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Buyer Beware: A Discussion of the Limitation of Liability for Year 2000 Failures

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Buyer Beware: A Discussion of the Limitation of Liability for Year 2000 Failures

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I. INTRODUCTION

Many products and computer systems will fail when the year 2000 arrives. Any individual, business or organization without a Year 2000 plan for detecting problems, evaluating suppliers and remediating systems will likely face claims of liability from shareholders, suppliers and customers. Information regarding remediation efforts is readily available and will not be discussed here. Rather, the focus of this article is to summarize the current state of the law relating to the liability of individuals, businesses and governments which cause damage to others from year 2000 failures.

II. THE PROBLEM

Year 2000 failures are caused by the implementation of a programming "short-cut" employed by thousands of computer programmers as late as the mid-1990's to save memory which, at the time, was quite expensive. Specifically, the programmers used two-digit variables to represent the year rather than the more accurate four-digit variable (i.e., 97 instead of 1997). This programming glitch creates a problem when these computer programs are required to make date calculations beyond the year 2000. In such cases, the program will either read such dates as starting the millennium over (i.e., the year 2000 becomes the year 1900), or it will simply report an error and fail to complete the operation. When one considers the number of date-sensitive calculations made every day by the government, financial institutions, insurance agencies, employee benefits specialists, businesses and individuals the magnitude of the problem becomes readily apparent. Experts have predicted that the cost of either repairing or replacing the obsolete technology will be approximately $300 to $600 billion worldwide.
More critical to the continued health of the economy is the estimated $1 trillion dollars in legal fees, costs and damages which are predicted to result from the occurrence of year 2000 failures. It is amidst this backdrop that the United States Congress and state legislatures throughout the country have hurriedly drafted and enacted legislation aimed at accomplishing several goals. Primarily, law-makers enacted the various pieces of legislation to (i) promote the free flow of information regarding year 2000 readiness; (ii) promote the continued remediation of products, equipment and systems with year 2000 problems; and (iii) stem the tide of litigation which is sure to follow any year 2000 failure by limiting liability for such failures to those most directly responsible and providing time and incentives to settle such actions before resorting to litigation.

This article will review currently existing federal and state legislation relating to the year 2000 issue and provide some practical solutions for limiting the potential damages to individuals and businesses resulting from year 2000 failures.

III. LEGISLATION ADDRESSING YEAR 2000 FAILURES

A. Federal Legislation

The United States Congress has been very active in implementing legislation relating to the year 2000 problem. The two most prominent pieces of legislation, which will be discussed below, are the Year 2000 Information and Readiness Disclosure Act, and The Y2K Act.

1. Year 2000 Information and Readiness Disclosure Act

On October 19, 1998, President Clinton signed into law the Year 2000 Information and Readiness Disclosure Act (the “Information Act”). The purpose of the Information Act is to promote the free flow of information regarding a company’s year 2000 readiness. To do this, the Information Act creates a safe harbor for various types of year 2000 statements. If the safe harbor applies, companies making those statements will not be liable for claims based on allegedly false or misleading year 2000 statements. Except for actions brought by federal or state governmental entities, the safe harbor is available in civil actions under federal or state law.
a. Year 2000 Statements Protected

The Information Act protects year 2000 statements, which are defined as "communications that relate to the company’s year 2000 processing capabilities." If a claim is based on a false or misleading year 2000 statement, the company making the statement will not be liable for the false statement unless it made the statement while knowing it was false or with the intent to deceive. In addition, if a year 2000 statement was originally made by another person and is republished, the republisher could be liable unless notice is given that the statement was not verified or was from another source. The safe harbor applies to year 2000 statements made beginning on July 14, 1998 and ending on July 14, 2001.

To further utilize the protections under the Information Act, companies must put all year 2000 statements in writing and designate the writing as a "Year 2000 Readiness Disclosure." With certain exceptions, such a disclosure cannot be used as evidence against the company to show that the statement contained incorrect information.

b. Year 2000 Internet Websites Protected

The Information Act also applies to year 2000 statements that are posted on year 2000 Internet websites. Year 2000 Internet websites are sites containing year 2000 statements about the company that are posted for public view. The adequacy of these notices will not be at issue if the posting was made in a reasonable manner and for a reasonable time. However, there are certain situations where the posting will not be adequate, such as when it is inconsistent with the course of dealings between the company and the plaintiff.

c. Exclusions from the Information Act

The safe harbor does not apply if a company makes year 2000 statements while selling a product or service that is designed to correct or prevent year 2000 problems in systems designed by a third party, unless the issuer gives notice to the customer that the Information Act applies. The notice should state:

Statements made to you in the course of this sale are subject to the Year 2000 Information and Readiness Disclosure Act (XX U.S.C. XX). In the case of a dispute, this Act
may reduce your legal rights regarding the use of any such statements, unless otherwise specified by your contract or tariff.\textsuperscript{16}

The Information Act also does not provide protection for year 2000 statements made to a consumer during the sale of a consumer product\textsuperscript{17} and further does not protect year 2000 statements made in conjunction with the formation of a written contract or written warranty.\textsuperscript{18}

The Information Act, while an important tool necessary to promote the free flow of information regarding year 2000 readiness, does not limit or preclude liability for damages resulting from a year 2000 failure. Such limitations are contained in the Y2K Act.

