106th Congress
1st Session

SENATE

REPORT
106–10

YEAR 2000 (Y2K) ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

on

S. 96

together with

MINORITY VIEWS

MARCH 10, 1999.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
69–010 WASHINGTON : 1999

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JOHN McCAIN, Arizona, *Chairman*

TED STEVENS, Alaska
CONRAD BURNS, Montana
SLADE GORTON, Washington
TRENT LOTT, Mississippi
KAY BAILEY HUTCHISON, Texas
OLYMPIA SNOWE, Maine
JOHN ASHCROFT, Missouri
BILL FRIST, Tennessee
SPENCER ABRAHAM, Michigan
SAM BROWNBACK, Kansas

ERNEST F. HOLLINGS, South Carolina
DANIEL K. INOUYE, Hawaii
JOHN D. ROCKEFELLER IV, West Virginia
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
RICHARD H. BRYAN, Nevada
BYRON L. DORGAN, North Dakota
RON WYDEN, Oregon
MAX CLELAND, Georgia

MARK BUSE, *Staff Director*
MARTHA P. ALLBRIGHT, *General Counsel*
IVAN A. SCHLAGER, *Democratic Chief Counsel and Staff Director*
KEVIN KAYES, DEMOCRATIC GENERAL COUNSEL

(II)

106TH CONGRESS
1st Session

SENATE

REPORT
106–10

YEAR 2000 (Y2K) ACT

MARCH 10, 1999.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 96]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 96) "A Bill to regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date", having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

To regulate interstate commerce by making provisions for dealing with losses arising from Year 2000 Problem-related failures that may disrupt communications, intermodal transportation, and other matters affecting interstate commerce.

BACKGROUND AND NEEDS

The purpose of S.96 is to provide incentives for solving technical issues related to Y2K problems before failures occur, encourage efficient resolution of Y2K problems when they do occur, and to impose reasonable limits on liability. The potential Y2K failures result from the use of a two-digit code for defining the year in computer programs, software, chips and systems. Lawsuits have already been filed either based upon failures or anticipated failures. The potential for litigation to overwhelm the nation's judicial sys-

tem, and to cause severe damage to the nation's economy require incentives for proactive solution of the problems before they occur, and prompt resolution of those failures which do occur.

The "Y2K" problem arises from the manner in which dates are coded and computed in computerized information systems. Computer systems have historically been programmed using two digits to represent the year, for example "98" instead of 1998, in order to minimize data storage requirements, especially in earlier computers, and reduce operating costs. Using a two-digit format, however, makes 2000 indistinguishable from 1900, or 2001 from 1901. In addition, 2000 is a leap year, raising additional date coding concerns. When a computer is unable to recognize or compute the 00 date code used in 2000, it may fail to operate, process or transmit the data, or may fail altogether. Because of the widespread use of computers in our society, the problem extends from the desktop PC to bank systems to national power grids. An example of a Y2K failure occurred last year when credit card machines used by some retailers were unable to process sales for credit cards expiring in 2000. The problem is international in scope, posing concerns for the entire global economy.

The massiveness of the problem, and the corrections required to prevent or remedy the potential computer, have resulted in concern as to whether our society will be faced with a crisis situation on January 1, 2000. The cost of fixing the problem in all affected systems, both public and private, is astronomical. Chase Manhattan Bank was quoted as spending $250 million to fix the problem within its 2000 million lines of computer code. The estimated overall cost of fixing the problem in the United States ranges from $200 billion to $1 trillion. Lloyd's of London has estimated the cost of litigation which will be generated in the United States alone at over $1 trillion.

The actual impact of the problem remains unclear. Some technical analysts predict that widespread failures in systems across the country, including power outages, stalled assembly lines, and halted international transactions could result in a major nationwide, or even worldwide, recession. Others contend that the efforts already underway or completed will ensure a nearly disruption-free transition into 2000.

A number of Y2K lawsuits have already been filed. The threat of litigation has resulted in a climate of fear and reluctance by many companies to acknowledge the potential problems which may be caused by their products. This atmosphere is counterproductive to the cooperative efforts necessary to ensure a seamless transition from 1999 to 2000, and is disruptive to the stability of the nation's interstate commerce.

SUMMARY OF MAJOR PROVISIONS

This bill was introduced January 19, 1998. The sponsors are Senators McCain, Gorton, Abraham, Frist, and Burns.

