of customers and goodwill and the ability to serve and the loss of advertising revenues and everything else going down.

My friend from Oregon says: Well, we give you what the contract says; this bill will give you what the contract says.

Sure, it gives what the contract says. That is an oxymoron. We know it gives you what the contract says. But the contract doesn't contract for economic loss. We are talking about misrepresentation, wrongful acts, fraudulent representation, tort—not contract. So don't give me this stuff about the contract, and we are giving you exactly what the contract says.

That is our complaint. We want what States all over the Nation, all 50 States, give you right now, and we do not want to repeal that.

When we don't repeal it, then they come in in the next 180 days, the next 6 months, and they go to work and they start getting something done, because they realize this bill has either been killed in the Congress or vetoed by the President. They have to get right with the market world or get out of the way. That is the way free enterprise works. It is a wonderful thing. We all talk about it.

By the way, don't give me this thing about the computer world created all of this productivity. Sure, it increases productivity. But what really created this economy—we are not going to stand here and listen time and time again—is the 1993 economic plan. Don't give the award to Bill Gates; give it to Bob Rubin.

We were there. We had to struggle to get the votes. We had to bring in the Vice President to get the vote. They were saying over at the White House and at the Economic Council: Let us have a stimulus; we have to have a stimulus. Rubin says: No, pay the bill.

What did we do? We paid the bill. We started paying off the bill. With what? Increased taxes. With increased taxes on what? Social Security.

I voted for it. The Senator from Texas said: You voted for increased taxes on Social Security. They will hunt you down in the streets and shoot you like dogs. That is what he said.

The other Senator, Mr. Packwood, said: I will give you my house, the chairman of the Finance Committee, if this thing works.

KASICH, who is running for President, I am trying to find JOHN. I don't know whether he is running as a Democrat or Republican, because he said: If this plan works, I will change parties and become a Democrat.

We have the record. They are trying to subterfuge this as this computerization is moving overseas and asking for what? They want all the special laws. They want capital gains. They are making too much money. So they have the onslaught: Wait, estate taxes, we ought not to die and be taxed at the same time. So we have to change the formula for estate taxes. No, excuse me, immigrants. Don't pay Americans, just bring them all in. Let's have an exemption from the immigration laws. Let's have an exemption from the State tort laws. Let's do everything. Let's upset the world for the idle rich.

Come on, 22,000 millionaires for Bill Gates. I employ, by gosh, instead, 200,000 textile workers at the mill. I would much rather have that crowd. Fine for the IQ group, but I am talking about working Americans, middle America, the backbone of our democratic society.

So what we have here is an onslaught for the computer world, for capital gains, immigration laws, estate taxes, Y2K exemptions, any and every thing. They have money. They have contributions. We would like to get their contributions. So Democrats and Republicans are falling all over each other trying to show what goody-goody boys we are. We will change the State laws. We will take the rights away from consumers and injured parties. We will destroy small businesses that bought a computer. They won't even be able to get a lawyer with all of this stringout of how to bring a case and everything else of that kind.

Saying, don't worry about it, it is only for 3 years, 3 years it will be gone—if there is a crisis on January 1, it shouldn't exist for over a year. Everybody will know within a year whether they are Y2K compliant and be able to file. But no, they want to use this for further argument, and I gainsay the way they are shoving it now, not agreeing to economic damages in the Kerry amendment, turning down the Leahy amendment for consumers rights. I am afraid what I said was a footprint for the Chamber of Commerce, but rather I think they really are on a forced drive for a veto because they can use that. Who vetoed productivity, the great industry that brought all of this productivity to America? Who vetoed it?

I can see Vice President GORE trying to get up an answer to that one. That is going to be very interesting.

Senator HATCH led the way with his bill last year, and we got together and started confronting this particular problem. As I speak—and I am ready to yield now to my distinguished colleague from North Carolina—they have not 90 days, but we are giving them twice that amount. Put everybody on notice, this thing they tell me is on C-SPAN so everybody ought to know to get Y2K compliant, try it out, test your set. If it is not, go down and, by gosh, get it fixed now. Don't run to the courthouse. Run to the computer salesman who sold you the thing, because they—Dell, Intel, Yahoo, all the rest of them—are coming in and saying that everything is Y2K compliant. We can't wait around for Congress to change all the tort laws.

I yield the floor.

Mr. MCCAIN. Mr. President, I can't help but note the Senator from South Carolina mentioned Mr. Gates has 2,000 employees for millionaires.

Mr. HOLLINGS. Twenty-two thousand. That is in Time magazine, the year-end report. It is a wonderful operation.

Mr. MCCAIN. There are 22,000 millionaires. I know our respective staffs feel like millionaires for having had the opportunity of working here in the Senate with us. I know I speak for all of our staffs.

## UNANIMOUS CONSENT AGREEMENT—S. 886

Mr. MCCAIN. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 91, S. 886, the State Department reauthorization bill, at a time determined by the two leaders, and that the bill be considered under the following limitations: that the only first-degree amendments in order be the following, and that they be subject to relevant second-degree amendments, with any debate time on amendments controlled in the usual form, provided that time for debate on any second-degree amendment would be limited to that accorded the amendment to which it is offered; that upon disposition of all amendments, the bill be read the third time, and the Senate proceed to vote on passage of the bill, as amended, if amended, with no intervening action.

I submit the list of amendments.

The list is as follows:

Abraham-Grams: U.S. entry/exit controls.
Ashcroft: 4 relevant.
Baucus: 3 relevant.
Biden: 5 relevant.
Bingaman: Science counselors—embassies.
Daschle: 2 relevant.
Dodd: 3 relevant.
Durbin: Baltics and Northeast Europe.
Feingold: 4 relevant.
Feinstein: relevant.
Helms: 2 relevant.
Kerry: 3 relevant.
Leahy: 5 relevant.
Lott: 2 relevant.
Managers' amendment.
Kennedy: relevant.
Moynihan: relevant.
Reed: 2 relevant.
Reid: relevant.
Sarbanes: 3 relevant.
Thomas: veterans
Wellstone: 3 relevant.
Wellstone: trafficking.
Wellstone: child soldiers.

The PRESIDING OFFICER. Without objection, it is so ordered.

## Y2K ACT

The Senate continued with the consideration of the bill.

Mr. MCCAIN. Mr. President, I ask unanimous consent that Senator EDWARDS be recognized to offer two amendments as provided in the previous consent, and time on both amendments be limited to 1 hour total, to be equally divided in the usual form, and no amendments be in order to the Edwards amendments.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCAIN. Mr. President, before yielding, we would expect votes on the

two Edwards amendments probably within an hour or less. That is our desire, and we will clear that with the leaders on both sides.

Mr. President, I yield the floor.

Mr. EDWARDS addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

AMENDMENT NO. 619 TO AMENDMENT NO. 608

Mr. EDWARDS. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from North Carolina [Mr. EDWARDS] proposes an amendment numbered 619.

Mr. EDWARDS. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike Section 12 and insert the following:

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

"A party to a Y2K action making a tort claim may only recover for economic losses to the extent allowed under applicable state or federal law in effect on January 1, 1999."

Mr. EDWARDS. Mr. President, the purpose of this amendment is to deal with section 12 of the McCain-Dodd-Wyden bill. Let me read it first to make it clear what the amendment deals with. I am quoting from the amendment now, and this would replace section 12 in the existing bill:

A party to a Y2K action making a tort claim may only recover for economic losses to the extent allowed under applicable State or Federal law in effect on January 1, 1999.

We have drawn this amendment in the narrowest possible fashion, and we did that for a number of reasons. Number one, there has been great concern voiced on the floor of the Senate about allowing and continuing to enforce existing contracts under contract law. This amendment has no impact on that whatsoever. The provisions in the McCain bill that provide for the enforcement of contract law remain in place.

I also say to my colleagues that if this amendment is adopted in the very narrow form in which it has been presented, all of the following things, which I think many Members of the Senate want to support, remain present in this bill.

Punitive damages will remain capped. The bill will continue to apply to everyone—consumers and businessmen and businesswomen. Joint and several liability is completely gone. In other words, proportionate liability, which has been a subject of great discussion, remains in place. The duty to mitigate remains in place. The 90-day waiting period remains in place. The limitations on class actions remain in place. The requirements of specificity and materiality in pleadings remain in place.

All of the things that have been discussed at great length and have been at the top of the list of what these folks have been trying to accomplish on behalf of the computer industry remain in place.

What this amendment is intended to do is close a loophole. It is a loophole that is enormous. Here is the reason. We will enforce, under the provisions of the McCain bill, a contract. The problem is, there are millions and millions of computer sales that occur in this country every year that are subject to no contract; there is no contract between the parties. Under the provisions of the McCain bill, as it is presently, if a consumer or a small businessperson purchases a computer, there is no written contract between the parties, which will be true in the vast majority of cases; so there is no contract to enforce, there is no agreement between the parties on the specific terms of what can be recovered and what the limitations of those recoveries are.

Let's suppose, in my example, that a blatant, fraudulent misrepresentation has been made to the purchaser. Unless we do something to amend this section, since there is no contract in place, we will put the purchaser in the position of being able to recover absolutely nothing but the cost of their computer. For example, a small family-run business in a small town in North Carolina—Murfreesboro, NC—buys a computer system. There is no written contract of any kind between the parties. What happens is, their computer system doesn't work; it is non-Y2K compliant. It turns out that the people who sold it to them knew it was non-Y2K compliant and, in fact, misrepresented when they made the sale that it was Y2K compliant. So we have, in fact, what probably is a criminal act in addition to everything else, a fraudulent misrepresentation.

Unless this amendment is adopted, if that family business has lost revenues, lost income, lost profits, while they continue to incur overhead, they are unable to recover even their out-of-pocket losses—the money they have to actually pay as a result of their computer being non-Y2K compliant—simply because there is no contract between the parties. That would be true even under the most egregious situation, i.e., where a fraud has occurred, where a misrepresentation has occurred, where a criminal act has occurred, even under those extreme circumstances.

Unless this amendment is adopted in its very narrowly drawn form, that purchaser, small businessperson or consumer, is limited to the recovery of the cost of their computer, even though their family-owned business, which has been in business forever, has been put out of business, even though they have lost thousands of dollars in revenue, even though they have had to pay out of their pocket for losses that have occurred as a result of a fraud committed against them. Even if the defendant can be put in jail for their conduct, this small businessperson is out of business, and what they can recover against this defendant is the cost of their computer.

There is a huge, huge loophole that exists in this bill as presently drafted, and that loophole is for all those cases across America where there is no contract. That is going to be true in the vast majority of cases. Most people don't have contracts. They go to the computer store and they buy a computer. Some computer salesman comes to their business or home and sells them a computer. So what we are left with is what happens to those folks—the folks who don't have a contract, which is going to be the vast majority of Americans, businessmen, businesswomen, consumers who have purchased computers. They are not going to have a contract.

I will tell you who will have a contract. The folks who will have contracts—therefore, their remedies will be clearly defined in the contract—will be big businesses. That will be true of the computer companies who sell their products because they can afford to hire a big team of lawyers to represent them and draft contracts for them. That will be true of big corporate purchasers of computer systems who need them in the operation of their business, such as Kaiser-Permanente and other big companies that use computers. The lawyers get together and draft the contracts and everybody knows from the beginning what the responsibilities of both the seller and the buyer are.

The problem we have is that it is not going to be the big guys who are going to be protected. It is the little guy who has absolutely no protection. The only conceivable remedy they have is in tort.

What we did in this very narrowly drafted provision is say they can recover economic losses only to the extent allowed already under State law or Federal law, which means that to the extent in Arizona there may be a limitation, or in Utah, or in Oregon, a limitation on what folks can recover and what they have to prove. There are some States that only allow pure out-of-pocket losses to be recovered—not lost profits. There are many States that have limitations on these things.

We create absolutely no cause of action, no tort claim. We create nothing that does not already exist. But we close the loophole. The loophole we close is for those millions and millions of Americans who will not have a contract. It is just that simple. All the other protections in this bill remain in place.

I want to say to my colleagues who have voted already against Senator KERRY's amendment, who intend to vote on final passage for the McCain bill, that you can vote for this amendment very narrowly drawn which closes the loophole that exists and still vote for the bill on final passage. I will not be doing that myself, because I think there are other problems in the bill. But this amendment does not create any problem with that.

