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Products Liability in the New Millennium: Products Liability and the Y2K Crisis

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Comment: Products Liability in the New Millennium: Products Liability and the Y2K Crisis

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I. INTRODUCTION

{1} Imagine the following scenario. It's December 31, 1999 and two minutes until midnight. The champagne has just been poured and everyone is joyfully preparing to welcome in the new millennium. The clock ticks and the countdown begins. While millions of New Yorkers push and shove, millions more gather around television sets to catch a glimpse of the famous "ball" as it begins its descent in Times Square. Five . . . Four . . . Three . . . Two . . . One . . . "Happy New Year!!!" Little does the crowd know, that as they disperse and seek their freedom, so are thousands of angry prisoners. An embedded computer chip exists in the cell doors of a maximum security prison. As we enter the Year 2000, the embedded chip does not. It has just become the first victim of the Year 2000, better known as the "Y2K" problem. The now-escaped convicts go on a riot where many people are injured and killed. As a result, the manufacturer of the locking mechanism is sued under the theory that its product had a defect that caused physical damage to both persons and property.

{2} This is the exact scenario that has Norwegian officials crippled with fear.[1] Injuries that may result from similar occurrences could flood the courts with litigation - specifically, in the products liability arena. This comment examines the application of products liability law to the Y2K problem. Part II of this comment provides an overview of the Y2K problem itself. Part III reviews the potential claims under a products liability theory in the context of the Y2K problem. Part IV explores the possible limitations and defenses to Year 2000 liability. Finally, Part V analyzes the rationale behind federal legislation which would absolve manufacturers of liability for producing non-Y2K compliant products.

II. OVERVIEW OF THE Y2K PROBLEM

{3} The Y2K problem exists because most computer hardware and software is unable to process date information later than December 31, 1999. Many computers use two digits to signify the year, thus the Year "1999" becomes simply "99." These same computers will interpret the Year "2000" as "00" and will be unable to determine if it is the Year 1900 or 2000. As a result, computers will either malfunction or shut down altogether. The rationale behind this two digit programming is simple. When computer memory was scarce and expensive, programmers used only two digits to signify the year in order to save money on processing costs. Robert Bemer, a pioneering scientist, first recognized the potential for Y2K problems in 1960.[2] In 1970, Bemer, along with eighty-six technical societies, counseled the Bureau of Standards to adopt a computer programming standard that used a four-digit rather than two-digit date field in order to avoid the now imminent Y2K problem.[3] The Bureau of Standards, however, decided otherwise and adopted

the two-digit standard.[4]

{4}The Y2K problem, however, is not limited to computer components. Date-sensitive computer chips exist in everything from security systems to missile launch sites. Efforts to remedy the problem are estimated to cost between \$200 billion and \$1 trillion.[5] Y2K's total cost, including repairs and litigation costs, may exceed \$2 trillion in the United States alone.[6]

III. POTENTIAL CLAIMS UNDER A PRODUCTS LIABILITY THEORY

{5}Under products liability law, a manufacturer who produces a product deemed to be defective, or anyone in the chain of distribution of a defective product can be held liable.[7] While there are several avenues of relief available to an injured plaintiff, the most common theories of liability in a products case are negligence, strict liability in tort, and breach of warranty.[8] These legal theories are discussed below.

A. Negligence

{6} A company can be found negligent if it has failed to use reasonable care in either its manufacture or design of a product, or if it has failed to affix proper warnings to the product.[9] Generally, a defendant corporation will be held to the same standard as the reasonable prudent corporation who produces or sells a particular product.[10] To prevail under a theory of negligence, the plaintiff has the burden to prove the following prima facie elements: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty of care; (3) the defendant's action was both the proximate cause and the cause-in-fact of the plaintiff's injuries; and (4) the plaintiff suffered recognizable damages.[11] There is no question that a defendant manufacturer holds a duty of care to produce a safe product. Further, the duty of care extends to anyone who can reasonably be expected to come into contact with the product.

{7}In the Y2K problem context, a cause of action for negligent manufacture will have limited effectiveness because a non-Y2K compliant product results from a design decision, rather than from a manufacturing flaw. *A fortiori*, negligent design will be the prominent theory relied upon in litigation. When bringing an action for negligent design, the plaintiff is alleging that the manufacturer failed to design its products in a reasonably safe manner.[12]

{8}Is it fair to say, however, that the product designer's decision to produce a non-compliant product is per se negligence? In many instances, the decision to produce a non-Y2K compliant product was not negligent. In the 1960's computer programmers saved valuable memory space, not to mention capital, by programming the computer to recognize a year by only two digits - not four.[13] Programmers knew that in the distant future (the Year 2000, for instance) there would be new and different computers. But, not in their wildest dreams could they have imagined that their programming would still be in use forty years later.