2. The Y2K Act

The Y2K Readiness & Responsibility Act (the “Y2K Act”) was enacted on July 29, 1999.\textsuperscript{19} The stated purpose of the Y2K Act is to establish procedures for civil actions relating to year 2000 failures.\textsuperscript{20} The Y2K Act was also intended to further encourage year 2000 remediation and promote the use of alternative dispute resolution.\textsuperscript{21}

a. Scope of the Y2K Act

The Y2K Act applies to any year 2000 action which is defined as "a civil action commenced in any Federal or State Court, or an agency board of contract appeal proceeding, in which the plaintiff’s alleged harm or injury arises from or is related to an actual or potential year 2000 failure or a claim or defense arises from or is related to an actual or potential year 2000 failure.”\textsuperscript{22} A year 2000 failure is “a failure by any device or system . . . to process, to calculate, to compare, to sequence, to display, to store, to transmit, or to receive year-2000 date-related data.”\textsuperscript{23} Accordingly, the Y2K Act is meant to limit and control nearly all potential causes of action relating to a year 2000 failure.

The Y2K Act expressly does not preempt state laws to the extent those laws offer greater protections and limitations on the liability of potential defendants. Notwithstanding the broad coverage of the Y2K Act, it specifically does not apply to personal injury or wrongful death claims.\textsuperscript{24} The Y2K Act also has limited applicability to claims brought under the securities laws\textsuperscript{25} and claims brought by a governmental entity in its regulatory or supervisory capacity.\textsuperscript{26} The Y2K Act applies only to year 2000 failures occurring on or after January 1, 1999, and before January 1, 2003.\textsuperscript{27}
b. Prelitigation Notice and Pleading Requirements

The Y2K Act requires that a plaintiff provide the defendant with a prelitigation notice prior to the filing of a lawsuit relating to a year 2000 failure. The notice must contain (i) "specific and detailed information" regarding the year 2000 failure; (ii) detailed information regarding the harm suffered; (iii) the remedy sought; (iv) the legal basis for the claim; and (v) the name of the person empowered to negotiate on behalf of the plaintiff.

A defendant in a year 2000 action must respond within thirty (30) days to a prelitigation notice with a proposed remedy to address the year 2000 failure and/or a statement regarding whether the defendant is willing to engage in alternative dispute resolution. If such a response is provided, the lawsuit will be postponed for an additional sixty (60) days to allow time for the proposed remediation or for ADR. If a defendant does not respond adequately, the plaintiff may pursue the lawsuit.

The Y2K Act requires that any lawsuit containing a claim relating to a year 2000 failure must meet certain pleading requirements. Namely, for each claim relating to a year 2000 failure, a plaintiff must file with its complaint a statement indicating (i) the nature and amount of each element of the damages sought; (ii) the manifestations of the material defects alleged; and (iii) the facts giving rise to a strong inference that the defendant acted with the required state of mind.

c. Duty to Mitigate

The Y2K Act expressly prevents a plaintiff from recovering compensation for damages that could have been avoided by the plaintiff. This duty to mitigate applies where the plaintiff was, or reasonably should have been, aware of means available to remedy or avoid the year 2000 failure involved in the action. The duty to mitigate in the Y2K Act is in addition to and in no way limits any duty to mitigate imposed by state law.

d. Application to Contracts

The Y2K Act does not attempt to interfere with contracts between parties. As such, the Y2K Act specifically states that all contracts shall be "strictly enforced" unless such enforcement would contravene state law in effect as of January 1, 1999. This provision prevents state legislatures and courts from creating new rules to increase liability for
year 2000 failures.

The Y2K Act also limits damages recoverable for year 2000 failures to those expressly contained in the contract. Accordingly, if the contract is silent as to the applicability of consequential damages, such damages will not be recoverable.

Further, the Y2K Act expressly allow defendants to avail themselves of affirmative defenses relating to impossibility of performance and commercial impracticability if such defenses existed as of January 1, 1999. Again, Congress is attempting to "freeze" the state of the law so that state legislatures and courts cannot circumvent the intent of the statute.

e. Application to Tort Actions

The Y2K Act also applies to limit the availability of certain tort actions to recover damages caused by year 2000 failures. Specifically, the Y2K Act codifies the common law concept of the economic loss rule by allowing a plaintiff to recover economic losses (i.e., losses not related to personal injury or property damage) in a tort action only where (i) such losses result directly from damage to tangible property (other than property experiencing the year 2000 failure); and (ii) recovery of such losses is permissible under applicable state or federal law. This limitation does not apply to intentional torts such as fraud.

In addition to the limitation on remedies, the Y2K Act also prohibits the application of strict liability to year 2000 actions by stating that the fact that a year 2000 failure occurred "shall not constitute the sole basis for recovery of damages." This provision ensures that reasonable defenses to year 2000 actions will be available to defendants.

f. Bystander Liability

The Y2K Act strictly limits the liability of "bystanders" for year 2000 failures. A defendant is a "bystander," if (i) the defendant is not the manufacturer, seller or distributor of the product or service which suffers the year 2000 failure; (ii) the plaintiff is not in substantial privity with the defendant; and (iii) the defendant's actual or constructive knowledge of the potential year 2000 failure is an element of the claim. If a defendant is deemed to be a "bystander" the Y2K Act states that such a defendant shall not be liable for damages caused by the year 2000 failure unless the defendant "actually knew or recklessly disregarded a known and substantial risk, that such failure would occur."
This provision will help to shield officers, directors, consultants and others from liability caused by year 2000 failures which occur in the companies they perform services for.

g. Limitations on Damages

The Y2K Act codifies the general principle that a defendant can only be held liable for its proportionate share of damages. A defendant will be jointly and severally liable for all damages only if the defendant’s action were intentionally wrongful or where the defendant acted recklessly.

If, however, a portion of the award is uncollectible as against one or more defendants, a plaintiff may hold the other defendants jointly and severally liable for the uncollectible portion if the plaintiff is an individual whose recoverable damages are more than 10 percent of plaintiff’s net worth and the plaintiff’s net worth is less than $200,000.

