

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

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As an example of a codification of the Business Judgment Rule, Section 141(e) of the Delaware General Corporation Law provides that:

"A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of his duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation."

In some states, such as Delaware, director liability for breach of the duty of care, under the Business Judgment Rule, has been held by courts to require a showing that the directors acted with gross negligence. However, the Business Judgment Rule has been held by some courts not to apply to protect the directors where they abdicated their functions and failed to act. In that instance, the directors could be held liable against a showing of simple negligence.

Thus, in order to avail themselves of the protection of the Business Judgment Rule to deflect shareholder suits seeking court review of the company's adoption and implementation of its Year 2000 corrective plan, the directors may need to show that they had consulted with Year 2000 experts and responsible corporate officials in a timely manner prior to adopting the corporation's Year 2000 corrective plan. This documentation also could serve to establish a "due diligence" defense in the event the directors become the subject of a lawsuit under Sections 11 or 12(2) of the 1933 Act or Section 10(b) of the Exchange Act and Rule 10b-5.

Statutory Limitations on Liability, Corporate Indemnification and D & O Insurance Coverage

Under the corporation laws of some states, such as Delaware, companies (1) are permitted (with the approval of their shareholders) to limit or eliminate their directors' (and in some instances officers') monetary liability for breaches of their fiduciary duties, and (2) may indemnify their directors against expenses, judgments, fines and settlement payments in third-party actions and derivative actions, provided the directors acted in good faith and in a manner they reasonably believed to be in the best interests of the company.

However, although many state laws permit companies to adopt the above limitation of liability and liberal indemnification policies, not all companies have adopted such limitation of liability and indemnification policies and incorporated them into their charter documents. Some corporations also have no D & O liability insurance or have policies with low policy limits.

Since the potential liability of officers and directors of a company which fails to become Year 2000 compliant in time could be considerable, company counsel should review with the company's directors and officers the company's D & O insurance policies, limitation of liability provisions and indemnification provisions so that they may be revised and updated appropriately. Officers and directors who have received personal indemnification agreements from their companies may wish to have their personal counsel re-review the agreements with the Year 2000 problem in mind (see, generally, Dennis Block and Stephen Radin, "Year 2000 Director Liability Issues, Part I", *New York Law Journal*, January 13, 1998, at pg. 1, col. 2 and "Year 2000 Director Liability Issues, Part II", *New York Law Journal*, January 20, 1998, Outside Counsel Section, at pg. 1).

Disclosure Due to Bank Examinations

Regulated banks with significant loan portfolios are likely to be reviewing their exposure to major debtors that have serious Year 2000 compliance problems. This is in part because bank examiners are likely to be reviewing loan portfolios of banks in the next few years to determine if adequate allowances have been made for possible loan defaults due to Year 2000 compliance problems. (See, e.g., the Federal Financial Institutions Examination Council ("FFIEC") Interagency Policy Statement on the Allowance for Loan and Lease Losses ("ALLL"); see also, J. Golter and P. Hawry, "What Every Loan Officer Needs to Know about the Year 2000 Computer Problem (But Doesn't Know How to Ask)", *FIDIC Banking Review* (1998)).

For companies with major lines of credit or bank loans outstanding, the Year 2000 compliance problem, if not handled correctly, may seriously cripple the company's finances even prior to the Year 2000. For example, if a company's line of credit is callable in the event the auditor's letter is qualified in any respect, the delivery of an audit letter in 1999 which is qualified as to the Year 2000 compliance issue might trigger a loss of the bank line of credit at the very time when funds are needed to finish the Year 2000 corrective work.

Federal Legislation Which May Encourage Y2K Disclosures

A number of bills have recently been introduced in Congress as a result of President Clinton's "Good Samaritan Law" proposal with the goal of providing a litigation "safe harbor" for companies which share information about their Y2K readiness and the Y2K status of their products. Senate bill S. 2392 has been approved by the Senate Judiciary Committee and if enacted into law, would provide companies with limited protection from liability if they post unknowingly false Year 2000 readiness statements on their Internet Web sites. Companies sharing Y2K readiness information would also be provided with a limited exemption from the antitrust laws, provided that no group boycotts or price-fixing is involved. Finally, companies sharing information about the Y2K compliancy status of third party vendor products would be given limited liability protection from trade disparagement suits.

STATUTORY/REGULATORY COMPLIANCE MANDATES

The Federal Government has stepped up its involvement during 1998 with respect to the Y2K problem. President Clinton has appointed John Koskinen as head of the President's Council on Year 2000 Conversion (see, *BNA Year 2000 Law Report*, Vol. 1, No. 3, June 1998). Federal regulators have also become more rigorous in their oversight of regulated companies, such as banks, stock brokerage firms, utilities, telecommunication companies and insurance companies with respect to the Year 2000 problem. For example, federally banking regulators have issued guidance to banks with respect to due diligence of borrowers' Y2K status, testing standards and other Y2K topics. They have also conducted Phase I audits with respect to regulated banks' Y2K remediation plans and are in the process now of conducting more extensive Phase II audits (see, e.g., <http://www.ffiec.gov/wp4web.htm>). As an indicator of how federal regulators may react to banks which do not aggressively implement Y2K remediation plans, on November 17, 1997, the Federal Reserve Board issued a cease and desist order against Putnam-Greene Financial Corp. of Eatonton, Georgia, requiring the company to take corrective action on its Y2K problem (see the ITAA Year 2000 Outlook, Volume 2, no. 44, dated November 21, 1997, at the URL of "<http://www.itaa.org>"; see also, Saul Hansell, "Georgia Bankers in Hot Millennium Water", *New York Times*, November 18, 1997). Other regulatory agencies have opted to work through industry trade associations to spur Y2K awareness. For example, the Department of Energy requested the North American Electric Reliability Council (NERC) to survey its utility members as to Y2K preparedness and issue a report, which report was issued on September 17, 1998 (see <http://www.nerc.com>). For the securities industry, Federal regulators are relying in part on industry-wide testing being conducted under the auspices of the Securities Industry Association (SIA) (see, e.g., <http://www.sia.com>). State regulators have opted in certain instances to conduct audits of regulated entities following the federal Y2K audit guidelines (e.g., the New York State Banking Department, following the FFIEC guidelines), while other state regulators have developed their own audit standards (e.g., the New York State Insurance Department). Finally, the U.S. House of Representatives and the U.S. Senate (especially the Special Committee on the Year 2000 Technology Problem) have held extensive public hearings on the Year 2000 problem (see, e.g., "<http://www.itpolicy.gsa.gov/mks/vr2000/cong.htm>").

The Private Securities Litigation Reform Act of 1995 (Pub.L. 104-67) may become of considerable importance to the Y2K disclosure issue as the Year 2000 nears. This act amends the Exchange Act by adding a new Section 10A (codified at 15 USCA §78j-1(a)), which requires auditors to include in their audits of public companies "procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts." Section 10A (15 USCA §78j-1(f)) defines "illegal acts" as "an act or omission that violates any law, or any rule or regulation having the force of law". The auditors must inform management and the board of directors of the occurrence of an "illegal act" (whether or

not it is perceived to have a material effect on the company). If after doing this, the auditors determine that timely and appropriate remedial action is not being taken by management with respect to the illegal act (i.e., complying with a statutory or regulatory Year 2000 compliance mandate) and the auditors reasonably expect the failure to take remedial action to result in the issuance of a non-standard audit report, or resignation from the audit engagement, the auditors must report the situation to the board of directors. The board then must report the auditors' conclusions to the SEC within one business day thereafter. The auditors are immune from private action for the findings in their report to the board of directors, but are subject to SEC civil penalties if the report is not issued as required.

INSURANCE ISSUES

The issue of whether current insurance policies cover some potential losses caused by the Y2K problem is a difficult one (see, generally, CPCU Society, *"The Year 2000 Crisis: Identifying and Managing Exposures: Live Satellite Broadcast Workbook"* (1998); see also, *"The 'Millennium Bug' Analysis of Exposure"* (Swiss Re America 1998)). Many underwriters are actively reviewing their existing policy forms in order to determine what types of coverage disputes they may have with insureds over this issue (see, e.g., *"Strategies & Solutions: The Year 2000 Countdown"*, a Guy Carpenter Special Report (August 1998)). Some insurance organizations, such as the Association of British Insurers, have reportedly been investigating the forms which these Y2K exclusions may take (see Christopher Adams, *"Insurers Agree 'Millennium Bomb' Exclusion Clauses"*, *Financial Times*, November 10, 1997). The Insurance Services Office (ISO) has submitted form Y2K exclusions to numerous state insurance departments for approval for inclusion by underwriters in various General Commercial Liability, Products Liability, Commercial Property, Inland Marine and other insurance policy forms (see, e.g., Peter Rice, *"The Y2K Problem: Where Is It Covered In ISO's CGL Forms?"*, *National Underwriter Property & Casualty/Risk & Benefits Management Edition*, October 13, 1997; see also, S. Brower, *"Bracing for the Invasion of the Millennium Bug"*, *The Recorder*, April, 1998, at p. 18).

The analysis of whether a particular Y2K loss may be covered under an insured's policy depends on whether the form is an ISO or manuscripted form, the type of insurance involved and the exact language of the policy. For example, some policies contain exclusions for losses caused by incorrect software instructions or the deliberate acts of the insured. Underwriters may argue that the Y2K problem represents such an "incorrect instruction" and that since the insured could have become Y2K compliant by devoting sufficient resources to its Y2K remediation plan, the failure to become compliant was due to the insured's deliberate act. Y2K coverage disputes therefore appear likely to occur in the future with respect to various types of policies, *impacting both primary insurers and reinsurers* (see, e.g., E. Canelo, *"The Reinsurer and the Year 2000"*, *Mealey's Litigation Report*, January 15, 1998, at p. 14). The following is a summary discussion of just a few relevant issues with respect to business interruption and Director's and Officer's liability policies.

Business Interruption Insurance

Insurance policies which cover "business interruption" claims (such as property insurance policies) usually require that the business interruption result from a "fortuitous event". A "fortuitous" event has been interpreted by some courts, based on Restatement of Contracts § 291, comment [a], to be "an event which so far as the parties to the contract are aware, is dependent on chance." It can be easily argued that since the Year 2000 problem has been well known for years and is totally within the control of the insured to correct, it does not qualify as a "fortuitous" event (see, e.g., P. Yost and P. Glad, "Computing Coverage: Insurance Issues Arising Out of the Year 2000 Problem", *Insurance Litigation*, March 15, 1998, at p. 164; for an exposition of a contrary position, that Y2K losses may not be excluded as "known risks", see Kirk Pasich, "Millennium: Do Traditional Insurance Policies Cover Businesses In the Event of Year 2000 Losses?", *Los Angeles Daily Journal*, November 20, 1997, at p. 7). Insurance carriers issuing business interruption insurance may decide to highlight the Year 2000 problem in an insert or letter to their insureds in order to be able to establish conclusively that their insureds were aware of the issue.

Directors & Officers Liability Insurance

If a public company were to fail to become Year 2000 compliant in time and shareholder suits against the directors and officers were to result, the company's D & O policy would become of critical importance. Generally, D & O policies will not make any payment, to cite some of the typical exclusions, for any loss arising from any claims made against any director or officer:

- (A) for any fines or penalties imposed in a criminal suit, action or proceeding;
- (B) where the loss represents a personal profit or advantage illegally taken by the officer or director;
- (C) where the loss was brought about by the fraudulent, dishonest or criminal acts of the director or officer, provided that the acts brought about or contributed to the claim adjudicated;
- (D) for bodily injury, sickness, disease or death of any person, assault, battery, mental anguish, or emotional distress;
- (E) for damage to or destruction or loss of use of tangible property; or
- (F) for injury based on invasion of privacy, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, libel or slander.

It therefore appears that so long as the insured company is making some effort to correct its Year 2000 problem, even if it is grossly negligent in the process, it still may be covered by its D & O insurance.

However, if a director or officer knew of a fact or circumstance which was likely to give rise to a claim (e.g., a material Year 2000 compliance problem) and failed to disclose or misrepresented the fact or circumstance in the application for D & O insurance, the insurance company may refuse to make payment for any loss arising from a claim against such officer or director.

Although D & O insurance is usually renewed every year, the renewal application usually requests little information and usually does not request any confirmation that no material change has occurred with respect to the representations of the company contained in the original D & O insurance application. Thus, unless a company is applying for D & O insurance for the first time or is switching insurers, its Year 2000 problem may not come up in the renewal process. In light of this, companies with significant Year 2000 problems and a short-form renewal application may hesitate to switch D & O insurers prior to the Year 2000.

Some D & O insurance renewal applications, however, do attempt to ascertain the insured's risk of potential loss, asking, for example, for information about material changes in the insured's financial statements or audit committee procedures. Accordingly, counsel for the insured should review the D & O insurance policy renewal application with the Year 2000 problem in mind to see if any disclosure is required. Some companies may also decide to seek three year D & O policies in order to try to lock in policy terms.

