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Part 1

YEAR 2000 READINESS AND RESPONSIBILITY ACT

MAY 7, 1999.—Ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 775]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 775) to establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transition from the year 1999 to the year 2000, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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69–006

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Year 2000 Readiness and Responsibility Act".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Congress seeks to encourage businesses to concentrate their attention and resources in the short time remaining before January 1, 2000, on addressing, assessing, remediating, and testing their year 2000 problems, and to minimize any possible business disruptions associated with year 2000 issues.

(2) It is appropriate for the Congress to enact legislation to assure that year 2000 problems do not unnecessarily disrupt interstate commerce or create unnecessary case loads in Federal and State courts and to provide initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact of the year 2000 problem.

(3) Year 2000 issues will affect practically all business enterprises to some degree, giving rise to a large number of disputes.

(4) Resorting to the legal system for resolution of year 2000 problems is not feasible for many businesses, particularly small businesses, because of its complexity and expense.

(5) The delays, expense, uncertainties, loss of control, adverse publicity and animosities that frequently accompany litigation of business disputes can only exacerbate the difficulties associated with the year 2000 date change, and work against the successful resolution of those difficulties.

(6) The Congress recognizes that every business in the United States should be concerned that widespread and protracted year 2000 litigation may threaten the network of valued and trusted business relationships that are so important to the effective functioning of the world economy, and which may put unbearable strains on an overburdened judicial system.

(7) A proliferation of frivolous year 2000 actions by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(8) The Congress encourages businesses to approach their year 2000 disputes responsibly, and to avoid unnecessary, time-consuming and costly litigation based on year 2000 failures. Congress supports good faith negotiations between parties when there is a dispute over a year 2000 problem, and, if necessary, urges the parties to enter into voluntary, non-binding mediation rather than litigation.

SEC. 3. DEFINITIONS.

In this Act:

(1) CONTRACT.—The term "contract" means a contract, tariff, license, or warranty.

(2) DEFENDANT.—The term "defendant" means any person against whom a year 2000 claim has been asserted.

(3) ECONOMIC LOSS.—The term "economic loss"—

(A) means any damages other than damages arising out of personal injury or damage to tangible property; and

(B) includes, but is not limited to, damages for lost profits or sales, for business interruption, for losses indirectly suffered as a result of the defendant's wrongful act or omission, for losses that arise because of the claims of third parties, for losses that must be pleaded as special damages, and consequential damages (as defined in the Uniform Commercial Code or analogous State commercial law).

(4) GOVERNMENTAL ENTITY.—The term "governmental entity" means an agency, instrumentality, other entity, or official of Federal, State, or local government (including multijurisdictional agencies, instrumentalities, and entities).

(5) MATERIAL DEFECT.—The term "material defect" means a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or intended. The term "material defect" does not include a defect that has an insignificant or de minimis effect on the operation or functioning of an item, that affects only a component of an item that, as a whole, substantially operates or functions as designed, or that has an insignificant or de minimis effect on the efficacy of the service provided.

(6) PERSON.—The term "person" means any natural person and any entity, organization, or enterprise, including but not limited to corporations, companies, joint stock companies, associations, partnerships, trusts, and governmental entities.

(7) PERSONAL INJURY.—The term "personal injury" means any physical injury to a natural person, including death of the person, and mental suffering, emotional distress, or like elements of injury suffered by a natural person in connection with a physical injury.

(8) PLAINTIFF.—The term "plaintiff" means any person who asserts a year 2000 claim.

(9) PUNITIVE DAMAGES.—The term "punitive damages" means damages that are awarded against any person to punish such person or to deter such person, or others, from engaging in similar behavior in the future.

(10) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, and any political subdivision thereof.

(11) YEAR 2000 ACTION.—The term "year 2000 action" means any civil action of any kind brought in any court under Federal or State law, or an agency board of contract appeal proceeding, in which a year 2000 claim is asserted.

(12) YEAR 2000 CLAIM.—The term "year 2000 claim"—

(A) means any claim or cause of action of any kind, other than a claim based on personal injury, whether asserted by way of claim, counterclaim, cross-claim, third-party claim, defense, or otherwise, in which the plaintiff's alleged loss or harm resulted, directly or indirectly, from a year 2000 failure;

(B) includes a claim brought in any Federal or State court by a governmental entity when acting in a commercial or contracting capacity; and

(C) does not include a claim brought by such a governmental entity acting in a regulatory, supervisory, or enforcement capacity.

(13) YEAR 2000 FAILURE.—The term "year 2000 failure" means any failure by any device or system (including, without limitation, any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions, however constructed, in processing, calculating, comparing, sequencing, displaying, storing, transmitting, or receiving year 2000 date-related data.

SEC. 4. APPLICATION OF ACT.

(a) GENERAL RULE.—This Act applies to any year 2000 claim brought after February 22, 1999, including any appeal, remand, stay, or other judicial, administrative, or alternative dispute resolution proceeding with respect to such claim.

(b) NO NEW CAUSE OF ACTION CREATED.—Nothing in this Act creates a new cause of action, and, except as otherwise explicitly provided in this Act, nothing in this Act expands any liability otherwise imposed or limits any defense otherwise available under Federal or State law.

(c) EXCLUSION OF PERSONAL INJURY CLAIMS.—None of the provisions of this Act shall apply to any claim based on personal injury.

(d) PREEMPTION OF STATE LAW.—Except as otherwise provided in this Act, this Act supersedes State law to the extent that it establishes a rule of law applicable to a year 2000 claim that is inconsistent with State law.

TITLE I—UNIFORM PRELITIGATION PROCEDURES FOR YEAR 2000 ACTIONS

SEC. 101. NOTICE PROCEDURES TO AVOID UNNECESSARY YEAR 2000 ACTIONS.

(a) NOTIFICATION PERIOD.—Before filing a year 2000 action, except an action that seeks only injunctive relief, a prospective plaintiff shall send by certified mail to each prospective defendant a written notice that identifies, with particularity as to any year 2000 claim—

(1) any symptoms of any material defect alleged to have caused harm or loss;

(2) the harm or loss allegedly suffered by the prospective plaintiff;

(3) the facts that lead the prospective plaintiff to hold such person responsible for both the defect and the injury;

(4) the relief or action sought by the prospective plaintiff; and

(5) the name, title, address, and telephone numbers of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.

Except as provided in subsection (c), the prospective plaintiff shall not commence an action in Federal or State court until the expiration of 90 days after the date on which such notice is received. Such 90-day period shall be excluded in the computation of any applicable statute of limitations.

(b) RESPONSE TO NOTICE.—

(1) IN GENERAL.—Not later than 30 days after receipt of the notice specified in subsection (a), each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice and describing any actions it has taken or will take by not later than 60 days after the end of that 30-day period, to remedy the problem identified by the prospective plaintiff.

(2) INADMISSIBILITY.—A written statement required by this subsection is not admissible in evidence, under Rule 408 of the Federal Rules of Evidence or any analogous rule of evidence in any State, in any proceeding to prove liability for, or the invalidity of, a claim or its amount, or otherwise as evidence of conduct or statements made in compromise negotiations.

(3) PRESUMPTIVE TIME OF RECEIPT.—For purposes of paragraph (1), a notice under subsection (a) is presumed to be received 7 days after it was sent.

(c) FAILURE TO RESPOND.—If a prospective defendant fails to respond to a notice provided pursuant to subsection (a) within the 30-day period specified in subsection (b) or does not describe the action, if any, that the prospective defendant has taken or will take to remedy the problem identified by the prospective plaintiff within the subsequent 60 days, the 90-day period specified in subsection (a) shall terminate at the end of that 30-day period as to that prospective defendant and the prospective plaintiff may thereafter commence its action against that prospective defendant.

(d) FAILURE TO PROVIDE NOTICE.—If a defendant determines that a plaintiff has filed a year 2000 action without providing the notice specified in subsection (a) and without awaiting the expiration of the 90-day period specified in subsection (a), the defendant may treat the plaintiff's complaint as such a notice by so informing the court and the plaintiff in its initial response to the complaint. If any defendant elects to treat the complaint as such a notice—

(1) the court shall stay all discovery in the action involving that defendant for the applicable time period provided in subsection (a) or (c), as the case may be, after filing of the complaint; and

(2) the time for filing answers and all other pleadings shall be tolled during such applicable period.

(e) EFFECT OF CONTRACTUAL WAITING PERIODS.—In cases in which a contract or a statute enacted before January 1, 1999, requires notice of nonperformance and provides for a period of delay prior to the initiation of suit for breach or repudiation of contract, the period of delay provided in the contract or the statute is controlling over the waiting period specified in subsections (a) and (d).

(f) SANCTION FOR FRIVOLOUS INVOCATION OF THE STAY PROVISION.—In any action in which a defendant acts pursuant to subsection (d) to stay the action, and the court subsequently finds that the defendant's assertion that the suit is a year 2000 action was frivolous and made for the purpose of causing unnecessary delay, the court may award sanctions to opposing parties in accordance with the provisions of Rule 11 of the Federal Rules of Civil Procedure or the equivalent applicable State rule.

(g) COMPUTATION OF TIME.—For purposes of this section, the rules regarding computation of time shall be governed by the applicable Federal or State rules of civil procedure.

(h) SPECIAL RULE FOR CLASS ACTIONS.—For the purpose of applying this section to a year 2000 action that is maintained as a class action in Federal or State court, the requirements of the preceding subsections of this section apply only to named plaintiffs in the class action.

SEC. 102. ALTERNATIVE DISPUTE RESOLUTION TO AVOID UNNECESSARY YEAR 2000 ACTIONS.

(a) IN GENERAL.—(1) At any time during the 90-day period specified in section 101(a), either party may request the other to use alternative dispute resolution. If, based upon that request, the parties enter into an agreement to use alternative dispute resolution, they may also agree to an extension of the 90-day period.

(2) At any time after expiration of the 90-day period specified in section 101(a), whether before or after the filing of a complaint, either party may request the other to use alternative dispute resolution.

(b) PAYMENT OF MONEYS DUE.—If the parties resolve their dispute through alternative dispute resolution as provided in subsection (a), the defendant shall pay all moneys due within 30 days, unless another period of time is agreed to by the parties or established by contract between the parties.

(c) FORECLOSURE OF FURTHER PROCEEDINGS ON RESOLVED ISSUES.—Resolution of the issues by the parties prior to litigation through negotiation or alternative dispute resolution shall foreclose any further proceedings with respect to those issues.

SEC. 103. PLEADING REQUIREMENTS.

(a) APPLICATION WITH RULES OF CIVIL PROCEDURE.—This section applies exclusively to year 2000 claims and, except to the extent that this section requires additional information to be contained in or attached to pleadings, nothing in this section is intended to amend or otherwise supersede applicable rules of Federal or State civil procedure.

(b) NATURE AND AMOUNT OF DAMAGES.—With respect to any year 2000 claim that seeks the award of money damages, the complaint shall state with particularity the nature and amount of each element of damages, and the factual basis for the damages calculation.

(c) MATERIAL DEFECTS.—With respect to any year 2000 claim in which the plaintiff alleges that a product or service was defective, the complaint shall identify with particularity the symptoms of the material defects and shall state with particularity the facts supporting the conclusion that the defects are material.

(d) REQUIRED STATE OF MIND.—With respect to any year 2000 claim as to which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each element of the year 2000 claim, state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) MOTION TO DISMISS; STAY OF DISCOVERY.—

(1) DISMISSAL FOR FAILURE TO MEET PLEADING REQUIREMENTS.—In any year 2000 action, the court shall, on the motion of any defendant, dismiss the complaint without prejudice if the requirements of subsection (a), (b), or (c) are not met with respect to any year 2000 claim asserted therein.

(2) STAY OF DISCOVERY.—In any year 2000 action, all discovery shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.

(3) PRESERVATION OF EVIDENCE.—

(A) IN GENERAL.—During the pendency of any stay of discovery entered pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically stored or recorded data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were a subject of a continuing request for production of documents from an opposing party under applicable Federal or State rules of civil procedure.

(B) SANCTION FOR WILLFUL VIOLATION.—A party aggrieved by the willful failure of an opposing party to comply with subparagraph (A) may apply to the court for an order awarding appropriate sanctions.

SEC. 104. DUTY OF ALL PERSONS TO MITIGATE YEAR 2000 COMPUTER FAILURES AND RESULTING DAMAGES.

Damages awarded for any year 2000 claim shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably should have been, aware, including information made available by the defendant to purchasers or users of the defendant's product or services concerning means of remedying or avoiding the year 2000 failure.

TITLE II—YEAR 2000 ACTIONS INVOLVING CONTRACTS

SEC. 201. CERTAINTY OF CONTRACT TERMS FOR PREVENTION OF YEAR 2000 DAMAGES.

(a) IN GENERAL.—Subject to subsection (b), in resolving any year 2000 claim, any written contractual term, including a limitation or an exclusion of liability, or a disclaimer of warranty, shall be fully enforced unless the enforcement of that term would manifestly and directly contravene applicable State law embodied in any statute in effect on January 1, 1999, specifically addressing that term.

(b) INTERPRETATION OF CONTRACT.—In resolving any year 2000 claim as to which a contract to which subsection (a) applies is silent with respect to a particular issue, the interpretation of the contract with respect to that issue shall be determined by applicable law in effect at the time the contract was executed.

SEC. 202. APPLICATION OF EXISTING IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY DOCTRINES.

(a) DOCTRINE OF IMPOSSIBILITY AND COMMERCIAL IMPRACTICABILITY.—With respect to any year 2000 claim for breach or repudiation of contract, the applicability of the doctrines of impossibility and commercial impracticability shall be determined by the law in existence on January 1, 1999. Nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines.

(b) REASONABLE EFFORTS.—To the extent that impossibility or commercial impracticability is raised as a defense against a claim for breach or repudiation of contract, the party asserting the defense shall be allowed to offer evidence that its implementation of the contract, or its efforts to implement the contract, were reasonable in light of the circumstances.

SEC. 203. PROTECTION OF PERSONS FROM LIABILITY NOT ANTICIPATED IN YEAR 2000 CONTRACTS.