{9}In the landmark case, *United States v. Carroll Towing Co.*, [14] Judge Learned Hand devised the modern formula for negligence. Judge Hand declared that a barge owner's duty to see that the barge did not break away from its moorings was a function of three variables:

- (1) The probability that she will break away;
- (2) the gravity of the resulting injury, if she does;
- (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P: i.e., whether $B < PL$. [15]

{10}Applying this formula to a possible Y2K scenario, suppose that a corporation uses a Commodore-64

with 64K of RAM^[16] to perform daily bookkeeping, and this non-compliant computer crashes on January 1, 2000. As a result, the company loses its last twenty years of business records. In today's world of constantly changing technology, no reasonable and prudent consumer can expect a computer manufacturer to bear the burden (the "B" in the B < PL formula) of ensuring that a computer it manufactured twenty years ago is Y2K compliant. The burden placed on the manufacturer greatly outweighs the likelihood of harm in such a scenario. Furthermore, the computer's antique value far exceeds any functional value.

{11} On the other hand, if Microsoft recently developed non-Y2K compliant software, Microsoft would likely be found negligent. This leads to the tangled web of foreseeability, a concept that often impacts negligence decisions.^[17] Information regarding the Y2K problem is so prevalent, it is almost impossible to escape. Likewise, computers are now so widespread that they are in nearly every home and business. Therefore, it is definitely foreseeable that a recently developed, non-compliant product could cause havoc in people's lives.

{12} The use of foreseeability in negligence law looks to both sellers and consumers.^[18] If the consumer has unreasonable expectations of a product or puts the product to an unforeseeable use, a judge will most likely grant a directed verdict in favor of the defendant manufacturer.^[19] Employing the previous scenario, a judge will likely grant a directed verdict in favor of the manufacturer of the Commodore-64. It is neither reasonably foreseeable nor reasonably expected that a Commodore-64 should make it into the new millennium. Any reasonable and prudent person should realize that the Commodore-64 is a "technological dinosaur" of the past, whose remnants should be deservedly fossilized.

{13} Contemporary Microsoft products, however, would not fair as well. A judge would be more inclined to hold Microsoft liable, considering the foreseeable nature of current computer software. A plaintiff could demonstrate this argument by presenting a reasonably safer alternative design utilized in other software that appropriately handles Y2K date processing. If Microsoft failed to exercise the standard of care that other similarly-situated manufacturers abide by, Microsoft would be held liable for injuries that result when the product is used in a foreseeable manner.^[20]

B. Strict Liability

{14} To assert a cause of action for strict liability, a plaintiff must establish the following: (1) the seller was engaged in the business of selling the product that caused the harm; (2) the product was defective when sold; (3) the product was unreasonably dangerous or not reasonably safe to the user or consumer; (4) the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; (5) the product caused physical harm to the consumer or damage to the consumer's property; and (6) the product was not fit for its intended or reasonably foreseeable use at the time it left the manufacturer's control.^[21] Liability for defective products is "strict," in the sense that a person whom the defective product has injured need not prove that the manufacturer was negligent. The fact that the product was not reasonably safe and caused injury is enough to attach liability.^[22]

1. Design Defect

{15} Similar to the negligence theories discussed above, a plaintiff may assert claims under a strict liability theory if a product is defective in design, manufacture, or if the manufacturer failed to include warnings of the inherent risks associated with using the product.^[23] In order to sustain a claim for strict liability based on a design defect, the plaintiff must first establish that the decision to design a product without making it Y2K compliant should be deemed a "defect" that makes the product not reasonably safe for its intended use.^[24] However, why should a computer that was state-of-the-art in the 1970's be deemed defective solely because it is not operational thirty years later? How long can a reasonable and prudent consumer expect a computer to last? The answers to these questions are dependent on the jurisdiction in which the case transpires. Some jurisdictions apply a consumer expectations test, while other jurisdictions apply a risk-utility balancing test.

a. Consumer Expectations

{16} Under a consumer expectations test, a product will be deemed defective if "the article sold [is] dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." [26] Application of the consumer expectations test to a Y2K problem may yield unfair results to product manufacturers. Although computers are now in almost every home and part of everyday life, most people have, at best, a perfunctory understanding of how a computer operates. Is it fair to put the fate of a computer manufacturer in the hands of an obtuse America Online user? This author thinks not. Therefore, I contend that the consumer expectations test is not the proper standard in determining whether a non-compliant product shall be deemed defective. As Professors Henderson and Twerski explain, "[the consumer expectation test's] extreme subjectivity leaves the manufacturer open to the real possibility of liability without defect." [27] Under this theory, application of the consumer expectations test to a Y2K problem could even attach liability to our Commodore-64 manufacturer. In cases dealing with complex products, the "ordinary consumer" may not possess the requisite knowledge necessary to determine whether a product is unreasonably dangerous. [28]