YEAR 2000 "MILLENNIUM BUG" LITIGATION

There has been considerable speculation in the legal and public press that the Year 2000 computer problem will generate considerable amounts of litigation. Capers Jones, Chairman of Software Productivity Research, a provider of software measurement, assessment and estimation products and services, has speculated that for every dollar not spent on repairing the Year 2000 problem, the anticipated costs of litigation and potential damages will probably amount to in excess of ten dollars. Since the corrective cost estimates range from the J.P. Morgan estimate of \$200 billion to the Gartner Group estimate of \$300 billion to \$600 billion, this would result in a litigation estimate of several trillion dollars if the necessary corrective work is not done. One legal commentator reportedly has estimated that the ultimate litigation may cost \$1 trillion, assuming average legal costs and a 5% failure rate. The Giga Information Group, an information technology advisory firm, also estimates Year 2000 litigation costs nearing or exceeding \$1 trillion. In order to underscore the enormity of the above litigation estimate of \$1 trillion in litigation costs, this cost would greatly exceed the *combined* estimated legal costs associated with Superfund environmental litigation (at \$1 billion per year), U.S. tort litigation (at \$29 billion to \$36 billion for 1985) and asbestos litigation (at \$1

billion per year). Indeed, a \$1 trillion cost for Year 2000 litigation would exceed even the estimated total annual direct and indirect costs of all civil litigation in the United States (at \$300 billion per year).

Notwithstanding the above statistical data, we can only speculate as to the actual litigation which will result from the Year 2000 computer problem and the cost of the ultimate litigation, since (a) relatively minimal litigation (such as the *Produce Palace*, *Software Business Technologies*, *Symantec*, *Macola*, *Medical Manager*, *Quarterdeck* and *J. Baker* lawsuits, discussed below) has been reported to have occurred as of the date of this article based on the Year 2000 problem and (b) we do not know how much necessary Year 2000 corrective work will ultimately not be completed on time. Why is Year 2000 Litigation Inevitable?

The main reason why some litigation is inevitable due to the Year 2000 problem stems from the Gartner Group estimate (with a 0.7 certainty) that perhaps 50% of the companies with a Year 2000 problem will not become fully Year 2000 compliant by January 1, 2000. The reason why so many companies will fall in their Year 2000 corrective effort is that (a) they are starting too late, (b) they are not devoting sufficient personnel and funds to the effort, (c) there are not enough trained programmers available, in any event, to fix all of the software code requiring correction, (d) not enough time and resources will be devoted to the testing phase, which could be the most expensive and time-consuming phase for many companies, (e) even if a particular company becomes fully compliant, its systems may become contaminated by data or software supplied by outside third parties who have not become compliant, and (f) the city or geographic area in which the company has its offices may not have Year 2000 compliant telecommunication and electric utility systems, resulting in infrastructure failures which negatively impact on the company.

Cascade Effect of Litigation

Assuming that the Gartner Group prediction is accurate, the failure of such a large percentage of corporate computer systems will undoubtedly lead, for example, to contracts being breached, defective products and services being delivered, industrial accidents and business interruptions. These corporate dislocations can cause stock prices of affected public companies to fall, which in turn may lead to shareholder derivative suits against the affected companies' boards of directors alleging breach of fiduciary duty and failure to disclose the Year 2000 problem fully in the annual and quarterly reports filed with the U.S. Securities and Exchange Commission ("SEC"). Affected companies may in turn sue the computer consultants which had advised them on the design of the companies' computer systems and also sue the vendors which had sold, licensed or maintained the hardware and software comprising the non-compliant system. Ultimately, many of the entities sued will seek to recover litigation costs from their professional errors & omissions insurance, directors and officers ("D&O") liability insurance and other insurance policies.

Insurers are Taking the Year 2000 Litigation Risk Seriously

The above litigation risks are not fanciful and should be taken seriously, since they can materially impact the underwriting community (see. e.g., Moody's Investors Service, *"Playing Chicken with the Millennium? Property & Casualty Insurers and Reinsurers Face the Year 2000 Problem"*, Special Comment (July 1998)). It appears that major insurance companies insuring the potentially affected companies agree with this approach, since several insurance companies are currently undertaking a serious evaluation of the potential litigation risk that the Year 2000 problem poses to their insurance portfolios. For example, a major insurer has sent a "Year 2000 Supplemental Questionnaire" to insureds in its D&O liability portfolio, requesting information as to whether the insured (a) has inventoried its hardware and software for Year 2000 compliance, (b) has a Year 2000 corrective plan in place, (c) has had its legal counsel review license agreements and long-term maintenance agreements to determine if the vendors of third party licensed software have an obligation to make their software Year 2000 compliant, (d) has contacted its critical suppliers in order to determine the suppliers' Year 2000 compliance plans, and (e) has a plan to monitor the critical suppliers' progress in becoming Year 2000 compliant. The insurer's questionnaire is stated as being intended to become part of the insured's D&O policy. Similar questionnaires are likely to be sent out by insurance companies to insureds under professional liability and errors and omissions policies in the near future. Presumably, if an insurance company determines that the risk of the Year 2000 problem to its portfolio is severe, it can consider (a) amending its policy to exclude liabilities arising out of the Year 2000 problem, (b) increasing the premiums to reflect the increased risk, (c) refusing to renew coverage for companies which appear not to be serious about becoming Year 2000 compliant on a timely basis, or (d) taking some other steps or combination of the above steps.

For purposes of business interruption insurance, as discussed above, it is likely that many insurance carriers will take the position that the Year 2000 problem is not a "fortuitous event" designed to be covered under their policy and that business interruption losses incurred due to the Year 2000 problem are therefore not covered under the existing business interruption policies. This "gap" in business interruption coverage has prompted (a) J&H Marsh & McLennan and AON Risk Services to announce the creation of competing risk transfer Year 2000 insurance products and (b) AIG to announce the creation of a finite risk Year 2000 insurance product, to cover insureds against certain business interruption, D&O, third party liability and other losses arising out of the Year 2000 computer problem and a special Y2K D&O coverage endorsement.

When will the Litigation Begin?

Suits may arise in the near future involving, for example, (a) claims that software and/or hardware purchased or licensed was not "Year 2000 compliant" as warranted, (b) claims that long-term maintenance providers or data processing outsourcing providers should

absorb part or all of the plaintiffs' Year 2000 corrective costs, or (c) claims for damages due to the malfunction of non-compliant software applications which conduct forward-looking calculations (i.e., the occurrence of an "event horizon" earlier than the year 2000). The first Year 2000 litigation filed was a suit by Produce Palace, a Michigan supermarket chain, against TEC America, Inc., claiming that cash registers were failing to handle credit cards with expiration dates in the year 2000 due to a TEC computer system which only recognized two digit date fields (which suit has now reportedly been settled). The second major U.S. Y2K litigation filed was *Atlaz International, Ltd. v. Software Business Technologies, Inc. and SBT Accounting Systems, Inc.* (case no. 172539), filed on December 2, 1997 in the Superior Court of the State of California, County of Marin (see the ITAA Year 2000 Outlook, Volume 2, No. 45, at the URL of "<http://www.ita.org>"). The SBT suit is a class action against a vendor of database accounting software, alleging breach of warranty, fraud and deceit and violation of the California Business and Professions Code Section 17200 prohibiting fraudulent and unfair business practices. Of particular note with respect to the SBT case is the issue of whether the vendor acted improperly in requiring companies who licensed the software prior to March of 1997 to purchase a Y2K compliancy upgrade issued in March of 1997, rather than issuing the upgrade for free. Suits alleging causes of action based on the vendor's charging for a Y2K corrective upgrade similar to the SBT case have also been filed against Symantec, Macola, Medical Manager, Quarterdeck and Intuit (although one of the Intuit lawsuits has been dismissed).

Of special note is the recent lawsuit by Michael Young, as representative of Andersen Consulting LLP against J. Baker, Inc., seeking a declaratory judgment to determine whether Andersen Consulting was in breach of its contract with J. Baker or violated any duty to J. Baker when it assisted it in the selection, design, customization and implementation of a third party retail software package which was not Y2K compliant (Superior Court Division of the Trial Court, Commonwealth of Massachusetts, Civ. Action No. 98-01597); see also, generally, the URL of "<http://www.year2000.com/lawcenter/NFlawcenter.html>"). Despite the appearance of the above suits, the majority of litigation likely will commence after January 1, 2000 since that is the date on which most of the impacted systems will begin to fail.

Of course, potential plaintiffs and their lawyers will need to determine if a statute of limitations may bar their suits if they wait too long to file. For example, if a plaintiff intends to sue a vendor for selling computer hardware which is not Year 2000 compliant, claiming that the product was defective and breached an implied warranty of merchantability or an express warranty within the sales contract, a four year contract statute of limitations may apply under Section 2-725(1) of the relevant state's Uniform Commercial Code ("UCC"). Under Section 2-725(2) of the Uniform Laws Annotated version of the UCC, the cause of action accrues when the breach occurs (i.e., when tender of the goods occurs), regardless of the aggrieved party's lack of knowledge of the breach. However, where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered. The plaintiff's

attorney may decide, out of an abundance of caution, that the statute began to run when the computer hardware was delivered, rather than when the plaintiff first learned that the software was not Year 2000 compliant or at the date of the first failure of the software. The plaintiff would then file suit within four years from the date of delivery of the hardware. In some instances, the default statute of limitations may have been shortened by contractual agreement of the parties.

Who Will be the Parties to the Litigation?

The possible plaintiffs commencing Year 2000 litigation run the gamut of potential plaintiffs: private sector companies, governmental entities, shareholders of companies, third party intellectual property owners, customers, individually or as a class, tenants or governmental entities, among others. Potential defendants include product vendors, consultants, outsourcing vendors, maintenance vendors, contract parties, banks, stock brokerage firms, service providers, boards of directors and top management, building owners of "smart" buildings providing telecommunications service and governmental entities.

What are Some Potential Causes of Action?

The following are some potential causes of action:

(a) In suits against hardware and software vendors and service providers:

(1) breach of an express warranty that a product is "Year 2000 compliant" (since there is no single, uniformly accepted legal definition of what it means for a product to be "Year 2000 compliant," these suits may involve the court in attempting to choose between competing definitions of compliancy put forth by the plaintiff and the defendant);

(2) breach of an express warranty by the vendor that the software contained no "viruses," arguing that the Year 2000 "Millennium Bug" constituted a "logic bomb" (a debilitating software code akin to a virus, that activates itself at a specified date or time), or alternatively, arguing that the vendor's disclaimer of implied warranty or merchantability was ineffective to exclude liability for latent defects such as a "logic bomb," since to permit such a disclaimer would be unconscionable;

(3) negligent misrepresentation or fraud, on the theory that the vendor knew that the plaintiff intended to utilize the product into the next century and fraudulently failed to alert plaintiff to the fact that the product would not operate properly past its first "event horizon" which might even precede January 1, 2000;

(4) where the computer products are considered "goods" within that UCC, a claim of "failure of essential remedy" under the license agreement and that therefore the vendor's disclaimer of other remedies (implied warranties and consequential damages, for example) should be deemed ineffective;

(5) violation of a state deceptive trade practices law;

(6) fraudulent misrepresentation on the theory that the Vendor's advertising implied that all of its products would be made Year 2000 compliant, when in fact the vendor had decided secretly not to provide Year 2000 compliant upgrades for older versions of its hardware and/or software, but only for the most recent version available in the marketplace in order to force its customer base to upgrade;

(7) tort claims for personal injury or property damages, based on negligent misrepresentation, fraud or strict product liability (note that some courts are reluctant to allow claims for pure economic loss under a tort theory, preferring to restrict the theory to cases involving personal injury and/or property damage);

(8) claim for injunctive relief against vendors which refuse to grant access to the source code of a licensed program so that the licensee may modify the software to make it Year 2000 compliant;

(9) violation of criminal laws prohibiting the marketing of a "destructive computer program";

(10) failure or refusal to correct the Year 2000 defect as part of an existing long-term maintenance agreement or long-term outsourcing agreement;

(b) in suits against hardware and/or software consultants:

(1) claims of negligence in failure to design Year 2000 compliant computer systems or negligent misrepresentation in failure to warn plaintiff of Year 2000 problem;

(2) claim of failure to exercise "good faith and fair dealing" in failing to disclose to the plaintiff the Year 2000 compliancy problem as part of consultation with respect to the purchase of a computer product;

(3) computer malpractice in designing a computer system which became obsolete due to the Year 2000 problem;

(c) in suits against boards of directors and top management:

(1) waste of corporate assets;

(2) breach of fiduciary duty, duty of due care and/or duty of loyalty;

(3) securities law violations;

(4) breach of duties under federal and state banking laws, pension laws (e.g., ERISA) and similar laws;

General Prediction:

Some plaintiff's lawyers are likely to accuse a defendant company's directors and top management in front of the jury of gross negligence and reckless disregard of their duty of due care, explaining that even though the Year 2000 problem has been known for decades, the company's directors and management waited until nearly the year 2000 to begin actual corrective work, did not hold a single board of directors meeting on the Year 2000 problem and did not even approve a budget for the corrective work, expecting the company's Information Systems (IS) staff to do all of the work out of its existing maintenance budget, inevitably leading to a failure of the company's year 2000 corrective plan.

(d) in suits against software licensees:

(1) infringement of intellectual property rights of a licensor, due to the object code only licensee (or its Year 2000 corrective vendor) reverse engineering software in order to modify the source code to make it Year 2000 compliant;

(e) in suits against product manufacturers:

(1) product liability claims (including personal injury and property damage claims) against manufacturers and distributors of non-computer equipment (such as HVAC systems, elevators, security systems and consumer products such as microwave ovens) with non-compliant embedded microchips;

(f) in suits against other employers of software programmers:

(1) misappropriation of trade secrets and tortious interference with a competitor's business, based on "raiding" by one company of a competitor's programmers in order to have sufficient human resources to implement a Year 2000 corrective plan;

(g) in suits against banks, stock brokerage firms and similar entities:

(1) for monies lost due to improper or failed financial transactions, stock trades, settlements, etc.

