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RECENT LEGISLATIVE ACTIVITY

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Readiness and Responsibility in the Year 2000: A Look at Y2K Legislation

After more than a year of deliberations, the U.S. House and the Senate have reached an agreement regarding the provisions that will be afforded by the Year 2000 Readiness and Responsibility Act.¹ Also known as the "Y2K Act," the bill is expected to be approved by the President via the first-ever "digital signing" of legislation. The act is intended to establish procedures for civil actions brought for damages relating to the failure of computer systems to successfully transfer information from the year 1999 to the year 2000.² Supporters believe the legislation will allow companies to pay more attention to the Y2K problem itself without having to worry about defending themselves in related lawsuits.³ According to Stirling Adams, corporate counsel for the network software company Novell, "money spent defending lawsuits is money diverted from hiring employees who could be placed on projects to develop new technology, or enhance support products."⁴

The Year 2000 computer problem, also known as the "Y2K bug" stems from the historical design of

computer programs that enabled computers to recognize years in double digits only. Manufacturers originally devised this plan in order to reduce both date-storage requirements and operating costs. The two-digit format, however, makes the year 2000 indistinguishable from 1900 or even 1800. A computer unable to recognize that the "00" date code represents the year 2000 may fail to transmit or receive data, or it may fail to operate altogether.

That's what happened to Mark Yarsike, a Michigan business owner believed to be the first in the nation to sue over a Y2K problem.⁵ When a customer attempted to pay for products with a credit card that expired in the year "00," Yarsike's computer simply stopped functioning. During the next 18 months, his computer vendor made 200 service calls to the business to fix malfunctions. Yarsike brought suit against the manufacturer, eventually receiving a \$260,000 settlement.⁶

Yarsike, like other critics of the Y2K Act, feels that "[g]overnment shouldn't be involved" in the potential

explosion of lawsuits that may result from Y2K-related complications.⁷ Critics, the most vocal of which have included small-business owners who rely on computers and computer software for business management and trial lawyers, argue that the threat of lawsuits may be the best incentive for encouraging companies to uncover and correct potential problems.⁸ After all, says Mark Mandell, president of the Association of Trial Lawyers of America, "[t]hey created the problems."⁹ Placing limitations on the liability of computer and software manufacturers prevents these entities from having to answer for their mistakes, denying consumers an adequate remedy for the harm caused.¹⁰

Currently, approximately eighty (80) Y2K-related lawsuits have been filed in the United States, even though the actual nationwide impact of the Y2K problem remains to be seen.¹¹ Some technicians predict that widespread computer failures will occur across the United States causing power outages, stalled assembly lines and suspended financial transactions; others fear that the sheer number and extent of potential computer glitches could be enough to put the United States into an immediate recession.¹² However, there are also those who feel that the efforts made so far to circumvent the potential problems may be adequate enough to ensure a nearly disruption-free transition into the new year.¹³

Nonetheless, the threat of litigation has resulted in a climate of

fear and many companies are reluctant to acknowledge potential problems that their computers and other consumer products may cause.¹⁴ Experts believe that this lack of acknowledgment could result in an explosion of "millennium bug-related litigation" that could exceed \$1 trillion in costs to consumers and businesses.¹⁵ Because the magnitude of the problem is simply unknown at this time, Congress has struggled to develop "solutions" to problems that have not yet arisen.¹⁶ Consequently, the legal ground rules set forth in the Y2K Act will determine the extent of corporate and individual liability if and when the computer glitches actually do occur.

Throughout the Congressional hearings, a legislative tug-of-war has ensued among those vying for more comprehensive protection of consumer financial interests, thus subjecting technology companies to greater liability risks, and those who would limit the liability of computer manufacturers, protecting these entities from possible financial destruction. Although President Clinton has repeatedly stated that he would veto any bills which he felt did not adequately support the interests of consumers, corresponding corporate interests required Congress to perform a delicate balancing act between the rights of citizens and the rights of businesses.¹⁷ The resulting Y2K Act is the product of Congress' efforts; it is a balance of provisions designed to serve the interests of both consumers and the industry, where both make good faith

efforts to ensure Y2K compliance.¹⁸
**Congress' First Attempt at Y2K
Legislation**

In 1998, Congress passed the Year 2000 Information and Readiness Disclosure Act,¹⁹ intending to address potential Y2K issues by increasing public awareness.²⁰ The act allows companies to share information regarding preparational strategies with partners and consumers without fear of being sued for disclosure, and limits the use of Y2K disclosure statements in a court of law as an admission of liability against the maker of the statements.²¹ Those who share information are protected against liability for false, misleading or inaccurate statements, barring clear and convincing evidence that the statement was made knowingly, and the law exempts from coverage any Y2K disclosure statement made by a seller in an effort to sell his product or service unless written notice of these provisions is given to the potential buyer.²²