With respect to any year 2000 claim involving a breach of contract or a claim related to the contract, no party may claim or be awarded any category of damages unless such damages are allowed by the express terms of the contract or, if the contract is silent on such damages, by operation of the applicable Federal or State law that governed interpretation of the contract at the time the contract was entered into.

TITLE III—YEAR 2000 ACTIONS INVOLVING TORT AND OTHER NONCONTRACTUAL CLAIMS

SEC. 301. PROPORTIONATE LIABILITY.

(a) IN GENERAL.—A person against whom a final judgment is entered with respect to a year 2000 claim, other than a claim for breach or repudiation of contract, shall be liable solely for the portion of the judgment that corresponds to the percentage of responsibility of that person, as determined under subsection (b).

(b) DETERMINATION OF RESPONSIBILITY.—

(1) IN GENERAL.—With respect to any year 2000 claim, the court shall instruct the jury to answer special interrogatories, or if there is no jury, shall make findings, with respect to each defendant and plaintiff, and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including (but not limited to) persons who have entered into settlements with the plaintiff or plaintiffs, concerning the percentage of responsibility of the defendant, the plaintiff, and each such person, measured as a percentage of the total fault of all persons who caused or contributed to the total loss incurred by the plaintiff.

(2) CONTENTS OF SPECIAL INTERROGATORIES OR FINDINGS.—The responses to interrogatories, or findings, as appropriate, under paragraph (1) shall specify the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of each person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

(3) FACTORS FOR CONSIDERATION.—In determining the percentage of responsibility under this subsection, the trier of fact shall consider—

(A) the nature of the conduct of each person alleged to have caused or contributed to the loss incurred by the plaintiff; and

(B) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs.

(4) NONDISCLOSURE TO JURY.—The standard for allocation of damages under paragraph (1) shall not be disclosed to members of the jury.

SEC. 302. LIMITATION ON BYSTANDER LIABILITY FOR YEAR 2000 FAILURES.

(a) IN GENERAL.—With respect to any year 2000 claim for money damages in which—

(1) the defendant is not the manufacturer, seller, or distributor of a product, or the provider of a service, that suffers or causes the year 2000 failure at issue,

(2) the plaintiff is not in substantial privity with the defendant, and

(3) the defendant's actual or constructive awareness of an actual or potential year 2000 failure is an element of the claim under applicable law,

the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves by clear and convincing evidence that the defendant actually knew, or recklessly disregarded a known and substantial risk, that such failure would occur.

(b) SUBSTANTIAL PRIVITY.—For purposes of subsection (a)(2), a plaintiff and a defendant are in substantial privity when, in a year 2000 claim arising out of the performance of professional services, the plaintiff and the defendant either have contractual relations with one another or the plaintiff is a person who, prior to the defendant's performance of such services, was specifically identified to and acknowledged by the defendant as a person for whose special benefit the services were being performed.

(c) CERTAIN CLAIMS EXCLUDED.—For purposes of subsection (a)(3), claims in which the defendant's actual or constructive awareness of an actual or potential year 2000 failure is an element of the claim under applicable law do not include claims for negligence but do include claims such as fraud, constructive fraud, breach of fiduciary duty, negligent misrepresentation, and interference with contract or economic advantage.

SEC. 303. REASONABLE EFFORTS DEFENSE.

With respect to any year 2000 claim seeking money damages, except with respect to claims asserting breach or repudiation of contract—

(1) the fact that a year 2000 failure occurred in an entity, facility, system, product, or component that was within the control of the party against whom the claim is asserted shall not constitute the sole basis for recovery; and

(2) the party against whom the claim is asserted shall be entitled to establish, as a complete defense to the claim, that it took measures that were reasonable under the circumstances to prevent the year 2000 failure from occurring or from causing the damages upon which the claim is based.

SEC. 304. DAMAGES LIMITATION.

(a) YEAR 2000 RECOVERY FUND.—There is established in the Treasury a Year 2000 Recovery Fund. In any year 2000 action in which punitive damages are awarded under applicable law, including this Act, the entire amount of such damages shall be paid into the Year 2000 Recovery Fund. Amounts in the Fund shall be used for the assistance of small businesses, State and local governments, and nonprofit organizations, that are affected by year 2000 failures.

(b) STANDARD FOR AWARDS.—With respect to any year 2000 claim for which punitive damages may be awarded under applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that conduct carried out by the defendant showed a conscious, flagrant indifference to the rights or safety of others and was the proximate cause of the harm or loss that is the subject of the year 2000 claim. This requirement is in addition to any other requirement in applicable law for the award of such damages.

(c) CAPS ON PUNITIVE DAMAGES.—

(1) IN GENERAL.—With respect to any year 2000 claim, if a defendant is found liable for punitive damages, the amount of punitive damages that may be awarded to a plaintiff shall not exceed the greater of—

(A) 3 times the amount awarded to the plaintiff for compensatory damages; or

(B) $250,000.

(2) SPECIAL RULE.—

(A) IN GENERAL.—Notwithstanding paragraph (1), with respect to any year 2000 claim, if the defendant is found liable for punitive damages and the defendant—

(i) is an individual whose net worth does not exceed $500,000,

(ii) is an owner of an unincorporated business that has fewer than 25 full-time employees, or

(iii) is—

(I) a partnership,

(II) corporation,

(III) association,

(IV) unit of local government, or

(V) organization,

that has fewer than 25 full-time employees,

the amount of punitive damages shall not exceed the lesser of 3 times the amount awarded to the plaintiff for compensatory damages, or $250,000.

(B) APPLICABILITY.—For purposes of determining the applicability of this paragraph to a corporation, the number of employees of a subsidiary of a

wholly owned corporation shall include all employees of a parent corporation or any subsidiary of that parent corporation.

(3) APPLICATION OF LIMITATIONS BY THE COURT.—The limitations contained in paragraphs (1) and (2) shall be applied by the court and shall not be disclosed to the jury.

SEC. 305. RECOVERY OF ECONOMIC DAMAGES FOR YEAR 2000 CLAIMS.

(a) LIMITATION ON RECOVERY OF ECONOMIC LOSSES.—Subject to subsection (b), a plaintiff making a year 2000 claim alleging a nonintentional tort may recover economic losses only upon establishing, in addition to all other elements of the claim under applicable law, that any one of the following circumstances exists:

(1) The recovery of such losses is provided for in a contract to which the plaintiff is a party.

(2) Such losses are incidental to a year 2000 claim based on damage to tangible personal or real property caused by a year 2000 failure (other than damage to property that is the subject of a contract between the parties involved in the year 2000 claim).

(b) RECOVERY MUST BE PERMITTED UNDER APPLICABLE LAW.—Economic losses shall be recoverable under this section only if applicable Federal law, or applicable State law embodied in statute or controlling judicial precedent as of January 1, 1999, permits the recovery of such losses.

SEC. 306. LIABILITY OF OFFICERS AND DIRECTORS.

(a) IN GENERAL.—A director, officer, or trustee of a business or other organization (including a corporation, unincorporated association, partnership, or nonprofit organization) shall not be personally liable with respect to any year 2000 claim in his or her capacity as a director or officer of the business or organization for an aggregate amount that exceeds the greater of—

(1) $100,000; or

(2) the amount of cash compensation received by the director or officer from the business or organization during the 12-month period immediately preceding the act or omission for which liability was imposed.

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be deemed to impose, or to permit the imposition of, personal liability on any director, officer, or trustee in excess of the aggregate amount of liability to which such director, officer, or trustee would be subject under applicable State law in existence on January 1, 1999 (including any charter or bylaw authorized by such State law).

TITLE IV—YEAR 2000 CLASS ACTIONS

SEC. 401. MINIMUM INJURY REQUIREMENT.

(a) IN GENERAL.—In any year 2000 action involving a year 2000 claim that a product or service is defective, the action may be maintained as a class action in Federal or State court as to that claim only if it satisfies all other prerequisites established by applicable Federal or State law and the court also finds that the alleged defect in the product or service was a material defect as to a majority of the members of the class.

(b) DETERMINATION BY COURT.—As soon as practicable after the commencement of a year 2000 action involving a year 2000 claim that a product or service is defective and that is brought as a class action, the court shall determine by order whether the requirement set forth in subsection (a) is satisfied. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

SEC. 402. NOTIFICATION.

(a) NOTICE BY MAIL.—In any year 2000 action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class by United States mail, return receipt requested. Persons whose actual receipt of the notice is not verified by the court or by counsel for one of the parties shall be excluded from the class unless those persons inform the court in writing, on a date no later than the commencement of trial or entry of judgment, that they wish to join the class.

(b) CONTENTS OF NOTICE.—In addition to any information required by applicable Federal or State law, the notice described in this subsection shall—

(1) concisely and clearly describe the nature of the action;

(2) identify the jurisdiction whose law will govern the action and where the action is pending;

(3) identify any potential claims that class counsel chose not to pursue so that the action would satisfy class certification requirements;

(4) describe the fee arrangements with class counsel, including the hourly fee being charged, or, if it is a contingency fee, the percentage of the final award which will be paid, including an estimate of the total amount that would be paid if the requested damages were to be granted; and

(5) describe the procedure for opting out of the class.

(c) SETTLEMENT.—The parties to a year 2000 action that is brought as a class action may not enter into, nor request court approval of, any settlement or compromise before the class has been certified.

SEC. 403. DISMISSAL PRIOR TO CERTIFICATION.

Before determining whether to certify a class in a year 2000 action, the court may decide a motion to dismiss or for summary judgment made by any party if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

SEC. 404. FEDERAL JURISDICTION IN YEAR 2000 CLASS ACTIONS.

(a) JURISDICTION.—Except as provided in subsection (b), a year 2000 action may be brought as a class action in the United States district court or removed to the appropriate United States district court if the amount in controversy is greater than the sum or value of $1,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action.

(b) EXCEPTION.—A year 2000 action shall not be brought or removed as a class action under this section if—

(1)(A) the substantial majority of the members of the proposed plaintiff class are citizens of a single State of which the primary defendants are also citizens; and

(B) the claims asserted will be governed primarily by the laws of that State; or

(2) the primary defendants are States, State officials, or other governmental entities against whom the United States district court may be foreclosed from ordering relief.

TITLE V—CLIENT PROTECTION IN CONNECTION WITH YEAR 2000 ACTIONS

SEC. 501. SCOPE.

This title applies to any year 2000 action asserted or brought in Federal or State court.

SEC. 502. DEFINITIONS.

In this title:

(1) ATTORNEY.—the term "attorney" means any natural person, professional law association, corporation, or partnership authorized under applicable State law to practice law.

(2) ATTORNEY'S SERVICES.—The term "attorney's services" means the professional advice or counseling of or representation by an attorney, but such term shall not include other assistance incurred, directly or indirectly, in connection with an attorney's services, such as administrative or secretarial assistance, overhead, travel expenses, witness fees, or preparation by a person other than the attorney of any study, analysis, report, or test.

(3) CONTINGENT FEE.—The term "contingent fee" means the cost or price of an attorney's services determined by applying a specified percentage, which may be a firm fixed percentage, a graduated or sliding percentage, or any combination thereof, to the amount of the settlement or judgment obtained.

(4) HOURLY FEE.—The term "hourly fee" means the cost or price per hour of an attorney's services.

(5) RETAIN.—The term "retain" means the act of a client in engaging an attorney's services, whether by express or implied agreement, by seeking and obtaining the attorney's services.

SEC. 503. CONSUMER'S RIGHT TO UP-FRONT DISCLOSURE OF INFORMATION REGARDING FEES AND SETTLEMENT PROPOSALS.

Before being retained by a client with respect to a year 2000 claim or a year 2000 action, an attorney shall disclose to the client the client's rights under this title and

the client's right to receive a written statement of the information described under sections 504 and 505.

SEC. 504. INFORMATION AFTER INITIAL MEETING.

(a) WRITTEN DISCLOSURE OF FEES.—Within 30 days after the disclosure described under section 503, an attorney retained by a client with respect to a year 2000 claim or a year 2000 action shall provide a written statement to the client setting forth—

(1) in the case of an attorney retained on an hourly basis, the attorney's hourly fee for services in pursuing the year 2000 claim or year 2000 action and any conditions, limitations, restrictions, or other qualifications on the fee, including likely expenses and the client's obligation for those expenses; and

(2) in the case of an attorney retained on a contingent fee basis, the attorney's contingent fee for services in pursuing the year 2000 claim or year 2000 action and any conditions, limitations, restrictions, or other qualifications on the fee, including likely expenses and the client's obligation for those expenses.

(b) CONSUMER'S RIGHT TO TIMELY UPDATED INFORMATION ABOUT FEES.—In addition to the requirements contained in subsection (a), in the case of an attorney retained on an hourly basis, the attorney shall also render regular statements (at least once each 90 days) to the client containing a description of hourly charges and expenses incurred in the pursuit of the client's year 2000 claim or year 2000 action by each attorney assigned to the client's matter.

SEC. 505. CONSUMER'S RIGHT TO TIMELY UPDATED INFORMATION ABOUT SETTLEMENT PROPOSALS AND DETAILED STATEMENT OF HOURS AND FEES.

An attorney retained by a client with respect to a year 2000 claim or a year 2000 action shall advise the client of all written settlement offers to the client and of the attorney's estimate of the likelihood of achieving a more or less favorable resolution to the year 2000 claim or year 2000 action, the likely timing of such resolution, and the likely attorney's fees and expenses required to obtain such a resolution. An attorney retained by a client with respect to a year 2000 claim or a year 2000 action shall, within a reasonable time not later than 60 days after the date on which the year 2000 claim or year 2000 action is finally settled or adjudicated, provide a written statement to the client containing—

(1) in the case of an attorney retained on an hourly basis, the actual number of hours expended by each attorney on behalf of the client in connection with the year 2000 claim or year 2000 action, the attorney's hourly rate, and the total amount of hourly fees; and

(2) in the case of an attorney retained on a contingent fee basis, the total contingent fee for the attorney's services in connection with the year 2000 claim or year 2000 action.