b. Risk-Utility Analysis

{17} A Y2K case would be better decided under a risk-utility analysis. [29] Risk-utility analysis has become the exclusive test for strict products liability for design defect in many jurisdictions. [30] The New Jersey Supreme Court has stated that, "[a] risk-utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the public." [31] While risk-utility sounds in negligence, most courts distinguish between strict liability and negligence in design defect cases. [32] In *Dart v. Wiebe Mfg., Inc.*, [33] the Arizona Supreme Court held that there was a difference between applying a risk-benefit analysis in a negligent design case versus a strict-liability design case. [34] The court explained that, "[n]egligence theory concerns itself with determining whether the conduct of the defendant was reasonable in view of the foreseeable risk of injury; strict liability is concerned with whether the product itself was unreasonably dangerous." [35] In the Commodore-64 hypothetical, under a negligence theory we were concerned with the actual decision to "build" computers which were Y2K non-compliant. [36] Here, the concern is with the Commodore-64 itself; i.e., is the Commodore-64 a time bomb waiting to explode, or is it a product that has reached the end of its expected life span? The author asserts that the latter is more applicable. In his highly influential article, [37] Dean John W. Wade sets forth seven factors in performing a risk-utility analysis. These seven factors are:

1. The usefulness and desirability of the product-its utility to the user and to the public as a whole;
2. The safety aspects of the product-the likelihood that it will cause injury, and the probable seriousness of the injury;
3. The availability of a substitute product which meets the same need and is not as unsafe;
4. The manufacture's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
5. The user's ability to avoid danger by the exercise of care in the use of the product;
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions; and

7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[38]

{18}Under the above analysis, it is clear that the manufacturer of the Commodore-64 should not be held liable for Y2K failure. As previously stated, the principal reason behind signifying the year with only two digits was to save valuable resources. It was impractical at that time to signify the year with four digits. While, it may have been technologically possible to do so, it would have driven up the price of computer chips to immeasurable costs. Furthermore, the user should be fully aware of the risks in operating such a "dated" piece of hardware, since information regarding the Y2K problem has permeated society. The utility that remains in operating this archaic piece of equipment is too minuscule to measure. In this scenario, the doctrine of *caveat emptor* is appropriate.

2. Failure to Warn

{19}In a cause of action for strict liability for defective warnings, the concepts of reasonableness and foreseeability are consequential. A manufacturer is only required to give reasonable warnings about foreseeable risks.[39] The adequacy of a warning will generally depend on the manufacturer's intended market.[40] If a product is intended for use only by trained professionals, then the scope of the warnings required would be significantly less than for a product intended for use by the general public.[41] This is known as the "learned-intermediary" rule.[42]

{20}Numerous other kinds of intermediaries are recognized. For instance, the Arizona Court of Appeals applied the "learned intermediary" rule to a building contractor with respect to polyurethane foam used for insulation.[43] A defendant computer manufacturer may attempt to invoke this rule in the context of Y2K litigation. Must a defendant computer manufacturer provide detailed warnings to the ultimate consumer, or do the warnings stop at the wholesaler/retailer level? The defendant manufacturer or seller may assert that it should have no duty to warn an ultimate user either because a warning had been provided already to the intermediary retailer, or because a warning was unnecessary.[44]

{21}This author contends that application of the "learned intermediary" rule, in this context, eviscerates the rationale behind the rule. The "learned intermediary" rule presupposes that the intermediary has an enhanced level of sophistication and expertise, above and beyond that of the ultimate purchaser.[45] Here, such an assumption cannot be made. Today, one can purchase computers and computer software from any local office supply store, where the "learned intermediary" may be a sixteen-year-old high school student. When contrasted with the scenario in which a medical doctor, with years of training, is the "learned intermediary" to her patient, it is quite obvious that the same level of expertise is not present.

{22}However, where a plaintiff filed suit against a component part manufacturer, such as Intel for its failure to warn of Y2K non-compliance and resulting damage, Intel should be able to successfully apply the "learned intermediary" rule.[46] Intel's provision of warnings to a computer manufacturer is analogous to a pharmaceutical company warning a prescribing doctor. The computer manufacturer is in a far better position to take heed of those warnings than the ultimate purchaser.[47] As a consequence, Intel's duty to warn should be satisfied by warning the computer manufacturer directly or by relying upon the computer manufacturer as a sophisticated and knowledgeable entity to warn the ultimate user.[48]

{23}Strict products liability for failure to warn has obvious application to the Y2K problem. While, most products currently manufactured are Y2K compliant, it is still possible that many are not. If these non-compliant products fail to function because of the Year 2000, plaintiffs will likely claim that the manufacturer is liable for failing to warn of those inherent risks. To illustrate, let us continue with our Microsoft software example.[49] If Microsoft distributed a non-compliant version of Flight Simulator, and damage to consumers' property occurred as a result; Microsoft would be strictly liable if it failed to warn of the inherent risk of

operating non-compliant software. As discussed earlier, the risks involved in operating non-compliant software are so foreseeable, that it would be inexcusable to fail to warn consumers about them.

{24}A warning has been called "a message intended to lessen the risk of personal injury or property damage by inducing certain patterns of behavior and discouraging or prohibiting certain other patterns of behavior."

