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THE Y2K BILL: THE NEXT GENERATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 461

A BILL TO ASSURE THAT INNOCENT USERS AND BUSINESSES GAIN ACCESS TO SOLUTIONS TO THE YEAR 2000 PROBLEM-RELATED FAILURES THROUGH FOSTERING AN INCENTIVE TO SETTLE YEAR 2000 LAWSUITS THAT MAY DISRUPT SIGNIFICANT SECTORS OF THE AMERICAN ECONOMY

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Hatch, Hon. Orrin G., U.S. Senator from the State of Utah	1
Leahy, Hon. Patrick J., U.S. Senator from the State of Vermont	3
Sessions, Hon. Jeff, U.S. Senator from the State of Alabama	22
Feinstein, Hon. Dianne, U.S. Senator from the State of California	24

CHRONOLOGICAL LIST OF WITNESSES

Statement of Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development, U.S. Department of Justice, Washington, DC	7
Panel consisting of Harris N. Miller, president, Information Technology Association of America, Arlington, VA; Laurene West, year 2000 healthcare consultant, Midvale, UT; Mark Yarsike, co-owner, Produce Palace International, Warren, MI; B.R. McConnon, president, Democracy Data and Communications, Alexandria, VA, on behalf of the National Federation of Independent Business; Harris Pogust, Sherman, Silverstein, Kohl, Rose and Podolsky, Pennsauken, NJ; and Stirling Adams, corporate counsel, Novell, Incorporated, Orem, UT	28
Statement of Hon. Robert F. Bennett, a U.S. Senator from the State of Utah	38

ALPHABETICAL LIST AND MATERIALS SUBMITTED

Acheson, Eleanor D.:	
Testimony	7
Prepared statement	11
Adams, Stirling:	
Testimony	60
Prepared statement	62
Bennett, Hon. Robert F.:	
Testimony	38
Prepared statement	42
Leahy, Hon. Patrick J.: Submitted the prepared statement of John A. Koskinen, President's Council on Year 2000 Conversion	5
McConnon B.R.:	
Testimony	50
Prepared statement	53
Miller, Harris N.:	
Testimony	28
Prepared statement	30
Pogust, Harris:	
Testimony	54
Prepared statement	58
West, Laurene:	
Testimony	34
Prepared statement	36
Yarsike, Mark:	
Testimony	44
Prepared statement	48

Page

APPENDIX

Questions and Answers

Responses of Eleanor Acheson to Questions from Senator Hatch 73
Responses of Mark Yarsike to Questions from Senators:
Hatch 74
Leahy 75
Responses of B.R. McConnon to Questions from Senator Hatch 78
Responses of Harris L. Pogust to Questions from Senators:
Hatch 78
Leahy 114
Torricelli 118
Responses of Stirling Adams to Questions from:
The Senate Committee on the Judiciary 120
Senator Leahy 121

Additional Submissions for the Record

Prepared statement of Hon. John Ashcroft, a U.S. Senator from the State of Missouri 149
Prepared statement of Thomas J. Donohue, for the U.S. Chamber of Commerce, and U.S. Chamber Institute for Legal Reform 150
Prepared statement of David C. Crane on behalf of the Semiconductor Industry Association 154
Prepared statement of Melissa W. Shelk on Behalf of the American Insurance Association 156

THE Y2K BILL: THE NEXT GENERATION

MONDAY, MARCH 1, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Abraham, Sessions, Leahy, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Well, we will begin today's hearing. Today's hearing is entitled "The Y2K Bill: The Next Generation." It is a hearing on S. 461, the Year 2000 Fairness and Responsibility Act, that Senators Feinstein, McConnell and I introduced last week. The bill is the next generation or follow-up legislation to the Senate Judiciary Committee-reported safe harbor bill that passed the Congress last year. Passage of this measure is important for consumers, businesses, and the economy, especially in my home State of Utah, and I think elsewhere. In Utah, we have quickly become one of the Nation's leading high-tech States, and we are concerned about this.

In working together to develop this legislation, Senator Feinstein and I have sought to produce a bill that encourages Y2K problem-solving rather than encouraging a rush to the courthouse. It is not our goal to prevent any and all Y2K litigation, and it is to simply make Y2K problem-solving a more attractive alternative to litigation. If we are to enact worthwhile Y2K problem-solving legislation this year, we must work together in a bipartisan manner on a fair and narrowly tailored bill. S. 461, it seems to me, gives us that opportunity.

Now, first of all, while our bill encourages problem-solving, nothing in it prevents injured parties from eventually bringing legitimate Y2K actions. The bill merely creates an opportunity for companies to correct problems and an additional incentive to settle cases. This will spur technology providers to spend resources in the repair room instead of diverting needed capital to the courtroom.

Now, with regard to the 90-day problem-solving period, this is a main feature of our bipartisan bill; in other words, its requirement that there be a 90-day delay before any Y2K-related litigation may begin. More specifically, this mandatory cooling-off or problem-solving period is designed to allow a consumer to notify in a simple

communication the technology provider, the supposed source of the Y2K problem, about the exact nature of the problem, how the consumer has been injured as a result, and what remedy is sought. The technology provider then has the chance to fix the problem. If no agreement is forthcoming, the consumer has the full right to sue.

With regard to proportionate liability, our bill provides that the liability of a defendant would be limited to the percentage of the company's fault in causing the harm. This will discourage the targeting of so-called deep-pocketed defendants.

On alternative dispute resolution, the bill specifically encourages the parties to a dispute to request alternative dispute resolution, or ADR, during the 90-day problem-solving period. In the event that the parties do engage in ADR, the bill requires the defendant to promptly pay any settlement. By ensuring expeditious payment of settlements, the bill makes out-of-court resolution a little more attractive for any and all parties.

On contract preservation, the bill ensures that if a contract does not limit liability for Y2K actions, or if there was not a true meeting of the minds in a contract which limits liability, recovery is available. Where, however, the contract specifically limits liability for actions that include Y2K claims, the bill justly limits recovery.

Now, this bill prevents careless Y2K class action lawsuits by requiring courts to determine whether an alleged Y2K defect was material as to a majority of class action members and whether members of the class are seriously engaged in the litigation, the bill guards against plaintiffs lawyers gathering large numbers of plaintiffs that have not really been harmed by a given Y2K defect or have only a passing interest in the case. The bill also limits punitive damages and ensures that our Federal courts have jurisdiction over what has become a major national problem.

In summary, it is clear that consumers and businesses have been and will be harmed by Y2K defects. And it is true that the Y2K problem could very well disrupt distribution systems and certain key sectors of our economy. It is also true, however, that the Y2K problem could spawn a rash of litigation that will inevitably shift scarce resources from fixing the Y2K problem to defending lawsuits, many of which will be frivolous. Indeed, one expert estimated that the worldwide cost of Y2K litigation could well be more than $1 trillion. We will hear much more about this from our witnesses today.

Now, our bill will give companies an incentive to fix Y2K problems right away, knowing that if they don't make a good-faith effort to do so, they will shortly face costly litigation. The natural economic incentive of industry is to satisfy their customers and thus prosper in the competitive environment of the free market. This will act as a strong motivation, for industry to fix a Y2K problem before any dispute becomes a legal one. This will be true, however, only as long as businesses are given an opportunity to do so and are not forced at the outset to divert precious resources from the urgent task of the repair shop to the often unnecessary distractions of the courtroom.

In the end, a business and legal environment which encourages problem-solving while preserving the eventual opportunity to liti-

gate may best ensure that consumers and other innocent users of Y2K defective products are protected.

Finally, I want to stress that we hope to proceed on a bipartisan basis, one that is modeled on the cooperation we achieved last year in passing the Year 2000 Information and Readiness Disclosure Act. That kind of bipartisan cooperation will be indispensable if we are to pass legislation in time for it to be of any use to consumers and businesses.

Now, I want to welcome our esteemed witnesses. I believe the witnesses today will shed new light on the Y2K problem and how our bill helps to resolve that predicament. And we will keep the record open for a week if additional testimony needs to be submitted.

Let me turn to the ranking member at this time, and we will move on from there.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I do hope that the Judiciary Committee is going to carefully review all the recent proposals, including those that would restrict the rights of American consumers and small businesses to seek redress for harms caused by year 2000 computer problems.

I think we should have just one simple, direct principle. Our goal should be to encourage Y2K compliance. Every single statement I have heard from everybody, no matter which piece of legislation they support, say they want Y2K compliance, and that should be our driving purpose. That is what we were looking for when we worked cooperatively last year with the President, the Vice President and the administration on the Year 2000 Information and Readiness Disclosure Act, which you have referred to, Mr. Chairman.

That is why I am cosponsoring and looking forward to Senate passage tomorrow of the Small Business Year 2000 Readiness Act, S. 314, to offer help to small businesses that are working to remedy their computer systems before the millennium bug hits.

I am concerned that sweeping liability protection has the potential to do great harm. Such legislation may restrict the rights of consumers and small businesses and family farmers and State and local governments, and even the Federal Government, from seeking redress for the harm caused by Y2K computer failures.

What worries me is that it tells all 50 of our State legislatures that they are irrelevant and we are going to rewrite every State law through Federal preemption. And I think it runs the risk of discouraging businesses from taking responsible steps to cure their Y2K problem before it is too late.

By focusing attention on liability-limiting proposals, no matter how much some special interests might want them, instead of on the remedial steps that need to be taken now, Congress could be contributing to distraction and delay from what should be our principal focus—encouraging Y2K compliance. Remedial efforts are necessary now.

Now, these recent legislative proposals by Senator Hatch and Senator McCain raise many questions that need to be answered be-

fore we move forward. If we do not proceed carefully, then broad liability limitation legislation could reward the irresponsible, at the expense of the responsible and the innocent, and that would not be fair or responsible.

Removing accountability from the law removes one of the principal incentives to find solutions before the problems develop. In fact, why would congressional consideration or passage of special interest immunity legislation make anyone more likely to expend the resources needed to fix computer systems to be ready for the millennium? In fact, some would ask would it not likely have just the opposite effect.

Why should individuals, businesses and governments act comprehensively now if the law is changed to allow you to wait, see what problems develop, and then use a 90-day cooling off period after receiving detailed written notice of the problem to think about coming into compliance? Why not wait and see what solutions are developed by others instead of working to develop your own, draw from them later in the 3-month grace period after the harm has been done, and then only if somebody complains?

I would rather continue the incentives our civil justice system allows to encourage compliance and remediation now, in advance of the harm. I am not looking at what we do after somebody has been harmed. I would like to make sure the harm doesn't occur in the first place. And I would rather reward responsible business owners who are already making the investments necessary to have their computer systems fixed for Y2K than to reward special interests with immunity for the irresponsible.

I sense that some may be seeking to use fear of the Y2K millennium bug to revive failed liability limitation legislation in the past. These controversial proposals may be good politics in some circles, but they don't solve Y2K. Instead, we should be looking to the future, creating incentives to accelerate the efforts to cure the Y2K bug.

The international aspect is one of the most important. We encounter a world as we are working to bring our systems into compliance that a lot of foreign suppliers to U.S. companies pose significant risks for all of us. And so we should consider whether creating a liability limitation model is going to help us in the international arena.

Under the bipartisan leadership of Senator Bennett and Senator Dodd, the Special Committee on the Year 2000 Technology Problem has done an outstanding job of raising awareness of the consequences that could result from ignoring the bug. I look forward to reviewing the findings and report of the Special Committee.

The administration is working hard to bring the Federal Government into compliance. The President decided to have the Social Security Administration's computers overhauled first and then tested and retooled and retested again. He was able to announce that Social Security checks will be printed without glitches in January 2000. Now, that is success.

Last month, I hosted a Y2K conference in Vermont to help small businesses prepare for 2000. Hundreds of small business owners from across Vermont attended the conference. Vermonters are working hard to identify their Y2K vulnerabilities and preparing

action to resolve them. This is the right approach. We should not be waiting to sit back, let the problems occur, and then say, well, you got hurt, but, you know, we have got liability protection and now we will see what we can do about it. We should fix the problems first.

During the last Congress, I joined with Senator Hatch to introduce and pass into law the consensus bill known as the Year 2000 Information and Readiness Disclosure Act. We worked on a bipartisan basis with Senator Bennett and Senator Dodd, the administration, industry representatives, and others to reach agreement on a bill to facilitate information-sharing to encourage Y2K compliance. And, Mr. Chairman, that was a good bill. It has helped. It is working to encourage companies to work together and share solutions and test results. It promotes company-to-company information-sharing.

The North American Electric Reliability Council got a great response from its efforts to obtain detailed Y2K information from various industries. Large telephone companies are sharing technical information over Web sites designed to help each other in solving year 2000 problems. I understand that Novell, which sent a witness to today's hearing, uses a Web site pursuant to our Act, to the Hatch–Leahy Act, to educate its customers about year 2000 software problems. Under a provision I included, that law also established a national Y2K information clearinghouse and Web site at GSA—again, a great place to go if you are a small business.

Now, I understand your bill, Mr. Chairman, was introduced just last Wednesday. It is very complex. A number of us are beginning our analysis. Some of the witnesses may not even be familiar with it yet and it will take some time to examine it. I would hope that you will also join me in taking a hard look at S. 96, the Y2K Act which was introduced 3 months ago by Senator McCain, in January. I understand that on Wednesday, he released a revised working draft of that bill. I hope that you will join with me and ask to have sequential referral of S. 96 to us. I mean, this is going to override many of our State laws and I think that we should be looking at it because of that.

We have a number of witnesses who have appeared on short notice, including Eleanor Acheson from the Justice Department, Mark Yarsike and Harris Pogust. I thank them for coming on such short notice.

Could I conclude by entering into the record a statement from John Koskinen? He chairs the President's Council on the Year 2000 Conversion. He is attending the global conference on Y2K compliance in Manila and thus could not be here. So if we could put his statement in the record?

The CHAIRMAN. We certainly will.

[The prepared statement of Mr. Koskinen follows:]

PREPARED STATEMENT OF JOHN A. KOSKINEN, PRESIDENT'S COUNCIL ON YEAR 2000 CONVERSION

I am in the Philippines today to meet with the National Year 2000 Coordinators from over 25 Asian–Pacific countries who are holding a series of meetings to discuss individual country and regional efforts to address the Year 2000 (Y2K) computer problem. However, I am pleased to have the opportunity to present to the Commit-

tee my views on the subject of Y2K liability limitations and efforts to prepare computers for the date rollover.

The Council is focused on efforts to ensure that as many information technology systems as possible function effectively through the transition to the next century. In addition to its work to prepare Federal Government systems for the Year 2000, the Council's more than 25 working groups have been reaching out to promote action on the problem in the private sector, among State and local governments, and internationally.

Last year, the Council worked with Congress to enact the bipartisan "Year 2000 Information and Readiness Disclosure Act," because there was strong evidence that concerns about liability for inaccuracies in voluntary statements were interfering with the sharing of information about technical solutions and the Y2K preparedness of businesses and governments throughout the country. During this process, we carefully distinguished between the need to increase the sharing of information—which would result in more systems being remediated—and dealing with the underlying question of whom should be held liable for actual Year 2000 failures or the cost of remediation efforts.

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

From my perspective, we need organizations to do everything they can between now and the end of this year to ensure that their systems and those of their customers and suppliers are made Year 2000 compliant. My principal concern about any liability legislation is that we do nothing to interfere with that goal. For example, I believe it would be counterproductive to establish a minimum standard of performance that triggers legal protections. I want to encourage leaders of every organization in the United States to keep asking if there is anything more they can do to get more systems fixed rather than seeking advice from their lawyers about when they have done what is necessary and can move on to other issues.

Ultimately, the best way to limit liability is to make sure that systems work, and we need everyone concentrating throughout the rest of this year on meeting that challenge. Significant progress is being made on the Year 2000 problem in the Federal Government and in critical sectors of the economy such as banking, electric power, oil and gas, and telecommunications. But much work remains. Our top priority must be continuing efforts with State and local government, the private sector, and the international community to maximize the number of compliant systems and thereby minimize potential disruptions related to the century date change. The Department of Justice has extensive expertise in analyzing efforts to limit liability or revise litigation procedures and is well positioned to speak to those issues.

I appreciate having the opportunity to share my views on this matter with the Committee.

Senator LEAHY. I thank you for holding this hearing, Mr. Chairman, but I do feel that the one before the Commerce Committee affects so many parts of our jurisdiction that when that comes out of committee, we should ask for sequential referral.

The CHAIRMAN. Thank you, Senator. We will sure look at that.

Our sole first witness on our first panel is the Honorable Eleanor D. Acheson. Ms. Acheson is currently the Assistant Attorney General for Policy Development in the U.S. Department of Justice. She has been with the Department since 1993 and is responsible for a broad range of policy initiatives. I want to welcome you and thank you for coming this morning.

Senator Bennett—we will try to fit him in as soon as he gets here. He is head of our committee on Capitol Hill and we are naturally very interested in what he has to say. But we will proceed with Ms. Acheson at this time.

STATEMENT OF ELEANOR D. ACHESON, ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. ACHESON. Thank you, Mr. Chairman. Good morning. I appreciate the opportunity to appear before this committee to express the Justice Department's preliminary views regarding the proposed Year 2000 Fairness and Responsibility Act.

This Act was introduced last Wednesday. The Department is still in the process of reviewing it and my submitted testimony, as well as this summary, presents only the Department's initial reactions to its more significant provisions. The Department fully supports the objective of the sponsors of this Act insofar as they seek to curtail frivolous Y2K actions and to encourage companies and individuals to focus their efforts on fixing Y2K problems before they occur.

At the same time, however, we are mindful that congressional amendment of State substantive law, as well as State procedures, should not be undertaken without real and compelling reasons, and must be done in ways consistent with the Constitution and important policy considerations, such as federalism.

This legislation presents a number of questions. First, does the legislation support or does it undercut the incentives that encourage companies to fix Y2K problems now? Second, has the factual predicate been established for the unprecedented changes that would be wrought by this bill, including the wholesale rewriting of State law?

Prior litigation reform measures have been based upon detailed study by both Houses of Congress and have been justified by demonstrated abuses. There has been no such examination in this context. Yet, the bill deals broadly with an entire universe of tort, contract and statutory claims.

Moreover, while Y2K failures will likely generate litigation——

[Technical interruption.]

Senator LEAHY. I told you to fix that computer, Mr. Chairman. [Laughter.]

The CHAIRMAN. I thought it was just the administration's appearance here today. [Laughter.]

We will try to prevent those types of glitches. We hope they are not starting before the year 2000.

Please continue, Ms. Acheson.

Ms. ACHESON. Thank you.

Moreover, while Y2K failures will likely generate litigation, it is difficult to predict at this time who will experience those problems, whether those persons will resort to litigation to resolve them, and what impact on which sectors of the economy that litigation will have. Thus, the Department will be looking to see whether the legislation addresses only those problems that are likely to arise.

Third, does the legislation comport with the Constitution, and in a way as to foreclose reasonable challenges to its constitutionality? Finally, does the legislation create more public policy and practical implementation problems than it may solve?

To the extent we have identified concerns about the current bill in the context of our continuing analysis, the Department is committed to working with the committee to craft appropriately tai-

lored legislation that responds to genuine Y2K liability or litigation-related problems likely to disrupt the American economy.

Title II of the Act amends Federal and State contract law as it applies to year 2000 claims, and in so doing effectively modifies the terms of already negotiated contracts and existing contractual relations. Section 202 of the Act, for example, creates a "reasonable efforts" defense in Y2K contract actions that would allow a defendant who had otherwise breached the express terms of the contract to show that the efforts it took to implement the contract were reasonable in order to limit or eliminate its liability.

In general, a party to a contract is obligated to fulfill its promises and is liable to the other party for damages to the latter resulting from the former's breach of contract. It does not matter whether the party breaching the contract made reasonable efforts to avoid doing so. 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. 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, with the risk of failure being transferred to the other party.

In a similar fashion, section 201 of the Act requires a court to enforce all written terms of a contract 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.

Title II may also implicate Fifth Amendment property interests under the Takings Clause of the Constitution. A business that paid for maintenance and a promise by a vendor to remedy defects in software that suffers a catastrophic Y2K failure could have a claim for compensation from the Government if that interest were invalidated by Federal legislation.

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. 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 section 302 does not always foreclose a negligence claim, a question over which reasonable minds might differ, section 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.

Section 303 erects a "reasonable efforts" defense similar to that contained in title II. This 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. Such a defendant has no responsibility for the damages suffered by the plaintiff as long as the defendant makes reasonable, albeit unsuccessful, efforts to fix the defect.

Section 104(a), while titled "Duty to Mitigate," imposes what appears to be a second complete defense to liability that bears little resemblance to the common law duty to mitigate. Again, these defenses would appear to be available even when the defendant is clearly at fault.

Other sections of title III curtail damages. Most dramatically, section 305 would appear to foreclose in tort cases the recovery of economic losses; that is, financial damages that flow from the defendant's tortious activity, unless they are incidental to personal injury or property damage claims. This provision appears to have the effect of granting defendants full immunity from tort suits involving fraud and misrepresentation, including securities fraud, where financial loss is unlikely to be unaccompanied by a personal injury or property claim or damage. Indeed, this section appears to preclude recovery in any tort case that does not involve personal injury or damage to tangible property.

Section 304 caps the punitive damages that may be awarded on Y2K claims, and section 306 caps the potential liability of directors and officers. This latter may turn out to be a windfall to insurance companies who have already been paid for unlimited coverage but will have only to pay out under the caps.

Section 301 abolishes joint and several liability entirely, substituting strict proportionate liability, even though most States have retained some form of joint and several liability to avoid placing all the risks on plaintiffs.

We have several concerns about these provisions. First, we do not understand, at least as yet, that State law is somehow defective in these areas. Second, a number of these provisions appear to provide disincentives to achieve Y2K readiness. Third, portions of title III may have undesirable collateral consequences. For example, the bill as currently drafted covers tort actions brought by governments and could curtail the ability of the SEC or other Federal and State agencies bringing regulatory or enforcement actions. Title III also overlaps in unpredictable ways with recent Federal legislation governing securities litigation.

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 would permit 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 court, 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 well leave large numbers of plaintiffs without redress. Title IV also imposes onerous opt-in requirements that may have the practical effect of making many class actions impossible.

The material changes to contract and tort law to State procedure and practices and to class action law and procedure that the Act would effect raise many unknowns about Y2K litigation under such a regime. Chief among those questions has to be will small business and consumers injured by wrongful conduct still be able to obtain compensation for the harm that they suffer. The changes to

current law appear to make it much more difficult, if not impossible, for small businesses and consumers to invoke traditional contract remedies, and significantly limit claims under statutory and tort law even in the face of reckless or intentional wrongdoing.

Finally, some concerns about the scope of the Act. The Act appears to cover Y2K lawsuits initiated by Federal and State governments and their agencies which are explicitly included within the Act's definition of "person." Title II's modifications to State and Federal contract law seem likely, for instance, to alter Government contracts law significantly, and more specifically the provisions of the Contracts Dispute Act which controls contract disputes involving the Federal Government.

Title III's modifications to tort law may have a similar effect on Government-initiated actions under consumer protection statutes. The limitations on the financial liability of corporate officers and directors contained in section 306 may, as discussed above, curtail the SEC's enforcement powers.

There is likely to be considerable dispute over whether or not lawsuits are subject to the Act. Plaintiffs will want likely to avoid styling their claims as year 2000 claims, and defendants 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 straightforward contract or tort litigation.

These are some of the concerns of the Justice Department with respect to the Year 2000 Fairness and Responsibility Act. On the other hand, there are ideas in the Act—for example, alternative dispute resolution and provisions for pre-filing notice with the opportunity to cure—that we believe provide common ground for us to work with the committee.

We are sympathetic to the concerns about Y2K liability and the need to act responsibly and expeditiously. We feel we need to know more of the nature and scope of any litigation-related problems that develop and are or may be beyond the ability of current law, procedure and practice to deal with. Above all, we must not do anything that would result, however unintentionally, in undermining Y2K readiness.

Accordingly, the Department would urge the committee not to act hastily, but instead to reflect carefully before enacting legislative provisions like the bill before you today that greatly alter the substantive and procedural tort and contract law of the States with regard to Y2K lawsuits. We are committed to working with the committee to create a responsible and balanced approach to any necessary Y2K litigation reform.

Thank you for the opportunity to address the committee today.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR D. ACHESON

Good morning. I appreciate the opportunity to appear before the Committee on the Judiciary to express the Justice Department's very preliminary views regarding the proposed Year 2000 Fairness and Responsibility Act.

INTRODUCTION

The Year 2000 Fairness and Responsibility Act ("the Act") was introduced last Wednesday. As many components of the Department are still in the process of considering its provisions, my testimony today will outline only the Department's initial reactions to some of the Act's more significant provisions.

The Administration has no quarrel with the objectives of this legislation insofar as it seeks to curtail frivolous Y2K actions and to encourage companies and individuals to focus their efforts on fixing Y2K problems before they occur. In crafting legislation to serve these objectives, however, we must be careful not to bar small businesses and consumers who have legitimate Y2K claims from the courts and not to create disincentives to Y2K readiness. We must also be mindful that Congressional amendment of state substantive laws, as well as state procedures and practices, is not a step to be taken without real and compelling reasons. And, even in such circumstances, there may be constitutional and significant federalism policy reasons to avoid those extraordinary means.

With these principles in mind, this proposed legislation raises a number of questions for us to consider. *First,* does the legislation support—or does it *undercut*—the incentives that encourage companies to fix Y2K problems now (thereby avoiding costly malfunctions before they occur)? *Second,* has the factual predicate been established for the unprecedented changes that would be wrought by this bill, including the wholesale rewriting of state law? Prior litigation reform measures have been based upon detailed study by both Houses of Congress and have been justified by demonstrated abuses. Before acting with respect to Y2K litigation, we should be comfortable in our estimation of what type of litigation is likely to arise, who the parties are likely to be, and which sectors of the economy are likely to be affected. If, for example, Y2K failures involving large businesses may be resolved more by negotiation than litigation, a bill directed primarily at Y2K litigation between such businesses might well be unnecessary. The need for justification is even more pressing when the legislation imposes dramatically different rules upon a relatively discrete subset of cases that are in many respects similar to those cases not affected by the legislation. *Third,* is the legislation targeted at frivolous lawsuits or will it prevent businesses and consumers with legitimate claims from vindicating their rights? *Fourth,* does the legislation comport with the Constitution and do so in a way that forecloses reasonable challenges to its constitutionality? *Finally,* would the legislation create more public policy and practical implementation problems than it would solve? While we share with the desire to act responsibly and expeditiously in this context, we feel it is important to answer these questions thoughtfully before enacting any legislation.

We have yet to answer any of these questions fully with respect to the bill before the Committee. But our preliminary analysis indicates that this bill would be by far the most sweeping litigation reform measure ever enacted if it were approved in its current form. The bill makes extraordinarily dramatic changes in both federal procedural and substantive law and in state procedural and substantive law. For all of the issues we have identified with the current bill, the Department is absolutely committed to working with the Committee to craft an appropriately tailored bill that responds to genuine Y2K-related litigation problems.

I will now outline the Department's initial thoughts on the current bill, and will begin with the provisions that alter substantive law affecting Y2K claims.

MODIFICATION OF PRE-EXISTING Y2K CONTRACTS

Title II of the Act amends federal and state contract law as it applies to "year 2000 claims" and, in so doing, effectively modifies the terms of already-negotiated contracts and existing contractual relationships. Most of these provisions appear to narrow, and in some cases eliminate entirely, the grounds and extent of relief available in breach-of-contract actions.

Section 202 of the Act, for example, appears—either intentionally or unintentionally—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" so that it could "limit[]" or "eliminat[e]" its liability. As far as we are aware, this would be a novel defense in contract law. As a general matter, a party to a contract is obligated to

fulfill its promises and is liable to the other party for damages to the latter resulting from the former's breach of the contract absent *force majeure* or other extremely rare circumstances. It does not matter whether the party breaching the contract made reasonable efforts to avoid a breach. This widespread rule of basic contract law has been in existence for hundreds of years in the common law, is currently reflected in our contract statutory schemes (e.g., the Uniform Commercial Code), and is essential to commerce.

In a similar fashion, § 201 of the Act would require a court, unless there is some defect in the formation of the contract, to enforce all written terms of a contract, even if those terms disclaim certain kinds of warranties, are unconscionable, or render the contract an unenforceable "adhesion contract." Most state legislatures, however, have adopted some version of the Uniform Commercial Code ("UCC" or "the Code"), which renders unenforceable in commercial contracts certain warranty disclaimers, as well as unconscionable contract terms and "adhesion contracts." These sections of the Code are designed to protect both individual and business consumers from particularly egregious contract terms imposed upon them by contracting parties with far greater economic power. The Act would appear to validate such terms, even though they were ineffective or illegal at the time they were made. Following in much the same pattern, Title II "freezes" the state law regarding the defenses of impossibility and commercial impracticability—and, in some cases, damages—to what it was on a specific date in the past: January 1, 1999 (for the defenses) or the time of contract formation (for damages).

Some of the provisions of Title II may be unfair both to American business and to American consumers. Creating a post hoc "reasonable efforts" defense that absolves parties to Y2K-related contracts of their contractual obligations seems to be unfair to the contracting plaintiffs who bargained—and paid—for contract compliance by the other party. That a breach resulted from a Y2K malfunction does not change the fact that the proposed reasonable efforts defense deprives parties to a contract of their paid-for bargain. Similarly, mandatory enforcement of only the written terms of a contract will upset the expectations of those businesses and consumers who relied upon the UCC for protection against unconscionable terms and illegal disclaimers. Together, these provisions seem extremely unfair and may, in many cases, leave without any remedy legitimately aggrieved plaintiffs who prudently bargained for protection against Y2K failures.

The reasonable efforts defense, in particular, appears also to undercut the incentives for potential contract defendants to discharge their contractual duties to prepare for—and prevent—potential Y2K errors. Presumably, under most bargained-for contracts, these defendants would be fully liable for a breach of contract if Y2K malfunctions occur; as modified by the Act, these defendants would be able to reduce or avoid liability, even if Y2K errors occur, as long as they made "reasonable efforts" to implement the contract. By curtailing the extent of their contractual liability, the Act may also curtail their incentives to meet the terms of the contract. Thus, the Act may actually fail to serve its own avowed purpose—"giv[ing] all businesses and users of technology products reasonable incentives to solve year 2000 computer date-change problems *before they develop.*"[1] John Koskinen, the Chairman of the President's Y2K Council, expressed these same concerns about the bill as currently written in his letter to this Committee.

We also preliminarily note that Title II may implicate constitutional interests and issues. There may be contracts for which a legislatively imposed post hoc reasonable efforts defense would raise issues under the Takings Clause of the Fifth Amendment. Contracts for computer services or software often contain explicit allocations of responsibility for remedying defects. Businesses that paid for maintenance and for commitments by vendors to remedy software defects, including defects that might cause Y2K failures, could file claims for compensation from the government if federal legislation invalidated those commitments. Title II's requirement that state courts in some circumstances apply substantive state law as that law existed on a particular date in the past may also raise some constitutional concern. These provisions effectively deny to state legislatures (and apparently state common law courts) the power to modify their own substantive law as they see fit to respond to changing circumstances.

Finally, Title II raises some fundamental policy and practice implementation problems that bear greater consideration. Initially, it is not clear how modifying the rules of liability that apply to meritorious contract actions will necessarily deter frivolous Y2K claims, which by definition will be filed regardless of the rules of liability. Moreover, the provisions requiring enforcement of all written contract terms would seem to displace the judgment of nearly all state legislatures that certain

[1] *See* § 2(b)(1).

types of contract terms in commercial contracts are against public policy. We strongly question whether sufficient study has been made to justify hastily discarding a principle of contract law that has become a cornerstone of consumer protection in so many states for very good reasons. In the same vein, requiring courts to apply state law as it existed at some date in the past withdraws from states their authority to respond reasonably to changing circumstances. The Act may also require courts to apply state law to various parts of a contract from three different time periods—the current law, the law as of January 1, 1999, and the law at the time of contract formation. This would, at a minimum, complicate what might otherwise be a relatively straightforward application of state contract law.

MODIFICATION OF SUBSTANTIVE TORT AND OTHER CIVIL LAW

Title III of the Act modifies federal and state substantive tort law (and other civil law) as applied to "year 2000 actions" for money damages not involving personal injury. The various sections place a greater burden of proof upon Y2K plaintiffs in these lawsuits, create new defenses, and significantly limit the damages that may be recovered. Several sections appear to preclude liability or recovery even when a defendant is clearly at fault. Is it sound policy for Congress to displace state law in such a dramatic way?

Sections 302 and 303 significantly alter the rules of liability for Y2K actions involving money damages. Section 302, for example, appears to foreclose some Y2K actions premised on a theory of negligence. Under ordinary principles of tort law, some Y2K negligence claims are likely to require proof that the defendant "should have been aware" of the potential Y2K failure and/or its likelihood to injure the plaintiff. Section 302(a), however, requires the plaintiff in any cause of action requiring proof of the defendant's actual or constructive awareness to prove that the defendant was "actually aware" or "recklessly disregarded a known and substantial risk." This "recklessness plus" standard would seem to preclude any such claim premised on culpability short of recklessness—that is, the standard appears to exclude negligence.

Section 302 clearly would require plaintiffs to satisfy a greater burden of proof in their civil actions. Instead of prevailing upon proof of their claims by a "preponderance of the evidence," Y2K plaintiffs would have to establish the critical elements of their actions—the defendant's knowledge and foreseeability—by "clear and convincing evidence."

Similarly, § 303 erects a "reasonable efforts" defense similar to that contained in Title II. This 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). Such a defendant would have no responsibility for the damages suffered by the plaintiff as long as the defendant made reasonable, albeit unsuccessful, efforts to fix the defect.

Section 104, while titled "Duty to Mitigate," appears to create two more new defenses—one complete and one partial—neither of which bears much resemblance to the common-law duty to mitigate. At common law, plaintiffs are not usually permitted to recover from defendants any damages they could reasonably have avoided after they are injured. By contrast, § 104(a) seems to bar recovery of any damages 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 when § 104(a) does not act as a complete bar, § 104(b) seems to preclude recovery for those damages that could have been avoided by consulting this Y2K information. By imposing an affirmative duty on Y2K plaintiffs to seek out publicly disseminated information or else lose their right to maintain an action at all, § 104 sweeps far beyond the fairness concerns that animate the common law duty to mitigate. Again, these defenses would appear to be available even when the defendant was clearly at fault.

Other portions of Title III significantly curtail the types and amount of damages a Y2K plaintiff may collect should he prevail in establishing liability. Most dramatically, § 305 would appear to foreclose the recovery of "economic losses"—that is, financial damages that flow from the defendant's tortious activity—unless they are incidental to personal injury or property damage claims. This provision apparently grants defendants full immunity from civil suits involving fraud and misrepresentation (including securities fraud), where financial loss is unlikely to be unaccompanied by any personal injury or property damage. Indeed, this section appears to preclude recovery in any case that does not involve personal injury or damage to tangible property.

Additionally, § 304 caps the punitive damages that may be awarded on Y2K claims, limiting damages against most defendants at the *greater* of $250,000 or

three times the plaintiffs' actual damages, and limiting damages for individuals and small-business defendants at the *lesser* of $250,000 or three times the plaintiffs' actual damages. Section 306 would apply in suits against corporate directors and officers and would cap their personal liability in Y2K actions at the *greater* of $100,000 or their past 12-months' compensation, as long as they did not intentionally make misleading statements or withhold material information with the specific intent to harm the plaintiff. This latter standard likely would not often, if ever, be met, so the cap on liability would apply in almost every case, even those in which fraud were proved.

Title III may also significantly impact whether a prevailing Y2K plaintiff will actually be able to recover his damages. Section 301 provides that a Y2K plaintiff may recover from each defendant only the amount of damages that defendant was responsible for causing. This would abolish 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. Because Y2K malfunctions may be caused by the complex interaction of software programs and computer hardware from several defendants, § 301's rule of absolute proportionate liability will, at the very least, place a greater burden on plaintiffs who will be forced to track down all potential defendants in order to receive a full recovery. Moreover, because many of these software and hardware companies are mid- to small-sized companies that are created and dissolved with some regularity, it is more likely that the rule of "proportionate liability" will create "orphan" liability that cannot be assigned to any still-existing defendant. As a result, a small business forced to shut down temporarily because of Y2K malfunctions may not be able to recoup its losses, which may be essential if it is to remain in business. Small business owner Mark Yarsike, for example, testified to the Commerce Committee earlier this month that his fledgling grocery store would have failed had he not been permitted to recover the losses he incurred when he was unable to process credit cards expiring after 1999.

In examining these changes to substantive state law, the Department has a number of concerns. *First,* we are troubled that the need for some of these provisions has yet to be demonstrated. With regard to § 301's rule of "proportionate liability," for example, the Department understands why a pure "joint and severable liability" rule may, on occasion, be deemed unfair to defendants, but only a handful of states currently follow such a pure rule. Instead, many limit a defendant's "joint and several" exposure to certain defendants (for example, those who are at least X percent responsible for the plaintiff's injury) or to certain percentages (for example, X times the defendant's proportional liability). As a result, we would urge the Committee to further investigate the need to foreclose modest forms of "joint and several liability" before resorting to an absolute "proportional liability" rule—which lies at the extreme end of the spectrum of potential options. We would also ask the Committee to consider further whether the case has been made for overhauling state law by abolishing recovery for most "economic loss." Also, we are not yet convinced that it is necessary to cap the liability of corporate directors and officers, who are already protected in most states by the "business judgment rule" that insulates them—and the insurance companies who insure them—from liability as long as they act reasonably in governing the affairs of the corporation. Indeed, the practical effect of this provision might well constitute a windfall to insurance companies, who have been paid for unlimited coverage but will have to pay only up to the cap.

Second, it appears that a number of Title III's provisions might provide disincentives to achieve Y2K readiness. Again, John Koskinen shares these concerns. Limiting a defendant's liability by circumscribing his duty of care with a "reasonable efforts" defense may in fact undercut the incentives to take all necessary steps to make computer systems and other machinery Y2K-compliant. Although some of the proponents of the Act argue that limiting liability in advance gives potential defendants more incentive to fix Y2K problems now because they will get some "credit" for their "reasonable efforts," this argument is unpersuasive to us at this stage. Given that the goal today is to get ready for Y2K problems before they happen, rewarding a person for only making "reasonable efforts"—instead of fixing the problems completely—seems counterintuitive. By the same token, capping punitive damages for Y2K defendants would reduce the deterrent effect of those damages, and accordingly leave such prospective defendants with less reason to take action now to avoid Y2K problems before they occur. We share the sponsors' worry about the potential effect of punitive damage awards on small business, but are concerned that an across-the-board cap may create the wrong incentives.

Third, we fear that some portions of Title III may, as a practical matter, have undesirable (and perhaps unintended) collateral consequences. As currently drafted, the bill covers civil actions initiated by government entities, including regulatory agencies. The SEC, for example, currently has responsibility for safeguarding the in-

tegrity of the securities markets, and towards that end has been active in bringing cases designed to promote timely Y2K compliance by market intermediaries.[2] Title III, and § 306 in particular, would likely interfere with these SEC actions. The Act is also likely to engender confusion in private securities fraud actions, which are already covered by specialized provisions in the federal securities laws that contain liability protections, such as the 1998 Securities Litigation Uniform Standards Act and the 1995 Private Securities Litigation Reform Act. Overlaying an additional layer of liability protection on top of these existing protections threatens to create a confusing and possibly conflicting set of legal standards that would lead to more complex, prolonged litigation over which set of liability protection provisions applies. Title III's comprehensive reform provisions may have a second, unintended effect—creating federal court jurisdiction over Y2K-related civil actions. Because it would amend rules to govern liability, and require courts to apply a federally prescribed rule that differs from the rule prescribed by current state law, the Act might be construed to create a federal question over which federal courts would have jurisdiction.

I have flagged some of the Department's chief initial concerns regarding the provisions of the bill that amend the substantive law applying to Y2K-related claims. Indeed, the Act's extensive amendments to state substantive law raises many unknowns about how Y2K litigation would operate under such a regime. For example, will small businesses and consumers injured by wrongful conduct still be able to obtain compensation for the harm that they suffer? The changes to current law appear to make it much more difficult, if not impossible, for small businesses and consumers to invoke traditional contract remedies, and significantly limit claims under statutory and tort law even in the face of reckless or intentional wrongdoing.

The Act amends state procedural requirements attendant to Y2K litigation as well, and it is to those provisions I will now turn.

PRE-LITIGATION PROCEDURES

Title I of the Act would impose some pre-litigation obligations upon plaintiffs seeking to bring civil claims premised on Y2K malfunctions. Section 101 requires plaintiffs to notify potential defendants of their intention to file a lawsuit 90 days in advance, and requires defendants to respond by explaining what actions they have taken, or will take, to "cure" the Y2K defect that forms the basis for the plaintiff's lawsuit. Section 102 encourages parties to use alternative dispute resolution mechanisms for resolving their Y2K claims. Section 103 imposes heightened pleading requirements on plaintiffs' Y2K-related claims by mandating that they plead with particularity the facts supporting their allegations of material defects, their prayer for damages, and their proof of the defendant's state of mind. Section 103 also stays discovery while any motion to dismiss based on failure to comply with these pleading requirements is pending.

The Department supports mechanisms that encourage parties to settle their disputes without litigation, and looks forward to working with the Committee in securing passage of appropriate provisions. We are not at this time convinced, however, that the need for heightened pleading requirements—or the need for stays of discovery pending a pleading-based motion to dismiss—has been established. We would welcome the opportunity to work with the Committee in exploring the need for these requirements and in fashioning a provision that avoids the constitutional concerns that arise from imposing procedural requirements upon state courts.

FEDERALIZING Y2K CLASS ACTIONS

The provisions of Title IV would grant the federal district courts jurisdiction (either original or by removal) over any Y2K-related class action as long as at least one of the defendants and one of the class plaintiffs are from different states. While the Act requires district courts to decline jurisdiction over certain Y2K class actions involving securities and grants them discretion to decline jurisdiction over class actions that involve primarily in-state parties and issues or that involve few plaintiffs or little money, it is unlikely that either of these discretionary grounds will be invoked very often. We note that these provisions are markedly similar to those contained in legislation proposed in the last Congress and to which the Department had significant objections. Title IV also imposes new and possibly onerous notification requirements on the class plaintiffs.

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[2] *See, e.g.,* "Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers," Release Nos. 33–7558, 34–40277, IA–1738, IC–23366 (Aug. 4, 1998), reprinted at <http://www.sec.gov/rules/concept/33–7558.htm>.

The Department is concerned about the practical effect of federalizing every class action that involves a Y2K claim. Granting defendants the power to remove all Y2K class actions to federal court may result in the dismissal of a number of meritorious class actions that would have otherwise proceeded to resolution in the state courts. It is possible that some Y2K class actions will be brought by primarily in-state plaintiffs who wish to apply their state's law against defendants from the same state. While a district court might have discretion to deny this removal, it may not do so when defendants face a number of similar, single-state class actions. Instead, the court is likely to grant removal and consolidate the cases into a single class action under § 1407 of Title 28. In that case, the federal court hearing the now-consolidated class action will be required to apply the substantive law of several different states. While the differences in law may be ameliorated to some extent by the Act's amendment of state substantive law, there will still be differences in the various states' laws. The court would at the very least be obligated to spend time canvassing the substantive law of many states to determine whether a class action applying those laws presented any common legal issues. If, as is often the case, the states' laws were sufficiently dissimilar, the court would find few common legal issues and would accordingly be unable to certify the class.[3] Under this latter scenario, the Act requires that the class actions be remanded to their respective state courts, but stripped of their class allegations. For those plaintiffs whose individual claims are so small as to make an individual action impractical, relief would be unlikely (because any attempts to reconstitute the class in state court will again prompt removal, consolidation, and remand stripped of class allegations). Thus, granting defendants the power of removal effectively grants them the power to terminate meritorious state-based Y2K class actions and to leave large numbers of plaintiffs without redress for their legitimate Y2K-related damage claims.

Moreover, the Department is not yet convinced that the benefit to be gained by federalizing Y2K class actions outweighs the cost. Unlike Titles II and III that alter substantive state law, Title IV—by permitting removal and then remand stripped of class allegations—does little more than effectively impose federal procedural law on Y2K class actions. We do not believe that it is appropriate—or desirable—to supplant the state courts' class action procedures. Because, in our federal system, states are encouraged to experiment and take different approaches to judicial administration and substantive law, the Act's imposition of federal standards on state class actions may be perceived to be an attack on federalism itself and the Constitution's allocation of authority between the state and federal governments.

Section 402 would impose a heightened notice requirement on Y2K class actions. Instead of the constructive notice now permitted in "opt-out" class actions under the Federal Rules of Civil Procedure, § 402 requires plaintiffs to send direct notice to every class member via first-class mail with a return receipt requested. If the plaintiffs cannot verify individual class members' actual receipt of the notice, those members are excluded from the class unless they affirmatively "opt in" to the class action. This may severely cripple the ability of private parties to bring some legitimate class actions. For example, these notice requirements might preclude a securities class action premised on a fraud on the market theory because it is often impossible to identify (and hence notify) the victims of such schemes in advance. At a minimum, this new notice requirement imposes significant costs on the Y2K class action plaintiffs that no other class action plaintiff must bear, and is not guaranteed to provide any benefits.