In any year 2000 action where punitive damages are allowable, the defendant can only collect punitive damages if the standard of proof for awarding such damages has been meet by “clear and convincing evidence.” Further, any punitive damages awarded may not exceed the greater of three times compensatory damages or $250,000, if the defendant is either (i) an individual whose net worth does not exceed $500,000; or (ii) a business entity with fewer than 50 full-time employees. For all other defendants, there are no limits on punitive damages imposed by the Y2K Act.

h. Consumer Protection

The Y2K Act also provides protection to consumers who fail to make payments on residential mortgages due to a year 2000 failure. Specifically, the Y2K Act provides that a mortgagor may not commence foreclosure proceedings on a residence where the consumer’s failure to make payments was due to a year 2000 failure. The consumer must notify the mortgagor within seven business days after the consumer became aware of the year 2000 failure to take advantage of the grace period. In the event of a year 2000 failure, the mortgagor may not proceed to foreclosure for four weeks following receipt of notice of a year 2000 failure.

The Y2K Act merely serves to toll the obligations of the consumer. It does not otherwise “affect or extinguish the obligation to pay.” Presumably this would also include any obligations to pay interest or penalties associated with the late payment.
i. Other Provisions

The Y2K Act also has a number of detailed provisions and restrictions relating to class action lawsuits and government enforcement actions which should be reviewed by counsel if such action results from a year 2000 failure.

In summary, the Information Act and the Y2K Act severely limit a plaintiff's ability to seek and collect damages for Year 2000 failures unless such failures result from intentional or reckless conduct. As these pieces of legislation are new and untested, it is likely that they will be the subject of many lawsuits and appeals for years to come. Thus, Congress may have succeeded in limiting the ultimate damages recoverable by plaintiffs suffering harm due to year 2000 failures, but it has not likely limited the amount of litigation which will flow from the year 2000 problem.

B. State Legislation.

Individual states have also taken an active role in preparing for the year 2000 date change. Many state legislatures have passed legislation addressing litigation that may arise due to year 2000 date-related computer failures. There are four main categories of legislation that states have enacted: (1) legislation granting immunity to the states for year 2000 failures; (2) legislation limiting the liability of and providing affirmative defenses to consumers and businesses for year 2000 failures; (3) legislation addressing liability for the dissemination of year 2000 solution information and the admissibility of year 2000 testing results; and (4) legislation addressing other issues such as local government funding of year 2000 remediation efforts. Each of these categories of legislation is discussed below.

1. Legislation Granting Immunity to the States

By far, the most prevalent type of state legislation enacted to date is legislation limiting the liability of state and local governments and their employees for year 2000 failures. At least seventeen states have enacted this type of legislation, including: Alabama, Arkansas, Florida, Georgia, Hawaii, Indiana, Maine, Maryland, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Tennessee, Virginia, Washington and Wyoming.

Many of these state statutes prevent all types of suits, whether for monetary damages or injunctive or declaratory relief, resulting
from a year 2000 date-related failure in any computer system owned or operated by the state government.\textsuperscript{55} The immunity extends not only to state governments, but also to the political subdivisions and employees of the state.

Some of the statutes provide absolute immunity for year 2000 failures to the state, its political subdivisions and employees.\textsuperscript{56} Other statutes, however, place some type of limitation on the immunity available to the state and its related entities. In South Dakota, for example, the state government, its subdivisions and employees are not liable for year 2000 failures occurring prior to December 31, 2002, if either (a) the failure was not foreseeable, or (b) if it was foreseeable, (i) a plan to prevent the failure from occurring was in place, (ii) the plan substantially complied with generally accepted computer standards and (iii) the government employee used due diligence while operating the hardware or software experiencing the failure.\textsuperscript{57}

In North Dakota, the state and its related entities must make a good faith effort to make governmental systems year 2000 compliant in order to be immune from contractual claims.\textsuperscript{58} A good faith effort is defined as either (1) the testing of systems and obtaining results showing that the system is year 2000 compliant; (2) the request for and receipt of assurance of compliance from the manufacturer or supplier of the system; or (3) the seeking of assurance when testing or receipt of assurance is not practicable.\textsuperscript{59} Likewise, Hawaiian law prohibits immunity claims by the state government and its related entities and employees for year 2000 related failures in governmental computer systems when the failures result from gross negligence.\textsuperscript{60} Gross negligence does not arise if the state or its employees makes a good faith effort to remedy the problem or prevent the error.\textsuperscript{61} In addition, immunity is not available in Hawaii for claims for physical injury or death.\textsuperscript{62}

Some states have also extended immunity to entities affiliated with the state. For example, Florida extends immunity for year 2000 failures to public and private medical schools that are affiliated with the state and whose computers are used by the state.\textsuperscript{63} Colorado has granted immunity to hospitals owned by the state or a political subdivision thereof if the hospital uses reasonable efforts to identify the potential for year 2000 failures and takes certain specified actions prior to the failure.\textsuperscript{64} Virginia has enacted legislation granting immunity to transportation services entities as well as cities and counties from tort claims arising from year 2000 failures.\textsuperscript{65}

One state, however, has taken a different approach to year 2000 claims against governmental entities. In Washington, liability is several and not joint for damages claims against the state or any public service
provider; additionally, agencies are not liable for the first $100 of damages for each claimant. The statute does not apply to claims for personal injury or wrongful death or to survival actions. Thus, in contrast to other states, the State of Washington has very limited immunity for year 2000 failures.

