

Mr. McCAIN. Mr. President, I yield the floor.

Y2K ACT

The Senate continued with the consideration of the bill.

Mr. HOLLINGS. I yield 2 minutes to the distinguished Senator from North Carolina.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. EDWARDS. Mr. President, I would like to respond very briefly to my colleague from Oregon, Senator WYDEN.

First, I point out that based on my study of the issue it appears to me that virtually every consumer group which is composed of, among others, small businesspeople around this country is opposed to this bill.

Second, and more importantly, Senator WYDEN said—I am quoting him—that the “bill permits recovery of damages for foreseeable consequences.”

I say with all due respect to my colleagues that is exactly what the bill does not permit. That language appears nowhere in this bill. I challenge him, since he has made that statement, to find the language in the bill that says “damages for foreseeable consequences.”

Mr. WYDEN. Will my colleague yield?

Mr. EDWARDS. I will.

Mr. WYDEN. I appreciate that. Of course, that is what many contracts say. That is the economic loss rule. We say that the rights that apply are the rights of contracts, which most small businesses enter into when they buy the system. It is the State economic loss rule. State contract law with respect to economic loss covers those issues.

I appreciate him yielding.

Mr. EDWARDS. My response to that is, first of all, the vast majority of the computers are not bought pursuant to a written law in contract, because most folks are not able to hire a team of lawyers to draft a contract on their behalf. So the contracting is a meaningless concept, except as between one big company buying the computer system from another big company. Otherwise, contracts don't exist. In the absence of a contract, this bill eliminates recovery of economic losses.

It is that simple. They do not allow for the recovery of damages that are the result of foreseeable consequences.

It is a huge, fundamental problem with this bill. It will not allow people to recover anything but the cost of their computer. That is what the bill says.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HOLLINGS. I yield 5 minutes to the distinguished Senator from California.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I say thanks to my friends, Senator HOLLINGS and Senator McCAIN. They worked very hard on moving this piece of legislation through.

I really like the premise of this bill. As a matter of fact, when I saw there was a bill introduced, and there were several that gave a 90-day cooling off period where we can fix the Y2K problem, I thought, there is a great idea. But the more I got into it, the more I saw the consumers being trampled on.

That is not the way my friend from Oregon sees it. I have the utmost respect for him. We just simply disagree. I say: How do you know who is right? I harken to what Senator EDWARDS said. Every consumer group is against it. They don't like taking on lost causes that they are going to lose.

This bill is going to pass overwhelmingly. Why would consumer groups step up to the plate and say it is wrong? Because in their heart they know the bill goes too far.

I am just going to give you three examples of what happened to this bill when it came to the floor. I am going to pick out three amendments as examples as to why this bill moved over so far to the anticonsumer.

Take one of the amendments of Senator EDWARDS. My friend offered an amendment that simply said that if you sell a computer in the year of 1999, or you sell software, and it is supposed to be Y2K compliant and something happens, you should get the protection of the underlying bill.

Why should we protect people who sell a computer to an ordinary person, or a small business, or sell software in the year of 1999, I say to my friend, as late as November of 1999, and then, whoops, it goes wrong, and in the year 2000 you still get the protection of this bill? I don't get it. It goes too far.

Then we have the Boxer amendment supported by a number of my friends.

What did that say? In the remediation period of that 60 days after you have notified the computer company or the software company that you have a failed product, they have to fix it, if they have a fix.

We had 31 votes or something like that. Where are the voices of the consumer in this Senate? It is perplexing to me. We showed at that time the law of the State of Arizona, a law on Y2K protecting their computer people, as well. Guess what. It said in the remediation period, you must offer a fix to the people.

If this is supposed to cure the problem, how are we curing it when we vote down the Boxer amendment, which said if there is a fix, fix the computer, fix the problem?

Today, we have the Gregg amendment. If I am correct, it is my understanding that the Gregg amendment will be accepted; is that correct?

Mr. HOLLINGS. I don't know. I had not discussed it with the distinguished Senator.

Mrs. BOXER. If it is accepted or we know they will pass because they all are passing, what does the Gregg amendment do? Under the Gregg amendment, if your small business makes a certain chemical and has to live by the rules of the Environmental Protection Agency regarding dumping of that chemical, but your computer goes on the fritz—I don't mean that in a derogatory way—your computer breaks down, guess what. Under the Gregg amendment you don't have to live by the environmental laws. Dump that stuff anywhere, because you will get a waiver which says the problem was my computer went down and, therefore, I can't live within the environmental laws.

This is amazing.

I have given the Senator three examples of how every proconsumer amendment has been voted down and every amendment that flies in the face of good government has moved forward. I am totally shocked and chagrined that we could not even pass the simplest amendments.

I see my friend from Vermont is here. I yield the floor.

Mr. HOLLINGS. I yield the remainder of my time to the Senator from Vermont.

Mr. LEAHY. Mr. President, earlier I came to the floor to show what happens in an actual case today under the law.

In a case in Warren, MI, a man bought a \$100,000 computer system and it was not Y2K compliant. He almost lost his business. However, he was able to follow the State laws we have today. He was able to use State law, enforce it, and save going into bankruptcy, save being out of business.

Under the law before the Senate today, instead, here is what would happen. Rather than a straight line of protection for that small businessperson, here is the way it goes: dead end, dead end, roadblock, roadblock, dead end, dead end, roadblock.

Now they say they have cured it. What did they do? They took off one of the roadblocks.

Look at this chart. The roads in Kosovo are easier to drive through than the roads on this so-called Y2K “correction” bill.

I wish we did what we did last year. We had a good Y2K bill. The information-sharing law, S. 96, was done in a truly bipartisan way. It passed virtually unanimously. It was signed into law.

Now we have a bill, instead of making efforts to bring all parties together to have a bill the President could sign, we have something we know the President will veto, and he will veto it because of these dead ends, because of these detours, because of these roadblocks, because the court door is slammed, and because it wipes out every single State law in this country—all 50.

Mr. President, a few months ago, I came to the Senate floor to take a look at what this Y2K liability bill will actually do in a real life situation. I had a similar chart with me at that time.

Since then, we have heard some of my colleagues praise the so-called compromise on the Y2K liability protection bill. I have adjusted my chart to take into account the changes made to S. 96. You can see that this new so-called compromise eliminated only one road block on the road to justice. The "compromise" dropped liability protection for officers and directors of corporations that have Y2K computer problems. All these other special legal protections are still in S. 96.

Let's take a closer look at my chart under the modified S. 96. The chart still illustrates the many detours, roadblocks and dead ends that this bill would impose on an innocent plaintiff in our state-based legal system. Let's take a real life example of a Y2K problem and see what would happen under the sweeping terms of this new bill.

A small business owner from Warren, Michigan, Mark Yarsike, testified this year before the Commerce and Judiciary Committees about his Y2K problems. In 1997, he brought a new computer cash register system for his small business, Produce Palace, that was not Y2K compliant. Naturally, he assumed his new cash register system would be Y2K compliant. But it was not.

His brand new high-tech cash register system, which cost almost \$100,000, kept crashing. After more than 200 service calls, it was finally discovered that his computer cash register system kept breaking down because it could not read credit cards with an expiration date in the year 2000. A Y2K computer defect that would be covered under this so-called "compromise" bill.

At the top of this chart is how the state-based court system works today for Mark Yarsike. His business buys a new computerized cash register system and a Y2K defect crashes the system. He then asks the cash register company to fix the system. If Congress rejects current Y2K liability legislation, a small business owner has two options under traditional state law.

The cash register company agrees to solve the Y2K problem and the small business owner has a quick and fair settlement.