The goal of the bill is to encourage companies to prevent Y2K failures, to remedy problems quickly if they occur, and to impose reasonable limits on liablity. The bill also encourages resolution of disputes arising from Y2K failures through alternative dispute res-

olution rather than through expensive and time consuming litigation.

The bill provides incentives for companies to be proactive in preventing Y2K failures through, e.g., a "good faith" defense to non-contract claim damages is provided which requires a showing that the company has used reasonable efforts to detect and correct a Y2K problem. The bill also states that plaintiffs have a duty to mitigate potential damages.

The bill also requires a prospective plaintiff to notify a company it intends to sue and provide the company an opportunity to correct the problem and offer remedies to resolve the dispute.

The bill preserves contractual rights and obligations of parties. Where the parties have already contracted for remedies and resolution of Y2K problems, the contract will control.

ESTIMATED COSTS

In the opinion of the Committee, it is necessary under paragraph 11(a)(3) of Rule XXVI of the Standing Rules of the Senate to dispense with the requirements of paragraphs 11(a)(1) and 11(a)(2) of the Rule and section 403 of the Congressional Budget Act of 1974 in order to expedite the business of the Senate.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

Because S. 96 does not create any new programs, the legislation will have no additional regulatory impact, and will result in no additional reporting requirements. The legislation will have no further effect on the number or types of individuals and businesses regulated, the economic impact of such regulation, the personal privacy of affected individuals, or the paperwork required from such individuals and businesses.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of sections

Section 1 states the short title, the "Y2K Act", and provides a table of contents for the bill.

Section 2. Findings and purposes

Section 2 provides findings and purposes of Congress in enacting the bill. The primary purposes of the bill are to ensure that the problems associated with the two-digit date code used in computer programming which impedes recognition of the year 2000 and related date codes associated with the change in millennium, including leap year on February 29, 2000, do not result in undue strain on the national economy or the nation's judicial system. The bill encourages all companies to prevent Y2K failures where possible, to remediate them quickly and without litigation, and to engage in alternate dispute resolution opportunities. The purpose of the bill is also to limit liability for persons acting in good faith and making reasonable efforts to prevent Y2K failures, and to provide a reason-

able opportunity to correct Y2K failures upon their occurrence prior to the commencement of legal action.

Section 3. Definitions

Section 3 sets forth definitions of certain terms used in the bill. These include the term "Y2K action", the definition of which prescribes the scope of the bill. The definition of "person" specifically includes Federal, State, and local government entities.

Section 4. Application of Act

Section 4 contains general provisions governing the application of the bill. It applies to any Y2K action brought in a Federal or State court after February 2, 1999. The bill creates no new causes of action. The bill does not cover claims for personal injury or wrongful death. The bill does not supersede a valid, enforceable written contract between a plaintiff and defendant. The bill preempts State law to the extent that it establishes a rule of law for Y2K actions that is inconsistent with State law.

Section 5. Punitive damages limitations

Section 5 sets forth a punitive damage standard and limitations. The bill does not establish a right to punitive damages where none is provided in applicable State law. The bill establishes a threshold for the award of punitive damages in Y2K actions, "conscious and flagrant disregard for the rights and property of others." The bill prohibits punitive damage awards against government entities. The bill caps punitive damages at the greater of $250,000 or three times actual damages for big businesses, or the lesser of these figures for small businesses.

The Committee notes that the State of Alaska allows and encourages the award of attorney fees to the prevailing party in civil actions. One policy behind the State statute is to prevent frivolous lawsuits. Under Alaska law, the award of prevailing party attorney fees is not considered a punitive measure and should not be included in the calculation of the part of a plaintiff's recovery subject to punitive damage caps.

Section 101. Pre-filing notice

Section 101 requires plaintiffs to give 30 days notice to defendants before commencing a Y2K action against defendants (except when seeking only injunctive relief). If the defendants don't respond to the notice within 30 days and describe what action they will take, plaintiffs may commence suit, but if the defendants respond favorably, 60 days are permitted to fix the problem before the plaintiff may commence suit. If the plaintiff files suit without giving notice, the defendant may treat the filing as a notice and the court shall stay discovery and all other proceedings for 90 days.

Section 102. Pleading requirements

Section 102 requires a complaint in a Y2K action to specify the nature and amount of damages and the factual basis for calculation.

- Materiality requirement: If the plaintiff alleges that a product or service is defective, the complaint must contain specific information about the manifestations of the material defects and facts supporting a conclusion that the defects are material.

