

Calendar No. 125

106TH CONGRESS
1ST Session

S. 1138

A BILL

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

MAY 27, 1999

Read the second time and placed on the calendar

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1ST SESSION**S. 1138**

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

IN THE SENATE OF THE UNITED STATES

MAY 26, 1999

Mr. MCCAIN (for himself, Mr. DODD, Mr. WYDEN, Mr. HATCH, Mrs. FEINSTEIN, Mr. GORTON, Mr. BENNETT, Mr. LOTT, Mr. ABRAHAM, Mr. FRIST, Mr. BURNS, Mr. SANTORUM, Mr. SMITH of Oregon, and Mr. LIEBERMAN) introduced the following bill; which was read the first time

MAY 27, 1999

Read the second time and placed on the calendar

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE; TABLE OF SECTIONS.**

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Y2K Act”.

4 (b) TABLE OF SECTIONS.—The table of sections for
5 this Act is as follows:

- Sec. 1. Short title; table of sections.
- Sec. 2. Findings and purposes.
- Sec. 3. Definitions.
- Sec. 4. Application of Act.
- Sec. 5. Punitive damages limitations.
- Sec. 6. Proportionate liability.
- Sec. 7. Pre-litigation notice.
- Sec. 8. Pleading requirements.
- Sec. 9. Duty to mitigate.
- Sec. 10. Application of existing impossibility or commercial impracticability doctrines.
- 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.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds that:

8 (1)(A) Many information technology systems,
9 devices and programs are not capable of recognizing
10 certain dates in 1999 and after December 31, 1999,
11 and will read dates in the year 2000 and thereafter
12 as if those dates represent the year 1900 or there-
13 after or will fail to process dates after December 31,
14 1999.

15 (B) If not corrected, the problem described in
16 subparagraph (A) and resulting failures could inca-
17 pacitate systems that are essential to the functioning
18 of markets, commerce, consumer products, utilities,

1 Government, and safety and defense systems, in the
2 United States and throughout the world.

3 (2) It is in the national interest that producers
4 and users of technology products concentrate their
5 attention and resources in the time remaining before
6 January 1, 2000, on assessing, fixing, testing, and
7 developing contingency plans to address any and all
8 outstanding year 2000 computer date-change prob-
9 lems, so as to minimize possible disruptions associ-
10 ated with computer failures.

11 (3)(A) Because year 2000 computer date-
12 change problems may affect virtually all businesses
13 and others users of technology products to some de-
14 gree, there is a substantial likelihood that actual or
15 potential year 2000 failures will prompt a significant
16 volume of litigation, much of it insubstantial

17 (B) The litigation described in subparagraph
18 (A) would have a range of undesirable effects, in-
19 cluding the following:

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

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

5 (iii) It would strain the Nation's legal sys-
6 tem, causing particular problems for the small
7 businesses and individuals who already find
8 that system inaccessible because of its com-
9 plexity and expense.

10 (iv) The delays, expense, uncertainties, loss
11 of control, adverse publicity, and animosities
12 that frequently accompany litigation of business
13 disputes could exacerbate the difficulties associ-
14 ated with the date change and work against the
15 successful resolution of those difficulties.

16 (4) It is appropriate for the Congress to enact
17 legislation to assure that Y2K problems do not un-
18 necessarily disrupt interstate commerce or create un-
19 necessary caseloads in Federal courts and to provide
20 initiatives to help businesses prepare and be in a po-
21 sition to withstand the potentially devastating eco-
22 nomic impact of Y2K.

23 (5) Resorting to the legal system for resolution
24 of Y2K problems is not feasible for many businesses
25 and individuals who already find the legal system in-

1 accessible, particularly small businesses and individ-
2 uals who already find the legal system inaccessible,
3 because of its complexity and expense.

4 (6) The delays, expense, uncertainties, loss of
5 control, adverse publicity, and animosities that fre-
6 quently accompany litigation of business disputes
7 can only exacerbate the difficulties associated with
8 the Y2K date change, and work against the success-
9 ful resolution of those difficulties.

10 (7) Concern about the potential for liability—in
11 particular, concern about the substantial litigation
12 expense associated with defending against even the
13 most insubstantial lawsuits—is prompting many per-
14 sons and businesses with technical expertise to avoid
15 projects aimed at curing year 2000 computer date-
16 change problems.