If the company fails to fix the cash register system with the Y2K defect, then a small business owner has the option to have his day in court and proceed with a fair trial. That is what Mark Yarsike did. He was forced to buy a new computer cash register system from another company and sued the first company that sold him the non-Y2K compliant system. He was able to recoup his losses through a fair settlement.

Today's court system worked for him.

Now what happens to that same small business owner who brought a Y2K defective computer cash register system under the bill before us. Well, the current "compromise" bill overrides the 50 state laws and places new Federal detours, roadblocks, and dead ends from justice for that small business owner. Let's take another look at the chart.

If Congress enacts this Y2K liability protection legislation that overrides state law, the small business owner faces all these special legal protections on his road to justice.

The bill's sweeping legal restrictions include—90 day waiting period, preservation of unconscionable contracts' terms, heightened pleading requirements, new class action requirements, duty to anticipate and avoid Y2K damages, override of implied warranties under state law, caps on punitive damages, limits on joint and several liability, and bystander liability protection. All these special legal protections still apply to small business owners and consumers under this so-called "compromise."

All these dead ends on the road to justice may force a small business owner, like Mark Yarsike, to file for bankruptcy or lay off employees.

The bill contains severe limits on recovery by capping punitive damages to 3 times the amount of compensatory damages or \$250,000, whichever is less, for medium-sized and small businesses. The sponsors of this "compromise" have touted the fact that they struck the looser punitive damages cap for larger businesses that was in the bill. I agree that this is an improvement, but it comes with another troubling compromise.

The bill now defines small businesses as firms with fewer than 50 employees, instead of firms with fewer than 25 employees, which was the definition in the original bill. As a result, the absolute cap of \$250,000 on punitive damages now applies to many more businesses without any justification. Never before in any product liability tort "reform" bill has a small business been defined so broadly.

An exception to this punitive damages cap has been added if a plaintiff can prove that the defendant intentionally defrauded the plaintiff. Of course, the plaintiff must prove this by a higher standard of proof than normal—by clear and convincing evidence. Even the legal standard to prove an exception is stacked against the plaintiff under this bill.

This exception will prove meaningless in the real world because no one will be able to meet this exception for proving the injury was specifically intended. How in the world is our small business owner going to prove that the cash register company intentionally tried to injure him by selling a Y2K defective cash register system? How in

the world is our small business owner going to prove this specific intent by clear and convincing evidence? Get real.

As a result, the small business owner who is harmed by the Y2K defective cash register system may be forced into bankruptcy or lay off employees.

To the credit of the sponsors of this "compromise," they have struck the last road block in the original bill—special liability protection to directors and officers of companies involved in Y2K disputes. I commend them for striking this section. Providing special Y2K liability protection to the key company decision makers would hinder Y2K remediation efforts. Instead, we want to encourage these key decision makers to be overseeing aggressive year 2000 compliance measures.

I hope special legal protections for corporate officers and directors does not resurface in the final bill after conference with the House.

A few of these detours, roadblocks and dead ends in this so-called "compromise" may be justified to prevent frivolous Y2K litigation. But certainly not all of them.

This bill makes seeking justice for the harm caused by a Y2K computer problem into a game of chutes and ladders—but there are only chutes for plaintiffs and no ladders. The defendant wins every time under the rigged rules of this game.

Unfortunately, this so-called compromise bill still overreaches again and again. It is not close to being balanced.

During Senate consideration of S. 96 last week, some of my colleagues and I offered amendments to add some balance to this bill. But the majority defeated every one.

Senator JOHN KERRY offered an alternative, which was endorsed by the White House. The President would sign Senator KERRY's bill tomorrow, but the majority voted it down.

I offered a consumer protection amendment to exclude ordinary consumers from the bill's legal detours, road blocks and dead ends. My amendment would have granted relief from the bill's broad Federal preemption for ordinary consumers to access their home state consumer protection laws. But the majority voted it down.

Senator EDWARDS offered two amendments to add balance to the bill. The first clarified the bill's economic loss section to ensure that recovery would be permitted only for claims allowed under applicable state or Federal law effective on January 1, 1999. The second excluded bad actors from the bill's special legal protections if they sold non-Y2K compliant products in 1999. But again the majority voted down these amendments.

Senator BOXER offered an amendment for computer manufacturers to offer free or at-cost fixes to small businesses and consumers who had purchased Y2K defective products as a requirement for these same computer

manufacturers to be protected under S. 96. This amendment would have added real balance to the bill. But the majority voted it down.

The prospect of Y2K computer problems requires remedial efforts and increased compliance. But as last week's delay in voting on final passage of S. 96 made clear, this bill is not about promoting Y2K compliance; it is about sweeping liability protection and partisan politics.

I fear that all the special legal protections for Y2K problems in S. 96 will hinder serious Y2K remediation efforts in 1999. Instead of passing protections against future lawsuits, Congress should be encouraging Y2K remediation efforts during the last six months of 1999. We have to fix as many of these problems ahead of time as we can. Ultimately, the best business policy and the best defense against Y2K-based lawsuits is to be Y2K compliant.

That is why I hosted a Y2K conference in Vermont to help small businesses prepare for 2000. That is why I taped a Y2K public service announcement in my home state. That is why I cosponsored Senator BOND and Senator KERRY's new law, the "Small Business Year 2000 Readiness Act," to create SBA loans for small businesses to eliminate their Y2K computer problems now. That is why I introduced, with Senator DODD as the lead cosponsor, the "Small Business Y2K Compliance Act," S. 962, to offer new tax incentives for purchasing Y2K compliant hardware and software.

These real measures will avoid future Y2K lawsuits by encouraging Y2K compliance now.

Last year, I joined with Senator HATCH to pass into law a consensus bill known as "The Year 2000 Information and Readiness Disclosure Act." We worked on a bipartisan basis with Senator BENNETT, Senator DODD, the Administration, industry representatives and others to reach agreement on a bill to facilitate information sharing to encourage Y2K compliance.

The new law, enacted less than nine months ago, is working to encourage companies to work together and share Y2K solutions and test results. It promotes company-to-company information sharing while not limiting rights of consumers. That is the model we should use to enact balanced and narrow legislation to deter frivolous Y2K litigation while encouraging responsible Y2K compliance.

Unlike last year's Y2K information sharing law, S. 96 is not narrow or balanced. Instead it is a wish list for special interests that are or might become involved in Y2K litigation.

This bill sends the wrong signal to the business community about its Y2K remediation efforts. It is telling them; "Don't worry, be happy." That will only make Y2K computer problems worse next year, instead of fixing them this year.

The coming of the millennium should not be an excuse for cutting off the rights of those who will be harmed, turning our States' civil justice system upside down, or immunizing those who recklessly disregard the coming problem to the detriment of American consumers.

I remain open to continuing to work with interested members of the Senate on bipartisan, consensus legislation that would protect consumers, deter frivolous Y2K lawsuits and encourage responsible Y2K compliance. S. 96 is not that bill.

The President will veto S. 96 in its present form, as he should. Then perhaps we can sit down with all interested parties and craft a truly balanced bill.

Those of us in Congress who have been active on technology-related issues have struggled mightily, and successfully, to act in a bipartisan way. It would be unfortunate, and it would be harmful to the technology industry, technology users and to all consumers, if that pattern is broken over this bill.

Mr. McCAIN. I yield 8 minutes to the Senator from Alabama, Senator SESSIONS.

Mr. SESSIONS. Mr. President, I am pleased to have the opportunity to comment on this extremely important bill. I congratulate Senator McCAIN for his leadership. I am confident it will pass with a strong vote.

This morning we completed our second day of a joint economic committee on the high-tech national summit. We have heard some of the leading practitioners of computer business in America, including Alan Greenspan and the president of MIT, and we have discussed the tremendous role computers and high-tech equipment have played in the economic growth of this country.

