morning business. Morning business is closed.

CLASS ACTION FAIRNESS ACT OF 2005

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 5, which the clerk will report.

The bill clerk read as follows:

A bill (S. 5) to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, as the Presiding Officer has noted, we are continuing consideration of class action reform. Yesterday, we had opening statements, which I led off as chairman of the Judiciary Committee, and the ranking member, Senator LEAHY, made his opening statement. Senator HATCH spoke. We will be going to an amendment this morning by Senator DURBIN on mass actions.

The class action bill has as its central focus to prevent judge shopping to various States and even counties where courts and judges have a prejudicial predisposition on cases. The issue of diversity of citizenship has been created in the Federal courts to eliminate favoritism. When diversity jurisdiction was established, it was undertaken in the context of the claimant from one State, illustratively, Virginia coming to Pennsylvania, and the concern there was there might be some favoritism for the local resident in Pennsylvania. So the jurisdictional amount, when I was in the practice of law, was $3,000. It is now $75,000 which would put the case in the Federal court where there would be more objectivity. That is what they are trying to do here, to eliminate judge shopping.

If the cases which stay in the State court have two-thirds of the class from that State, it would go into the Federal court. If one-third or less is not from the State—in the one-third to two-third range—it would be the discretion of the judge.

As I said yesterday, there is, as far as I am concerned, a very important purpose here: to put cases in the Federal court to avoid forum shopping and judge shopping.

With respect to the substantive law, it is my view that the substantive law ought not to be altered. I commented briefly on the Bingaman amendment yesterday where I think it is important that the Federal judges who have the cases would have the discretion to apply State law. But that will be taken up sometime when we debate the matter later.

I want to yield now to Senator MCCONNELL for leadership time or time as he may choose.

Mr. MCCONNELL. Mr. President, I thank the chairman of the Judiciary Committee.

I rise to speak about a case that I believe perfectly illustrates some of the problems with our current class action system. This case is, unfortunately, not at all unique. These outrageous decisions happen all too frequently. The bill currently under consideration will help fix some of these problems.

I have a chart. It is kind of hard to see. Basically, it is a letter that a member of my staff recently got. It included a check. The check is made payable to a member of my staff who received it in the mail. On the check's ''Pay to the Order of'' line, I have covered up the name of the staffer so she may remain anonymous.

I also obscured the name of the defendant in this case. Plaintiffs' lawyers have already soaked them once, and I do not want to give them the opportunity to do it again. I would hate to see others able to sue the company because they heard the company settled at least one class action lawsuit.

Along with this settlement check, my staffer received a letter which says in part:

You have been identified as a member of the class of . . . customers who are eligible for a refund under the terms of a settlement agreement reached in a class-action lawsuit . . . The enclosed check includes any refunds for which you were eligible.

Imagine her excitement. As you know, Senate staffers are certainly not the highest paid people in town. So this woman on my staff told me she was, indeed, thrilled to anticipate what she might be receiving. And then she looked at the enclosed check to see just how big her windfall was. It was a whopping 32 cents. That is right, she received a check made out to her in the amount of 32 cents. I guess it goes without saying that she was a little bit disappointed to find out her newfound riches had disappeared already.

Do not misunderstand me. I am not suggesting my staffer deserved a bigger settlement check. In fact, she told me she had no complaint against the defendant, and she never asked to be a part of the lawsuit. Apparently, she just happened to be a customer of the company that was sued, and it was determined that she theoretically could bring a claim against the defendant. So she became a member of ''a class'' who was due a settlement.

If this does not precisely illustrate the absurdity of the current class action epidemic in this country, I do not know what does. To demonstrate just how far out of whack the system is, let's start with the letter notifying my staffer that she was a member of a class action lawsuit and had been awarded a settlement.

This letter and check arrived via the U.S. mail. The last time I checked, it cost 37 cents to send an envelope through the U.S. mail. The settlement check is only for 32 cents. You can probably see where I am headed with this. It cost the defendant in a class action suit 37 cents to send a settlement check worth 32 cents. I don't have the expertise in economics like my good friend and our former colleague Senator GRAMM of Texas, but I can tell you, forcing a defendant to spend 37 cents to send somebody a 32-cent check does not make much economic sense, and it certainly defies common sense.

Let me point out the most disturbing element about this lawsuit. My staffer researched this case, and it may be of interest to all of our colleagues to note that the unwitting plaintiff received 32 cents in compensation from this class action lawsuit, and her lawyers pocketed in excess of $7 million—$7 million. All in all, not a bad settlement if you happen to be a plaintiff's lawyer rather than a plaintiff.

And in case you think my staffer received an unusually low settlement in this litigation, let me quote from the letter accompanying the settlement check:

At the time of the settlement, we estimated that the average [refund] would be less than $1—

The average refund would be less than a dollar—

for each eligible [plaintiff]. That estimate proved correct.

So you see, while the settlement was being arranged, it was clear each plaintiff on average would receive less than $1. It was clear that each plaintiff would receive less than $1. Yet the plaintiffs' lawyers still rake in more than $7 million.

My colleagues may also be interested to know how much the defendant was forced to spend defending the lawsuit. Knowing the extent of the defense costs is instructive in demonstrating how unjust these abusive suits can be. So we asked the defendant how much it spent defending this suit that provided each plaintiff with pennies and the lawyers with millions. Perhaps not surprisingly, the defendant was not willing to discuss the matter. You see, the defendant told us that if it were readily known just how much they spent defending the suit, then that information would almost certainly be used against them in the future. The defendant feared that if their defense costs were known, then another opportunistic plaintiff's lawyer would file another one of these predatory suits, and then that lawyer would offer to settle for just slightly less than the millions he knew it would cost the defendant to defend the suit.

This case illustrates how plaintiffs' lawyers exploit and abuse defendants under the current system. Can there be any doubt that the current class action system is in need of repair? When the lawyers get more than $7 million and the plaintiff gets a check for 32 cents, something is terribly wrong. When defendants fear to disclose how much they spend fighting these ridiculous suits because to do so would invite even more litigation, something is terribly wrong. Justice is supposed to be distributed fairly. This is clearly not a fair way to distribute justice.

By passing this legislation, we are not going to end every 32-cent award to

plaintiffs and multimillion dollar award to lawyers, but we certainly can curb a great deal of this nonsense.

I know some of my friends on the other side of the aisle will complain this bill will sound the death knell for class actions in State court. Nothing could be further from the truth. This is an important piece of legislation, but it is also a moderate and reasonable piece of legislation.

Frankly, I liked the original version, but we are where we are today, and I will talk more about that in a moment. The bill on the floor is the product of not one, not two, but three carefully crafted compromises. Not one, not two, but three carefully crafted compromises. These carefully crafted compromises have us to a point where we can enact meaningful reform that respects the ability of States to adjudicate local controversies as class actions while allowing Federal courts to decide truly national class actions.

The House, frankly, would prefer a stronger bill, and so would I. I like the original bill that stalled out at 59 votes last year. But the House also understands that the legislation on the floor is a good bill.

Therefore, the House is prepared to take this up and pass it without amendment, assuming that our carefully crafted compromise is itself not compromised on the Senate floor.

I had an opportunity to talk to Majority Leader TOM DELAY this morning and he reiterated the statement that he and Chairman JIM SENSENBRENNER made last Friday and it is this: If this bill is passed without amendment in the Senate, the House will take it up immediately, pass it, and send it to the President for signature. If it is altered in any way, the House will then follow the regular order and maybe sometime during this Congress we will get a class action bill.

Frankly, in my judgment, those who are skeptical of this bill would be better off with this compromise version than having the House go through the regular order, in which case they would probably pass a bill much different from this compromise. We would ultimately have a conference and in all likelihood, out of that conference might come a bill more like the one we had last year, which stalled out at 59 votes.

So I would say that for those who are not terribly enthusiastic about this compromise, it could get a lot worse from their point of view. This compromise is one that people who have worked on this bill for years are willing to take, and so our challenge is to keep it clean, to defeat the amendments that would slow down the process and prevent this important piece of tort reform legislation from getting to the President for an early signature. So that is where we are.

We have a marvelous opportunity to demonstrate at the beginning of this Congress that we are indeed going to be able to accomplish some important things on a bipartisan basis. This compromise bill appears to have at least 62 Senators who are for it. Let us hold it together. Let us keep it as it is and demonstrate to the American public that we can work together on a bipartisan basis and pass important legislation for our country.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the next Senator to seek recognition is Senator DODD. I am informed Senator LOTT will be coming to the floor shortly to speak, and that soon thereafter Senator DURBIN will offer his amendment. It is now 11:18. That should take the time for floor action until the hour of 12:30 when we are scheduled under a previous order to recess for the party caucuses. So I now yield to Senator DODD.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I begin by thanking our colleague from Pennsylvania for his leadership on this issue as the new chairman of the Senate Judiciary Committee, and also to commend our colleague from Vermont, Senator LEAHY, the ranking Democrat on the committee. Despite their differences on this legislation, we are debating this bill because the managers have gone through the committee process and have produced a product for the consideration of the full Senate. I am pleased this bill is finally before us once again. It has been a year and a half since we last considered this legislation.

