Y2K LAWSUIT ABUSE PROTECTIONS/Cloture

SUBJECT: **Y2K Act . . . S. 96. Lott motion to close debate on the McCain/Wyden substitute amendment No. 267.**

ACTION: CLOTURE MOTION REJECTED, 52-47

SYNOPSIS: As reported, S. 96, the Y2K Act, will enact numerous reforms to protect companies from abusive litigation related to year 2000 (Y2K) computer date change problems. Without passage of this reform bill, litigation costs could reach $1 trillion (12 percent of the entire United States' economy), potentially crippling the competitiveness of the United States' high technology industry and raising costs for consumers and for all businesses that use computers and automated systems.

The McCain/Wyden substitute amendment would enact numerous compromise changes. (The description below is of the amendment as it was offered. After the amendment was offered, negotiations continued with concerned parties and other agreements were reached that are not reflected in the description.) Provisions of the amendment include the following: it would apply only to Y2K actions brought in State or Federal courts after February 22, 1999, and before January 1, 2003; it would not apply to any claim for personal injury or wrongful death, nor would it supersede any valid, enforceable written contract between a plaintiff and a defendant; no new cause of action would be created; State law would be superseded to the extent that it established a rule of law applicable to a Y2K action that was inconsistent with State law; clear and convincing evidence would be required for the award of punitive damages; for individuals with net worths of not more than $500,000, and for businesses that had fewer than 25 full-time employees, punitive damages would be limited to the lesser of 3 times the actual damages awarded or $250,000, and for all other plaintiffs punitive damages would be limited to the greater of 3 times the actual damages awarded or $250,000; punitive damage caps would not apply if there was clear and convincing evidence of specific intent to injure; punitive damages would not be awarded against government entities; injunctive relief could be sought immediately, but other actions would require prior notice and then a waiting period (if the defendant responded to the notice) during which time the defendant could attempt to resolve the problem (this waiting period would not supersede or otherwise preempt any State law or procedure with respect to the use of alternative dispute resolution for Y2K actions; the total notice and waiting period would be a maximum of 90 days); pleading standards woul d

(See other side)

YEAS (52)			NAYS (47)			NOT VOTING (1)	
Republicans (52 or 95%)		Democrats (0 or 0%)	Republicans (3 or 5%)	Democrats (44 or 100%)		Republicans (0)	Democrats (1)
Abraham	Helms		Cochran	Akaka	Johnson		Moynihan-3AN
Allard	Hutchinson		Shelby	Baucus	Kennedy		
Ashcroft	Hutchison		Specter	Bayh	Kerrey		
Bennett	Inhofe			Biden	Kerry		
Bond	Jeffords			Bingaman	Kohl		
Brownback	Kyl			Boxer	Landrieu		
Bunning	Lott			Breaux	Lautenberg		
Burns	Lugar			Bryan	Leahy		
Campbell	Mack			Byrd	Levin		
Chafee	McCain			Cleland	Lieberman		
Collins	McConnell			Conrad	Lincoln		
Coverdell	Murkowski			Daschle	Mikulski		
Craig	Nickles			Dodd	Murray		
Crapo	Roberts			Dorgan	Reed		
DeWine	Roth			Durbin	Reid		
Domenici	Santorum			Edwards	Robb		
Enzi	Sessions			Feingold	Rockefeller		
Fitzgerald	Smith, Bob			Feinstein	Sarbanes		
Frist	Smith, Gordon			Graham	Schumer		
Gorton	Snowe			Harkin	Torricelli		
Gramm	Stevens			Hollings	Wellstone		
Grams	Thomas			Inouye	Wyden		
Grassley	Thompson						
Gregg	Thurmond						
Hagel	Voinovich						
Hatch	Warner						

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

be enacted; unless a defendant acted with specific intent to injure or knowingly committed fraud, liability in a Y2K action would be several but not joint (each defendant would pay only the proportion of damages for which it was responsible); special rules would restore joint and several liability in certain circumstances if one of the defendants was insolvent; and a class action suit would be maintained only if the court found that the alleged defect was material to the majority of the members of the class and the suit satisfied all other prerequisites established by applicable Federal or State laws or rules.