Most people may not know that for a number of years the average wage of Americans has been increasing twice as fast as the cost of living. That is exactly what we want in America. We want productivity. That occurs because of an increase in the productivity of our workforce.

Mr. Greenspan, who everybody recognizes is such a knowledgeable person about our economy, attributes that primarily to the increased productivity that has come from being on line with our computer systems.

Experts, including Bill Gates of Microsoft, talked about the leading exports from the United States being computer related.

This is good for America. We are buying more than we take in. We are selling less than we buy. We need to change that. We need to increase our exports. The one industry that is strong in that record is the computer industry.

Craig Barrett of Intel testified yesterday. I asked him about the Y2K bill.

He said it was critical for their industry to maintain economic growth.

Some say they can pay, and we can sue and sue. I know one Senator mentioned a case, and I believe it was the same case, in which a man testified before the Senate Judiciary Committee. He had filed a lawsuit over the computers in his company. He eventually won. I asked him how long it took. The litigation took 2 years.

With regard to asbestos, we have 200,000 lawsuits completed, 200,000 pending, with another 200,000 expected. They are filed all over this country. Do we want hundreds of thousands, perhaps even a million or more, lawsuits filed in every court in America, with every single case clogging those courts, distracting the computer companies from fixing the problem, trying to defend against the litigation with punitive damages and other unexpected costs that somebody might claim in a lawsuit?

We need to act. It is the responsibility of Congress to set the standards for lawsuits. We have every right to do that. That is what the legislative branch does.

We have an industry that deals throughout the United States. It deals throughout the world. We need to make sure it fixes the problem—and focuses on fixing the problem, not on draining its resources.

With regard to asbestos, 70 percent of the asbestos companies are now in bankruptcy, and of the money they paid out through this litigation onslaught, only 40 percent actually got to the victims.

What I think this bill is intended to do, with strong bipartisan support, is to make sure the moneys these companies spend are spent on fixing the problem. The idea that somehow joint and several liability is horrible is not so. Many States already have joint and several liability in every aspect of their legal system. We are simply saying for this one problem we will have joint and several liability. Frankly, I think that is the better way to go. Why should a company that is not responsible but for 10 percent of the problem pay the whole cost of the problem? What is just about that? I don't think that is a good argument.

We have a potential crisis in our country. We have the potential, make no mistake about it, to significantly damage our highest and most productive industry, the industry that has led to our economic growth and increased wages for American workers. We are endangering that community. If anyone thinks hundreds of thousands of lawsuits filed against all our computer companies in every county in America will not drain them of creativity, will not drain them of research and development, will not reduce their ability to be competitive in the world, I suggest that person is clearly wrong.

I thank Senator WYDEN and Senator DODD, on that side, and Senators MCCAIN and HATCH, who have worked on this bill. They have done a good job, and I am pleased to support it.

I yield the floor.

Mr. KYL. Mr. President, I support S. 96, the Y2K Act of 1999. The subject of Y2K liability is an important and timely issue for the Senate to address. As you know, I serve on the Senate Special Committee on the Year 2000 Technology Problem. Earlier this year, the Committee held a hearing examining Y2K litigation and its potential effect on the courts. A study by the Gartner Group estimated that the cost of Y2K-related litigation could reach \$1 trillion.

The issue of liability is especially important to me. Last Congress, I sponsored the Year 2000 Information and Readiness Disclosure Act, which became law. That legislation encouraged companies to disclose and exchange information about computer processing problems, solutions, test practices, and test results that have to do with preparing for the year 2000. The goal of the bill was to encourage information sharing, which would in turn lead to remediation, which would in turn lead to greater Y2K compliance. Unfortunately, many companies still fear liability, and it is that fear of lawsuits that is inhibiting them from getting done what is needed—which is remediation. The goal of S. 96, like that of the Year 2000 Information and Readiness and Disclosure Act, is to ease the fear of lawsuits so businesses can focus on remediation rather than litigation.

S. 96 is the second major Y2K bill passed by the Congress. Earlier this year, the Senate passed (by a vote of 99 to 0) the Small Business Y2K Readiness Act, which became law on April 2. The bill directed the Small Business Administration to establish a loan guarantee program to guarantee loans of up to \$1 million for small businesses to fix their computers or tackle other Y2K-related problems.

S. 96 enjoys bipartisan support and the backing of a broad coalition of business groups—large and small—including the U.S. Chamber of Commerce, the Information Technology Association of America, the National Retail Federation, the National Association of Independent Business, the Semiconductor Industry Association, to name a few. The bill provides incentives for fixing Y2K problems before failures occur and it encourages the prompt resolution of Y2K problems if they do occur.

Finally, I commend my colleague from Arizona, JOHN MCCAIN, for his tireless efforts in navigating this bill through the Commerce Committee and for his repeated attempts to secure its passage on the Senate floor. S. 96 will provide much needed protection against a potential flood of lawsuits

against the nation's business community and I look forward to its prompt signature by the President.

Mr. THOMPSON. Mr. President, I rise in opposition to S. 96, the Year 2000 liability legislation. The problems caused by faulty computer software on January 1, 2000 may be severe, and some legislation addressing that problem may be warranted. Although I had concerns about S. 96 as it was originally offered, I supported invoking cloture on the bill because I wanted to see the compromise process continue so as to possibly improve the legislation. But even the modified bill would cause the litigation nightmare that it ostensibly seeks to avoid.

Were this bill to become law, both State and Federal courts would be required to resolve disputes resulting from Year 2000 failures not under familiar legal standards developed over 200 years, but by applying new legal terms and definitions, or terms never before applied to this context. As a result, vast amounts of litigation will be required to establish the meaning of those terms, and various State and Federal courts are certain to adopt different views of the same language.

For instance, the bill applies to injuries that result "directly or indirectly from an actual or potential Y2K failure." Because it would be in the interest of defendants to apply the liability shields contained in this bill as widely as possible, many types of cases certainly will be characterized as "result[ing] directly or indirectly from an actual or potential Y2K failure." Pre-trial motions, trial court rulings, appellate court decisions, and ultimately, appellate court rulings to resolve conflicting appellate court rulings will be necessary before the scope of cases actually covered by the bill is finally determined. Courts will consume years determining the meaning of other operative terms, such as "material defect," or deciding precisely what factors are relevant in assessing "the nature of the conduct."

Although punitive damages have been a staple of the common law, this bill would impose a punitive damages regime never before adopted in any jurisdiction. While some States have adopted caps on punitive damages for noneconomic damages in personal injury cases, this bill represents the first time that a law would cap punitive damages with respect to property damage. No one has offered a compelling reason for this course. And no one can predict what the consequence will be of a blanket Federal rule on this subject in the absence of any State experiences with this approach.

The bill's effects on the procedures for resolving cases are equally serious. It would permit a defendant to respond to a complaint by indicating a willingness to engage in alternative dispute resolution. But the bill makes no pro-

vision for the actual availability of alternative dispute resolution in federal courts that lack them, nor does it ensure the use of State ADR procedures. And federal law would control the pleading requirements even of State law causes of action brought in state courts.

Additionally, I am concerned about the effect this bill would have on small businesses. Unless a small business is in the computer business, its exclusive role in Year 2000 litigation will be as a plaintiff, not a defendant. But this bill provides benefits only to defendants, benefits that would be of no use to most small businesses. At the same time, it denies otherwise available legal rights to small business plaintiffs. Apart from restricting their right to recover punitive damages, small businesses who currently could bring an action against a landlord who fails to provide working elevators so that customers and employees can reach their offices would not be able under this bill to sue the landlord if he for failed to take action now to make sure that those elevators will work on January 1, 2000. The landlord's relief from liability will both increase the chances that a small business' elevator will not work and decrease the recovery that the small business can obtain if in fact the elevator does not work.