COVERAGE

As a final matter, the Department has a number of concerns regarding the scope of the Act. For example, we are very concerned that the Act appears to cover Y2K lawsuits initiated by federal and state governments and their agencies, which are explicitly included within the Act's definition of "person."[4] Applying the Act's substantive and procedural limitations to these sovereigns may interfere with their ability to enforce their own laws. Title II's modifications to state and federal contract law seem likely, for instance, to alter government contracts law significantly and, more specifically, the provisions of the Contract Disputes Act, which controls contract disputes involving the federal government. Title III's modifications to substantive law in civil suits may have a similar effect on government-initiated actions under consumer protection statutes. The limitations on the financial liability of corporate officers and directors contained in § 306 may, as discussed above, curtail the

[3] *See* Fed. R. Civ. P. 23(a)(2) (one prerequisite to class certification is the existence of "questions of law or fact common to the class").

[4] *See* § 3(6).

SEC's enforcement powers. The Department would urge this Committee to give fuller consideration to whether it is either necessary or advisable to reach Y2K actions in which governmental entities are parties, either as plaintiffs or defendants.

With respect to private litigation, we are concerned that the Act may reach more than Y2K lawsuits even though the stated purpose of the Act is to "encourage the resolution of *year 2000 computer date-change disputes* involving economic damages without recourse to unnecessary, time consuming, and wasteful litigation."[5] Titles II and III of the Act, which extensively modify state tort and contract law, apply to any "year 2000 claim." As currently drafted, however, a "year 2000 claim" involves any cause of action or defense that directly *or indirectly* asserts "*any* failure by any device or system * * * or software * * * in processing, calculating, comparing, sequencing, displaying, storing, transmitting, or receiving date-related data *including* [Y2K data]."[6] The term "including" strongly implies that Y2K date-related failures are simply one species within a larger universe of date-related failures covered by the Act. In that same vein, a "year 2000 claim" also includes any "failure to recognize or accurately process *any* specific date," without limiting the coverage to Y2K problems.[7] Title IV of the Act has a noticeably broader scope because it creates federal jurisdiction over class actions even if only one of the plaintiffs' claims is a "year 2000 claim," thereby subjecting non-Y2K claims to the provisions of the Act.

It seems very likely that even a well-tailored definition will invite 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 often will not know if a particular problem has indeed been caused by a Y2K failure. Conversely, defense lawyers will likely 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 substantive law, controls. In light of the fact that the Act works great changes in state law, which may have a substantial 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, significantly adding to the length and complexity of civil litigation.

Even clear definitions are unlikely to aid courts forced to grapple with questions of the Act's coverage when a single cause of action has both Y2K and non-Y2K bases. If, for instance, a building security system fails because a Y2K computer chip malfunctioned *and* the security company also failed to secure the emergency exit door, a court would still need to determine whether to apply the Act notwithstanding the contributing non-Y2K cause or whether (and how) to sever the claim given the two causes. Wasteful use of scarce judicial resources on these coverage issues seems inevitable, with greatly increased costs of litigation for both plaintiffs and defendants.

CONCLUDING REMARKS

In my testimony today, I have outlined the more important of the preliminary concerns of the Justice Department regarding the Year 2000 Fairness and Responsibility Act. As noted above, there are ideas in the Act—alternative dispute resolution and provisions for pre-notice filing with an opportunity to "cure," to name two—that the Department would like to aid the Committee in developing and crafting into appropriate legislative provisions. While we have concerns about some of the other provisions in terms of constitutional issues, public policy, practicality, and their effect on Y2K readiness incentives, we are eager to work with the Committee to address these concerns.

In closing, let me say again that we are sympathetic to the need to act responsibly and expeditiously with any Y2K litigation legislation, but we believe that we need to know more about the nature and scope of any liability- or litigation-related problems that are likely to develop and with which current law, procedure, and practice would be unable to cope. Above all, we must do nothing that will undermine Y2K readiness. Accordingly, the Department urges the Committee not to act hastily. Rather, we urge you to reflect carefully before enacting legislative provisions, like the bill before you today, that would greatly alter the substantive and procedural law of the states with regard to Y2K lawsuits. Indeed, it would be useful to know the view of the states as to any novel approaches to Y2K liability or litigation and to study what the states are doing to prepare for Y2K lawsuits, as sufficiently responsive action by the states may obviate the need for Congressional action. We are

[5] *See* § 2(b)(2) (emphasis added).
[6] *See* § 3(12), 3(13) (emphasis added).
[7] *See* § 3(13)(B).

committed to working with the Committee to formulate mutually agreeable principles that would form the basis for a needed, targeted, responsible and balanced approach to Y2K litigation reform.

I thank you for the opportunity to address this Committee.

The CHAIRMAN. Thank you, Ms. Acheson. We appreciate you coming. As I understand at least part of your testimony, a criticism of the bill is that certain provisions may have, "unintended consequences." I guess all legislation has some degree of unintended consequences. What I think we can agree to is the intended consequences of the bill.

It is the intent of Senator Feinstein and myself, and hopefully others, that this litigation reduce frivolous litigation and create a strong incentive for industry to fix the Y2K problem. My personal belief is that you share those goals and that the Justice Department shares those goals.

Will you work with us in order to refine this bill, the language of the bill, so that we minimize any unintended consequences that we can foresee?

Ms. ACHESON. Absolutely, Senator Hatch.

The CHAIRMAN. That is important to us. You know, I think we have a lot of differences with some of the statements that you have made here today in the interpretation of this bill, but we are willing to work with you to see if we can resolve those differences.

Let me just clarify a point that you have made in your testimony. I understand that the "reasonable efforts" provision is not an affirmative defense. All the provision does is allow some evidence that reasonable efforts were made by companies to fix the problem. So it is not an absolute affirmative defense.

And we would differ on a number of issues that you have stated here today, but I also understand that the administration has consistently opposed certain civil justice reform measures, such as caps on punitive damages. Of course, the purpose of punitive damages is to deter future bad behavior, but punitive damages is most effective in intentional tort cases and in personal injury cases, at least as I view it.

In general, the justification for the caps here is that in many cases the Y2K problem will be the result of neither negligent nor wrongful behavior. As such, punitive damages, if applied, would have little deterrent effect. Now, are you aware that personal injury cases are exempt from this bill, and that caps on punitive damages do not apply to those types of tort actions?

Ms. ACHESON. Yes, I am.

The CHAIRMAN. Do you not agree that caps on punitive damages, particularly in the breach of contract cases in which historically punitive damages did not apply, create an incentive for companies to fix Y2K problems because litigation costs would be less likely to soak up capital needed to remediate the problem?

Ms. ACHESON. Well, I guess, Senator Hatch, on that point we may have some difference of perspective because I think, first of all, a point John Koskinen makes in his letter and a point that we make is on the readiness issue, the law both with respect to actual damages and compensatory damages and then punitive damages is as it is, and it was that way when parties entered into their various relationships here.

So we are concerned that a change that would, in fact, remove some of the implicit pressures that exist in the law on defaulting or negligent or restless parties to correct their behavior or correct the problems that they have made for other people would be removed. So it is not as if we are suddenly larding punitive damage provisions onto a situation. The situation has developed in the context of already existing long since legal structures, and we are concerned with the impact and the message sent by removing them.

Second, I would say that the point that you make about the bite of punitive damages in contract—I think you are absolutely right on as a generic and theoretical matter. Punitive damages are far—they are, I guess, maybe indeed rare in contract actions, and there is no reason why there should be more recoveries in Y2K litigation, really, either in the contract or the tort side of the house.

So I guess our question would be if, in fact, the focus of this legislation is to deal with abusive or frivolous lawsuits, which I gather the word "insubstantial" is meant to collect, what about the meritorious cases? The frivolous, insubstantial cases that might come are going to be dealt with as frivolous, insubstantial, non-meritorious cases that already come in the State and Federal courts. And most of them, even if they are loaded up with punitive damage type claims, judges and other actors have procedures in place to deal with.

So I guess our response is we don't see the need to change this structure with respect to this type of litigation and are worried that, in fact, the doing of it will send a signal that we don't intend.

The CHAIRMAN. Well, we appreciate your testimony and I appreciate your kind offer to work with us and see if we can perfect this bill, because we file them and then we work on them and we try to get them perfect. And I would like to have the administration on board when we take it to the floor, assuming that this bill does come up on the floor.

At this point, we will turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I was just going to say who—no, I am not going to say that.

The CHAIRMAN. He has been resisting all morning saying that you Republicans are in charge in the Senate; now, why can't you get the thing to run on time? [Laughter.]

I can't blame him. I am a little upset myself.

Senator LEAHY. I am afraid you reminded me of a couple times when it was even worse when we were in charge. [Laughter.]

That is the only thing that has kept me from resisting.

The CHAIRMAN. I had a long list I was going to bring up.

Senator LEAHY. I am sure you did. [Laughter.]

It is called mutual deterrence.

This bill, as I said earlier, we have just barely gotten to see it. Even though there has been a lot of talk about it, it has only been in the last couple days we have seen it. And I have read it and I am concerned reading it that it appears to restrict the rights of consumers, small businesses, family farmers, State and local governments, and the Federal Government from seeking redress for the harm caused by Y2K computer failures.

Let me ask you a series of questions. Does the Department of Justice agree that S. 461 restricts the rights of consumers from seeking redress for the harm caused by Y2K computer failures?

Ms. ACHESON. Senator, it certainly does, as it is currently drafted, appear that it would have that effect, assuming that consumers and small business proceeded with respect to Y2K claims the way I think we have come to understand they proceed with respect to other types of claims.

Senator LEAHY. Then it would be the same for small businesses seeking redress for the harm caused?

Ms. ACHESON. I agree.

Senator LEAHY. And does the Department of Justice agree that S. 461 restricts the rights of family farmers from seeking redress for the harm caused by Y2K computer failures under the same standards?

Ms. ACHESON. Putting family farms, in my experience, in the same category as small business—I cannot speak to anything particular about family farms, but I would assume they would face the same challenges.

Senator LEAHY. Assuming they are small businesses, they would?

Ms. ACHESON. Small business, yes.

Senator LEAHY. And State and local governments?

Ms. ACHESON. I think that the challenges for State and local governments are even more complicated. Yes, there are constraints, and they fall not only on the rights of the government themselves, of their contractual rights, and so forth, but the functions that we rely on them and the rights that we rely on them to enforce for the greater public good in the context of their regulatory and enforcement authorities. And it raises a lot of questions on those lines.

Senator LEAHY. You had said in your testimony about the Justice Department's analysis, speaking of the Department's analysis, "Preliminary analysis indicates that this bill would be by far the most sweeping litigation reform measure ever enacted if it were approved in its current form." Can you tell us in layman's terms what that means?

Ms. ACHESON. Well, I think there are several levels to that statement. The first level is looking at what it would do to longstanding principles and substantive law in the area of contract law. Principles that have been outstanding in the common law for many hundreds of years would be undone specifically for this kind of legislation. And I can give you some examples if you like, but the same applies with respect to the underlying law of tort, negligence and recklessness.

It would not only change substantive law, it would narrow the liability and damages recovery rights for plaintiffs. It puts a lot of procedural burdens on plaintiffs for this litigation that they don't ordinarily have. That is one whole layer that it would complicate, and I would be happy to amplify on any point of that.

But the second is that it is the Federal Government—and this is another layer—stepping in and actually directing these changes to State substantive law and procedure and practice, which raises a whole other set of questions.

Senator LEAHY. Well, I am concerned about the terms and, of course, the lack of any case law in this because we are going into

such a new area. I can see every plaintiff going into court on something like this and arguing that they are not a Y2K lawsuit so they can escape the strictures blocking out the questions of liability. Of course, every defendant is going to say, well, it is a Y2K lawsuit so that they can get the law's legal protection. And then the court is going to have to determine what is a Y2K lawsuit, without any stare decisis, without any past cases.

In S. 461, they have definitions of "year 2000 claim" or "year 2000 failure." These are apparently words of art which trigger the special legal protections. Do we know how far the scope of those definitions go?

Ms. ACHESON. Senator, I don't think we do. And, in fact, I think one of the matters in the spoken testimony that I gave, but also in the written testimony we have focused on is the breadth particularly of the Y2K failure that seems to pick up a tremendous number and different aspects of failures in any device or system, or any software, firmware, or other set or collection of processing instructions. And it goes on and on and on, and then it says "including the failure to accurately administer or account for transitions or comparisons from, into, and beyond the 20th and 21st centuries, and the failure to recognize or accurately process any date, and the failure accurately to account for the status of the year 2000 as a leap year."

It would seem to me, just as a narrow point but good example of your point, is that that is, it would seem to me, way overbroad for the problem that I understood we were concerned about. And, two, it is so broad that it will provide anybody trying to color anything as a Y2K claim a broad brush to do it.

Senator LEAHY. And I worry about the bill's breath too. We worked a lot with the Small Business Administration because most of the businesses in Vermont, even our newest high-tech businesses, are small businesses. They say 330,000 small businesses are at risk of closing down because of the Y2K problems nationwide. Another 370,000 could be permanently hobbled. It may not be any fault of their own. It may be that a small manufacturing company does just-in-time inventory, but their supplier is shut down, so they become shut down.

S. 461 poses a 90-day waiting period on access to the courts for Y2K actions. Now, most of these small businesses may have limited cash flow, other resources. If a court doesn't grant injunctions or say you have got to wait 90 days, they could be out of business. Is that a concern that you share?

Ms. ACHESON. It is a concern. I mean, I think that is a provision that brings together, it seems to me, the tensions here because I think one of the things that certainly characterized the efforts of the industry, the concerns of the Senators, the concerns of the Federal Government, is a tremendously positive and constructive effort to fix their own problems, Y2K problems, and help other people fix theirs. And so it seems to me a tremendously positive policy idea to have a sort of stand-still time to effect a cure. On the very same point, it runs into the type of practical problems for small businesses that you have described.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I want to congratulate you and Senator Feinstein and the others who have taken the lead on this important issue.

We do have a problem, in my opinion. The tort legal system is just not the way to settle this tremendously complex and expensive process of computer Y2K problems. I just don't think it is the proper way to do it. It is going to involve extraordinary expenses and random rewards to one person and zero benefits to another, costing huge sums of money and taking large amounts of time.

I believe your analysis, Ms. Acheson, is just too naive in how these things are going to actually play out. What is going to happen is that in every county, every circuit court in America, hundreds, perhaps thousands of these cases will be filed. Plaintiff lawyers will be claiming punitive damages in every one of them as sort of a hammer, a threat; you could call it even an extortive-type threat to the company to force settlements even where settlements are not necessary.

One of the individuals who is going to testify here today, I understand—Mr. Yarsike will testify that he is against this bill, but it took him 2½ years to get his case to conclusion. And that is what happens. We had testimony, Mr. Chairman, as you know, about the asbestos litigation. I have practiced law all my life until the 2 years I have been in this Senate, and I am horrified to know that in asbestos only 40 percent of the money paid out by asbestos companies actually got to the victims of asbestos. Sixty percent was eaten up in litigation costs.

So I think we are at an incredibly complex period. We are talking about $1 trillion in costs. That $1 trillion needs to go to fixing this problem. All the asbestos companies are in bankruptcy. We certainly don't want to have all our major computer companies in bankruptcy. They need to be spending their money fixing this problem.

So I am really troubled by, I think, the analysis that you have presented. I think it is way too negative. I think this administration has got to deal with this problem. This administration does not need to be in the position of just stonewalling this and taking nothing but the trial lawyers position. Certainly, they will be making millions, and hundreds of millions of dollars out of the litigation—billions of dollars out of it.

And I know they are the number one financial supporters of this administration, but we are going to have to do something for the people of this country. So I am a little disappointed in what I consider an excessively negative view. I know the chairman is willing to consider helpful comments to improve this legislation. I know Senator Feinstein would, too, but I am just real troubled about that.

Let me just say this. Isn't it true under the 90-day rule that when you are talking about tens of thousands of cases that might be brought, isn't it likely that more small businesses will get their

cases favorably disposed of and their problems handled quicker than if they all filed a lawsuit at the same time?

Ms. ACHESON. It is very hard to say, Senator, you know, and I think one of the points that we have tried to make here, and we believe it, is that, you know, you have a view about what is going to happen here. Other people have very different views about what is going to happen here, both with respect to failures and with respect to resulting litigation.

We don't know, and that is what we are saying. And what we are saying is until we know, until we get a little bit of a better handle on the extent and nature of failures and the extent and nature of resulting litigation, before we undertake something that may well in the end be called for—we are not saying this is not called for; we are saying we simply do not yet have a factual predicate to know whether some or all of this may be called for—that we ought to continue to work on the Y2K problems.

What I am hopeful of is that the small businesses that you are talking about have identified their Y2K problems, their own, the people upstream from them and the people downstream, and are working right now to solve those problems. As I understand, if you get out on the World Wide Web and you look at what is out there, there are businesses working hard on solving the problem, and spending a lot of money doing it.

I don't know what money they may be spending for lawyers, and so forth, but what I am hopeful of is we won't have all these pieces of litigation lined up because we will have solved their problems. And I am not saying that, you know, there won't be any. Surely, there will be some.

Senator SESSIONS. Well, it is the kind of problem I think you could send a good person in or a good computer company could have tried to design a system that they thought would work and they have tried to repair it and they found out they didn't. Three times the actual damages that is suffered by a company—isn't that a sufficient compensation, and would the risk of even more than that make companies reluctant to even attempt to undertake repair of systems?

Ms. ACHESON. Well, I think if you had a company that went in three times and actually tried hard to, you know, repair the problem, they may end up with the contract damages under the State law. But I don't see in that case how they should be liable for punitive damages. It seems to me punitive damages is when somebody does something truly outrageous, and attempting to respond to your customer and fix the problems——

Senator SESSIONS. Well, limiting the punitive damages to three times actual losses seems like to me a pretty generous compensation and a fairly rational way to present some predictability to the companies who are undertaking to fix this problem. Wouldn't you agree that that would be helpful?

Ms. ACHESON. Senator, as a personal matter, I agree with you completely. I think the position of the administration on this issue has always been this is a matter for State law reform and State law process and State law legislative determination.

Senator SESSIONS. Well, I agree with you. Most of the complaints you have made about the bill are simply that it changes existing

law and, of course, that is what the goal of this legislation is, to change existing law to make it more rationally able to help us get through this crisis we are facing.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

[The prepared statement of Senator Sessions follows:]

PREPARED STATEMENT OF HON. JEFF SESSIONS

Computers have grown to be an integral part of our daily lives. Although studies differ on the extent of preparedness, most analysts agree that all Y2K problems will not be solved before January 1st. It should be expected that many people will suffer as a result of the Y2K computer bug. But because we live in a society in which people go to court and sue over even minor of inconveniences, I am inclined to believe the reports that claim litigation expenses associated with this problem could reach $1 trillion.

In addition to the problems resulting from the computer failure, it is absolutely necessary that we not allow this flood of litigation to worsen the situation. Testimony before this committee on asbestos litigation revealed that only 40 percent of the money awarded to plaintiffs actually reached the victims. The other 60 percent was taken by attorney's fees and court costs. The Asbestos suits are symbolic of mass litigation that provide too little benefit to those individuals who suffer actual harm. We should try to prevent similar injustices from occurring in Y2K litigation. Legislation which encourages business to repair Y2K problems and not waste resources defending themselves in court serves the public interest. We must avoid costly, time consuming litigation in which the lawyers are the only real winners.

Congress must also seek to avoid a situation where the court system has become so cluttered with marginal or frivolous lawsuits that individuals and businesses who have suffered genuine harm are not able to obtain relief. The legal system must focus on the legitimate lawsuits to ensure that they proceed in a timely fashion. An injured party does not need to compound that injury by enduring several years of litigation.

I look forward to working with the Chairman and other members of this committee to promote legislation which will encourage businesses to work diligently on fixing the problem, minimize unnecessary, unjustified and frivolous Y2K lawsuits, but still protect those individuals with legitimate legal claims.

The CHAIRMAN. Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Welcome, Ms. Acheson. I must say I am somewhat surprised by the response to this, which I frankly find not very helpful. I think there is a major problem. I got into this because of the concern about what might happen and the fact that more than 20 percent of America's high-tech jobs are in California.

We tried to craft a moderate piece of legislation; it is certainly much more so than the House. I believe that some legislation is, in fact, going to pass. I think both Senator Hatch and I have said that we are eager to work with the administration. We are eager to see amendments, and I would certainly hope that the Administration would be willing to work with us on this.

I think not to recognize the degree to which frivolous suits take place and the degree to which there is a possibility for these suits to take place even on a class action basis in the Y2K era is kind of like being an ostrich and putting one's head in the ground.

What we have tried to do in this legislation is not prevent legitimate suits from going ahead, but be able to provide a dampening effect on the frivolous suit and the frivolous class action lawsuit,

which we believe is brought sometimes just for the purpose of early settlement and the collection of money. So, that is the intent.

I have said over and over again that we are willing to entertain amendments. We have tried to vet this legislation in the short time we have had. I have sent this legislation now to every major computer company that I know of in the State of California, asked them to review it. We have asked ATLA to review it and submit comments. We initially heard, well, they are just going to oppose it. Now, I am very hopeful that they will review it in a respectful way and present some amendments. But let me just end by saying I am somewhat surprised by the comments.

Let me ask a couple of questions, if I can. You have argued that section 201 of the bill would enforce all contracts, even those that would otherwise be unenforceable. Yet, clause (c) of 201 specifically states that the section will not apply to contracts that are unenforceable due to an infirmity of formation. We meant for this provision to exempt contracts of adhesion between a large company and one with no negotiating power and other unenforceable contracts.

Do you think this exclusion is not clear? Do we need to change it?

Ms. ACHESON. I think it was our impression that that exclusion was unclear. I think that how we read this was that contracts that appeared to be carved out were contracts as to which a court determined that the contract as a whole was unenforceable due to an infirmity in the formation. And yet provisions that are unconscionable and have been held by State law or warranties and such like are really—they are just one piece of the contract.

And the way most—I shouldn't say I know this as a matter of most States, but certainly the States that I have practiced in and are familiar with and the Uniform Commercial Code have overridden offensive warranty and sort of limited provision problems. And so the whole contract doesn't become unenforceable; it is just that provision gets thrown out.

Senator FEINSTEIN. Well, perhaps you would take a look at it and submit some language.

Ms. ACHESON. Absolutely, absolutely. I mean, contracts of adhesion, it seemed to me, when the whole contract is a problem would be picked up in your unenforceable contract thing, but the oppressive or offensive provision piece wouldn't.

Senator FEINSTEIN. Now, as you know—and I thank you very much. We would appreciate an amendment, and obviously we want this to be as right as it possibly can be.

As you know, the House bill puts all punitive damage recoveries into a year 2000 recovery fund. In this bill, the plaintiff keeps punitive damage awards. The Administration has in the past opposed punitive damage caps for product liability legislation. However, this Y2K legislation affects only a narrow class of cases, those dealing with Y2K defects. These suits have never happened before and they are never going to happen again.

I think that caps on punitive damages can in some instances be helpful in limiting frivolous litigation filed solely to force a quick settlement. Is the Administration opposed to all punitive damage caps, or are you willing to discuss narrow or limited caps in some circumstances?

Ms. ACHESON. Senator, we are willing to discuss that and anything else about this bill. One thing that I want to make very, very clear—in fact, a couple things I want to make very clear; one is we just saw this bill on Wednesday. Two, we have done our level best, working very, very hard since then to look at it from the perspective that we must as the Department of Justice.

I am afraid maybe I have spent too many late nights on it and needed to sleep for 3 days and then read it because I don't think any of us intended it to sound as negative as apparently the committee thinks it does, and we regret that. We very much want to work with the committee on the bill and we want to keep talking about the nature of the problem that people see coming, that your constituents, that the computer industry does, what are the States doing, what do they think. Those are the kinds of things that we want to explore, but we are absolutely open to discussing every aspect of this.

Senator FEINSTEIN. Just one quick question. I would think the fundamental points are the provision for an arbitration process, the 90-day cooling off period. Of course, we don't cap attorneys fees, but we do cap, as Senator Sessions and Senator Hatch have said, the punitive damages. And the other big issue, I would think, for you is the proportionate liability. That is very hard for me not to see the justice in some proportionate liability, as opposed to allowing the person sometimes with the least liability but the deepest pockets getting the greatest penalty, which to me has always seemed like a very unfair part of the law.

And I say this as a non-lawyer. It seems to me that your liability—or excuse me—your responsibility really ought to relate to your degree of liability. And in this case, you can see some of the larger companies really having to absorb tremendous losses if there isn't some protection against that.

Ms. ACHESON. And it seems to me, Senator, that is a very good example of looking to some positions about proportionate liability that are somewhere in between joint and several, on the one hand, and strict proportionate on the other. States have looked at this in other contexts and some have made the joint and several tag or responsibility come in when there is a certain level of responsibility. Others have had different approaches to it. There are a lot of different approaches out there, and we would be happy to look at any of them against the emerging nature of the problem and work with the committee on those and other aspects.

Senator FEINSTEIN. I thank you very much. And, Mr. Chairman, I want to thank you very much for your help and working together on this. And I think we both said we would be happy to receive amendments and take a look at them, but this is a very important bill.

The CHAIRMAN. Well, thank you, Senator Feinstein. It is reciprocal. I really appreciate your going on the bill. We all know that when we file these bills, it is to create the controversies, and hopefully we have got it right the first time. But if we haven't, that is why we have a Justice Department to help us and aid us. And we are gratified that you are willing to reexamine this bill and look at it carefully and to give us your best suggestions on how we

might make it more acceptable to the Administration, and hopefully to everybody concerned.

We do appreciate that kind of cooperation and we will look forward to having it in the future. And if you could get back to us—this is on a kind of a fast track, so if you can get back to us within a relatively short period of time, we would appreciate it.

Ms. ACHESON. Absolutely, Senator.

The CHAIRMAN. And we will just work with you and see what we can do to refine this bill and make it even better than it is. But something has to be done. We can't ignore these problems any longer, and everybody knows this is going to be an awfully expensive process if it devolves to a pure litigation process. And we can't allow that to happen if we have a reasonable way of preventing it.

So thank you so much for being with us and taking the time.

Ms. ACHESON. Thank you.

The CHAIRMAN. Good to have you here.

Senator Bennett is not here yet, but when he comes in, we will interrupt whatever testimony is being given, unless it takes a sentence or two to finish, and let him give his testimony.

We will introduce our second witness panel and we are very happy to welcome all of you here today. It consists of a variety of members from the technology industry and consumers. Addressing the committee first will be Harris Miller, President of the Information Technology Association of America, the ITAA. ITAA is the largest and oldest information technology trade association. It represents 11,000 software services, Internet, telecommunications, electronic commerce, and systems integration companies.

Our second witness is Laurene West, from my home State of Utah. Ms. West has more than 20 years of health care experience. We are happy to have you here today. Not only is she a registered nurse, but she has also gained experience in medical informatics, designing, developing and implementing medical information systems. Ms. West has recently started a year 2000 consulting firm, so we are very interested in what you have to say here today.

Senator LEAHY. And, Mr. Chairman, you know I always listen to registered nurses.

The CHAIRMAN. That is good. His wife is a registered nurse, and I listen to her, too, by the way.

Our third witness is Mark Yarsike. Mr. Yarsike is a small businessman from Warren, MI. He is co-owner of Produce Palace International, a gourmet produce market in the Detroit suburbs. He is also the first person to ever file a Y2K suit.

Our fourth witness is B.R. McConnon, President of Democracy Data and Communications, DDC, which is a grass-roots database management and communications firm. Mr. McConnon provides oversight of grass-roots technical activities for several leading corporate and association grass-roots programs.

Our fifth witness is Harris Pogust. Mr. Pogust is the head of the Sherman, Silverstein year 2000 litigation group and is co-chairman of the Association of Trial Lawyers of America's Year 2000 Litigation Group. That is a very prestigious group. Mr. Pogust is an attorney with the law offices of Sherman, Silverstein, Kohl, Rose and Podolsky, located in New Jersey.

Our sixth and final witness is Stirling Adams. As in-house counsel with the software company Novell, Mr. Adams works with technology license agreements and is a member of the Novell team that oversees the company's year 2000 preparation efforts. He is also the Chair of the Software and Information Industry Association's Year 2000 Committee, and is a member of the Business Software Alliance's Year 2000 Committee. So we are happy to welcome you as well.

We are happy to welcome all of you here today and we will look forward to taking your testimony. Please understand that if Senator Bennett comes in, because of the pressures on him and others in the Senate, we will probably interrupt you to allow him to present his testimony.

So we will start with you, Mr. Miller. Now, we would like you to watch the lights. We are giving each of you 5 minutes. When that red light goes on, I would sure appreciate it if you would just really wrap up very quickly.

PANEL CONSISTING OF HARRIS N. MILLER, PRESIDENT, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ARLINGTON, VA; LAURENE WEST, YEAR 2000 HEALTH CARE CONSULTANT, MIDVALE, UT; MARK YARSIKE, CO–OWNER, PRODUCE PALACE INTERNATIONAL, WARREN, MI; B.R. McCONNON, PRESIDENT, DEMOCRACY DATA AND COMMUNICATIONS, ALEXANDRIA, VA, ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS; HARRIS POGUST, SHERMAN, SILVERSTEIN, KOHL, ROSE AND PODOLSKY, PENNSAUKEN, NJ; AND STIRLING ADAMS, CORPORATE COUNSEL, NOVELL, INCORPORATED, OREM, UT

STATEMENT OF HARRIS N. MILLER

Mr. MILLER. Well, thank you, Chairman Hatch, and thank you and Senator Feinstein and Senator McConnell for introducing this bill.

Revolution is about change, about new ideas and new challenges and new opportunities, about responding to the unknown, the unanticipated, and oftentimes the unbelievable. Who, for instance, would believe that in just a few short years the Internet would reach into every school, that E-mail would become just as important as telephones to business communications, that computers would cost less than the desk they sit on, or that two zeroes, or the absence thereof, could trip up our digital planet?

Today, this information revolution, bringing education, health care, political empowerment and numerous other economic benefits to billions of people, and valued at almost $2 million worldwide according to a recent study by the World Information Technology and Services Alliance, is threatened by those two zeroes.

That great philosopher, Yogi Berra, once said, I came to a fork in the road and I took it. The year 2000 software challenge is a fork in the road, presenting society with a choice about its immediate future. Unlike Mr. Berra, however, this committee and this Congress has to choose one of the forks. Down one path, we work together to correct our systems, assure uninterrupted consumer access to a very high level of products and services, maintain our

business relationships and preserve stockholder values. The other way, however, systems are left unfixed because companies look to the courts to make things right or to recover damages that need not have occurred. Product and service delivery goes haywire, company reputations plummet, and we enter a lose/lose outcome. Not a difficult choice really, Senators.

The Year 2000 Fairness and Responsibility Act of 1999 is legislation which rightly recognizes that remediation is vastly preferable to litigation. And although the clock is ticking, time remains to assess, fix and test many systems, and to develop contingency plans to prevent business disruption due to Y2K. Addressing the Y2K challenge will be difficult, but as Senator Hatch said, it is not an option.

So how do we create the environment that encourages fix over fight? The simple answer is we create incentives to repair systems and remove disincentives to do so; remediate, not litigate. ITAA believes that following key principles are essential to any bill addressing year 2000 liability, and they produce the incentives and remove the disincentives needed.

First, the language and the commitments of the contract will be the first point of reference to define the parties' rights and obligations. Second, we must have a uniform Federal approach to the resolution and litigation of problems attributed to year 2000 and making it the most equitable and predictable way to resolve Y2K disputes.

Third, a vendor-supplier must have the opportunity to effect a cure of the Y2K problem before a lawsuit is filed. Fourth, the parties must be encouraged to seek to resolve remaining disagreements through non-litigation alternative dispute resolution, such as non-binding mediation.

Next, defendants should be permitted to enter into evidence and use reasonable efforts in the circumstances to achieve year 2000 readiness not only as a defense to allegations of negligence, but to serve to mitigate contract and statutory suits in any action to recover economic damages resulting from a year 2000 problems and as a means of encouraging—and this is very important—businesses to invest in fixing systems today.

Next, all parties should mitigate their potential Y2K problems this year, and if a Y2K failure does occur, recovery in suit must focus on material defects and then should be limited to direct damages, except in cases of physical injury or fraud.

Next, abusive and frivolous class action litigation should be eliminated. Parties with legitimate claims, however—and there will be some—must have their rights protected and the courts unclogged to handle those claims. And, last, legislation should be industry- and organization-neutral, with no sector of the economy or level of government obtaining special treatment or special exemptions not available to other entities.

Critics of the eight principles I have just outlined and the legislation embodied in the bill that Senator Hatch and Senator Feinstein introduced usually trot out one of three arguments against it; No. 1, that taking legislative action now will encourage companies to stop fixing systems. Or, No. 2, they say just the opposite that legislation is not needed because fixes are going on. Or, No. 3, in logic

which I find truly defies reason, they say we don't have to worry about it because the disease this legislation is meant to prevent, a tidal wave of lawsuits, has not presented itself yet.

None of these arguments is in touch with reality. First, the bill creates incentives to fix the system because it says by taking action, you are going to be rewarded should you get into disputes. The incentives are to take action, not to not take action.

Second, they argue that the Y2K problem is solved. Well, unfortunately, members of the Senate, that is not true. And Senator Bennett can talk to you more about that, but certainly more and more data is coming in indicating that while a lot of progress is being made, the problem is far from being solved. So the idea that we don't need legislation because the problem is solved is also inaccurate.

The third issue which I have heard, and the Administration witness also raised, is we don't know how big the problem should be. Well, I did a simple Internet search recently and I typed in the words "Year 2000 plus Attorneys." I got 11,000 hits. There are a lot of lawyers out there who think they are going to make a lot of money out of this. Lloyd's of London as estimated $1 trillion in litigation.

I don't mean to suggest that all year 2000 problems will be solved and there will be no personal injury or other cases which warrant litigation if this bill passes. But I do suggest that unless Congress acts now, many suits will be launched on frivolous or speculative grounds, tying up the courts and companies in an exercise which is as unnecessary as it is unproductive.

Chairman Hatch, the legislation that you and Senator Feinstein introduced has incredibly broad support from all aspects of business—IT companies and their customers, small and large businesses, and companies across all sectors of our economy. I urge this committee to support the legislation. I am prepared to answer questions you may have.

Senator LEAHY [presiding]. Thank you, Mr. Miller.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF HARRIS N. MILLER

INTRODUCTION

I am Harris Miller, President of the Information Technology Association of America (ITAA), representing over 11,000 direct and affiliate member companies in the information technology (IT) industry—the enablers of the information economy. Our members are located in every state in the United States, and range from the smallest IT start-ups to industry leaders in the custom software, services, systems integration, telecommunications, Internet, and computer consulting fields. These firms are listed on the ITAA website at www.itaa.org.

ITAA appreciates the opportunity to express our industry association's strong support for the legislation being considered today on the Year 2000 (Y2K) software challenge. I am here to offer our perspective on the pressing need for Congress to pass this legislation and for businesses across the entire spectrum of our society to take advantage of and utilize its provisions so that our nation can take the responsible steps necessary to meet the challenge head on. In order successfully to make the transition to the new millennium, the Y2K challenge must be effectively addressed by all the affected stakeholders—governments, businesses, users and suppliers across all industries and enterprises around the globe. Though the clock is ticking, *there is still time to assess, fix and test systems, as well as develop contingency plans to prevent business disruption.*

Almost every sector of American industry—small business and large companies alike—is already making massive investments to prepare for Y2K. An onslaught of

unnecessary, costly, and time-consuming litigation at the turn of the century will, however, hinder rather than help efforts to cure potential Y2K problems. Rather than focusing on whom to sue, organizations should be in a partnership enterprise—working with key suppliers and customers, finding the answers, fixing any problems, and settling disputes quickly in order to prevent business disruption.

OUR COMMON GOAL: REMEDIATION NOT LITIGATION

Our common public policy goal should be to continue encouraging Y2K remediation, not litigation. While the Y2K technical challenge cannot be solved by legislation, well-conceived legislative initiatives, which implement a set of key principles, can play a constructive role. We believe that the Federal legislation introduced by you and Senator Feinstein and in the House of Representatives last week will achieve precisely that. This legislation is supported by a truly amazing coalition of trade associations and companies, representing the broad spectrum of the U.S. economy, because it is a fair, reasonable and necessary approach to the Y2K challenge. This coalition of interested parties includes potential Y2K plaintiffs, defendants and those that believe they could be BOTH!

When passed into law your bill will (1) create incentives to assess, fix, and test systems before problems develop; (2) provide business certainty through a uniform Federal approach; (3) encourage contracting parties to resolve Y2K disputes— particularly where there is only an economic loss—without litigation; and (4) screen out insubstantial lawsuits and actions not based on material defects, while preserving the rights of parties that suffer real harm. If there is personal injury or fraud or recklessness, this bill will NOT prevent the recovery of damages or reparations.

I am not a lawyer, so my comments will not attempt to analyze the specific aspects of the proposed bill defining plaintiff rights or defendant responsibilities. Rather, what I can tell you is *why* our members, their customers and suppliers, the broad spectrum of companies and associations that have come together in support of your bill, and *how* our overall economy NEEDS and DESERVES this legislation.

ITAA ON Y2K

Over the past four years ITAA has been the leading trade association voice on the issue of successfully confronting the Year 2000 challenge. We have long advocated that vendors and users become aware of and actively develop response mechanisms to identify the problems and remediate their systems. Our goal has been to make sure the parties receive the necessary information they require. We developed our own *Y2K Product and Service Compliance Questionnaire* over two years ago. In response to a specific request from Congress we established the first of its kind Y2K certification program for IT companies and enterprises that utilize IT to provide some certainty in a crowded and often confused marketplace. In the past two years, more than 100 user and provider organizations have successfully gone through the *ITAA*2000 Certification Program.* We have published and distributed free of charge a *Y2K Solution Providers Directory*—the 9th edition of which will be out next month. Our Internet website is the only place where the public and public policy makers can look to find all of the Federal and State bills on Y2K, and—unfortunately—all of the Y2K litigation.

ITAA worked closely with the House, this Committee and the Administration, to write and unanimously get passed into law the *Information and Readiness Disclosure Act* because we and Congress were convinced that the threat of lawsuits was hampering the sharing of vital Y2K information between business partners. Organizations were afraid to provide and could not receive the information needed to successfully approach resolution of Y2K issues to ensure a seamless transition into the next century. Since the passage of the "Good Samaritan" law, which came about in large part through the yeoman efforts of your chairmanship, ITAA has produced a set of special *Y2K Guidelines* and has sponsored an Internet webcast explaining how to take advantage of the Act's provisions. Companies across the country now have a tool that allows them to share company-to-company information. At the same time, the rights of consumers remain protected, and the law did nothing to limit any cause of action that may grow out of actual Y2K-related losses.

The legislation you and Senator Feinstein have introduced will broaden the protections contained in last year's information-sharing bill and will continue to keep organizations focused on the fix—not downstream litigation. This bill will serve to encourage vendors of all types to continue to put the time and resources into Y2K remediation and testing efforts in 1999. It will also serve to provide protection to those enterprises that are impacted by Y2K glitches even though they attempted to get their systems on track, by mandating, for example, an "opportunity-to-cure" period before a Y2K lawsuit can be filed, and discouraging the award of consequential

damage penalties against businesses impacted by events outside of their control. By focusing their time, energy and resources on fixing systems, rather than litigating lawsuits, business partnerships will continue and disruptions will be minimized.

Inevitably, even if parties do everything possible between now and the Year 2000 to prevent disruptions, failures and resulting disputes will occur. Business relationships can survive these challenges, however, as long as the contracting parties work together towards a solution and approach the Y2K challenge as partners, realizing that the problems encountered should not lead to contract termination or litigation.

BILL CRITICISMS TURN BLIND EYE TO REALITY

Let me take a moment to address three principle objections made by critics of this legislation. Contrary to logic and business practice, some have charged that legislation which gives companies a cure period is essentially an opportunity to delay, defer or deny that Y2K problems exist. Such a viewpoint turns a blind eye to the very nature of most business relationships, which is to do everything possible to assure customer satisfaction and a predictable revenue stream into the future. Meanwhile, bill provisions create clear incentives for both potential defendants and plaintiffs to take affirmative action on Year 2000—not hang back waiting for courtroom settlements. I refer here to the responsibility placed on companies to make reasonable efforts in anticipation of contractual or tort claims as well as the requirement to mitigate the likelihood of Y2K risks for those who might raise such claims. Buyers and sellers responding to these key provisions of the bill will implicitly reduce the size of exposures as well as actual damages and, as a result, minimize the need for lawsuits.

Other critics are pointing out that we have not yet seen evidence of the prognosticated flood of litigation, and therefore we are developing a cure in search of a disease. Again, I am not a lawyer, so I can only report what I read and see. What I see is a stable of salivating legal factories gearing up. I am in the "Internet business" so-to-speak, so I used my trusty web access search engine last week and found *11,051 'hits'* when I typed in the subject: "Year 2000 + Attorneys." My General Counsel is invited to speak at or is invited to attend two to three Y2K Litigation Seminars and Conferences a day. Is it prudent or responsible for Congress to wait for the inevitable flood or do what it can to provide sandbags now?

There are some critics who contend that this legislation is unnecessary because companies, thank you, are moving ahead on a remediation path just fine without the bill. I have been traveling throughout the country and the world for four years—speaking to every private sector group and government agency you can think of—and we are not even close to full remediation.

A recent ITAA Y2K contingency planning survey found that 87 percent of respondents, representing a wide cross section of industries, call Year 2000 a crisis for the nation and the world. Over half said Y2K will hurt their companies. Over one-third reported actual Y2K related failures.

Our research is supported by other studies and analysis:

• In the government sector, the GAO reports 39 percent of federal systems are yet to be made Y2K ready. The National Association of State Information Resources Executives says that of 46 states included in a recent survey, most are not close to being compliant. A recent report from the National Association of Counties found 50 percent of its survey base do not have a Y2K plan.

• A National Federation of Independent Business survey of small business owners in January 1998 found that 37 percent of those polled have either taken no Y2K action or do not plan to.

• A survey released in January by the Media Studies Center found that 53 percent of Americans agree that the Y2K problem is one of the most important problems facing the country—one percentage point more than had heard about the recent U.S. military action against Iraq.

• A January 1999 USA Today/Gallup Poll found 34 percent of respondents predicting major problems from the date bug generally and 14 percent saying they expect to experience major problems personally.

• A Cap Gemini/Industry Watch Survey conducted late last year found on-time completion schedules for Year 2000 projects slipping for 90 percent of those polled. An October 1998 survey conducted by CIO Communications, Inc., found over two-thirds of the CIO's polled indicated that the job of the century will not get done on time, and that government officials and consumers should be getting prepared to cope with the consequences. Those consequences could include an economic slowdown in the U.S. Seventy three percent of respondents said Y2K has the potential to cool the economy. Over 50 percent thought Uncle Sam should be creating a disaster recovery fund and emergency management agency.

The nation's Year 2000 glass is not half empty, but I think it is equally fair to conclude that much work and many risks to success remain.

Protracted court action will not fix a single system. Litigation is not a Y2K remedy. It will merely clog the court system; keep truly harmed plaintiffs from getting quick redress; expose companies to public criticism; damage reputations; destroy supplier relationships; and divert attention and energy from technical corrections.

It is for all of these reasons that large and small businesses—suppliers and customers, vendors and users, plaintiffs and defendants—have come together and urge you to pass this legislation as soon as possible.

ESSENTIAL BILL COMPONENTS

Let me briefly highlight a few of the key principles contained in the bill, which are essential components of any legislative framework seeking to encourage continuing remediation efforts, to resolve the disputes that may arise and to discourage unnecessary litigation.

• American businesses operate with the underlying expectation that they will be held to their contractual and statutory commitments, and expect their vendors, suppliers and customers to do likewise. Courts should not turn away from basic contract law principles and make new law because of Y2K. Contracts should not be "tortified" and should remain the first point of reference to define the parties' rights and obligations in Y2K disputes. Where parties have negotiated contract terms and conditions that limit their respective obligations and liabilities, those limitations should be strictly enforced.

• Vendors of products or services must be given an opportunity to respond to the problem identified by the prospective plaintiff and to cure a Y2K problem before a lawsuit is filed. A 90-day notice period is already embraced in existing contract law and the Universal Commercial Code. It is in the overall interest of our society to provide the tools that will solve problems and disputes, not encourage litigation, which will not fix a single system.

• We welcome the provision in this bill that encourages parties to resolve disagreements through non-litigative means, such as non-binding mediation and other alternative dispute resolution (ADR) methods. It is in the long-term best interest of contracting parties to maintain an ongoing business relationship, and ADR, rather than litigation, maximizes resolution chances and minimizes transaction costs.

• The President told the nation last July that our nation's ability to respond successfully to the Y2K challenge requires sharing the responsibility of fixing the systems. All parties are encouraged by this legislation to continue their remediation efforts and to develop contingency plans because they will have a duty to mitigate Y2K damages they could reasonably have avoided.

• In any Y2K claim to recover economic damages resulting from a Y2K problem, a defendant should be permitted to plead and prove that it used reasonable efforts or due diligence in light of the circumstances to achieve Year 2000 readiness. While this is already an accepted standard in negligence or tort actions, we strongly support the inclusion of this evidentiary showing in contract actions: that in light of the efforts made by the defendant, the plaintiff's economic damages were not damages that the defendant could have reasonably anticipated or prevented. This provision will encourage continued remediation efforts because the supplier of goods or services will know THIS YEAR that all of the time, resources and money that it puts towards fixing its systems and the efforts made to contact its suppliers can be entered into evidence if—for reasons outside of its control—a Y2K problem does occur NEXT YEAR and a lawsuit is filed. And that if no such efforts are made, no such defense is available.

