to U.S. Representative William F. Goodling (R-PA). He monitors foreign relations matters and oversees related legislation initiated by Congressman Goodling, who is a member of the House International Relations Committee.

John Tierney Ph.D.: Dr. Tierney is a member of the faculty at Catholic University in Washington, D.C. and also teaches at the University of Virginia and Johns Hopkins. He has served as Director of the U.S. House of Representatives Caucus on National Defense, as a consult to the Heritage Foundation, and as a Special Assistant with the U.S. Arms Control and Disarmament Agency during the Reagan Administration.

Jacqueline Tillman: Ms. Tillman is Senior Staffer for National Security Affairs and Director of Issue Advocacy for Empower America in Washington, D.C. Before joining Empower America, she was Executive Vice President of the Cuban American National Foundation, Director of Latin America policy with the National Security Council during the Reagan Administration and an assistant to U.S. Ambassador to the United Nations Jeane Kirkpatrick.

Mr. McCAIN. People can honestly disagree on what they observed. But to allege that somehow agreement or disagreement with administration policy concerning Haiti would somehow affect one's view of this election, I think, does great disservice to the people what took their time and their effort.

The Senator from Florida certainly knows how unpleasant the conditions are down there. They may disagree with the Senator from Florida as to the veracity of the elections, but I cannot, without any evidence, accept any allegation that the observation of these elections and the conclusions that were reached by these observers were in any way colored by their view of United States policy toward Haiti.

I am sure that my friend from Florida would not intimate such a thing. I want to make the record clear and I want to thank the Senator from Florida for his many-year-long involvement in the issue of Haiti, for his strong advocacy for freedom and democracy in Haiti, and his continued knowledgeable and informative manner as far as the region is concerned. I yield the floor.

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

Mr. D'AMATO. Madam President, I know the distinguished Senator from Florida, Senator GRAHAM, is about to offer an amendment.

It would be my intent when the ranking member returns, Senator SARBANES, to offer a unanimous-consent agreement, the nature of which is we would have 1 hour equally divided on Senator GRAHAM's amendment, and we then would proceed to Senator BOXER's amendment.

I see Senator SARBANES is here. I yield the floor to Senator GRAHAM so he can start and offer his amendment, and at some point in time he might break to propound the unanimous-consent agreement.

Mr. GRAHAM. Could I ask the Senator from New York a question? Your unanimous consent—are you going to provide some time in the morning prior to the vote for a brief statement for those who may not be able——

Mr. D'AMATO. It would be our intent to vote this evening, probably by about 8 o'clock.

Mr. GRAHAM. I am sorry. From earlier comments, I understood it was suggested otherwise.

Mr. D'AMATO. We had attempted to get an agreement to stack the votes, but there was an objection to stacking more than a certain number. It is my intent to dispose of the Senator's amendment prior to disposing of the Boxer amendment.

May I ask at this point unanimous consent that when the Senate considers the Graham amendment, there be 1 hour for debate, to be equally divided in the usual form, and no second-degree amendments be in order.

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

Mr. D'AMATO. Madam President, I further ask that following the conclusion or yielding back of the time on the Graham amendment, that the amendment be laid aside and Senator BOXER be recognized to offer an amendment regarding insider trading, on which there would be 90 minutes for debate to be equally divided in the usual form, and no second-degree amendments to be in order.

Mr. SARBANES. Madam President, I will have to object to that request.

The PRESIDING OFFICER. Does the Senator object? Objection is heard.

Mr. D'AMATO. Well, then, we proceed to the Graham amendment.

The PRESIDING OFFICER. The Senator from Florida.

AMENDMENT NO. 1479

(Purpose: To provide for an early evaluation procedure in securities class actions)

Mr. GRAHAM. Madam President, before I offer my amendment, I would like to make a few comments relative to this legislation. When I approach a piece of legislation, I like to do so by asking some basic questions, the first of which is: What is the problem? What is it that we do not like about the status quo that has caused us to propose some alteration of the status quo?

In this case, that diagnosis has been very consistent, clear, and trumpeting, and it is that we have too many frivolous lawsuits that relate to securities fraud.

I cite as my evidence of that an ad which appeared on page A7 of today's Washington Post, under the headlines, ''Who Profits? 'A Coterie of Lawyers'.''

This ad was in support of S. 240, and it was placed by ''America Needs More Investors, Not More Lawsuits,'' under the sponsorship of American Business Conference and American Electronics Association.

What did the proponents of this legislation say was the reason that we have S. 240 before us this evening? Quoting from the ad:

Specialized securities lawyers win big bucks by filing meritless lawsuits against many of America's most promising companies. The securities lawyers profit handsomely, but Americans with money in stocks, pensions and mutual funds are the losers in the deal.

This is what editorial writers across the Nation are saying about securities lawsuit abuse:

And then the ad quotes a number of newspapers which have taken a position in support of this legislation. It happens that the first of those newspapers is from my State, the Tampa Tribune, June 25, 1995:

> The situation now is that all investors are paying the costs of settling lawsuits that should never have been filed. . . . [T]he time has come to pull the legal leeches off the backs of corporations that have done no wrong.

That is from the Tampa Tribune.

The next is from the Rocky Mountain News:

> . . . the nogoodniks suffer at the same rate as the straight-shooters. Meanwhile, who profits? A coterie of lawyers with stock charts and fill-in-the-blanks fraud complaints.

That is the January 18, 1995, Rocky Mountain News.

The Chicago Tribune of March 29 of this year:

> . . . groundless lawsuits by shareholders alleging fraud . . . are often merely a way of extorting settlements from corporations whose stock prices have dropped.

Madam President, I ask unanimous consent the totality of the ad from today's Washington Post be printed in the RECORD immediately following my remarks.

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

(See exhibit 1.)

Mr. GRAHAM. Madam President, that is the stated problem: Frivolous, meritless lawsuits. But what do we have? Is that the prescription that has come out in S. 240? Is it legislation which is targeted at eradicating the tumor of meritless lawsuits? Unfortunately not.

If I may quote from another newspaper, the Miami Herald of yesterday, which stated, under the headline, ''License to steal'':

> Practically everyone in Washington, to some degree or other, has blamed ''frivolous or abusive lawsuits'' for sapping America's economic vigor. And judging from anecdotes, the complaint has some merit. But more often than not, the proposed cures turn out to be far more debilitating than the disease. A perfect illustration is a bill moving through Congress that supposedly protects the securities industry from ''frivolous'' suits by investors.
>
> The bill may come to a Senate vote today. It would bar, among many other things, charges of fraud against those who make false projections of a company's likely performance. By granting ''safe harbor'' to all statements of a ''forward-looking'' nature, it essentially tells companies and brokers: Go ahead, lie about the future. As long as you're not misrepresenting the past, you can fleece investors in any way that your imagination allows.

Madam President, I ask unanimous consent the editorial from the June 26,

1995, Miami Herald also be printed in the RECORD immediately after my remarks.

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

(See exhibit 2.)

Mr. GRAHAM. What I think has happened, Madam President, is we had a goal to eliminate frivolous lawsuits which could have been hit easily with a .22 rifle. We have now used a howitzer, which has cratered in a large area of the legitimate rights of American investors when they are subjected to abusive and to fraudulent activities. We have created a situation in which it is going to be much more difficult to maintain any kind of suit, serious or frivolous, where fraud is alleged. We have shortened the statute of limitations. We have provided protection for those who assisted in the fraudulent behavior of the principals. We have created a circumstance of a conflict of interest by designating the largest investor in the company as the principal plaintiff in these types of cases. These are just some of the things that have happened, all under the pretext that we are going to be dealing with frivolous lawsuits.

I suggest that there are serious consequences of this type of legislation, and what it is likely to lead to for the American free enterprise system. It was only 100 years ago that we had a very predatory form of free enterprise in the United States. We had large companies using their power in an abusive way to squelch small competitors, to gain monopolistic economic control. We had extreme swings in our business cycle, in large part attributed to that predatory behavior. We had the growth of populism and other forms of political dissent, as farmers and workers felt as if they were being the targets of this predatory behavior.

The free enterprise system in America was in a very precarious condition. Free enterprise has flourished in America when people felt that the rules of free enterprise were fair and that everyone was going to be treated equally, that people could invest in firms—not without risk; that is the nature of the marketplace. But at least they were going to be treated with some discretion and some level of an equal playing field.

I am afraid that legislation such as S. 240—which is going to be seen as, and I believe will in fact result in, a tilting of the economic playing field toward those who would be inclined to wish to abuse it and to use it for their own fraudulent purposes—will undermine that essential confidence of the American people in their economic institutions.

So, with that, Madam President, I have an amendment that I would like to propose. It is an amendment which I will send to the desk which actually goes directly at the issue of frivolous lawsuits.

Madam President, I send the amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Florida [Mr. GRAHAM] proposes an amendment numbered 1479.

Mr. GRAHAM. Madam 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 104, after line 22, insert the following:

(c) EARLY EVALUATION PROCEDURES.—

(1) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

''(j) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

''(1) IN GENERAL.—In a private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

''(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

''(A) defendants shall not be required to answer or otherwise respond to any complaint;

''(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

''(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

''(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

''(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

''(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

''(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

''(4) EVALUATION BY THE MEDIATOR.—

''(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

''(i) clearly frivolous, such that it can only be further maintained in bad faith;

''(ii) clearly meritorious, such that it can only be further defended in bad faith; or

''(iii) described by neither clause (i) nor clause (ii).

''(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

''(5) MANDATORY SANCTIONS.—

''(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated by the mediator under paragraph (4)(A)(i), upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of rule 11(b) of the Federal Rules of Civil Procedure.

''(B) MANDATORY SANCTIONS.—If the court makes a finding under subparagraph (A) that a party or attorney violated any requirement of rule 11(b) of the Federal Rules of Civil Procedure, the court shall impose sanctions on such party or attorney in accordance with rule 11 of the Federal Rules of Civil Procedure.

''(C) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

''(i) IN GENERAL.—Subject to clauses (ii) and (iii), for purposes of subparagraph (B), the court shall adopt a presumption that the appropriate sanction for failure of the complaint to comply with any requirement of rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

''(ii) REBUTTAL EVIDENCE.—The presumption described in clause (i) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

''(I) the award of attorneys' fees and other expenses will impose an undue burden on that party or attorney; or

''(II) the violation of rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

''(iii) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under clause (ii), the court shall award the sanctions that the court deems appropriate pursuant to rule 11 of the Federal Rules of Civil Procedure.

''(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

''(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.''.

(2) SECURITIES EXCHANGE ACT OF 1934—Section 21 of the Securities Act of 1933 (15 U.S.C. 78a) is amended by adding at the end the following new subsection:

''(l) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

''(1) IN GENERAL.—In any private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

''(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

''(A) defendants shall not be required to answer or otherwise respond to any complaint;

''(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

''(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

''(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

''(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

''(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

''(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

''(4) EVALUATION BY THE MEDIATOR.—

''(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

''(i) clearly frivolous, such that it can only be further maintained in bad faith;

''(ii) clearly meritorious, such that it can only be further defended in bad faith; or

''(iii) described by neither clause (i) nor clause (ii).

''(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

''(5) MANDATORY SANCTIONS.—

''(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(i) in which final judgment is entered against the plaintiff, the plaintiff or plaintiff's counsel shall be liable to the defendant for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly frivolous when filed and was maintained in bad faith.

''(B) CLEARLY MERITORIOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(ii) in which final judgment is entered against the defendant, the defendant or defendant's counsel shall be liable to the plaintiff for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly meritorious and was defended in bad faith.

''(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

''(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.''.

On page 105, line 5, strike ''(j)'' and insert ''(i)''.

On page 106, line 25, strike ''(l)'' and insert ''(k)''.

On page 108, line 24, strike ''(k)'' and insert ''(j)''.

On page 109, line 8, strike ''(l)'' and insert ''(k)''.

On page 126, line 19, strike ''(m)'' and insert ''(l)''.

On page 127, line 6, strike ''(m)'' and insert ''(l)''.

Mr. GRAHAM. Madam President, the time I just used should be counted against the time which I was afforded to debate this matter.

Madam President, the amendment that I send to the desk I do not purport to be original.

It is in fact a version of what appeared in S. 240 as it was originally filed. It also draws heavily on language that was contained in the Bryan-Shelby bill, S. 667. What it attempts to do is to provide an early evaluation procedure for litigation filed either under the 1933 Securities Act, or the 1934 Securities Act. It would provide that on the motion of the parties, or by the motion of the court before whom the case has been filed, that there can be an independent mediator designated. That mediator would have the responsibility of reviewing all of the facts of the litigation. After that review, the mediator would submit a report. That report would contain a finding that the litigation was either one of three categories. It was either a clearly frivolous action; second, a clearly meritorious action; or, third, was neither.

If the parties in the face of that determination proceed with litigation, at the conclusion of the litigation, that report is submitted to the judge. And in the case under the 1934 act, for instance, where the report has found that this was a clearly frivolous action, and if the final judgment is entered against the plaintiff—that is, the plaintiff proceeded forward to full litigation in spite of the fact that there had been an early evaluation that this was a clearly frivolous action, and the plaintiff had in fact had the final judgment entered against the plaintiff—then the plaintiff or the plaintiff's counsel shall be liable to defendant for sanctions as awarded by the court, which may include an order to pay reasonable attorney's fees and other expenses, if the court agrees based on the entire record that the action was clearly frivolous when filed and was maintained in bad faith.

Madam President, if, on the other hand, this report of the early evaluation found that this was a clearly meritorious action, and the defendant carried it through to final judgment, and final judgment was entered against the defendant, then the defendant, or the defendant's counsel, shall be liable to the plaintiff for the sanctions awarded by the court which may include reasonable attorney's fees and other expenses; if the court agrees based on the entire record that the action was clearly meritorious and was defended in bad faith.

Madam President, that is what we are trying to do here. We are trying to create some effective sanctions against people bringing frivolous lawsuits. We are attempting to set up a procedure that will facilitate the delineation and early determination of the frivolous from the nonfrivolous and meritorious cases. It is hoped with that early determination the parties against whom this report is entered will not pursue it further, or, in the case of the defendant, that they will settle the case without the necessity of prolonged and expensive litigation.

Is not that what we are here for? We have identified the problem as being frivolous lawsuits. Why do we not solve the problem of frivolous lawsuits and not allow that problem to become a Trojan horse into which we load a lot of other issues, of shortening statute of limitations, creating conflicts of interest by designating only the most affluent investor as the lead plaintiff, giving really quite unwarranted protection to persons who make projections about the future with knowledge that those projections are false, giving increased sanction and protection to aiders and abettors who have acted in a reckless manner that has resulted in investors of being defrauded? None of those things are relevant to the issue of frivolous lawsuits.

So, Madam President, I urge my colleagues to seriously consider this amendment which is submitted in an attempt to refocus our remedies on what has been general agreement to be the problem, which is frivolous lawsuits that do not advance the cause of justice that have the economic adverse effects that are recited by the proponents of S. 240.

So, Madam President, I will reserve the remainder of my time. But I urge a

favorable consideration of this amendment by my colleagues.

Thank you.

EXHIBIT 1

Who Profits? ''A Coterie of Lawyers''—Rocky Mountain News.

Specialized securities lawyers win big bucks by filing meritless lawsuits against many of America's most promising companies. The securities lawyers profit handsomely, but Americans with money in stocks, pensions and mutual funds are the losers in the deal.

This is what editorial writers across the nation are saying about securities lawsuit abuse:

''The situation now is that all investors are paying the costs of settling lawsuits that should never have been filed. . . . [T]he time has come to pull the legal leeches off the backs of corporations that have done no wrong.''—Tampa Tribune, June 25, 1995.

''. . . the nogoodniks suffer at the same rate as the straight-shooters. Meanwhile, who profits? A coterie of lawyers with stock charts and fill-in-the blanks fraud complaints.''—Rocky Mountain News, January 18, 1995.

''. . . groundless lawsuits by shareholders alleging fraud . . . are often merely a way of extorting settlements from corporations whose stock prices have dropped.''—Chicago Tribune, March 29, 1995.

''Enactment of either [the House or Senate] bill would remove a serious blot on the legal system, which is supposed to settle real disputes, not provide a protection racket for a few lawyers.''—Boston Sunday Herald, June 18, 1995.

''These frivolous lawsuits discredit the legal profession, distract companies from their main tasks, discourage or retard the development of new, cutting edge businesses and ultimately harm the interests of shareholders.''—The Hartford Courant, April 11, 1994.

''The contemporary class action has created a class of entrepreneurial lawyers. The first beagle to the court house with a tame plaintiff in tow often gets to represent the class, and collect a 33%–50% fee. . . Then the members of the class receive small compensation . . .''—Barron's, June 5, 1995.

''The chief target of the reform legislation is a small group of lawyers who have made a venal industry of filing groundless securities-fraud lawsuits. . .

''. . . the securities bill [S. 240] would go a long way toward curbing egregious abuse of the legal system. Such abuse is in effect a hidden tax that costs American jobs and discourages the entrepreneurial risk-taking that stimulates economic growth.''—The News Tribune (Tacoma, Washington), June 10, 1995.

Legislation introduced in the Senate (S. 240) by Republican Pete Domenici and Democrat Chris Dodd will give control back to shareholders and really protect investors.

EXHIBIT 2

[From the Miami Herald]

LICENSE TO STEAL

Practically everyone in Washington, to some degree or other, has blamed ''frivolous or abusive lawsuits'' for sapping America's economic vigor. And judging from anecdotes, the complaint has some merit. But more often than not, the proposed cures turn out to be far more debilitating than the disease. A perfect illustration is a bill moving through Congress that supposedly protects the securities industry from ''frivolous'' suits by investors.

The bill may come to a Senate vote today. It would bar, among many other things, charges of fraud against those who make false projections of a company's likely performance. By granting ''safe harbor'' to all statements of a ''forward-looking'' nature, it essentially tells companies and brokers: Go ahead, lie about the future. As long as you're not misrepresenting the past, you can fleece investors in any way that your imagination allows.

Technically, investors still could sue in cases of egregious deceit. But they'd have only one year to do so, and they'd have to show evidence, up front, that the fraud was deliberate. Not even the Securities and Exchange Commission can prove willfulness that quickly.

The problem is that companies make plenty of rosy projections in good faith. Sometimes, when the promises don't pan out, frustrated (or merely opportunistic) investors try to sue. How common is that? Experts disagree.