The Year 2000 Information and Readiness Act was considered by many to be merely a "first step" in addressing possible Y2K-related complications.²³ Critics contended that the act, "wasn't worth the time that Congress put into it."²⁴ It did not address the possible legal gridlock that might result once the date changes and the glitches actually occur, causing many to request that Congress develop more legislation to address additional legal concerns resulting from Y2K complications.²⁵ Harris N. Miller,

president of the Information Technology Association of America expressed many of these concerns, testifying to the importance of legislation which would reduce the level of litigation itself.²⁶ Extensive litigation, Miller pointed out, "will only clog the court system; keep truly harmed plaintiffs from getting quick redress; expose companies to public criticism; damage relations; destroy supplier relations; and divert attention and energy from technical corrections."²⁷

The Next Step: The Year 2000 Readiness and Responsibility Act

In February 1999, Congress responded to the call for additional legislation, referring the issue to various Congressional committees for bill proposals and hearings. Although three different proposals were initially presented, all helped to establish a foundation upon which later issues could be developed.²⁸ Many basic provisions of the current Y2K Act arose from these proposals.

First, while the Y2k Act certainly does not prohibit litigation, its intent is to encourage technology companies to avoid potential litigation altogether by addressing Y2K-related problems before January 1, 2000.²⁹ Where companies do become involved in later litigation, despite attempts to address potential problems in advance and their ability to establish that they took protective measures, the chances of punitive damages being awarded to

the plaintiff are greatly reduced.³⁰

The "avoidance" language was relied upon in each of the initial proposals, gaining fairly widespread acceptance from the beginning. In keeping with the established intent, a provision was later added that entitles plaintiffs to punitive damages only where they are able to show by "clear and convincing evidence" that the defendant's acts caused the harm.³¹ Hence, although advance precautions may be insufficient to avoid all litigation, such precautions may make the burden more difficult for the plaintiff, enabling defendants to avoid any risk of punitive damages. Plaintiffs have also been assigned a duty to mitigate, prohibiting them from collecting damages for harm that could reasonably have been avoided through their own actions.³²

Another issue, perhaps the most hotly-contested issue surrounding the Y2K Act has been the attempt to place caps on punitive damages. While all three of the initial proposals addressed this concern, each differed widely in the extent to which liability should be limited, and the hearings regarding this issue in both the House and Senate took up a significant portion of the total time spent developing the bill.³³ The final version of the act limits the level of liability that can be assessed against a defendant to the lesser of either three times the amount awarded for compensatory damages or \$250,000. For purposes of this section of the act, a defendant is defined as one who: (A) is

sued in his or her capacity as an individual and whose net worth does not exceed \$500,00; or (B) is an unincorporated business, a partnership, corporation, association, or organization, with fewer than 50 full-time employees.³⁴ The Y2K Act does not limit the amount of punitive damages that can be awarded against a large corporation.³⁵

This reflects a significant difference from earlier proposals. The bill submitted by the House Judiciary Committee, for example, completely eliminated the plaintiff's ability to recover punitive damages altogether, while the original House-approved bill placed the above liability restrictions on *all* businesses, large and small. President Clinton took issue with the initial version of the House-passed bill, it was the punitive damages cap that garnered a "promise" for veto.³⁶

Third, the Y2K Act entitles all defendants to a 90-day prelitigation notice, giving the defendant the opportunity to fix Y2K failures and/or consider arbitration measures before complaints proceed to trial.³⁷ Litigation is discouraged simply by the fact that remedies may be obtained more quickly and cheaply when parties resolve disputes themselves.

A fourth issue, proportionate liability, involves another significant issue provided for by the Y2K Act. This section abolishes joint and several liability *for the purposes of Y2K-related litigation only* and sets forth the general rule that defendants are accountable only for their proportionate share of

liability.³⁸ Exceptions to this rule do exist, and the White House suggested these exceptions to make sure that ordinary consumers were protected and "bad actors" were not rewarded. For example, this section of the act does not apply in cases where the defendant either acted with specific intent to injure the plaintiff or knowingly committed fraud.³⁹

Finally, the so-called "sunset provision" denies the Y2K Act any force and effect on actions stemming from any harm occurring after January 1, 1993.⁴⁰ The provision was important because it encouraged much of the legislative opposition to eventually support the final draft of the act. House Representative John Conyers (D-Mich.) Testified, "I can support this legislation because it represents a one-time Federal response to a unique nationwide problem relating to possible Year 2000 computer failures and does not serve in any way as precedent for broader-ranging changes in our tort laws."⁴¹