• Except in cases of personal injury or fraud, recovery in Y2K lawsuits should be limited to actual direct damages, and only when the defect is deemed to be material. Punitive damages have historically been given to deter the defendant or like defendants from engaging in similar behavior in the future. This is a unique situation which will not occur again, and a higher negligence standard should be required if awards beyond actual damages are to be provided.

• This legislation will not prevent parties with legitimate claims to have their rights protected, but abusive and frivolous class actions by opportunistic plaintiff attorneys will be discouraged.

CONCLUSION: WORKING TOWARDS A CONSTRUCTIVE SOLUTION TO A DIFFICULT ISSUE

I will conclude by observing that the century date change challenge is formidable, and our attention and resources should be trained on developing solutions. Relying on lawyers and the courts to solve the problem is certainly not the answer. The IT industry is committed to helping the marketplace work through this difficult issue

in a positive, constructive manner. This bill recognizes that establishing and maintaining partnerships with everyone in the 'supply chain'—upstream and downstream—will allow us to be able to confront the issue successfully and find ourselves enjoying January 1, 2000, rather than facing it with dread and trepidation.

Thank you very much for this opportunity to appear before you today.

Senator LEAHY. Ms. West, it is good to have you here. The chairman had to step out just for a moment. You are going to think we are doing tag team here. He will come, I will leave. But please go ahead with your testimony.

STATEMENT OF LAURENE WEST

Ms. WEST. Thank you. Members of the committee, and Mr. Chairman at the moment——

Senator LEAHY. I am not the chairman. I am just filling in for him.

Ms. WEST. My name is Laurene West. I reside in Salt Lake City. I would like to ask that my full statement be inserted in the record of this hearing.

Senator LEAHY. It is so ordered.

Ms. WEST. I am here today not as a spokesperson for any organization and not as a lobbyist for any company that is paying me to be here, but as an example of the situation being faced by millions of Americans as we move toward the year 2000 event.

I have been a registered nurse for 20 years. I have worked within all critical care areas of the hospital, including surgery and recovery. And I am also a deputy sheriff with Salt Lake County Search and Rescue. But my perspective on the crisis looming in health care does not derive from being a trained clinician, but from being a patient, perhaps a better informed patient than most other people in the United States.

And as members of the committee are already aware, I suffer from a combination of disease processes. Specifically, I have a brain tumor that, without a daily supply of medication which is imported from a single factory in Sweden, my life expectancy is quite short. I have tried some kind of strategy to protect myself. That is because I am an informed consumer, but my strategy depends on everything happening at exactly the right time and a coordinated effort among the health care community, and also a significant amount of just plain good luck.

After the first surgery on my head, I acquired a staph infection. I have had 13 surgeries since, and that staph infection is no longer susceptible to any known oral antibiotics. So I am completely dependent on an IV antibiotic. So if there are significant year 2000-related failures as far as distribution of any kind of drug that I am on, I will be a casualty. I will die.

I am here representing 40 million medication-dependent patients, and I found that number a bit staggering when the Department of Health and Human Services gave me that number. That number represents one member of every family in the United States being at risk to year 2000-related failures, to the supply and distribution of medication.

And I am here representing those that are on chemotherapy, those who are cardiac patients, those who are asthmatics, those who are epileptics, insulin-dependent diabetics who do not have any time to wait if they do not have access to their drugs, and also

end-stage cancer or end-stage disease process patients who know they are dying and need a continual access to narcotics for pain relief. And I fall in that category. If there are not significant changes in the way that we are headed within the health care community, combining industry with government efforts, my death will be very slow, very painful, and I will not make it past March of the year 2000.

I also am here representing those patients that are device-dependent, those that have pacemakers, internally implanted defibrilators, neural stimulators, PCA pumps, insulin pumps. Most of those devices—the only option there is for those patients as far as testing is that the companies that produce those devices have said that they have done their own testing. There is no third-party testing.

As a legal layperson, I can only conclude that the single greatest impediment to an aggressive program to assure the availability of all the products necessary to supply me and my 40 million friends is the threat that whatever extraordinary steps the industry takes to attempt to assure the availability of their products will be viewed somehow by some lawyer as a confession of the inadequacy of their business model.

Clearly, I don't want to die, and I am sure that my 40 million friends don't want to die either. I have taken what I believe to be prudent steps in this regard, but I also realize the complexity of the manufacturing, distribution, ordering of raw materials, making sure that distribution cycles are changed to accommodate the increased needs.

Am I suppose to stop or can I keep going?

The CHAIRMAN. Keep going. If you can, wrap up.

Ms. WEST. I will hurry.

The CHAIRMAN. But I am going to give you some leeway here.

Ms. WEST. OK, thank you.

We know that the year 2000 is coming. We know that the medication supply, that the biomedical device supply will be affected. And we have the responsibility to help 40 million people so that they do not have to painfully die within the next year. That is our responsibility, that is my responsibility, that is the responsibility of industry, and that is your responsibility.

Suing someone in the drug supply chain after my death only makes health care costs rise, and those people who are still living after me may not even be able to have access to health care because it will be so expensive. Any legislation which discourages that sort of economically irrational, opportunistic lawsuit I support, and I am confident that I can get 40 million other people to support that legislation as well.

In my estate management documentation, I have had for years an express clause that says when I die, no one is to sue anyone. And I recently updated that so that that clause includes that if I die of anything related to year 2000 failures that no one is to sue anybody over that as well. Legislation that discourages lawsuits against those who have used their best efforts, without malice, to fix year 2000 problems, whether in health care or any other environment, I support, especially if it will, by easing fears of litigation,

allow the specialists in every field to spend more of their energy remediating the problem and educating the public.

And I know there are skeptics who do not believe that there is a tie between year 2000 liability legislation and my ability to get medicines. But I have worked in the health care field long enough that I have seen—I have actually for my own self experienced that litigation, the threat of litigation, has always driven a great deal of medical decisions. My fear of losing my malpractice insurance has made me make decisions that I would have preferred not to make.

And in this case, most importantly, as I understand it, the liability legislation being discussed among you does not even apply to suits involving wrongful death. So there will be no impact on the rights of individuals to recover in the event of such a loss. And this gives us—by passing this legislation, it gives us the freedom to get back to work fixing the problem, making sure that those of us who need help, who know that if there is not significant intervention that we will not survive past first quarter of the year 2000—I support.

I want to thank you especially for going over time, and also thank the members of the committee, and I am happy to answer any questions that you may have.

The CHAIRMAN. Well, thank you. I think your testimony is very dramatic and it may bring home to people more than any other testimony I have heard just how important this year 2000 problem is. So your traveling back here and helping us to understand this better is really a worthwhile thing, so we appreciate your being here.

Ms. WEST. Thank you.

[The prepared statement of Ms. West follows:]

PREPARED STATEMENT OF LAURENE WEST, R.N.

Mr. Chairman, members of the Committee, my name is Laurene West. I reside in Salt Lake City, Utah.

I am here today not as the spokesperson for any organization, not as the lobbyist for any group that is paying me to be here, but as an example of the situation being faced by millions of Americans as we move towards the Year 2000 "event."

I am an experienced health care professional. I have been a registered nurse since 1976, practicing in the Intensive Care, Surgery and Recovery. Also, I served as a Deputy Sheriff for Salt Lake County's Search and Rescue/Special Forces team.

But my perspective on the crisis looming in health care does not derive from being a provider or trained professional, but from being a patient—albeit perhaps a better informed one than many.

For as members of the Committee already are aware, I suffer from a combination of disease processes, most significantly a brain tumor which requires the daily administration of a pharmaceutical product which is imported into the United States from a single factory in Sweden.

If my access to this medication is interrupted, I will die.

As an informed patient, I have a strategy for attempting to assure that my access to the drugs, which keep me alive, is uninterrupted by Year 2000 events.

But that strategy is complex, depends on many events happening in just the right sequence, and also not an insignificant amount of plain good luck. And it would be easy for you—or the Administration, or the Y2K experts to say "see, this person is taking care of her own problem, we don't need to do anything special for her." But that would not be correct.

Because I am not typical of the nearly 60,000,000—yes SIXTY MILLION Americans who are dependent on ready access to daily administration of medicine or procedures to stay alive.

The number is indeed staggering—I was astonished when I first learned that the Department of Health and Human Services has itself estimated the number of dependent patients to be over 40,000,000. At least one member of every family in the

United States will be at risk if Year 2000 related failures cause disruptions to the supply of medications.

Start with those who are receiving antibiotics in post-operative care. Cancer patients receiving chemotherapy. Nitroglycerine for cardiac patients. Insulin for diabetics. Broncialdilators for asthmatics, Cyclosporin and Immuran for transplant patients. Hundreds of thousands who, like me depend on uniquely prescribed sole source or "orphan" drugs for rare illnesses. Ambulatory individuals who are on oxygen on a daily basis. Dialysis patients. End-stage cancer patients who are on narcotics for pain relief as they painfully wait to die. The list goes on.

Then there are those who are device dependent. Adults who require ventilators (12–20 breaths/minute) or preemie babies on jet ventilators (250–300 breaths/minute), sleep apnea monitors with embedded microprocessors. Those utilizing feeding devices for monitored intravenous or groshong catheterization. People with implants, such as pacemakers, internally implanted defibrilators, Insulin pumps or other devices where the Y2K readiness reports from manufacturers to date are based only on self certification, rather than actual documented third party testing.

Clearly, the universe of individuals affected by continuing access not only to a reliable supply of prescription medications and electro-mechanical medical devices is large. And while the risk to the entire population of medically dependent individuals is perhaps relatively small, who among us would want to sentence any *one* of these individuals to most likely a painful death because of a problem that can be anticipated, planned for, and corrected?

I have had an extensive conversation over the past year with members of both the patient advocacy community, the health care providers and producers, and the government payors.

As a LEGAL lay person, I can only conclude that the single greatest impediment to an aggressive program to assure the availability of all of the products necessary to supply me and my 60,000,000 dependent friends is the threat that whatever extraordinary steps the industry takes to attempt to assure the availability of their products will be viewed somehow by some lawyer as a confession of the inadequacy of their existing business model, and result in a lawsuit on behalf of any and every individual who might suffer in some way—no matter how modest—from a failure of the system to work as expected.

Clearly, I do not want to die, and do not want my supply of Synthroid, Vancomycin and Vasopressin to become the decisional factor about whether I live or die. I have taken what I believe are prudent steps to protect myself. But I also recognize what the reality of the complex production and delivery cycle is for the products on which I and others depend. And based on my own moral system, I can not find it a good decision to ask that, should I die, my trustees sue my Physicians, the Hospital or the drug company because my supply of Synthroid, Vancomycin and Vasopressin did not arrive in time. No, we know Y2K to be an issue, so we can plan to make sure that the supply is available, that the raw materials are ordered, that the production cycles are adjusted, that contingency plans are put in place so that the supply of my drugs and the drugs required by millions of others will be available without interruption.

That is our responsibility, that is the industry's responsibility, and, that is your responsibility.

Suing someone in the drug supply chain after my death is certainly shutting the barn door after the horses have left. And legislation which discourages that sort of economically irrational opportunistic lawsuit makes good sense to me.

In my estate management documents and letter of instructions to my executors, I have for many years had an express instruction that NO ONE BE SUED after my death. Unless it was plainly a criminal act that caused it, God's decision to take me can not be redressed by moving money around.

I believe that legislation which discourages lawsuits against those who have used their best efforts to fix Y2K problems, whether in health care, or any other environment, makes good sense, especially if it will, by easing fears of litigation, allow the specialists in every essential field to spend more of their energies remediating their Y2K problems.

I know there are skeptics who don't see the link between Y2K liability legislation and access to medicines. But I have been around health care delivery long enough to know that the threat of litigation has always, unfortunately, driven a great deal of medical behavior.

And I am confident that as government agencies have begun to send questionnaires asking pharmaceutical companies about their Y2K readiness, as clinics have asked distributors to certify as to their Year 2000 delivery schedules, as the President's Council has asked industry associations to poll their members about Y2K

readiness, concerns about that one-and-only what if situation becomes the tail that wags the dog, to coin a phrase.

And most importantly, as I understand it, the liability legislation being discussed among you does not even apply to suits involving wrongful death or serious physical injury, so there will be NO IMPACT on the rights of individuals to recover in the event of such a loss.

But in the business-to-business transactions that make up the complex food chain of drug and device delivery, a great deal of pressure and concern about the distraction of lawsuits could be relieved, allowing members of the industry to focus on the important job of figuring out how to assure continuing uninterrupted access to these critical medicines and tools.

This freedom to get busy putting plans in place and practicing them to keep the delivery of critical medicines on track is the core of what is needed. And if that is one of the things the legislation you are considering will do, then I am all for it, and I think millions of others will be as well.

I want to thank the members of the Committee for allowing me to appear today, and I will be happy to answer any questions you may have.

The CHAIRMAN. Mr. Yarsike.

Mr. Yarsike, Senator Bennett is here and I don't want to interrupt you in the middle of your remarks. Why don't we allow you to start over again and take Senator Bennett's testimony at this time?

If you care to, Bob, you could do it right here beside me, if you would like, or you can go down there, either way.

STATEMENT OF HON. ROBERT F. BENNETT, A U.S. SENATOR FROM THE STATE OF UTAH

Senator BENNETT. I can't avoid sitting where it says "Mr. Kennedy." [Laughter.]

Senator FEINSTEIN. Welcome to our side.

The CHAIRMAN. I am sure that will be a matter of great remembrance to him.

We are happy to welcome Senator Bennett here today. Senator Bennett, more than any other person other than Senator Dodd, in my opinion, in the Congress has done more to try and resolve the Y2K problems. He is probably, in my opinion, more up on it than any other Senator, and so we are very honored to have him take time from his busy schedule and come here today to help us along the path of trying to get some sort of legislation that will help to resolve these problems.

So we are very appreciative to have you here, Senator Bennett, and we look forward to taking your testimony.

Senator SESSIONS. Mr. Chairman, I would like to join in these remarks, and say to Senator Bennett—I expressed to him personally just a few days ago how much I appreciate his leadership on this. I think it has helped move our Government forward.

I will have to go to another appointment and I wanted to say to you I am sorry I will not be able to hear your remarks, but again to say how much I appreciate your leadership on this issue.

Senator BENNETT. Thank you. You will get a chance to hear them again tomorrow, and again and again and again.

The CHAIRMAN. I don't want you to get too comfortable on that Democrat side of the table is all I can say.

Senator BENNETT. Don't worry.

Thank you very much, Mr. Chairman. I appreciate it, and I apologize to the witnesses for barging in in this fashion. The sched-

ule that we keep sometimes does this to us, but it can be rude and I assure you no offense was meant.

I appreciate the opportunity of testifying. As you know, I have been studying this problem since 1996, when I first became aware of it as chairman of the Senate Banking Subcommittee on Financial Services and Technology; more recently, in my capacity as chairman of the Special Committee on the Year 2000 Technology Problem. And along with Senator Dodd, who was on that subcommittee of banking and is now the ranking member and vice chairman of the Senate Special Committee, I have presided over 20 hearings on the Y2K problem. Ms. West has testified before our Special Committee during our hearing on pharmaceutical problems.

We have looked at the effects of this on such disparate sectors as financial services, utilities, telecommunications, transportation, health care, general business and, of course, general government. Now, as widespread as these sectors may be, they all have one thing in common, and that is a fear of massive litigation as a result of Y2K-related failures.

The Judiciary and the Commerce Committees are to be commended for acting quickly to address these legal issues created by Y2K because the problem will be upon us. If we wait for the next half of this session of this Congress, we will be too late. I told the Commerce Committee 2 weeks ago it is important that we find a reasonable and just means of handling the potential Y2K tidal wave of litigation because it threatens to overwhelm our judicial system—remember, all of these lawsuits will be triggered within a 30-day period of time and the courts are just not prepared to handle that compact a wave of litigation. Also, of course, it is because the time and money spent on preparing for endless lawsuits and counter-suits is time and money that is not invested in the research and development of Y2K solutions.

We learned last year that one aspect of the fear of litigation involved the disclosure and exchange of information. And strange as that may seem to those of us who aren't trained to think like lawyers, the very commodity that could avert a Y2K crisis, information related to readiness, was being withheld because different sectors of the industry feared lawsuits if their disclosures proved ineffective.

The Congress moved toward solving that problem when it passed the Year 2000 Information and Readiness Disclosure Act last year to promote free disclosure and exchange of information related to Y2K readiness. I am interested, Mr. Chairman, that among those who came to me and said thank you for passing this legislation were not only commercial enterprises and firms, but also government entities, cities, and counties, who came and said as a result of this legislation, we can now exchange information. I wasn't aware that they were afraid of litigation, but at that level, too, the passage of that Act has elicited some favorable response.

Since the bill was signed into law in October of 1998, industry has told our committee that the logjam of readiness information has been broken. The Act has enabled businesses from all sectors—and as I say, I add to that small government entities as well—to make significant progress not only with their remediation efforts,

but also with their contingency plans, and being able to share what one entity is doing with another has been helpful.

But, unfortunately, disclosure of year 2000 readiness information is only part of the problem. The fear of litigation that lingered in the shadows for much of last year has now stepped forward, and it is shouldering aside what should be the overriding goal of everyone involved with this problem, which is remediation. The committee maintains its belief that remediation and contingency planning are of paramount importance. But our findings over the last year suggest that the fear of litigation is real and justified.

Now, the Special Committee plans to set forth its findings in a report to be issued tomorrow, and I actually have a copy of it somewhere that I can hold up. You can read all about it in last week's Washington Post, but here it is, and this will be formally issued tomorrow and is available today.

A quarter of all companies worldwide have yet to start any Y2K effort. According to the Gartner Group report, which is included in ours, between 30 and 50 percent of all companies worldwide will have at least one mission-critical failure. Now, that figure drops to 15 percent for companies in America, but that is still a very high figure. Fifteen percent of the companies in a country that is tied together with just-in-time interdependability having a mission-critical failure could be very serious.

It is estimated that the correction of these failures will take at least 3 days in most cases, maybe longer in some, and that the cost per incident will run into the millions, which means that the total cost will run into the billions. This is only where the problem begins because no business operates in a vacuum in this day and age. Our economic sectors are inextricably bound together. The financial services sector depends on its ability to exchange electronic information between its members and with government agencies, and that means the telecommunications sector is involved.

The manufacturing sector depends on just-in-time inventory and the exchange of electronic information to create a tight chain between suppliers, processors, manufacturers, distributors, retailers and consumers. And this linkage extends far beyond our shores to encompass international trading partners, creating a gigantic worldwide web of commerce. We have all gained from this interconnectivity. We have things available to us we never had before, and we have them at cheaper prices than we ever had before.

But the price is that one company's inability to fulfill its contracts open it and all the companies that depend on it to liability. As a result, the Y2K failures of one company can set in motion the unraveling of all of its business partners. In a best-case scenario, a Y2K disruption will only last a few days. Even so, a few days is more than enough time for a vast array of businesses and individuals to suffer some kind of economic injury.

All too often in this country, our first stop on the way to recovering our losses is at the courthouse. If litigation resulting from Y2K-related failures is anything like we are predicting, up to $1 trillion worth—I frankly think that number is a little high, but the experts keep giving it to us—the courthouses will be standing room only and the Y2K litigation will last for years into the next millennium.

Now, as much as I am concerned about the $1 trillion estimate, I am even more concerned about the cost to the economic infrastructure. Companies that have made every reasonable effort to become Y2K-compliant but experience failures anyway could end up in court and be put out of business by the cost of litigation. Critical suppliers to key industries might be lost altogether. Entire industries might be set back, causing an economic downturn with repercussions well into the millennium.

If the lifeblood of our economy, which is capital, is diverted to support litigation, it cannot nourish the start-up enterprises that represent our future. If our technological industries are bombarded with litigation, they cannot afford to invest in the research and development essential to maintain our competitive position in the world. The question for Congress is whether or not there is an alternative.

Now, Senator Hatch, you and Senator Feinstein have introduced legislation that may represent such an alternative, as has Senator McCain. I have not been able to study your bill closely enough to comment on the specifics of it. And lacking a legal education, my comment probably wouldn't be too helpful to you anyway, but I would ask that the following issues be carefully considered.

Do not reward or encourage irresponsible behavior. There are some people who say, well, you pass this bill and that means people will say failure is an option; I am covered, I am protected. We cannot craft legislation that does that. The best deterrent to litigation is remediation, so we cannot consider any measure that would be interpreted as an excuse to stop the remediation efforts they have already begun. For many businesses, there is still time to fix the problem. Congress should not make inaction an attractive option by limiting the liabilities of the companies that are not responsible enough to take care of their own business.

We also cannot consider any measure that could be interpreted as an excuse to stop disclosing their readiness status. As I said earlier, one of the big problems we have is getting information about how ready people are, and we must make sure that disclosure continues and increases. These disclosures force businesses to focus on their Y2K problems, and more importantly the information in these disclosures helps everyone prepare for Y2K remediation and contingency planning.

We must take care to craft legislation that fully preserves the Government's right to bring action against business entities that have not complied with their requirements to report their Y2K readiness status. This goes to the heart of the SEC and what they are trying to do.

Now, companies that have made reasonable efforts to remediate their Y2K problems ought to get credit for having done so. One way of doing that is to limit their liability if, despite all their efforts, they do have a Y2K-related failure that causes economic injury to another party. When I say limit their liability, I am talking about limit it to actual damages.

It is counterproductive to punish a company that has acted responsibly and nonetheless experiences a failure with punitive damages. Punitive damages are meant to discourage similar bad behavior in the future. You are not going to have a future example like

this one. It is a one-time event, and for that reason, for those who act responsibly and still experience a failure, punitive damages, in my view, are inappropriate. What is more, when responsible businesses have to pay damages that exceed the cost of the actual harm, their products, of course, end up costing more, and risky but vital services that they perform simply may stop. We all pay a price for unnecessary punitive damages.

Now, as I said, I am not a lawyer. I can't help you with the details on legal concepts, but I do know that existing and hard-won statutes should not be altered by or confused with new Y2K provisions. The use of valuable enforcement tools should not be inadvertently curtailed by Congress' well-intentioned efforts to address the Y2K problem.

We are not that far from Abraham Lincoln's birthday. Let me end with a Lincoln quote that I think is appropriate here. He said, discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time. I think that applies to what we are dealing with here, Mr. Chairman. I salute you and Senator Feinstein for your efforts, and thank you again for allowing me to intrude in this fashion.

The CHAIRMAN. Well, thank you, Senator Bennett. We appreciate you taking time from your busy schedule to be with us and we are grateful to have your statement. And we will look forward to everybody's suggestions on how we might improve this bill and make it even more effective than it is. Thank you.

Senator BENNETT. If I may now be excused, I have to go prepare my Y2K presentation to the entire Senate which is scheduled for tomorrow.

The CHAIRMAN. We will be happy to excuse you and wish you luck there.

[The prepared statement of Senator Bennett follows:]

PREPARED STATEMENT OF SENATOR ROBERT F. BENNETT

Thank you, Mr. Chairman, for asking me to testify on the subject of the Year 2000 technology problem. As you know, I've been studying this problem since 1996, in my capacity as the chairman of the Senate Banking Subcommittee on Financial Services and Technology and, more recently, in my capacity as the chairman of the Special Committee on the Year 2000 Technology Problem. Along with my esteemed colleague Senator Dodd, I've presided over almost 20 hearings on the Y2K problem and its effects on such disparate sectors as financial services, utilities, telecommunications, transportation, healthcare, and general business. As disparate as these sectors may be, they all have one thing in common: A fear of massive litigation resulting from Y2K-related failures.

The Judiciary and the Commerce committees are to be commended for acting quickly to address the legal issues raised by the Y2K problem. As I told the Commerce committee 2 weeks ago, it is important that we find a reasonable and just means of handling the potential Y2K tidal wave of litigation not only because it threatens to overwhelm our judiciary system, but because time and money spent on preparing for endless lawsuits and counter-suits is time and money not invested in the research and development of Y2K solutions.

We learned last year that one aspect of the fear of litigation involved the disclosure and exchange of information. Strange as it may seem to those of us who aren't trained to think like lawyers, the very commodity that could avert a Y2K crisis—information related to Year 2000 readiness—was being withheld because different sectors of industry feared lawsuits if their disclosures proved inaccurate.

The Congress went a long way toward solving that problem when it passed the "Year 2000 Information and Readiness Disclosure Act" to promote the free disclosure and exchange of information related to Year 2000 readiness by providing, as

an incentive, some liability protection for the release of certain types of information. Since the bill was signed into law on October 19, 1998, industry has told us that the logjam of Year 2000 readiness information has been broken. The Act has enabled businesses from all sectors to make significant progress not only with their Y2K remediation efforts, but with their contingency plans as well.

Unfortunately, disclosure of Year 2000 readiness information is only one part of the problem. The fear of litigation that lingered in the shadows for much of the last year has now stepped forward, shouldering aside what should be the overriding goal of everyone involved with this problem—remediation. The Committee maintains its belief that remediation and contingency planning are of paramount importance, but our findings over the last year suggest that the fear of litigation is real and justified.

The Special Committee plans to set forth its findings in a report to be issued tomorrow, but I can tell you now that it will not be a happy New Year for many businesses. Almost a quarter of all companies worldwide have yet to start any Y2K effort. According to the Gartner Group report, between 30 and 50 percent of all companies worldwide will have at least one mission critical failure; that figure drops down to 15 percent for companies here at home. It is estimated that correction of these failures will take at least 3 days in most cases, and that the cost per incident could soar into the millions.

This is, I'm afraid, only where the problems begin. No business operates in a vacuum in this day and age. Our economic sectors are inextricably bound together. The financial services sector depends on its ability to exchange electronic information between its members and with government agencies. The manufacturing sector depends on just-in-time inventory and the exchange of electronic information to create a tight chain between suppliers, processors, manufacturers, distributors, retailers and customers. This linkage extends far beyond our shores to encompass our international trading partners, creating a giant web of commerce. We have all gained from this interconnectivity, but its price is that one company's inability to fulfill its business contracts opens it and ALL the companies that depend upon it to liability. As a result, the Y2K failures of one company can set in motion the unraveling of all its business partners.

In a best-case scenario, Y2K-related disruptions may last only a few days. Even so, a few days is more than sufficient time for a vast array of businesses and individuals to suffer some kind of economic injury. All too often in this country, our first stop on the way to recovering our losses is the courthouse. If the litigation resulting from Y2K-related failures is anything like experts are predicting—up to $1 trillion worth—the courthouses will be at standing room only and Y2K litigation will last for years into the next millennium.

The trillion dollar estimated cost of litigation is of great concern to me, but a far greater cost of this litigation is the cost to the entire economic infrastructure.

Companies that have made every reasonable effort to become Y2K compliant but experience failures anyway could end up in court and be put out of business by the costs of litigation. Critical suppliers to key industries might be lost altogether, and entire industries might be set back, causing an economic downturn with repercussions lasting well into the millennium. If the lifeblood of our economy—capital—is diverted to support Y2K litigation, it cannot nourish the start-up enterprises that represent our future. If our technology industries are bombarded with litigation, they cannot afford to invest in the research and development essential to maintain our competitive position in the world. If businesses across the country are struggling to pay their legal bills, they cannot also pay to retain quality personnel or to expand into new markets. The U.S. economy and the American people simply cannot afford to pay the price of a litigation explosion. The question for the Congress is whether there is an alternative.

Chairman Hatch, you and Senator Feinstein have introduced legislation that may represent such an alternative, as has Senator McCain. I have not been able to study your bill closely enough to comment on it directly, but I would like to make some observations that apply not only to your bill, but to any legislative proposals concerning Y2K litigation.

Do not reward or encourage irresponsible behavior. Since the best deterrent to Y2K litigation is remediation, we cannot consider any measure that could be interpreted by businesses as an excuse to stop the remediation projects they've already begun. For many businesses, there is still time to fix the problem. Congress should not make inaction an attractive option by limiting the liability of companies that have not been responsible enough to take care of their own business. We also cannot consider any measure that could be interpreted by business as an excuse to stop disclosing their Y2K readiness status. These disclosures force businesses to focus on their own Y2K problems and, perhaps more importantly, the information in these

disclosures helps everyone prepare for Y2K remediation and contingency planning. We must take care to craft legislation that fully preserves the government's right to bring action against business entities that have not complied with their requirements to report their Y2K readiness status.

Companies that take reasonable efforts to remediate their Y2K problems ought to get credit for having done so. One way of doing that is to limit their liability if, despite all their efforts, they have a Y2K-related failure that causes economic injury to another party. It is counter-productive to punish a company that has acted responsibly—and still experiences a failure—with punitive damages. Punitive damages are meant to discourage similar bad behavior in the future. Since Y2K is a one-time event, punitive damages are inappropriate. What's more, when responsible businesses have to pay damages that exceed the cost of the actual harm, their products end up costing more and the risky but vital services they perform may simply stop. In the end, we all pay the price for unwarranted punitive damages.

Any legislation that imposes new legal concepts onto our existing framework must be scrutinized with great care to avoid unintended consequences. I'm not a lawyer, and I'm afraid I can't help you with the details. I do know that existing and hard-won statutes should not be altered by or confused with new Y2K provisions, and the use of valuable enforcement tools should not be inadvertently curtailed by the Congress' well-intentioned efforts to address the Y2K litigation crisis.

Finally, we need to do everything we can to encourage companies to take proactive measures to avoid litigation in 1999 before they are pulled into litigation in 2000. We ought to consider providing incentives for people to put off taking that trip to the courthouse so they can talk to each other first. As Abraham Lincoln said,

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.

Again, Mr. Chairman, thank you for moving on this issue, and for inviting me to testify.

The CHAIRMAN. Mr. Yarsike, we will go back to you.

STATEMENT OF MARK YARSIKE

Mr. YARSIKE. Chairman Hatch, Senators, my name is Mark Yarsike.

The CHAIRMAN. Just because I gave some leeway to Ms. West. [Laughter.]

OK, go ahead.

Mr. YARSIKE. I will move along very speedily.

Chairman Hatch and Honorable Senators, my name is Mark Yarsike and I am a co-owner, with Sam Katz, in a small business from Warren, MI. I am also the first person in the world to ever file a Y2K suit. It is an honor for me to appear before you today and I appreciate you allowing me to testify on the Y2K issue.

I am grateful to you, Mr. Chairman, for wanting to hear from a real businessman from outside Washington as to how this legislation would affect me, and I suspect thousands of other small businesses in the country. I see that I am sitting next to some very distinguished individuals. Unlike these people, however, I do not have a team of analysts and specialists at my disposal, but I do have my story and it is a story that seems at odds with what they are saying about the interests of small business.

I own a gourmet produce market in the Detroit suburbs. The produce business is in my blood. My parents and partner fled Europe and the Holocaust and came to this country from Poland after the Second World War. Taking advantage of the wonderful opportunities that America offers new citizens, within a few years they had managed to open their own small produce store in Detroit. My parents worked 7 days a week and instilled in me the values of hard and honest work. I grew up helping run the store, and I fi-

nally decided 13 years ago that it was time for me to follow in their footsteps.

Four years ago, I found a great partner in Sam Katz and we opened a store in Warren. It is not easy these days being a small, independent grocer in an industry totally dominated by huge corporate chains, but I still believe there is opportunity for little guys like us who can offer our customers unparalleled service, who can adjust quickly to changes in the market, and who can treat our employees like family. However, it was not a large chain store which nearly destroyed my business a few years back. It was a year 2000 computer problem, and that is what I am here to talk about this morning.

My parents had a cheap $500 register in their store. It was basic, but it worked. When I opened my store, I decided to take advantage of the most current technology, which is needed today. I spent almost $100,000 for a high-tech computer system. My computer system was top-of-the-line, or at least that is what we thought. They could process credit cards, keep inventory, and control cash. The company that I purchased them from spent hours extolling the virtues of the system. They sent a salesman from Chicago. They sent me sales literature. They promised that the system would last well into the 21st century. I believed them.

Opening day was the proudest day of my life. As we opened the doors to the store, we were thrilled to see lines of people streaming in. The store was sparkling. Everything was ready, or so we thought. As people began to choose their purchases, lines began to form. Suddenly, the computer systems crashed. We did not know why it took over a year and over 200 service calls to realize it, but the credit cards with the expiration date of 2000 or later blew up my computer, the one that I spent $100,000 on. The entire computer system crashed.

Lines were 10 to 20 people deep. People were waiting with full carts of groceries and couldn't pay. We could not process a single credit card, could not take cash or checks. We could not make a sale. People began drifting out, leaving full carts of groceries behind. As my partner and I darted around the store trying to calm people down, we heard constant comments like, I will never come back here; who needs to wait in lines this long only to find that you can't even buy what you want. People walked out in droves. Many, I venture, have never returned. This happened over and over.

We did not know what to do. We called TEC America, who had sold us the computer system. We called them over 200 times in 2 years. Everyday, there were problems, lost sales, aggravation. We were struggling to keep afloat week to week. The company declared that it was doing its best to fix the problem, but refused to give us another system to use while they fixed these broken ones.

Each time their technician visited my shop, the company insisted that the problem was solved, only to have the registers fail again hours later. I lost thousands of dollars and hundreds of customers. I was on the brink of disaster and a nervous breakdown. The company was still promising every day that they had the problem licked, and every day they continued to refuse to give me new registers. I could not focus on the day-to-day operations of my busi-

ness. I was consumed with making sure the computer system functioned daily.

I finally had to go out and buy a brand new system. I should have bought the $500 registers my parents used when they arrived from Poland. At least those worked. But the huge cost of purchasing the first system and then replacing it, on top of the lost sales and lost reputation, caused daily havoc and stress on my partner and myself and all the employees. And I was getting absolutely no satisfaction from the computer company which put me in this fix in the first place.

I imagine that if I was one of those big corporate chains, I could have used my market power to compel the computer company to work out some sort of resolution. But being the owner of just one store, I did not have that option, so I turned to the court system. I approached an attorney and we filed a case in Macomb County. The system worked for me. The company who caused all this grief finally settled with me 2½ years later. I was able to recoup some of my losses, but I will never get those hundreds of customers back or be able to rid the store of the reputation that it got for those long lines. In fact, if any of those customers are watching these proceedings today, I hope you will come back and give us a second chance.

I am just a businessman. I am no expert on the legislation before the committee today, but my lawyer tells me that had this bill or others like it in Congress been in effect when we had our problem, the computer company never would have settled. If we were lucky, we would still be in litigation, but more likely my store would be out of business. I would not be a small businessman today; I would be a former small businessman. One hundred twenty families would be out of work, my landlord would have a "for lease" sign on the building, and I would be looking for a job.

One thing I know now is that the so-called Y2K problem is not a Silicon Valley problem. It is a Warren, MI, problem, and it is not so much a high-tech problem as it is a problem of getting companies to take responsibility for their products and the need to repair or replace them. What we need are responsible businesses to take care of the problem now and not spend months and months of wasting time trying to get Congress to protect them.

There are a number of very disturbing pieces in this bill which would quite literally have put me out of business had this law been in effect when I had my Y2K difficulties. I fear that many other small businessmen will suffer that fate if this committee does not step back for a minute and carefully consider what this bill would do.

First, this 90-day waiting period. Take it from a real small businessman who works day to day in order to make ends meet. This will put thousands of people out of business. Waiting three full months to have the ability to even begin to bring a claim would have put me out of business. Every single day, I was losing money. Every single day, I came close to the point where I could not open my doors anymore. Ninety more days would have been too much.

Also, realistically, any small businessman is going to try to get the company to fix the problem before they turn to an attorney. Lord knows, we called 200 times to give them a chance to fix it and

they couldn't. Why would I hire and pay for a lawyer to take a simple step of making a phone call to a company? The problem is that some companies don't do the right thing once you call. I called over 200 times and they still couldn't fix my problem. Now, you want to add an additional 90 days. Why? That has only one effect, to put me out of business and allow them to stall more.

Next, why is everyone so worried about the software and hardware companies? What about the little guy who is the end user of the software product? I see that they get all the breaks in this bill. They get to ignore the State law provisions that protect me against the unscrupulous in all other industries, implied warranties, and State fraud statutes. They also get limitations on damages, limitations on joint and several liability. What do I get, besides a more difficult standard to prove if I finally manage to jump through the procedural hoops to get to court?

Third, I would love to see legislation that holds the companies that are profiting off this problem responsible. The company that I bought my system from got away intact. If a company sells a faulty product and doesn't fix it, they should be held responsible, period. It seems like common sense to me and every other small businessman I talk to. Let's get some common-sense things like that into law. Let's actually do something that fixes the problem.

All of these bills, with all due respect, make the problem worse by discouraging these companies from fixing the problem. I ended up having to replace my entire system for another $130,000. Give me a tax credit for those purchases; help me get SBA loans. Those are the kinds of things that will help, not this "we have got to do something, so let's get with protecting a powerful set of lobbying groups who organize quickly to seek protection for themselves." I thank God I had a partner with some deep pockets or I would be out of business.

Finally, if Congress is hell-bent on passing some kind of liability protection bill for large software manufacturers, at least exclude from the legislation small businesses who may end up being plaintiffs because they suffer commercial loss from software defects. Let the big guys cope with the new scheme if they want, but not us who have to make payrolls and who need protection of State laws.

Long ago, while sitting in this little grocery store in Detroit, my parents taught me that sometimes people with the best of intentions can try to make a problem better, but end up making it worse. I understand what they mean. I know that Congress is trying to help, but before you act I now hope you will consider what this legislation will do to the small businessman. I know that is why you have allowed me to share my story and I am grateful you provided me the opportunity to testify today. I will be happy to try to answer any of your questions.

Thank you, Mr. Hatch.

The CHAIRMAN. Thank you, Mr. Yarsike. We are grateful for your testimony and we will certainly look at it very carefully. I might add that the 90-day period, had it been in effect in your case, would have been a tremendous incentive for them to get that problem solved in 90 days rather than the 2 years it took for you to finally win in litigation. That is the goal here. Now, we are going to look at this and we are going to look at all aspects of it. And,

of course, one of the things we want to do is protect people just like you.

Mr. YARSIKE. May I say something?

The CHAIRMAN. Yes, so you are just not limited to litigation.

Mr. YARSIKE. I don't think a small business can afford or will run straight to an attorney when they have a problem. They are going to call that company and say, help me out, I am in trouble here.

The CHAIRMAN. Well, that is right, and the 90-day period may get you some help that you would not otherwise get because it is a solid notice to these companies, you better do what you can in 90 days.

Mr. YARSIKE. In 90 days, I couldn't afford to hire an attorney either at that point of the game. So I needed their help. I needed them to help me get my business going. And on top of it, they sold me a system in 1996 knowing that it wasn't Y2K-compatible, and that is another thing that is not in this bill. There are a lot of companies that still have items on the shelf for the next 10 months and will be selling these systems to businesses and they are not Y2K-compatible. And they are the ones that are defrauding our businesses in this country right now, and nothing in this bill—this bill protects those people who are selling these systems today, not being Y2K-compatible, and they should have known this 5, 10 years ago.

The CHAIRMAN. Well, let me just say nothing in this bill would stop you from being able to sue for intentional actions of the company, at least the way I view it. And if that is not so, then we will try and change that.

Second, the 90-day period is to get all these companies to realize you have got 90 days to remediate, you have got 90 days to get this thing straightened out. If you straighten it out, your damages are going to be much less. We are certainly going to pay attention to your testimony and see what we can do to resolve problems like yours because it is not fair for you to have to put up with 2 years of litigation in order to get a settlement that didn't even make you whole, according to your testimony here. So we will certainly take that into consideration. We appreciate you being here.

[The prepared statement of Mr. Yarsike follows:]

PREPARED STATEMENT OF MARK YARSIKE

Chairman Hatch, Senators, my name is Mark Yarsike, and I am a small businessman from Warren, Michigan. I am also the first person in the world to ever file a Y2K suit. It is an honor for me to appear before you today, and I appreciate your allowing me to testify on the Y2K issue.

I am grateful to you, Mr. Chairman, for wanting to hear from a real businessman from outside Washington as to how this legislation would effect me and I suspect thousands of other small businesses in this country. I see that I am sitting next to some very distinguished individuals. Unlike these people, however, I do not have a team of analysts and specialists at my disposal. But I do have my story, and it's a story that seems at odds with what they are saying about the interests of small business.

I own a gourmet produce market in the Detroit suburbs. The produce business is in my blood. My parents and partner fled Europe and the Holocaust and came to this country from Poland after the Second World War. Taking advantage of the wonderful opportunities that America offers new citizens, within a few years they had managed to open their own small produce stores in Detroit.

My parents worked seven days a week and instilled in me the values of hard and honest work. I grew up helping run the store, and finally decided 13 years ago that

it was time for me to follow in their footsteps. I found a great partner, Samuel Katz, and we opened a store in Warren.

It is not easy these days being a small, independent grocer in an industry totally dominated by huge corporate chains. But I still believe there is opportunity for the little guy like us who can offer our customers unparalleled service, who can adjust quickly to changes in the market, and who treat our employees like family.

However, it was not a large chain store which nearly destroyed my business a few years back—it was a Year 2000 computer problem, and that is what I am here to talk about this morning.

My parents had a cheap $500 cash register in their store. It was basic, but it worked. When I opened my store, I decided to take advantage of the most current technology. I spent almost $100,000 for a high-tech computer system. My computer systems was the top of the line—or at least that is what I thought. They could process credit cards, keep inventory. The company that I purchased them from spent hours extolling the virtues of the system—they sent a salesman from Chicago, they sent me sales literature, they promised that the system would last well into the year 2000. I believed them.

Opening day was the proudest day of my life. As we opened the doors to the store, we were thrilled to see lines of people streaming in. The store was sparkling, everything was ready. Or so we thought.

As people began to choose their purchases, lines began to form. Suddenly, the computer systems crashed. We did not know why it took over a year and over 200 service calls to realize it was the credit cards with the expiration 2000 or later that blew up my computer—the one which I spent $100,000 on.

The entire computer system crashed. Lines were ten to twenty people deep. People were waiting with full carts of groceries to pay but couldn't. We could not process a single credit card or could not take cash or checks. We could not make one sale.

People began drifting out, leaving full carts of groceries behind. As my partner and I darted around the store trying to calm people, we heard constant comments like "I'll never come back here," "Who needs to wait in lines this long only to find you can't even buy what you want?" People walked out in droves. Many, I venture, have never returned. This happened over and over.

We did what anyone would do. We called TEC America, which had sold us the registers. We called them over 200 times. Every day there were problems, lost sales, aggravation. We were struggling to keep afloat week-to-week.

The company declared that it was doing its best to fix the problem, but refused to give us another system to use while they fixed these broken ones. Each time their technician visited our shop, the company insisted that the problem was solved—only to have the registers fail again hours later.

I lost thousands of dollars and hundreds of customers. I was on the brink of disaster and a nervous breakdown. The company was still promising every day that they had the problem licked, and every day they continued to refuse to give me new registers. I could not focus on the day-to-day operations of my business. I was consumed with making sure this computer system functioned daily.

I finally had to go out and buy a brand new system. I should have bought the $500 dollar registers my parents used when they arrived from Poland—at least those worked.

But the huge costs of purchasing the first system, and then replacing it, on top of the lost sales and lost reputation caused daily havoc and stress on my partner and myself and all the employees—and I was getting absolutely no satisfaction from the computer company which put me in this fix in the first place.

I imagine that if I were one of the big corporate grocery chains, I could have used my market power to compel the computer company to work out some sort of resolution. But being the owner of just one store, I did not have that option.

So, I turned to the court system. I approached an attorney and we filed a case in Macomb County, Michigan. The system worked for me. The companies who caused all this grief finally settled with me 2½ years later. I was able to recoup some of my losses.

But, I'll probably never get those hundreds of customers back, or be able to rid the store of the reputation that it got for long lines. In fact, if any of those customers are watching these proceedings today, I hope you will come back and give us a second chance.

I'm just a businessman. I am no expert on the legislation before the Committee today. But my lawyer tells me that had this bill—or others like it in Congress—been in effect when we had our problem, the computer company would have never settled. If we were lucky, we would still be in litigation. But more than likely, my store would be out of business.

I would not be a small businessman today—I would be a former small businessman. One hundred twenty people would be out of work, my landlord would have a "for lease" sign on my store's front window, and I would be looking for a job.

One thing I know now is that the so-called Y2K problem is not a Silicon Valley problem. It's a Warren, Michigan problem. And its not so much a "high tech" problem as it is a problem of getting companies to take responsibility for their products and the need to repair or replace them. What we need are responsible businesses to take care of the problem now—and not spend months and months of wasted time trying to get Congress to protect them.

There are a number of very disturbing pieces of this bill which would quite literally have put me out of business had this been the law at the time I had my Y2K difficulties. I fear that many other small businessmen will suffer that fate if this Committee does not step back for a minute and carefully consider what this bill would do.

First, this 90 day waiting period. Take it from a real small businessman who works day to day in order to make ends meet. This would put thousands of people out of business. Waiting three full months to have the ability to even begin to bring a claim would have put me out of business. Every single day I was losing money. Every single day I came closer to that point where I couldn't open my doors anymore. Ninety more days would have been too much. Also, realistically, any small businessman is going to try and get the company to fix the problem before they turn to a lawyer. Why would I hire and pay for a lawyer before taking the simple step of making a phone call to the company? The problem is that some companies don't do the right thing once you call. I called over 200 times and they still didn't fix the problem. Now you want me to wait an additional 90 days? Why? That has only one effect—to put me out of business and allow them to stall more.