17 (8) A proliferation of frivolous Y2K lawsuits by
18 opportunistic parties may further limit access to
19 courts by straining the resources of the legal system
20 and depriving deserving parties of their legitimate
21 rights to relief.

22 (9) Congress encourages businesses to approach
23 their Y2K disputes responsibly, and to avoid unnec-
24 essary, time-consuming and costly litigation about
25 Y2K failures, particularly those that are not mate-

1 rial. Congress supports good faith negotiations be-
2 tween parties when there is a dispute over a Y2K
3 problem, and, if necessary, urges the parties to enter
4 into voluntary, non-binding mediation rather than
5 litigation.

6 (b) PURPOSES.—Based upon the power of the Con-
7 gress under Article I, Section 8, Clause 3 of the Constitu-
8 tion of the United States, the purposes of this Act are—

9 (1) to establish uniform legal standards that
10 give all businesses and users of technology products
11 reasonable incentives to solve Y2K computer date-
12 change problems before they develop;

13 (2) to encourage continued Y2K remediation
14 and testing efforts by providers, suppliers, cus-
15 tomers, and other contracting partners;

16 (3) to encourage private and public parties alike
17 to resolve Y2K disputes by alternative dispute mech-
18 anisms in order to avoid costly and time-consuming
19 litigation, to initiate those mechanisms as early as
20 possible, and to encourage the prompt identification
21 and correction of Y2K problems; and

22 (4) to lessen the burdens on interstate com-
23 merce by discouraging insubstantial lawsuits while
24 preserving the ability of individuals and businesses

1 that have suffered real injury to obtain complete re-
2 lief.

3 **SEC. 3. DEFINITIONS.**

4 In this Act:

5 (1) Y2K ACTION.—The term “Y2K action”—

6 (A) means a civil action commenced in any
7 Federal or State court, or any agency board of
8 contract appeal proceeding, in which the plain-
9 tiff’s alleged harm or injury resulted from a
10 Y2K failure;

11 (B) includes a civil action commenced in
12 any Federal or State court by a governmental
13 entity when acting in a commercial or con-
14 tracting capacity; but

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

18 (2) Y2K FAILURE.—The term “Y2K failure”
19 means failure by any device or system (including any
20 computer system and any microchip or integrated
21 circuit embedded in another device or product), or
22 any software, firmware, or other set or collection of
23 processing instructions to process, to calculate, to
24 compare, to sequence, to display, to store, to trans-

1 mit, or to receive year-2000 date-related data, in-
2 cluding failures—

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

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

8 (C) accurately to account for the year
9 2000's status as a leap year, including recogni-
10 tion and processing of the correct date on Feb-
11 ruary 29, 2000.

12 (3) GOVERNMENT ENTITY.—The term “govern-
13 ment entity” means an agency, instrumentality, or
14 other entity of Federal, State, or local government
15 (including multijurisdictional agencies, instrumentality,
16 ities, and entities).

17 (4) MATERIAL DEFECT.—The term “material
18 defect” means a defect in any item, whether tangible
19 or intangible, or in the provision of a service, that
20 substantially prevents the item or service from oper-
21 ating or functioning as designed or according to its
22 specifications. The term “material defect” does not
23 include a defect that—

1 (A) has an insignificant or de minimis ef-
2 fect on the operation or functioning of an item
3 or computer program;

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

7 (C) has an insignificant or de minimis ef-
8 fect on the efficacy of the service provided.

9 (5) PERSONAL INJURY.—The term “personal
10 injury” means physical injury to a natural person,
11 including—

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

14 (B) mental suffering, emotional distress, or
15 similar injuries suffered by that person in con-
16 nection with a physical injury.

17 (6) STATE.—The term “State” means any
18 State of the United States, the District of Columbia,
19 Commonwealth of Puerto Rico, the Northern Mar-
20 iana Islands, the United States Virgin Islands,
21 Guam, American Samoa, and any other territory or
22 possession of the United States, and any political
23 subdivision thereof.

24 (7) CONTRACT.—The term “contract” means a
25 contract, tariff, license, or warranty.