Similarly, a small business that bought a computer that did not work now has the right to obtain consequential damages from that failure. If the business had to shut down because of the failure, the business owner could recover the lost profits for the period that the defective computer caused the shutdown. But under this legislation, all that the business owner who files a tort and contract lawsuit could obtain is recovery for damage to the computer itself. No compensation would be permitted for real injuries that the owner faces. There is no reason to impose this hardship on a small business that bought a product that it had every reason to believe would work. There is no reason to increase the protection of the company that did not take the appropriate steps to ensure Y2K compliance as against the workers who will be laid off because the small business cannot continue to operate.

Even though the bill does preempt state law in a number of areas, federal action might be appropriate to address a unique event such as the Year 2000 problem. There could in fact be a large volume of litigation that could overwhelm courts. But this bill is not an effective means of addressing that possible calamity. Reducing in advance the exposure of people who made non-Y2K compliant products will reduce neither the scope of the computer malfunctions nor the number of lawsuits. Restrictions only on the ability of plaintiffs, such as individuals and small businesses, to recover damages,

no matter how meritorious their cases, is not warranted. S. 96 will create many new issues to litigate, increase the likelihood that the Year 2000 problem will be great rather than small, and harm the ability of innocent persons to recover that which their states legally entitle them to retain. These are not desirable objectives, and for these reasons I oppose this bill.

Mr. KERREY. Mr. President, the debate surrounding Y2K Liability is a very important one. The estimated cost associated with Y2K issues vary greatly, ranging from \$600 billion to \$1.6 trillion worldwide. The amount of litigation that will result from Y2K-related failures is uncertain, but at least one study has guesstimated the costs for Y2K related litigation and damages to be at \$300 billion.

With that in mind, several bills have been drafted which encourage companies to prevent Y2K failures and to remedy problems quickly if they occur, and to deter frivolous lawsuits. It has essentially boiled down to 2 bills: the McCain-Wyden-Dodd bill, and the Kerry bill. Many of the provisions within the bills are the same; however, there are a couple of issues that warrant discussion.

I have studied these bills closely. And for me, what it all comes down to is two simple questions: Which bill provides more of an incentive for computer companies to identify and remedy potential Y2K problems? And, second, what effect will this legislation have on consumers?

First. Which bill provides more of an incentive for computer companies to identify and remedy potential Y2K problems? To answer that question, one needs to understand what the backers of this bill are so concerned about. The people that are pushing for this bill, namely, some of the computer companies and big business, are not afraid of me. They are not afraid of what Congress might do to them. What they are concerned about, and what they are afraid of, is 12 men and women on a jury. They are afraid of what a jury might do to them if they are sued and their case ends up in court before a jury.

Let me be clear: I do think this Y2K liability is a special situation and believe that we should provide computer companies with some type of certainty and protection from these lawsuits. That is why I want to pass one of these bills. However, I think we need to be careful that the protections we provide aren't so great that companies no longer have an incentive to fix their Y2K problems.

So, when I hear people asking to "cap" the amount of punitive damages that can be imposed against them, I can't help but to wonder, "Why do you need to worry about that? The only time punitive damages are awarded is if the person has done something flagrantly wrong."

Similarly, proportionate liability, which provides assurances to the defendant on how much money he would have to pay the plaintiff, is fair and reasonable for most defendants, but not all defendants. Under the Kerry bill, only good corporate citizens will have the benefit of proportionate liability. Under the McCain bill, all corporate citizens, no matter whether they act in good faith or bad faith, will be rewarded with proportionate liability.

Computer companies must have an incentive to identify and remedy potential Y2K problems. If we pass the McCain bill, which both caps punitive damages, and rewards all corporate citizens, both good and bad, with proportionate liability, I believe that would provide a disincentive to remedy potential Y2K problems.

Therefore, the answer to the first question is clear: the Kerry bill provides more incentive for computer companies to identify and remedy potential Y2K problems.

Second. The second question I had to answer is what effect will this legislation have on consumers? To answer that question, we need to look at one provision in particular: the economic loss provision. The economic loss provision has to do with whether a small business owner or the consumer is allowed to recover for lost profits, lost overhead, and out-of-pocket costs.

The McCain bill bars the recovery of economic losses for businesses in all Y2K contexts. The economic loss rule that I support, and the rule followed in most jurisdictions, says that if the parties have agreed by contract about the allocation of loss, then that agreement should govern. If there is no contract, then state law would apply.

What does this mean? It means that under the McCain bill, consumers and small businesses are going to be at a disadvantage. To illustrate, let's look at a very practical example that would apply to many small businesses in Nebraska. A businessman wants to open a flower shop. He goes into a computer store and talks to a computer salesman. That salesman tells the businessman that the computer is Y2K compliant and that come January 1, 2000, the computer will be fine. The businessman buys the computer for \$5,000. The flower shop opens and is doing great. On January 1, 2000, the computer crashes and can not be fixed for four weeks. The businessman relies on his computer for almost everything, including as a cash register, a client database, and record keeping. As a result of the computer crash, his business is severely affected—he pays bills late, he can't meet payroll, and he loses customers, costing him a total of \$75,000. Under the McCain bill, the only damages the businessman can recover are the cost of the computer, \$5,000. The economic loss rule I support, the Ed-

wards amendment, would allow the businessman to make a case as to why he should be able to recover at least some of his lost profit. Thus, to answer to the second question, the McCain bill would unfairly place small businesses and consumers at a disadvantage to computer companies.

Because of these reasons, I will cast a vote against the McCain Y2K Liability bill. I want to reiterate that I support the goals of this legislation—I want computer companies to have an incentive to identify and remedy potential Y2K problems, and I don't want there to be an onslaught of frivolous lawsuits beginning on January 2, 2000. Unfortunately, I do not believe the McCain bill in its current form is the proper way to address these issues.

If these issues are properly addressed in conference, I will support the conference report. Until that happens, although the McCain bill may achieve its goal of eliminating frivolous lawsuits, I believe this comes at too high a price to our small businesses and consumers.

Mr. ROCKEFELLER. Mr. President, the overriding point to be made today is that the vast majority of the Senate, Democrats and Republicans, and the White House, agree on the need for legislation to encourage Y2K readiness and to prevent frivolous litigation.

We all agree that there is likely to be a surge in Y2K related complaints and lawsuits and that everyone will benefit if many of those cases can be dealt with outside the courtroom. We agree on the need to encourage consumers and businesses to use remediation to fix Y2K problems and to use negotiation to settle disputes.

Where we differ is on the details of how to get there. And let me assure you from my 11 years of experience as a proponent of product liability reform—the details matter.

And the details should matter. In liability reforms, and especially tort reforms, what's at stake is the basic balance between plaintiffs and defendants, consumers and business, injured and responsible parties. Our state courts and legislatures have struggled for several hundred years to get that balance right. If we're going to change their work then we have a responsibility to work hard at getting the details right, too.

Senators KERRY and DASCHLE deserve a great deal of credit for wading into the middle of the Y2K liability reform issue. I've been in their shoes before, and I know how hard it is to try to find the middle ground. It is no easy feat to craft a bill that protects consumers, gives business the predictability and relief from frivolous suits they deserve, wins the support of the majority in Congress, and would secure a presidential signature.

Senators KERRY and DASCHLE came up with a bill that gives the high-tech community about 80 percent of what

they want, that meets every one of the objections outlined by the White House, and that won 41 votes in the Senate last week. I voted for that bill.

Forty-one votes, including the votes of many Senators who hold strong reservations about federalizing any part of our tort liability system at all. Forty-one votes shows us in plain terms that there is obvious overlap on the core issues and principals of this bill, and on a good many of the details.