Next, why is everyone so worried about the software and hardware companies? What about the little guy who is the end user of a software product? I see that they get all the breaks in this bill. They get to ignore the state law provisions that protect me against the unscrupulous in all other industries—implied warranties, state fraud statutes. They also get limitations on damages, limitations on joint and several liability * * * what do I get, besides a more difficult standard to prove if I finally manage to jump through the procedural hoops and get to court?

Third, I would love to see legislation that holds the companies that are profiting off of this problem responsible. The company that I bought my system from got away with their profit intact. If a company sells a faulty product and doesn't fix it, they should be held responsible. Period. Seems like common sense to me and every other small businessman I talk to. Let's get common sense things like THAT into law.

Let's actually do something that FIXES the problem. All of these bills—with all due respect—make the problem worse by discouraging these companies from fixing the products. I ended up having to replace my entire system. Give me tax credits for those purchases. Help me get SBA loans. Those are the kinds of things that will help, not this "we've got to do something so let's start with protecting a powerful set of lobbying groups who organized quickly to seek protection for themselves."

Finally, if Congress is hell-bent on passing some kind of liability protection bill for large software manufacturers, at least exclude from the legislation small businesses who may end up being plaintiffs because they suffer commercial loss from software defects. Let the big guys cope with this new scheme if they want, but not us who have to make payrolls and who need the protection of state laws.

Long ago, while sitting in their little grocery store in Detroit, my parents taught me that sometimes people with the best of intentions can try to make a problem better, but end up making it worse. I understand what they mean. I know that Congress is trying to help. But, before you act, I now hope you will consider what this legislation will do to the small businessman. I know that is why you have allowed me to share my story, and I am grateful you provided me the opportunity to testify today. I will be happy to try and answer any questions you may have.

The CHAIRMAN. Mr. McConnon, we will go to you.

STATEMENT OF B.R. McCONNON

Mr. MCCONNON. Thank you, Mr. Chairman. Good morning. My name is B.R. McConnon and I am from Alexandria, VA. I am the president and owner of Democracy Data and Communications, a grass-roots database management company located in Old Town. We currently have 18 full-time employees who manage a variety of

databases for our clients, which include many of the Nation's largest corporations.

I am pleased to be here today testifying on behalf of the National Federation of Independent Business regarding potential problems resulting from year 2000 failures. NFIB is the Nation's largest small business advocacy organization representing more than 600,000 small business owners in all 50 States and the District of Columbia. The typical NFIB member employs five people and grosses $350,000 in annual sales.

Nationwide, the small business community is making progress toward inoculating itself against the millennium bug. A recent NFIB Education Foundation study found that as of November 1998, 1.9 million small firms have addressed their Y2K problems. I am proud to say that I am among them. Considering that I am a computer-based business, it should come as no surprise that becoming Y2K-compliant was important to the survival of Democracy Data.

We have nearly 30 computers that run dozens of software packages simultaneously everyday. I depend on these systems to store and process data, and to make it accessible to clients through the Internet. Because I was concerned about their operation after the millennium date change, my chief technology officer and I initiated a series of intricate tests to ensure that each of our systems and software packages would continue to operate without Y2K problems. Although it cost my company several thousand dollars and took several days, it was worth it, considering my business would fail to operate if not Y2K-compliant.

Like most businesses, however, Democracy Data does not operate in a vacuum. I am dependent upon numerous vendors and suppliers who provide my company with the input data necessary for us to create several of our core products. These vendors include commercial data providers who supply geographic information systems or electronic mapping data, State governments who supply us with a range of geographic and other data, and other commercial vendors who rely on the U.S. Postal Service and the Census Bureau as primary data sources. I also rely on our clients' information system staff to supply us with the data that we store and manipulate, an absolutely essential function if we are to be able to do our part.

Without the services these vendors provide and the data provided by the companies themselves, I would not be able to serve my clients as they expect. At the end of the day, their failure is my failure. In spite of all my efforts, however, I am still at risk should Y2K problems afflict my suppliers, clients, or financial institutions. In a perfect world, every business would take steps to fix their problems now, but that is not happening. There will be failures. There will be late shipments, damaged goods, and failed data delivery.

For example, should the Postal Service fail to supply current, accurate data to our commercial vendor, that vendor in turn could not add their critical component to the data that we use. Consequently, Democracy Data would not be able to supply our clients with the data and services that they expect and need.

While it is impossible to know the extent to which any one of us will be impacted, I do believe that we must prepare to be affected.

That is why I am so pleased to see Congress taking action on this issue. I work hard everyday to deliver on my promises to clients. If one of my vendors has a Y2K failure that impacts my ability to serve clients, I could have serious problems on my hands, possibly even a lawsuit. I could be used by a client who is displeased with my services. If the situation could not be resolved any other way, I may have no choice but to sue my vendor. I have worked hard to build good relationships with my clients and the other businesses I depend on. Therefore, going to court against them is the recourse of last resort.

Now, I am not a lawyer, but I do know from my own experience that it wouldn't take much of a lawsuit to knock a small business out of business for good. Two years ago, I was involved in a lawsuit that was not only expensive, but took up valuable time and kept me from running my business. Although that suit that was brought against me was ultimately dismissed, the lost revenue during the time that I spent with lawyers on interrogatories and depositions far exceeded legal fees. My experience just goes to show that lawsuits can seriously burden small businesses, regardless of whether you are plaintiff or defendant and regardless of whether the suit is legitimate.

The emphasis should be on quick resolution of disputes, not on expensive and time-consuming litigation. For these reasons, I believe that any legislation Congress enacts should do three things.

First, Congress must create incentives to mitigate, not litigate. It is essential that businesses of all sizes are urged to address their Y2K problems now. Otherwise, 2000 will go down in history as the year of the lawsuit. Every business depends on other businesses. The more problems we can anticipate and fix, the better it will be for everyone.

Second, Congress must encourage the settlement of Y2K disputes to happen as quickly as possible. For a small business, it all comes down to the bottom line, cash flow. If my vendors do not provide me with the data and access I need, I cannot operate. If my clients aren't satisfied with the service I provide, they will stop using my company. It doesn't take long for a company operating in a competitive environment such as ours to go out of business. Disputes should be settled as quickly as possible and outside of the court, when feasible. Getting a court date can take months, if not years. What it may cost small business owners is their livelihood.

Third, Congress must curb the desire to file frivolous lawsuits by placing limits on punitive damages. Ninety-three percent of NFIB members support capping damage awards for this very reason. Limiting punitive damages will keep unnecessary lawsuits to a minimum, but would not keep businesses from going forward with legitimate lawsuits in order to recover their actual damages.

I believe the bill introduced by Senators Hatch and Feinstein, the Year 2000 Fairness and Responsibility Act, will accomplish these three important goals. Although some may argue that we don't need Federal legislation to address these issues, I disagree. Businesses need a push to get their own Y2K house in order, and the reward should be quicker dispute resolution and fewer lawsuits.

I would like to thank the committee for the opportunity to testify before you today and hope that you will act quickly on this bill. I

would also be pleased to answer any questions that you might have.

The CHAIRMAN. Thank you, Mr. McConnon.

[The prepared statement of Mr. McConnon follows:]

PREPARED STATEMENT OF B.R. MCCONNON

Good morning, Mr. Chairman and members of the Committee. My name is B.R. McConnon and I am from Alexandria, Virginia. I am the President and owner of Democracy Data and Communications, a grassroots database management company located in Old Town. We currently have 18 full time employees who manage a variety of databases for our clients, which include many of the nation's largest corporations.

I am pleased to be here today testifying on behalf of the National Federation of Independent Business regarding potential problems resulting from Year 2000 failures. NFIB is the nation's largest small business advocacy organization, representing more than 600,000 small business owners in all 50 states and the District of Columbia. The typical NFIB member employs five people and grosses $350,000 in annual sales.

Nationwide, the small business community is making progress towards inoculating itself against "the millennium bug." A recent NFIB Education Foundation study found that, as of November 1998, 1.9 million small firms have addressed their Y2K problems. I am proud to say that I am among them. Considering that I am in a computer-based business, it should come as no surprise that becoming Y2K compliant was very important to the survival of Democracy Data. We have nearly 30 computers that run dozens of software packages simultaneously every day. I depend on these systems to store and process data and to make it accessible to clients through the Internet. Because I was concerned about their operation after the millennium date change, my chief technology officer and I initiated a series of intricate tests to ensure that each of our systems and software packages would continue to operate without Y2K problems. Although it cost my company several thousand dollars and took several days, it was worth it, considering my business would fail to operate if not Y2K compliant.

Like most businesses, however, Democracy Data does not operate in a vacuum. I am dependent upon numerous vendors and suppliers who provide my company with the input data necessary for us to create several of our core products. These vendors include commercial data providers who supply Geographic Information Systems (GIS) or electronic mapping data, state governments who supply us with a range of geographic and other data, and other commercial vendors who rely on the United States Postal Service and the Census Bureau as primary data sources. I also rely on our clients' information systems staff to supply us with the data that we store and manipulate—an absolutely essential function if we are to be able to do our part. Without the services these vendors provide and the data provided by the companies themselves, I would not be able to serve my clients as they expect. And at the end of the day, their failure is my failure.

Though my own systems and software may be "bug-free," I am still at risk should Y2K problems afflict my suppliers, clients or financial institutions. In a perfect world, every business would take steps to fix their problems now, but that is not happening. There will be failures. There will be late shipments, damaged goods and failed data delivery. For example, should the Postal Service fail to supply current, accurate data to our commercial vendor, that vendor in turn could not add their critical component to the data we use. Consequently, Democracy Data would not be able to supply our clients with the data and service that they expect and need. While it is impossible to know the extent to which any one of us will be impacted, I do believe that we must prepare to be affected.

That is why I am so pleased to see the Congress taking action on this issue. I work hard every day to deliver on my promises to clients. If one of my vendors has a Y2K failure that impacts my ability to serve clients, I could have a serious problem on my hands—possibly even a lawsuit. I could be sued by a client who is displeased with my services. If the situation could not be resolved any other way, I may have no choice but to sue my vendors. I have worked hard to build good relationships with my clients and the other businesses I depend on. Going to court is the recourse of last resort—especially since Y2K problems can most likely be avoided.

Now, I am not a lawyer, but I do know from my own experience that it wouldn't take much of a lawsuit to knock a small business out of business for good. Two years ago, I was involved in a lawsuit that was not only expensive, but took up valu-

able time and kept me from running my business. While I ultimately triumphed, the lost revenue during the time that I spent with lawyers on interrogatories and depositions far exceeded the legal fees. My experience just goes to show that lawsuits can seriously burden a small business, regardless of whether you are a plaintiff or defendant and regardless of whether the suit is legitimate. The emphasis should be on quick resolution of disputes, not on expensive and time consuming litigation.

For these reasons, I believe that any legislation Congress enacts should do three things:

First, Congress must create incentives to mitigate, not litigate. It is essential that businesses of all sizes are urged to address their Y2K problems NOW. Otherwise, 2000 will go down in history as the Year of the Lawsuit. Every business depends on other businesses. The more problems we can anticipate and fix, the better it will be for everyone.

Second, Congress must encourage the settlement of Y2K disputes to happen as quickly as possible. For a small business, it all comes down to the bottom line—cash flow. If my vendors do not provide me with the data and access I need, I cannot operate. If my clients aren't satisfied with the service I provide, they will stop using my company. It doesn't take long for a company operating in a competitive environment such as ours to go out of business. Disputes should be settled as quickly as possible and outside of court when feasible. Getting a court date can take months if not years. What it may cost small business owners is their livelihood.

Third, Congress must curb the desire to file frivolous lawsuits by placing limits on punitive damages. Ninety-three percent of NFIB members support capping damage awards for this very reason. If I am forced to enter into Y2K legal action with one of my vendors, I would do so only to recover what is owed to me. I don't want to "punish" my vendors—I want to continue working with them! The relationships I have built over time are essential to the operations of my business and no Y2K glitch should endanger them. Limiting punitive damages will keep unnecessary lawsuits at a minimum, allowing businesses to recover their actual damages more quickly.

I believe the bill introduced by Senators Hatch and Feinstein, the Year 2000 Fairness and Responsibility Act, will accomplish these three important goals. Although some may argue that we don't need federal legislation to address these issues, I disagree. Businesses need a push to get their own Y2K house in order, and the reward should be quicker dispute resolution and fewer lawsuits.

I would like to thank the Committee for the opportunity to testify before you today and hope that you will act quickly on this bill. I would be pleased to answer any questions you might have.

The CHAIRMAN. Mr. Pogust, we will turn to you now.

STATEMENT OF HARRIS POGUST

Mr. POGUST. Thank you, Chairman Hatch. It is an honor to appear before you today. My name is Harris Pogust and I am an attorney from Pennsauken, New Jersey. I work at a small firm which represents over 2,000 small businesses in the Philadelphia and southern New Jersey area. My firm's focus has always been on representing small business and their issues—contract disputes, insurance issues, litigation, permit problems.

It is only because the Y2K problem began to threaten the very existence of many of my small business clients that I became aware of the issue at all. I am here today, Senator, because many of those small businessmen just couldn't be here. As small businessmen, they could not leave their business on short notice. As doctors, they cannot reschedule their patients' appointments. But I have spent a great deal of time talking to them, however, and I am here to tell their story.

They come from all over. They come from Pennsylvania, New Jersey, Delaware, Ohio and California, just to name a few. They all own different types of businesses—cleaning supply stores, furniture retailers, community hospitals, doctors, medical schools, just to

name a few. They asked me to pass their names to you, if you are interested in hearing their stories in person.

Beginning in 1998, one after another of my small business clients began to tell me horror stories about being taken advantage of by companies who sold them non-compliant software and hardware for thousands of dollars, only to turn around months or even weeks later and demand thousands more to make the product functional. It is only by being able to turn to a jury of their peers that they were able to obtain justice.

My basic message to you, the message of all small businessmen who have faced this issue head-on and have been forced to deal with it, is that the current system works. The fundamental precept that has dispensed justice in this country for hundreds of years remains true today. If all else fails, a business knows that they can turn to the court system to obtain justice and to get resolution by a jury of their peers. Altering the system in any way will only hurt these small businessmen, who after all just want to sell furniture, treat their patients, and teach their students.

I would quickly like to share some representative stories from my clients. In one case, two small business people who owned furniture stores down at the Jersey shore came into their business on January 3rd of this year, 1999, and tried to turn on their computer systems. For some reason, nothing happened and the system didn't work—a blank screen; they couldn't run their business. Those computers ran the whole 9 yards—lay-away plans, inventory. Everything that these furniture stores needed to run their business was contained on these systems. They called the vendor and the vendor said, sure, I will help you, but you have to pay me $10 or $15,000; if you don't, I can't help you. This would wipe them out. They are still today trying to fix this problem with that vendor and are looking elsewhere to solve the problem.

Another situation: We represent a doctor from Atlantic County, Dr. Robert Courtney, who purchased a medical management software. The doctor is a sole practitioner, is a classic doctor that only exists in the movies. He is an ob-gyn. He has delivered generations of babies in some families, makes house calls, gives out his phone number, treats indigent patients, knowing full well that the practice will have to swallow these expenses.

In 1996, he purchased this software package from the Medical Manager Corporation for $13,000. A year later, November of 1997, he gets a letter from Medical Manager saying, we are sorry to inform you, but the system that we sold you a year ago is not year 2000-compliant. But we are going to take reasonable efforts to fix it for you, but it is going to cost you $25,000. So he spent $13,000 in 1996 and now they are asking for $25,000 a year later.

The doctor wrote to Medical Manager, made calls. They ignored him. He called me. I wrote to them, told them the situation, and they turned around and said, sorry, we can't help you. So we filed suit in June of 1998. Within 60 days, Medical Manager invited us down to their offices in Florida to resolve the situation. And, thankfully, in December of this year we resolved the situation for 50,000 physicians across the country who now have saved between $20 and $30,000 apiece and can put that toward providing more care

and better care to their patients instead of giving it to a software manufacturer who was trying to extort the money from them.

One final situation. A small college in Philadelphia recently called me and told me they were being charged over $100,000 to repair their Y2K problem, despite the fact that they had in place a full and in-force maintenance agreement which provided for such repairs. The software company is totally ignoring that contract, basically saying we can't afford to do it, so you have to pay us. So, accordingly, the school doesn't know what to do, but what we know is that students will lose their scholarships, research won't be done, the library will have to do with old books, and only because a company didn't do what was right. Now, these are just three examples of the hundreds of phone calls I have received in the last 3 months, and I could tell you more if you would like to hear them.

The problems that we see with this bill, just to scratch the surface, is, first, the 90-day waiting period. As Mr. Yarsike said, some of these small businesses can't handle the 90 days. Many of these doctors, many of these furniture stores—in 90 days, they will be out of business by that time. The system works as it is now. We send letters, the clients send letters, and if they are ignored, then we file suit.

Second, the bill contains a broad escape hatch to companies who supposedly do their best to fix the problem they caused in the first place. All a company apparently needs to do is make a few trips to the site and claim that they put forth their best effort to fix the problem. Then they can as Medical Manager did and say, well, we put our best efforts, but it is going to cost you $25,000.

Now, who should pay for this problem? Should the small businessman who is just trying to run a business pay for this problem, or the companies who knowingly and intentionally put out defective products throughout this country and throughout the world?

Further, such legislation would preempt existing protections of State law and the UCC. Businessmen entered into contracts knowing that the UCC and State fraud statutes were going to provide them with the necessary protections from faulty products. Businessmen, even those with only little stores, know that the products sold in commerce are required under the UCC and all 50 States to be fit and functionable and merchantable. These fundamental safeguards are wiped out if the proposed initiatives, and thus the victims, are left without the basic consumer protections that distinguish American markets from those around the world.

This bill would also swoop in and declare one Federal, often heightened standard that must be shown by the innocent, injured victim. That is fundamentally unfair. Also, with the bill's various limitations on damages, joint liability and other areas of liability, the legislation favors defendants over plaintiffs at every turn. Why is this? Since personal injury cases are excluded from the legislation, then the bill's focus is on business suing business. Why would Congress want to favor one group of businessmen, the manufacturers who produced and distributed defective software, over a small businessman who is just trying to run his day-to-day operation? That is exactly what this bill does. Just ask the small businessmen who have been affected by these problems. They can tell you the

reality, not the theory that others supposedly representing them might espouse.

Mr. Chairman, I want to thank you again for letting me appear today. I know that everyone on this committee is seeking in good faith to help solve this problem. But what I think we are seeing out in the real America is that job one for the Y2K problem should be fixing the problem. That we seem to be approaching the issue by protecting those who are responsible rather than creating incentives for remediation is worrisome. If the pressure is building on Congress to take away some of the rights and remedies available in our court system, then please do not inflict this scheme on small business.

I would be honored to answer any questions that you may have. Thank you very much.

The CHAIRMAN. Thank you, Mr. Pogust. Just one question. I have been led to believe that in the Medical Manager case that there were out-of-pocket losses of about $1.45 million.

Mr. POGUST. Medical Manager stood to make over $100 million if every doctor was forced to spend $20,000.

The CHAIRMAN. I understand, but as I understand it, when the case was settled, you settled it for about that much and about $600,000 went to the class of businesses and about $800,000 to the attorneys. Am I wrong on that?

Mr. POGUST. Well, that is just a small portion of the settlement. There are approximately 17,000 offices out there that had the product; 10 to 12,000 hadn't upgraded to the new version, so they were still not compliant.

The CHAIRMAN. Did they agree to upgrade everybody?

Mr. POGUST. They agreed to upgrade all those people.

The CHAIRMAN. That was worth a lot more than the actual cash settlement?

Mr. POGUST. No doubt. The number that you are throwing out or that you are discussing just deals with people who have already upgraded to the year 2000-compliant version. One of the options they had was to receive a cash rebate or to get more software from Medical Manager. So that was only 2 to 3,000 out of the 17,000 clients.

The CHAIRMAN. It wouldn't have been that tough for the Medical Manager people, once they got the basic plan written, to cure the 2000 problem——

Mr. POGUST. No doubt.

The CHAIRMAN [continuing]. To have sent out a disk to every one of those people.

Mr. POGUST. That is exactly right, but they chose not to do that until we filed our lawsuit. They ignored Dr. Courtney, they ignored my letters. We filed suit in June. By August, I was sitting in their offices in Florida and they are saying, let's resolve this, you know. I mean, one doctor bought the software in October of 1997 and gets a letter a month later. He spent $20,000 in October of 1997 and specifically asked whether it was compliant and they told him it was. And then he gets a letter the next month saying, whoops, it is not going to work, give us another $25,000. And it is just not Medical Manager. That case got a lot of publicity. It was written up in the Wall Street Journal. I get calls daily with the same story.

The CHAIRMAN. This is very interesting to me. We have got to figure out a way to resolve these problems and make sure that justice is done here, and you make a pretty interesting case. So did you, Mr. Yarsike, I think. We are certainly going to look at what you have to say, and give us any other help you can. We would be glad to consider it.

Mr. POGUST. Today, in 1999, these software companies are making trillions of dollars by forcing everybody to upgrade. So they are not the poor software company out there who is hurting and is being threatened. It is a gold mine for them, this year 2000 problem. Everybody has to go out and fix their product. They are charging everybody. There are some companies that are doing the right thing and providing free fixes, but the majority of those are charging us.

Thank you.

[The prepared statement of Mr. Pogust follows:]

PREPARED STATEMENT OF HARRIS POGUST

Chairman Hatch, Senator Leahy, distinguished Senators it is an honor to appear before you today.

My name is Harris Pogust, and I am a lawyer from Pennsauken, New Jersey. I work at a small firm which represents over 2,000 small businessmen in the Philadelphia and Southern New Jersey areas. My firm's focus has always been on representing small businesses and their issues: contract disputes, insurance issues, and permit problems. It is only because the Y2K issue began to threaten the very existence of many of my small business clients that I became aware of the issue at all.

I am here today, Senators, because those small businessmen could not be. As small businessmen, they could not leave their businesses on such short notice. As doctors, they could not reschedule their patient's appointments. I spent a great deal of time talking to them, however, and I am here to tell their stories. They come from all over—Pennsylvania, New Jersey, Delaware, Ohio, California. They own all types of businesses: cleaning supply stores, furniture retailers, community hospitals, and doctors. They asked me to pass on their names and phone numbers to any of you who expressed an interest in hearing their stories—the real story behind the Y2K issue and what legislation like this would do to them. They are not represented by any large Washington, D.C. organizations. But they are what they are—America's small businesses.

Beginning in 1998, one after another, my small business clients told me horror stories of being taken advantage of by companies who sold them non-compliant software and hardware for thousands of dollars, only to turn around months or even weeks later and demand thousands more to make the products functional. It is only by being able to turn to a jury of their peers, or the threat of this, that they were able to obtain justice.

My basic message for you—the message of all of the small businessmen who have faced this issue head on and been forced to deal with it—is that *the current system* works. The fundamental precept that has dispensed justice in this country for hundreds of years remains true today: if all else fails, and a business feels that they need to turn to the court system to get justice, to get deadlines, to get resolution by a jury of their peers. Altering the system in any way can only hurt these small businessmen who, after all, just want to sell furniture, treat their patients, or teach students.

I would like to quickly share three representative stories that I have heard from my clients. Please remember, these are just a few of the many that I have heard. There are thousands—thousands—more horror stories like this.

In one case, two small businesspeople who own furniture stores at the New Jersey shore faced severe financial hardship because of their systems crashing due to the Y2K problem. Like most furniture stores, they allow people to purchase products on lay-a-way plans. Someone buys a dining room set and has two years to pay it off. This software was supposed to track those payments and keep the accounts. The software cost $10 to $15,000—a huge outlay for a business of that size.

One day, the computers were turned on and—nothing happened. The system was dead, due to a Year 2000 problem. They immediately called the company for help, since they stood to lose thousands—without the system, they would have no idea

who owed them money, what their inventory status was, or who they owed money to. This could wipe them out. They called the company that sold them the software—and the company said, sure, we'll fix it—for ten thousand dollars. Ten thousand dollars these small businessmen simply couldn't afford, especially since they had paid that amount for the system in the first place.

In another situation, a doctor in Atlantic County, New Jersey, purchased medical management software. The doctor, a sole practitioner, is the classic doctor that you think only exists in movies. He is an ob-gyn. He has delivered generations of babies in some families; makes house calls, gives out his home phone number. He treats indigent patients, knowing full well that his practice will have to swallow the expense. It's just him and Diane, his nurse/receptionist. He made a huge outlay of $13,000 to purchase this software, which was supposed to help him track his patients appointments, keep track of their medical records, and generally help him improve his patients health.

The salesman for the company came to his office and promised him when he purchased the software that it would last for years. The doctor believed him. Twelve months later, the doctor received a letter from the company telling him what it had known when it sold him the software: it wasn't Y2K complaint. In order to make it complaint, the doctor was asked to pay $25,000—almost double what he spent on the original system! That's real money to a real small town doctor. It threatened to take him away from what he loves: being a sole practitioner who is a part of his patient's lives. Senators, if you do anything at all to address the Y2K problem, please deal with the Y2K profiteering issue. It's nowhere to be found in any of the bills I've seen to date.

Finally in another situation, a college in Philadelphia is being charged over $100,000 to make their computer systems Y2K compliant. This is despite the fact that they initially paid $100K for the system, and paid thousands of dollars every year for a maintenance contract that supposedly provides for such services. What that means in practical terms to this small school is this: students will lose their scholarships. Research that could otherwise have been conducted will remain as theories in a notebook. The library will have to make do with books that are decades old. All because one company didn't do what was right.

These are three of many examples of the real problems faced by real small businesses in the real world. Now, as an attorney who has been able to help those facing these situations, I would like to make the following points about why this bill, and those like it, would have devastated and probably forced these businesses to close their doors forever.

First, *the 90-day delay period built into this bill would be devastating to the small businessmen out there.* If the furniture store has its computers fail on January 1, 2000, it faces immediate damage. Every day it has to continue meeting payroll. It has to pay the electric bill. It has to pay taxes. If they are forced to wait 90 days to even have the opportunity to do anything about it they would simply go out of business. Ninety days to a company like AT&T is nothing; to Jim's Furniture Store it is everything. For example, these furniture stores contacted the company involved and were told that they would not fix anything unless they paid $10,000. The furniture store simply couldn't afford that much. They were at a dead end. Not only does it make no sense to force that company to wait 90 days to do anything—it would push the company over the edge. I know this to be true—the businessmen I speak to tell me, and would tell you this too. Senators, the 90-day waiting period may be one thing if you're talking about a lawsuit between American Airlines and Intel. It means something entirely different for small companies who can barely make a payroll every week.

Second, these bills all contain broad escape hatches to companies who supposedly do their best to fix the problem they caused in the first place. All a company apparently needs to do is make a few trips to the sites and claim that they did their best to fix the problem. Or, they can say "I have a fix—it'll cost you $25,000, though." Or they can claim that they didn't have enough opportunity to fix the problem. Does the furniture store, for example, need to allow the company to come into their store as many times as they want—even into the hundreds—or face a claim that they did not provide an adequate opportunity to fix the problem? Moreover, precisely because many important terms are not defined, parties might well have to "litigate" over the meaning of these terms rather than moving forward to have an expeditious resolution of the underlying problem itself. I assure you that this bill will create far more litigation than it will eliminate.

Further, such legislation would preempt existing protections of state law and the UCC. Businessmen entered into contracts knowing that the UCC and state fraud statutes were going to provide them with the necessary protections from faulty products. Businessmen, even those with only their own little store, know that products

sold in commerce are required under the UCC of all 50 states to be "fit" and "functional" and "merchantable." These fundamental safeguards are wiped out in the proposed initiatives, and thus the victims are left without the basic "consumer" protections that distinguish American markets from all others in the world. These bills would also swoop in and declare one federal, often heightened standard that must be shown by plaintiffs. That is fundamentally unfair.

Also, with the bill's various limitations on damages, joint liability and other areas of liability, the legislation favors defendants over plaintiffs at every turn. Why is this? Since personal injury cases are excluded from the legislation, then the bill's; focus is on businesses suing other businesses. Why would Congress want to favor one group of businesses (manufacturers) over small business end-users—the very group that can least economically sustain delay and commercial loss? That is exactly what this bill does—just ask the small businessmen who have been effected by these problems. They can tell you the reality—not the theory that others supposedly representing them might espouse.

Mr. Chairman, I want to thank you again for letting me appear today. I know that everyone on this Committee is seeking in good faith to help solve this problem. But what I think we are seeing out in the real America is that Job 1 for the Y2K problem should be fixing the problem. That we seem to be approaching the issue from protecting those who are responsible rather than creating incentives for remediation is worrisome. If pressure is building on Congress to take away some of the rights and remedies available in our State court system, then please do not inflict this new scheme on small business.

I would be honored to answer any questions that you may have.

The CHAIRMAN. Mr. Adams, we will finish with you.

STATEMENT OF STIRLING ADAMS

Mr. ADAMS. Thank you, Mr. Chairman. Good morning. I am Novell's attorney for year 2000 issues, and for several years I have been part of our company-wide team that oversees our Y2K preparations. Today, I would like to describe those preparations to kind of give a face to what it means for a software company to do that. I would like to thank this committee for exercising leadership in facing the Y2K challenge. I would particularly like to thank Senator Hatch and Senator Feinstein for their leadership with the Year 2000 Fairness and Responsibility Act.

Novell is the world's largest network software company, and over 70 million users worldwide are connected to networks running on Novell software. For the software products that we license, we have spent thousands of painstaking hours conducting tens of thousands of performance tests. Our purpose in doing this is to ensure that Y2K problems do not occur. If, after further testing or use, Y2K issues are discovered, we have a worldwide services organization that provides technical support in all of the world's major languages and they are able to create and distribute patches.

We have placed an emphasis on communicating about Y2K with our customers. One way we accomplish this is through posting information on our Y2K web site. We have had this site up for several years, and I would like to thank the Senators for passing the Year 2000 Readiness and Information Act which has made us feel more comfortable about posting even more information on this site to help the customers.

Through mass mailings, we have mailed to over a million customers free software tools to help them in their year 2000 efforts. As a free service, Novell will provide to customers an individualized report on the Y2K status of products. We also include specific information on how, if needed, a product can be updated or how to in-

stall patches or upgrades. Thousands of businesses, representing tens of millions of users, have taken advantage of this service.

We also provide a free subscription list of Y2K information updates. We have 60,000 businesses on this list; thousands more join each week. And for those who don't have Internet access, we provide information through toll-free phone lines and we have distributed tens of thousands of CD's containing the information on our web site.

Despite our preparations and despite our communications, one of Novell's major concerns is that the normal market forces that encourage cooperative problem-solving are being overwhelmed by a fear of Y2K litigation. We believe the Year 2000 Fairness and Responsibility Act would promote Y2K cooperation and preparation, and help restore the normal market forces in America.

For example, section 201 ensures that terms agreed to in a contract are enforceable. This follows the intent of business partners and would remove some of the uncertainty businesses feel today when entering into contracts to perform Y2K services. Today, we are not sure what our risks are.

Section 301 states an entity would be responsible for the proportion of harm caused by its actions, but not for the actions of others. With this, consultants would be more willing to work on the complex systems of companies that need assistance. Also, the codification of the duty to mitigate in section 104, along with section 202 and 303's "reasonable efforts" provisions, would have the definite effect of providing express incentives for technology users and distributors to resolve Y2K issues before they occur.

We believe the notification requirements in section 101 provide a simple mechanism to encourage cooperative problem resolution. Before filing a Y2K suit, a plaintiff would need to provide notice of the problem experienced. This makes good sense. Probably the least efficient way to notify someone of a problem is in a complaint filed in court.

A significant benefit of the bill is that it would create uniform substantive and procedural guidelines for Y2K litigation. This would lead to outcome predictability and would have the direct result of facilitating quick settlements and efficient case management.

The serious concern of Novell is the Y2K class actions that have been filed where class members have experienced little or no harm. Some of these suits have been dismissed because no harm had occurred, but the litigation costs were still very high. As should be clear, $500,000 spent in obtaining dismissal of a suit is money diverted from productive uses.

The bill provides that a Y2K class action can only be brought if a majority of the class experience a material defect. This would help ensure that class actions are motivated by a legitimate injury to the plaintiff class. Let me emphasize that I do not mean to suggest that plaintiffs with legitimate claims should be prevented from having their day in court. Novell believes that the proposed Year 2000 Fairness and Responsibility Act strikes a fair balance to preserve legitimate rights to sue while implementing reasonable provisions to encourage preventive problem-solving.

In summary, Novell shares the perspective of the broad-based coalition in support of this bill, whose members notably include defendants or plaintiffs in Y2K litigation. This bill can help restore the normal market conditions of our Nation that assume as a starting point not expensive litigation over the slightest problem, but an environment of professional, cooperative problem-solving and service.

Thank you for your time.

[The prepared statement of Mr. Adams follows:]

PREPARED STATEMENT OF STIRLING ADAMS

Mr. Chairman, Senators, good morning. My name is Stirling Adams. I am an in-house counsel for the networking software company Novell. I am Novell's lead attorney for year 2000 issues, and for several years I have been a member of the Novell team that oversees our Y2K preparation efforts, both for technology Novell uses internally, and for technology we license to others. Additionally, I chair the Year 2000 Committee of the Software & Information Industry Association, and I am a member of the Year 2000 Committee of the Business Software Alliance.

I would like to thank this Committee for exercising leadership in facing the challenge the advent of the year 2000 presents. Novell believes the Year 2000 Fairness and Responsibility Act is a positive move in addressing this challenge, and I would like to especially thank Senator Hatch and Senator Feinstein for their leadership with this proposed legislation.

I will first describe Novell's Y2K preparation efforts to give a face to what it means for a company to "prepare for the Y2K." Then I will describe some concerns we have, despite our extensive preparations, about the litigious environment that is building in anticipation of the Y2K. I will explain how we feel provisions in the proposed Year 2000 Fairness and Responsibility Act address these concerns, to the benefit of both technology consumers and technology distributors.

BROAD SUPPORT FOR Y2K LEGISLATION

While I am here to provide the perspective of and specific examples from a large high-tech company, first I would like to emphasize that the ideas behind the proposed Y2K legislation are supported by an exceptionally wide-spread coalition led by entities such as the National Association of Manufacturers and the U.S. Chamber of Commerce. The coalition included the National Retail Federation, the National Association of Wholesalers and Distributors, and the International Mass Retail Association, among many others. Note that just one of the coalition members, the U.S. Chamber of Commerce, represents over three million businesses and organizations in every business sector—96 percent of these business are small businesses.

Though members of this coalition have the potential to be either plaintiffs or defendants in Y2K-related litigation, the coalition has reached a consensus that this legislation would benefit its members generally. I think the reason for this is that the legislation would encourage cooperative efforts to reduce the total number of Y2K problems that occur, and while the legislation would place restrictions on litigation based on claims where no injury has occurred, it would also preserve the rights of entities to sue if they have experienced legitimate harm.

NOVELL'S Y2K PREPARATIONS

Novell is the world's largest network software company, and over 70 million users worldwide are connected to networks running on Novell software. Novell, like all other companies, is also a technology consumer. We have thousands of employees distributed throughout dozens of locations across the world. From our telecommunications and security systems to our accounting and payroll systems we use technologies with date functionality.

Testing

We have carefully tested and re-tested these technologies. With some upgrading that we have largely completed, we believe our internal systems are in good shape. We are working directly with our suppliers and we are preparing and revising preparations and contingency planning to deal with unexpected Y2K issues that either we or our suppliers may face.

As a developer and distributor of software products, we have obvious additional Y2K issues to prepare for. For the dozens of software products we are currently licensing, we have spent thousands of painstaking hours conducting tens of thousands of performance tests. We have also spent significant resources testing older products that we continue to support for date issues. These efforts are dedicated to preventing the occurrence of Y2K performance issues in our products.

If despite these extensive efforts an issue is discovered, either by additional Novell testing, or by a customer, we have a large worldwide technical support organization that provides technical support to customers in all of the world's major languages, and where needed, we can quickly create and distribute software fixes. Additionally, we have a Critical Problem Resolution ("CPR ") organization that focuses on high priority support issues—this is essentially a software SWAT team that, if needed, can rush to provide maximum effort to resolve any serious technical issues.

Communicating with customers

We are putting significant resources into providing our customers information and tools to help them prepare for their potential Y2K-related problems. We have a Y2K web site that provides extensive information about our Y2K efforts and status. This site (http://www.novell.com/year2000) has been visited by millions of customers. Just today, Monday, March 1, several thousand businesses will use this site to collect Y2K information on Novell products.

We also provide a free e-mail subscription list through our Y2K web site. The 60,000 customers who have joined this list receive free mailings of significant issues relating to Y2K issues and Novell products. Thousands more subscribers join this list each week.

For Customers without internet access, we also have toll-free phone numbers through which customers can call service representatives for Y2K information. And, we have created CD's that contain our Y2K web site contents. Tens of thousands of these CD's are distributed free of charge through Novell's reseller channels, sales force, through trade shows and other events attended by Novell customers.

Free Y2K tools and information resources

Additionally, we have created information and software tools that can assist customers in Y2K remediation efforts. We make these tools available for free, and they can identify the specific versions of Novell software running on a customer's systems. As a free service, Novell will provide the customer an individualized report identifying which software versions the customer is running are supported for Y2K issues, and which older products may need a patch or upgrade, with specific information on how to obtain a patch or upgrade.

Thousands of customers have downloaded these tools from our web site, and through direct mailings or hand distribution we have distributed over a half a million of these free information or tool mailings. We expect to mail, in total, over a million. To date, thousands of businesses representing over 10 million end users have taken advantage of this service.

THE NEED FOR Y2K LEGISLATION

The Year 2000 Fairness and Responsibility Act addresses many of Novell's core concerns about Y2K litigation. To those who say it is not fair or appropriate to pass legislation that favors industry over consumers, or that protects businesses from accepting proper responsibility for their actions, let me be clear that Novell agrees wholeheartedly. Let's not pass a bill that does that.

Instead, let's work with a bill that does something very different—that would be the Year 2000 Fairness and Responsibility Act. This bill encourages cooperative problem prevention, it preserves the rights of those with legitimate claims to sue, and it places restrictions on frivolous litigation.

One might ask, with all of our preparations, what is Novell worried about? As an introduction to the answer, consider the various analyst estimates that the volume of Y2K claims will dwarf that of all civil litigation filed annually in the U.S., or that Y2K litigation costs will reach $1 trillion. I do not know if these figures will be accurate: I hope they are gross overestimates. But, as evidenced by the lawsuits that have already been filed prior to the plaintiffs experiencing damages, and by the law firms that have dedicated entire departments to preparing for and filing Y2K litigation, it seems completely reasonable to anticipate that Y2K claims could have an overwhelmingly negative impact on our court system and our economy.

RESTORING THE NORMAL COOPERATIVE BUSINESS ENVIRONMENT

What is industry worried about? As individuals, businesses, or governments, we all participate in a sophisticated economy based on a complex technology-based in-

frastructure; occasional hiccups and difficulties are a normal and accepted part of this complexity. One of our major concerns is that the normal market forces that encourage cooperative problem-solving in this environment will be overwhelmed by a hysteria driven by mass Y2K litigation.

The following is a practical example of how this hysteria works to the detriment of technology users. There is a huge need for consultants to assist organizations in performing internal Y2K testing and remediation efforts. This need is so large because most organizations do not have either the internal resources or the expertise to perform these tasks. Though many individuals and companies offer such consulting services, some industry analysts are predicting there will not be enough Y2K consultants to meet the market need. One contributor to this lack is likely to be concerns about Y2K litigation.

As an industry participant, Novell has seen specific cases where entities that do offer general consulting services have been extremely wary of widening their offerings to provide complete Y2K services. The concern is that even if top-quality consultants provide services in the most professional manner, because of system complexity, there may be some hardware, firmware, or software component in the system that may not react perfectly to the Y2K. Some companies and consultants are very definitely factoring into their business analyses the strong possibility that the risks of being sued for Y2K problems may outweigh the benefits to be earned.

Parties to contracts need to be confident that their agreements will stand

The above situation is a concrete example of a need addressed by the proposed legislation. Today, could a consultant worried about Y2K litigation reasonably limit its liability using standard liability limitations in the consultant's contract? The hope is that contractual limitations will be honored by courts, but enough questions exist in this area that the uncertainty has a direct impact on companies' decision-making processes. The end result is that fewer resources are available to the technology consumer who is preparing for the Y2K.

Section 201 of the proposed legislation would ensure that the terms agreed to in a contract are enforceable. This is what business partners generally expect when they agree to a contract, and it is what the coalition, from small to large businesses across the business spectrum, is supporting. And, it would have a very real effect on Y2K preparations because people could reliably know what their risks and obligations will be.

Proportionate liability rules would facilitate cooperative Y2K efforts

Some consultants shy away from performing complete Y2K services because they fear that if a Y2K problem occurs, even if the consultant is only partially responsible for the problem, it may be found liable for all of the damages. Section 301, Proportionate Liability, states that a party would only be liable for damages it was responsible for causing. This would allow entities to worry less about the litigation risks and more about how to fix Y2K problems. It's important to note that companies would still be expressly liable for their own responsibilities, and that this provision would not affect claims involving personal injury.

REIGNING IN UNNECESSARY OR FRIVOLOUS LITIGATION

Another element of normal life in America has been that people are unlikely to engage in costly litigation over minor or non-existent harms, especially where market forces exist that encourage product suppliers to provide continually better products to meet competitive demands. This is changing. As you may be aware, some Y2K class actions have been filed based on situations where the user has experienced little, or in some circumstances, no harm.

Such class actions are a serious concern to Novell. Some of these lawsuits have been dismissed exactly because no actionable harm had occurred to the plaintiffs. But notably, dismissal may not occur until after the defendant has spent hundreds of thousands of dollars in defending the claims. In case it is not clear, let me inform you that such an outcome has a direct negative impact on a company's productive output. $500,000 that is spent in defending a class action law suit is money diverted from hiring employees that could be placed on projects to develop new technology, or to enhance or support products. This works to the detriment of a defendant, of the technology users, and offers no benefit to the class of plaintiffs.

Notification requirements provide a mechanism to encourage cooperative resolution without litigation

Provisions in the proposed legislation address the concern of such non-productive litigation. For example, section 101 states that before filing a Y2K suit, a plaintiff would need to provide a defendant notice of what problem was experienced, what

injury occurred, and what remedy is sought. If the defendant doesn't respond appropriately, then a suit may be filed; this provision does not apply to a plaintiff seeking injunctive relief. What this provides is a mechanism to encourage cooperative resolution without litigation. If a resolution is not reached, the plaintiff still has complete freedom to sue in court. The legislation also provides that a Y2K class action can only be brought if a majority of the members of the class meet a minimum injury requirement of having experienced a material defect. This would help insure that any Y2K class actions filed are motivated by legitimate injury to the plaintiff class.

Let me emphasize that I do not mean to suggest that plaintiffs with legitimate claims should be prevented from having their day in court. Novell believes that the proposed legislation strikes a fair balance to preserve legitimate rights to sue while implementing reasonable provisions to encourage resolution without litigation.

ADDITIONAL BENEFITS TO TECHNOLOGY USERS

As I mentioned earlier, the proposed contract enforcement and proportionate liability provisions would facilitate cooperation by businesses in working together to accomplish Y2K preparations. The proposed legislation includes other provisions that would benefit technology users.

The Duty to Mitigate and Reasonable Efforts sections would encourage preventive actions by all parties

As an example, section 104 states an entity cannot recover for damages it could have reasonably acted to avoid. This codification of the duty to mitigate, along with section 303, which provides that an entity's reasonable efforts to prepare for the Y2K can offer some protection against liability, are express incentives for all members of the technology community, from users to suppliers to developers, to resolve Y2K issues before they occur. Obviously the more issues that are resolved before the Y2K, the less technology users will experience Y2K problems.

Uniform Y2K liability guidelines would increase the efficiency of pursuing claims in or out of court

In case litigation is warranted, a significant benefit of the proposed legislation is that it would create uniform substantive and procedural guidelines for Y2K litigation. Uniform guidelines lead to outcome predictability and would have the direct result of making it easier for entities to decide whether or not to sue. If they choose to do so, uniform guidelines are more likely to facilitate quick settlements or more efficient trial processes. Obviously, the more quickly a case is resolved, the more judicial and litigant resources are preserved for other matters.

CONCLUSION

Novell shares the perspective of the broad-based coalition in support of the Year 2000 Fairness and Responsibility Act. The likelihood of an unparalleled surge of litigation represents a serious threat to U.S. resources. The proposed legislation would address this threat by encouraging cooperative efforts to prevent Y2K problems before they occur. And while the bill would place reasonable restrictions on litigation based on claims with little or no injury, it would preserve rights to sue for legitimate harms. The bill would also wisely establish uniform guidelines that would lead to more efficient resolution of Y2K claims that are filed.

The CHAIRMAN. Thank you very much.

Now, I have got to leave, but I want to ask just a couple of questions of you, Mr. Miller. Mr. Miller, you have heard the testimony of Mr. Yarsike and Mr. Pogust. Do you have any comments with regard to how this bill will actually affect the problems that they have raised here today?

Mr. MILLER. As I understand Mr. Pogust's situation, nothing in this bill would have restricted him from taking exactly the actions that were taken, except maybe at the end of the day there would have been less money going to the attorneys and more money going to the companies.

The CHAIRMAN. Well, the one thing this bill would do is it would require a 90-day cooling off period where any company that doesn't

utilize that time isn't going to be in business very long because they are stupid.