1 (8) ALTERNATIVE DISPUTE RESOLUTION.—The
2 term “alternative dispute resolution” means any
3 process or proceeding, other than adjudication by a
4 court or in an administrative proceeding, to assist in
5 the resolution of issues in controversy, through pro-
6 cesses such as early neutral evaluation, mediation,
7 minitrial, and arbitration.

8 **SEC. 4. APPLICATION OF ACT.**

9 (a) GENERAL RULE.—This Act applies to any Y2K
10 action brought in a State or Federal court after January
11 1, 1999, for a Y2K failure occurring before January 1,
12 2003, including any appeal, remand, stay, or other judi-
13 cial, administrative, or alternative dispute resolution pro-
14 ceeding in such an action.

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

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

23 (d) CONTRACT PRESERVATION.—

24 (1) IN GENERAL.—Subject to paragraph (2), in
25 any Y2K action any written contractual term, in-

1 including a limitation or an exclusion of liability, or a
2 disclaimer of warranty, shall be strictly enforced un-
3 less the enforcement of that term would manifestly
4 and directly contravene applicable State law em-
5 bodied in any statute in effect on January 1, 1999,
6 specifically addressing that term.

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

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

19 (f) APPLICATION WITH YEAR 2000 INFORMATION
20 AND READINESS DISCLOSURE ACT.—Nothing in this Act
21 supersedes any provision of the Year 2000 Information
22 and Readiness Disclosure Act.

23 **SEC. 5. PUNITIVE DAMAGES LIMITATIONS.**

24 (a) IN GENERAL.—In any Y2K action in which puni-
25 tive damages are permitted by applicable law, the defend-

1 ant shall not be liable for punitive damages unless the
2 plaintiff proves by clear and convincing evidence that the
3 applicable standard for awarding damages has been met.

4 (b) CAPS ON PUNITIVE DAMAGES.—

5 (1) IN GENERAL.—Subject to the evidentiary
6 standard established by subsection (a), punitive
7 damages permitted under applicable law against a
8 defendant described in paragraph (2) in a Y2K ac-
9 tion may not exceed the lesser of—

10 (A) 3 times the amount awarded for com-
11 pensatory damages; or

12 (B) \$250,000.

13 (2) DEFENDANT DESCRIBED.—A defendant de-
14 scribed in this paragraph is a defendant—

15 (A) who—

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

18 (ii) whose net worth does not exceed
19 \$500,000; or

20 (B) that is an unincorporated business, a
21 partnership, corporation, association, or organi-
22 zation with fewer than 50 full-time employees.

23 (3) NO CAP IF INJURY SPECIFICALLY IN-
24 TENDED.—Paragraph (1) does not apply if the
25 plaintiff establishes by clear and convincing evidence

1 that the defendant acted with specific intent to in-
2 jure the plaintiff.

3 (c) GOVERNMENT ENTITIES.—Punitive damages in a
4 Y2K action may not be awarded against a government
5 entity.

6 **SEC. 6. PROPORTIONATE LIABILITY.**

7 (a) IN GENERAL.—Except as provided in subsections
8 (b) and (c), a person against whom a final judgment is
9 entered in a Y2K action shall be liable solely for the por-
10 tion of a judgment that corresponds to the relative and
11 proportional responsibility of that person. In determining
12 the percentage of responsibility of any defendant, the trier
13 of fact shall determine that percentage as a percentage
14 of the total fault of all persons, including the plaintiff,
15 who caused or contributed to the total loss incurred by
16 the plaintiff.

17 (b) PROPORTIONATE LIABILITY.—

18 (1) DETERMINATION OF RESPONSIBILITY.—In
19 any Y2K action, the court shall instruct the jury to
20 answer special interrogatories, or, if there is no jury,
21 the court shall make findings with respect to each
22 defendant, including defendants who have entered
23 into settlements with the plaintiff or plaintiffs,
24 concerning—

1 (A) the percentage of responsibility, if any,
2 of each defendant, measured as a percentage of
3 the total fault of all persons who caused or con-
4 tributed to the loss incurred by the plaintiff;
5 and

6 (B) if alleged by the plaintiff, whether the
7 defendant (other than a defendant who has en-
8 tered into a settlement agreement with the
9 plaintiff)—

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

12 (ii) knowingly committed fraud.

