute of limitations. The opponents want the courthouse doors closed. Let them explain otherwise. Let them explain otherwise.

States with statutes of limitation that begin to run out at the time of injury, there are four of them: Arkansas, Virginia, Hawaii, Wyoming.

States with statutes of limitation which begin to run when the injury is discovered or should have been discovered, there are 16 of them. So that does not mean when the cause was discovered, that just means when the injury was discovered. That is not enough. It has to be when it was discovered and when the cause was discovered. We know from the Persian Gulf war veterans—and I do not know whether this applies to them or not—but we know they know when they are sick. But we also know that the U.S. Government and Department of Defense says that they are not sick. I go visit them and their hands are trembling, they cannot sleep, they cannot keep their marriages together, they are tired all day, they cannot keep their jobs, and they cannot focus their eyes on a newspaper for more than 5 minutes. But the Department of Defense says there is nothing wrong.

I beg to differ because I visit these people when I go back to my State of West Virginia, because I care about this and this is a cause of mine, to unmask Persian Gulf war syndrome. They know they are sick, but they cannot say why. What caused it? Was it Pyridostigmine? Was it some other kind of vaccine?

So you have 16 States—20 States—automatically where people are shut out. If those who oppose this legislation want to say, ''We are for that, let them continue to be shut out,'' then let them get up and say so. Or if they say I am wrong, the Senator from West Virginia is wrong, then let them get up and say that. Let them get up and say we do not open the courthouse doors and that they do not close them—as they do, the courthouse doors—and keep them closed.

It is cruel. It does not make sense. It is based upon old-time life when it was all machines. Now a lot of the stuff is chemicals, toxins, and all kinds of things. That is where a lot of accidents happen. The industrial age has evolved. Just as you can sue somebody under current law for a piece of machinery that was built in the 19th century and that has passed through 15 different owners, all of whom have altered it. That was made for that time, that generation, that industrial revolution period. That idea is not made for the current times at all.

So we are trying to open the courthouse doors to consumers. Manufacturers lose under this current system. We are talking about people and manufacturers, yes, a balanced bill. Liability stifles research and development. This country is great because of our research and development, our spirit, our entrepreneurial spirit, which is embodied in research and development. Japan does not do basic research. The United States does. Then they come and buy it from us, or we sell it to them, however you want to characterize it. And on that the Senator from South Carolina would agree. We sell them our technology. But we do the basic research. That is the heart of America's greatness, the basic research we have done and the uses to which we put it.

But because of the current law, the fact is that many businesses spend far more money on litigation than they do on research and development. That is bad for business. That is bad for America. The fact remains that many companies these days—I think it is something like 47 percent of companies—have withdrawn products because of litigation fears. And a lot of companies now, if this is possible to believe, are afraid to improve their current products because by the act of improving their current products, it would imply that the previous iteration of that product was somehow defective and, therefore, they could be sued and, therefore, they do not improve the product so they cannot be sued. How ridiculous. How unlike America. If those who oppose this bill want to defend that, then let them go ahead and do that.

Phyllis Greenberger, who is the executive director of the Society for Advancement of Women's Health Research, in testimony before the Senate Commerce Committee on March of this year said:

> Liability concerns are stifling research and development of products for women.

She said:

> Contraceptive development in the U.S. provides an excellent example of how the threat of litigation can devastate an entire industry. Thirty years ago there were 13 companies in this country putting their resources towards research and development of new contraceptives. Today, there are only two.

And then what does she say?

> This is not because there is no market demand. Liability concerns are keeping products which have already been developed off the market despite a known therapeutic need.

I will use an example which I have used before. It is a very good one. It is Benedictine.

> Benedictine is the only prescription medicine ever approved in the United States for the treatment of nausea and vomiting during pregnancy. None other has ever been approved. It was approved by the Food and Drug Administration. The drug was used by 30,000 women until assertions arose that it caused birth defects. While scientific evidence failed to demonstrate any link and the FDA continued to back the product.

Remember this is still Phyllis Greenberger talking:

> While . . . the FDA continued to back the product, the manufacturer voluntarily removed Benedictine from the market due to the overwhelming cost of defending the product. Currently, therefore, there is no approved product available to treat pregnant women who experience severe and prolonged nausea, which can be harmful to the mother and to the fetus.

If that is what the opponents of this legislation want, let them defend it. They are using Benedictine all over the world—all over the world but not in the good old U.S.A. because of the fear of product liability litigation under our present system, which some of us are trying to change.

I think the United States loses under the current system. Insurance rates disable U.S. manufacturers. American manufacturers pay 10 to 50 times more for product liability insurance than their foreign competitors.

You have the European Economic Community, which has adopted uniform product liability laws. I believe, although I am not 100 percent sure, that 60 affiliated countries have done the same.

So we will continue to pay as a country 10 to 50 times more in insurance because we have all of these State laws, which all compete with each other, and other countries will have a uniform law, and they all will be our main competitors for exports and imports in this

world. And who loses? The American people, the American workers, American business. America loses.

In a single year, Mr. President, the liability system cost the State of Texas 79,000 jobs. If that is the case, then let those who want to see that current system continue to get up and defend it. When people run for office, they talk about the need for jobs. Texas is losing jobs because of this. They have a lot of research and development in Texas, which is a very progressive, industrial State. So they are very much hurt by this.

Interestingly, when I say the United States loses under the current system, part of this is that the current system does not enhance product safety. I will have something to say about that. I would beg those listening to listen to this one sentence.

Though the number of torts—that is, suits—in product liability rose dramatically in the 1980's, consumer interest steadily declined during the 1980's as it did during the 1970's. So to link this with product safety is open to some substantial question.

Let me just make some more points. I go back to this problem of injured people having to wait so long to receive compensation. Mr. President, after I ran for Governor of West Virginia, an event little noticed and not long remembered, I gave my inaugural speech on the steps of the capitol. It was on a day in which the temperature was 37 degrees below zero. So in order for me to say it, I had to really mean it because people were just freezing all over the place. I made four promises to the people of West Virginia. I talked about education. I talked about roads. I said I wanted to remove the sales tax from food, at that time 3 percent, which I eventually moved to zero. And I wanted to make the workers compensation system, which at that time we called the workmen's compensation system, more efficient because I was offended that in the State of West Virginia when a worker was injured it took the State 77 days on average to get a check to an injured worker. I said, how can we be a humane State and do that? And I pledged in my inaugural address, which is sort of like your constitution, that I would get it done in 4 days.

Well, I did. I got it down to 4 days. If I am offended by the 77 days it took under the old West Virginia workers compensation system, what am I meant to feel about a 3-year period of time on average for an injured worker under U.S. laws, and State law in particular, to receive compensation for the first time. Three years later.

An Insurance Service Office study found that it took 5 years to pay claims with the average dollar loss and that ''larger claims''—that is, the more seriously injured victims—''tend to take much longer to close than the smaller ones.''

Now, this is interesting. ''Several injured victims cannot afford to wait years to receive compensation.'' So what do they do, Mr. President? They know they are going to have to wait a long time while the lawyers rake in the money and they wait. They know they are going to have to wait a long time. They know they do not have the resources. So what do they have to do? The delays force them to settle, to not use the system as it is meant to be used but to settle for inadequate amounts of money. That is shameful. That is shameful. If those who oppose this bill want to stand up and defend that, I will be here to hear their argument. That is shameful. They have to settle because they know they cannot go through the business of paying the lawyers the money.

