

Y2K Liability Legislation: Overseas Experience

9 July 1999

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Y2K LIABILITY LEGISLATION: OVERSEAS EXPERIENCE

PART 1 - WHAT IS Y2K LIABILITY LEGISLATION?

1.1 This refers to legislation which seeks to establish certain procedures for civil actions brought for damages relating to the failure of any computer or related device or system or process that deal with the transition from the year 1999 to the year 2000 (Y2K). The question of transition arises from a programming convention established years ago when two digits, instead of four, were used to record year so as to save computing memory and cost. As a result, many computer systems, software programmes, and semiconductors or microprocessors which contain “programmed” instructions embedded in machines or equipment (commonly referred to as “embedded chips”) are not capable of recognizing certain dates in 1999 and after 31 December 1999. They will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter, or will fail to process those dates. Such failure could cripple computer systems that are essential to the functioning of markets, business, consumer products, utilities, government, and safety and security systems. As computer systems are frequently linked, failure in one could lead to failure in another. A list of possible Y2K problems is in Appendix I.

1.2 Reprogramming or replacing affected computer systems before the problem cripples essential systems is a matter of socio-economic significance. Certain legislation has been introduced in overseas countries to encourage disclosure and exchange of information about computer processing problems, solutions, test practices and test results. This kind of legislation has been referred to as the “Good Samaritan Act” because it encourages companies to share information on Y2K readiness and contingency plans. Such legislation usually precedes the Y2K liability legislation in which the duties and obligations of the parties concerned are defined and the procedure for dispute settlement established.

1.3 Y2K liability may fall into three categories:

Contract: If a software vendor fails to deliver a product that is Y2K-compliant, liability may arise under an express contractual term. In the absence of any express agreement, the vendor may still be liable under an implied contractual term that the goods provided must be of merchantable quality and fit for their intended purpose or in the case of the provision of services, they are provided with reasonable care and skill.

Negligence: There is a duty for a supplier of goods or services to take reasonable care so that the goods or services supplied would not bring harm to the user. Failing to take such reasonable care would constitute negligence. In a claim in negligence, the plaintiff needs to prove that such failure caused reasonably foreseeable loss or harm. There is an established process by which the court assesses professional liability. Action in tort is usually taken if the defendant by his negligence caused damage to the person or property of the plaintiff. In the context of Y2K liability, action in tort may arise in many cases, such as failure of medical equipment or passenger lift which is driven by Y2K-non-compliant “embedded chips”.

Statutory requirement: The legislature may make statutes requiring certain standards to be met, procedures to be followed, or for certain institutions and individuals to keep proper records, such as banks, brokerages, estate agents, employers, etc. In the context of Y2K liability, failure to keep proper records could result in an infringement of the statutory requirement.

1.4 This paper outlines the experience of legislative efforts to resolve Y2K liability in the United States, the United Kingdom, Australia, Canada.

PART 2 - LEGISLATIVE EFFORTS IN THE UNITED STATES

2. Year 2000 Information and Readiness Disclosure Act

2.1 The United States Congress was one of the first legislatures in the world to make legislative efforts to tackle the problem of Y2K-compliance in computers. First, it passed in October 1998 the Year 2000 Information and Readiness Disclosure Act (the "Good Samaritan Act"), which became Public Law 105-271 upon signature by the United States President on 19 October 1998. The Act encourages disclosure and exchange of information about computer processing problems, solutions, test practices and test results in connection with Y2K. It limits the liability against the maker of Y2K statements in all civil litigation, unless bad faith or fraud is involved. Temporary antitrust exemption (until 14 July 2001) is granted to individuals or businesses engaging in activities to correct or avoid a Y2K problem. A copy of the Act is attached at [Appendix II](#). A brief summary of its legislative history is at [Appendix III](#).

3. Year 2000 Readiness and Responsibility Act

3.1 Secondly, and most importantly, the United States Congress approved on 1 July 1999 a conference report (with conferees from the House of Representatives, the Senate and White House) on a bill to establish certain procedures for civil actions brought for damages relating to Y2K failures--bill number H.R. 775, Year 2000 Readiness and Responsibility Act. Both the House and the Senate passed the conference report on 1 July 1999; the Bill is cleared and enrolled for signature by the United States President soon. The Bill is made in response to an estimated expenditure of US\$50 billion spent by American businesses to re-programme their computers and possible Y2K-related litigation estimated to be in excess of US\$1 trillion. The text of the Bill is reproduced at [Appendix IV](#) and its main provisions are summarized as follows:

Period of Effectiveness

3.2 The Bill applies to Y2K failures which occur before 1 January 2003. This means that the Bill represents a one-time change in contract- and tort-related actions limited to harm caused during a narrow three-year window.

Contract

3.3 The Bill preserves all terms of an existing contract. Existing law of contract applies.

Tort

3.4 The Bill does not apply to claims for personal injury or wrongful death.

Statutory Requirement: Limited Relief

3.5 The Bill preserves all existing statutory requirements. Nonetheless, it provides limited relief from penalties for Y2K-related violations of a reporting or monitoring nature. This provision is limited to a defence to penalties; the defendant would need to show that the non-compliance was (a) unavoidable in the face of an emergency directly related to a Y2K failure; and (b) necessary to prevent the disruption of critical functions or services that could result in harm to life or property. The defendant would also be required to demonstrate that it had made a reasonable good faith effort to anticipate, prevent and effectively correct a potential Y2K failure; that it has notified the regulatory agency within 72 hours of the violation; and that it had fixed it within 15 days. The defence does not apply to any such violations occurring after 30 June 2000.

Consumer Protection

3.6 The Bill ensures that homeowners cannot be foreclosed due to Y2K failure. This provision is limited to residential mortgages and only applies to transactions occurring between 16 December 1999 and 15 March 2000.

Damages

3.7 The Bill caps punitive damages at US\$250,000 or three times compensatory damages, whichever is less, for individuals with a net worth of up to US\$500,000 and for companies with 50 or fewer employees. This is an objective to prevent extortion suits against deep-pockets defendants. The Bill gives a 90-day grace period to the defendant to solve problems before a suit is filed. The Bill creates a proportionate liability formula for assessing blame so that a company's financial liability is linked to its share of causing the problem. This formula would make whole individual consumers even if one of the defendants went bankrupt. The Bill applies current State standards for establishing punitive damages instead of creating a new pre-emptive Federal standard. The Bill provides no punitive damage awards against governmental entities.

Limits in Class Actions

3.8 The Bill requires class action suits to be litigated in federal court to have at least 100 plaintiffs and US\$10 million in claims, or which seek punitive damages.

Alternative Dispute Resolution

3.9 The Bill encourages remediation and alternative dispute resolution over litigation. It discharges a defendant who settles a Y2K action that is not a contract action at any time before court verdict or judgement from all claims for contribution brought by other persons.

Protection of Y2K Disclosure made under the Good Samaritan Act

3.10 The Bill confirms that the protection for the exchange of information provided by the Year 2000 Information and Readiness Disclosure Act (Public Law 105-271) shall apply to any Y2K action.

4. Small Business Year 2000 Readiness Act (Public Law 106-8)

4.1 This law is popularly known as the Small Business Y2K Act, enacted 5 April 1999. It amends the Small Business Act to authorize the Small Business Administration (SBA), during the period ending on 31 December 2000 to (a) guarantee loans made by eligible lenders to small businesses to address Y2K problem, including repair and acquisition, consulting, and related expenses; and (b) provide relief for a substantial economic injury incurred by a small business as a direct result of Y2K problems. The law provides loan amounts and administration participation limits. It also requires an annual report from the SBA to the congressional small business committees on the loan guarantee programme. A copy of the law is at [Appendix V](#).

5. Examination Parity and Year 2000 Readiness for Financial Institutions Act (Public Law 105-164).

5.1 This law addresses the Y2K problems with regard to financial institutions, to extend examination parity to the Director of the Office of Thrift Supervision and the National Credit Union Administration. Each Federal banking agency and the National Credit Union Administration Board shall offer seminars to all depository institutions and credit unions under the jurisdiction of such agency on the implication of the Y2K problem. This Act was signed by the United States President on 20 March 1998. The Home Loan Act and Federal Credit Union Act are amended to allow examination by the regulatory agency. Copies of the law are available at Legislative Council Library; it can also be downloaded from "Research Activities" at the Legislative Council Library Sub-homepage at <http://www.legco.gov.hk/>.

6. Other Bills

6.1 There are a number of other bills before the United States Congress which deal with Y2K. The question addressed by some of them has been incorporated into H.R. 775 mentioned above. There are many more bills at State legislature level which deal with different aspects of Y2K within the State. For reasons of expediency, only relevant federal bills are summarized below for easy reference. Bills which originated from the House of Representatives have a bill number that begin with "H.R." while bills which originated from the Senate have a bill number that begin with "S".

S.962 “Small Business Y2K Compliance Bill”: a bill to allow a tax deduction from gross income for Y2K conversion costs of small businesses. The aggregate cost could not exceed US\$40,000. The Bill was introduced, read twice and referred to the Committee on Finance on 5 May 1999.

S.1138 “Y2K Bill”: a bill to regulate interstate commerce by making provision for dealing with losses arising from Y2K-related failures that may disrupt communications, intermodal transport, and other matters affecting interstate commerce. Placed on calendar in Senate on 27 May 1999. All proposals have been incorporated in H.R. 775.

H.R. 1447 “National Y2K Test Day Bill”: a bill to provide for the coordinated end-to-end testing and disclosure of the readiness of certain federal and non-Federal computer systems for the Y2K problem. Referred to the Subcommittee on Technology, House Committee on Science, on 22 April 1999.

S.723 “Y2K Regulatory Amnesty Bill”: a bill to provide regulatory amnesty for defendants who are unable to comply with federal enforceable requirements because of factors related to a Y2K system failure. Read twice and referred to the committee on Governmental Affairs on 25 May 1999. This amnesty is referred to as “Y2K upset”, which has been incorporated in H.R.775.

S.738/H.R.1319 “Y2K Fairness in Litigation Bill”: a bill to assure that innocent users and businesses gain access to solutions to Y2K failures through fostering an incentive to settle Y2K lawsuits that may disrupt significant sectors of the American economy. Read twice and referred to the Committee on Judiciary on 25 May 1999. Incorporated in H.R.775.

H.R.1022/H.R.909/S.174 “Y2K State and Local Government Assistance Bill”: a bill to authorize the Secretary of Commerce to make grants to States to correct Y2K problems in computers that are used to administer State and local government programmes. There would be a total of 75 grants, not more than 2 per State. Funding capped at US\$40 million, to be appropriated from a special fund already established for the purpose of ensuring Y2K compliance in government. Referred to Subcommittee on Government Management, Information and Technology, House Committee on Government Reform on 12 March 1999.