(h) in suits against landlords of "smart" buildings:

(1) breach of the lease covenant of quiet enjoyment, based on the failure of the landlord to provide telecommunications service for the tenant's computer systems due to the malfunction of the building telephone PBX caused by the Year 2000 problem;

(i) in suits against insurers:

(1) claims that the business interruption damages suffered due to the Year 2000 problem should be covered under the insured's business interruption insurance despite the insurer's position that the Year 2000 problem does not constitute an insurable "fortuitous event";

(2) claims that the D&O liability policy should cover the insured's directors and officers for suits arising out of a Year 2000 problem, despite (a) the insureds' failure to disclose the Year 2000 problem in insurance applications or renewal applications, or (b) the insurer's position that no "claims" had been made during the policy period;

(3) claims that the insurer wrongfully failed to honor claims against a professional errors and omissions policy;

(4) claims that the insurer wrongfully terminated or failed to renew the insured's professional errors and omissions insurance, D & O insurance or business interruption insurance;

What are Some Potential Defenses?

Defendants may attempt to raise the following defenses, among others:

(1) the plaintiff assumed the risk of a Year 2000 problem and is estopped from raising its claim (i.e., the defendant vendor may argue that the plaintiff customer must have known about the Year 2000 problem when it purchased the hardware or software, since the Year 2000 problem has been common knowledge in the technology community for decades and computers had malfunctioned in the past due to date field problems);

(2) defendant is not liable under the theory of "force majeure" for the breach of its contract with plaintiff, because defendant was unable to perform due to a failure of one of defendant's suppliers caused by a Year 2000 problem, which failure was not anticipated by defendant and was beyond defendant's reasonable control;

(3) plaintiff's claim is barred by a statute of limitations;

(4) defendant's board of directors and/or officers have a "due diligence" defense to the plaintiffs' securities law violation claim;

(5) defendant's directors and/or officers are not liable under the applicable states "business judgment rule" unless plaintiffs can prove the defendants guilty of fraud, bad faith, abuse of discretion, of being uninformed or guilty of gross negligence;

(6) plaintiff's claim is barred due to the disclaimer of warranties and limitation of remedies language in the contract;

(7) defendant was following industry standard practice in designing computer systems, writing software and/or manufacturing microchips using two digit year date fields, and this practice has been shown to be reasonable on a cost-benefit historical analysis;

(8) governmental entities may rely on the defense of sovereign immunity, subject to applicable tort claims acts.

What are Some Potential Damages?

Damages sought in the litigation could include direct, indirect, incidental, special, consequential and punitive damages and recovery of fines and penalties assessed by governmental agencies. It should be recognized, however, that some types of damages may be unavailable due to (a) the parties to a transaction having agreed to exclude them, (b) exclusion by operation of statute, (c) exclusion by operation of tariff, such as with a telephone company, or (d) reluctance of a court to award punitive damages in a pure contract case.

What is the Potential Collateral Impact of the Litigation?

The collateral impact could include loss of revenues, loss of stock value, loss of bank lines of credit, invalidation of warranty and maintenance obligations due to unauthorized licensee alterations to software programs and bankruptcy, among others. For example, if a company's independent public accountants issues a qualified audit letter due to concerns about the company's Year 2000 corrective plan, the company's bank lender may decide to terminate the company's line of credit just when it needs the funds to complete its corrective work. The impact of the failure of governmental systems could include short-term civil unrest, as well as long-term loss of trust in the government.

Litigation Arising Out of Dependencies on Business Partners

Finally, even if companies become fully Year 2000 compliant, they still may suffer computer system shutdowns due to the failure of their business partners to become Year 2000 compliant. This principle holds true for governmental entities as well, since Federal and state government computer systems communicate and share data regularly with each other. Shared resources such as NATO computer systems and international settlement clearing systems are other examples of how U.S. governmental entities and private companies could become Year 2000 compliant and still suffer shutdowns due to the failure of non-U.S. business partners. The failure of governmental systems may have an impact on private sector companies doing business with governmental entities. This dependency problem could itself generate litigation even in advance of a system failure. For example, a large automotive manufacturer might terminate a supply contract with a smaller company in favor of a contract with a substitute supplier because of worries that the original supplier will not become Year 2000 compliant in time, resulting in a wrongful termination/breach of contract suit by the terminated supplier.

Preventive Law Measures

For example, unless otherwise agreed by parties to an electronic data interchange ("EDI") transaction, the default rule is that the sender of an EDI message is responsible for the loss incurred if the value-added network ("VAN") does not accurately transmit a message to the intended EDI recipient. This default rule may be reasonable when the occurrence of a VAN mistake is rare, but if a VAN fails to become Year 2000 compliant and incorrectly transmits thousands of EDI messages, the VAN may file for bankruptcy and fail to indemnify all of the various senders for the damages. Rather than

face this problem, EDI senders could investigate the possibility of amending their Trading Partner Agreements to provide that the sender and recipient will equally share in any loss caused by the non-compliance of a VAN, whether chosen by the sender or the recipient. The sender and recipient could also require the VAN to secure Year 2000 insurance, which would not be issued unless the VAN had a satisfactory Year 2000 corrective plan in place and continued to implement such plan through the year 2000.

CONCLUSION

Computer experts and chief information officers of corporations have long known of the Year 2000 problem from a *technical* point of view. As is evident from the above discussion, the *legal* issues surrounding the Year 2000 problem can be equally as thorny and merit serious attention. Failure to address the legal issues surrounding the Year 2000 problem can lead to (a) delays from third party vendor lawsuits, (b) loss of claims against vendors who otherwise might be required to pay for Year 2000 corrective costs, (c) legal liabilities for the company and (d) personal monetary liability for the company's officers and directors.

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Jeff Jinnett is Head of the Year 2000 Practice Group of the law firm of LeBoeuf, Lamb, Greene & MacRae, LLP. He also serves as President of LeBoeuf Computing Technologies, LLC, a business subsidiary of the law firm, which advises clients on the Year 2000 computer problem. Jeff Jinnett can be reached via e-mail at jinnett@llgm.com.

Author's Note: This article is intended solely to raise the level of Year 2000 awareness of the reader and is not intended to provide legal advice with respect to specific transactions or matters. Readers of this article are cautioned to consult with their own legal counsel prior to undertaking any action with respect to specific legal matters or issues. This article was written in September of 1998 and does not reflect any information or events after September of 1998. Portions of this article first appeared in print in the December, 1996 issue of *The Computer Lawyer* and in the June, 1997 issue of the *Los Angeles Lawyer*. An earlier version of this article also has been published in *Understanding, Preventing and Litigating Year 2000 Issues* (Practising Law Institute 1998).

ALASKA STATE LEGISLATURE

HOUSE LABOR AND COMMERCE COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Andrew Halcro, Vice-Chairman
Representative John Harris
Representative Lisa Murkowski
Representative Jerry Sanders
Representative Tom Brice
Representative Sharon Cissna



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4954
Fax: (907) 465-2040

MEMORANDUM

TO: E&O and D & O Insurance Providers

FROM: Rep. Norman Rokeberg, Chairman
House Labor & Commerce Committee

DATE: February 24, 1999

RE: House Bill 82 - Y2K Immunity for Private Sector

The House Labor & Commerce Committee will be holding a hearing on the captioned legislation on Friday, February 26, 1999, beginning at 3:15 p.m. The Anchorage Legislative Information Office, 716 West Fourth Avenue, Anchorage, will be on line and would be the Anchorage location for this hearing. The Committee would like to concentrate on insurance issues and concerns of insurance providers in regards to private sector and Y2K.

If you write E&O and/or D & O insurance policies in Alaska, I would like to extend an invitation to you to attend and present testimony at this hearing. The testimony would be limited to 3 minutes; however, if you wish to submit written testimony that would be appreciated.

The Committee wishes to consider the following areas:

1. Do current E & O and/or D & O policies protect against Y2K failure claims?
2. Are Y2K failure policies readily available?
3. What would be the impact of requiring these policies to cover Y2K failures?
4. What has the insurance industry been doing to ensure Y2K compliance of the industry itself?

If you have any questions, please contact Janet Seitz at (907) 465-4954. Testimony may be faxed to me at (907) 465-2040. Thank you for your assistance.

FEB 25 1999

Cathcart Ltd.

FAX LETTER

907 258 2413

TO: Alaska State Legislature

ATTN: Rep. Norm

House Labor & Commerce

Rokeberg

FAX: 1 907 465 2040

Date: 2/25/99

Re: House Bill 82 – Y2K Immunity for Private Sector

PAGES: 1

In response to your FAX of 2/24/99 the following is my response to the questions posed. These answers are after consulting with major carriers who are involved in the D & O and E & O coverages.

#1 – Standard E & O policies routinely include a Y2K Exclusion. On a case by case basis underwriters may delete the exclusion after a careful review of Y2K questionnaires. D & O policies may have an exclusion, be silent or offer coverage on a limited basis. Any Y2K coverage on a D & O policy will be for claims brought by third parties.

#2 – No – Insurance Carriers view Y2K failure claims to be foreseeable, known events. (Last year there were some policies available for very large companies (Fortune Five-Hundred) but underwriting was very strict and very few if any written.

#3 – At this late date I do not think this is possible.

#4 – Insurance carriers are developing their own compliance policies and will provide status upon request. Since the Y2K problem has become a coverage issue the insurance industry has devoted extensive effort in providing information and requiring written documentation of compliance.

Thank you

Wally Cathcart

ALASKA STATE LEGISLATURE

House of Representatives

Committee Assignments:

Labor & Commerce Committee, Chairman
Judiciary Committee, Member
Legislative Council, Member

Special Committees:

Utility Restructuring, Member
Economic Development, Member

Budget Subcommittees:

Commerce & Economic Development, Member
Corrections, Member
Labor, Member



Interim:

716 West 4th Avenue, Suite 640
Anchorage, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:

State Capitol
Juneau, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

REPRESENTATIVE NORMAN ROKEBERG

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

February 26, 1999

RE: House Bill 82

Attachments:

1. S 96 - Senator McCain's "Y2K Act" pending before Congress
2. California SB 1173, signed by Governor 9/24/98
3. As requested by the Committee, a copy of various state proposals from:
 - a. Arizona - SB 1057
 - b. Colorado - HB 1190
 - c. Florida - SB 80
 - d. Indiana - SB 666
 - e. Maryland - HB 8
 - f. Montana - SB 16
 - g. Nebraska - LB 661
 - h. New Jersey - AB 2666
 - i. North Dakota - SB 2303
 - j. Oklahoma - HB 1412
 - k. Texas - HB 40
 - l. Virginia - SB 983 which passed the Senate with SB 1180 rolled into it.

NOTE: These were the bills described in the handout provided by the Department of Administration at the last meeting.

106TH CONGRESS
1ST SESSION

S. 96

To regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. McCAIN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Y2K Act".

5 **SEC. 2. DEFINITIONS.**

6 In this Act:

1 (1) Y2K ACTION.—The term “Y2K action”
2 means a civil action commenced in any Federal or
3 State court for a cause of action arising out of a
4 Y2K failure but does include an action to recover
5 damages for personal injury (excluding emotional
6 harm) or wrongful death.

7 (2) Y2K FAILURE.—The term “Y2K failure”
8 means a systems product failure caused by the in-
9 ability of a computer system, program, or software’s
10 failure to accurately store, process, provide, or re-
11 ceive data containing the year-2000 date.

12 (3) Y2K-COMPLIANT.—The term “Y2K-compli-
13 ant” means—

14 (A) with respect to an information tech-
15 nology product, that the product does not have
16 a Y2K failure; and

17 (B) with respect to a business, that none
18 of that business’s information technology prod-
19 ucts that materially affects the business’s ca-
20 pacity to deliver goods and services has a Y2K
21 failure.

22 (4) INFORMATION TECHNOLOGY PRODUCT.—
23 The term “information technology product” means a
24 computer, a computer program, or computer soft-

1 ware, or product using a computer program, chip, or
2 computer software.

3 **SEC. 3. APPLICABILITY; PREEMPTION.**

4 (a) **APPLICABILITY TO Y2K ACTIONS.**—This Act ap-
5 plies to any Y2K action, commenced after the date of en-
6 actment of this Act, brought in a Federal or State court.

7 (b) **SCOPE OF PREEMPTION.**—This Act supersedes
8 any State law regarding recovery for harm caused by a
9 Y2K failure only to the extent that this Act establishes
10 a rule of law applicable to any such recovery which is in-
11 consistent with State law. Any issue arising under this Act
12 that is not governed by any such rule of law shall be gov-
13 erned by applicable State or Federal law.

14 (c) **ACTIONS FOR PERSONAL INJURY.**—This Act does
15 not apply to a civil action brought for personal injury to
16 the extent that the action is based on physical injury.

17 **SEC. 4. EXCLUSIVE REMEDIES.**

18 (a) **IN GENERAL.**—The remedies provided by this Act
19 are the exclusive remedies available to a plaintiff in a Y2K
20 action, except as may be otherwise provided in a contract
21 to which the plaintiff and the defendant are parties.