I just want to point out a couple of things which were said yesterday during the debate by my friend, Senator WYDEN from Oregon.

He said:

I just think it would be a mistake given the extraordinary potential for economic calamity in the next century to change the law with respect to economic loss. We are neither broadening it nor narrowing it. We are keeping it in place.

That is a verbatim quote.

This amendment couldn't be any clearer. All it does is keep existing State law in place for those people who do not have a contract. It is that simple. If they have a contract, the contract is going to control because the section immediately preceding section 11 specifically requires that the courts enforce the existing contract. But for all those folks out there who do not have a contract and who may have been lied to, or who may have had misrepresentations made to them and are maybe subject to criminal conduct, they have no remedy whatsoever under this bill. That is the reason we have drawn it so narrowly.

Again, Senator WYDEN pointed out yesterday that he believes they should recover exactly what they are entitled to today, that the law is exactly what they are entitled to recover today, and there are numerous quotes throughout the day where Senator WYDEN spoke to this issue.

What I say to my friend Senator WYDEN is what I really believe we are doing here. I know he expressed concern yesterday about creating causes of action, creating force in Senator KERRY's bill, and I understood those concerns. What we have done is draft this in a way that can't possibly create anything. What it says is they may only recover for economic losses to the extent allowed already under existing State or Federal law.

When you put that combination in with the provision immediately preceding it that requires contracts to be enforced, then I think what we have done is closed a loophole, closed it in the narrowest possible fashion. Leave all the restrictions that already exist on economic recovery in this country in place, deal with those millions of Americans who could have been the subject of fraud, abuse, and misrepresentation and allow them to recover, because otherwise they have no possible way of recovering. They have no contract. But to the extent folks have a contract, we are going to enforce that contract. We are going to require that the courts enforce that contract.

I think this really dovetails perfectly with what I believe to be the intent of the McCain-Wyden bill.

The bottom line on this amendment is this: It is narrowly drawn. Those folks who intend to vote on final passage for the McCain bill can vote for this amendment perfectly consistent with their desire to do everything they can to protect the computer industry. But for that class of people who have no contract, who have no cause of action whatsoever, this creates nothing. It simply allows under existing law for them to pursue whatever claim they have—only those people who have absolutely no contract. If they have a contract, the contract is going to be enforced, and it ought to be enforced. I have no problem with that whatsoever.

I urge my colleagues to support this amendment. It is narrowly drawn. I think it is consistent entirely with the purposes of the McCain bill. It leaves all the protections in place that the folks who support the McCain bill believe in. It closes an enormous loophole that exists in this law at the present time.

I reserve the remainder of my time.

Mr. HATCH. Mr. President, I appreciate the remarks of my colleague, and I appreciate what he is trying to do. This bill is trying to resolve what really are unlimited litigation possibilities. If we don't pass this bill, that could really wreck our computer industry and wreck our country and would make it even more difficult to get the computer industry and everybody involved in Y2K problems to really resolve these problems in advance of the year 2000.

I rise to oppose the Edwards amendment, which basically strikes the economic loss section of S. 96, the Y2K bill.

I have followed carefully the debate of the bill. And, as of now, it is the Dodd-McCain-Hatch-Feinstein-Wyden substitute, S.1138, that we are now debating.

My observation is that during this debate there has been much confusion over the economic loss section.

Let me attempt to clarify this matter.

It is important to note that the economic loss rule is a legal principle that has been adopted by the U.S. Supreme Court and by most States.

The rule basically prevents ''tortification'' of contract law, the trend that I view with some alarm.

The rule basically mandates that when parties have entered into contracts and the contract is silent as to ''consequential damages,'' which is the contract term for economic losses, the aggrieved party may not turn around and sue in tort for economic losses. Thus, the expectation of the parties are protected from undue manipulation by trial attorneys. The party under the rule may sue under tort law only when they have suffered personal injury or damage to property other than the property in dispute.

The economic loss rule exists primarily or principally because of the importance of enforcing contractual agreements. If the parties can circumvent a contract by suing in tort for their economic losses, any contract that allocates the risk between the parties becomes worthless.

The absence of the economic loss rule would hurt contractual relations and create an economic and unnecessary economic cost to society as a whole. It would encourage suppliers to raise prices to cover all of the risks of liability and would encourage buyers to forego assurances as to the quality of the product or service. If anything goes wrong, simply sue the supplier under tort law.

The economic loss rule also reflects the belief that the parties should not be held liable for the virtually unlimited yet foreseeable economic consequences of their actions, such as the economic losses of all the people stuck in traffic in a car accident.

In light of this, most States apply the rule without regard to privity, and the vast majority of States that have considered the rule have applied it not only to products but to the services as well with some exceptions for ''professional services,'' such as lawyers and ''special relationships''.

Why then should Congress codify the economic loss rule with regard to Y2K actions or litigation?

First, adopting the economic loss rule helps identify which parties have the primary responsibility of ensuring Y2K compliance. It is one of the major goals of the Y2K legislation to encourage companies to do all they can to avoid and repair Y2K problems, and adoption of the economic loss rule helps us to do exactly that.

Second, adoption of the economic loss rule preserves the parties' ability to enter into meaningful contractual agreements and preserves existing contracts. Parties who suffer personal injury or property damage, other than to the property at issue, could still sue in tort, or in contract, while those suffering only economic damages would be able to sue in contract.

Third, adoption of the rule would strengthen existing legal standards. We have the rule in this bill, and there is very good reason to have it in this bill.

By strengthening existing legal standards, we would avoid costly and potentially abusive litigation as a result of the Y2K failures.

That is what we are trying to avoid.

This bill only lasts 3 years. It then sunsets. The bill's purpose is to get through this particularly critical time without having the Federal courts and the State courts overwhelmed by litigation, yet at the same time providing people with a means of overcoming some of these problems. That is the whole purpose of this bill.

If this amendment is adopted, that whole purpose will be subverted. It is not a loophole at all, as Senator EDWARDS contended. If we change this rule and adopt this amendment, we surely will have courts clogged, we surely will have undue and unnecessary litigation, and in the end we surely are not accomplishing what we need to accomplish—encouraging the companies to do what is right and to get the problems solved now. That is what we want to do. This bill will do more toward getting that done than anything I can think of.

Lastly, adoption of the economic loss rule would establish a uniform national rule applicable to Y2K actions. This would help to avoid the patchwork of State legal standards that would otherwise apply to Y2K problems and actions. The subtle and complex idiosyncrasies and the rule's applications by the various States strongly indicate the need for a uniform national rule with regard to Y2K actions.

Without a uniform rule, which we have in this amendment, every issue concerning Y2K liability may have to be litigated in each different State. This increases the already enormous costs of Y2K litigation.

As I stated, the Supreme Court has adopted and endorsed the economic loss rule, which has greatly influenced State law. The leading case is East River S.S. Corp. v. Transamerica Delaval, Inc. In that case, the company that chartered several steamships sued the manufacturer of the ship's turbine engines in tort for purely economic damages, including repair costs and lost profits caused by the failure of the turbines to perform properly. In a unanimous decision, the Supreme Court denied recovery in tort under the economic loss rule. The Court's ruling was based in large part on the propriety of contract law over tort law in cases involving only economic loss.

The Court goes on to say:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the ''luck'' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong . . . Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product . . .

The Court's ruling was also based on the fact that allowing recovery in tort would extend the turbine manufacturer's liability indefinitely:

> Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers—already one step removed from the transaction [which included the shipbuilder in between]—were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from delays, and the charterers' customers also might claim their economic losses, and so on. ''The law does not spread its protections so far.''

Let me turn to state law cases. The leading case on this issue is *Huron Tool and Engineering Co.* v. *Precision Consulting Services, Inc.*, 532 N.W.2d 541 (Mich. Ct. App. 1995). In *Huron*, the Michigan Court of Appeals held that the Economic Loss Rule barred plaintiff's fraud claim against a computer consulting company to recover purely economic loss caused by alleged defects in a system provided under contract. The court explained:

> The fraudulent representations alleged by plaintiff concern the quality and characteristics of the software system sold by defendants. These representations are *indistinguishable from the terms of the contract and warranty* that plaintiff alleges were breached. Plaintiff fails to allege any wrongdoing by defendants *independent of defendant's breach of contract and warranty*. Because plaintiff's allegations of fraud are *not extraneous* to the contractual dispute, plaintiff is restricted to its contractual remedies under the UCC. The circuit court's dismissal of plaintiff's fraud claim was proper.

*Hotels of Key Largo, Inc.* v. *RHI Hotels, Inc.*, 694 So.2d 74, 77 (Fla.Ct. App. 1997), holding that the Economic Loss Rule barred plaintiff's fraud claim seeking to recover economic loss caused by the defendant's failure to promote the plaintiff's hotel per contractual agreement, says: ''[W]here the only alleged misrepresentation concerns the heart of the parties' agreement simply applying the label 'fraudulent inducement' to a cause of action will not suffice to subvert the sound policy rationales underlying the economic loss doctrine.''.

*Raytheon Co.* V. *McGraw-Edison Co., Inc.*, 979 F Supp. 858, 870–73 (E.D. Wisc. 1997), holding that the Economic Loss Rule barred tort claims, including strict-responsibility, negligent, and intentional misrepresentation claims, brought by purchaser of real property against seller to recover purely economic loss caused by environmental contaminants in the soil says: ''[T]he alleged misrepresentations forming the basis of Raytheon's fraud claims are inseparably embodied within the terms of the underlying contract . . . [Therefore,] Raytheon cannot pursue its fraud claims.''

*AKA Distributing Co.* V. *Whirlpool Corp.*, 137 F.3d 1083, 1087 (8th Cir. 1998), holding under Minnesota law that the Economic Loss Rule barred plaintiff's fraud claim based on defendant's statements that the plaintiff would be engaged as a vacuum-cleaner distributor for a long time despite one-year contract says: ''[I]n a suit between merchants, a fraud claim to recover economic losses must be independent of the article 2 contract or it is precluded by the economic loss doctrine.''

*Standard Platforms, Ltd* v. *Document Imaging Systems Corp.*, 1995 WL 691868 (N.D. Cal. 1995, an unpublished opinion holding that the Economic Loss Rule barred plaintiff's fraud claim based on defects in Jukebox disk drives manufactured by defendant says: ''In commercial settings, the same rationale that prohibits negligence claims for the recovery of economic damages also bars fraud claims that are subsumed within contractual obligations. . . . [Plaintiff's] fraud claim is precluded because it does not arise from any independent duty imposed by principles of tort law.''

This rule regarding intentional torts is not new but is in fact a restatement of old principles separating contract law from tort law. In general, breach of contract, intentional or otherwise, does not give rise to a tort claim; it is simply breach of contract. Thus many courts in addition to those above have held, without mentioning the Economic Loss Rule, that claims such as fraud emerging only from contractual duties are not actionable. *See, e.g., Bridgestone/Firestone, Inc.* V. *Recovery Credit Services, Inc.*, 98 F.3d 13 (2d Cir. 1996), holding under New York law that plaintiff's fraud claim against a collection agency to recover funds collected by the defendant under contract with the plaintiff was not actionable where the fraud claim merely restated the plaintiff's claim for breach of contract: ''[T]hese facts amount to little more than intentionally-false statements by [the defendant] indicating his intent to perform under the contract. That is not sufficient to support a claim of fraud under New York law.''

In sum, the application of the Economic Loss Rule to intentional torts, such as fraud, is best summarized by the U.S. Court of Appeals for the Eighth Circuit in *AKA Distributing Co.,* listed above:

> A fraud claim independent of the contract is actionable, but it must be based upon a misrepresentation that was outside of or collateral to the contract, such as many claims of fraudulent inducement. That distinction has been drawn by courts applying traditional contract and tort remedy principles. It has been borrowed (not always with attribution) by courts applying the economic loss doctrine to claims of fraud between parties to commercial transactions.—*AKA Distributing Co.*, 137 F.3d at 1086 (internal citations omitted).

In sum, the economic Loss provision in the Y2K act is not a radical provision or change in law. That is why I oppose its removal from the bill, which in essence the Edwards amendment would accomplish.

This is not a simple problem. This is something that we have given a lot of thought to. For those who believe we should have unlimited litigation in this country because of alleged harms, this is not going to satisfy them. For those who really want to solve the Y2K problem and to save this country trillions of dollars, the amendment of the distinguished Senator from North Carolina will not suffice.