H.R.1502 “Year 2000 Bill”: a bill to minimize the disruption of Government and private sector operations caused by the Y2K problem. It stipulates action to be taken by government agencies and assistance to be given to health care providers and water utilities. Referred to the Subcommittee on Technology, House Committee on Science, on 27 April 1999

S.AMDT.621: to ensure that manufacturers provide Y2K fixes if available. Motion agreed in Senate on 10 June 1999.

S.RES.7: a resolution “to ...increase funding of the Special Committee on the Year 2000 Technology-related Problems”. Measure passed Senate, amended, roll call #29.

6.2 For the latest update on the progress of these bills in the U.S. Congress, please search for “Y2K” “Bill Status” at <<http://thomas.loc.gov/>>.

PART 3 - LEGISLATIVE EFFORTS IN THE UNITED KINGDOM

7.1 The Computer Millenium Non-Compliance (Contingency Plans) Bill was presented to the House of Commons on 2nd February 1999. It requires organizations responsible for the provision of essential public services and critical infrastructure to draw up contingency plans, to notify such plans and the persons responsible to an appropriate authority and to make such information available on demand. A copy of the Bill is at Appendix VI. The Bill is on the Order Paper for Second Reading on 23 July 1999.

7.2 This is the third time David Atkinson, Member of Parliament, tries to legislate on the subject. Atkinson first introduced the Companies (Millennium Computer Compliance) Bill in November 1996. The Bill imposed a statutory duty on every company to assess the Y2K compliance of its computer systems and to disclose the result in its report to the shareholders. The Bill was dropped later as it was not able to overcome procedural hurdles. Atkinson's second attempt was to bring in a Bill which requires any company related to the manufacture or sale of computer systems to conform to Y2K. He made the first reading on 31 March 1998 but took no further action subsequently.

7.3 For the latest update of this bill, please visit <http://www.parliament.uk>.

PART 4 - LEGISLATIVE EFFORTS IN AUSTRALIA

8.1 Australia enacted the Year 2000 Information Disclosure Act 1999 on 26 February 1999. The Act establishes a framework for voluntary disclosure and exchange of information about Y2K computer problems and remediation efforts. The Act protects persons making Y2K statements from civil liability, unless certain exceptions apply. These exceptions are made for a range of circumstances, including false statements, pre-contractual statements, or statements made in fulfilment of an obligation or to induce consumers to acquire goods or services. Specifically, a Y2K disclosure statement does not amend a contract unless the parties otherwise agree. Copies of the law are available at Legislative Council Library; it can also be downloaded from "Research Activities" at the Legislative Council Library Sub-homepage at <<http://www.legco.gov.hk/>>.

8.2 There is no indication of any current discussion in the Australian Parliament leading to the making of another bill on Y2K liability. For the latest update of the legislative efforts in Australia, please visit <<http://www.aph.gov.au/>>.

PART 5 - LEGISLATIVE EFFORTS IN CANADA

9.1 There is no law enacted in Canada concerning Y2K liability. The Parliamentary Standing Committee on Industry recommended in its sixth report “The Year 2000 Problem – Where is Canada Now?” tabled in the House on 14 May 1998 that “legislative amendments be introduced to add the explicit responsibility of ensuring Year 2000 compliance to the list of directors’ duties for federally incorporated businesses”. The Government of Canada’s response by February 1999 is extracted below:

“Present corporate governance statutes give directors responsibility to manage the business and affairs of the corporations they oversee, with a view to the best interests of the corporation and with the care, diligence and skill of a reasonably prudent person in comparable circumstances. The Department of Justice has advised that this duty requires directors to take into account such major issues as Year 2000 problems.”²

9.2 The Parliamentary Standing Committee on Industry also recommended in its sixth report that “legislative amendments be introduced to eliminate legal liability for firms who, as good Samaritans, make Year 2000 solutions available free of charge.” The Government of Canada’s response is extracted below:

“The government shares the objectives of the Standing Committee’s recommendation. Matters that deal with civil liability generally fall within the jurisdiction of the legislatures of the various provinces and territories. The government is bringing the Standing Committee’s recommendation to the attention of provincial and territorial governments.”³

However, we have not been able to locate relevant legislation at the provincial level.

9.3 In addition, the Parliamentary Standing Committee on Industry also recommended in its sixth report mentioned above that there be a complete tax write-off for new computers purchased by small and medium size businesses to replace those that are not Y2K-compliant. The Canadian Government accepted the recommendation and allowed all small and medium size businesses in Canada to take a 100% capital cost allowance on all purchases up to C\$50,000 in hardware, software and information technology. The allowance period was made retroactive to 1 January 1998 and would be effective until 30 June 1999, later extended to 31 October 1999.

9.4 A Member of the Canadian Parliament asked the Government to consider setting a date for Y2K compliance of all computer hardware and software devices and incorporate it into the Canadian Standards Act. The Canadian Government considered that the tax exemption mentioned above was sufficient to ensure Y2K-compliance in computer hardware and software⁴. In addition, the Canadian Government designated the week of 8-13 February 1999 to be National Year 2000 Preparedness Week, during which every household in Canada received a guide with information on their appliances, vehicles, insurance, personal finances and computers.

9.5 For the latest update of the legislative efforts in Canada, please visit <<http://www.parl.gc.ca/>>.

Notes

1. The procedure of passing a parliamentary Bill in the United Kingdom Parliament is summarized as follows:
First reading-----Second reading-----Committee stage-----Report stage-----
Third reading-----Passage through the other House-----Royal Assent
2. Please see Response to Recommendation 2 in Appendix A – Government response to the Sixth Report, “The Year 2000 Problem – Canada’s State of Readiness”, Thirteenth Report (Interim), Standing Committee on Industry, tabled in the House on 8 February 1999.
3. Please see Response to Recommendation 6 in Appendix A – Government response to the Sixth Report, “The Year 2000 Problem – Canada’s State of Readiness”, Thirteenth Report (Interim), Standing Committee on Industry, tabled in the House on 8 February 1999.
4. Mr. Jim Jones, see Canadian Parliamentary Hansard Number 121, 12 June 1998 at time 1150.

Appendix I

POSSIBLE Y2K PROBLEMS

A. Possible Year 2000-related Dates

9/4/99 = the 99th day of the Year 99 (“99” and “9999” digits are used as a marker for “end of file” in some computer programmes; hence, programmes may fail immediately after that date)

21/8/99-22/8/99 = the roll-over of the satellite navigation Global Positioning System

31/12/99 and 1/1/2000 = the roll-over to the new Millennium

29/2/2000 = some computer programmes may not recognize the year “00” (used to express “2000”) as a leap year; hence, cannot recognize the leap day

B. Possible Y2K Problem Areas

Automated burglar alarm

Automated fire alarm

Automated lighting system

Automated sprinkler system

Computer

Cash register

Computer network

Computerized access control, including building entrance, car park entrance, passenger lift

Computerized medical equipment

Computerized payroll

Computerized production equipment or machinery

Computerized register of transaction such as trading in goods and services, including stocks and shares, issuing or processing of travel tickets, cash transfer or credit card payment, sale and purchase of real estate, etc.

Computerized recording such as programmable, closed circuit television recorder, video-cassette recorder etc.

Dating equipment

Fax machine

Safe and time lock

Telephone set, mobile telephone and telephone switchboard

Time clock

Time register, i.e. clock-in machines

Vending machine

--S.2392--

Appendix II

S.2392

One Hundred Fifth Congress***of the******United States of America******AT THE SECOND SESSION***

Begun and held at the City of Washington on Tuesday,
the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act

To encourage the disclosure and exchange of information about computer processing problems, solutions, test practices and test results, and related matters in connection with the transition to the year 2000.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Year 2000 Information and Readiness Disclosure Act'.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS- Congress finds the following:

(1) (A) At least thousands but possibly millions of information technology computer systems, software programs, and semiconductors are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process those dates.

(B) The problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, government, and safety and defense systems, in the United States and throughout the world.

(C) Reprogramming or replacing affected systems before the problem incapacitates essential systems is a matter of national and global interest.

(2) The prompt, candid, and thorough disclosure and exchange of information related to year 2000 readiness of entities, products, and services-

Appendix II (cont'd)

(A) would greatly enhance the ability of public and private entities to improve their year 2000 readiness; and

(B) is therefore a matter of national importance and a vital factor in minimizing any potential year 2000 related disruption to the Nation's economic well-being and security.

(3) Concern about the potential for legal liability associated with the disclosure and exchange of year 2000 readiness information is impeding the disclosure and exchange of such information.

(4) The capability to freely disseminate and exchange information relating to year 2000 readiness, solutions, test practices and test results, with the public and other entities without undue concern about litigation is critical to the ability of public and private entities to address year 2000 needs in a timely manner.

(5) The national interest will be served by uniform legal standards in connection with the disclosure and exchange of year 2000 readiness information that will promote disclosures and exchanges of such information in a timely fashion.

(b) **PURPOSES-** Based upon the powers contained in article I, section 8, clause 3 of the Constitution of the United States, the purposes of this Act are--

(1) to promote the free disclosure and exchange of information related to year 2000 readiness;

(2) to assist consumers, small businesses, and local governments in effectively and rapidly responding to year 2000 problems; and

(3) to lessen burdens on interstate commerce by establishing certain uniform legal principles in connection with the disclosure and exchange of information related to year 2000 readiness.

SEC. 3. DEFINITIONS.

In this Act:

(1) **ANTITRUST LAWS-** The term `antitrust laws'--

(A) has the meaning given to it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition; and

(B) includes any State law similar to the laws referred to in subparagraph (A).

Appendix II (cont'd)

(2) CONSUMER- The term `consumer' means an individual who acquires a consumer product for purposes other than resale.

(3) CONSUMER PRODUCT- The term `consumer product' means any personal property or service which is normally used for personal, family, or household purposes.

(4) COVERED ACTION- The term `covered action' means civil action of any kind, whether arising under Federal or State law, except for an action brought by a Federal, State, or other public entity, agency, or authority acting in a regulatory, supervisory, or enforcement capacity.

(5) MAKER- The term `maker' means each person or entity, including the United States or a State or political subdivision thereof, that--

(A) issues or publishes any year 2000 statement;

(B) develops or prepares any year 2000 statement; or

(C) assists in, contributes to, or reviews, reports or comments on during, or approves, or otherwise takes part in the preparing, developing, issuing, approving, or publishing of any year 2000 statement.

(6) REPUBLICATION- The term `republishing' means any repetition, in whole or in part, of a year 2000 statement originally made by another.

(7) YEAR 2000 INTERNET WEBSITE- The term `year 2000 Internet website' means an Internet website or other similar electronically accessible service, clearly designated on the website or service by the person or entity creating or controlling the content of the website or service as an area where year 2000 statements concerning that person or entity are posted or otherwise made accessible to the general public.