Let us talk about the business of bringing the lawsuit, and costs being so high. The GAO—who I think people respect pretty much throughout this Hill—estimated that 50 to 70 cents of every jury-awarded dollar goes to lawyers and legal costs. Fifty to 70 cents of every jury-awarded dollar goes to lawyers and legal costs. That is wonderful news for the injured person. It leaves him or her maybe 30 cents, maybe 50 cents. They are hurt. They are the ones hurting. The lawyers are just running these things through.

I am not picking on trial lawyers in particular. I have always made a point of saying lawyers on both sides—the trial lawyers and defense lawyers. They are both part of the act. Defense lawyers are very, very good at stringing it out, putting in more paper, asking for more information. They are very, very good at it. But the point is the people do not get the money. The injured person does not get the money. The lawyers and the legal process get the money.

A further illustration came in 1994 in a survey by the Association of Manufacturing Technology. This is hard to follow, so I would ask people just listen. It found that every 100 claims filed against its members result in outlays of $4.45 million in defense costs and $8 million in subrogation paid to employers or their workers compensation insurers. Claimants, therefore, received only $8.35 million of these 100 claims in the Association of Manufacturing Technology survey, and since plaintiffs' attorneys usually received one-third of the awards, injured people get to keep about $2.2 million while transaction and legal costs totaled $8.6 million.

Something that bothers me greatly about the current system is that the current system discourages the development of innovative products.

This is where I got off when I was talking about the amendment of the Senator from Tennessee. I used the word ''innovation'' in the States. The chairman and CEO of Biogen, Jim Vincent, stated to the Senate Commerce Committee in September 1993 that he has decided not to pursue research into the development of an AIDS vaccine because of the current U.S. product liability system.

The Immune Response Corp. of California is attempting to develop an AIDS vaccine, but in 1992 it had to delay important clinical trials because of liability concerns, and I believe they are not doing it anymore.

An Office of Technology Assessment study found that liability fears are a barrier to research testing and marketing of AIDS vaccines and called for Federal action.

Health Industry Manufacturers Association Vice President Ted Mannon told a House Energy and Commerce subcommittee that joint liability law is having an adverse effect on the ability of medical device manufacturers to obtain biomaterials—the raw materials that make products such as hip replacements and pacemakers.

I will just do one or two more of these.

In 1994, April 25, the New York Times reported:

> Big chemical companies and other manufacturers of materials used to make heart valves, artificial blood vessels, and other implants have been quietly warning medical equipment companies that they intend to cut off deliveries because of fear of lawsuits.

Now, if we simply want to stop that stuff and the people who have pacemakers and all the things that we can do in modern medicine do not matter anymore, then let those who oppose this bill defend that; that the very essence of modern research and the very essence of modern medical innovation is being cut off or cut down or cut back or cut out by the product liability system that we currently have in this country.

One more. The fear of exposure to product liability lawsuits again has diminished investment in basic scientific research. The reason I mention the word ''basic'' is because it has always distinguished us from other countries. We are the ones who do the basic research. The other countries do the applied research, particularly Japan, and Asian countries. We do the really hard stuff, which costs a lot of money. You do the basic research and you come up with materials or products or possibilities. Then during the applied research and getting it to commercialization—here the Senator from South Carolina and I would agree completely—that has been our American problem, the commercialization of products. But not basic research. That has been our strength.

Well, Mark Skolnick, who is a professor of biophysics at the University of Texas, has noted that areas where litigation has occurred will not receive support for exploration and development. Producers fearful of possible suits simply make that impossible.

The Conference Board, as I indicated earlier, said that 47 percent of U.S. companies have withdrawn products from the marketplace because of product liability concerns.

Gallup, in a 1994 survey, said that one in five small business executives report

that they have decided not to introduce a new product or not to improve an existing one out of concern for product liability litigation.

What are we doing to ourselves, Mr. President? Why is it that such a small group can prevent our country from progressing while, at the same time, we protect our people?

I want to say a word about punitive damages.

I want to discuss the punitive damages concept, what it actually is, so that it becomes clearer.

Again, I am not a lawyer, so I have to look at these things from the point of view of somebody who is not a lawyer. I do not think the Presiding Officer is a lawyer, although he has all the attributes sometimes of that kind of sharp insight. But, as far as I know, I do not think he is a lawyer. There are a few of us in this body who are not.

The U.S. Supreme Court—which I do not consider to be a trivial body—has said that punitive damages have run wild in the United States.

JAY ROCKEFELLER, representing the people of West Virginia, did not say that. The U.S. Supreme Court said that.

There are virtually no standards for when punitive damages may be awarded under the current law and no clear guidelines as to their amount. Good behavior is swept in with bad. The result is uncertainty and instability and a chilling effect on innovation.

Now, I go back to Science magazine, 1992. A Science magazine article reported that at least two companies have delayed AIDS vaccine research and another company abandoned one promising approach as a result of liability concerns.

European parents can place children in built-in baby seats in cars. American parents cannot as easily, because the companies who make baby seats do not want to improve them on the fear that they will get sued because a previous iteration might therefore have been inferred to have been deficient. That's crazy.

So clear, rational rules are needed to promote innovation and responsible manufacturing practices while, at the same time, providing assurances that wrongdoers will be justly punished and deterred from future misconduct.

Please let us not have this as an argument between those who care about business and those who care about consumers. In fact, and I believe my colleague from the State of Washington would agree, those of us who are trying to reform the system care a whole lot more and are willing to do a whole lot more to help plaintiffs who are injured than are those who oppose this. Although they claim that they wear the halo for consumers, they do not. We are trying to help them. They are trying to keep the system as it is. They say that status quo is perfect; just leave it exactly as it is.

I have not done it every year, but I have routinely called in the American Trial Lawyers Association to my office to say: ''Is there some way that we can work with you to try to work out some compromise on this subject?'' The answer has always been no. Clear, but not encouraging. No. Into which I read, therefore, they want the system to be exactly as it is. Little changes? Big changes? Halfway changes? No. No changes. No changes.

I remember once one of the leaders of one of the consumer groups several years ago brought a woman from West Virginia who had been injured to my office. I guess the idea was to shame me, and to show me what anguish I had caused this woman. She came in and I saw them.

And at the end of the meeting, the woman was in fact sobbing, holding onto my hand, saying, ''Your bill would have helped me, perhaps saved me.''

Now, the leader of the consumer group was, obviously, at something of a loss. But I have to note that, for the RECORD, this is the case.

So a clear understanding of the nature of punitive damages is an essential prerequisite to meaningful reform. Punitive damages are punishment. They are quasi-criminal in nature and developed in England and the United States to serve as an auxiliary or helper to the criminal law. They have nothing to do with compensating a person who has been harmed and are not in any way intended to make the plaintiff whole. That purpose is served by compensatory damages, which provide recovery for both economic—which is lost wages—and medical expenses.

Let me make a point here, too. A lot of people say, ''Oh, economic damages. Persons making $35,000 a year. They are 30 years old. Now they cannot work.'' Which, of course, is horrible, if it comes to that.

But they say, ''Well, gee; I guess that is going to be $35,000 for economic wages.'' No, no, no. It is $35,000 for every year that that person would have deemed to have been able to work, plus all benefits, plus all retirement, and all the rest of it.

In fact, if you did that, let us say somebody was making $30,000 a year, and is 30 years old. They could work for another 35 years. I am not very good at math, but that would be many, hundreds of thousands of dollars; way above $250,000.

Mr. THOMPSON. Will the Senator yield for a point?

Mr. ROCKEFELLER. Yes.

Mr. THOMPSON. Was the Senator present when I made my statement concerning the family who visited me in my office concerning their 5-year-old daughter recently?

Mr. ROCKEFELLER. I apologize; I was not here.

