as Surgeon General. And it worked. It wasn't until Dr. Koop was named to the position, that the offices were again split.

Do not get me wrong—those who have filled this position have done some remarkable things. But the position is redundant. And if we are serious about wanting to reduce the size of Government and save the taxpayers money, then we have to take a close look at why this position is still there.

The Office of the Surgeon General has six employees and costs the taxpayer close to $1 million each year. In the scheme of things, that may not sound like a lot, but to folks in Montana, folks in Arizona, in fact, folks anywhere outside the beltway, a million dollars is a lot of money.

Am I saying the public doesn't need the information they get from the Surgeon General? No. They will still get the information that is important to preventing disease promoting wellness and learning how to live healthy lives. But that information will come from the Assistant Secretary for Health, who by the way should be no less credible. This position is consistently filled by a medical doctor. And again, it's been done before.

Mr. President, I think it is time we stop playing games with the public's dollar. This is one level of bureaucracy that we don't need. It has been proven in the past and we can make it work again. Eliminating the Office of the Surgeon General would not only save money—without hurting the public, I might add—it will also remove the football that has been used by both Republicans and Democrats to control a pulpit that the public has come to count on.

We do not need a separate Office of the Surgeon General, Mr. President. I have been joined by Senators KYL, THOMAS, HELMS, SANTORUM, NICKLES, THOMPSON, and BROWN in introducing this bill and I urge my colleagues to join with me in this effort to restore common sense to the Government.

I ask unanimous consent that a copy of the bill be printed in the RECORD.

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

S. 957

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Office of Surgeon General Termination Act''.

SEC. 2. TERMINATION OF OFFICE OF SURGEON GENERAL OF PUBLIC HEALTH SERVICE.

With respect to the Office of Surgeon General of the Public Health Service—

(1) all authorities and personnel of the Office are transferred to the Assistant Secretary for Health of the Department of Health and Human Services;

(2) all unobligated portions of budget authority allocated for the Office are rescinded; and

(3) the Office, and the position of such Surgeon General, are terminated.

CHANGE OF VOTE

Mr. BIDEN. Mr. President, on rollcall vote No. 274, I voted ''nay.'' It was my intention to vote ''aye.'' Therefore, I ask unanimous consent that I be permitted to change my vote. This will not change the outcome of the vote. I have checked with both leaders.

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

NATIONAL HIGHWAY SYSTEM DESIGNATION ACT

Mr. BYRD. Mr. President, on June 21, 1995, I proposed an amendment, No. 1446, to S. 440, the National Highway System Designation Act. When the amendment was printed in the RECORD, the name of Senator MCCONNELL was inadvertently omitted as a cosponsor, even though he was so recorded in the official papers. I wanted to take this opportunity to note that Senator MCCONNELL was, in fact, a cosponsor of my amendment.

WAS CONGRESS IRRESPONSIBLE? THE VOTERS HAVE SAID YES

Mr. HELMS. Mr. President, as of the close of business yesterday, Thursday, June 22, the Federal debt stood at $4,885,968,241,521.21. On a per capita basis, every man, woman, and child in America owes $18,547.22 as his or her share of that debt.

Mr. INHOFE. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now closed.

PRIVATE SECURITIES LITIGATION REFORM ACT

The PRESIDING OFFICER. Under the previous order, the hour of 9:30 a.m. having arrived, the Senate will now proceed to consider S. 240, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 240) to amend the Securities Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act.

The Senate resumed consideration of the bill.

Mr. D'AMATO. Mr. President, Senator SHELBY has an amendment dealing with proportionate liability. It is an amendment really that goes to the heart of the legislation. He is going to offer it and take it up at this time. I believe we have agreed that at 10:55 we will have a vote on it. At this time, I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SHELBY. Mr. President, I would like to commend Chairman D'AMATO, Senators DOMENICI, DODD, and GRAMM for their hard work in trying to forge a consensus behind reforming our securities litigation system to weed out abuses and eliminate frivolous suits.

I am concerned and disappointed, however, that the bill before the Senate will do more to impair the rights of the small investor than it will to place checks on abusive conduct and frivolous litigation. For this reason, I continue to oppose S. 240.

Earlier this spring, Senator BRYAN and I introduced a bill aimed at striking a balance between preserving the rights of the small investor and eliminating incentives for frivolous and abusive litigation.

Senate bill 667 incorporated many of the widely supported provisions incorporated in the bill before us like prohibiting referral fees, and the payment of attorney fees from the SEC disgorgement fund, increasing fraud detection and enforcement, and ensuring adequate disclosure of settlement terms.

In addition, our bill addressed many of the concerns that Chairman Levitt and the SEC have raised against S. 240 regarding pleading requirements, liability standards, and statute of limitations issues.

While the bill before us responds to some of these concerns—it still fails to ensure adequate protection of the rights of the innocent victim of securities fraud and effectively leaves the little guy who seeks redress for professional wrongdoing out in the cold.

On several key issues, S. 240 fails to preserve the important role that legitimate private securities litigation plays in checking abusive conduct and, in fact, makes it more difficult for the small investor to gain access to the courts and obtain full recovery for securities fraud.

I believe that individual investors, particularly small shareholders, must be assured a full recovery against professional wrongdoers if we are to maintain integrity in our securities markets.

Like Chairman Levitt and many other colleagues, I believe the bill can still be improved.

I, therefore, intend to offer a couple of amendments that I believe will help assure that meritorious claims are not inhibited in our effort to prevent frivolous and abusive ones.

Mr. President, S. 240 makes important reforms, many of which I support. Sadly, however, the bill would come at too great a cost to the small individual shareholder.

I urge my colleagues to oppose S. 240 as currently drafted and support

amendments to reinstate important investor protections against securities fraud.

AMENDMENT NO. 1468

(Purpose: To amend the proportionate liability provisions of the bill)

Mr. SHELBY. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Alabama [Mr. SHELBY], for himself and Mr. BRYAN, proposes an amendment numbered 1468.

On page 134, strike lines 5 through 24, and insert ''uncollectible share in proportion to the percentage of responsibility of that defendant, as determined under subsection (c).''.

Mr. SHELBY. Mr. President, the amendment that I am offering I am offering on behalf of myself and the Senator from Nevada, Senator BRYAN.

S. 240, which is the bill before us, provides for proportionate liability for defendants found guilty of reckless conduct by limiting joint and several liability to defendants found guilty of knowing securities fraud.

As an equitable matter, I generally support proportionate liability as between wrongdoers. Less culpable defendants should not, I believe, necessarily be liable to the same extent as more culpable defendants. I think that is just common sense.

However, proportionate liability should not act to deprive the innocent victim of a full recovery—in other words, defraud people of their basic rights. Much more important than ensuring equity among defendants, I believe is ensuring that as between the wrongdoer and the innocent victim, it is the wrongdoer that bears the burden—yes, Mr. President, bears the burden—of any uncollectible judgment caused by an insolvent defendant, not the victim.

S. 240 turns the principle on its head. S. 240 before us today would make the innocent victim bear the loss of an insolvent defendant by capping the liability of proportionate defendants to only an additional 50 percent of their share. Beyond that, the victim bears the loss.

Additionally, S. 240 would only allow the victim to recover his full damages against the remaining defendants if his or her net worth is less than $200,000 and the victim's damages are greater than 10 percent of their net worth.

Mr. President, why we would want to place restrictions on a victim's full recovery, to limit a defendant's liability is beyond me in the first place. But the provision also fails in its purpose. Many retirees own their own homes and have significant equity in their property. Many have saved and invested for years and years for retirement. This is not a bad thing. We usually encourage such behavior. Yet, many older retirees would be precluded from a full recovery here because their net worth is over $200,000 and their damages are less than 10 percent or $20,000. Why we would want to intentionally punish an individual who is productive, who saves and invests for the future, is not completely clear to me.

Further, Mr. President, I must seriously question, as others have, a bill like this that makes a judgment that these productive members of our society should somehow be less entitled to recovery because they have more net worth than the next guy.

Mr. President, as I have stated, this amendment that I offer on behalf of myself and Senator BRYAN is simple. It would strike the net worth and damage requirements and make proportionate defendants responsible for the uncollectible share of an insolvent codefendant in proportion to their percentage of responsibility or culpability. It puts the victim before the defendant, as I believe it should in this society, as it rightly should. I urge my colleagues to support it.

This bill has some good things in it, but this is not one of them. I think it is time we think up here today—and I hope we will—about the victim and not the perpetrator of fraud and abuse in securities.

I urge my colleagues to support this amendment.

Mr. D'AMATO. Mr. President, I feel this amendment addresses one of the areas that is in the most significant need of reform.

Imagine yourself being named as a defendant in a class action suit where the damage claims are $100 million. Further imagine that a jury finds you reckless or negligent, because you are an insurance company, or because you are a securities firm, or because you are a bank, or because you are a large accounting firm associated with the people who committed the fraud. Your liability could be 2 percent, because you failed to see the violation and take action against it; you, therefore, were negligent and should be held accountable.

Well, you could settle and pay that 2 or 3 or 5 percent, or you might want to fight and say that given your tangential relation to the fraud, the duty was not yours to uncover it, but if you are found liable you could be held accountable for the full $100 million. For example, an accounting firm who cannot go beyond the numbers that were put forth in the audits that they conducted, who has had almost nothing to do with the alleged grievance, could be named as a defendant because they have a large asset base—we call these firms deep pockets.

I, myself, would never have to worry about being named as one of those defendants because I do not have deep pockets. Deep pockets are generally firms of economic substance who are generally well insured. They find themselves dragged into these suits, and their lawyers tell them it will cost $700,000, $800,000, maybe $1 million to defend themselves, even if the company has had literally little, if anything, to do with the alleged fraud that was perpetrated on stockholders. Let me say again, that these firms are brought in only because they represent an economic interest of some substance. As I said last night, in these lawsuits, they sue everybody and anything that moves and some things that do not move. Your involvement in the fraud could as little as you walked into the building on the days the fraud was committed, but if you have deep pockets you will be sued. They will sue an outsider on the board of directors, who had no knowledge of the schemes, but he will face a $100 million suit, notwithstanding the fact that he had little or nothing to do with the fraud. Even the standard of proof does not help the director; the plaintiffs will claim he should have know, or could have found out about this, or with more diligence could have stopped the fraud, the distinction legally between reckless conduct and negligent conduct is rather unclear. Let me say that again. It is very blurry.

So now the director, or the accounting firm, has a corporate decision to make. Whether they will settle the case for what is nothing more than a legal payoff to get rid of the suit, or whether they try to defend themselves, because they think they can win. By staying in the suit the firm could risk a $100 million when they could settle it for $2, $3, or $4 million, and avoid the legal costs. Ordinarily, I expect, firms would fight it out, but under joint and several liability, it does not matter what damage the firm caused, because they have the deep pockets; they can be held liable for the full amount of the settlement.

Now, we hear that we should not put the burden on the victims, nor do I think we should. What we have said here is that if somebody committed a tortious act, he will be held responsible for his portion of the damage. If it is 2 percent, he will pay 2 percent of the damages. We even went beyond that. If the fraudulent defendant is bankrupt and cannot pay, we would double the liability of the other defendants. So if a defendant was found 5 percent negligent, but the main defendant was not able to pay, the 5 percent negligent defendant would be held responsible for 10 percent of the damages.