For consumers and businesses with year 2000 related claims against a state government or related entity, it is important to examine the applicable state's legislation addressing year 2000 failures. Such claims, particularly those for damages, may be restricted or prohibited by legislative grants of immunity. Because businesses and consumers may bear the burden of losses that are caused by year 2000 failures in government-related computer systems, they should attempt to take actions now to protect themselves from such losses before the losses occur.

2. Legislation Limiting Liability and Creating Affirmative Defenses for Year 2000 Failures

As the Year 2000 approaches, there has been a growing concern over the potential lawsuits that may erupt as a result of computer failures due to year 2000 date-related errors. The concern has been that an explosion of litigation could not only overwhelm the judicial system, but also result in large damages awards that could severely harm individuals, businesses and the economy as a whole. In response to this concern, several states have passed legislation that limits the liability of and creates affirmative defenses for consumers and businesses for claims related to year 2000 failures.

a. Consumer Protection

States have attempted to protect individuals from suits related to year 2000 failures outside the control of the individuals. Many of these statutes provide consumers with limited protection from foreclosure or other adverse actions resulting from a payment default if the default is due to a year 2000 failure that is not caused by the consumer. However, none of these statutes extinguish the obligations of individuals to pay the debt. Colorado is one of the states that has passed legislation of this type to protect individuals. Individuals who default on the payment of debts in Colorado will have an affirmative defense to any claims brought by the creditor if the default is caused by a year 2000 failure and the individual would have otherwise been able to pay the debt. If the affirmative defense is available, the court
must dismiss any action brought by the creditor, and the creditor cannot reassert that claim for 30 days. In addition, any individual with this affirmative defense may dispute items in that person's credit report relating to the affirmative defense. The individual can require the credit reporting agency to include a statement of no more than 100 words in the individual's file explaining the disputed item.

The legislation passed in Washington contains provisions similar to that of Colorado but also specifically addresses the failure of individuals and small businesses to pay insurance premiums, state taxes and other state imposed obligations. An insurer that has cancelled a personal lines insurance policy must reinstate it without imposing interest or penalties if three conditions are met. First, the insured must provide written notice that the payment default was due to a year 2000 failure outside of the insured's control within 10 days of the effective cancellation date. Second, the insured must prove the year 2000 failure occurred and that the insured would have otherwise been able to pay the premium. Third, the insured must pay the premium as soon as possible but no later than 10 days after the problem is corrected or should have been corrected. The state cannot impose interest or penalties on individuals and small businesses that fail to pay property taxes, excise taxes and state-imposed obligations on employers if the payment default results from a year 2000 failure that was not caused by the defendant and the defendant would have otherwise been able to pay the obligation.

In addition to providing protection to consumers for payment defaults, Tennessee also addresses the failure to make child support payments due to a year 2000 failure. In order to obtain the 60-day cure period for action taken by the Tennessee Department of Human Services, the debtor must not be able to access money to pay the child support because it is held by a third party. In addition, the debtor must provide proof of the third party's year 2000 failure within two weeks of the payment date. Tennessee also prohibits the sending of late notices and the imposition of late charges for 60 days after any creditor receives the notice in writing from a debtor that a payment default resulted from a year 2000 failure, regardless of the type of debt involved.

Individuals who live in the states that have enacted consumer protection legislation of this type should be aware of this protection in the event that they default on the payment of an obligation as a result of a year 2000 failure outside of their control.
b. Protection for Businesses

Some states have also reduced or eliminated the liability of businesses for year 2000 failures if certain remedial steps are taken to correct any potential problems prior to the occurrence of the year 2000 failure. Although most of the statutes limit recovery to a plaintiff's actual damages, states have taken different approaches to protecting businesses from liability.

In Colorado, for instance, a business will not be liable for year 2000 failures if the business takes reasonable measures to identify potential failures and takes the following actions prior to the year 2000 failure: (a) inventories critical devices that may experience year 2000 failures; (b) identifies systems that are critical to the business; (c) identifies the potential for year 2000 failures; (d) creates and implements a remediation plan; (e) complies with applicable industry regulations regarding the year 2000 date change; (f) tests critical systems; and (g) develops contingency plans for year 2000 failures. The officers and directors of a company will be protected from liability if they or the company took reasonable efforts to identify failures and attempt to correct them using all of the above stated actions.

The State of Arizona has taken a different approach to limiting the liability of businesses, which is similar to that adopted by the federal government discussed above. Plaintiffs bringing claims for year 2000 failures must provide ninety (90) days' written notice of the claim to the defendant. The defendant may request to inspect the product that experienced a year 2000 failure within sixty (60) days after receipt of the plaintiff's notice, and the defendant may offer to cure the failure within ninety (90) days of receiving the plaintiff's notice. The defendant may offer both the offer to cure and the results of the inspection into evidence. The legislature also created a complete affirmative defense for businesses under three different sets of circumstances. First, the defendant business has an affirmative defense if the defendant notified the buyer of the possible defect, the defendant made an unconditional offer to repair or remediate the problem, and the offer would have avoided the damages incurred by the plaintiff. Second, an affirmative defense is available if the defendant relied upon a year 2000 statement of a third-party supplier that was false and the defendant had no knowledge that the statement was false. Third, a defendant business will have an affirmative defense to a year 2000 failure if the defendant examined the product, repaired or upgraded the product in good faith, and successfully tested the product without error. Plaintiffs cannot use a defendant's year 2000 analysis or remedial
measures as evidence of negligence, a defective or unreasonably dangerous product, or other culpable conduct.90