What is so regrettable is that even after our negotiating a bill that gives most stakeholders most of what they say they need, my Republican colleagues and much of the business community would rather have an issue than a bill. A negotiated compromise that gives them 80 percent of what they want but also keep the courts open to legitimate claims apparently isn't enough.

So rather than achieve a major portion of their goals for the year 2000, they've decided to put all of us through an exercise that will result in nothing. Believe me, I've been down this road before. I know these issues, I know these stakeholders, I know the vote counts, and I know this White House on liability reforms. And I know what the outcome will be if we continue down this dead-end path.

What baffles me is to see the business community, once again, choose nothing. Haven't we learned from years of legislating on liability reforms that purists come away emptyhanded?

The bottom line is that the bill before us today is simply too far afield of what's doable. And the best way to get back on course for enacting a Y2K law is to vote against this bill and sit down at the negotiating table.

Unlike the never-ending products liability debate the opportunity to deal with Y2K suits won't last long. We can't afford to get it wrong. And we don't have time to pass a bill that we know will be vetoed and then come back to the drawing board.

I urge my colleagues not to squander this opportunity.

Mr. WYDEN. Mr. President, I rise today to ask my colleague, the Senator from Oklahoma, Senator INHOFE, a few questions regarding his amendment Thursday to the Y2K Bill.

Mr. INHOFE. I thank my colleague from Oregon, Senator WYDEN, and I am pleased to answer any questions he might have.

Mr. WYDEN. The Senator's amendment refers to temporary non-compliance with "federally enforceable requirements" because of factors related to a Y2K failure beyond the control of the party charged with compliance. Could the Senator provide an example of such a federally enforceable requirement so that this Body can understand the practical scope of the Senator's amendment, especially what would and would not be an imminent threat to

health, safety or the environment that would bar the use of the defense?

Mr. INHOFE. I would be pleased to. An example of a use of the defense that this amendment would provide would be a federally enforceable reporting requirement on an energy facility. Suppose a plant operator is vigilant at the controls of a conventional power plant. At the stroke of midnight New Year's the plant is operating smoothly, and power is being transmitted to homes, hospitals, and nursing homes right on schedule. Further, the operator can see clearly that the environmental machinery that cleans emissions such as sulfur dioxide (an acid rain precursor) or nitrogen oxides (a contributor to smog) is operating normally in every respect save one. The computer read-out from the continuous emissions monitor at the top of the smoke stack does not seem to be transmitting or storing the emission data verifying that equipment is otherwise in normal function. Repairing the bug in the monitor transmitter may take a few days over the holiday weekend.

Without my amendment the plant operator faces a terrible choice. Does he shut down the whole plant and let the people in the nursing homes freeze in the dark, or does he run the risk of severe sanctions for disregarding a requirement that he provide government agencies an unbroken chain of emission monitor print-outs? Mind you, he knows the pollution is being controlled as usual because he or she has hands on the equipment. With my amendment, the plant could keep operating, nobody's lights would have to go out unless—and this is key—doing so does not threaten public health, safety, or the environment. This is not a holiday from environmental quality laws.

Mr. WYDEN. Could the Senator also provide an example of when the defense would not apply?

Mr. INHOFE. Certainly, suppose the power plant were nuclear and—this time—a temperature gauge is broken and the operator does not really know whether the plant is operating in safe mode or not. In such a case, the operator could not, under my amendment, "drive in the dark with no lights on." Clearly operating in such a fashion that could pose a risk to health, safety, or the environment would receive no protection under my amendment, and no sympathy from me.

Mr. WYDEN. What does the phrase "federally enforceable requirements" mean? Is it broader than federal requirements?

Mr. INHOFE. It is broader only in the following respect. Many federal standards are actually implemented in collaboration with states. For example, it could technically be a state-issued monitoring and data recordation and reporting program that is enforceable federally.

Mr. WYDEN. I thank the Senator from Oklahoma for clarifying his

amendment and I thank him for his work on this issue.

Mr. INHOFE. I appreciate the Senator from Oregon's interest in my amendment and I thank him for his support and assistance in getting my amendment accepted.

Mr. BYRD. Mr. President, in little more than six months time, each and every American is going to be impacted by one of the simplest, yet most complex technological problems we have ever faced. The so-called Y2K computer problem—simple to understand, but enormously complex in terms of its solution—has the potential to adversely affect every facet of our lives. Yet, while no one can say with absolute certainty what consequences will flow from the new year, there is one thing our litigious nation can be sure of: Come January 1st, many Americans will seek redress in our nation's courtrooms.

At the very time when businesses will need to focus their attention on mending computer problems and helping others deal with service disruptions, too many companies will, unfortunately, find themselves distracted from that important task by the threat of legal action. Equally troubling is the possibility of hundreds of thousands of law suits being brought in a matter of weeks or months; a situation which could simply overwhelm our judicial system.

Consequently, I am concerned that, unless we act now, our legal system may not be able to adequately address the ramifications of the new year in an efficient, fair, and effective manner. But beyond the courthouse doors, I am also deeply concerned about the potential long-term effect on our nation's computer industry.

Mr. President, a generation ago, the United States was the world's preeminent producer of manufactured goods. At one time, we were unrivaled in our construction of automobiles, aircraft, consumer electronics, communications equipment including satellite technology, and steel, to name but a few. For various reasons, though, we have lost our dominant position in each of these important areas. No longer do foreign companies immediately look to the U.S. when seeking to purchase an airplane or a roll of steel. And no longer do consumers around the world automatically purchase an American-made television, an American-made radio or an American-made camera. Those days are gone.

Yet, despite that circumstance, unsettling as it may be, the fact remains that the United States is predominate in the world of computers and computer technology. Companies such as IBM, Microsoft, Intel, and Compaq, are household names around the world, and for good reason. They, among many others, are American success stories that have produced enormous benefits

to our nation's economy and provided our workers with good, high-paying jobs.

Like many of my colleagues, I am troubled by the fact that some small businesses may suffer as a result of a Y2K failure. But it also troubles me to think that we may be on the verge of litigating our computer industry into submission. Where are we if, in our zeal to place blame, we cripple these corporate entities, some of which may be big and rich, but most of which are small? And how do we preserve what may be our last industrial stronghold if we are willing to treat the overwhelming majority of these companies, which have worked diligently and in good faith, the same way we treat those few unscrupulous firms that do not wish to accept their responsibilities? I believe that the protections afforded small business in the bill, while not as I would have written them, are adequate.

We must acknowledge that what is at stake here is of enormous long-term importance to the economic well-being of every American. Each of us has a duty to ensure that our technological and industrial base flourishes, not just in the coming months, but for decades. In weighing those factors, I sincerely hope that my colleagues will come to the same conclusion as I and support this legislation for the good of our economy, our workers, and our nation.

Mr. KOHL. Mr. President, we should act both to deter frivolous litigation over Y2K defects and to encourage Y2K fixes, but this bill will create as many problems as it solves. Instead of merely establishing incentives to address Y2K defects, several provisions in this bill could, perversely, discourage companies from acting responsibly and reward those who silently—and inexcusably—wait for defects to happen rather than cure them before disaster strikes. In short, I will oppose this measure because it fails to strike the right balance.

To be sure, the bill has improved from earlier versions, and some sections—like class action reform to curtail frivolous lawsuits and a 90-day waiting period to promote remediation instead of litigation—are steps in the right direction. Still, provisions like limits on punitive damages and a one-sided duty on consumers to anticipate all Y2K defects give businesses an excuse to continue doing nothing because even the bad actors end up with a lower risk for liability. And provisions like the elimination of “joint and several” liability, which I have supported in other contexts, seem out of place here where remediation is the heart of the matter. In other words, if a company isn't fixing a defect when it could be 100 percent liable, why should limiting its liability to a fraction of that be anything but a disincentive to take corrective steps?