SEC. 506. CLASS ACTIONS.

An attorney representing a class or a defendant in a year 2000 action maintained as a class action shall make the disclosures required under this title to the presiding judge, in addition to making such disclosures to each named representative of the class. The presiding judge shall, at the outset of the year 2000 action, determine a reasonable attorney's fee by determining the appropriate hourly rate and the maximum percentage of the recovery to be paid in attorney's fees. Notwithstanding any other provision of law or agreement to the contrary, the presiding judge shall award attorney's fees only pursuant to this title.

SEC. 507. AWARD OF REASONABLE COSTS AND ATTORNEY'S FEES AFTER AN OFFER OF SETTLEMENT.

(a) OFFER OF SETTLEMENT.—With respect to any year 2000 claim, any party may, at any time not less than 10 days before trial, serve upon any adverse party a written offer to settle the year 2000 claim for money or property, including a motion to dismiss the claim, and to enter into a stipulation dismissing the claim or allowing judgment to be entered according to the terms of the offer. Any such offer, together with proof of service thereof, shall be filed with the clerk of the court.

(b) ACCEPTANCE OF OFFER.—If the party receiving an offer under subsection (a) serves written notice on the offeror that the offer is accepted, either party may then file with the clerk of the court the notice of acceptance, together with proof of service thereof.

(c) FURTHER OFFERS NOT PRECLUDED.—The fact that an offer under subsection (a) is made but not accepted does not preclude a subsequent offer under subsection (a). Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, or to determine costs and expenses under this section.

(d) EXEMPTION OF CLAIMS.—At any time before judgment is entered, the court, upon its own motion or upon the motion of any party, may exempt from this section any year 2000 claim that the court finds presents a question of law or fact that is

novel and important and that substantially affects nonparties. If a claim is exempted from this section, all offers made by any party under subsection (a) with respect to that claim shall be void and have no effect.

(e) PETITION FOR PAYMENT OF COSTS, ETC.—If all offers made by a party under subsection (a) with respect to a year 2000 claim, including any motion to dismiss the claim, are not accepted and the dollar amount of the judgment, verdict, or order that is finally issued (exclusive of costs, expenses, and attorneys' fees incurred after judgment or trial) with respect to the year 2000 claim is not more favorable to the offeree with respect to the year 2000 claim than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys' fees, incurred with respect to the year 2000 claim from the date the last such offer was made or, if the offeree made an offer under this section, from the date the last such offer by the offeree was made.

(f) ORDER TO PAY COSTS, ETC.—If the court finds, pursuant to a petition filed under subsection (e) with respect to a year 2000 claim, that the dollar amount of the judgment, verdict, or order that is finally issued is not more favorable to the offeree with respect to the year 2000 claim than the last such offer, the court shall order the offeree to pay the offeror's costs and expenses, including attorneys' fees, incurred with respect to the year 2000 claim from the date the last offer was made or, if the offeree made an offer under this section, from the date the last such offer by the offeree was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust.

(g) AMOUNT OF ATTORNEY'S FEES.—Attorney's fees under subsection (f) shall be a reasonable attorney's fee attributable to the year 2000 claim involved, calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under subsection (f) may not exceed—

(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the year 2000 claim; or

(B) if no such cost was incurred by the offeree due to a contingency fee agreement, a reasonable cost that would have been incurred by the offeree for an attorney's noncontingent fee payable to an attorney for services in connection with the year 2000 claim.

(h) INAPPLICABILITY TO EQUITABLE REMEDIES.—This section does not apply to any claim seeking an equitable remedy.

(i) INAPPLICABILITY TO CLASS ACTIONS.—This section does not apply with respect to a year 2000 action brought as a class action.

SEC. 508. ENFORCEMENT OF CONSUMER PROTECTION RULES IN YEAR 2000 CLAIMS AND ACTIONS.

A client whose attorney fails to comply with this title may file a civil action for damages in the court in which the year 2000 claim or year 2000 action was filed or could have been filed or other court of competent jurisdiction. The remedy provided by this section is in addition to any other available remedy or penalty.

PURPOSE AND SUMMARY

H.R. 775, the "Year 2000 Readiness and Responsibility Act," was introduced on February 23, 1999 by Congressmen Tom Davis, David Dreier, Chris Cox, Jim Moran, Bud Cramer and Calvin Dooley. Its purpose is twofold: to encourage remediation activities and thus prevent Year 2000 computer failures; and to create a dispute resolution regime which will limit transaction costs in resolving disputes when Year 2000 computer failures occur, without prejudicing the rights of injured parties to seek damages from the responsible party.

As amended by the Goodlatte amendment in the nature of a substitute, H.R. 775 creates a legal framework by which Y2K-related disputes will be resolved. It is specifically designed to help consumers by creating incentives for businesses to address the Y2K computing crisis, thereby avoiding Y2K problems and eliminating the need for litigation. It also establishes clear, uniform rules for

determining the rights and responsibilities of contracting parties in Y2K disputes. Another important feature is that it provides for a waiting period before Y2K-related litigation may commence. This is designed to allow parties to discuss the problem and hopefully resolve their dispute without resorting to litigation.

As distinguished from legislation considered by the Committee in recent Congresses which dealt with specific types of claims, such as products liability, this bill applies equally to any type of claim raised in state or federal court, as long as a Y2K failure is legally relevant. It is a significant departure from products liability reform in that it does not govern claims for personal injury caused by a malfunctioning product, which are clearly exempted from the bill. In fact, it is triggered not by the movement of a defective product in commerce, but by the malfunction of stationary computer software. In essence, H.R. 775 is about defining rights and remedies in court to address problems presented by a particular technological problem, regardless of the type of claim that results.

BACKGROUND AND NEED FOR THE LEGISLATION

As the millennium nears, the Year 2000 (Y2K) computer problem poses a critical challenge to our economy. Tremendous investments are being made to fix Y2K problems, with United States companies expected to spend more than $50 billion. However, these efforts could be hampered by a barrage of potential litigation, and fear of liability may keep some businesses from effectively engaging in Y2K remediation efforts. Also, many businesses are likely to have Y2K-related failures, despite diligent efforts to remediate. Since our economic sectors are inextricably intertwined, one company's inability to fulfill its business contracts opens it and all the companies that depend on it to liability. The result is a litigation domino effect, which allows the Y2K failure of one company to topple all its business partners. A broad range of businesses and individuals will suffer some kind of economic injury, and many will undoubtedly seek recourse by filing suit.

The Year 2000 Computer Technology Problem [1]

The Y2K technology problem started as an innocuous short term solution to the oppressively high cost of computer memory in the 1950's and 1960's. Programmers represented four-digit years with only two digits. For instance, 1968 would be represented as 68, with the number 19 (indicating years in the 1900s) being implicitly understood. This worked smoothly until users started to input dates occurring after December 31, 1999. Computers started running into problems when required to calculate a number based on the difference in two dates, such as the interest due on a mortgage loan. Computers continued to assume that the prefix 19 was implied in any date, so they would incorrectly read 00 (input for 2000) or 01 (input for 2001) as 1900 or 1901. Consequently, computers could not correctly calculate the difference between years in the 20th and 21st centuries.

[1] The information in this section draws heavily on the February 24, 1999 report by the United States Senate Special Committee on the Year 2000 Technology Problem, "Investigating the Impact of the Year 2000 Problem." (S. Prt. 106–10)

Another Y2K problem occurs in the storage of data. Many kinds of data are organized and processed by date, such as driver's license records and credit card accounts. Computers have had problems processing credit cards that have expiration dates after December 31, 1999, because computers read the cards as having expired almost a century ago.

Although programmers and managers knew in the 1950's and 1960's that they had built software with latent defects in it, no one thought that software written then would survive to the year 2000. Compounding that problem, newer software had to interface and share data with older software. Although the new software could have handled dates internally in four-digit formats and swapped data in two-digit formats with the older software, to do so added complexity and hence added cost to new software. The net result was that the two-digit standard for representing years continued much longer than anyone would have guessed.

Technical experts tell us that there is no easy fix for Y2K problems. Software programs and computer hardware vary too greatly to be fixed by one solution. Currently, there are over 500 programming languages in use. A universal or broadly applicable Y2K solution would have to be compatible with many or most of these languages. Additionally, finding all the dates and date processing in an estimated 36,000,000 programs is an enormous task difficult to automate. Embedded processors pose another problem. Although the percentage of embedded chips with a Y2K problem is estimated to be relatively small, potentially millions of chips exist that may have to be replaced. Unfortunately, most of them are not readily accessible or easily modified.

The Effect on the Economy

The massiveness of the problem, and the corrections required to prevent or remedy the potential computer errors, 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 alone was quoted as spending $250 million to fix the problem within its 2000 million lines of computer code.

The actual impact of the problem remains unclear. Unfortunately, the ways that a Y2K failure can cause a problem are almost unimaginable, because date sensitive data is used in so many different types of products. Two general classes of equipment are at risk. The first are business systems or mainframe systems. These computers perform a variety of data-intensive calculations such as balancing accounts, making payments, tracking inventory, and ordering goods. The second class includes products which run on instructions contained on embedded chips, embedded processors, and embedded control systems. The problems that need to be fixed involving embedded devices have already been detected in medical treatment devices, water and electricity distribution and control systems, airport runway lighting and building security systems. Other suspect areas are pipeline control systems and chemical and pharmaceutical manufacturing processes.

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. But this is difficult to predict, because even a company who has made its own business Y2K compliant is still susceptible to Y2K problems if it depends on other businesses which might not be.

Litigation Related Y2K Issues

Although it is eight months before the year 2000 begins, over 50 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. The potential for litigation to overwhelm the nation's judicial system, and to cause severe damage to the nation's economy require incentives for proactive solutions to the problems before they occur, and prompt resolution of those failures which do occur. Assuming that current law remains unchanged, the projected cost of Y2K litigation is as high as $1 trillion. The transaction costs associated with these potential lawsuits are also projected to be unprecedented: last August, at the American Bar Association annual convention, a panel of experts predicted that the legal costs associated with Y2K will exceed that of asbestos, breast implants, tobacco, and Superfund litigation combined. That is more that three times the total annual estimated cost of all civil litigation in the United States.

The magnitude of this problem demands solutions which will reduce litigation whenever possible without limiting the rights of aggrieved parties. One way is to provide clear legal rules and then encourage parties to find solutions to fix the problem without resorting to the courts. If potential litigants know how the courts will allocate responsibility for Y2K compliance, many disputes will settle rather than being litigated to an inevitable conclusion. Clear rules also reduce the potential for frivolous lawsuits which might be filed when non-avoidable Y2K problems occur, thereby clearing the courts for the legitimate cases which deserve adjudication. Clear rules will also increase the likelihood that the entity who bears responsibility for Y2K compliance will work quickly to fix the problem and reduce damages.

HEARINGS

The Full Committee held a hearing on H.R. 775 on April 13, 1999. Testimony was received from three panels of witnesses. Panel I consisted of Congressman Tom Davis (R-Va.), Congressman David Dreier (R-Ca.), Congressman Jim Moran (D-Va.), Congressman Bud Cramer (D-Al.), Congressman Calvin Dooley (D-Ca.), and Congressman Max Sandlin (D-Tx.). Panel II included four small business persons: Lisa Bender (on behalf of the National Association of Manufacturers), Bill Lewis, Janet Wylie, and Mark Yarsike; Mayor William Greenup of Fredericksburg, Virginia (on behalf of the National League of Cities); Joan Mulhern of Public Citizen

Congress Watch; Sally Greenberg of the Consumer's Union; and Charles Rothfeld, Esq. On Panel III the Committee heard from Michael Harden, President and CEO of Century Technology Services, Inc., Walter Andrews, Esq., Leon Kappelman, Co-chair of the Society for Information Management Year 2000 Working Group, Howard Nations, Esq., Marc Pearl, Esq., Judge Walter Stapleton of the Third Circuit Court of Appeals (on behalf of the Judicial Conference), and Dean Mark Grady of the George Mason University School of Law.

COMMITTEE CONSIDERATION

On April 29 and May 4, 1999, the Committee met in open session and on May 4, 1999 ordered favorably reported the bill H.R. 775 with amendment by a recorded vote of 15 ayes to 14 nays, a quorum being present.

VOTES OF THE COMMITTEE

There were seven amendments resolved by voice vote. Mr. Goodlatte offered an amendment in the nature of a substitute which by unanimous consent was treated as the base text for purposes of the markup. Mr. Hutchinson offered an amendment to the Goodlatte amendment in the nature of a substitute which revised Title V to eliminate caps on attorneys' fees. Mr. Watt offered a substitute amendment to the Hutchinson amendment which made further modifications to Title V. Mr. Watt's substitute amendment was adopted by voice vote, and Mr. Hutchinson's amendment, as amended, was then also adopted by voice vote.

Mr. Nadler offered an amendment to the Goodlatte amendment in the nature of a substitute to strike sections 401, 402, 403, and 404 (dealing with class actions). The amendment was defeated by voice vote. Mr. Scott offered an amendment to the Goodlatte amendment in the nature of a substitute to clarify that only discovery involving a defendant who is entitled to the benefits of the Act's waiting period would be stayed during the waiting period. The amendment was agreed to by voice vote. Mr. Scott offered an amendment to the Goodlatte amendment in the nature of a substitute to eliminate a court's ability to dismiss a complaint with prejudice for failure to comply with the Act's pleading standards. The amendment was agreed to by voice vote. Mr. Scott offered an amendment to the Goodlatte amendment in the nature of a substitute to strike section 306 (dealing with directors' and officers' liability). The amendment was defeated by voice vote. Mr. Scott offered an amendment to the Goodlatte amendment in the nature of a substitute to make it discretionary, rather than mandatory, that a court determine by order that the Act's materiality standard is met in a class action. The amendment was defeated by voice vote.