[50] In our previous example, if users of Microsoft's Flight Simulator were given a warning such as:

"CAUTION: THIS SOFTWARE MAY NOT BE YEAR 2000 COMPLIANT, DAMAGE TO PROPERTY MAY RESULT IN ITS USE,"

they would be making an informed choice before using this software because they would have had the opportunity to find a more suitable and safer alternative computer program.

{25}A manufacturer may also have a "post-sale" duty to warn of potential defects.[51] If the manufacturer or seller learns of a potential defect after the product is sold, it may have an obligation to inform consumers.[52] This duty may require the manufacturer to recall its products or to offer to "fix" those products if defects are discovered after the product is sold.[53] Though there has been some difference as to the circumstance which may give rise to this "post-sale" duty, most courts have held that a seller or manufacturer should provide a "post-sale" warning when a reasonable person in the same position would do so.[54] However, in most of the states which have adopted a "post-sale" duty to warn, knowledge of advances in the state-of-the art has been held not to give rise to a "post-sale" duty to warn.[55] The Restatement (Third) of Torts: Product Liability, which uses a reasonable person test to determine liability for "post-sale" failure to warn, states four factors to consider:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.[56]

This basis for liability may have special application to the Y2K problem because considerable attention has been paid to the topic over the last several years. Software developers who have recently discovered their product's inability to deal with Y2K date processing may have a duty to warn of their product's deficiency.

{26}Application of the above factors to our ongoing hypotheticals indicates that, in order to escape liability, Microsoft will have to warn the users of its Flight Simulator software. On the other hand, it is highly improbable that a court would require a "post-sale" warning from the manufacturer of the Commodore-64. To require the manufacturer of such an antiquated appliance to locate any of its remaining owners would be unduly burdensome, particularly when a reasonable expectation of a computer's life is taken into consideration.

3. Breach of Express Warranty

{27}A company may have a breach of express warranty claim against a vendor if the vendor provided an express warranty against Y2K failure and the product fails because of Y2K problems. The Uniform Commercial Code ("UCC") dictates that, "[a]ny . . . promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the . . . promise." [57] No particular words are necessary to create an express warranty. For, "(a)ny affirmation of fact . . . made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation" [58]

{28}The scope of express warranties and their applicability to the Y2K problem will vary depending upon

the specific language used in the contract. In determining whether an express warranty was created, courts look to the language of the sales contract, the product manuals, or other documentation describing the product.^[59] For example, several lawsuits that have been filed against software vendors in connection with Y2K have alleged that the vendor's marketing materials create the basis for a breach of express warranty claim.^[60] It is unlikely that any "affirmation of fact" regarding Year 2000 reliability was made regarding the Commodore-64 or any product manufactured before 1990. The Flight Simulator software, however, may be more susceptible. If any brochures or materials that can be construed as affirmations to the reliability of the software came with the product, then the manufacturer will be considered to have breached its warranty.^[61]

4. Breach of Implied Warranties

{29} A company may also have viable claims against its vendors for breach of implied warranties.^[62] Claims based on implied warranty permit ultimate purchasers to sue for product "defects" that render the product unfit for the ordinary purposes for which the product was sold.^[63] The inquiry in such cases focuses on the ordinary expectations for the performance of the product when used in a customary, usual, and reasonably foreseeable manner.^[64] Because this inquiry is similar to the inquiry undertaken in a tort-based action under products liability theories, some states have merged the two common law causes of action either by statute or by judicial action, at least with respect to actions for personal injury.^[65] However, an implied warranty of fitness for ordinary purposes does not mean that the product must meet all of the buyer's expectations.^[66]

a. Implied Warranty of Merchantability

{30} An action for breach of the implied warranty of merchantability requires that the product have a defect that renders the product unfit for the ordinary purposes for which it is used.^[67] An implied warranty of merchantability, unless modified or excluded, is a warranty that products sold by a "merchant" will be merchantable.^[68] The warranty is implied in a sales contract if the seller is a merchant with respect to goods of that kind.^[69] The UCC provides a non-exhaustive list of the meaning of merchantable.^[70]

{31} This implied warranty has specific application in the Year 2000 context. If a company has purchased equipment (such as computer, phone, or data processing systems) with an expected useful life that runs past January 1, 2000, and the product fails to function either before or after January 1, 2000 because of the Y2K problem, the purchaser may argue that the equipment is unfit for the ordinary purposes for which it is used. While it may be highly likely that a contract for this type of equipment or product would expressly limit or waive this kind of implied warranty, the implied warranty of merchantability may form the basis of a claim if it is not limited or waived.

b. Implied Warranty of Fitness for a Particular Purpose

{32} A warranty of fitness for a particular purpose is implied, unless excluded or modified, when the seller, at the time of contracting, has reason to know any particular purpose for which goods are required, and that the buyer is relying on the seller's skill or judgment to select or to furnish a suitable product.^[71] The seller does not have to be a merchant.^[72] Any seller possessing sufficient skill and knowledge to justify the buyer's reliance could be subject to the warranty of fitness for a particular purpose.^[73]

{33} Again, this has special application in the Year 2000 context, especially with complex systems designed to evaluate date-sensitive data and which will involve date-sensitive information (such as a payroll or accounting systems). For these types of systems, a company may be able to claim that its very purpose assumes that it can properly evaluate date-sensitive information over a long period (which would include post-January 1, 2000), and therefore, the seller would have known that the product was intended to be Year 2000-compliant.