I also commend the two leaders, Senators FRIST and Daschle, for working as early as the fall of 2003 to try and craft a compromise. Senator REID of Nevada has picked up on this and I want to particularly commend Senator REID. He has some strong reservations about this bill, as many of our colleagues do, but he has arranged, as the Democratic leader can, for this matter to come forward. Certainly all of my colleagues are fully aware that a determined minority can pretty much stop anything from happening, but the Senator from Nevada, despite his reservations about this legislation, has worked through the process with the distinguished majority leader.

The chairman of the committee, the ranking member, and those who are interested in this bill are trying to move this matter forward. So I would not want to begin my comments without commending the leaders, but particularly the Democratic leader, my leader, for putting in the time and effort to see to it that this matter dealing with class action be a part of the Senate debate.

The legislation has had a rather long and torturous history, going back a number of years. I am not going to recite at length that history. I will only note that several of our colleagues deserve to be acknowledged for their long and steady persistence in bringing the Senate to this point. Those Senators include Senator GRASSLEY of Iowa, Senator KOHL of Wisconsin, Senator HATCH of Utah, and Senator FEINSTEIN of California. They have worked on the Judiciary Committee, in a very strong bipartisan fashion, to try and bring this matter up.

I also want to highlight and mention Senator CARPER of Delaware who has been tireless in his support for this effort. Senator MCCONNELL as well has worked on this issue. Senator LANDRIEU, and Senator SCHUMER, I should mention as well, as a member of the Judiciary Committee, have also been a part of an effort to try and come up with a bill that could enjoy broad-based support.

I mentioned Senators SPECTER and LEAHY at the outset of my remarks as the chairman and ranking member who also worked well together to bring us to this point. I want to point out to my colleagues, of course, as someone who was very much involved in the negotiations back in the fall of 2003, that when the cloture motion failed, as pointed out by the Senator from Kentucky, within a few moments of that vote this Senator rose and offered to the majority at that point a willingness to sit down that day in fact to try and work out differences that would allow for this bill to go forward.

The distinguished majority leader accepted that offer and we immediately began a process to put this bill together. In fact, several of us sent a letter at that time to Senator FRIST. The letter was sent by myself, Senator LANDRIEU, Senator SCHUMER, and Senator BINGAMAN, outlining four areas that we thought if we could be accommodated in these areas the bill could go forward in a bipartisan fashion.

I ask unanimous consent that the letter dated November 14, 2003, from three of my colleagues and me to Senator FRIST be printed in the RECORD.

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

U.S. SENATE,
Washington, DC, November 14, 2003.

Hon. BILL FRIST,
Senate Majority Leader,
U.S. Capitol, Washington, DC.

DEAR MAJORITY LEADER FRIST: We agree with the fundamental principle of the pending class action legislation that would permit removal of national class actions to federal court. Under current law, there have been a number of instances of unjustified forum-shopping and other abuses of the legal process. We are committed to helping to reform the law to ensure fair adjudication for all Americans. To that end, we are writing to outline the policies that need to be addressed in order to move the Senate toward a bill that can pass before Congress adjourns for the year.

While we support the general thrust of S. 1751, there are some instances where the legislation goes beyond the scope of what we believe must be addressed. It is our view that we are very close to having a bill that we can support and if we can satisfactorily address each of the following issues, we can move forward quickly with you to pass a reform bill.

Based upon our understanding of the issues that have been discussed by you and the

Democratic Leader, we believe that most of our concerns are readily solvable [while a narrow subset may require some further negotiation to resolve.]

We believe more consideration must be given to the formula for federal removal. We agree that many types of cases are best considered in federal court. At the same time, we would not want the Senate to fashion rules that permit the removal of cases that are truly single-state cases which are appropriately considered in state court. Additionally, we should permit federal court judges to consider a set of factors that includes both state and federal concerns when determining whether a case in the ''middlethird'' of the current formula should be removed.

Mass tort actions that are not brought as class actions should be removed from the bill. The bill passed by the Judiciary Committee did not contain this language. We understand that the peculiarities of state law in two states may need to be addressed. However, the current mass tort standard is much broader than necessary to address issues raised by two of the fifty states. We want to write a rule that is as precise as possible—in this case, by encompassing actions that are truly class actions, while at the same time excluding any cases that are not.

There are several places in the bill that pre-empt current law or allow for significant deviation from standard practice. This has the effect of encouraging manipulation or abuse by either side, and should not be allowed in reform legislation. The current version of the removal provision permits removal at any time, even during trial. This includes a potential ''merry-go-round effect'' of repeated removal and remand between state and federal courts. Additionally, the underlying bill does not specify when the court would measure the plaintiff class and it creates a new appellate review of remand orders.

In many cases, plaintiffs, who take the risk of coming forward, should be able to be compensated for that risk. The bill currently requires their recovery to be precisely the same as all other members of the class. Different risks and different damages in civil rights and other claims, should receive different compensation, upon approval of the trial judge.

Lastly, the underlying bill simply restates current law in requiring judges to review coupon settlements. Given the clear problems that have been raised with abusive coupon settlements, we believe it is imperative to include stronger provisions that the attorneys' fees to the actual coupons redeemed.

While time is short in this session, there is no reason why the Senate cannot consider this legislation in a bi-partisan spirit. If we indeed reach agreement, it is critical that the agreement be honored as the bill moves forward—both in and beyond the Senate. We are prepared to work with you toward that end and we look forward to hearing from you soon as possible as to how we can best move this legislation forward.

Sincerely,

MARY L. LANDRIEU.
CHARLES SCHUMER.
CHRISTOPHER J. DODD.
JEFF BINGAMAN.

Mr. DODD. As a result of that letter, we went through several days of negotiations on this bill. The four areas that we sought changes in the bill are the following: Removal of formula including the definition of mass torts; the so-called merry-go-round problem in the bill; coupon settlements; and fair compensation for named plaintiffs. Those are the four areas we identified in the November 14 letter. As a result of our negotiations, we came back with 12 improvements in this bill, agreed to by myself, Senators FRIST, GRASSLEY, HATCH, KOHL, LANDRIEU, and SCHUMER.

I ask unanimous consent that the list of the 12 changes that was a result of that negotiation be printed in the RECORD.

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

SUMMARY OF CHANGES TO S. 1751 AS AGREED TO BY SENATORS FRIST, GRASSLEY, HATCH, KOHL, CARPER, DODD, LANDRIEU, AND SCHUMER

THE COMPROMISE IMPROVES COUPON SETTLEMENT PROCEDURES

S. 1751 would have continued to allow coupon settlements even though only a small percentage of coupons are actually redeemed by class members in many cases.

The compromise proposal requires that attorneys fees be based either on (a) the proportionate value of coupons actually redeemed by class members or (b) the hours actually billed in prosecuting the class action. The compromise proposal also adds a provision permitting federal courts to require that settlement agreements provide for charitable distribution of unclaimed coupon values.

THE COMPROMISE ELIMINATES THE SO-CALLED BOUNTY PROHIBITION IN S. 1751

S. 1751 would have prevented civil rights and consumer plaintiffs from being compensated for the particular hardships they endure as a result of initiating and pursuing litigation.

The compromise deletes the so-called ''bounty provision'' in S. 1751, thereby allowing plaintiffs to receive special relief for enduring special hardships as class members.

THE COMPROMISE ELIMINATES THE POTENTIAL FOR NOTIFICATION BURDEN AND CONFUSION

S. 1751 would have created a complicated set of unnecessarily burdensome notice requirements for notice to potential class members. The compromise eliminates this unnecessary burden and preserves current federal law related to class notification.

THE COMPROMISE PROVIDES FOR GREATER JUDICIAL DISCRETION

S. 1751 included several factors to be considered by district courts in deciding whether to exercise jurisdiction over class action in which between one-third and two-thirds of the proposed class members and all primary defendants are citizens of the same state.

The compromise provides for broader discretion by authorizing federal courts to consider any ''distinct'' nexus between (a) the forum where the action was brought and (b) the class members, the alleged harm, or the defendants. The proposal also limits a court's authority to base federal jurisdiction on the existence of similar class actions filed in other states by disallowing consideration of other cases that are more than three years old.