22 (b) **DEFENDANT'S OPPORTUNITY TO FIX PROB-**
23 **LEM.**—A Y2K action may not proceed to trial until—

1 (1) the plaintiff has notified the defendant in
2 writing, describing the Y2K failure with particular-
3 ity; and

4 (2) the plaintiff has afforded the defendant the
5 opportunity, including reasonable access to comput-
6 ers and computer software affected by the Y2K fail-
7 ure described in the notice, to fix the problem.

8 **SEC. 5. DAMAGES.**

9 (a) **ECONOMIC LOSS.**—Except as otherwise provided
10 in this section, damages awarded in a Y2K action are lim-
11 ited to economic loss.

12 (b) **OTHER DAMAGES.**—

13 (1) **IN GENERAL.**—Damages in a Y2K action
14 (including punitive damages) other than for eco-
15 nomic loss may not exceed the greater of—

16 (A) 3 times the amount awarded for eco-
17 nomic loss; or

18 (B) \$250,000.

19 (2) **SPECIAL RULE.**—In the case of a
20 defendant—

21 (A) who—

22 (i) is sued in his or her capacity as a
23 individual; and

24 (ii) whose net worth does not exceed
25 \$500,000; or

1 (B) that is an unincorporated business, a
2 partnership, corporation, association, unit of
3 local government, or organization with fewer
4 than 25 full-time employees,

5 paragraph (1) shall be applied by substituting
6 "\$50,000" for "\$250,000" in subparagraph (B).

7 (c) PUNITIVE DAMAGES.—No amount shall be
8 awarded a plaintiff in a Y2K action for punitive
9 damages—

10 (1) except to the extent authorized by State
11 law; and

12 (2) unless the plaintiff proves that the economic
13 damages suffered resulted from conscious and fla-
14 grant disregard, rather than mere negligence, on the
15 part of the defendant.

16 (d) GOOD FAITH LIMITATION.—Damages in a Y2K
17 action may not be awarded, except for economic loss,
18 against any defendant who demonstrates that the defend-
19 ant exercised due diligence and reasonable care to prevent
20 or remedy the Y2K failure according to generally accepted
21 standards of care and effort in the business activity in
22 which the defendant was engaged.

23 **SEC. 6. SEVERAL LIABILITY.**

24 The liability of more than 1 defendant in a Y2K ac-
25 tion may be several but may not be joint.

1 **SEC. 7. APPOINTMENT OF SPECIAL MASTERS FOR Y2K AC-**
2 **TIONS.**

3 Any District Court of the United States in which a
4 Y2K action is pending may appoint a special master to
5 hear the matter and to make findings of fact and conclu-
6 sions of law in accordance with Rule 53 of the Federal
7 Rules of Civil Procedure.

8 **SEC. 8. LIABILITY RULES APPLICABLE TO PRODUCT SELL-**
9 **ERS, RENTERS, AND LESSORS.**

10 (a) **GENERAL RULE.—**

11 (1) **IN GENERAL.—**In any Y2K action, an infor-
12 mation technology product seller other than a manu-
13 facturer shall be liable to a claimant only if the
14 claimant establishes—

15 (A) that—

16 (i) the information technology product
17 that allegedly caused the harm that is the
18 subject of the complaint was sold, rented,
19 or leased by the information technology
20 product seller;

21 (ii) the information technology prod-
22 uct seller failed to exercise reasonable care
23 with respect to the information technology
24 product; and

1 (iii) the failure to exercise reasonable
2 care was a proximate cause of harm to the
3 claimant;

4 (B) that—

5 (i) the information technology product
6 seller made an express warranty applicable
7 to the information technology product that
8 allegedly caused the harm that is the sub-
9 ject of the complaint, independent of any
10 express warranty made by a manufacturer
11 as to the same information technology
12 product;

13 (ii) the information technology prod-
14 uct failed to conform to the warranty; and

15 (iii) the failure of the information
16 technology product to conform to the war-
17 ranty caused harm to the claimant; or

18 (C) that—

19 (i) the information technology product
20 seller engaged in intentional wrongdoing,
21 as determined under applicable State law;
22 and

23 (ii) such intentional wrongdoing was a
24 proximate cause of the harm that is the
25 subject of the complaint.

1 (2) REASONABLE OPPORTUNITY FOR INSPEC-
2 TION.—For purposes of paragraph (1)(A)(ii), an in-
3 formation technology product seller shall not be con-
4 sidered to have failed to exercise reasonable care
5 with respect to an information technology product
6 based upon an alleged failure to inspect the informa-
7 tion technology product—

8 (A) if the failure occurred because there
9 was no reasonable opportunity to inspect the in-
10 formation technology product; or

11 (B) if the inspection, in the exercise of rea-
12 sonable care, would not have revealed the as-
13 pect of the information technology product
14 which allegedly caused the claimant's harm.

15 (b) SPECIAL RULE.—

16 (1) IN GENERAL.—An information technology
17 product seller shall be liable as a manufacturer of an
18 information technology product for harm caused by
19 the information technology product if—

20 (A) the manufacturer is not subject to
21 service of process under the laws of any State
22 in which the action may be brought; or

23 (B) the court determines that the claimant
24 would be unable to enforce a judgment against
25 the manufacturer.

1 (2) STATUTE OF LIMITATIONS.—For purposes
2 of this subsection only, the statute of limitations ap-
3 plicable to claims asserting liability of an informa-
4 tion technology product seller as a manufacturer
5 shall be tolled from the date of the filing of a com-
6 plaint against the manufacturer to the date that
7 judgment is entered against the manufacturer.

8 (c) RENTED OR LEASED PRODUCTS.—Any person
9 engaged in the business of renting or leasing an informa-
10 tion technology product (other than a person that is an
11 information technology product manufacturer or a seller
12 liable as a manufacturer under paragraph (1)) shall be
13 subject to liability in a Y2K action, but any person en-
14 gaged in the business of renting or leasing an information
15 technology product shall not be liable to a claimant for
16 the acts of another solely by reason of ownership of such
17 information technology product.

○

BILL NUMBER: SB 1173 CHAPTERED
BILL TEXT

CHAPTER 860
FILED WITH SECRETARY OF STATE SEPTEMBER 25, 1998
APPROVED BY GOVERNOR SEPTEMBER 24, 1998
PASSED THE SENATE AUGUST 31, 1998
PASSED THE ASSEMBLY AUGUST 28, 1998
AMENDED IN ASSEMBLY AUGUST 25, 1998
AMENDED IN ASSEMBLY AUGUST 17, 1998
AMENDED IN ASSEMBLY JULY 17, 1997
AMENDED IN SENATE JUNE 3, 1997

INTRODUCED BY Senators Vasconcellos and Kopp and Assembly Members
Alquist and Honda

FEBRUARY 28, 1997

An act to add Title 17 (commencing with Section 3269) to Part 4 of Division 3 of the Civil Code, relating to liability, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1173, Vasconcellos. Liability: disclosure of Year 2000 information.

Existing law provides that an obligation arises either from a contract or from the operation of law. An obligation arising from operation of law may be enforced in the manner provided by law or by a civil action. Existing law provides governmental entities with limited immunity from liability for injuries, however, the immunity does not extend to liability based on contract or to obtain relief other than money damages.

This bill would provide immunity from liability for tort damages to any person or entity, including governmental entities, for injury resulting from the gratuitous disclosure of information relating to the Year 2000 Problem, as defined, affecting computer systems and programs, as specified. The bill would not, however, limit liability for those persons or entities that provide Year 2000 solutions for profit, as specified; nor would it affect any other remedy available at law.

This bill would declare that it is to take effect immediately as an urgency statute.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) The "Year 2000 Problem," characterized by the failure of computers to function because they are programmed to recognize the year using the last two digits and may be unable to recognize dates after December 31, 1999, threatens potential catastrophe and poses a substantial risk to the welfare of the citizens, businesses, and government of California.

(b) Massive efforts are underway in both the public and private sectors to prepare all "mission critical" computer systems to recognize the year 2000, thereby protecting against computer failures

that could jeopardize our public safety, our economic health, our ready access to electricity and water, our medical care, and numerous other essential goods and services.

(c) The free flow of information about solutions to the Year 2000 Problem among public and private entities and individuals is essential to our collective efforts to achieve Year 2000 Problem compliance and minimize the risks associated with Year 2000 Problem failures.

(d) Businesses and individuals are reluctant to share information relating to the Year 2000 Problem due to concerns that the information, although shared in good faith, may be used or applied incorrectly or include unintended inaccuracies that may lead to costly legal complications.

(e) The federal Department of Justice Antitrust Division has informed publicly traded corporations that sharing data with one another regarding the Year 2000 Problem should not be considered an antitrust issue.

(f) The federal Securities and Exchange Commission is requiring broker-dealers to submit information on where they are in the Year 2000 Problem compliance process in two reports on August 31, 1998, and April 30, 1999.

SEC. 2. It is the intent of the Legislature to ensure a free flow of information about Year 2000 Problem remediation efforts by creating a safe harbor for individuals and public and private entities that share, in good faith, information about their preparations for Year 2000 Problem compliance.

SEC. 3. Title 17 (commencing with Section 3269) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 17. YEAR 2000 INFORMATION DISCLOSURES

3269. For purposes of this title, the following definitions shall apply:

(a) "Year 2000 Problem" means any expected or actual computing, physical, enterprise, or distribution system complications that may occur in any computer system, computer program, software application, embedded systems, embedded chip calculations, or other computing application as a result of the year change from 1999 to 2000. These complications are often associated with the common programming practice of using a two-digit field to represent a year, resulting in erroneous date calculations, an ambiguous interpretation of the term "00," the failure to recognize the year 2000 as a leap year, the use of algorithms that use the year "99" or "00" as a flag for another function, or the use of applications, software, or hardware that are date sensitive.

(b) "Information" means any assessment, projection, estimate, planning document, objective, timetable, test plan, test date, or test result related to the implementation or verification of Year 2000 Problem processing capabilities of a computer system, computer program, software application, embedded systems, embedded chip calculations, or other computing application and intended to solve a year 2000 Problem.

(c) "Disclosure" and "discloses" means any dissemination or provision of information without any expectation or right to remuneration or fee therefor.

(d) "Person" means any individual, corporation, partnership, business entity, joint venture, association, the State of California or any of its subdivisions, or any other organization or any combination thereof.

3270. (a) Notwithstanding any other law, any person that discloses information regarding the Year 2000 Problem or any

potential solutions to the problem, including, but not limited to, those persons described in subdivision (b), shall not be liable for damages in any tort action brought against that person regarding the Year 2000 Problem for any injury caused by, arising out of, or relating to, the use of the information disclosed, except as provided in Section 3271.

(b) This section shall apply to any person that, when making the disclosures described in subdivision (a), specifically disclaims the universal applicability of the potential solutions disclosed, and expresses a unique experience with any Year 2000 information.

(c) This section does not apply to prospective solutions sold or exchanged for profit or provided for profit by a person or entity holding itself out as a provider of Year 2000 solutions.

3271. (a) Section 3270 shall not apply if the claimant in an action described in that section establishes that the Year 2000 Problem information disclosure was all of the following:

(1) Material.

(2) False, inaccurate, or misleading.

(3) Either (A) made with the knowledge that the statement was false, inaccurate, or misleading, (B) if the information disclosed was a republication of or otherwise a repetition of information from another person, made without a disclosure that the information was based on information supplied by another person or made with the knowledge that the statement was false, inaccurate, or misleading, or (C) made with gross negligence in the determination of the truth or accuracy of the disclosure or in the determination of whether the disclosure was misleading.

(b) Nothing in this title shall be deemed to affect any other remedy available at law, including, but not limited to, temporary or permanent injunctive relief, against a public or private entity or individual with respect to Year 2000 Problem information disclosures.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to significantly reduce the risks posed to the livelihood of Californians, the ability of industry to conduct business in the state, and the state to mitigate possible systems failures due to the Year 2000 Problem, as defined in this act, that would damage the state's ability to do business with and provide for its citizens, it is necessary that this act take effect immediately.



NEW LANGUAGE APPEARS LIKE THIS

Stricken language appears like this

Remaining language appears like this

SB1057 - 441R - I Ver

Reference Title: Y2K; financial protection

AN ACT

AMENDING TITLE 12, CHAPTER 6, ARTICLE 12, ARIZONA REVISED STATUTES, BY ADDING SECTION 12-714; PROVIDING FOR THE DELAYED REPEAL OF SECTION 12-714, ARIZONA REVISED STATUTES; RELATING TO CIVIL ACTIONS.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 12, chapter 6, article 12, Arizona Revised Statutes, is amended by adding section 12-714, to read:

12-714. Year 2000 computer malfunctions; liability

A. A PERSON OR ENTITY THAT TRANSACTS BUSINESS IN THIS STATE SHALL NOT FORECLOSE, DEFAULT OR TAKE OTHER ADVERSE OR ENFORCEMENT ACTION AGAINST A PERSON WHO FAILS TO ACCURATELY OR TIMELY PROCESS ANY INFORMATION, DATA, PAYMENT OR TRANSFER IF THE FAILURE BOTH:

1. IS DUE DIRECTLY OR INDIRECTLY TO THE FAILURE OR MALFUNCTION OF A COMPUTER PROCESSOR TO ACCURATELY OR PROPERLY RECOGNIZE, COMPUTE, DISPLAY, SORT OR PROCESS DATES OR TIMES.