On Tuesday, April 27, Senator Lott sent to the desk, for himself and others, a motion to close debate on the McCain/Wyden substitute amendment.

NOTE: A three-fifths majority (60) vote is required to close debate. Generally, those favoring the motion to invoke cloture favored the amendment; those opposing the motion to invoke cloture opposed the amendment.

Other amendments and motions were pending at the time of the vote that filled available parliamentary openings for offering amendments.

Those favoring the motion to close debate contended:

The Y2K litigation problem is so large it threatens the continued viability of our computing industry and could impose a litigation tax of up to $1 trillion, which would ultimately come out of the pocketbooks of American consumers. The problem is national in scope and demands a national response. The sooner we act, the less costs that businesses and consumers will have to endure. Only lawyers will lose. They will not be able to collect 30 percent, 40 percent, or more of the proceeds from up to, or even more than, $1 trillion in lawsuits. Instead of letting matters drag on for years in litigation, we should enact a one-time fix to the problem so that businesses, and lawyers, will have incentives to resolve problems quickly with minimal costs for everyone. This bill will enact such a one-time fix. It is narrowly tailored to address only the Y2K problem, and numerous compromises have been agreed to in order to accommodate the concerns of some Democratic Senators. We cannot compromise much more, though, without destroying the value of this bill. We do not need to enact window dressing that pretends to address the litigation problem. We need a real solution.

In the early days of computing, the cost of memory was very high. Early programmers, therefore, decided to store year data using just the last two digits. For instance, the year 1960 would be stored as "60" rather than "1960." The 2-digit format was the industry standard for decades and reflected sound business judgment. The expectation was that those original programs would be abandoned long before the year 2000. That expectation turned out to be wrong. Programmers usually modified existing code rather than creating whole new programs. About 5 years ago, the computing industry began to realize that many programs, with thousands and even millions of lines of code, had deeply embedded 2-digit date fields and commands that expected 2-digit date fields. It realized that these programs would wrongly interpret the year 2000 as the year 1900, or would fail to recognize the year at all and, consequently, would fail.

Efforts have been underway to fix the problem, but they are slowing down due to the emerging threat of massive lawsuits. Companies have limited cooperation with each other on Y2K problems for fear of their actions being taken as admissions of guilt for the existence of those problems, which could then be used against them in court. They are fixing their own problems, and are providing as little information as possible about how they are proceeding, again for fear of their actions being used against them. Larger companies are severing relations with smaller companies that they fear are not Y2K-compliant, because they know under the doctrine of joint and several liability they could end up being forced to pay for suits against those companies if they have any sort of business relationship with them.

Companies have good reason to fear litigation. They know that approximately 500 law firms across the country have already put together teams of lawyers to explore how they may capitalize on Y2K problems. Though we are still nearly a year away from the turn of the century when Y2K problems will begin, more than 80 lawsuits, including numerous mammoth class-action lawsuits, have already been filed. Billions of dollars of damages have already been claimed, even though no damages have yet resulted. Last year, a panel of experts at the American Bar Association's annual convention looked at this issue, and it predicted that the legal costs associated with Y2K will exceed those of asbestos, breast implants, tobacco, and Superfund litigation combined. In total, the costs will be an estimated three times the total of all other annual litigation in the United States. The Gartner Group has estimated that the actual costs of fixing every Y2K problem worldwide will be between $300 billion and $600 billion. The Giga Information Group has estimated that litigation costs could be up to 3 times the costs of just fixing every single existing problem; Capers Johns, chairman of Software Productivity Research, a provider of software measurement, assessment, and estimation products and services, has come up with the much higher estimate of up to 10 times the actual costs of fixing everything.