But the Senate bill offers a curious solution: To prevent some unknown number of unfair securities-fraud lawsuits, let's *outlaw huge categories of them.* The genuine, fair ones will just have to go unpunished.

So sorry you're swindled, old chap. Better luck next time.

This is licensed larceny, and it's unconscionable. Yet Florida Sen. Connie Mack, a member of the Banking Committee, has cosponsored and voted for the bill so far. In the time since the committee review, Mr. Mack may have had a chance to ponder its ill consequences. He'd do well to vote No today and help slay this beast for good.

Recent history is replete with colorful illustrations of deliberate, systematic fraud on small investors. Their savings were replenished, if at all, only by the courts or by the threat of litigation. It's a strange moment indeed, with the sores of the savings-and-loan fiasco still raw, for Congress essentially to declare open season for deceiving investors.

It prompts an ironic question: How does it help American investment to scare off potential investors with a promise that the law *won't aid them* if they're bilked? The point of solving the ''frivolous lawsuit'' problem was supposed to be to encourage more investment. By that standard, the Senate's ''Private Securities Litigation Reform Act'' amounts to self-strangulation.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Madam President, the distinguished Senator from Florida is correct that the amendment he is now submitting has been the subject of intense scrutiny. Indeed, it was considered in the initial draft of this legislation. One of the reasons this proposal was rejected and dropped from the initial legislation was because it requires—and will wind up costing—too much. Also, this provision would set up an entirely new bureaucracy, by setting up an early evaluation procedure for class action lawsuits.

Although early evaluation may be a laudable concept, this amendment will force parties into an early evaluation procedure. The procedure requires parties to voluntarily turn over documents or be subject to sanctions. At the end of the evaluation, if the parties do not settle or dismiss the action, they can be sanctioned if any further action is considered frivolous. I believe that parties should attempt to mediate their claims, if possible, but they should not be forced to mediate claims if they really want to seek a day in court.

This is the balance that was reached. This Senator has never attempted to keep people from having their day in court. This Senator stated that belief clearly for the record during debate on this provision and the loser pays provision when they were strongly urged by those in the private sector who sought relief. But I would not, and could not, support the losers-pays concept because, as laudable as that might sound, it would indeed infringe upon the basic rights of men to seek relief. It would just be too high a bar for those who have truly been aggrieved.

This amendment requires parties to submit to an early dispute resolution. If one of the parties, however, does not want this early procedure, then we have a very real problem. The early evaluation procedure would take place if each side agrees to it, or if either side wants it and the court acts upon such motion within 60 days of the filing the class action. I believe that this amendment goes too far in its attempt to resolve disputes. It actually sets up a standard where people would lose the ability to fight for their rights, whether they are the plaintiff or the defendant. I notice that Senator DODD is here and know that he has spent a great deal of time on this issue.

I yield the floor.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Madam President, let me first of all thank my colleague from Florida for giving me a call earlier today about what he was going to offer with this amendment.

Let me first of all, say that the spirit of this amendment, which I admit I like, in a way, has been offered as a part of the original bill alternative dispute resolution procedure to try to give litigants in securities matters an option of going a route rather than going into court to resolve their problems. We tried that on a number of bills. I go back 7 or 8 years ago in my efforts with then Senator Danforth of Missouri. We proposed some tort reform legislation that set up an alternative dispute resolution mechanism.

So there is a spirit to this amendment and I am attracted to that spirit. I say that at the outset. But let me also say that despite my attraction with the spirit of what is being offered, I see this as being a proposal which is going to complicate matters rather than help resolve them.

Under this amendment, as I understand it, any party that seeks a court order or an early evaluation—and if the court grants that order—an early evaluation might sound, and does sound very attractive, to Federal judges who are looking for a way to clear off their dockets, then you have the fishing process which can begin which I think runs counter to what we are trying to

achieve even under an alternative dispute resolution, a modest one as we have in the bill.

Even if the complaint, Madam President, is clearly a matter—let us for the sake of argument assume that is the case—which would be dismissed and the case ended, when a motion to dismiss is decided, the plaintiff would get complete discovery prior to any ruling on the motion to dismiss. Now, that raises the issue of discovery and discovery costs. Of course, these are some of the principal forces and factors that cause innocent defendants to settle their cases.

In testimony before our committee, in hearings on this matter—and I am quoting from page 14 of our committee report:

. . .discovery costs account for roughly 80 percent of the total litigation costs in securities fraud cases.

In many cases the discovery can work in determining the guilt of a party. So I am not arguing there should not be discovery, but here you are getting it completely even before you get to the process, even before the motion to dismiss.

One witness described the broad discovery requests requiring a company to produce over 1,500 boxes of documents at an expense of $1.4 million, referring to page 16 of our report.

What does all this mean, Madam President? Lawyers who can file meritless cases—and we have seen examples of that, cases that would be dismissed by the Court—will be able to circumvent the very important protection against unjustified claims that is provided by the motion to dismiss process.

Indeed, this amendment would expand attorneys' ability to coerce settlements, in my view to include a new category of cases—those that are by definition meritless and that would be dismissed by the court. Given all the evidence that these lawyers extract in settlements in unjustified cases, we cannot—in my view, should not—enact a provision that would expand their power to do so in meritless cases, and that would be the net effect were the amendment to be adopted.

So again, for one who is attracted very strongly to the alternative dispute resolution process, what you are getting here is something very different than that which raises the costs which provokes these kinds of settlements in meritless cases, and therefore, with all due respect to my good friend from Florida, I would urge the rejection of this amendment.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO. Madam President, we have nothing further to say on this side, unless the Senator from Florida wishes to continue. Otherwise, we will put in a quorum call.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. GRAHAM. I ask unanimous consent that the quorum call time be taken equally off both sides.

The PRESIDING OFFICER. Without objection, the time will be applied equally.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. I suggest the absence of a quorum.

Mr. SARBANES. Will the Senator withhold on that?

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. How much time remains?

The PRESIDING OFFICER. The Senator from Florida has 14½ minutes; the Senator from New York has 22 minutes and 32 seconds.

Mr. SARBANES. I thank the Chair.

Will the Senator from Florida give me just 2 minutes?

Mr. GRAHAM. The Senator from Florida yields such time as the Senator from Maryland would choose to use.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Madam President, I wish to say to the Senator from Florida that I think he has come up with a very imaginative proposal here. His proposal in fact really gets at the question of the frivolous suits. We have been hearing a lot of discussion here over the last couple of days about trying to get at frivolous suits.

When you look at the provisions that are being used in order to get at frivolous suits, you discover that they really encompass a great number of other things as well. As my colleague from Nevada, Senator BRYAN, said at one point during the debate, this is a Trojan horse riding beneath the pennant of the frivolous suit with all sorts of other menacing, dangerous things hidden in the Trojan horse.

I am interested that the proponents of this legislation are not responsive to the amendment of the Senator, which, of all the proposals I have seen, is the one that focuses on the frivolous suit and on the frivolous suit only, as I understand it.

I ask the Senator, is it, in fact, correct that the focus of the Senator's amendment is the frivolous suit and it does not go beyond that?

We have other things that are being done. People are being denied access to the courthouse. Aiders and abettors are being protected from any liability whatsoever. Joint and several liability is being done away with, all in the name of trying to get at the frivolous suit. It may have some implications for the frivolous suit, but the unfortunate thing is it also has very significant implications for the meritorious suit.

As I understand the Senator's amendment, it is not subject to that criticism. This is the frivolous suit only.

Mr. GRAHAM. The purpose, I say to the Senator, is the difference between using a laser beam to precisely remove a tumor as opposed to amputation to remove the entire limb. I fear that what we have done in this legislation, Madam President, is to amputate the ability of most investors to bring a serious case of securities fraud. Whether it is frivolous, competitive, or highly meritorious, we have eliminated for many individuals the ability to have access to court, to have their claims adjudicated in all types of cases.

The purpose of this amendment was to be that laser that would identify those cases which in fact are, to use the amendment's term, clearly frivolous actions, and to provide some very stiff sanctions against persons who are found to have filed a clearly frivolous action but persist. If they lose that clearly frivolous action, which assumedly they are likely to do, then they face the prospect of paying not only their attorneys and their costs; they have to pay the defendant's attorneys and costs.

Conversely, if a clearly meritorious action is filed and the defendant persists in litigation to defend against that clearly meritorious action and the defendant loses, then the defendant is placed in the position of being subject to the sanction of having to pay not only his own costs but also the costs of the plaintiff.

This is not an attempt to apply a broadly based English standard of loser pays. This is an attempt to achieve the very purpose of this legislation, which is to discourage frivolous lawsuits by making the economic consequences of filing a frivolous lawsuit so onerous.

I thank my colleague for having asked that clarifying question.

Mr. SARBANES. As I understand it, the amendment of the Senator is balanced. There has been a tremendous amount of focus about the frivolous lawsuit filed by plaintiffs, but there also can be a problem with defendants resisting what are otherwise meritorious claims. Is that not correct? How does the Senator address that?

Mr. GRAHAM. Yes, Madam President, there could be a frivolous defense as well as there can be a frivolous plaintiff's filing. And this amendment would provide balance. Exactly the same sanctions would be applied under the 1934 Securities Act to a frivolous action as would be applied to a clearly meritorious action. That is, if you are the defendant, and the evaluation is this is a clearly meritorious case, but you persist, litigate, and you lose, then you are subject to the sanction of having to pay the plaintiff's attorneys fees and court costs. So this is an attempt to create some strong economic incentives for people to settle and for people not to file a frivolous action, nor to persist in frivolous defenses.

Mr. SARBANES. I have to say to the Senator, having listened to this explanation, I have difficulty understanding why the proponents of this legislation have asserted that the purpose in trying to move the legislation is to avoid expensive litigation or preparation for litigation.

Let me ask the Senator one final question. Does your process come in ahead of an extensive discovery period, or how does it work? At what point does your process come into play?

Mr. GRAHAM. The expectation would be that this would be at the discretion of the parties or of the judge that this would be the first action initiated after the litigation has been filed.

Mr. SARBANES. I see. So it would involve potentially a lot of the costs that are associated with preparing for trial, let alone the costs connected with the trial?

Mr. GRAHAM. That is correct.

Mr. SARBANES. It is difficult for me to understand the people who are opposing this amendment on the assertion they are trying to get at the cost of frivolous suits, or as I understand it, opposing the Senator's amendment. I just have difficulty squaring that.

Mr. GRAHAM. It seems to me, Madam President, that this amendment is exactly consistent with what proponents of this legislation say the evil is that we are attempting to correct, and it would avoid the necessity of having to overreach in terms of a remedy to apply an excessive amount of medication of severely restricting access to courts by people with legitimate claims, which I fear this legislation will do. And even if a legitimate claim matures into a judgment, to then protect those persons against whom the judgment might be rendered by things like the aiders and abettors provision and the joint and several liability, particularly as it relates to small investors, et cetera. All of those types of things would be less necessary if we went straight at the problem cited, the frivolous lawsuit, and tried to eliminate as many of those lawsuits by effective sanctions as I believe this will be at the initial stages.

Mr. SARBANES. Then you would not be running the risk, the very substantial risk, as I perceive this legislation, that meritorious claims would be adversely affected by these other sweeping provisions that are in this legislation. Your provision by definition is so directed that the meritorious claim would pass through the screening process, as I understand it?

Mr. GRAHAM. The early evaluation would make a determination that the case was either clearly frivolous, clearly meritorious, or neither. And if you fell into that third category, then that ought to be the kind of open, civil due process that we associate with the American judicial system.

Mr. SARBANES. Well, I thank the Senator very much for his explanation and for his very constructive and I think imaginative proposal.

Mr. GRAHAM. Madam President, unless there is someone else who would like to speak on this amendment, I am prepared to make a short concluding statement and then if the opponents are prepared to yield back their time, I would be so prepared and we could proceed.

Madam President, we have before us consensus on one issue, and that is that there is a problem relative to frivolous lawsuits in the securities area. The quandary is how to eradicate or mitigate that problem without doing excessive damage to other rights of investors, without eliminating what has been one of the principal deterrents to fraudulent behavior within our free enterprise system, what has been one of the foundations of public confidence that they could invest in our capitalistic system and be treated fairly.

I believe this amendment goes directly at the problem that we have identified. It states that early on, after a case has been filed, there will be an independent evaluation by a judicially selected mediator as to whether this is a frivolous, meritorious, or other action. The case would then be in the hands of the litigants as to whether, in the face of that determination, they wish to proceed.

But if they proceeded with a frivolous case, and if they lost that frivolous case, then they would be subject to very serious sanctions of having to pay not only their bills, but also the attorney fees and costs of their opponent. I think that would be a significant factor in terms of deterring the prosecution of frivolous suits.

Frivolous defenses are sanctioned in exactly the same manner. So if a case is determined to be clearly meritorious, and yet the defendant proceeds and loses, that defendant will be subject to these sanctions. Madam President, I believe that comes as close to solving the problem we have identified and does so in a way that does not have unintended, adverse consequences on other aspects of investors' rights.

So I urge those who are proponents of S. 240 to see this as a supportive, friendly, positive contribution to achieve their objective. And I hope that they and my other colleagues will support this amendment, which I believe moves toward achieving the very purpose that led to the introduction of this legislation in the first instance.

Thank you, Madam President.

I yield the floor, and I am prepared to yield back the balance of my time.

Mr. D'AMATO. Madam President, I want to thank the Senator from Florida. I too yield back the balance of our time, and ask unanimous consent that this matter be set over for the purpose of giving Senator BOXER an opportunity to offer her amendment. She has indicated that she would take 40 minutes on her side and retain the balance of 5 minutes for tomorrow with the express intent that we will vote on her amendment first tomorrow after she makes her 5-minute statement. I reserve ourselves 2 minutes for tomorrow, and as much time as we need this evening. I do not intend to use more than 15 minutes at the most.

Mrs. BOXER. Reserving the right to object, and I do not want to object, when are we going to vote on the Graham amendment?

Mr. D'AMATO. It is my thought and intent that we will vote on Senator GRAHAM's amendment after your amendment. And Senator SPECTER has several amendments to offer. If we could stack them to accommodate some of our colleagues, certainly well before 9 o'clock. It is my intent to ask for unanimous consent that we proceed in that manner.

No matter, at least the Senator will have the opportunity of offering her amendment and starting to use some of her time.

(Mr. BURNS assumed the chair.)

Mrs. BOXER. I say to my friend, I am very willing. I would prefer to have my vote follow Senator GRAHAM's. I think it makes more sense.

Mr. D'AMATO. Would you like to vote on it this evening?

Mrs. BOXER. I am suggesting tomorrow morning.

Mr. D'AMATO. We will vote on Senator GRAHAM's amendment this evening.

Mrs. BOXER. I was not aware of that.

Mr. D'AMATO. That was my purpose, so you would have an opportunity.

Mr. SARBANES. If the manager will yield, as I understand the procedure now, the Graham amendment is being set aside so Senator BOXER can offer her amendment?

Mr. D'AMATO. That is correct. Possibly Senator SPECTER, as well.

Mr. SARBANES. Senator BOXER's amendment we will debate for 40 minutes. You will respond for, I think, not more than——

Mr. D'AMATO. Not more than 15 minutes.

Mr. SARBANES. Then we will move on to some other amendments?

Mr. D'AMATO. It is my hope we would take the three Specter amendments, at least two of those amendments, and dispose of them this evening, as well.

Mr. SARBANES. The Boxer amendment would go on over to the morning. Senator BOXER will have an opportunity to speak in the morning for 5 minutes.

Mr. D'AMATO. That is correct.

Mr. SARBANES. We intend to vote tonight on Senator GRAHAM and Senator SPECTER?

Mr. D'AMATO. That is correct.

Mr. SARBANES. All together, or Senator GRAHAM after Senator BOXER finishes her debate?

Mr. D'AMATO. Well, I would like to possibly stack them for the convenience of our Members so they do not have to keep coming back and forth this evening.

Mr. SARBANES. This evening.

Mr. D'AMATO. This evening.

Mr. SARBANES. So it would be the Graham amendment and Specter, some number of Specter.

Mr. D'AMATO. That is correct, either two or three.

Mr. GRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida.

Mr. GRAHAM. Mr. President, at the appropriate time, and if that appropriate time is now, I would like to ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The Senator from California is recognized.

AMENDMENT NO. 1480

(Purpose: To make an amendment relating to the consequences of insider trading)

Mrs. BOXER. I yield myself 30 minutes at this time.

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

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. BOXER] proposes an amendment numbered 1480.

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

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

The amendment is as follows:

At the appropriate place in title I, insert the following new section:

SEC. . CONSEQUENCES OF INSIDER TRADING.

(a) SECURITIES ACT OF 1933.—Section 13A of the Securities Act of 1933, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

''(h) CONSEQUENCES OF INSIDER TRADING.—

''(1) IN GENERAL.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

''(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

''(B) financially benefited from the forward-looking statement.

''(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

''(A) with respect to an issuer, equity securities of the issuer of any class having a total value of not less than $1,000,000; and

''(B) with respect to an officer or director of an issuer, holdings of that officer or director of any class of the equity securities of the issuer having a total value of not less than $50,000.''.

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 37 of the Securities Exchange Act of 1934, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

''(h) CONSEQUENCES OF INSIDER TRADING.—

''(1) CONSEQUENCES OF INSIDER TRADING.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

''(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

''(B) financially benefited from the forward-looking statement.

''(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

''(A) with respect to an issuer, $1,000,000 worth of any class of the equity securities of the issuer; and

''(B) with respect to an officer or director of an issuer, $50,000 worth of the holdings of that person of any class of the equity securities of the issuer.''.

Amend the table of contents accordingly.

Mrs. BOXER. Mr. President, simply put, my amendment says that insider traders who financially benefit from false or misleading forward-looking statements shall not benefit from the safe harbor in S. 240. It could not be more direct. I am very hopeful colleagues will support me on this.

It is very clear that 48 colleagues are unhappy with the safe harbor as it is in S. 240. All we are doing here is saying, ''Well, you didn't change it, so at least let us not allow insiders who financially benefit in connection with a false and misleading statement they issue to get the benefit of the safe harbor.''

S. 240 has a safe harbor provision which basically gives insiders huge protection for false forward-looking statements, all statements, except those involving intentional fraud. In other words, there is a safe harbor for reckless fraud, knowing fraud and purposeful fraud. Let me repeat that. The S. 240 safe harbor provision, which gives insiders immunity for false forward-looking statements, involves reckless fraud, knowing fraud and purposeful fraud.