THE COMPROMISE EXPANDS THE LOCAL CLASS ACTION EXCEPTION

S. 1751 established an exception to prevent removal of a class action to federal court when 2/3 of the plaintiffs are from the state where the action was brought and the ''primary defendants'' are also from that state (the Feinstein formula). The compromise retains the Feinstein formula and creates a second exception that allows cases to remain in state court if: (1) more than 2/3 of class members are citizens of the forum state; (2) there is at least one in-state defendant from whom significant relief is sought and who contributed significantly to the alleged harm; (3) the principal injuries happened within the state where the action was filed; and (4) no other class action asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons has been filed during the preceding three years.

THE COMPROMISE CREATES A BRIGHT LINE FOR DETERMINING CLASS COMPOSITION

S. 1751 was silent on when class composition could be measured and arguably would have allowed class composition to be challenged at any time during the life of the case. The compromise clarifies that citizenship of proposed class members is to be determined on the date plaintiffs filed the original complaint, or if there is no federal jurisdiction over the first complaint, when plaintiffs serve an amended complaint or other paper indicating the existence of federal jurisdiction.

THE COMPROMISE ELIMINATES THE ''MERRY-GO-ROUND'' PROBLEM

S. 1751 would have required federal courts to dismiss class actions if the court determined that the case did not meet Rule 23 requirements. The compromise eliminates the dismissal requirement, giving federal courts discretion to handle Rule 23-ineligible cases appropriately. Potentially meritorious suits will thus not be automatically dismissed simply because they fail to comply with the class certification requirements of Rule 23.

THE COMPROMISE IMPROVES TREATMENT OF MASS ACTIONS

S. 1751 would have treated all mass actions involving over 100 claimants as if they were class actions. The compromise makes several changes to treat mass actions more like individual cases than like class actions when appropriate.

The compromise changes the jurisdictional amount requirement. Federal jurisdiction shall only exist over those persons whose claims satisfy the normal diversity jurisdictional amount requirement for individual actions under current law (presently $75,000).

The compromise expands the ''single sudden accident'' exception so that federal jurisdiction shall not exist over mass actions in which all claims arise from any ''event or occurrence'' that happened in the state where the action was filed and that allegedly resulted in injuries in that state or in a contiguous state. The proposal also added a provision clarifying that there is no federal jurisdiction under the mass action provision for claims that have been consolidated solely for pretrial purposes.

THE COMPROMISE ELIMINATES THE POTENTIAL FOR ABUSIVE PLAINTIFF CLASS REMOVALS

S. 1751 would have changed current law by allowing any plaintiff class member to remove a case to federal court even if all other class members wanted the case to remain in state court. The compromise retains current law—allowing individual plaintiffs to opt out of class actions, but not allowing them to force entire classes into federal court.

THE COMPROMISE ELIMINATES THE POTENTIAL FOR ABUSIVE APPEALS OF REMAND ORDERS

S. 1751 would have allowed defendants to seek unlimited appellate review of federal court orders remanding cases to state courts. If a defendant requested an appeal, the federal courts would have been required to hear the appeal and the appeals could have taken months or even years to complete.

The compromise makes two improvements: (1) grants the federal courts discretion to refuse to hear an appeal if the appeal is not in the interest of justice; (2) Establishes tight deadlines for completion of any appeals

so that no case can be delayed more than 77 days, unless all parties agree to a longer period.

THE COMPROMISE PRESERVES THE RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE

The compromise clarifies that nothing in the bill restricts the authority of the Judicial Conference and Supreme Court to implement new rules relating to class actions.

THE COMPROMISE IS NOT RETROACTIVE

Unlike the House bill, the compromise will not retroactively change the rules governing jurisdiction over class actions.

Mr. DODD. I will not go through and name each one of them. Some of them are rather arcane but nevertheless important provisions of this bill, the point being that we were prepared basically in the fall of 2003 to go forward.

We were notified at that point that the first item of business in January of 2004, more than a year ago, would be the class action reform bill. Well, here we are in February of 2005 finally getting to this matter. There was a prepared bipartisan bill over a year ago on class action and we are now dealing with exactly the same bill. As the Senator from Kentucky pointed out, he would have preferred the House bill, the bill that was not approved when the cloture motion was held, and reluctantly is supporting this bill.

There are those of us who could not have supported the House bill or the version that came up in the Senate earlier, but we have worked very hard to put this compromise together over a year ago. So we could have dealt with this a long time ago, but nonetheless we are here today and that is the good news.

I am heartened that the other body has agreed to accept this version if it goes unamended over the next day or so during the debate and consideration of this legislation. I am hopeful that will be the case.

Very briefly, I will go through what we have achieved. As I mentioned, following the vote Senator FRIST asked myself and others, including my good friend from Delaware who is on the floor today, to enter into discussions with him and other Members to explore whether there might be some ways of building greater support for this bill. Senators SCHUMER and LANDRIEU joined in writing a letter to the majority leader, which I have put into the RECORD already, in which we laid out the four areas of our concerns. We subsequently entered into those negotiations among our four offices. Senators GRASSLEY, KOHL, HATCH, and CARPER played very important roles in that consideration. Those negotiations were very productive. We reached significant agreement not on the four original areas of concern but on eight others as well. That point deserves special emphasis. We went into the negotiations seeking improvement on four issues. We emerged with significant changes on 12 issues.

The result is a bill that is now before this body. In my view, it is very fair and balanced, rather modest legislation that addresses a number of well documented shortcomings in our Nation's class action system. It shows what we can accomplish in the Senate when we work together in a bipartisan fashion. As with all good compromises, this bill is entirely satisfactory to no one and in some respects unsatisfactory to everyone.

There are those who will say this bill does not go nearly far enough in rectifying the shortcomings of the class action system in our country. On the other hand, there are those who believe that the sky is falling, that the bill severely impairs the ability of people to gain access to our courts. In my judgment, claims of both sides are vastly overstated. One of the reasons why I believe this is so is that the people on both sides of the legislation, proponents and opponents alike, agree our compromise has made this bill better. It targets more precisely those problems in need of reform and addresses them in an appropriate and effective manner.

We will no doubt discuss those problems in more detail in the coming hours, but allow me to briefly mention two of them. Perhaps the central problem addressed by the compromise is the forum shopping issue. Article III of the Federal Constitution sets forth the circumstances under which cases may be heard in Federal court. Article 2 of Article III extends Federal jurisdiction to suits ''between citizens of different States.'' These are known as diversity cases. The Framers had two separate but related reasons for allowing Federal courts to hear cases between citizens of different States.

Very simply, one was to prevent the possibility that the courts of one State would discriminate against the citizens of another State. The second reason was to prevent the possibility that the courts of one State would discriminate against interstate business and thereby impede interstate commerce. Over the years, however, class action rules have been interpreted in such a way that plaintiffs' lawyers have been able to keep class actions out of Federal court, even those that are precisely the kind of cases for which diversity jurisdiction was created, because of their interstate character. They do this by adding named plaintiffs or defendants solely based on their State of citizenship in order to defeat the diversity requirement.

Alternatively, they allege an amount in controversy that does not trigger the $75,000 threshold for removing cases to Federal court. The result is frequently an absurd one. A slip-and-fall case in which a plaintiff alleges, say, $76,000 in damages can end up in Federal court. At the same time, a case involving millions of plaintiffs from multiple States and billions of dollars in alleged damages is heard in State court, just because no plaintiff claims more than $75,000 in damages or because at least one defendant is from the same State of at least one plaintiff.

Section four of the bill modifies these diversity rules to allow Federal courts to hear diversity cases that have a strong interstate character. In particular, it allows Federal jurisdiction if the amount in controversy alleged by all plaintiffs exceeds $5 million and if any member of the plaintiff class is a citizen of a different State than any defendant. At the same time, the bill creates careful exceptions that allow cases to remain in State courts where those cases are primarily intrastate actions that lack national implications.

The legislation attempts to bring diversity rules more in line with the original purpose of Federal diversity jurisdiction. Cases that are interstate in nature because they involve citizens of multiple States and interstate commerce may be heard in Federal courts. Cases that are not interstate in nature remain in State courts.

A second problem the compromise addresses is the so-called coupon settlements. As our colleagues may know, a growing number of class action cases involves these type of settlements. In a typical coupon settlement, class members receive only a promotional coupon to reduce the cost of a defendant's products while the lawyers for the class action receive a rather large fee that is disproportionate to any client benefit.

For instance, in one case a soft drink company was sued for improperly adding sweeteners in apple juice. The company agreed to settle the case. The settlement required it to distribute to customers a 50-percent coupon off the purchase of apple juice. Meanwhile, class counsel received $1.5 million in cash.

I have no problem with attorneys earning a fee for their services. In fact, the compromise bill places no caps at all on attorney fees, although there were those who wanted to do that.

But what is particularly disturbing about these coupon settlements is class members typically redeem only a small portion of the coupons awarded. In fact, over the years only 10 or 20 percent of coupons were actually redeemed. Yet the attorneys are paid regardless of how many coupons are cashed in.