(8) YEAR 2000 PROCESSING- The term `year 2000 processing' means the processing (including calculating, comparing, sequencing, displaying, or storing), transmitting, or receiving of date data from, into, and between the 20th and 21st centuries, and during the years 1999 and 2000, and leap year calculations.

(9) YEAR 2000 READINESS DISCLOSURE- The term `year 2000 readiness disclosure' means any written year 2000 statement--

(A) clearly identified on its face as a year 2000 readiness disclosure;

(B) inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form; and

Appendix II (cont'd)

(C) issued or published by or with the approval of a person or entity with respect to year 2000 processing of that person or entity or of products or services offered by that person or entity.

(10) YEAR 2000 REMEDIATION PRODUCT OR SERVICE- The term 'year 2000 remediation product or service' means a software program or service licensed, sold, or rendered by a person or entity and specifically designed to detect or correct year 2000 processing problems with respect to systems, products, or services manufactured or rendered by another person or entity.

(11) YEAR 2000 STATEMENT-

(A) IN GENERAL- The term 'year 2000 statement' means any communication or other conveyance of information by a party to another or to the public, in any form or medium--

(i) concerning an assessment, projection, or estimate concerning year 2000 processing capabilities of an entity, product, service, or set of products and services;

(ii) concerning plans, objectives, or timetables for implementing or verifying the year 2000 processing capabilities of an entity, product, service, or set of products and services;

(iii) concerning test plans, test dates, test results, or operational problems or solutions related to year 2000 processing by--

(I) products; or

(II) services that incorporate or utilize products; or

(iv) reviewing, commenting on, or otherwise directly or indirectly relating to year 2000 processing capabilities.

(B) NOT INCLUDED- For the purposes of any action brought under the securities laws, as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), the term year 2000 statement does not include statements contained in any documents or materials filed with the Securities and Exchange Commission, or with Federal banking regulators, pursuant to section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 781(i)), or disclosures or writing that when made accompanied the solicitation of an offer or sale of securities.

Appendix II (cont'd)

SEC. 4. PROTECTION FOR YEAR 2000 STATEMENTS.

(a) EVIDENCE EXCLUSION- No year 2000 readiness disclosure, in whole or in part, shall be admissible against the maker of that disclosure to prove the accuracy or truth of any year 2000 statement set forth in that disclosure, in any covered action brought by another party except that--

(1) a year 2000 readiness disclosure may be admissible to serve as the basis for a claim for anticipatory breach, or repudiation of a contract, or a similar claim against the maker, to the extent provided by applicable law; and

(2) the court in any covered action shall have discretion to limit application of this subsection in any case in which the court determines that the maker's use of the year 2000 readiness disclosure amounts to bad faith or fraud, or is otherwise beyond what is reasonable to achieve the purposes of this Act.

(b) FALSE, MISLEADING AND INACCURATE YEAR 2000 STATEMENTS- Except as provided in subsection (c), in any covered action, to the extent that such action is based on an allegedly false, inaccurate, or misleading year 2000 statement, the maker of that year 2000 statement shall not be liable under Federal or State law with respect to that year 2000 statement unless the claimant establishes, in addition to all other requisite elements of the applicable action, by clear and convincing evidence, that--

(1) the year 2000 statement was material; and

(2)(A) to the extent the year 2000 statement was not a republication, that the maker made the year 2000 statement--

(i) with actual knowledge that the year 2000 statement was false, inaccurate, or misleading;

(ii) with intent to deceive or mislead; or

(iii) with a reckless disregard as to the accuracy of the year 2000 statement; or

(B) to the extent the year 2000 statement was a republication that the maker of the republication made the year 2000 statement--

(i) with actual knowledge that the year 2000 statement was false, inaccurate, or misleading;

(ii) with intent to deceive or mislead; or

(iii) without notice in that year 2000 statement that--

(I) the maker has not verified the contents of the republication; or

Appendix II (cont'd)

(II) the maker is not the source of the republication and the republication is based on information supplied by another person or entity identified in that year 2000 statement or republication.

(c) **DEFAMATION OR SIMILAR CLAIMS-** In a covered action arising under any Federal or State law of defamation, trade disparagement, or a similar claim, to the extent such action is based on an allegedly false, inaccurate, or misleading year 2000 statement, the maker of that year 2000 statement shall not be liable with respect to that year 2000 statement, unless the claimant establishes by clear and convincing evidence, in addition to all other requisite elements of the applicable action, that the year 2000 statement was made with knowledge that the year 2000 statement was false or made with reckless disregard as to its truth or falsity.

(d) **YEAR 2000 INTERNET WEBSITE-**

(1) **IN GENERAL-** Except as provided in paragraph (2), in any covered action, other than a covered action involving personal injury or serious physical damage to property, in which the adequacy of notice about year 2000 processing is at issue, the posting, in a commercially reasonable manner and for a commercially reasonable duration, of a notice by the entity charged with giving such notice on the year 2000 Internet website of that entity shall be deemed an adequate mechanism for providing that notice.

(2) **EXCEPTION-** Paragraph (1) shall not apply if the court finds that the use of the mechanism of notice--

(A) is contrary to express prior representations regarding the mechanism of notice made by the party giving notice;

(B) is materially inconsistent with the regular course of dealing between the parties; or

(C) occurs where there have been no prior representations regarding the mechanism of notice, no regular course of dealing exists between the parties, and actual notice is clearly the most commercially reasonable means of providing notice.

(3) **CONSTRUCTION-** Nothing in this subsection shall--

(A) alter or amend any Federal or State statute or regulation requiring that notice about year 2000 processing be provided using a different mechanism;

(B) create a duty to provide notice about year 2000 processing;

(C) preclude or suggest the use of any other medium for notice about year 2000 processing or require the use of an Internet website; or

Appendix II (cont'd)

(D) mandate the content or timing of any notices about year 2000 processing.

(e) LIMITATION ON EFFECT OF YEAR 2000 STATEMENTS-

(1) IN GENERAL- In any covered action, a year 2000 statement shall not be interpreted or construed as an amendment to or alteration of a contract or warranty, whether entered into by or approved for a public or private entity.

(2) NOT APPLICABLE-

(A) IN GENERAL- This subsection shall not apply--

(i) to the extent the party whose year 2000 statement is alleged to have amended or altered a contract or warranty has otherwise agreed in writing to so alter or amend the contract or warranty;

(ii) to a year 2000 statement made in conjunction with the formation of the contract or warranty; or

(iii) if the contract or warranty specifically provides for its amendment or alteration through the making of a year 2000 statement.

(B) RULE OF CONSTRUCTION- Nothing in this subsection shall affect applicable Federal or State law in effect as of the date of enactment of this Act with respect to determining the extent to which a year 2000 statement affects a contract or warranty.

(f) SPECIAL DATA GATHERING-

(1) IN GENERAL- A Federal entity, agency, or authority may expressly designate a request for the voluntary provision of information relating to year 2000 processing, including year 2000 statements, as a special year 2000 data gathering request made pursuant to this subsection.

(2) SPECIFICS- A special year 2000 data gathering request made under this subsection shall specify a Federal entity, agency, or authority, or, with its consent, another public or private entity, agency, or authority, to gather responses to the request.

(3) PROTECTIONS- Except with the express consent or permission of the provider of information described in paragraph (1), any year 2000 statements or other such other information provided by a party in response to a special year 2000 data gathering request made under this subsection--

(A) shall be exempt from disclosure under subsection (b)(4) of section 552 of title 5, United States Code, commonly known as the 'Freedom of Information Act';

Appendix II (cont'd)

(B) shall not be disclosed to any third party; and

(C) may not be used by any Federal entity, agency, or authority or by any third party, directly or indirectly, in any civil action arising under any Federal or State law.

(4) EXCEPTIONS-

(A) INFORMATION OBTAINED ELSEWHERE- Nothing in this subsection shall preclude a Federal entity, agency, or authority, or any third party, from separately obtaining the information submitted in response to a request under this subsection through the use of independent legal authorities, and using such separately obtained information in any action.

(B) VOLUNTARY DISCLOSURE- A restriction on use or disclosure of information under this subsection shall not apply to any information disclosed to the public with the express consent of the party responding to a special year 2000 data gathering request or disclosed by such party separately from a response to a special year 2000 data gathering request.

SEC. 5. TEMPORARY ANTITRUST EXEMPTION.

(a) EXEMPTION- Except as provided in subsection (b), the antitrust laws shall not apply to conduct engaged in, including making and implementing an agreement, solely for the purpose of and limited to--

(1) facilitating responses intended to correct or avoid a failure of year 2000 processing in a computer system, in a component of a computer system, in a computer program or software, or services utilizing any such system, component, program, or hardware; or

(2) communicating or disclosing information to help correct or avoid the effects of year 2000 processing failure

(b) APPLICABILITY- Subsection (a) shall apply only to conduct that occurs, or an agreement that is made and implemented, after the date of enactment of this Act and before July 14, 2001.

(c) EXCEPTION TO EXEMPTION- Subsection (a) shall not apply with respect to conduct that involves or results in an agreement to boycott any person, to allocate a market or fix prices or output.

(d) RULE OF CONSTRUCTION- The exemption granted by this section shall be construed narrowly.

Appendix II (cont'd)

SEC. 6. EXCLUSIONS.

(a) EFFECT ON INFORMATION DISCLOSURE- This Act does not affect, abrogate, amend, or alter the authority of a Federal or State entity, agency, or authority to enforce a requirement to provide or disclose, or not to provide or disclose, information under a Federal or State statute or regulation or to enforce such statute or regulation.

(b) CONTRACTS AND OTHER CLAIMS-

(1) IN GENERAL- Except as may be otherwise provided in subsections (a) and (e) of section 4, this Act does not affect, abrogate, amend, or alter any right established by contract or tariff between any person or entity, whether entered into by a public or private person or entity, under any Federal or State law.

(2) OTHER CLAIMS-

(A) IN GENERAL- In any covered action brought by a consumer, this Act does not apply to a year 2000 statement expressly made in a solicitation, including an advertisement or offer to sell, to that consumer by a seller, manufacturer, or provider of a consumer product.

(B) SPECIFIC NOTICE REQUIRED- In any covered action, this Act shall not apply to a year 2000 statement, concerning a year 2000 remediation product or service, expressly made in an offer to sell or in a solicitation (including an advertisement) by a seller, manufacturer, or provider, of that product or service unless, during the course of the offer or solicitation, the party making the offer or solicitation provides the following notice in accordance with section 4(d):

`Statements made to you in the course of this sale are subject to the Year 2000 Information and Readiness Disclosure Act (XX U.S.C. XX). In the case of a dispute, this Act may reduce your legal rights regarding the use of any such statements, unless otherwise specified by your contract or tariff.'`

(3) RULE OF CONSTRUCTION- Nothing in this Act shall be construed to preclude any claims that are not based exclusively on year 2000 statements.

(c) DUTY OR STANDARD OF CARE-

(1) IN GENERAL- This Act shall not impose upon the maker of any year 2000 statement any more stringent obligation, duty, or standard of care than is otherwise applicable under any other Federal law or State law.