IV. LIMITATIONS AND DEFENSES TO YEAR 2000 PRODUCTS LIABILITY

{34} There are several legal theories available which can either limit, or even eliminate liability entirely. The applicability of these limitations and defenses vary from state to state.

A. Economic Loss Rule

{35} The economic loss rule states that a plaintiff cannot bring a tort claim if he only suffers economic losses, including loss of the product itself, instead of physical injury or injury to others' property.[74] In *East River Steamship Corp. v. Transamerica Delaval Inc.*, [75] the United States Supreme Court held that there is no tort liability when a defective commercial product injures only the product itself, thus causing only economic losses.[76] The Court further stated that,

contract law, and the law of warranty in particular, is well suited to setting the responsibilities of a seller of a product that fails to perform the function for which it was intended[] Given the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better.[77]

The economic loss rule may have a direct impact on claims arising out of Y2K. While it is possible that non-compliant products could result in personal injury or property damage, it is much more likely that Y2K will result in disruptions to business and loss of revenue. For these types of injuries, the availability of tort claims may be limited.

B. Statutes of Limitation and Statutes of Repose

{36} A statute of limitation will bar a claim and the action will be dismissed unless a plaintiff commences a lawsuit within a certain number of years from the time the injury occurred. While the exact limitation period varies among jurisdictions, many states have a three year statute of limitations for negligence and strict liability suits, which usually begins to run from the date of the alleged injury.[78] In the context of the Y2K problem, the injury would first occur when the product begins to perform improperly due to the Y2K defect - which presumably could occur prior to the Year 2000 for users of a product who work with forward dating, such as credit cards that expire after 1999. In contrast, the statute of limitations for breach of warranty under the UCC is four years and begins to run from the time of sale, not the time of injury.[79] Since a long period of time may pass in a Y2K scenario, statutes of limitations may play a large role in limiting product liability cases.

{37} Similarly, statutes of repose may limit many Y2K claims. These statutes terminate any right of action after a specified time period, following the manufacture or first sale of the product, regardless of whether an injury has yet occurred.[80] The rationale behind statutes of repose is that after a certain number of years, a presumption arises that a product's "useful safe life" has expired.[81] Further, statutes of repose "operate as a grant of immunity serving primarily 'to relieve potential defendants from anxiety over liability for acts committed long ago.' "[82]

{38} This notion of a product's "useful safe life" will spark a substantial amount of litigation in the Y2K arena. For instance, what is the useful safe life of a Commodore-64? Under a typical statute of repose, a presumption arises in which harm that occurs more than twelve years after delivery of the product has occurred after its "useful safe life." [83] Furthermore, "[t]his presumption may only be rebutted by a preponderance of the evidence." [84] Accordingly, the manufacturer of the Commodore-64 will be absolved of any liability which occurs after the year 1992 (assuming the Commodore-64 was purchased in 1980). In

this scenario, Y2K liability is not even an issue.

C. The "State-of-the-Art" Defense

{39}A product cannot be regarded as defectively designed simply because after the sale, and before the time of trial or a claimant's injury, there was a technological breakthrough that made it possible to eliminate the product's risk of harm altogether or to reduce the magnitude of the danger.[85] Thus, the majority of courts have held that the question of whether it was feasible to design a safer product must be determined at the time the product was designed.[86] The state-of-the-art defense could be successfully used in a Y2K case if the product in question were designed many years ago when there was less computing power, and memory space was scarce and expensive.

D. Contributory Negligence/Comparative Fault and Assumption of the Risk

{40}Contributory negligence or comparative fault defenses apply if it can be proven that the plaintiff's own negligence contributed to his injury. If a valid comparative fault defense is established, the plaintiff's damages will be reduced in proportion to the defendant's fault.[87] Meanwhile, if a contributory negligence defense is established, the plaintiff's claim may be completely extinguished.[88] In order to establish the defense of assumption of the risk, a defendant must prove that the plaintiff had both knowledge that the risk existed, and that the plaintiff voluntarily accepted the risk.[89] For several years now, the Y2K problem has been highly publicized. Plaintiffs who have failed to take reasonable measures to prepare for it may be held to have assumed the risk.