Mr. THOMPSON. You mentioned the lady who was sobbing in your office. It reminded me of that visit I had last week. It was a family from Nashville who had lost their 5-year-old daughter. She had gone in for a routine tonsillectomy. One error followed another; many, many things went wrong. The clinic was hiring on the cheap. They had a drug addict there administering to this person.

Mr. ROCKEFELLER. Is the Senator discussing product or malpractice?

Mr. THOMPSON. Well, this is part of the underlying bill, as I understand it, the McConnell amendment.

Mr. ROCKEFELLER. I was trying to discuss product.

Mr. THOMPSON. Well, the Senator was talking about punitive damages, and that is the subject of my question.

And then the clinic sought to cover up. Finally, one of them called 911.

They did several things totally, totally that would constitute gross misconduct. They finally called 911, and then tried to cover up the records. They were caught. A lawyer represented them, charged 30 percent, incidentally, financed the litigation out of his own pocket for 2 years because the plaintiffs did not have the money to do that. Finally, they got to court. The defense, the insurance company, would not settle the case until they got to court. The mother broke down in court and they found out what they were up against in there and settled the case for $3 million.

Under this legislation, if this passed, I wonder what the Senator would tell that sobbing mother who was in my office last week in terms of whether or not we ought to tell the State of Tennessee they cannot allow a jury in Tennessee any longer to make that kind of award in a punitive damage case.

Mr. ROCKEFELLER. My answer to the distinguished Senator from Tennessee is that this particular Senator is trying to work to find a way in which there will not be caps as classically defined on punitive damages.

I say to the Senator from Tennessee that I voted, for example, with Senator DORGAN on his amendment to remove caps. And the Senator did that for a very specific purpose, because I think we can find a way, because I do not think we can pass the bill without finding that way, and I am convinced that we can find a way to do this so that I would have been as comfortable or as uncomfortable in that room with your constituent as I was with mine.

Now, I also want to say, when I talk about pain and suffering, the State of Washington has no punitive damages whatsoever. They have no punitive damages. Is it not interesting then that within the last 6 weeks that the State of Washington came down with a jury award for economic and pain and suffering of $40 million?

The only reason I mention that is to say, one, that economic is much more than people think of it as. It is the rest of your life's wages. It includes the raises that you might have gotten. It even presumes promotions you might have gotten, as well as the benefits, insurance, retirement and all the rest of it.

But pain and suffering is where a jury can get very subjective and where

a jury does often get very subjective in a proper way and, in this case, a $40 million award. I do not think anybody who opposed this bill could have guessed there would have been a $40 million award out of a State that does not even have punitive damages. That happened 6 weeks ago in Washington.

So, Senator GORTON's and my bill understands and accepts the basic premise that punitive damages are punishment and provides the fundamentals that are part of any criminal punishment; a definition of the crime establishing a level of proof necessary for punishment and making the sentence fit the crime. So let us define the crime.

S. 565 defines the crime as conduct specifically intended to cause harm or conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by the product. The standard is fair and is similar to the standards of many States, in fact. It conveys that punitive damages are to be awarded only in the most serious cases of extremely outrageous conduct.

Level of proof: S. 565 explains how a claimant must prove the crime and requires that the proof be clear and convincing. This standard reflects, I think properly, a middle ground between the burden of proof standard ordinarily used in civil cases, which is proof by a reponderance of the evidence and criminal law standard which is proof beyond a reasonable doubt. So this is in between, clear and convincing.

The U.S. Supreme Court has endorsed clear and convincing evidence burden of proof standards in punitive damage cases. In addition, each of the principal groups to analyze the law of punitive damages since 1979 has recommended the standard, including the American Bar Association, which the Senator from South Carolina mentioned some time ago is bipartisan if anything ever was bipartisan, and the American College of Trial Lawyers.

Recently, the standard was recommended in a 5-year study of scholars by the American Law Institute and, incidentally, the standard is now law in 24 States.

Making the sentence fit the crime: Most importantly, we try to put reasonable parameters on sentencing to make it fit the crime; an established principle of law. Even very serious crimes, such as larceny, robbery and arson have sentences defined with a maximum sentence in statute.

As a result of adopting the amendment by the Senator from Maine and drawing on the interest expressed by colleagues on this side, we modified the bill to allow punitive awards to go as high as two times compensatory damages.

Opponents to this bill have argued that unlimited punitive damages are necessary to police corporate wrongdoing. Absolutely unlimited. This is not necessarily supported by facts. There is no credible evidence that products are any less safe in either those States that have set reasonable limits on punitive damages or in six States—Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan—that do not permit punitive damages at all. In fact, Brookings makes no link whatsoever between what is happening in punitive damages and product safety. That is an argument which is used by the opponents often.

Furthermore, plaintiffs in those States have no more difficulty obtaining legal representation than in those States where the sky is the limit.

I am coming to a close.

Bifurcation: This is a general remedy proposed to ease adverse impacts of punitive damages awards that permits a trial to be divided into segments, and this makes sense. The first part of the trial is addressing compensatory damages, the second dealing with punitive damages.

One has to do with helping the person. The second with punishing the manufacturer. Judicial economy is achieved by having the same jury determine liability and amounts of both compensatory damages and punitive damages.

This remedy we give the shorthand name of ''bifurcation.'' Bifurcation trials are equitable because they prevent evidence that is highly prejudicial and relevant only to the issue of punitive damages—that is, the wealth of the defendant—from being heard by jurors and properly considered when they are determining basic liability. Bifurcation also helps jurors compartmentalize the trial, allowing them to easily separate the lower burden of proof required for compensatory damages and the higher burden of proof, clear and convincing evidence, for punitive damages.

So, Mr. President, I will soon yield the floor. First, I simply conclude by saying that product liability reform—the bill before the Senate—is not a child, a stepchild, not even a foster child of the Contract With America. It is the result of people of both sides of the aisle here in the Senate agreeing that the legal system, where it deals with interstate commerce, needs to be fixed, and it is precisely Congress' role, and only Congress' role, to step in where the States cannot do the job on their own, which is why we need to pass the bill.

I thank the Chair and yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. Mr. President, I want to make a few remarks on the Thompson amendment. Before that, I want to see whether or not we can accommodate a number of Members. Rather than seeking a unanimous-consent agreement on a vote for a time certain, I hope that we will be able to debate the Thompson amendment fully. At the same time, there is another amendment that will be proposed by the Senators from Michigan and Kentucky. I hope that we will be able to set aside the present amendment and allow them to speak.

I know the Senator from Kentucky is the chairman of the Ethics Committee and must meet with that committee between 4 p.m. and 6 p.m. I would like to know whether or not the proponents of the Thompson amendment will permit that amendment to be introduced, for them to speak, and then speak back and forth on both of them—however they want to utilize their rights to continue debate on in this amendment.

Mr. HOLLINGS. Without objection, I will go along with the distinguished author of the amendment, Senator THOMPSON. I will need a little bit of time. You were asking for a time agreement?

Mr. GORTON. I will not make a motion to table until the Senator from South Carolina has all the time he wishes to speak.

Mr. THOMPSON. Does the Senator from Kentucky need to proceed before 4 o'clock? Otherwise, I believe we can finish in short order. We need a very few minutes. I think that will probably wind us up.

Mr. MCCONNELL. I say to my friend from Tennessee that it is my hope and the hope of the Senator from Michigan as well, with your permission, to call up an amendment we are going to offer for discussion purposes. It could be stacked or laid aside. It will give both of us a chance to discuss this—in my particular case, the need to discuss it some time between now and 4 o'clock, because I will not be available for 2 hours after that. I do not know when these are going to be voted on in any event.

Mr. THOMPSON. How much time does the Senator from South Carolina need?

Mr. HOLLINGS. Ten minutes.