• Required state of mind: If a plaintiff is required to prove the defendant's state of mind, the complaint must state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind.

Section 103. Duty to mitigate

Section 103 provides that damages in a Y2K action shall exclude damages that the plaintiff could reasonably have avoided in light of disclosures or other information that the plaintiff was, or reasonably could have been aware of, including defendants' reasonable efforts to advise purchasers or users about ways to remedy or avoid the Y2K failure. While the duty to mitigate is generally considered an obligation of a plaintiff to determine and take measures to lessen the impact and to limit the amount of damages resulting from defendants' actions, the intent of this provision is also to highlight that it is in the best interest of a defendant to make Y2K solutions readily available so that potential plaintiffs can use them in mitigation. A defendant that proactively provides solutions and remediation in this manner will reduce its potential liability.

Section 104. Proportionate liability

Section 104 provides that liability in a Y2K action is several and not joint, and defendants are liable only for their share of responsibility as a percentage of the responsibility of all persons (whether parties or not) at fault. This provision prevents plaintiffs from selecting a defendant to pay damages based upon ability to pay rather than responsibility for the problem and harm.

Section 201. Contracts enforced

Section 201 provides that, in any Y2K action, any written term or condition of a valid and enforceable contract between a plaintiff and defendant, including limitations or exclusions of liability and disclaimers of warranty, is fully enforceable. Courts can determine that contract as a whole is unenforceable. If the contract is silent on a matter, the interpretation of the contract with respect to that matter shall be determined by applicable law at the time the contract was executed.

Section 202. Defenses

Section 202 establishes a "reasonable efforts" defense. If breach of contract is alleged, the party against whom the breach is alleged can offer evidence that its efforts to implement the contract were reasonable in light of the circumstances for the purpose of limiting or eliminating the defendant's liability.

It also provides that, if breach of contract is alleged, the doctrines of impossibility and commercial impracticability in force under applicable law on January 1, 1999, shall apply.

Section 203. Damages limitation

Section 203 provides that, in any Y2K action for breach or repudiation of contract, no party may claim or be awarded consequential or punitive damages unless those damages are allowed (1) by the express terms of the contract; or (2) if the contract is silent on such damages, by the operation of State law at the time the contract was executed or by the operation of Federal law.

Section 204. Mixed actions

Section 204 provides that, if a Y2K action includes claims based both on contract and on tort and other non-contractual premises, Title II applies to the contract claims and Title III to the non-contract claims.

Section 301. Damages in tort claims

Section 301 establishes a modified "economic loss rule." Subject to applicable State and Federal law, a party making a tort claim cannot recover economic loss damages, unless such damages are provided for in a contract to which the party making a claim is a party. Economic losses result directly from a personal injury claim resulting from a Y2K failure or losses result directly from damage to tangible property other than the property that is the subject of the contract.

Section 302. Certain defenses

Section 302 provides for defenses based on good faith and reasonable efforts. Section 302(a) provides that, in any Y2K action except an action for breach or repudiation of contract, the party against whom the claim is asserted can establish as a complete defense to the claim that they acted in good faith and took measures reasonable under the circumstances to prevent the Y2K failure from occurring or causing the damage. While what constitutes reasonable efforts and good faith will depend on the facts and circumstances of each situation, generally it will require affirmative actions which, when viewed objectively, are calculated to prevent the Y2K failure or the damage resulting from the Y2K failure.

With regard to the defendant's state of mind, section 302 provides that, in a claim for money damages in which the plaintiff must prove the defendant's actual or constructive knowledge of an actual or potential Y2K failure, the plaintiff must prove by clear and convincing evidence that the defendant knew or recklessly disregarded a known and substantial risk that the failure would occur.

With regard to foreseeability, section 302 provides that, in a Y2K action making a claim for money damages, the defendant is not liable unless the plaintiff proves by clear and convincing evidence that the defendant knew or should have known that the defendant's action or failure to act would harm the plaintiff.

Section 302 also establishes as a rule that the fact that a Y2K failure occurred in a facility, system, etc within a person's control shall not be the sole basis for recovering damages against that person.