Mr. MILLER. Exactly. I think Mr. Yarsike obviously was getting the run-around, it sounds like, and this bill would give a very strong incentive from the vendor to respond quickly. And if the vendor did not respond quickly, he would basically be laying himself open for much more serious problems. I think you have crafted it very well, Senator.

The CHAIRMAN. Nothing in this bill would prevent Mr. Yarsike's litigation, or Mr. Pogust's.

Mr. MILLER. Absolutely not.

The CHAIRMAN. Do you disagree?

Mr. POGUST. I would disagree with that. The "reasonable efforts" seems to be—section 303—a complete defense. It says it in section 303.

The CHAIRMAN. It is not, though. It is not meant to be, and if it is, we will change it so that it is not. But what it becomes is it becomes an incentive to the companies to make reasonable efforts so that Mr. Yarsike doesn't have to go through what he went through and your clients don't have to go through what they went through.

Mr. POGUST. With all due respect, Senator, it says, "The party against whom the claim is asserted shall be entitled to establish as a complete defense to the claim that the party took measures that were reasonable." Mr. Yarsike had them in hundreds of times.

The CHAIRMAN. Yes, but you are reading a paragraph—we have rewritten that where it is not an absolute defense.

Mr. POGUST. I don't have that, so——

The CHAIRMAN. We apologize to you for that.

Mr. POGUST. I understand.

The CHAIRMAN. But we have taken that into consideration because we think you make a good point.

Let me just ask you this, Mr. Miller, because I am concerned about Mr. Yarsike's case. I am concerned about Mr. Pogust. I think that attorneys do a lot of good in this country by making sure that people do live up to contracts, do live up to their obligations. Product liability suits are suits that make companies make even extra efforts to try and make sure their products are safe, but there is an astonishingly broad coalition that supports this bill as it is currently written.

Could you identify the main companies and associations that support this bill? And while I am at it, isn't it true that potential plaintiffs in Y2K claims, as well as defendants, are represented in the coalition that supports this bill as well?

Mr. MILLER. Absolutely, Senator. We have organizations such as the National Association of Manufacturers, the United States Chamber of Commerce, the American Insurance Association. Mr. McConnon testified on behalf of the National Federation of Independent Business; the National Retail Federation; Edison Electric Industry. We can supply the complete list of 90 organizations and associations for the record, Senator.

Clearly, we would not have had this broad-based coalition supporting the bill that you and Senator Feinstein have introduced unless they believed that this was going to protect all business orga-

nizations in business-to-business transactions. Several of the witnesses have focused only on the software and services industry and the hardware industry. In fact, there could be a trucking company that could be not only a plaintiff, but could also be a defendant if they can't deliver a product on a certain date.

There could be a business that has nothing to do with producing products and services in the year 2000—Mr. McConnon addressed that—who could find himself sued by his customers not because he is a software company, but because he can't deliver. So I think what you have got here, Senator—it took 4 to 5 months to put this coalition together—is a very, very broad-based coalition supporting this bill.

The CHAIRMAN. Well, a very important provision of the bill, as has been raised, is the "reasonable efforts" provision. Now, this section allows the evidence to be presented by companies that acted with due diligence in attempting to resolve the problem. You state that this section acts as an incentive for a supplier of goods or services to fix the problem this year and not wait until litigation is commenced. Could you explain that to us?

Mr. MILLER. We are afraid, Senator, today that too many lawyers are advising their clients, don't go out of your way to try to be helpful because you are exposing yourself to liability and problems. We think your bill, if it is enacted, turns that around because, coupled with the commercial responsibility provision, the "reasonable efforts" section sends a strong message to all potential defendants.

It says if you continue remediation efforts, following necessary elements of due diligence, take all the actions you possible can, and even notwithstanding all that there are still problems, the court must at least allow you an opportunity to present that evidence. So the incentive now shifts to having as much information forthcoming, being as helpful as you can. Just as you did with the Disclosure Act last year which was to incent people to give information, this incents people to take action because should there be a failure, they will be able to present that as one piece of evidence in any kind of legal dispute.

Mr. POGUST. Mr. Chairman, can I just respond to this?

The CHAIRMAN. Sure, of course.

Mr. POGUST. I have never heard—I obviously don't talk to every lawyer in the country, but who would counsel their client not to fix a year 2000 problem because of the threat of being sued? It is the opposite, it is the opposite.

Mr. MILLER. Absolutely, Mr. Pogust. Even Mr. Koskinen, the President's Y2K czar, stated that publicly before this committee.

Mr. POGUST. So they are telling them don't fix the problem so you won't be sued. If you don't fix the problem, you are going to be sued. That is the point.

Mr. MILLER. I defer to Mr. Koskinen and Senator Bennett. They will tell you that.

The CHAIRMAN. Well, let me just say this, Ms. West. I was intrigued by your use of the metaphor of shutting the barn door after the horses have left to describe the practical results of suing someone in the drug supply chain after someone dies.

By that, did you mean that we would better serve drug-and medical device-dependent people if we could provide a legal set of in-

centives for companies to fix their Y2K problems, and thereby ensure that they can make their deliveries in time to help them, than if we simply went after them after the fact?

Ms. WEST. We need to put them in the position now where they are not continually looking over their shoulder wondering who is going to sue them next and allow them to get their operations and their medications and their procedures ready. As a nurse, I have looked over my shoulder many times and made decisions because I was afraid that what I charted would be in court.

The CHAIRMAN. Well, let me just say this. Your testimony is very important here today because, naturally, I don't want you to die; neither does anybody else. Nor do I want those 40 million people to suffer unduly or to die, so this is important.

Look, there is no pride of authorship in this legislation. We have worked hard to try and come up with something we think will work and that will help to resolve these problems. I don't think it interferes with Mr. Yarsike's ability to sue in his case, or yours, Mr. Pogust, in your case. But there may need to be further changes and we would love to have you help us make them. I am open to that.

I never think that what we do here is absolutely perfect. In fact, I think, to the contrary, many times we have to work within the framework of compromise and bringing people together. I have got people on the other side of the table who will never vote against anything the trial lawyers want. I have got people on my side of the table who will vote against everything they want. And I have got to find some way of bringing people together, so it is always somewhat imperfect, although I have to say I have gotten a few things through that I think have darn well been perfect. [Laughter.]

Quite a few, as a matter of fact. I have to say when Senator Kennedy and I put it together, everybody kind of gets out of the way, but they all think it is as imperfect as it can be on both sides. It is a terrible thing to have the leading liberal and a conservative like myself get together on some matters. It so seldom happens, and occasionally it is a wonderful thing.

Mr. Yarsike, I have great respect for you and what you have gone through in your troubled business life. No question about it, your testimony here is very important to me. I just want it to be made clear that Senator Feinstein's and my bill would not have prevented you from recovering compensation.

As I understand it, you settled after 3 years of negotiation, and this bill does delay litigation for 90 days and requires the vendor to fix the system within that time. If that vendor doesn't, you have got a better case than before, in my opinion. Your case took 2 or 3 years, as I understand it, so this legislation might actually have helped you, at least the way we view it today.

Now, help us to know; write to us. I am going to keep the record open for questions from all Senators on the committee. I would like to have you answer those within 2 weeks, earlier if you can, but you can help us to maybe find the flaws that do exist in this legislation. And we will do our best, you know, to help the companies who act in good faith to fix the systems to do so. Without legislation, these companies could stall in doing the things that you feel are critical to your industry and so many others as well.

Mr. YARSIKE. I just want to say in my case, this is the first lawsuit I have ever had in 41 years in America. I am not a suing type of person. We still ended up losing a couple hundred thousand dollars, but we were able to put it behind us and get on with our business.

The CHAIRMAN. Right.

Mr. YARSIKE. But we feel we recouped some of our losses. There was no profit or extra.

The CHAIRMAN. No, nobody is suggesting that there was.

Mr. YARSIKE. The other side of the coin is no matter what this bill passes, the way I read it there will still be hoggish attorneys out there trying to push lawsuits.

The CHAIRMAN. Really? [Laughter.]

Mr. YARSIKE. But I feel that mainstream America, the small businessman like myself, just wants to get it down, get it done, and get moving on with business.

The CHAIRMAN. Well, I am with you because I believe that legislation like this may prevent frivolous litigation, which is what we are trying to do. Important litigation like you have had to go through—of course, we don't want to interfere with that when clearly you were in the right.

I also respect Mr. Pogust for the work that he is doing to try and represent small business people. I mean, I might disagree on individual cases because I might have to defend them or something like that if I were out in private practice. But the fact of the matter is that he does a service. Not all attorneys are voracious—well, almost not all attorneys. I am just kidding. Attorneys are essential to our society. Our litigation system is essential, but we also have to continually work on it so it is fair to everybody, and that we solve problems in advance, which is what this bill is aiming to do.

Mr. McConnon, you have testified as a small businessman, and it seems to me you would rather, wouldn't you, get notice of a Y2K problem through a simple communication, which our bill would allow to happen, instead of hearing about it for the first time in a lawsuit?

Mr. MCCONNON. Without a doubt, yes.

The CHAIRMAN. And if you had a problem as a vendor and somebody notified you that, hey, they are having a problem, you would want to get it solved in this 90-day period, wouldn't you?

Mr. MCCONNON. Absolutely. I would say one thing that I am struck by with both of these stories is that if I attempted to do to my clients, most of whom are considerably larger than I am, what people have attempted to do to this gentleman and this gentleman's client, I would be out of business much faster from market forces than from legal forces.

The CHAIRMAN. Well, you spoke about how your relationships with your vendors and clients are the key to your survival as a small business. As a result, it seems that you already have a natural market incentive to settle a dispute as quickly as possible and, when feasible, outside of the litigation process or outside of court.

Mr. MCCONNON. Absolutely. Having been through the process I was through a couple of years ago, again, even though that suit was dismissed, our goal in that litigation wasn't really to get justice because had justice been done, it would have ended more in

my favor than it did. It was just to get out of the litigation because of the amount of time and expense that it was taking.

The CHAIRMAN. Now, having expressed respect for you, Mr. Pogust, and attorneys like you who fight for small business people, you assert that the 90-day cooling off period could bankrupt small businesses. But most civil actions take a year or more to resolve and someone who brings suit immediately obviously is not going to obtain money damages for many months or years to come.

Surely, you cannot suggest that it is a good thing for people to sue without first contacting the potential defendant to try and get it worked out. Now, in your case they didn't do it and they deserved to be sued.

Mr. POGUST. Every case I have, I send a letter. I think everybody tries to resolve it without suing.

The CHAIRMAN. Right.

Mr. POGUST. And the UCC requires you to—if you have a breach of warranty, you have to send notice to the defendant anyway and give them a reasonable time to fix it. So it is already there, and all these are going to be breach of warranty claims. The lawsuits, the majority, that will be one of the counts, and if you want to have that in your lawsuit, you are required under existing law to give them notice and opportunity to repair and to fix the problem.

The CHAIRMAN. Well, but they also know that it can take 1 to 4 years, depending on the jurisdiction, before they have to comply or before a court might find them guilty or responsible. And that gives them more time to delay and to not do the things they should. See, I believe that the cooling off period will act as an incentive to fix Y2K problems, avoiding the need to hire expensive lawyers, and that it will be corrective to the system, which seems to me makes a lot of sense.

But we will get you a copy of the current draft.

Mr. POGUST. I appreciate that. Thank you.

The CHAIRMAN. I would like you to look it over carefully and give us your considered suggestions as to what you think would make it better because, after all, it would help your clients, if Senator Feinstein and I are right on what we are trying to do here.

Now, let me just end with you, Mr. Adams. The ATLA, or American Trial Lawyers Association, president, Mark Mandell, criticized the bill even before it was introduced in the Senate. And part of the problem is we have had various drafts, and you have had an earlier draft yourself, Mr. Pogust. But he criticized the bill because the bill allegedly creates a disincentive for companies to fix Y2K problems. According to Mr. Mandell, whom I respect, companies will wait for complaints to be filed before they fix any Y2K glitches. Do you agree with him on that?

Mr. ADAMS. I don't, and if I could I would like to answer first with an example of how that wouldn't be the case.

The CHAIRMAN. Well, I think you state in your written testimony that the bill encourages, to use your words, "cooperative problem prevention."

Mr. ADAMS. Right. A lot of small businesses, especially, but also governments and large organizations, don't have the internal resources to perform their own Y2K preparations or remediation ef-

forts. So how do they get that done? They want to bring in another company, a consultant, to do that.

There are specific cases where consultants are saying, you know, we provide a lot of services, but unfortunately we are not able to provide you year 2000 services because it is just too risky. There aren't the number of resources out there to do all the remediation that needs to occur. This type of bill sets up an environment where that consultant company can say, OK, I am going to follow the normal market forces. Is there a business opportunity for me? Am I going to make a profit? And then the legal consideration will be there, but it will be the normal consideration that we think about in our normal business operations. It won't be worry over being sued over the slightest problem.

The CHAIRMAN. You also contended in your written statement that the bill preserves the rights to sue for legitimate claims, but places restrictions on frivolous claims. Could you explain how the bill can do both?

Mr. ADAMS. Certainly. A couple of examples of the restrictions that we feel are reasonable on frivolous claims would be section 401, which is the minimum injury requirement. It says the class action can't be brought unless a majority of the class has a minimum injury. That helps ensure that frivolous litigation doesn't occur. And the less frivolous litigation that occurs, the more legitimate claims are brought quickly to resolution. If the courts are jammed with frivolous litigation, the legitimate claim may take an additional year to get recovery. That is one example.

The pre-trial notice period which we have talked about quite a bit I feel is very important. Note that the plaintiff is required to give 90 days' notice, and then the bill as written would say that the defendant company needs to respond within 30 days. So that is the real time frame that we are talking about. You are going to get a response in 30 days. Nothing that happens during this period is going to diminish somebody's rights.

If damage is occurring during that 90-day period, you are still going to be able to sue for that. What it is it sets up the 90-day period so that if companies are inclined to work things out without pursuing it through inefficient, often, litigation, there it is. It is an automatic time where you can work things out. If you choose not to do that, if a company—today, a company can say, you know, go ahead and sue me, I am not going to provide you a solution. I think we have seen a couple of examples of that.

If this legislation is passed, that could still happen. A company could say, you know, I am not going to provide you the response; I think I have got a claim. But what this legislation will do is it sets in a couple of standards that make it more likely for perhaps the defendants in the cases we have heard to say, wow, under these uniform guidelines I can see that, you know, if I haven't acted reasonably, if I haven't performed these particular operations, I am going to be liable. This is the time frame. It is going to make more sense for me to settle now. We feel it would lead to cooperative solutions.

The CHAIRMAN. Well, this has been a most interesting panel. I want to thank all of you for being here. I think each one of you has added to our knowledge here today. Again, I will keep the

record open because I want members of the committee—this is a Monday and sometimes it is very difficult to have everybody here on Monday, but I want members of the committee to have the opportunity to provide questions to you, which I will insist you answer within two weeks from this date.

Each one of you has enlightened me here today and I am very grateful to have you all here, and I appreciate the effort that you have made to be here and the good testimony that you have given. So the last thing I am asking is that you and everybody else who is concerned about this matter read this bill, look at it, see how we can make it better. I will do my very best to try and bring both sides together and make it better and see if we can do something that literally pushes us down the road toward having a much more compatible system in the coming year 2000 and other years as well.

And if we work together, we might be able to solve some of these problems without having all the money go down the drain in litigation and courtroom costs and fees. And it would be better to do that, in my opinion. As much as I love my profession, it would be better to do that because there is still going to be lots of litigation out there, no matter what we do. And there will be people who will not act responsibly who should be sued, and I am sure that my colleagues in the profession are going to make sure that happens.

But in any event, I want to thank each of you for being here today. You have been great. If I can limit the answers to the questions to a week from today, but they should get the questions in right away. If we can do that, we do want to move ahead with this.

So with that, we will recess until further notice.

[Whereupon, at 12:37 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF ELEANOR ACHESON TO QUESTIONS FROM SENATOR HATCH

Question 1. As I understand at least part of your testimony, a criticism of this bill is that certain provisions may have "unintended consequences." Well, I guess that all legislation has some degree of unintended consequences. What I think we can agree to is the intended consequences of this bill. It is the intent of Senator Feinstein and myself that this legislation reduce frivolous litigation and create a strong incentive for industry to fix the Y2K problem. I believe that you share our goals. Will you work with us to refine the language of the bill to minimize unintended consequences?

Answer. I do share the goals that both you and Senator Feinstein have stated should underlie any legislation aimed at Y2K litigation—that is, reducing frivolous lawsuits and preserving (or increasing) incentives to correct Y2K errors before they cause malfunctions. The Justice Department is committed to working with you and this Committee to create a bill that advances these goals in a manner that is fair to persons with legitimate Y2K lawsuits and that has few unintended, collateral consequences.

Question 2. I also understand that the Administration has consistently opposed certain civil justice reform measures, such as caps on punitive damages. Of course, the purpose of punitive damages is to deter future bad behavior. But punitive damages is most effective in intentional tort cases and in personal injury suits. In general, the justification for the caps here is that in many cases the Y2K problem was the result of neither negligent nor wrongful behavior. As such, punitive damages if applied would have little deterrent effect. Are you aware that personal injury cases are exempt from this bill and that caps on punitive damages do not apply to those tort actions? Do you agree that caps on punitive damages—particularly in breach of contract cases—in which historically punitive damages did not even apply—create an incentive for companies to fix Y2K problems because litigation costs would be less likely to soak up capital needed to remediate the problem?

Answer. The Justice Department's primary concern with punitive damages caps in this bill is based on our preliminary analysis of how such caps would affect Y2K readiness efforts. We believe that capping punitive damages may be both ineffective and unnecessary. As you note, some number of Y2K malfunctions will not result from wrongful behavior, but punitive damages will not be available in those cases in any event under current state law. The same is true in contract actions. Even malfunctions resulting from negligence would not be subject to punitive damages because the standard for punitive damages is well above negligence.

We appreciate that your bill exempts personal injury cases from its operation, but even here we have some concerns. The bill limits the definition of personal injury to claims for physical harm. Other kinds of harm—emotional, pain and suffering—are excluded from the definition. We are not sure how this provision will work in practice because any personal injury suit is likely to include claims relating to non-physical injury, but presumably punitive damages would be capped for those parts of personal injury cases relating to non-physical injury. Thus, while perhaps not intended, it appears that the bill effectively limits punitive damages even in personal injury cases.

Moreover, we are concerned that legislation in this area be based on solid evidence of a problem requiring an appropriate solution. Your primary concern and ours is that businesses take the necessary steps in the remaining months to fix, in

advance, Y2K problems so that they either do not occur or their effect is minimized. Accordingly, we will work to encourage incentives to correct Y2K errors and avoid frivolous lawsuits.

RESPONSES OF MARK YARSIKE TO QUESTIONS FROM SENATOR HATCH

Thank you again for allowing me to testify before the Judiciary Committee on March 1, 1999 concerning the Y2K bill that you and Senator Feinstein have introduced. It was an honor to appear before your committee. That you spent so much time listening to my concerns speaks well of both you and the Committee's desire to insure a fair process.

With all due respect, I remain convinced—utterly, without a glimmer of doubt—that this bill would have devastated my business, probably forcing me to shut my doors. It was only the threat of facing a jury of my peers in Macomb County, Michigan that forced TEC to settle with me. This bill's new scheme would have provided them with so many loopholes to hide behind—for example, the 90 day waiting period and the "good faith exception", just to name a few—that I would have had to give up. I'm just a small businessman—I can't fight the big companies.

I remain anxious to work with you in order to help solve this problem. If I may make two suggestions:

- Create an anti-profiteering provision—Many companies, including the one that I dealt with, are simply using the Year 2000 scare as a way to make money. If I am sold a faulty good and then the company tries to charge more money to fix it (when it should have worked in the first place), they shouldn't be allowed to get away with it. Let's make it the law that if a company sells a good that they know is faulty, and then attempts to make money off of upgrading that product, they will face civil and criminal penalties.

  If I sold a product—say a box of oranges—knowing that they were spoiled, I would be responsible for refunding the customer's money or replacing the faulty good. The idea that I could charge the customer to make the box of oranges "fit" for what they paid for in the first place is obscene—and yet that is what these companies are doing on a daily basis! Let's not let them get away with it.

  Sadly, this bill seems to provide protections at every turn for these bad actors, but doesn't hold them accountable. If anything, by heightening the burden that people like myself have to face to prove wrong-doing, it makes it *less* likely that these companies will ever face justice. That can't be what was intended.
- Exempt Small Businesses from the bill—The bill and its proponents claim to want to help small businesses survive the Y2K crunch. I—and every other small business owner I speak to about this new scheme—are convinced that the bill will do the complete opposite. This bill should have an "opt-out" provision for small business.

  I signed my contract with TEC knowing that state fraud and UCC statutes protected me. I know those laws, I trust those laws, and I expected those laws to work on my behalf should a bad actor ever threaten my business. I don't want this new bill, with its Federal preemption of state law and UCC provisions and new procedural hurdles. If you are really trying to help me, let me decide what's best for me. Allow me to take my chances under state law as I always have, or allow me to use the new law (I suspect no small businesses ever would make this second choice—mark my words!)

Below are my answers to your questions:

Question 1. Mr. Yarsike, I have great respect for you and what you have gone through in your troubled life. I just want it to be made clear that Senator Feinstein's and my bill would not have prevented you from recovering compensation. As I understand it, you settled after three years of negotiations. The bill delays litigation for just 90 days and requires the vendor to fix the system. This legislation may have actually helped you in that companies must act in good faith to fix the system. Without the legislation they could stall. Do you want to comment?

Answer. With all due respect, the basic assumptions in this question do not mirror business reality. First, TEC was dying to litigate this case for years. They made clear that they wanted to drag this out for as long as possible, knowing full well that at a certain point I could no longer absorb the cost and would have to give up. This bill would have been their dream—it provides them with dozens of escape hatches to hide behind. They'd say I didn't provide adequate or "particularized" notice. They'd argue that they made a "reasonable" and "good faith" effort to fix my

problem. They'd spend months or years litigating over the meaning of every new word and phrase. Meanwhile, each day I am losing money and customers.

Any business will attempt to solve a problem without turning to lawyers and litigation. I made over two hundred phone calls to the company trying to get them to fix it. *Two hundred!* They professed to be doing their best—they would arrive at the store, tinker a bit, declare the problem fixed. Minutes later the system would crash again. Each crash cost me time and money. I still kept trying to turn to them for help. They simply would not fix the problem. Worse, they refused to provide me with new registers or a new system so that I could function while they fumbled around trying to "fix" the problem.

I spent all that time trying to allow them to fix the problem. When I finally decided that I had enough—when I decided that 200 calls and 200 chances for them to fix the problem were sufficient—I then turned, with great hesitation and sorrow, to the court system. That's not the way I am—I work on handshakes and honor. I didn't want to have to sue someone. It became necessary, however.

So, 200 calls—200 notices—after the problem was first brought to the attention of the company, I decided to file suit. Almost immediately after that, the company decided to settle. They did so because they feared facing a jury of my peers and knew that if they had to defend themselves under normal contract and state fraud laws, they couldn't possibly win.

What possible reason can you give me for the concept that, after making all of those calls and waiting all of those months for the company to fix the problem, I should have to give them yet *another* 90 days to fix the problem? That's just 3 more months of delay—of loss of business and money—that you are providing to the company. I made a business decision on the day I filed suit that no other option was available to me. This tells me that my decision was wrong and forces me to put up with another three months of torture. Then another month for them to respond. Then more delay when they file a motion to dismiss. Then more delay as they litigate over the new terms and phrases and hide behind the new defenses which aren't defined.

All of this adds up to one thing: My being forced out of business. I simply could not have waited another 90 days. If the company was going to do the right thing and fix the problem, they would have done so long before I filed suit.

The idea that the legislation would prevent the company from stalling is quite frankly without any basis. This would permit them to do just that. Don't tinker with a system that worked perfectly for me—once I filed suit they settled. Period. This would change that. Period.

Senator, thanks again for the opportunity to respond to your questions and make my views known to the Committee. Feel free to call upon me in any way. I and all of the employees of this one produce store in Warren, Michigan hope that you will hear our voices and help us. This bill is not the way to do that.

RESPONSES OF MARK YARSIKE TO QUESTIONS FROM SENATOR LEAHY

Question 1. Please elaborate on why you think this bill benefits big business to the detriment of small businessmen and women?

Answer. This bill provides countless opportunities for delay and enhances the likelihood that big companies will litigate instead of settling these Y2K claims. The bill takes away the state provisions which normally provide protections to small businessmen like myself in one fell swoop—the UCC and its protections, *gone.* The state fraud statutes, *gone.* The other various protections each state has carefully legislated over the years in order to protect small business and consumers, *gone.*

The bill creates a new scheme. It preempts all state law that I and other small businessmen counted on when we signed contracts. More importantly, it creates ambiguities and unclear defenses that create the opportunity for delay—just what big business wants and small business simply cannot afford. What is describing a problem with "particularity?" Nobody knows. What is a "good faith effort" to solve a problem? Again, it is unclear. What is clear is that this legislation takes away all incentives to settle. That hurts small business, who cannot afford delay and litigation.

Question 2. What do you think of the provisions in S. 461 that would have required you to give "notice" and then give TEC America an opportunity to fix the non-complaint problem?

Answer. Those who argue that this is necessary are showing a fundamental misunderstanding of how the small business world works. First of all, the term is not defined. What is "notice?" Are the 200 service calls I placed to TEC enough? Appar-

ently not, because although I spoke with them over 200 times I never put anything in writing.

More fundamentally, any business will attempt to solve a problem without turning to lawyers and litigation. I made over two hundred phone calls to the company trying to get them to fix it. *Two hundred!* They professed to be doing their best—they would arrive at the store, tinker a bit, declare the problem fixed. Minutes later the system would crash again. Each crash cost me time and money. I still kept trying to turn to them for help. They simply would not fix the problem. Worse, they refused to provide me with new registers or a new system so that I could function while they fumbled around trying to "fix" the problem.

I spent all that time trying to allow them to fix the problem. When I finally decided that I had enough—when I decided that 200 calls and 200 chances for them to fix the problem were sufficient—I then turned, with great hesitation and sorrow, to the court system. That's not the way I am—I work on handshakes and honor. I didn't want to have to sue someone. It became necessary, however.

So, 200 calls—200 notices—after the problem was first brought to the attention of the company, I decided to file suit. Almost immediately after that, the company decided to settle. They did so because they feared facing a jury of my peers and knew that if they had to defend themselves under normal contract and state fraud laws, they couldn't possibly win.

What possible reason can you give me for the concept that, after making all of those calls and waiting all of those months for the company to fix the problem, I should have to give them yet *another* 90 days to fix the problem? That's just 3 more months of delay—of loss of business and money—that you are providing to the company. I made a business decision on the day I filed suit that no other option was available to me. This tells me that my decision was wrong and forces me to put up with another three months of torture. Then another month for them to respond. Then more delay when they file a motion to dismiss. Then more delay as they litigate over the new terms and phrases and hide behind the new defenses.

All of this adds up to one thing: me being out of business. I simply could not have waited another 90 days. If the company was going to do the right thing and fix the problem, they would have done so long before I filed suit.

Question 3. Why do you think that TEC America finally settled with you after refusing to successfully fix your Y2K problem after hundreds of service calls?

Answer. Simple. TEC settled only when they faced the real possibility of having to justify their actions before a jury of my peers in Macomb County, Michigan. Knowing that I could easily meet the required burdens under the state UCC and fraud statutes, they quickly settled once I took the last-ditch effort of filing suit.

This bill would have changed that calculus and encouraged TEC to litigate. I'd still be in litigation—if I wasn't out of business. This bill makes it more difficult to make my case against TEC by raising the burdens I must prove almost impossibly high. Why should it be more difficult for me to make my case—I was the one who was harmed! Why isn't Congress trying to help me—the innocent small businessman—instead of helping those who caused this problem in the first place?

The settlement occurred because the current system works. When people commit fraud, or act in a commercially unacceptable matter, they are forced to right their wrongs. That's exactly what happened with me, and that's what happens with others in my situation. This bill will change that and change everything *to the benefit of those who caused the problem in the first place.* That makes no sense, and it isn't fair!

Question 4. What would have been some of the consequences to your business had you been required to wait 90 days to file your lawsuit against TEC America under the provisions of S. 461?

Answer. Simple—I would have gone out of business. Maybe waiting an extra 90 days is not a big deal to AT&T or other large corporations, but I run my business month to month. Each month I have to pay my electricity bill. I have to pay my employees. I have to pay my suppliers. Waiting three months to get any recovery would be deadly to me and thousands of other businesses like me.

Don't forget—every day that I had to wait was lost income, lost standing in the community, lost time. Ninety days of this—deadly! Why should I have to shoulder this additional burden? My case shows the unfairness of this—I provided months of notice and opportunity to fix. I only turned to litigation as a last result. Why, at that point in time, should I have to wait 90 MORE days? All rational businesses would try to get the problem fixed before having the expense of going to court. The 90 day provision is nothing but another 90 days of delay for big business at my expense.

Question 5. What would have been some of the consequences to your business had your rights to sue TEC America been limited under the provisions of S. 461?

Answer. Again, the answer is simple. S. 461 would have put me out of business. After long efforts to try everything else, my attorney and I decided that recourse to the court system was all that was left to us due to the company's refusal to do what was right. This bill makes that more difficult. The process is difficult enough on small businessmen. This makes it that much harder—and would be the last straw. I would have either gone out of business completely or had to cut expenses to continue the fight against TEC. That means failing to give my employees raises, or failing to pay for their health care, or refusing to contribute money and services to charities for years. That may not be the intent of this bill, but it is without a doubt its consequence.

Question 6. As a small business owner, what do think Congress should do to address the Y2K problem?

Answer. This is one of the most remarkable things about this bill: it does not do anything that will fix one computer, one software program, or one system. However, there are some great proposals out there that actually help small business to fight this problem. Senator Bond's S. 314 is a perfect example. Give me tax credits that help me absorb my expenses for dealing with the Y2K. Make it easier for me to get SBA loans. Those are the kind of actions that Congress should take.

If you must pass this new scheme, however, *exempt small business from this bill—we don't want any part of it!* The bill and its proponents claim to want to help small businesses survive the Y2K crunch. I—and every other small business owner I speak to about this new scheme—are convinced that the bill will do the complete opposite. This bill should have an "opt-out" provision for small business.

I signed my contract with TEC knowing that state fraud and UCC statutes protected me. I know those laws, I trust those laws, and I expected those laws to work on my behalf should a bad actor ever threaten my business. I don't want this new bill, with its Federal standards and new procedural hurdles. If you are really trying to help me, let me decide what's best for me. Allow me to take my chances under state law as I always have, or allow me to use the new law (I suspect no small businesses ever would make this second choice—mark my words!)

Question 7A. Why are you so certain that S. 461 would have resulted in protracted litigation instead of a speedy settlement?

Answer. This bill would have *discouraged* a speedy settlement and encouraged litigation by making it very difficult for me to bring a successful suit. I'm not a lawyer, but the bill seems filled with chances for these companies to delay: the 90 day waiting period; the redundant notice requirements; the good faith provisions; the heightened proof requirements. All of these cause delays and hurt small business—those very people who were wronged in the first place. They allow big business to drag out the expense of the litigation, either putting the small businessman out of business or causing them to give up out of business necessity. They provide secret loopholes that nobody understands—but I'm sure the big companies will find ways to exploit them all—at my expense.

Question 7B. Why would TEC America have wanted to use protracted litigation instead of simply settling with you?

Answer. Just like me, the people at TEC are businessmen. If they know that I have to prove very difficult standards, that they have scores of new defenses to hide behind, and that it will be more difficult and take me longer to reach a jury of my peers (all reality in this bill) then they will choose to litigate rather than settle. They know that the longer they drag this out the more strain I am under, and the more likely I will either go out of business or give up. By creating this new scheme, and all of its attendant protections for these bad actors, this bill encourages massive litigation and discourages the settlements that occur when a business has to actually face up to what is has done before a jury of normal folks.

Question 8. The Chamber of Commerce, the National Federation of Independent Business, and other groups that claim to represent small businesses support S. 461. Do you agree with their stance? Why do you think they support this bill? Do you think that other small business owners agree with you or with them?

Answer. Quite simply, I think these guys have been in Washington too long. They've forgotten what it is like to be a small businessman, juggling loans, meeting a payroll, waking up at four each morning to open the store and closing its doors at ten that night. If they were still in touch with that, they wouldn't stand where they do on this bill.

They are not in touch with their membership. Every small businessman I speak to about this is shocked that these groups which supposedly represent them are acting as they are. I don't know why they are saying what they say—maybe they really

are out of touch, maybe they have another agenda. They sure don't represent me, though.

I'm actually a member of the Chamber of Commerce. Or, I was. When they recently called to renew my membership, I refused. I'm through with them. They are supporting a bill that would quite simply put me out of business. I won't allow them to say they represent me, because they don't. They have reduced the world into an almost ridiculous simplistic theory: plaintiffs are bad and any defendants are good. How can legitimate business interests stand behind such a proposition when it arbitrarily punishes small businesses like me, who have a terrible Y2K problem that someone else caused, and had to become a "plaintiff" when the manufacturer refused to fix the problem?

Every small businessman I have spoken to, here in Warren and around the country, seems to agree with me. I guess that I would encourage the heads of these groups to spend a day with me hauling boxes and dealing with customers and vendors. Then I guess they may remember what it's really like out here in the trenches. Then I'm guessing they'd reexamine their support for this bill.

RESPONSES OF B.R. MCCONNON TO QUESTIONS FROM SENATOR HATCH

Question 1. As a small businessman, wouldn't you rather get notice of a Y2K problem through a simple communication, which our bill would allow to happen, instead of hearing about it for the first time when served with a lawsuit?

Answer. As a small businessman, I would most certainly prefer being served with a notice of a Y2K problem to being served with a lawsuit. The last place a small business owner wants to end up is in the courtroom. The defendant's focus should be on fixing the problem, not dealing with attorneys and depositions. Every moment spent on the legal process is a moment not spent on fixing Y2K problems.

Question 2. Speaking from personal experience with the lawsuit with which you were involved, wouldn't a 90-day cooling-off period have given you the option of, focusing your resources, in your words, on anticipating and fixing a potential Y2K problem and resolving the dispute out of court instead of causing you automatically to focus your resources on preparing your legal defense?

Answer. My personal experience with the legal process would compel me to do *everything* possible to address problems and implement fixes during that 90-day "cooling-off" period. My suit was so incredibly wasteful and kept me from running my business. While it was eventually dismissed, there was no real winner. I can never recover the lost time and effort. Knowing I was facing a hard deadline to avoid a Y2K lawsuit would crystallize what already is a powerful incentive to address client Y2K concerns.

Question 3. You spoke about how your relationships with your vendors and clients are the key to your survival as a small business. As a result, it seems that you already have a natural market incentive to settle a dispute as quickly as possible and, when feasible, outside of court. Assuming this, wouldn't it be good for small business if we could provide a legal incentive to make sure this natural market incentive doesn't get overwhelmed by an avalanche of frivolous lawsuits?

Answer. I most certainly have a market incentive to address client problems. If I do not, I will not be in business for long. The biggest disruption to business that I can imagine would be "an avalanche of frivolous lawsuits." Lawsuits would immediately make the nature of my relationships with vendors and clients adversarial, instead of the partnerships that they are now. Keeping us all out of court and focused on fixing problems is the best course of action for everyone, and the direction that Congress should guide us with legislation.

We all are likely to be affected by Y2K issues. Small business owners will want rapid resolution of problems so that we can resume normal business operations. If we do nothing to encourage resolution of these problems, we cannot accomplish this goal.

RESPONSES OF HARRIS L. POGUST TO QUESTIONS FROM SENATOR HATCH

Question 1. You ask in your initial question the following: If this legislation is so harmful to small businesses why would the trade associations which represent those businesses support the legislation. You then go on to allege that my motives for testifying are based upon my own selfish reasons and that I have no concern for my client's well being.

Answer. With all due respect, the very premise of this question that I am nothing but an advocate for litigation is incorrect. I invite any one of your staff members

to come to my office and review the files that I am currently handling and the clients that I represent. More than 90 percent of my active files involve a small businessperson who has been taken advantage of or injured by the wrong of another and is seeking redress through the court system. Additionally, you will see in each and every file a letter, sent prior to litigation, which attempts to amicably resolve the matter. I serve my clients, the small businessperson who depend upon me to steer them through extremely difficult and challenging times and I do so with honor and with only their interests in mind. Any suggestion to the contrary, for example, that I would file a suit when a mere phone call providing notice will do, is unfair and untrue.

You ask why the groups that supposedly represent small business don't seem to agree that the Act is harmful to the small businesspeople they represent. I would suggest that they are simply out of touch with their membership. The small businessman, Mark Yarsike, who sat on the same panel as I did, didn't seem to agree with the lobbyist who supposedly represent him. Neither do any of the small businesspersons I represent. Perhaps the leadership of these groups spend too much time in Washington and have forgotten what it is like in the trenches. I simply reiterate what I said in my testimony, I have the names and addresses of hundreds of small businesspeople who will tell you that the Act would harm them.

As to Mr. McConnon's testimony, I would venture to guess that Mr. McConnon had not read the Act prior to testifying. Even if he had, he would not have understood or comprehended the broad and far reaching implications that the Act has. In his testimony Mr. McConnon emphasized three points. First, Congress must create incentives to mitigate the Y2K situation. He stated that "it is essential that businesses of all sizes are urged to address their Y2K problems NOW." I agree wholeheartedly with this statement by Mr. McConnell. Unfortunately, I fail to see how the proposed legislation in any way helps us address the current Y2K situation. The Act's purpose is to limit lawsuits that occur after 1/1/00 and in no way creates an incentive for businesses to correct their Y2K problems today. To the contrary, common sense dictates that if the threat of litigation exists, a company will do more to correct the situation. I cannot comprehend the argument that has been expounded that companies are being counseled to be less active in solving their Y2K problems due to the threat of litigation. Such an argument defies all logic.

I also agree with the second point made by Mr. McConnell that "disputes should be settled as quickly as possible and outside of court when feasible." As we well know, more than 90 percent of lawsuits which are in fact filed never of to trial. Additionally, it cannot be disputed that every individual would rather settle their disputes than litigate them. In each case I handle, as well as those handled by other members of my firm, we always attempt to amicably resolve disputes prior to resorting to litigation. Unfortunately, an amicable resolution is not always possible.

The third and final point made by Mr. McConnell dealt with the need to curb the filing of frivolous lawsuits. I am still at a loss as to why there is this misconception that there will be such an increase in the filing of "frivolous" lawsuits resulting from the Y2K problem. While there indeed may be many lawsuits resulting from the Y2K problem, they are not the making of the trial lawyers but are the result of companies knowingly and intentionally selling defective software and products with embedded chips. By attempting to shift the focus of the Y2K problem from the party truly responsible to the trial lawyers is clearly unjustified and unfair. Furthermore, there are currently many safeguards in place which deter the filing of frivolous lawsuits. These include Federal Rule 11, as well as similar state statutes.

These are the three areas addressed by Mr. McConnell. He concluded his remarks by stating: "I believe the bill introduced by Senators Hatch and Feinstein, the Year 2000 Fairness and Responsibility Act, will accomplish these three important goals." He may be correct, but what he fails to understand is that the Act does much more than that. It will close the courthouse door to thousands of small businesspeople throughout this country who will lose their businesses if this Act becomes law.

Question 2. You assert that the 90 day cooling period will act as an incentive to fix Y2K problems, avoiding the need to hire "expensive" lawyers like myself. You further assert that this will correct the current system.

Answer. In my ten years of practice, I have never instituted a commercial litigation without first contacting the other party in an attempt to try to amicably resolve the matter. I am quite sure that this is the practice of the vast majority of attorneys in this country. Everyone would like to resolve their disputes in the most expeditious fashion possible. Accordingly, I adamantly believe that your premise, that in most instances, lawyers file lawsuits prior to trying to amicably resolve their disputes, is flawed.

The Act allows a responsible party to sit on their hands for 90 days while the injured businessperson is left holding the bag. It is common knowledge, and has al-

ready been seen in the Produce Palace situation, that the Y2K problem could cause the total disruption and inability of a small businessperson to conduct business. If a business was required to wait 90 days, 90 days in which no business at all is being conducted, it would forever shut down many small businesses. As evidenced by Medical Manager's conduct, defendants in many situations do not appear anxious to resolve disputes until litigation is commenced.

The Medical Manager is a classic example of how the 90 day waiting period would have caused massive damage to thousands of medical practices throughout this country. If the physicians were required to wait 90 days after Medical Manager was notified of the problem, thousands of practices would have been spending enormous sums of money unnecessarily upgrading to the Year 2000 compliant version of the software since Medical Manager was telling these practices that was the only way to become Year 2000 compliant. This is money which otherwise could have been used to create superior health care for the millions of patients instead of lining the pockets of a company that knowingly and intentionally sold a defective product and then attempted to make hundreds of millions of dollars from their own misdeeds.

Furthermore, the filing of a lawsuit does not prolong the possible resolution of the matter. If anything, it speeds up the process due to the fact that clients would rather spend their money settling a matter than paying their attorney. The cases that drag on for years obviously had no possibility of settling early and the 90 day period would do nothing to help those situations.

Question 3. You assert that the Medical Manager case, in which I was lead counsel, provided more benefit to the attorneys than to the class members.

Answer. You seem to take the position that the settlement was unfair since the Company's out-of-pocket expenses were only $600,000 to the customers while paying $825,000 to the attorneys. Pursuant to this line of reasoning, if we were able to get everybody the free upgrade so that Medical Manager would have had $0 out-of-pocket expense to the customer, I assume that you would contend that the attorneys should not receive any attorney's fees at all. Unfortunately, you fail to see the benefit which was received by the thousands of physicians across the country in this case. Prior to my involvement in this matter, Medical Manager was charging its customers between $10,000 and $25,000 to upgrade their systems to become Year 2000 compliant. This was so even though Medical Manager had sold some of these non-compliant systems within weeks of announcing that these systems would not operate after 12/31/99.

Instead of Medical Manager pocketing approximately $225,000,000 (15,000 customers × $15,000 per customer) from their own misdeeds, we allowed the physicians to keep this money to be used to improve health care in this country. I am very proud of the result. I wholeheartedly disagree with your assertion that the lawyers profited far more than their clients in this matter. You should also note that this settlement was entered into with the assistance of a Federal Magistrate.

To clarify your question regarding the attorney's fees, as you are aware, there were four additional actions brought against Medical Manager in California, New York, Pennsylvania and Florida. The $825,000 figure is to pay the attorneys in *all* of these cases. Additionally, the expenses that all of these attorneys incurred must be paid out of this lump sum. Although we are still calculating that number, it will be approximately $75,000. Accordingly, after expenses we will be left with approximately $750,000 to be divided between the various attorneys in this matter. I have reviewed the time expended by each of these firms. Multiplying that number by the attorney's hourly rate you arrive at a number which is extremely close to the $750,000 figure. Additionally, although the settlement was entered into in December of last year, work continues on this matter today. Notice of the settlement was sent to the approximately 15,000 members of the class. I receive several calls a day from physicians across this country discussing the settlement and thanking me for helping them in this situation. I personally respond to each one. Not one of these physicians has ever complained about the attorney's fees in this case. I myself have spent in excess of 500 hours litigating and resolving this matter.

Finally, I disagree with your statement that this case is "a model of the abuse of class action procedures". To the contrary, I believe the Medical Manager case is a model to be used to show the benefits of class actions. Here, without the class action mechanism, we would not have been able to obtain the outstanding result due to the prohibitive cost factors in bringing each case individually. Class action provisions exist because they have been found to bring justice to diverse and dispersed individuals or businesses who have been aggrieved. Had a class action suit not been filed in the Medical Manager case thousands of doctors would individually have had several options: (a) pay the upgrade fee of over $15,000 because it just didn't make economic sense to spend tens of thousands of dollars on a lawsuit for that sum; or (b) each doctor would have had to file an individual suit. Thousands

of cases, all with the same operative facts, would have been filed in state courts throughout this country. Talk about clogging the system!

Instead, what happened? Only a handful of cases were filed. All interested parties were contacted. Thousands of physicians got free upgrades or rebates. The system wasn't clogged, to the contrary, a quick settlement resulted. Efficiency ruled the day, and all involved, including the defendant, agree that the result was a win win for all parties involved.

Question 4. This question deals with how the Act would have affected the Medical Manager case. Please note that my response deals with the Medical Manager case as well as how the Act would affect similar actions.

Answer.

Sec. 101

First, in my initial contact with Medical Manager, I requested a response to my demand that they fix Dr. Courtney's system within several weeks. I did in fact receive a response within that time in which Medical Manager refused to fix Dr. Courtney's problem. Accordingly, I filed suit. If I was required to wait an additional 75 days, hundreds of physicians across this country would have been damaged by unnecessarily paying tens of thousands of dollars for upgrades to the Y2K compliant version of the Medical Manager system since they would have been unaware that an action had been instituted against the company. Additionally, the 90 day waiting period would have made no sense since Medical Manager refused to fix the problem well prior to the 90 day period. The Act does not take this into account. According to the Act, if the defendant responds within the 30 day window and says it won't fix the problem or responds with a totally inadequate response, you still need to wait an additional 60 days to file suit. An example of such a response may be that the company attempted to fix the Y2K problem during the course of the previous year and that it does not plan to do anything further. In such a case, making a plaintiff wait until the expiration of ninety days makes no sense.