2. ARISES OUT OF OR IN CONNECTION WITH THE YEAR 2000 DATE CHANGE.

B. A PERSON OR ENTITY SHALL NOT TAKE ADVERSE OR ENFORCEMENT ACTION AGAINST ANY PERSON OR ENTITY THAT FAILS TO MAKE TIMELY PAYMENTS OR TO COMPLETE OTHER FINANCIAL TRANSACTIONS IF THE FAILURE OF THE OBLIGOR TO ACCESS OR RECEIVE MONIES OR TO OTHERWISE CAUSE A PROPER TRANSACTION TO OCCUR IS DUE WHOLLY OR IN PART TO THE INABILITY OF EITHER PARTY TO MAKE THE NECESSARY PAYMENTS, FUND TRANSFERS OR CHECKING OR OTHER FINANCIAL TRANSACTIONS OR TO ACCESS THE NECESSARY DATA OR INFORMATION.

C. THIS SECTION APPLIES TO AT LEAST THE FOLLOWING:

1. MORTGAGES.

2. CONTRACTS.

3. LANDLORDS AND TENANTS.

4. CONSUMER CREDIT OBLIGATIONS.

5. UTILITIES.

6. BANKING AND OTHER FINANCIAL TRANSACTIONS.

7. TANGIBLE OR INTANGIBLE PROPERTY.

D. A PERSON OR ENTITY SHALL NOT TAKE ENFORCEMENT ACTIONS BEFORE THE OBLIGOR'S ABILITY TO REGULARLY RECEIVE AND DISPENSE FINANCIAL TRANSACTIONS HAS BEEN FULLY RESTORED.

E. THIS SECTION DOES NOT AFFECT TRANSACTIONS IN WHICH A DEFAULT OCCURRED BEFORE ANY DISRUPTION OF FINANCIAL OR DATA TRANSFER OPERATIONS AROSE IN CONNECTION WITH THE YEAR 2000 DATE CHANGE.

F. A CREDIT REPORTING AGENCY SHALL NOT ENTER NEGATIVE CREDIT INFORMATION INTO ANY CREDIT REPORT IF THE NEGATIVE CREDIT INFORMATION IS DUE TO EITHER:

1. THE DISRUPTION OF THE OTHERWISE PROPER PROCESSING OF FINANCIAL RESPONSIBILITIES AND INFORMATION BY THE CREDIT REPORTING AGENCY.

2. THE CONSUMER'S INABILITY TO MAKE PAYMENTS TO CREDITORS DUE TO THE DISRUPTION OR MALFUNCTION OF COMPUTER PROCESSING, BANKING OR OTHER RELATED MATTERS.

Sec. 2. Delayed repeal

Section 12-714, Arizona Revised Statutes, as added by this act, is repealed from and after December 31, 2006.

[Bills](#) | [Members](#) | [FloorCalendars](#) | [CommitteeAgendas](#) | [Session Laws](#) | [Statutes](#) | [Arizona Constitution](#)



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First Regular Session
Sixty-second General Assembly

LLS NO. 99-0402.01 Jennifer Gilroy

HOUSE BILL 99-1190

STATE OF COLORADO

BY REPRESENTATIVE T. Williams;
also SENATOR Blickensderfer.

JUDICIARY**A BILL FOR AN ACT**

101 CONCERNING THE LIMITATION OF LIABILITY FOR CIVIL ACTIONS RELATING
102 TO FINANCIAL SERVICE PROVIDERS ARISING FROM DATE-RELATED
103 PROBLEMS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Establishes the "Limited Liability of Financial Service Providers Act of 1999". Limits the liability of financial service providers for any civil action claim relating to a year 2000 problem to actual damages. Provides that a financial service provider shall not be liable for punitive damages in any civil action in which the claim for damages is based upon a year 2000 problem. Limits a financial service provider's liability to its customers and cuts off remedies to any persons who are not in privity of contract with the financial service provider. Establishes an affirmative defense for financial service providers in any claim, action, or proceeding alleging liability based upon a year 2000 problem if the financial institution named in the action or proceeding has complied with all regulations and requirements established by its regulator. Defines "financial service provider" and "year 2000 problem".

Limits the liability of directors, officers, members, and employees of financial service providers acting in the performance of the director's, officer's, member's, or employee's duties for civil damages arising in connection with year 2000 problems if the financial service provider has complied with the examination requirements imposed by its primary regulator.

Adds to the list of confidential functions of the compliance review

[] denotes HOUSE amendment. { } denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate material to be deleted from existing statute.

Page 2

committee the duty to seek to improve the ability of electronic computing devices to account for the year 2000 date change and compliance with regulations and guidelines in system preparedness for year 2000 problems and implementation of year 2000 (Y2K) plans.

Establishes a one-year statute of limitations for civil actions against financial service providers based upon or arising out of year 2000 problems.

1 Be it enacted by the General Assembly of the State of Colorado:

2 SECTION 1. Article 21 of title 13, Colorado Revised Statutes, is
3 amended BY THE ADDITION OF A NEW PART to read:

4 PART 6

5 LIMITED LIABILITY OF FINANCIAL SERVICE PROVIDERS

6 13-21-601. Short title. THIS PART 6 SHALL BE KNOWN AND MAY
7 BE CITED AS THE "LIMITED LIABILITY OF FINANCIAL SERVICE PROVIDERS
8 ACT OF 1999".

9 13-21-602. Legislative declaration. THE GENERAL ASSEMBLY
10 HEREBY FINDS, DETERMINES, AND DECLARES THAT THE ABILITY OF
11 FINANCIAL SERVICE PROVIDERS TO CONTINUE TO OPERATE THROUGH AND
12 DURING ANY ISSUES ARISING OUT OF THE DATE CHANGE TO THE YEAR 2000
13 IS ESSENTIAL TO THE CUSTOMERS OF FINANCIAL SERVICE PROVIDERS, TO
14 THE COMMUNITIES SERVED BY FINANCIAL SERVICES PROVIDERS, AND TO
15 THE ENTIRE ECONOMY. THE GENERAL ASSEMBLY RECOGNIZES THAT
16 FINANCIAL SERVICE PROVIDERS ARE REGULATED ENTITIES AND, UNDER THE
17 GUIDANCE OF REGULATORS, HAVE UNDERTAKEN EXHAUSTIVE EFFORTS,

18 UTILIZING THE KNOWLEDGE OF THE ENTIRE INDUSTRY AND ITS
19 REGULATORS, TO IDENTIFY AND REMEDY ANY POTENTIAL ISSUES RELATING
20 TO THE YEAR 2000 DATE CHANGE. IT IS THE INTENT OF THE GENERAL

Page 3

1 ASSEMBLY TO REDUCE THE RISKS OF THE YEAR 2000 PROBLEMS FOR
2 CUSTOMERS OF THESE INSTITUTIONS BY ASSURING THAT FINANCIAL
3 SERVICE PROVIDERS CONTINUE TO PREPARE FOR OPERATION DURING THE
4 YEAR 2000 DATE CHANGE.

5 **13-21-603. Definitions.** AS USED IN THIS PART 6, UNLESS THE
6 CONTEXT OTHERWISE REQUIRES:

7 (1) "FINANCIAL SERVICE PROVIDER" MEANS A FEDERALLY INSURED
8 AND REGULATED FINANCIAL INSTITUTION INCLUDING SECURITIES
9 BROKERAGE FIRMS, CREDIT UNIONS, STATE AND FEDERAL SAVINGS AND
10 LOANS, STATE AND NATIONAL BANKS, AND TRUST COMPANIES.

11 (2) (a) "YEAR 2000 PROBLEM" MEANS, WITH RESPECT TO
12 INFORMATION TECHNOLOGY, ANY PROBLEM, INCLUDING ELECTRICAL OR
13 TELECOMMUNICATIONS, THAT PREVENTS SUCH TECHNOLOGY FROM
14 ACCURATELY PROCESSING, CALCULATING, COMPARING, OR SEQUENCING
15 DATE OR TIME DATA:

16 (I) FROM, INTO, OR BETWEEN:

17 (A) THE TWENTIETH AND TWENTY-FIRST CENTURIES; OR

18 (B) THE YEARS 1999 AND 2000; OR

19 (II) WITH REGARD TO LEAP YEAR CALCULATIONS.

20 (b) "YEAR 2000 PROBLEM" ALSO INCLUDES ANY INABILITY OF A
21 FINANCIAL SERVICE PROVIDER TO PERFORM ITS INTENDED OR REQUESTED

22 FUNCTIONS BECAUSE OF THE SYSTEM FAILURE OF AN OUTSIDE PARTY,
23 INCLUDING, BUT NOT LIMITED TO, THE FAILURE OF A GOVERNMENTAL BODY
24 TO PROVIDE DATA, TRANSPORTATION DELAYS, ENERGY FAILURES, OR
25 COMMUNICATION FAILURES.

26 13-21-604. Affirmative defense - financial service providers.

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1 (1) A FINANCIAL SERVICE PROVIDER'S LIABILITY FOR DAMAGES IN WHICH
2 THE CLAIM FOR DAMAGES IS BASED UPON A YEAR 2000 PROBLEM OR IS THE
3 RESULT OF OR ARISES OUT OF THE FAILURE OF ANY COMPUTER SYSTEM
4 BECAUSE OF A YEAR 2000 PROBLEM SHALL NOT EXCEED THE AMOUNT OF
5 ACTUAL DAMAGES IN ANY CIVIL ACTION AGAINST A FINANCIAL SERVICE
6 PROVIDER. A FINANCIAL SERVICE PROVIDER SHALL NOT BE LIABLE FOR
7 PUNITIVE DAMAGES IN ANY CIVIL ACTION WHERE THE CLAIM FOR DAMAGES
8 IS BASED UPON A YEAR 2000 PROBLEM OR IS THE RESULT OF OR ARISES OUT
9 OF THE FAILURE OF ANY COMPUTER SYSTEM BECAUSE OF A YEAR 2000
10 PROBLEM.

11 (2) A FINANCIAL SERVICE PROVIDER MAY BE FOUND LIABLE TO ITS
12 CUSTOMERS BUT SHALL NOT BE LIABLE TO PERSONS NOT IN PRIVACY OF
13 CONTRACT WITH THE FINANCIAL SERVICE PROVIDER FOR CIVIL DAMAGES
14 RESULTING FROM ACTS, OMISSIONS, DECISIONS, OR OTHER CONDUCT IN
15 CONNECTION WITH A YEAR 2000 PROBLEM.

16 (3) IF A FINANCIAL SERVICE PROVIDER HAS COMPLIED WITH ALL
17 REGULATIONS AND REQUIREMENTS TO ADDRESS YEAR 2000 PROBLEM
18 COMPLIANCE AS SET FORTH BY ITS PRIMARY REGULATOR AND IS NAMED IN
19 A CIVIL ACTION OR PROCEEDING, THE FINANCIAL SERVICE PROVIDER SHALL

20 HAVE AN AFFIRMATIVE DEFENSE THAT IT COMPLIED WITH ALL
21 REGULATIONS AND REQUIREMENTS AGAINST ANY CLAIM, ACTION, OR
22 PROCEEDING ALLEGING LIABILITY BASED UPON, RESULTING FROM, OR
23 ARISING OUT A YEAR 2000 PROBLEM.

24 SECTION 2. 11-3-114, Colorado Revised Statutes, is amended
25 BY THE ADDITION OF A NEW SUBSECTION to read:

26 11-3-114. Directors and officers - limited liability for year

Page 5

1 2000 problems. (8) (a) A MEMBER OF THE BOARD OF DIRECTORS, A
2 MEMBER OF ANY COMMITTEE DESIGNATED BY THE BOARD OF DIRECTORS,
3 AN OFFICER, A MEMBER, AND AN EMPLOYEE OF A FINANCIAL SERVICE
4 PROVIDER, SHALL, IN THE PERFORMANCE OF THE DIRECTOR'S, MEMBER'S,
5 OFFICER'S, OR EMPLOYEE'S DUTIES, BE FULLY PROTECTED FROM, AND HAVE
6 NO LIABILITY FOR, ANY CLAIMS ARISING OUT OF, REGARDING, OR RELATING
7 TO A YEAR 2000 PROBLEM, OR CLAIMS ARISING OUT OF THE FAILURE OF
8 ANY COMPUTER SYSTEM BECAUSE OF A YEAR 2000 PROBLEM, IF THE
9 FINANCIAL SERVICE PROVIDER HAS COMPLIED WITH THE EXAMINATION
10 REQUIREMENTS IMPOSED BY ITS PRIMARY REGULATOR.

11 (b) FOR PURPOSES OF THIS SUBSECTION (8):

12 (I) "FINANCIAL SERVICE PROVIDER" SHALL HAVE THE SAME
13 MEANING SET FORTH IN SECTION 13-21-603 (1), C.R.S.

14 (II) "YEAR 2000 PROBLEM" SHALL HAVE THE SAME MEANING SET
15 FORTH IN SECTION 13-21-603 (2), C.R.S.