The amendment of the Senator from North Carolina, attempts to freeze the State law of economic losses—freeze it in place. However, the States are not uniform in this area.

One of the things we want to accomplish with this Y2K bill —which is only valid for 3 years, enough to get us through this crisis—is to have uniformity of the law so everybody knows what the law is and everybody can live within the law and there will be incentives for people to solve the problems in advance, which is what this bill is all about.

The purpose of the Y2K Act is to ensure national uniformity. A national problem needs a national solution. That is why we need the national economic loss doctrine or rule, based on the trends in State law towards them. We do need uniformity if we are going to solve this problem, or these myriad of problems, in ways that literally benefit everybody in our society and not just the few who might want to take advantage of these particular difficulties that will undoubtedly exist. We all know they will exist.

The remediation section of this bill gives a 3-month time limit to resolve some of these problems. We hope we can. On the other hand, we don't want to tie up all of our courts with unnecessary litigation.

I have to emphasize again that this bill has a 3-year limit. This provision ends in 3 years. That is not a big deal. It is a big deal in the sense of trying to do what is right with regard to the potential of unnecessary litigation that this particular Y2K problem really offers.

Let me just mention, I know the distinguished Senator from North Carolina is aware that his own State has adopted the economic loss rule. Let me raise one particular case in North Carolina, the MRNC case.

Let me offer a few comments on this case.

Specifically, with respect to what losses are recoverable in the products liability suit, North Carolina's court recognized that the state follows the majority rule and does not allow the recovery of purely economic losses in an action for negligence.

It cites a number of cases which I ask with unanimous consent be printed in the RECORD.

At issue in this case is whether MRNC suffered economic loss. Central to the resolution of this issue is what constitutes economic loss. The court noted that when a product fails to perform as intended, economic loss results. Economic loss is essentially ''the loss of the benefit of the users bargain.'' ''[T]he distinguishing central future of economic loss is . . . its relation to what the product was supposed accomplish.'' So economic loss should be available for only contract claims. Tort law should not be allowed to skirt contract law. In other words, contract law should not be ''tortified.'' This is what the Y2K Act codifies. Economic loss should not be allowed in cases where a contract exists. This is the law of North Carolina and most states.

I ask unanimous consent these matters be printed in the RECORD at this particular point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AT&T CORPORATION, PLAINTIFF,

v.

MEDICAL REVIEW OF NORTH CAROLINA, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF,

v.

CAROLINA TELEPHONE & TELEGRAPH COMPANY AND NORTHERN TELECOM INC., THIRD-PARTY DEFENDANTS.

No. 5:94–CV–399–BR1.

United States District Court, E.D. North Carolina, Feb. 10, 1995.

Long-distance telephone company brought action against customer, seeking payment for past-due charges for long-distance telephone services. Customer counterclaimed, and brought third-party complaint against telephone company, that installed telephone system which included voice mail system, and system manufacturer, alleging manufacturer was negligent and breached implied warranty, arising from alleged telephone line access by unauthorized users via system, resulting in long-distance telephone charges. Manufacturer moved to dismiss. The District Court, Britt, J., held that: (1) under North Carolina law, customer's negligence claim against manufacturer sought to recover purely economic loss, which was not recoverable under tort law in products liability action, and (2) customer's breach of warranty claim against manufacturer was not ''product liability action'' under Products Liability Act so as to render applicable Act's relaxation of privity requirement.

Motion granted.

[1] FEDERAL CIVIL PROCEDURE 1722

170Ak1722—For purposes of motion to dismiss for failure to state claim, issue is not whether plaintiff will ultimately prevail, but whether claimant is entitled to offer evidence to support claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.A.

[2] FEDERAL CIVIL PROCEDURE 1829

170Ak1829—For purposes of motion to dismiss for failure to state claim, complaint's allegations are construed in favor of pleader. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] PRODUCTS LIABILITY 6

313Ak6—When action does not fall within scope of North Carolina's Products Liability Act, common-law principles, such as negligence, and Uniform Commercial Code still apply, but they apply without any alteration by Act, which might otherwise occur had Act applied. U.C.C. §1–101 et seq.; N.C.G.S. §99B–1(3).

[4] PRODUCTS LIABILITY 17.1

313Ak17.1—Under North Carolina law, long-distance telephone company customer's negligence claim against manufacturer of voice mail system, alleging customer suffered harm in charges for unauthorized long-distance telephone calls as result of manufacturer's failure to change standard preset dialing access code and to provide instructions and warnings concerning alteration of access code, sought to recover purely economic loss, which was not recoverable under tort law in products liability action, where allegations centered on product's failure to perform as intended, and no physical injury had occurred.

[5] PRODUCTS LIABILITY 6

313Ak6—Under North Carolina law, elements of products liability claim for negligence are evidence of standard of care owed by reasonably prudent person in similar circumstances, breach of that standard of care, injury caused directly by or proximately by breach, and loss because of injury.

[6] PRODUCTS LIABILITY 17.1

313Ak17.1—Under North Carolina law, with respect to losses that are recoverable in products liability suit, recovery of purely economic losses are not recoverable in action for negligence.

[7] SALES 425

343k425—Under North Carolina law, long-distance telephone company customer's breach of warranty claim against manufacturer of voice mail system, with which customer was not in privity, arising from charges imposed on customer for unauthorized long distance telephone calls allegedly resulting from manufacturer's failure to inform customer of system's susceptibility to toll fraud if certain precautionary measures were not taken, was not ''product liability action'' under Products Liability Act so as to render applicable Act's relaxation of privity requirement, where customer had only alleged economic loss. N.C.G.S. §99B–2(b).

See publication Words and Phrases for other judicial constructions and definitions.

[8] PRODUCTS LIABILITY 17.1

313Ak17.1—North Carolina's Products Liability Act is inapplicable to claims in which alleged defects of product manufactured by defendant caused neither personal injury nor damage to property other than to manufactured product itself. N.C.G.S. §99B–2(b).

[9] SALES 255

343k255—When claim does not fall within North Carolina's Products Liability Act, privity is still required to assert claim for breach of implied warranty when only economic loss is involved. N.C.G.S. §99B–2(b).

*92 Marcus William Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, Raleigh, NC, for AT & T Corp.

Craig A. Reutlinger, Paul B. Taylor, Van Hoy, Reutlinger & Taylor, Charlotte, NC, for Medical Review of North Carolina, Inc.

James M. Kimzey, McMillan, Kimzey & Smith, Raleigh, NC, for Carolina Tel. and Tel. Co.

ORDER

BRITT, District Judge.

Before the court are the following motions of third-party defendant Northern Telecom Inc. (''NTI''): (1) motion to dismiss, and (2) motion to stay discovery proceedings. Defendant and third-party plaintiff Medical Review of North Carolina, Inc. (''MRNC'') filed a response to the motion to dismiss and NTI replied. As the issues have been fully briefed, the matter is now ripe for disposition.

I. FACTS

In 1990, MRNC purchased a new phone system from third-party defendant Carolina Telephone & Telegraph Company (''Carolina Telephone''). Included within this system, among other things, was a Meridian Voice Mail System, manufactured by NTI. Carolina Telephone installed the phone system and entered into an agreement with MRNC to provide maintenance for the system.

Plaintiff AT & T Corporation (''AT & T'') provided certain long distance services to *93 MRNC. AT & T has calculated charges that MRNC allegedly owes for June 1992 in the amount of $93,945.59. MRNC claims that unauthorized users gained access to outside lines via the Meridian Voice Mail System and placed long distance calls. MRNC contends these unauthorized charges comprise part of the June 1992 bill.

AT & T filed a complaint against MRNC to recover these charges which were past-due. Subsequently, MRNC filed a counterclaim against AT & T and a third-party complaint. As part of its third-party complaint, MRNC alleges NTI, as the manufacturer of the Meridian Voice Mail System, was negligent and breached an implied warranty. MRNC seeks to recover of NTI charges, interest, costs and expenses it may incur as a result of the action brought by AT & T.

II. DISCUSSION

[1][2] Pursuant to Fed.R.Civ.P. 12(b)(6), NTI has filed a motion to dismiss for failure to state a claim upon which relief can be granted. With such a motion, ''the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim.'' Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir.1989) citing Scheuer v. Rhodes (416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)). The complaint's allegations are construed in favor of the pleader. Id.

[3] MRNC contends North Carolina's Products Liability Act pertains to its claims. This act applies to ''any action brought for or on account of personal injury, death or property damaged caused by or resulting from the manufacture . . . of any product.'' N.C.Gen.Stat. §99B–1(3). Among other things, the Act defines against whom a claimant may bring an action. See id. §99B–2. ''The Act, however, does not extensively redefine substantive law.'' Charles F. Blanchard & Doug B. Abrams, North Carolina's New Products Liability Act: A Critical Analysis, 16 Wake Forest L. Rev. 171, 173 (1980). When an action does not fall within the scope of the Act, common law principles, such as negligence, and the Uniform Commercial Code still apply; but, they apply without any alteration by the Act, which might otherwise occur had the Act applied. See Gregory v. Atrium Door and Window Co., 106 N.C.App. 142, 415 S.E.2d 574 (1992); Cato Equip. Co. v. Matthews, 91 N.C.App. 546, 372 S.E.2d 872 (1988).

A. Negligence Claim

[4][5][6] In its first claim against NTI, MRNC alleges NTI negligently failed ''to change the standard preset dialing access code in the [system] prior to delivery and installation at MRNC'' and negligently failed to give appropriate instructions and warnings concerning alteration of the standard preset dialing access code. The elements of a products liability claim for negligence are ''(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach; and (4) loss because of the injury.'' Travelers Ins. Co. v. Chrysler Corp., 845 F.Supp. 1122, 1125–26 (M.D.N.C. 1994) (quoting McCollum v. Grove Mfg. Co., 58 N.C.App. 283, 286, 293 S.E.2d 632, 635 (1983)). Specifically, with respect to what losses are recoverable in a products liability suit, North Carolina follows the majority rule and does not allow the recovery of purely economic losses in an action for negligence. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C.App. 423, 432, 391 S.E.2d 211, 217, review denied and granted, 327 N.C. 426, 395, S.E.2d 674, and reconsideration denied, 327 N.C. 632, 397 S.E.2d 76 (1990), and appeal withdrawn, 328 N.C. 329, 402 S.E.2d 826 (1991). At issue in this case is whether MRNC suffered economic loss. Central to the resolution of this issue is what constitutes economic loss.

Before determining the nature of economic loss, examining the reasoning behind the majority rule disallowing recovery for such loss is instructive. The rule's rationale rests on risk allocation. See 2000 Watermark Ass'n v. Celotex Corp., 784 F.2d 1183, 1185 (4th Cir.1986) (analyzing whether South Carolina courts would adopt the majority position).

Contract law permits the parties to negotiate the allocation of risk. Even where the law acts to assign the risk through implied warranties, it can easily be shifted *94 by the use of disclaimers. No such freedom is available under tort law. Once assigned, the risk cannot be easily disclaimed. This lack of freedom seems harsh in the context of a commercial transaction, and thus the majority of courts have required that there be injury to a person or property before imposing tort liability.

The distinction that the law makes between recovery in tort for physical injuries and recovery in warranty for economic loss is hardly arbitrary. It rests upon an understanding of the nature of the responsibility a manufacturer must undertake when he distributes his products. He can reasonably be held liable for physical injuries caused by defects by requiring his products to match a standard of safety defined in terms of conditions that create unreasonable risks of harm or arise from a lack of due care.

Id. at 1185–86. The manufacturer can insure against tort risks and spread the cost of such insurance among consumers in its costs of goods. Id. at 1186.

Some courts examining the nature of the claimant's loss focus on whether the damages result from a failure of the product to perform as intended or whether they result from some peripheral hazard. See, e.g., Fireman's Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs. Inc., 93 Ill.App.3d 298, 48 Ill.Dec. 729, 417 N.E.2d 131 (1980); Arell's Fine Jewelers v. Honeywell, Inc., 170 A.D.2d 1013, 566 N.Y.S.2d 505 (1991). When some hazard occurs which the parties could not reasonably be expected to have contemplated, the result is noneconomic loss. Fireman's Fund Am. Ins. Cos., 48 Ill.Dec. at 731, 417 N.E.2d at 133. Yet, when a product fails to perform as intended, economic loss results. Id. Economic loss is essentially ''the loss of the benefit of the user's bargain.'' Id. ''[T]he distinguishing central feature of economic loss is . . . its relation to what the product was supposed to accomplish.'' Id.