In effect, there is a negative incentive for counsel for both plaintiffs and defendants to enter into such settlements. Counsel for the plaintiff is paid their fee regardless of the percentage of coupons redeemed. At the same time, counsel for the defendants know they are likely to pay in redeemed coupons only a fraction of what they would pay if they paid cash to settle a case. Meanwhile, the actual class members—the ones who have actually been aggrieved—receive a benefit of little or no value at all.

Our compromise takes several steps to remove this negative incentive to enter into coupon settlements. Most importantly, it states that an attorney's fee incurred to obtain a coupon

settlement can only be paid in proportion to the percentage of coupons actually redeemed. For example, if an attorney's fee for obtaining a coupon settlement is $5 million but only one-fifth of the coupons are actually redeemed, the attorney can only recover one-fifth of his or her fee—roughly $1 million.

In addition, the bill requires that a judge may not approve a coupon settlement until he or she conducts a hearing to determine whether settlement terms are fair, reasonable, and adequate for class members.

There are other provisions of the bill that are also important.

In the interest of time—I see my colleague from Mississippi also wants to speak before our colleague from Illinois offers the first amendment—I will defer discussing them in detail at this hour. However, to reinforce my central argument that this is a reasonable, modest piece of legislation, it is worth mentioning what the bill does not do.

First, it does not apply retroactively, despite those who wanted it to. A case filed before the date of enactment will be unaffected by any provision of this legislation.

Second, this legislation does not distinguish in any way or alter a pending case.

Third, it does not in any way alter substantive law or otherwise affect any individual's right to seek equitable and monetary relief.

Fourth, in does not in any way limit damages, including punitive damages.

Fifth, it does not cap attorney fees.

These are all matters that some people wanted to include in the bill.

And, it also does not impose more rigorous pleading requirements of evidentiary burdens of proof.

As some of our colleagues have said, this legislation is actually more court reform than tort reform. Candidly, I think they are more right than wrong about that. This is more court reform than tort reform. It stands in very sharp contrast to some of the other legislation considered by the Senate in the last Congress. That includes the Energy bill, which extinguished pending and future suits against makers of MTBE, a highly toxic substance that pollutes ground water.

It also includes legislation that shielded gunmakers and gun dealers from many types of lawsuits.

Incredibly, we were about to adopt legislation that would completely exclude an entire industry even when there was complete negligence on their behalf of being sued. I suggested when we were about to adopt those bills that Members think about talking about tort reform. Those matters cause this Senator deep concern, despite the fact I represent the largest gun producers in the United States. I cannot imagine my insurance companies getting a deal as the gun manufacturers were about to get. Nonetheless, those bills died, as they should have, in my opinion.

The legislation before the Senate today does not close the courthouse door to a single citizen in this country. Maybe that citizen will end up in Federal court rather than State court, but no citizen will lose the sacred right in America to seek redress or grievance in a court of law.

When this compromise was written 15 months ago, it was said that it was critical that this bill be honored as the bill moves forward—both within and beyond the Senate. I continue to believe that to be the case.

In the words of the Senator from Kentucky earlier today, as well as statements made by Speaker HASTERT, this Member is assured that, in fact, the agreements will be kept. In fact, I had a conversation with the staff of Mr. SENSENBRENNER, chairman of the House Judiciary Committee, who reinforced the notion that if we adopt this bill as it presently reads, then there will no changes in the House and they will accept the Senate language. That is good news for those of us who have worked on this compromise.

Certainly, this is not a perfect bill. No bill is. We all know that, but I think it strikes a careful balance between remedying the shortcomings and retaining the strengths of current class action practice in this country.

Obviously, the bill is not yet through the Senate. But the consent agreement entered into by the two leaders is an auspicious beginning to preserving the balance.

Let me, once again, reiterate my thanks to Senator REID of Nevada, the distinguished Democratic leader, and for Senator FRIST entering into that agreement which allows us to have this debate, and for all relevant and germane amendments to be considered to this legislation. Certainly, that is the way it ought to be done.

Moreover, I note that the leadership of the other body has indicated its willingness to respect the balance that this bill strikes, as well. That, too, is a positive development.

I stand in strong support of this legislation. I think it is a good compromise. It is not a perfect one. I know my colleagues may offer some amendments that I might have been attracted to under different circumstances which I may support, but when you try to reach agreement here, it is not easy. And when you do, I think it is worthy of support, particularly when those agreements cover as much territory as we did during the compromise efforts 15 months ago.

As I mentioned at the outset, there were four proposals with which we ended the negotiations. Those four proposals were adopted, and eight others were added during that negotiation.

I commend again the leader. I commend Senators SPECTER and LEAHY for their efforts, and I look forward to this bill passing the Senate and being adopted by the House and going to the President for his signature.

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. LOTT. Mr. President, I rise today in strong support of the Class Action Fairness Act of 2005.

Before he leaves the floor, I thank the Senator from Connecticut, Mr. DODD, for his comments and for his leadership in this area. He has been steadfast. He has been involved in the process of moving this bill forward. A process which involves some give and take and some compromise.

Surprise, surprise. That is the legislative process. This is not a perfect bill, as he noted. It is not one that I particularly like. I would like to make it a lot stronger, but it is a major step forward.

I thank Senator DODD, and other Senators. Senator CARPER has been involved in that process, and colleagues on this side of the aisle.

I am pleased that the first substantive bill of the year is one that truly has a chance to make a huge difference in this country, and it is a bipartisan effort. It is one that I predict, when we go through the amendment process and get to the end, will have a large vote in support. I will not be surprised if it gets 70 votes. I hope for that. That would be a positive step.

If we can hold the line on amendments that may be offered—some that I would be attracted to, some that Senators such as Senator DODD would be attracted to—but we worked out an agreement. We should brush back those amendments, discourage a whole raft of amendments being contemplated, and complete our work. The House has indicated they will accept this product—the compromise we came up with. When was the last time you heard of that even being possible?

But they have reaffirmed just in the last few days that, yes, if we can complete it the way it is presently structured, they will take it up, pass our bill, and send it to the President. That would be a good way to start this year.

I thank colleagues on both sides of the aisle for the work that has been done.

Senator HATCH is here managing the legislation. He has worked on this long and hard, including last year when we had an opportunity that slipped away from us for a variety of reasons. It was tough last year to get much of anything done with all of us preoccupied with the Presidential campaign and our Senate campaigns and the House races. There is no use going back and rehashing why we didn't get it completed. We didn't get the job done. But we can do it now.

I thank Senator HATCH for the work he has done on this bill over the years, and Senator SPECTER for getting it out of the Judiciary Committee in good order. I thank Senator GRASSLEY for his usual dogged determination to not give up on an issue, and he continues to press not only this but the bankruptcy reform issues.

I am thankful for the way we are starting off this year. I thank the leadership for working out an agreement to

bring this bill to the floor. We could very well have had a filibuster. But Senator FRIST, working with Senator REID, has indicated we are not going to get into that morass. We are going to step up to this issue, we are going to address it and debate it, and we are going to get results. I think that is good.

I believe the American people want us to complete action on this legislation and pass the bipartisan compromise this week, if at all possible.

There is no reason for this to be dragged out over a long period of time. We know there are a few amendments that are going to be offered. We will debate them. Let us vote and get to the conclusion of this process in the Senate, and send it to the House so they can take it up.

Why do we need this bill?

Some people would say we have the greatest judicial and jurisprudence system in the world. Things are working fine. Let us just leave it alone.

I don't believe things are exactly working just fine. Every system over a period of time needs some adjustment, and if abuses begin to occur, we must step up and stop them.

Over the past decade, we have seen a dramatic rise in the number of interstate class actions being filed in State courts, particularly in what are called magnet jurisdictions. I regret to say, and acknowledge, my State is one of the worst abusers. To the credit of our State legislature and our Governor, Haley Barbour, last year in Mississippi we passed tort reform legislation. We have gone from being the center of jackpot justice to being a State that has been praised by legal journals and the Wall Street Journal as having stepped up to the issue and dealt with it in a responsible way. They now describe my State in this way: Mississippi, open for business.

Prior to tort reform though, businesses, industry, manufacturers, drugstores, etc. would not come to Mississippi to do business. They were not coming to my State, one of the poorest States in the Nation, because of the abuses that have been occurring in the legal system.

But now, we have done our part in Mississippi. We still need to do more, but this is a Federal interstate problem and we in Congress are going to have to help address it.