While this issue has become a political football here in Washington, it doesn't play the same way in Wisconsin, where we know how to play football. Our home State businesses are concerned about the potential for wasteful litigation, and they want to see fixes rather than breakdowns. Like me, they do want Y2K liability reform. That is why I supported the Kerry/Robb substitute. But the Wisconsin businesses who've contacted me don't have very strong feelings about any of the provisions unique to the McCain/Wyden bill. And it is not surprising because, unlike as with product liability reform, here they are more likely to be plaintiffs than defendants, making them weary of measures that discourage remedial action.

I continue to believe that we should generally reform litigation. But if we are going to start doing it piecemeal, the place to start is probably in the product liability context, where 90-year-old products, still in use, are being judged by today's standards. The place not to start with sweeping reform is here—especially when it would benefit a software manufacturer who produces a product in 1998 that becomes dysfunctional just two years later and did nothing at all to try to prevent the defect from happening.

That said, there are moderate steps we have taken, and can take, to help address the Y2K issue. For example, last year I cosponsored and Congress passed the Year 2000 Information Disclosure Act. This law encourages the disclosure and exchange of information about computer processing problems by raising the standard regarding when companies can be liable for releasing false information. I also cosponsored the Small Business Year 2000 Readiness Act, which was signed into law earlier this year. It expands the Small Business Administration's lending program to provide companies with assistance as they work to become Y2K compliant. The Kerry/Robb substitute is a reasonable measure that can make a difference and, indeed, that the President can sign.

When all is said and done, I suspect we will enact a law this year and before the Year 2000, and that it will look a lot more like the Kerry/Robb substitute than the unbalanced bill before the Senate today. That would be fair to the high tech world and it would be in the best interests of consumers and small businesses in Wisconsin.

Mr. BURNS. Mr. President, today I rise to highlight the hypocrisy that I have heard during this debate on S. 96, the Y2K legislation admirably led by my friend, Senator JOHN MCCAIN. I have heard a number of Senators up here saying they would not do anything to hurt the high-tech industry. Those same Senators then turn around and offer an amendment or voice their support for an amendment that no one

in the high-tech industry supports, but there is one group who supports their amendments, the American Trial Lawyers.

As Chairman of the Senate Subcommittee on Communications, I work with leaders from the high-tech industry on a daily basis. I sit back in amazement when I watch the economic success of our nation, which is largely driven by the high-tech industry. In fact, yesterday, June 14, Alan Greenspan testified in front of Chairman MACK's Joint Economic Committee and placed strong emphasis on the fact that the high-tech industry is driving our current economic boom. It is creating an economy like we have never seen before. I am working toward the goal of bringing high-tech jobs to Montana, my home state. I believe in my heart that the day will come when the high-tech economy delivers more good paying jobs to my fellow Montanans. I do not want anything to get in the way of this possibility. Let me give you a few amazing statistics that outline the success and tremendous growth opportunities in this industry. In 1998, there was anywhere from \$32 billion to \$50 billion in electronic commerce done worldwide depending on which research firm you listen to. The Gartner Group projects that in 2003 there will be \$3.2 trillion in electronic commerce done worldwide. Think about that, \$32 billion in 1998 and over \$3.2 trillion in 2003 or 100 times as much electronic commerce in five years. Friends, we have never seen growth like this in an economic sector in American history. Further, in 2010, 20 percent of worldwide commerce will be done online. I ask myself, “What can the Government do to make sure these numbers become a reality?”

We need to stay out of the way. What can the Government do that could stop this unprecedented growth? I can tell you what we could do to stop the growth of the industry, we could listen to our colleagues who are up here carrying the water of the trial lawyers.

Let me show you exactly why the American trial lawyers do not want to see this legislation pass. The Gartner Group estimates that the cost of dealing with the Y2K bug worldwide will run in excess of \$600 billion. Yet, we continuously hear that class action lawsuits and other suits are being filed or are being written for later filing that may reach past the \$1 trillion mark. Do you know any industry in the world that is so resilient that it can easily take a \$1 trillion hit without being slowed down in its growth? I don't. As a matter of fact, as big as the Y2K problem is, the biggest problem our high-tech industry faces is from the trial lawyers. We cannot stand by and let this happen.

I want the American people to see why many Senators are carrying Amendments that are supported by the American trial lawyers. In the 1998

election cycle, nearly 90 percent of the roughly \$2.4 million given to federal candidates by the American Trial Lawyers Association was given to Democrats. Every single one of the Amendments offered here on the Senate floor that the American Trial Lawyers Association backed has been offered by Democrats. It is not hard to see the correlation and draw conclusions. President Clinton has threatened to veto S. 96 if passed in its current form. Sure enough, if you look back to his election in 1996, you find that over 90 percent of the money given by the American Trial Lawyers Association was given to President Clinton over former Majority Leader Bob Dole.

The Democrats stand on the Senate floor and say that their proposed amendments to S. 96 are proconsumer. I am here to highlight the hypocrisy in that statement. Is it proconsumer to slow the growth of our Nation's economy because of frivolous legislation? What the amendments do and President Clinton's threatened veto stand to do are to slow one of the most outstanding eras of economic growth this country has ever seen. And they say this is proconsumer? As voices for the people, we are elected to do what is best for the citizens of America. The high tech industry, which is carrying us into an unprecedented era of economic strength, wants to see this bill passed so that the \$1 trillion plus in threatened lawsuits by the American trial lawyers never become a reality.

The Democrats are again threatening to play politics with a matter of grave danger and utmost importance to the American economy. I want to say to my colleagues, stand firm. Push this bill through unchanged, and send it to President Clinton.

The growth of the high-tech industry is absolutely critical to the continued growth of our Nation's economy. Make President Clinton tell the American people that he would rather see the trial lawyers have their day and pay rather than see one of the most exciting industries in American history continue its rise to the top of our Nation's economy. Do not let the American trial lawyers dictate our economy, stand in support of Senator McCAIN's bill, S. 96.

Mr. DOMENICI. Mr. President, I rise in support of the compromise Y2K liability bill before the Senate today.

I want to commend my colleagues who have worked hard to put the Senate in position to pass this important legislation.

After working for years to enact securities litigation reform, I know how tough it is to battle the trial lawyers. In fact, many of the same entrepreneurial lawyers who specialize in securities class actions have already begun to file Y2K class actions.

Let there be no doubt that being a trial lawyer is big business. In anticipation of the problems associated with

Y2K, lawyers have been putting on seminars on how to plead, try and negotiate Y2K lawsuits. Nearly 80 companies have already been hit by Y2K lawsuits.

Y2K offers these enterprising lawyers a new litigation gold mine. If we do not pass this bill, estimates are that the litigation costs from the Y2K problem will be as much as \$1.5 trillion. That exceeds the cost of the asbestos, breast implant, tobacco and Superfund lawsuits combined.

Our economy is the envy of the world. High technology companies have done much to fuel the growth of the stock market in recent years, and they have provided millions of Americans high paying and rewarding jobs. The average high-tech wage is nearly 75% higher than the average private sector wage in the United States. These companies spend nearly \$40 billion per year in research and development. I would rather see high-tech firms continue to spend their resources on their employees and on improving their products, rather than spend money on lawyers.

And there is no doubt that deep-pocketed technology companies will be the most attractive potential defendants in abusive Y2K litigation. These companies proved to be the most attractive for entrepreneurial securities class action lawyers, and I have every reason to believe that they will find themselves in the lawyers' cross hairs once again if we don't enact this bill.