If we really want to be fair, and we all want fairness, we should protect the small investor who is legitimately aggrieved but, also protect people who are unfairly dragged into a suit that is nothing less than legal blackmail. These firms are forced to settle because their business cannot be subjected to years of this litigation, or the possibility of having to pick up the entire cost—notwithstanding that their contribution to this scheme was not fraudulent. If a person has contributed 2 percent to the fraud, they should pay the 2 percent of the damages.

Why does the plaintiff's bar not want this? Because more firms would be willing to stand up and say, ''Okay, we will battle it out,'' and because more of the charges that the cases are frivolous would be proven. These lawyers are suing the people because they are given an opportunity to hold them up.

Now the victim is fighting back. The victim in this is not just the shareholder. The victims in many of these cases are the people with deep pockets who may just associated with the fraudulent company, and because of their connection with a company, they are dragged in.

That is not what the law should be about. If you do the act, then you should pay. I absolutely agree. But do not bring in some guy who just happens to be in close proximity or has some connection with the company, has not really participated in this.

But let me tell you, if you commit fraudulent conduct, or intentional wrongdoing, there is no escape from paying the full settlement.

In our attempt to be fair, we have said quite clearly, that if you are knowingly participating—knowingly—in a fraudulent act then even if you committed only 2 percent of the fraud, you can be held liable for all of it. If you intentionally participate—intentionally—then even though you may have been only 1, 2, or 3 percent liable, who can be held responsible for the entire amount.

We do not, as some have claimed, make it possible for people to lie, to cheat, and escape their liability. That is an oversimplification. It demonstrates the lack of knowledge of this legislation on the part of some of the editorial writers. I wish their newspapers had to be held to the same standard that they would ask the business community to be held to. That would be nice. That would be incredible.

Imagine, they would have to be accurate, and truthful. It would be quite something. Quite something.

We want to be fair, and I think we have tailored this legislation in such a way that we make it clear—if you intentionally mislead, even if that act causes only 1 to 2 percent in damages, you will be held for the whole. We have not changed that.

I hope the Senate will not however, make it possible for people to become further exposed to these plots of extortion. That is wrong. Our Founding Fathers did not want it that way. This has developed over the years, and it has come about as a result of the lawyers practicing law, who act not on behalf of the poor stockholders, but on behalf of their own economic aggrandizement. That is not what the practice of law should be about.

Mr. DODD. Will my colleague yield?

Mr. D'AMATO. I am happy to yield to the Senator.

Mr. DODD. I think something deserves to be repeated here, and that is, of course what we are talking about here is the process of intimidation, quite frankly, to achieve settlement.

What needs to be pointed out, rarely do these cases ever go to court. We have seen that 98 percent, I think, is the number, ends up being settled. The reason is because, as our colleague from New York has pointed out, is because of that protracted lengthy process, where a person who is marginally involved can end up being held accountable for the entire cost.

Of course, who pays for all of that? It is also investors who pay for this. At the end of the day, this is not a cost that is just absorbed by one group of business people or another. This ends up being passed on.

The very investors that we talk about that can be damaged, and where there is intentional fraud, obviously, they collected from anyone who is involved, but in the cases where it was not fraudulent intent, then the investors on the other side of this end up paying, because those costs get shifted.

So my colleagues make the point here, it is not just the individual companies that end up being damaged as a result of this, where they literally today write into their budgets in preparation for these kinds of lawsuits being filed, which ends up costing consumers, costing business, costing jobs, as a result of a present scheme which allows for people who literally happen to be hanging around, as the distinguished chairman has pointed out, on the margins of this, being drawn into this. That is patently unfair by anyone's standard.

In fact, Jane Bryant Quinn, whose column has been referred to on numerous occasions here in the last 24 hours, makes the point in a column. She has criticisms about some aspects of the bill and supports others. She makes a point that the issue of the proportional liability, to quote her column, she says ''Some sort of proportional payment is fair,'' as the proposal suggests here, and what we have tried to do is fashion a scheme that would make those who are even marginally involved, fully culpable, where you have fraudulent intent; where that is not the case, at all, then proportional liability would trigger in.

What the amendment from the distinguished Senator from Alabama would do is eliminate virtually that entirely.

Again, whatever differences people may have with this bill on safe harbor and securities, statute of limitations and so forth, there is, I think, some general consensus that some notion of proportional liability and protection against the small investor, particularly the investor who does not have the kind of resources which this bill also protects, ought to be a part of this legislation.

We have tried to do that here in a way that is fair and balanced, and takes into consideration the legitimate concerns of bona fide plaintiffs that have been intentionally defrauded, those who are even intentionally defrauded, but fall into the smaller category, so there is a way to protect their particular interest.

We also must try and keep in mind the legitimate interests of those who are not fully culpable. Those businesses out there that are then being drawn in and asked to pay the entire freight on a matter where they are not at fault to that extent. That is fair, as well.

This amendment would gut that, destroy that entirely. We would go back to the status quo, and once again we get into this hijacking process here where those individuals and those companies have to be held accountable.

In fact, the Supreme Court observed in the Central Bank of Denver,

> Newer and small companies may find it difficult to obtain advice from professionals because professionals may fear that a newer or smaller company may not survive, that business failure would generate securities litigation against the professional. In addition, the increased costs incurred by professionals because of the litigation and settlement costs may be passed on to their client companies and in turn incurred by the company's investors, and intended beneficiaries of the statute.

The point being they are the investors that pay the price as result of destroying the proportional liabilities provisions of this legislation.

I hope this amendment would be defeated.

Mr. D'AMATO. I yield the floor.

Mr. SHELBY addressed the Chair.

The PRESIDING OFFICER (Mr. JEFFORDS). The Senator from Alabama.

Mr. SHELBY. Mr. President, I think what we need to do here this morning is focus on what we are really doing here; focus between a wrongdoer, perpetrator of wrong, and the victim of the action.

It is not the process of intimidation—I would reject that—but the process of wrongdoing that we should be concerned with.

We should not, Mr. President, we should not protect the perpetrator of wrongdoing over the victim. That turns American jurisprudence upside down. I believe here in the Senate today that we should be thinking about the innocent victim and not the perpetrator, not the people who put these things in motion and then they want a statute to protect them to some extent. That is what that is about here. I think, if the Members of the Senate would really focus on the content of this bill and what it will do to the innocent victim, they would feel a lot better about the amendment.

The phrase ''hijacking'' was using. That is right, ''hijacking.'' Who is going to be hijacked if this bill passes? I will tell you who it is going to be, it is going to be the innocent victims, it is going to be the innocent people who are going to be hard pressed to press their claims or to collect anything for the wrongdoing in the future.

I am real concerned and really disappointed that this bill before the Senate will do more to impair the rights of

the small investors in America—and there are millions of them—than it will do to place checks on abusive conduct and frivolous litigation. None of us are interested in frivolous litigation. There is no room for that in our courts. You know, that is one of the reasons, I suppose—one of the reasons, not the only reason—this bill was brought.

But there are bona fide cases in America and there will be in the future where, if this bill passes, the innocent victims will not be able to redress their injuries.

Mr. President, I ask unanimous consent that an article that appeared in Newsweek by Jane Bryant Quinn, ''Losing Your Right To Sue? Congress may make it hard for you to pursue a case of securities fraud,'' be printed in the RECORD.

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

(See exhibit 1.)

Mr. SHELBY. Mr. President, something I thought was ironic here, if you look at S. 240 it starts out and says:

A bill to amend the Securities Exchange Act of 1934, to establish a filing deadline and [listen to this] to provide certain safeguards to ensure that the interests of investors are well protected.

Is that what this bill is really about? I submit that it is not. I hope the Members of the Senate will focus on this amendment because it has a lot of merit to it. It will strengthen this bill. It will strengthen the rights of victims in America, victims of securities fraud. I do commend my colleague from Nevada, Senator BRYAN, for his cosponsoring this, and his leadership in this direction.

[From Newsweek, June 26, 1995]

EXHIBIT 1

LOSING YOUR RIGHT TO SUE?

CONGRESS MAY MAKE IT HARD FOR YOU TO PURSUE A CASE OF SECURITIES FRAUD

(By Jane Bryant Quinn)

Talk about a twist of fate. Rep. Christopher Cox, a California Republican, wrote a tough, aggressive bill on securities-law reform, which passed the House of Representatives in March. If it becomes law, investors who think they've been defrauded will find it incredibly hard to bring a class-action lawsuit to recoup their loss.

Just two months after this bill passed, Cox found himself tagged by just such a suit, brought by some victims of the noxious First Pension fraud. In a second suit last week, First Pension's court-appointed receiver charged Cox, among others, with contributing to the hoax. ''Defamatory and wildly false,'' Cox fumes.

First Pension handled the paperwork for tax-deferred retirement accounts. It also sold clients fraudulent real-estate investments and secretly tapped their accounts for cash. The company is in receivership, its principals in jail and its customers out $136 million. To recover some money, investors are going after the supporting players. That includes Cox and his former law firm, Latham & Watkins. Cox's job was to set up a company that could have absorbed the purported mortgage investments. The lawsuits allege that he knew, or recklessly failed to find out, that the mortgages weren't sound. Says Cox, ''I did not know. First Pension concealed the fraud.''

So is Cox the innocent victim of scorched-earth lawyering? Or is he an enabler who deserves to be called to account? The courts will decide this specific case. But the issue encapsules the conflicts that swirl around securities-law reform.

The objective of reform is to staunch what companies claim is a flood of frivolous lawsuits. Greedy lawyers, they say, sue on flimsy grounds. The companies pay as the cheapest way out. But the Cox bill and another bill before the Senate would stifle honest lawsuits, too. Among other things, they:

Preserve a Supreme Court decision that sharply limits the time for bringing a securities suit. Formerly, you had three years to sue in federal court, starting from when the fraud was discovered. In 1991, the court cut that back to just one year but in no event more than three years after the date you bought. So if a crook can deceive you long enough, you lose the protection of these laws. Most of First Pension's investors have been caught in that trap, says San Diego attorney Michael Aguirre. The scam began more than a decade ago but investors just recently found it out. So they can't sue for securities fraud, either in federal or state court. Aguirre is suing for common-law fraud, but says that it's not an easy fit.

Preserve another Supreme Court decision that lets some of the people who helped with a fraud escape liability for the loss. It's the lawyers/accountants/consultants self-protection clause (although those who are central to the fraud remain on the hook). This rule would have limited the sums recovered by those who bought bad bonds from the notorious Charles Keating, chief of the Lincoln S & L. Keating's company went broke and he went to jail. His duped investors got most of their money back, says San Diego lawyer Bill Lerach, but only because they successfully sued the minions who helped him operate. (I do think, however, that marginal players shouldn't have to foot the entire bill. Some sort of proportional payment is fair, as the proposals suggest.)