In addition, there were eight recorded votes during the Committee's consideration of H.R. 775, as follows:

1. A substitute amendment offered by Mr. Watt to the Hutchinson amendment to the Goodlatte amendment in the nature of a substitute, to strike Title V of the Goodlatte amendment in the nature of a substitute. Defeated 14 to 17.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Coble
Mr. Boucher	Mr. Smith (TX)
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Goodlatte
Ms. Lofgren	Mr. Bryant
Ms. Jackson Lee	Mr. Chabot
Ms. Waters	Mr. Barr
Mr. Delahunt	Mr. Jenkins
Mr. Wexler	Mr. Hutchinson
Ms. Baldwin	Mr. Pease
Mr. Weiner	Mr. Cannon
	Mr. Rogan
	Ms. Bono
	Mr. Bachus

2. An amendment offered by Mr. Nadler to the Goodlatte amendment in the nature of a substitute to strike section 402. Defeated 4 to 13.

AYES	NAYS
Mr. Nadler	Mr. Hyde
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
	Mr. Goodlatte
	Mr. Bryant
	Mr. Chabot
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Mr. Cannon
	Mr. Rogan
	Ms. Bono

3. An amendment offered by Mr. Scott to the Goodlatte amendment in the nature of a substitute to strike section 203 and insert in lieu thereof a provision establishing rules of recovery in breach of contract actions. Defeated 5 to 11.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Weiner	Mr. Goodlatte
	Mr. Bryant
	Mr. Chabot
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Mr. Rogan

4. An amendment offered by Mr. Scott to the Goodlatte amendment in the nature of a substitute to require that a defendant bear the burden of proof as to its relative share of responsibility for the plaintiff's injury. Defeated 5 to 10.

AYES	NAYS
Mr. Frank	Mr. Hyde
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Gallegly
Mr. Meehan	Mr. Canady
Mr. Weiner	Mr. Goodlatte
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease

5. An amendment offered by Mr. Watt to the Goodlatte amendment in the nature of a substitute to amend the definition of "material defect." Defeated 5 to 13.

AYES	NAYS
Mr. Frank	Mr. Hyde
Mr. Scott	Mr. Gekas
Mr. Watt	Mr. Coble
Mr. Meehan	Mr. Smith (TX)
Mr. Weiner	Mr. Gallegly
	Mr. Canady
	Mr. Goodlatte
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Ms. Bono

6. A substitute offered by Ms. Lofgren, Mr. Conyers and Mr. Boucher to the Goodlatte amendment in the nature of a substitute. Defeated 9 to 15.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Boucher	Mr. McCollum
Mr. Scott	Mr. Gekas
Mr. Watt	Mr. Coble
Ms. Lofgren	Mr. Gallegly
Mr. Meehan	Mr. Canady
Mr. Delahunt	Mr. Goodlatte
Mr. Rothman	Mr. Bryant
	Mr. Chabot
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Mr. Graham
	Ms. Bono

7. An amendment in the nature of a substitute offered by Mr. Goodlatte, as amended. Agreed to by vote of 15 to 13, with one Member voting present.

AYES	NAYS	PRESENT
Mr. Hyde	Mr. Graham	Mr. Frank
Mr. Sensenbrenner	Mr. Conyers	
Mr. McCollum	Mr. Boucher	
Mr. Gekas	Mr. Scott	
Mr. Coble	Mr. Watt	
Mr. Smith (TX)	Ms. Lofgren	
Mr. Gallegly	Ms. Jackson Lee	
Mr. Canady	Ms. Waters	
Mr. Goodlatte	Mr. Meehan	
Mr. Bryant	Mr. Delahunt	
Mr. Chabot	Mr. Wexler	
Mr. Jenkins	Ms. Rothman	
Mr. Hutchinson	Mr. Weiner	
Mr. Pease		
Ms. Bono		

8. Motion to report favorably H.R. 775, as amended. Passed 15 to 14.

AYES	NAYS
Mr. Hyde	Mr. Graham
Mr. Sensenbrenner	Mr. Conyers
Mr. McCollum	Mr. Frank
Mr. Gekas	Mr. Boucher
Mr. Coble	Mr. Scott
Mr. Smith (TX)	Mr. Watt
Mr. Gallegly	Ms. Lofgren
Mr. Canady	Ms. Jackson Lee
Mr. Goodlatte	Ms. Waters
Mr. Bryant	Mr. Meehan
Mr. Chabot	Mr. Delahunt
Mr. Jenkins	Mr. Wexler
Mr. Hutchinson	Mr. Rothman
Mr. Pease	Mr. Weiner
Ms. Bono	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE JURISDICTION LETTER

CONGRESS OF THE UNITED STATES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC, May 6, 1999.

Hon. HENRY J. HYDE,
Chairman Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR CHAIRMAN HYDE, As you know, H.R. 775, the "Year 2000 Readiness and Responsibility Act," was referred to the Committee on Small Business for consideration of Title VI of the legislation. It is my understanding that an amendment in the nature of a substitute was offered by Representative Bob Goodlatte at the mark-up of this legislation. I understand that substitute eliminates Title VI, "Assistance to Small Businesses for Preventing Year 2000 Computer Failures," of H.R. 775. After careful consideration of the portions of H.R. 775 referred to the Committee on Small Business, our Committee has no opposition to the absence of Title VI in the measure that the Committee on the Judiciary actually reports.

Title VI of H.R. 775 contains many provisions that have already been considered by the Committee on Small Business and that have been passed into law. As you know, S. 314, the "Small Business Year 2000 Readiness Act," which was recently signed by the President (Public Law 106–8), establishes a loan program that is similar to the pilot program contained in Sections 603 and 604 of H.R. 775. Additionally, Section 605, "Suspension of Penalties for Certain Year 2000 Failures by Small Business Concerns," contains provisions that are very similar to those codified in Sections 222 and 223 of Public Law 104–121, the Small Business Regulatory Enforcement Fairness Act.

In light of this, the Committee on Small Business waives further consideration of the provisions of H.R. 775 within its jurisdiction. Our waiver of jurisdiction in this matter is limited to the circumstances surrounding this specific legislation.

The Committee on Small Business thanks you for your consideration regarding this matter. Please contact me if I can be of further assistance to you or the Committee on the Judiciary regarding this very important legislation.

Sincerely,

JAMES M. TALENT, *Chairman.*

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 775, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 7, 1999.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 775, the Year 2000 Readiness and Responsibility Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman (for federal costs), Lisa Cash Driskill (for the state and local impact), and John Harris (for the private-sector impact).

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 775—Year 2000 Readiness and Responsibility Act

Summary

Enacting H.R. 775 would provide some liability protection for businesses that fail to repair their year 2000 (Y2K) computer problems. CBO estimates that the net effect of H.R. 775 would most likely be a savings to the federal court system but we cannot estimate the extent of any such savings because we cannot predict the number of lawsuits that would arise—under either H.R. 775 or current law—from computer failures associated with the year 2000.

The cost of addressing the Y2K problem in the United States is estimated by some to total hundreds of billions of dollars. The extent to which such problems will be resolved prior to next January (or shortly thereafter) remains highly uncertain. Even more uncertain is the extent to which companies and individuals might file lawsuits against businesses because of problems encountered next year. CBO expects that enacting H.R. 775 could deter some potential plaintiffs from filing such lawsuits.

Some class action lawsuits may be shifted from state courts to federal courts under this bill, so the federal courts could incur an increase in costs because class action lawsuits tend to be very timely and costly. However, CBO expects that any such increase would be more than offset by savings attributable to having fewer Y2K cases, overall, under the bill than under current law. Any net change in costs to the federal court system would affect appropriated spending.

H.R. 775 also would require that any punitive damages awarded to plaintiffs be paid into a Year 2000 Recovery Fund in the U.S. Treasury instead of to the plaintiffs. Amounts in the fund would be used for assistance to small businesses, state and local govern-

ments, and nonprofit organizations. CBO estimates that the money collected by and spent from the fund would net to zero over the long run. But the government's collection of the payments for damages would not extinguish the plaintiffs' right to such awards. As a result, we expect that the federal government would ultimately be responsible for the payment of punitive damages awarded to individuals. Any such additional payments would be considered direct spending, as would the spending of the new fund. Thus, H.R. 775 would be subject to pay-as-you-go procedures. While CBO cannot estimate the amounts of net direct spending under the bill, the amounts paid to plaintiffs could be significant.

H.R. 775 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) but, overall, CBO expects that enacting this bill would lead to a savings for state and local governments. The threshold established in UMRA ($50 million in 1996, adjusted annually for inflation) would thus not be exceeded. The bill also would impose new private-sector mandates but CBO cannot estimate the cost of the mandates.

Description of the bill's major provisions

H.R. 775 would provide various liability protections for businesses and state and local governments facing possible litigation arising from Y2K computer problems. In particular, the bill would:

Limit punitive damages to $250,000 or three times the actual damages that a plaintiff suffered, whichever is larger, and cap punitive damages at $250,000 for companies with fewer than 25 employees;

Require potential plaintiffs to give a prospective defendant 90 days to propose a plan to resolve the Y2K problem before any legal action could be taken under a lawsuit;

Assess any liability on a proportional basis, whereby a person against whom a judgment is made would be liable for only the portion of damages corresponding to that person's percentage of responsibility as determined by the judge;

Ease restrictions for filing class action lawsuits in federal court;

Require a plaintiff to pay the defendant's attorneys fees if the defendant made an offer of settlement prior to trial that was rejected and later proved to be larger than the damages actually awarded in the subsequent trial; and

Establish, within the U.S. Treasury, a Year 2000 Recovery Fund, and direct that the punitive damages awarded in any year 2000 action be paid into that fund. Amounts would be used to provide assistance to small business, state and local governments, and nonprofit organizations that are affected by Y2K problems.

Estimated cost to the Federal Government

Spending subject to appropriation

CBO estimates that enacting H.R. 775 would probably result in a net reduction in the workload of the federal court system as compared to what would occur under current law. Thus far, about 60 complaints associated with Y2K problems have been filed; the ma-

jority of cases based on those complaints are class action lawsuits that have been filed in state courts. Several of the larger cases have been settled, but there is little basis for predicting the number or outcome of Y2K lawsuits that would be filed under H.R. 775 or under current law. Therefore, CBO cannot estimate the magnitude of any net savings to the federal government under the bill.

To the extent that a significant number of lawsuits related to Y2K problems are filed under current law, the Judiciary will either need to seek legislation authorizing additional judgeships and support personnel to address the increased workload or experience a severe backlog in cases. Because H.R. 775 would limit punitive damages associated with Y2K cases, give businesses 90 days to respond to Y2K problems before any legal action could be taken against such businesses, and make other changes affecting liability laws, CBO expects that parties to lawsuits would be encouraged to reach a settlement. Thus, we anticipate that many lawsuits would not result in a trial, which can be timely and expensive. However, some class action lawsuits could be shifted from state to federal jurisdiction under H.R. 775 because the bill would ease restrictions for filing such actions in federal court. On balance, CBO estimates that the savings from eliminating trials for many lawsuits would more than offset any increased costs that might be incurred from trying additional class action lawsuits in federal court.

Direct spending and receipts

By creating the Year 2000 Recovery Fund to collect and disburse punitive damages that are awarded by courts in year 2000 lawsuits, H.R. 775 would affect direct spending and receipts. Although cash flows of the fund would have no net budgetary impact, the collection by the federal government of damages awarded to plaintiffs would likely necessitate additional payments by the government to compensate the affected plaintiffs. While we cannot estimate the amount of punitive damages that could be awarded to plaintiffs and the resulting amounts of federal payments, we expect that the amounts could be significant. These additional payments would be considered direct spending.

Pay-as-you-go considerations

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. Establishing the Year 2000 Recovery Fund would affect direct spending and receipts, and would probably lead to significant net costs to the federal government. However, CBO cannot estimate the extent of such costs.

Estimated impact on State, local, and tribal governments

Mandates

H.R. 775 contains intergovernmental mandates as defined in UMRA but, overall, CBO expects that enacting this bill would result in savings for state, local, and tribal governments. The bill would preempt state law by applying certain federal requirements to Y2K civil and class action lawsuits filed in state courts and by subjecting state and local governments to those requirements as

potential plaintiffs. As potential plaintiffs, they would see a small increase in costs due to notice and filing requirements. Overall, CBO expects that these same requirements would deter some potential plaintiffs from filing and pursuing lawsuits, thus reducing the resources state courts would expend on this type of litigation.

The bill would set forth specific limits on punitive damages in Y2K civil lawsuits that would supersede inconsistent state laws. While, to date, only one state has established Y2K liability protection for the private sector, several states currently are considering that issue in their legislative bodies. Any future state laws covering situations subject to H.R. 775 would be preempted by this bill.

Other Impacts

In cases where state and local governments have no sovereign immunity law in place, H.R. 775 would provide them the same protection from liability as provided to the private sector. Only a handful of states and the District of Columbia have already enacted legislation specifically protecting themselves and their localities from Y2K liability. To the extent that state and local governments could become defendants in Y2K litigation and have not protected themselves from liability, this bill would provide some protection and could result in a savings.

The bill also would establish a Year 2000 Recovery Fund, derived from punitive damages awarded in Y2K cases. Amounts paid into the fund would be distributed to state and local governments, small businesses, and nonprofit organizations affected by Y2K failures. State and local governments could benefit from these funds, but CBO has no basis for predicting how much state and local governments might receive.

Finally, by making it easier to file Y2K class action lawsuits in federal court, the bill could diminish some of the burden on state courts, where most of the current lawsuits have been filed. On the other hand, more individual cases might be filed in state courts to complement class action suits in federal courts. Overall, CBO anticipates that the net effect of this bill would be a savings to state courts. This bill would not affect a suit filed by a public entity acting in a regulatory, supervisory, or enforcement capacity.

Estimated impact on the private sector

H.R. 775 would create new private-sector mandates on prospective plaintiffs in disputes related to year 2000 computer problems and on attorneys who represent clients involved in such disputes. Title I would require prospective plaintiffs to notify prospective defendants of their intent to file suit and wait up to ninety days after such notification before filing. The notice must identify the source and size of the prospective plaintiff's injury, the remedy sought, and any person with the authority to negotiate a settlement on the plaintiff's behalf. Title V would require attorneys to provide clients with summaries of fees and expenses, notify clients of any written settlement offers, and provide clients with a notice describing these requirements. In class action suits, attorneys representing the injured class would make these disclosures to the presiding judge as well as to members of the class, and the presiding judge would set attorneys' fees. Title V would also limit contingent fees in all year

2000 computer problem suits to one-third of any damages recovered. Because CBO has no basis for predicting the number of lawsuits related to year 2000 computer problems, we cannot estimate the costs of these mandates.