(2) ADDITIONAL DISCLOSURE- This Act does not preclude any party from making or providing any additional disclosure, disclaimer, or similar provisions in connection with any year 2000 readiness disclosure or year 2000 statement.

Appendix II (cont'd)

(3) DUTY OF CARE- This Act shall not be deemed to alter any standard or duty of care owed by a fiduciary, as defined or determined by applicable Federal or State law.

(d) INTELLECTUAL PROPERTY RIGHTS- This Act does not affect, abrogate, amend, or alter any right in a patent, copyright, semiconductor mask work, trade secret, trade name, trademark, or service mark, under any Federal or State law.

(e) INJUNCTIVE RELIEF- Nothing in this Act shall be deemed to preclude a claimant from seeking injunctive relief with respect to a year 2000 statement.

SEC. 7. APPLICABILITY.

(a) EFFECTIVE DATE-

(1) IN GENERAL- Except as otherwise provided in this section, this Act shall become effective on the date of enactment of this Act.

(2) APPLICATION TO LAWSUITS PENDING- This Act shall not affect or apply to any lawsuit pending on July 14, 1998.

(3) APPLICATION TO STATEMENTS AND DISCLOSURES- Except as provided in subsection (b)--

(A) this Act shall apply to any year 2000 statement made beginning on July 14, 1998 and ending on July 14, 2001; and

(B) this Act shall apply to any year 2000 readiness disclosure made beginning on the date of enactment of this Act and ending on July 14, 2001.

(b) PREVIOUSLY MADE READINESS DISCLOSURE-

(1) IN GENERAL- For the purposes of section 4(a), a person or entity that issued or published a year 2000 statement after January 1, 1996, and before the date of enactment of this Act, may designate that year 2000 statement as a year 2000 readiness disclosure if--

(A) the year 2000 statement complied with the requirements of section 3(9) when made, other than being clearly designated on its face as a disclosure; and

(B) within 45 days after the date of enactment of this Act, the person or entity seeking the designation--

(i) provides individual notice that meets the requirements of paragraph (2) to all recipients of the applicable year 2000 statement; or

Appendix II (cont'd)

(ii) prominently posts notice that meets the requirements of paragraph (2) on its year 2000 Internet website, commencing prior to the end of the 45-day period under this subparagraph and extending for a minimum of 45 consecutive days and also by using the same method of notification used to originally provide the applicable year 2000 statement.

(2) REQUIREMENTS- A notice under paragraph (1)(B) shall--

(A) state that the year 2000 statement that is the subject of the notice is being designated a year 2000 readiness disclosure; and

(B) include a copy of the year 2000 statement with a legend labeling the statement as a 'Year 2000 Readiness Disclosure'.

(c) EXCEPTION- No designation of a year 2000 statement as a year 2000 readiness disclosure under subsection (b) shall apply with respect to any person or entity that--

(1) proves, by clear and convincing evidence, that it relied on the year 2000 statement prior to the receipt of notice described in subsection (b) (1) (B) and it would be prejudiced by the retroactive designation of the year 2000 statement as a year 2000 readiness disclosure; and

(2) provides to the person or entity seeking the designation a written notice objecting to the designation within 45 days after receipt of individual notice under subsection (b)(1)(B)(i), or within 180 days after the date of enactment of this Act, in the case of notice provided under subsection (b)(1)(B)(ii).

SEC. 8. YEAR 2000 COUNCIL WORKING GROUPS.

(a) IN GENERAL-

(1) WORKING GROUPS- The President's Year 2000 Council (referred to in this section as the 'Council') may establish and terminate working groups composed of Federal employees who will engage outside organizations in discussions to address the year 2000 problems identified in section 2(a)(1) to share information related to year 2000 readiness, and otherwise to serve the purposes of this Act.

(2) LIST OF GROUPS- The Council shall maintain and make available to the public a printed and electronic list of the working groups, the members of each working group, and a point of contact, together with an address, telephone number, and electronic mail address for the point of contact, for each working group created under this section.

(3) BALANCE- The Council shall seek to achieve a balance of participation and representation among the working groups.

Appendix II (cont'd)

(4) ATTENDANCE- The Council shall maintain and make available to the public a printed and electronic list of working group members who attend each meeting of a working group as well as any other individuals or organizations participating in each meeting.

(5) MEETINGS- Each meeting of a working group shall be announced in advance in accordance with procedures established by the Council. The Council shall encourage working groups to hold meetings open to the public to the extent feasible and consistent with the activities of the Council and the purposes of this Act.

(b) FACAs- The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the working groups established under this section.

(c) PRIVATE RIGHT OF ACTION- This section creates no private right of action to sue for enforcement of the provisions of this section.

(d) EXPIRATION- The authority conferred by this section shall expire on December 31, 2000.

SEC. 9. NATIONAL INFORMATION CLEARINGHOUSE AND WEBSITE.

(a) NATIONAL WEBSITE-

(1) IN GENERAL- The Administrator of General Services shall create and maintain until July 14, 2002, a national year 2000 website, and promote its availability, designed to assist consumers, small business, and local governments in obtaining information from other governmental websites, hotlines, or information clearinghouses about year 2000 processing of computers, systems, products and services, including websites maintained by independent agencies and other departments.

(2) CONSULTATION- In creating the national year 2000 website, the Administrator of General Services shall consult with--

- (A) the Director of the Office of Management and Budget;
- (B) the Administrator of the Small Business Administration;
- (C) the Consumer Product Safety Commission;
- (D) officials of State and local governments;
- (E) the Director of the National Institute of Standards and Technology;
- (F) representatives of consumer and industry groups; and
- (G) representatives of other entities, as determined appropriate.

Appendix II (cont'd)

(b) REPORT- The Administrator of General Services shall submit a report to the Committees on the Judiciary of the Senate and the House of Representatives and the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives not later than 60 days after the date of enactment of this Act regarding planning to comply with the requirements of this section.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

Appendix III

**A SUMMARY OF LEGISLATIVE STATUS OF
THE YEAR 2000 INFORMATION AND
READINESS DISCLOSURE ACT, U.S. PUBLIC LAW 105-271**

Date	Floor Actions
19 Oct 1998	Public Law 105-271
8 Oct 1998	Measure presented to President
8 Oct 1998	Enrolled Measure signed in Senate
8 Oct 1998	Enrolled Measure signed in House
1 Oct 1998	Measure passed House
1 Oct 1998	Measure considered in House
1 Oct 1998	Measure called up by unanimous consent in House
28 Sep 1998	Measure passed Senate, amended
28 Sep 1998	Measure considered in Senate
28 Sep 1998	Measure called up by unanimous consent in Senate
17 Sep 1998	Reported to Senate from the Committee on the Judiciary, amended

--H.R. 775--

Appendix IV

H.R. 775

One Hundred Sixth Congress
of the
United States of America
AT THE FRIST SESSION

Begun and held at the City of Washington on Wednesday,
the sixth day of January, one thousand nine hundred and ninety-nine

An Act

To establish certain procedures for civil actions brought for damage relating to the failure of any device or system to process or otherwise deal with transition from the year 1999 to the year 2000, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF SECTIONS.

- (a) SHORT TITLE- This Act may be cited as the `Y2K Act'.
- (b) TABLE OF CONTENTS- The table of sections for this Act is as follows:
- Sec. 1. Short title; table of contents.
 - Sec. 2. Findings and purposes.
 - Sec. 3. Definitions.
 - Sec. 4. Application of Act.
 - Sec. 5. Punitive damage limitations.
 - Sec. 6. Proportionate liability.
 - Sec. 7. Prelitigation notice.
 - Sec. 8. Pleading requirements.
 - Sec. 9. Duty to mitigate.
 - Sec. 10. Application of existing impossibility or commercial impracticability doctrines.

Appendix IV (cont'd)

- Sec. 11. Damages limitation by contract.
- Sec. 12. Damages in tort claims.
- Sec. 13. State of mind; bystander liability; control.
- Sec. 14. Appointment of special masters or magistrate judges for Y2K actions.
- Sec. 15. Y2K actions as class actions.
- Sec. 16. Applicability of State law.
- Sec. 17. Admissible evidence ultimate issue in State courts.
- Sec. 18. Suspension of penalties for certain year 2000 failures by small business concerns.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS- The Congress finds the following:

(1)(A) Many information technology systems, devices, and programs are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process those dates after December 31, 1999.

(B) If not corrected, the problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, Government, and safety and defense systems, in the United States and throughout the world.

(2) It is in the national interest that producers and users of technology products concentrate their attention and resources in the time remaining before January 1, 2000, on assessing, fixing, testing, and developing contingency plans to address any and all outstanding year 2000 computer date-change problems, so as to minimize possible disruptions associated with computer failures.

(3)(A) Because year 2000 computer date-change problems may affect virtually all businesses and other users of technology products to some degree, there is a substantial likelihood that actual or potential year 2000 failures will prompt a significant volume of litigation, much of it insubstantial.

(B) The litigation described in subparagraph (A) would have a range of undesirable effects, including the following:

(i) It would threaten to waste technical and financial resources that are better devoted to curing year 2000 computer date-change problems and ensuring that systems remain or become operational.

Appendix IV (cont'd)

(ii) It could threaten the network of valued and trusted business and customer relationships that are important to the effective functioning of the national economy.

(iii) It would strain the Nation's legal system, causing particular problems for the small businesses and individuals who already find that system inaccessible because of its complexity and expense.

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

(4) It is appropriate for Congress to enact legislation to assure that the year 2000 problems described in this section do not unnecessarily disrupt interstate commerce or create unnecessary caseloads in Federal courts and to provide initiatives to help business prepare and be in a position to withstand the potentially devastating economic impact of such problems.

(5) Resorting to the legal system for resolution of year 2000 problems described in this section is not feasible for many businesses and individuals who already find the legal system inaccessible, particularly small businesses and individuals who already find the legal system inaccessible, because of its complexity and expense.

(6) Concern about the potential for liability -- in particular, concern about the substantial litigation expense associated with defending against even the most insubstantial lawsuits--is prompting many persons and business with technical expertise to avoid projects aimed at curing year 2000 computer date-change problems.

(7) A proliferation of frivolous lawsuits relating to year 2000 computer date-change problems by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(8) Congress encourage businesses to approach their disputes relating to year 2000 computer date-change problems responsibly, and to avoid unnecessary, time-consuming, and costly litigation about Y2K failures, particularly those that are not material. Congress supports good faith negotiations between parties when there is such a dispute, and, if necessary, urges the parties to enter into voluntary, nonbinding mediation rather than litigation.