Make it harder to sue a company that grievously misleads investors. Under current law, it's OK for execs to make good-faith business predictions, even if their guess is wrong. They're liable only for deliberate fibs. But because they worry about lawsuits, they may suppress even reasonable forecasts that might help investors make a decision about the stock. Hence, this proposal, which makes it safer for managers to talk. But like so much else in these slipshod bills, it goes too far. A shady promoter could safely say almost anything. You'd call it a lie; he'd say it was innocent optimism. To win a lawsuit you'd have to prove that the speaker intended to deceive—which is pretty tough to do. Cox's bill (but not the bill in the Senate) could protect even a deliberate lie.

Put investors and their lawyers at risk of owing the defendants' legal fees if they lose their case. Cox scoffs at the thought that judges would actually order individuals to pay. ''The lawyer would pay'' and adds the cost to your fee, he says. But the mere threat of owing a corporation's costs will scare people off—and scare all but the best-funded lawyers, too. Sen. Richard Bryan has a better idea. He proposes a screening process that would test the merits of a suit. If the screener thought it was frivolous—and you brought it and lost—then you'd risk paying all the costs. Ditto on the other side, if the company refused to settle what looked like a meritorious claim.

Some reasonable, Bryan-like compromises need to be reached because Congress (especially the House) is throwing a bomb at a problem that just needs a switchblade. There's not even a litigation explosion, says James Newman, publisher of Securities Class Action Alert in Cresskill, N.J. The number of lawsuits is up, but that's because more are filed in each dispute. The number of companies sued remains in a constant range. There were only 140 in 1993, he says.

Another myth is the oft-heard claim that ''vulture lawyers'' automatically sue if a company's stock falls by 10 percent in a single day. Baruch Lev, a professor at the University of California, Berkeley, tested a version of this idea for the three years ending in 1990. Of 589 companies whose stock price dropped by more than 20 percent in the five days around the time of a disappointing earnings report, only 20 were hauled into court. And rarely on the strength of the price drop alone, says Jonathan Cuneo, general counsel of the National Association of Securities and Commercial Law Attorneys. In many of these cases, he says, ''executives are telling the public that everything is going to be great while they're bailing out and selling their own stock.''

There's some good stuff in these bills, especially in the Senate version. They stop lawyers from paying a bounty to people who find them clients, block stockholders who sue for a living and try to discourage frivolous suits. But they overreach. In a nation of laws, you're disenfranchised if you lose your day in court.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. D'AMATO. I see my good friend, Senator BRYAN, would like to speak and although I do not want to dominate this debate I think it is important to note that as a result of the give and take in shaping a bill that is balanced, we have put into this bill a provision, on page 138 of the bill, called the Audited Disclosure Of Corporate Fraud. That provision was suggested by our colleague from Massachusetts, Senator KERRY.

By the way, I do not think including this provision is going to change his final vote on the bill, nor was it an attempt to do that. It was an attempt to make this bill better at the suggestion of our colleague. Senator KERRY pointed out that after our accountants come across situations which are fraudulent, they have a duty to report that to the board but they should not be allowed to sit back and relax and say, ''I reported it to the board.'' When we say we are trying to protect the little guy, we are. This provision means that if the board does not do anything the accountants have to follow up on their report. They must then go to the Securities and Exchange Commission and report this wrongdoing.

Why do I mention this? Because when the bill has been characterized in some of the media, there is no mention of the protections we have built in. I continue to hear that this bill allows people to commit fraud. Let me say, as it relates to proportional liability, if you knowingly are involved in a fraud you do not escape being liable for the entire suit. And that is the way it should be. In other words, if you participate in a fraudulent scheme then you should be and would be accountable for the entire loss.

Let us understand what this legislation does is not let the fraudulent conduct, or the people who participate in that, off the hook.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. BRYAN. Mr. President, I acknowledge this is an extraordinarily complicated area of the law. But it has profound implications for millions of Americans who have lost money as a result of investment fraud. So, as I commented last night, this is not just an argument among lawyers, accountants, bankers and securities underwriters. Everybody who has one nickel in a retirement fund, who invests in the stock market, everybody who owns a single share of stock, can be potentially affected by this.

Historically, under the law, since ''the memory of man runneth not to the contrary,'' defendants were jointly and severally liable, irrespective of their degree of culpability. That is to say, in a case in which several defendants are joined and are found liable, an individual who is 5 percent liable was jointly and severally liable just as the individual who may have been 50, 60, or 70 percent liable.

The theory is one of equity, balancing the scales of justice that are such an important symbol of the American judicial system. And that is, basically, who ought to bear the burden? The innocent plaintiff—in this case the investor? Or an individual whose conduct was responsible for the loss? I think it is important to understand that under the Securities Act of 1934, if a defendant is guilty of ordinary negligence—no recovery at all; no recovery at all. An individual defendant who is guilty of gross negligence—no recovery at all.

In order for liability to attach to any defendant under the Securities Act, the conduct must be either intentional or knowing or reckless conduct. So when we are talking about balancing the burden we are not talking about somebody who just made a little mistake. We all make mistakes. We are not talking about somebody who did something accidental. We are talking about somebody whose conduct was intentional or knowing, or somebody whose conduct was reckless. In my judgment that is not an unreasonable standard to hold somebody liable for.

What S. 240 does is to change centuries of American jurisprudence by dividing categories of defendants, some jointly and several, and some proportionate liability. Let me say, I agree in part with what our colleagues who drafted S. 240 have attempted to do. The amendment, which my distinguished colleague from Alabama offers, recognizes that distinction.

What we say, and what S. 240 in its current form says, is that if the conduct is intentional or knowing, then all such defendants whose conduct rises to that level of misconduct are jointly and severally liable, which means that a plaintiff can recover against any one of those the full 100 percent of his or her or its loss.

A new category is established under S. 240, and also under the amendment offered by my distinguished colleague from Alabama, that says with respect to those who are reckless-—not intentional, not knowing misconduct, but reckless misconduct, they will be guilty in a proportionate liability sense. That is their legal responsibility.

I am willing to recognize that in terms of trying to seek that equilibrium on the scales of justice that is not an unreasonable proposition. But here is the fundamental distinction between S. 240 in this, and the amendment of my distinguished colleague that I am happy to support. Remember the basic premise: Who ought to bear the burden, the totally innocent investor or those whose conduct rises to the level of intentional and knowing fraud or reckless misconduct? That is not a difficult proposition for me. I think, between those two categories, those who are totally innocent of any misconduct ought to have the right to recover for their economic loss.

I might just say, over my years as a Member of this institution, we have debated product liability endlessly.

That was one of the titanic battles of the last Congress, the Congress before that, and this Congress. And, as the distinguished occupant of the chair and my colleagues on the floor know, we passed product liability. Some of us were against it; some of us for it. But it is interesting to note that with respect to product liability and economic loss as opposed to pain and suffering, there was never a suggestion that we ought to, in effect, make some of those defendants proportionately liable and not jointly and severally liable.

So for those who followed that debate closely, it was never suggested that someone who was only 5 or 10 or 15 percent liable for the economic loss in a product liability lawsuit would only be responsible for 10 or 15 percent. Each and every defendant is jointly and severally liable under the new product liability bill that passed this Congress.

So whether the misconduct is 5 or 95 percent, the plaintiff has the right to recover 100 percent of his or her or its economic loss. The only thing we did—many of us disagreed with that—is we put a cap on pain and suffering but not economic damage.

What we are talking about in this legislation is not pain and suffering. We are talking about economic loss for investors who have purchased securities and, as a result of securities fraud, they have lost money.

So I just share with my colleague the irony that all of this great ordeal that we have gone through over the past—this will be the fourth Congress that I have been privileged to serve in—it was never suggested in product liability that we ought to, in effect, create these categories of proportionate or joint and several liability. The plaintiff was entitled to 100 percent of his or her or its recovery.

This is in the abstract. My distinguished colleague from California, my distinguished colleague from Maryland, and I yesterday mentioned the Keating case. The reason why we mentioned the Keating case is, if you look at the malefactors' greed in that great decade of the eighties and you look at the icons, you see the Milkens, the Boeskys and the Charles Keatings. Those are household names in terms of frauds perpetrated upon the American people costing innocent people hundreds of millions of dollars.

Somehow it has been suggested that this action 240 has nothing to do with the Keating case. Let me remind my colleagues that I will be offering in the RECORD that the actions brought on behalf of a class of defrauded investors against Mr. Keating were brought under the Securities Act, the very act that we are amending. We are talking about the Securities Act of 1934, the RICO provisions, and the Securities Act of 1933.

Mr. D'AMATO. Mr. President, will my colleague yield?

Mr. BRYAN. Yes. I am happy to yield.

Mr. D'AMATO. I am not certain, but I believe—and I know that we all watch legal proceedings today—that the securities actions that were brought against Charles Keating were brought by the Government. Is not that true?

Mr. BRYAN. That is not true. In responding to my good friend and distinguished chairman, they were brought as part of a private cause of action on behalf of a class. Mr. Keating was a defendant together with a whole host of others. I will not belabor the chairman's time. But it was a whole category.

The point I want to make in responding to my good friend's question is that the heart and soul and essence of the recovery, $262 million, was brought under the Securities Act. That was the underpinning, the foundation, the premise, the essence of the cause of action.

Mr. D'AMATO. Is it not true, though, that there was knowing fraud being committed?

Mr. BRYAN. The answer to that would be, in some instances, yes. But there were other defendants which, under S. 240, would fit under the proportionate liability classification. And in the Keating case, as the distinguished chairman knows, Mr. Keating was bankrupt. There is no question he was a primary offender; no question he would be jointly and severally liable under the bill as drafted by the chairman.

But what makes the Keating case so significant is that the amount of recovery by the plaintiffs would have been reduced dramatically because there were others who were not in the category of potential and knowing fraud whose conduct was knowingly reckless.

Mr. D'AMATO. In fairness, my friend did answer that. I would like to make the point that those people whose conduct under this bill was knowingly fraudulent, even if they were only partially responsible, will still be liable

for the entire amount if the others have gone bankrupt. In other words, and in layman's terms, if you committed fraud intentionally, and others have gone bankrupt, you can be held liable for the entire amount. I think we need to keep that fact in sight. That was my the point.

Mr. BRYAN. Before responding to a question from my colleague from California, the chairman is correct that those who are intentional in their fraud, and knowingly, are jointly and severally liable. In the Keating case, there was a whole list of people, however, who would be aiders and abettors. Under the provisions of S. 240, aiders and abettors are home scot-free; no recovery at all.

There was another category of individuals. Some of them were firms and some of them were securities underwriters who would fit under the new classification of reckless conduct. And they would come under only the proportionate liability. Much of the recovery, much of the $260 million the innocent plaintiffs in the Keating case recovered, was from the reckless category.

I say in all due respect to the chairman, whom I greatly respect, that recovery would be greatly and dramatically reduced because under S. 240 there is only proportionate liability.

Mr. SARBANES. Will the Senator yield?

Mr. BRYAN. Yes.

Mr. SARBANES. Mr. President, I just want to point out that the recklessness standard has long been a part of the common law for purposes of fraud. It is a very high standard. The chairman of the committee earlier said, Well, you know, someone could come in and be negligent, and they are going to be held jointly and severally liable. That has never been the law. It is not the law. It will not be the law under the amendment of the distinguished Senator from Alabama.