Today: Current Response to the Y2K Act

The final Y2K liability legislation received much support. In the House and Senate, the bill was supported by lopsided margins, with the final House vote at 404-24 and the Senate vote at 81-18.⁴² The White House also gave its official "blessing" to the bill.⁴³ White House Press Secretary Joe Lockhart stated, "[w]e got the kind of changes that we needed to narrow the bill and make it more about the Y2K

issue and less about a broader tort reform agenda."⁴⁴

The American Tort Reform Association ("ATRA") commended the White House and Congress on reaching an agreement on Y2K issues while managing to avoid tort reform legislation.⁴⁵ According to ATRA President Sherman Joyce, "[i]t is important to note that the legislation does not bar recovery for damage but does put in place a series of rules such as limiting punitive damages and requiring plaintiffs to give a company 90 days to ... fix ...Y2K problems [that must be followed prior to litigation]."⁴⁶ Other groups supporting the act include the U.S. Chamber of Commerce as well as a broad coalition of potential plaintiffs and defendants, corporations and small businesses alike.⁴⁷

It is perhaps the Senate minority which has voiced the strongest opposition to the legislation. "The consumers are getting the shaft. . . . This is a shabby performance," said Senator Ernest Hollings (D-S.C.).⁴⁸ Senate Minority Leader Daschle commented on the National Federation of Independent Business's support of the Y2K Act, "[t]hey may have to eat their words on this one because I believe the people who could be in greater peril are small businesses."⁴⁹ Daschle argued that the Act will likely "miss the mark" on prevention of Y2K-related litigation and may have unintended consequences, particularly for small businesses.⁵⁰

Of course, whether or not the

Y2K Act accomplishes its intent, and what the consequences will be, remain to be seen.

Endnotes

¹ Pub. L. No. 106-37, 106 H.R. 775 (1999).

² *Dreier Calls Y2K Liability Reform Law a Victory for Teamwork*, 1999 Federal Document Clearinghouse, Inc. Congressional Press Release, June 16, 1999.

³ J. Scott Orr, *Senators Push Y2K Limits: Businesses and Consumers Spar as Fears of Legal Eruption Grow*, STAR LEDGER (Newark), June 1, 1999, at 1 [hereinafter Orr].

⁴ See *id.*

⁵ B.G. Greg, *State Confident it's Fixed Y2K Bug: Michigan Ranks 4th Among Governments' Computer Readiness*, DETROIT NEWS, February 28, 1999, at D1.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Ray Long, *Lawmakers Leery Of Legal Bite From Millennium Bug*, CHICAGO TRIBUNE, April 14, 1999, Sec. 1 at 1 and 20 [hereinafter Long].

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See David Judson, *Controversial House Effort to Head Off Y2K Lawsuits Criticized as Too Sweeping*, GANNETT NEWS SERVICE, May 13, 1999, available in 1999 WL 6968149; see also *House Passes Y2K Liability Bill by Overwhelming Margin*, NATIONAL JOURNAL'S CONGRESS DAILY, July 1, 1999.

¹⁸ See Orr, *supra* note 3.

¹⁹ Pub. L. No. 105-271, 105 S. 2392 (1998).

²⁰ See Kristin Cormier, Susan Parnas, *Y2K Legislation Passes the Senate*, NATION'S CITIES WEEKLY, Oct. 5, 1998, at 8, available in 1999 WL 2983894.

²¹ See *id.*

²² See *id.*

²³ Steve Cocheo, *Federal, State Bills Would Remove Some of the Y2K's Legal Sting*, ABA BANKING JOURNAL, March 1, 1999, available in 1999 WL 10893080.

²⁴ See *id.*

²⁵ See *id.*

²⁶ Long, *supra* note 11.

²⁷ *Id.*

²⁸ See Cocheo, *supra* note 23.

²⁹ See *id.*

³⁰ 145 CONG. REC. H5196-01 (daily ed. July 1, 1999) (statement of Rep. Goodlatte).

³¹ See *id.*

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See Cocheo, supra* note 23.

³⁷ *See* 145 CONG. REC. H5196-01.

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* H.R. 775, 106th Congress, 1st Sess. (1999).

⁴³ *House Passes Y2K Liability Bill By Overwhelming Margin, supra*, note 17.

⁴⁴ *Id.*

⁴⁵ *ATRA Statement on Y2K Deal*, PR NEWSWIRE, June 30, 1999.

⁴⁶ *Id.*

⁴⁷ *See Dreier Calls Y2K Liability Reform Law a Victory for Teamwork, supra*, note 3.

⁴⁸ Andrew J. Glass, *Bill to Curb Y2K Suits Passes Congress*, THE ATLANTA JOURNAL AND CONSTITUTION, July 2, 1999, at 1E.

⁴⁹ *House Passes Y2K Liability Bill By Overwhelming Margin, supra*, note 17.

⁵⁰ *Id.*

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