(b) PURPOSES- Based upon the power of the Congress under Article I, Section 8, Clause 3 of the Constitution of the United States, the purposes of this Act are--

(1) to establish uniform legal standards that give all businesses and users of technology products reasonable incentives to solve year 2000 computer date-change problems before they develop;

Appendix IV (cont'd)

(2) to encourage continued remediation and testing efforts to solve such problems by providers, suppliers, customers, and other contracting partners;

(3) to encourage private and public parties alike to resolve disputes relating to year 2000 computer date-change problems by alternative dispute mechanisms in order to avoid costly and time-consuming litigation, to initiate those mechanisms as early as possible, and to encourage the prompt identification and correction of such problems; and

(4) to lessen burdens on interstate commerce by discouraging insubstantial lawsuits, while also preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief.

SEC. 3. DEFINITIONS.

In this Act:

(1) Y2K ACTION- The term `Y2K action'--

(A) means a civil action commenced in any Federal or State court, or any agency board of contract appeal proceeding, in which the plaintiff's alleged harm or injury arises from or is related to an actual or potential Y2K failure; or a claim or defense arises from or is related to an actual or potential Y2K failure;

(B) includes a civil action commenced in any Federal or State court by a government entity when acting in a commercial or contracting capacity; but

(C) does not include an action brought by a government entity acting in a regulatory, supervisory, or enforcement capacity.

(2) Y2K FAILURE- The term `Y2K failure' means failure by any device or system (including any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions to process, to calculate, to compare, to sequence, to display, to store, to transmit, or to receive year-2000 date-related data, including failures--

(A) to deal with or account for transitions or comparisons from, into, and between the years 1999 and 2000 accurately;

(B) to recognize or accurately to process any specific date in 1999, 2000, or 2001; or

(C) accurately to account for the year 2000's status as a leap year, including recognition and processing of the correct date on February 29, 2000.

Appendix IV (cont'd)

(3) **GOVERNMENT ENTITY**- The term 'government entity' means an agency, instrumentality, or other entity of Federal, State, or local government (including multijurisdictional agencies, instrumentalities, and entities).

(4) **MATERIAL DEFECT**- The term 'material defect' means a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or according to its specifications. The term 'material defect' does not include a defect that--

(A) has an insignificant or de minimis effect on the operation or functioning of an item or computer program;

(B) affects only a component of an item or program that, as a whole, substantially operates or functions as designed; or

(C) has an insignificant or de minimis effect on the efficacy of the service provided.

(5) **PERSONAL INJURY**- The term 'personal injury' means physical injury to a natural person, including--

(A) death as a result of a physical injury; and

(B) mental suffering, emotional distress, or similar injuries suffered by that person in connection with a physical injury.

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

(7) **CONTRACT**- The term 'contract' means a contract, tariff, license, or warranty.

(8) **ALTERNATIVE DISPUTE RESOLUTION**- The term 'alternative dispute resolution' means any process or proceeding, other than adjudication by a court or in an administrative proceeding, to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration.

SEC. 4. APPLICATION OF ACT.

(a) **GENERAL RULE**- This Act applies to any Y2K action brought after January 1, 1999, for a Y2K failure occurring before January 1, 2003, or for a potential Y2K failure that could occur or has allegedly caused harm or injury before January 1, 2003, including any appeal, remand, stay, or other judicial, administrative, or alternative dispute resolution proceeding in such an action.

Appendix IV (cont'd)

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

(c) **CLAIMS FOR PERSONAL INJURY OR WRONGFUL DEATH EXCLUDED-** This Act does not apply to a claim for personal injury or for wrongful death.

(d) **Warranty and Contract Preservation-**

(1) **IN GENERAL-** Subject to paragraph (2), in any Y2K action any written contractual term, including a limitation or an exclusion of liability, or a disclaimer of warranty, shall be strictly enforced unless the enforcement of that term would manifestly and directly contravene applicable State law embodied in any statute in effect on January 1, 1999, specifically addressing that term.

(2) **INTERPRETATION OF CONTRACT-** In any Y2K action in which a contract to which paragraph (1) applies is silent as to a particular issue, the interpretation of the contract as to that issue shall be determined by applicable law in effect at the time the contract was executed.

(3) **UNCONSCIONABILITY-** Nothing in paragraph(1) shall prevent enforcement of State law doctrines of unconscionability, including adhesion, recognized as of January 1, 1999, in controlling judicial precedent by the courts of the State whose law applies to the Y2K action.

(e) **PREEMPTION OF STATE LAW-** This Act supersedes State law to the extent that it establishes a rule of law applicable to a Y2K action that is inconsistent with State law, but nothing in this Act implicates, alters, or diminishes the ability of a State to defend itself against any claim on the basis of sovereign immunity.

(f) **APPLICATION WITH YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT -** Nothing in this Act supersedes any provision of the Year 2000 Information and Readiness Disclosure Act.

(g) **APPLICATION TO ACTIONS BROUGHT BY A GOVERNMENT ENTITY-**

(1) **IN GENERAL-** To the extent provided in this subsection, this Act shall apply to an action brought by a government entity described in section 3 (1) (C).

(2) **DEFINITIONS-** In this subsection:

(A) **DEFENDANT-**

(i) **IN GENERAL-** The term 'defendant' includes a State or local government.

Appendix IV (cont'd)

(ii) STATE- The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(iii) LOCAL GOVERNMENT- The term 'local government' means--

(I) any county, city, town, township, parish, village, or other general purpose political subdivision of a State; and

(II) any combination of political subdivisions described in subclause (I) recognized by the Secretary of Housing and Urban Development.

(B) Y2K UPSET- The term 'Y2K upset'--

(i) means an exceptional temporary noncompliance with applicable federally enforceable measurement, monitoring, or reporting requirements directly related to a Y2K failure that are beyond the reasonable control of the defendant charged with compliance; and

(ii) does not include--

(I) noncompliance with applicable federally enforceable measurement, monitoring, or reporting requirements that constitutes or would create an imminent threat to public health, safety, or the environment;

(II) noncompliance with applicable federally enforceable measurement, monitoring, or reporting requirement that provide for the safety and soundness of the banking or monetary system, or for the integrity of the national securities markets, including the protection of depositors and investors;

(III) noncompliance with applicable federally enforceable measurement, monitoring, or reporting requirements to the extent caused by operational error or negligence;

(IV) lack of reasonable preventative maintenance;

(V) lack of preparedness for a Y2K failure; or

(VI) noncompliance with the underlying federally enforceable requirements to which the applicable federally enforceable measurement, monitoring, or reporting requirement relates.

(3) CONDITIONS NECESSARY FOR A DEMONSTRATION OF A Y2K UPSET-A defendant who wishes to establish the affirmative defense of Y2K upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that --

Appendix IV (cont'd)

(A) the defendant previously made a reasonable good faith effort to anticipate, prevent, and effectively remediate a potential Y2K failure;

(B) a Y2K upset occurred as a result of a Y2K failure or other emergency directly related to a Y2K failure;

(C) noncompliance with the applicable federally enforceable measurement, monitoring, or reporting requirement was unavoidable in the face of an emergency directly related to a Y2K failure and was necessary to prevent the disruption of critical functions or services that could result in harm to life or property;

(D) upon identification of noncompliance the defendant invoking the defense began immediate actions to correct any violation of federally enforceable measurement, monitoring, or reporting requirements; and

(E) the defendant submitted notice to the appropriate Federal regulatory authority of a Y2K upset within 72 hours from the time that the defendant became aware of the upset.

(4) GRANT OF A Y2K UPSET DEFENSE- Subject to the other provisions of this subsection, the Y2K upset defense shall be a complete defense to the imposition of a penalty in any action brought as a result of noncompliance with federally enforceable measurement, monitoring, or reporting requirements for any defendant who establishes by a preponderance of the evidence that the conditions set forth in paragraph(3) are met.

(5) LENGTH OF Y2K UPSET- The maximum allowable length of the Y2Kupset shall be not more than 15 days beginning on the date of the upset unless specific relief by the appropriate regulatory authority is granted.

(6) FRAUDULENT INVOCATION OF Y2K UPSET DEFENSE- Fraudulent use of the Y2K upset defense provided for in this subsection shall be subject to the sanctions provided in section 1001 of title 18, United States Code.

(7) EXPIRATION OF DEFENSE -The Y2K upset defense may not be asserted for a Y2K upset occurring after June 30, 2000.

(8) PRESERVATION OF AUTHORITY- Nothing in this subsection shall affected the authority of a government entity to seek injunctive relief or require a defendant to correct a violation of a federally enforceable measurement, monitoring, or reporting requirement.

(h) CONSUMER PROTECTON FROM Y2K FAILURES-

(1) IN GENERAL- No person who transacts business on matters directly or indirectly affecting residential mortgages shall cause or permit a foreclosure on any such mortgage against a consumer as a result of an actual Y2K failure that results in an inability to accurately or timely process any mortgage payment transaction.

Appendix IV (cont'd)

(2) NOTICE - A consumer who is affected by an inability described in paragraph (1) shall notify the servicer for the mortgage, in writing and within 7 business days from the time that the consumer becomes aware of the Y2K failure and the consumer's inability to accurately or timely fulfill his or her obligation to pay, of such failure and inability and shall provide to the servicer any available documentation with respect to the failure.

(3) ACTIONS MAY RESUME AFTER GRACE PERIOD- Notwithstanding paragraph (1), an action prohibited under paragraph (1) may be resumed, if the consumer's mortgage obligation has not been paid and the servicer of the mortgage has not expressly and in writing granted the consumer an extension of time during which to pay the consumer's mortgage obligation, but only after the later of --

(A) four weeks after January 1, 2000; or

(B) four weeks after notification is made as required under paragraph (2), except that any notification made on or after March 15, 2000, shall not be effective for purposes of this subsection.

(4) APPLICABILITY- This subsection does not apply to transactions upon which a default has occurred before December 15, 1999, or with respect to which an imminent default was foreseeable before December 15., 1999.

(5) ENFORCEMENT OF OBLIGATIONS MERELY TOLLED- This subsection delays but does not prevent the enforcement of financial obligations, and does not otherwise affect or extinguish the obligation to pay.

(6) DEFINITION- In this subsection--

(A) The term 'consumer' means a natural person.

(B) The term ' residential mortgage' has the meaning given the term 'federally related mortgage loan under section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C.2602).

(C) The term 'servicer' means the person, including any successor, responsible for receiving any scheduled periodic payments from a consumer pursuant to the terms of a residential mortgage, including amounts for any escrow account, and for making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage. Such term includes the person, including any successor, who makes or holds a loan is such person also services the load.

Appendix IV (cont'd)

(i) **APPLICABILITY TO SECURITIES LITIGATION-** In any Y2K action in which the underlying claim arises under the securities laws (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), the provisions of this Act, other than section 13(b) of this Act, shall not apply.

SEC. 5. PUNITIVE DAMAGES LIMITATIONS.

(a) **IN GENERAL-** In any Y2K action in which punitive damages are permitted by applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met.