Courts where the class action mechanism is routinely and egregiously abused have been proliferating. In many instances we know the plaintiffs get little or nothing, and the lawyers have gotten massive fees. I can cite example after example in my State where awards have been de minimus or nothing. Jefferson County, MS, in my State is one of the worst, most abused magnet jurisdictions in the country. Far too often innocent local business men and women are joined as defendants in controversies to which they were merely innocent bystanders, all because plaintiffs' lawyers wanted to file the case in Jefferson County for the purpose of getting a bigger fee. Often, the cases have no other relationship to that county or to my State other than this is a good place to go. This is unconscionable. We have an obligation to our constituents to put a stop to it.

Before going any further, it is important we take note of the title of this legislation: Class Action Fairness Act. This is not just some random title that Senator GRASSLEY or others came up with. The whole point of the bill is to make the class action mechanism fair for all involved.

Some of my colleagues will argue today, I am sure, that the system is already fair. I ask, Is it fair for the plaintiffs in a class action suit to receive nothing, literally nothing, when the lawyers representing them receive $19 million? The citation is Shields et al. v. Bridgestone/Firestone, Inc. et al.

That is an actual case. Is it fair for the claims of residents of Mississippi, Washington, or Maine to be decided according to Illinois State law? Of course not. These are just two of the many reasons we need class action fairness, and we need it now.

Our Nation's judicial system was designed to be the fairest in the world for all litigation, and we have gotten away from that. These abuses have called into question the very fairness of our whole system. It is imperative we act to close these loopholes that have allowed this process to fail in the way that it has.

Before I talk about the specifics of what this bill does, let me take a minute to emphasize a few things the bill does not do. We will hear these allegations over the next few days, I am sure. This bill is not a tort reform bill, it is a court reform bill. This bill does not alter in any way substantive law. There may be some here who would want to debate that. However, I made that point at a meeting earlier today and I have gone back and checked it with experts. That is an accurate statement.

Contrary to the scare tactics of the plaintiffs' lawyers, this bill does not affect an individual's right to seek redress or damages through the court, and it does not in any way limit damages, either punitive or compensatory.

What does it do? First, it expands the jurisdiction of Federal courts over large interstate class actions. Clearly, that is a Federal jurisdictional issue and one we have a right and a real need to get into.

Let's be clear. We are only talking about those cases in which the aggregate amount in controversy exceeds $5 million, in which there are at least 100 plaintiffs, and in which any plaintiff is a citizen of a different State from any defendant. This makes basic sense. Where you have more than 100 class members and where parties to the litigation are from different States, the Federal courts should have jurisdiction. This provides fundamental fairness for all involved. The Framers of our Constitution were concerned about ensuring fairness in cases like this, worried that State courts could be biased in favor of a home State party versus another party who was a resident of a different State. That is the very reason for a Federal diversity jurisdiction.

It only makes sense that we close the loopholes that a growing number are abusing and exploiting with the result of creating a system that is having a huge impact in terms of dollar amounts and business and economic development.

It is also important to note that this bill does not apply to every class action, only those meeting certain criteria. It is not going to result in our Federal courts being overwhelmed by a large number of class actions. We will hear that accusation this week. And it will not move all class actions to Federal court. In fact, it leaves in State courts a significant number of class actions. It reserves for State courts those cases in which all plaintiffs and defendants are residents of the same State. It reserves for State court those class actions with less than 100 plaintiffs. Likewise, class actions involving an amount in controversy of less than $5 million would remain in the State court as would class actions in which a State government entity is the primary defendant.

As a part of the compromise worked out with Senator FEINSTEIN last year, class actions that are brought against a company in its home State and in which two-thirds or more of the class members are also residents of that State would remain in State court.

Finally, State courts would retain jurisdiction over class actions involving local controversies where at least two-thirds of the class members and one real defendant are residents of the State where the action is brought. This bill reserves these cases for State court because it is the right thing to do.

There are other provisions of importance in this bill, including a consumer class action bill of rights. As many know, part of this section represents a compromise worked out by Senators SCHUMER, DODD, and LANDRIEU last year. Notably, it places limitations on contingency awards for attorneys in coupon settlement cases. By basing these contingency fees on the value of the coupons that are actually redeemed, or the amount of time expended by the attorney, it provides for a far greater protection for plaintiff class members. This provision takes a big step toward addressing the grossly inequitable fee awards to attorneys when class members end up with a coupon.

Additionally, by requiring the judge to make a written finding that the benefits to class members substantially outweigh the monetary loss from a settlement, the bill provides an added layer of protection for class members who will suffer a net monetary loss as a result of payment of attorney's fees.

Do not get me wrong. I went to law school. I practiced law for a while. Yes, I was on the defense side of the ledger most of the time. But I have to admit reluctantly that my brother-in-law—I am really not related to him by blood; he married my wife's sister—is one of the, shall we say more famous lawyers in this country, Richard Scruggs. He has brought a lot of lawsuits I don't like. On occasion he actually makes a point with some of those lawsuits. I don't want to put him out of business, but I want some reasonable restraint on how these class action suits have been abused. He has not been one of the ones who actually wound up having abused lawsuits in the courts, as he winds up getting settlements most of the time.

I understand both sides of this equation. I certainly do not want to take away people's right to sue—individuals or even class actions, when they are really a class. That is not what has been happening. There has been an effort to dredge up clients, and it has led to the next area I will talk about, mass actions.

There is language in this bill dealing with mass actions. I understand there may be an effort later today or this week to change this section with an amendment that I understand may be offered. But it is vital that we retain the mass action section of the bill without an amendment so that we don't open the door for lawyers to make an end run around what we are trying to do with class actions in this bill.

The mass action section was specifically included to prevent plaintiffs' lawyers from making this end run. It will ensure that class action-like cases are covered by the bill's jurisdictional provisions even if the cases are not pleaded as class actions.

The amendment that we are hearing may be offered later today is a little sleight of hand. This is a case where you argue that you're only changing one word but, in reality, you fundamentally alter what happens with regard to these mass actions. There are a few States, such as my State—which do not provide a class action device. In those States, plaintiffs' lawyers often bring together hundreds, sometimes thousands of plaintiffs to try their claims jointly without having to meet the class action requirements, and often the claims of the multiple plaintiffs have little to do with each other. There was an instance in my State where you had more plaintiffs in one of these mass actions than you had people in the county, more than the residents in the county. Under the mass action provision, defendants will be able to remove these mass actions to Federal court under the same circumstances in which they will be able to remove class actions. However, a Federal court would only exercise jurisdiction over those claims meeting the $75,000 minimum threshold. To be clear, in order for a Federal court to take jurisdiction over a mass action, under this bill there must be more than 100 plaintiffs, minimal diversity must exist, and the total amount in controversy must exceed $5 million. In other words, the same safeguards that apply to removal of class actions would apply to mass actions.

Mass actions cannot be removed to Federal court if they fall into one of four categories: One, if all the claims arise out of an event or occurrence that happened in the State where the action was filed and that resulted in injuries only in that State or contiguous States. That makes sense. The second exception would be, if it is the defendants who seek to have the claims joined for trial; third, if the claims are asserted on behalf of the general public pursuant to a State statute; and, lastly, if the claims have been consolidated or coordinated for pretrial purposes only.

Some of my colleagues will oppose this mass actions provision and will want to gut it by making an effort to confuse mass actions with mass torts. I realize we are kind of getting into a legalese discussion, but words make a difference when you are considering a bill such as this. I am very concerned that the real motive is to render this provision meaningless, thereby creating a loophole for the trial lawyers to basically get a class action by another name.

Mass torts and mass actions are not the same. The phrase ''mass torts'' refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of events, or exposure to a particular product. In contrast, the phrase ''mass action'' refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one combined trial. Mass actions are basically disguised class actions.

If we enact the amendment that we are hearing may be offered to alter the mass action section, if we do not keep the mass action section intact, we will be knowingly creating a loophole that would undermine our whole effort in getting some responsible reform.

I also understand there is another amendment that will be offered, and it has been referred to as the choice of law amendment. That has a good sound, choice of law. To me, that is another word for shopping around to find the best forum, once again, with no relation to where the incident occurred or where the plaintiffs live, or the defendants, or anything.

I have spoken to several of my colleagues about this amendment in the last week or two, and some of them have even said to me: Don't you think we should include this amendment? My answer is no. This is a bad amendment. In my opinion, it is a poison pill. If we accept this choice of law amendment, basically the plaintiffs' lawyers can go to Federal court and say: OK, it is in Federal court, but we want to look at this State law, that State law, or another State law, depending on which one suits our particular cause the best. If this amendment is offered and passes, we would certainly have to go to conference then with the House. It would delay our efforts to get a final bill. And if we could not come up with a solution in conference that did not include this amendment, we would not get a bill.