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

20 (3) FACTORS FOR CONSIDERATION.—In deter-
21 mining the percentage of responsibility under this
22 subsection, the trier of fact shall consider—

23 (A) the nature of the conduct of each per-
24 son found to have caused or contributed to the
25 loss incurred by the plaintiff; and

1 (B) the nature and extent of the casual re-
 2 lationship between the conduct of each such
 3 person and the damages incurred by the plain-
 4 tiff.

5 (c) JOINT LIABILITY FOR SPECIFIC INTENT OR
 6 FRAUD.—

7 (1) IN GENERAL.—Notwithstanding subsection
 8 (a), the liability of a defendant in a Y2K action is
 9 joint and several if the trier of fact specifically deter-
 10 mines that the defendant—

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

13 (B) knowingly committed fraud.

14 (2) FRAUD; RECKLESSNESS.—

15 (A) KNOWING COMMISSION OF FRAUD DE-
 16 SCRIBED.—For purposes of subsection
 17 (b)(1)(B)(ii) and paragraph (1)(B) of this sub-
 18 section, a defendant knowingly committed fraud
 19 if the defendant—

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

23 (ii) omitted a fact necessary to make
 24 the statement not be misleading with ac-

1 tual knowledge that, as a result of the
2 omission, the statement was false; and

3 (iii) knew that the plaintiff was rea-
4 sonably likely to rely on the false state-
5 ment.

6 (B) RECKLESSNESS.—For purposes of
7 subsection (b)(1)(B) and paragraph (1) of this
8 subsection, reckless conduct by the defendant
9 does not constitute either a specific intent to in-
10 jure, or the knowing commission of fraud, by
11 the defendant.

12 (3) RIGHT TO CONTRIBUTION NOT AF-
13 FECTED.—Nothing in this section affects the right
14 under any other law, of a defendant to contribution
15 with respect to another defendant found under sub-
16 section (b)(1)(B), or determined under paragraph
17 (1)(B) of this subsection, to have acted with specific
18 intent to injure the plaintiff or to have knowingly
19 committed fraud.

20 (d) SPECIAL RULES.—

21 (1) UNCOLLECTIBLE SHARE.—

22 (A) IN GENERAL.—Notwithstanding sub-
23 section (a), if, upon motion made not later than
24 6 months after a final judgment is entered in
25 any Y2K action, the court determines that all

1 or part of the share of the judgment against a
2 defendant for compensatory damages is not col-
3 lectible against that defendant, then each other
4 defendant in the action is liable for the
5 uncollectible share as follows:

6 (i) PERCENTAGE OF NET WORTH.—

7 The other defendants are jointly and sever-
8 ally liable for any uncollectible share if the
9 plaintiff establishes that—

10 (I) the plaintiff is an individual
11 whose recoverable damages under the
12 final judgment are equal to more than
13 10 percent of the net worth of the
14 plaintiff; and

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

17 (ii) OTHER PLAINTIFFS.—For a plain-
18 tiff not described in clause (i), each of the
19 other defendants is liable for the
20 uncollectible share in proportion to the per-
21 centage of responsibility of that defendant,
22 except that the total liability of a defend-
23 ant under this clause may not exceed 50
24 percent of the proportionate share of that

1 defendant, as determined under subsection
2 (b)(2).

3 (B) OVERALL LIMIT.—The total payments
4 required under subparagraph (A) from all de-
5 fendants may not exceed the amount of the
6 uncollectible share.

7 (C) SUBJECT TO CONTRIBUTION.—A de-
8 fendant against whom judgment is not collect-
9 ible is subject to contribution and to any con-
10 tinuing liability to the plaintiff on the judg-
11 ment.

12 (2) SPECIAL RIGHT OF CONTRIBUTION.—To the
13 extent that a defendant is required to make an addi-
14 tional payment under paragraph (1), that defendant
15 may recover contribution—

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

18 (B) from any other defendant that is joint-
19 ly and severally liable;

20 (C) from any other defendant held propor-
21 tionately liable who is liable to make the same
22 payment and has paid less than that other de-
23 fendant's proportionate share of that payment;
24 or

1 (D) from any other person responsible for
2 the conduct giving rise to the payment that
3 would have been liable to make the same pay-
4 ment.