The Fourth Circuit apparently views physical harm as a distinguishing factor between noneconomic and economic losses. See 2000 Watermark Ass'n, Inc., 784 F.2d at 1186. ''The UCC is generally regarded as the exclusive source for ascertaining when the seller is subject to liability for damages if the claim is based on intangible economic loss and not attributable to physical injury to person or to a tangible thing other than the defective product itself.'' Id. (citing W. Page Keeton et al., Prosser and Keeton on Torts §95A, at 680 (5th ed. 1984))

The application of either approach—the benefit of the bargain approach or the physical harm approach—which North Carolina might adopt would lead to the conclusion that MRNC has suffered pure economic loss. MRNC alleges it suffered harm as a result of NTI's failure to change the standard preset dialing access code before delivery and installation at MRNC and as a result of NTI's failure to provide instructions and warnings concerning the alteration of the access code. The harm is in the form of monetary loss, if MRNC is required to pay AT & T. Clearly, MRNC's allegations center on the product's failure to meet MRNC's expectations, or in other words, failure to perform as intended. That someone might gain access to the system and place unauthorized calls could reasonably be expected to be within the parties' minds. In addition, no physical injury has occurred. The only injury MRNC asserts is damage to its financial resources. Based on the foregoing reasons, MRNC seeks to recover purely economic loss and such loss in not recoverable under tort law in a products liability action in North Carolina. North Carolina's Products Liability Act does not change this result, and the applicability of the Act is not at issue as to the claim. Therefore, NTI's motion to dismiss the negligence claim is GRANTED.

B. Breach of Implied Warranty Claim

[7] MRNC contends NTI breached an implied warranty by failing to inform MRNC of the system's susceptibility to toll fraud if certain precautionary measures, such as changing the access code, were not taken. North Carolina's Product Liability Act relaxes the privity requirement with respect to a claim for breach of implied warranty. See Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C.App. 428, 432, 396 S.E.2d 815, 817–18 (1990).

*95 A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved . . . may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity shall not be grounds for dismissal of such action.

N.C.Gen. Stat. §99B–2(b). This section applies to a ''product liability action'' as that term is defined in the Product Liability Act, Chapter 99B. See id. As noted previously, a ''product liability action'' is ''any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture . . . of any product.'' Id. §99B–1(3). In the instant case, the issue is whether MRNC's breach of implied warranty claim is a ''product liability action'' under the Act, thereby abrogating the necessity of privity between MRNC and NTI.

[8][9] The Act is inapplicable to claims ''where the alleged defects of the product manufactured by the defendant caused neither personal injury nor damage to property other than to the manufactured product itself.'' Reece v. Homette Corp., 110 N.C. App. 462, 465, 429 S.E.2d 768, 769 (1993); see Cato Equip. Co., 91 N.C. App. at 549, 372 S.E.2d at 874. When the claim does not fall within the Act, privity is still required to assert a claim for breach of an implied warranty where only economic loss is involved. Gregory, 106 N.C. App. at 144, 415 S.E.2d at 575 (quoting Sharrard, McGee & Co., 100 N.C. App. at 432, 396 S.E.2d at 817–18 and questioning whether this rule is still good policy); see Arell's Fine Jewelers, Inc., 566 N.Y.S.2d at 507.

Here, MRNC does not deny that privity does not exist between itself and NTI. MRNC claims it is entitled to maintain an action under the Products Liability Act and, thus, would fall within the exception to the privity requirements in the context of breach of implied warranty. However, MRNC does not allege the defects in the Meridian Voice Mail System resulted in any physical injury or property damage. It has only alleged economic loss. See supra part II.A. In such a situation, the general rule regarding privity remains intact. Without privity, MRNC cannot maintain its breach of implied warranty claim. Therefore, NTI's motion to dismiss the breach of implied warranty claim in GRANTED.

III. CONCLUSION

For the foregoing reasons, third-party defendant NTI's motion to dismiss is GRANTED as to both claims, and as to this party the action is DISMISSED. This ruling moots NTI's motion to stay discovery proceedings and, thus, such motion is DENIED.

Mr. HATCH. Mr. President, I understand what the distinguished Senator from North Carolina is attempting to do. He is a very skilled lawyer, and a very good lawyer, and from my understanding primarily a plaintiffs' lawyer in the past. I have been both a defense and plaintiffs lawyer, and I presume maybe he has also, and I have a lot of respect for him and I understand what he is trying to do.

The fact of the matter is, we have a 3-year bill here, that sunsets in 3 years,

that is trying to solve all kinds of economic problems in our country that could cripple our country and cause a major, calamitous drop in everything if we do not have this bill, plus it could destroy our complete software and computer industry in a short period of time if we get everything tied up in litigation in this country because we are unwilling to pass this bill with this amendment on, that we have worked so hard, with Senator DODD, to bring about.

If we do not pass this bill with this amendment, as amended by this amendment, the Dodd-McCain-Hatch-Feinstein-Wyden amendment—and Sessions amendment—I apologize for leaving out Senator SESSIONS' name. He has worked hard on this bill. But if we don't pass this bill with this language in it, then I predict we will have undermined the very purposes we are here to try to enforce.

This bill is an important bill. This bill assures every aggrieved party his day in court. It does not end the ability to seek compensation. What it does, however, is to create procedural incentives that for a short time delay litigation in order to give companies the ability to fix the problem without having to wait for a judgment from some court—which could take years. But in this particular case, I want to remind all that the bill sunsets in 3 years. It is limited in a way that prevents what would be catastrophic losses in this country, unnecessary losses if this bill is enacted. That is why we should quit playing around with this bill and get it passed.

I don't care that the President of the United States says, he is not going to veto this bill. He would be nuts to veto it. This is a bipartisan bill. This amendment is a bipartisan amendment, and it has been worked out over a very long period of time and through a lot of contentious negotiations. We finally arrived at something here that can really solve these problems.

Sincerely motivated as is the distinguished Senator from North Carolina, I hope our colleagues will vote this amendment down, because it will really undermine, at least in my opinion and I think in the opinion of many others, what we are trying to do here. What we are trying to do here is in the best interests of our country.

I yield the floor.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. EDWARDS. If I can respond briefly to the comments of the distinguished Senator from Utah, first I say to Senator HATCH I am absolutely willing, and the people of North Carolina are willing, to live with the law in North Carolina. What my amendment does is leave all existing law in place in this very narrow area.

The problem is that, for example, I know under North Carolina law, if a fraudulent misrepresentation—if a crime—is committed, if somebody makes a fraudulent misrepresentation and as a result somebody is put out of business, they are entitled to recover their economic losses, because there is an exception for intentional fraud, there is an exception for a criminal act.

The McCain bill has no such exception. It has no exceptions at all.

Mr. HATCH. Will the Senator yield on that point?

Mr. EDWARDS. Yes, I will.

Mr. HATCH. The McCain bill doesn't affect that. If fraud is committed consumers in most states will be able to recover even economic losses under state statutes. This is not altered by the Y2K Act. So, if there is fraud committed or a criminal act committed, you are going to be able to have all your rights, even in States like North Carolina, where they codify the economic loss rule. So that is not affected by this bill at all.

The only thing that will be affected by this bill, if your amendment is adopted there will be an increase of wide open and aggressive litigation. Without your amendment, we will not have a uniformity of rule that will help us to get to the bottom of this matter. So with regard to the count on fraud, with regard to real fraud, or statutory fraud, with regard to criminal acts, the defendants will still be liable for what the distinguished Senator believes they should be liable for.

Mr. EDWARDS. I say to Senator HATCH I respectfully disagree with that. If you look at the section, it has no exceptions of that nature in it at all. It has no exception. There is a powerful limitation on the recovery of economic loss, essentially eliminating the right to recover for economic loss. And there is no exception in that section for intentional, there is no exception for fraud and misrepresentation, there is no exception for egregious, reckless conduct. None of those things is excepted from the limitation on economic loss.

I might add, to the extent we are looking for uniformity when we are going to enforce contracts—there has been a great deal of discussion about contract law—we are going to enforce contracts under State law. So whatever the State law is, in the various States across the country, is going to be enforced under State law.

So what I respectfully disagree with the Senator about is what I believe my amendment does, which is, in a very narrow fashion, it works in concert with the section immediately preceding it, and the section immediately preceding it requires every court in this land to enforce any existing contract. So if there is a contract, that contract will be enforced. It cannot be subverted by any kind of tort claim.

What my amendment does, is it allows a remedy to all those millions of people who could have been the victims of fraud, who could have been the victims of reckless conduct, who could have been the victims of carelessness and negligence, who have absolutely no remedy; they cannot recover any of their out-of-pocket losses or any of those things. What my amendment does is it creates no new torts, no causes of action, no anything. When you talk, at great length, about the economic loss rule, the Supreme Court, and how various States have adopted it, it simply leaves that law in place. That is all it does, and only for those folks who have no other remedy because they have no contract.

Mr. HATCH. Will the Senator yield?

Mr. EDWARDS. I will.

Mr. HATCH. That is what the Senator's amendment does. But in this total, overall bill, there is a statutory compensation, statutory exemption.

Most States—in fact, I think virtually all States—have consumer fraud statutes that provide for the right to sue that allow for economic loss if there is an intentional fraud or criminal violation.

Mr. EDWARDS. Will the Senator yield for a question on that?

Mr. HATCH. The underlying bill does not change that. It does provide for an exception for statutory law. Where a State has a statutory provision, this bill does not change that.

The Senator's position that intentional torts and common law fraud would not be remedied under this bill is incorrect.

Mr. EDWARDS. Only with respect to economic loss, which is what we are talking about.

In any event, my belief is, what we are dealing with is a situation where anybody, any little guy in the country who has no contract basically has no remedy. They cannot do anything.

To the extent we talk about this being just a 3-year bill, that 3-year period, in the nature of the Y2K problem, is going to cover every single Y2K problem that exists in the country. This problem is going to erupt in the year 2000. Three years is plenty of time to cover every single problem that is going to occur in this country. To the extent the argument is made that it is a limited bill, it is going to cover every single Y2K loss that will occur in this country.

What I am trying to do with this amendment, which is very narrowly drawn, is create no new claims, no new causes of action, to have a provision that works in concert with the requirement that contracts be enforced. But for all those folks who have no contract, if their State allows them to recover for out-of-pocket losses, then they would be allowed to do that. If they have been the victim of fraud, if they have been the subject of criminal conduct, if they have been the victim of simple recklessness or negligent conduct, only if their State allows that would they be allowed to recover that loss.

Every other limitation in this bill stays in place: No joint and several, caps on punitive damages, duty to mitigate, 90-day waiting period, alternative dispute resolution, limitation

on class action, specificity of pleadings and materiality—all those things stay in place.

We are simply saying for those little guys across America who do not have a team of lawyers representing them drafting contracts, they ought to have a right to recover what they had to pay out of pocket as a result of somebody being irresponsible with respect to a Y2K problem.

AMENDMENT NO. 620 TO AMENDMENT NO. 608

Mr. EDWARDS. Mr. President, I ask that the previous amendment be set aside and I send another amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative assistant read as follows:

The Senator from North Carolina [Mr. EDWARDS] proposes an amendment numbered 620 to amendment No. 608.

Mr. EDWARDS. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 7 (7), line 12 (12), after ''capacity'' strike ''.'' and insert:
''; and

''(D) does not include an action in which the plaintiff's alleged harm resulted from an actual or potential Y2K failure of a product placed without reasonable care into the stream of commerce after January 1, 1999, or to a claim or defense related to an actual or potential Y2K failure of a product placed without reasonable care into the stream of commerce after January 1, 1999. However, Section 7 of this Act shall apply to such actions.''

Mr. EDWARDS. Mr. President, the purpose of this amendment is very simple. It is to provide that this bill, which provides many protections to those people who sell computer products for Y2K problems, not apply after January 1 of 1999, after this bill began its process of consideration in the Congress, because it is absolutely obvious that everybody in the country has known about this problem for many years and has been documented. It has actually been known for a period of 40 years and intensely watched over the last few years. Certainly every computer company in the world knew about Y2K before the beginning of January 1, 1999, when we began consideration of this legislation. There is a reason that this amendment is needed and necessary. Let me give an example.