Section 303. Liability of officers and directors

Section 303 provides that for officers, directors, trustees, and employees in a Y2K action brought in a State where that liability is not subject to lower monetary caps in State law, charter, or bylaw authorized by State law, the liability of directors, trustees, officers, or employees is capped at $100,000 or pre-tax compensation in the year preceding the act or omission. The caps do not apply if it is shown by clear and convincing evidence that the person intentionally made misleading statements about the Y2K problem or intentionally withheld information she had a legal duty to disclose

regarding the businesses' Y2K problem that would likely result in an actionable Y2K failure.

Section 401. Minimum injury requirement

Section 401 provides that, in any Y2K action involving a claim that a product or service is defective, the action can be maintained as a class action as to that claim only if the court finds that the alleged defect was material as to a majority of the class members.

Section 402. Notification

Section 402 provides that, in addition to any other notice required by law, the court shall direct notice of a Y2K action to each member of the class return receipt requested. If the receipt is not verified, the person in excluded from the class unless they notify the court in writing before trial or settlement that they want to be in the class. The notice must describe the nature of the action, the jurisdiction, and the fee arrangement with counsel,

Section 403. Forum for Y2K class actions

Section 403 expands original jurisdiction of U.S. District Courts for Y2K actions where there is minimal diversity, but provides that district courts may abstain from hearing the case if there is a predominant State interest (most members are from same State as primary defendants and State law will apply) or where the amount in controversy is minimal, the class is small, or the primary defendants are States or other entities against whom the district court may not order relief. In Y2K actions, permits removal by any defendant or any plaintiff class member.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 96:

The bill was ordered reported with an amendment in the nature of a substitute by a rollcall vote of 11 yeas and 9 nays as follows:

YEAS—11—	NAYS—9
Mr. McCain–	Mr. Hollings
Mr. Stevens[1]–	Mr. Inouye[1]
Mr. Burns—	Mr. Rockefeller
Mr. Gorton –	Mr. Kerry[1]
Mr. Lott[1]—	Mr. Breaux[1]
Mrs. Hutchison[1]–	Mr. Bryan[1]
Ms. Snowe—	Mr. Dorgan[1]
Mr. Ashcroft–	Mr. Wyden[1]
Mr. Frist[1]–	Mr. Cleland
Mr. Abraham—	
Mr. Brownback– ——	

[1]By proxy

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

MINORITY VIEWS OF SENATOR HOLLINGS

In offering the dissenting views to the reporting of this bill, let me make it clear that I take the Y2K issue very seriously. Because of the significance of this issue to the entire country, Congress is certainly warranted in taking action to prevent potential adverse consequences that may be associated with it.

In pursuing this objective, however, Congress must make sure that any action it takes is necessary, justified, and will achieve the goals of encouraging readiness and preparedness on behalf of public and private sector organizations. I have objected to the bill reported by this Committee (S. 96) on the grounds that it fails to meet these justifications.

The essence of this bill is to impose severe restrictions on the ability of plaintiffs to recover damages in Y2K actions. These restrictions include: (1) expansive pleading requirements that parties would have to meet before even being afforded the opportunity to a jury trial or judicial review; (2) elimination of joint and several liability; (3) the granting of highly favorable defenses to defendants to assist them in avoiding liability and the payment of damages; and (4) exceptionally stringent caps on punitive damages. These limitations will apply to both commercial and tort related Y2K civil actions.

The bill's supporters claim these restrictions are needed to prevent unnecessary and frivolous Y2K litigation. Yet, they have provided no factual proof that there actually will be unnecessary and frivolous claims. Additionally, because the legislation applies to all cases regardless of the nature or seriousness of the claims, it goes well beyond addressing the issue of frivolous suits. For example, if a small business owner experiences major losses due to a computer failure caused by the use of defective software, would it be frivolous for that business owner to sue the product seller to recover his or her damages? What if there is evidence that the company knowingly sold the product in a defective condition, and then attempted to profit from the sale by offering to upgrade the software at a cost higher than the original price? Would it be illegitimate for the aggrieved party to reject such an offer and pursue his or her right to recover damages in a court of law? Moreover, would Congress be justified in passing legislation that shields the seller of the product potentially from any liability? Of course, the answers to these questions are obvious; unfortunately, this would be the actual effect of this legislation.