Florida has also passed comprehensive legislation that limits the liability of businesses for year 2000 failures. Any damages that the plaintiff could have avoided by taking notice of a defendant’s year 2000 product disclosure that was made prior to December 1, 1999 will not be recoverable.91 The legislature also eliminated all liability for businesses for year 2000 failures in three situations.92 First, a defendant has a complete defense if the defendant assessed the actions it should take to achieve compliance and, prior to December 1, 1999, had a reasonable good faith belief that it was year 2000 compliant.93 Second, a defendant will have no liability if, before December 1, 1999, the defendant tested its systems and had a reasonable good faith belief that it was year 2000 compliant.94 Third, the defendant will not be liable for a year 2000 failure if (a) it has no more than five employees and a net worth that does not exceed $100,000, (b) it took reasonable efforts to determine which entities upon which it relies or with which it has contractual relations are year 2000 compliant, and (c) before December 1, 1999, either had a reasonable good faith belief that those parties were year 2000 compliant based on its on research or disclosed in writing that the products are presumed not to be year 2000 compliant.95 Class actions against the state are prohibited, and can only be brought against businesses if each class member has damages exceeding $50,000.96 In addition, directors and officers are immune from personal liability if the director or officer instructed the company (or received a written assurance from another officer or director that the company has been so instructed) to determine whether the company is year 2000 compliant, to develop and implement a plan and to inquire as to the year 2000 compliance of third parties.97

In Hawaii, defendants facing year 2000 claims will only be liable for the plaintiff’s out of pocket expenses caused by the year 2000 failure if the defendant used commercially reasonable efforts to avoid the impact of year 2000 failures.98 Commercially reasonable efforts require the timely implementation of remedial actions and compliance with data formats that are identified in government regulations or by a governing body or that are reasonably requested by the other party.99 The legislation defines remediation as having taken the following five steps: awareness, assessment, renovation, validation and implementation.100

North Carolina also protects businesses that are faced with litigation resulting from year 2000 failures.101 If a business has acted with reasonable care to prevent year 2000 problems from occurring,
then the business will not be liable to anyone with whom it is not in privity or to whom it has not extended an express warranty. In such a situation, employees, officers and directors cannot be held liable for year 2000 failures if sued in their capacity as such.

Some states are also attempting to limit the burden of year 2000 litigation on the judicial system through the use of alternative dispute resolution. Florida allows courts to refer year 2000 class actions for damages to mediation. In addition, if either party to a suit offers to submit the claim to binding arbitration with a maximum amount of damages that may be recovered and that offer is rejected, the rejecting party will be liable for the offering party’s costs and fees if the rejecting party would have been better off going to arbitration. Hawaii has also given courts the power to order alternative dispute resolution for claims for year 2000 failures. In North Carolina, claims for year 2000 failures must be mediated prior to pursuing the claim in court unless the parties waive the required mediation.

The impact of the state legislation limiting liability for year 2000 failures could be significant. Individuals in the applicable states are given a cure period for payment defaults before creditors can foreclose or take other adverse actions. Businesses who take certain remedial efforts may receive limited liability, and in some cases, complete immunity from damages for claims resulting from year 2000 failures. Because federal law does not preempt state statutes that provide more protection from liability for year 2000 failures, potential litigants should be aware of the limitations on a defendant’s liability for year 2000 failures as well as any procedural requirements that must be followed prior to filing suits for these failures. Once potential litigants are aware of their rights and obligations, they will be in a better position to protect their rights.

3. Legislation Addressing the Dissemination of Year 2000 Solution Information and the Admissibility of Year 2000 Testing Results

In response to the desire to resolve potential year 2000 failures before they occur and avoid costly litigation, many organizations such as state and federal agencies, bar organizations and trade and professional associations have begun collecting information relating to potential resolutions of year 2000 failures and disseminating that information to interested third parties. In addition, companies are testing their systems and are creating documentation that discusses their year 2000 compliance efforts. To encourage the sharing of information and the testing of computer systems, several states have enacted legislation to
protect organizations that share information from liability as well as limit the admissibility of information generated during year 2000 testing.\textsuperscript{109}

Several of these statutes address the liability that distributors of year 2000 solution information may incur in the event that the information distributed is incorrect. These laws prevent the recovery of damages from persons who collect and distribute year 2000 solution information, provided that these persons do not receive payment for the information and do not know that the information distributed is false or misleading.\textsuperscript{110} If the distributor has republished information from a third party, the distributor must disclose that fact to obtain protection.\textsuperscript{111} The State of Minnesota has specifically exempted trade and professional organizations that publish year 2000 solution information as well as persons providing that information to those organizations from liability for monetary damages.\textsuperscript{112}

Several of these statutes address the liability that distributors of year 2000 solution information may incur in the event that the information distributed is incorrect. These laws prevent the recovery of damages from persons who collect and distribute year 2000 solution information, provided that these persons do not receive payment for the information and do not know that the information distributed is false or misleading.\textsuperscript{110} If the distributor has republished information from a third party, the distributor must disclose that fact to obtain protection.\textsuperscript{111} The State of Minnesota has specifically exempted trade and professional organizations that publish year 2000 solution information as well as persons providing that information to those organizations from liability for monetary damages.\textsuperscript{112}

A few states have also addressed the ability of plaintiffs to use information generated by a defendant during year 2000 testing as evidence in suits arising from year 2000 failures. In Virginia, voluntary year 2000 evaluations conducted between January 1, 1996, and July 1, 2000, as well as information that is generated while planning for and conducting that evaluation are not discoverable or admissible in court.\textsuperscript{113} Likewise, North Dakota provides that year 2000 information that is collected by public entities is not admissible or discoverable in civil actions for damages unless the plaintiff uses an independent legal authority to obtain the information.\textsuperscript{114}

Due to these limitations, prospective plaintiffs may have difficulty obtaining relief for inaccurate year 2000 solution information as well as acquiring evidence to establish claims that relate to year 2000 failures. Prospective plaintiffs should be aware of these constraints and realize that they may not be successful in their claims for incorrect information or it may take additional resources and evidence to prove the defendant's liability. These statutes make it more difficult for plaintiffs to obtain relief for damages resulting from year 2000 failures.