The definition of reckless conduct—let me read the definition that is generally used by the courts: ''A highly unreasonable omission involving not merely simple or even gross negligence''—so it is higher than simple negligence, it is higher than gross negligence—''involving not merely simple or even gross negligence but an extreme departure from the standards of ordinary care, and which present a danger of misleading buyers or sellers that is either known to the defendant, or is so obvious that the actor must have been aware of it.''

The way the bill is written now, the phrase ''ignorance is bliss'' is going to take on a meaning that just staggers the imagination.

The problem that is being talked about, about the strike suits, is dealt with up front in the bill. You try to make it harder to bring those suits. We support a lot of those provisions. This is, simply put, a question whether fraud participants are going to be put ahead of innocent victims and individual investors. I mean, why in the world, if a fraud has been committed, should the burden fall on the innocent victim of the fraud and not on the people who have been participants in the fraud?

I defy anyone to explain to me the logic or the rationale for protecting the participant of the fraud ahead of the innocent victim of the fraud.

I thank the Senator for yielding.

Mr. BRYAN. Mr. President, I yield to the Senator from California. I just assure my friend from North Carolina that I intend to be very brief because I know he wishes to speak. It is not my purpose to preempt the time of those who share a different point of view.

I am delighted to respond to my friend.

Mrs. BOXER. I thank my friend from Nevada and my friend from Alabama for this amendment because if we are not here to protect innocent victims, then what are we here for? That is the bottom line. Yes, we want to correct problems and we want to do it right, but we have to look at the bottom line. That is why I am so grateful to my friend for bringing up the Keating case, because when this Senator brought up the Keating case late in the night she was told—in some very agitated tones, frankly—that the Keating case had nothing to do with this section of the law we are amending.

Well, I have the documents in front of me, and it is very clear they are class action lawsuits based on violations of the Securities Act of 1934 and the Securities Act of 1933. And at some point I am going to put these in the RECORD, as I promised my chairman last night that I would do, for all to see.

I am so grateful to my friend from Nevada for bringing this up. This bill is about the Charles Keatings of the future and whether they are going to commit the kind of financial atrocities they committed in the past.

Now, that is not the goal of the authors of this, but it is an unintended consequence of this if we are not careful, if we do not listen to Arthur Levitt of the SEC, if we do not listen to the consumers, if we do not listen to the securities people in each and every State including my own State, including those in Connecticut, including those in New York, and all over this country who are against this bill, and a New York Times editorial today, which really takes on this bill.

So the question I have for my friend is this. The Senator from Alabama and the Senator from Nevada are putting before us what they consider to be a correction. It is technical; it is difficult for people to understand, but I wish to ask my friend a direct question because I know he is a student of the Keating case and I know he has stated that the Keating case is involved here.

If S. 240 had been in effect and the joint and several liability had been changed, would it have adversely affected those people who eventually collected because they were able to go to these other actors in the suit?

Mr. BRYAN. To answer my distinguished colleague from California, it would have adversely affected the plaintiffs. It would have reduced their amount of recovery by tens of millions of dollars. The overall amount of the recovery was $262 million as a result of the class action filed under the securities laws. It would have reduced that amount by tens of millions of dollars, and I will try—I do not have the number right before me—to develop that number to give more particularity.

Mrs. BOXER. I am finished with my questions. But what I really appreciate about his presentation is it is not some academic debate. You are telling this Senate, and I hope they are listening, that if we change the laws too much, if we go too far—and, yes, we should correct it—the people who collected in the Keating case would not have collected tens of millions of dollars, and it includes this amendment that is standing before us.

I thank my friend.

Mr. BRYAN. I thank the Senator from California. I am going to be very brief, as I assured my colleague——

Mr. DODD. Will my colleague yield on that point?

Mr. BRYAN. I would be happy to yield. I recognize that others want to speak on this issue, and I do not want to dominate, and I do need to make a couple other points. But I would be happy to yield.

Mr. DODD. I just ask my colleague here: If the provisions of this legislation, in fact, had been in place at the time, my colleague from Nevada is not suggesting, I hope, by his comments that the Keating case would have, as it was finally concluded as we know, changed necessarily the awards to the plaintiffs in that case because of the proportionate liability provisions of this legislation, because we are not dealing with that?

Mr. BRYAN. I would respond with all due respect—the Senator knows how greatly I respect his insight into this process—dramatically, categorically and emphatically. If S. 240 had been in effect at the time of the Keating action, the recoveries would have been tens of millions of dollars, maybe even more than $100 million, less.

Mr. DODD. I say to my colleague, I totally disagree with that conclusion. In fact, I think we might have enhanced, had the provisions of this bill been in place, the collection rather than deny, because of the requirement of accountants to actually report the kind of problems that they were not required to under existing law at the time of the Keating proceedings.

Mr. BRYAN. I thank the Senator. I am just going to make one point. The fundamental difference between the Bryan-Shelby amendment and S. 240 is that it recognizes, as does the chairman and the distinguished Senator from Connecticut, that we create two classes of liability. One is joint and

several, and the other is proportionate. But the fundamental distinction is that in the Shelby-Bryan amendment, if those who are jointly and severally liable are judgment proof, that is, they are insolvent, they are in prison, they have taken flight, they are unable to respond to the full amount of damages, our legislation in the amendment would require you to look first to the joint and several liability. But if the innocent investor was unable to recover the full amount of his or her losses, then you could look to the proportionate liability, those people whose conduct was reckless, and the plaintiff can fully recover.

Under the print before us, that would not be possible; there is a limitation, and you can only recover against the proportionate liability the amount that is determined to be the proportionate liability plus another 50 percent.

So let us say, for example, that the loss was $1 million, that there was a 10-percent responsibility on the part of a reckless defendant. With proportionate liability, the full amount that you could recover would be $100,000. Under the bill that is currently before us, the full amount that you could recover would be $150,000, even though the loss might be $1 million.

Mr. SARBANES. Would the Senator yield for a question?

Mr. BRYAN. I would be happy to.

Mr. SARBANES. Who would bear the burden of the other $850,000 in that case?

Mr. BRYAN. The innocent plaintiff.

Mr. SARBANES. The plaintiff.

Mr. BRYAN. The investor, who was not at fault at all.

Mr. SARBANES. Why should that investor, who was the victim of a fraud, have to swallow $850,000 of the loss when there are parties who were participants in the fraud who ought to be held accountable?

Mr. BRYAN. I would agree with the observation made by the Senator from Maryland. I cannot comprehend the public policy of saying, look, those who are active and are involved in reckless misconduct in this case, they should have their liability limited so that the innocent plaintiff, innocent investor, should bear the loss. I do not think that is responsible public policy, I would say in response to the Senator.

Mr. SARBANES. If the Senator would yield further, because I wish to be fair to my friend from Connecticut and the distinguished chairman of the committee, they say, well, there are these strike suits and we have to try to preclude them because these deep pocket people are being held up, as it were.

The way you handle that problem, as is done in this bill, is you make it more difficult to bring the strike suit so you clear out the so-called frivolous suits that have been asserted. And we agree that that is a desirable objective. But by definition, the cases we are talking about are cases where there is liability and there has been fraud, and in that instance there is no rationale that I can think of that warrants putting the participant in the fraud ahead of the innocent victim of the fraud.

Mr. BRYAN. I simply respond to my friend's question by saying I share that view.

I know others desire to speak. I must say the view shared by the Senator from Maryland and the distinguished Senator from Alabama and I is a view that is endorsed by the Securities and Exchange Commission and the North American Association of Securities Administrators. So we are not alone in making that determination.

Mr. SHELBY. I wonder if the distinguished Senator from Nevada would yield for one question.

Mr. BRYAN. I am happy to yield.

Mr. SHELBY. Does the Senator from Nevada know anywhere in American jurisprudence where the victim is left out in the cold like they would be if this bill passes?

Mr. BRYAN. In responding to the question, I would not presume to know all jurisprudence, but I can think of no instance in which, as a matter of public policy, a determination is made where the wrongdoer should benefit and that the innocent victim should suffer the consequence of the wrongdoer's conduct.

Mr. SHELBY. I thank the Chair.

Mr. BRYAN. I yield the floor.

Mr. FAIRCLOTH addressed the Chair.

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

Mr. FAIRCLOTH. Mr. President, I heard the questions and the arguments back and forth on the Shelby-Bryan amendment, and certainly both are distinguished Senators and very good friends, so I somewhat with hesitation oppose the Shelby-Bryan amendment. But as I mentioned yesterday, one of the key provisions of this bill is the reform of the proportionate liability rules. This is unethical lawyers going after deep pockets.

It says very simply that you or a company pay your fair share of the losses that you or your company might have caused. If 10 percent was your share of the loss, then you pay 10 percent. I think it is a reasonable provision that you pay for the damages that you cause, but not others.

Moreover, Mr. President, the bill already goes several steps in the direction that Mr. SHELBY and Mr. BRYAN would like.

First, for those persons or companies that engage in knowing fraud, they become jointly and severally liable. So they do not come under the proportionate rules. They will have to pay more than their share and if any of the fellow defendants—anybody else in the suit—are insolvent, then they are committed to paying that portion. If knowing fraud was committed, they are not covered, and they simply have to pay it all if they are the only ones with any money.

Second, investors with a financial net worth under $200,000 will be made whole even if there are insolvent defendants. This is not a small pool of people. This is about 99 percent of America. This was supposed to be the so-called widows and orphans provision that I assume was one of the things being talked about this morning.

This was a provision whereby we protect the small investor. I think the current bill goes further, so the bill is already protecting widows, orphans and a lot more.

The Shelby-Bryan amendment would go even further. His amendment proposes to protect the little fellow, which we have already covered, but also it would protect the sophisticated investor without distinction.

I have to oppose the amendment. Too often the lawyers that deal in these type of securities suits go after one thing: The deep pockets, knowing that the deep pockets will have to pick up the whole tab of the litigation. That is why they get sued in the first place. The fact that they can go after the deep pockets is probably one of the principal reasons the suit was filed to begin with.

Of course, the lawyers hope it will never go to trial. They hope that the person with the deep pockets will simply settle the case and they will simply never have to take a weak case to court. We know that the lawyers collect the lion's share of the money that is settled before or during court. The investors get pennies, if even that, on the dollar.

Mr. President, as I say, I have a great deal of respect for both Senator BRYAN and Senator SHELBY, but I am adamantly in opposition to this amendment.

I yield the floor.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The majority manager of the bill is recognized.

Mr. D'AMATO. Mr. President, let us take a look at this. My distinguished colleague from Nevada has put forth a very compelling case on the principles underlying joint and several.

Let us turn to the abstract—let us look at reality. Do you want to know what the reality is? About 300 cases being brought a year—and, believe me, they are not being brought on behalf of stockholders, the stockholders are being used; 93 percent of those cases are settled. Do you think they are being settled because the people have done something wrong? The vast majority of those cases are being settled because an innocent person cannot face the exposure and cost of this kind of suit.

Minimal participation, not knowing fraud, but just being around the company, being the auditor, being the lawyers, being the investment adviser can bring you to the case. Let me tell you something, when you are facing a $100 million or a $200 million lawsuit and you can buy your way out for $6 or $7

million, and your lawyer says and the board of directors says settle it, you have no choice but to settle. These cases take people and put them up against a wall. They cannot fight; they have to surrender. It is as if you held them up. We are providing the ability for legal blackmail. We have to stop that.