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

11 (e) SETTLEMENT DISCHARGE.—

12 (1) IN GENERAL.—A defendant who settles a
13 Y2K action at any time before final verdict or judg-
14 ment shall be discharged from all claims for con-
15 tribution brought by other persons. Upon entry of
16 the settlement by the court, the court shall enter a
17 bar order constituting the final discharge of all obli-
18 gations to the plaintiff of the settling defendant aris-
19 ing out of the action. The order shall bar all future
20 claims for contribution arising out of the action—

21 (A) by any person against the settling de-
22 fendant; and

23 (B) by the settling defendant against any
24 person other than a person whose liability has

1 been extinguished by the settlement of the set-
2 tling defendant.

3 (2) REDUCTION.—If a defendant enters into a
4 settlement with the plaintiff before the final verdict
5 or judgment, the verdict or judgment shall be re-
6 duced by the greater of—

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

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

12 (f) GENERAL RIGHT OF CONTRIBUTION.—

13 (1) IN GENERAL.—A defendant who is jointly
14 and severally liable for damages in any Y2K action
15 may recover contribution from any other person
16 who, if joined in the original action, would have been
17 liable for the same damages. A claim for contribu-
18 tion shall be determined based on the percentage of
19 responsibility of the claimant and of each person
20 against whom a claim for contribution is made.

21 (2) STATUTE OF LIMITATIONS FOR CONTRIBU-
22 TION.—An action for contribution in connection with
23 a Y2K action shall be brought not later than 6
24 months after the entry of a final, nonappealable
25 judgment in the Y2K action, except than an action

1 for contribution brought by a defendant who was re-
2 quired to make an additional payment under sub-
3 section (d)(1) may be brought not later than 6
4 months after the date on which such payment was
5 made.

6 (g) MORE PROTECTIVE STATE LAW NOT PRE-
7 EMPTED.—Nothing in this section pre-empts or super-
8 sedes any provision of State statutory law that—

9 (1) limits the liability of a defendant in a Y2K
10 action to a lesser amount than the amount deter-
11 mined under this section; or

12 (2) otherwise affords a greater degree of protec-
13 tion from joint or several liability than is afforded by
14 this section.

15 **SEC. 7. PRE-LITIGATION NOTICE.**

16 (a) IN GENERAL.—Before commencing a Y2K action,
17 except an action that seeks only injunctive relief, a pro-
18 spective plaintiff with a Y2K claim shall send a written
19 notice by certified mail (with either return receipt re-
20 quested or other means of verification that the notice was
21 sent) to each prospective defendant in that action. The
22 notice shall provide specific and detailed information
23 about—

24 (1) the manifestations of any material defect al-
25 leged to have caused harm or loss;

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

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

5 (4) the basis upon which the prospective plain-
6 tiff seeks that remedy; and

7 (5) the name, title, address, and telephone
8 number of any individual who has authority to nego-
9 tiate a resolution of the dispute on behalf of the pro-
10 spective plaintiff.

11 (b) PERSON TO WHOM NOTICE TO BE SENT.—The
12 notice required by subsection (a) shall be sent—

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

15 (2) if the prospective defendant does not have
16 a registered agent, then to the chief executive officer
17 of a corporation, the managing partner of a partner-
18 ship, the proprietor of a sole proprietorship, or to a
19 similarly-situated person for any other enterprise; or

20 (3) if the prospective defendant has designated
21 a person to receive pre-litigation notices on a Year
22 2000 Internet Website (as defined in section 3(7) of
23 the Year 2000 Information and Readiness Disclo-
24 sure Act), to the designated person, if the prospec-
25 tive plaintiff has reasonable access to the Internet.

1 (c) RESPONSE TO NOTICE.—

2 (1) IN GENERAL.—Within 30 days after receipt
3 of the notice specified in subsection (a), each pro-
4 spective defendant shall send by certified mail with
5 return receipt requested to each prospective plaintiff
6 a written statement acknowledging receipt of the no-
7 tice, and describing the actions it has taken or will
8 take to address the problem identified by the pro-
9 spective plaintiff.