Many Democrats can see no harm whatsoever in the fact that it could cost ten times as much to litigate this mess, for years on end, as it would to fix every single problem. Over the years, they have been totally consistent in their vociferous defense of the worst of results. No facts could ever shake their blind love for trial lawyers. For instance, before we finally were able to enact legislation to protect the small plane industry, more than 90 percent of it was wiped out. That industry, which was on the verge of extinction just a few years ago, has now rebounded. Similarly, they never have questioned whether the asbestos suits were the best way to get recovery for workers who had alleged injury from asbestos exposure. Those suits have made a handful of lawyers fabulously

wealthy. They have taken between 30 percent and 40 percent of all the amounts recovered, largely in class-action suits. Other legal fees have moved the total up to 60 percent, so the average recovery has been just 40 percent. On top of that, those suits by class-action lawyers ended up putting every single asbestos-producing company in America into bankruptcy. Many of those companies produced many other products besides asbestos products, and thousands of people lost their jobs. After years of years of litigation, 200,000 cases have been concluded, 200,000 are still pending, and another 200,000 are expected to be filed. The sheer stupidity of a system that destroys businesses, making recovery all but impossible, that leaves victims uncompensated, and that makes billionaires out of a few lawyers does not phase many of our Democratic colleagues. Instead, as in the tobacco litigation, they champion trial lawyers who take huge sums from class-action lawsuits. They call those lawyers the cream of the legal profession who deserve every penny they squeeze out of defendants, even if the people they are supposedly representing see next to nothing, and sometimes even nothing, in compensation. Trial lawyers very much appreciate the unswerving support of most Democrats. They show that appreciation with their campaign contributions. Trial lawyers provide most of the legal campaign contributions that Democrats receive.

The Y2K problems are all going to occur at the same time, and they will be a one-time event. Our goal should be to fix the problems as swiftly as possible, not to tie people and companies up for years in court. Some of the existing Y2K suits are already a couple of years old--do we want Y2K litigation swamping our court systems for years to come, or do we want to just get the problems fixed? Businesses and consumers know the answer--they just want their computer systems to work. Our colleagues have gone on and on about how this legislation will be so harmful for small businessmen, yet the National Federal of Independent Businesses, which has over 600,000 small business members, strongly supports this bill. Small businesses do not want to go to court--they like the provisions of this bill that will allow them to get their systems fixed quickly. If we can get rid of the threat of unjust, punitive class-action lawsuits, we believe that we will in fact be able to fix most systems before the turn of the century so that there will be very few system failures. The longer we wait, the more businesses will divert resources to preparing legal defenses instead of using those resources to fix problems.

The States are responding to the Y2K litigation threat, but their responses will also create problems. At present, there are more than 100 bills pending in State legislatures, each of which has its own theories of recovery, limitation on liability, and changes in judicial procedures. The differing approaches that are taken are going to end up encouraging forum shopping. Lawyers will seek out the States that give them the greatest chance of making obscene profits. They will not go to States that limit punitive damages or that put controls on class-action suits; instead, they will go to those few States that are actually considering legislation that will encourage more litigation, such as by allowing recovery from companies and individuals without having to provide any showing of fault on the part of those companies or individuals. A few small States will likely make a cottage industry out of Y2K litigation, and in the process will destroy tens of thousands or even hundreds of thousands of jobs in other States when they wipe out businesses. Yet another problem is that there will even be conflicting results within a State. One judge and jury may end up finding in favor of a defendant, and another judge and jury, simultaneously considering a case with the same basic set of facts, may come to exactly the opposite conclusion. There will be no consistency--defendants in suits will be no better off under such a system than they would if their fate were to be determined by rolling dice.