There are 800 medical devices that are produced by manufacturers across this country that are date sensitive and critical to the health care of people in this country, because a malfunction can cause injury to people.

Approximately 2,000 manufacturers sell these medical devices. About 200 of those manufacturers, 10 percent, have yet to contact the FDA about whether their medical devices are Y2K compliant. After being asked numerous times by the FDA, they have given no response. These are people who have been on notice for a long time about this problem.

It is really a very simple amendment. What the amendment says is, beginning in 1999, when everybody on the planet knew that this was a huge problem, if you kept selling non-Y2K-compliant products, you certainly should not have any of the protections of this bill, with one exception: We still keep in place the 90-day cooling off or waiting period because we think it is reasonable for the manufacturer or the seller to have that period of time to look at the problem and work with the purchaser to see if it can be resolved, even if they put a product in commerce unreasonably knowing that this problem existed.

The amendment says that folks who kept selling, beginning in 1999, non-Y2K-compliant products, knowing full well that this problem existed, knowing that the Congress was about to consider legislation on this issue and knowing that they were acting irresponsibly, should not have the protection of the McCain bill. That is the purpose and reason for this amendment.

The FDA example is a perfect example. We have 200 companies out there who are unwilling to tell the FDA they have even looked to determine whether their medical products that involve the safety and lives of people are Y2K compliant.

There is nothing in the McCain bill that prevents companies from continuing—I mean through today—selling non-Y2K-compliant products. I know in the spirit in which this bill was offered and intended that my colleagues would not have intended that we continue to allow, as a nation and as a Congress, people to engage in reckless, irresponsible conduct without holding them accountable for that, even today, knowing full well this problem exists. It simply excises from protection of this bill all those folks who continue, even today, to sell non-Y2K-compliant products unreasonably; that is, knowing that they are selling non-Y2K-compliant products.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, parliamentary inquiry. Does this amendment modify the prior amendment; does it supersede the prior amendment?

The PRESIDING OFFICER. The previous amendment was set aside, and this is a separate amendment.

Mr. HATCH. Mr. President, this amendment basically is, in my opinion, too broad and too vague to provide guidance. It would cause more litigation, and what we are trying to do is prevent litigation that literally is unjustified.

This amendment does not take into account the practical reality that the standard of care is determined as part of the case. Thus, how would a plaintiff know what the pleading requirements are under S. 96 for specificity? How would they know that? If it simply depends on the allegation of the plaintiff, then no plaintiff would fall under the requirements of this bill. This could result in tremendous abuse. Talk about loopholes, this would be the biggest loophole of all in the bill. The fact of the matter is, what we are trying to do in this bill is avoid litigation.

The distinguished Senator from North Carolina talks about protecting the little guy out there, and the way that is done generally is through class actions, where the little guy gets relatively little, but those in the legal profession make a great deal. That is what we are trying to avoid, a pile of class actions that are unjustified under the circumstances where the manufacturers and all these other people go into the bunkers and get a bunker mentality rather than resolving these problems in advance. The whole purpose of this bill is to get problems resolved, to get our country through what could be one of the worst economic disasters in the country's history.

The Y2K bill before us sets an important criteria for fixing the problems. There needs to be specificity in plaintiffs' pleadings—in fact, both plaintiffs' and defendants' pleadings—so glitches can be fixed before litigation.

This amendment would allow ''reasonable care standards,'' which must be shown in negligence cases. It does not have to be pleaded with specificity. This would defeat the very purpose of this act, which is trying to get us to be more specific so those who have problems will be able to rectify those problems and remediate those problems.

The goal here is to solve problems, not allow any one side or the other to get litigation advantage. We are not trying to give the industries litigation advantage. We are not trying to give big corporations litigation advantage. We are trying to solve problems. I commend all of those on this bill who have worked so hard to do so.

If we accept this amendment, my gosh, we will not only not solve problems, we will not have specificity in pleadings, we will never know what is really going on, and we will have massive class actions all over this country that will tie this country in knots over what really are glitches that possibly could be corrected in advance.

I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. I thank Senator HATCH for his very important and persuasive input in this debate. I appreciate it very much.

I did want to save a few minutes for Senator SESSIONS to make his remarks. I yield to the Senator from Alabama.

The PRESIDING OFFICER. The opponents have 4 minutes remaining.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. I associate myself with the excellent analysis by Senator HATCH. He chairs the Judiciary Committee. He has had hearings on this very problem. I think he has explained the situation very well.

We need, in the course of dealing with computer Y2K problems, a uniform national rule. That is what we are attempting to do here. One of the great problems for the computer industry is that they are subject to 50 different State laws. The question is, Can they be unfairly abused in the process of massive litigation? I suggest that they could be, and actually that the entire industry could be placed in serious jeopardy.

I recall the hearings we had in the Judiciary Committee on asbestos. There were 200,000 asbestos cases already concluded, and 200,000 more are pending. Some say another 200,000 may be filed. What we know, however, is that in that litigation 70 percent of the asbestos companies are now in bankruptcy. We do not have all the lawsuits completed yet.

We also know that only 40 percent of the money they paid out actually got to the victims of this asbestos disease. That is not the way to do it, and that is what is going to happen in this case.

What the Senator from North Carolina is basically arguing is for each State to keep its own economic loss rule, as I would understand his argument. But the problem with this is that a clever State could run out tomorrow and change its economic loss rule, or the court could rule and allow a few States to drain this industry, while other States are maintaining the national rule.

First and foremost, the economic loss rule is a traditional rule of law. This statute basically says that. We will use a national rule for economic loss. It is a significant issue because we are blurring the differences between tort and contract.

Alabama used to have common law pleading in which they were very careful about how you pled a case. You had to plead in contract or you had to plead in tort. If you pled in contract, you were entitled to certain damages. If you pled in tort, you were entitled to other damages. But you had to prove different elements under each one to get a recovery. The courts have said certain actions are not tort and certain action are not contract—they are only one.

This legislation that is proposed would say, let's accept the national rule, the rule that has been clearly approved by the U.S. Supreme Court. Senator HATCH quoted from the U.S. Supreme Court in a unanimous verdict in approving this economic loss rule.

I think it would be a big mistake for us to go back to the 50–State rule instead of the uniform rule so that we can get through this one problem, the Y2K problem, and limit liability and focus our attention on fixing the problem rather than lawsuits. If we have lawsuits in every single county in America, we are not going to have 200,000, we are going to have 400,000, or more. We have to end that. I know my time is up.

The PRESIDING OFFICER. All time of the opponents has expired.

The Senator from North Carolina has—

Mr. DODD. I ask unanimous consent for 1 minute.

The PRESIDING OFFICER. Is there objection?

Without objection, the Senator from Connecticut is recognized for 1 minute.

Mr. DODD. The Senator from Alabama said it. Look, this is one of those issues where we have legislators, as Senators, who are constantly trying to find compromise. Reaching a 100-vote consensus, I guess, is the ideal representation of that. But occasionally there is just a division here. You have to make a choice on where you are going to go with this.

This is a 36-month bill to deal with a very specific, real problem. I just left a hearing this morning on the medical industry. We are not talking about personal injuries here, but to give you some idea, there are some serious problems in terms of compliance we are seeing across the country. You have to decide here whether or not you want to expand litigation, which is a legitimate point.

There are those who think the only way to deal with this is to rush to court. I respect that. I disagree with it, but respect it. Or do you decide for 36 months we are going to try to fix the problem to try to reduce the race to the courthouse?

Those of us who are in support of this bill come down on that side. The only way you are going to do it is to have some uniform standards across the country. We all know, as a practical matter—any first-year lawyer would tell you—you would run to the State that has the easiest laws and get into court.

If you disagree, you ought to vote for the Edwards amendment. If you think we ought to fix the problem, we think you should reject it so we can solve this over the next 36 months.

I thank my colleagues.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. EDWARDS. I say to my friend, Senator DODD, he and I actually agree about the vast majority of what he just said. I think this bill in place, if it passes, will do all the things the computer industry wants to protect them against Y2K problems.

Joint and several liability is gone. There is a cap on punitive damages. The duty to mitigate isn't present. There is a 90-day waiting period, cooling off period. We have the 36 months. We have class action limitations. We have specificity and materiality of pleading.

This is a very narrow, simple thing that we are trying to accomplish with this first amendment. We will enforce contracts as they exist. That is what these folks have been talking about at great length, and that is exactly what we should do.

The problem is with those folks who do not have a contract, which is going to be the vast majority of Americans. When Senator SESSIONS says that the economic loss rule is a traditional rule, he is right about that. What my amendment says is that traditional rule stays in place exactly as it is.

The problem is, the provision in this bill, in the McCain bill, is not the traditional rule. It contains no exceptions of any kind—no exceptions for fraud, no exceptions for reckless conduct, no exceptions for irresponsibility. The result of that is, regular people who buy computers—small businessmen, small businesswomen, consumers, folks who do not have an army of lawyers who went in and crafted contracts on their behalf—have no remedy. They simply have no remedy; they cannot get anything, not even their out-of-pocket loss. That is what the McCain bill does.

What I have done in the narrowest conceivable fashion is drawn an amendment that allows those folks to recover only what their State law permits them to recover. It is just that simple. That is on the first amendment.

On the second amendment, I just can't imagine what the argument is against this, although I heard the distinguished Senator from Utah argue against it. The very idea that people who are today, in 1999, selling non-Y2K-compliant products irresponsibly—and that is what is required—if they sell it without knowing about it, then they are still covered by the bill. Under my amendment, if they sell it knowingly, if they sell it irresponsibly in 1999, today, it simply says: Surely the Congress of the United States is not going to protect you. You have known about this forever. We are not going to continue to protect you.

It is not going to create a flood of litigation. I have to respectfully disagree with my friend, Senator HATCH. That makes no sense at all. If the consumer didn't buy the product in 1999, and they can't show the product was sold and put into the stream of commerce irresponsibly in 1999, then the McCain bill is going to apply to them. Surely my colleagues do not want to provide this Congress's, this Senate's protection, stamp of approval for people to keep selling noncompliant Y2K products, including, in my example, people who sell medical devices that can cause injury and death to people. I just don't believe my colleagues on either side of the aisle want their stamp on allowing people to keep doing this, even though they are fully aware of it.

That is simply what my amendment addresses. It says if you are still selling this stuff, and you are selling it non-Y2K compliant, and you know what you are doing, you don't get the benefit of the McCain bill.

It couldn't be any simpler than that. I respectfully suggest to my colleagues

they do not want to put their stamp on people who have known about this problem forever and are doing nothing about it. Not only that, knowingly continuing to sell non-Y2K-compliant products that can cause injury to business, and, in the medical device fields, can cause injury to people, I just do not believe my colleagues on either side of the aisle would want to support that. This amendment cures that problem.

With that, I yield back the remainder of my time and ask for the yeas and nays on both amendments.

The PRESIDING OFFICER. The yeas and nays have been requested. Is there a sufficient second?

There is a sufficient second.

The yeas and nays are ordered on both amendments.

VOTE ON AMENDMENT NO. 619

The PRESIDING OFFICER. The question is on agreeing to amendment No. 619. The yeas and nays are ordered.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Alaska (Mr. STEVENS) is necessarily absent.

Mr. REID. I announce that the Senator from Hawaii (Mr. INOUYE) is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 41, nays 57, as follows:

[Rollcall Vote No. 161 Leg.]

YEAS—41

| | | |
|---|---|---|
| Akaka | Edwards | Mikulski |
| Baucus | Feingold | Murray |
| Bayh | Graham | Reed |
| Biden | Harkin | Reid |
| Bingaman | Hollings | Robb |
| Boxer | Johnson | Rockefeller |
| Breaux | Kennedy | Sarbanes |
| Bryan | Kerrey | Schumer |
| Byrd | Kerry | Shelby |
| Cleland | Kohl | Specter |
| Conrad | Landrieu | Thompson |
| Daschle | Lautenberg | Torricelli |
| Dorgan | Leahy | Wellstone |
| Durbin | Levin | |

NAYS—57

| | | |
|---|---|---|
| Abraham | Feinstein | Lugar |
| Allard | Fitzgerald | Mack |
| Ashcroft | Frist | McCain |
| Bennett | Gorton | McConnell |
| Bond | Gramm | Moynihan |
| Brownback | Grams | Murkowski |
| Bunning | Grassley | Nickles |
| Burns | Gregg | Roberts |
| Campbell | Hagel | Roth |
| Chafee | Hatch | Santorum |
| Cochran | Helms | Sessions |
| Collins | Hutchinson | Smith (NH) |
| Coverdell | Hutchison | Smith (OR) |
| Craig | Inhofe | Snowe |
| Crapo | Jeffords | Thomas |
| DeWine | Kyl | Thurmond |
| Dodd | Lieberman | Voinovich |
| Domenici | Lincoln | Warner |
| Enzi | Lott | Wyden |

NOT VOTING—2

| | |
|---|---|
| Inouye | Stevens |

The amendment (No. 619) was rejected.