Senator SARBANES tried to change that standard. He offered two amendments. Those two amendments failed, although I would say the second one got 48 votes from both sides of the aisle. Obviously, people are troubled by the safe harbor which my friend from Maryland calls a pirate's cove. I call it a deep ocean—a deep ocean.

In the Boxer amendment, the insider trading has to appear on the records of the SEC, so it is no guesswork. You know that insider made his insider trades because it is registered with the SEC, and it would have to involve significant insiders—the company itself or its officers or directors. So it is very narrowly drawn.

Under my amendment, the insider trading would have to involve significant sums; in the case of a company, a million dollars in insider trading or more; in the case of an officer or director, insider trading would have to involve $50,000 or more.

Let us be clear, the Boxer amendment only covers those trading on inside information who also issue false forward-looking statements in connection with that insider trading and who financially benefit from that trading.

Make no mistake, unsuspecting investors are harmed quite directly by false or misleading forward-looking statements made in connection with insider trades. Why is that? Because small investors believe the statement. Buy the stock, push up the price, the insider then sells his stock at the higher price, pockets the profit, because of a false and misleading statement. The stock collapses. When the true news hits, the small investors are left holding losses.

I am going to show a chart which I showed last week, the Crazy Eddie story. Crazy Eddie was a business. This is real. This is not a figment of anyone's imagination. Let us hear what Crazy Eddie said. This is a forward-looking statement:

''We are confident that our market penetration can grow appreciably.''

''Growing evidence of consumer acceptance of the Crazy Eddie name augurs well for continuing growth outside of New York.''

Crazy Eddie dumps his stock, the top officer flees the country with millions, the CEO is convicted of fraud, and to any of my colleagues who say there is another provision that covers insider trading, that is only for the stockholders who actually bought Crazy Eddie's stock. It does not cover the class of other people who suffer because the stock plummeted. I think that is an important point, because every time I raise an amendment, the opposition stands up and says this is covered in another section. Wrong. Not for the class of shareholders, only the ones who buy Crazy Eddie's stock.

If he sells a million dollars worth of stock, those people who bought it, yes, they can pursue under another provision of law. The other $2 million worth of stock bought by the general public have very little chance here.

Let us go to the next chart.

T2 Medical, Inc. Here is another business. Take a look at this one's forward-looking statements. My colleagues want to encourage forward-looking statements. So do I, but not false ones. I want to encourage honest ones. Does that mean that some businesses may make a mistake? They may make a mistake, a true mistake. But look at these guys:

''T2 plans to lead the way through the 1990's.''

''We expect continued steady revenue and earnings growth.''

Just at the time of those statements, look what happens: The stock goes up; insiders sell 571,000 shares for 31 million bucks; the Wall Street Journal reports insurers reducing their payments by 15 to 50 percent; the stock plunges; then the company discloses a grand jury investigation; total insider sales of $31.6 million.

And look at the story here. Now the people at T2 Medical would get the safe harbor for forward-looking statements, the very same safe harbor that Senator SARBANES tried to tighten up. They would get the protection of that safe harbor.

It is an invitation to fraud. It is exactly what Chairman Levitt of the SEC

said would happen. He does not like the safe harbor. He said if you do this, by God, you crook, you cannot hide under that safe harbor. I hope my colleagues will embrace this amendment.

Look at this, it tells the story, I say to my friend. The statement is made:

''T2 plans to lead the way through the 1990's.''

''We expect continued steady revenue and earnings growth.''

The stock goes up, insiders sell, and the truth comes out. They disclose the grand jury investigation and bye, bye, baby, for all those poor snooks who bought it.

This individual and these insiders do not deserve the safe harbor in S. 240. If Senator SARBANES had been successful at changing the safe harbor, I would feel a lot better and I would not have offered this amendment. I told that to my friend. But we have the pirate's cove. Here are the pirates—Crazy Eddie and these people. These are just two examples. And for those who said Charles Keating never made forward-looking statements, I have a chart on that, too. So Crazy Eddie's top officer fled the country. The CEO was convicted of fraud. Investors were left with huge losses. That is the type of misbehavior this bill would encourage and reward. Why? It is not that anybody who writes this bill wants to help guys like this. But as a result of the safe harbor, these guys get the benefits. We say that they should not.

Now, I do not think we want to encourage this. These are not isolated examples. There is a great deal of insider trading. Am I picking out two examples because I am exaggerating here? No; let me show you where we are with insider trading. This is a story from Business Week, December 1994. ''Insider Trading: It's Back, But With a New Cast of Characters.'' They looked at 100 of the largest businesses, by the way, and found that one out of every three merger deals was proceeded by stock price runups.

Here is one from the Los Angeles Times. I want to say to my friends that this is a story from Saturday, June 24, 1995. I opened the paper when I was in L.A., and there it was. ''Insider Trading Probes Make a Comeback. Wall Street. SEC official notes more investigations than at any time since the takeover boom of the 1980's.''

What are we doing? We are giving these people a safe harbor. I do not think this is in the best interest of the country. How about reading this a little bit:

A wave of mergers and acquisitions in the United States is reviving an unwanted headache for regulators: Insider trading.

''We have more insider trading investigations now than at any time since the takeover boom of the 1980's,'' said Thomas Newkirk, associate director of enforcement for the Securities and Exchange Commission.

No wonder the SEC has trouble with the safe harbor in this bill. These are the guys who have to go after these crooks. They do not want to make it harder to catch them.

I will put all of these in the RECORD at the appropriate time.

Now, here is a quote from Gene Marcial, a Business Week ''Inside Wall Street'' columnist. This is his book.

Don't kid yourself: Very little has changed on Wall Street. Half a dozen years after the scandals of the 1980's, when any number of street veterans were charged with violations of securities laws and several high profile insiders were marched off to jail, insider trading and market manipulation—in most cases illegal—are still the most zealously desired play in the financial world.

He concludes and basically says, ''Sorry, but that's the way the game is played.''

Now, look, if the game is played that way, we should try to stop it. We should not make it easier.

Let us go to the next chart. Here is another one. New York Times, June 1995.

Regulatory Alarms Ring on Wall Street. With the frenzy of merger deals and takeover battles these days, it seems like old times on Wall Street in more ways than one. Securities regulators say they are opening investigations into insider trading at a rate not seen since the mid-1980's, the era in which Ivan Boesky, who went to jail for trading on inside information, became a household name.

They go on to say that it is a growth industry. We are going to give insider traders a safe harbor. They do not deserve it. I am worried about the good business people. I represent a lot of them and I am proud of them. They would not cheat anyone. They deserve to be supported, and they do not deserve frivolous lawsuits. This is about the bad guys.

So let us, in good faith, say we did not change the safe harbor, but let us make sure that the worst of the worst, these inside players who issue a false or misleading statement and then sell their stock and benefit, do not get the benefit of the safe harbor.

I say, if we do not do this, the incentives for insider trading and cashing in will be greater because, clearly, there is a nice, safe harbor for these people to hide in. I hope anyone who supports this bill would not want to encourage insider trading.

Again, my amendment focuses narrowly on only one type of notorious fraud, insider trading in conjunction with false or misleading forward-looking statements, and they have to increase the insider trader's profit. That is the only way they do not get the safe harbor. It has to be a false or misleading statement made in conjunction with their sale, and they have to make a profit. So we are not opening up a loophole for anybody good. We are closing a loophole for the bad. And that is very clear.

My friend from Connecticut—and he is my friend and we go back and forth on this bill—has said many times that confidence of the investors is the most important thing. I have news. You just wait. If we do not fix this bill and this safe harbor provision goes forward, and we do not at least take this Boxer amendment, when we have the first crisis in the marketplace, when a group of investors like those burned by Keating or any of the others, when they come to Washington and stand on the steps of the Capitol and say, ''What have you done? You are giving these people a safe harbor. Where is my safe harbor? Why can I not collect from these crooks?'' You know, that is when confidence in the investing public will plummet.

I tell you, with what I know about this bill—and my colleague said some claims would work. I worked on Wall Street at Hemphill, Noyes, & Co., Zuckerman & Smith, and J.R. Williston & Beane. I was proud of those days. I was one of the few women who had the license, passed the exam, was a registered representative. I had a very small—but important to me—practice. You can call it a practice. I had clients. They trusted me, and I will tell you, if I was in that business today, honestly knowing what I know about this bill and the fact that we did not pass the amendment offered by my friend from Maryland, I would really tell people to be very wary and to be very careful. I really would.

The small investor, the IRA owner, the 401(k) owner, is increasingly coming to believe there are two games in town, two securities markets, one for the insiders and one for the little investors. The small investor is increasingly coming to fear that little investors are being played for suckers. Gary Lynch, who oversaw the Securities and Exchange Commission's investigation of Ivan Boesky, Dennis Levine, and Michael Milken is quoted as saying, ''What is happening now is exactly what everyone predicted in the 1980's, that as memories dulled, insider trading would pick up again. The temptation would be too great.''

That is what this bill does—temptation in the form of a safe harbor, which my friend from Maryland calls the pirate's cove and I call an ocean. Insiders could well have a field day if this bill passes in its current form.

I talked about the loss of faith that people would feel, and I say that very seriously. We may not see securities markets as we know them today. They may not be the envy of the world, the engine of economic opportunity for ordinary Americans, because they will be rigged against the honest investor, who will stay out of the securities marketplace.

Now the bill supporters want to stop strike suits. So do I. They want to stop frivolous lawsuits. So do I. I have to say, I do not think anyone that backs S. 240 wants to help insiders who would issue a false and misleading statement, and pocket the stock. I know they do not.

I hope they look at this legislation with an open mind. I think it is very narrowly focused. It is crafted for the sole purpose of making sure the bill

does not shield and encourage insider trading. I think it is quite clear.

Let me say I do have a Charles Keating chart, and I want to just say some of the things that Charles Keating said in terms of his forward looking statements: ''Future prospects are outstanding.'' That's what he said. He tried to get people to buy the junk bonds. He said, ''We offer significant profit potential over the next 5 years.'' That is forward looking. ''Completion and sale of projects will generate huge gains.'' Thousands bought and lost money.

Senator BRYAN showed a chart. He showed what the impact would be if we adopt S. 240 the way it came to the floor. It would hurt those people.

I just want to say, and I will retain the balance of my time, we are very clear in what we are trying to do with S. 240. We are trying to make it a better bill.

Believe me, it would be easier for the ranking member and those members on the committee who had trouble with this bill to fold up our tents, because in this committee we could hardly get but a couple of votes.

We believed enough in these amendments that we are offering that we decided to take to the floor and try to explain them to our colleagues. As others have said, it is difficult to do that. It is a technical area of the law.

The bottom line is we do not want to give the Crazy Eddies—those who would make a false statement—a safe harbor, and then turn around when they make their money, the facts come out, the investors are left holding the bag. Why should those people get a safe harbor, I say to my friends.

I hope you will endorse the Boxer amendment.

Mr. President, I ask unanimous consent to have printed in the RECORD a New York Times article and a Los Angeles Times article.

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

[From the New York Times, June 9, 1995]

REGULATORY ALARMS RING ON WALL STREET

(By Susan Antilla)

With the frenzy of merger deals and takeover battles these days, it seems like old times on Wall Street in more ways than one. Securities regulators say they are opening investigations into insider trading at a rate not seen since the mid 1980's, the era in which Ivan Boesky, who went to jail for trading on inside information, became a household name.

Regulatory alarm bells went off again earlier this week after I.B.M. disclosed its hostile $60-a-share offer for the Lotus Development Corporation. That bid pushed up the value of Lotus shares by 89 percent on Monday, the day it was announced, and caused regulators to begin looking into suspicious trading last week.

Other cases brought to light recently involved Lockheed's merger last year with Martin Marietta, another military contractor, and AT&T's acquisition of the NCR Corporation.

''It's a growth industry,'' said William McLucas, director of the division of enforcement at the Securities and Exchange Commission.''In terms of raw numbers, we have as many cases as we've had since the 1980's, when we were in the heyday of mergers and acquisition activity.''

Through the end of May, the National Association of Securities Dealers, which oversees the Nasdaq electronic trading market, had already referred 47 cases to the S.E.C. for investigation into possible insider trading, said James Cangiano, N.A.S.D.'s senior vice president for surveillance. If the pace of suspect trading continues at that rate, it would mean the N.A.S.D. would surpass the record 110 insider trading referrals it made to the S.E.C. in 1987, he added.

The same holds true for the New York Stock Exchange, where investigators have opened three times as many insider trading cases so far this year as they had by this date in 1994.

The Lotus case seems typical. In the days before the I.B.M. announcement, trading in both Lotus stock on Nasdaq and Lotus options, which are traded on the American Stock Exchange, was unusually heavy. ''I think you can presume we are looking at it,'' Mr. Cangiano said. And while the S.E.C. does not comment on pending investigations, Wall Street professionals say that the agency has undoubtedly already opened a case to investigate Lotus trading.

These days, those trading on insider information apparently do not come as frequently from the ranks of Wall Street's professionals as they did in the 1980's, regulators say. Those who take advantage of privileged information now tend to be corporate officers, directors, and their families, friends and lovers, according to executives at the nation's stock exchanges, and lawyers who represent defendants.

But the game—and the potential profits—are the same: get information about a proposed deal that might raise the shares of a publicly traded company before it is announced, and buy the stock ahead of the news. Better yet, buy the options, which cost less and tend to attract less regulatory scrutiny.

Then, after the public learns what the insiders knew ahead of time, it's time to get out with a quick profit.

The lure of profits from insider information regarding deals is just too much to resist for some players, the S.E.C.'s Mr. McLucas said. The potential rewards compared with the risks look better ''when people look at the premiums available in takeovers,'' he said. ''We're a few years removed from the Boesky insider trading cases, and people have short memories.'' Of the 1,400 unresolved cases in the S.E.C.'s current inventory, Mr. McLucas said, 20 percent involve insider trading.

The initial rounds of suspect trading of the last year or so differed from those of the 1980's in that they generally did not focus on big names in the securities business. ''While Wall Street learned some lessons of the 1980's, it's not completely clear that Main Street learned all of the lessons,'' said Harvey Pitt, the former S.E.C. lawyer who defended Mr. Boesky.

If Wall Street appears to be more honest, though, it is largely a function of increased surveillance by brokerage firms and by regulators, say defense lawyers and securities cops. ''We have not returned to the environment of the 1980's where so many defendants were investment bankers, brokerage firm employees and young lawyers,'' Mr. McLucas said. Still, he added, ''We're seeing people in those areas start to crop up, and I wouldn't be surprised to see more of them.''

Earlier this week, Frederick A. Moran, a money manager in Greenwich, Conn., said that he was the focus of an S.E.C. investigation. Regulators contend that he bought shares of Tele-Communications Inc., the big cable operator, in advance of the announcement that it planned to merge with Bell Atlantic. The S.E.C. is looking at Mr. Moran's purchases because his son is a securities analyst who was privy to information about the pending deal. Mr. Moran has said he will fight the charges.

Despite the higher numbers, regulators undoubtedly miss cases both big and small. But, in this newest round of insider trading investigations, it appears that the chances of being caught are higher than before. At the New York Stock Exchange, 100 employees work in market surveillance today, up from 76 in 1975. And white-collar criminals who are members of the Big Board face stiffer fines if they get caught. In 1988, the New York exchange removed the previous limit of $25,000 for each charge against a member, eliminating any cap on potential fines. At the same time, Congress enacted the Insider Trading Sanctions Act, which allows for triple damages to be paid when a trader is convicted on insider charges.

Moreover, the New York Stock Exchange and the Chicago Board Options Exchange, which routinely share information with each other and with the S.E.C. about suspect action in the markets, have beefed up their detection mechanisms substantially.

''When I first came her in 1981, the analysts drew genealogical trees of corporate officers and investment bankers and hung them on the wall'' to analyze who had privileged information about a pending deal, said Agnes Gautier, a vice president in the Big Board's market surveillance department. Today, by contrast, computer software programs spit out the dates, times and names behind the trades that look suspicious, she said, making what used to be an onerous task a fairly simple exercise.

Thus, the S.E.C. was able to quickly investigate and settle a case against a lawyer for Lockheed only eight months after the news that the military contractor and Martin Marietta would merge. The lawyer made $42,000 in illegal profits by buying Lockheed options, Mr. McLucas recalled.

Considering all this renewed attention to insider trading, shouldn't more people be wary of breaking the rules? ''We'd like to think so,'' Ms. Gautier said. ''But, I guess, as the defense lawyers say, 'Greed will overcome.' ''

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INSIDER-TRADING PROBES MAKES A COMEBACK

WALL STREET: SEC OFFICIAL NOTES MORE INVESTIGATIONS THAN AT ANY TIME SINCE THE TAKEOVER BOOM OF THE 1980'S

NEW YORK.—A wave of mergers and acquisitions in the United States is reviving an unwanted headache for regulators: insider trading.

''We have more insider-trading investigations now than at any time since the takeover boom in the 1980s,'' said Thomas Newkirk, associate director of enforcement for the Securities and Exchange Commission.

Several of this year's largest merger announcements have been preceded by unusual trading Thursday, shares of Scott Paper Co. jumped $2.50 to $46.875. Friday morning, the Wall Street Journal reported that Kimberly-Clark Corp. was negotiating to buy the company.

During the merger bonanza of the 1980s, insider trading was equated with greed on Wall Street as prosecutors won convictions against Ivan Boesky, Michael Milken and others. The alleged culprits of the 1990s tend to be more ordinary working folk.

In February, the SEC charged 17 people with civil violations of insider-trading laws

related to trading in shares of AT&T Corp. acquisition targets, including NCR Corp. and McCaw Cellular Communications Inc. Two were former AT&T employees. Charles Brumfield, former vice president in the human resources department, pleaded guilty in connection with the case.

Earlier this month, the SEC sued a Salomon Bros. Inc. analyst, Frederick Moran, and his father, a money manager in Greenwich Conn., for alleged insider trading in the failed merger of Tele-Communications Inc., the nation's largest cable systems operator, and Bell Atlantic Corp.

''We brought 45 cases in the last fiscal year and the caseload is running about the same this year,'' the SEC's Newkirk said.

Opportuunities are increasing for people to use advance knowledge of a merger to make illegal profits. About $178 billion in mergers have been announced since the beginning of the year, putting 1995 on course to exceed last year's $368 billion, according to Securities Data Co.