Mr. THOMPSON. I think I will need approximately the same. Would it be all right if we went 20 minutes or so and then brought up the amendment of the Senator from Kentucky?

Mr. MCCONNELL. I say to the Senator from Tennessee it is fine with me, provided it is all right with the Senator from Michigan.

Mr. ABRAHAM. That would be fine.

Mr. GORTON. Then I will be relatively short.

Mr. HOLLINGS. I defer to the Senator from Tennessee. He is the author. If the Chair recognizes me, I can proceed——

Mr. GORTON. I think the Senator from Washington has the floor.

The PRESIDING OFFICER. Yes, the Senator from Washington has the floor at this time.

Mr. GORTON. Mr. President, I wanted to speak briefly on the Thompson amendment and will do so only relatively briefly to give him some more ammunition for his wonderful presentation on this subject.

I must start my remarks by confessing that he really had me dead

to rights on one of the comments that he made about the impact of his own amendment. I will have to confess error and then say that I believe that error strengthens my case rather than weakens it.

I had said earlier during the course of this debate that the result of the passage of this amendment, giving litigants in every State two choices of different laws to enforce would simply mean, because of the restrictions included in the bill here, that all plaintiffs' lawyers would seek to bring their actions in the State courts in order to avoid the restrictions on punitive damages and on joint liability. And the Senator from Tennessee quite properly pointed out that there are a number of instances in which this bill, the Rockefeller-Gorton bill, treats plaintiffs' claimants more liberally than do the laws of various States. He took the statute of repose, which is 20 years in this bill, 10 to 12 years in most States that have a statute of repose—obviously, if the cause of action was based on a piece of machinery or a product that was 15 years old, the choice would be to go into Federal court and get the advantage of that more liberal provision. He even spoke about my own State, which does not allow punitive damages and, therefore, would impel the plaintiff to go into Federal court if the plaintiff wished punitive damages rather than into the State court.

He is correct. There are certainly some cases in which the claimant would have a better climate in which to bring such an action in Federal Court than in State court. But, Mr. President, one of the great vices of the present system, one of the vices that this bill—to focus on product liability for the moment—is designed to deal with is the myriad of 50 different sets of laws and procedures in the courts of 50 States. The justification, as the Senator from Tennessee pointed out himself, for any legislation in the field of product liability is the interstate commerce clause and the desire to smooth commerce among the several States, to have a degree of predictability.

This bill does not attempt to do what bills a decade ago in this field did, and that is to define negligence and strict liability and deal with a number of other matters of substantive law. It calls for limitations only in the field of a statute of repose and joint liability and punitive damages and allows more restrictive regimes in the various States to remain enforced. But, certainly, as compared with the present status of the law, there will be a greater degree of predictability and a greater degree of uniformity.

As the Senator from Tennessee so eloquently pointed out, if his amendment passes and should become law, instead of having 50 different systems in 50 different States, we would have 100 systems in 50 different States. We would double the complexity of the present system, because he is right—while I am right that in most States most plaintiffs would seek out the State court and attempt to avoid this law, under some circumstances in some States they would seek the Federal court in order to avoid the greater restrictions of State law. Not only would we not increase predictability and uniformity, we would double the degree of complexity. And there would be far more gaming of the system.

I think that every small business in the United States should greatly fear the Thompson amendment, because now at least if the defendant is large and obviously capable of paying a large judgment, many plaintiffs will only sue the manufacturer of a particular product. That manufacturer will be from a different State than the plaintiff, a case which under most circumstances could be brought in Federal court. But if the plaintiff of the future does not want to be in Federal court, we can bet their sweet life if this is a piece of equipment, a stepladder, the subject of lawsuits, the Ace Hardware Store in the hometown of the plaintiff will end up being a defendant.

There will be a lot more small business defendants in product liability litigation in the future if this amendment passes than there are now, because that will be the way to avoid diversity of citizenship and bring the action in State court when the State law is more favorable.

There will be more defendants, Mr. President. There will be twice as many applicable laws—two in every State in the United States rather than one. And there will be less uniformity and less predictability.

Now, Mr. President, it seems difficult for me to imagine any person thinking seriously about the practice of law and uniformity who really wants to overturn the doctrine in Erie Railroad versus Tompkins, in 1938, in which the Supreme Court said: ''We are going to end this forum shopping. We will say it does not matter whether a person brings the diverse action in State or Federal court; the same law is going to apply.''

This amendment would reverse that doctrine, would double the number of applicable laws in the United States, and increase infinitely the degree of forum shopping on the part of claimants' lawyers.

Mr. HOLLINGS. Mr. President, I want to touch on just two or three things quickly, and I want to yield, of course, to the principal author of the amendment, the Senator from Tennessee, with respect to punitive damages.

The statement was made by Senator ROCKEFELLER that the Supreme Court said that the punitive damages would just run amok. The fact is, the Supreme Court of the United States of America has not turned down or reversed punitive damages.

The most recent case happens to be a West Virginia case of this particular court, dated June 25, 1993, TXO Production Corp. versus Alliance Resources. Actual damages were $19,000, Mr. President. Do you know what the punitive damages were? Punitive damages, $10 million.

Do you think that disturbs the Senator from West Virginia, who says he is here for consumers? He is for corporations. They can get all the punitive damages they want. They are not subject to this bill. Oh, no; as a matter of fact, they are not subject to this bill. The leading case in his own State, $19,000 in actual damages, $10 million in punitive damages, upheld by the U.S. Supreme Court.

Second, with respect to keeping all the products off the shelf, and particularly as the Senator refers to AIDS and AIDS drugs, and how they are all going out of business.

Mr. President, I ask unanimous consent we have printed in the RECORD a statement by Gerald J. Mossinghoff, president of the Pharmaceutical Manufacturers Association, made last year before the Committee on Energy and Commerce.

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

STATEMENT OF GERALD J. MOSSINGHOFF

Mr. Chairman and Members of the Subcommittee: I am Gerald J. Mossinghoff, President of the Pharmaceutical Manufacturers Association. PMA represents more than 100 research-based pharmaceutical companies—including more than 40 of the country's leading biotechnology companies—that discover, develop and produce most of the prescription drugs used in the United States and a substantial portion of the medicines used abroad. I appreciate the opportunity to appear today at this important hearing on the role of the pharmaceutical industry in healthcare reform.

Our companies support President Clinton's goal of assuring healthcare security for all Americans without sacrificing quality of care. To accomplish this goal, comprehensive healthcare reform is needed. Total healthcare costs are rising too fast. And too many people lack coverage for necessary medical care, including prescription drugs. These problems must be addressed.

The Administration is to be commended for proposing a comprehensive healthcare-reform plan that addresses all elements of an extremely complex healthcare system. We support strengthening consumer choice among competing private plans, rather than mandating a single-Government payer. We support providing comprehensive benefits, including prescription drugs, for all Americans. We support continuous coverage regardless of illness. We support greater emphasis on prevention and medical outcomes. And we support strong safeguards to ensure quality care. We also are pleased that the Administration has indicated that it will remain flexible and open to constructive suggestions on ways to improve its proposal. We believe that there must be greater reliance on the free competitive market in a reformed healthcare system.

WORLD LEADER

For many years, the pharmaceutical industry's success in developing new and better medicines has made it one of the country's most innovative and internationally competitive industries. The industry has a good chance to remain innovative and competitive—if the incentives for pharmaceutical innovation are preserved.