16 SECTION 3. 11-71-103 (1) (c), Colorado Revised Statutes, is
17 amended, and the said 11-71-103 (1) is further amended BY THE

18 ADDITION OF THE FOLLOWING NEW PARAGRAPHS, to read:

19 11-71-103. Applicability of article - confidentiality of
20 compliance review committee documents. (1) This article applies to
21 a compliance review committee the functions of which are to evaluate
22 and seek to improve:

23 (c) Compliance with federal or state statutory or regulatory
24 requirements; or

25 (e) THE ABILITY OF COMPUTERS, SOFTWARE PROGRAMS,
26 DATABASES, NETWORK INFORMATION SYSTEMS, FIRMWARE,

Page 6

1 MICROPROCESSORS, INTERNAL TIME CLOCKS, HARDWARE, OR ANY OTHER
2 DEVICE USED TO INTERPRET, PRODUCE, CALCULATE, GENERATE, COMPARE,
3 ACCOUNT FOR, OR SEQUENCE A DATE FROM, INTO, OR BETWEEN THE YEARS
4 1999 AND 2000; OR

5 (f) (I) COMPLIANCE WITH REGULATIONS AND GUIDELINES FOR
6 PREPARING SYSTEMS TO HANDLE A YEAR 2000 PROBLEM AND THE
7 IMPLEMENTATION OF ANY PLANS FOR ADDRESSING THE SITUATION.

8 (II) FOR THE PURPOSES OF THIS SECTION:

9 (A) "FINANCIAL SERVICE PROVIDER" SHALL HAVE THE SAME
10 MEANING SET FORTH IN SECTION 13-21-603 (1), C.R.S.

11 (B) "YEAR 2000 PROBLEM" SHALL HAVE SAME THE MEANING SET
12 FORTH IN SECTION 13-21-603 (2), C.R.S.

13 SECTION 4. 13-80-103 (1), Colorado Revised Statutes, is
14 amended BY THE ADDITION OF A NEW PARAGRAPH to read:

15 13-80-103. General limitation of actions - one year. (1) The

16 following civil actions, regardless of the theory upon which suit is
17 brought, or against whom suit is brought, shall be commenced within one
18 year after the cause of action accrues, and not thereafter:

19 (i) (I) ALL ACTIONS AGAINST A FINANCIAL SERVICE PROVIDER
20 REGARDING, BASED UPON, OR ARISING OUT OF A YEAR 2000 PROBLEM.

21 (II) FOR PURPOSES OF THIS PARAGRAPH (I):

22 (A) "FINANCIAL SERVICE PROVIDER" SHALL HAVE THE SAME
23 MEANING SET FORTH IN SECTION 13-21-603 (1).

24 (B) "YEAR 2000 PROBLEM" SHALL HAVE THE SAME MEANING SET
25 FORTH IN SECTION 13-21-103 (2).

26 **SECTION 5. Effective date - applicability.** This act shall take

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1 effect July 1, 1999, and shall apply to all causes of action accruing on or
2 after said date.

3 **SECTION 6. Safety clause.** The general assembly hereby finds,
4 determines, and declares that this act is necessary for the immediate
5 preservation of the public peace, health, and safety.

Senate Bill 0080

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Florida Senate - 1999

SB 80

By Senators Grant, Campbell, Klein, Brown-Waite and Bronson

13-52-99

1 A bill to be entitled
2 An act relating to information technology
3 resources; creating the "Commerce Protection
4 Act"; defining terms; prescribing exclusive
5 remedies against persons, businesses, and
6 governmental agencies for damages caused by the
7 failure of their information technology
8 resources to function properly with respect to
9 date data; prescribing damages; expanding the
10 waiver of sovereign immunity; providing for
11 costs and attorney's fees; barring certain
12 class actions; providing immunity from personal
13 liability for directors and officers of
14 businesses under specified circumstances;
15 creating a lien in favor of certain lending
16 institutions on proceeds received by a business
17 as a result of its failure or the failure of
18 another to be year-2000 compliant; imposing
19 insurance and warranty requirements on persons
20 who undertake to assess whether information
21 technology resources are year-2000 compliant or
22 make such resources so compliant and

23 prescribing remedies against such persons;
24 prohibiting such persons from misusing or
25 disclosing specified information provided to
26 them; providing for remedies and damages for
27 unlawful use or disclosure of that information;
28 providing for costs and attorney's fees;
29 providing criminal penalties; exempting the
30 exchange of certain information among specified
31 entities from action under the Florida

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Florida Senate - 1999
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1 Antitrust Act of 1980; prescribing incentives
2 to use alternative dispute-resolution
3 procedures; providing for liability for costs
4 and attorney's fees under specified
5 circumstances; providing an effective date.

6

7 Be It Enacted by the Legislature of the State of Florida:

8

9 Section 1. Short title.--This act may be cited as the

10 "Commerce Protection Act."

11 Section 2. Definitions.--For the purposes of this act,

12 the following terms have the following meanings:

13 (1) BUSINESS.--The term "business" means a person or

14 any entity, however organized, that is routinely engaged in

15 this state in providing goods or services in the stream of
16 commerce, but the term excludes any governmental agency.

17 (2) DATE DATA.--The term "date data" means data that
18 contain dates or that contain both dates and times.

19 (3) GOVERNMENTAL AGENCY.--The term "governmental
20 agency" includes the state or any of its political
21 subdivisions, or any agency of either.

22 (4) INFORMATION TECHNOLOGY PRODUCT.--The term
23 "information technology product" includes software, firmware,
24 microcode, hardware, and embedded chips that create, read,
25 write, calculate, compare, sequence, or otherwise process date
26 data.

27 (5) SOLUTION PROVIDER.--The term "solution provider"
28 means any entity that accepts compensation or other valuable
29 consideration from a business or governmental agency either to
30 assess whether it or any of its information technology

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1 products is year-2000 compliant or to make it or any of its
2 information technology products year-2000 compliant.

3 (6) YEAR-2000 COMPLIANT.--

4 (a) An information technology product is "year-2000
5 compliant" if it processes all of its date data accurately and
6 if it will do so even for data that contain dates occurring

7 before February 29, 1996, and dates occurring after February
8 29, 2000.

9 (b) A business or governmental agency is "year-2000
10 compliant" if all of its information technology products are
11 year-2000 compliant.

12 Section 3. Remedies for failure to be year-2000
13 compliant; waiver of sovereign immunity; costs and attorney's
14 fees; limitation on class actions.--

15 (1) Effective January 1, 2000, the exclusive remedies
16 in this state for recovering from a business or governmental
17 agency damages caused by its failure to be year-2000 compliant
18 are those provided by this act or by contract with the
19 business or governmental agency. However, if a contract
20 provides exclusive or limited remedies and circumstances cause
21 those remedies to fail of their essential purpose, remedy may
22 be had as provided in this act.

23 (2) Effective January 1, 2000, any business that is
24 not year-2000 compliant is liable:

25 (a) For compensatory damages caused by its failure to
26 be year-2000 compliant; and

27 (b) For punitive damages in an amount equal to three
28 times the amount of any compensatory damages caused by its
29 intentional or grossly negligent misrepresentation that it is
30 year-2000 compliant.

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13-52-99

1 (3) Effective January 1, 2000, any governmental agency
2 that is not year-2000 compliant is liable for compensatory
3 damages caused by its failure to be year-2000 compliant:

4 (a) Within the limits on the waiver of sovereign
5 immunity established in sections 282.4045 and 768.28, Florida
6 Statutes; and

7 (b) Beyond the limits on the waiver of sovereign
8 immunity established in sections 282.4045 and 768.28, Florida
9 Statutes, if it is shown by clear and convincing evidence that
10 the damages occurred because of its gross negligence.

11 (4) Compensatory damages awarded under this section
12 shall exclude any damages that the plaintiff should reasonably
13 have avoided as a result of any disclosure actually made to
14 the plaintiff before September 1, 1999, by the business or
15 governmental agency concerning whether it or any of its
16 information technology products were year-2000 compliant.

17 (5) The prevailing party in an action brought under
18 this section is entitled to recover costs and reasonable
19 attorney's fees. However, a business or governmental agency is
20 not liable for such costs and fees if, before September 1,
21 1999, it has:

22 (a) Exercised due diligence in assessing whether it is
23 year-2000 compliant and, based on that assessment, holds a
24 reasonable good-faith belief that it is year-2000 compliant or
25 has adequately disclosed to the other party before that date
26 that it is not year-2000 compliant; and

27 (b) Exercised due diligence in assessing its legal
28 liability for failure to be year-2000 compliant, with respect

29 to both claims by its customers and claims by third parties,
30 and, based on that assessment, has before that date insured
31 itself against all foreseeable claims.

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1 (6) Effective January 1, 2000, a class action may not
2 be maintained in this state:
3 (a) Against a governmental agency for damages caused
4 by the failure of the governmental agency to be year-2000
5 compliant.
6 (b) Against a business for damages caused by the
7 failure of the business to be year-2000 compliant, unless each
8 member of the class has suffered damages in excess of \$50,000.
9 However, the limitation in this paragraph does not apply to
10 class actions against a manufacturer or vendor of information
11 technology products for damages resulting from the failure of
12 those products to be year-2000 compliant.
13 Section 4. Immunity from liability for directors and
14 officers of businesses.--A director or officer of a business
15 is not personally liable for any damages resulting from the
16 failure of the business to become year-2000 compliant if the
17 officer or director has in good faith and with due diligence
18 secured an assessment by qualified persons to determine
19 actions necessary for the business to become year-2000
20 compliant and that assessment can reasonably be expected to:

21 (1) Allow the business to become year-2000 compliant
22 by September 1, 1999; and

23 (2) Identify those persons who are likely to suffer
24 damages as a result of the failure of the business to be
25 year-2000 compliant and allow the business to disclose to them
26 by September 1, 1999. that it is not year-2000 compliant.

27 Section 5. Lien in favor of lending institutions.--Any
28 financial institution as defined in section 655.005, Florida
29 Statutes, which holds an interest in any asset of a business
30 as security for a loan made to that business has a lien, in
31 the amount of the outstanding balance of the loan, on all

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1 damages received by that business under any civil action,
2 settlement agreement, insurance policy, or indemnity agreement
3 as a result of the failure of that business or of another to
4 be year-2000 compliant. The lien provided by this section is
5 superior to all other liens and claims of creditors other than
6 liens for the payment of taxes.

7 Section 6. Solution providers; warranties; remedies;
8 insurance requirements.--

9 (1) A solution provider who represents to a business
10 or governmental agency that it or any of its information
11 technology products is year-2000 compliant or that the
12 solution provider will make the business or governmental

13 agency or any of its information technology products year-2000
14 compliant thereby gives an express warranty upon which the
15 business or governmental agency may rely; this express
16 warranty supersedes all warranty exclusions, modifications,
17 and disclaimers; and, if circumstances cause an exclusive or
18 limited remedy to fail of its essential purpose, remedy may be
19 had as provided in the Uniform Commercial Code.

20 (2) Each solution provider must maintain liability
21 insurance in an amount that is not less than its annual gross
22 income to cover claims against it by its customers and third
23 parties.

24 Section 7. Confidentiality of information provided to
25 solution providers; remedies regarding unlawful use or
26 disclosure; penalties.--

27 (1) All information acquired by a solution provider
28 concerning the information technology operations, programs,
29 equipment, and data of a business or governmental agency
30 remain the property of the business or governmental agency.
31 The solution provider:

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1 (a) May use the information only in the manner
2 expressly permitted by the business or governmental agency;
3 and
4 (b) May not disclose the information to another

5 without the express consent of the business or governmental
6 agency.

7 (2) Notwithstanding the limitations of section
8 688.008, Florida Statutes, a business or governmental agency
9 may bring an action to enjoin any actual or threatened
10 violation of subsection (1) or to recover damages resulting
11 from a violation of subsection (1). These damages include:

12 (a) Both the actual monetary loss incurred as a result
13 of the violation and any unjust enrichment caused by the
14 violation which is not otherwise considered in calculating the
15 actual monetary loss incurred; and

16 (b) If the misuse or disclosure was intentional or
17 grossly negligent, punitive damages in an amount not exceeding
18 three times the award made under paragraph (a).

19
20 The court shall award costs and reasonable attorney's fees to
21 the prevailing party in any action under this subsection.

22 (3) (a) Any person who misuses or discloses information
23 in violation of subsection (1) is guilty of a misdemeanor of
24 the first degree, punishable as provided in section 775.082 or
25 section 775.083, Florida Statutes.

26 (b) Any person who for pecuniary gain intentionally
27 misuses or discloses information in violation of subsection
28 (1) is guilty of a felony of the third degree, punishable as
29 provided in section 775.082 or section 775.083, Florida
30 Statutes.

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1 Section 8. Antitrust exemption with respect to
2 exchanges of information.--The exchange of information among
3 businesses and governmental agencies concerning measures that
4 have been taken or are to be taken in order for a business or
5 governmental agency to become year-2000 compliant does not
6 constitute an activity or conduct in restraint of trade or
7 commerce under chapter 542, Florida Statutes.

8 Section 9. Incentives to use alternative
9 dispute-resolution procedures.--

10 (1) VOLUNTARY BINDING ARBITRATION.--

11 (a) Any party to a dispute under this act for which
12 there is no prior arbitration agreement may, before a lawsuit
13 has been filed, make an offer to the other party to submit the
14 dispute to voluntary binding arbitration under section 44.104,
15 Florida Statutes. An offer made under this paragraph must set
16 out the maximum amount of damages that may be imposed pursuant
17 to arbitration.