4. Other Types of State Legislation Addressing the Year 2000 Issue

A few states have passed legislation that addresses other aspects of the year 2000 issue. For example, North Carolina requires health care insurers to report to the state in the event that year 2000 failures prevent the insurers from timely processing the claims of health care providers.\textsuperscript{115} In such a situation, an insurer must make minimum interim payments until the year 2000 failure is corrected.\textsuperscript{116}
Minnesota has addressed the issue of funding year 2000 remediation efforts by local governments. Municipalities may dispense with regular procedures for purchasing materials and entering contracts in the event that a year 2000 failure prevents the delivery of critical services.\textsuperscript{117} If municipalities have the authority to borrow, the authorization is inherently deemed to include authorization to borrow for year 2000 remediation.\textsuperscript{118} In addition, debt incurred for year 2000 remediation efforts is not subject to any limitations on the ability of the municipality to borrow or to voter approval.\textsuperscript{119}

Taken as a whole, the effect of all of the state statutes that have been enacted is to (i) reduce the amount and effect of litigation that may result from year 2000 failures and (ii) to promote the free flow of information and remediation efforts. Because it will be more difficult for prospective plaintiffs to obtain relief in the event that they are harmed by year 2000 failures, prospective plaintiffs should learn more about the entities upon which they rely, both personally and professionally, before a year 2000 failure occurs in order to protect their rights.

IV. YEAR 2000 READINESS

As the year 2000 approaches, consumers and businesses are becoming increasingly aware of the potential effects of year 2000 failures on their lives, both personally and professionally. To be prepared for the year 2000 date change all individuals and entities should develop a year 2000 plan which contains the following elements: (i) a review of internal systems to determine which are critical to individual survival or the survival of a business; (ii) a test of those critical systems to determine whether they are compliant; (iii) investigation of providers of third party products and services to ensure those third party products and services are year 2000 compliant; (iv) remediation of all critical systems which are not compliant and replacement of all non-compliant third party providers with those that provide compliant products and services; and (v) development of contingency plans for dealing with year 2000 failures. Many of these elements are required by law to allow defendants to avail themselves of the protections of the various pieces of legislation discussed above. Further, being able to prove these elements will be helpful for plaintiffs attempting to demonstrate that they effectively mitigated their damages.
V. OBTAINING YEAR 2000 INFORMATION

Central to any year 2000 plan is the need to obtain more information about the year 2000 compliance of third party products and services such as banks, investment advisors, mutual funds and other companies. This information may be obtained through reports that certain companies are required to file with the government as well as through other methods.

A. Reporting Requirements

Obtaining information about some companies has become easier due to federal and state reporting requirements. In 1998, the Securities and Exchange Commission (the “SEC”) began requiring public companies to discuss the year 2000 readiness status of the company in their annual filings on Form 10-K and quarterly filings on Form 10-Q. The SEC requires disclosure of a company’s year 2000 readiness status if the company’s assessment of year 2000 issues is not complete or if management has determined that the consequences of year 2000 failures would have a material effect on the company. Generally, the SEC has indicated that the discussion should be contained in the financial statements and under the section entitled “Management’s Discussion and Analysis of Financial Condition and Results of Operations” although if the discussion of year 2000 issues is pertinent to other sections of the filings, it may be included in those other sections as well. The information that companies must disclose includes the status of their progress in addressing year 2000 issues, the costs that will result from addressing year 2000 problems, the risks that the companies face due to the year 2000 date change, and the contingency plans that the companies have in place for addressing year 2000 failures. These filings may be obtained on the Internet through various websites or directly from the SEC.

In addition, in 1998, the SEC began requiring broker-dealers, transfer agents, investment advisers and mutual funds to file forms describing their year 2000 readiness status. The reports contain information about the actions that these entities have taken to become year 2000 compliant. These entities are required to update the information contained in these forms on specific dates. These forms may be searched on the SEC’s website. In addition, copies of these documents may be obtained from the SEC, and consumers may obtain additional information regarding the status of the year 2000 compliance efforts of these entities by contacting the contact person identified...
in the filing.

Some states also require filings by companies in certain industries. For example, in Minnesota, utility and telephone companies, hospitals, nursing homes and water supply systems are required to file reports with the state government disclosing the status of their year 2000 compliance efforts. Although these reports generally may not be used as evidence in court, these reports may provide consumers with valuable information about the remediation efforts of these entities. In North Dakota, public entities are also allowed to gather information about the year 2000 compliance efforts of companies. Thus, consumers should consider contacting their state government representatives to determine whether their states have similar reporting requirements.

B. Other Sources of Year 2000 Information

As a result of the Information Act, many product and service providers have posted information regarding their year 2000 readiness on their Internet websites. Such information can also be obtained by contacting the customer service department for most major businesses. If the business you have contacted does not have a Year 2000 Readiness Disclosure, this is a good sign that the business is not year 2000 prepared.

If a governmental body regulates the business you are investigating, such as a financial institution or utility, it is highly likely that that business is required by law to make information regarding its year 2000 plans available to the public. For example, the Office of the Comptroller of the Currency ("OCC") oversees the operations of federally chartered banks. The OCC has several pages of information on its website regarding the year 2000 preparedness of the banks it oversees. The OCC has also devised a checklist for customers to assist in year 2000 planning.