Regulators say they are looking at such transactions for any sign of trading picking up before the agreements were announced. That was the case for shares of Telular Corp., which said June 22 that it might seek a buyer for the company, and for Lotus Development Corp., which agreed to be bought by International Business Machines Corps.

On June 20, just before a New York state agency proposed a buy-out of Long Island Lighting Co. for $17.50 a share, the utility's stock jumped $1.50 to a seven-month high of $17.

One person who isn't surprised by the recent rise in insider-trading cases in Gary Lynch, who as chief of enforcement at the SEC during the 1980s was one of the main people responsible for bringing about the convictions of Boesky and Milken.

''What's happening now is exactly what everyone predicted back in the '80s: that with the number of high-profile cases brought, the incidence of insider trading would decline for a while, but as memories dulled, insider trading would pick up again,'' said Lynch. ''The temptation is too great for people to resist.''

Mrs. BOXER. I yield such time as he desires to my friend from Maryland.

Mr. SARBANES. How much time does the Senator have?

The PRESIDING OFFICER. Nineteen minutes and 41 seconds.

Mr. SARBANES. I will be very brief so the Senator can reserve the balance of her time.

I want to say the distinguished Senator from California has made a very strong, effective statement on behalf of her amendment.

Does the Senator agree with me that there are people who—corporate insiders—who would sometimes make fraudulent forward-looking statements, to run up the stock price so they can unload their stock price before it goes down? Is that not exactly what has been happening?

Mrs. BOXER. Exactly. And we showed the same in two examples. Here is one of the charts.

Mr. SARBANES. Could we see the other chart? That is Crazy Eddie's. The other chart, as I understand it, the Senator shows on the left where we begin, making the statements. That runs their stock price up. Then they start unloading their stock, having done that.

Is that correct?

Mrs. BOXER. That is exactly right.

Mr. SARBANES. What happens further along there? They get news, then revealed, that the insurance for this medical company is falling off, is that it?

Mrs. BOXER. That is correct. The clients say they are reducing their payments to the T2 Medical Inc. by 15 to 50 percent, and the company here discloses a grand jury investigation which they knew.

Mr. SARBANES. What happens further along?

Mrs. BOXER. It goes on down list.

They have unloaded at this point, $31 million or 571,000 shares of the stock at the high price, and now as this bad news comes out, we see the stock plummet, and essentially, the company here reports the SEC is investigating them.

That is as far as this chart goes. They are under investigation. These were bad apples. People got snookered in as this stock went up, left holding the bag as it goes down. Insiders knew all of this.

And we are saying they should not have the ability to get the safe harbor.

Mr. SARBANES. I want to commend the Senator for offering this amendment, for her very clear explanation of it.

I want to underscore one other point the Senator had which I think is extremely important. Members have taken the floor in the sense of a constructive way, trying to propose and get adopted amendments which we think should straighten out some of the problems with this legislation.

In fact, I am prepared to say if all of the amendments had been adopted I would have been prepared to be supportive of this legislation.

But what is happening here is that the bill contains provisions that are far in excess of dealing with frivolous suits. The provisions in this bill are going to cut off meritorious suits, and they will make honest, legitimate investors suffer as a consequence, as the Senator has so carefully outlined. I simply want to thank the Senator for her very strong statement.

Mr. President, we have had difficulty with respect to these amendments, although we have come increasingly close on some of these amendments. I think that is reflecting a growing sense within this body that there is something amiss with this legislation.

All is not right with this legislation. I think that is increasingly becoming clear. There has been an effort to portray it by the proponents in terms of the competing economic interests. So they engage in long denunciations in that regard.

The fact is, every, as it were, independent observer or outside group, has sounded warning bells about this legislation. Members need to understand that. The Securities and Exchange Commission, the North American Securities Administrators Association, the Government Finance Officers Association.

The distinguished Senator from California put into the RECORD a long list of organizations that had difficulty with this legislation. We were sounding the warnings about this legislation. The consumer groups all have joined in doing that.

I hope, as Members approach the end of the amendment process and consider the bill itself, they will come to realize that the burden of the consequences are going to fall on the supporters. If this legislation passes, those voting to support it will bear the heavy burden in terms of what the consequences are going to be.

There is no doubt in my mind that honest people will end up being defrauded and not have a remedy as a consequence of this legislation. The regulators have warned Members of that fact. Groups that have no vested economic interest in this legislation have warned Members of that fact. I just want to sound that warning to my colleagues.

Mr. D'AMATO. Mr. President, first of all, I want to thank the Senator from California for being so gracious and so accommodating in attempting to go forward in a manner—and I know she was not feeling up to par. Although she has made a brilliant case, and has presented her case with the eloquence of someone who believes in what they are saying, and she does believe very strongly, I am forced to oppose this amendment.

Let me say, this is not easy to oppose. Let me explain why I oppose this amendment, because this is a very complex issue. The fact of the matter is that insider trading is not given safe harbor protection and is absolutely covered and will continue to be covered by section 10(b) and rule 10b–5 of the securities laws. It prohibits the kind of fraudulent conduct that we consider to be insider trading. Fraudulent conduct and insider trading? The conduct that Senator BOXER seeks to prohibit is already prohibited in the securities law.

Let me tell you what the consequences this amendment would be. They would be devastating. For example, somebody who routinely takes stock options—officers, directors in the company—would lose safe harbor protection. This amendment would bring us back to the situation that lawyers could simply allege fraud to bring a lawsuit. This amendment opens the door for the same kinds of operations that this legislation seeks to stop. That is why I must oppose this bill, notwithstanding the fact this amendment seems to indicate that it prohibits insider trading. This amendment does not do that.

What this amendment does is strip away, the opportunity for someone to make a forward looking statement that might at some point in time prove to be inaccurate. Why should a firm have the door to litigation opened just because an executive engaged in any trades or exercised an options and made $50,000?

Tell me, if someone engages in legal insider trading should they be tarred and feathered? Should they be sued? However, should you have a right of action against illegal insider trading as prohibited by rule 10b–5? Absolutely. And that right of action does exist.

So I have to oppose the amendment. But again I commend my colleague for coming forward and certainly for the manner in which she has made this presentation tonight, in an attempt to accommodate so many of our colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I am going to wait until my colleague from California is back at her desk, because I have some questions that the amendment raises, that I would legitimately like to get some answers to. I am trying to understand the implications of the amendment.

On page 2 of the amendment, as I read this, now—part of the difficulty is under the previous amendment——

The PRESIDING OFFICER. If the Senator will suspend, who controls the time?

Mr. DODD. The Senator from New York.

Mr. D'AMATO. Senator DODD is speaking on the time of the Senator from New York.

The PRESIDING OFFICER. I thank the Senator from New York.

Mr. DODD. Mr. President, one of the difficulties is trying to read and understand. The previous amendment, offered by the Senator from Florida, was a 12-page amendment. Trying to read through it and understand the implications in the space of a short amount of time is difficult.

Let me come to page 2 of this amendment. Starting on the bottom of page 1.

> Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—
>
> (A) purchased or sold . . .

And so forth.

My concern is this, and correct me if I am wrong. It seems to me you would be confronted with a factual situation where you have a director who had nothing to do with the problems associated with the Crazy Eddie case or whatever else. I heard my colleague, and I agreed with her, give eloquent statements on the importance of stock options. It was on an issue not too many months ago involving the value of stock options. She talked about what a valuable tool this can be.

The mere action on the part of a director to either purchase or sell a stock that may or may not—let us assume did not have anything to do with what an officer of the company was doing regarding statements. Am I correct in assuming that director, then, if in fact you are able to prove the first point, assuming they met the other qualifications of $50,000, would be penalized under your amendment, were it to be enacted?

Mrs. BOXER. I say to my friend, we indicate in the amendment who insiders are. It is pretty boilerplate. Yes, it covers insiders, people who would have inside information. But only, and I underscore only, if in conjunction with the false or misleading statement they sold stock and made a profit, they would be covered.

Mr. DODD. What about the directors themselves? Not an officer, the director. Directors—one of the compensations for directors is we offer them stock options.

The members of the board of directors did not have anything to do with this; the officers of the companies did. Let us assume that is the situation, assuming everything else is the case and that director, who had no involvement whatsoever with the insider false statements, as I read this, that innocent director who then sold or bought stock innocently, outside of whatever else the officers may be doing, would then be subject to the penalties of this?

Mrs. BOXER. That is right. I say to my friend, we are using a pretty boilerplate definition of what an insider is. The insider is the company itself or any officer or director. But only if they sold their securities in connection with a false and misleading statement, we do not give them the safe harbor. We did not go out of our way to reach them. We are just saying you have to be an officer or director——

Mr. DODD. Even though the director had nothing to do with the false and misleading statements? We all know how important stock options are, and so forth. I want to know the implications.

Mrs. BOXER. All it says is they cannot benefit from the safe harbor and the lawsuit can go forward. If, in the course of the lawsuit, it turns out that this director is senile and did not know anything about it, or whatever the defense is, that is different. But we are saying as reasonable people that insiders—and we define that as the company, any officer or director.

I have to tell my colleague, if my friend from Connecticut does not view that as a fair definition of an insider, I want to know what is—someone who sits on the board of directors, someone who knows all the good news and bad news.

All we are saying is the case will have to go forward. But in fact, if there is insider trading in connection with a false or misleading statement, they do not get the safe harbor and the case goes forward. Does it mean they are convicted? Of course not.

Mr. DODD. I am not trying to be argumentative here.

Mr. D'AMATO. Will my colleague yield?

Mrs. BOXER. I am trying to answer my friend's questions. I am not being argumentative. I am being strong in my response.

The PRESIDING OFFICER. If the Senator will suspend, I will advise the Senators they may speak in third person through the Chair.

Mr. D'AMATO. Mr. President, I would like to propound a unanimous-consent request so we might give, to those of our colleagues who are off the Hill, an opportunity to get back and request that we vote up or down on the Graham amendment.

Have the yeas and nays been ordered on the Graham amendment?

The PRESIDING OFFICER. The Chair advises they have.

Mr. D'AMATO. Mr. President, I ask unanimous consent we be permitted to vote on the Graham amendment at 8 o'clock. In this way we will give opportunity to all our Members to get back and they would get a little extra notice. That would not interfere with any of the time my colleagues have.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. I am glad to yield to my colleague. Do I not still have the floor?

The PRESIDING OFFICER. Is there objection to the unanimous consent?

Mr. SARBANES. What is the time situation on the Boxer amendment?

The PRESIDING OFFICER. Senator BOXER has 13 minutes and 14 seconds; the other side has 5 minutes and 41 seconds.

Mr. SARBANES. The time would expire at 8 o'clock under the agreement and then vote at 8 on the Graham amendment.

Mr. D'AMATO. Then maybe we might be able to dispose of the other amendment by consent.

Mr. SARBANES. After the Graham amendment, the Bingaman amendment?

Mr. D'AMATO. Possibly before, or after. Certainly.

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

Mr. D'AMATO. I thank my colleagues.

Mr. DODD. Mr. President, I yield to my colleague from California who wants to make a request.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you, I say to my friend. Mr. President, I ask for the yeas and nays on the Boxer amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DODD. Mr. President, if I can, let me just come back. The point I am trying to make here, and I say this with all due respect, no one wants to protect insider trading—obviously insider trading is an abhorrent exercise and practice.

My concern here is that the mere exercise of an option by, for the sake of discussion, an innocent director—there can be innocent directors here; not the assumption that they automatically then take away the safe harbor for the

entire company because there has been a sale or a purchase of an amount triggered by the amounts indicated in the amendment itself. I appreciate where my colleague from California wants to get. But my concern here is that she is reaching a legal conclusion about someone where the assertion has been made and the mere existence of that then takes away the safe harbor protections. I think that goes farther even for those who have strong reservations about safe harbor. I think that just strips away unnecessarily. That is just drawing a legal conclusion triggering a whole response to a safe harbor provision on the mere assumption that someone has engaged in an illegal activity.

As I read the amendment, that is how I see it being triggered. When you talk about any officer or any director who purchased or sold a material amount of equities and who financially benefited from the forward-looking statement in it, that is, to me, trying to put too much in this with a lot of assumptions made that I do not think are necessarily borne out by the actions. To assume there is inherently something illegal, that it is an assumption of an illegal act for someone to exercise an option, and that action becomes a presumption of guilt in this context, then stripping away safe harbor, I think, goes too far. That is how I read it and understand it.

I am going to yield the floor in a minute and give my colleague from California an opportunity to respond to how I read this. But that is my concern here. I think it is taking an abhorrent activity of insider trading and then using that vehicle as a way to try to jam it into the issue of the safe harbor.

My colleague from California and others have real problems with safe harbor. I understand that. But it seems to me that again we are taking a set of actions where there is not necessarily anything wrong with them, making a presumption about that, and then taking that activity and immediately stripping away the veil that protects the statements made in the forward-looking statements that are made in the context of predictions by companies, their direction, and thus triggered the safe harbor provisions. I for the life of me do not understand why we want to necessarily do that when I do not think those actions necessarily should trigger that kind of response.

So for those reasons, I object to the amendment. Again, I appreciate, I think, the direction they want to go in, but it seems to me to be overreaching in terms of how you deal with safe harbor. With that, I give my colleague a chance to respond to that.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you, Mr. President.

Mr. President, let me say to my friend, to say that I am overreaching in this amendment could not be farther off the mark, I have made this so narrow in scope. I have said, if Senator SARBANES' safe harbor provisions had passed, I would not have gone with this. But what I am saying is, why should we give such a good, nice, warm, and cozy safe harbor to crooks? It does not mean automatically that anyone is guilty of anything, I say to my friend. All we are saying is this is about getting a case brought forward and move forward. All we are saying is if an insider—I defy my friends, seriously, I do not understand how I could have been more fair in defining who an insider is other than to say the company, an officer or director. I did not say the secretary or anybody else. I am just hitting the top people. If they sell securities in connection with a false or misleading forward-looking statement—when my friend read my amendment, he left out the words ''false or misleading,''—then all we are saying is they do not get the benefit of the safe harbor. The case moves forward quicker. If they are innocent, this will take care of it.

My goodness. Let us not make small investors leap through hurdles when you have a situation such as this where clearly the insiders—by the way, there were a lot of insiders here: $31 million worth of stock. I do not think that the small investor who got caught in this downward plummet should have to leap through all sorts of hoops to get into court in this case.

I hope my friends who support S. 240 will support this. I think we drew it narrowly. I think we are fair. I just hope that we can get a good vote on this amendment.

Mr. SARBANES. Mr. President, I say to the Senator from California, the Senator from Connecticut says we are for it. If I could say, I am for legitimate safe harbor, I am not for excessive or overreaching safe harbor. That is what the whole debate has been about today.

I thought that the safe harbor issue should have been sent to the SEC the way the Senator from Connecticut proposed in his bill and that the SEC could then develop the safe harbor, taking into account all of these complications.

This body decided not to do that. So we then tried to have a different standard governing safe harbor. Again, the regulators are telling us that the standard in this bill is going to permit abuse. Under the standard in this bill, there will be abuses. The Senator from California is offering yet an even more limited amendment addressed to the insider traders. She has demonstrated in very graphic form the kind of practices that took place in two instances which she is trying to preclude and she has offered a remedy. For the life of me, I do not understand why this amendment is being resisted.

Mr. DODD. Will my colleague yield for the purpose of a question?

Mr. SARBANES. It is on the time of the Senator from California.

Mr. DODD. If you told me the officer or director who made the misleading statements, that would be one thing. You could have an outside director of a company that could live literally thousands of miles away who exercises an option, and it has nothing to do with the misleading statement. That is my point here. If the Senator said the director or officer makes the misleading statements, then I understand, I think, where the Senator is going. But I do not understand why you take an outsider——

Mrs. BOXER. Let me ask my friend on my own time. It is true, the director could have been in Paris. He could have a call from someone. ''Hey, Joe, tomorrow, the Wall Street Journal is giving us a bad report.''

Mr. DODD. That is different though.

Mrs. BOXER. Let me finish my point. We would not know that. The plaintiffs do not know that. If this man or woman is totally innocent, we are not taking away his or her right. We are just saying there is a smoking gun if a director unloads, by the way, a large amount, a material amount, makes a good profit, and, quess what, in conjunction with a forward-looking statement or a bad report coming out in the paper. It is worth it, we think, to allow that case to go forward. If the director is totally innocent, fine. All we are saying is they should not have the safe harbor of this particular bill as the good people should. And if, in fact, it turns out that they were far away, they are on their honeymoon, they did not take any calls, did not know anything about the fact that there was going to be a false statement, they are going to walk away. God, I hope we have faith.

Mr. DODD. The Senator has triggered a whole legal activity on the mere financial transaction. The Senator has then triggered a whole level of activity on safe harbor merely because she is assuming something that she has not been able to prove yet. But the mere fact that some director exercises an option, that then the whole safe harbor process collapses, the Senator has connected a lot of dots here on the basis of some assumptions. That, to me, is exactly what we are trying to avoid.

Mrs. BOXER. If this is what the Senator is trying to avoid, then this is, in my view, a terrible bill. In other words, if you are trying to avoid giving an insider a hard time if he dumps his stock and runs over——

Mr. DODD. The Senator has drawn a legal conclusion.

Mrs. BOXER. Not a bit. What we are saying is you will meet a certain threshold if these facts happen to come forward, a false and misleading statement in conjunction with insider sale. Look, I am not too naive about these insider trades because I have seen it happen. Business Week did a whole issue on insider trades. Let us bring that up. The Wall Street Journal has run stories on this. Everybody is saying it is coming back in vogue. That is not BARBARA BOXER. Those are people who are experts in the field. ''Insider

trades.'' ''It's back, but with a new cast of characters.'' All we are saying with this amendment, and I think this is important, all we are saying is it is an insider, and we have narrowly defined that.

I challenge anyone to write a better definition of an insider other than the company itself, the board of directors or the officers. If they pocket huge amounts of money in connection with a false and misleading statement, they should not benefit from the safe harbor. Now, the case goes forward. If they are away and they can prove it, fine. But we are changing the law radically here. We are going far beyond anything the Senator from Connecticut proposed doing in his original bill. We have a safe harbor that has caused 48 Senators in this Chamber to say we want to change it. We have a safe harbor in S. 240 that has the SEC saying they are very worried that there will be increases in fraud.