In its 1991 study of the industry, the ITC reported that U.S. firms accounted for nearly two-thirds of the new drugs introduced in the world market during 1940–1988. In his recent study, Heinz Redwood stated, ''The American industry has a clear and outstanding lead in discovering and developing major, medically innovative, globally competitive, and therapeutically accepted new drugs . . . Perhaps the most important finding is that the American lead includes all but one of the therapeutic classes.'' The General Accounting Office, in a September 1992 study, concluded that the pharmaceutical industry maintained its competitive position and strong international leadership during the 1980s, while most other high-technology industries experienced some decline in their position. A report in the March 9, 1992 edition of Fortune magazine placed the pharmaceutical industry at the very top of the list of the country's most internationally competitive industries.

In conclusion, we believe the three principles outlined earlier in this statement—coverage, competition and cures—are fully consistent with the six goals specified by President Clinton for his healthcare-reform plan. Our industry firmly believes we can contribute significantly in helping to meet these worthy goals. We look forward to working with this Subcommittee in your efforts to achieve healthcare reform in a way that will accommodate our major concerns.

Mr. Chairman, that concludes my prepared Statement. I will be pleased to answer any questions that you or other Members of the Subcommittee may have.

Mr. HOLLINGS. Mr. President, I will read two sentences. ''For many years''—says the leader of the pharmaceutical industry—

For many years, the pharmaceutical industry's success in developing new and better medicines has made it one of the country's most innovative and internationally competitive industries.

In a study of the industry, the ITC reported that U.S. firms accounted for nearly two-thirds of the new drugs introduced in the world market during the period 1940 to 1988.

Forty-eight years, almost fifty years. There is Fortune Magazine, there is the head of the industry, speaking for itself. Now we will bring it up to date, to February and April of this year.

February 23, 1995. I hold in my hand an advertisement entitled ''Drug Companies Target Major Diseases with Record R&D Investment.'' It is an advertisement by America's pharmaceutical research companies, and I read:

Pharmaceutical companies will spend nearly $15 billion on drug research and development in 1995.

Remember, the Senator from West Virginia said they are all going out of business on account of product liability, and they could not invest. The overwhelming evidence is the opposite of what the Senator from West Virginia contends.

New medicines in development for leading diseases include 86 for heart disease and stroke, 124 for cancer, 107 for AIDS and AIDS-related diseases, 19 for Alzheimer's disease, 46 for mental diseases, and 79 for infectious diseases.

The pharmaceutical industry categorically refutes the statements made by the distinguished Senator from West Virginia.

Now, going right to less than a month ago, April 5, 1995, another advertisement: ''Who Leads the World in Discovering Major New Drugs,'' put out by the America's pharmaceutical research companies.

Between 1970 and 1992, close to half of the important new drugs sold in major markets around the world were introduced by the U.S. pharmaceutical companies. Here at home, the broad drug industry has been making 9 out of every 10 new drug discoveries. So when a breakthrough medicine is created for AIDS, heart disease, Alzheimer's disease, stroke, cancer, or any other disease, chances are it will come from America's drug and research companies.

That totally refutes the Senator from West Virginia's statement. Now finally, the arithmetic, simple arithmetic, refutes this pose for the consumer, whereby the consumer is not getting the majority of the money; the lawyer is getting the majority of the money. Of course, the inference is that the injured party, the plaintiff's lawyers, get the money. Arithmetic says that 33⅓ percent, which has been agreed to generally in the debate on both sides of the aisle, and parties pro and con, on a particular measure, 33⅓ percent is less than 100 percent and less than 50 percent, so the other 66⅔ percent goes to the client.

Or take the amendment of the Senator from Kentucky on malpractice: A 25 percent limitation there; 25 percent leaves 75 percent for the client.

Now, what are the facts? Why does the Senator use that distorted representation about being so concerned that the consumer is not getting the money he deserves, like every case brought is a winner?

No. 1, according to the Rand study of product liability injuries, of 100 percent injured, we find that only 7 percent of the injured parties consult an attorney; only 4 percent hire an attorney; and only 2 percent file a lawsuit. According to the New York Times, one-half of those filing are losing.

Now, who pays for all of those expenses, except for the plaintiff's attorney? So it gives no regard and no account for our distinguished group of professionals who are willing to take it on a contingency basis, although they are losing half the time, to try to get middle America and poor injured parties their day in court.

I can tell you now, come to this town and get injured, do not go downtown on billable hours. I tried to point that out with my particular amendment. You could not afford to hire the lawyer and we all know that. But they are being derided here as somehow the lawyers are running off with all the money.

Where does the money go? According to the National Consumers Insurance Organization, according to this survey, in our hearings,

For every dollar paid to claimants, insurers paid an average of an additional 42 cents in defense costs while for every dollar awarded a plaintiff, plaintiff pays an average contingent fee of 33 cents out 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's fees, with the defendants' attorneys on average paid better than plaintiffs' attorneys.

They go take it down to where they are getting 56 percent.

Now here are the poor plaintiffs' lawyers. They are not even seen but in 2 percent of the product liability injury cases, and of the cases they file they are only recovering in half. So they are taking the expenses of the others. You can bet your boots when they finally prevail and get their third, that is still 66 2/3 percent going to the client and 33 1/3 percent going to the lawyer. So the lawyers they are interested in trying to restrict and with their amendments have voted to limit, they are the ones already in a sense losing.

The Senators stand here and say it is shameful? It is shameful to misrepresent the idea that this crowd sponsoring this bill is for the consumer. They know they are for the corporations. They know they are for the insurance companies. They know the drive. It is corporate America: Business Round Table, Conference Board, NAM—National Association of Manufacturers—they have been sponsoring this bill for 15 years and they know it. No consumer organization has come forward with this bill. All the consumer organizations of size and repute absolutely oppose the bill. To come up here and talk about shame, and the consumers are not getting the money, and misrepresenting the facts with respect to percentage when simple arithmetic shows no one gets over a third, and if limited by a vote, 25 percent. That leaves 75 percent for the client if they win.

And on that contingent fee, that trial lawyer who is representing the injured party has to assume all the costs and all the burden and all the risk. Otherwise that poor injured party would not have a lawyer because they cannot afford it. They found out $50 an hour was not enough. I tried to limit it here in my amendment. So they come forward here in this town with $100 an hour billable hours and going on up to $500 and more. They could just never get their day in court. We know that is being cared for back home.

That is why I am so interested in the amendment of the Senator from Tennessee, because we can stop this pell-mell march to Washington with the Washington bureaucrats administering and determining, not hearing any of the facts, disregarding the 12 jurors sworn to listen to the facts, bureaucrats who say,

Forget about you, you all are runaway. You do not know. You have not heard. There is no relief. And it is a national problem and we are going to correct it with this mish-mash bill.

I favor the amendment of the Senator from Tennessee.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I thank the Senator from South Carolina for his remarks, which were eloquent as usual. I do think it is important that we refocus on what we are about here. The debate most of this afternoon has gotten off onto who is making the money, who is supporting who, scare tactics and figures taken out of thin air. I do not know where most of these figures are coming from.

I would like to refocus on what we are about here. We are about our judicial system in this country. There is nobody on the floor here who does not want a fair system, one that is fair to all parties. We certainly all recognize that manufacturers and sellers of products ought to be treated fairly and should not be put in a position where they cannot reasonably manufacture products and send them in interstate commerce and not be put out of business unfairly. We also understand that there are innocent people out there, children, other innocent people who sometimes are injured through the negligence and sometimes through the willful misconduct of large companies. And they need to be protected. We all know that.

We are talking about a system here. We are not talking about good guys and bad guys. We are talking about a system. What is the system that is best designed to produce a good system of justice across the board for this country?

Traditionally, we have had a system where States determine what their laws are. They learn, they change laws, a lot of innovation is going on in a lot of different States as has been pointed out here today. Changes are being made. Radical changes, in some States, are being made.

It has been suggested now that in the area of products liability, primary, we need to take a little bit different look. I am trying to take a little bit different look.