VI. CONCLUSION

The bottom line regarding preparation for the year 2000 is to be proactive. The United States Congress and the various states enacting legislation have made it very clear that a passive approach to the year 2000 problem will not be rewarded with either the ability to bring claims or defend against them. The best offense in this case is definitely a good defense. Consumers and businesses alike will be rewarded only if they used their reasonable best efforts to remediate problems prior to the year 2000 and to mitigate damages once problems occur.
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Endnotes


4. Legislation enacted through August 1, 1999, was included in this article. Please note that as of this writing there remain many other bills pending in front of the various state legislatures which were not reviewed for this article.


6. See id. § 2(b).

7. See id. § 4(b).

8. See id. § 3(11).


10. See id. § 4(b)(2)(B).

11. See id. § 7(a)(3).

12. See id. § 3(a).

13. See id. § 4(a).

14. See id. § 4(d).

15. See id. § 4(d)(2).

16. See id. § 6(b)(2)(B).

17. See id. § 6(b)(2)(A).


20. See id. § 2.

21. See id.

22. See id. § 3(1).

23. See id. § 3(2).

24. See id. § 4(c).

25. See id. § 4(i).

26. See id. § 3(1)(C).

27. See id. § 4(a).
28. See id. § 7(a).
29. See id.
30. See id. § 7(c).
31. See id. § 7(e).
32. See id. § 7(d).
33. See id. § 8.
34. See id. § 9.
35. See id. § 9(b).
36. See id. § 4(d).
37. See id. § 11.
38. See id. § 10.
39. See id. § 12.
40. See id. § 13(c).
41. See id. § 13(b)(1).
42. See id.
43. See id. § 6.
44. See id. § 6(c).
45. See id. § 6(d)(1).
46. See id. § 5(a).
47. See id. § 5(b).
48. See id. § 4(h)(1).
49. See id. § 4(h)(2).
50. See id. § 4(h)(3).
51. See id. § 4(h)(5).

52. See id. § 15. The provisions relating to class action lawsuits are complex and require a working knowledge of the procedures relating to class actions to fully
understand. Such a discussion is outside the scope of this article but these provisions should be reviewed prior to initiating or responding to any class action proceeding.

53. See id. §§ 18 and 4(g). The Y2K Act limits the ability of governmental agencies to fine businesses that fail to abide by regulatory reporting requirements due to year 2000 failures. Such limitations do not apply where the health or safety of the public is at stake.


55. See supra note 1. However, some states, such as Arkansas, allow suits for declaratory and injunctive relief and for illegal exactions. See sec. 3, 1999 Ark. Acts 1482.


58. See secs. 2-4, §§ 32-12.1-03(e), 32-12.2-02(3)(q), 1999 N.D. Laws 303.

59. See id.

60. See Act of June 25, 1999, sec. 6, § 662E-2(a), 1999 Haw. Sess. Laws 115. The statute also prevents any claims from being brought against any person arising out of a year 2000 failure of a governmental computer system; however, in such instances claims are allowed against the manufacturer of the system or contractor who provided the government with the system or software that experienced the problem. See id. at sec. 6, § 662-E2(b).

61. See id. sec. 6, § 662E-2(a).

62. See id. sec. 6, § 662-E2(b).

64. See Act of May 17, 1999 Colo. Sess. Laws 178. The actions that hospitals must take to be exempt from liability are as follows: (a) identify critical devices that may experience failures; (b) identify the hospital’s critical systems; (c) identify the potential for year 2000 failures; (d) create and implement a reasonable plan to remedy the problems; (e) comply with any applicable industry regulations regarding year 2000 remediation; (f) test critical systems for year 2000 compliance; and (g) develop contingency plans for year 2000 failures. See id. sec. 1, § 13-21-902(1).


67. See id.


71. See id. § 13-21-704(1).

72. See id. § 13-21-704(2). The length of the cure period granted to individuals is different in each state. For example, North Carolina gives individuals a 60-day cure period to correct the payment default. See § 1-539.26(b), 1999 N.C. Sess. Laws 99-0308.

73. See id. (§ 13-21-704(5)).

74. See 1999 Wash. Laws 369. It should be noted that Washington requires that the year 2000 failure that caused the individual or small business to incur a payment default must not result from a failure to upgrade the electronic device in the control
of the individual or small business. See id. sec. 2.

75. See id. sec. 3, § 48.18(1).

76. See id. secs. 4-6.


78. See id.

79. See id. sec. 5(i)(1).


82. See § 13-21-604(2), 1999 Colo. Sess. Laws 99-75. Colorado has included in the definition of year 2000 failure a failure of a third party's systems, including a failure of a governmental entity to provide data, transportation delays, energy failures and communications failures. See id. at § 13-21-603(3)(b).

83. See id. § 13-21-604(3).

84. See sec. 1, § 12-743(A), 1999 Ariz. Legis. Serv. 64.

85. See id. sec. 1, § 12-743(D)(E).

86. See id. sec. 1, § 12-743(F).

87. See id. sec. 1, § 12-744(A).

88. See id. sec. 1, § 12-745(A).

89. See id. sec. 1, § 12-746(A).

90. See id. sec. 1, § 12-748(A).

91. See Commerce Protection Act, sec. 4(4)(b), 1999 Fla. Laws ch. 99-230 (June 4, 1999). This statute also applies to claims against the state government.

92. The three affirmative defenses available to businesses are also available to the government. See id. sec. 4(5)(a).
93. See id. sec. 4(5)(a)(1).