(b) **Caps on Punitive Damages-**

(1) **IN GENERAL-** Subject to the evidentiary standard established by subsection (a), punitive damages permitted under applicable law against a defendant described in paragraph (2) in a Y2K action may not exceed the lesser of--

(A) three times the amount awarded for compensatory damages; or

(B) \$250,000.

(2) **DEFENDANT DESCRIBED-** A defendant described in this paragraph is a defendant--

(A) who--

(i) is sued in his or her capacity as an individual; and

(ii) whose net worth does not exceed \$500,000; or

(B) that is an unincorporated business, a partnership, corporation, association, or organization with fewer than 50 full-time employees.

(3) **NO CAP IF INJURY SPECIFICALLY INTENDED-** Paragraph (1) does not apply if the plaintiff establishes by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff.

(c) **GOVERNMENT ENTITIES-** Punitive damages in a Y2K action may not be awarded against a government entity.

Appendix IV (cont'd)**SEC. 6. PROPORTIONATE LIABILITY.**

(a) IN GENERAL- Except in a Y2K action that is a contract action, and except as provided in subsections (b) and (g), a person against whom a final judgment is entered in a Y2K action shall be liable solely for the portion of a judgment that corresponds to the relative and proportionate responsibility of that person. In determining the percentage of responsibility of any defendant, the trier of fact shall determine that percentage as a percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total loss incurred by the plaintiff.

(b) PROPORTIONATE LIABILITY-

(1) DETERMINATION OF RESPONSIBILITY- In any Y2K action that is not a contract action, the court shall instruct the jury to answer special interrogatories, or, if there is no jury, the court shall make findings with respect to each defendant, including defendants who have entered into settlements with the plaintiff or plaintiffs, concerning--

(A) the percentage of responsibility, if any, of each defendant, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and

(B) if alleged by the plaintiff, whether the defendant (other than a defendant who has entered into a settlement agreement with the plaintiff)--

(i) acted with specific intent to injure the plaintiff; or

(ii) knowingly committed fraud.

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

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

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

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

(c) Joint Liability for Specific Intent or Fraud-

(1) IN GENERAL- Notwithstanding subsection (a), the liability of a defendant in a Y2K action that is not a contract action is joint and several if the trier of fact specifically determines that the defendant--

Appendix IV (cont'd)

(A) acted with specific intent to injure the plaintiff; or

(B) knowingly committed fraud.

(2) Fraud; recklessness-

(A) KNOWING COMMISSION OF FRAUD DESCRIBED- For purposes of subsection (b)(1)(B)(ii) and paragraph (1)(B) of this subsection, a defendant knowingly committed fraud if the defendant--

(i) made an untrue statement of a material fact, with actual knowledge that the statement was false;

(ii) omitted a fact necessary to make the statement not be misleading with actual knowledge that, as a result of the omission, the statement was false; and

(iii) knew that the plaintiff was reasonably likely to rely on the false statement.

(B) RECKLESSNESS- For purposes of subsection (b)(1)(B) and paragraph (1) of this subsection, reckless conduct by the defendant does not constitute either a specific intent to injure, or the knowing commission of fraud, by the defendant.

(3) RIGHT TO CONTRIBUTION NOT AFFECTED- Nothing in this section affects the right, under any other law, of a defendant to contribution with respect to another defendant found under subsection (b)(1)(B), or determined under paragraph (1)(B) of this subsection, to have acted with specific intent to injure the plaintiff or to have knowingly committed fraud.

(d) SPECIAL RULES-

(1) UNCOLLECTIBLE SHARE-

(A) IN GENERAL- Notwithstanding subsection (a), if, upon motion made not later than 6 months after a final judgment is entered in any Y2K action that is not a contract action, the court determines that all or part of the share of the judgment against a defendant for compensatory damages is not collectible against that defendant, then each other defendant in the action is liable for the uncollectible share as follows:

(A) PERCENTAGE OF NET WORTH- The other defendants are jointly and severally liable for any uncollectible share if the plaintiff establishes that--

(I) the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff; and

Appendix IV (cont'd)

(II) the net worth of the plaintiff is less than \$200,000.

(ii) OTHER PLAINTIFFS- For a plaintiff not described in clause (i), each of the other defendants is liable for the uncollectible share in proportion to the percentage of responsibility of that defendant.

(iii) For a plaintiff not described in clause (i), in addition to the share identified in clause (ii), the defendant is liable for an additional portion of the uncollectible share in an amount equal to 50 percent of the amount determined under clause (ii) if the plaintiff demonstrates by a preponderance of the evidence that the defendant acted with reckless disregard for the likelihood that its acts would cause injury of the sort suffered by the plaintiff.

(B) OVERALL LIMIT- The total payments required under subparagraph (A) from all defendants may not exceed the amount of the uncollectible share.

(C) SUBJECT TO CONTRIBUTION- A defendant against whom judgment is not collectible is subject to contribution and to any continuing liability to the plaintiff on the judgment.

(D) SUITS BY CONSUMERS-

(i) Notwithstanding subparagraph (A), the other defendants are jointly and severally liable for the uncollectible share if--

(I) the plaintiff is a consumer whose suit alleges or arises out of a defect in a consumer product; and

(II) the plaintiff is suing as an individual and not as part of a class action.

(ii) In this subparagraph:

(I) The term 'class action' means--

(aa) a single lawsuit in which: (1) damages are sought on behalf of more than 10 persons or prospective class members; or (2) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated; or

(bb) any group of lawsuits filed in or pending in the same court in which: (1) damages are sought on behalf of more than 10 persons; and (2) the lawsuits are jointed, consolidate, or otherwise proceed as a single action for any purpose.

(II) The term 'consumer' means an individual who acquires a consumer product for purposes other than resale.

Appendix IV (cont'd)

(III) The term 'consumer product' means any personal property or service which is normally use for personal, family, or household purposes.

(2) SPECIAL RIGHT OF CONTRIBUTION- To the extent that a defendant is required to make an additional payment under paragraph (1), that defendant may recover contribution--

(A) from the defendant originally liable to make the payment;

(B) from any other defendant that is jointly and severally liable;

(C) from any other defendant held proportionately liable who is liable to make the same payment and has paid less than that other defendant's proportionate share of that payment; or

(D) from any other person responsible for the conduct giving rise to the payment that would have been liable to make the same payment.

(3) NONDISCLOSURE TO JURY- The standard for allocation of damages under subsection (a) and subsection (b)(1), and the procedure for reallocation of uncollectible shares under paragraph (1) of this subsection, shall not be disclosed to members of the jury.

(e) SETTLEMENT DISCHARGE-

(1) IN GENERAL- A defendant who settles a Y2K action that is not a contract action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter an order constituting the final discharge of all obligations to the plaintiff of the settling defendant arising out of the action. The order shall bar all future claims for contribution arising out of the action--

(A) by any person against the settling defendant; and

(B) by the settling defendant against any person other than a person whose liability has been extinguished by the settlement of the settling defendant.

(2) REDUCTION- If a defendant enters into a settlement with the plaintiff before the final verdict or judgment, the verdict or judgment shall be reduced by the greater of--

(A) an amount that corresponds to the percentage of responsibility of that defendant; or

(B) the amount paid to the plaintiff by that defendant.

Appendix IV (cont'd)

(f) GENERAL RIGHT OF CONTRIBUTION-

(1) IN GENERAL- A defendant who is jointly and severally liable for damages in any Y2K action that is not a contract action may recover contribution from any other person who, if joined in the original action, would have been liable for the same damages. A claim for contribution shall be determined based on the percentage of responsibility of the claimant and of each person against whom a claim for contribution is made.

(2) STATUTE OF LIMITATIONS FOR CONTRIBUTION- An action for contribution in connection with a Y2K action that is not a contract action shall be brought not later than 6 months after the entry of a final, nonappealable judgment in the Y2K action, except than an action for contribution brought by a defendant who was required to make an additional payment under subsection (d)(1) may be brought not later than 6 months after the date on which such payment was made.

(g) MORE PROTECTIVE STATE LAW NOT PREEMPTED- Nothing in this section preempts or supersedes any provision of State law that--

(1) limits the liability of a defendant in a Y2K action to a lesser amount than the amount determined under this section; or

(2) otherwise affords a greater degree of protection from joint or several liability than is afforded by this section.

SEC. 7. PRELITIGATION NOTICE.

(a) IN GENERAL- Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about--

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

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

(3) how the prospective plaintiff would like the prospective defendant to remedy the problem;

(4) the basis upon which the prospective plaintiff seeks that remedy; and

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

(b) PERSON TO WHOM NOTICE TO BE SENT- The notice required by subsection (a) shall be sent--

Appendix IV (cont'd)

(1) to the registered agent of the prospective defendant for service of legal process;

(2) if the prospective defendant does not have a registered agent, then to the chief executive officer if the prospective defendant is a corporation, to the managing partner if the prospective defendant is a partnership, to the proprietor if the prospective defendant is a sole proprietorship, or to a similarly-situated person if the prospective defendant is any other enterprise; or

(3) if the prospective defendant has designated a person to receive prelitigation notices on a Year 2000 Internet Website (as defined in section 3(7) of the Year 2000 Information and Readiness Disclosure Act), to the designated person, if the prospective plaintiff has reasonable access to the Internet.

(c) Response to Notice-

(1) IN GENERAL- Within 30 days after receipt of the notice specified in subsection (a), each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff.

(2) WILLINGNESS TO ENGAGE IN ADR- The written statement shall state whether the prospective defendant is willing to engage in alternative dispute resolution.

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

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

(5) PRIORITY - A prospective defendant receiving more than one notice under this section may give priority to notices with respect to a product or service that involves a health or safety related Y2K failure.

(d) FAILURE TO RESPOND- If a prospective defendant--

(1) fails to respond to a notice provided pursuant to subsection (a) within the 30 days specified in subsection (c)(1); or

(2) does not describe the action, if any, the prospective defendant has taken, or will take, to address the problem identified by the prospective plaintiff,

the prospective plaintiff may immediately commence a legal action against that prospective defendant.

Appendix IV (cont'd)**(e) REMEDIATION PERIOD-**

(1) **IN GENERAL-** If the prospective defendant responds and proposes remedial action it will take, or offers to engage in alternative dispute resolution, then the prospective plaintiff shall allow the prospective defendant an additional 60 days from the end of the 30-day notice period to complete the proposed remedial action or alternative dispute resolution before commencing a legal action against that prospective defendant.

(2) **EXTENSION BY AGREEMENT-** The prospective plaintiff and prospective defendant may change the length of the 60-day remediation period by written agreement.

(3) **MULTIPLE EXTENSIONS NOT ALLOWED-** Except as provided in paragraph (2), a defendant in a Y2K action is entitled to no more than one 30-day period and one 60-day remediation period under paragraph (1).