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

14 (3) INADMISSIBILITY.—A written statement re-
15 quired by this paragraph is not admissible in evi-
16 dence, under Rule 408 of the Federal Rules of Evi-
17 dence or any analogous rule of evidence in any
18 State, in any proceeding to prove liability for, or the
19 invalidity of, a claim or its amount, or otherwise as
20 evidence of conduct or statements made in com-
21 promise negotiations.

22 (4) PRESUMPTIVE TIME OF RECEIPT.—For pur-
23 poses of paragraph (1), a notice under subsection
24 (a) is presumed to be received 7 days after it was
25 sent.

1 (d) FAILURE TO RESPOND.—If a prospective
2 defendant—

3 (1) fails to respond to a notice provided pursu-
4 ant to subsection (a) within the 30 days specified in
5 subsection (c)(1); or

6 (2) does not describe the action, if any, the pro-
7 spective defendant has taken, or will take, to address
8 the problem identified by the prospective plaintiff,
9 the prospective plaintiff may immediately commence a
10 legal action against that prospective defendant.

11 (e) REMEDIATION PERIOD.—

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

20 (2) EXTENSION BY AGREEMENT.—The prospec-
21 tive plaintiff and prospective defendant may change
22 the length of the 60-day remediation period by writ-
23 ten agreement.

24 (3) MULTIPLE EXTENSIONS NOT ALLOWED.—
25 Except as provided in paragraph (2), a defendant in

1 a Y2K action is entitled to no more than one 30-day
2 period and one 60-day remediation period under
3 paragraph (1).

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

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

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

21 (2) the time for filing answers and all other
22 pleadings shall be tolled during the appropriate pe-
23 riod.

24 (g) EFFECT OF CONTRACTUAL OR STATUTORY WAIT-
25 ING PERIODS.—In cases in which a contract, or a statute

1 enacted before January 1, 1999, requires notice of non-
2 performance and provides for a period of delay prior to
3 the initiation of suit for breach or repudiation of contract,
4 the period of delay provided by contract or the statute is
5 controlling over the waiting period specified in subsections
6 (c) and (d).

7 (h) STATE LAW CONTROLS ALTERNATIVE METH-
8 ODS.—Nothing in this section supersedes or otherwise pre-
9 empts any State law or rule of civil procedure with respect
10 to the use of alternative dispute resolution for Y2K ac-
11 tions.

12 (i) PROVISIONAL REMEDIES UNAFFECTED.—Noth-
13 ing in this section interferes with the right of a litigant
14 to provisional remedies otherwise available under Rule 65
15 of the Federal Rules of Civil Procedure or any State rule
16 of civil procedure providing extraordinary or provisional
17 remedies in any civil action in which the underlying com-
18 plaint seeks both injunctive and monetary relief.

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

1 **SEC. 8. PLEADING REQUIREMENTS.**

2 (a) APPLICATION WITH RULES OF CIVIL PROCE-
3 DURE.—This section applies exclusively to Y2K actions
4 and, except to the extent that this section requires addi-
5 tional information to be contained in or attached to plead-
6 ings, nothing in this section is intended to amend or other-
7 wise supersede applicable rules of Federal or State civil
8 procedure.

9 (b) NATURE AND AMOUNT OF DAMAGES.—In all
10 Y2K actions in which damages are requested, there shall
11 be filed with the complaint a statement of specific infor-
12 mation as to the nature and amount of each element of
13 damages and the factual basis for the damages calcula-
14 tion.

15 (c) MATERIAL DEFECTS.—In any Y2K action in
16 which the plaintiff alleges that there is a material defect
17 in a product or service, there shall be filed with the com-
18 plaint a statement of specific information regarding the
19 manifestations of the material defects and the facts sup-
20 porting a conclusion that the defects are material.

21 (d) REQUIRED STATE OF MIND.—In any Y2K action
22 in which a claim is asserted on which the plaintiff may
23 prevail only on proof that the defendant acted with a par-
24 ticular state of mind, there shall be filed with the com-
25 plaint, with respect to each element of that claim, a state-

1 ment of the facts giving rise to a strong inference that
 2 the defendant acted with the required state of mind.