Now, I think as a Senator from the largest State in the Union, where a lot of this happens—we look to the Keating people, and a lot of it was California—I have an obligation to make this bill better.

I would far prefer to have the safe harbor that my friend from Maryland proposed. Instead, we have this other safe harbor that my friend from Connecticut embraces. And we are saying you are opening it up for everybody. How about closing it for some obvious abuses.

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

Mrs. BOXER. I will.

Mr. DODD. Again, I am not arguing about the spirit of what the Senator is trying to do. And no one is here trying to defend insider trading. But at this juncture, when we have tried to get directors to buy stock—it is one of the things we have tried to do over the years in our committee, purchase stock and get involved—I would have to say today, if this amendment were adopted, the last thing you would want to do is become even a purchaser. Forget a seller; the amendment says even purchasing stock here. You are removed from the process. All of a sudden you are trying to buy. My advice to anyone in that category, if this amendment were to be adopted, would be to stay away from this. I would stay entirely away from this. It would have absolutely the countereffect as we try to get people to acquire this stock. You are subjecting yourself to some very dangerous situations.

Mrs. BOXER. Let me take my time because my friend is distorting what this amendment does. He is distorting what this amendment does. No honest director, no honest person has to fear about this amendment. Only the crooks. Only the crooks. And all we are saying is this is a problem. ''Insider-Trading Probes Make a Comeback,'' Saturday's edition of the L.A. Times.

I say to my friends in the Senate from both sides of the aisle, I think if you vote for this Boxer amendment, you will thank those of us who brought it forward because the handwriting is on the wall. They are saying it is back in vogue, insider trading is back in vogue. If it occurs in connection with a false or misleading statement, not a true statement but a false or misleading statement, we say why should we give the benefit of that safe harbor to those people? Let the case be brought forward. Let the officer or director make the point. But my goodness, to argue against this amendment, I just am rather stunned. I was hopeful that we could have an agreement on both sides. I thought we could from the beginning. I was hit with all kinds of arguments the first time I brought this up: well, it is covered in another section. If you bought the shares the insider sold, yes, you are covered in another section.

What about the general public? They are not covered. And yet those directors, those officers, who pocketed that money are protected by the safe harbor.

I have reiterated this on a number of occasions, and I do not feel the need to continue at this point; my energy level is running down. But I have to come back tomorrow and present this in 5 minutes. So I look forward to that conclusion tomorrow, and I hope a favorable vote. I know that my colleagues have been hanging on my every word and everything I read here. I know that they are sitting in their offices, and they are absolutely intrigued by this debate. I hope if they did watch all of it they will come down and vote yes on the Boxer amendment tomorrow after we reiterate this argument and get it down to 5 minutes tomorrow morning.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Chair advises the Senator from California she has 2 minutes.

Mrs. BOXER. I will save that time, Mr. President, in case something is stated here to which I feel I must retort. Otherwise, I will be happy to yield back.

Mr. D'AMATO. Mr. President, do we have any time remaining?

The PRESIDING OFFICER. The time remaining on the Senator's side of the aisle is 13 seconds.

Mr. D'AMATO. Well, Mr. President, I am prepared to yield back the remainder of our time. I yield the floor.

Mrs. BOXER. Mr. President, in the spirit of comity and good will across the party aisle, I will yield back my 2 minutes.

The PRESIDING OFFICER. All time is yielded back.

Mrs. BOXER. I note the absence of a quorum.

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

VOTE ON AMENDMENT NO. 1479

The PRESIDING OFFICER. The hour is 8 o'clock. The question now is on agreeing to the amendment No. 1479 offered by the Senator from Florida [Mr. GRAHAM]. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

Mr. LOTT. I announce that the Senator from Rhode Island [Mr. CHAFEE], the Senator from North Carolina [Mr. HELMS], the Senator from Vermont [Mr. JEFFORDS], the Senator from Indiana [Mr. LUGAR], and the Senator from Tennessee [Mr. THOMPSON] are necessarily absent.

Mr. FORD. I announce that the Senator from Hawaii [Mr. INOUYE] is necessarily absent.

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

The result was announced—yeas 32, nays 61, as follows:

[Rollcall Vote No. 290 Leg.]

YEAS—32

Akaka	Feingold	Levin
Biden	Graham	McCain
Bingaman	Harkin	Moynihan
Boxer	Hatfield	Nunn
Bradley	Heflin	Pell
Breaux	Hollings	Rockefeller
Bryan	Johnston	Sarbanes
Byrd	Kennedy	Shelby
Conrad	Kerrey	Simon
Daschle	Kohl	Wellstone
Dorgan	Lautenberg	

NAYS—61

Abraham	Ford	Moseley-Braun
Ashcroft	Frist	Murkowski
Baucus	Glenn	Murray
Bennett	Gorton	Nickles
Brown	Gramm	Packwood
Bumpers	Grams	Pressler
Burns	Grassley	Pryor
Campbell	Gregg	Reid
Coats	Hatch	Robb
Cochran	Hutchison	Roth
Cohen	Inhofe	Santorum
Coverdell	Kassebaum	Simpson
Craig	Kempthorne	Smith
D'Amato	Kerry	Snowe
DeWine	Kyl	Specter
Dodd	Leahy	Stevens
Dole	Lieberman	Thomas
Domenici	Lott	Thurmond
Exon	Mack	Warner
Faircloth	McConnell	
Feinstein	Mikulski	

ANSWERED ''PRESENT''—1

Bond

NOT VOTING—6

Chafee	Inouye	Lugar
Helms	Jeffords	Thompson

So the amendment (No. 1479) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

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

The motion to lay on the table was agreed to.

Mr. D'AMATO. Mr. President, let me say that if we get this unanimous consent agreement, all those Members who have asked to have amendments considered will have them considered. All

of the votes on those amendments will take place tomorrow, or tonight by voice. So what I am saying is there will be no further rollcall votes. And all of the debate, with the exception of, I believe, 7 minutes for one Member, and the intervening times, will take place this evening. I am going to propound that request.

UNANIMOUS-CONSENT AGREEMENT

Mr. D'AMATO. Mr. President, I ask unanimous consent that the following amendments be the only remaining first degree amendments in order, other than the committee-reported substitute, that no second-degree amendments be in order and that all amendments must be offered and debated this evening: The Biden amendment; the Bingaman amendment; the D'Amato-Sarbanes managers amendment; the Boxer amendment, re: insider trading; the Specter amendment, re: fraudulent intent; the Specter amendment, re: rule 11B; the Specter amendment, re: stay of discovery.

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

Mr. D'AMATO. I further ask that when the Senate completes its business today, it stand in recess until 8:40 a.m., and at 8:45 a.m. the Senate proceed to vote on or in relation to the first Specter amendment, and that following the conclusion of that vote, there be 4 minutes for debate, to be equally divided on the second Specter amendment, to be followed by a vote on or in relation to the second Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the second Specter amendment, there be 4 minutes for debate, to be equally divided, on the third Specter amendment, to be followed by a vote on or in relation to the Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the third Specter amendment, there be 7 minutes for debate, to be divided under the previous order, to be followed by a vote on or in relation to the Boxer amendment.

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

Mr. D'AMATO. I further ask that following the disposition of the Boxer amendment, the committee substitute, as amended, be agreed to and S. 240 be advanced to third reading, and the Banking Committee be discharged from further consideration of H.R. 1058, the House companion bill, and the Senate proceed to its immediate consideration; that all after the enacting clause be stricken and the text of S. 240, as amended, be inserted in lieu thereof, and H.R. 1058 be considered read the third time.

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

Mr. D'AMATO. I further ask unanimous consent that at that point there be 30 minutes for closing remarks, to be equally divided in the usual form, to be followed by a vote on H.R. 1058.

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

Mr. D'AMATO. Mr. President, I further ask unanimous consent that all of the votes after the first vote in the voting sequence be limited to 10 minutes each, except for final passage.

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

Mr. D'AMATO. Mr. President, there will be no further rollcall votes this evening, and the first vote tomorrow is at 8:45 a.m. The first amendment to be in order will be the Biden amendment, which will be kept under 5 minutes. Thereafter, the Bingaman amendment will follow, which will also be limited to 5 minutes, to be followed by Senator Specter's three amendments.

Mr. SARBANES. The first vote in the morning will be at 8:45. I remind my colleagues, that is a vote at 8:45.

The PRESIDING OFFICER. The first vote will be 8:45.

Mr. D'AMATO. Mr. President, I ask unanimous consent that the pending amendment be set aside so the Senator from Delaware can offer his amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The pending amendment is set aside.

AMENDMENT NO. 1481

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

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Delaware [Mr. BIDEN] proposes an amendment numbered 1481.

Mr. BIDEN. 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:

At the appropriate place insert:

SEC. . AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Section 1964(c) of title 18, United States Code, is amended by inserting before the period '', except that no person may rely upon conduct that would have been actionable as fraud in the purchase of sale of securities to establish a violation of section 1962'', provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction becomes final.

Mr. BIDEN. Mr. President, I have been here a while. When I first got here 23 years ago, I learned a lesson from Russell Long.

I went up to him on a Finance Committee day and asked to have an amendment accepted, and he said yes. I proceeded to speak on it half an hour and say why it was a good amendment. And he said, ''I changed my mind. Rollcall vote.'' I lost. He came later and he said, ''When I accept an amendment, accept the amendment and sit down.''

I will take 30 seconds to explain my amendment because it is about to be accepted. I thank my friend from Pennsylvania for allowing me to move ahead. He is always gracious to me and I appreciate it.

There is a carve-out in this legislation, carving out securities fraud from the application of the civil RICO statutes. I think that is a bad idea. But I will not debate that issue tonight.

I have an amendment that is before the body that says such a carve-out exists, except that it shall not apply if any participant in fraud is criminally convicted; then RICO can apply, and the statute does not begin to toll until the day of the conviction becomes final.

Keeping with the admonition of Russell Long, I have no further comment on the amendment.

Mr. D'AMATO. Mr. President, we have no objection. We accept that amendment.

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

The amendment (No. 1481) was agreed to.

Mr. BIDEN. I move to reconsider the vote.

Mr. SARBANES. I move to table the motion.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1482

(Purpose: To clarify the application of sanctions under rule 11 of the Federal Rules of Civil Procedure in private securities litigation)

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

The PRESIDING OFFICER. The pending amendment is set aside. The clerk will report.

The legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN], for himself and Mr. BRYAN, proposes an amendment numbered 1482.

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

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

The amendment is as follows:

On page 105, line 25, insert '', or the responsive pleading or motion'' after ''complaint''.

On page 107, line 20, insert '', or the responsive pleading or motion'' after ''complaint''.

Mr. BINGAMAN. Mr. President, I send this amendment on behalf of myself and Mr. BRYAN. It is a very simple amendment.

The present bill, as it is pending before the Senate, calls for a mandatory review by the court in any private action arising under the legislation. It says that the court shall establish a record with specific findings regarding compliance by each party, and each attorney representing any party with the requirements of rule 11 of the Federal Rules of Civil Procedure, prohibiting frivolous pleading or frivolous activity by counsel.

The difficulty is that later in the bill where it specifies presumption, that we call for on page 105 and 107 of the bill,

we only specify that the appropriate sanction apply to pleadings filed by the plaintiffs.

Our amendment would change that and make it more balanced, in that it would specify that the sanctions could apply either to pleadings filed by the plaintiff or to responsive pleadings or motions filed by defense.

I think this is acceptable to the managers of the bill. I think it is only reasonable that if we are going to have this provision in the bill—which is a provision, quite frankly, I do not agree with—I think that singling out these securities cases as the only cases in our court system where we require a mandatory review by the court, and the finding and imposition of specific findings, is a mistake. If we are going to have it, we should make it balanced between plaintiff and defendant.

I know the Senator from Nevada wishes to speak. I yield the floor.

Mr. BRYAN. Mr. President, first let me commend my colleague from New Mexico. I think his amendment is well-constructed. We have used the word often in the course of the debate—balanced. This is balanced. What is sauce for the goose is sauce for the gander.

Those lawyers, whether they be plaintiff's lawyers or defendant's lawyers who are involved in frivolous conduct, now feel the full effect of sanctioned rule 11 under the Federal Rules of Civil Procedure.

Much has been said about the frivolous nature of this lawsuit correction act. I must say this is one of the few amendments that actually deals with this issue. I am pleased to support my colleague and friend from New Mexico, and I am pleased that the managers have agreed to accept the amendment. I urge its adoption.

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

The amendment (No. 1482) was agreed to.

Mr. SARBANES. I move to reconsider the vote.

Mr. D'AMATO. I move to table the motion.

The motion to lay on the table was agreed to.

Mr. SPECTER. Mr. President, I have sought recognition to offer three amendments which I think will provide some balance to the legislation that is now pending before the Senate.

I believe that there is a need for some modification of our securities acts, but I think it has to be very, very carefully crafted.

As I take a look at what is occurring in the courts, compared to what happens in our legislative process, I think that the very deliberative rule in the courts, case by case, with very, very careful analysis, has to take precedence over the procedures which we use in the Congress where hearings are attended, sometimes by only one or two Senators, and then provisions are added in markup very late in the process. Legislation does not receive the kind of very thoughtful encrustation that comes through common law development and interpretation of the securities acts.

I have represented both sides in securities litigation before coming to the U.S. Senate in the private practice of law. I would remind my colleagues that before we proceed to make such enormous changes by this legislation, we need to recall the importance of protecting investors, especially small investors, small unsophisticated investors, in some cases, who put a substantial part of their savings, perhaps all of their life savings, into securities, and how much is involved in the accretion of capital through corporations, through common stock, compared to what is the thrust of this legislation, really looking to curb some lawsuits which should not be brought, some frivolous lawsuits which ought not to have been filed, and perhaps some of the excesses in the plaintiffs' bar, as there may be excesses in any group.

What we are looking at is the value of shares traded in 1993 on the stock exchanges, the most recent year available for analysis. Mr. President, the $6.63 trillion traded on the stock exchanges in 1993 is more than half of the gross national product of the United States in 1963. The value of initial public offerings in 1993, was $57.444 billion.

If we take a look at the comparison as to how much is spent on attorney's fees, according to a 1990 article in the Class Action Reports, a review of some 334 securities class action cases decided between 1980 and 1990, a group of cases in which there was a recovery of $4.281 billion, only some 15.2 percent of that recovery went to fees and costs, a total of some $630 million.

In those cases, according to the court records, the attorneys for the plaintiffs spent 1,691,642 hours.

Statistics have already been presented on the floor of the Senate which show a decrease in securities litigation. I submit that it is very important to be able to continue to protect investors—especially small investors—from stock fraud.

We know that in the crash of the Depression, 1929 and thereafter, tremendous savings were lost at that time. These losses gave rise to the legislation in 1933 and 1934 to protect investors and the securities markets.

Without speaking at length on the subject, I would point to a few cases where there were very substantial losses to the public and in which private actions were brought to enforce the securities laws. For example, the ongoing Prudential Securities litigation, with over $1 billion in losses, perhaps as much as double that; the Michael Milken cases, where there were recoveries in the range of $1.3 billion, involving Drexel, Burnham & Lambert, recovered by the Federal Deposit Insurance Corporation under the securities laws; we all know the famous Charles Keating case, involving his former company, Lincoln Savings & Loan, involving some $262 million recovered and some $288 million lost; the $2 billion lost in the Washington Public Power Supply System case—mentioning only a few.

The concern that I have on the legislation as it is currently pending is that there is an imbalance which will discourage this very important litigation to protect the shareholders. I have supported the managers of the bill on a number of the amendments which have been filed, but I am going to submit a series of three amendments which, I submit, will make the bill more balanced.

The PRESIDING OFFICER. Without objection the pending amendment will be set aside.

AMENDMENT NO. 1483

(Purpose: To provide for sanctions for abusive litigation)

Mr. SPECTER. At this time, Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1483.

Mr. SPECTER. 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:

Beginning on page 105, strike line 1 and all that follows through page 108, line 17, and insert the following:

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

''(j) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

''(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

''(2) include in the record findings of fact and conclusions of law to support such determination.''.

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

''(*l*) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

''(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

''(2) include in the record findings of fact and conclusions of law to support such determination.''.

Mr. SPECTER. Mr. President, this amendment is designed to leave discretion with the trial judge in place of the very onerous provisions of the pending

bill which require a mandatory review by the court after each securities case is concluded and then a requirement that the court impose sanctions on a party if the court finds that the party violated any requirement of rule 11(b) with the presumption being that attorney's fees will be awarded to the losing party.

I submit that this is a very harsh rule which will have a profoundly chilling effect on litigation brought under the securities acts, and will in addition spawn an enormous amount of additional work for the Federal courts by causing what is called satellite litigation.

That means that in any case where the litigation is concluded under the securities acts, the judge will be compelled, under the mandatory review provision, to review all the pleadings filed in the case to determine whether rule 11 was violated, whether or not either party chooses to have that review made, and then will be compelled to impose the sanction with the presumption being payment of attorney's fees, which is really the British system, not the United States' system, where we have had open courts. This provision risks causing a tremendous imbalance between plaintiffs and defendants in these cases because the defendants are characteristically major corporations with much greater resources to defend, contrasted with the plaintiffs who do not have those resources, or their lawyers who bring the suits on their behalf.

I have surveyed the Federal bench, the judges in the U.S. district courts and in the courts of appeals, to see how the judges respond to changes in rule 11 to take away the discretion of the trial judges and have what is, in effect, micromanagement of the judiciary by the Congress of the United States. I have done this to try to get a sense as to what is going on in the courts. It has been some time since I practiced there.

I submit that the views of a few Senators, the authors of this bill and the Senators who are voting on this legislation, are a great deal more limited than the insights of the Federal judges who preside in the administration of these cases day in and day out. The procedures which are being followed in this legislation are not those customarily followed where the rules of civil procedure are formulated by the Federal courts under the Rules Enabling Act—the Supreme Court which has the authority to do so, and the delegation of that authority to committees where the judges work with it all the time, and representatives of the bar, as opposed to the Members of Congress, who have very, very limited experience in this field and, in this particular case, had this provision added very late in the process, late in May, a few days before there was final markup of the bill in the Banking Committee, which does not normally deal with issues of the Federal Rules of Civil Procedure.

Earlier in the consideration of this bill I made an effort to have these issues on procedure referred to the Judiciary Committee, on which I serve, which has the most experience of any committee in the Congress—certainly more than the Banking Committee, which has jurisdiction over this bill—because hearings were not held and consideration was not given to this rule 11 provision.