Proponents of the bill argue that the legislation will benefit all parties involved in civil Y2K actions. However, the way the bill is currently drafted, it will work to the advantage of defendants only. It is obvious from the provisions in the bill that the proponents intend to use the powers of the federal government to reform state law in the broadest fashion possible, so as to tailor the law in favor of defendants, and more specifically entities that are likely to be responsible for losses and injuries caused by potential Y2K disruptions. An illustration of these intentions is a provision that would allow a defendant to avoid paying damages in contract cases based on evidence that the defendant made a reasonable effort to comply. Generally under contract law, a party's subjective intentions or

conduct are immaterial. The only relevant issue is whether the defendant party failed to meet the terms of the contract, either by selling a defective product, or failing to perform the required services. This legislation, however, would allow defendants to use evidence relating to their conduct and subjective intentions to avoid the payment of damages, regardless of whether they breached the contract. This is one example of how this legislation will drastically change civil law.

Among the parties that will be affected adversely by the bill are small businesses, and professional practitioners, such as medical doctors. The Committee received testimony from representatives of both groups. It is important to acknowledge that they were not associated with any local trade association. They testified in their capacity as independent proprietors. They requested to appear to discuss their experiences with litigation involving Y2K computer failures. In beseeching the Committee not to pass this legislation, they made it clear that if the provisions of the bill were the law at the time they filed their claims, it is doubtful that they would have been able to recover any sufficient amount damages, and most likely would have been involved in protracted litigation.

Finally, proponents contend that the legislation is needed to provide uniformity and clarity regarding possible Y2K claims. This supposedly will help reduce the volume of litigation. If this is the goal of the bill, however, it is not evident in the legislation. For example, although uniformity is to be achieved through the preemption of state law, the bill preempts state law only to the extent that it benefits defendants. In addition, the legislation, as drafted, will not provide clarity to the law, nor is it likely to reduce litigation. In fact, because the bill alters in part, but not in whole, complex tort and commercial state law, the bill actually serves to create more uncertainty about the law and liability, which is likely to result in more, rather than less, litigation.

I also question why the majority members of this Committee feel the need to act expeditiously on this legislation. A number of studies have shown that large commercial entities in general, and the computer industry specifically, have known about the existence of the Y2K problem for more than 30 years, as well as the availability, and likely feasibility, of technology that could have corrected the problem. Notwithstanding this reality, this Committee is intent on providing these entities with broad legal protections.

Not only is the Committee's decision premature, however, it contradicts the purported goal of the legislation, which is to provide businesses with an incentive to become compliant. I am baffled, however, as to how legislation that shields entities from liability for not becoming compliant will, in turn, inspire them to become compliant. The proponents' view is that the legislation will create an opportunity for these entities to direct resources into becoming compliant that they otherwise would reserve for litigation. It appears to be a simple proposition, however, that compliance and readiness in themselves will eliminate concerns about liability and litigation. This is, in fact, the essence of the liability and civil justice systems. Additionally, I find it unacceptable that Congress should pass laws to shield an entity either from liability for wrongful acts it already has committed, or from liability it might face for

not doing what it is obligated to do. At a minimum, this legislation will encourage organizations to conduct a cost benefit analysis to determine whether it is more economically feasible to resort to the legal protections of the legislation, rather than expending the funds to become compliant.

Both the Administration and the Senate have established special committees to address the Y2K issue. Conducting the review for the Administration is the "President's Council on Year 2000 Conversion." The group that has been working on behalf of the Senate is the "Special Committee on the Year 2000 Technology Problem." These committees have been in existence for almost a year, and are considered the leaders and experts on the Y2K issue. Their primary focus has been the passage of measures to educate and provide incentives to public and private sector organizations to actively address potential Y2K problems. In keeping with this objective, they have recommended passage of legislation, such as the Year 2000 Information Readiness and Disclosure Act [P.L. 105-271]. This law encourages companies to share information about their Y2K readiness by shielding them from liability solely on the basis of such disclosures. They also recommended legislation recently passed by the Senate that will ensure the availability of loans to small business to aid them in becoming Y2K compliant. Both of these measures were unanimously supported by the Senate.

Interestingly, neither the "President's Council on Year 2000," nor the Senate's "Special Committee on the Year 2000 Technology Problem," has endorsed the legislation reported by the Committee. In fact, the "President's Council on Year 2000," has expressed strong reservations about the need and timing of the legislation. On March 1, 1999, John Koskinen, the Chairman of the President's Council, released the following statement regarding the legislation:

"The bills before the Judiciary and Commerce Committees focus on liability litigation, which is not a Year 2000 readiness issue. In fact, I have serious doubts that these bills will do anything to enhance readiness and increase the number of systems able to effectively make the century transition. In addition, we need to ensure that discussion speculating about the possibility of voluminous litigation does not inadvertently increase the possibility of unnecessary overreaction by the public as a result of a misperception about the magnitude of the number of systems that will fail.".