(4) **STATUTES OF LIMITATION, ETC., TOLLED-** Any applicable statute of limitations or doctrine of laches in a Y2K action to which paragraph (1) applies shall be tolled during the notice and remediation period under that paragraph.

(f) **FAILURE TO PROVIDE NOTICE-** If a defendant determines that a plaintiff has filed a Y2K action without providing the notice specified in subsection (a) or without awaiting the expiration of the appropriate waiting period specified in subsection (c), the defendant may treat the plaintiff's complaint as such a notice by so informing the court and the plaintiff in its initial response to the plaintiff. If any defendant elects to treat the complaint as such a notice--

(1) the court shall stay all discovery and all other proceedings in the action for the appropriate period after filing of the complaint; and

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

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

(h) **STATE LAW CONTROLS ALTERNATIVE METHODS-** Nothing in this section supersedes or otherwise preempts any State law or rule of civil procedure with respect to the use of alternative dispute resolution for Y2K actions.

(i) **PROVISIONAL REMEDIES UNAFFECTED-** Nothing in this section interferes with the right of a litigant to provisional remedies otherwise available under Rule 65 of the Federal Rules of Civil Procedure or any State rule of civil procedure providing extraordinary or provisional remedies in any civil action in which the underlying complaint seeks both injunctive and monetary relief.

Appendix IV (cont'd)

(j) SPECIAL RULE FOR CLASS ACTIONS- For the purpose of applying this section to a Y2K action that is maintained as a class action in Federal or State court, the requirements of the preceding subsections of this section apply only to named plaintiffs in the class action.

SEC. 8. PLEADING REQUIREMENTS.

(a) APPLICATION WITH RULES OF CIVIL PROCEDURE- This section applies exclusively to Y2K actions and, except to the extent that this section requires additional information to be contained in or attached to pleadings, nothing in this section is intended to amend or otherwise supersede applicable rules of Federal or State civil procedure.

(b) NATURE AND AMOUNT OF DAMAGES- In all Y2K actions in which damages are requested, there shall be filed with the complaint a statement of specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation.

(c) MATERIAL DEFECTS- In any Y2K action in which the plaintiff alleges that there is a material defect in a product or service, there shall be filed with the complaint a statement of specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.

(d) REQUIRED STATE OF MIND- In any Y2K action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, there shall be filed with the complaint, with respect to each element of that claim, a statement of the facts giving rise to a strong inference that the defendant acted with the required state of mind.

SEC. 9. DUTY TO MITIGATE.

(a) IN GENERAL - Damages awarded in any Y2K action shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably should have been, aware, including information made available by the defendant to purchasers or users of the defendant's product or services concerning means of remedying or avoiding the Y2K failure involved in the action.

(b) PRESERVATION OF EXISTING LAW - The duty imposed by this section is in addition to any duty to mitigate imposed by State Law.

(c) EXCEPTION FOR INTERNATIONAL FRAUD - Subsection (a) does not apply to damages suffered by reason of the plaintiff's justifiable reliance upon an affirmative material misrepresentation by the defendant, made by the defendant with actual knowledge of its falsity, concerning the potential for Y2K failure of the device or system used or sold by the defendant that experienced the Y2k failure alleged to have caused the plaintiff's harm.

Appendix IV (cont'd)

SEC. 10. APPLICATION OF EXISTING IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY DOCTRINES.

In any Y2K action for breach or repudiation of contract, the applicability of the doctrines of impossibility and commercial impracticability shall be determined by the law in existence on January 1, 1999. Nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines.

SEC. 11. DAMAGES LIMITATION BY CONTRACT.

In any Y2K action for breach or repudiation of contract, no party may claim, or be awarded, any category of damages unless such damages are allowed--

- (1) by the express terms of the contract; or
- (2) if the contract is silent on such damages, by operation of State law at the time the contract was effective or by operation of Federal law.

SEC. 12. DAMAGES IN TORT CLAIMS.

(a) IN GENERAL- A party to a Y2K action making a tort claim, other than a claim of intentional tort arising independent of a contract, may not recover damages for economic loss unless--

- (1) the recovery of such losses is provided for in a contract to which the party seeking to recover such losses is a party; or
- (2) such losses result directly from damage to tangible personal or real property caused by the Y2K failure involved in the action (other than damage to property that is the subject of the contract between the parties to the Y2K action or, in the event there is no contract between the parties, other than damage caused only to the property that experienced the Y2K failure),

and such damages are permitted under applicable Federal or State law.

(b) ECONOMIC LOSS- For purposes of this section only, and except as otherwise specifically provided in a valid and enforceable written contract between the plaintiff and the defendant in a Y2K action, the term `economic loss' means amounts awarded to compensate an injured party for any loss, and includes amounts awarded for damages such as--

- (1) lost profits or sales;
- (2) business interruption;
- (3) losses indirectly suffered as a result of the defendant's wrongful act or omission;

Appendix IV (cont'd)

(4) losses that arise because of the claims of third parties;

(5) losses that must be pled as special damages; and

(6) consequential damages (as defined in the Uniform Commercial Code or analogous State commercial law).

(c) CERTAIN OTHER ACTIONS- A person liable for damages, whether by settlement or judgment, in a civil action to which this Act does not apply because of section 4(c) whose liability, in whole or in part, is the result of a Y2K failure may, notwithstanding any other provision of this Act, pursue any remedy otherwise available under Federal or State law against the person responsible for that Y2K failure to the extent of recovering the amount of those damages.

SEC. 13. STATE OF MIND; BYSTANDER LIABILITY; CONTROL.

(a) DEFENDANT'S STATE OF MIND- In a Y2K action other than a claim for breach or repudiation of contract, and in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim, the defendant is not liable unless the plaintiff establishes that element of the claim by the standard of evidence under applicable State law in effect on the day before January 1, 1999.

(b) LIMITATION ON BYSTANDER LIABILITY FOR Y2K FAILURES-

(1) IN GENERAL- With respect to any Y2K action for money damages in which-

(A) the defendant is not the manufacturer, seller, or distributor of a product, or the provider of a service, that suffers or causes the Y2K failure at issue;

(B) the plaintiff is not in substantial privity with the defendant; and

(C) the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law,

the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves, by the standard of evidence under applicable State law in effect on the day before January 1, 1999, that the defendant actually knew, or recklessly disregarded a known and substantial risk, that such failure would occur.

(2) SUBSTANTIAL PRIVITY- For purposes of paragraph (1)(B), a plaintiff and a defendant are in substantial privity when, in a Y2K action arising out of the performance of professional services, the plaintiff and the defendant either have contractual relations with one another or the plaintiff is a person who, prior to the defendant's performance of such services, was specifically identified to and acknowledged by the defendant as a person for whose special benefit the services were being performed.

Appendix IV (cont'd)

(3) **CERTAIN CLAIMS EXCLUDED-** For purposes of paragraph (1)(C), claims in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law do not include claims for negligence but do include claims such as fraud, constructive fraud, breach of fiduciary duty, negligent misrepresentation, and interference with contract or economic advantage.

(c) **CONTROL NOT DETERMINATIVE OF LIABILITY-** The fact that a Y2K failure occurred in an entity, facility, system, product, or component that was sold, leased, rented, or otherwise within the control of the party against whom a claim is asserted in a Y2K action shall not constitute the sole basis for recovery of damages in that action. A claim in a Y2K action for breach or repudiation of contract for such a failure is governed by the terms of the contract.

(d) **PROTECTIONS OF THE YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT APPLY-** The protections for the exchanges of information provided by section 4 of the Year 2000 Information and Readiness Disclosure Act (Public Law 105-271) shall apply to any Y2K action.

SEC. 14. APPOINTMENT OF SPECIAL MASTERS OR MAGISTRATE JUDGES FOR Y2K ACTIONS.

Any district court of the United States in which a Y2K action is pending may appoint a special master or a magistrate judge to hear the matter and to make findings of fact and conclusions of law in accordance with Rule 53 of the Federal Rules of Civil Procedure.

SEC. 15. Y2K ACTIONS AS CLASS ACTIONS.

(a) **MATERIAL DEFECT REQUIREMENT-** A Y2K action involving a claim that a product or service is defective may be maintained as a class action in Federal or State court as to that claim only if--

(1) it satisfies all other prerequisites established by applicable Federal or State law, including applicable rules of civil procedure; and

(2) the court finds that the defect in a product or service as alleged would be a material defect for the majority of the members of the class.

(b) **NOTIFICATION-** In any Y2K action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class, which shall include--

(1) a concise and clear description of the nature of the action;

(2) the jurisdiction where the case is pending; and

Appendix IV (cont'd)

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

(c) Forum for Y2K Class Actions-

(1) JURISDICTION- Except as provided in paragraph (2), the district courts of the United States shall have original jurisdiction of any Y2K action that is brought as a class action.

(2) EXCEPTION- A Y2K action may not be brought or removed as a class action under this section if--

(A)(i) a substantial majority of the members of the proposed plaintiff class are citizens of a single State;

(ii) the primary defendants are citizens of that State; and

(iii) the claims asserted will be governed primarily by the law of that State;

(B) the primary defendants are States, State officials, or other governmental entities against whom the district courts of the United States District Court may be foreclosed from ordering relief.

(C) the plaintiff class does not seek an award of punitive damages, and the amount in controversy is less than the sum of \$10,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action; or

(D) there are less than 100 members of the proposed plaintiff class.

A party urging that any exception described in subparagraph (A), (B), (C), or (D) applied to an action shall bear the full burden of demonstrating the applicability of the exception.

(3) PROCEDURE IF REQUIREMENTS NOT MET-

(A) DISMISSAL OR REMAND - A United States district court shall dismiss, or, if after removal, strike the class allegations and remand, any Y2K action brought or removed under this subsection as a class action if--

(i) the action is subject to the jurisdiction of the court solely under this subsection; and

Appendix IV (cont'd)

(ii) the court determines the action may not proceed as a class action based on a failure to satisfy the conditions of Rule 23 of the Federal Rules of Civil Procedure.

(B) AMENDMENT; REMOVAL - Nothing in paragraph (A) shall prohibit plaintiffs from filing an amended class action in Federal or State court. A defendant shall have the right to remove such an amended class action to a United States district court under this subsection.

(C) PERIOD OF LIMITATIONS TOLLED - Upon dismissal or remand, the period of limitations for any claim that was asserted in an action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.

(D) DISMISSAL WITHOUT PREJUDICE - The dismissal of a Y2K action under subparagraph (A) shall be without prejudice.

(d) EFFECT ON RULES OF CIVIL PROCEDURE- Except as otherwise provided in this section, nothing in this section supersedes any rule of Federal or State civil procedure applicable to class actions.

SEC. 16. APPLICABILITY OF STATE LAW.

Nothing in this Act shall be construed to affect the applicability of any State law that provides stricter limits on damages and liabilities, affording greater protection to defendants in Y2K actions, than are provided in this Act.