18 (b) If at trial, the court finds that an offer was
19 made under paragraph (a) and was rejected, the court shall
20 award attorney's fees and costs in accordance with this
21 paragraph regardless of which party is determined to be the
22 prevailing party and notwithstanding the provisions of section
23 3(5).

24 1. If the offer was made by the plaintiff and rejected
25 by the defendant, and if the defendant is ultimately found to
26 be liable for damages in an amount equal to or exceeding the
27 maximum amount of damages specified in the plaintiff's offer,

28 the defendant must pay the plaintiff's costs and reasonable
29 attorney's fees.

30 2. If the offer was made by the defendant and rejected
31 by the plaintiff, and if the plaintiff is not ultimately

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1 awarded damages in an amount exceeding the maximum amount of
2 damages specified in the defendant's offer, the plaintiff must
3 pay the defendant's costs and reasonable attorney's fees.

4 (2) MEDIATION.--The court may submit a claim for
5 damages under this act to mediation upon its own motion or
6 upon the motion of the parties. If the mediation reaches an
7 impasse, the mediator shall file with the court, under seal,
8 both the plaintiff's and the defendant's last best offer, and
9 these offers may not be disclosed to the ultimate trier of
10 fact until after trial. Regardless of which party is
11 determined to be the prevailing party and notwithstanding the
12 provisions of section 3(5):

13 (a) If the ultimate trier of fact does not award the
14 plaintiff more than 75 percent of the defendant's last best
15 offer, the plaintiff must pay the defendant's costs and
16 reasonable attorney's fees; and

17 (b) If the ultimate trier of fact awards the plaintiff
18 125 percent or more of the plaintiff's last best offer, the
19 defendant must pay the plaintiff's costs and reasonable

20 attorney's fees.

21 Section 10. This act shall take effect upon becoming a

22 law.

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SENATE SUMMARY

3

Creates the "Commerce Protection Act." Prescribes exclusive remedies against persons, businesses, and governmental agencies for damages caused by the failure of their information technology resources to function properly with respect to date data. Provides for punitive damages under specified circumstances. Expands the waiver of sovereign immunity for damages caused by the gross negligence of governmental agencies. Excludes from compensatory damages, those that should have been avoided as a result of disclosures made. Provides for the award of costs and attorney's fees under specified circumstances. Provides for immunity from liability for officers and directors of businesses under specified circumstances. Creates a lien in favor of lending institutions on damages received by a business as a result of its failure or the failure of another to be year-2000 compliant. Imposes insurance and warranty

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12 requirements on persons who undertake to assess whether
13 information technology resources are year-2000 compliant
14 or to make such resources so compliant, and prohibits
15 such persons from misusing or disclosing certain
16 information provided to them. Provides for remedies,
17 damages, and criminal penalties for misuse or disclosure
of that information. Exempts the exchange of certain
information from action under the Florida Antitrust Act
of 1980. Provides incentives for seeking voluntary
binding arbitration of disputes and for reaching
agreement with respect to disputes submitted to
mediation.

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Introduced

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in this style type, and deletions will appear in this style type:

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in this style type. Also, the word NEW will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in this style type or this style type reconciles conflicts between statutes enacted by the 1998 General Assembly.

SENATE BILL No. 666

A BILL FOR AN ACT to amend the Indiana Code concerning civil law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-1-6 IS ADDED TO THE INDIANA CODE AS
2 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
3 JANUARY 1, 1999 (RETROACTIVE)]:

4 Chapter 6. Exchange of Information; Year 2000 Problems
5 Sec. 1. Neither IC 24-1 nor any other law prohibits a business
6 (as defined in IC 34-6-2-17) from exchanging information with any
7 other person concerning measures that are taken in good faith (as
8 defined in IC 34-6-2-64) in order for a business (as defined in
9 IC 34-6-2-17) to become year 2000 compliant (as defined in
10 IC 34-6-2-152). An exchange of information under this section may
11 not be construed to be a combination or other act in restraint of
12 trade under IC 24-1 or any other law.

13 SECTION 2. IC 34-6-2-34.7 IS ADDED TO THE INDIANA CODE
14 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
15 JANUARY 1, 1999 (RETROACTIVE)]: Sec. 34.7. "Due diligence in



1 mitigating year 2000 liability", for purposes of this title, refers to
 2 an act described in IC 34-30-20.

3 SECTION 3. IC 34-6-2-17 IS AMENDED TO READ AS
 4 FOLLOWS [EFFECTIVE JANUARY 1, 1999 (RETROACTIVE)]:
 5 Sec. 17. "Business":

6 (1) for purposes of IC 34-42, means each business, bank, industry,
 7 governmental entity, profession, occupation, and calling of every
 8 kind; and

9 (2) for the purposes of a provision of this title other than
 10 IC 34-42, means each business, bank, industry, profession,
 11 occupation, and calling of every kind, other than a
 12 governmental entity.

13 SECTION 4. IC 34-6-2-45 IS AMENDED TO READ AS
 14 FOLLOWS [EFFECTIVE JANUARY 1, 1999 (RETROACTIVE)]:
 15 Sec. 45. (a) "Fault", for purposes of IC 34-20, means an act or omission
 16 that is negligent, willful, wanton, reckless, or intentional toward the
 17 person or property of others. The term includes the following:

18 (1) Unreasonable failure to avoid an injury or to mitigate
 19 damages.

20 (2) A finding under IC 34-20-2 (or IC 33-1-1.5-3 before its
 21 repeal) that a person is subject to liability for physical harm
 22 caused by a product, notwithstanding the lack of negligence or
 23 willful, wanton, or reckless conduct by the manufacturer or seller.

24 (b) "Fault", for purposes of IC 34-51-2 and IC 34-51-6, includes
 25 any act or omission that is negligent, willful, wanton, reckless, or
 26 intentional toward the person or property of others. The term also
 27 includes unreasonable assumption of risk not constituting an
 28 enforceable express consent, incurred risk, and unreasonable failure to
 29 avoid an injury or to mitigate damages.

30 SECTION 5. IC 34-6-2-64 IS AMENDED TO READ AS
 31 FOLLOWS [EFFECTIVE JANUARY 1, 1999 (RETROACTIVE)]:
 32 Sec. 64. "In good faith", for purposes of IC 34-30-15 and IC 34-30-20,
 33 refers to an act taken:

34 (1) without malice;

35 (2) after a reasonable effort to obtain the facts of the matter; and

36 (3) in the reasonable belief that the action taken is warranted by
 37 the facts known.

38 SECTION 6. IC 34-6-2-152 IS ADDED TO THE INDIANA CODE
 39 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
 40 JANUARY 1, 1999 (RETROACTIVE)]: Sec. 152. "Year 2000
 41 compliant", for purposes of this title, means that all software,
 42 firmware, microcode, hardware, and embedded chips that are used



1 by a person and that create, read, write, calculate, compare,
2 sequence, or otherwise process data that consists of:

- 3 (1) a date; or
4 (2) both a date and time;

5 perform these functions accurately.

6 SECTION 7. IC 34-6-2-153 IS ADDED TO THE INDIANA CODE
7 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
8 JANUARY 1, 1999 (RETROACTIVE)]: Sec. 153. "Year 2000
9 problem", for the purposes of this title, means injury or another
10 loss that results from the failure of a business or another person on
11 which the business relies to be year 2000 compliant.

12 SECTION 8. IC 34-24.5 IS ADDED TO THE INDIANA CODE AS
13 A NEW ARTICLE TO READ AS FOLLOWS [EFFECTIVE
14 JANUARY 1, 1999 (RETROACTIVE)]:

15 **ARTICLE 24.5. CLASS ACTIONS**

16 **Chapter 1. Year 2000 Problems**

17 **Sec. 1. A class action may be maintained against a business for**
18 **a year 2000 problem only if:**

- 19 (1) the class action:

20 (A) involves the business as a manufacturer or vendor of
21 software, firmware, microcode, hardware, or embedded
22 chips that create, read, write, calculate, compare,
23 sequence, or otherwise process data that consists of dates,
24 times, or both dates and times; and

25 (B) a party to the proceeding presents facts that indicate
26 that the business represented that the software, firmware,
27 microcode, hardware, or chips were year 2000 compliant;

28 or

- 29 (2) subdivision (1) does not apply and the amount of the
30 pecuniary loss incurred by each member of the class is at least
31 fifty thousand dollars (\$50,000).

32 SECTION 9. IC 34-30-20 IS ADDED TO THE INDIANA CODE
33 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
34 JANUARY 1, 1999 (RETROACTIVE)]:

35 **Chapter 20. Officer and Director Liability; Year 2000 Problems**

36 **Sec. 1. Due diligence in mitigating year 2000 liability consists of**
37 **doing both of the following:**

- 38 (1) Assessing, before September 1, 1999, whether a business
39 has a year 2000 problem.

- 40 (2) Based on the assessment described in subdivision (1):

41 (A) holding a reasonable belief in good faith that the
42 business does not have a year 2000 problem; or



1 (B) if clause (A) does not apply, adequately disclosing,
 2 before September 1, 1999, to persons likely to suffer
 3 damages from the year 2000 problem of the business that
 4 the business has a year 2000 problem.

5 Sec. 2. If a business is created after August 31, 1999, due
 6 diligence requires that the business comply with section 1 of this
 7 chapter as soon as practicable after the business is created.

8 Sec. 3. If a business enters into a new business relationship after
 9 August 31, 1999, due diligence requires that the business make the
 10 disclosures required under section 1(2)(B) of this chapter to each
 11 person involved in the new business relationship as soon as
 12 practicable after the business enters into the business relationship.

13 Sec. 4. If a business discovers facts after August 31, 1999, that
 14 indicate that the business has a year 2000 problem and the facts
 15 could not have been reasonably discovered before September 1,
 16 1999, due diligence requires that the business comply with section
 17 1 of this chapter as soon as practicable after the business discovers
 18 the facts.

19 Sec. 5. An individual who is a director or an officer of a business
 20 and who would otherwise be personally liable for the year 2000
 21 problem of a business is not personally liable for damages resulting
 22 from the year 2000 problem if the business exercised due diligence
 23 in mitigating year 2000 liability.

24 SECTION 10. IC 34-30-21 IS ADDED TO THE INDIANA CODE
 25 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
 26 JANUARY 1, 1999 (RETROACTIVE)]:

27 **Chapter 21. Financial Institution and Creditor Liability; Year**
 28 **2000 Problems**

29 **Sec. 1. Notwithstanding any liability imposed on a business by**
 30 **law, a lender, a secured or unsecured creditor, or a fiduciary is not**
 31 **liable under any law in connection with:**

32 (1) the failure of a business to exercise due diligence to
 33 mitigate year 2000 liability; or

34 (2) the failure of a business to be year 2000 compliant;

35 unless the lender, the fiduciary, or creditor has participated in the
 36 management of the business.

37 SECTION 11. IC 34-51-3-7 IS ADDED TO THE INDIANA CODE
 38 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
 39 JANUARY 1, 1999 (RETROACTIVE)]: Sec. 7. A person may not
 40 recover an award of punitive damages in a civil action that arises
 41 from a year 2000 problem. The commencement or litigation of a
 42 cause of action for punitive damages described in this section shall



1 be treated as an action or defense that is frivolous, unreasonable,
2 or groundless for purposes of IC 34-52-1-1.

3 SECTION 12. IC 34-51-6 IS ADDED TO THE INDIANA CODE
4 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
5 JANUARY 1, 1999 (RETROACTIVE)]:

6 Chapter 6. Compensatory Damages Arising From Year 2000
7 Problems

8 Sec. 1. This chapter applies to all civil actions based on fault,
9 contract, product liability, or another legal theory that:

- 10 (1) are brought to recover damages for injury to a person,
11 death to a person, or harm to property; and
12 (2) arise from a year 2000 problem.

13 Sec. 2. Except as provided in section 3 of this chapter, the
14 liability of a business that would otherwise be liable to another
15 person for a loss resulting from a year 2000 problem is limited to
16 compensatory damages for the pecuniary loss incurred by the
17 other person.

18 Sec. 3. (a) Except as provided in subsection (b), if:

- 19 (1) a person entered into a contract with a business that is
20 liable for a loss resulting from a year 2000 problem;
21 (2) the contract provides an exclusive remedy for a year 2000
22 problem or otherwise limits the remedies or damages
23 available to the person for a year 2000 problem; and
24 (3) the contractual remedy is enforceable;

25 the person may recover damages only as provided by the contract.

26 (b) A person that represents that the person:

- 27 (1) is skilled in assessing whether another person is year 2000
28 compliant; or
29 (2) has a product or service that will make another person
30 year 2000 compliant;

31 creates an express warranty on which the person to whom the
32 representation is made may rely. The person making the
33 representation may not exclude, modify, or disclaim the warranty
34 described in this section.

35 Sec. 4. Compensatory damages awarded under section 2 of this
36 chapter shall be reduced by the amount of damages that the
37 plaintiff reasonably could have avoided as a result of a disclosure
38 made in conformity with IC 34-30-20-1.

39 SECTION 13. IC 34-57-5 IS ADDED TO THE INDIANA CODE
40 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
41 JANUARY 1, 1999 (RETROACTIVE)]:

42 Chapter 5. Arbitration of Year 2000 Problems



1 **Sec. 1. This chapter applies to a dispute involving a year 2000**
 2 **problem if:**

3 (1) a business and a person affected by a year 2000 problem
 4 have not entered into an agreement governing the arbitration
 5 of disputes related to a year 2000 problem; and

6 (2) the persons described in subdivision (1) are not parties to
 7 a civil proceeding that has been filed in a court related to a
 8 year 2000 problem.