Among the responses which I received, some 164 responses from Federal judges, there was a general sense that the trial judges ought to have the discretion and were in the best position to make a determination as to whether sanctions ought to be imposed without having a mandate from the Congress, the micromanagement from the Congress, saying you must make this determination. Even though the winning party did not ask for it, even though there are not procedures for one party to say to the other, ''You are undertaking something which our side considers frivolous and, if you do not cease and desist, we will bring an action to impose sanctions,'' to have a chance to correct it.

A very lucid statement of the problem was made by a very distinguished judge for the Court of Appeals for the Third Circuit, Judge Edward R. Becker, who had this to say.

> The mandatory sanctions are a mistake and will only generate satellite litigation.

By satellite litigation, Judge Becker is referring to the situation where another lawsuit, another issue has to be litigated as to whether a rule 11 sanction should be instituted. Again, not at the request of the losing party. Judge Becker continues to this effect:

> The flexibility afforded by the current regime enables judges to use the threat of sanctions to manage cases effectively. Well-managed cases almost never result in sanctions. Moreover, the provisions for mandatory review, presumably without prompting by the parties, will impose a substantial burden on the courts and prove completely useless in the vast majority of cases. Requiring courts to impose sanctions without a motion of a party also places the judge in an inquisitorial role, which is foreign to our legal culture, which is based on the judge as a neutral arbiter model.

A very cogent reply was made by Judge James A. Parker, of the United States District Court for the District of New Mexico, who had this to say:

> As a member of the judiciary, I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold the strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

Judge Parker further writes that ''Rule 11 * * * gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11.''

Mr. President, a number of the judicial comments which I am about to read apply to my second amendment as well. That second amendment relates to a provision in the bill which requires that the court not allow discovery after a motion to dismiss is filed. On that particular line, the rule is that discovery may proceed unless the judge eliminates discovery. Under the pending legislation, there would be no discovery as a matter of mandate unless under very extraordinary circumstances, but the mandatory rule applies. And the comments of Judge Parker would apply to the second amendment as well, the second amendment which I propose to bring.

Mr. President, the statement by Judge Bill Wilson of the Eastern District of Arkansas, in a letter dated April 27, is to the same effect, as follows:

> Federal Rule . . . 11, as it now reads, gives a judge all he or she needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

On that point, Mr. President, I think it is fair and appropriate to note that we have a very able Federal judiciary which can administer justice if left to do so with appropriate discretion.

Judge Prentice H. Marshall of the Northern District of Illinois said this in a May 5 letter:

> Rule 11 . . . gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed.

A letter from Martin F. Loughlin of the District of New Hampshire, dated May 2 reads:

> Federal Rule of Civil Procedure 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

A letter from Federal Judge Miriam Goldman Cedarbaum from the Southern District of New York, dated May 10, 1995, says in part:

> I have found the general supervisory power of the court as well as 28 U.S.C., Section 1927, and Rule 11 adequate sources of judicial authority to discourage frivolous litigation.

A letter from Federal Judge J. Frederick Motz from the District of Maryland, dated May 9, 1995, referring to the mandatory rules said that they are:

> . . . counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

Continuing to quote:

> I oppose any amendment to the Rule that would make imposition of sanctions mandatory.

A similar view was expressed by Judge Ilana Diamond Rovner of the Court of Appeals for the Seventh Circuit in a letter dated April 1995:

The current Rule 11 gives the District Court ample discretion to address frivolous litigation.

A letter from Senior Judge Floyd R. Gibson from the U.S. Court of Appeals for the Eighth Circuit, dated April 20, 1995:

I believe more discretion should be given to the district judge in the how and when to apply the sanctions under Rule 11(c) on sanctions.

Similarly, Judge Avern Cohn from the Eastern District of Michigan, dated May 5, 1995, says, in part:

I firmly believe that Congress involves itself too deeply in the procedural aspects of the litigation process.

A letter from Martin Feldman from the Eastern District of Louisiana, says, in part:

I believe that giving district courts more discretion in applying the Rule was good thinking.

And Judge Jimm Larry Hendren of the Western District of Arkansas, writes, in part:

I am not sure the Congress needs to pass any legislation. I think the courts, themselves, can handle this matter with the rules already in place and their inherent powers.

And a letter from Judge Leonard I. Garth, a distinguished member of the Court of Appeals for the Third Circuit, says:

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercise their judicial discretion was a welcome measure.

A good many of these comments apply to the change in rule 11, which had been mandatory from 1983 to 1993. It would apply equally well to the kind of a rule which is in effect here.

The letter from Senior Judge William Schwarzer from San Francisco says that the sanctions ought to be discretionary.

Mr. President, I ask unanimous consent that these letters, which represent only a small sample of the responses I received supporting discretionary imposition of sanctions, appear in the RECORD at the conclusion of my statement, with the exception of the letter from Judge Becker.

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

(See exhibit 1.)

Mr. SPECTER. Mr. President, I now refer again to the letter from Judge Becker citing the draft of a rule from Circuit Judge Patrick Higginbotham, who is chairman of the Judicial Conference Advisory Committee on Civil Rules, which sets out the amendment which I have submitted, and it is to this effect: that the sanction for abusive litigation would arise in any private action when the abusive litigation practice is brought to the district court's attention by motion or otherwise. The court shall promptly decide with written findings of fact and conclusions of law whether to impose sanctions under rule 11, and upon the adjudication, the district court shall include the conclusions and shall impose the sanctions which the court in the court's discretion finds appropriate.

Mr. President, I submit to my colleagues that leaving the discretion to the judge really is the right way to handle these matters. These judges sit on these cases, know the cases, and have ample authority as a discretionary matter to impose the sanction. As one judge said, all these rules cannot make a bad judge do the right thing. But I think we can rely upon the discretion of the judges without tying their hands.

Mr. President, I would be glad to yield the floor at this time to argument by the managers if they would care to do so. We can then proceed to conclude the argument on this amendment.

EXHIBIT 1

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW MEXICO,
Albuquerque, New Mexico, May 2, 1995.

Hon. ARLEN SPECTOR,
U.S. Senate, Committee on the Judiciary, Wsshington, DC.

DEAR SENATOR SPECTOR: Thank you for your letter of April 24, 1995 and the opportunity to express comments on issues involving Rule 11 of the Federal Rules of Civil Procedure.

For purposes of clarity, I have restated each question posed in your April 24, 1995 letter followed by my response.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify ''loser pays'' and strengthening of FRCP 11?

Response: Rule 11, as amended effective December 1, 1993, gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11. Rule 11(c) states that if Rule 11 has been violated ''the Court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.'' Rule 11(c)(2) describes the sanctions that may be imposed for a violation. These include directives of a non-monetary nature, an order to pay a penalty into Court, or an Order directing that an unsuccessful movant who has violated Rule 11 pay ''some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.'' At this point there appears to be no need to change Rule 11, or to pass legislation, to introduce a more stringent ''loser pays'' sanction.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: In this judicial district, considerable satellite litigation developed under Rule 11 after the 1983 amendment. This required judges to devote significant time to resolving squabbles among counsel unrelated to the merits of the case. The 1993 amendment of Rule 11 has dramatically reduced the number of motions alleging Rule 11 violations. This I attribute directly to the ''safe harbor'' provision found in Rule 11(c)(1)(A). The ''safe harbor'' provision has forced lawyers to communicate and to resolve their disputes in most instances without the need for Court intervention. My personal opinion is that this feature of the 1993 amendment of Rule 11 strengthened instead of weakened Rule 11. It has made the lawyers talk to each other about claims or defenses perceived by their opponents to be frivolous and this has resulted in most disputes being resolved without extensive briefing and devotion of valuable court time. Removal of the ''safe harbor'' provision from Rule 11 would be extremely detrimental to the orderly functioning of the courts.

(3) What suggestions, if any, do you have in relation to this issue?

Response: As a member of the judiciary I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold a strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

If you wish, I will be happy to provide additional information on this subject either orally or in writing.

Sincerely,

JAMES A. PARKER.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS,
Little Rock, AR, April 27, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you very much for your letter of April 6, 1995.

In the year and a half that I have been on the bench I have had no problem with frivolous litigation. I have sanctioned two lawyers for engaging in what I thought to be inappropriate discovery procedures, but have had no experience with FRCP 11 as a trial judge.

I am strongly opposed to the ''loser pays'' proposal. I am told by my scholarly friends that this is a British rule. With all due respect for our kinfolks across the Atlantic, many of our ancestors got on a ship and came to the United States because they were not particularly fond of the justice system in Britain. In all seriousness, I do have a lot of respect for some aspects of the system in England, but, in my opinion, ours is much superior.

The ''loser pays'' will obviously slam the courthouse door shut in the face of deserving citizens who are not well heeled financially.

It appears to me that the 1993 Amendment to FRCP 11 was much needed. The rule, before these changes, tended to be too rigid, at least on the surface. It encouraged satellite litigation. FRCP 11, as it now reads, gives a judge all she or he needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

Finally, I would like to comment on the ''crisis'' claims that are being made about the case load in federal district courts. I quote from Judge G. Thomas Eisele: *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts,* 46 SMU L. Rev. 1935 (1993):

. . . In 1985 the total case filings in all U.S. District Courts came to 299,164; in 1986, 282,074; in 1987, 268,023; in 1988, 269,174; in 1989, 263,896; in 1990, 251,113; in 1991, 241,420; and in 1992, 261,698. So in a period of seven years the total filings have fallen from 299,164 to 261,698. The number of civil filings per judgeship fell from 476 in 1985 to 379 in 1990—a period when the number of judgeships remained constant at 575. In 1991 the number of judgeships increased to 649 and the number of civil cases per judgeship fell to 320. For 1992 the figure is 350.

''We are frequently told that our criminal dockets are interfering with our civil dockets, and this has certainly been true in a few

of our federal districts. But the number of felony filings per judgeship only increased from forty-four in 1985 to fifty-eight in 1990. In 1992, that number fell to fifty-three. The total filings per judgeship, criminal and civil, have been lower than they were in 1991 (372) in only two years since 1975. And the weighted filings per judgeship have likewise fallen in the past five years from 461 in 1986 to 405 in 1992.

''So there is not much support for the oft-repeated assertions that 'federal court system has entered a period of crisis;' that our courts are 'on the verge of buckling under the strain;' that 'our courts are swamped and unmanageable'. . . . The actual figures and trends simply do not support such doomsday hyperbole.

''On the issue of delay we find, as always, that a few district courts are having considerable trouble moving their dockets, but overall we find the same median time from filing to disposition in civil cases (nine months) for each year from 1985 until 1992. And the period between issue and trial in 1992 (fourteen months) is the same as it was in 1985. A Rand Corporation study confirms that the rhetoric about unconscionable and escalating delays in processing and trying cases in the federal district court system is nothing more than myth. . . .''

In other words, the sky is not falling down.

Again, thank you very much for permitting me to comment on these questions.

Cordially,

WM. R. WILSON, JR.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
Chicago, Illinois, May 5, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: I respond to yours of April 19 inquiring about the need to strengthen Rule 11 of the Federal Rules of Civil Procedure.

1. In my 22 years on the federal trial bench I state unequivocally that there is not a significant problem with frivolous litigation in the federal courts warranting a ''loser pays'' sanction. I have encountered two or three repetitious/abusive plaintiffs. But their first complaints were not frivolous. They just had difficulty taking ''No'' for an answer.

Of course, in all litigation which is tried, somebody wins and somebody loses. But the losers are not frivolous complainers.

2. The 1993 amendment to Rule 11 of the Federal Rules of Civil Procedure did not ''weaken'' it. Quite the contrary: it made the Rule bilateral, i.e., it applies to unfounded denials as well as unfounded contentions; it gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed. The rule should not revert to 1983.

3. I suggest that Rule 11 be left just the way it is. It is working well. The collateral litigation provoked by the 1983 version has diminished.

Respectfully yours,

PRENTICE H. MARSHALL.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE,
Concord, NH, May 2, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is to acknowledge receipt of your letter dated April 24, 1995 with respect to the recently passed United States House of Representatives legislation providing for a form of ''loser pays.''

In response to question #1, I do not believe there is a significant problem with frivolous litigation in the Federal Courts to justify ''loser pays.''

With respect to question #2 FRCP 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

Candidly, I hope that the Senate does not pass the ''loser pays'' legislation. I have one comment related to strengthening of FRCP 11. Although there may be and there is some justification for losers pay, I do not believe it is necessary. There are many cases where an indigent, well-intentioned litigant may be penalized by strict adherence to a rule that losers pay. I have been a New Hampshire Superior Court judge for sixteen years and a Federal Judge for an equal amount of time. While not strictly restricted to the Federal Courts, we are being inundated with paper, usually by the party who is well-off financially. This unfortunately sometimes puts pressure on the non-affluent litigant to settle or withdraw his or her claim.

Sincerely,

MARTIN F. LOUGHLIN.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,
New York, NY, May 10, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter dated April 24 inquiring about frivolous litigation in the federal courts. I have been a federal trial judge for nine and one-half years in one of the busiest districts in the country. During that period, Fed.R.Civ.P. 11 has been both strengthened and weakened. I have not observed a significant problem that requires a legislative remedy.

The only noticeable effect of the weakening of FED.R.Civ.P. 11 has been a welcome diminution in the number of Rule 11 motions. With respect to ''loser pays,'' it is my strongly-held view that the founders of this Republic wisely chose to eliminate certain aspects of the English legal system as contrary to the egalitarian ideals of American democracy. Two of the most important of these reforms were the abolition of the distinction between barristers and solicitors and the elimination of the British practice of requiring the losing party in civil litigation to pay the lawyers fees of the winning party. Indeed, the system of having each party bear its own legal fees has come to be known as the American Rule. It is based on the belief that people of limited means would be deterred from suing on meritorious claims by the fear that if they were not successful, the costs would ruin them.

I have found the general supervisory power of the court as well as 38 U.S.C. §1927 and Rule 11 adequate sources of judicial authority to discourage frivolous litigation, and do not believe that the American Rule should be abolished.

Sincerely,

MIRIAM GOLDMAN CEDERBAUM.

UNITED STATES DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Maryland, May 9, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter of April 19, 1995, in which you solicit my views on a ''loser pays'' rule and the possible strengthening of FRCP 11.

There is, of course, a fair amount of frivolous litigation in the federal courts. However, the bulk of that litigation is conducted by impecunious litigants as to whom a ''loser pay'' rule would have no effect. Accordingly, I do not support the adoption of such a rule. I particularly oppose the rule in diversity cases since it would provide in such cases a significant incentive for attorneys to forum shop.

Similarly, I oppose any amendments to strengthen FRCP 11. I believe that as a general matter, Rule 11 is a valuable tool for judges to use, and I have occasionally imposed Rule 11 sanctions myself to punish or deter inappropriate behavior. However, I further believe that Rule 11, as it existed prior to the 1993 amendments, had a deleterious effect upon the professional relationships of members of the bar. Furthermore, I think that in its pre-1993 form the Rule was counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

For these reasons I oppose any amendment to the Rule that would make imposition of sanctions mandatory; to a somewhat lesser extent, I also oppose elimination of the Rule's ''safe harbor'' provision provided in the 1993 amendments.

I hope that these comments are helpful to you. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

J. FREDERICK MOTZ,
United States District Judge.

U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,
Chicago, IL, April 19, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter requesting my views on the ''loser pays'' and Rule 11 issues. I very much appreciate being given an opportunity to comment. My thoughts on the specific questions you pose are as follows:

(1) In my judgment, there is no significant problem with frivolous litigation in the federal courts such as would justify ''loser pays'' legislation or strengthening FRCP 11. The current Rule 11 gives the district court ample discretion to address frivolous litigation. If a given case is sufficiently frivolous, a court is not hampered from invoking Rule 11 to shift the entire cost of the case to the loser. Rule 11 also grants the district court discretion to impose more modest penalties or to refrain from a penalty, depending on what is appropriate in a given case.

(2) After the 1983 amendment, FRCP 11 created a cottage industry of satellite litigation which consumed an enormous amount of court time and did not succeed in improving the overall quality of litigation. The fact that penalties were mandatory if a violation was found simply raised the stakes of Rule 11 litigation and encouraged the filing of requests for sanctions, even if the breach was slight and the damage minimal. In many cases, it turned a dispute between the litigants into a dispute between the lawyers, and hampered or prevented altogether the pre-trial settlement of cases. The 1993 amendment has improved matters greatly by making sanctions discretionary. This permits much greater flexibility and has removed the incentive to file Rule 11 motions when the case for sanctions is weak.

(3) I strongly recommend that Congress leave Rule 11 as is and not adopt the ''loser pays'' rule. A ''loser pays'' provision will not add anything substantive to the district court's arsenal of tools to deal with frivolous litigation. It is likely merely to discourage litigants with limited resources to pursue their cases, particularly when the litigant seeks a change in the law. The ability to pursue such cases seems to me one of the fundamental protections of individual rights in

this country, and I believe if we want to reduce litigation, rather than disincentives for pursuing novel theories we ought to introduce incentives for settlement. ''Loser pays'' would act as a disincentive to settlement by introducing the question of fees and costs into settlement discussions. It would also generate an enormous amount of fees litigation. The net effect would thus be deleterious to individual liberties without significantly reducing the amount of litigation, and would in my judgment merely exacerbate the core problem—the amount of time that judges are increasingly required to devote to non-substantive matters.

Thank you again for inviting me to comment. I hope that my thoughts will be of aid to you in your deliberations, and I send, as always, warmest good wishes and my thanks for your many kindnesses through the years.

With best regards,

ILANA DIAMOND ROVNER.

U.S. COURT OF APPEALS,
EIGHTH CIRCUIT,
Kansas City, MO, April 20, 1995.

Re FRCP 11.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: In reply to your letter of April 6, positing inquiry on three issues related to FRCP 11, I would like to respond as follows:

1. There is a significant problem with frivolous litigation in the Federal Courts. I think a trial run with ''loser pays'' proposal would be in order provided the district judge would have the discretion to apply or not to apply such sanction in any given case.

2. I think FRCP 11 worked better after the 1983 Amendment; and, has some difficulty since the 1993 Amendment.

3. I believe more discretion should be given to the district judge in the how and when to apply the sanctions authorized under FRCP 11(c) on sanction. Also, some revisions of subsection (d) might be in order relating to discovery as there has been many abuses reported of extensive, unnecessary and costly discovery procedures which makes the whole legal system too expensive for many citizens to handle or even participate in the legal process.