This bill does assign greater responsibility. If you know the fraud is taking place, that this business that is going on, this hanky-panky in the company, if you are the auditor, you have to report it.

Some people in the past did report it. They said, ''We reported it to the managing directors,'' and that is the end of our responsibility. We go further and say you have to report it and see that the directors act, and if they do not, you have to go to the SEC. That is how you deal with fraud.

I want to assure you that Senator DOMENICI and Senator DODD do not want to protect fraudulent acts. But just because they are alleged does not mean the companies should be forced to settle without a chance to defend themselves. Is it right to force people who are coerced into settling to pay for the losses of the so-called victims? I say so-called. Some of these cases are totally without merit. I am not talking about the Keating case. Of the 300 cases that are settled, most of them are meritless, but what we have constructed is a system where a person cannot defend him or herself because the cost of that defense, is prohibitive and the effects of the negative exposure, even though the exposure may be minimal, are so great.

A company can be wiped out by these suits, a company can be hit for $300, $400 million, so how can they not settle for $2 or $3 million? Investors are not being made whole. You would believe and think somehow investors are being made whole, but they get pennies for their losses.

What we are talking about is giving people the ability to defend themselves. Most of these defendants have not even reached negligence standards. But the law is not clear on those standards, and a jury decision is never a sure thing. How can a firm put in the hands of the jury the decision of whether they are totally wiped out? Some 600, 700, 800, 900 people who everyday go to work and depend on those jobs, wiped out? They cannot afford to defend themselves. A lawyer can say, ''Look, I think you are going to win; you have a 90-percent chance of winning.''

''Ninety percent? You mean to tell me that I have a 10-percent chance of losing and getting hit with the entire settlement which could wipe out this firm just because I'm the guy with the deep pockets?''

The answer is yes. This causes a huge cost to society? When you pay your insurance premiums, you are paying for these settlements. Also, the cost of insurance for the firms has gotten so high, because the insurance firm is worried it will be sued, that many small firms cannot afford it. These costs are passed out to everybody.

We are not protecting somebody who commits fraud. What we want to do is give people a reasonable opportunity to defend themselves; to have that opportunity and not to face this incredibly destructive process in which they really cannot defend themselves; 93 percent of these cases are being settled because the firms cannot afford to defend themselves.

That is not what the American justice system is about: You should send somebody a summons and they have to surrender. That is what is happening. You have the entrepreneurial lawyers who have made this an art form, who basically hire these plaintiffs. They have them on the payroll. They bring them in and race to the courthouse. They are not interested in getting money back for poor defrauded people and, in many cases, there has been no fraud.

I will tell you what is a fraud in this system. When you coerce somebody to pay and they have not done anything wrong, that is a fraud. I have not heard anybody say anything about the fraud of coercing honest, hard-working people because they find they would face financial ruin if they defended themselves or there were some finding against them and they would be responsible for the entire settlement. They cannot even fight it out because the risks are so great, they must surrender.

What about that kind of fraud? Is that what our system is about—that we strip away the ability of a person to stand up for his or her rights because to do so would be totally destructive to them? I do not think that is what our system is about, but that is what they have turned the system into. If you intentionally committed fraud you should pay the piper. That is what we are saying.

Do you know why the lawyers are against this? I will tell you why. It is because this will give to the entrepreneur who built a building, the fellow that is the accountant, the securities people, the investors, the ability to stand up and fight. The strike suit lawyers do not want that. These lawyers be able to hit everyone with that summons—just like holding a gun to them—and then say, OK, how much you are going to pay us. They do not want the guy to have the ability to reach back and take that gun and say, in return, OK, let us fight it out. They do not want cases to be heard on whether or not there was real fraud.

This Senator does not want to protect anybody who commits fraud. That is nonsense that I read in these insipid editorials—insipid. We want to give people their day in court. If you want to protect the holdup artists we should we should keep joint and several liability.

I hear people say, you are going to be defending the Keatings. No way. If the fraud is intentional, we are going to get you. Charles Keating was selling products for a bank and suggested that the Federal Government was insuring it. Senator DODD and I cosponsored legislation we introduced on May 5, 1995, that financial institutions cannot sell these products and imply they are backed by the Government. That is how you stop the Charles Keating types. We will hold these people responsible, and we are going to stop them from conducting these actions. Let us not talk about defending fraudulent conduct. We do not. But we must give a person an opportunity to fight for himself instead of giving up to the holdup artists.

Mr. DODD. Mr. President, let me try to bring this back to the point at hand here. Let us get some matters off the table. We are not talking about intentional and knowing fraud. ''Joint and several'' still applies on intentional and knowing fraud. We have tried to deal in this legislation with the issue of recklessness, because it is in that area of recklessness that we feel the issue of proportionate liability ought to have some application—not intentional, not knowing, but in reckless behavior.

Let me share with my colleagues the thoughts of those who spent a great deal of time on this issue. In fact, as pointed out by one authority, the vagueness of the recklessness standard is one of the principal reasons, Mr. President, that the joint and several liability provisions ought to be modified. In practice, the legal standard does not provide protection against unjustified and abusive claims, because juries can—and as a practical matter do—misapply the standard. Juries today, quite frankly, have considerable difficulty in distinguishing innocent mistakes, negligence, and even gross negligence—none of which, by the way, Mr. President, is actionable under rule 10(b)(5) from recklessness.

One commentator observed that the courts have been less than precise in defining what exactly constitutes a reckless misrepresentation. The imprecision of the court, he went on to say, has resulted in ad hoc, if not arbitrary and reckless, determinations. The result is that the actual and potential parties to section 10 and rule 10(b)(5) actions cannot predict with any degree of certainty how a trier of fact would characterize alleged conduct and thus whether it may serve the basis for liability.

There is a whole series of discussions about the problems in determining that particular criteria. So in the recklessness area, we apply the proportional liability provisions. Much of the reason goes to the heart of what the Senator from New York was talking about. Once you are into it, and if it is only joint and several, and if you are a marginal player and you could be held for the whole amount, that is unfair and lacks balance, just as it would be if

you would deprive a legitimate plaintiff of any kind of compensation at all.

Go back and look, if you will, at the statements of all of the preceding members of the Securities and Exchange Commission on this very point.

Carter Bees said:

Allocating liability on the basis of the proportion of each defendant's contribution to a plaintiff's harm would address these problems by changing incentives. Plaintiffs may be less likely to name secondary market participants if the potential recovery from these entities was relatively small. Secondary market participants who are nonetheless sued would be more willing to defend those cases they believed were without merit, rather than entering into a quick settlement in order to avoid broader liability exposure.

Adversely, I point out, affecting these investors as well.

The Senator from New York is correct. Let us make the system work. Let us get to court if that is where you have to go. This involves very little court participation because of this particular standing. ''You are an idiot not to pay.'' That is what their lawyers and accountants tell them, rather than jeopardize the entire operation, in some cases, because of the size of the claims.

Richard Breeden, former SEC Chairman noted:

The current application of joint and several liability results in a system that should perhaps be called inverted disproportionate liability. Under this system, parties who are central to a perpetrating of fraud often pay little if anything. At the same time, those whose involvement might be only peripheral and lack any deliberate or knowing participation in the fraud often pay the most in damages.

That is not right. That is unfair, Mr. President. He concluded by saying:

Paying your fair share but no more than your fair share of liability is hardly a radical proposal.

That is what we are suggesting.

David Ruder, a former Chairman of the SEC, said:

The threat that the secondary defendants can become liable for all of the damage caused by the primary wrongdoers has had a dramatic affect upon the settlement negotiations in large class action suits. These actions frequently have been settled by secondary defendants for significant sums because of the possibility that they will be required to pay the entire amount claimed and thus destroying them.

He concluded:

Reform of joint and several liability is necessary because the fees received by accountants, lawyers, and banks for their commercial services do not justify enormous dollar judgments against them on securities class action cases.

So, Mr. President, what we have tried to do in this bill is to strike that balance that everybody talks about rhetorically but denies we have achieved here. We do not include the intentional knowing specifically. We protect the small investor—$200,000. Only 1 percent of the people in this country have incomes in excess of $100,000. We are talking about a very small number of people who would actually be affected. The overwhelming majority are still protected as a result of the widows or orphans provision we put in.

Also, recent data indicate that the median net worth of American families is $47,200. So we protect those people when we have intentional and knowing fraud. Even if you are marginally involved, you pay all of it. That is what we have tried to do. To wipe all of that out strikes out the balance of this legislation. That is what the years of work have tried to achieve here.

Now, do we know how perfectly it is going to work? No. To my colleagues who cite potential future cases, how do I argue against a potential future case without knowing the facts except to cite some draconian case that conjures up the worst fears in people. I do not know the exact application. I know that presently the system stinks. That much I know. We have made an effort to change this, to avoid the kind of problem that exists where 93 percent of the cases are settled because people make the conclusion you would be an idiot not to do so because you are jeopardizing your entire business.

There is something wrong with the system that results in that kind of conclusion.

Now, we hope this will work. Time will tell whether or not we have done it absolutely perfectly. I suspect we have not done it perfectly.

This much we know: The present system does not work. It says to innocent, relatively innocent, marginal players, ''You must assume the entire responsibility for the vague standard of recklessness,'' I think is unfair.

Intentional knowing—pay the price. Protect the widows and orphans—that you must do. To say we are sorry, those on the periphery here will pay a full tab where a reckless standard is applied, I think is unfair.

We have applied the standard in the law to see if we can get some balance into the system, get people to court. If there is a real fight, fight it out. Do not just achieve these huge awards because people are afraid to go into court, knowing what the price would be if they are ultimately asked to pay the entire tab, when they are only marginally involved.

That is the whole purpose. Citing future cases and what may happen down the road, engaging in the scare tactic approach—the Senator from New York, the Senator from New Mexico, myself, and others who put this bill together—do my colleagues really believe we are trying to do something here that would potentially expose people to future Keatings? By God, how could any Member possibly draw that conclusion?

We are trying to get balance into a system that is out of balance. That is all this is intended to do. My hope is that the Shelby amendment will be resoundingly defeated.

Mr. SHELBY. Mr. President, I ask unanimous consent that Senators BOXER and SARBANES be added as original cosponsors.

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

Mr. SHELBY. Mr. President, I ask that a statement by the Chairman of the Securities and Exchange Commission regarding proportionate liability be printed in the RECORD.

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

SEC Chairman Levitt has been forceful about the need to protect fraud victims in the insolvency situation, even when it forces parties who are only partially responsible for the harm to bear more than their proportionate share of the damages. In 1994 House testimony, Levitt explained:

''Since securities fraud cases often involve insolvent issuers or individuals, however, some defendants in such cases may not be able to pay their fair share of the damages they have jointly caused. Advocates of proportionate liability argue that joint and several liability produces an inequitable result in such circumstances because it forces parties who are only partially responsible for the harm to bear more than their proportionate share of the damages. . . .''