V. CONCLUSION: CURRENT Y2K LEGISLATION

{41}Those who face potential litigation because of Y2K glitches have lobbied hard to promote federal legislation that would provide broad immunity from liability. Recently, Congress passed Senate Bill 96, better known as "the Y2K Act." [90] President Clinton initially vowed to veto the legislation, but after some minor concessions, he agreed to go along with the bill because of the "unique and unprecedented" nature of the Y2K problem.[91]

{42}The bill is designed to protect businesses that have profited from the sale of products that are not Y2K-compliant, and to shift the burden of paying for damages that occur to small businesses and consumers.[92] Under the Y2K Act, officers and directors of companies will be protected from liability in many instances. Punitive damages against responsible companies will be limited, even where the company showed a conscious disregard for the safety of others.[93] Furthermore, a waiting period will be required before an injured party can bring any legal action, and limits will be placed on class actions.[94]

{43}The various provisions are both unrealistic and potentially harmful to parties affected by Y2K failures. For example, the legislation provides a ninety day "cooling off period" before any legal action can be taken against a company responsible for a Y2K failure. The purpose of this provision is to give the company responsible for the failure an opportunity to attempt to rectify the failure.[95] A small business that suffers a Y2K failure on January 1st, will have to wait until April 1st to take legal action. Not many small firms are going to be able to put their customers and business on hold for three months, let alone survive financially during that time. Such a waiting period is unreasonable in the Y2K context, where the parties responsible have been aware for years that this problem was imminent and should have already taken steps to prevent failures before they occur.

{44}The limits on punitive damages are designed to protect companies whose conduct is most egregious.

Punitive damages generally are intended to punish a party who acts recklessly or maliciously, such as a company that markets a product knowing it is defective and will cause harm.^[96] The legislation makes unprecedented requirements for imposing such damages in Y2K cases. Even when this difficult standard is met, the amount will be capped.^[97]

{45} The restriction on class action lawsuits does not benefit consumers whose only damage is the amount spent on a non-compliant software product for use in their home or small business.^[98] The Y2K bill will make it more difficult for consumers and small businesses to band together, commence a class action, and share the costs of litigation against a giant company. There are already laws restricting when lawsuits can be certified as class actions.^[99] In fact, very few of the approximately fifty Y2K class actions filed so far in state and federal courts have received certification as class actions.

{46} Having courts mired in litigation over damage claims resulting from Y2K failures will have an adverse impact on us all. Unfortunately, the legislation passed by Congress disregards the interests and needs of small businesses and consumers and only serves to provide additional incentive for the companies responsible to ignore the problem. Legislation is needed to encourage the complete disclosure of Y2K compliance issues and to provide incentives to remedy the problem.

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[1]. *See Y2K May Lead Norway To Free Inmates*, Associated Press Online, June 17, 1999, available in Westlaw, ALLNEWS, 1999 WL 17814969.

[2]. *See Y2K In the Courts: Will We Be Capsized by a Wave of Litigation?: Hearings on S. 96 Before the Special Comm. On the Year 2000 Tech. Problem*, 106th Cong. (1999) (Opening Statement of Howard L. Nations).

[3]. *See id.*

[4]. *See id.*

[5]. *See S. REP. NO. 106-10*, at 2 (1999).

[6]. *See id.*

[7]. *See generally Welge v. Planters Lifesavers Co.*, 17 F.3d 209 (7th Cir. 1994); *Anderson v. Somberg*, 338 A.2d 1 (N.J. 1975), *cert. denied*, 423 U.S. 929 (1975) (explaining that the potentially liable population includes wholesalers).

[8]. *See PROSSER, LAW ON TORTS* § 95 (4th ed. 1971).

[9]. *See Roginsky v. Richardson-Marrell, Inc.*, 378 F.2d 832 (2nd Cir. 1967); *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969) (recognizing negligent misrepresentation as a valid cause of action in California); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (N.Y. 1916) (holding that negligent testing and inspection are recognized causes of action under New York state law).