My amendment is called a killer amendment. This is the first time, I guess, in the history of the Senate, where we have ever gotten a product liability debate on the floor. I was one of the ones who said I will not support a filibuster. I will support bringing this up on a motion to proceed. I, and people like myself, presumably carried the day and we got this debate here. And I am suggesting now an approach that makes sense from the standpoint of what we as a U.S. Congress ought to be about. Not rewriting all the State laws in this country. That is against our basic philosophy. That is what I campaigned against, the Washington-knows-best attitude.

The Senator from West Virginia makes an eloquent plea for a 2-year statute of limitations. He is entitled to his opinion on a 2-year statute of limitations. I may agree with a 2-year statute of limitations. But why should the people of Tennessee have to follow the dictates of the Senator from West Virginia as to what the proper number of years for a statute of limitations is? It is just not right. I cannot go down that road.

Perhaps we can involve ourselves in an area that involves interstate commerce, that involves products; 70 percent of them which travel in interstate commerce and which also involves interstate litigants, if you will. And that is litigants who are in the Federal court because of diversity of jurisdiction, because you have citizens of various States.

To me, that makes some sense. That makes some sense. That is not a killer. That is an attempt to legislate in an area that we properly legislate in. I hope we do not, in this area or any other, rush to judgment to change longstanding rules or longstanding procedures that the States have enacted over the years, over 200 years, simply because of pressures and editorials in newspapers and some rush to judgment.

I support the Contract With America. I have simply pointed out that this is the only provision in the Contract With America that goes against our basic philosophy. All the rest of the Contract With America is limiting the Federal Government. It has to do with limiting one branch or another: Term limits, line-item veto. It has to do with limiting the Federal Government with regard to the States. How do we handle our welfare system? With regard to individuals, how much in taxes do we take from them or not? It all has to do with limitations on the Federal Government except this one thing.

What I am suggesting is that with regard to these cases that can legitimately be called interstate in nature, with regard to litigants who are legitimately interstate in nature—not because of what I thought up but because of what has been the law of this country for many, many years—let us apply some of these things, which are really broad and far reaching in many respects, but let us go ahead and do it. Let us go ahead and try it and see and experiment, if you will, and see if this is going to save the world as we think it is.

I think we have to get straight on our statistics. We keep hearing a figure, some low figure of tort cases that are brought in Federal court, and that is true. But the indications from the Administrative Office of the U.S. Courts, an unassailable source, are that approximately 45 percent of products liability cases are either brought in Federal court or removed to Federal court because you have diversity of jurisdiction.

So is it suggesting that we apply these rules to 45 percent of the cases gutting this bill? Or is it saying instead of going 100 percent overnight, interfering in areas that people who are concerned about States rights and intrusive Federal Government are concerned about, that we take one step at a time. Under my amendment we would have uniformity in Federal courts in all States. Under the underlying bill you have caps in various areas but States are still free within those caps, as long as they do not go over the caps, to pass what legislation they want.

You still have 50 different States and 50 different State laws. That is not uniformity under the underlying bill. At least with regard to the diversity cases you would have uniformity. Is it bad for small business because they would be joined in order to defeat diversity? Would you have complete diversity? Would you join an interstate defendant? That is happening now. That is what is happening now. The courts have to determine. Are they properly joined in? So be it? You follow the legal consequences from that. If they are, you are in State court. If they are not properly joined then the court throws them out, and you have diversity and you can go to Federal court, if you want to.

Applying this to 45 percent of the cases before we rush pell-mell to take over State law in this country is not a killer amendment.

I must say that I understand the legitimate points of both sides of this argument. I understand the problems the manufacturers have. I am trying to redress the legitimate problems that manufacturers have in this country. I understand the proponents believe that we need to level the playing field some. But for me it is trying, I say to my friends on the other side, let us at least acknowledge that this is the case and this is what we are doing, and we are trying to level up the playing field.

Let us not try to convince the American people that this is a consumer's bill. This is not a consumer's bill. They say this is a consumer's bill because of attorney's fees. Most of the attorney's fees do not go to the litigants. Why is that? Often the defendant company or the insurance company representing them will string out a case for 2 or 3 years knowing it is a meritorious case causing costs to rise, having to pay defense attorney's fees and all of that, and then settle a case. Then they complain about the cost of the system.

That is what happened to the family that came into my office last week. They had a clear-cut situation where a clinic, if they had been trying to kill their 5-year-old daughter for a routine medical procedure they could not have done it any more efficiently. There was one mistake after another. A drug addict working on the premises who later OD'd. A comedy of errors; had to call 911; then covered up their activities. I cannot imagine of a more clear-cut case. Yet, it took 2 years, a lawyer having to finance that lawsuit out of his own pocket as often happens because they have been dragged around and deposed all around, running all the expenses up.

Anybody who has ever been involved in this knows the way it happens. Only when the mother got on the witness stand and broke down they said, OK, let us settle this case for $3 million.

Should we be terribly impressed with the defense costs and the court costs and also what was involved in that particular piece of legislation? Whose fault is that? The parents of that little girl last week in my office who have no further ax to grind, they have no monetary or economic interest in this anymore, in this system, did not think that it was a consumer piece of legislation. They were saying please do not get into a situation where in this unusual case—thank God it does not happen every day. But it does happen. And when that does happen, let us make sure that we set an example that it does not pay for a clinic or a manufacturer to hire on the cheap, operate on the cheap thinking that they have a situation out here that is going to favor them in court, and they do not have to worry about it too much.

Some say it is a consumer bill because of the delays. You are going to have more delays under this underlying bill, if it passes, without this amendment than you have ever had before because we are creating new law. In all of the circuits this new law is going to have to be interpreted. There is all kinds of language in there. Every word of it will be subject to court interpretation, new interpretation, new law in every circuit which will then, with regard to that legislation, be binding on the States.

Other points that were made: The fact that we have a system with 50 different sets of laws in this country with 50 different States. That we do. It is called a Federal system. I kind of like it. I thought most of my colleagues kind of liked it. I may have a different idea about what the statute of limitations ought to be in Tennessee than the Senator from West Virginia. People in Tennessee might have different ideas about a lot of things than other people of other States. They have a right to address those things.

The suggestion was made that we could under the present system forum shop and go to Alabama, I believe the State was mentioned, and get a favorable situation there. Of course, the practical difficulties of that are well known. To anybody that has gone in the system you are a long way from home. You hire another lawyer. You expand your expenses—all of that. But assuming that does happen on occasion, my amendment would prevent that. If a fellow from Tennessee decided he wanted to get favorable State law from Alabama and went to the State of Alabama to sue an Alabama defendant, there would be diversity jurisdiction. They could go into Federal court and have the Federal standard apply, not the Alabama State standard.

The point is made that products are being restrained from the marketplace under our present system. I am sure that is true to a certain extent. It was said we could have all of these other products and people are now making products because of liability laws. Of course, there are no statistics on that. All of this is what somebody said. But I will take it at face value. So we do not have all the products that we otherwise would have if we had a different system.

I asked the question. What do we do about that? Assuming that is true, what do we do about it? Has anybody come up with a solution other than just wringing our hands and saying that products are being restrained? Are we going to say that beforehand you cannot sue these companies? Are you going to say that we can only bring *x* number of lawsuits a year—citizens of the United States of America—against these companies? Of course, not. You cannot do that.

On the other hand, are we going to say what these questions are going to be like if anybody gets hurt without any proof of negligence, without any proof of responsibility? Of course, not. We are not going to say that either.