So the phrase ''choice of law'' does sound nice, but the amendment actually would alter very fundamental legal principles. It would require Federal courts to apply one State's laws when adjudicating a nationwide class action. Here is what that means. If a nationwide class action is brought against a Mississippi company, the judge would be forced, under this amendment, to choose one State's law to apply to the whole country. The Mississippi company, which typically conducts business in Mississippi in compliance with Mississippi law and Federal law, would not necessarily have the protection of Mississippi law. Even though the Mississippi law, with which the company complied, differed from, for example, Nebraska law, the judge could potentially choose to apply Nebraska law.

So believe me, the proponents of this amendment know exactly what they are doing. If it were adopted, it would perpetuate the forum shopping that has been going on in recent years that has led to one of many areas of abuse.

Let me conclude because I know others want to speak. We want to get the process started. It is a compromise bill. It is not perfect. There will be different points of view. I have worked in this area for many years. I have heard all the arguments. I have heard those arguments on the floor of the Senate, in committee rooms, and at the family dinner table.

I want people to be able to get justice and redress. But I do not see how anybody can argue that there has not been abuse in the area of class actions and in mass actions. It has certainly been abusive in my own State. What disgusts me the most is the lawyers it has made superwealthy while the claimants got almost nothing. We can do better. This legislation will lead to a better solution.

I yield the floor, Mr. President.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Illinois.

Mr. DURBIN. Mr. President, I say to those of you who are following the Senate in action, welcome to our first substantive bill. That is right, this is the first substantive bill that we are considering. Some might conclude, if it is the first, it must be a very high priority.

Does it have to do with health care in America, the increasing costs of health care for families and businesses and individuals? No.

Does it have to do with education in America, how to improve our schools so we can compete in the 21st century? No.

It must be the Federal Transportation bill then. We know we need that. We are 2 years late in passing that bill, and we need the money spent in America to build our infrastructure. Is this the Federal Transportation bill? No.

No, it does not have anything to do with health care or education or transportation, despite the fact that every Senator in this Chamber, when they go back to their States and meet with their people, hears about those issues.

Senator, what are you going to do about the cost of health insurance? It is killing my business. Senator, what are you going to do about the President's No Child Left Behind, an unfunded Federal mandate? We are having trouble with our school districts back in Illinois and Utah and other places. What are you going to do about that? Senator, when are you going to pass the Federal Transportation bill? We need to improve our highways in Illinois.

Those are the comments we hear. But, no, when it comes to the very first bill, the highest priority of the Republican leadership in this Congress, we are going to deal with what they have characterized as a litigation crisis.

Richard Milhous Nixon, former President of the United States, wrote a famous book during his public career entitled: ''My Six Crises.'' Well, if you pay close attention to the Bush administration, you will find that they are way beyond six crises. They have told us we had a national security crisis that required the invasion of Iraq; an economic crisis which required tax cuts for the wealthiest people in America; a vacancy crisis in the Federal courts, despite the fact that this Senate had approved 204 of the President's 214 judges he sent to us. We were told we had a moral crisis requiring constitutional amendments. And just last week, the President has told us we have a Social Security crisis.

It is hard to keep up with this White House and all their crises. And here today, we are told we have a litigation crisis and a sense of urgency to deal with this bill. Yet the facts do not back it up.

According to the Administrative Office of the U.S. Courts, which is a part of the Federal judiciary, tort actions in Federal district courts from 2002 to 2003 dropped by 28 percent.

Over the last 5 years, Federal civil filings have not only decreased by 8 percent, the percentage of civil filings that are personal injury cases has declined to a mere 18.2 percent of the total docket.

The same thing is happening at the State level. So the statistics tell us we are not seeing an onslaught of more and more cases. Just the opposite is true; that is, in cases filed by individuals.

The study also took a look to find out what American businesses were doing—American businesses suing other businesses. It turns out American businesses were 3 to 5 times more likely to file lawsuits than individuals.

For example, in Mississippi, the State of the Senator previously addressing the Chamber and one of the States often criticized by tort reform advocates, Public Citizen found that businesses were more than five times more likely to file suits than individuals. In that State, there were 45,891 business lawsuits filed compared to 7,959 lawsuits by individuals. You sure wouldn't know it listening to the comments on the floor about a litigation crisis.

Along comes the self-styled group called the American Tort Reform Association. I think if you lift the lid on the American Tort Reform Association, you will find a lot of the big business interests in America. They have come forward and decided that they are going to call certain areas of America judicial hellholes. For example, their 2004 report labeled the entire State of West Virginia as the No. 4 judicial hellhole in America. Why? The report states that in one county, Roane County, WV, which in its first 150 years never had a class action lawsuit, actually had two class action lawsuits filed in a year and a half—two in a year and a half, the No. 4 judicial hellhole in America.

Here is another exaggeration by the same group: the No. 6 judicial hellhole in America, Orleans Parish, LA. According to the report from the American Tort Reform Association, a strong proponent of this bill, this county earned the title because ''plaintiffs attorneys are turning mold into gold'' by representing a class of government attorneys working in buildings containing toxic mold which caused health problems. How many class action lawsuits were filed in Orleans Parish to make them a judicial hellhole? One.

The Senator from Mississippi spoke a few minutes earlier about abuses in his own State. Take a look at what happened in the State of Mississippi. In 2002 and 2003, this same American Tort Reform Association listed Mississippi, its 22nd judicial district, as a judicial hellhole. In 2004, it didn't make the list. Why? Because the State actually received five pages of praise from the same group for changing its State's laws to deal with class action lawsuits. This Mississippi judicial hellhole became an object of praise and admiration when they fixed their own problem at the State level.

I can't avoid the topic of judicial hellholes without speaking for a moment about Madison County, IL. The President was so upset about Madison County, IL, that he flew to Collinsville a couple weeks ago to criticize their court system. Let's take a look at Madison County in terms of real numbers.

In 2004, Madison County ranked No. 1 by the American Tort Reform Association as the worst judicial hellhole in America. So what do we find about the class action lawsuits that were filed in Madison County? Of the class action lawsuits filed in 2002, four were certified to go forward. All the rest of them languished and did not. Four cases in 2002 went forward. But surely if they are a judicial hellhole, it got worse. But it didn't. In 2003, only one class action lawsuit was certified. One. What happened in 2004? Not a single class action lawsuit has been certified. So when you hear these exaggerations on the floor about judicial hellholes and all of these class action lawsuits, it turns out that the No. 1 example of a judicial hellhole—Madison County, IL—had no class action lawsuits that were certified in 2004.

We know what this is all about. We should get down to the basics. Why is the U.S. Chamber of Commerce spending over $1 billion to lobby us to pass this bill? This is the largest amount of money ever recorded for lobbying activities and the first time that lobbying spending has passed the $1 billion mark. Why is it so important? According to Senator LOTT and others, it is just a simple thing. We are going to take class action lawsuits out of State courts and put them in Federal courts. What is the matter with that? Federal courts are supposed to represent the Nation. These class action lawsuits have plaintiffs from all over the country. It seems reasonable.

If that is all there is to it, why would these business interests spend such an inordinately large sum of money to lobby us to pass it? Because they know, as we know who have practiced law, that Federal courts are unfriendly to class actions. Federal courts are less likely, by their own rulings, to certify a class. In other words, a class of plaintiffs files a lawsuit in Federal court, it is less likely it will go forward. That is what this is all about. It isn't about class action fairness; this is the class action moratorium act.

Also, Federal law favors less liability in case after case. Federal law discourages Federal judges from providing remedies under State laws. So the business interests that want to move these cases from State court to Federal court understand what it is all about. Fewer cases will survive. Those that do will pay less. That is what their goal is. That is why they have spent this enormous amount of money lobbying Congress.

Listen to what the business interests say about the Class Action Fairness Act before us:

> It would simply allow Federal courts to more easily hear large national class action lawsuits affecting consumers all over the country.

How harmless. Yet they spent $1 billion lobbying to pass this bill as the first bill of this Congress—before health care, before education, before the Federal transportation bill. They know, as we do, that class action lawsuits in Federal court are much less likely to survive.

Let me give an example, because the problem with talking about class actions is most people listening say: What in the world is he talking about?

Is this a class in school or class of people? Who are you referring to? Let me give a concrete example.

Charles and Jenny Will live in Granite City, IL, which happens to be in Madison County. They are an older couple. They live in a small blue and white wood-frame house. Their main source of income is Social Security. They are nice people. I am proud to have them as my constituents. On their walls hang pictures of their kids and the Last Supper.

Mr. Will has 3 years of Active-Duty service in the U.S. Navy and a sign in his front yard that he proudly put there saying ''support our troops.'' He is 71 years old. He is on oxygen, but he moves around pretty well. He has had some major heart problems, including triple bypass in 1989, and problems with his leg where the doctors had to remove a vein for surgery.

Mr. Will is taking nitro tablets and about 15 different medications daily, two of which are insulin. He was, unfortunately, diagnosed with diabetes 20 years ago, and he has very few complications—thank goodness—but it seems to have affected his vision, which is not very good.