Sec. 103(c)

In the Medical Manager case we set forth a count under the New Jersey Unfair Trade Practices Act, N.J.S.A. 56:8–1, et. seq. Many states have similar statutes in which the state of mind of the defendant is a critical element in proving a deceptive or fraudulent act. In many actions, although you are quite sure that such a state of mind is present, the evidence of such is not revealed until discovery is taken. Under the Act the plaintiff is required to "state in detail the facts giving rise to a *strong inference* that the defendant acted with the required state of mind." If a plaintiff fails to do so the defendant can file a motion to dismiss pursuant to Sec. 103(d)(1). Furthermore, Sec. 13(d)(2) further prolongs the litigation process and further increases the damages which are being sustained by a plaintiff whose business is shut down by a Y2K problem, by staying discovery during the pendency of such a motion. This could unnecessarily add an additional 30–60 days to the litigation process.

Sec. 201

Every piece of software, as well as many products sold today, contain contractual terms which limit the manufacturers' liability as well as limit those damages which are recoverable in case of a product failure. In the Medical Manager case, we set forth a claim for breach of implied warranty of merchantability in order to overcome the limiting language in the software license agreement. In other similar cases, a claim for breach of express warranty has also been made.

Pursuant to Sec. 201, such claims would be totally extinguished as long as the defendant places in the software license agreement or other similar document, language which limits or excludes liability or disclaims any and all warranties. According to the proposed legislation, if a manufacturer makes certain representations concerning the nature and character of its product and those representations turn out to be completely false, a plaintiff will be unable to recover under either a breach of contract or breach of warranty theory as long as the limiting language is contained in the contract. Such a result is patently unfair.

Sec. 302

As previously stated, many consumer fraud statutes require that the plaintiff prove defendant's state of mind as an element of the cause of action. Here, instead of having to prove this element by a preponderance of the evidence, which is the standard of almost all other civil causes of action, the burden of proof is raised to clear and convincing evidence. Additionally, the burden of proof is inexplicably raised in sections (b) and (c) which pertains to negligence actions. I fail to see how this promotes the purpose of the Act, that being, the prevention of the filing of frivo-

lous lawsuits and the solving of the Y2K problem. If every other civil cause of action requires only that it be proven by a preponderance of the evidence why should this be any different?

Sec. 303

Section 303(2) may have totally extinguished Dr. Courtney's tort claims in this matter. This section provides, as a complete defense, that the party took measures that were reasonable under the circumstances to prevent the Year 2000 failure from occurring. Medical Manager did indeed take certain steps but were charging exorbitant sums to implement those steps.

I appreciate you giving me the opportunity to take part in this process. I feel an obligation to reiterate my position and the position of the hundreds of small businesspeople who I represent regarding the Act. I have serious doubts concerning the stated purpose of the Act which I understand to be the prevention of the filing of frivolous lawsuits and the need to focus on solving the Year 2000 problem prior to January 1, 2000. The Act goes much farther than preventing frivolous lawsuits and in essence extinguishes the rights of many small businesspeople who have legitimate and proper claims. Additionally, it seems that the Act's focus is not on how to fix the problem prior to the next millennium but only how to prevent lawsuits due to a problem which was foreseeable and totally ignored by individuals in the computer industry. In your opening remarks at the hearing you stated that you and Senator Feinstein have "sought to produce a bill that encourages Y2K problem-solving, rather than encouraging a rush to the courthouse. It is not our goal to prevent any and all Y2K litigation. It is to simply make Y2K problem-solving a more attractive alternative to litigation." Unfortunately, I believe that this Act could have just the opposite effect. It would discourage such problem solving due to the fact that the threat of litigation has all but been extinguished. The companies who created this problem would not be held responsible and the burden of dealing with the repercussions from the Y2K problem would be thrust upon the shoulders of the small businessperson.

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March 24, 1999

Direct Dial
(609) 661-2076

The Honorable Orrin G. Hatch
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Hatch:

I have enclosed for your review the recent opinion of The Honorable Joel B. Rosen. Magistrate Judge Rosen recently presided over the hearing by which final approval was given in the Medical Manager case. I believe Magistrate Judge Rosen's statements will further bolster my response to your third question concerning the adequacy of the settlement in the Medical Manager case. Specifically, Magistrate Judge Rosen stated:

> This is a class action that I'm very comfortable with. Because it's fixed the problem in a timely fashion. It's saved not just the plaintiffs but their patients untold agita, which is a legal term, and all kinds of consequential damages. And the timeliness in fixing this is what I like about this case. It's fixing a problem. It's not some coupon that if you in the next year go to buy, as one of the attorneys mentioned, if you maybe go out and buy a new car, you might use. It's fixing a problem or putting money in the people's pockets, which I think is what this rule was really designed to do.

Opinion at Pg. 23.

> It's a pleasure having all you ladies and gentlemen here. You all conducted yourself professionally. I know that this was highly fought. I was in the room a couple of times. And I think that this is a class action that I'm very comfortable with since it is actually solving a problem, which is refreshing. That's what we should be doing in this system. And it's solving it in a timely fashion and in a fair way to all the parties.

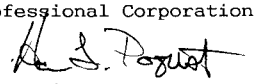
Opinion at pp. 25-26.

As can be seen, contrary to your assertion that this case was "a model of the abuse of class action procedures" all parties involved as well as the Judge who presided over the litigation thought otherwise. I would appreciate you including this letter as well as Magistrate Judge Rosen's opinion as part of the record in this matter.

Please feel free to contact me if I can be of any further assistance.

Respectfully,

SHERMAN, SILVERSTEIN, KOHL, ROSE & PODOLSKY
A Professional Corporation



Harris L. Pogust

HLP/lmh
Enclosure

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3
4 ROBERT COURTNEY, D.O. and :
5 LONNY MATLICK, D.O., :
6 Plaintiffs, : CIVIL ACTION NO.
7 v. : 98-Civ-3347 (JEI)
8 MEDICAL MANAGER CORPORATION, :
9 Defendant. :
10
11 BEFORE: THE HONORABLE JOEL B. ROSEN, USMJ
12
13 Mitchell H. Cohen U.S. Courthouse
14 One John F. Gerry Plaza
15 Camden, New Jersey 08101
16 Monday, March 15, 1999
17 1:15 p.m.
18
19 (PARTIAL TRANSCRIPT - FINAL JUDGMENT)
20
21
22 SILVER REPORTING SERVICES
23 3131 PRINCETON PIKE, BLDG. 4D, SUITE 212
24 LAWRENCEVILLE, NJ 08648
25 (609) 844-1212 or (800) 722-7223 (TOLL FREE)

1

2 A P P E A R A N C E S:

3

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23 For the Plaintiffs.
24
25

1 A P P E A R A N C E S (CONTINUED)
2
3 AKERMAN, SENTERFITT & EIDSON, P.A.,
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5 - and -
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13 EPSTEIN & GROSS, P.A.,
14 BY: LORA L. FONG, ESQ.,
15 One Riverfront Plaza
16 Newark, NJ 07102-5400
17 For the Defendant.
18
19 PRESENT:
20 ALANA B. WEXLER, Law Clerk
21 DR. MICHAEL HUNDERT
22
23
24
25

1 THE COURT: Back on the record.
2 The parties have requested that I enter
3 this as a final judgment pursuant to the Magistrate
4 Judge's Act. Under that act, if the parties consent,
5 then the magistrate judge can enter a final judgment,
6 and any appeal will be directed to the Court of
7 Appeals.
8 Normally, I would not do that in this kind
9 of case in case there was an objector who would want
10 to appeal, but there aren't any objectors here.
11 There are a number of people who want to--sit down,
12 everyone. Sit down and relax.
13 There are a number of people who want to be
14 excluded. The one objector who was--well, there were
15 three. One was mute. The other, essentially, I read
16 as a request to be excluded. And Dr.
17 Hundert--correct?
18 DR. HUNDERT: Correct.
19 THE COURT: --withdrew his objection and
20 wanted to be excluded. So what I suggested, and in
21 an attempt to move this, or what has been suggested
22 is that I go ahead and handle this. I still--and is
23 that what the parties want me to do?
24 MR. KLAFTER: Yes, your Honor. We're
25 prepared to proceed in that manner.

1 MR. HARTZ: As to the defendant, we're
2 prepared to proceed in that manner as well.
3 THE COURT: Okay.
4 The only thing I'm going to ask you to do
5 is before you leave, to sign a written consent, and
6 we'll take care of that.
7 MR. HARTZ: Certainly.
8 THE COURT: You can have a seat.
9 Off the record again.
10 (Discussion held off the record.)
11 THE COURT: I'm going to put a brief
12 opinion on the record. And I also reserve my right
13 under the local rule, the number of which escapes me
14 because they've renumbered it, that should there be
15 an appeal of this, that I reserve the right to edit
16 the opinion portion of this transcript only.
17 Currently pending before the Court is an
18 application to certify a settlement class and approve
19 a settlement in fees in a matter that's pending
20 before this court.
21 For the reasons noted below, I find that
22 the settlement is, in fact, fair and just and is in
23 compliance with the prerequisites of Rule 23, as well
24 as the jurisprudence of this circuit concerning the
25 fairness of a class action settlement.

1 Additionally, I find that the fee
2 application as well as expenses applied for are
3 reasonable, both under a lodestar analysis or as well
4 as a percentage fee, contingent fee analysis, and,
5 further, I find that the expert's fees are reasonable
6 and appropriate.
7 Now, this case involves a claim by a group
8 of punitive class members that Medical Manager
9 Corporation sold a software product that was
10 allegedly defective in that it was not Y2K
11 compliant. I'm summarizing this.
12 Of course, the defendants--and let me note
13 this right up front. The defendants do not
14 acknowledge any liability or any fault here. And if
15 I forget that later on, I want to make sure the
16 record is clear here.
17 The essence of the case is that this
18 software, which is used by physicians and other
19 medical providers, was not Y2K compliant. The
20 amended complaint was filed October 16, 1998. Many
21 thousands of copies of this software were sold
22 throughout the United States, costing on the average
23 approximately $5,000.
24 Off the record.
25 (Discussion held off the record.)

1 THE COURT: As I've indicated, the
2 plaintiffs allege that this software contains a
3 latent and fatal defect that renders it unable to
4 process dates with the year commencing in 2000. The
5 software called Medical Manager is used by doctors
6 and physicians to automate billings and patient
7 records.
8 The plaintiffs allege, and the defendants
9 deny, of course, that the defendants sought to
10 capitalize improperly on a defect by requiring
11 punitive class members and plaintiffs to purchase a
12 new hardware required to run Version 9, as well as
13 software. That is the essence of this case.
14 The case is brought as a proposed class
15 action. And there is a proposed settlement class,
16 which again I'm summarizing. The documents speak for
17 themselves. But it covers all persons and entities
18 which purchased or lawfully obtained versions 7.0--
19 MR. KLAFTER: X.
20 THE COURT: --or 8.X with the Medical
21 Manager software from the period December 1990 until
22 November 1997, including such persons or entities who
23 purchased an upgrade to Version 9 on or before
24 December 16, 1998. That is the date the proposed
25 settlement was publicly announced.

1 The plaintiffs believe that there are
2 approximately 2,169 members.
3 MR. KLAFTER: 22,000.
4 THE COURT: I misspoke. 22,169 members of
5 the class. This was, in this case, relatively easy
6 to identify in that it has been described by the
7 defendants when they sell this software before it's
8 activated, there is a code that is activated so the
9 defendant knows who the owner or the operator of the
10 software is.
11 Therefore, in this case, it was very easy
12 to specifically identify the class members. The
13 plaintiffs allege various breaches of warranties that
14 have been made in connection with the sale of the
15 software, including implied warranties of
16 merchantability and fitness, breach of express
17 warranties, as well as alleged violations of the New
18 Jersey Deceptive Trade Practices statute.
19 In this action, the plaintiffs sought to
20 compel the defendant to provide a free patch to
21 repair the defect, to do so expeditiously to ensure
22 the fact that the patch's existence is directly
23 disseminated to the Medical Manager's users. For
24 those of you who allegedly upgraded to Version 9,
25 plaintiff's sought restitution for the cost of their

1 allegedly unnecessary upgrade.
2 Now, as the parties have noted, and I have
3 noted myself, the timeliness of the resolution of
4 this case is, I believe, a factor that weighs very
5 heavily in approving this settlement. As we all
6 know, and I think I can take judicial notice of this,
7 January 1st of the year 2000 is fast approaching.
8 For those of us over 50, the time seems to be moving
9 over even quicker. At least let me speak for
10 myself.
11 MR. HARTZ: Very fast.
12 THE COURT: Very fast.
13 I'm considering that and keeping that in
14 the back of my mind. And in my discussion here, this
15 is a very time sensitive problem, as I've indicated
16 earlier. But for the fact that this matter has come
17 to resolution, this alleged defect could have had
18 disastrous effects to the 22,000 users, not to
19 mention your insurance companies and pay--other pays,
20 such as Medicare, Medicaid. But, most importantly,
21 it would have wreaked chaos in doctors' offices and
22 had an adverse impact primarily on their patients and
23 also on their ability to operate.
24 And one of the things that's also been
25 pointed out to me here is that under Medicare and

1 Medicaid regulations, there's an April 1st deadline,
2 I'm advised, for medical providers who participate in
3 those programs to be Y2K compliant by April 1st of
4 1999.
5 Is that correct, Counsel?
6 MR. KLAFTER: Yes, your Honor. That's what
7 we were advised.
8 THE COURT: Now, this case was filed in
9 Superior Court of New Jersey June 9th of '98. It was
10 removed July 16th of 1999.
11 MR. KLAFTER: '98.
12 THE COURT: '98?
13 As counsel has indicated here, counsel for
14 the plaintiffs undertook substantial written
15 discovery in terms of interrogatories, document
16 requests, depositions were taken of the named
17 plaintiffs. Most critically, the plaintiffs retained
18 an expert who did an analysis of this product and the
19 harm that it could cause, in their view, by not being
20 Y2K compliant.
21 So the plaintiffs' counsel had the benefit
22 not only of their own discovery, but of a qualified
23 expert in the field who, as has been represented to
24 me, has performed his own detailed analysis.
25 In the fall of this year, there were a

1 number of settlement conferences. I participated at
2 times, at times I did not. But counsel, after
3 meeting a couple of times and conferring, entered
4 into a proposed settlement agreement, which, of
5 course, since it's a punitive class action, was
6 subject to this court's approval.
7 Now, I've commented briefly on the damages,
8 but let me be more particular. Under plaintiffs'
9 analysis of the alleged defect, the proposed damages
10 to the settlement class would have been in excess of
11 $50 million. As I've stated, approximately 22,000
12 users of the Medical Manager--there are approximately
13 22,000 users of the Medical Manager software. Of
14 these users, an estimated 5,878 upgraded to Version 9
15 on or prior to December 16th, which is the date when
16 this proposed settlement became public. Correct?
17 MR. KLAFTER: Correct.
18 THE COURT: Plaintiffs' counsel believes
19 that it would cost each class member a minimum of
20 $2500 to purchase Version 9 and a minimum of $5,000
21 after including additional hardware and other
22 changes.
23 MR. KLAFTER: Charges.
24 THE COURT: Charges.
25 Assuming this all to be correct, the money

1 spent to correct this problem would have been
2 substantial.
3 Now, the defendants do not acknowledge that
4 exact dollar amount. That it's somewhere in excess
5 of $50 million. And the defendants acknowledge,
6 while they have not done a calculation, the proposed
7 settlement is clearly not one of these class
8 settlements where the only people who are making
9 money are the attorneys. And that practice has been
10 criticized profoundly, I think it's safe to say. I'm
11 not casting aspersions on anyone, but this is not one
12 of those cases.
13 There is something here of direct financial
14 value, both actual damages and cost of replacing this
15 equipment, not to mention the consequential damages.
16 I would guess if you're running a medical facility
17 and you're unable to send out bills to Medicare or
18 Medicaid or to insurance companies, you've got a real
19 problem. And I'm not even talking about
20 consequential damages here; I'm talking about actual
21 damages.
22 Now, in order for a court to approve a
23 proposed class settlement under Rule 23, the court
24 must determine whether the proposed compromise is
25 fair and adequate. And, in this case, I want to

1 address, before I get into the various factors, that
2 this circuit has noted in both the General Motors
3 case, as well as Girsch and other cases, this
4 prerequisites under Rule 23. And I want to address
5 those now.
6 Under 23(a), first there must be a precise
7 class definition. I believe that the class
8 definition here is very precise. It gives notice
9 consistent with due process as to who is bound and
10 who is not bound. It is particular as to time and
11 activity and is very identifiable. This is a group
12 of identified people who purchased a piece of
13 software that does essentially the same thing with
14 certain modifications for all of them, I guess
15 depending on the nature of your practice, and it
16 might have certain bells and whistles, but I believe
17 the class definition is clear, precise and consistent
18 with notions of due process.
19 The other prerequisites are, number one,
20 that the class is so numerous that joinder of all
21 members is impracticable. I find, and I don't
22 believe that that is disputed in this case, there are
23 in excess of 22,000 potential class members here and
24 bringing individual cases is, in fact, impracticable.
25 Number two, there are questions of law, in

1 fact, common to the class. Clearly, the law is
2 common, i.e., that various alleged warranty breaches
3 and consumer law breaches are, in fact, common, and
4 the facts are common; again, because it's essentially
5 a cookie-cutter product. It's not a product that can
6 only be used by the medical profession for the
7 purposes noted. It's not something that's of a
8 general application to the public.
9 Number three, the claims and defenses of
10 the representative parties are typical of the claims
11 and defenses of the class. Well, the claims here are
12 clearly more than typical. They're essentially
13 identical for the reasons that I have previously
14 noted, as well as the defenses are identical.
15 Now, the fourth issue is that the
16 representative parties will fairly and adequately
17 protect the interest of the class. That looks to
18 whether, in fact, the class members are independent,
19 have standing or are of such character that, in fact,
20 they properly represent the class.
21 The two class representatives, as I
22 understand it, are, in fact, physicians, who use this
23 product and have standing in that it is alleged that
24 their version of this software is, in fact, not Y2K
25 compliant.

1 So they are certainly adequate. There has
2 been nothing suggested to me that would indicate they
3 are not adequate representatives or there is anything
4 about them that would make them unfit.
5 Additionally, case law suggests the court
6 must look not only to class representatives, but
7 class counsel, since in a class action attorneys have
8 a heightened rule of its fiduciaries to the class
9 members. And, in this case, I find, and the record
10 supports, that counsel here are experienced in their
11 field, they're professional. My knowledge of them,
12 based on their work in this case, in terms of their
13 oral presentation and paperwork, suggests that they
14 are very fine counsel with an excellent track records
15 in this field. So I have absolutely no concerns
16 about that.
17 Now, 23(b) requires a court to determine,
18 give certain factors, to indicate whether, in fact,
19 the class, even assuming arguendo, that the
20 prerequisites today are satisfied. There are other
21 criteria that must be looked at. And we're talking
22 about in this case it's a 23(b)3 class action.
23 I have found for the reasons, though, above
24 that the prerequisites exist. A 23 class action is
25 an opt-out class action, in that it will only be

1 binding on those parties who do not choose to opt out
2 of the class action. This provides a mechanism for
3 those who, for reasons unknown, choose to go their
4 own way or for other reasons, personal or economic
5 reasons that they don't want to be bound.
6 Rule 23(b)3 notes that the court must find
7 the questions of law or fact common to the members
8 predominate over any questions affecting only
9 individual members. I think clearly that's the case
10 here. There is a commonality here. This is not a
11 mass tort in the sense where individual-like damages
12 depend on a person's particular medical condition,
13 for example, while the damages may vary, they're
14 calculable here and they clearly predominate only
15 over individual issues affecting the parties.
16 Further, it's clear to me that the class
17 action in this case is superior to the fair and
18 efficient adjudication of this controversy. As I've
19 indicated before, having 22 or 23,000 cases versus
20 one that would resolve all these in a fair manner is
21 far preferable.
22 There are certain findings that a court
23 must consider, may consider in making these findings:
24 that the interest of members of the class and
25 individually controlling the prosecution or defense

1 of separate actions predominate. And I think that's
2 true here, the extent and nature of any litigation
3 concerning the controversy already commenced by or
4 against members of the class. I think there are one
5 or two other cases pending here, but it's been
6 represented to me, this settlement here sort of led
7 the way, and all the other cases will settle.
8 Is that right?
9 MR. KLAFTER: Your Honor, it resolves all
10 of the belated settlement actions except for the two
11 actions. Mr. Gold has one in Illinois and one in
12 Massachusetts.
13 THE COURT: And it certainly will not, nor
14 is it intended to, affect those actions.
15 MR. KLAFTER: Those are not class actions.
16 THE COURT: But this will not affect them.
17 Have they opted out here?
18 MR. KLAFTER: Yes, your Honor.
19 MR. HARTZ: Yes, your Honor.
20 THE COURT: There's clearly a desirability
21 of concentrating this litigation in one forum. It's
22 efficient not only for counsel and the court, but the
23 parties. And the difficulty is likely to be
24 encountered in management. Well, I guess any class
25 action is a little harder to manage than--

1 MR. KLAFTER: Your Honor, under the United
2 States Supreme Court decision in Hampkin, the court
3 need not focus on the manageability issue when
4 dealing with a settlement class.
5 THE COURT: I'm not worried about that. I
6 just thought I'd mention it.
7 Now, courts are particularly sensitive to
8 settlement classes. The Supreme Court and this
9 circuit have noted that courts cannot give short
10 shrift because parties come in and say, Here it is,
11 settle it, and the court rubber stamps it. I've
12 looked carefully at this, which is why I've taken the
13 time to go through the particular items here. And
14 I'm satisfied that the prerequisites have been
15 satisfied.
16 Now, the General Motors case and Girsch lay
17 out, as counsel has indicated, certain other criteria
18 that I want to comment on that a court should
19 consider in determining whether a proposed class
20 action settlement is fair, reasonable and adequate.
21 Number one, the complexity and duration of
22 the litigation. Unquestionably, this is complex.
23 Unquestionably, if it was not resolved, I'm not going
24 to say how long it's going to go on, because Judge
25 Irenas runs a pretty tight ship. But there was

1 clearly the possibility that resolution would not
2 have occurred in time to provide an effective,
3 practical solution to a computer crash involving this
4 software in December 31st of 1999, the reaction of
5 the class to the settlement. And approximately
6 22,000 parties were noticed. And I'm going to talk
7 about notice in more detail in a while. Claims
8 manager was established, approximately 2,000 proof of
9 claims have been submitted. There were approximately
10 28, 30 parties who asked to be excluded.
11 MR. KLAFTER: Twenty-nine.
12 THE COURT: Twenty-nine? Excuse me.
13 There were three of the parties who
14 originally noted themselves as objectors, one I've
15 excluded from the class.
16 What's the name of that place in
17 California?
18 MR. KLAFTER: Blue Ridge.
19 THE COURT: Yes.
20 MR. KLAFTER: Blue Ridge Medical
21 Specialists.
22 THE COURT: Because their letter was really
23 a request to be excluded. Additionally, one other
24 objector. Their problem has been, according to
25 correspondence submitted, has been resolved by the

1 installation of software.
2 MR. KLAFTER: That's West Coast Eye
3 Institute.
4 THE COURT: And Dr. Hundert has withdrawn
5 his objection and wants to be excluded. So, in fact,
6 there are no objectors.
7 MR. KLAFTER: If you want to do this,
8 there's one other one you should mention. And that's
9 the American Medical Management one. That's the one
10 in California. Blue Ridge is in Georgia. And your
11 Honor I believe indicated that the court would rule
12 that their objection be deemed a request for
13 exclusion.
14 THE COURT: Which is my reading of it.
15 That's essentially how I read it.
16 Now, let me be clear. This settlement does
17 not in any way prejudice the rights of those parties
18 who are excluded. It does not prejudice the rights
19 of parties who might have purchased this before
20 December of 1990. Correct?
21 MR. KLAFTER: Correct.
22 THE COURT: And it doesn't prejudice the
23 rights of parties who might have any other disputes
24 with this defendant.
25 MR. KLAFTER: Well, other than Y2K.

1 THE COURT: Other than the issues in this
2 lawsuit.
3 MR. HARTZ: Other than the matters set
4 forth in the settlement agreement.
5 THE COURT: In the settlement agreement.
6 With regard to the risks of number three at
7 the stage of the proceedings, this case, complaints
8 and answers have been filed, there's been motion
9 practice, there's been substantial discovery and
10 investigation, and the plaintiffs have noted that
11 they obtained an expert who has a product who he can
12 actually work with here to make a determination.
13 So I'm satisfied that this case has matured
14 enough so that the parties and the court can properly
15 evaluate it. The risk of establishing damages, well,
16 you know, who knows? This is always a tough one. I
17 guess there are risks here in that certain of the
18 causes of action may not have made it past motion
19 practice, in which case, certain of the components of
20 the damaged claim may have died. There are some
21 ripeness issues, there are some standing issues. And
22 I'm certainly not taking a position, but there
23 clearly is a risk of establishment damages here.
24 Number six, the risk of maintaining a class
25 action. Again, this is being vigorously opposed.

1 And while I personally think that it's appropriate as
2 a class action, I certainly couldn't speak for Judge
3 Irenas. I guess there is always a risk.
4 The ability of defendants to withstand a
5 greater judgment. Well, it's been represented to me,
6 and not disputed, that this settlement has a
7 potential value of in excess of $50 million, and the
8 companies last year, their income--was that the
9 income number?
10 MR. KLAFTER: Yes, your Honor.
11 THE COURT: Was approximately $50 million.
12 MR. HARTZ: I believe it was profit.
13 THE COURT: Profit. Excuse me. Of course,
14 that doesn't account for other assets they might
15 have. But, factually, it's a serious problem. The
16 range of reasonableness in light of the best
17 recovery, I think this settlement fund is reasonable,
18 because it either puts money in people's pockets or
19 helps them fix the problem. They either get a fix
20 or, in certain cases, they have an option for getting
21 money. A thousand dollars. Correct?
22 MR. KLAFTER: Modules worth a thousand
23 dollars or cash.
24 THE COURT: Or cash. So that something is
25 being put in their pocket to solve the problem before

1 a problem becomes worse.
2 Number nine, the rate of reasonableness in
3 light of all of the attendant risks of litigation. I
4 think it is fair and reasonable, and I keep going
5 back to this because I think it's important. This is
6 a class action that I'm very comfortable with.
7 Because it's fixed the problem in a timely fashion.
8 It's saved not just the plaintiffs but their patients
9 untold agita, which is a legal term, and all kinds of
10 consequential damages. And the timeliness in fixing
11 this is what I like about this case. It's fixing a
12 problem. It's not some coupon that if you in the
13 next year go to buy, as one of the attorneys
14 mentioned, if you maybe go out and buy a new car, you
15 might use. It's fixing a problem or putting money in
16 people's pockets, which I think is what this rule was
17 really designed to do.
18 So for all those reasons, I find that the
19 proposed settlement is fair and just in the best
20 interest of the class, that it's an appropriate
21 settlement class, and I'm not going to repeat
22 myself.
23 Let me address the notice issue. Rule 23
24 requires the best notice practicable. Well, the best
25 way--in this case, I find that that occurred. They

1 had the mailing list of people who bought this. In
2 addition, there was a substantial amount of money,
3 about $60,000 spent in a half-page ad in The Wall
4 Street Journal, as well as an ad in The Investors
5 Business Daily. So I'm satisfied that all
6 conceivable steps were taken to put people on notice
7 of this.
8 With regard to fees, I've taken a look at
9 the affidavits of counsel as to their fees and their
10 backgrounds and their work in this case. I find that
11 the lodestar multiplier is minimal.
12 Additionally, it's a relatively small
13 percentage of the total value of the settlement. So
14 even if you viewed this in the lodestar analysis or,
15 as some courts do, view this in the context of a
16 percentage, a contingent fee analogy, 28, 30 percent,
17 under either case, the fees in this case are
18 reasonable.
19 Further, there have been no objections to
20 them, although that's not controlling. I've looked
21 at them independently. And again, this is a unique
22 area of law, very high risk. And it's worked out in
23 a timely fashion. And I think counsel, in this kind
24 of case, should be rewarded for that.
25 I also find the expenses fair and

1 reasonable. This case depended--the largest expense
2 of the plaintiff was Dr. Grossman. There's no way
3 you could have gotten this case developed the way you
4 did without someone with his type of expertise. And
5 while it may under other circumstances seem to be
6 high, I think his background and what he actually did
7 here is appropriate.
8 So, for all of those reasons, I'm going to
9 approve the settlement and the fee. The final
10 judgment in order for dismissal will be entered. I
11 ask Mr. Pogust to get me by tomorrow, I want all the
12 parties who are excluded typed in. I don't want
13 anything handwritten in. And we're also going to
14 extend the date of filing proofs of claims. It was
15 supposed to be postmarked on or before today, so
16 people who put in claims late will have that
17 opportunity.
18 And before you leave, I'm going to ask you
19 to sign a consent, which you verbally have indicated
20 to.
21 Is there anything else?
22 MR. HARTZ: Nothing further for the
23 defense, your Honor, except to thank you for your
24 courtesy throughout. I really do appreciate it.
25 THE COURT: That's okay. It's a pleasure

1 having all you ladies and gentlemen here. You all
2 conducted yourself professionally. I know that this
3 was highly fought. I was in the room a couple of
4 times. And I think that this is a class action that
5 I'm very comfortable with since it is actually
6 solving a problem, which is refreshing. That's what
7 we should be doing in this system. And it's solving
8 it in a timely fashion and in a fair way to all the
9 parties.
10 Let me just mention one other thing. Even
11 assuming arguendo--I considered those two or three
12 objections as objectors rather than excluders. And
13 even assuming arguendo that their problems haven't
14 been worked out, I would still approve this
15 settlement. Because I have to look at the overall
16 benefit to the potential class. While I understand
17 some of the concerns, it's a question of thousands of
18 people having a problem solved in a fair way.
19 Although this is moot, I want the record to reflect
20 that even, assuming arguendo, if those objections
21 still existed, I'd still approve the class as being
22 fair and just and in the best interest of all the
23 parties.
24 Anything else?
25 MR. KLAFTER: No, your Honor. I also thank

1 your Honor for the court's time and patience.
2 THE COURT: Well, it was a pleasure having
3 all of you here. And before you leave, we'll sign a
4 consent, and that will be the end of it.
5 Do you want to, just for the record, order
6 just the opinion portion of this?
7 MR. POGUST: Yes.
8 THE COURT: Why don't you order it and
9 share the cost.
10 MR. HARTZ: Certainly, your Honor. That
11 would be fine.
12 MR. KLAFTER: I think we would really like
13 the whole thing.
14 MR. HARTZ: I'm prepared to share the cost
15 on that as well.
16 THE COURT: Fine. I was just trying to
17 save you money.
18 Now, I did reserve my right in case there's
19 an appeal under whatever the number of the rule is.
20 It's a rule that allows the court, if he or she does
21 an oral opinion on the record, to edit the opinion
22 portion only, and I reserve my right to do that,
23 although I don't think that's really an issue here.
24 But other than that, thank you all very
25 much for a job well-done.

1 Doctor, it was a pleasure. I hope you feel
2 that your trip down here was worthwhile.
3 DR. HUNDERT: I find the system to be
4 fascinating, and I enjoyed my time here immensely.
5 THE COURT: Well, it was a pleasure having
6 you here. And I know sometimes there's a little bit
7 of tension between the medical profession, not in
8 this case, and the legal profession, but I'm glad you
9 were here, because I think this was a good thing.
10 And occasionally we get to do, you know,
11 good things. And I think everyone acted in good
12 faith here, both the plaintiffs and the defendants.
13 And let me also reemphasize that nothing that I've
14 said is any finding in terms of liability as to the
15 defendants or any admission.
16 Anything else?
17 MR. KLAFTER: No, your Honor. Thank you
18 very much.
19 THE COURT: Have a good day.
20 MR. HARTZ: Thank you, your Honor.
21 (Hearing concluded at 3:35 p.m.)
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2
3 C E R T I F I C A T E
4
5 I, TAMMY L. SERGEANT (Certificate No. XI02065),
6 Certified Shorthand Reporter and Notary Public of the
7 State of New Jersey, do hereby certify the foregoing
8 to be a true and accurate transcript of my original
9 stenographic notes taken at the time and place
10 hereinbefore set forth.
11
12
13 Tammy L. Sergeant
14 TAMMY L. SERGEANT, CSR
15
16 Dated: March 22, 1999
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RESPONSES OF HARRIS L. POGUST TO QUESTIONS FROM SENATOR LEAHY

Question 1. Are you aware of any instances where manufacturers or vendors have tried to profit from Y2K problems of their own making?

Answer. Sadly, the answer to this question is a resounding "yes." It is ironic to me that this bill would provide protection to those very companies who have improperly profited off of the Year 2000 issue while limiting remedies of those who have already been hurt—the small business owners who are end users of non-compliant software and hardware. Examples of this "profiteering" abound—each small business person that I speak with has their own horror story.

The companies that are profiting are almost breath-taking in their opportunism. First, they sell goods that they know are non-compliant while promising that the goods will last "well into the future" or "into the 21st Century." Then, often only months later, they demand thousands of dollars to make these very goods Y2K compliant. This bill would not only fail to punish such behavior but shield these companies from liability! If a car dealer sold a car knowing it had a defect and then demanded a month later thousands of dollars to make it functional, they would be roundly chastised—rightly so—and subject to liability based on fraud statutes, the UCC, and various other state laws protecting consumers from such behavior. For some reason, however, when the good involved is software or hardware, Congress seems poised to give these companies a free "get out of jail" card.

The case of Dr. Courtney, a small town OB/GYN doctor from southern New Jersey, is a typical—and sadly not unusual—example of the type of profiteering that is occurring every day in the marketplace. Dr. Courtney purchased Medical Manager software for $13,000.00 in 1996—a huge expenditure for his sole practice. He did so only after a sales rep from the company came to his office and extolled the software, promising that it would last for over ten years.

One year later, he received a letter informing him that the software would not last ten years—it would not even be functional within months—unless Dr. Courtney spent another $25,000.00 to upgrade the system. Within a year of paying $13,000.00, he was asked to spend another $25,000.00 just to make the software work as the company had promised it would! Dr. Courtney was not alone—at least 15,000 other doctors had purchased the software and were asked to pay for the upgrade. By selling non-compliant software and then charging each of these doctors at least $15,000.00 to upgrade, only months after paying the original purchase price, the company stood to gain $225,000,000. This is fraud of the highest magnitude—and yet such a company would be *protected* by this bill while the doctors would find it harder to recoup their losses. This cannot possibly be what Congress intends.

The above example is not the only one I know of hundreds of such stories—for example, the medical school in Philadelphia that paid $100,000.00 for a system and was asked to pay $100,000.00 even though they had a software maintenance agreement which they paid thousands of dollars each year to keep in force and which covered such repairs. That's $100,000.00 that should go to scholarships, or textbooks, or treating indigent patients, not to a profiteering seller taking advantage of the Y2K scare.

An anti-profiteering provision should be a prominent feature of this bill—where is it?

Question 2. In your experience representing small businesses: (a) What would be the real world, practical effect of requiring small businesses to wait 90 days before pursuing legal claims against manufacturers, service providers, and suppliers for a Y2K problem? (b) Is it your experience representing small businesses that they try to solve their problems without spending the time and incurring the expense of litigation?

Answer. The answer to the first question is simple: such a waiting period will cause businesses to either go bankrupt or descend further into debt as a result of the unfair situation they are placed in by unsavory retailers. The proposal is being touted as nothing but a benefit to small businessmen, but such a view shows a fundamental lack of understanding of how small business operates and the difficulties of surviving in today's competitive marketplace.

First, before hiring an attorney and turning to the expensive justice system, any business will call the company who sold them the goods. To suggest otherwise is utterly lacking in any grasp of business reality. Any businessman will pick up the telephone, call the seller, and demand help in fixing the problem. It's a simple business decision—a call costs twenty-five cents, and hiring a lawyer costs more. Only if the businessman has tried and failed, after all possible efforts, to get a suitable response on their own will they turn to the court system. Therefore, a waiting period is already built into the system both in business reality and in state codes i.e., In UCC provisions requiring notice before filing suit).

Second, once a company does all that they can to get the product repaired, and finally decides that there is no other recourse than to turn to a lawyer, that lawyer will almost certainly write a letter to the company, giving them yet another chance to fix the problem. This process will often provide months or even years of time to fix the defects. If all else fails, and the company has shown no willingness to fix the problem, why cause the small businessman to wait another 90 days? It makes no sense—and is unfair.

Ninety days to AT&T or Intel is perhaps not a difficulty. For my client's however—the furniture retailers, the dry cleaners, the auto repair shops—a 90 day wait, during which their systems do not work, is often a matter of business' life and death. I hear this from them every day—they react in horror when I tell them of this provision. The Committee heard this from Mr. Yarsike, the small produce store owner from Michigan, who testified alongside me at the committee.

Bottom line—90 days of waiting equals a death sentence for too many businessmen.

Bottom line—every small businessman I know already provides the company with notice and an opportunity to fix their faulty products. Nobody wants to be tied up in litigation—least of all a small business man with limited resources. Litigation should be, and is, a last resort for small businessmen. But providing for such a long waiting period is simply anti-business and provides more opportunity for wrongdoers to stall and delay doing the right thing.

Question 3a. What would be the consequences to small business if S. 461's provisions limiting Uniform Commercial Code remedies becomes law?

Answer. When businessmen like Dr. Courtney sit down and sign a contract, they know that certain business fundamentals will protect them. If the person on the other side of the table commits fraud, they can be held accountable. If the other party sells a good promising that it is fit for a particular purpose but it ends up the good actually cannot perform that task, there is recourse for the wronged party. This bill takes that away from the very people who rely the most upon such laws. Withdrawing the protection of the various state's UCC is unfair and fundamentally against longstanding American ideas of justice.

When two parties sign a contract, they do so knowing that these laws exist in the background. Dr. Courtney, for example, signed his contract for Medical Manager software back in 1996, knowing that the UCC and other state laws in New Jersey protected him from unsavory business practices. This bill would reach back three years and withdraw those protections from him—just at the time he needs them most! The implied warranties—all gone. The standards of proof he expected to have to prove in case he did need to bring suit—all altered to his disadvantage.

If Dr. Courtney had agreed in the contract to five yearly payments to pay off the cost of the software and he failed to pay last year's amount due, he would be held responsible under the terms of the contract and pursuant to New Jersey state law. If Medical Manager breached the same contract and delivered goods that violated the UCC, however, Dr. Courtney would have to prove this case under the new Federal heightened standards—standards that didn't exist when he signed the contract. How can this be just?

Business count on certainty. The UCC provides that certainty, and the popularity of the UCC in all 50 states has been a fundamental part of the economic vitality in our economy. All businessmen know that the UCC exists and will protect those who play by the rules and provide remedies against those who don't. Taking away the UCC—as the bill does—creates uncertainty. Businessmen may hesitate before signing a contract, knowing that in two years Congress may alter the terms of the contract, or withdraw the safety and certainty provided by the UCC.

As the Justice Department noted at the hearing, this legislation is a massive, unprecedented departure from the norms established by years of contract, UCC, and state laws. This departure can only harm business and the economy, and ought to be considered in intricate detail before being passed into law. The small businessmen of our country deserve no less.

Question 3b. In your opinion, what incentives does S. 461 provide for businesses to address their Y2K problems now?

Answer. This bill provides NO incentives to address Y2K problems. As a matter of fact, it provides an incentive to do exactly the opposite. This is apparent on so many levels that it is difficult to know how to begin to describe the negative incentives.

First, this bill makes it procedurally more difficult to hold bad actors accountable. New delays—for example the 90 day waiting period—provide more time to stall. New procedural hoops to jump through—for example, the heightened notice requirements for class actions—make bringing these actions more costly, time-consuming,

and challenging. The stay of discovery during the pendency of a motion to dismiss can cause months of delay. If a court fails to rule on such a motion for six months, for example—a not uncommon occurrence—no discovery can occur. Only after such a motion is disposed of can discovery begin. All of these delays hurt those who were wronged in the first place. They allow big business to drag out the expense of the litigation, either putting the small businessman out of business or causing them to give up out of business necessity.

Second, the bill makes it more difficult for a plaintiff to prove their case by heightening the standards that must be proven. This provides an incentive to litigate instead of fix a problem. By raising these standards, the bill makes a bad actor's chance of success at trial more likely—making the choice to litigate instead of remediate or settle more attractive. The delays make it less likely that they will face a jury—again, providing an incentive to delay and then litigate.

Third, the bill provides unfair loopholes for businesses to hide behind. This will effect the ability of businesses who have been wronged to get justice in several ways. First, the new absolute defenses and reasonable efforts provisions will provide yet more incentives to litigate—a company can make half-hearted plays at fixing a problem and go to trial, knowing it can claim a "reasonable effort" to fix the problem. Next, the bill creates undefined and previously unknown provisions of law for companies to litigate over. What is a "reasonable effort?" What is "commercial impracticality" in the Year 2000 realm? Nobody knows, but the bad actors are sure to litigate every word of this bill, dragging out cases for years on such issues as what the definition of "mitigation" is or what "commercial impracticability" stands for. More delay, more likelihood that the small businessmen will go out of business to have to give up the suit.

The negative incentives go on. The positive incentives are remarkably absent. Why not create a bill that *helps* those who are wronged instead of protecting those that created the problem in the first place? Such bills exist—S. 314, Senator Bond's recently passed bill which actually does positive things to help business deal with this problem is a perfect example. That's what businessmen need more of.

Question 4. If the Senate Judiciary Committee were to decide to exclude small business plaintiffs from the scope of this bill, or were to give them the option of utilizing the features included in S. 461, what would be your response?

Answer. Now that makes sense! Small businessmen stand to lose the most from this problem—they stand to go out of business. The large corporations can afford to take a one-time charge of $25,000 to upgrade their software. The small businesses I represent imply cannot afford such charges—it would mean laying off an employee, deciding not to provide health care to their workers that year, or shutting their doors.

Congress should do everything possible to *help* these small businesspeople survive these problems which they didn't create. Allow them to rely on a jury of their peers without waiting extra months. Permit them to prove the same standards that they would need to meet in any other case where they are sold faulty goods. Allow them to turn to the locally crafted state law protections enacted on their behalf. And, if they decide that this new scheme can help them, allow them that choice.

I'm not worried about the big businesses. I represent small businessmen, and that's what makes the South New Jersey economy run. Let the big businesses fight this out under this new scheme. Protect the small businessmen—let them opt out of this otherwise disastrous bill.

Question 5a. What do you think of the provisions in S. 461 that requires plaintiffs to give "notice?"

Answer. As with the 90 day waiting period, this already happens as a simple business practice. When a computer crashes, the first call a company will make is to the people who sold them the software. They will call as many times as needed, until the problem is solved or until it is clearly futile to call anymore. Why require still further notice after that? A businessman will only turn to the courts after trying every other option. Notice was thus provided in every case I have ever heard of. This provision is a perfect example of a procedural loophole that benefits only the bad actors.

Say, for example, that a company has their software fail. They call the company over 200 times to fix it. Two hundred calls later, the problem persists. Under this bill, the aggrieved party with the faulty software would have to provide still more notice—nonsense! Such additional notice is not required in the case of a faulty auto sold to a small businessman. It isn't required in a faulty piece of machinery it sold. Why should faulty software or hardware be any different? More delay, more chance for the bad actors to hide, more harm to the small businessman who is caught in the middle!

Question 5b. In your experience, do most small businesses provide "notice" to a manufacturer of a defective product before commencing legal action?

Answer. Of course. As noted above, any businessman weighing the options will do so. Paying a lawyer versus making a phone call—no contest. A businessman wants one thing—to get functional again so he can do what he does best—sell furniture, treat patients, or train students. They don't want litigation, or legal fees, or the expense of a trial. They will do everything to avoid it—including, *without fail,* notifying the manufacturer of the problem and asking them to fix it. Suggesting that a businessman would do otherwise ignores the cost-benefit analysis that all businesses would undertake in such a situation.

Question 5c. Is it likely that there could be litigation over the operation of this provision?

Answer. Yes. Like other provisions, this provides yet another tool for the at fault companies to litigate well into the future—instead of fixing the problem or facing justice under the normal. current system. The meaning of notice, the question of whether the notice is sufficient, and countless other issues provide pitfalls to small businessmen seeking to get reimbursed for their losses.

For example, take the requirement that the notice identify and describe the problem "with particularity." What does that mean? If I own a furniture store, I walk in one day, and my accounts receivable software no longer works, what do I have to say to meet this requirement? I don't know computers, I don't know what the problem is with "particularity"—I just know that I suddenly have no ability to collect what is owed to me. The software was purchased from experts who have the knowledge to describe the problem "with particularity." Will that furniture store be unable to satisfy this provision if their notice is simply that "my computer software stopped working one day?" Nobody knows—but you can be sure that the company who sold that faulty software will do their best to use that provision to try and argue such! More delay, more chance that justice is circumscribed.

Question 6. Would this legislation be more likely than the current civil justice system to cause protracted litigation or speed resolution of disputes?

Answer. This legislation, for the many reasons articulated above, will delay justice and do more to clog the court system than almost anything else imaginable. The bill creates vast new territory—new standards, new procedural requirements, preemption of state law * * * The current system has been tested. Procedural requirements are clear and precise in both state and federal courts. This new scheme creates uncertainty. Each term, each provision, each new loophole, each definition—all will be litigated for years. Why not let the current UCC, fraud, and contract laws deal with the problem?

To date, the court system has shown a remarkable ability to handle these cases. Of the many dozens that have been filed, some cases have settled. Others are proceeding to trial. Still others have been dismissed by judges. The current system is working.