VOTE ON AMENDMENT NO. 620

The PRESIDING OFFICER. The question now is on agreeing to amendment No. 620.

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Alaska (Mr. STEVENS) is necessarily absent.

Mr. REID. I announce that the Senator from Hawaii (Mr. INOUYE) is necessarily absent.

The PRESIDING OFFICER (Mr. FITZGERALD). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 36, nays 62, as follows:

[Rollcall Vote No. 162 Leg.]

YEAS—36

| | | |
|---|---|---|
| Akaka | Feingold | Lincoln |
| Biden | Graham | Mikulski |
| Boxer | Harkin | Murray |
| Breaux | Hollings | Reed |
| Bryan | Johnson | Reid |
| Byrd | Kennedy | Rockefeller |
| Cleland | Kerrey | Sarbanes |
| Conrad | Kerry | Schumer |
| Daschle | Landrieu | Shelby |
| Dorgan | Lautenberg | Specter |
| Durbin | Leahy | Torricelli |
| Edwards | Levin | Wellstone |

NAYS—62

| | | |
|---|---|---|
| Abraham | Enzi | Mack |
| Allard | Feinstein | McCain |
| Ashcroft | Fitzgerald | McConnell |
| Baucus | Frist | Moynihan |
| Bayh | Gorton | Murkowski |
| Bennett | Gramm | Nickles |
| Bingaman | Grams | Robb |
| Bond | Grassley | Roberts |
| Brownback | Gregg | Roth |
| Bunning | Hagel | Santorum |
| Burns | Hatch | Sessions |
| Campbell | Helms | Smith (NH) |
| Chafee | Hutchinson | Smith (OR) |
| Cochran | Hutchison | Snowe |
| Collins | Inhofe | Thomas |
| Coverdell | Jeffords | Thompson |
| Craig | Kohl | Thurmond |
| Crapo | Kyl | Voinovich |
| DeWine | Lieberman | Warner |
| Dodd | Lott | Wyden |
| Domenici | Lugar | |

NOT VOTING—2

| | |
|---|---|
| Inouye | Stevens |

The amendment (No. 620) was rejected.

Mr. GORTON. Mr. President, I move to reconsider the vote by which the amendment was rejected.

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

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from California.

AMENDMENT NO. 621 TO AMENDMENT NO. 608

(Purpose: To ensure that manufacturers provide Y2K fixes if available)

Mrs. BOXER. Mr. President, I have an amendment which I send to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from California [Mrs. BOXER] proposes an amendment numbered 621 to amendment No. 608.

Mrs. BOXER. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In section 7(e) insert at the end the following:

(5) SPECIAL RULE.—

(A) IN GENERAL.—With respect to a defendant that is a manufacturer of a 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 that experienced a Y2K failure, the defendant shall, during the remediation period provided in this subsection—

(i) make available to the plaintiff a repair or replacement, if available, at the actual cost to the manufacturer, for a device or other product that was first introduced for sale after January 1, 1990 and before January 1, 1995; and

(ii) make available at no charge to the plaintiff a repair or replacement, if available, for a device or other product that was first introduced for sale after December 31, 1994.

(B) DAMAGES.—If a defendant fails to comply with this paragraph, the court shall consider that failure in the award of any damages, including economic loss and punitive damages.

Mrs. BOXER. Mr. President, before I start to explain the amendment, I wonder if I may engage in a colloquy with the managers of the bill to make sure we are on the same path.

As I understand it, after conversing with Senators HOLLINGS and MCCAIN, there has been an agreement that we will have a vote at 2 o'clock on this particular amendment—I want to make sure I am correct on that—and that we will come back at 10 to 2 and each side will have 5 minutes at that time.

Mr. GORTON. Unfortunately, we have been notified of an objection to that request on this side. We cannot agree to it right now. We are going to try to work it out.

Mrs. BOXER. We will just start the debate and see how long it takes us.

Mr. President, this bill is an important bill to the State of California. I want to put it in a certain perspective. I very much want to vote for a Y2K bill, and that is why I supported the Kerry alternative which I believe is a fair and balanced bill because, after all, what we are trying to do is get the problem fixed.

A lot of times I listen to this debate and it gets very lawyerly, and that is fine. I am not an attorney. What I want to do is get the problem fixed. What I want to do is be a voice for the consumer, the person who wakes up in the morning and suddenly cannot operate his or her computer; the small businessperson who relies on this system, and, frankly, a big businessperson as well. I want to make sure what we do here does not exacerbate the problem. I want to make sure what we do here gets the problem fixed. That is what all the Senators are saying is their desire: to get the problem fixed.

The reason I support the Kerry bill and think it is preferable to the underlying bill is that I believe it is more balanced. If you are a businessperson and, as Senator HOLLINGS has pointed out, many times you make a decision based on the bottom line—most of the

time—what you will do is weigh the costs and the benefits of taking a certain action. If you have a certain number of protections the Senate has given you, and those protections mean you have a better than even chance in court of turning back a lawsuit, you are apt to say: Maybe I will just gamble and not fix this problem, because I have a cooling off period.

Frankly, in the underlying bill, the only thing that has to be done by the manufacturer involved is, he has to write to the person who thinks they may be damaged. That is all they have to do. They do not have to fix the problem. They do not even have to say they are going to fix the problem. They just have to say: Yes, I got your letter and I am looking at the situation.

Then you look at the rest of the law, and the bar is set so high that I believe some businesspeople—certainly not all—will say: I am probably better off not fixing the problem.

I go back to the original point. If your idea is to fix the problem, we ought to do something that encourages the problem to be fixed.

I totally admit, each of us brings a certain set of eyes to the bill. When I look at the underlying bill, I see some problems. Others think it is terrific, that it will lead to a fix of the problem, and therein lies the debate.

Every time I listen to this debate, I hear colleagues of mine who support this bill talk about how much they love the high-tech industry, how important the high-tech industry is to this country, how important it is that we do not do anything to reverse an economic recovery.

All I can say is, no one can love the high-tech industry more than the Senator from California—I should say the Senators from California—because it is the heart and soul of our State. I do not have to extol Silicon Valley, the genius of the place, the fact that it is now being replicated in other parts of California, in San Diego, for example, in Los Angeles, where they have these high-tech corridors. It is wonderful to see what is happening.

The last thing I want to do is hurt that kind of industry and hurt that kind of growth. But there is something a little condescending when my colleagues who support the underlying bill stand up and say: You are going to hurt the industry if you do not support the underlying bill. I think it is demeaning. I think it is demeaning to Silicon Valley.

This is a strong industry. This is an ethical industry. These are good, decent people with good business sense and a sense of social justice, if you look at what they are doing in their local communities. To make it sound as if they need special protections and they need to be coddled is something that I do not ascribe to.

I think it is a lack of respect. Yes, we have a problem here. Let's try to fix it. But to assume that this industry cannot stand up and fix a problem somehow troubles me. It is not respectful of the industry. It says there are some people who may need to have this special protection, and not fix the problem of the consumers.

So when I look at the bill, I say, what really is in this bill that will lead to a fix of the problem? I have to tell you, in my heart of hearts, I really do not see it. I support a cooling off period. I think everybody does—most people do, because we do not know exactly what is going to hit us. Let's have a cooling off period. But something ought to be done in the cooling off period—more than just simply having a letter.

If I write a letter to company X and say, ''I woke up this morning; my computer failed me; I'm a small businessperson; I'm in deep trouble; fix it,'' you know what the McCain bill says? I have a right to get a letter back within 30 days telling me what the company is going to do. What does that do for my business? What does that do for me? What does that do to help me get back on line? Nothing. As I read the bill, that is all that is required.

So I want to fix the problem. I want to do it fairly. Under this underlying bill, suppose you bought the computer in 1998 or 1999. They could charge you more for the fix than the computer itself. You might just say: I am just getting rid of this computer. I am going to go out and buy a new one. You know what. You might then go to court; you would be so angry.

So I don't see what we are doing in this bill that is real. I want to offer something that is real. That is what I do in this amendment.

I want to tell you where I got the idea for this amendment, because I want you to know I did not think it up, as much as I wish I did. The consumer groups brought this to me—not the lawyers, not the high-tech people, the consumer groups. They said: We really don't want to have to go to court. We want to fight for a fix. We have this good idea. Guess where it was found, word for word, almost. Congressman COX's and Congressman DREIER'S original bill on Y2K contains this wonderful idea that, in the cooling off period in the bill, after you write to the company or companies involved, they must write back to you. And if they determine there is a fix available—and it is their determination, nobody else's—they have to fix the problem.

What we have said in this amendment is, if the fix is on a system that is between 1990 and 1995, they can charge you the cost of the fix. So the company is out nothing, because we figure it may be a little more complicated than the later models. If it is after 1995, to 1999, then they have to do it for free, because—I have listened to Senator HOLLINGS, and perhaps he can help me out with this point—most of the companies knew about this problem a long time ago. And, more than that, a vast majority of them are fixing the problem. They are doing it for nothing.

Mr. HOLLINGS. Will the distinguished Senator yield?

Mrs. BOXER. I am delighted to.

Mr. HOLLINGS. I am intrigued by the Senator's comments with respect to the industry itself. This Senator does not know of a lousy computer manufacturer. It is the most competitive industry in the world. You have to have the most brilliant talent around you. As they say, it changes every other year. Or every year, and so forth, it is outdated. So, that being the case, there are no real laggards or hangerson.

Right to the point, does the Senator realize, for example, that they have to file with the Securities and Exchange Commission what we call a 10–Q report; namely, of the Y2K problem? Do they know of the problem? What is the potential risk under the problem? What is to be done in order to correct that particular problem, and otherwise? What is the cost to the company? The stockholders want to know this information.

The Securities and Exchange Commission requires it. Just looking at the Boeing Company Y2K report under their 10–Q report: ''The State of Readiness. The company recognized the challenge early, and major business units started work in 1993.''

Did the Senator realize that?

Mrs. BOXER. I actually was not aware many of them started the fix that early.

Mr. HOLLINGS. Well, going further, does the Senator realize, for example—we are going to have lunch with the distinguished leader, Mr. Dell of Dell Computer—as of December 14 of last year, in their 10–Q report they state: ''All products shipped since January 1997 are Y2K-certified. Upgrade utilities have been provided for earlier hardware products''?

Mrs. BOXER. I was not aware of that, that the Dells were Y2K-compliant as of 1997.

Mr. HOLLINGS. Does the distinguished Senator realize ''no material''—no material cost? So they are not looking for a bill.

I hope we do not pass a bill. Then, when the world ends, as some of the Senators around here are saying, and the computer industry is ruined, Dell will be the only one left. I will be all for them. That is really the history of all of them. I have Yahoo. I have all the rest of them here listed.

But I think that is the point the distinguished Senator from California is making, who would know better than any, that this is a most responsible industry. They are not trying to get rid of the old models.

This particular legislation, the Senator's amendment makes sure they do not get rid of the old models. It is like a car company saying: We are going to bring out a new model come January 1, so all the old models that we sell all this year are going to have all kinds of gimmicks or glitches. But let's make them 90 days or let's let them get a letter back or something else of that

kind. If the automobile industry came to Washington and asked for that, we would laugh them out of court.

Mrs. BOXER. I want to make a point. It is a very subtle point to make. But by discussing minute after minute these special protections that go beyond the fair protections that I believe are warranted—and, by the way, my friend from Oregon made this a much better bill; I give him tremendous credit for that—but in my view, they still have special protection that, frankly, the greatest business in the world does not really need to have, because they are good people, because they are making the fixes, because their future depends upon how the consumer rates them.

Mr. HOLLINGS. Certainly.