Mr. Will was prescribed the drug Rezulin by his doctor. He remembers it because the drug was real expensive. He told the doctor he couldn't afford it, so his doctor gave Mr. Will a bunch of samples to take home. Rezulin, a drug prescribed for the treatment of type 2 diabetes, became available in the U.S. in 1997. Warner-Lambert marketed this drug as ''safe as a placebo''—in other words, as safe as a sugar pill.

Three years after Rezulin came to market, the FDA asked Warner-Lambert to voluntarily remove the drug from the market as they started noting too high an incidence of liver failure and deadly side effects. Mr. Will was subsequently taken off Rezulin and prescribed a safer treatment.

A class action lawsuit was filed in Illinois to protect people living there like Mr. Will. The case alleged that Warner-Lambert violated the New Jersey consumer fraud statute by pricing the drug much more in excess of the price that the drug would have been but for Warner-Lambert's concealment of the drug's deadly side effects.

This theory is supported by the major insurance companies.

Last year, the case was certified by the State court as a class action. But it was turned down in Federal Court. That is the problem we are running into.

Mr. President, I have an amendment I am going to offer. I think I will wait until after lunch to do that. The Senator from Texas is here and wishes to speak. We have about 20 minutes remaining.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. I will speak generally about the issue of class action reform contained in S. 5, because I believe the American civil justice system is, in many ways, at a crossroads. We have an opportunity to choose between taking a path toward greater freedom and responsibility, or heading down a path that encourages lawsuit abuse and cripples our ability to compete in a global economy. Now is the time, I believe—actually it is past time—to enact the reforms necessary to ensure America's competitiveness in the 21st century.

I am struck, as I listen to the critics of this bill, many of whom are the same people who complain about the fact that American jobs are being sent offshore to places like India, China, and elsewhere, when one of the very causes of the damage to America's global competitiveness is our civil justice system.

I think people of good faith and good will agree that the goal of our civil justice system ought to be getting people who are truly injured as a result of the fault of another fair compensation. But I think also, being objective about this issue and some of the examples of abuses that we have seen, we know too often that this goal is not being met in the current environment. We see lawsuit abuse particularly in the class action area and also in the asbestos area. This abuse is having a damaging impact on our economy. In the asbestos area, we see people who are sick are getting pennies on the dollar in compensation because people who are not sick are getting ahead of them in line, resulting in bankruptcies which have destroyed jobs and pensions for American workers.

So it is unthinkable to me that anyone could stand here on the Senate floor and claim there is nothing wrong. That seems to be a common theme these days, whether we are talking about Social Security or lawsuit reform, or a variety of subjects. But the truth is that the facts clearly indicate otherwise.

As the continued spread of democracy and capitalism take root in countries throughout the world, and as modern travel and information technology bring our world closer together, there is no question that the health of America's economy is influenced by the free flow of goods and services in international markets.

It is a simple fact of life: We live in a global marketplace, where we do not just compete with businesses across the street, but with ones on the other side of the world. Our economic strength and ability to compete now depends on our willingness to confront the burdens that prevent growth, discourage innovation, and ultimately cost Americans their jobs.

It is unthinkable to me that anyone can claim a system that compensates people who truly are injured as a result of the fault of another so poorly, but makes a handful of lawyers rich, doesn't need to be fixed. But the system—particularly in the class action area—is fraught with abuse. I will not detail all of those abuses, since they have been addressed earlier. But one of the most classic cases is the coupon settlement. It reminds me of an old country and western song, where the lawyers get the goldmine and the consumers get the shaft.

We have all seen the numbers relating to the cost of our broken civil justice system. According to one estimate, the cost of the tort system in 2003 totaled more than $245 billion, or 2.2 percent of the gross domestic product. That amounts to a tort tax on every American citizen of approximately $845 a year.

The percentage of our economy that is devoted to tort law and resolution of claims through our tort system is far greater than any other industrialized country. In Britain, for example, the entire tort system—attorneys' fees, settlement costs, jury awards, and administrative costs—costs less as a percentage of GDP than America's plaintiffs' lawyers gross for themselves alone.

This level of stress on the economy and on our civil justice system itself is unacceptable. But it hasn't always been that way. Class actions, prior to significant rule changes in the 1960s and 1970s were not, as they are today, largely a sport for a handful of aggressive personal injury lawyers to pursue abusive litigation and junk lawsuits. Take, for example, the change in 1966, from a system where class members were required to ''opt in'' to a system, where now they are required to ''opt out.'' By 1971, four times as many class actions were being filed than had been in 1966. In other words, from 1966 to 1971, we saw four times the number of class actions brought.

Since that time, recoveries have skyrocketed. This chart behind me reflects the growth I mentioned a moment ago. You can see that from 1973 to 1975 there were relatively few class action lawsuits and relatively modest recoveries. But they have obviously ballooned and appear to be getting bigger year by year.

The problems we increasingly experience with abusive class action lawsuits call for a significant overhaul of our civil justice system and particularly our rules providing for the resolution of mass tort litigation.

I must tell you that the bill we have before us today is clearly a modest reform. It amounts to an improvement over the status quo, but it doesn't begin to approach the comprehensive solution America needs.

As it stands, S. 5 provides two primary improvements: It allows removal of a greater number of class action lawsuits from State court to Federal court, and it requires judges to carefully review all coupon settlements and limit attorneys' fees paid in those settlements to the value actually received by class members.

These two reforms—as modest as they are—are important and will certainly offer fair but desperately needed

relief for State courts which are experiencing firsthand the explosion of class action litigation. It will also provide for greater fairness for defendants who are currently being dragged into ''magnet jurisdictions,'' and it will provide greater fairness for class members who are oftentimes receiving pennies on the dollar, while class counsel get rich.

Yet, as much of an improvement as this bill is, it falls short of the ideal. To be effective and fair, I believe class actions and other mass tort litigation require three things: A level playing field; transparency, so consumers can have complete, fair, and accurate information; and a clear relationship between class members and their lawyers.

First, a level playing field depends on a fair class certification process. As the current occupant of the chair knows, almost all class actions settle if certified. The main event in class action lawsuits is the certification process because ultimately, once certified, most defendants feel as if they have no choice but to settle because even a small risk of an adverse judgment, given the large number of class members, can lead to a ruinous result. They are forced to try to settle the case on the best terms they can.

Where there is no right to an immediate interlocutory appeal of class certification and stay on discovery, class certification can cause settlements that far exceed the case's value on the merits because of the extortionate effect of the certification process and the threat it brings to the very livelihood, not to mention the financial life, of the defendant involved.

States, such as my home State of Texas, have also embraced limits on appeal bonds. Too often in large class action lawsuits, the judgment can be so large that the defendant cannot, in effect, buy an appeal bond with which to appeal the case and correct an erroneous ruling below. So the defendant is forced to settle because they cannot afford to appeal—again, not based on the merits, but based on the way class action lawsuits are structured, without a right to interlocutory appeal.

The second step toward an effective system, I believe, is information flow. Class actions require that adequate information be available both for the sake of the process itself and for policymakers, like us, to analyze. It is hard for us to do our job when it comes to class action reform or civil justice reform when some of the information—much of the information—is simply hidden from public view. Class members should be fully advised of all aspects of their case, and we should require that certain relevant information about all class action settlements be collected and published centrally for examination and review by analysts and policymakers.

Just as in Government, when it comes to class actions, people deserve to know what is going on, particularly if it is their case.

The final step, and the most important one to me, is maintaining the proper relationship between the class members and their attorney. As the occupant of the chair, the Presiding Officer, knows, this is a particularly tough issue when it comes to class counsel who may have one real client, the class representative, with whom they deal but, in reality, class counsel calls the shots and runs the case. Class members may not even know they are involved in a lawsuit until they receive a notice of settlement and perhaps, as we heard, a coupon worth pennies on the dollar. The opportunity for abuse of that important fiduciary relationship between the lawyer and the client is very important to address.

I believe one solution would be to allow members of the class to opt in instead of opting out because, indeed, in a country that says we do not promote litigation, although we certainly give fair access to courts, it just does not make much sense to me to say to the consumers: You can be a plaintiff in a lawsuit, you can actually be a party to a lawsuit and not even know about it until the lawsuit is over, which is what happens today.

Consumers should not have to learn that they are members of a class action lawsuit by receiving a check for $2.38 in the mail and then find out in the morning paper that the lawyers who purported to represent them just collected $5 million. The cases and examples go on and on.

It should also go without saying that the attorneys should be paid at a level commensurate with the work before them, not based on strictly a contingency fee which may, indeed, allow huge financial rewards for relatively modest work actually being done.