I have been sitting with the Ninth Circuit in San Francisco since the receipt of your letter, hence my slight delay in reply.

Sincerely,

FLOYD R. GIBSON.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
Detroit, MI, May 5, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for asking my views on pending ''loser pays'' legislation.

I firmly believe the Congress involves itself too deeply in the procedural aspects of the litigation process. Federal judges are capable of dealing with abusive lawyering. Legislation is not needed. I handle my docket just fine. I control abusive lawyering within the existing rules. Giving me more authority to deal with abusive lawyering is likely to make me more abusive.

Specifically,

1. There is no problem with frivolous litigation in the federal courts. FRCP 11 does not need to be strengthened and ''loser pays'' is not justified. We have gotten along very well for 220 years without much fee shifting and there is no need for it now.

2. FRCP 11 worked less well after the 1983 Amendment than it has since the 1993 Amendment. After the 1983 Amendment there were frequent occasions of overuse. That overuse no longer appears. Rarely is there a need for Rule 11 sanctions of any significant amount.

3. I suggest that Congress stay out of this area. What is pushing the Congress now is the better heeled part of society. More defendants win in court than plaintiffs. ''Loser pays'' and a stricter FRCP 11 would discourage otherwise potentially meritorious cases from coming to federal courts.

Lastly, published statistics show a 14% drop in the number of civil filings in federal courts between 1985 and 1994. Why all the excitement?

Sincerely yours,

AVERN COHN.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans, LA, May 1, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is in response to your letter of April 19th, which I assume went to all members of the judiciary (unless our mutual good friend, Ed Becker, suggested that you write to me).

Let me say at the outset that after having been a lawyer who practiced principally in federal courts for some 26 years and a United States District Judge for nearly 12 years, I support some form of ''loser pay'' legislation.

There is indeed a problem with frivolous litigation in the Federal Courts which, in my view, justifies some form of ''loser pay'' rule. ''Loser pay'' legislation would serve as a deterrent to many lawsuits that ought not be filed, including suits by lawyers and pro se litigants. Moreover, ''loser pay'' legislation would also deter frivolous defenses in the early stages of the litigation. That, to me, is the main difference between ''loser pay'' and Rule 11.

I believe Rule 11 has worked after the 1983 Amendment, but its weakness is that Rule 11 addresses matters that might have occurred at the outset of litigation but that usually occur as an abuse of the adversary process in a later stage of the litigation. On the other hand, ''loser pay'' would serve as a deterrent from the very beginning of the litigation. I haven't had much involvement with Rule 11 since the 1993 Amendment, but I believe that giving district courts more discretion in applying the Rule was a good thing and I would not consider the 1993 Amendment to have been a weakening of the Rule.

As to specific suggestions, ''loser pay'' comes in many forms as you no doubt are aware. I don't have a specific model in mind, only a concept. I like the English rule but they have a much more sophisticated Legal Aid system. The question of whether or not pro se litigants should be dealt with the same way as lawyers and other litigants is a close call. I guess what I am saying is that there are several models of ''loser pay'' and your Committee would no doubt want to consider many of them and, perhaps, even a refinement of them that would accommodate the Federal system. But some form of ''loser pay'' is most appropriate now and I would be pleased to work with any group who was interested in drafting such legislation.

Thank you very much for writing me. You may also be interested to know that one of my present law clerks is Marc DuBois, whose father I understand is also a close friend of yours.

Sincerely,

MARTIN L.C. FELDMAN.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF ARKANSAS,
Fort Smith, AR, April 20, 1995.

Re: Your Letter of April 6, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: With respect to your request for comment, I would make the following observations:

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify ''loser pays'' and strengthening of FRCP 11?

Response: I cannot speak for all federal courts but, with respect to those with which I am involved, the answer is ''no.''

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: I did not commence my duties as a federal district judge until April 15, 1992. Accordingly, I don't feel qualified to make an appropriate comment on this issue.

(3) What suggestions, if any, do you have in relation to this issue?

Response: I am not sure the Congress needs to pass any legislation. I think courts, themselves, can handle this matter with the rules already in place and their inherent powers.

Respectfully,

JIMM LARRY HENDREN.

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT,
Newark, NJ, April 24, 1995.

Hon. ARLEN SPECTER,
U.S. Senator, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Your letter of April 6th asks for my comments respecting congressional proposals to strengthen Rule 11 and to enact ''loser pays'' legislation. I am pleased to respond to your inquiries as best I can.

The 1983 amendment to Rule 11 generated a rash of Rule 11 motions, which themselves often generated responding Rule 11 motions. These motions were frequently groundless. According to a 1989 Federal Judicial Center (FJC) survey, approximately 31 percent of judges believed that many or most Rule 11 motions for sanctions are themselves frivolous. Federal Judicial Center, Rule 11: Final Report of the Advisory Committee on Civil Rules §2A at 7 (1990). Indeed, the post-1983 Rule 11 jurisprudence gave rise, in my opinion, to tangential ''satellite'' proceedings which, in many instances, not only delayed but appeared to dwarf the controversy on the merits.

I make special reference here to the practice of counsel who file a Rule 11 motion in an attempt to recover fees, which is met with a Rule 11 motion by adversary counsel, claiming that the initial Rule 11 motion was itself frivolous. According to the Judicial Center, the majority of judges (and I count myself among them) believe that the possibility of ''dueling'' Rule 11 motions can make litigation even more contentious if the threat of cost shifting materializes. *Id.* §2A at 10. Further, judicial time spent defining what is ''frivolous'' and resolving arguments over the appropriate fee award, allowable costs, and the like deprives judges of time which they could otherwise devote to the merits of other matters.

Additionally, about 65 percent of judges believe that frivolous litigation represents a small or very small problem, accounting for only 1–10 cases per judge in a year. *Id.* §2A at page 2–3. In combination, these statistics suggest to me that the 1983 version of Rule 11 itself may have contributed to needless proceedings in the courts.

The 1993 Amendment, of course, altered Rule 11 so that district court judges may exercise their discretion over whether to impose sanctions. Further, it explicitly provides for the option of penalties (fines) paid to the court in lieu of attorney's fees, and incorporates a 21 day ''safe harbor'' provision. Each provision reduces the likelihood that attorneys will fine Rule 11 motions to shift costs while still permitting judges to target violators with appropriate sanctions aimed at deterring future frivolous proceedings.

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercises their judicial discretion was a welcome measure. Some frivolous litigation will always exist, and judges should have the power and discretion to address such behavior. After experience on the district court and more than twenty years examining district court records on appeal, I am confident that district court judges through the exercise of their discretion can control the evil that Rule 11 was originally promulgated to cure. This is the same power and discretion which we in the Courts of Appeal exercise over litigants through Federal Rule of Appellate Procedure 38.

I am also of the opinion that there has not been sufficient time since the 1993 Amendment has gone into effect to assess the institutional and judicial problems that may have arisen. I think that before further amendment to Rule 11 is sought, or further legislation in this area is contemplated, there should be a period for judicial maturation, study and evaluation.

In this regard, let me state a final concern that I have with the proposed congressional changes to the Federal Rules. The procedure for Rule amendments provided in the Rules Enabling Act—consideration by committees, the Judicial Conference, and the Supreme Court followed by submission to Congress—represents a prudent and conservative allocation of rulemaking authority between the judiciary and Congress. I am concerned that the initiation of rule changes by Congress without study and input from the judiciary, and without a developmental process involving the bench and bar, risks overlooking relevant considerations. Moreover, the ever-present separation of powers problems which lurk in the background of congressional attempts to fashion procedural rules for the Federal Courts suggests that Rules such as Rule 11 should be processed through traditional judicial channels before congressional action is taken.

As for my thoughts on the ''loser pays'' aspect of the Attorneys Accountability Act, I will be brief. It is clear to me that the primary results of such legislation can only be to (1) reduce the number of cases that go to trial, and (2) spur plaintiffs to take lower settlements than they would otherwise have accepted. However, this is just my opinion and it is not based on empirical data.

I note, for instance, that the Proposed Long Range Plan for the Federal Courts, in its March 1995 publication, recognizes that ''appropriate data are needed to assess the potential impact of fee and cost shifting on users of the Federal Courts.'' *Id.* at 61. The Plan rejects the ''English'' rule but recommends continuing a study of the problem of fee shifting to decrease frivolous or abusive litigational conduct. I share those views.

I am generally of the opinion that the American Rule is consonant with our tradition of liberal access to the courts. I have always taken great pride in the fact that in our country, plaintiffs with legitimate claims may have their ''day in court'' without fear of sanctions should their suits prove unsuccessful. I am also concerned that public interest groups and civil rights claimants may be discouraged from filing meritorious complaints due to fears that they will be assessed ''shifted'' fees in excess of their ability to pay.

You have asked what suggestions I have with respect to these issues. I would retain the 1993 Amendment to Rule 11 in its present form and revisit the effect of the Amendment at some future time, perhaps in another five years. Because Federal Rule of Civil Procedure 11 and Federal Rule of Appellate Procedure 38 give the courts power to sanction frivolous actions when necessary, my inclination is not to remove that discretion, but to encourage it.

I am similarly conservative as to ''loser pays.'' I note that even in Great Britain there has been recent criticism, both in the press and among scholars, of the English Rule. My experience tells me that ''each side pays'' has resulted in a just balance of interests. I am also a firm believer in the old adage. ''if it ain't broke, don't fix it.'' I therefore recommend against abandoning our present system until such time as studies of the two system reveal the desirability of change.

I am certain that you and your office have considered all of the matters that I have written about before receiving this note, but I did want to respond and explain to you why I entertain the views that I have advanced with respect to Rule 11 and ''loser pays'' legislation. Certainly, I would be pleased to respond to any inquires you may have.

Thank you writing to me in this regard.

Sincerely,

LEONARD I. GARTH.

San Francisco, CA, May 1, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This letter responds to yours of April 19 posing the following questions relating to legislation that would amend Rule 11 of the Federal Rules of Civil Procedure.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify ''loser pays'' and strengthening of FRCP 11?

The short answer is that there is no significant problem with frivolous litigation in the federal courts. To the extent there is frivolous litigation, it consists mostly of cases brought by prisoners. Existing law adequately enables judges to dismiss those cases summarily with a minimum of work. And neither Rule 11 nor fee shifting would have any impact on prisoners filing cases.

More generally, it is a misconception to look at Rule 11 or fee shifting as a way to deter frivolous litigation. On the whole, Rule 11 has had a beneficial impact in making lawyers more careful about the pleadings they file, i.e. encouraging them to take a closer look to see whether a particular pleading is justified. Most frequently its application has been to motions and other procedural activities rather than to complaints or answers. But if it has been a deterrent at all, its impact has been mostly on persons who are risk averse-persons who may not want to take a chance that a borderline case will be found to be in violation of Rule 11 leading to possible sanctions. In this way, it functions not so much as a filter based on frivolity but as a gauge of risk averseness. I believe that it has functioned in this way in very few cases but the civil rights bar believes that it has deterred filing of some civil rights cases.

On the question of whether there is a justification for what you call a ''loser pays'' rule, in my view fee shifting has little to do with control of frivolous litigation. There are of course various ways in which to approach fee shifting. The so-called English rule is not practical for the United States for several reasons: (1) it impacts everyone, plaintiff and defendant alike, on the basis of risk averseness, not frivolity, i.e. perfectly non-frivolous cases are lost every day and it makes no sense to punish defendants or plaintiffs for losing a case; (2) a loser-pays rule, unless carefully drafted, would undermine contingent fee practice and over 100 federal fee-shifting statutes, and (3) to the extent it works in England, it is made possible by legal aid which pays attorneys fees for lower income litigants and exempts them from the rule.

A more constructive approach is to amend FRCP 68 to provide for fee-shifting offers of judgment but in a way that will make the rule serve as an incentive, not as a sanction. If you are interested in this, I refer you to the enclosed copies of an article I published on the subject and of a letter I wrote recently to Senator Hatch.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

The Federal Judicial Center undertook a study of the operation of the 1983 amendment. It showed, among other things, that Rule 11 activity occurred only rarely (in 2 percent of the cases) and that sanctions were imposed in only about a quarter of the affected cases, that eighty percent of the judges thought that its overall effect was positive but also that it had a potential for causing satellite litigation and exacerbating relations among lawyers, and that the rule probably had a disparate impact on plaintiffs, particularly in civil rights cases. This is discussed in some detail in the enclosed article.

While I believe that on the whole the 1983 rule worked well, there is wide agreement among bench and bar that the 1993 amendment is an improvement and ought to be given a chance to operate before further changes are considered. The rule, as amended, will preserve the incentive for lawyers to use care in filing pleadings while minimizing costly and unproductive satellite litigation over sanctions by making sanctions discretionary (which in practical effect they are anyway), by providing a safe harbor, and by lessening the emphasis on the rule as a fee shifting device. The amendment will moderate what on occasion had become excessive reliance on the rule. The amendment now pending in Congress will inevitably result in more expense and delay by stimulating Rule 11 litigation without giving any assurance that the people who are prone to file frivolous cases will be deterred from doing so. I believe that the amendment will be counterproductive and self-defeating and therefore recommend that Congress leave the rule alone and observe its operation for a few years.

Sincerely,

WILLIAM W. SCHWARZER.

Mr. BENNETT. Mr. President, as I have said earlier in this debate, I am unburdened with the blessing of having been to law school, and as a consequence feel myself inadequate to respond to the learned legal arguments of one of the Senate's best lawyers. As a consequence, Mr. President, I will leave that argument to be made by the chairman of the committee at some future point. I have no response at this time.

Mr. SPECTER. Mr. President, I ask unanimous consent that the amendment be set aside so that I may proceed to offer my second amendment.

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

AMENDMENT NO. 1484

(Purpose: To provide for a stay of discovery in certain circumstances, and for other purposes)

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

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1484.

Beginning on page 108, strike line 24 and all that follows through page 109, line 4, and insert the following:

''(k) STAY OF DISCOVERY.—

''(1) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

''(A) would avoid waste, delay, duplication, or unnecessary expense; and

''(B) would not prejudice any plaintiff.

''(2) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

''(A) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

''(B) except as provided in subparagraphs (A) and (B), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.''.

On page 111, strike lines 1 through 7, and insert the following:

''(2) STAY OF DISCOVERY.—

''(A) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

''(i) would avoid waste, delay, duplication, or unnecessary expense; and

''(ii) would not prejudice any plaintiff.

''(B) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

''(i) notwithstanding any stay of discovery issued in accordance with subparagraph (A), the court may permit such discovery as may be necessary to permit a plaintiff to prepare an amended complaint in order to meet the pleading requirements of this section;

''(ii) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

''(iii) except as provided in clauses (i) and (ii), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.

Mr. SPECTER. Mr. President, this is the amendment which I referred to earlier dealing with a provision of the bill in its current form which prohibits any discovery after a motion to dismiss has been filed, except under very limited circumstances.

The general rule of Federal procedure is that discovery may proceed after a complaint has been filed and a motion to dismiss has been filed unless on application by the defendant the judge stays the discovery.

The current bill provides as follows:

In any private action arising under this title during the pendency of any motion to dismiss, all discovery proceedings shall be stayed unless the Court finds, upon the motion of any party, that a particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.

It is more than a little surprising, Mr. President, to find securities litigation separated out from all of the other litigation in the Federal courts. And for those who may be watching this matter on C–SPAN, while this may be viewed as somewhat esoteric, somewhat hypertechnical, it will not be hypertechnical if you are a stockholder and the stock goes down and you find you have been misled and defrauded by people who have made misrepresentations.

What this means in common parlance, common English, is that a lawsuit is started. It is a class action started, and this private right of action has been developed in order to protect shareholders, especially small shareholders who band together in a class, and after the complaint is filed the plaintiffs' attorney seeks to find out the details as to what happened with the defendant; the plaintiff does not know all the details of the facts at the time of filing suit. The corporation or the officers may have made some very fine promises which sounded very good when the promises were made but no one can tell about the details of the facts unless you go into the records of that party because those facts are not generally known.

In lawsuits, discovery is permitted where one party seeks to take the deposition, that is, to ask the other party questions, or propounds interrogatories, that is, submits written questions, or makes a motion for the discovery of documents to take a look at records.

In discussing this issue with the proponents of the legislation, I was given a response—it is a little disappointing not to find somebody to argue against here. It is not easy to make an argument when there is nobody to disagree. Perhaps my distinguished colleague from Iowa wishes to disagree with me. My distinguished colleague from Utah chooses not to.

The response I got was that it changes the mindset of the litigation, and I would say that the trial judge who is sitting on the spot has ample discretion, if it is inappropriate discovery, to say the discovery is not going to go on, instead of having a mandatory change singling out this legislation from all other legislation.

Well, may I defer to my distinguished colleague from Utah, who I know, having warning in advance, now has had ample opportunity to muster the legal arguments, or am I to infer that the managers of the bill have fled the scene because there is nothing to be said in response to the overwhelming arguments I have presented?

Mr. BENNETT. I would not concede that there is nothing to be said in response to the overwhelming arguments.

Mr. SPECTER. Good. Will the Senator yield for a question or two?

Mr. BENNETT. I will concede that this Senator is not prepared to mount that response. I suggest, Mr. President, that the Senator proceed in his scholarly and learned way.

Mr. SPECTER. It is a little difficult to proceed, Mr. President, without opposition. But permit me at this time, Mr. President—and may I note ascension to power of my distinguished colleague from Pennsylvania, Senator SANTORUM.

Mr. President, in the absence of a reply, I would ask unanimous consent to proceed with the third amendment which I propose to offer.

The PRESIDING OFFICER (Mr. SANTORUM). Without objection, the pending amendment is set aside.

AMENDMENT NO. 1485

(Purpose: To clarify the standard plaintiffs must meet in specifying the defendant's state of mind in private securities litigation)

Mr. SPECTER. Mr. President, I now send a third amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1485:

On page 110, strike lines 12 through 19, and insert the following:

''(b) REQUIRED STATE OF MIND.—

''(1) IN GENERAL.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

''(2) STRONG INFERENCE OF FRAUDULENT INTENT.—For purposes of paragraph (1), a strong inference that the defendant acted with the required state of mind may be established either—

''(A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or

''(B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Mr. SPECTER. Mr. President, I thank the clerk. I sense that the clerk was surprised I had not asked unanimous consent and permitted the clerk to read the amendment. But I did so just for a change of scene on C–SPAN2. Since there is nobody here to argue with me, at least let there be some break in the action. The formulation of the amendment by my distinguished chief counsel, Richard Hertling, was as clear and succinct as I could have articulated it.