SEC. 17. ADMISSIBLE EVIDENCE ULTIMATE ISSUE IN STATE COURTS.

Any party to a Y2K action in a State court in a State that has not adopted a rule of evidence substantially similar to Rule 704 of the Federal Rules of Evidence may introduce in such action evidence that would be admissible if Rule 704 applied in that jurisdiction.

SEC. 18. 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 State Code, that has the authority to impose civil penalties on small business concerns;

Appendix IV (cont'd)

(2) the term 'first-time violation' means a violation by a small business concern of a federally enforceable rule or regulation (other than a Federal rule or regulation that relates to the safety and soundness of the banking or monetary system or for the integrity of the National Securities markets, including protection of depositors and investors) caused by 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 the enactment of this Act, 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 subsection (d) and (e), no agency shall impose any civil money penalty on a small business concern for a first-time violation.

(d) STANDARD FOR WAIVER- An agency shall provide a waiver of civil money penalties for a first-time violation, provided that a small business concern demonstrates, and the agency determines, that--

(1) the small business concern previously made a reasonable good faith effort to anticipate, prevent, and effectively remediate a potential Y2K failure.

(2) a first-time violation occurred as a result of the Y2K failure of the small business concern or other entity, which significantly 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 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 prompt measures to correct 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 5 business days from the time that the small business concern became aware that the 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--

Appendix IV (cont'd)

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

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

(f) EXPIRATION- This section shall not apply to first-time violations caused by a Y2K failure occurring after December 31, 2000.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

Appendix V

--S.314--

S.314

One Hundred Sixth Congress

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday,

the sixth day of January, one thousand nine hundred and ninety-nine

An Act

To provide for a loan guarantee program to address the Year 2000 computer problems of small business concerns, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Small Business Year 2000 Readiness Act'.

SEC. 2. FINDINGS.

Congress finds that--

(1) the failure of many computer programs to recognize the Year 2000 may have extreme negative financial consequences in the Year 2000 , and in subsequent years for both large and small businesses;

(2) small businesses are well behind larger businesses in implementing corrective changes to their automated systems;

(3) many small businesses do not have access to capital to fix mission critical automated systems, which could result in severe financial distress or failure for small businesses; and

(4) the failure of a large number of small businesses due to the Year 2000 computer problem would have a highly detrimental effect on the economy in the Year 2000 and in subsequent years.

Appendix V (cont'd)

SEC. 3. YEAR 2000 COMPUTER PROBLEM LOAN GUARANTEE PROGRAM.

(a) PROGRAM ESTABLISHED- Section 7(a) of the Small Business Act (15 U.S.C. 636(a)) is amended by adding at the end the following: `

`(27) YEAR 2000 COMPUTER PROBLEM PROGRAM-

`(A) DEFINITIONS- In this paragraph--

`(i) the term `eligible lender' means any lender designated by the Administration as eligible to participate in the general business loan program under this subsection; and

`(ii) the term `Year 2000 computer problem' means, with respect to information technology, and embedded systems, any problem that adversely effects the processing (including calculating, comparing, sequencing, displaying, or storing), transmitting, or receiving of date-dependent data--

`(I) from, into, or between--

`(aa) the 20th or 21st centuries; or

`(bb) the years 1999 and 2000 ; or

`(II) with regard to leap year calculations.

`(B) ESTABLISHMENT OF PROGRAM- The Administration shall--

`(i) establish a loan guarantee program, under which the Administration may, during the period beginning on the date of enactment of this paragraph and ending on December 31, 2000 , guarantee loans made by eligible lenders to small business concerns in accordance with this paragraph; and

`(ii) notify each eligible lender of the establishment of the program under this paragraph, and otherwise take such actions as may be necessary to aggressively market the program under this paragraph.

`(C) USE OF FUNDS- A small business concern that receives a loan guaranteed under this paragraph shall only use the proceeds of the loan to--

Appendix V (cont'd)

`(i) address the Year 2000 computer problems of that small business concern, including the repair and acquisition of information technology systems, the purchase and repair of software, the purchase of consulting and other third party services, and related expenses; and

`(ii) provide relief for a substantial economic injury incurred by the small business concern as a direct result of the Year 2000 computer problems of the small business concern or of any other entity (including any service provider or supplier of the small business concern), if such economic injury has not been compensated for by insurance or otherwise.

`(D) LOAN AMOUNTS-

`(i) IN GENERAL- Notwithstanding paragraph (3)(A) and subject to clause (ii) of this subparagraph, a loan may be made to a borrower under this paragraph even if the total amount outstanding and committed (by participation or otherwise) to the borrower from the business loan and investment fund, the business guaranty loan financing account, and the business direct loan financing account would thereby exceed \$750,000.

`(ii) EXCEPTION- A loan may not be made to a borrower under this paragraph if the total amount outstanding and committed (by participation or otherwise) to the borrower from the business loan and investment fund, the business guaranty loan financing account, and the business direct loan financing account would thereby exceed \$1,000,000.

`(E) ADMINISTRATION PARTICIPATION- Notwithstanding paragraph (2)(A), in an agreement to participate in a loan under this paragraph, participation by the Administration shall not exceed--

`(i) 85 percent of the balance of the financing outstanding at the time of disbursement of the loan, if the balance exceeds \$100,000;

`(ii) 90 percent of the balance of the financing outstanding at the time of disbursement of the loan, if the balance is less than or equal to \$100,000; and

`(iii) notwithstanding clauses (i) and (ii), in any case in which the subject loan is processed in accordance with the requirements applicable to the SBAExpress Pilot Program, 50 percent of the balance outstanding at the time of disbursement of the loan.

Appendix V (cont'd)

`(F) PERIODIC REVIEWS- The Inspector General of the Administration shall periodically review a representative sample of loans guaranteed under this paragraph to mitigate the risk of fraud and ensure the safety and soundness of the loan program.

`(G) ANNUAL REPORT- The Administration shall annually submit to the Committees on Small Business of the House of Representatives and the Senate a report on the results of the program carried out under this paragraph during the preceding 12-month period, which shall include information relating to--

 `(i) the total number of loans guaranteed under this paragraph;

 `(ii) with respect to each loan guaranteed under this paragraph--

 `(I) the amount of the loan;

 `(II) the geographic location of the borrower; and

 `(III) whether the loan was made to repair or replace information technology and other automated systems or to remedy an economic injury; and

 `(iii) the total number of eligible lenders participating in the program.'.

(b) GUIDELINES-

(1) IN GENERAL- Not later than 30 days after the date of enactment of this Act, the Administrator of the Small Business Administration shall issue guidelines to carry out the program under section 7(a)(27) of the Small Business Act, as added by this section.

(2) REQUIREMENTS- Except to the extent that it would be inconsistent with this section or section 7(a)(27) of the Small Business Act, as added by this section, the guidelines issued under this subsection shall, with respect to the loan program established under section 7(a)(27) of the Small Business Act, as added by this section--

(A) provide maximum flexibility in the establishment of terms and conditions of loans originated under the loan program so that such loans may be structured in a manner that enhances the ability of the applicant to repay the debt;

(B) if appropriate to facilitate repayment, establish a moratorium on principal payments under the loan program for up to 1 year beginning on the date of the origination of the loan;

Appendix V (cont'd)

(C) provide that any reasonable doubts regarding a loan applicant's ability to service the debt be resolved in favor of the loan applicant; and

(D) authorize an eligible lender (as defined in section 7(a)(27)(A) of the Small Business Act, as added by this section) to process a loan under the loan program in accordance with the requirements applicable to loans originated under another loan program established pursuant to section 7(a) of the Small Business Act (including the general business loan program, the Preferred Lender Program, the Certified Lender Program, the Low Documentation Loan Program, and the SBAExpress Pilot Program), if--

(i) the eligible lender is eligible to participate in such other loan program; and

(ii) the terms of the loan, including the principal amount of the loan, are consistent with the requirements applicable to loans originated under such other loan program.

(c) REPEAL- Effective on December 31, 2000, this section and the amendments made by this section are repealed.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

Appendix VI

Session 1998-99

Internet Publications

Other Bills before Parliament

House of Commons

**Computer Millenium Non-Compliance
(Contingency Plans) Bill**

This is the text of the Computer Millenium Non-Compliance (Contingency Plans) Bill, as presented to the House of Commons on 2nd February 1999.

**Computer Millenium Non-Compliance
(Contingency Plans) Bill**

ARRANGEMENT OF CLAUSES

Clause

1. Application.
2. Duties of certain organisations to prepare contingency plans.
3. Financial provisions.
4. Short title.

A

B I L L

TO

Require organisations responsible for the provision of essential public services and critical infrastructure to draw up contingency plans in the event of their computer systems failing to deal with calendar dates after 31st December 1999; to require such plans and the names of those responsible for them to be notified to an appropriate authority; to require the plans to be made available on demand; and for connected purposes.

Appendix VI (cont'd)

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Application.

1. - (1) This Act applies to any organisation of a type listed in subsection (2).

(2) The types of organisations are-

- (a) government departments or agencies;
- (b) local authorities;
- (c) police forces;
- (d) fire brigades;
- (e) ambulance services;
- (f) coastguard services;
- (g) air traffic control services;
- (h) marine pilotage services;
- (i) airport authorities;
- (j) port authorities;
- (k) health authorities;
- (l) water companies;
- (m) sewerage companies;
- (n) electricity providers;
- (o) nuclear fuel reprocessing facilities;
- (p) mains gas providers;
- (q) suppliers or refiners of hydrocarbon fuels;
- (r) providers of telecommunications services;
- (s) banks;
- (t) building societies;
- (u) any organisation or type of organisation which may be added to this list in an order made by the Secretary of State.

Duties of certain organisations to prepare contingency plans.

2. - (1) An organisation to which this Act applies shall be under a duty to-

(a) assess the capability of every computer system operated by the organisation which is-

(i) essential to the continued provision of essential public services or critical infrastructure, and

(ii) programmed to manipulate calendar dates

Appendix VI (cont'd)

to deal accurately with dates later than 31st December 1999;

(b) prepare plans for continuing to provide such services or infrastructure in the event of failure on the part of such a system to deal accurately with such dates; and

(c) deposit a copy of such plans and the name of any person responsible for them with the local authority for any area which might be affected by a failure of the kind referred to in paragraph (b).

(2) A local authority shall ensure that any plans deposited with it under subsection (1) are made available for inspection at all reasonable times.

(3) In this section, "computer" and "computer system" shall be construed to include any means of processing instructions capable, when incorporated into a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task and result and will further include (without limitation to the foregoing) a semiconductor chip embedded within a machine.

Financial provisions.

3. *There shall be paid out of money provided by Parliament-*

(a) any expenditure incurred by a government department under or by virtue of this Act; and

(b) any increase attributable to this Act in the sums payable out of money so provided under any other Act.

Short title.

4. This Act may be cited as the Computer Millennium Non-Compliance (Contingency Plans) Act 1999.