Take Medical Manager and Dr. Courtney. Dr. Courtney filed suit in state court in New Jersey after all other options proved unfruitful. Within months, the company settled. It was without a doubt the threat of facing a jury in southern New Jersey, and defending their actions under well-settled provisions of state law, that forced them to settle. Nothing else. This bill would provide loopholes, escape hatches, heightened standards—all inducements to litigate for years, not to settle.

Question 7. Do you think defendants will ever be held accountable under the bill given the way the good faith defense is currently structured?

Answer. No—this provision will allow even the worst of actors to escape with their ill-gotten gains intact. What is a "good faith effort?" Apparently, a company can say "We'll fix your problem immediately—just give is $100,000" and that will suffice as a good faith effort. What if a company comes to the stores and tries over 200 times to fix the problem—but fails to do so? They will argue "good faith"—"hey, we came out 200 times!" Lost is the fact that the problem was never solved, the business is disrupted for months, and the small business is still left holding the dysfunctional software.

This creates an incentive to make the smallest possible efforts possible to satisfy this "good faith escape hatch" instead of actually fixing the problem. Defendants will hide behind this broad provision. Why solve the problem—just visit the site a few times, tinker a bit, and declare that you tried your best!

Question 8. Why do you think that conclusions you have reached about this litigation differ so much from those of the technology companies that appeared at the hearing?

Answer. Quite simply, the technology companies know that this problem is of their making. Software developers have warned these companies for years about the

impending Y2K problem—since the 1960's! The technology companies stand to make millions on upgrades and new purchases as businesses and consumers are forced to upgrade their systems. Incredibly, there are still non-compliant goods being sold today!

Of course, the software companies support this bill—they are the ones that are protected by it! They face profits—not bankruptcy like those who bought their products. And may I be so cynical as to suggest that this is seen as the first step toward product liability reforms that Congress has seen fit to defeat year after year?

Question 9. If Congress were to enact legislation providing special legal protections to manufacturers of non-Y2K complaint software and hardware, would that be fair to those manufacturers who did the right thing and in vested the time and money to develop, manufacture, and market Y2K compliant software and hardware?

Answer. Of course not. The responsible companies who did what they should have—and indeed were required to under the law!—deserve commendation for making their goods and products compliant. Those that didn't—those that sold non-compliant goods on purpose, knowing that the problem existed—deserve to face the consequences of their actions. This bill provides the promise of a free ride to the guilty!

Many—indeed, hopefully most—companies did what any other industry or company would do. They learned of the problem and complied with the UCC. Before they sold the goods, they made sure that they would do what they were built to do, that they were fit for the purpose they were purchased for, and that they would not harm the very people who bought them. Before they sold their products and promised that they would take their customers into the next century, they made sure that those statements were actually true. Why protect the few who did not do what was right?

If auto manufacturers learned that a certain defect would arise in all cars on a date certain in the future, they would be expected to sell no cars which had that defect. If 9 out of 10 companies took the time and money to fix the defect, they would face no threat of liability—they did the responsible and legal thing. The one bad actor should—and would—face liability if they knew of the defect but sold the good anyway. Why should the computer industry be any different? It isn't fair to those 9 responsible actors to swoop in just before the defect manifests itself and provide protection for their inaction. To do so would provide unfair profits and creates a future incentive to likewise not do the right thing. But that's exactly what this legislation does. Why? Nobody can seem to answer that simple question.

Question 10. How likely are small businesses to recover damages in any legal proceeding if the heightened provisions in S. 461—requiring the plaintiff to show with clear and convincing evidence that the defendant actually knew or recklessly disregarded a known and substantial risk that a Y2K failure would occur—is enacted into law?

Answer. These are incredibly high standards to meet, and few—if any—small businesses could meet such a burden. I cannot for the life of me understand why the wrong-doers here should benefit from such a rigorous standard of proof—at the expense of small business! It makes no sense.

I know, as an attorney who litigates cases for small businessmen ever day, that meeting this burden will likely never happen. It's just too high. It's certainly not the standard that small businesses expected to face in such a situation when they signed their contracts! Talk about a free ride—this amounts, in practice and in reality—to an almost complete "pass" on all liability for any Y2K related wrongs.

Question 11. Does this bill provide incentives for businesses to address their Y2K problems now?

Answer. No. This bill provides every incentive for bad actors to delay indefinitely ever fixing their defective products.

We know how to fix this problem—let's provide incentives to business to make the expenditures needed to keep their small businesses afloat. S. 314 does that. This bill does the opposite—its says to the high tech industry that they can delay forever—why fix the problem? Just litigate, and the little guy will be unable to afford protracted litigation.

This bill will not fix one computer. It will do only one thing—destroy thousands of small businesses while allowing those responsible for this mess to emerge with more profits than ever.

RESPONSES OF HARRIS L. POGUST TO QUESTIONS FROM SENATOR TORRICELLI

Question 1. At the Judiciary Committee's March 1, 1999 hearing on the Year 2000 Fairness and Responsibility Act, you testified that the Medical Manager Corporation

attempted to charge doctors for making their software Y2K complaint, even though the doctors purchased this software after Medical Manager represented that their product was Y2K compliant. Do you consider this to be profiteering? Do you have other similar examples of companies using their product's Y2K defects as a way to make a profit at the expense of their customers?

Answer. As a result of the extensive publicity which resulted from the Medical Manager case, I have received hundreds of phone calls from small businesses across this country who are being charged thousands of dollars to correct their Year 2000 problems. In many situations the systems which need to be made compliant were purchased in the very recent past. These businesses range from physicians offices who are using software other than Medical Manager as well as physicians offices who are being charged to fix medical equipment which is not Year 2000 compliant; municipalities who are being charged to fix their 911 systems; furniture stores; medical schools; cleaning supply vendors; and law firms just to name a few. It is hard to believe that these software companies have the gall to charge thousands of dollars to fix systems which they knew were defective when they were originally sold. In the Medical Manager situation the company anticipated making in excess of $225,000,000 15,000 customers × $15,000 per customer) from their own misdeeds. Fortunately, they were stopped and as a result of our lawsuit the physicians were allowed to keep this money to be used to improve health care in this country. Unfortunately, millions of Americans are indeed paying these software companies thousands of dollars to fix systems which were knowingly and intentionally manufactured and sold in a defective condition. Why is the consumer so willing to make these payments? There are several reasons. First, they are unaware of their legal rights. They do not know that they have recourse for such conduct through our system of justice. Second, they are afraid to "upset" their software vendor since they need these computer programs to run their businesses. Once a business becomes comfortable with a software program they are very reluctant to change software companies since it means significant down time for installation and training as well as significant inconvenience. The comfort level they have obtained is great disincentive to demand that these companies fix the problem for free. Accordingly, although they don't feel that they should pay for these repairs, they feel they have no choice if they want to keep using the system.

As a result, software manufacturers are making billions of dollars from the Year 2000 problem. Unbelievably, they are now asking the government to protect them from the monster they have created and from which they are profiting at the expense of the American public. This profiteering will continue next year when these same companies will charge exorbitant fees to fix the Year 2000 problems which undoubtedly will result.

Question 2. Do you have suggestions on what could be done to improve the Year 2000 Fairness and Responsibility Act with respect to companies profiting by charging its customers for fixing Y2K defective products that they originally marketed or sold as Y2K compliant products?

Answer. The main problem with the Act as it pertains to the issue of profiteering is that it fails to deal with the issue at all. There is no recourse against a company who tries to extort thousands of dollars from innocent consumers. The Act favors the manufacturer at every turn. It provides no protection for the consumer who is being asked to pay exorbitant fees to fix a problem which was knowingly thrust upon them. Such a result is patently unfair.

The second problem with the Act is contained in Section 303. This section provides, as a complete defense, that the party took measures that were reasonable under the circumstances to prevent the Year 2000 failure from occurring. Medical Manager did indeed take certain steps but were charging exorbitant sums to implement those steps. Such conduct cannot be condoned and certainly cannot be used as a defense in a lawsuit resulting from a Year 2000 failure.

I appreciate the opportunity to express my views and the views of the hundreds of small businesspeople with whom I have discussed this issue. We must remember that although the Year 2000 problem has also been called the "millennium bug" it is not a computer bug. A computer bug is a software defect which resulted from an unintentional act on the part of the programmer. The problem that we are facing today did not result from the unintentional acts of the software companies. The Year 2000 problem has been discussed extensively throughout the IT community for the last 20 years. It is not a surprise. What has occurred is that these same companies saw the Year 2000 situation as an opportunity to greatly increase revenues. As John Kang, the President of Medical Manager, stated when commenting on the November 1997 release of Version 9.0 of the Medical Manager software: "This important upgrade will be highly beneficial for our existing customers and will also provide us with new sales opportunities to those physician groups currently using

legacy systems which must be replaced by Year 2000." Accordingly, it is clear that companies such as Medical Manager see the Year 2000 situation as an opportunity to greatly increase revenue. Such profiteering cannot be allowed to continue at the expense of the American public.

RESPONSES OF STIRLING ADAMS TO QUESTIONS FROM THE SENATE COMMITTEE ON THE JUDICIARY

Question 1. ATLA President Mark Mandell criticized the bill—even before it was introduced in the Senate—because the bill allegedly creates a disincentive for companies to fix Y2K problems. According to Mandell, companies will wait for complaints to be filed before they fix any Y2K glitches. Could you please comment on this allegation?

Answer. The bill provides some liability protections for a company that exercises "reasonable efforts" in preventing a problem (see Sec. 303, Reasonable Efforts Defense). This is a strong incentive for companies to work to proactively prevent problems in order to receive this protection.

If the legislation is passed, and if material Y2K problems occur, this bill does not prevent suits based on legitimate claims for damages. Therefore, companies also have the incentive to limit risk from such claims by acting proactively to prevent problems or minimize potential damages caused by Y2K problems.

And, the 90 day pre-trial period outlined in section 101 of the bill does not provide protection from liability, it only provides a mechanism for parties to try to resolve issues before the expensive process of litigation is at full speed. Note that probably the most economically inefficient way to notify someone of a Y2K problem is to first file a law suit in court. Instead, section 101 encourages simple communication of Y2K problems before a costly suit is filed.

Addtionally, the bill does not remove the normal market incentive for companies to work to prevent problems before they occur; within the competitive market environment, if a company doesn't provide timely service and thorough customer satisfaction, it is less likely to be successful.

Question 2. You stated in your written testimony that the bill encourages, in your own words, "cooperative problem prevention." What does that mean? You also contended that the bill preserves the right to sue for legitimate claims, but places restrictions on frivolous claims. Could you please explain how the bill can do both? What provisions of the bill deter frivolous claims and exactly how does the bill affect legitimate claims?

Answer. Cooperative problem prevention is encouraged by section 104, which states an entity cannot recover for damages it could have reasonably acted to avoid. This is an express incentives for all members of the technology community, from users to suppliers to developers, to resolve Y2K issues before they occur.

And, as explained further in Response 3, provisions such as 201, Contract Preservation, and 301, Proportionate Liability, would help create an environment where companies can assist others in performing Y2K remediation or preparation efforts without fearing they will be held responsible for damages they did not cause or for liability they did not contractually agree to. Provisions such as these would help restore the normal market forces that encourage companies to identify technical needs and rapidly develop solutions to meet these needs. Right now, these cooperative market forces are diminished because of the fear of a wave of Y2K litigation.

Frivolous litigation would be discouraged by, for example, Section 401, requiring that a majority of the members of a plaintiff class must have experienced a material defect, and by Sections 101, Pre-trial Notice, and 103, leading Requirements, which require complaints to specifically identify harms caused by a Y2K problem. Additionally, the fact that the legislation would provide uniform substantive and procedural guidelines for Y2K-related suits would diminish the incidence of frivolous claims. Because litigants and courts would be better able to quickly establish whether a legitimate claims exists, it would be easier for courts to dismiss improper claims, and for defendants to fight frivolous claims.

Legitimate claims are preserved in Titles I, Prelitigation Procedures, and IV, Class Actions. These titles set up a process to efficiently resolve claims, but do not prohibit claims from being filed as long as actionable damage has occurred. For example, the pre-trial notice and pleading requirements of Sections 101 and 103 do not restrict claims, but do require that Y2K complaints describe the Y2K problems giving rise to the suit and identify what resolution is sought. This would allow all parties to understand up-front what damages are alleged and what resolution is requested.

Question 3. Cannot parties accomplish the goals of this legislation through private contractual terms? In other words, why is this legislation necessary? More specifically, how would this bill spur consultants to fix the Y2K problem?

Answer. So many small businesses, governments, and even large businesses need technical assistance in performing Y2K preparation efforts that analysts are predicting there will not be enough consulting resources available to meet this need. Because our legal system hasn't dealt with the Y2K problem before, significant uncertainty exists as to whether courts will honor terms agreed to in contracts relating to Y2K-related services or liability. This uncertainty works to diminish the level of resources available for Y2K remediation.

For example, we are aware of companies that provide general computer and system consulting services that either refuse to offer Y2k system preparation/remediation services or significantly limit such offerings, specifically because they are worried that contractual liability limits may not be honored by a court. Section 201 of the bill would ensure contractual terms are enforced. This would help consultants decide to offer Y2K services because they could contract to perform services with confidence that they understand what their resulting risks and obligations will be.

Additionally, these consultants are most needed in working on complex systems made up of numerous hardware, software, and other system components. Some consultants don't offer complete Y2K services because they fear being held liable for all damages that occur on a system which they have worked on, even if they had little responsibility for, or only a minor role in preparing, the entire system. The bill's Section 301, Proportionate Liability, addresses this concern by stating a party would only be liable for damages it was responsible for causing. This would allow entities to worry less about the litigation risks and more about how to fix Y2K problems.

Question 4. Would you care to comment on anything you heard today?

Answer. We see two major objectives this bill seeks to accomplish. The first is to facilitate cooperative problem prevention so that fewer Y2K problems occur in the first place. The second is to establish an efficient legal framework so that frivolous claims are avoided or quickly dismissed, and where legitimate Y2K claims do occur, they are efficiently processed and resolved. The testimony from the witnesses at this hearing suggests that these objectives are widely shared, and we encourage you to proceed towards passing legislation that meets these goals.

RESPONSES OF STIRLING ADAMS TO QUESTIONS FROM SENATOR LEAHY

Question 1. You mention a number of committees on which you serve and organizations to which Novell belongs in the course of your testimony. Did you, in fact, testify on behalf of Novell or are you also representing those other committees and entities, as well?

Answer. I testified on Novell's behalf only.

Question 2. Your testimony indicates that you think that the reason Senator Hatch's bill is broadly supported is because "the legislation would encourage cooperative efforts to reduce the total number of Y2K problems that occur." Please explain, and be as precise as you can, the factual basis and your reasoning that lead you to that conclusion.

Answer. The broad support of the bill is shown by the coalition supporting it, which is made up of over 80 organizations and associations, and includes entities such as the National Association of Manufacturers, the National Retail Federation, the National Association of Wholesalers and Distributors, and the International Mass Retail Association, among many others. Just one of the coalition members, the U.S. Chamber of Commerce, represents over three million businesses, over 90 percent of which are small businesses. Notably, most coalition members have the potential to be either plaintiffs or defendants in Y2k-related litigation.

Cooperative efforts that would decrease the incident of Y2K problems are encouraged by section 104, which states an entity cannot recover for damages it could have reasonably acted to avoid. This is an incentive for technology users and suppliers to resolve Y2K issues before they occur. With this provision, an entity would be much less likely to avoid fixing a problem it was aware of because it felt it could just go to court after the advent of the Y2K to seek compensation for any damages that might occur.

Additionally, as is discussed further in the responses to questions 7–9, provisions such as 201. Contract Preservation, and 301, Proportionate Liability, would help create an environment where companies can assist others in performing Y2K preparation efforts without undue fear of being held responsible for damages they did not cause or for liability they did not contractually agree to.

Question 3. Your testimony indicates that the legislation "would place restrictions on litigation based on claims where no injury has occurred." Is it not true that the legislation would also place restrictions on litigation based on claims where injury does occur and even after injury has occurred?

Answer. Yes. As discussed in the previous answer, for example, if injury occurs that could have been avoided by reasonable actions, section 104 would place limitations on recovery.

Question 4. Your testimony includes a general description of the testing and customer communications Novell has undertaken in preparations for Y2K. Although you are Novell's "lead attorney for Year 2000 issues" you do not discuss the legal preparations that the company has made and is making. Would you describe in detail those preparations. In particular, include a complete description of the types of contractual arrangements in which Novell engages, the insurance arrangements Novell have made, the indemnification arrangements to which Novell is a party, and the legally-required disclosures Novell has made or is making.

Answer. One element of our preparations for the Y2K has involved how much information about our Y2K testing processes we should make available. One factor in our decision-making process had involved the legal risks, some related to anti-trust issues, some related to providing fodder for frivolous claims. With the passage last year of the Year 2000 Information and Disclosure Act we have felt a little more free in making public Y2K information. As a result, we have released additional information about Y2K testing processes.

Novell's Y2K preparations have addressed both our internal Y2K readiness, and the Y2K readiness of products we license to others. In both of these areas, our preparations have included reviewing our contractual arrangements with suppliers to verify whether the suppliers are obligated to provide Y2K-ready services or supplies. Beyond contract review, our effort has also included a technical review of many of our major suppliers. In situations where our testing has disclosed non-Y2K ready internal systems, we have generally chosen to upgrade that technology or we have installed a different system that is Y2K ready.

Some of the types of contracts we sign that might be implicated by Y2K issues are contracts to purchase food services, telecommunications services, security services, utility services, package and mail delivery services, audit and accounting services, and information systems services. Other relevant contracts includes purchases of buildings, building systems such as elevators of HVAC, insurance policies, vehicles, and computers or software supplies. Contracts we make that involve our provision of licenses to someone else include contracts with original equipment manufacturers, distributors, software or service resellers, technical education centers, and end users. For contracts that we enter to purchase supplies for our use, we typically seek language that offers some guarantee against a failure to perform due to Y2K issues. In these contracts we do not typically seek indemnification for any damages that occur, but we do seek a commitment that the item is Y2K ready, and that if any issues come up, the supplier will address them promptly. In most of our contracts under which we sell licenses or services, we provide performance warranties, in some cases these spell out Y2K issues as a specific category covered by the performance warranty.

Regarding our insurance policies, we have reviewed each of them to evaluate our coverage regarding Y2K issues. Regarding required disclosures, Novell has disclosed in its annual reports and quarterly 10Q filings to the SEC information about our Y2K efforts; please see question 26 below for more information on these.

Question 5. Please provide a thorough description of each legal action to which Novell has been a party that involves Y2K concerns.

Answer. There are none.

Question 6. Please provide a thorough description of each Y2K-related claim or demand of dispute to which Novell has been a party that has not yet resulted in litigation. Include, if the claim, demand or dispute was against Novell how Novell responded and whether the matter has been resolved.

Answer. While answering this question in detail might reveal business-sensitive information, please see the response to question 4 for some information about Novell's approach to addressing Y2K readiness with other entities.

Question 7. Please provide the factual basis and specifics for your testimony that "Novell has seen specific cases where entities that do offer general consulting services have been extremely wary of widening their offerings to provide complete Y2K services." Be specific and complete and provide all documentary support for this statement.

Answer. Here is a restatement of this issue from another source, the NACCB: The National Association of Computer Consultant Businesses is an industry association

representing hundreds of companies that provide computer and engineering consulting services. The NACCB has previously provided the following testimony to the Senate to describe that organization's experience with this issue:

> NACCB member firms supply frontline technical experts that provide a number of computer related services to clients on a contract basis, including Y2K remediation services and typically, these experts follow the specifications outlined by the client.
>
> NAACB firms are in a unique position in that they provide the necessary services to remedial the Y2K problem, but they typically do not write the specifications for the remediation process. We often refer to our businesses and their remediators as the "Good Samaritans" in that they have the expertise and knowledge to remediate the problem. Yet, our members are very concerned about possible Y2K-related liability, especially where they follow the specifications the client provides and make a good-faith effort to fix the problem pursuant to these client specifications.
>
> NACCB member firms may avoid Y2K remediation projects rather than risk costly potential litigation in situations where needed the staffing firm nor the computer consultant provide the work specifications. This avoidance of Y2K remediation projects by staffing companies in computer consultants will further compound the Y2K problem. (mail *staff@naccb-gov.org* for more info on this statement).

And the following is a specific example of how the current environment can discourage companies from providing resources to remedy Y2K issues: In addition to the free Y2K information and tools Novell provides that inventory Novell products for software issues, Novell also licenses software that helps customers in surveying and managing all of their networked software to resolve Y2K issues. And, Novell has a large consulting services organization that assists customers assessing their Novell products for Y2K issues.

Over the last year, we have had discussions with various companies about working to provide additional services to assist customers in evaluation or remediation of non-Novell products for Y2K issues. And, with at least one company we have struck a deal that allows us to distribute a technology that inventories numerous types of products and provides Y2K information about these products.

However, as we have participated in these discussions, one factor that has dampened companies' enthusiasm in collaborating to provide full Y2K services across an end-user's system is the significant legal risks involved. This legal risk does not always prevent companies from choosing in the end to provide the service or collaborate with a product or service offering, but the risk is a definite factor in the analysis of whether to pursue the business opportunity. The concern by such companies is that even if they provide their products or services in a professional manner, because of the complexity of today's networks, there may be some system component that experiences a problem and subjects the Y2K services company to liability for damages to that component or to the entire system.

Question 8. Please describe in detail and provide relevant legal authority regarding your statement: "Today, could a consultant worried about Y2K litigation reasonably limit its liability using standard liability limitations in the consultant's contract? The hope is that contractual limitations will be honored by courts, but enough question exists in this area that the uncertainty has a direct impact on companies' decision-making processes."

Answer. For example, a consultant might agree in a contract with a company that needs Y2K remediation services that:

> Customer recognizes that Consultant will provide the testing and evaluation services described in this contract, but agrees that due to the complexity of Customer's systems, Consultant does not guarantee that Customer's systems will not experience any Y2K problems. Consultant shall not be liable for Y2K problems in Customer's system that were not caused by Consultant."

The concern of businesses today is that despite such contractual language, if Y2K problems occur and a lawsuit is filed, the plaintiff might successfully avoid the disclaimer above, either by making the claim "outside of the contract" as a negligence claim, or by claiming that because of the consultant's position of superior knowledge, or superior bargaining power, the disclaimer is not valid.

Question 9. You argue that section 201 of the proposed legislation would ensure that the terms agreed to in a contract are enforceable. Do you interpret the bill to change the law with respect to adhesion contracts or the doctrine of unconscionability? If a contractual liability limitation was a matter of adhesion or

would be found unconscionable under State or federal law could section 201 nonetheless require its enforcement?

Answer. If a contract were to be found unenforceable as a whole, section 201 would not apply. Section 201 would apply if only an individual liability limitation were determined to be unenforceable by otherwise applicable law.

Question 10. You argue for proportionate liability as a matter of federal law. If defendants are found jointly and severally liable is it not true that they can still legally determine their respective liability among themselves? The purpose of the doctrine of joint and several liability is so that the injured, innocent plaintiff not be left holding the bag. Is that not correct? Are you opposed to the traditional doctrine of joint and several liability in all legal contexts or any other legal contexts beyond that of consultants performing remedial Y2K services?

Answer. While defendants may seek to determine respective liability among themselves, this may not be possible or practical where a defendant (perhaps the one chiefly responsible for damages) has no assets or no longer exists (due to bankruptcy or other reasons). Also, if $100,000 of damages occur, and a defendant is found 1 percent responsible, she may need to spend $300,000 establishing that someone else should cover the other 99 percent. So, the situation still exists where there is significant concern about a company being held responsible for damages beyond the degree of its involvement in the problem that caused the damages. Our testimony in support of a uniform principle of proportionate lability is limited to the context of Y2K actions, on the assumption that the Y2K presents a unique challenge to our court system that can be more efficiently addressed with specific modifications to that system.

Question 11. You oppose frivolous lawsuits. We all do. The difficulty is in finding a process to separate frivolous lawsuits from those with merit without prematurely curtailing peoples' rights to relief. You argue for an extended notification period. What has Novell's experience been in this regard? Is Novell usually sued before there is more informal contact about the dispute? Does Novell sue first and ask questions later? Is the typical dispute scenario one in which there is contact before litigation is commenced?

Answer. Our typical experience is that parties communicate with each other prior to litigation. Our support of the pre-litigation notice period is based on our view that the Y2K presents our economy with a very non-typical experience, as evidenced by suits that have been filed without prior meaningful discussions, or where no damage has been experienced.

Question 12. Is there anything in the rules of State courts or federal courts that prevents parties to a lawsuit from ending such actions quickly if all is resolved to their mutual satisfaction?

Answer We think a relevant issue here is how quickly a stage can be reached where parties can know their rights and the potential outcome of litigation well enough that they are satisfied with the potential results. Uniform procedural and substantive guidelines can make the process more efficient so that this result is reached more quickly, often before litigation occurs.

Question 13. Is there currently any prohibition from parties to a Y2K dispute seeking to resolve their dispute by arbitration if they mutually agree to do so?

Answer. No.

Question 14. Is there any legal prohibition in State or federal law from doing everything possible to assure customer satisfaction by Novell?

Answer. While there are no express "prohibitions," we feel the benefit of legislation like this is that it helps create an environment where companies feel they can work together without experiencing a higher level of risk due to an anticipated wave of litigation, some of which, if the past year has been an accurate harbinger, will not be based on reasonable claims.

Question 15. Does anything prevent Novell from seeking agreement from companies to adhere to mediation or arbitration of disputes?

Answer. No.

Question 16. Specifically, what has Novell's experience been to date with Y2K-related disputes?

Answer. To this date, Novell has been able to resolve Y2K issues with its suppliers and customers. See the response of question 4 above for more information on Novell's efforts in working with its suppliers and customers.

Question 17. You note that section 104 adds a federal statutory codification of the general duty to mitigate harm and damages. What justifies this particular federal statutory provision and what change and effect is intended?

Answer. The benefit we perceive in this provision is the proactive action it can encourage. Though many companies and governments are on track for Y2K readiness for their own systems, all institutions depend to some degree on supplies or information from other entities. In this context, Y2K problems experienced within individual entities can be magnified by their effect on other entities in the same supply chain. This problem, and its unique context given the effect of the Y2K on most members of the economy at the same time, justifies federal legislation.

Question 18. You indicate that you believe the bill creates "uniform substantive * * * guidelines for Y2K litigation." What are those guidelines?

Answer. Uniform substantive guidelines include the codification of the duty to mitigate in section 104, the contract preservation provision in section 201, section 301's proportionate liability provisions, and the reasonable efforts provision of section 303. Also fitting in this category are the minimum injury or material defect provisions in sections 101, Notice Period, 103, Pleading Requirement section, and 401, Minimum Injury Requirement.

Question 19. Does the Uniform Commercial Code already provide "uniform substantive guidelines" for contract claims in State courts?

Answer. To some degree, yes, but the UCC has not been adopted by each state in the same manner. To the extent that it does offer uniform guidelines, it helps facilitate commerce as entities feel more comfortable doing business in a greater number of jurisdictions.

Question 20. John Koskinen the Chair of the President's Council on Year 2000 Conversion notes that he "believes it would be counterproductive to establish a minimum standard of performance or activities after which legal protections are provided." He says: "I would like to encourage leaders of every organization in the United States to keep asking if there is anything more they can do rather than seeking advice from their lawyers about when they have done enough and can move on to other issues." Do you agree? If not, what is your response?

Answer. We agree that the focus of efforts regarding Year 2000 issues should be based on problem solving, and not on a lawyer-based analysis of the risks posed by the threat of a historically large crush of litigation. We believe that appropriate Year 2000 litigation can facilitate such a focus on problem solving.

Question 21. I saw that in a recent column in *Computerworld* Paul Gillin wrote that "Vendors have had plenty of time to prepare for 2000. The fact that some were more preoccupied with quarterly earnings and stock options than in protecting their customers is no excuse for giving them a get-out-of-jail-free card now." How do you respond?

Answer. Regarding the time to prepare, from our corporate experience to the experience of the U.S. Government in pursuing its own remediation efforts, it appears that the task of preparing for the Y2K is so complex that there is not "plenty of time." Each technology process or product in use needs to be tested on its own and with other technologies with which it interacts. This is a tremendously difficult and resource-intensive task. As discussed further in our responses to questions 2 and 24, we agree with members of the coalition that the bill offers benefits that are not unique to a particular industry.

Question 22. Please give examples of a "material defect, in a product or service as defined by S. 461. Please give examples of defects in a product or service that would not be "material" under S. 461.

Answer. If an elevator in a 10-story building would not rise above the 3rd floor, that would be a material defect. If a fully automated time-stamp machine required an initial manual advance of a lever or data element so that is would subsequently stamp the correct date, that would not be a material defect.

Question 23. If Congress were to enact legislation providing special legal protections to manufacturers of non-Y2K compliant software and hardware, would that be fair to those manufacturers who did the right thing and invested the time and money to develop, manufacture and market Y2K compliant software and hardware?

Answer. As discussed further in questions 2 and 24, we, with the broad coalition in support of Y2K litigation, believe that it provides benefits across industries and supply chains.

Question 24. This is a circumstance in which business is coming to Congress asking for a special federal law to be enacted to provide special legal protections for them in connection with potential Y2K liability. Last year the tobacco industry came to Congress demanding special legal protections. At that time I urged that Congress insist first on full disclosure so that we could have a sense of what claims were being compromised. In this circumstance involving Y2K liability, should Congress

insist on full disclosure in order to have a better understanding before passing special legal protections?

Answer. We agree that legislation should be passed based on the best available information. The coalition that supports this bill runs horizontally across industries and vertically up and down the spectrum of company sizes. And, coalition members have the potential to be either plaintiffs or defendants in Y2K-related litigation. The reason for this, we perceive, is that coalition members believe Y2K legislation offers benefits that are not industry or business-size specific.

Question 25. Do you think special legal protections should be granted to companies that have not complied with current legal requirements by making full and fair disclosure of their readiness, costs, risks and contingency plans?

Answer. We do not advocate legislation to create special protections for companies that do not comply with current statutory requirements.

Question 26. Please provide copies of all public disclosures that Novell has made about Y2K compliance.

Answer. Our web site at *www.novell.com/year2000* contains most of our publicly available Y2K information: this site is updated frequently with new or updated information. Please find attached a copy of most of this information. These documents include, Year 2000 Q & A, Year 2000 Q & A (Internal Business Systems), Year 2000 Status of Novell Products, Novell's Project 2000 White Paper, Novell Year 2000 Testing Criteria, and Year 2000 Web Resources. Also, we have made Year 2000 disclosures in our annual reports and quarterly SEC filings. The most recent of these was in our 1998 Annual Report, which can be accessed on our web-site at http://www.novell.com/corp/ir/annual/financials/mda.html. Past disclosures are also found on our web site.

Question 27. Please provide copies of all analyses and notes of conversations regarding Novell's Y2K compliance.

Answer. Our web site at *www.novell.com/year2000* contains information we have made public. Also, please see the response to question 26 above.

Question 28. Do you think special legal protections should be granted to companies that have withheld information from a customer about their own Y2K problems?

Answer. In the example of a trucking company, or a software company, that contracts to make deliveries that it knows it will not be able to make because its delivery system will be down for a time period to address Y2K testing or remediation, we do not favor a mechanism that would relax the company from its contracted obligations.

Question 29. Do you think special legal protections should be granted to companies that have analyzed the costs and potential risks of Y2K noncompliance and made the calculated business decision not to make the investment needed to come into compliance? Might that type of calculation, the type of calculation apparently made by Ford in the exploding gas tank case, be affected by changing the law to make it harder for customers to seek legal redress for wrongs?

Answer. The Ford case is an appropriate example for showing what this proposed legislation does not do. It generally does not apply to cases involving personal injury. And, as discussed above, we believe that the legislation will offer benefits to companies and industries generally because it facilitates a focus on providing solutions and because it discourages frivolous suits. We believe that can be accomplished without decreasing incentives for entities to prepare for Y2K issues.

Question 30. Section 304 of S. 461 limits punitive damage award to "3 times the amount awarded to the claimant for actual damages" or a dollar threshold depending on the status of the defendant as a company or individual as defined by the bill. Why are these limits in punitive damage awards tied to "actual damages" as defined in S. 461 instead of "economic loss" as defined in S. 461? Under what circumstances, if any, could a plaintiff receive damages for "economic loss" as defined in S. 461 under its provisions?

Answer. It is our understanding that the concept behind limiting punitive damages in the Y2K arena is that this is a one-time event and so awards of large punitive damages over and beyond compensation for damage experienced would be less likely to serve the public policy objective of punishing defendants in order to increase incentives by that defendant and other entities to avoid similar harms in the future.

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Q & A
PRODUCT STATUS
THIRD-PARTY PRODUCTS
YEAR 2000 UPDATES
TESTING GUIDE
WHITE PAPER
YEAR 2000 ★FB RESOURCES
Y2K TOOLS

Novell's Year 2000 effort, known as Project 2000, was established to validate that Novell's current products are ready for the next millennium. Project 2000 defines Year 2000 requirements that Novell's products must meet before being declared "Year 2000 Ready". This web site is Novell's only official source of information about Project 2000 requirements and the status of Novell products.

NEW Novell releases the Year 2000 Information Ferret™

Novell, in its continuing effort to assist customers with Year 2000 issues, has released a new weapon in the war against the Millennium Bug. The **Year 2000 Information Ferret** collects Novell software file information from your NetWare servers and, when sent to Novell for analysis, will report the Year 2000 status of Novell products found on each server. Take advantage of your Novell NetWare environment, the software that makes this tool possible!

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If you wish to provide a link to our web site please go to this site for information.

Send written requests for information to:

Novell, Inc.
Project 2000
1555 N. Technology Way
Orem, Utah 84097 USA
FAX:(801) 228-5378

Year 2000 Questions and Answers

Q What is Novell's definition of "Year 2000 Ready"?

A Novell defines "Year 2000 Ready" as the ability of our software products to accurately process date data from, into, and beyond the years 1999 and 2001, including leap year calculations, when used in accordance with the product documentation, provided that all products (e.g. hardware, firmware, software) used in combination with Novell software, properly exchange date data with it.

Q What is Novell doing?

A Novell created, over two years ago, a corporate-wide effort known as Project 2000 to focus on Year 2000 issues. Each of Novell's product divisions created a team which has been responsible for implementing Project 2000 requirements and, if necessary, renovating the products within the division. These divisional teams all report to a corporate-wide steering team that has ensured Novell is addressing Year 2000 solutions in a uniform, and thorough manner.

Q What is Novell doing about its own internal business systems?

A Novell's internal systems are undergoing the same rigourous scrutiny as our products have. For more information please see the Internal Systems Q&A.

Q What is the status of Novell products?

A Current versions of Novell products have completed the Project 2000 validation process and are Year 2000 Ready. NetWare 4.11, NetWare 3.2, GroupWise 5.2 and GroupWise 4.1, ManageWise 2.5, Border Manager, Fast Cache and other major products are all Year 2000 ready or provide released (not beta) patches for free download through the Year 2000 Updates link.

Q What is the status of International Novell products?

A Please see the International Product Status table for specific International product information.

Q What is the Year 2000 status of Btrieve that shipped with NetWare?

A Btrieve version 6.10c shipped with NetWare v3.12, NetWare v3.2, and NetWare v4.10. Btrieve version 6.10f ships with NetWare 4.11 and NetWare 5. Btrieve 6.10c and 6.10f have not been Year 2000 tested by Pervasive Computing. However, Novell, as part of our Year 2000 testing, did test the Btrieve functionality associated with NetWare and found no issues that would effect the Year 2000 functionality of NetWare. Pervasive states on their web site at http://www.pervasive.com/support/technical/white/white_y2k.html:

"Btrieve v6.15 has been tested for Year 2000 compliance and the tests have determined that Btrieve v6.15 does not present any Year 2000 limitations. Btrieve v6.15 has always allowed a four-digit year format, which is not affected by the transition to the Year 2000. Applications that consistently use the four-digit year format will make a seamless transition into the Year 2000 by virtue of Btrieve's navigational design characteristics. However, each application accessing the Btrieve engine must also be properly engineered for Year 2000 compliance. Please check with each application vendor using Btrieve for their compliance information."

"Older versions of Btrieve (including v5.x and v6.10) may be compliant; however, testing has been limited to our current version. We recommend upgrading to Btrieve v6.15 if you have any concerns."

Q **What is the difference between patching NetWare 3.12 and purchasing NetWare 3.2?**

A NetWare 3.2 offers improved system reliability, enhanced performance and simplified administration. Included are all the latest software updates (including Year 2000 updates), new administration tools (including a Windows-based SYSCON tool), up-to-date client software, and LAN, WAN and disk drivers -- all in one convenient, easy to install package. Please see the NetWare 3 product page for additional information.

Q **Is Novell still working on NetWare patches that will be released later in 1998?**

A Most Year 2000 work has been completed. The NetWare 4.11 and 3.12 operating system patches were released at the end of 1997 as promised. We have completed testing most other products and have provided Year 2000 patches for free download where necessary. These are the released version of these patches. They are not beta versions.

As part of customers' own preparations to be Year 2000 Ready they should be migrating to newer versions if NetWare 2.x, 3.11, or 4.10 (or any prior) versions are in use. Please see the Product Status table for specific product and version information including other Novell products.

Q **Why is Novell now supporting NetWare 4.10?**

A Over the past year or so Novell has been maintaining a position of supporting the latest versions of our products for Year 2000 readiness. As the new millennium approaches and customer awareness of the Year 2000 issue escalates, NetWare 4.10 has received considerable attention. In response to our NetWare 4.10 customers, Novell will support NetWare 4.10 for Year 2000 issues.

Q **Why is Novell recommending an upgrade from NetWare 4.10 when you are now going to provide Year 2000 updates?**

A Novell's recommended path for Year 2000 readiness remains NetWare 4.11 or NetWare 5. It is Novell's desire to foster the growth of the intelligent and scalable network, and to provide the tools necessary for our customers to take advantage of new solutions and increases in network capacity. Supporting NetWare 4.10 for the Year 2000 is not designed to detract from this direction but rather provide customers with solutions they need today to move forward with Novell tomorrow.

Realizing the procurement and logistics issues in implementing a new network operating system, and the time remaining until the year 2000, Novell is taking this action in support of our customers. This support of NetWare 4.10 for Year 2000 issues is intended to allow customers more time to migrate to a new version of Novell's operating system software. Customers that have already upgraded to Year 2000 ready solutions are ahead of the year 2000 deadline imposed on the entire industry.

Q **What kind of problems can I expect if I continue to use Novell products not supporting for Year 2000 issues?**

A Novell is not testing older versions of our products as indicated in the Product Status table. Without testing these products there is no way of knowing what Year 2000 issues might exist. Our recommendation is to upgrade to new versions of our products and discontinue using unsupported Novell products prior to the turn of the century.

Q **When did Novell begin addressing Year 2000 issues?**

A Novell's first Year 2000 issue was documented by Novell in July of 1990. While Novell products were designed so they would not have date sensitive problems, such as the ones being revealed by Year 2000 efforts, Novell embarked on this Project to validate this fact to protect our customers' investment in our products.

Q **Which Novell products are Year 2000 Ready today?**

A Most of Novell's products have passed the validation testing and are Year 2000 Ready. A complete list of the Year 2000 Readiness status for Novell's products is found in the Product Status Table located on this site.

Q **What can we do to get ready for the Year 2000?**

A Novell encourages all organizations to perform their own assessment of critical operations. This assessment should include testing applications and other software to identify those that will not function correctly when the year 2000 date change occurs. Special attention should be given to applications and other software that interact with Novell products and were not Year 2000 Ready tested by Novell. Prepare plans to minimize disruption that will be caused by applications and other software that will not be Year 2000 Ready by January 1, 2000.

CAUTION

YEAR 2000 READY TESTING OF NOVELL PRODUCTS SHOULD BE DONE IN A TEST ENVIRONMENT ONLY, NOT IN A LIVE PRODUCTION ENVIRONMENT.

Moving time forward for testing then backward again to perform another test or to reset to the current time on a NetWare server requires the generation of a new Epoch to resolve "future" timestamps in the NDS database. Declaring a new Epoch sends ALL NDS objects to all holders of NDS replicas which, depending on the tree design, has been known to require excessive network bandwidth while the new Epoch information is distributed.

A similar caution is in order for testing GroupWise. If purge or archive rules are created by the user or administrator and the date of the client machine or server is advanced to test for Year 2000 issues in a production environment, the purge or archive rules may be invoked and GroupWise mail, appointments, tasks, etc., may be permanently erased.

Q **Where can I send a written request for information?**

A Written requests can be sent to:

Novell, Inc.
Attn: Project 2000
1555 North Technology Way
Orem, Utah 84057 USA

All information that is being made publicly available can be accessed through this web site. Novell's response to written inquiries may also be retrieved (Adobe Acrobat file)HERE.

In order to view or print Novell's written response you must have the Adobe Acrobat Reader™ 3.0, which can be downloaded from the Adobe™ website.

Year 2000 Questions and Answers (Internal Business Systems)

These questions and answers are in response to common questions asked about our internal business systems. Our efforts to ensure our continued ability to provide the quality of service our customers expect, and to conduct business as usual after the roll over to 2000, has been underway for some time and continues to progress to the scheduled conclusion well before the end of 1999.

Q How is Novell handling Year 2000 issues for internal business processes?

A A year 2000 project team was setup in 1996 to address year 2000 issues for internal business processes. This team reports directly to the CIO and is responsible for ensuring that Novell's business processes continue uninterrupted into the year 2000. The team created and is executing a project plan to ensure a smooth transition into the next century.

Q How has internal system prioritization been determined?

A Systems and applications utilized internally by Novell have been prioritized according to their impact on operations. Within that framework, enterprise systems have the highest priority; department critical systems are second, and so on. Test schedules and modification plans reflect those priorities.

Q How are critical issues identified?

A The project plan includes a testing phase in which systems and applications are identified as compliant or non-compliant, including specific problems that cause Year 2000 concerns. This involves internally developed systems and third party products, and extends to include outsource partners whose systems we interface with.

Q How is progress measured for the Year 2000 project?

A The project plan clearly identifies major project phases, as well as key date milestones and deliverables within each phase. Progress is measured by completion of deliverables.

Q How is Novell communicating Year 2000 issues to both customers and business partners?

A Novell has established a Year 2000 Web page (www.novell.com/year2000) to communicate Year 2000 readiness information to customers, suppliers, and third party organizations.

Q Is there a contingency plan in place?

A Efforts are focused on achieving compliance for systems that will be in place in the Year 2000. A Year 2000 specific contingency plan is scheduled for completion in 1999.

Q Will internal compliance issues impact product development initiatives?

A Product development resources are not being used for work on systems that are uniquely internal. Novell's Engineering and Internal Systems & Technology Project 2000 team members are coordinating their efforts through the Year 2000 Steering Committee and keeping each other appraised of progress in both product and internal compliance efforts.

Novell's Project 2000 White Paper

May 1997

Executive Summary

As the Year 2000 approaches, information systems will undergo a date transition that will present some major challenges to the information technology industry. In an era when disk space and memory were both scarce and expensive, many software programs were originally developed to represent the year component of the date with two digits. As a result, these programs will not operate correctly unless they are reprogrammed to avoid rolling back to the year *1900* when faced with the "00" for the year 2000. Novell, with an estimated 60 million users around the world, has a responsibility to its customers, and to the information technology community in general, to properly address these Year 2000 issues.

> "Novell will be taking more networks into the 21st century than any other company. Being year 2000 ready isn't a question, it's a given."
> *– Eric Schmidt, Novell CEO*

As a part of this effort, Novell has established a program to ensure for our customers and partners that our products will be Year 2000 ready. Through this process, Novell will identify products that are ready to support the next millennium and establish transition plans for products that are not ready. Additionally, Novell is working with its third-party developers to ensure readiness in integrated products. This project also includes validation of Novell's internal applications as well.

Customers expect a Year 2000 Ready environment. Novell's efforts illustrate a commitment to readiness across its product lines and third-party technologies and applications. Novell will also monitor and incorporate additional readiness issues identified by the industry at large.

Introduction

This document provides an overview of Novell's Project 2000 for Year 2000 issues as related to products that Novell sells as well as the internal applications and technology Novell utilizes to conduct business. This plan should be adapted to meet the needs of individual organizations as appropriate.

While the Year 2000 challenge is an urgent matter, responding to this challenge without the proper analytical discipline could prove counter-productive in achieving timely and cost-effective results. Therefore, Novell began this process by clearly articulating the criteria for "Year 2000 Ready". These criteria provide the basis for the projects implementation phases being utilized to guide the planning and execution of Year 2000 activities.

Background

From the early days of software development, two-position year fields were used to reduce

data entry, memory requirements, data storage requirements and computer processing cycles. At the time, carrying the century field was considered a waste of limited resources and unnecessary because data always contained the value "19". This convention persisted even as memory, storage, and computer processing cycles became more available. Program code containing two-position year fields was reused or enhanced in developing new systems and data with two-position year fields was passed from older systems to newer ones. When these systems were being developed, it was never envisioned that they would still be running at the turn of the century. The fact that they are still in production today is a reflection of both the quality of the systems and the difficulty of replacing them with more modern technology. Unfortunately, habits of the past have followed us into the future.