H.R. 775 would also create additional burdens for private-sector plaintiffs awarded punitive damages by the courts. Section 304 would require punitive damages awarded in judgments related to year 2000 computer problems to be paid into the Year 2000 Recovery Fund in the Treasury. This provision would redirect funds from some private-sector plaintiffs, including members of an injured class in class action suits, medium-sized businesses, and large businesses, to the federal government. To recover these damages, plaintiffs might have to take legal action against the government. CBO cannot estimate the losses that would be incurred by such plaintiffs.

Previous CBO estimates

On April 15, 1999, CBO transmitted a cost estimate for S. 461, the Year 2000 Fairness and Responsibility Act, as reported by the Senate Committee on the Judiciary on March 26, 1999. On March 19, 1999, CBO transmitted a cost estimate for S. 96, the Y2K Act, as reported by the Senate Committee on Commerce, Science, and Transportation on March 10, 1999. Both S. 96 and S. 461 are similar to H.R. 775 and the effects on state and local governments and the private-sector would be similar for all three bills. However, unlike the other bills, H.R. 775 would affect direct spending and receipts because of the collections and spending associated with the Year 2000 Recovery Fund.

Estimate prepared by

Federal Costs: Susanne Mehlman; Impact on State, local, and tribal governments: Lisa Cash Driskill; Impact on the private sector: John Harris.

Estimate approved by

Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1—Short Title

The short title of the bill is the "Year 2000 Readiness and Responsibility Act."

Section 2—Findings

Section 2 sets forth the findings of the Congress with regard to the need for legislation to encourage Year 2000 computer remedi-

ation efforts and to streamline the resolution of disputes over Year 2000 computer failures. First, Congress finds the need to encourage businesses to concentrate their attention on addressing potential Y2K problems so as to minimize any possible business disruptions associated with Y2K failures. Doing so will ensure that Y2K problems do not unnecessarily disrupt interstate commerce or create unnecessary case loads in the courts. Second, the Congress finds that resorting to the legal system for resolution of Y2K problems is not feasible for many businesses, and the costs associated with litigation only exacerbate the difficulties associated with Y2K problems. Congress also finds that a proliferation of frivolous Y2K lawsuits could strain the resources of the courts and deprive deserving parties of their rights to relief.

Section 3—Definitions

The bill is limited to "Year 2000 Actions," which are defined to exclude any claims for personal injury. Personal injury is defined to include both physical injury and non-economic damages suffered in connection with the personal injury. Claims by or against governmental entities would be covered by the Act if the government was acting in a commercial or contracting capacity, but not if it was acting in a regulatory, supervisory, or enforcement capacity.

A "Year 2000 claim" is a claim or cause of action, whether raised by a plaintiff or by a defendant, where the plaintiff's alleged loss or harm resulted directly or indirectly from a Year 2000 Failure. A "Year 2000 Failure" means any failure by any device or system, or any software, firmware, or other set or collection of processing instructions, however constructed, in processing, calculating, comparing, sequencing, displaying, storing, transmitting, or receiving year 2000 date-related data. The Goodlatte amendment in the nature of a substitute modified the original definition of "Year 2000 Failure" by removing reference to three examples of Year 2000 Failures and clarifying that the date-related data at issue is limited to year 2000 date-related data. This change was made in response to critics of the original definition who suggested that under the previous formulation, Y2K date-related failures were simply one species within a larger universe of date-related failures covered by the Act. That was not the intent of the sponsors, nor is it the intent of the Committee.

Section 4—Application of the Act

The Act would apply to any claim brought after February 22, 1999. It does not create any new cause of action, and it supercedes state law where that law is inconsistent with the Act. The Act would not apply to any claim based on personal injury.

TITLE I—UNIFORM PRELITIGATION PROCEDURES

Section 101—Notice

A potential plaintiff would be required to give 30 days notice to a potential defendant before commencing a Y2K action against that defendant (except when seeking only injunctive relief). If the defendant does not respond to the notice within 30 days and describe what action it will take in response to the problem identified by the

prospective plaintiff, the plaintiff may commence suit at the end of that 30 days. If the defendant responds by describing the action that it has taken or will take within the subsequent 60 days to remedy the problem identified by the prospective plaintiff, then there is an addition 60 day remediation period before the plaintiff can file a suit. If the plaintiff files suit without giving notice, the defendant may treat the filing as a notice and the court shall stay discovery involving that defendant until the appropriate notice and response period has elapsed. In a class action, the obligations imposed on a prospective plaintiff for providing notice are applicable only to the named plaintiffs.

Section 101(b)(1) requires any entity receiving a notice pursuant to Section 101(a) to respond to the actual sender of the notice, whether a prospective plaintiff or an agent of a prospective plaintiff, not later than 30 days after receipt of the notice. In the event that an agent for one or more prospective plaintiffs is the sender of the notice, the prospective defendant is required to respond only to the agent, and not to each of the agent's principals.

The response of the prospective defendant contains two sections. First, the prospective defendant must acknowledge receipt of the notice. Second, the prospective defendant must either describe the actions it has taken, or will take, not later than 60 days after the end of the 30-day period, to commence addressing the problem described in the notice. A prospective defendant who accepts responsibility for the problem described in the notice is not required to complete repair or remediation of the problem within the 60-day period, but is expected to act in good faith to repair or to remediate the identified problem within a reasonable time under the circumstances.

Section 102—Alternative Dispute Resolution

This provision encourages parties to engage in alternative dispute resolution. If the parties resolve their differences in this manner, a defendant must pay all moneys due within 30 days, unless otherwise agreed to. Any issue that is resolved through alternative dispute resolution could not be reopened in a subsequent proceeding.

Section 103—Pleading Requirements

A complaint containing a Y2K claim must plead with particularity the nature and amount of damages, the nature of any alleged "material defect," and any state of mind of the defendant that is a necessary element of the alleged claim. The court shall dismiss without prejudice a complaint which fails to satisfy these requirements. During the pendency of any motion to dismiss, discovery is stayed unless the court determines that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Section 104—Duty to Mitigate

Damages may not include compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or information of which the plaintiff was, or reasonably could have been, aware.

TITLE II—YEAR 2000 ACTIONS INVOLVING CONTRACTS

Section 201—Certainty of Contract Terms

Any written term or condition of a contract between a plaintiff and defendant, including limitations or exclusions of liability and disclaimers of warranty, is fully enforceable, unless it is in direct conflict with state statute in effect on January 1, 1999 addressing that term of the contract. This would include, among others, the Uniform Commercial Code and state consumer fraud statutes. 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 201 is intended to enhance business certainty and discourage frivolous lawsuits that seek to circumvent established contractual relationships. The section is based on the Committee's strong belief in the importance of holding parties to their contractual agreements. Contracts are the backbone of American business relations and permit parties to anticipate and allocate risk. The Committee is concerned that courts may react to year 2000 problems by promoting new or expanded theories of liability that attempt to circumvent contractual agreements. Section 201 makes clear that contractual terms are to be enforced in year 2000 claims unless such terms directly conflict with State statutory law, such as State UCC provisions.

Section 202—Doctrines of Impossibility and Impracticability

If breach of contract is alleged, the doctrines of impossibility and commercial impracticability in force under applicable law on January 1, 1999 shall apply. A party raising such a defense is entitled to offer evidence as to the reasonableness of its conduct for purposes of proving the defense.

Section 203—Limitation of Damages to Contract Terms

A contract between the parties controls the nature of the remedies available for its breach or repudiation. If the contract contains no express provisions regarding remedies, then Federal or state law in existence at the time the contract was entered into controls.

TITLE III—TORT AND OTHER NONCONTRACTUAL CLAIMS

Section 301—Proportionate Liability

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. The trier of fact must determine the responsibility of all such persons.

Section 302—Bystander Liability Rules

This provision covers potential defendants in claims other than negligence who have not manufactured, sold, produced, or provided the product or service that suffers a Y2K failure. Where that person is also not in privity with the defendant by contract or by relationship, then any requisite element which includes a showing of

the defendant's state of mind must be proven by clear and convincing evidence that the defendant actually knew, or recklessly disregarded a substantial risk that the Y2K failure would occur. This rule would apply, for example, in claims for fraud, constructive fraud, breach of fiduciary duty, negligent representation, and interference with contract or economic advantage. It would not apply to claims for negligence.

Section 303—Reasonable Effort Defense

In a noncontractual claim, the fact that a Y2K failure occurred in an entity, facility, system, product, or component that was within a person's control shall not be the sole basis for recovering damages against that person. A defendant to a noncontractual claim is entitled to establish, as a complete defense, that it took measures that were reasonable under the circumstances to prevent the Y2K failure from occurring or from causing the damages upon which the claim is based.

Section 304—Damages Limitation

Punitive damage awards for Y2K claims may not be awarded unless the plaintiff establishes by clear and convincing evidence that the conduct carried out by the defendant showed a conscious, flagrant indifference to the rights or safety of others and was the proximate cause or the harm or loss that is the subject of the claim. The bill does not establish a right to punitive damages where none is provided by applicable State law. Punitive awards may not exceed the greater of $250,000 or three times compensatory damages for big businesses, or the lesser of these figures for small businesses. Any punitive damages awarded will be paid into a Year 2000 Recovery Fund, which shall be used for the assistance of small businesses, State and local governments, and nonprofit organizations that are affected by Y2K failures.

Section 305—Recovery of Economic Losses

A party making a nonintentional tort claim cannot recover "economic loss" unless recovery for the economic loss is provided for in a contract to which the party is a party or such losses result directly from damage to tangible property other than the property that is the subject of the contract. "Economic loss" is defined as losses such as damages for lost profits or sales, for business interruption, and consequential damages.

Section 305 is intended to codify the "Economic Loss Rule" so as to provide a uniform, national standard for determining liability for economic losses caused by year 2000 failures. The "Economic Loss Rule" has been widely recognized in the vast majority of states and has been endorsed by the U.S. Supreme Court. The purpose of the Rule is to ensure that tort actions are not used to circumvent, nullify, or enlarge contract rights or obligations and to avoid limitless liability for purely economic loss. Tort law should apply when a party has suffered personal injury or damage to property other than property that is in dispute. Contract law should apply when a party has suffered only economic damages, such as lost value, cost of repair or replacement, or business interruption.

The Committee's inclusion of the Rule in this section is consistent with § 201 and reinforces the notion that when two parties have agreed to their respective rights and responsibilities in a valid contract, that contract should be honored and enforced. If a party can simply circumvent a contract and sue in tort for any economic losses that occur, every existing contract that allocates risk between parties is, in essence, worthless.

The Committee recognizes that state law interpretation of the Economic Loss Rule varies and believes that in the year 2000 context, the Rule must be codified to set out a uniform, consistent standard. Thus, § 305 applies the Economic Loss Rule even in the absence of contracts, which is consistent with the law in the majority of states which have considered the issue. Also, § 305 applies the Economic Loss Rule to all economic losses under year 2000 claims, whether resulting from the provision of services or the sale of goods. Because many business relationships include both provision of goods and services, it is important to ensure consistent treatment for both.

Section 306—Liability of Directors and Officers

Subject to lower monetary caps in state law, charter, or bylaw authorized by state law, the liability of directors, trustees, or officers is capped at $100,000 or the amount of cash compensation received by that person from the business in the year preceding the act or omission.

TITLE IV—YEAR 2000 CLASS ACTIONS

Section 401—Minimum Injury Requirement

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—Notice

In addition to any other notice required by law, the court shall direct notice of a Y2K action to each prospective member of the class. The notice must describe the nature of the action, identify the jurisdiction whose law will govern the action and where the action is pending, identify any potential claims that class counsel chose not to pursue so that the action would satisfy class certification requirements, describe the fee arrangement with class counsel, and describe the procedure for opting out of the class. A person may not be a member of the class if that person did not receive the requisite notice, unless that person informs the court in writing that he wishes to join the class. No settlement may be entered in to, or can be approved by the court, before the class has been certified.

Section 403—Dismissal Prior to Certification

The court may decide a motion to dismiss or for summary judgment prior to determining whether to certify the class.

Section 404—Federal Jurisdiction in Year 2000 Class Actions

Grants original and removal jurisdiction in the United States district court for class actions where the amount in controversy exceeds $1 million, unless the substantial majority of the members of the proposed plaintiff class are citizens of a single state of which the primary defendants are also citizens and the claims will be governed primarily by that state's laws, or where the primary defendants are states or other governmental entities against whom the United States district court may be foreclosed from ordering relief.

TITLE V—CLIENT PROTECTION RULES

Section 501—Scope

The title applies to any Year 2000 action, whether brought in Federal or State court.

Section 502—Definitions

Defines the terms attorney, attorney's services, contingent fee, hourly fee and retain.

Section 503—Disclosure of Fee Information

Before being retained by a client, an attorney in a Y2K action must disclose to the client his rights under this title.

Section 504—Information After Initial Meeting

An attorney retained in a Y2K action must within 30 days of the notice required under section 503 disclose to the client his hourly fee for providing services (if being retained on an hourly basis), or his contingent fee for providing services (if being retained on a contingent fee basis). An attorney retained on an hourly basis must render regular statements as to hourly charges and expenses, not less than each 90 days.

Section 505—Information About Settlement Proposals

An attorney must advise the client of all written settlement offers and the attorney's estimate of the likelihood of achieving a more or less favorable resolution to the case. Within 60 days after a Y2K claim is settled or adjudicated, the attorney must provide a written statement to the client of the total number of hours expended, the hourly rate, and the total hourly fees (if retained on an hourly fee basis), or the total contingency fee (if retained on a contingent fee basis).