Mrs. BOXER. What I am fearful of is that in the end we are protecting the bad apples. And I do not mean to use Apple Computer. Apple Computer got this a long time ago. They are all compliant. But we will wind up—because so much of the industry cares about this, wants to make the fixes—protecting those few that are bad. I am very worried.

Mr. DURBIN. I think the Senator makes an excellent point. I ask the Senator if she will yield for a question.

Mrs. BOXER. Yes.

Mr. DURBIN. Because many people think this is a debate between the computer and software companies versus the trial lawyers; choose whose side you are going to be on. People forget we are talking about the consumers of the products, the people who buy computers and software. These are businesses, too. These are doctors and manufacturers and retail merchants who rely on computers to work.

This bill basically says, if you bought a computer that, it turns out, stops working come January 1 in the year 2000, we are going to limit your ability to recover for wrongdoing by the person who sold it to you. We will limit it. Unlike any other category of defendants in American courts, save one that I can think of, we are going to say this is a special class of people; those who make computers and software are not going to be held accountable like the people who make automobiles, and the folks who make equipment, the folks who make virtually everything in the world, including all of us.

Everybody gathered here in this Chamber can be held liable in court for our wrongdoing. If we make a mistake, we can be brought before a jury, and they can decide whether our mistake caused someone damage. This bill says: Wait a minute, special class of Americans here. American corporations that make computers and software shall not be held liable, or at least if they are going to be held liable, under limited circumstances. So the losers in this process are not trial lawyers. The losers are other businesses that say, January 2, wait a minute, this computer is not working. I can't make a profit. I have hundreds of employees who counted on this, and now what am I supposed to do?

I say to the Senator from California, thank you for this amendment.

A couple questions. You make a point here that if we are going to generalize and say, well, there may be some bad actors in this industry that sold defective products, that we are going to, in fact, absolve all manufacturers, it is a disservice to the companies which in good faith have been doing everything in their power to bring everything up to speed. Just to make this point, is it the Senator's point that we do not want to favor those bad actors at the expense of so many good actors from Silicon Valley and across the world?

Mrs. BOXER. Absolutely. I think this argument has not been made before. Something was troubling me, as I listened to the debate, because it seemed to me that the implied sense around here is that somehow this wonderful industry can't stand up to this test. This is an industry that has performed miracles for the people of this country, changing the nature of the way we do business, the way we live, the incredible communications revolution. I think they can meet this challenge. I do not think they need to have, as my friend puts it, this special carve-out, because I think in a way it is insulting to them.

Mr. DURBIN. If the Senator will continue to yield, I can only think of two other groups in America that enjoy this special privilege from being sued: foreign diplomats——

Mrs. BOXER. Yes.

Mr. DURBIN. —and health insurance companies, which happen to fall under the provision in Federal law which says—we are debating this, incidentally, on the Patients' Bill of Rights—if they denied coverage to you, they only have to pay for the cost of the procedure, as opposed to all the terrible things that might have happened to them. As I understand this bill, from the amendment by the Senator from North Carolina, there are strict limitations here on what a person whose business is damaged can recover.

Mrs. BOXER. Correct.

Mr. DURBIN. I also ask the Senator, as I take a look at her amendment, she is suggesting, if I am not mistaken, that if you bought your computer back 10 years ago, which was light-years ago in terms of computer technology, for a 5-year period of time, 1990 to 1995, is that correct——

Mrs. BOXER. That is correct.

Mr. DURBIN. —if you bought it during that period of time and there is a problem, then the company, of course, can charge you for the cost of bringing your computer up to speed, making sure it works?

Mrs. BOXER. Yes.

Mr. DURBIN. But after 1995, the Senator is arguing, the industry knew what was going on. They knew what the challenge was. If they continued to sell computers they knew were going to crash or did not take the time to fix, then she is saying the customers, the businesses, the doctors and engineers that bought the computers shouldn't be left holding the bag; it should be the expense of the computer company to fix it. Is that the Senator's amendment?

Mrs. BOXER. Exactly right. Under the underlying bill, if you bought a computer in 1999, and it fails you a few days later, you get nothing in terms of a fix. You get a letter. We hope the letter says we are going to fix it. But you do not have any commitment that it would be for free. You could get charged thousands of dollars. Our friend, Senator HOLLINGS, who has been so articulate in the opening moments of the debate, talked about these doctors where the company said in order for them to get a fix, it costs them more than the original system. Am I right, I say to the Senator?

Mr. HOLLINGS. Exactly. He bought an upgrade just the year before, guaranteed for at least 10 years, for $13,000. In order to fix it, the charge was $25,000. That is the testimony before a committee of the Congress. He had really not only written a letter and everything else, no response, he finally got a lawyer, but even that did not work. The lawyer was clever enough to put it on the Internet and, bam, there were 20,000 similarly situated. Wonderful Internet. Immediately the company said: We will not only fix it, we will pay the lawyers' fees and everything. That is all he wanted. He wanted a fix. Otherwise, he was out of business.

People don't rush to the courthouse. They have to do business. If I filed a claim for Senator BOXER this afternoon in the courts of California or South Carolina, I would be lucky to get into the courthouse before the year 2000. I mean, the dockets are backed up that way. We live in the real world.

We are not looking for lawsuits. We are looking for results.

Mrs. BOXER. I say to my friends, that is so true. If you look at the number of lawsuits that are out there, the big explosion, and there has been one, has been business suing business. It is not the individual, and it is not the small guy, because it is cumbersome, and it is expensive. You don't get your problem fixed really.

Mr. DURBIN. If the Senator will yield, I am curious. I ask the Senator for her reaction on this. What if we said, instead of computers, we are going to deal with airplanes this way. If we said we do not want people who make airplanes to be held liable if they fall out of the sky, America would say that is crazy, that is ridiculous. We, of course, want to hold the manufacturers of products where we have a lot at stake to a standard of care.

If you were going to absolve them, insulate them, then, frankly, as a consumer I am going to have second thoughts about getting on the airplane.

I think what the Senator is saying with her amendment is those companies that have done the right thing,

have established their reputation for integrity by stepping forward and saying we are solving the Y2K problem, certified, as the gentleman from Dell Computer did with the SEC, these companies that have gone that extra mile and want to stand behind that reputation will actually be penalized by this bill, because, frankly, all their hard work is not only being ignored, it is being defied.

They are saying: We have to carve out a special treatment here for those who didn't do a good job as businesspeople.

Coming back to the point I made earlier, the victims here are not trial lawyers. The victims are businesses, small businesses as well as medium-size businesses, trying to keep their employees at work, worrying that January 2 of the year 2000, they are going to have to close down and send people home without a paycheck. Those are the folks disadvantaged by the broad sweep of this bill.

I think the Senator from California is on the right track. The good actors, the ones that have worked hard to make this work, should be rewarded. Those that have not should not be protected by the National Association of Manufacturers, the U.S. Chamber of Commerce, and all of the interests that have come in here and said, let us provide special treatment for those that have not met their responsibility.

Mrs. BOXER. I thank my friends for their comments, because as I listened to them, I become more and more convinced of the importance of this amendment. It levels the playing field between the good actors and the bad ones.

Right now, if this bill passes without this amendment, nobody has to do anything. The people who already have taken the move to fix the problem are definitely at a disadvantage. Why? They spent money to do it. They worked hard to do it. Yet, we are protecting those who are sitting back and saying, wow, I can't believe this deal I am getting.

They are changing the law. It is only for 3 years, but it is enough time. How many people are going to sit around and wait to get their computers fixed? They will throw them out, and that is hard for a lot of consumers. That is why the Consumers Union is so strongly behind this and Public Citizen is so strongly behind this.

Mr. HOLLINGS. Will the Senator yield?

Mrs. BOXER. I am happy to yield.

Mr. HOLLINGS. I hold in my hand an Institutional Investor. This is the real official document, the investment industry. They had a survey of the Congressional Financial Officers Forum of all the large corporations in the country. To the question, Do you feel your company's internal computer systems are prepared to make the year 2000 transition without problems, do you realize that 88.1 percent said yes, and only 6 percent said no? So that is 6 percent that have another 6 months to take care of it. With respect to actually getting and working out with their suppliers, do you realize that 95.2 percent said they have worked with their suppliers and are ironing out all the problems?

It really verifies exactly the astute nature of the computer industry, as described by the Senator from California. You are right on target, and it hasn't been said on the floor as you are saying it, with authority, too. I commend the Senator.

Mrs. BOXER. I thank the Senator. I can't be more proud of the Silicon Valley. I can't be more proud of the high-tech industry that I see blossoming all throughout my State. I can't be more proud of them.

The facts the Senator put into the RECORD make me even more proud, because what he is saying is the vast majority are good actors. The vast majority understand their good practice of fixing the Y2K problem will redound to their benefit as well as to the benefit of consumers. They have a business conscience. They are good corporate actors. They have a social conscience. They understand it.

In many ways, when you talk to some of these executives, they are very democratic. And I don't mean in terms of their party affiliation; I mean democratic with a small ''d.'' They want to spread democracy. They want each individual, through the power of the Internet and the power of their computer, to have the information, to have the knowledge. That is what excites them.

So they are good people making a wonderful product. They don't want it to fail. Yet, we have a bill here that essentially says to those who haven't moved aggressively on this problem—and by the way, this is taken from the Apple web site, I say to my friend. There is a great quote by Douglas Adams about the year 2000 readiness. His quote is:

> We may not have gotten everything right, but at least we knew the century was going to end.

Good point. They knew the century was going to end. They knew there might be some problems.

So to sum up the argument I am making for this important amendment, it is the one amendment that I know of where the attorneys and the Silicon Valley were not even entered into the discussion. It is a hard, straightforward, consumer rights amendment, brought to you by the consumer groups, the people who really care about the individual business and the individual. It was originally found in the Cox-Dreier legislation, which was introduced in 1998. We practically take it word for word. What does it require? It says in that remediation period, after you have notified the company of your problems, if they determine they have a fix to your problem, they have to fix it. It is as simple as that. Who decides if there is a fix? They decide. We are not having anybody come and look over their shoulder. If the company says we have a fix, they fix it.

Guess what happens. Everybody is happy. The consumer is happy. They can go back to work on their computers. The company is going to be happy because they are going to have to satisfy the consumer. There will be no lawsuit. Why? We fixed the problem.

In some very interesting way, the underlying bill, because it doesn't require any fix at all, even if your computer was bought 3 days before the millennium, encourages companies not to do it. I just hope there will be a unanimous vote for this amendment, and if there isn't, if we don't win this amendment, it says to me the consumer isn't important in this debate.

I can't imagine we are being so fair—if it is a really old computer, before 1990, the company could charge anything they want because we admit maybe it is worthless. But if it is between 1990 and 1995, they can charge you the cost. If it costs them $500 to fix the problem, you will pay $500. If it is a newer computer, between 1995 and the year 2000, they ought to do it for free because, as the Apple people said, ''We may not have gotten everything right, but we knew the century was going to end.''

I have to tell you that by 1995, 1996, 1997, 1998, 1999, if people didn't know this was a problem, they had to be sleeping, because everybody knew this was a problem in the 1990s.

I am very hopeful to get the support of the Senator from Oregon and to get the support of the Senator from Arizona. I think this will be something that would make this bill more consumer friendly, despite the other problems.

I yield the floor at this time.

Mr. WYDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Mr. President, I came over to the floor because I am in sympathy with what the Senator from California is trying to do. But this bill has taken such a pasting in the last 15 or 20 minutes that I am going to take a couple of minutes to correct the RECORD before we actually get into the merits of what my colleague is trying to do.

For example, I have heard repeatedly that if you pass this bipartisan legislation put together by the Senator from Arizona and the Democratic leader on technology issues, Senator DODD, and myself, well, these companies won't have to do anything; they won't have to do anything at all.

Well, if they don't do anything at all, they are going to get sued. That is what is going to happen to them. Then we heard that if they were big and bad, they were going to get a free ride. I heard that several times here on the floor of the Senate in the last 15 or 20 minutes. If you are big and bad, you are going to get a free ride if we pass this bill. I will tell you what happens if

you are big and if you engage in egregious activity, if you rip people off; what happens is you get stuck for punitive damages because there is absolutely no cap on those, and joint and several liability applies to those people as well. That is what happens to the people who are big and bad under our legislation.

I think it is just as important that the RECORD be corrected. I also heard that businesses were going to be the victims and the like. Well, if that is the case, it is sort of hard to understand why hundreds and hundreds of business organizations are supporting this bill. I would be very interested in somebody showing me a list of some business groups that aren't supporting the bill because I would sure want to be responsive to those folks.