- [10]. See RESTATEMENT (SECOND) OF TORTS §§ 282-283 (1965). See also *City of Thomasville v. Lease-Afex, Inc.*, 268 S.E.2d 190, 194 (N.Y. 1980), in which the court used an expert's statement that the purpose of having a fire suppression system is to have it function properly, concluding that "[t]he fair inference for the plaintiff from this evidence is that the standard of care of a reasonably prudent fire suppression system manufacturer is to manufacture a system which functions properly."
- [11]. See generally *United States Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (enumerating the prima facie elements of negligence); *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959).
- [12]. Several decisions have suggested that negligent design of computer systems can serve as a basis of liability. See *Invacare Corp. v. Sperry Corp.*, 612 F. Supp. 448 (N.D. Ohio 1984); *Shell Pipeline Corp. v. Coastal States Trading Co.*, 788 S.W.2d 837 (Tex. Ct. App. 1990).
- [13]. See S. REP. NO. 106-10, *supra* note 5.
- [14]. 159 F.2d 169, 173 (2d Cir. 1947).
- [15]. *Id.*
- [16]. See Eric Watermolen, *The Basics of Buying a Personal Computer System* (last modified Aug. 29, 1999) <<http://www.magicnet.net/~ericwat/buyipc.htm>> (explaining that, "[t]he more RAM you have, the faster the computer can perform tasks. RAM is usually used in blocks of four. The minimum amount of RAM you should have is 16 megabytes. The standard now is 32 megabytes. As computers improve, they seem to need more memory, and 64 megabytes will surely be considered standard in the future."). Most new mid-range computers today have 64mb, or 64,000 kb. See generally *Best Buy Online Product Info* (visited Sept. 29, 1999) <<http://www.bestbuy.com/productinfo/products/models.asp?C=33&P=N>>. A Commodore-64 was a popular computer in the 1980's. See, e.g., *Greg and David's C64 Web Site* (last modified April 5, 1998) <<http://www.ozemail.com.au/~gvincent/>>.
- [17]. See Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1421 (1961).
- [18]. See *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).
- [19]. See *Killeen v. Harmon Grain Prods., Inc.*, 413 N.E.2d 767, 773 (Mass. App. Ct. 1980) (affirming a directed verdict in favor of the manufacturer and finding that the manufacturer need not have anticipated that a child would be injured in a fall while sucking on a toothpick). See *Phillips*, 525 P.2d at 1037.
- [20]. See PROSSER, *supra* note 8 at § 96.
- [21]. See e.g., *Gebo v. Black Clawson Co.*, 703 N.E.2d 1234, 1237 (N.Y. 1998); *Liriano v. Hobart Corp.*, 700 N.E.2d 303, (N.Y. 1998).
- [22]. See *Gebo*, *supra* note 21 at 392-394.
- [23]. See *id.* See e.g., *Liriano*, *supra* note 21 at 305.
- [24]. See *Liriano*, *supra* note 21 at 307.
- [25]. See *infra* III(B)(1)(b) Risk-Utility Analysis.
- [26]. RESTATEMENT, *supra* note 10 at § 402A cmt. i.

[27]. Henderson & Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV.1263, 1295 (1991).

[28]. *See* Turner v. General Motors, 584 S.W.2d 844 (Tex. 1979); *see also* Gann v. International Harvester Co., 712 S.W.2d 100 (Tenn. 1986) (stating that the consumer expectation test assumes that the consumer knows what he is buying, when in fact the consumer does not have adequate information upon which to base his expectations).

[29]. *See, e.g.*, Dart v. Wiebe Mfg. Inc., 709 P.2d 876 (Ariz. 1985). Sometimes this test is called a risk/benefit analysis.

[30]. *See e.g.*, Hull v. Eaton Corp., 825 F.2d 448 (Mich. 1987); Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (D.C. Cir. 1984).

[31]. O'Brien v. Mushkin Corp., 463 A.2d 298, 305 (N.J. 1983).

[32]. *See e.g.*, Bilotta v. Kelly Co., 346 N.W.2d 616, 622 (Minn. 1984); Slisze v. Stanley-Bostitch, 979 P.2d 317 (Utah 1999).

[33]. 709 P.2d 876.

[34]. *See id.* at 880.

[35]. *Id.* (citing Salt River Project Agr. V. Westinghouse, 694 P.2d 198, 206 (Ariz. 1984); Beach v. City of Phoenix, 667 P.2d 1316, 1319 (Ariz. 1983)).

[36]. *See supra* notes 17-20 and accompanying text.

[37]. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

[38]. *See id.* at 837-38.

[39]. *See* Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971).

[40]. *See id.*

[41]. *See generally* Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969) (establishing that where a manufacturer distributed drugs among physicians for prescription, a lesser warning was sufficient as physicians would have their own literature on the drug); Martin v. Ortho Pharmaceutical Corp., 661 N.E.2d 352 (Ill. 1996) (warning to a physician regarding a prescription can be limited).

[42]. Martin v. Hacker, 628 N.E.2d 1308, 1311 (N.Y. 1993) "Warnings for prescription drugs are intended for the physician, whose duty it is to balance the risks against the benefits of various drugs and treatments and to prescribe them and supervise their effects. The Physician acts as a 'learned intermediary.' "

[43]. *See* Dole Food Co., Inc. v. North Carolina Foam Indus., Inc., 935 P.2d 876, 880 (Ariz. Ct. App. 1996).

[44]. *See, e.g.*, Davis v. Cessna Aircraft Corp., 893 P.2d. 26, 38 (Ariz. Ct. App. 1994) (citation omitted).

[45]. *See, e.g.*, Stone v. Smith, Kline & French Lab, 447 So. 2d 1301, 1305 (Ala. 1984).

[46]. *See id.*

[47]. *See id.*

[48]. *See id.*

[49]. *See infra* Section III(A) for Microsoft software example introduction.

[50]. Alan L. Dorris & Jerry Purswell, *Warnings and Human Behavior: Implications for the Design of Product Warnings*, 1 J. PROD. LIAB. 225, 225 (1977).

[51]. In several jurisdictions the courts have found a "post-sale" duty to warn. *See generally* *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2nd Cir.), *cert. denied*, 396 U.S. 959 (1969)(applying to a airplane); *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 280 (4th Cir. 1987)(applying to a coal mining machine); *Davies v. Datapoint Corp.*, No. 94-56-P-DMC, 1996 U.S. Dist. LEXIS 13272 at *8-12 (D. Me. Jan. 19, 1996) (applying to a computer keyboard).