Rather than turn our booming high tech economy over to the trial lawyers, this bill seeks to place some reasonable restraints on Y2K litigation. The focus of this bill is to encourage potential litigants to fix their Y2K problems without having to resort to the courts, and the lawyers.

The bill would require a 90-day cooling off period to allow potential plaintiffs to offer a way to cure any Y2K defects which arise in their products. This is a reasonable alternative to the "rush to the courthouse" atmosphere which might prevail without this legislation.

I am also pleased to see that the drafters of this bill have chosen to include the proportionate liability provisions from the Private Securities Litigation Reform Act of 1995 in this bill. These provisions, taken from the bill Senators DODD, D'Amato and I passed into law, are the essence of fairness in tort reform. Who can argue with the concept that defendants should only be responsible for the portion of damages corresponding to their actual fault in any given case? I guess the trial lawyers might argue with that idea, but few others would.

Finally, I want to say a word about punitive damages. I think the drafters of this bill have done all they can, and compromised as much as possible on the issue of punitive damages. At this point, unless you are a small business,

there is no limit in this bill on punitive damages, if the plaintiff can prove by clear and convincing evidence that the applicable standard for punitives has been met.

In my view, I would have liked to see this bill further cap punitive damages. Punitive damages are designed to deter future wrongful conduct, but it has been shown that they serve relatively little deterrent purpose. This is particularly true in Y2K cases, where the problem is one that is fixable the first time it is discovered. Since we cannot have another "millennium problem" for another thousand years, I fail to see how punitive damages should apply in any Y2K case.

Former Supreme Court Justice Lewis Powell, in describing punitive damages generally many years ago, noted that they invited "punishment so arbitrary as to be virtually random." Justice Powell wisely has commented that because juries can impose virtually limitless punitive damages, they act as "legislator and judge, without the training, experience, or guidance of either." Justice Powell didn't know about the Y2K problem when he wrote these words, but they still ring true in this debate here today.

While many of us would have liked to see this bill go farther in a few areas, I believe that some lawsuit reform is better than no reform at all. Rather than let the trial lawyers run out the clock, the drafters have done a fine job reaching a compromise. This bill is a reasoned approach to the problem—one that emphasizes cooperation, not litigation and puts our economic growth and our high-tech businesses ahead of greedy trial lawyers. I am happy to support it.

I thank my colleagues for yielding me time, I again commend the drafters of this bill, and I yield the floor.

Mr. ROBB. Mr. President, while most people think of divisions in this body as divisions of party, there are other divisions as well. Increasingly, I'm becoming concerned about the division between those who want to create political issues and those who want to solve problems.

From the start of this debate, I realized that the crushing wave of litigation which could accompany the new year threatens to hinder our efforts to achieve Y2K readiness and exacerbate the damage done by the Y2K bug. The prospect of litigation enormously complicates an already complex problem. I have worked with others to try to move all interested parties toward enough of a consensus that we could get a bill that would be signed into law.

This effort to develop a consensus bill led to the development of the alternative offered by Senator KERRY. That substitute had the benefit of both addressing the legitimate needs of the high tech community and satisfying

the concerns expressed by the Administration. Instead we have voted out legislation which, if unchanged in conference, is heading toward a veto.

I have said from the outset that I believe we ought to pass a bill to address this real—and unique—problem. So today I voted for S. 96, to move it to the next stage in the legislative process. But I caution my colleagues that if this bill is not modified—if the conferees are not willing to address the remaining concerns in the upcoming conference—then we're still faced with a veto, we'll end up where we began, and we'll have wasted valuable time in reaching our goal.

With regard to the conference, I have heard that the House may simply adopt the Senate language, sending this bill directly to the White House knowing it would be vetoed. That's pure politics and it's counter-productive. From my negotiations with the White House, I know that they too want to find consensus, but at this point, the only way to find this consensus is to sit down with them in a conference setting.

If a conference does not take place, if this bill is sent to the President with the explicit knowledge that it will draw a veto, then the reports on Capitol Hill that some would rather have a Y2K issue than a Y2K solution will be obvious for one and all to see, because there is consensus to be found on this issue, if all parties are willing to negotiate in good faith.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I think we have had a very excellent debate. I yield the remainder of my time.

I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Democratic leader.

Mr. DASCHLE. Mr. President, I appreciate the opportunity to say just a couple of words about the pending bill. I will use my leader time, because I know we are out of time under the unanimous consent agreement.

Let me begin by saying I do not think there is disagreement at all among most of our colleagues about the importance of stopping frivolous Y2K lawsuits. We recognize that high technology is now the driving engine of our economy and will become an even more important part of our economy in the years ahead. We recognize that businesses need to focus on fixing the problem, not defending against lawsuits.

So we want a bill. We hope to have a bill the President will sign. I am disappointed we are not there yet. The White House has made it very clear the pending bill will be vetoed even with the changes that have been made so far. So we have gridlock. We have gridlock in large measure because we have not been able to resolve the remaining differences on this important legislation.

I think it is very important we balance the legitimate needs of industry to be protected from frivolous attacks and the rights of consumers. We differ on very critical legislative details that were the focus of a substitute Senator KERRY offered some time ago. We recognize that consumers and small businesses will face real problems. We need to protect their rights in court. That is one of our fundamental concerns about the passage of the current legislation.

We want a bill. We do not want frivolous lawsuits. But we also want to ensure that people have some protection.

Let me just give one example of what will happen if this bill is passed and signed into law. This is just one example.

The pending bill only allows small businesses to recover economic losses for tangible property damage. That is a phrase we are going to hear a lot more in the future, "tangible" property damage. This does not include the loss of business information, such as that contained in computer databases. So such losses, including billing records or customer lists, property that is critical to a business owner but which is not tangible, is not covered under the bill we are passing. Amazingly, the pending bill would even protect defendants from liability for fraud or misrepresentation.

If you are a small businessman watching C-SPAN right now, you are on Main Street and you are wondering what this bill is all about, under this bill, in those cases where you do not have a tangible property matter at stake, you have absolutely no protection. If you lose your database, if you lose that so-called nontangible property, you have no recourse. That is unacceptable.

I know we are going to get all kinds of debate, and I will probably get calls this afternoon: Yes, we do. The fact is, we have had analysis after analysis. The bottom line is that there is no protection for intangible property. That is not protected.

Defendants are even protected from liability for economic losses if they engaged in fraud or misrepresentation under the current legislation.

Our alternative, by contrast, only protects responsible companies. The biggest difference between our approach and theirs is that we protect only companies that have acted responsibly. We require companies to demonstrate that they have taken steps to clear up the Y2K problems.

For example, the pending bill provides blanket proportional liability. The Kerry amendment merely requires companies to have identified and warned potential victims of problems to get proportional liability.

The pending bill caps punitive damages for small companies. Punitive damages punish egregious conduct. We provide no such protection for irre-

sponsible behavior in the alternative we offer.

The pending bill sets up roadblocks for consumers suffering from real Y2K-related problems. Our amendment lets them in the courthouse door to at least have the opportunity for redress their damages in a court of law.

This area of law traditionally falls under State jurisdiction. But this legislation, the pending bill, preempts State law. We acknowledge the need to do so because of unique circumstances, but we also recognize the need to be careful.

The pending bill virtually shifts all Y2K suits into Federal court. It makes it harder for consumers to bring a suit. It increases the strain on an already backlogged Federal court system. Chief Justice Rehnquist and the Judicial Conference oppose such federalization. Our bill places limits on class actions but does not federalize them.

In some ways our bill is very similar. Our version addresses all the basic concerns raised by the high-tech industry. Our plan is identical to the pending bill in many ways. Both give defendants 60 days to fix a Y2K problem. Both allow either party to request alternative dispute resolution. Both require anyone seeking damages to have the opportunity to offer reasonable proof—including the nature and amount of the damages—before a class action suit could proceed.