''The response to this argument is that, although the traditional doctrine of joint and several liability may cause accountants and others to bear more than their proportional share of liability in particular cases, this is because the current system is based on equitable principles that operate to protect innocent investors. In essence, as between defrauded investors and the professional advisers who assist a fraud by knowingly or recklessly failing to meet professional standards, the risk of loss should fall on the latter. Defrauded investors should not be denied an opportunity to recover all of their losses simply because some defendants are more culpable than others.''

Mr. SHELBY. Mr. President, I believe the bottom line here is balance. The balance is, who should bear the cost of fraud? That is the question before the Senate today. Who should bear the cost of fraud?

Should it be the perpetrators, or should it be the victims? It should be the perpetrators, and never the victims. I think that is a bottom line of American jurisprudence.

This bill, if it were to pass, would change that, unless we adopted the amendment that I have offered on behalf of myself, Senators BRYAN, BOXER, and SARBANES.

This amendment makes sense. Why do we think the Chairman of the Securities and Exchange Commission supports it? We do not need any more Keatings in America. We did not need anything close to that in America. We do not need to pass a bill up here without protection of the innocent people that invest. We should never, never, Mr. President, try to protect the perpetrators of wrong in America.

I believe this amendment makes a lot of sense. I urge my colleagues at the proper time to vote for it.

Mr. D'AMATO. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. D'AMATO. Mr. President, under the agreement, we indicated we would

vote at 10:55. Let me suggest at 10:55 we vote.

I yield the floor to Senator DOMENICI.

Mr. DOMENICI. Mr. President, first, I want to commend both Senator D'AMATO and Senator DODD for their splendid arguments today.

While I normally find the distinguished Senator, Senator SHELBY, to be rational and reasonable, let me suggest in this case I would summarize this, this way: What we have had heretofore in the United States, before this new approach, is a cookie-cutter complaint.

What they do is draft up a complaint, and it contains the right words, regardless of the facts.

Now, we can count on it, I say to my good friend from Mississippi, make this joint and several, dependent upon recklessness—which nobody understands—and every complaint will accuse the whole crowd of being reckless.

It will not be just a case of ''under certain circumstances.'' The issue will be, those reckless people will have to be subject to joint and several total liability for a little tiny bit of negligence. It will be all of them in the same suit, under the word ''reckless,'' and we are right back where we started, and we will not have accomplished the reforms that we seek, to balance a very unfair system.

I yield the floor.

(At the request of Mr. DOLE, the following statement was ordered to be printed in the RECORD.)

● Mr. MCCAIN. Mr. President, because of a longstanding commitment to address the Veterans of Foreign Wars, I will be necessarily absent on Friday. If I were to be present, I would vote for the Shelby-Bryan amendment on joint and several liability.

This amendment would continue to allow victims of securities fraud to recover their losses by holding all those who participated in the fraud joint and severally liable for the damages.

In many instances, the primary culprit in a securities fraud declares bankruptcy. The only resource for an innocent victim is to recover their full losses from others who contributed to the fraudulent activity.

While the pending bill would hold those who ''knowingly'' contribute to a fraud severally liable, it would limit the liability of those who ''recklessly'' contribute. This provision means that innocent victims will pay for the fraud inflicted on them, rather than those who recklessly contributed to their victimization. That is simply not right.

Mr. President, there is serious abuse of our litigation system. Too often, frivolous suits are brought in order to wrest money from defendants who find it far easier and less expensive to settle the case out of court than to pay the exorbitant cost of defending themselves. While we must take steps to address such abuse, we must take great care that in that effort we do not unfairly diminish the ability of truly innocent victims of fraud to fully recover their losses from those who participated.●

The PRESIDING OFFICER. Under the previous order, the hour of 10:55 a.m. having arrived, the Senate will now proceed to vote on or in relation to the Shelby amendment.

The question is on agreeing to the amendment. The yeas and nays have been ordered.

The clerk will call the roll.

The bill clerk called the roll.

Mr. LOTT. I announce that the Senator from Colorado [Mr. CAMPBELL], the Senator from Texas [Mr. GRAMM], the Senator from Idaho [Mr. KEMPTHORNE], the Senator from Arizona [Mr. KYL], the Senator from Arizona [Mr. MCCAIN], the Senator from Wyoming [Mr. SIMPSON], the Senator from Pennsylvania [Mr. SPECTER], and the Senator from Wyoming [Mr. THOMAS] are necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming [Mr. SIMPSON] would vote ''nay.''

Mr. FORD. I announce that the Senator from Arkansas [Mr. BUMPERS], the Senator from Iowa [Mr. HARKIN], the Senator from New York [Mr. MOYNIHAN], the Senator from Arkansas [Mr. PRYOR], and the Senator from Illinois [Mr. SIMON] are necessarily absent.

The result was announced—yeas 30, nays 56, as follows:

[Rollcall Vote No. 282 Leg.]

YEAS—30

Akaka	Feingold	Kohl
Biden	Feinstein	Lautenberg
Boxer	Graham	Leahy
Bradley	Heflin	Levin
Breaux	Hollings	Rockefeller
Bryan	Inouye	Sarbanes
Cohen	Jeffords	Shelby
Daschle	Kennedy	Snowe
Dorgan	Kerrey	Thompson
Exon	Kerry	Wellstone

NAYS—56

Abraham	Faircloth	McConnell
Ashcroft	Ford	Mikulski
Baucus	Frist	Moseley-Braun
Bennett	Glenn	Murkowski
Bingaman	Gorton	Murray
Brown	Grams	Nickles
Burns	Grassley	Nunn
Byrd	Gregg	Packwood
Chafee	Hatch	Pell
Coats	Hatfield	Pressler
Cochran	Helms	Reid
Conrad	Hutchison	Robb
Coverdell	Inhofe	Roth
Craig	Johnston	Santorum
D'Amato	Kassebaum	Smith
DeWine	Lieberman	Stevens
Dodd	Lott	Thurmond
Dole	Lugar	Warner
Domenici	Mack	

ANSWERED ''PRESENT''—1

Bond

NOT VOTING—13

Bumpers	Kyl	Simpson
Campbell	McCain	Specter
Gramm	Moynihan	Thomas
Harkin	Pryor	
Kempthorne	Simon	

So the amendment (No. 1468) was rejected.

The PRESIDING OFFICER (Mr. ABRAHAM). The majority leader is recognized.

UNANIMOUS-CONSENT AGREEMENT

Mr. DOLE. Mr. President, a number of my colleagues are inquiring about the schedule for the remainder of the day, and I want to congratulate the managers for their good work until late last evening after somewhere around 10:30. This is a major bill.

What I would like to do is propound a unanimous-consent request. I have been told it has been worked out with the managers for action on Monday, and if we can do this on Monday, then there will be no more votes today.

So I would ask consent that when the Senate resumes S. 240 at 12 noon on Monday—there is going to be additional debate this afternoon. This refers only to Monday. We go on the bill at 12 noon—Senator SARBANES be recognized to offer an amendment relative to proportional liability, and there be a time limitation of 2 hours to be equally divided in the usual form, with no second-degree amendments in order.

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

Mr. DOLE. I further ask that at 2 p.m. the Sarbanes amendment be laid aside, and that Senator BOXER be recognized to offer a relevant amendment, on which there be 90 minutes equally divided, with no second-degree amendment in order prior to a failed motion to table.

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

Mr. SARBANES. Could I just make an inquiry, reserving the right to object.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. I have no objection. In other words, we are leaving the Boxer amendment open to a second-degree amendment, is that right?

Mr. DOLE. Right. We were not certain what the subject matter is.

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

Mr. DOLE. And I further ask that at 3:30 p.m. the Senate resume the Bryan statute of limitations amendment, and there be 90 minutes of debate to be divided in the usual form.

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

Mr. DOLE. The Senator indicated he needed additional time.

I further ask that at 5 o'clock on Monday, the Senate proceed to vote on or in relation to the Bryan amendment, to be followed by a vote on or in relation to the Sarbanes amendment, to be followed by a vote on or in relation to the Boxer amendment; that there be 2 minutes for explanation between the second and third stacked votes to be in the usual form. In other words, Members get a brief explanation. Senator BYRD suggested, I think, a good idea. So that when they vote, they will have the latest information on that particular amendment.

Mr. SARBANES. There will be 2 minutes to a side?

Mr. DOLE. One.

Mr. SARBANES. One minute to each side.

Mr. DASCHLE. Reserving the right to object, I would ask the majority leader—I am told we have one Member

who is returning at 5 o'clock—if we could move that to 5:15 to accommodate his schedule I think it would probably work a little bit better.

Mr. DOLE. As long as it does not cause any problem. The time of 5:15 is fine with me.

Mr. SARBANES. Senator BURNS actually spoke to me earlier, and we slipped it from 4:30 to 5 to accommodate him, or as I understood it was slipped from 4:30 to 5 to accommodate Senator BURNS, and if we could slip it another 15 minutes——

Mr. DOLE. At 5:15.

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

Mr. DOLE. The first vote will be at 5:15, and the rest will follow.

Mr. BYRD. Mr. President, before the distinguished majority leader proceeds—reserving the right to object, and I will not object—I thank the distinguished majority leader for providing time for explanation before the vote on each of the stacked amendments. My question is, Will there only be three stacked votes for Monday?

Mr. DOLE. Yes.

Mr. BYRD. I thank the majority leader.

Mr. DODD. There may be votes after 5:15.

Mr. BYRD. That was not my question.

Mr. DODD. Stacked votes.

Mr. BYRD. Only three stacked votes. I thank all leaders.

I have no objection.

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

Mr. DOLE. For the information of all Senators, a lot of amendments will be debated during the day on Monday and the first vote will occur at 5:15. We will notify all offices, certainly the Democratic side and the Republican side, and I again wish to thank the managers for the progress. It is a very important bill. I listened to the debate last night and learned a little bit after I got home. You were still debating. It is an important bill, very important bill. In view of the progress made and the fact there is going to be an amendment debated this afternoon, I think it is safe to announce—and I have checked with the Democratic leader—no more votes today.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, as we return to the bill, Senator BRYAN has an amendment to offer.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. I ask unanimous consent to speak in morning business.

Mr. D'AMATO. May I say to the Senator, because others have asked to proceed in morning business, we are ready to take the amendment which our colleague wants to put up, and if it is going to be protracted, I do not want to open the door.

Mr. FEINGOLD. I only asked to speak in morning business for 10 minutes.

Mr. D'AMATO. Might I ask my colleague—because he has a time problem, we have provided that we would go to this—that Senator BRYAN be at least permitted to proceed and then I would have no objection to moving forward.

Mr. BRYAN. If I might, I can assure my colleague that I am simply going to lay an amendment down, speak for approximately 5 minutes, so that I do not in any way—we did make a commitment to lay this down, and I have a time commitment in terms of a flight to get so I will accommodate the Senator.

Mr. FEINGOLD. Mr. President, in light of that comment, I will defer for a few moments. And I thank the Senator from New York and the Senator from Nevada.

The PRESIDING OFFICER. The Senator from Nevada.

AMENDMENT NO. 1469

(Purpose: To amend the Securities Exchange Act of 1934 to provide for a limitations period for implied private rights of action)

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

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Nevada [Mr. BRYAN] proposes an amendment numbered 1469.