I hope those listening, if there are any listening to my comments, understand my concerns that this modest legislation does not go far enough to remove the scandal of litigation abuse that too often plagues our civil justice system and the American economy. I hope they understand my reservations do not indicate I am not for this bill because, indeed, I am. I believe S. 5 is an important first step in reform and an important step in the right direction.

In conclusion, because I know there are others who want to speak, there will be attempts to offer amendments to this bill. I know Senator DURBIN, but for the loss of his voice, would have been the first to offer his amendment. I am told Senator KENNEDY will be here shortly to do the same, but as everyone knows who has followed this bill—certainly Senator CARPER who has been an advocate for class action reform for some time, knows—the compromise reflected by S. 5 is a very fragile one, and it essentially depends on no amendments being made to the bill or agreed to the bill. If that happens, it is likely the bill will go promptly to the House where they will pass it, and it will go to the President's desk, and we will have an early victory for the American people in this important area. But there are a number of amendments that will be offered which, in essence, are poison pills, that if agreed to will completely destroy any opportunity we have for this modest reform.

I have my own amendments that I filed, if others are offered and agreed to, which I believe are important to move the bill in the direction where I think it ought to go. But the truth is, I am refraining from urging those amendments at this time because I think this fragile compromise, as modest as it is, does represent real reform in moving the bill in the right direction.

Here again, as the Washington Post editorial on August 27, 2001, points out:

> No portion of the American civil justice system is more of a mess than the world of class action. None is in more desperate need of policymakers' attention.

That was in 2001, and certainly the situation has not changed today.

I am baffled by those who want to whistle past the graveyard and act as if there is nothing wrong and that everything is just hunky-dory when it comes to class action reform. I believe the American people expect that the civil justice system will operate in their best interest, not in the best interest of a handful of lawyers.

I am confident the damage that is being done to American competitiveness is killing jobs that would be created in the United States but for the fact that people do not want to subject themselves to an out-of-control class action system. So, instead, jobs are being created in other countries across the world where they do not have those same concerns.

This is clearly an area that cries out for reform. It is one that is long past due.

I congratulate Senator CARPER and others on that side of the aisle who have worked so carefully to try to craft this fragile compromise. But I want my colleagues to understand—and I think they all do; I think we all do—that any amendments to this bill will doom it. So I urge all of my colleagues to vote against any and all amendments; indeed, even ones that I may like but which I know will have the ultimate effect of killing the bill. I think it is better to save those for another day and another time rather than have the prospect of this bill going down in flames.

Mr. President, I appreciate the time and yield the floor.

The PRESIDING OFFICER. The Senator from Delaware is recognized.

Mr. CARPER. Mr. President, I understand that under the previous order, the Senate will stand in recess at 12:30 p.m. for our weekly caucus luncheons. I ask unanimous consent, notwithstanding that unanimous consent agreement, to proceed for 5 minutes.

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

Mr. CARPER. Mr. President, before Senator CORNYN leaves the floor, I

thank him for his kind words, and I am pleased that we are at the point where we are on this legislation this week. I look forward to both sides exercising constraint—we cannot let the perfect be the enemy of the good—and pass the good legislation that has been introduced and debated this week, with the understanding the House will accept it and the President will sign it into law.

We heard a fair amount already about the ills of class action lawsuits. Class action lawsuits, in and of themselves, are not a bad thing. Class action lawsuits give little people who are harmed, in some cases by companies, the opportunity—maybe not harmed in a way that the consumers, the little people, lose their eye, arm, leg, or life, but they suffer some kind of harm.

The idea behind class action lawsuits is to say when little people are harmed by big companies or others that those people can band together and present their grievances to an appropriate court, State or Federal, and for the people who are harmed to be made whole.

At the same time, it is important that when the plaintiffs are bringing a class action lawsuit against a defendant from another State, that the case be heard in a court where both sides can get a fair shake, the plaintiffs as well as the defendant.

If we go back over a couple hundred centuries in this country, we ended up with a law that the Congress passed that said if we have a defendant from one State and plaintiffs from another State, it is not fair to the defendant to have the case necessarily heard in the home of the plaintiffs. Someone may have dragged the defendant in across the State lines and put them in a courthouse or courtroom where there is a bias toward the local plaintiffs who brought the case against the defendant from another State, and in an effort to try to make sure that we are fair to both parties, those who are bringing the accusations and those who are defending against them, we have the Federal courts which were established in many cases to resolve those kinds of issues.

Unfortunately, we have seen an abuse of some class action lawsuits in recent years which led the Congress to begin debating this issue and considering legislation to address these abuses starting in, I want to say 1997, 7 years ago. The original problem that was discovered or was pointed out is this: There seems to be a growing prevalence of plaintiffs' attorneys who are forum shopping in State or local courts where the plaintiff class may have an inordinate advantage against the defendant. I will not go into the examples today, but there are any number of instances where one can see forum shopping has gone on, a State or a county courthouse has certified a class, agreed to hear a case, and it sets up a situation where the defendant company or the defendant knows they are going to have a hard time getting a fair shake in that courthouse. As a result, the defendant will agree to a settlement with the plaintiffs' attorneys. The settlement may richly reward the plaintiffs' attorneys for bringing the case, the defendant may cut their losses, but the folks on whose behalf the litigation was brought in the first place, those who allegedly are harmed, in many instances get little or nothing for their harm. That is not a fair situation. It is not fair to the little people on whose behalf the case has been brought. It is arguably not fair to the defendant because they are in a courtroom where they do not have a fair chance to defend themselves. It can be fixed, and it ought to be fixed.

The legislation before us today will not end the practice of class action lawsuits being litigated and decided in State courts. I believe the majority of class action lawsuits, even if this legislation is passed, which I am encouraged that it will, will still continue to be held in State courts, and they should be. We will have the opportunity to explain why that is true later on.

Before my 5 minutes expires, I conclude with this: There are any number of people on both sides of the aisle who would like to offer amendments to this bill. We have been working for 7 years to try to pass something that the House, the Senate, and the President will agree to. The time has come. To the extent that we make a change, whether it is in a Republican amendment or a Democratic amendment that might be offered, if we make a change, we invite the other side to retaliate and to offer their amendments and perhaps to adopt their amendments. For those of us who want to see this bill passed, I believe this legislation is about the fairest balance we are going to get, and I would encourage us to support it. We should consider and debate the amendments but in the end turn those amendments down.

I look forward to debating each of those amendments, and I hope in the end we can accomplish three things with this legislation: No. 1, make sure that where small people are harmed in a modest way, they have the opportunity to be made whole; No. 2, make sure that the defendants who are pulled into court on these class action lawsuits have a reasonable chance of getting a fair shake; and lastly, I am not interested in overburdening Federal judges. I think most of this litigation should remain in State court. I believe the compromise we have struck will do that. Those are our three goals, and I look forward to the debate that is going to follow.

RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:34 having arrived, the Senate will stand in recess until 2:15 p.m.

Thereupon, the Senate, at 12:34 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

CLASS ACTION FAIRNESS ACT OF 2005—Resumed

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, it had been announced earlier that the Senator from Illinois, Mr. DURBIN, would be offering an amendment on class action, so we will await his arrival. In the interim, I will yield to my distinguished colleague from Utah, Senator HATCH, who has some comments and who will be managing the bill this afternoon.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, what is the parliamentary state of affairs?

The PRESIDING OFFICER. S. 5 is before the Senate.

Mr. HATCH. Have no amendments been presented?

The PRESIDING OFFICER. Not yet.

Mr. HATCH. I ask the distinguished Senator from Massachusetts if he is prepared to submit an amendment. If he is, I would be happy to yield to him instead of making my comments.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. I am going to send an amendment to the desk.

Mr. President, it is wrong to include civil rights in wage-and-hour cases in this bill. Families across the country are struggling to make ends meet. They work hard, play by the rules, and expect fair treatment in return, but they often don't get it.

Unfair discrimination can lead to the loss of a job or the denial of a job. It can keep them from having health insurance or obtaining decent housing. It can deprive their children of a good education. We can't turn a blind eye to that enormous problem. Those who engage in illegal discrimination must be held accountable.

That is why I am offering this amendment—to protect working families and victims of discrimination. Hard-working Americans deserve a fair day in court. Class actions protect us all by preventing systematic discrimination.

Attorneys general from 15 States—California, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oklahoma, Oregon, Vermont, and West Virginia—oppose the inclusion of civil rights in wage-and-hour cases in the bill. The problems that supporters of the bill say they want to fix don't even rise in civil rights and labor cases. No one has cited any civil rights or labor cases as an example of abuses in class action cases under the current law.

During the discussion of this bill in the Judiciary Committee and on the floor last year and during the committee's discussion last week, no one identified any need to fix civil rights or labor class actions. ''If it ain't broke, Congress shouldn't try to fix it.''

There is no good reason to include these cases in this bill, but there is an