What is the solution? The solution has always been let them manufacture their products with the knowledge that if they are manufacturing a product that affects human life, if they are proven to be negligent and they kill somebody, they are going to pay damages. And if they knew that they were likely to kill somebody, they are going to pay a lot of damages.

I do not know that any of this legislation addresses that problem except to put some caps on the amount of damages. I do not know a way in a free judicial system other than the way we have where we let juries decide these things under the supervision of a judge, under the supervision of the court of appeals, under the supervision of the State supreme court. I do not know that anybody has come up with a solution that is perfect that will make sure the right number of products come to market and no good products are restrained but bad products are kept off the market. The U.S. Congress cannot solve that problem. What we can have is a fair, open, responsible, judicial system with fair rules for everybody across the board.

Texas has lost how many jobs; how many thousands of jobs because of its product liability? I do not know where you get these figures. But my suggestion is that Texas changes law. As a matter of fact, from what I read in the paper, Texas has made and is in the process of making substantial changes in its tort law as we speak. Do we need to do that for Texas? Do we know more about what Texas needs than Texas does?

The Senator from Utah a while ago pointed out that only 5 percent of the tort cases are filed in Federal court. That is not the product liability cases which is the major thrust of the underlying bill and my amendment. But that proves their point, does it not? Most tort cases do not belong in Federal court because you do not have diversity. But 35 percent of product liability cases are in Federal court because you do have diversity, and you are more properly in an area that we can legislate in.

So, Mr. President, I would conclude simply by saying let us refocus on what this is about. The basic question is do we have a problem? How bad is it? And what do we do about it? I suggest that we do have some problem. It is certainly not in the dimension of the world coming to an end that we have heard on the Senate floor.

For anybody who knows anything about the system, looks at any of the statistics, it is just not there. But let us address the problem that we do have. Let us do it in a responsible manner, and let us not lose our philosophical integrity, those of us who have campaigned on the basis of limited Federal Government, having States do more in the areas of welfare, having States do more in the areas that affect the people who elected the members of the State legislatures who write those laws, and have Federal Government do a lot less. I suggest that having these reforms in this area involving interstate commerce, with regard to litigants who are involved in interstate commerce is a reasonable approach to a problem that will allow us to see whether or not it works, how it works, perhaps will wind up in uniformity if States desire to go in that direction, but does not represent a wholesale takeover of 200 years of State tort law in this country.

I yield the floor.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I would like to speak to another amendment that will be offered by the occupant of the chair at some time in the next 30 minutes or so dealing with the question of joint and several liability.

Put another way, Mr. President, we all know what that means. That is the looking-for-somebody-with-a-deep-pocket problem which is a pervasive problem in American litigation.

Interestingly enough, the mayor of the city of New York was before a subcommittee of the judiciary yesterday, and I obtained a copy of his testimony. It is really quite interesting. The mayor outlined the problems of the city of New York in recent years with regard to our tort system, which has clearly run amok. It is very interesting that last year New York City paid out $262 million in tort cases on roughly 8,000 claims which either proceeded to settlement or verdict.

And the mayor goes back and compares that to earlier years. In 1977, the mayor pointed out, the city paid out $24 million as compared to $262 million last year. In 1984, the city paid $84 million compared to $262 million last year. In 1990, the city of New York paid out $177 million—that was just 5 years ago—compared to $262 million in tort cases last year.

Most of these, of course, Mr. President, are cases where the plaintiff was trying to get into the pockets of the

taxpayers of the city of New York. The mayor in his testimony proceeded to describe it in another way that kind of brings it home for all of us.

There has been a lot of talk here about whether statistics do or do not exist in various areas of this debate. The mayor put it this way. He said—and this was just yesterday before a Senate Judiciary Committee subcommittee. ''With just half of our annual tort payments,'' said Mayor Giuliani, ''the city could hire 2,900 additional police officers or firefighters or more than 3,700 teachers.'' The city could have hired 2,900 additional police officers or firefighters or more than 3,700 teachers for the money they paid out in tort claims in the city of New York last year alone.

The mayor went on. He said, ''In terms of our operating budget, the amount we spent on these cases is more than 61 of 75 agencies of city government spent over a year.''

Let us go over that. They spent more in tort cases in the city of New York than 61 of 75 agencies of the city of New York spent last year and more than the combined amount budgeted to sustain the operation of the DA's, district attorneys, in all five boroughs of the city of New York. They spent more money in tort claims last year in the city of New York than the amount of the district attorneys' budgets of all five boroughs of the city last year.

The mayor proceeded to say that New York City's personal injury payout is an enormous expense no matter how you look at it and falls squarely on the taxpayers, he says, the consumers in the city of New York.

The mayor went on. It is kind of interesting the way he put it. He says, ''As individuals, Americans are the most generous people in the world. They are equally generous with their hard-earned tax dollars, but they would like to know that their money is being put to use wisely. When they learn, however, their money is being wasted, Americans rightly demand an accounting. I submit the time has come,'' said the mayor of New York, ''for an accounting of the waste associated with the tort system as we know it.''

What he was talking about, Mr. President, is the deep-pocket issue. ''Municipalities and other public entities are often viewed as deep pockets that can easily afford to pay extra sums to plaintiffs claiming to be injured.'' He also mentioned a few of those cases.

I thought I might relate to the Senate the mayor of New York yesterday mentioned one case in which a subway mugger was caught in the act and shot by an alert transit cop. What did the robber do? Why, he sued the city and he won $4.3 million. The robber sued the city.

Here is another interesting one that New York experienced. He said in another case an 18-year-old student in direct contravention—direct contravention—of a teacher's instructions jumped over a volleyball net. The teacher said, ''Don't do it.'' And the 18-year-old student did it anyway. The student suffered tragic injuries. But the city's liability for the teacher's effort to supervise cost the city $15 million.

The mayor cited another case. The city was ordered by a jury to pay a woman's estate $1 million after she entered a closed city park, ignored all the instructions, entered a closed city park and drowned in 3 feet of water.

So there you have it, Mr. President. That is the kind of thing that is going on all across America under the concept of joint and several liability, and it is clearly costing taxpayers, consumers, a lot of money.

The Senator from Michigan on behalf of himself and myself will bring up shortly with the permission of the Senate the Abraham-McConnell joint and several liability amendment which would permit an injured plaintiff to collect a full judgment from any defendant found to be liable for any part of the injury.

Mr. President, the doctrine of joint liability permits an injured plaintiff to collect the full judgment from any defendant found liable for any part of the injury. It means that no matter how remotely connected a defendant is to the events leading to plaintiff's injury, a defendant could be required to satisfy the entire judgment.

That is the kind of thing I was seeking to illustrate in referring to the testimony of the mayor of New York just yesterday.

The result is that lawyers for the plaintiffs add a whole host of defendants to a lawsuit in an effort to ensure the plaintiff can get the full judgment paid. With joint liability, it does not matter if you had anything to do with the events leading up to the plaintiff's injury. Instead, the chances of your getting sued depend upon how deep your pockets are. The deeper the pocket, the more likely to be sued.

For example, if a drunk driver injures an individual on someone else's property, the property owner will be joined in the lawsuit. It happened to the Cincinnati Symphony Orchestra, only it was not even the property owner. The accident happened near one of the orchestra's performance facilities. And the orchestra, a nonprofit entity, was needless dragged into a $13 million lawsuit and put at risk for the judgment.

Nonprofit organizations, municipalities, and small businesses can be hardest hit by joint liability. Although we do not think of these defendants as wealthy or rich, they are usually adequately insured, which also makes them good candidates to be deep pockets. New York City, to which I just referred, spends more on personal injury awards and settlements—$262 million in the last fiscal year—than it spends on funding public libraries.