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

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

The amendment is as follows:

On page 129, between lines 16 and 17, insert the following:

SEC. 111. STATUTE OF LIMITATIONS.

Title I of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by adding at the end the following new section:

"SEC. 38. STATUTE OF LIMITATIONS.

''(a) IN GENERAL.—Except as otherwise provided in this title, an implied private right of action arising under this title may be brought not later than the earlier of—

''(1) 5 years after the date on which the alleged violation occurred; or

''(2) 2 years after the date on which the alleged violation was discovered.

''(b) EFFECTIVE DATE.—The limitations period provided by this section shall apply to all proceedings commenced after the date of enactment of this section.''.

On page 131, strike line 1, and insert the following:

"SEC. 39. PROPORTIONATE LIABILITY."

Amend the table of contents accordingly.

Mr. BRYAN. I thank the Chair.

Mr. President and my colleagues, this is an amendment dealing with the statute of limitations. Some of my colleagues will recall that in 1991, the Supreme Court of the United States decided by a 5-to-4 vote a case that is referred to as the Lampf decision. The Supreme Court in that decision determined that there would be with respect to securities actions a statute of limitations that would limit an investor from bringing a cause of action to 1 year from the point that the fraud was discovered and in no event longer than 3 years.

The Supreme Court gave that a retrospective interpretation as well as a prospective interpretation. A number of us came to the floor in 1991, because this would have wiped out a number of the cases in which Charles Keating had been named the defendant, and the Congress corrected it. It changed the law—that it would be 2 to 5 years.

Now, this deals prospectively. Under the Lampf case, the 1- to 3-year statute was identified as the appropriate statute of limitation. This amendment would provide rather than a 1- to 3-year statute of limitation, a 2- to 5-year statute of limitation.

I must say that S. 240 in its original form as introduced contained the identical provision.

So, in effect, this amendment, if adopted, would restore S. 240 to its original form.

The importance of the statute of limitations, as the Securities and Exchange Commission and other regulators point out, is that by the very nature of these securities frauds, they are not easily detected. The last thing in the world we would want to do is to give comfort to those who are clever enough to conceal their fraud to effectively preclude a plaintiff from bringing his or her cause of action.

There will be much more debate on this on Monday, but suffice it to say what we are trying to do is to provide 2 years from the date of discovery, in no event longer than 5 years, recommended by the Securities and Exchange Commission, recommended by the North American Association of Securities Administrators, and just one point for my colleagues to contemplate.

In testimony before the Banking Committee, the Chairman of the SEC advised us that even with the enormous resources available to the SEC, all of the staffing that they have, and the sophistication that they have acquired over the past 60 years, it takes approximately 2.25 years to conduct such an investigation.

Obviously, individual plaintiffs have much less in the way of resources available, and their likelihood of completing an investigation in the timeframe is considerably more limited.

What we seek to do is provide a 2- to 5-year statute of limitations prospectively, and we will point out in the debate with more detail on Monday the overwhelming public policy argument in favor of this.

Suffice it to say this has nothing to do with frivolous lawsuits—nothing to do with frivolous lawsuits. There are provisions in the mark which deal with enhanced enforcement provisions under rule 11 of the Federal Rules of Civil Procedure to deal with the issue of frivolous lawsuits. This simply is a provision that will provide some fairness to investors to be able to present their claim in the first instance.

I thank my colleagues for permitting me to go forward at this time.

Mr. SARBANES. Will the Senator yield?

Mr. BRYAN. I will be pleased to do so.

Mr. SARBANES. Mr. President, I want to underscore the importance of this amendment.

I ask the distinguished Senator from Nevada, did the Banking Committee not report an amendment lengthening the statute of limitations for securities fraud actions to 2 years after the plaintiff knew of the violation and to 5 years after the violation occurred, following that Supreme Court decision?

Mr. BRYAN. Responding to the distinguished ranking member, that was, in fact, what the Banking Committee did, and on the floor of the Senate, the Senate followed the lead of the Banking Committee and ultimately, as the Senator from Maryland will recall, we protected those cases that were pending in the 1991 action we took.

Mr. SARBANES. So the proposal, your amendment, in effect, is seeking to put into the law the very provision that we had previously reported.

Mr. BRYAN. That is essentially correct. This operates prospectively. What we did, as the Senator from Maryland will recall, is to try to protect all of those actions that were pending in 1991 which had been wiped out by the Supreme Court decision and we, in effect, provided at that time that the operable State law would apply, which had been, in effect, the interpretation of the courts over the years.

In essence, we kept those cases active so that they could be decided on their merits, not having been precluded by a decision, which surprised many, that the Court gave and particularly the retroactive portion of that.

Mr. SARBANES. As I understand it, following the Supreme Court decision in the Lampf case, the then-Chairman of the Securities and Exchange Commission, Richard Breeden, a Republican nominee—because I think it is very important to understand, as far as Chairman of the SEC is concerned, they are bipartisan in their view about this matter—testified or stated, and I quote him:

> The timeframe set forth in the Court's decision is unrealistically short and will do undue damage to the ability of private litigants to sue.

Chairman Breeden pointed out that in many cases:

> . . . events only come to light years after the original distribution of securities and the cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse.

As I understand it, the States securities regulators and the FDIC at the time joined the SEC in this position. As I understand it, the States securities regulators today feel very strongly that the amendment which the Senator is offering is an extremely important amendment.

Mr. BRYAN. The Senator from Maryland is correct. This has had bipartisan support with the Commission. Chairman Breeden, as the Senator points out, strongly urged upon the committee a 2- to 5-year statute of limitations. That same position has been taken by Chairman Levitt under the current administration.

The North American Association of Securities Administrators then and now have urged this course of action. I simply point out to my friend and colleague that S. 240, in the last session of the Congress its counterpart, had a 2- to 5-year statute of limitations, and in this Congress, the very bill we are debating in its original form, as introduced by Senators DODD, DOMENICI, and others, had a 2- to 5-year statute of limitations.

So what this amendment would do is simply restore S. 240, with respect to the statute of limitations, to its original form as introduced by a number of colleagues.

Mr. SARBANES. Mr. President, this is an extremely important amendment. The 1- and 3-year time periods are unrealistically short, and the danger that is associated with an unrealistically short time period for the application of the statute of limitations is that people with meritorious causes will be barred from the courthouse door.

We have statute of limitations because we say, ''Well, we do not want this thing just hanging out there indefinitely, and people ought to assert their rights,'' and so forth and so on. But the time periods have to be reasonable.

Under the amendment, there is a 5-year time period regardless, so that the victim may never know of it. If 5 years goes by, he is closed out. The bill would reduce that to 3 years. People have to make their judgment, but why should you come down on the side of concealment instead of on the other side in terms of protecting the investor?

The 1 and the 2 years is very important because you may discover, or think you have discovered, the fraud, but then you have to work it up to determine whether you have a case or not, and 1 year is a very unrealistically short time period. In fact, I think the Senator yesterday quoted a time period that it took the SEC from when they began working on a case before they felt they could bring it. Was I correct in that?

Mr. BRYAN. The Senator is correct. I cited Chairman Breeden, I believe, who indicated it was 2.25 years for the average case to fully investigate. I might just say in response to the distinguished Senator's point about the inherent complexity, Chairman Levitt testified earlier this year on April 6, and I will read a very short quote, in support of the proposition before us:

> Extending the statute of limitations is warranted because many securities frauds are inherently complex and the law should not reward a perpetrator of fraud who successfully conceals its existence for more than 3 years.

I think that is a compelling policy argument, I say to my good friend from Maryland.

Mr. SARBANES. I think that is an extremely important point. This does not affect the basis on which you can bring the suit in any way. All the other provisions are unaffected. This only affects the time period within which the suit must be brought.

Mr. BRYAN. The Senator is correct.

Mr. SARBANES. I say to my colleagues, this is a very rough bill on innocent investors who have been victimized, as it were swindled, and I certainly hope that at a minimum, the Senate would be willing to restore an appropriate statute of limitations back to the time periods that have prevailed, generally speaking, throughout most of our experience with the securities laws. It has been related to the State laws, and most of the State laws are 2 to 5 and some even longer than that, if I am not mistaken.

Mr. BRYAN. The Senator is correct, and I think his observation is particularly insightful. If you look at S. 240 in its original form, there is only one provision that could reasonably, arguably be supported in providing a consumer, investor, a victim of fraud, with an additional benefit, and that is the statute of limitations provision. That was in the original bill, as the distinguished Senator from Maryland knows. During the course of processing that legislation, for reasons which I do not understand, the provision was deleted.

But even those who are the most fervent advocates of the bill—I know our distinguished colleague, Senator DODD, has spoken eloquently on behalf of the statute of limitations—we may have differences with respect to proportionate liability and some other issues. But I point out, in response to the Senator's question, that the introducers of the bill, Senator DODD, Senator DOMENICI, and many others on both sides of the aisle, felt that it was inherently fair for the reasons which the Senator from Maryland so aptly pointed out, and that the statute of limitations needs to be extended to 2 to 5 years so those who perpetrate fraud do not benefit by the cleverness of their ability to conceal.

I yield the floor.

Mr. BOND. Mr. President, S. 240, the private securities litigation legislation addresses a very important issue of concern to many Americans, securities litigation reform. While this is a subject that I believe needs to be addressed and one I have some personal views and experience in, I will not be participating in the debate or votes on the floor.

I inform the Senate that I am currently engaged in securities litigation of the kind this legislation seeks to reform. As a result, I have decided to recuse myself from the debate. Given the status of my current suit and the issues before the Senate, I have been advised that I should not participate in the proceedings or voting on the floor.

Mr. DOLE. Mr. President, the high cost of litigation imposes an enormous burden on our economy. According to some estimates, legal judgments account for 2.3 percent of our gross national product. Plaintiffs' lawyers earn

nearly $20 billion annually in legal fees, often as a result of contingency-fee arrangements guaranteeing a 30 or 40 percent share of any jury award.

These are the big-picture statistics. But, as we all know, the fear of litigation can hit much closer to home:

Playgrounds and little leagues shut down because local communities can't afford the insurance. Boy Scout troops disband because there aren't any adults around who are willing to be troop leaders. Doctors practice defensive medicine, increasing the cost of health care in the process. Volunteers stay home instead of offering their services to the community. Police officers start second-guessing their own actions, wondering whether they're going to be hauled into court for some minor misstep.

Even worse, people start to lose faith in the system. They begin to view the system not with respect, but as an opportunity to make a quick buck. Everyone becomes a potential victim. Every social transaction, no matter how minor or benign, becomes a potential lawsuit leading to a multimillion-dollar jackpot.

That is why comprehensive legal reform is so important—not only to reduce costs for businesses and consumers alike, not only to protect the innocent from frivolous lawsuits, but also to restore a sense of perspective and personal responsibility.

So, earlier this year, the Senate took the historic step of passing landmark product liability reform legislation.

And, today, we continue the reform process in another key area—the area of securities litigation.

Why securities litigation? Because our securities markets provide the fuel that drives our economy. When these markets run efficiently, allocating capital to established companies and to newer, emerging businesses, we all win out with more economic growth, more jobs, a stronger economy.