Section 506—Class Actions

In a class action, the disclosures required by this title shall be made to the presiding judge as well as to the client. For purposes of this section, the clients for a class are the named representatives of the class. The presiding judge in a class action shall at the outset of the case set a reasonable fee rate for the class attorney. Attorney fees for a class may only be awarded under this title.

Section 507—Award of Fees After an Offer of Settlement

In the event that a party rejects an offer of settlement of a Year 2000 claim, and the dollar amount of the judgment or verdict as

to that claim is ultimately not more favorable to the offeree than the offer, the rejecting party shall be ordered to pay the costs and expenses of the offeror. This section does not apply to claims brought in class actions.

Section 508—Enforcement

A client may bring a civil action to enforce the terms of this title.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 29, 1999.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: I am writing to convey the Department's strong opposition to the "Year 2000 Readiness and Responsibility Act" (H.R. 775) currently before the Committee. If H.R. 775 were presented to the President, the Attorney General would recommend a veto. The Administration, however, understands that Representatives Lofgren, Conyers and Boucher are working on an amendment in the nature of a substitute that will be substantially similar to an amendment offered in the Senate by Senators Kerry and Robb, which satisfactorily addresses many of our concerns and which we can support. In addition, we understand that another substitute may be offered to the base bill that makes some modest changes. We look forward to reviewing it.

The Administration's overriding concern is that H.R. 775 will not enhance readiness and may, in fact, decrease the incentive organizations have to be ready and assist customers and business partners to be ready for the transition to the next century. The Department agrees however, with the three stated goals of H.R. 775: (i) giving companies every incentive to become Y2K compliant; (ii) encouraging resolution of Y2K problems without resort to litigation; and (iii) deterring frivolous Y2K lawsuits without deterring legitimate Y2K claims.[1] We are nevertheless very concerned that H.R. 775 does not achieve these goals. In fact, H.R. 775 may significantly undermine two of them. Because Titles II and III of the bill modify tort and contract law so as to reduce the liability of potential Y2K defendants, these provisions reduce the incentive potential defendants have to become Y2K compliant. In a similar fashion, we are not sure how modifying the rules of liability that apply to meritorious tort and contract actions (as Titles II and III do) will necessarily deter frivolous Y2K claims, which by definition will be filed regardless of the rules of liability. Instead, modifying substantive law seems more likely to curtail legitimate Y2K lawsuits.

Our preliminary analysis indicates that H.R. 775 is the most sweeping of any of the Y2K-litigation bills yet proposed in either Chamber—and would be by far the most sweeping litigation reform measure ever enacted if it were approved in its current form. Al-

[1] *See* § 2(b) (listing purposes of the Act).

though the Department's major concerns with the Act are explained at length in the Statement I submitted to this Committee for its April 13, 1999 hearing (and which I have attached for your convenience), I will summarize them briefly.

Modification of Pre-Existing Y2K Contracts (Title II)

Title II of the Year 2000 Readiness and Responsibility Act amends federal and state contract law as it applies to "year 2000 actions" and, in so doing, effectively modifies the terms of already-negotiated contracts and existing contractual relationships. Section 202 of the Act appears to create a "reasonable efforts" defense in Y2K contract actions that would allow a defendant who had otherwise breached the terms of a contract to show that the efforts it took to implement the contract were reasonable "for the purpose of limiting the award of damages." This effectively sets up a complete defense to a contract action, even though a party to a contract is generally obligated to fulfill all its promises completely. Creating a post hoc "reasonable efforts" defense that absolves parties to Y2K-related contracts seems to be unfair to the contracting plaintiffs who bargained—and paid—for contract compliance by the other party. It may also raise issues under the Takings Clause of the Fifth Amendment. Moreover, this defense appears to undercut incentives for Y2K contractees to discharge their obligations—instead of being required to fulfill their contracts, potential defendants need only make reasonable efforts to do so.

In a similar fashion, § 201 of the Act requires a court to enforce all of a contract's written terms, even if those terms, in violation of state law, disclaim certain kinds of warranties or are unconscionable. As a result, the Act would appear to validate contract terms that were ineffective or illegal at the time they were made.

Modification of Substantive Tort and Other Civil Law (Titles III, V, and VI)

Title III of the Act modifies federal and state substantive tort law as applied to "year 2000 actions" for money damages and not involving personal injury. This Title, and the rest of the Act, do not exclude enforcement actions brought by federal, state, and local governments. Applying the Act's substantive and procedural limitations to these sovereigns is likely to interfere with their ability to enforce their own laws. More to the point, Title III's modifications to substantive law in civil suits may affect government-initiated actions (and citizen suits) brought under a number of federal and state statutes that rely upon traditional mechanisms of tort law for their proper operation, including CERCLA, Securities Acts, and federal banking laws.

We also have many concerns with the application of Title III to private actions. Sections 302 and 303 significantly alter the rules of tort liability for Y2K actions involving money damages. Section 302, for example, appears to foreclose some Y2K actions premised on a theory of negligence. Even if it does not, § 302 does clearly require plaintiffs to satisfy a greater burden of proof in their tort actions. Y2K tort plaintiffs would be required to establish the critical elements of their tort actions—the defendant's knowledge and foreseeability—by "clear and convincing evidence," even though

this standard is usually reserved for use in quasi-criminal proceedings.

Title III both expands existing defenses and creates new defenses for Y2K defendants. Section 303 erects a reasonable efforts defense similar to, but more extreme than, the one contained in Title II. This provision would establish a complete defense to liability—no matter how much the defendant was initially at fault or how much damage the plaintiff actually suffers. Indeed, even a defendant who recklessly disregarded a known risk of Y2K failure could escape liability by taking advantage of this new defense, and making reasonable, albeit unsuccessful, efforts to fix the defect. Similarly, § 104, while titled "Duty to Mitigate," acts as a complete bar to recovery if a defendant can show that the plaintiff should have known of information that "could reasonably" have aided the plaintiff in avoiding the injury upon which his Y2K claim is based—even if that information had been provided by someone other than the defendant. Thus, § 104 imposes an affirmative duty on plaintiffs to find information—but no duty on defendants to provide it—or else face dismissal of their lawsuits. Section 104's duty to mitigate sweeps far beyond the common law doctrine of the same name, which more reasonably prohibits plaintiffs only from recovering damages they could have reasonably avoided.

Title III would also curtail significantly the types and amount of damages Y2K plaintiffs may collect should they prevail in establishing liability. Most dramatically, § 305 would appear to bar the recovery of "economic losses" in all tort cases unless they are incidental to personal injury or property damage claims. Thus, § 305 would appear to grant defendants full immunity from civil suits involving fraud and misrepresentation (including securities fraud), not just in tort suits involving defective products or services. Section 304 caps the punitive damages that may be awarded on Y2K claims, and more strongly bars the award of any punitive damages unless the plaintiff proves by clear and convincing evidence that the defendant "specifically intended to cause injury to the plaintiff." Because this standard of proof is unlikely, if ever, to be met, the caps would be largely irrelevant because punitive damages would almost never be awarded. Section 306 caps the potential liability of directors and officers, creating a windfall to insurance companies who have been paid for unlimited coverage but will only have to pay out under the caps.

Title III may also significantly impact whether a prevailing Y2K plaintiff will actually be able to recover his damages. Section 301 abolishes all species of "joint and several liability," which in varying forms permits tort plaintiffs to hold any one defendant responsible for more than its share of damages. Section 301's rule of absolute proportionate liability applies whether or not a defendant makes efforts to identify and fix Y2K problems now, and will accordingly reduce the incentives defendants have to prepare for Y2K.

Modification of Other State and Federal Law

Section 605 of the Act would preclude federal and state agencies from imposing civil penalties on small businesses for first-time violations of federal information collection requirements if those viola-

tions result from a Y2K failure. We are concerned that granting small businesses one "free pass" with respect to Y2K-related failures could seriously undercut the incentives those businesses have to become Y2K compliant. Risking these consequences might be acceptable if there was a genuine need for this protection—that is, if there was some danger that federal and state agencies would otherwise "penalize" small businesses out-of-business for failing to comply with information reporting requirements. But this is clearly not the case because current law and Administration policy already require agencies to issue policies to provide for the reduction or waiver of civil penalties for small businesses under appropriate circumstances. We also question whether it is wise as a matter of federal policy to preempt the regulatory authority of state agencies.

Several other provisions of the Act appear to modify state procedural law without modifying any state substantive law. For example, § 402 imposes procedural requirements concerning the specificity of notice to class members in State court class actions. Although it is possible to draft similar modifications to State law without raising constitutional concerns, as they appear in H.R. 775, these procedural requirements arguably have no direct connection to the vindication of substantive Federal rights and would accordingly be vulnerable to constitutional challenge on federalism grounds. Although the Supreme Court has stated that Congress, in enacting legislation under the Commerce Clause, possesses broader power to require action by State courts than to require action by State legislatures or executives, *see Printz* v. *United States,* 117 S. Ct. 2365, 2371 (1997), the Court also has endorsed the "general rule, bottomed deeply in belief in the importance of state control of statue judicial procedure, * * * that federal law takes the state courts as it finds them," *Johnson* v. *Frankell,* 520 U.S. 911, 919 (1997) (internal quotation marks omitted). There is a serious risk that courts would view H.R. 775's procedural instructions to State courts as constitutionally impermissible intrusions on State governmental autonomy.

Federalizing Y2K Class Actions

Title IV essentially federalizes class action standards in class actions involving Y2K claims, even when the Y2K claim is only a small part of the overall action. Title IV permits removal of state class actions to federal court when any class plaintiff is diverse from any defendant, and further provides that cases so removed but not certified under federal class action standards be remanded to state courts stripped of their class allegations. This mechanism effectively prevents states from setting their own policies concerning class actions involving Y2K claims, and, in cases where individual claims are too small to justify litigation, may leave large numbers of plaintiffs without redress. Title IV also imposes onerous notice and opt-in requirements that may have the practical effect of making many class actions impossible.

Coverage

As a final matter, the Department would like to point out a few of its other concerns regarding the scope of the Act, aside from its inclusion of government-initiated lawsuits.

As currently drafted, the Act would seem to apply to claims having nothing to do with Y2K failures. Titles II III, and V of the Act, which extensively modify state tort, contract, and attorney-ethics law, apply to any "year 2000 action," which includes non-Y2K claims if they are joined with a single Y2K claim (or countered by a single Y2K defense). The definition of "year 2000 claim" would also seem to cover date failures having nothing to do with the change-over to the year 2000.

Even if these defects were corrected, it seems very likely that there will be considerable dispute over whether or not certain lawsuits are subject to the Act. Plaintiffs' lawyers are likely to avoid styling their claims as "year 2000 claims," and defense lawyers will probably assert Y2K-related defenses in order to bring the claims under the terms of the Act. State and federal courts will then be forced to determine whether the Act, or normal state tort and contract law, controls. In light of the fact that the Act works great changes in state law, which may have a great impact on the outcome of any given Y2K lawsuit, substantial disputes about the Act's coverage are likely to be common and will occupy much judicial time, complicating what would otherwise be rather straight-forward contract or tort actions.

New Alternatives

We understand that some Members, led by Representative Lofgren, are on the verge of introducing an amendment to HR 775 that is more modest in scope, and better tailored to achieving the goals that Y2K litigation legislation should serve—encouraging parties to fix Y2K problems now, and weeding out frivolous Y2K claims while allowing the meritorious ones to go forward.

While the Department has not yet had the opportunity to review the precise language of this new amendment, we understand that its modifications of State and Federal law affecting Y2K claims addresses the majority of our concerns. We are told this amendment will be substantially similar to the amendment offered in the Senate by Senators Kerry and Robb, which we support (although we are working to resolve certain drafting issues raised by the Department of Justice).

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget had advised us that from the perspective of the Administration's program, there is no objection to submission of this letter. Thank you for the opportunity to express the Department's views.

Sincerely,

JON P. JENNINGS,
Acting Assistant Attorney General.

DISSENTING VIEWS

We strongly oppose H.R. 775, the "Year 2000 Readiness and Responsibility Act." H.R. 775 dangerously discourages corporate responsibility, robs consumers of their ability to obtain relief, and disadvantages small businesses seeking proper remediation. Although the legislation is described by its proponents as a specifically designed fix to the so-called Y2K litigation crisis, it will actually be the broadest and most overreaching tort reform package to ever reach the floor of the House of Representatives. It is significant to note that the bill was reported out of the Judiciary Committee by only a narrow margin of 15 to 14 (13 Democratic Members, joined by 1 Republican Member).

H.R. 775 would supersede most state law claims founded on tort, contract, or other legal theories. With regard to Y2K actions, in addition to providing for a litigation "cooling off period" and clarifying the application of pleadings requirements and state contract law, the legislation (1) completely eliminates joint and several liability; (2) alters state tort liability rules by limiting damage recovery where the defendant's actions were "reasonable;" (3) places various limits on the categories or amount of punitive money damages that could be awarded in Y2K cases; (4) caps the liability of officers and directors; (5) federalizes most class actions; and (6) mandates a "loser pays" mechanism.

H.R. 775 is strongly opposed by the Administration and the Justice Department, and it will surely be vetoed in its current form.[1] The legislation is also opposed by consumer and public interest groups, including Public Citizen[2] and Consumer's Union,[3] as well as small business concerns. Finally, the class action and pleading requirements in the bill are opposed by the Judicial Conference of the United States.[4]

This is not to say, however, that the information technology community does not have legitimate concerns due to the unique nature of the Y2K problem that should be addressed through legislation. They have advocated consistently for more narrow legislative goals, rather than for the broad tort reform provisions in the bill. Representative Zoe Lofgren, joined by Representatives John Conyers, Jr. and Rick Boucher offered a reasonable substitute to H.R. 775 during the House Judiciary Committee markup that would have, in large part, addressed the specific concerns of the information tech-

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[1] See White House Statement of Administrative Policy: S.96—Y2K Act (April 27, 1999). The Year 2000 Readiness and Responsibility Act: Hearing on H.R. 775 Before the House Comm. on the Judiciary, 106th Cong. (1999) (Statement of John A. Koskinen, Chairman, President's Council on Year 2000 Conversion and Statement of Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development) [hereinafter House Judiciary Hearing on H.R. 775].