Mr. President, this again involves a question which might be viewed as being esoteric and legalistic unless you are someone who has lost money in the stock market and seek to make a recovery, unless you are one of the people who has participated in the stock transactions in excess of $3.5 trillion or have been among those who have bought stock in the market, more than

$54 billion worth in 1993, the most recent year available for statistical summary. And what this amendment seeks to do, Mr. President, is to amplify the language of the bill which imposes a very difficult pleading burden on the plaintiff. Let me take just a moment or two to say what goes on in a lawsuit.

When somebody loses money because they bought stock where there has been a misrepresentation, and that person goes to a lawyer, they may have a relatively small amount of stock, say $1,000 worth, or $10,000 worth, or even $100,000 worth. That is not a sufficient sum to be able to carry forward litigation which is very, very costly on all sides, so class actions are authorized under the rules of civil procedure where many plaintiffs can join together and there is a sufficient sum so that the lawsuit can be brought forward.

Then the lawyer—and I have been on both sides, filing complaints and filing motions to dismiss—has to prepare a complaint, and the complaint involves allegations. An allegation is a statement of what the party represents happened. And then there is an answer filed by the defendant or the defendant may file what is called a motion to dismiss, if the defendant makes the representation that even assuming everything in the complaint is true, there is not a sufficient statement to constitute a claim for relief under the Federal rules, to warrant a recovery.

When these rules of civil procedure were formulated back in the 1930's, and I had the good fortune in law school to have the distinguished author of the Federal Rules of Civil Procedure, Charles E. Clark, the former dean of Yale Law School who was then a judge on the Court of Appeals for the Second Circuit and came to the law school to instruct us law students—there was done what was called notice pleading so that there did not have to be any elaborate statement as to what the case was about. It could be very simple. There was a case called Jabari versus Durning, if my recollection is correct, where a person just scribbled some notes on a piece of paper, went to the clerk's office and filed it.

And the effort was made at that time to have a notice pleading, contrasted with a common law pleading under Chitty where the averments had to be very, very specific. If he did not say it exactly right, you were thrown out of court. It was very complicated. And I can recall the early days practicing, going to the prothonotary in the Philadelphia Court of Common Pleas, which draws a smile from my learned colleague who is also a lawyer. There was no way that I could draw the complaint with sufficient specificity to satisfy the clerks, who would take some delight in rejecting legal papers filed by young lawyers. So at any rate, this bill seeks to have a very tough standard for pleading. And I think that it is a good point.

And what the draftsmen have done is gone to the Court of Appeals for the second circuit, and they have drafted a type of pleading requirement which was articulated by the chief judge of the court of appeals by the name of John Newman, who was a classmate of mine in law school and studied at the same one as the distinguished jurist, Charles Clark, the chief judge. And now Judge Newman is chief judge in his place. And this required state of mind provides that:

> In any private action arising under this title, the plaintiff's complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

Now, that is the toughest standard around. And that is fine. We ought to move away from notice pleading and really make the plaintiff state with specificity the state of mind. But when the Court of Appeals for the second circuit handed down this very tough rule, they went just a little farther and said what would give rise to an inference so that there would not be guessing on the part of the plaintiffs. And this is what Judge John Newman, who established this standard in the case of Beck versus Manufacturers Hanover Trust Co., said:

> These factual allegations must give rise to a ''strong inference'' that the defendants possessed the requisite fraudulent intent.
>
> A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

Now, what my amendment seeks to do, Mr. President, is to put into the statute the same things that Judge Newman was citing when he posed this very tough standard pleading. Judge Newman and the court said that the strong inference that the defendant acted with the required state of mind may be established either:

> (a) alleging facts to show the defendant had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Now, in the committee report, which accompanies this bill, the committee says this:

> The Committee does not adopt a new and untested pleading standard that would generate additional litigation. Instead, the committee chose a uniform standard modeled upon the pleading standard of the second circuit. Regarded as the most stringent pleading standard, the second circuit requires that the plaintiff plead facts that give rise to a ''strong inference'' of the defendant's fraudulent intent. The committee does not intend to codify the second circuit's caselaw interpreting this pleading standard, although courts may find this body of law instructive.

Now, I am a little bit at a loss—and I know that the distinguished Senator from Utah will have a response at this time, or Senator GRASSLEY will, or the Chair will—as to why the—I am just joking about that because there is nobody here to argue with me about this. And it may create some change in my agreeing to the unanimous consent for 2 minutes tomorrow to discuss this with the managers of the bill.

But the committee does say here that they are not adopting a new and untested pleading standard. They are correct. This is tested by the second circuit. But the second circuit in the whole series of cases has found that the way to make this determination is through these inferences which I have added in this amendment. And the committee does say accurately that this is the most stringent pleading standard around. And then the committee says that it does not intend to ''codify the second circuit's caselaw interpreting this pleading standard, although the courts may find this body of law instructive.''

Well, if we do not have it the way the second circuit says you plead it, but only saying this is instructive, then this bill allows courts to interpret this tougher pleading standard anyway they choose, and courts may impose some standards which go far beyond what the second circuit and Judge Newman had in mind in imposing this tough pleading standard. And it is one thing for the committee to say that they are not adopting a new and untested pleading standard, but it is only halfway if it does not put into the statute but leaves open the question of how you meet this standard.

I do wish I had the managers here to question them about precisely what they have in mind. And I am going to have to figure out some way, Mr. President, to raise this issue. Maybe I will offer this amendment in another form later so we can have some discussion and debate on it, because there is not really any explanation or any way to respond to or to understand what the committee has done here, because what they have done in essence is say the second circuit has a tough pleading standard; let us take it. But when the second circuit amplifies and says how you meet that standard, the committee says no, no, we are not going to adopt that.

What I am trying the do in this amendment is simply complete the picture and have in the statute this standard so that people know what they are to do on the pleading. Now, I know my colleague from Utah will have a comprehensive reply on this substantive issue.

Mr. BENNETT. Comprehensive is in the eye of the beholder, Mr. President.

Mr. SPECTER. If the Senator will yield for a question?

Can you give me in a beholder's eye what you are about to say is comprehensive?

Mr. BENNETT. I would say—

Mr. SPECTER. I think that question may be even understandable on C-SPAN2.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. The issue did come up. We did discuss it in the committee at some length. And even though I am not a lawyer, I think I did follow the conversation on this one. My understanding —which I think is what the Senator has said, but I will repeat it so that we have a common basis here—my understanding is that there was concern about different standards and different circumstances. And the committee decided they wanted to codify the standard from the second circuit. Now, the committee intentionally did not provide language to give guidance on exactly what evidence would be sufficient to prove facts giving rise to a strong inference of fraud. They felt that adopting the standard would be sufficient.

Obviously, the Senator from Pennsylvania disagrees with that decision. But the decision was intentional. This is not an inadvertent thing that the committee did. And they felt that with the second circuit standard being written into the bill, it was best to stop at that point and allow the courts then the latitude that would come beyond that point.

Beyond assuring the Senator that this was a deliberate decision within the committee by the drafters of the bill, both staff and members, I probably cannot give him any further enlightened knowledge on this particular subject.

Mr. SPECTER. Mr. President, I thank my distinguished colleague for that response.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. But I must say, I do not understand the logic of what the committee has done when they utilize the second circuit standard which they say is the most stringent standard, and the second circuit is given a road map as to how you meet it.

The legislation might not say this is the only way to meet it, but this is one of the ways to meet it so that when somebody is drafting a pleading, a party has knowledge and notice as to how to go about it. When the committee takes credit here for not adopting a new and untested pleading standard, I give them credit, because it is something which has already been tested. It is not new, but is incomplete if it does not have the second part of what the second circuit said as to how you meet the standard. It simply to me does not follow.

I shall not pursue it because I understand the distinguished Senator from Utah is not the draftsman.

Mr. President, that concludes the argument, and I do not think there is any point at this late hour in keeping the staff here if we are not going to have any reply. So, Mr. President, I yield the floor. If my colleagues are here and intend to make some reply, if they are on the premises, I will wait a reasonable period of time, but only that, in view of the lateness of the hour.

Mr. DORGAN. Mr. President, I rise today to discuss briefly my thoughts about the securities litigation reform bill, S. 240 sponsored by Senators DODD and DOMENICI that is being considered on the Senate floor.

No one disagrees with the goals of S. 240, which are to help pull the plug on frivolous and unmeritorious securities fraud lawsuits and to secure greater protections for those innocent victims in fraud litigation. But regrettably this bill, as it is currently drafted, will make it more difficult for innocent fraud victims to bring legitimate fraud cases. It also limits their ability to recover all of their losses from fraud perpetrators in those cases that they win. For these reasons, I intend to vote no.

Some of the provisions in the bill are long overdue. The bill would limit unreasonable attorney's fees in securities fraud cases. It also prohibits bonus payments and referral fees which may create an incentive to file frivolous cases. Moreover, it requires lawyers to provide all plaintiffs with more information about the nature of a proposed settlement in class action cases—including a statement about the reasons for settlement, about an investor's average share of the award and the amount of the attorney's fees and costs. I support all of these provisions.

But other provisions in the bill could effectively shield from liability those perpetrators who knowingly mislead or defraud investors. And if there is one thing that the investors of this country have a right to expect, it is that those who commit fraud or those who substantially assist in fraud get punished and that they are forced to return their ill-gotten gains to honest victims of their misdeeds.

In the 1980's, a flood of S&L executives openly flouted the law and the trust of their investors and depositors. Some of them lived like maharajahs while building monuments of worthless paper. This charade perpetrated by these swindlers contributed to a bailout of the industry that is costing the taxpayers of America as much as $500 billion to clean up. Innocent investors were bilked out of tens of billions of dollars and their ability to recover their losses has been limited.

Congress enacted tough legislation to ensure that this debacle will not happen again. I recall legislation that I offered, which passed Congress, prohibiting S&L's from investing in risky junk bonds and requiring them to divest the ones they already own. Some S&L's were actually selling worthless junk bonds to investors out of their lobbies. It never should have happened. But still many unwary investors lost a bundle on junk bonds offered by these deceptive fast-buck artists before Congress acted to stop this activity.

We ought to pass tough, reformed-minded securities legislation that stops the abusive legal cases that are filed to simply line the financial pockets of unscrupulous lawyers and professional plaintiffs. The companies that are the targets of such lawsuits are rightfully concerned about frivolous lawsuits. Meritless cases unnecessarily divert the much-needed resources and attention of firm personnel to defending these cases rather than allowing the companies to focus on product improvement and on their global competitors.

But I think that S. 240 as drafted goes too far toward immunizing those who are guilty of securities violations from liability. The provisions that shield these wrongdoers in securities fraud cases from liability are unfair to the innocent victims of fraud. And it sends the wrong message to our securities market that fraudulent behavior will be tolerated, if not sanctioned.

We must not insulate the white collar crowd who would exploit unwary investors for their own personal gains. Those responsible for the S&L scandal and those responsible for fraud in the future should pay. That's why I will vote against S. 240, unless it is substantially improved before the Senate votes on final passage.

Mr. HATFIELD. Mr. President, the Private Securities Litigation Reform Act of 1995, of which I am a cosponsor, is not about aiding perpetrators of fraud in the financial markets or hurting small investors. This legislation is about curtailing the abuses in this country's securities litigation system and empowering defrauded investors with greater control over the class action process. This legislation would restore fairness and integrity to our securities litigation system.

This legislation assists small investors by requiring lawyers to provide greater disclosure of settlement terms, including reasons why plaintiffs should accept a settlement. This is a common sense approach which is often lacking under the current system. This legislation also incorporates public auditor disclosure language. S. 240 requires that independent public accountants report to their client's management any illegal act found during the course of an audit. If the management of the company or the board of directors fail to notify the Securities and Exchange Committee of the illegal act, the auditor is required to inform the SEC or face civil penalties. This is needed reform which assists all investors who rely on accountants to act in an independent manner on their behalf.

I would like to close my statement on the Private Securities Litigation Reform Act of 1995 by highlighting some statistics from an article in today's issue of the Wall Street Journal. The article notes that the net legal costs of accounting firms has increased from 8 percent of their total revenue in 1990 to 12 percent of revenue in 1993. That is a 50 percent increase in net legal costs in just 3 years. In one of the cases cited in the article, it notes that an accounting firm spent $7 million defending itself in a case where the jury

ruled in the accounting firms favor. That is $7 million spent just to prove that the firm was innocent. As these statistics show, common sense should be reintroduced to our securities litigation system, and this legislation does just that. Common sense benefits all parties in the securities litigation system, especially investors, which is fundamental to this legislation.

Ms. MIKULSKI. Mr. President, I rise today to speak in support of the Securities Litigation Reform Act. I like this bill for three reasons: It stops the bounty hunters, it puts people who have lost money in charge, and it penalizes people who commit fraud.

Mr. President, we are finally moving on this issue. We've moved beyond discussing whether or not there is a problem—to discussing exactly what reforms are needed.

Here is what I think. First, let us stop the bounty hunters. This bill says that lawyers can't shop around for clients. I mean—a lawyer will not be able to pay a commission to someone else to find them a client.

I have heard of instances where lawyers seek out clients just so they can have cases to litigate.

Second, I think the people who lose the most money should have the most to say. By that I mean—with this bill the court will be able to pick one person—who has lost a lot of money in a class action suit—to be the leader. This way the system works for investors instead of against them.

Third, Mr. President, I am all for ending fraud and protecting businesses that are just trying to create jobs. This bill will not apply to people who knowingly cheat investors.

I have talked to several investors and I have heard from the people of Maryland on this issue. Accountants tell me that some attorneys pay stockbrokers, and others, in return for information about possible lawsuits and possible clients. That is unacceptable. Courts are for protecting the rights of people and promoting fairness, not for frivolous lawsuits.

Companies are hit with higher insurance costs, time in court and are generally distracted from the mission of creating jobs. Lawsuits mean that companies are reluctant to provide the kind of public information that can benefit investors.

In Maryland, high-technology companies are hit the most by this problem. That means these unnecessary lawsuits are costing Maryland citizens—lost jobs and lost opportunities.

Mr. President, this is not about protecting some ''savings and loan con artist'' as the ads say. This bill is about saving jobs and keeping the courthouse doors open to those who really need to get inside.

I support this bill because I believe it will create jobs. We needs investors. We need new companies. We need new jobs. But we will not have any new jobs if companies cannot invest or ask people to invest in their future.

Mr. President, this legislation is long overdue. I am pleased this day has come, and I am pleased that this reform has overwhelming bipartisan support.

It is time we look at liability issues and liability reform not on a partisan basis but on an American basis. It is in the best interest of business and it is in the best interest of the consumers. We can do both, because this bill does both.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak for 6 minutes as in morning business.

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

Mr. GRASSLEY. I thank the Chair.

(The remarks of Mr. GRASSLEY pertaining to the introduction of S. 974 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. BENNETT. Mr. President, I ask unanimous consent that the pending amendment be set aside.

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

AMENDMENT NO. 1486

(Purpose: To make certain technical amendments, and for other purposes)

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

The PRESIDING OFFICER. The clerk will report.

The assistant clerk read as follows:

The Senator from Utah [Mr. BENNETT], for Mr. D'AMATO, for himself and Mr. SARBANES, proposes an amendment numbered 1486.

Mr. BENNETT. 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 84, line 11, strike '', if'' and insert ''in which''.

On page 111, beginning on line 2, strike ''during the pendency of any motion to dismiss,''.

On page 111, line 4, insert ''during the pendency of any motion to dismiss,'' after ''stayed''.

On page 114, line 13, strike ''has been,''.

On page 114, strike line 15 and insert the following: ''made—

''(i) was convicted of any felony or misdemeanor''.

On page 114, strike line 17 and insert the following: ''15(b)(4)(B); or

''(ii) has been made the subject of a ju-''.

On page 114, line 20, strike ''(i) prohibits'' and insert the following:

''(I) prohibits''.

On page 115, line 1, strike ''(ii) requires'' and insert the following:

''(II) requires''.

On page 115, line 4, strike ''(iii) determines'' and insert the following:

''(III) determines''.

On page 116, between lines 11 and 12, insert the following:

''(D) made in connection with an initial public offering;

On page 116, line 12, strike ''(D)'' and insert ''(E)''.

On page 116, line 17, strike ''(E)'' and insert ''(F)''.

On page 118, line 13, before the period insert ''that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation''.

On page 121, line 7, strike ''has been,''.

On page 121, strike line 9, and insert the following: ''made—

''(i) was convicted of any felony or misdemeanor''.

On page 121, strike line 11 and insert the following: ''15(b)(4)(B); or

''(ii) has been made the subject of a ju-''.

On page 121, line 14, strike ''(i) prohibits'' and insert the following:

''(I) prohibits''.

On page 121, line 16, strike ''(ii) requires'' and insert the following:

''(II) requires''.

On page 121, line 19, strike ''(iii) determines'' and insert the following:

''(III) determines''.

On page 122, between lines 20 and 21, insert the following:

''(D) made in connection with an initial public offering;

On page 122, line 21, strike ''(D)'' and insert ''(E)''.

On page 123, line 1, strike ''(E)'' and insert ''(F)''.

On page 124, line 21, insert before the period ''that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation''.

On page 128, line 25, strike ''the liability of'' and insert ''if''.

On page 128, line 25, strike ''offers or sells'' and insert ''offered or sold''.

On page 129, line 1, strike ''shall be limited to damages if that person''.

On page 129, line 9, strike ''and such portion or all of such amount'' and insert ''then such portion or amount, as the case may be,''.

On page 131, lines 19 and 20, strike ''that person's degree'' and insert ''the percentage''.

On page 131, line 20, insert ''of that person'' before the comma.

Mr. BENNETT. Mr. President, I ask unanimous consent that the amendment be agreed to and that the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

So the amendment (No. 1486) was agreed to.

MORNING BUSINESS

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

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

IS CONGRESS IRRESPONSIBLE? THE VOTERS HAVE SAID YES

Mr. HELMS. Mr. President, the impression simply will not go away: The