94. See id. sec. 4(5)(a)(2).

95. See id. sec. 4(5)(a)(3).

96. See id. sec. 4(7).

97. See id. sec. 5(1).

98. See Act of June 25, 1999, sec.2, § 6(e), 1999 Haw. Sess. Laws 115. If the defendant has not used commercially reasonable efforts, then the defendant will be liable for the plaintiff's economic damages.

99. See id. sec. 2, § 6(c).

100. See id. sec. 2, § 6(d). Each step is defined to include specific activities. Awareness includes providing supervisors the necessary information. Assessment involves determining the impact of the year 2000 failures, identifying core activities and resources, and developing a strategy. Renovation consists of converting and upgrading computer systems. Validation involves testing the performance of the systems. Implementation refers to using the new systems as well as creating contingency plans. See id.

101. See Act of July 19, 1999, sec. 1, § 66-282, 1999 N.C. Sess. Laws 99-295. Although application of this statute is discussed in the context of businesses, the statute also extends protection to individuals. See id. sec. 1, § 66-281(2).

102. See id. sec. 1, § 66-282(a)(1).

103. See id. sec. 1, § 66-282(a)(3).


105. See id. sec. 7(1). For example, if the plaintiff refuses the defendant's offer for binding arbitration, and the amount of damages awarded to the plaintiff in court is less than the maximum amount of damages set forth in the defendant's arbitration offer, the plaintiff would be required to pay the defendant's costs and fees.

106. See Act of June 25, 1999, sec. 4, 1999 Haw. Sess. Laws 115. However, these alternative dispute resolution provisions can be waived or modified by express agreement.

107. See Act of July 19, 1999, sec. 1, § 66-283(a), 1999 N.C. Sess. Laws 99-295. Mediation can also be avoided if one of the parties is an individual with an affirmative defense for a payment default due to a year 2000 failure. See id. sec. 1, § 66-283(c1); see also supra Part II.B.2.a. However, if an individual with this affirmative defense agrees to engage in mediation, the affirmative defense will be lost if the claim is filed in court. See id.


110. See sec. 3, CAL CIV. CODE § 3270(a), § 3271(a), 1997 Cal. Stat. 860; secs. 2-3, 1999 Va. Acts ch. 859. However, the California law only prohibits damages in tort, and the Virginia law does not apply to actions for personal injury or death.


112. See art. 2, sec. 3(5), 1999 Minn. Laws 250. Minnesota has also given state agencies immunity from all claims for damages for the collection or publication of year 2000 solution information. See art. 2, sec. 6(7), 1999 Minn. Laws 250.

113. See sec. 1, § 8.01-418.3, 1999 Va. Acts 17. To obtain protection for information generated while planning for and conducting a year 2000 evaluation, those documents must be clearly marked on their face as being generated pursuant to such an evaluation. A court, however, may deem these evaluations and documents admissible if the other party shows good cause. Arizona also prohibits a plaintiff from using a defendant's year 2000 analysis as evidence of negligence, a defective or unreasonably dangerous product, or other culpable conduct. See Act of April 26, 1999, sec. 1, §12-748(A), 1999 Ariz. Legis. 64 (West, WESTLAW through 44th Leg., 1st Sess.)

114. See sec. 1(1), 1999 N.D. Laws 303. In Minnesota, all year 2000 status reports that are required to be filed with the government by utilities, phone companies, hospitals, nursing homes and water supply systems cannot be used as evidence and are considered Year 2000 Readiness Disclosures. See supra Part II.A.


116. See id. sec. 1, § 58-2-235(b).

117. See art. 2, sec. 6(1), 1999 Minn. Laws 250. In such an event, municipalities may enter contracts through direct negotiation or an open market.

118. See id. art. 2, sec. 6(5). Municipalities that do not have the authority to incur debt may get the approval of the state government to incur debt for year 2000 remediation efforts.

119. See id.

120. See Disclosure of Year 2000 Issues and Consequences, Exchange Act Release No. 40,277, Fed. Sec. L. Rep. (CCH) ¶ ______ (July 29, 1998). These discussions may be included in the company's annual report to stockholders and quarterly report to
stockholders, which are then incorporated by reference into the Form 10-K and Form 10-Q. Thus, stockholders of a company may find information relating to the company's year 2000 readiness in the annual and quarterly reports, rather than in the filings with the SEC. In addition, companies that are in the process of making an initial public offering and that have filed a registration statement with the SEC are required to include this disclosure in the registration statement.

121. See id.

122. See id.


124. These filings can be accessed through either the SEC's website at <http://www.sec.gov> or private websites that access the SEC's database, such as <http://www.freedgar.com>. There is no charge for accessing and downloading or printing these filings from either of these websites.

125. See Disclosure of Year 2000 Issues and Consequences, Exchange Act Release No. 40,277, FED. SEC. L. REP. (CCH) ¶ 00000 (July 29, 1998). Broker-dealers that are registered with the SEC and that meet the minimum net capital requirement of $5,000 are required to file Form BD-Y2K. See Year 2000 Reports Database Website, <http://www.sec.gov/news/y2k/y2kreps.htm>, (last modified May 24, 1999). Investment advisers that are registered with the SEC and either manage more than $25 million in assets or manage an investment company must file a Form ADV-Y2K. See id. The SEC will also have information about mutual funds for which advisers must file Form ADV-Y2K. See id. Transfer agents that are not banks or savings associations must file Form TA-Y2K. See id.


127. The SEC's website is <http://www.sec.gov>. The SEC does charge a fee for copying any of the filings.


129. See supra note [63].


131. See the Internet website for the Comptroller of the Currency found at <http://www.occ.treas.gov>.