But while we recognize the need for a bill, we must carefully write it. Evidence is yet unclear as to the extent of this problem. Evidence is yet unclear about how much frivolous litigation will result from the Y2K bug.

We should not grant sweeping legal immunity to those who have caused but not corrected problems. Those who have not tried to address problems deserve no special protection. Yet, this bill provides them that protection.

Our approaches are identical in every important, necessary way. But they differ in critical ways for consumers and for our court system.

Our approach is the only one the President will sign, so it is the only one that has hope of becoming law.

The year 2000 is fast approaching. We cannot waste time debating a bill we know will be vetoed only to have to start all over again. It is senseless to do that.

If enough of our colleagues vote against this legislation, it sends a message to fix it in conference. If conferees fail to fix it, I will make every effort to pass another bill that addresses the problem, that the President can sign.

In fact, I will present again, as clearly as I can, an articulated, very understandable version of what the President will sign. I want to make it very clear what it is the President will sign and what he will not. We owe it to all of our colleagues to reiterate one more time just what it is that he finds so offensive about this.

Let's go back one more time, because I think it is so incredible an issue. If you are affected tangibly, if your property is somehow tangibly affected, you have redress, you can be compensated for economic losses; but if your database, if your mailing list, or if anything else in the computer is adversely affected, is lost, is destroyed as a result of an advertent or inadvertent error on the part of technology—you lose everything—you have no recourse. You cannot recover economic losses that result.

Is that really what we want to do? Do we want to destroy your opportunity for recourse when you have lost your database? When you have lost your mailing list? Do we really want that to be the law of the land overriding State law? That is exactly what we are voting on.

The answer is, I will bet you this afternoon a majority of our colleagues are going to say: Yes, that is what I am voting on. I will support taking away the right of a small businessman to go to court if he has lost his database. I will support the right of an errant computer salesman or somebody else to take away a small business's opportunity to go to court.

I do not believe we want to do that. That is why the President said he will veto this bill. We can do better than that. Nobody can plead ignorance. I am saying it this afternoon. I want everybody to understand it. Nobody can say, "I didn't know that's what the bill did," because I am telling you right now, that is what it does.

So before you vote, my colleagues, understand, ignorance is not bliss here. Ignorance is no excuse. When they come back and say, "I didn't know," we can say, "I told you before the vote."

If you want to take away a small businessman's right to go to court because he has lost everything, you go ahead and vote for this bill. If you want a bill that works, work with us, work with the President; let's get one approved by the Senate he can sign.

I yield the floor.

#### RECESS

The PRESIDING OFFICER. Under the previous order, the Senate now stands in recess until the hour of 2:15.

Thereupon, the Senate, at 1:16 p.m., recessed until 2:14 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. INHOFE).

#### Y2K ACT

The Senate resumed the consideration of the bill.

AMENDMENT NO. 623 TO AMENDMENT NO. 608

Mr. MCCAIN. Mr. President, it is my understanding that there is a Sessions

amendment at the desk, No. 623, and I ask for its immediate consideration.

It is also my understanding, with the agreement of the Senator from South Carolina, that the amendment is acceptable to both sides. Therefore, I believe there is no further debate on the amendment.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

The amendment (No. 623) was agreed to.

Mr. MCCAIN. Mr. President, I move to reconsider the vote.

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

The motion to lay on the table was agreed to.

AMENDMENT NO. 624 TO AMENDMENT NO. 608

Mr. MCCAIN. The next item of business is the amendment that was offered by Senator GREGG.

The PRESIDING OFFICER. The Senator is correct.

Mr. MCCAIN. Mr. President, the amendment is very well intentioned. I believe we more appropriately sought to deal with this matter when we adopted the Inhofe amendment. I come to the conclusion that the Gregg amendment could possibly have an adverse affect on the bill and lead to more litigation, when certain individuals use this legislation as an excuse to avoid legitimate regulation.

I also believe that the adoption of this amendment might further increase the risk of veto of the bill. I want to assure the Senator from New Hampshire that we will deal with this matter in a thoughtful manner in conference, but I am very concerned about the impact of this amendment.

I believe that under the previous order, unless the Senator from New Hampshire requests unanimous consent to speak on the amendment, we should move forward.

The PRESIDING OFFICER. There are 2 minutes equally divided.

The Senator from New Hampshire.

AMENDMENT NO. 624 TO AMENDMENT NO. 608, AS MODIFIED

Mr. GREGG. Mr. President, I ask unanimous consent to modify the amendment.

The PRESIDING OFFICER. Without objection, the amendment is modified.

The amendment (No. 624), as modified, is as follows:

At the appropriate place, insert the following:

#### SEC. \_\_\_\_ SUSPENSION OF PENALTIES FOR CERTAIN YEAR 2000 FAILURES BY SMALL BUSINESS CONCERNS.

(a) DEFINITIONS.—In this section—

(1) the term "agency" means any executive agency, as defined in section 105 of title 5, United States Code, that has the authority to impose civil penalties on small business concerns;

(2) the term "first-time violation" means a violation by a small business concern of a Federal rule or regulation (other than a Federal rule or regulation that relates to the safety and soundness of the banking or monetary system, including protection of deposi-

tors) resulting from a Y2K failure if that Federal rule or regulation had not been violated by that small business concern within the preceding 3 years; and

(3) the term "small business concern" has the same meaning as a defendant described in section 5(b)(2)(B).

(b) ESTABLISHMENT OF LIAISONS.—Not later than 30 days after the date of enactment of this section each agency shall—

(1) establish a point of contact within the agency to act as a liaison between the agency and small business concerns with respect to problems arising out of Y2K failures and compliance with Federal rules or regulations; and

(2) publish the name and phone number of the point of contact for the agency in the Federal Register.

(c) GENERAL RULE.—Subject to subsections (d) and (e), no agency shall impose any civil money penalty on a small business concern for a first-time violation.

(d) STANDARDS FOR WAIVER.—In order to receive a waiver of civil money penalties from an agency for a first-time violation, a small business concern shall demonstrate that—

(1) the small business concern previously made a good faith effort to effectively remediate Y2K problems;

(2) a first-time violation occurred as a result of the Y2K system failure of the small business concern or other entity, which affected the small business concern's ability to comply with a federal rule or regulation;

(3) the first-time violation was unavoidable in the face of a Y2K system failure or occurred as a result of efforts to prevent the disruption of critical functions or services that could result in harm to life or property;

(4) upon identification of a first-time violation, the small business concern initiated reasonable and timely measures to remediate the violation; and

(5) the small business concern submitted notice to the appropriate agency of the first-time violation within a reasonable time not to exceed 7 business days from the time that the small business concern became aware that a first-time violation had occurred.

(e) EXCEPTIONS.—An agency may impose civil money penalties authorized under Federal law on a small business concern for a first-time violation if—

(1) the small business concern's failure to comply with Federal rules or regulations constitutes or creates an imminent threat to public health, safety, or the environment; or

(2) the small business concern fails to correct the violation not later than 1 month after initial notification to the agency.

Mr. GREGG. Mr. President, is the precedent that the presenter of the amendment has the last minute?

The PRESIDING OFFICER. The time is equally divided.

The Senator from New Hampshire.

Mr. GREGG. This amendment is really fairly simple. Essentially, it is an attempt to give the middle person, the small businessperson in this country who may, through no fault of their own, be subject to a Federal fine because they didn't comply with some Federal law as a result of the failure of their computer system, some protection from that fine. It says that this can only occur in instances where it is the first time it has happened. In other words, you can't have a bad actor trying to use this to try and get out from underneath the fines.