3 **SEC. 9. DUTY TO MITIGATE.**

4 Damages awarded in any Y2K action shall exclude
 5 compensation for damages the plaintiff could reasonably
 6 have avoided in light of any disclosure or other informa-
 7 tion of which the plaintiff was, or reasonably should have
 8 been, aware, including information made available by the
 9 defendant to purchasers or users of the defendant's prod-
 10 uct or services concerning means of remedying or avoiding
 11 the Y2K failure.

12 **SEC. 10. APPLICATION OF EXISTING IMPOSSIBILITY OR**
 13 **COMMERCIAL IMPRACTICABILITY DOCTRINES.**
 14

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

21 **SEC. 11. DAMAGES LIMITATION BY CONTRACT.**

22 In any Y2K action for breach or repudiation of con-
 23 tract, no party may claim, nor be awarded, any category
 24 of damages unless such damages are allowed—

25 (1) by the express terms of the contract; or

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

4 **SEC. 12. DAMAGES IN TORT CLAIMS.**

5 (a) IN GENERAL.—A party to a Y2K action making
6 a tort claim may not recover damages for economic loss
7 unless—

8 (1) the recovery of such losses is provided for
9 in a contract to which the party seeking to recover
10 such losses is a party; or

11 (2) such losses result directly from damage to
12 tangible personal or real property caused by the
13 Y2K failure (other than damage to property that is
14 the subject of the contract between the parties to the
15 Y2K action or, in the event there is no contract be-
16 tween the parties, other than damage caused only to
17 the property that experienced the Y2K failure),

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

20 (b) ECONOMIC LOSS.—For purposes of this section
21 only, and except as otherwise specifically provided in a
22 valid and enforceable written contract between the plain-
23 tiff and the defendant in a Y2K action, the term “eco-
24 nomic loss”—

1 (1) means amounts awarded to compensate an
2 injured party for any loss other than losses described
3 in subsection (a)(2); and

4 (2) includes amounts awarded for damages such
5 as—

6 (A) lost profits or sales;

7 (B) business interruption;

8 (C) losses indirectly suffered as a result of
9 the defendant's wrongful act or omission;

10 (D) losses that arise because of the claims
11 of third parties;

12 (E) losses that must be plead as special
13 damages; and

14 (F) consequential damages (as defined in
15 the Uniform Commercial Code or analogous
16 State commercial law).

17 (c) CERTAIN ACTIONS EXCLUDED.—This section
18 does not affect, abrogate, amend, or alter any patent,
19 copyright, trade-secret, trademark, or service-mark action,
20 or any claim for defamation or invasion of privacy under
21 Federal or State law.

22 (d) CERTAIN OTHER ACTIONS.—A person liable for
23 damages, whether by settlement or judgment, in a civil
24 action to which this Act does not apply because of section
25 4(c) whose liability, in whole or in part, is the result of

1 a Y2K failure may, notwithstanding any other provision
2 of this Act, pursue any remedy otherwise available under
3 Federal or State law against the person responsible for
4 that Y2K failure to the extent of recovering the amount
5 of those damages.

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

7 (a) **DEFENDANT'S STATE OF MIND.**—In a Y2K ac-
8 tion other than a claim for breach or repudiation of con-
9 tract, and in which the defendant's actual or constructive
10 awareness of an actual or potential Y2K failure is an ele-
11 ment of the claim, the defendant is not liable unless the
12 plaintiff establishes that element of the claim by the stand-
13 ard of evidence under applicable State law in effect before
14 January 1, 1999.

15 (b) **LIMITATION ON BYSTANDER LIABILITY FOR Y2K**
16 **FAILURES.**—

17 (1) **IN GENERAL.**—With respect to any Y2K ac-
18 tion for money damages in which—

19 (A) the defendant is not the manufacturer,
20 seller, or distributor of a product, or the pro-
21 vider of a service, that suffers or causes the
22 Y2K failure at issue;

23 (B) the plaintiff is not in substantial priv-
24 ity with the defendant; and

1 (C) the defendant's actual or constructive
2 awareness of an actual or potential Y2K failure
3 is an element of the claim under applicable law,
4 the defendant shall not be liable unless the plaintiff,
5 in addition to establishing all other requisite ele-
6 ments of the claim, proves, by the standard of evi-
7 dence under applicable State law in effect before
8 January 1, 1999, that the defendant actually knew,
9 or recklessly disregarded a known and substantial
10 risk, that such failure would occur.