Impact of the Year 2000 problem

What will happen when these legacy systems try to process dates of 2000 and beyond? The year 2000 will be stored as "00" which may be interpreted as 1900. This could cause systems to either "blow up" and stop processing completely or to produce erroneous results. This misinterpretation of the date primarily affects calculations, comparisons and sequencing, but any use of a two-position year field is a potential problem. Mrch has been written about the problems facing business applications that compute such things as ages, expiration dates, and due dates, by subtracting one year from another. For instance, at the year 2000, the age of someone born in 1960 will be computed as -60 years old, instead of 40 years old. There is much less information available about the impact on more sophisticated systems such as radar processors, communications processors, and satellite systems.

Another component of the Year 2000 issue is that 2000 is a leap year. This may not have been incorporated into date routines since years ending in "00" are only leap years if they are divisible by 400. Thus even if date routines use a four-position year, there is a concern that they may not incorporate the necessary logic to recognize that 2000 is a leap year.

The systems affected are primarily legacy systems, although all systems should be checked to ensure they correctly handle a four-digit year field. The types of systems include mainframe, client/server, workstations, distributed systems, telecommunications systems like PBXs, networks, routers, hubs, and communication processors. The software potentially impacted includes that developed in-house, developed commercially, and software developed by end-users for their own use. The impact is not limited to application software. It is a potential problem in system software, such as operating systems and system utilities, embedded microcode, firmware, and hardware. Another significant aspect of the problem is the data bases and files where the two-position year fields are stored.

The Year 2000 issue is generally discussed in terms of what will happen January 1, 2000 if the systems have not been fixed. In actuality, some systems have already required date conversion and it is likely that other systems are producing erroneous results and the errors have not yet been noticed. For instance, application systems which handle mortgage computations required correcting in 1970. The Gartner Group estimated that 20 percent of business applications would fail in 1995 due to date computations. Between now and January 1, 2000, systems that use dates in the future, such as forecasting, long term expirations, and archival and backup, may begin to fail. Systems that use fiscal years may begin to fail in or before 1999. Other systems may fail during the transition period between 1999 and 2000.

The Management Challenge

The Year 2000 problem is primarily a business and a management problem. What makes it such a challenge is its sheer size. In most cases, the changes needed to each individual component are not technically difficult. The difficulty comes in the planning, scheduling, coordinating, and managing an effort of this magnitude.

Project coordination is one example of the management challenge. Some areas to consider include:

Components within a system
Date fields must be identified and consistent in all components of a system (files, databases, programs, etc.). The timing of the date change implementation should be such that all are ready before system and acceptance testing can begin.

Between systems on the same hardware platform
Systems sharing a hardware platform often share data files and databases and may share common objects, utilities, and subroutines. If these are not all converted at the same time, temporary bridges may need to be put in place to handle converting date fields between two and four-position years.

Between applications and operating systems
Application software is dependent on the operating system for some date functions, such as system dates. Unfortunately, not all operating systems have been updated to be Year 2000 ready and some operating systems may never be updated to be Year 2000 ready.

Between software, hardware or firmware
Hardware or firmware may need to be upgraded to be Year 2000 ready.

Creating the Readiness test bed
In most cases, creating a Year 2000 Ready environment will require coordination in building enabled versions of hardware system, firmware, operating system, database version, third-party application software, in-house developed software and utilities (e.g. backup systems).

Organization of Novell's Year 2000 Effort

Project 2000 is organized with an executive level Steering Committee reporting to the President of Novell and is supported by a full-time Project Manager. Project teams from all Product Groups, Business Application Groups, and Marketing and Communications report to the Project Manager.

Role of Project 2000 Project Teams

The Project 2000 teams are responsible for coordinating the Year 2000 issues and information, reporting the status of assessments, business risks, systems conversions, testing processes and sharing lessons learned with other team members. These teams are comprised of representatives from the Product and Business Application Groups.

Role of Product and Business Application Groups

Each group is responsible for the Year 2000 changes to their systems and products. Each Product and Business Application Group developed an overall inventory of their systems, prioritized the conversion of the systems based on the criticality of each system, and has developed a plan which includes resources to perform the work.

Within the Product and Business Application Groups, each group manager is responsible for the planning and conversion of their own systems, consistent with Project 2000 requirements.

Project Phases

Awareness

This is the preliminary phase of the project. The purpose of this phase is to recognize, define and publicize the issues involved. During this phase, management support is obtained and plans are put in place to begin the actual Year 2000 effort. A key requirement for success of any project of this magnitude is an understanding of the issues and a commitment to successfully implement the right solutions on the part of all management and technical personnel involved. This project requires a significant commitment of resources. Support of senior management is essential in making tradeoffs and setting priorities in order to ensure that products and business applications are converted and thoroughly tested.

Assessment

The purpose of this phase is to assess the vulnerability of systems and products to the Year 2000 problem and develop a plan for correcting any that may be discovered or creating transition plans for others. This is perhaps the most critical phase in the entire project. To the extent that it is performed accurately and completely, it forms the basis for completing the remaining phases in a timely manner.

Renovation

Renovation is defined as the phase where code is actually changed to be Year 2000 ready. In addition to updating source code, common date routines may be developed and file conversion and bridge programs written. Configuration management plays a *key* role in maintaining the integrity of these and ongoing changes.

Conversion

The actual conversion consists of modifying all product components and business applications to be Year 2000 ready. All routines that deal with date calculations need to be checked carefully and all related components must be examined to determine if there are any date impacts. All documentation needs to be updated to reflect any new date formats or processing.

Validation

During this phase, changed components are tested. Test requirements must conform to Project 2000 requirements and should follow standard Novell testing procedures. As with any conversion, various levels of testing are needed, including unit, system, acceptance, integration, and interface testing.

Implementation

Implementation is the phase where the Year 2000 ready business applications are put back into production and Year 2000 ready products are released for production. Implementation plans should consider issues such as upgrade migration path, cost, and revenue impact. The technical aspects of the Year 2000 issue is only important in resolving the functional problems that might occur. The issue as it relates to our customers is how these changes are going to impact their business. Constant consideration to existing data and processes must be incorporated in the implementation.

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Novell makes no warranty or representation regarding any third-party products; such products are provided "AS IS." Users interested in the Year 2000 readiness of these products, or corresponding warranty information, should contact the respective third-party product manufacturer.

This document is a Year 2000 Readiness Disclosure under the United States Year 2000 Information and Disclosure Act.

NetWare...Ready for the next millennium

Novell is pleased with the result of Project 2000's effort to validate the Year 2000 date related performance of our products. Project 2000, undertaken over two years ago, has verified that most current shipping versions of our products are Year 2000 ready!

Some products do require updates (patches) which Novell is providing free through this site. Please review the information in the tables below for a description of the Y2K issues fixed by these patches and determine, based on your Year 2000 requirements, if the application of optional updates is necessary. If the Product Status Tables list a product as "Year 2000 Ready with update" the update must be installed for Year 2000 support. All previously released patches must be installed prior to the application of Year 2000 specific patches. See the read-me included with the download file for installation instructions and additional technical details. Scroll down for specific product modification information.

Future releases of Novell products will include these modifications.

Please read the Disclaimer

NetWare 4.11/intraNetWare Support Pack 8 including Updates for NetWare 4.11/intraNetWare, intraNetWare for Small Business, SMP for NetWare v4.11, and NetWare SFTIII v4.11 (iwsp8b.exe)	Download
Year 2000 Update for NetWare 4.11/intraNetWare, intraNetWare for Small Business, SMP for NetWare v4.11, and NetWare SFTIII v4.11 (Y2K Updates Only) (411Y2Kp2.EXE)	Download
Year 2000 Update for NetWare 4.11 for OS/2 (Required for OS/2) (411Y2Kp2.EXE)	Download
Year 2000 Update for NetWare 4.10 (no SFTIII, SMP, or OS2 support)	Download
Year 2000 Update for NetWare 3.12 (312y2kp2.exe) (requires current patch level before applying Y2K patches. See readme in downloaded patch file for additional information)	Download
Year 2000 Update for Novell Clients (clty2kp1.exe)	Download
Year 2000 Update for Novell Administrator for Windows NT v2.0c (na4nty2k.exe)	Download
Year 2000 Update for NetWare ConnectView v2.0 (ncv20y2k.exe)	Download
Year 2000 Update for BorderManager v2.1 (English) (bm21y2k.exe)	Download
Year 2000 Update for BorderManager v2.1 (Portuguese) (pbm21Y2K.EXE)	Download
Year 2000 Update for BorderManager v2.1 (French) (fbm21y2k.exe)	Download
Year 2000 Update for BorderManager v2.1 (Italian) (ibm21y2k.exe)	Download
Year 2000 Update for BorderManager v2.1 (German) (gbm21y2k.exe)	Download
Year 2000 Update for BorderManager v2.1 (Spanish) (sbm21y2k.exe)	Download
Year 2000 Update for ManageWise v2.6 (mwnxp01a.exe)	Download
Year 2000 Update for Lan WorkGroup 5.0 (iwp501.exe)	Download
Year 2000 Update for Lan WorkPlace 5.0 (iwp501.exe)	Download
Year 2000 Update for Lan WorkPlace Pro (iwp511.exe)	Download
Year 2000 Update for Hostprint 1.11 (hpdef.exe)	Download

NetWare 4.11 Year 2000 Updates

Novell Product(s) and version(s):

NetWare 4.11
NetWare 4.11 SMP
NetWare 4.11 SFTIII
NetWare 4.11 for OS/2 (Required)
intraNetWare
intraNetWare for Small Business (INSB)

Program affected	Program location	Description of problem resolved
MENU.OVL	..\SYS\PUBLIC\	"Logged in Since" date displays improperly.
NWVQLE3X.DLL	..\SYS\PUBLIC\	Unable to set defer printing in NWADMIN.EXE for any dates beyond 31 December 1999.
NWVQLE95.DLL	..\SYS\PUBLIC\WIN95\	Unable to set defer printing in NWADMIN.EXE for any dates beyond 31 December 1999.
RCONSOLE.EXE	..\SYS\PUBLIC\	When selecting the directory scan option within Rconsole (Alt/F1), the file created information (year) does not display properly after the year 1999. This is a display issue only and does not affect the file date.
UIMPORT.EXE	..\SYS\PUBLIC\	Uimport does not create password and account expiration dates properly if the year is greater than 1999 when importing users from a database application file into Novell Directory Services.
VNETWARE.SYS	..\SYS\	After the rollover from 31 December 1999 to 1 January 2000, the NetWare Server for OS/2 system date is reset to 1980. **If running NetWare Server for OS/2 this update should be installed prior to 2000.**

Download NetWare 4.11 update

NetWare 3.12 Year 2000 Update

Novell Product(s) and version(s):
NetWare 3.12

Please read the Disclaimer

Program affected	Program location	Description of problem resolved
LISTDIR.EXE	..\SYS\PUBLIC	Date not displayed properly when using the /D or /T options.
LOADER.EXE	..\BOOT	Year 2000 roll over failed on NetWare 3.12 on some machines, depending on the BIOS in use. The BIOS date reverted back to the default origin date (usually 1/1/1980). This was fixed for NetWare 3.12 in the update that included the 08/14/97 revision of LOADER.EXE.
MENU.OVL	..\SYS\PUBLIC	Date not displayed properly beyond the year 2000.
PAUDIT.EXE & NET_REC.DAT	..\SYS\PUBLIC\	Paudit does not display the year properly if greater than 1999
PSERVER.EXE	..\SYS\PUBLIC\	Print banner page prints the date incorrectly for years greater than 1999.
PSERVER.NLM	..\SYS\SYSTEM\	Print banner page prints the date incorrectly for years greater than 1999.
RCONSOLE.EXE	..\SYS\PUBLIC\	When selecting the directory scan option within Rconsole (Alt/F1), the file created information (year) does not display properly after the year 1999. This is a display issue only and does not effect the file date.
SBACKUP.NLM	..\SYS\SYSTEM	Date not displayed properly beyond the year 2000 in the session files.
SESSION.EXE	..\SYS\PUBLIC\	Session displays the login time incorrectly for years 2028 and beyond.

Download NetWare 3.12 update

Novell Client Year 2000 Updates

Novell Product(s) and version(s):

IntraNetWare Client 2.20 for DOS/WIN - IWCD097
IntraNetWare Client 2.20 for WIN95 - IWCD897
IntraNetWare Client 4.11 for Windows NT - IWCD897

Some of the client beta update files (as indicated in the table below) were excluded from the final release based on customer feedback from the beta. The expense of rolling out an update for a problem that will not occur until the year 2035 is not justified. Novell does not consider this a "Year 2000 problem" and will incorporate these in future releases of the client software.

Please read the Disclaimer

Program affected	Program location	Description of problem resolved
ignw9532.dll	N/A	Exception error occurs when logging in during the year 2035 or 12/31/2034 **Excluded from final client update based on customer beta response (not needed until 2036)**
ignw9532.dll	N/A	Login is unable to set date at workstation for dates greater than 2034 **Excluded from final client update based on customer beta response (not needed until 2036)**
ignwnt32.dll	N/A	Exception error occurs when logging in during the year 2035 or 12/31/2034 **Excluded from final client update based on customer beta response (not needed until 2036)**
Nwlocale.dll	Local workstation c:\windows\system	During the years 2000-2009 the century designator for localities that display the year first (i.e. 97/12/23) would only display one digit for the year beyond 2000 (i.e. 0/01/01).

Download client update

Novell Administrator for Windows NT 2.0c Year 2000 Update

None of the year 2000 issues addressed by this update pose any threat to the network or to data integrity. This is an optional display enhancement only. This file is not required for system stability or the prevention of data corruption.

Novell Product(s) and version(s): Novell Administrator for Windows NT 2.0c

Program affected	Program location	Description of problem resolved
ASMNTWNT.DLL	SYS:Public\winnt\	In NWADMNNT, the "Account Expires" property of a non-integrated NT user account would display as 100 instead of 00 if the year of expiration was set to 2000.

Download Novell Administrator for Windows NT update

Novell Year 2000 Testing Criteria

Novell defines "Year 2000 Ready" as the ability of our software products to accurately process date data from, into, and beyond the years 1999 and 2001, including leap year calculations, when used in accordance with the product documentation, provided that all products (e.g. hardware, firmware, software) used in combination with Novell software, properly exchange date data with it.

"We have been working to thoroughly test our products and ensure that solutions our customers receive will be free from the significant year 2000 problems many are predicting."
- Glenn Ricart, Novell CTO

CAUTION

YEAR 2000 READY TESTING OF NOVELL PRODUCTS SHOULD BE DONE IN A TEST ENVIRONMENT ONLY, NOT IN A LIVE PRODUCTION ENVIRONMENT.

Moving time forward for testing then backward again to perform another test or to reset to the current time on a NetWare server requires the generation of a new Epoch to resolve "future" timestamps in the NDS database. Declaring a new Epoch sends ALL NDS objects to all holders of NDS replicas which, depending on the tree design, has been known to require excessive network bandwidth while the new Epoch information is distributed.

A similar caution is in order for testing GroupWise. If purge or archive rules are created by the user or administrator and the date of the client machine or server is advanced to test for Year 2000 issues in a production environment, the purge or archive rules may be invoked and GroupWise mail, appointments, tasks, etc., may be permanently erased.

Novell's 10 Requirements for Year 2000 Readiness

Novell has identified ten Year-2000 and other date-related requirements for its products. These requirements are listed below:

1. Correctly displays dates up to the year 2035. This includes debugging, logging, and diagnostic information that may be used by other programs.

2. Correctly treats the year 2000 as a leap year.

3. Correctly calculates the day of the week for all dates from 1980 to 2035.

4. The calendar arithmetic must correctly count time durations between any two dates from 1980 through 2034. This includes, but is not limited to, the following critical dates:

   Friday, December 31, 1999

   Saturday, January 1, 2000

Monday, February 28, 2000

Tuesday, February 29, 2000

Wednesday, March 1, 2000

Sunday, December 31, 2034

Monday, January 1, 2035

In addition, the difference between 01/01/1980 and 01/01/2035 should calculate to 20,089 days.

5. The product or business application must sort dates in proper chronological order for any collection of dates from 1980 through 2034.

6. The product or business application must treat "dates and durations" intended to mean "no date" or "never" explicitly. Specific attention is directed to 9/9/99.

7. For each product or business application: Wherever a time stamp is stored in binary, the time stamp must be tested for rollover to zero or rollover to negative to ensure proper handling. All time stamps used for dates must have sufficient capacity to function properly during the years 1980 through 2034 without ambiguity.

8. For each product or business application: Any file format used as input to a subsequent process must be scrutinized and the subsequent process analyzed to ensure proper operation of the combined functionality from 1980 through 2034.

9. For each product or business application: Any file format that is changed as a result of these requirements will be supported by documentation describing the migration from the old format to the new format. Programs that manipulate the new format must also tolerate the old format.

10. Any wire protocol that is changed as a result of these requirements will be supported by documentation describing the migration from the old wire protocol to the new wire protocol. Servers or clients that use the new protocol must be able to tolerate the old protocol as well. If two devices must exchange times or time stamps and only one of them is capable of the old format, the newer device must be capable of supplying the old format.

Novell WHAT'S NEW | HOW TO BUY | SEARCH | SITE MAP

Text Only

YEAR 2000 HOME Q & A PRODUCT STATUS THIRD PARTY PRODUCTS WHITE PAPER
YEAR 2000 UPDATES TESTING CRITERIA YEAR 2000 WEB RESOURCES

Year 2000 Web Resources

New Greenwich Mean Time
http://www.gmt-2000.com

The Year 2000 Information Center
http://www.year2000.com

IBM Year 2000
http://www.ibm.com/IBM/year2000

Sun Microsystems Year 2000 Program
http://www.sun.com/y2000

The Santa Cruz Operation (SCO)
http://www.sco.com/year2000

Hewlett Packard
http://www.hp.com

ITAA
http://www.itaa.org

The Institution of Electrical Engineers (IEE) 2000 Dangers for Engineers
http://www.iee.org.uk/2000risk/

Other Sites for Year 2000
http://www.mitre.org/research/y2k/docs/Y2K_LINKS.html

Link Disclaimer: Information on the above sites or documents is provided only as a convenience. Novell's listing of a link or document does not imply endorsement. Novell has no control of the linked sites or documents and is not responsible for their contents.

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NOVELL.

RE: Novell's Year 2000 Readiness

Dear Novell Customer:

As the year 2000 approaches, the issues and challenges of moving to the new millennium are becoming increasingly more visible. Novell, with the largest install base of any PC network operating system in the world, recognized its responsibility to properly address this challenge and began a project to validate product performance relating to year 2000 issues several years ago. While our products have been designed for use regardless of the century designation in a date, Novell understands the importance of the global network infrastructure we have built over the past ten years and has taken the action necessary to ensure your continued success with our products.

When Novell started this process there were no industry defined standards for "Year 2000 Ready". Novell articulated its own based on date issues found in ISO, ANSI, FIPS, BTI and other standards. This definition of "Year 2000 Ready" has been the basis for Novell's Year 2000 efforts and has been shared with organizations around the world. Application of this definition, through a carefully defined process, has validated that our shipping products are Year 2000 ready. This same definition is being used to validate that our internal business systems will be capable of providing the same quality of support and service our customers and business partners expect.

Specific information about this process and our definition of "Year 2000 Ready" can be found on our Internet web site at http:www.novell.com/year2000. Numerous documents are available on this site including a White Paper describing our process, a list of our "Testing Criteria" which identifies specific date related issues we are testing for, our "Product Readiness" table which identifies products and their Year 2000 status, a link to Year 2000 updates, and a Q&A that addresses some of the most common questions. Please visit this web site frequently for current Year 2000 information.

For product upgrade information please contact your local Novell sales representative or reseller.

Sincerely,

John Canfield
Year 2000 Marketing Manager

This document is a Year 2000 Readiness Disclosure under the federal U.S. Year 2000 Information and Disclosure Act.

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF HON. JOHN ASHCROFT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Mr. Chairman, I want to take an opportunity to thank you for holding this hearing and congratulate you and Senator Feinstein for introducing the Year 2000 Fairness And Responsibility Act. Your bill represents an important step in Congress' ongoing efforts to limit the scope and impact of the Year 2000 problem before it is too late. Last year, we passed the Year 2000 Information and Readiness Disclosure Act, which was an important first step in removing any legal barriers that could prevent individuals and companies from doing everything possible to eliminate Year 2000 problems before they happen. I was particularly gratified that I was able to work with you and others on the Committee to include the provisions of my temporary antitrust immunity bill, S. 2384, in last year's bill. However, as I said at last year's mark-up, the Disclosure Act must be understood as only the first step in our efforts to deal with this problem. Your bill and Senator Bond's Small Business Year 2000 loan guarantee bill, which we will consider on the Senate Floor tomorrow, are the next logical steps in this ongoing effort.

Countless computer engineers and experts are busy right now trying to solve or minimize the Year 2000 and related date failure problems. Part of what makes this problem so difficult to address is that there is no one Year 2000 problem. There are countless distinct date failure problems, and no one silver bullet will solve them all. Nonetheless, information relevant to solving one date failure problem may help solve other problems and eliminate date failure problems before they happen. We cannot allow concerns over frivolous litigation to chill the exchange of vital information.

At the same time, we must ensure that those who do not make adequate efforts to address the Year 2000 problem are held to account. Real harm from inadequate efforts to address this problem must be compensated, and individuals must retain their capacity to receive compensation for injuries. However, we cannot allow the prospect of frivolous litigation between businesses to block efforts to avoid such injuries before they occur. We also must ensure that frivolous litigation over the Year 2000 problem does not consume the lion's share of the next millennium. While it is not possible for Congress to guarantee that private individuals and companies will be able to solve the Year 2000 problem, Congress can eliminate legal obstacles that stand in the way of private solutions. Information regarding existing software and known problems must be shared as completely and openly as possible. The current fear of litigation and liability that imposes a distinct chilling effect on information sharing must be alleviated.

The Year 2000 Fairness And Responsibility Act appears to provide some much needed relief from the threat of frivolous litigation. The Act provides some important procedural innovations, such as the waiting or cooling off period, that may help avoid costly and drawn-out litigation battles. I am looking forward to today's hearing, which should help us fine-tune our approach. One principle that I suggest will be important in fashioning successful legislation is that we try to keep the legislation focused on what is unique about Year 2000 litigation. There are many aspects of our civil justice system that are in desperate need of reform. However, if we attempt to address all those ills in a single bill, we may endanger a bill that could provide targeted relief to address the Year 2000 problem.

Resources to address the Year 2000 problem, particularly time, are finite. They must be focused as fully as possible on remediation, rather than on unproductive litigation. Moreover, the availability of adequate development and programming talent may hinge upon a working environment that protects good faith remediation efforts from the threat of liability. Congress must prevent a fiasco where only lawyers win.

PREPARED STATEMENT OF THOMAS J. DONOHUE, FOR THE U.S. CHAMBER OF COMMERCE, AND U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

INTRODUCTION

Mr. Chairman and members of the committee, I am Thomas J. Donohue, President and Chief Executive Officer of the United States Chamber of Commerce and Chief Executive Officer of the U.S. Chamber Institute for Legal Reform. The U.S. Chamber is the world's largest business federation, representing more than three million businesses and professional organizations of every size, in every business sector, and in every region of the country. The central mission of the Chamber is zealously representing the interests of its members before Congress, the Administration, the independent agencies of the federal government, and the federal courts. The mission of the Institute for Legal Reform is to reform the nation's state and Federal civil justice systems to make them more predictable, fairer and more efficient while maintaining access to our courts for legitimate lawsuits.

Given the diversity of our membership, the U.S. Chamber of Commerce is well qualified to testify on this important topic. We are particularly cognizant of the problems that small businesses may face as the Year 2000 approaches because more than 96 percent of our members are small businesses with 100 or fewer employees and 71 percent have 10 or fewer employees. I welcome this opportunity to provide testimony on the critical issue of Year 2000 (Y2K) reform and the urgent need for prompt action by Congress.

I would also like to point out that I have unique distinction in that I represent the interests of both potential Y2K plaintiffs and defendants. Certainly under these conditions, you can appreciate the challenge at hand to bring about effective Y2K reform and yet preserve the interests of those whom I represent.

I want to take a moment to recognize the tremendous work of Chairman Orrin Hatch, Senator Feinstein and the rest of this committee on the Y2K issue. This hearing and your legislative efforts, including last year's Information Readiness and Disclosure Act are critical as we all seek to move quickly to address the Y2K problem. I also want to express my appreciation for the leadership and commitment to the Y2K issue by Chairman John McCain of the Commerce Committee, Chairman Kit Bond of the Small Business Committee and Co-Chairman Robert Bennett and Christopher Dodd and the Senate Special Committee on the Year 2000 Technology Problem. All of us owe you a great debt of gratitude for your efforts to work with us to address the Y2K problem quickly, fairly and in a bipartisan manner.

During the next year, the world community will face the possibility of a very serious threat to the global economy caused by the transition of computing systems to Y2K compatibility. This is a challenge not only to our technical ingenuity, but also to the public's faith in our leading technology industries, the American business community, and government in general and our legal system.

And the United States is not alone. All around the world, leaders are grappling with addressing the Y2K problem and its impact on their economies. This is particularly daunting given the U.S. leadership in the global economy and the implications due to our relationship with our trading partners abroad.

THE Y2K PROBLEM

The Year 2000 computer problem started decades ago when, in an effort to conserve memory and time as well as to be cost-effective, programmers designed software that recognized only the last two digits of dates. Thus, when "00" is entered for the Year 2000, a computer may process the date as the year 1900. This can cause the computer to produce erroneous data or to stop operating, both of which have far-reaching implications.

No one knows for certain what the scope of the problem may be. However, our economy is critically dependent on the free-flow of information. If this flow is disrupted or halted, our nation's economy could be seriously damaged. Indeed, the Federal Reserve Bank of Philadelphia recently predicted that while the Year 2000 computer problem may boost the gross domestic product in 1999 by 0.1 percent, or $8 billion, due to the massive influx of resources to fix the problem, in 2000, however, the problem could shrink GDP by 0.3 percent due to Y2K disruptions. In fact, some estimates are that that the Year 2000 computer problem could cost an estimated $119 billion in lost output between now and 2001.

What will be the final impact of the Y2K problem on our economy is unknown. But we do know that it poses a very real and serious threat.

BUSINESS AWARENESS AND COMMITMENT TO SOLVE THE PROBLEM

To that end, American businesses have committed hundreds of billions of dollars and the extraordinary intellectual resources of its employees to meet the challenges we face as computer systems make the transition to Year 2000 compatibility. From laboratories to offices to other workplaces throughout the country, businesses are working diligently to ensure that America is prepared to address the challenges of the new millennium with as little disruption as possible to our economy and every day lives. This will be a tough and costly challenge. The Gartner Group, a technology consulting firm, estimates that software remediation alone will cost between $300 and $600 billion. This amount does not include the cost of repairing other factors, such as hardware, end-user software, embedded systems or litigation. According to the Cap Gemini Millennium Index released on November 10, 1998 major Western economies have made progress in addressing the Y2K problem. Year 2000 spending nearly doubled in the six months before the report, and climbed 93 percent from $256 billion in April to $494 billion by October. Projected cost estimates for software, hardware and labor expenses increased 20 percent from $719 billion to $858 billion. Furthermore, as of November 1, 1998, U.S. firms had expended 61 percent of their estimated Y2K budgets.

While businesses are working diligently, cooperatively and responsibly to meet this challenge, we must still acknowledge and prepare for the likely possibility that some problems may occur. Unfortunately, even under best-case scenarios, we will not be able to find and fix every single Y2K problem. This includes the Federal government as well. In fact, the General Accounting Office (GAO) reported recently that the Federal government is having difficulty in meeting a March 31, 1999 deadline to find, fix and test all of its computer systems. Only 11 departments were given satisfactory progress ratings, seven were making slow progress and seven more were making unsatisfactory progress.

But even if we fix most of the computer system problems, the Y2K problem is still expected to cause some disruptions. Some problems will not be fixed because of technical difficulties, some because of not starting soon enough, and some because of indifference.

CONCERNS ABOUT LITIGATION

The true tragedy, however, is that some problems will not be fixed because of a fear of litigation or the transfer of resources from actually fixing the problem to defending lawsuits. While business is working to fix the problem, there are those in our society who are planning to exploit it. Unless steps are taken soon, we could experience an explosion in litigation. In fact, Giga Information Group, a technology-consulting firm, has estimated that the amount of litigation associated with Y2K will be $2 to $3 for every dollar spent actually fixing the problem. If this is allowed to proceed, guess who will bear the cost? It will ultimately be consumers. Obviously, this scenario would be a monumental tragedy for American businesses, workers and consumers.

Business has good reason to be concerned. A report from the Newhouse News Service quoted a participant in the American Bar Association's most recent annual convention as describing Y2K as "the bug that finally provides lawyers the opportunity to rule the world." In addition, at a seminar held at the ABA's convention, a team of lawyers estimated that the amount of legal costs associated with Y2K could exceed all the money spent on asbestos, breast implants, tobacco and Superfund litigation combined.

Clearly, America has a choice. It can adopt a legal environment that encourages the sharing of information, the fixing of the problem, and the fast, fair and predictable resolution of legitimate claims for compensation. Or, it can allow a potential litigation explosion that could be very costly to American consumers. Just think of the impact this would have on our economy, job creation and maintenance, and the average American family. Can we run the risk of quashing those historic years of economic expansion with the lowest unemployment rate in three decades? Mr. Chairman and members of the Committee, this is a very real scenario and a very serious challenge that we have before us.

BUSINESS' RECOMMENDATIONS

But something can be done and your bill. The Year 2000 Fairness and Responsibility Act does so. The business community and other organizations have worked with Chairman Hatch and Senator Feinstein to fashion legislation that directly addresses the Y2K problem. This bill encourages remediation, precludes exploitive and costly litigation while continuing to allow those with legitimate claims access to our

legal system in addition to giving the courts the means to efficiently resolve Y2K-related disputes. In developing this bill, the coalition was happy to see that all interests were listened to and compromise and concessions from all the participants was required.

The coalition represents a cross-spectrum of various industries and interests. It includes the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, the National Federation of Independent Business, the National Association of Wholesalers and Distributors, the Edison Electric Institute, the American Insurance Association, the International Mass Retail Association, among many others. It is important to note that some members of this coalition represent both potential plaintiffs and defendants in Y2K-related litigation.

Passage of S. 461, or one of the other similar bills currently pending in the Congress would accomplish several things. It would encourage remediation and minimize costs, thereby protecting the economy, jobs, taxpayers and consumers. Our national infrastructure and national security would also benefit.

Before turning to the specifics of what S. 461 does, it is important for me to emphasize what it will not do. This legislation does not alter the rights of persons who are physically injured or otherwise truly harmed by a Y2K failure. It specifically excludes from its purview claims for personal injury. It allows those who experience harm because of a Y2K problem to have access to the legal system and to be fully compensated for their real losses.

Over the past five years, most large and mid-size American companies have taken steps to address their Y2K problems. The anecdotal reports we are receiving indicate that the computer systems of most of these companies will be Y2K compliant and that during the next few months most of them will be testing their systems and preparing for January 1, 2000. Much work, however, must still be done—especially in the small business community.

The consensus proposal is supported by large, mid-size and small businesses because it will both help and encourage them to address their Y2K problems. Passage of S. 461 or other similar legislation in the remaining months of 1999 would accomplish several things:

- Business and consumers will be encouraged to fix their Y2K problems because they will not be compensated for damages they could reasonably have avoided;
- Businesses will be encouraged to make efforts to fix Y2K problems because those efforts will be made admissible in contract cases and would be an absolute defense in non-personal injury tort actions; and
- Consultants and other solution providers will know that the terms of their contracts will not be altered if Y2K problems occur, so they will have a greater incentive to take on additional Y2K remediation work.

If Y2K problems begin to materialize, S. 461 encourages both potential claimants and potential defendants to resolve their disputes without burdening the court system with expensive litigation:

- Before suing, potential plaintiffs will be required to give potential defendants an opportunity to fix the Y2K problem by giving written notice outlining their Y2K problem. The potential defendants would then have 30 days to provide a written response to this notice describing what actions they have taken or will take to fix the problem. If not satisfied with the response, potential plaintiffs may initiate a lawsuit 60 days after the receipt of the potential defendants' response. This provision will accelerate the remediation process if failures occur, eliminating the need for most lawsuits and preventing the diversion of precious time and resources from remediation to litigation.
- The legislation also encourages parties to resolve their Y2K disputes through voluntary alternative dispute resolution mechanisms.

An important aid in discouraging litigation and encouraging settlement is a set of "ground rules" which ensures fairness to both parties and brings some certainty and predictability to the process. It is important to remember that S. 461 does not cover claims for personal injury. Some of the essential points of the bill are:

- It ensures that the terms contained in written contracts are fully enforceable except in cases where a court finds that the contract, as a whole, is unenforceable.
- To minimize the "lottery" aspect of litigation surrounding Y2K, the imposition of punitive damages is limited. Any punitive damages that can be assessed against a defendant are limited to the greater of three times actual damages or $250,000, or for small companies (those with less than 25 employees), to the lesser of three times actual damages or $250,000.

- In tort actions, each defendant will only be liable for the amount of damage in direct proportion to the defendant's responsibility. This provision is modeled on the Private Securities Litigation Reform Act of 1995.

If Y2K failures lead to disputes that cannot be resolved without litigation, S. 461 provides additional procedural and substantive rules that small and large plaintiffs and defendants in the business community believe are fair and will promote efficiency. This includes expansion of Federal class jurisdiction for Y2K class actions and no strict liability for a Y2K problem.

I must restate that this legislation does not alter a plaintiff's right to recover actual or consequential damages, bring claims for personal injury, nor does it unduly burden a plaintiff's access to the courts. In other words, the ability of any plaintiff to be made whole from losses resulting from a Y2K failure is not altered.

Finally, I believe that a provision should be included that would reduce the likelihood of frivolous litigation by placing reasonable limits on the fees that attorneys stand to gain from this problem that threatens our national economy and national security. Such a provision should require that an attorney in a Year 2000 action not earn a contingency fee greater than the lesser of the attorney's hourly billings (not to exceed $1000 per hour) or an agreed upon percentage of the total recovery (not to exceed one third of the recovery). In addition, that provision should require that the presiding judge in a class action determine, at the outset of the lawsuit, the appropriate hourly rate (not to exceed $1000 per hour) and the maximum percentage of the recovery (not to exceed one third of the recovery) to be paid in attorneys fees. Such a provision would serve to both fairly compensate an attorney who takes on a meritorious claim while reducing the incentives for frivolous, speculative and exploitive litigation.

CONCLUSION

Unlike other national emergencies that hit without any warning, we now have an opportunity to directly address the Y2K problem before it hits. The business community is willing to do its part in fixing the Y2K problem, and to compensate those who have suffered legitimate harms. All that we ask is that Congress, the Administration and the courts work with us to ensure that our precious resources are not squandered and that our focus will be on avoiding disruptions. We look forward to working with you, the full Congress, and the Administration to pass a commonsense proposal for Y2K reform.

PREPARED STATEMENT OF DAVID C. CRANE ON BEHALF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION

THE Y2K CHALLENGE—A SEMICONDUCTOR INDUSTRY PERSPECTIVE

An introduction to the issue

The Year 2000 ("Y2K") issue has emerged as perhaps the single most critical challenge facing today's business community. The Y2K challenge stems from a decades-old practice—that emerged at a time when conserving computer memory was considered essential because of its high cost—of storing and processing dates in a two-digit format. What this means from a practical viewpoint is that electronic products that process dates in this way, which could include everything from computers to the family VCR, may not know whether "00" means 1900 or 2000. This confusion may cause such products to malfunction or shut down on January 1, 2000. Another date-related issue that companies are confronting arises from the practice of some computer programmers who use "dummy dates" such as "99" and "00," which can trigger system shutdowns and other effects when dates that include those numbers are reached. Because electronic products are highly integrated into today's world, these problems can have far-reaching effects.

While the Y2K issue may seem relatively simple, the solution is not. Basically, an electronic product can be considered Y2K ready if, when used properly, it is capable of correctly processing, producing and/or receiving dates in and between the years 1999 and 2000—including leap year calculations—provided that all other products (for example software, hardware and firmware) used with the product properly exchange accurate date data with it. But evaluating whether an electronic product is Y2K ready is quite complicated. Many electronic products are collections of semiconductors and other parts that operate and interact according to instructions supplied by software. It is the interaction of all these hardware and software elements that determines whether a particular product is Y2K ready. And, evaluating that is further complicated by the fact that many such elements may have been made and/or programmed by different companies.

The unique challenges facing the semiconductor industry

The semiconductor industry faces a considerable challenge in evaluating Y2K readiness issues. There are thousands of different kinds of semiconductors. The vast majority of semiconductors are incapable of generating, comparing or sorting date information. These semiconductors are unaffected by the Y2k issue. A small percentage of semiconductors are capable of generating or processing date information when software programs that perform these functions are added to the chip—the software is typically specified and owned by the customer, not the chipmaker. An even smaller number of chips have circuitry that is designed to generate or process dates, and even in this category the chipmaker may be manufacturing to customer specifications. Examples of chips that may be capable of generating or processing date information are non-volatile memory devices, real-time clocks and certain microcontrollers.

In general, the semiconductor manufacturer does not design or develop the programming for the semiconductors that is sells. In the vast majority of instances, distributors, electronic product manufacturers or other entities or persons who buy and use semiconductors create the programming. In such instances, this programming is almost always the proprietary material of these third parties, not the semiconductor manufacturer. Because of the proprietary nature of this programming, a semiconductor manufacturer is not permitted to and therefore cannot verify that programming provided to it is Y2K ready, even in those instances in which it adds programming provided by the customer to its chip prior to shipment. For similar reasons, if a semiconductor manufacturer has been asked to manufacture to a design supplied by a customer, the semiconductor manufacturer cannot determine whether the semiconductor is Y2K ready.

Further complicating this issue is the fact that semiconductors are an integral part of a larger "embedded" system that controls, monitors or assists the operation of a myriad of electronic products. Embedded systems provide control functions in numerous products, from the family VCR to microwave ovens to cars. They are also used in airplanes, medical equipment, electrical utility systems, manufacturing equipment and elsewhere. Embedded systems have the ability to compute. Typically, these systems also contain instructions (usually software) that determine how the end product operates and what it computes. Again, these instructions are in the vast majority of instances not developed by the semiconductor manufacturer, but rather by the manufacturer of the end product.

Another critical issue is how the semiconductor device will work as part of an electronic product, which may contain other parts that are not Y2K ready. For example, a typical electronic product such as the family VCR or computer contains a collection of parts that work together. It is the interaction of all these elements that dictates whether the product is Y2K ready. In the case of the computer, these parts include the microprocessor, the BIOS (Basic Input Output System) that controls the interface between the operating system and the computer hardware and controls the system's real-time clock, the operating system and the software applications. Because it is the function of the product as a whole that determines whether a particular electronic product is Y2K ready, the manufacturer—or in some cases the distributor or owner—of the finished electronic product, whether that be a VCR or a computer, is the only appropriate entity able to fully test and evaluate whether that particular product is Y2K ready .

The industry's response

Semiconductor manufactures are conducting extensive research and evaluation programs to resolve the Y2K issues within their control. As part of this comprehensive effort, manufacturers are working cooperatively with suppliers and customers to help resolve questions and concerns about the Y2K readiness of electronic products. Because of the complexity of these issues, the semiconductor industry supported the Year 2000 Information and Readiness Disclosure Act, which encourages companies to disclose vital information about Y2K issues so that they can work together to solve common issues.

This statement is intended to help explain the relationship of "embedded systems" to the Y2K issue. The ultimate solution to this question is beyond the control of the semiconductor supplier, who cannot identify Y2K readiness issues caused by circuitry or programming that was specified by others. Chipmakers can and will continue to assist their customers by providing information. Ultimately, the manufacturer of the finished electronic product is the only one capable of determining how the elements of the system function together as an integral unit and whether the product is Y2K ready. And at the consumer level, individuals and businesses must contact the manufacturers of electronic products to determine whether they are Y2K ready.

PREPARED STATEMENT OF MELISSA W. SHELK ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION

The American Insurance Association is grateful for the opportunity provided by the Senate Judiciary Committee to offer testimony in its efforts to minimize the adverse economic impact of the Year 2000. The AIA represents more than 300 property and casualty insurers across the nation, insuring millions of families and large and small businesses. Our members are leaders in advocating loss prevention measures for our individual and business policy holders, and we're proud to say that AIA companies have worked diligently, some for as long as a decade, to ensure our systems are Y2K compliant to better serve our customers. Our industry has devoted real resources to facing this challenge; it's been estimated that insurers will spend between $6–8 billion for readiness efforts. Our customers expect us to fulfill this obligation, and we are doing exactly that.

The Year 2000 computer challenge is a result of the dynamism and entrepreneurial spirit of the American high-tech industry. It is a tribute to this segment of our economy that in just a few short decades, everything from airplanes and automobiles to kitchen toasters is safer, more reliable, and longer lasting because of computer technology. The so-called "Year 2000 glitch," where computers read only the last two digits of a year, was a decision made not of negligence but of the desire to push technology as far as it could go, as fast as it would go. And it is with this spirit that American businesses are working to solve this problem—hundreds of billions of dollars are being spent to solve potential problems before they occur. The business community is facing the Y2K challenge head-on.

Even with this commitment and dedication to minimizing Y2K disruption, we can expect problems to occur. We conduct business in a global economy, and not every nation has matched our dedication and commitment to managing Y2K. And the pervasiveness of computer chip technology in our businesses and daily lives suggests that some problems will be undetectable until they arise. Estimates of economic loss range from the negligible to the catastrophic, we simply don't know. This lack of knowledge demands that we must be prepared as a nation to solve problems quickly, fairly, and with a minimum amount of discord.

Last year, a bipartisan majority in Congress recognized that too often in our nation, the fear of frivolous lawsuits can jeopardize cooperative solutions to the Y2K problem. The Y2K Information and Readiness Disclosure Act of 1998 took steps to allow businesses to share information without fears that this cooperation would lead to courtrooms. We supported last year's efforts, and we're thankful that Congress is set to take the next step, in the form of discouraging litigation and encouraging remediation. The bipartisan commitment shown by Members of this committee was crucial to our success in 1998, and we're delighted that same spirit is shown on the issue of limited liability reform.

The American Insurance Association has spent the last few months working with a coalition of more than 85 trade associations, individual corporations, and other business interests. These organizations—the Year 2000 Coalition—represent large and small businesses, technology producers and consumers, retailers, financial services, to name just a few. We represent both potential plaintiffs and defendants in Y2K litigation, reflecting a consensus desire to work together to avoid lawsuits. We are determined to fix problems, not profit from them.

Members of the Year 2000 Coalition understand that the unknown extent of the Year 2000 and the fear of lawsuits can actually *inhibit solutions,* multiplying the disruptive impact of any systems failures. Those who would exploit the problem for personal gain are doing our nation a great disservice. Congress is to be commended for seeking reforms to minimize the economic costs arising from this once-in-a-millennium event.

The Year 2000 Coalition has crafted principles for limited Y2K liability relief legislation, many of which are reflected in S. 461, the Year 2000 Fairness and Responsibility. Our priorities are simple, and common-sense.

We agree with sponsors of the legislation that contracts must be respected, and the legitimate ability to seek redress should not be impeded in any way. Nor should any liability reform adversely impact personal injury or wrongful death claims. Our goal is simply to streamline and expedite an often unruly, costly, and time-consuming system to protect the heath of our economy, while ensuring that fairness and predictability govern the process.

In that spirit, the AIA supports:

- Legal incentives for businesses and contractors to fix Year 2000 problems before they arise, and without fear of frivolous lawsuits,
- Limits on punitive damages to keep frivolous lawsuits out of court,
- Limits on liability proportional to the defendant's responsibility, and,

- Opportunities to settle disputes before they're litigated.

Key to fairness, predictability, and speed is keeping disputes out of courtrooms such as the 90-day cure or cooling off provision that would encourage pre-trial solutions. We hope the Senate considers such a provision as part of any liability legislation, and are gratified the Hatch–Feinstein bill includes a similar measure. This 90-day "cure" period is critical to keeping parties' energies focused on solutions rather than litigation.

The AIA and the Coalition also support other important reforms to encourage prompt resolutions. We are encouraging our members to promote alternative dispute resolution methods and remediation and we hope any legislation offers incentives to stay out of the courts.

We believe that, because of the extent of date chip technology in our homes and businesses, class action reforms must be enacted to discourage predatory lawsuits. Reforms can restore some balance and fairness to a growing trend in our legal system, and again, ensure that legitimate claims are heard in a timely fashion.

Our priority is to encourage a legal environment where problem-solvers compete for business, not fear frivolous lawsuits, legitimate claims are resolved promptly, and where legal profiteering cannot take advantage of a once-in-a-millennium problem.

These modest reforms, designed to focus on a unique and predictable event, will focus our energies on solving problems. They are not, as some have already suggested, ways to escape responsibility. The Year 2000 Coalition and the American Insurance Association believe any package must respect negotiated contracts, grant no immunities, offer no excuses to businesses that refuse to address potential Y2K problems, and in fact expedite payment of legitimate claims.

The Year 2000 Coalition is a result of the business community's desire to minimize economic costs and disruption from the Year 2000 problem. This legal liability coalition is unique in that the reforms represent the consensus desires of both potential plaintiffs and defendants, and are focused on fixing the problem. American business has, through its investments to date, shown its commitment to avoiding disruptions. We ask that Congress and the administration join us in creating a legal climate that reinforces that commitment. Only then can we be sure we're doing everything possible as a nation to be "Y2K OK."

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