[2] See House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Joan Mulhern).

[3] See House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Sally Greenberg).

[4] See House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of The Honorable Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit).

nology community: (1) to encourage remediation; (2) to encourage mitigation; and (3) to deter frivolous lawsuits. The substitute, however, was defeated on a party line vote. H.R. 775 does a disservice to the information technology community by neglecting their narrow concerns, as addressed by the Democratic Substitute, and instead, pushing for broad-ranging tort reform.

In this regard, we have concerns that H.R. 775 is being used more as a "political football" to obtain partisan advantage, than as a serious means of legislating public policy. The press has raised a number of these issues. For example, the February 11, 1999 issue of Roll Call notes that "the bill was written for GOP leadership by two prominent leadership groups [the Chamber of Commerce and the National Association of Manufacturers]" and that the bill "could provide a windfall of contributions to the NRCC [National Republican Campaign Committee]." Republicans were quoted as saying "[t]here are millions of dollars at stake here over the long run" and "[t]he fundraising potential is enormous."[5]

A subsequent article of Salon Magazine described how the bill actually represented an effort by the Chamber of Commerce as establishing a precedent for broad ranging tort reform:

> [F]rom the beginning, the U.S. Chamber had a much more audacious goal for the Y2K litigation reform bill than the narrow legislative issues that matter to the high tech companies. The Chamber's number one priority is far-reaching tort reform. The group has always wanted to legally limit the amount plaintiffs can be awarded, and it saw Y2K litigation reform as a first step * * *.[6]

A high tech lobbyist was quoted as acknowledging "they [the Chamber of Commerce] want reform and they're using us." The article went on to describe the displeasure that the business community had expressed when it became apparent that the high tech community was willing to consider supporting more narrow and responsibly drawn legislation. For example, a business lobbyist was quoted as complaining that the high tech community "tried to cut their own deals. When this is over you'll see Republicans are going to try to scalp "em."[7]

I. EXTREME Y2K LEGISLATION IS PREMATURE AND BASED ON UNSUBSTANTIATED ASSUMPTIONS

The Majority offers numerous rationales for the pending legislation. They claim that it is necessary for Congress to assist in (1) providing the necessary incentives to encourage the development of Y2K solutions before failures occur; (2) encouraging fair and efficient resolution of Y2K problems when they do occur; (3) avoiding massive quantities of frivolous litigation which could overwhelm our court systems; (4) making the law governing Y2K liability more uniform and clear than it is under the patchwork of state laws; and (5) imposing reasonable limits on liability. They assert that legislation is necessary to prevent an explosion of litigation, the cost of

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[5] Jim VandeHei, GOP Readies Campaign on Y2K Davis, Cox, Dreier to Push Plan That Caps Legal Fees, Roll Call, February 11, 1999.

[6] Jake Tapper, The Millennium Bug Bill Battle, Salon, April 30, 1999.

[7] Id.

which they expect to exceed $1 trillion—approximately the same amount that would be available to fix the problem if companies were not keeping Y2K litigation reserves. [8]

Although many of us believe there is a possibility of confusion and uncertainty regarding Y2K litigation which warrants a federal legislative response, we believe there is no compelling need for legislation as broad-ranging and counterproductive as H.R. 775. For example, there is no factual proof offered that there will actually be a litigation explosion or that it will include significant amounts of frivolous lawsuits. In fact, the $1 trillion figure for Y2K litigation costs cited by the U.S. Chamber of Commerce was specifically rebutted during the House Judiciary Committee hearing on H.R. 775 by Howard Nations, a trial lawyer from Houston with an expertise in Y2K liability:

> One of the myths surrounding the Y2K litigation is the often cited Lloyds of London estimate of one-trillion-dollars in litigation costs. The one-trillion-dollar figure emanated from the testimony of Ann Coffou, Managing Director of Giga Information Group before the U.S. House of Representatives Science Committee on March 20, 1997, during which Ms. Coffou estimated that the Year 2000 litigation costs could perhaps top one-trillion-dollars. Ms. Coffou's estimate was later cited at a Year 2000 conference hosted by Lloyds of London and immediately became attributable to the Lloyds organization rather than the Giga Group * * * There has been no scientific study and there is no basis other than guesswork as to the cost of litigation. [9]

A recent New York Times article has also cast further skepticism regarding the predictions of a year 2000 litigation explosion, noting "so far the cases offer little support for the dire predictions that courts will be choked by litigation over Y2K." [10] Many lawyers involved in these issues have also questioned the magnitude of the litigation threat. For example, Wynne Carvill, a partner at Thelen, Reid & Preist, a prominent San Francisco firm with high tech clients noted that "[t]here was more reason to be alarmed a year ago * * * [p]eople are finding things to fix but not many that would shut them down." [11]

The bill's provisions are drastic overkill—according to the Justice Department, if adopted, the legislation would represent, "by far the most sweeping litigation reform measure ever enacted. The bill makes extraordinarily dramatic changes in both federal procedural and substantive law and in state procedural and substantive law * * *" [12] This means that in addition to cutting off possible frivolous litigation, it would also adversely impact many compelling and merit-based claims. Instead of encouraging remediation, these provisions will limit incentives to cure defects and result in greater

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[8] See U.S. Chamber of Commerce National Business Agenda for the 106th Congress (1999).

[9] House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Howard Nations at 9).

[10] Barnaby J. Feder, A Trickle of Year 2000 Lawsuits, New York Times, April 12, 1999, at C4.

[11] Id.

[12] House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Attorney General Eleanor D. Acheson, U.S. Department of Justice, Office of Policy Development at 2).

Y2K losses than would otherwise be the case. Further, since the class action provisions will prevent most class actions, the legislation could result in more individual actions—a result which could lead to more, not less, litigation. The bill is so broad that it would protect defendants who continued to produce software with Y2K defects well after the problem was known and well after the technology was available to eliminate the problem.

These concerns were highlighted in recent editorials by the New York Times and the Washington Post. The New York Times has written, "the legislation is misguided and potentially unfair. It could even lessen the incentive for corrective action."[13] The Washington Post has written that the legislation "removes a key incentive for companies to fix problems before the turn of the year, and it also responds to a problem whose scope is at this stage unknown."[14]

Rather than being neutrally designed to promote "uniformity," the bill is principally designed to benefit defendants. Thus, for example, rather than superseding state laws which are both more and less favorable than the bill, it only supersedes laws which are less beneficial to defendants. Many of the provisions of the bill raise serious constitutional problems. Some of these are highlighted in the Justice Department's testimony. For example, the provisions federalizing state class actions may be an unconstitutional attack on federalism since it limits state procedural prerogatives (discussed in Section II, infra).

The legislation also carries many grave risks for large and small businesses who are users of information technology, and may be left harmed and without any credible recourse by virtue of this legislation. This is why a comparable Senate bill (S. 96) has been strongly opposed by Kaiser Permanente, one of the nation's largest health care providers. Kaiser has written that the legislation "[s]everely limits the rights of small businesses, consumers, and non-profit organizations like ours to recover the often excessive costs of Y2K fixes, purchases, and upgrades, [and] * * * unfairly prejudices (or completely bars) the ability of the health care community to recover costs associated with any potential personal injury or wrongful death award from the entity primarily at fault for the defect that caused the injury."[15] Similar concerns have been expressed by Donald J. Palmisano, a Board Member of the American Medical Association, who has stated, "we strongly caution against providing liability caps to manufacturers in exchange for the Y2K information they may provide." Those businesses who have also had the foresight to cure their own Y2K problems will also be negatively impacted. They have spent the money and time necessary to avoid liability, yet this bill will allow their competitors to obtain the same benefits without the costs.

H.R. 775 goes well beyond reasonable reform. It fails to protect consumers and shields grossly negligent defendants and harms in-

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[13] Liability for the Millennium Bug, New York Times, April 26, 1999.

[14] Y2K Liability, Washington Post, April 29, 1999.

[15] See Letter from Mary Ann Thode, Senior Vice President, Chief Operating Officer, Kaiser Permanente, to the Honorable Barbara Boxer, United States Senate (April 27, 1999) (on file with the minority staff of the House Judiciary Committee).

nocent plaintiffs. Worst of all, instead of creating positive incentives to fix problems, it creates new reasons to avoid remediation.

I. H.R. 775 WILL DISCOURAGE CORPORATE RESPONSIBILITY

Title III of the legislation would effectuate a wide range of alterations in the state law of tort and other non-contractual law. A summary of our concerns follows:

A. "Elimination of Joint and Several Liability" (Section 301)

H.R. 775 eliminates joint and several liability entirely. Therefore, a defendant in a Y2K action will only be liable for the portion of the judgment that corresponds to its percentage of responsibility. This provision diverges from the common law rule of joint and several liability, found in many states, that if more than one defendant is found liable for a tort, each defendant is liable for the total damages; and if a defendant pays for more than its share, it may seek contribution from the other liable defendants. Instead of placing the burden of financial loss on the identifiable defendant, consumers who prevail on a liability claim may not be able to recover all of their damages. The principle behind joint and several liability is that as between an innocent plaintiff and a culpable co-defendant, it is preferable for the co-defendant to assume liability where other defendants are unable to assume liability rather than the victim of the tort.

Although some of us are willing to support the development of reasonable guidelines concerning joint and several liability, the provisions in H.R. 775 are far too extreme. Under this provision it will be necessary for all plaintiffs in all cases to find all potential defendants in order to ensure full recovery, inevitably increasing the number of lawsuits filed. Under the bill, if one or more potential defendants has gone out of business or cannot be reached because of jurisdictional difficulties, the injured consumer or small business is forced to bear the brunt of this unrecoverable liability, even if the defendant being sued has committed the bulk of the negligence or has failed to take any remedial or corrective action. The provision also will allow defendants to avoid liability by pointing the blame at other parties who are not part of the suit (the so-called "empty chair defense"). The limitation will also be problematic in cases where there exist foreign defendants who cannot be reached because of jurisdictional problems, a particular concern for computer products which include a wide array of foreign component parts, such as memory chips.

B. "Limitation on Bystander Liability" (Section 302)

H.R. 775 also provides that "with respect to a Y2K claim for money damages in which (A) the defendant is not the manufacturer, seller, or distributor of a product, or the provider of a service, that suffers or causes the Y2K failure, (B) the plaintiff is not in substantial privity with the defendant, and (C) the defendants' actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law," the plaintiff must prove "by clear and convincing evidence that the defendant actually knew, or recklessly disregarded a substantial risk, that such failure would occur." The plaintiff and defendant are in substantial privity

when, in a Y2K claim for professional services, they have contractual relations with one another, or if the plaintiff was specifically acknowledged by the defendant as a beneficiary of its services, prior to the defendants performance of such services.

Raising the common law standard of proof in most civil cases from "by preponderance of the evidence" to "by clear and convincing evidence," would make it more difficult to bring actions based on recklessness or fraud. Negligence claims are excluded from this provision. It is unclear who the drafters intend to benefit from this broad liability protection, although one possible beneficiary is professional service and accounting firms. In any event, we are not aware of any testimony or other evidence which justifies such a departure from ordinary liability principles.

C. Reasonable Efforts Defense for Defendants (Section 303)

Perhaps the most sweeping and unjustified liability relief provision in the bill is set forth in section 303, providing a "reasonable efforts defense". Under this defense, the fact that a defendant took reasonable measures to prevent the Y2K-related failure is a complete defense to liability. Thus, despite the defendant's level of fault, if it made reasonable efforts to fix the problem—even if those efforts did not result in a cure—it would have no responsibility for damages suffered by the plaintiff. Even if a defendant takes minimal steps to remedy a Y2K problem, it will serve as a complete defense against a tort action, thereby undercutting incentives to prepare for and prevent Y2K errors. Moreover, state courts will have little precedent in determining what is a "reasonable effort."

The breadth of this liability protection is truly breathtaking. The Justice Department has pointed out that the "section provides a complete defense to liability—no matter how much the defendant was at fault—for example the defendant could have recklessly disregarded a known risk of Y2K failure."[16] The defense is so broad it would even cover intentional wrongdoing or fraud, so long as the misconduct was eventually papered over by some sort of post-hoc reasonable effort. This hardly conforms with the personal responsibility theme the Majority repeats so often. The provision could also serve to completely insulate entities which sold Y2K defective products well after they knew of the problem and knew how to avoid it. We have received testimony establishing that the Y2K problem was identified in the 1950's and widely publicized in the late 1970's and early 1980's. Yet this bill would protect vendors who sell defective hardware and software up through and beyond the year 2000, as long as they try to remediate after the sale. It is difficult to ascertain any legitimate policy rationale for such broad protection.

D. Caps on Punitive Damages (Section 304)

H.R. 775 caps punitive damages in Y2K actions at the greater of three times the amount of actual damages or $250,000 and the lesser of the two amounts for small businesses. Under the bill, a plaintiff would have to prove by "clear and convincing evidence that conduct carried out by the defendant showed a conscious, fla-

[16] House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Attorney General Eleanor D. Acheson, U.S. Department of Justice, Office of Policy Development at 5).

grant indifference to the rights or safety of others and was the proximate cause of the harm or loss that is the subject of the Y2K claim." The legislation also funnels any punitive damages that may be recovered into a special Treasury fund.

Punitive damages impose punishment for outrageous and deliberate misconduct and they deter others from engaging in similar behavior. Collectively, these restrictions on punitive damages are likely to completely eliminate not only the incentive for seeking punitive damages, but any realistic possibility of obtaining them. Such restrictions are counterproductive in that they provide the greatest amount of liability protection to the worst offenders, those who have done the least to solve their Y2K problems. In addition, absolute caps send a message to wrongdoers that it doesn't matter how harmful or malicious their behavior, they will never be liable for more than a set limit. These restrictions allow companies to ignore Y2K problems, knowing they can never be hit with punitive damages for completely reckless and irresponsible behavior. This is not the signal that we need to send during this crucial time for Y2K remediation efforts.