In testimony before the Senate Judiciary Committee last week on an almost identical bill, a representative of the Justice Department advised against the passage of any bill that would bar small businesses and consumers who have legitimate Y2K claims from the courts. In the view of the Justice Department, this legislation would represent "by far the most sweeping litigation reform measure ever enacted..." At a minimum, the Department believes Congress should conduct a careful and thorough review of these measures.

In closing, I would like to reiterate my opposition to this legislation. According to the Justice Department, this bill goes well beyond restrictions contained in previous federal litigation reform bills. The dangers of this bill are reflected in the organizations that are opposed to its passage. Almost every major consumer organization is opposed to the bill. Members of the trial bar, including the

Association of Trial Lawyers of America (ATLA), are opposed to the bill. The American Medical Association (AMA), which has traditionally supported federal tort reform bills, is opposed to the legislation. I strongly urge my colleagues to reject this bill and to focus the Senate's energies on policies that are more likely to achieve the goals of ensuring Y2K compliance, and avoiding potentially widespread computer failures.

LEGISLATION IS SUBSTANTIVELY FLAWED

I have provided below a few examples of how this legislation will substantively provide enormous advantages to defendants in Y2K actions to the detriment of aggrieved parties.

I. MAJOR DEFINITIONS (SECTION 3)

Definition of a Y2K Action

Y2K action is defined as any civil action that involves an alleged harm or a loss resulting directly or indirectly from an actual or a potential Y2K failure. Allegations that a claim is associated with a Y2K failure can be made by the plaintiff when filing a pleading, or by a defendant when responding to a plaintiff's complaint. As a result of the advantages provided to defendants by the legislation, they will have strong incentives to designate as many civil suits as possible as Y2K actions. The broadness of the definition, which permits any claim that is remotely related to a Y2K failure to be governed by the bill, means that defendants will have wide latitude in defining civil claims as Y2K action.

Definition of a Y2K Failure

A Y2K failure is defined as any device or system, including computers and computer parts, such as microchips and embedded chips, as well as software or hardware, that fails to process, calculate, compare, store, display, or receive date-related data. These include, but are not limited to, failures of computer systems to accurately process specific data in 1999, 2000, or 2001. However, the bill will not be limited to systems disruptions in these years exclusively. A computer systems failure in any year beyond enactment of the bill that is related to a faulty transmission of date-related data will be covered by the legislation.

II. APPLICATION OF LEGISLATION

Covered Actions

The legislation will apply to commercial and tort claims involving property damage and personal injuries relating to emotional distress. A potential class of emotional distress cases includes persons whose medical records have been exposed to the public because of a Y2K failure.

III. CAPS ON PUNITIVE DAMAGES (SECTION 5)

The legislation caps punitive damages at an amount equal to the greater of three times actual damages or $250,000; however, for entities with fewer than 25 full-time employees, and a $500,000 or lesser net worth, the cap is the smaller of three times actual damages or $250,000. This provision is significantly more stringent than the punitive damage caps in previous product liability bills.

In those bills, the multiplier was tied to all economic damages. Under this bill, the multiplier is tied to actual damages only. Actual damages under the legislation are limited to damages to tangible property, along with replacement and repair costs. Additionally, this means that in cases such as emotional distress cases, punitive damages may be completely barred.

IV. PLEADING REQUIREMENTS (TITLE I)

Pre-filing Notification to Defendants/ 90 Day Waiting Period for Plaintiff (Section 101)

Before commencing a Y2K action, a plaintiff is required to provide a written notice to each prospective defendant that identifies, with particularity, (1) the manifestations of any material defect that allegedly caused the harm; (2) the actual harm or loss suffered; (3) the remedy plaintiffs plan to seek in court; (4) the basis upon which plaintiff plans to seek that remedy; and (5) the name, title, address and telephone number of any individual who has authority to negotiate a resolution of the matter. Once the pre-trial written notice is provided to each prospective defendant, a plaintiff will be barred from commencing the action in court for 90 days. This purportedly is to give the defendant time to respond to the plaintiff's pre-trial notice with recommendations to resolve the matter before litigation ensues. However, the bill imposes no requirement on the defendant to fix the problem. This means the defendant, after acknowledging the receipt of the plaintiff's notice, can sit and allow the 90 days to expire without taking any remedial action.