One industry that is severely impacted by joint liability is the engineering profession. Often engineering firms are small and entrepreneurial. The American Consulting Engineers Council reports that of its 1,000 members, more than 700 are involved in lawsuits. The typical case involves a drunk or reckless driver speeding down a road that is undergoing construction. Although the road is well marked with a detour sign, an accident occurs. The driver sues everybody involved with the road: the local government, the highway department, anybody who owns adjoining property and, of course, the engineers who designed the road improvement. While the engineers—and any of the other defendants—may ultimately prevail, the costs of defense can be staggering. The Consulting Engineers report that in 1993, they paid out more than $35 million in awards and settlements. That is a huge amount of money, especially considering 80 percent of the engineering firms employ fewer than 30 people.

What does it mean for consumers and taxpayers? Higher prices and more taxes, since the engineering firms will have to pass their costs on to their customer. The local governments who hire engineers to build their roads and bridges will pay more and the American people will pay higher taxes to cover these lawsuits.

So, make no mistake about it. The tort tax is real. Every American lives with it. And every potential defendant has to take account, in the prices they set, for the possibility of being dragged into a lawsuit.

I recently received a letter from the institute for the National Black Business Council, an association of minority business owners. Mr. Lou Collier, the president of the council, writes in support of expanding the product liability bill.

Without an expansion of the joint and several liability reform, Mr. Collier states, ''Millions of small businesses—restaurants, gas station owners, hair stylists, nearly every small business you can think of, would still face the threat of bankruptcy. That includes most African-American firms.'' The latest census data shows that 49 percent of all black-owned firms are service firms, and Mr. Collier, on behalf of minority small business owners, asks us to improve the climate for small business, ''Small business owners and entrepreneurs have to overcome staggering odds to build a successful company. They shouldn't have to face a legal system where one frivolous lawsuit can force them to close their doors.''

Now, that is Mr. Collier on behalf of the minority businesses of this country.

The amendment offered by Senator ABRAHAM and myself, by eliminating joint liability for noneconomic damages, would relieve some of those burdens.

Injured plaintiffs would still recover their full economic loss. But for the

subjective noneconomic loss, each defendant would be responsible only for his or her proportionate share of harm caused.

This amendment is fair and consistent with principles of individual responsibility. It will put an end to the gamble taken by the trial bar when they join everyone in sight of an injury.

Let me just say in conclusion, Mr. President, having chaired a number of hearings years ago as chairman of the Courts Subcommittee of the Judiciary Committee, I had a hard time ever getting any plaintiff's lawyer to make a good argument in support of joint and several liability, because it is obviously not just. It violates any standard of American justice to require that someone who contributed little or nothing, just a little bit of what may have caused the harm, to end up getting assessed 100 percent of the damages simply because they are able to pay. That is not just. That does not have anything to do with civil justice.

It is astonishing to me, Mr. President, that our tort system in this country has evolved to the point where essentially innocent parties can end up being assessed all of the damages for a harm that they did not cause.

That is what the Abraham-McConnell amendment will be about when it is subsequently offered. I hope that I will be able to come back to the floor and speak again on this amendment at the appropriate time.

I wish to commend the occupant of the chair, the Senator from Michigan, for his great leadership in this tort reform field. He has been in the Senate now about 4 months, and I cannot remember anybody who has taken a subject and made a difference on it any more quickly than he has. I have enjoyed working with him.

We have another issue that we may be talking about later in the debate, something called an early offer mechanism, which I do not have the time to address at this point.

I just want to say how much I have enjoyed working with him. We are greatly in hope that the Senate will decide that changing the way we handle joint and several liability will be in the best interest of the American people.

Mr. President, I believe no one is about so speak. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mrs. MURRAY. Mr. President, I ask unanimous consent that I be allowed to speak as in morning business for approximately 2 minutes.

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

NOMINATION OF DR. HENRY FOSTER, TO BE SURGEON GENERAL

Mrs. MURRAY. Mr. President, I say to Members of the Senate, the Senate Labor and Human Resources Committee has just a few minutes ago concluded its testimony from Dr. Foster, who is the nominee for Surgeon General. I wanted to take this opportunity to personally thank Senator KASSEBAUM, chair of that committee, for doing an outstanding job of giving Dr. Foster the opportunity to present himself to the Senate and to the United States of America. I felt that the hearing was very fair and very well conducted by both Senator KASSEBAUM and all the members of the committee.

I also wanted to take this opportunity to commend Dr. Foster who, for the last several months, has been a person we have only known as a cardboard cutout; who, in the last day and a half has, I believe, really presented a very strong image to this country of a man who is caring, who is compassionate, and who can be a very forthright Surgeon General, to speak to the issues of the day that are of concern to so many of us; who will be a person, I believe, who will speak to women's health care issues in a way that needs to be done in this country today; who will speak to the issue of teen pregnancy and provide leadership; and a man who I think is a person who we can all look up to in terms of being a model public servant; who understands that we cannot just sit in our houses and close our blinds and shut our doors, but we need to personally get out and work with young kids today and be a personal role model for all of them.

I think he has done an outstanding job of answering all the questions that have been brought to him, and I believe that both Dr. Foster and the committee deserve a debt of gratitude from the Senate.

I look forward to having an expeditious vote on his nomination and to being allowed, as a U.S. Senator, to vote up or down on his nomination very soon on the floor of the Senate.

I thank the Chair and yield the floor. 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. ABRAHAM. 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.

AMENDMENT NO. 600 TO AMENDMENT NO. 596

(Purpose: To provide for proportionate liability for noneconomic damages in all civil actions whose subject matter affects commerce)

Mr. ABRAHAM. Mr. President, I ask unanimous consent to lay aside the pending Thompson amendment so I may offer an amendment.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Michigan [Mr. ABRAHAM], for himself, Mr. MCCONNELL and Mr. KYL, proposes an amendment numbered 600.

Mr. ABRAHAM. I ask unanimous consent further reading be dispensed with.

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

The amendment is as follows:

Strike out section 109 and insert in lieu thereof the following new section:

SEC. 109. SEVERAL LIABILITY FOR NONECONOMIC DAMAGES.

(a) FINDINGS.—The Congress finds that—

(1) because of the joint and several liability doctrine, municipalities, volunteer groups, nonprofit entities, property owners, and large and small businesses are often brought into litigation despite the fact that their conduct often had little or nothing to do with the harm suffered by the claimant;

(2) the imposition of joint and several liability for noneconomic damages frequently results in the assessment of unfair and disproportionate damages against defendants that bear no relationship to their fault or responsibility;

(3) producers of products and services who are only marginally responsible for an injury risk bearing the entire cost of a judgment for noneconomic damages even if the products or services originate in States that have replaced joint liability for noneconomic damages with proportionate liability, because claimants have an incentive to bring suit in States that have retained joint liability; and

(4) the unfair allocation of noneconomic damages under the joint and several liability doctrine disrupts, impairs and burdens commerce, imposing unreasonable and unjustified costs on consumers, taxpayers governmental entities, large and small businesses, volunteer organizations, and non-profit entities.

(b) GENERAL RULE.—Notwithstanding any other section of this Act, in any civil action whose subject matter affects commerce brought in Federal or State court on any theory, the liability of each defendant for noneconomic damages shall be several only and shall not be joint.

(c) AMOUNT OF LIABILITY.—

(1) IN GENERAL.—Each defendant shall be liable only for the amount of noneconomic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which the defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY.—For purposes of determining the amount of noneconomic damages allocated to a defendant under this section, the trier of fact shall determine the percentage of responsibility of each person, including the claimant, responsible for the claimant's harm, whether or not such person is a party to the action.

(d) 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) give rise to any claim for joint liability;

(3) supersede or alter any Federal law;