Mark Yarsike, a small business owner in Warren, MI, who testified at the Judiciary Committee hearing on H.R. 775, is an excellent example of how current law effectively functions in the Y2K context. Mr. Yarsike purchased a $100,000 computer cash register and inventory system for his new store. On the day of the grand opening, the cash register would not accept credit cards with a Y2K expiration date. After calling the manufacturer over 200 times to no avail, the owner sued the manufacturer and the case was settled.[17] Mr. Yarsike commented on the unfairness of the punitive damages cap and other provisions in his testimony before the House Judiciary Committee: "The very people who caused this problem in the first place get all the breaks in this bill * * * They [also] get limitations on damages, limitations on joint and several liability * * * what do I get, besides a more difficult standard of proof if I finally manage to jump through the procedural hoops and get to court?" [18] In this case, the manufacturer's action was so outrageous that the threat of punitive damages very well could have been a factor in encouraging a settlement. Thus, the current civil justice system appears to have worked.

E. Limits the Liability of Corporate Officers and Directors (Sec. 305)

H.R. 775 caps the personal liability of corporate directors and officers at the greater of $100,000 or their past 12–months' compensation. This provision is not only unnecessary, it is affirmatively dangerous. It is unnecessary for any director or officer acting reasonably because under current law the "business judgment rule" already insulates officers and directors from liability for their business decisions as long as they acted reasonably in governing the affairs of the corporation.

It is dangerous because it will protect irresponsible and reckless behavior. One widely respected commentator on year 2000 problems has written, "[t]he duty of care is of critical importance in the

[17] House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Mark Yarsike, Co-owner, Produce Palace, Intl.).
[18] Id. at 4.

Year 2000 context because it establishes the standards that corporate officers and directors will need to meet in overseeing and making decisions regarding the corporation's Year 2000 efforts." [19] A Raytheon Corporation spokesman has written that "[p]erhaps the most compelling motivation for a company "opening its eyes" to the Y2K problem is the threat of direct, personal, pecuniary liability of officers and directors." [20] The liability cap would also interfere with the private enforcement of the securities laws with regard to misconduct by corporate directors and officers. Finally, the provision could serve as a windfall for insurance companies—while they have been paid to provide unlimited coverage, the amount that they actually have to pay to claimants would be capped.

II. H.R. 775 ALSO CREATES AN UNDUE BURDEN ON PLAINTIFFS AND ATTORNEYS

In addition to the sweeping restrictions on liability in tort and other non-contractual actions set forth in Title III, the legislation also contains a number of more general sections which will make it more difficult for harmed parties to obtain compensation for their damages:

A. Y2K Class Actions (Title IV)

Class action procedures offer a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation—they provide plaintiffs access to the courts in cases where a defendant may have gained a substantial benefit through small injuries to a large number of persons. H.R. 775 creates an undue burden on class action plaintiffs through a number of provisions. First, it requires that plaintiffs send direct notice to every class member with a return receipt requested, by first class mail. Plaintiffs would be automatically excluded from the class unless they affirmatively "opt in" to the class action in the event that receipt of the notice cannot be verified. Under current law, plaintiffs are considered members of the class unless they affirmatively "opt out." This provision would impede the ability of private parties to bring legitimate class actions in certain fraud on the market actions, for example, where it is impossible to identify, and hence notify, the victims in advance. In addition, it imposes significant costs on Y2K class action plaintiffs.

This procedural instruction to state courts could be a constitutionally impermissible intrusion on State Governmental autonomy. The Department of Justice addressed this constitutional argument in its letter of opposition to H.R. 775:

> [T]hese procedural requirements arguably have no direct connection to the vindication of substantive Federal rights and would accordingly be vulnerable to constitutional challenge on federalism grounds." Although the Supreme Court has stated that Congress, in enacting legislation under the Commerce Clause, possess broader power to re-

[19] Robert J. Kenney, et al., "The Year 2000 Challenge: Legal Problems and Solutions" at 34, Perspectives on Legislation, Regulation, and Litigation, National Legal Center for the Public Interest (1999).

[20] Raytheon Corporation, "Y2K and Director Officer Liability: The Writing's on the Wall."

> quire action by State courts than to require action by State legislatures or executives, see *Printz* v. *United States*, 117 S.Ct. 2365, 2371 (1997), the Court also has endorsed the "general rule, bottomed deeply in belief in the importance of state control of statue judicial procedure, * * * that federal law takes the state court as it finds them," *Johnson* v. *Frankell*, 520 U.S. 911, 919 (1997) (internal quotation marks omitted).[21]

H.R. 775 also eliminates the complete diversity requirement for Y2K class action plaintiffs. Under current law, the federal diversity statute mandates, inter alia, that U.S. district courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds $75,000 and is between citizens of different states.[22] This bill, however, provides federal court jurisdiction over any Y2K-related class action as long as the amount in controversy is greater than the sum or value of $1,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action. The only exception is for classes where the substantial majority of the members are citizens of a single state of which the primary defendants are also citizens, and the claims asserted will be governed primarily by laws of that state, or the primary defendants are governmental entities against whom the U.S. district court may be foreclosed from ordering relief.

Under this provision, nearly all class actions will be federalized, resulting in the dismissal of meritorious claims that could have been resolved in state courts. In effect, this provision will remove class actions involving state law issues from state courts—the forum most convenient for victims of wrongdoing to litigate and most familiar with the substantive law involved—to the federal courts—where the class is less likely to be certified and the case will take longer to resolve. There is also the overall concern that large numbers of plaintiffs will not have redress for their Y2K claims if the class action is not certified—it may be too costly for many plaintiffs to bring individual actions. Many of these unsubstantiated concerns were used by supporters of H.R. 3789 of the 105th Congress. This class action bill was reported out by the Committee during the 105th Congress over the objection of most Committee Democrats.

B. Fee Disclosure and Loser Pays (Title V)

The bill includes a number of procedural restrictions that govern the attorney-client relationship, such as the requirement that attorneys disclose to their clients the fee arrangement up-front, and the requirement that attorneys provide a monthly statement to clients regarding the hours and fees spent on the case. These procedural requirements could prove to be burdensome in practice, and there is no demonstrated need in Y2K cases for this form of federal regulation. In written testimony submitted to the House Judiciary Committee, Assistant Attorney General Eleanor D. Acheson of the Department of Justice Office of Policy Development noted, "We are

[21] See Letter from Jon P. Jennings, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Henry Hyde, Chairman, House Judiciary Committee 4 (April 29, 1999) (on file with the minority staff of the House Judiciary Committee).

[22] 28 U.S.C. Sec. 1332 (a)(1).

skeptical that there is a need for federal micro-management of the attorney-client relationship in Y2K cases, particularly when there are already state laws in place that require attorneys to disclose fees up front and to keep their clients informed."[23]

We also strongly oppose the "loser pays" (or "English Rule") provisions set forth in section 507 of the bill. Under this section, a litigant would be liable to pay the other side's attorneys fees if they rejected a pre-trial settlement offer and ultimately secured a less favorable verdict. Although styled as an effort to reduce litigation, the provision will operate at a tremendous disincentive to small businesses and poor and middle class victims of Y2K failures. This is because such small businesses and individuals have far less financial resources than large defendant corporations and cannot afford the risk of paying a large corporation's legal fees based on the outcome of a trial.

In effect, the possibility of an adverse verdict will deter small businesses from pursuing even the most egregious claims to court. The provision is so onerous that it would even apply to a harmed party that prevails in a Y2K action so long as they obtain less than a pre-trial settlement—in this respect it could actually operate as a "winner pays" provision. This would have the perverse effect of rewarding a negligent or reckless defendant and punishing an innocent victim. In addition, like other proposed federal procedural mandates on state courts, this provision raises serious federalism and constitutional concerns.[24]

This section represents a failed vestige of the infamous "Contract with America" that was summarily rejected by the 104th Congress.[25] At that time we noted the irony of the fact that a Republican Majority was so eager to embrace the so-called "English rule" at the same time prominent voices in England were calling for the abandonment of the rule. For example, the conservative British magazine, The Economist, wrote "only the very wealthy can afford the costs and risks of litigation [under the English Rule] which offends one of the most basic principles of a free society: equality before the law."[26] It is also notable that the States have not in any significant numbers sought to incorporate the English Rule into their own systems.

C. Consumers are Not Excluded

Another concern we have with the bill is its failure to exclude individual consumers from its restriction. Although the legislation carves out "personal injury" actions from its scope (e.g., for physical injury or pain and suffering), the legislation fails to exclude actions by individuals for pecuniary losses, such as any harm to their financial affairs or loss of their personal computer information resulting from a Y2K computer glitch.

In our view the heart of the Y2K problem is principally an issue of business to business litigation. Individual consumers do not have the same knowledge or bargaining power in the marketplace as

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[23] House Judiciary Hearing on H.R. 775, 106th Cong. (1999) (Statement of Attorney General Eleanor D. Acheson, U.S. Department of Justice, Office of Policy Development at 10).
[24] See note 22 supra.
[25] See H.R. 988, 104th Cong., 1st Sess., Sec. 2.
[26] The Economist, February 6, 1995.

businesses that have well established relationships with their suppliers to protect themselves by individualized contract. This legislation will greatly disadvantage consumers who are oftentimes unaware of potential Y2K problems and whose only recourse for fair treatment is the current civil justice system, particularly the tort system. In this regard it is useful to note that the 105th Congress passed S. 2392, the "Year 2000 Information and Readiness Disclosure Act."[27] That law limits the liability of individuals and businesses who act responsibly to share information designed to fix Y2K problems. But unlike H.R. 775, the new law included a consumer carve-out.

III. A REASONABLE Y2K SUBSTITUTE

Representative Lofgren lead the effort, with Representatives Conyers and Boucher, to craft a substitute that incorporates the legitimate needs of the information technology community. This narrow substitute, which is substantially similar to an amendment offered in the Senate by Senators Kerry and Robb, ensures that the Y2K remediation effort goes forward, without overreaching. In a recent letter by the Department of Justice to Chairman Henry Hyde, the Administration wrote, "while the Department has not yet had the opportunity to review the precise language of this new amendment, we understand that its modifications of State and Federal law affecting Y2K claims addresses the majority of our concerns. We are told this amendment will be substantially similar to the amendment in the Senate by Senators Kerry and Robb, which we support."[28]

The substitute specifically addresses the concerns of the information technology community by retaining the provisions that encourage remediation and mitigation and deter frivolous lawsuit, and properly deals with the problems raised by H.R. 775. The substitute includes provisions concerning a 90 day pre-litigation cooling off period, specifies pleading and mitigation requirements in Y2K cases and clarifies applicable state contract law. However, it excludes a number of the most extreme provisions of H.R. 775. First, and foremost, the substitute eliminates entirely the cap on punitive damages and the reasonable efforts defense. The substitute also eliminates entirely the attorneys fee disclosure requirements and the limitation on the liability of directors and officers. And, it eliminates the class action section, except for the minimal injury requirement that the court must find that the alleged defect in the product or service must be a material defect as to a majority of the members of the class, which should serve to deter frivolous lawsuits.

In addition, instead of eliminating joint and several liability altogether, the substitute provides that the court will have equitable discretion to determine whether a defendant, that is minimally liable, will be held jointly and severally liable. And, in cases where the defendant knowingly intended to cause harm, the liability of the defendant is joint and several. Under common law, tort feasors

[27] Pub. Law. 105–271 (October 19, 1998).

[28] See Letter from Jon P. Jennings, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Henry Hyde, Chairman, House Judiciary Committee 5 (April 29, 1999) (on file with the minority staff of the House Judiciary Committee).

who are responsible for an injury are jointly and severally liable for all of the claimant's damages. While acknowledging that the defendants, not the victims, should bear the financial burden if one or more defendants is judgment-proof, this provision alleviates the unfairness claimed by some defendants who are minimally at fault but are nonetheless included in lawsuits.

Finally, the substitute only applies to claims for commercial loss. Therefore, suits by consumers are not affected by this bill. A consumer carve-out will protect consumers in these situations by preserving tort and contract remedies available under state law for consumers harmed by product or system failures.

CONCLUSION

The high tech community has made it clear that they are interested in a bill that specifically addresses liability issues that are unique to the Y2K problem. As we understand it, they are not interested in a far-reaching tort reform proposal, but a narrowly tailored bill, that will address the problem of, among other things, frivolous lawsuits. H.R. 775, on the other hand, goes well beyond reasonable reform by failing to protect consumers, shielding grossly negligent defendants and harming innocent plaintiffs. Instead of creating positive incentives to fix problems, it creates new reasons to avoid remediation. H.R. 775 will unnecessary gut the protections of tort law while simultaneously failing to address the true concerns of the information technology community. For the above reasons, we dissent.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTY MEEHAN.
WILLIAM D. DELAHUNT.
STEVEN R. ROTHMAN.
TAMMY BALDWIN.
ANTHONY D. WEINER.

DISSENTING VIEWS OF HON. ROBERT C. "BOBBY" SCOTT

I concur with the dissenting views of the Minority except for the indication that the Substitute offered by Representatives Boucher, Conyers, and Lofgren is needed. Although the Substitute is better than the base bill, neither is better than the existing law. The remedies for breaches of contracts, fraud, and tort liability under current laws are adequate. Responding to the special interest of powerful groups through legislation to meet particular developments only invites the politically powerful to seek special dispensation through the legislature rather than fight their position out through the court processes provided for that purpose. Unfortunately, Congress has intervened as a legislative alternative to the court of appeals on several occasions in recent years. The Morgan case and the airline industry case are examples of such intervention where we changed the law after events arose.

I specifically object to the Substitute and the bill with regard to the suggestion that the section of the Act pertaining to "joint and several liability" need to be amended. In the normal course of business, businesses have the ability to insure against and provide for indemnification against losses not properly attributable to them. Consumers are generally not able to track down and apportion liability among joint tort feasors, particularly when some may no longer be in existence. The current law on "joint and several liability" properly presumes that defendants are in a better position to know their level of responsibility and to apportion that responsibility among themselves.

BOBBY SCOTT.