Historically, the United States Congress and State legislatures have both set standards for lawsuits. They have set the bases of liability, they have put limits on how long one may wait from an injury until one files a lawsuit, and they have set numerous other standards. Congress has gotten involved when national interests have been at stake. In this case, the national effect that Y2K litigation could have is undeniable. A few States, and a patchwork of differing standards from State to State, could cripple the high-technology industry in America, which deserves much of the credit for the strength of our economy. We ought to step in and set uniform standards that will quickly get the Y2K issue behind us. We want results, not litigation. If companies have caused problems, they should fix them. Arbitration should be encouraged, and settlements should be quickly reached. Most Senators, in fact, are in agreement on most of the steps that should be taken. Numerous compromises have been negotiated in the bill before us. In general, those compromises reflect a middle ground between the steps being taken by the States. For instance, many States have proposed eliminating, or have eliminated, joint and several liability, others have limited it, and others still have decided that no limits should be imposed. This bill will impose some limits. Similarly, some States have suggested that there should be no punitive damages, while others have done away with them. This bill will limit punitive damages to 3 times actual damages. This limitation will encourage settlements. For instance, if a defendant offers a settlement of $200,000 in a case in which actual damages are around $150,000, many lawyers will reject it because they figure that if they go to court they are confidant that they will not get much less than $200,000 but that they also may hit the jackpot and get $2 million or more in punitive damages. A limit of 3 times actual damages will encourage settlements.

We believe that we are very close to an agreement. Many changes have been made in order to gain support from certain Democratic Senators. Many of us frankly believe that those changes have weakened the bill. If we continue to compromise, and water down the bill's provisions, we will soon be left with nothing but a pretend reform bill. We are not interested in pretending to do something. Our goal is to fix the Y2K problems instead of dragging businesses and consumers into a litigation nightmare that could seriously harm our high-technology industry, cost tens of thousands of dollars, and impose litigation costs that would

inevitably be passed on to consumers in higher prices. Those Democrats who support this bill are going to vote against cloture in a show of party unity. They know a few more of their Democratic colleagues will support this bill if a few more, or a lot more, compromises are made, and they are representing those Senators by voting against cloture. We urge them to reconsider their position. This bill should pass, and they know it. They need to put the good of the country ahead of their party's interests. No bill would be better than a pretend bill. We think that we are very close to an agreement, but we also think that Democrats are very close to killing this bill.

Those opposing the motion to close debate contended:

Argument 1:

There is nothing wrong with the tort system that needs to be fixed. It has worked well for 200 years and will continue to work well if the Federal Government just stays out of it. Our colleagues say that they want to pass this bill because of the supposed huge litigation costs that are going to come about from the Y2K bug. We have seen no evidence that there will be any such huge costs. Only a little more than 40 suits that we know of have been filed to date, half of which have been dismissed as frivolous, and some of which have resulted in jury awards. In one case, a doctor had purchased a computer system which he had been promised would meet his business needs for years, and he was then sent a notice the following year saying that he needed to buy a "patch" for his computer to make it Y2K compliant. The cost of the patch that the company tried to sell him was more than he had paid for the computer system. He went to court, and he also found thousands of other doctors who were similarly situated. Once he found those other doctors the company agreed to settle the case by giving the patches to those other doctors for free. Even if it turns out that the litigation costs will be high, we see no justification for limiting them. If they are high, it means that juries have found that high-technology companies are guilty of causing significant harm to consumers. If the choice is between protecting consumers who have been harmed or protecting rich computer companies that have caused the harm, we will of course choose the former. We have been fighting these efforts to subvert the tort system for years. On issues from product liability to medical malpractice, we have had to fight one effort after another to take away the constitutional right to have a jury trial to sue for damages. Now we have this effort, which is supposedly narrowly focused on just the Y2K issue, but, after it passes, we know our colleagues will try to use it as an example for other efforts to subvert the jury system. We are willing to be reasonable. For instance, we will support a delay for filing suits, as proposed in this bill, so when companies are threatened with suits they will be able to make repairs during the delay in order to avoid being taken to court. However, we will definitely not support other provisions in this bill, particularly the limits on joint and several liability. That fundamental principle on which so many of our States' tort systems rest should not be eroded. Therefore, we strongly oppose the motion to invoke cloture.

Argument 2:

We believe a few more compromises should be made to increase bipartisan support for this bill. If such changes are made we will support cloture.