This provision also will result in a significant change to current law. Although in some contract cases plaintiffs are required to provide pre-trial notices to defendants, they are normally not required to wait three months to file their claims in court. This provision will be advantageous to defendants. It will permit them to prepare their defense before plaintiffs can officially pursue formal discovery. Considering the likelihood that many small businesses will not be able to wait three months before filing a claim, defendants are likely to use the provision to pressure small business plaintiffs into accepting unreasonably low settlements.

Mark Yarsike, owner of a produce store, encountered problems because of the failure of a newly purchased computerized cash register to process credit cards with expiration dates of 2000 and beyond. Yarsike, who testified at the Committee's February 9, 1999 hearing, has stated that if this rule was in place at the time he filed his claim, he would have been virtually put out of business.

V. ELIMINATION OF JOINT AND SEVERAL LIABILITY (SECTION 104)

The bill abolishes joint and several liability in all actions covered by the legislation. Defendants will be liable only for their specific share of harm that the plaintiff is able to prove in relation to all other actual or prospective defendants. The Justice Department has advised that this provision will place considerable burdens on the plaintiffs' ability to recover their full damages.

VI. RULES GOVERNING CONTRACT-RELATED CLAIMS (TITLE II)

Enforceable Contracts (Section 201)

The legislation will require enforceability of all contracts, including written disclosures and disclaimers of warranties, unless the court determines the contract, as a whole, is unenforceable. Generally, contracts can be nullified by courts if they are found to violate public policy, especially as it concerns fairness with respect to bargaining power of the parties. For example, if one party, such as a large business, has enormous bargaining power in comparison to the other party, a court may act to overturn the contract upon evidence that the disadvantaged party was placed in an unconscionable position, notwithstanding the written agreement.

Reasonable Efforts Defense for Defendants (Section 202)

The legislation grants defendants a "reasonable efforts" defense with respect to any Y2K contract action. Under this defense, a defendant is permitted to introduce evidence that its efforts to implement the contract were reasonable under the circumstances, for the purpose of limiting or eliminating its liability. Generally, under contract law, the defendant's conduct is immaterial to a breach of contract. Normally, the only relevant issue is whether the product is defective or the service lacks the required performance standard. It is not clear how the actions involving reasonable measures will be determined, since there is not much history regarding these types of cases. What is likely, however, is that the standard will be measured by like parties (the manner in which defendants generally seeks to respond to potential problems). No matter how minimal or ineffective such efforts might be in informing plaintiffs, to the extent such conduct becomes common among potential Y2K defendants, it could be used to exonerate defendants from any damages owed to a plaintiff.

VII. RULES GOVERNING TORT-RELATED CLAIMS (TITLE III)

Good Faith Defense for Defendants (Section 302)

In all tort claims covered by the bill, a defendant will be permitted to offer into evidence, as a complete defense to any damages, that it acted in good faith and took reasonable measures under the circumstances to prevent the Y2K failure from occurring. This provision will likely have the same effect as Section 202 relating to contract suits. The main difference, however, is that the reasonable efforts defense relating to contract suits allows defendants to use the defense to reduce damages, with the possibility of eliminating all damages. The good faith defense relating to tort claims, however, operates as a complete defense, precluding any possibility of damages being awarded to plaintiffs.

Higher Burdens of Proof for Plaintiffs in Tort Suits (Section 302)

The legislation will require plaintiffs to meet a substantial burden of proof to recover in tort cases. The bill provides that in any tort action involving the plaintiff's state of mind, the necessary burden of proof will be clear and convincing evidence that the defendant knew, or recklessly disregarded a known and substantial risk, and that the failure would cause the actual and specific injury suffered by the plaintiff. This is one of the highest standards of proof

required in a civil action. It is generally reserved for punitive damages. However, because it is tied to any case involving the defendant's state of mind, it will apply even in cases involving ordinary negligence. The ordinary negligence standard requires plaintiffs to prove that the defendant knew, or should have known, that a product in a certain condition could be defective, which involves proof of a defendant's state of mind. However, not only must a plaintiff meet this burden to prove simple negligence, the plaintiff must also prove the defendant was aware of the specific injury that the plaintiff suffered. This standard will make it extremely difficult to recover damages in property loss cases. Moreover, the burden of proof is not in lieu of, but in addition to, any burdens of proof the plaintiff is required to meet under state law.

○