Of course, those who seek to invest in our securities markets need to be confident that these markets operate efficiently and fairly. And that is why Congress acted more than 60 years ago to promote investor confidence by passing the Landmark Securities Act of 1933 and the Securities Exchange Act of 1934.

Unfortunately, a handful of lawyers today devote their professional lives to gaming the system by filing strike suits alleging violations of the Federal securities laws—all in the hope that the defendant will quickly settle in order to avoid the expense of prolonged litigation. The lawyers who file these suits often rely on professional plaintiffs, shareholders with only small stake in the company being sued, but who are nonetheless willing to stand on the sidelines ready to lend their names to the litigation.

Needless to say, these strike suits are often baseless, triggered not by any evidence of fraud, but by a drop in stock price or the announcement of some bad news by the company. In effect, the lawsuits act as a litigation tax that raises the cost of capital and chills disclosure of important corporate information to shareholders. High-technology, high-growth companies are particularly vulnerable to these baseless strike suits because of the volatility of their stock prices.

S. 240, the Private Securities Litigation Reform Act of 1995, seeks to reduce the number of meritless securities fraud cases, while protecting investors, by proposing several commonsense reforms:

First, it puts an end to the use of professional plaintiffs by requiring that the court appoint as the lead plaintiff the party willing to serve in this capacity who has the greatest financial stake in the outcome of the litigation.

Second, it clamps down on skyrocketing attorney's fees by requiring that fees be awarded as a percentage of the actual recovery based on the efforts of the attorney.

Third, it retains joint and several liability for those who knowingly commit fraud, but establishes a system of proportionate liability for other, less culpable defendants.

Fourth, it adopts the second circuit's pleading standard, which requires specificity when pleading securities fraud cases. As a result, general allegations of fraud will no longer be enough to justify a lawsuit.

And fifth, it creates a statutory safe harbor for those companies whose good-faith estimates about future earnings do not materialize. Statements that are knowingly false, however, are not protected by the safe harbor.

Mr. President, I want to commend my colleagues, the chairman of the Banking Committee, Senator D'AMATO, and the chairman of the Budget Committee, Senator DOMENICI, for their leadership in moving this bill through Senate. I also want to commend my colleague from Connecticut, Senator DODD, whose involvement in this issue is proof that there is nothing partisan about securities litigation reform.

Mr. BURNS. Mr. President, I rise today to add my voice to those who are supportive of this legislation and to also take the opportunity to commend the sponsors of S. 240, Senator DOMENICI and Senator DODD. It is through their hard work and effort that we now have a balanced bill that protects both investors, and defendants of securities litigation.

It almost seems as if the class—action securities fraud suit has become a feature of doing business for just about every size and type of company in the United States. In 1990 and 1991, a record 614 securities class action suits were filed in Federal courts against American businesses. In an article printed in the Wall Street Journal on September 10, 1991, Mr. Vincent O'Brien reported that he collected data on more than 330 Federal class-action securities-fraud cases involving common stock. In every case, the plaintiffs alleged material misrepresentations and omissions by management regarding the true health and potential of the defendant company. Of the 330 case sample, only 3 cases were decided by a jury; an additional 5 were dismissed or withdrawn, and an astonishing 96 percent were settled out of court.

Proponents of securities class actions say that the suits prevent fraud and help maintain the integrity of financial markets. It is certainly true that one aspect of a fair marketplace is that those persons who have been injured by fraud in connection with a securities transaction, have some avenue available to retrieve their losses.

While the current system does provide for a means to address fraud, the evidence is overwhelming that the real victims of securities fraud are not receiving adequate compensation for their losses. In fact, the plaintiffs in a lawsuit, those who were actually damaged, obtain only about 60 percent of the settlement while attorneys' fees and litigation expenses eat up the rest. Moreover, because plaintiffs' attorneys only pursue cases involving large offerings, the lion's share of the stock at issue tends to be held by institutional investors. Small investors often account for only an insignificant percentage of the shares at issue.

Many of these lawsuits, whether they are with or without merit, generally come to the same end. Settlement amounts depend entirely on the amount of damages claimed or the defendants' insurance coverage. The sad part is, that between 5 and 15 cents on each dollar sought is actually returned to the plaintiffs while the lawyers average $1 million in fees for each case.

Mr. President, it has become far too easy and profitable to file securities suits. Computer tracking of stock prices has led to nearly instantaneous suits filed by class action plaintiffs' attorneys. The incentive to the lawyers for being first is simple: Usually the judge who ultimately presides over the case will name the lawyers who got their cases filed first to be lead counsel. On what basis do they file? If a company's earnings are less than projected, a suit is filed claiming shareholders were not told of the dangers. If earnings shoot through the roof, they can be sued for withholding good information that would have prevented impatient stockholders from selling their stock. Such suits, or threats of suits, have a serious consequence of deterring valuable risk-taking and cause qualified persons to be unwilling to serve as directors because of the risks of liability. American business and the American consumers are the big losers.

Mr. President, once a suit is filed, defendants face enormous incentives to settle. Those who choose to fight the allegations face large legal fees even if they ultimately prevail. For some defendants, the stakes are even higher because the law currently does not distinguish differing degrees of fault and you could very well be liable for losses

attributed to other parties. Even though claims might be completely meritless, firms feel coerced to settle rather than assume the open-ended risk.

The legislation we have before us today will go a long way toward curbing abuses in securities litigation. It will provide a filter at the earliest stage of a lawsuit to screen out those that have no factual basis. A complaint should outline the facts supporting the lawsuit and not just a simple assertion that the defendant acted with intent to defraud. If the complaint does not set forth the facts supporting each of the alleged misstatements or omissions, the law suit may be terminated.

In order for the judge to be able to determine whether the case has any merit prior to subjecting the defendants to the time and expense of turning over the company's records, a stay of discovery is included in this bill. A typical tactic of plaintiff lawyers is to request an extensive list of documents and to schedule an ambitious agenda of depositions that take up the time and resources of a company. The discovery costs comprise 80 percent of the expense of defending a securities class action lawsuit. The stay of discovery provision will provide the defendants with the opportunity to have a motion for a dismissal considered prior to entering into the costly discovery process.

Securities laws are intended to help investors by ensuring a flow of accurate information about public companies. However, the present system reduces the amount of information as companies limit their public statements to avoid allegations of fraud. In fact, an American Stock Exchange survey found that 75 percent of corporate CEO's limit the information disclosed to investors out of fear that greater disclosure would lead to an abusive lawsuit. To encourage disclosure of information, the bill will create a statutory safe harbor.

To deter plaintiffs' attorneys from filing meritless securities class actions, judges will have the authority to review the conduct of attorneys and discipline those who file frivolous suits. Suits filed with little or no research into their merits can cost companies thousands of dollars in legal fees and company time. According to a sample of cases provided by the National Association of Securities and Commercial Law Attorneys [NASCAT] 21 percent of the class action cases were filed within 48 hours of a triggering event such as the announcement of a missed earnings projection. Innocent companies pay millions of dollars defending these frivolous cases and are left with large attorney bills even when they win. If a judge finds that an attorney filed a frivolous suit, he can award sanctions as appropriate.

This bill ensures that those primarily responsible for the plaintiff's loss bear the primary burden in making the plaintiff whole. Under current law, codefendants each have liability for 100 percent of the damages irrespective of their role in a fraudulent scheme. In this bill, the courts would determine who has committed knowing securities fraud, and hold them fully responsible for all damages. Any other defendants named in the suit would be held proportionately liable.

As we all know, there are instances when a defendant is insolvent and is unable to pay their share of damages. This bill contains provisions to ensure that investors are compensated in cases where there is an insolvent codefendant. When plaintiffs are unable to collect a portion of their damages from an insolvent codefendant, the proportionally liable codefendants would be required to pay up to 150 percent of their share of damages.

Mr. President, we have heard a lot of talk that this legislation would adversely impact small investors. Nothing could be further from the truth because this bill actually provides special protection for them. All defendants, whether they are jointly and severally liable or proportionately liable, would be held fully responsible for the uncollectible shares of plaintiffs whose damages are more than 10 percent of their net worth, if their net worth is less than $200,000. Providing special protection for small investors is a critical component of this bill and one I support strongly.

Mr. President, there has been an effort by the critics of this bill to misrepresent the facts. Several opponents have claimed that if the bill had been law during the savings and loan crisis, investors defrauded by Charles Keating would have been left without remedy. However, they fail to tell you that most of the losses from the S&L crisis did not result from securities fraud and this bill would not apply. The primary enforcement mechanism in dealing with the S&L crisis was the bank regulatory system, not the Federal securities law.

Finally, oppoinents allege that S. 240 would make it impossible for municpalities to recoup losses from securities fraud involving derivatives. However, the Domenici-Dodd bill preserves investors' rights to sue. Just as under current law, defrauded investors who purchased or sold derivatives would still be able to sue defendants who had actual knowledge of the fraud or who acted recklessly.

In concluding, Mr. President, legislative reform is needed to return rationality to the system so that meritorious claims are compensated and meritless claims are neither rewarded nor encouraged. Business desperately needs relief from both the financial and management burdens attending these abusive suits. I encourage my colleagues to support this legislation and I once again want to commend Senator DOMENICI and Senator DODD for their tremendous work on this bill.

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

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

THE BUDGET RESOLUTION AGREEMENT

Mr. FEINGOLD. Mr. President, I would like to say a few words about what has happened with regard to the concurrent budget resolution. The Republican leadership have unveiled their final conference budget proposal. I just have to say that I am appalled at the fiscal irresponsibility that it represents.

I, for one, disagree with some other Democrats in that I am glad the President came in with a budget that had a date certain for balancing the budget. I am glad that the Republicans are working on a date certain to balance the budget. I happen to think both of them wait too long. I think it can be done before the year 2000, if you really put everything on the table.

I recognize that the President himself has proposed a tax cut—certainly, a much more modest tax cut than the various Republican proposals. I happen to disagree with any tax cut at this time if we are going to balance the budget as fast as we can, Mr. President. But this agreement last night really takes the cake. It includes a massive, $245 billion tax cut—not the $50 or $60 billion the President was talking about, or $90 billion that some said the process would end up with, but really an unbelievably high figure, at a time when this country has a $5 trillion debt. A $245 billion tax cut over the next 7 years.

Mr. President, such a tax cut at this time is so fiscally irresponsible as to be downright reckless. To me, Mr. President, this is not just a budget compromise, it is a compromising of the economic health of the American people. It could not come at a worse time. It could not be more irresponsible. This is a deal cut in the back room by members of one party, which sacrifices the whole principle of fiscal discipline for very shallow political ends, Mr. President. I am afraid the Senate budget conferees have totally caved in to political gamesmanship, Presidential politics, and the Contract With America.

I was watching TV this morning. On the Today Show, I saw the Speaker's comment when the reporters asked him what this deal was all about. With a wink, the Speaker said, ''You are going to have more take-home pay. You will like it.'' He knows what he is doing. He is trying to tell the American people they can have their cake and eat it, too. They can have a $245 billion tax cut and a balanced budget by 2002.

But the American people know better. They know that cannot be done. In fact, I would almost understand it if this deal was based on a political understanding of what the people in America really want. But I cannot find anywhere in the State of Wisconsin, which I represent, people clamoring for a tax cut. I have been watching this