Let me, if I might, talk specifically about the Boxer amendment. By the way, apart from the last 15 or 20 minutes of discussion, my friend from California has been very helpful on a lot of technology issues that this Senator has been involved in. I remember the Internet Tax Freedom Act that we worked on in the last session of the Congress, where the Senator from California was very helpful. I very much appreciated that.

The question that I have—and maybe I can engage in a discussion with the Senator from California on this and try to see if I can get fixed in my mind how to make what the Senator from California is talking about workable, because I think the Senator from California wants to do what is right. I am now just going to focus on her amendment and sort of put aside some of these other comments that I have heard in the last 15, 20 minutes, which I so vehemently take exception to, and see if I can figure out with the Senator from California how we can make this workable. I want to tell her exactly what my concerns are. I come from a consumer movement, and she comes from that movement, and I know what she is trying to do is the right thing.

Let us say that you have a system where one chip out of thousands is out of whack. My colleague says it ought to be repaired or replaced, and the question that we have heard as we have tried to talk to people is: Does this mean replacing just a chip? Does it mean replacing the operating system? Who is responsible for the fix? Is it Circuit City, where you bought it? Is it Compaq Computer? Is it the chip maker?

What we have found in our discussions with people is that it wasn't just chips, but it was the software situation as well. Is it going to be Lotus or Novell or the retired computer programmer who put the code together a few years ago? As far as I can tell, the responsible companies—and I think the Senator from California has been absolutely right in making the point that there are an awful lot of responsible people out there. We are trying to do the right thing. The responsible people seem to want to do the kinds of things that the Senator from California is talking about. I know I saw an EDS advertisement essentially in support of our bill that talked about how they have a system to try to do this.

If we can figure out a way, with the Senator from California, to do the kinds of things she is talking about so as to not again produce more litigation at a time when we are trying to constrict litigation, I want to do it.

I have already had my staff put a lot of time into this. We are willing to spend a lot more time, because I think the motivations of the Senator from California are absolutely right. The question is how to deal with the kinds of bits, bytes, and chips, and all of the various technological aspects that go into this.

I would be happy to yield to my colleague and hear her thoughts on it.

Mrs. BOXER. Mr. President, first of all, I thank my friend. I know it is hard, when you put so much work into the bill, when there is a disagreement. I just want to say to my friend, in terms of my particular bill, it focuses on that so-called remediation period. That is what I am focusing on, because, in my opinion, there is nothing that requires any action to fix in that period. It requires communication back and forth. That was my only point.

This amendment—I am happy my friend is sympathetic to it, and I hope we can work out our differences on it—actually says to the manufacturer—the retailer is not involved in this. I say to my friend, if he reads my amendment, it just says if the manufacturer determines that there is a fix, then they must make the fix.

In that 10-year period, we prescribe that if it is a newer part and a newer system, he does it for nothing, because in 1995 he should have known it, and prior to 1995, 1990 to 1995, we say at cost.

Again, I want to make sure my friend knows, we do not change one piece of the underlying bill in terms of the rest of the bill. The rest of the bill stands. We don't add any other court suits. We don't change any damages. All we say is fix it if you can. And if you cannot, the underlying bill will apply. That is really all we are doing.

I think this sends a clear message to those manufacturers that have been lax to follow the lead of the good manufacturers that have been wonderful. And those are the ones I know and love from my State who have said we are going to make the consumer whole, we are going to make the consumer happy.

I want my friend to know that we add no new cause of action—nothing. In the underlying bill, we just say remediation, period, instead of just saying it is a time for people to write bureaucratic lawyers a letter to each other, which is better than nothing. It is a cooling-off period. We say if you have a fix, make it work, because under the underlying bill there is no such requirement. You could charge people more than they even pay for the machine, et cetera, even if they got the machine 3 days before the millennium.

I am happy to work with my friend. If she wants to put a quorum call in, perhaps, and sit down together to see if we can come up with something, Senator MCCAIN said to me through staff that he thought we could do this as a policy.

Frankly, we are writing legislation, and I think it is deserving of being included. But I would be delighted to work with my friend.

Mr. WYDEN. My colleague is constructive, as always. Here is the kind of concern I think the high-technology sector would have to focus on the manufacturer. That deals with this issue of interoperability where, in effect, if you have one system or product that is Y2K compliant but, as a result of it being installed in a system that isn't already Y2K ready, you may have in fact failures, or bugs, or defects, the Y2K-ready product may get infected and not properly function. Then the question is, Who is responsible? Can you, in effect, have somebody take responsibility for fixing a problem that isn't under their control?

If the Senator from California would like to put in a quorum call and get into the issue of interoperability and how to deal with these various issues, and sort of have all of the people talking at once, I think that is very constructive. I am anxious to do it.

I think this is a discrete and important concept. Again, without going back to all the things that were said in the last 20 or 25 minutes, if you are a consumer, or a business, and you are getting stiffed, you can go out and sue immediately. You can go out and sue and get an injunction immediately. You don't have to wait 30 or 60 days, or whatever. You can go immediately.

I would like to spend the time during the quorum call to try to focus on what I think is a very sincere effort of the Senator from California to try to do something to help people who need a remedy, and need it quickly. We are going to have to get into some of these interoperability questions and some of the questions of what happens when you have a problem that essentially gets into your system after it leaves your hands. I am anxious to try to do it. We can put it in the context of the kind of discrete, specific idea that the Senator from California was talking about rather than what I heard during the last 20 or 25 minutes about how big and bad actors are going to get a free ride, when in fact on page 13 of the bill it says that you are liable for the problem that you cause. That is what is on page 13 of the bill. Proportionate liability—you are liable for the portion of the problem you caused. If you engage in intentional misconduct, if you rip people off, you are going to be stuck for the whole thing—joint and several, punitive damages, the works.

I would prefer to do what the Senator from California is now suggesting,

which is to put in a quorum call, bring the good people from Chairman MCCAIN's office and from the office of the Senator from California and myself, along with Senator DODD's, into a discussion to see if we can figure out a way to make this workable.

I am happy to yield the floor.

Mrs. BOXER. I want to engage with my friend. I thank him for his usual willingness.

I want to make a point that I want my friend to understand. This is a very business-friendly amendment, because this amendment says the manufacturer has to determine if a fix is available.

In all the issues my friend raises—well, there is a part over here from that company, and a part over there—the question is, it has nothing to do with liability; it has to do with a fix available for the consumer. If the manufacturer determines there is no fix, because there is little product in inside, and a company is out of business and they can't replace the part, the manufacturer simply says there is no fix available, and then the rest of the bill applies.

Again, I say to my friend, as he said, as he described the fact, of course, the bad actors will be called into court later. We want to avoid that—both my friend and I.

I believe we have so many good actors out there, and my friend cited one of the companies that has really taken care of this problem. I think that is what the Senator from Oregon was talking to me about before when he said you know some of these companies are doing this. Absolutely, they are. We ought to make that the model. We ought to say that is wonderful, you take care of it, and everybody is happy, and there is no lawsuit.

I am hopeful, because I don't see this as complicated. We worked very hard to make it simple. We didn't want to tell the manufacturer, ''You can make the fix,'' if in fact they can't. If they in good faith say, ''There is a part inside this mother board, and we can't fix it,'' then they simply say, ''I am sorry, there is no fix available in this circumstance,'' and then the underlying bill applies.

But we think the leadership by the really good people in this high-tech community ought to be followed. We believe if we don't put this amendment in the bill that those who already have acted in such good faith, in such good business behavior, and such good corporate responsibility to fix the problem and are seriously at a disadvantage, because they scratch their head and say, ''You know, I should have waited, maybe I didn't have to do all of this, and people would have decided it is too much of a hassle, I will just throw out my computer and get a new one,'' I can tell my friend, I bet a lot of people will wind up doing that. That would be unfortunate, if a fix is available.

Whenever the Senator wishes to put in a quorum call, actually our friend from Delaware has been waiting to speak on another very important topic.

Mr. WYDEN. I believe I have the time. I am going to wrap up in 2 minutes, maximum.

Mrs. BOXER. When the Senator yields the floor, the Senator from Delaware will take over, and the Senator from Oregon, Senator MCCAIN, Senator DODD, and I can meet.

Mr. WYDEN. We are going to have to look at some of these.

The question is, Is a fix available? If we are not careful, that could be a lawyer's full employment program.

My colleague is absolutely right. In Oregon and California, we have access to some of the best minds and most dedicated and thoughtful people on the planet in this area. We should spend some time making sure we can get at this concept the Senator from California wishes to address in a workable way so we don't have more litigation, rather than less. I know the Senator from California shares that goal.

I yield the floor.

Mr. BIDEN. I ask unanimous consent to proceed in morning business for 15 minutes.

The PRESIDING OFFICER (Mr. VOINOVICH). Without objection, it is so ordered.

## PEACE AGREEMENT

Mr. BIDEN. Mr. President, I rise today to speak of the military technical agreement signed by NATO and Yugoslavia. That is a fancy way for saying that we accepted the surrender of Slobodan Milosevic.

I just got off the phone with the Secretary of State who called me from Germany with another piece of very positive news. She indicated that because the G–8 was meeting in Germany, they put together a group of Europeans to flesh out in detail a Southeastern Europe Stability Pact, which is an idea generated by the German Government.

The objective of that pact is to encourage democratic processes in southeastern Europe, in the Balkans, and to reduce tensions in the area. They have set up a very elaborate but clear timetable, and what they call ''regional'' tables, to promote democracy, economic reconstruction, and security. They have involved as the lead group the European Union, plus the OSCE, the United Nations, NATO, and to a lesser extent, the United States.

The reason I bother to mention this is that the hard part is about to come. I hope we will have the patience that we did not show on this floor to win the peace. We have won the war, notwithstanding the fact many thought somehow we should be able to do this in less than 78 days.

I think it is astounding that we talked about how this ''dragged on.'' We will probably find that close to 10,000 paramilitary and Serbian troops were killed. Only 2 Americans were lost in a training exercise—as bad as that is. Yet, we began to lose patience, because it wasn't done in a matter of 24 hours.

If we have the patience, we can win the peace, because unlike pursuing the war, the bulk of the financial responsibility, organizational effort, and guidance will come from the Europeans. The European Union will take on the major portion of the responsibility for rebuilding the region, reconstructing the area.

The American people should know that the President of the United States has tasked the Secretary of State to see to it—we will hear phrases such as ''mini Marshall Plan''—that the United States of America is not going to bear the brunt of the financial burden in reconstructing southeastern Europe. It is fully within the capacity of the Europeans. It is their responsibility. It is in their interest, and they are prepared to do it.

On the military side, the first part is in place. The Yugoslav Government has capitulated on every single point NATO has demanded. The last several days of discussions between NATO and Yugoslav military commanders were not about negotiation. They were about the modalities of meeting the concessions made by Milosevic's government on every single point NATO demanded. It took some time to work that out.

''Modalities'' is a fancy foreign policy word. Translated, it means: How in the devil are they going to leave the country? In what order are they going to leave the country? What unit goes first? When do NATO forces, KFOR, move in so that no vacuum is created? By ''vacuum,'' I mean when there are no Yugoslav forces in Kosovo.

That is what was going on. I got sick of hearing commentators on the air talking about how negotiations were going on between NATO and Milosevic. There were no negotiations. It was a total, complete surrender by the Yugoslavs, as it should have been.

There is now a firm, verifiable timetable for withdrawal of all Yugoslav and Serbian military, and all special police—those thugs who have roamed the countryside in black masks, raping women, executing men, and wreaking havoc on a civilian population. Those thugs—half of whom are war criminals themselves, and should be indicted as such, like Milosevic—are required to leave. The worst of all are the paramilitaries. They all are also required to leave. If they do not leave, they will be killed or forcibly expelled.

As I speak, this withdrawal has begun, although I trust Mr. Milosevic and the Serbian military about as far as I could throw the marble podium behind which the Presiding Officer sits. I am not worried, because even if they default, I am convinced of the resolve of NATO. We will pursue them. General Clark said 78 days ago that we would pursue them and hunt them down. And we did. And we will again, if necessary.

The fundamental goal of NATO's air campaign has been achieved, notwithstanding all the naysayers on this floor, all the talking heads on television, and all the columnists.