11 (2) SUBSTANTIAL PRIVACY.—For purposes of
12 paragraph (1)(B), a plaintiff and a defendant are in
13 substantial privity when, in a Y2K action arising out
14 of the performance of professional services, the
15 plaintiff and the defendant either have contractual
16 relations with one another or the plaintiff is a per-
17 son who, prior to the defendant's performance of
18 such services, was specifically identified to and ac-
19 knowledged by the defendant as a person for whose
20 special benefit the services were being performed.

21 (3) CERTAIN CLAIMS EXCLUDED.—For pur-
22 poses of paragraph (1)(C), claims in which the de-
23 fendant's actual or constructive awareness of an ac-
24 tual or potential Y2K failure is an element of the
25 claim under applicable law do not include claims for

1 negligence but do not include claims such as fraud,
2 constructive fraud, breach of fiduciary duty, neg-
3 ligent misrepresentation, and interference with con-
4 tract or economic advantage.

5 (c) CONTROL NOT DETERMINATIVE OF LIABILITY.—

6 The fact that a Y2K failure occurred in an entity, facility,
7 system, product, or component that was sold, leased,
8 rented, or otherwise within the control of the party against
9 whom a claim is asserted in a Y2K action shall not con-
10 stitute the sole basis for recovery of damages in that ac-
11 tion. A claim in a Y2K action for breach or repudiation
12 of contract for such a failure is governed by the terms
13 of the contract.

14 (d) PROTECTIONS OF THE YEAR 2000 INFORMATION

15 AND READINESS DISCLOSURE ACT APPLY.—The protec-
16 tions for the exchanges of information provided by section
17 4 of the Year 2000 Information and Readiness Disclosure
18 Act (Public Law 105–271) shall apply to this Act.

19 **SEC. 14. APPOINTMENT OF SPECIAL MASTERS OR MAG-**
20 **ISTRATE JUDGES FOR Y2K ACTIONS.**

21 Any District Court of the United States in which a
22 Y2K action is pending may appoint a special master or
23 a magistrate judge to hear the matter and to make find-
24 ings of fact and conclusions of law in accordance with Rule
25 53 of the Federal Rules of Civil Procedure.

1 **SEC. 15. Y2K ACTIONS AS CLASS ACTIONS.**

2 (a) **MATERIAL DEFECT REQUIREMENT.**—A Y2K ac-
3 tion involving a claim that a product or service is defective
4 may be maintained as a class action in Federal or State
5 court as to that claim only if—

6 (1) it satisfies all other prerequisites established
7 by applicable Federal or State law, including appli-
8 cable rules of civil procedure; and

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

12 (b) **NOTIFICATION.**—In any Y2K action that is main-
13 tained as a class action, the court, in addition to any other
14 notice required by applicable Federal or State law, shall
15 direct notice of the action to each member of the class,
16 which shall include—

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

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

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

1 (c) FORUM FOR Y2K CLASS ACTIONS.—

2 (1) JURISDICTION.—Except as provided in
3 paragraph (2), a Y2K action may be brought as a
4 class action in a United States District Court or re-
5 moved to a United States District Court if the
6 amount in controversy is greater than the sum or
7 value of \$1,000,000 (exclusive of interest and costs),
8 computed on the basis of all claims to be determined
9 in the action.

10 (2) EXCEPTION.—A Y2K action may not be
11 brought or removed as a class action under this sec-
12 tion if—

13 (A)(i) a substantial majority of the mem-
14 bers of the proposed plaintiff class are citizens
15 of a single State;

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

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

20 (B) the primary defendants are States,
21 State officials, or other governmental entities
22 against whom the United States District Court
23 may be foreclosed from ordering relief.

24 (d) EFFECT ON RULES OF CIVIL PROCEDURE.—Ex-
25 cept as otherwise provided in this section, nothing in this

- 1 section supersedes any rule of Federal or State civil proce-
- 2 dure applicable to class actions.

Amend the title so as to read: An Act to regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date through fostering an incentive for businesses to continue fixing and testing their systems, to communicate with other businesses, resolve year-2000 business disputes without litigation, and to settle year 2000 lawsuits that may disrupt significant sectors of the American economy.