[52]. *See, e.g.*, *Clark Equipment Co. v. The Dial Corp.*, 25 F.3d 1384 (7th Cir. 1994).

[53]. *See* *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993).

[54]. *See generally* *Patton*, 861 P.2d at 1314-1315 (setting forth numerous reasonableness factors).

[55]. *See id.* at 1311. (choosing not to "impose a requirement that a manufacturer seek our past customers and notify them of changes in the state of the art").

[56]. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (b) (1997).

[57]. U.C.C. § 2-313(1)(a) (1999).

[58]. *Id.*

[59]. *See, e.g.*, *Neville Constr. Co. v. Cook Paint & Varnish Co.*, 671 F.2d 1107 (8th Cir. 1982) (concerning an advertising brochure); *Beyette v. Ortho Pharm. Corp.*, 823 F.2d 990 (6th Cir. 1987) (concerning product literature); *Anthony v. General Motor Corp.*, 109 Cal. Rptr. 254 (1973) (concerning an owner's manual).

[60]. *See generally* *Atlaz Int'l v. Software Business Tech., Inc.*, No. 172539, class action complaint ¶ 8 (Cal. Super. Ct. Cty. of Marin) (referring to software "designed to meet the needs of business today and into the next century"); *Paragon Networks Int'l v. Macola, Inc.*, No. 98CV0119, class action complaint ¶¶ 11-14 (Ct. of Com. Pleas, Marion Cty., Ohio) (referring to "Accounting Software You'll Never Outgrow").

[61]. *See id.*

[62]. *See* U.C.C. § 2-314(1) (1999).

[63]. *See id.*

[64]. *See id.* cmt. 2.

[65]. *See supra* note 90.

[66]. *See* U.C.C. § 2-314 cmt. 2. (1999).

[67]. *See id.* § 2-314.

[68]. *See id.*

[69]. *See id.*

[70]. *See id.* § 2-314(3).

[71]. *See id.* § 2-315; *see, e.g.*, *Eichler Homes v. Anderson*, 9 Cal. App. 3d 224, 231 (1970).

[72]. *See id.* § 2-314 cmt. 4.

[73]. *See id.* § 2-315.

[74]. *See East Steamship Corp. v. Transamerica Delaval, Inc.* 476 U.S. 858 (1986).

[75]. *Id.*

[76]. *See id.*

[77]. *Id.* at 872.

[78]. *See* NY CPLR § 214-c (McKinney's 1990); *see also* Va. Code § 8.01-244 (1992) (two-year statute of limitations).

[79]. *See* U.C.C. § 2-725(1) (1999).

[80]. *See e.g.*, *Barber Greene Co. v. Urbantes*, 517 So. 2d 768 (Fla. App. 1988); *Berry v. Berry Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

[81]. Bruce Schroeder, Comment, *Washington's Useful Safe Life: Snipping Off the Long Tail of Product Liability?*, 57 WASH. L. REV. 503 (1982).

[82]. *Menne v. Celotex Corp.*, 722 F. Supp. 662, 665-666 (D. Kan. 1989) (quoting *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987)).

[83]. WASH. REV. CODE § 7.72.060 (1992).

[84]. *Morse v. City of Toppenish*, 729 P.2d 638, 641 (Wash. Ct. App. 1986).

[85]. *See Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980).

[86]. *See Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968); *see also Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549 (Cal. 1991).

[87]. *See* CONN. GEN. STAT. ANN. § 52-572(m)(1955); OR. REV. STAT. § 30.905 (1977); KAN. CIV. PROC. CODE ANN. § 60-3301(1981); WASH. REV. CODE ANN. § 7.72.010(1981); N.J. STAT. ANN. § 2A:58C-1(b)(3) (1987).

[88]. *See generally Jones v. Meat Packers Equip. Co.*, 723 F.2d 370 (4th Cir. 1983) (explaining that in Virginia, contributory negligence is a complete bar to an action based on negligence).

[89]. *See Hovanec v. Harnischfeger Corp.*, 807 F.2d 448 (5th Cir. 1987).

[90]. 15 U.S.C. §§ 6601-6617 (1999).

[91]. Statement by the President - H.R. 775, the "Y2K Act" (visited Sept. 30, 1999) <<http://www.itpolicy.gsa.gov/mks/yr2000/pres720.htm>>.

[92]. See S. REP. NO. 106-10, *supra* note 5.

[93]. See 15 U.S.C. § 6604(a) (1999).

[94]. See *id.* § 6606 (1999)

[95]. See *id.*

[96]. See *Burke v. Deere & Co.*, 780 F.Supp. 1225, 1237 (S.D. Iowa 1991).

[97]. See 15 U.S.C. § 6604(b) (1999).

[98]. See *id.* § 6614 (1999).

[99]. See FED. R. CIV. P. § 12.

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