9 **Sec. 2. A person may offer to submit a dispute to arbitration**
 10 **under IC 34-57-1 and IC 34-57-2. An offer must specify the**
 11 **maximum amount of damages that may be awarded in the**
 12 **arbitration proceeding.**

13 **Sec. 3. A person that makes an offer under section 2 of this**
 14 **chapter is entitled to receive an award in the amount of the costs**
 15 **and reasonable attorney's fees incurred by the person in a**
 16 **subsequent civil proceeding from a person rejecting the offer if:**

17 (1) the person rejecting the offer is a defendant and a
 18 judgment is entered against the defendant that exceeds the
 19 maximum amount specified in the person's offer to arbitrate;

20 or

21 (2) the person rejecting the offer is a plaintiff and the plaintiff
 22 is not awarded a judgment against the person making the
 23 offer in an amount that exceeds the maximum amount
 24 specified in the person's offer to arbitrate.

25 **SECTION 14. IC 34-57-6 IS ADDED TO THE INDIANA CODE**
 26 **AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE**
 27 **JANUARY 1, 1999 (RETROACTIVE)]:**

28 **Chapter 6. Mediation of Year 2000 Problems**

29 **Sec. 1. This chapter applies to a civil proceeding involving a**
 30 **year 2000 problem.**

31 **Sec. 2. A court may submit a claim for damages to a mediator**
 32 **on its own motion or on the motion of any party to the proceeding.**
 33 **If the mediation reaches an impasse, the mediator shall file with**
 34 **the court the terms of the last best settlement offer submitted to the**
 35 **mediator by the plaintiff and the defendant. The offers of the**
 36 **parties shall be sealed. The offers may not be disclosed until all**
 37 **issues except responsibility for attorney's fees and costs are**
 38 **resolved.**

39 **Sec. 3. A person making a settlement offer is entitled to receive**
 40 **an award from a person rejecting the offer in the amount of the**
 41 **costs and reasonable attorney's fees incurred by the person if:**

42 (1) the person rejecting the offer is a plaintiff and the plaintiff



1 was not awarded damages in an amount that exceeds
2 seventy-five percent (75%) of the amount of a defendant's last
3 best offer submitted to the mediator; or

4 (2) the person rejecting the offer is a defendant and a
5 judgment for damages was awarded against the defendant in
6 an amount that exceeds one hundred and twenty-five percent
7 (125%) of the plaintiff's last best offer submitted to the
8 mediator.

9 SECTION 15. [EFFECTIVE JANUARY 1, 1999
10 (RETROACTIVE)] IC 24-1-6, IC 34-24.5, IC 34-30-20,
11 IC 34-51-3-7, IC 34-51-6, IC 34-57-5, and IC 34-57-6, all as added
12 by this act, apply to a cause of action regardless of when the cause
13 of action accrued.

14 SECTION 16. An emergency is declared for this act.



HOUSE BILL 8

Unofficial Copy
D3

1999 Regular Session
9lr0881

(PRE-FILED)

By: Delegates Taylor, Vallario, Arnick, Busch, Dewberry, Doory, Guns,
Harrison, Hixson, Howard, Hurson, Kopp, Menes, Owings, Rawlings,
Rosenberg, and Wood

Requested: November 20, 1998

Introduced and read first time: January 13, 1999

Assigned to: Judiciary

A BILL ENTITLED

1 AN ACT concerning

2 **Commercial Law - Year 2000 Commerce Protection Act**

3 FOR the purpose of creating the Year 2000 Commerce Protection Act to establish
4 certain remedies for Maryland government, business, commerce, and consumers
5 for damages caused by the failure of information technology products because of
6 certain data; providing for certain damages under certain circumstances;
7 providing for certain standards of liability and for certain defenses; limiting
8 certain actions under certain circumstances; clarifying certain responsibilities of
9 officers and directors of corporations and certain other persons regarding due
10 diligence; clarifying the discoverability of certain information and documents;
11 defining certain terms; providing for the construction of this Act; declaring the
12 intent of the General Assembly; and generally relating to remedies for Maryland
13 government, business, commerce, and consumers for damages caused by the
14 failure of information technology products because of data.

15 BY repealing and reenacting, with amendments,
16 Article - Commercial Law
17 Section 11-203(12) and (13)
18 Annotated Code of Maryland
19 (1990 Replacement Volume and 1998 Supplement)

20 BY adding to
21 Article - Commercial Law
22 Section 11-203(14); and 21-101 through 21-107, inclusive, to be under the new
23 title "Title 21. Maryland Year 2000 Commerce Protection Act"
24 Annotated Code of Maryland
25 (1990 Replacement Volume and 1998 Supplement)

26 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
27 MARYLAND, That the Laws of Maryland read as follows:

Article - Commercial Law

2 11-203.

3 This subtitle does not make illegal the activity of:

4 (12) A political subdivision of the State in furnishing services or
5 commodities; [or]6 (13) A hospital, as defined in § 19-301 of the Health - General Article, in
7 the course of a merger or consolidation or the joint ownership and operation of major
8 medical equipment, to the extent that the activity is approved by the Health
9 Resources Planning Commission under § 19-123 of the Health - General Article; OR10 (14) GOVERNMENTAL ENTITIES AND PERSONS IN THE COURSE OF THE
11 EXCHANGE OF INFORMATION CONCERNING MEASURES THAT HAVE BEEN TAKEN OR
12 ARE TO BE TAKEN IN ORDER FOR PRODUCTS OR SERVICES OF THE GOVERNMENTAL
13 ENTITIES OR PERSONS TO BECOME YEAR 2000-READY, AS DEFINED IN TITLE 21 OF
14 THIS ARTICLE.

15 TITLE 21. MARYLAND YEAR 2000 COMMERCE PROTECTION ACT.

16 21-101.

17 (A) IN THIS TITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

18 (B) "DATE DATA" MEANS DATA THAT CONTAINS DATES OR THAT CONTAINS
19 BOTH DATES AND TIMES.20 (C) "GOVERNMENTAL ENTITY" MEANS THE STATE, A COUNTY, OR A
21 MUNICIPAL CORPORATION, OR ANY UNIT OF THE STATE, A COUNTY, OR A MUNICIPAL
22 CORPORATION.23 (D) "INFORMATION TECHNOLOGY SYSTEM OR PRODUCT" INCLUDES ANY
24 SOFTWARE, FIRMWARE, MICROCODE, HARDWARE, EMBEDDED CHIPS, OR OTHER
25 SYSTEM OR PRODUCT, OR ANY COMBINATION OF THOSE ITEMS, THAT CREATES,
26 READS, WRITES, CALCULATES, COMPARES, SEQUENCES, OR OTHERWISE PROCESSES
27 DATE DATA.28 (E) "SOLUTION PROVIDER" MEANS ANY PERSON THAT ACCEPTS
29 COMPENSATION OR OTHER VALUABLE CONSIDERATION FROM A GOVERNMENTAL
30 ENTITY OR PERSON TO:31 (1) ASSESS WHETHER ANY OF THE GOVERNMENTAL ENTITY'S OR
32 PERSON'S PRODUCTS OR SERVICES ARE YEAR 2000-READY; OR33 (2) ENSURE THAT ANY OF THE GOVERNMENTAL ENTITY'S OR PERSON'S
34 PRODUCTS OR SERVICES ARE YEAR 2000-READY.

35 (F) "YEAR 2000-READY" MEANS ANY PRODUCT OR SERVICE THAT:

1 (1) RELIES UPON AN INFORMATION TECHNOLOGY SYSTEM OR PRODUCT
2 THAT INCLUDES DATE DATA; AND

3 (2) BEFORE JANUARY 2, 2001, OPERATES IN A MANNER CONSISTENT
4 WITH THE DESIGN REQUIREMENTS OR OTHER SPECIFICATION FOR THE PRODUCT OR
5 SERVICE.

6 21-102.

7 (A) SUBJECT TO SUBSECTION (B) OF THIS SECTION, THE EXCLUSIVE
8 REMEDIES IN THIS STATE FOR RECOVERING FROM A GOVERNMENTAL ENTITY OR
9 PERSON ANY DAMAGES CAUSED BY THE FAILURE OF A PRODUCT OR SERVICE
10 PROVIDED BY THE GOVERNMENTAL ENTITY OR PERSON TO BE YEAR 2000-READY
11 SHALL BE AS PROVIDED:

12 (1) UNDER ANY PROVISION OF A CONTRACT WITH THE GOVERNMENTAL
13 ENTITY OR PERSON THAT PROVIDES SPECIFIC REMEDIES FOR THE FAILURE OF THE
14 PRODUCT OR SERVICE TO BE YEAR 2000-READY; OR

15 (2) IN CASES NOT COVERED UNDER PARAGRAPH (1) OF THIS
16 SUBSECTION, UNDER THIS SUBTITLE.

17 (B) ANY ACTION AGAINST A GOVERNMENTAL ENTITY REMAINS SUBJECT TO
18 ALL PROCEDURES AND LIMITATIONS ON DAMAGES OTHERWISE SPECIFIED BY LAW.

19 21-103.

20 (A) AN ACTION AGAINST A GOVERNMENTAL ENTITY OR PERSON WHOSE
21 PRODUCT OR SERVICE IS NOT YEAR 2000-READY ARISES ON THE DATE ON WHICH
22 THE PRODUCT OR SERVICE THAT RELIES ON AN INFORMATION TECHNOLOGY
23 SYSTEM OR PRODUCT:

24 (1) FAILS TO OPERATE IN A MANNER CONSISTENT WITH THE DESIGN
25 REQUIREMENTS OR OTHER SPECIFICATION FOR THE PRODUCT OR SERVICE; AND

26 (2) CAUSES DAMAGE OR LOSS.

27 (B) A GOVERNMENTAL ENTITY OR PERSON WHOSE PRODUCT OR SERVICE IS
28 NOT YEAR 2000-READY SHALL BE LIABLE UNDER THIS TITLE ONLY WHERE THE
29 FAILURE OF THE PRODUCT OR SERVICE TO BE YEAR 2000-READY IS THE PROXIMATE
30 CAUSE OF THE DAMAGES.

31 21-104.

32 (A) IT SHALL BE AN AFFIRMATIVE DEFENSE TO ANY ACTION BROUGHT BY A
33 PLAINTIFF AGAINST ANY GOVERNMENTAL ENTITY OR PERSON WHOSE PRODUCT OR
34 SERVICE IS NOT YEAR 2000-READY THAT:

35 (1) IN THE CASE OF A GOVERNMENTAL ENTITY, THE ENTITY EXERCISED
36 DUE DILIGENCE TO ENSURE THAT IT WAS YEAR 2000-READY IN A MANNER THAT

1 WOULD BE EXERCISED BY A REASONABLY PRUDENT PERSON IN ACCORDANCE WITH
2 THE STANDARDS APPLICABLE TO THE SAME TYPE AND SIZE OF GOVERNMENTAL
3 ENTITY; OR

4 (2) IN THE CASE OF ANY OTHER PERSON, THE PERSON DETERMINED
5 AND IMPLEMENTED ACTIONS NECESSARY FOR THE PERSON TO BECOME YEAR
6 2000-READY IN ACCORDANCE WITH THE REQUIREMENTS AND STANDARDS SET
7 FORTH IN § 2-405.1 OF THE CORPORATIONS AND ASSOCIATIONS ARTICLE.

8 (B) IN DETERMINING WHETHER A GOVERNMENTAL ENTITY OR PERSON HAS
9 MET THE STANDARD SET OUT IN SUBSECTION (A) OF THIS SECTION, THE COURT
10 SHALL CONSIDER WHETHER THE GOVERNMENTAL ENTITY OR PERSON:

11 (1) HAS INVENTORIED ITS PRODUCTS AND SERVICES TO DETERMINE
12 WHETHER THEY ARE YEAR 2000-READY;

13 (2) CAN EVIDENCE A PLAN TO MAKE ITS PRODUCTS AND SERVICES TO
14 BE YEAR 2000-READY; AND

15 (3) HAS CONTACTED ITS CRITICAL SUPPLIERS TO DETERMINE
16 WHETHER THEY HAVE YEAR 2000 READINESS PLANS.

17 (C) THE FAILURE OF A SOLUTION PROVIDER TO PROVIDE AN EXPRESS
18 WARRANTY ON WHICH A GOVERNMENTAL ENTITY OR PERSON MAY RELY MAY NOT
19 BE CONSTRUED AS A FAILURE OF THE GOVERNMENTAL ENTITY OR PERSON TO
20 COMPLY WITH THE STANDARD SET OUT UNDER SUBSECTION (A) OF THIS SECTION IF
21 THE SOLUTION PROVIDER REPRESENTS TO THE GOVERNMENTAL ENTITY OR PERSON
22 THAT:

23 (1) THE SOLUTION PROVIDER OR ANY OF ITS INFORMATION
24 TECHNOLOGY SYSTEMS OR PRODUCTS ARE YEAR 2000-READY; OR

25 (2) THE SOLUTION PROVIDER WILL MAKE THE GOVERNMENTAL
26 ENTITY'S OR PERSON'S PRODUCTS OR SERVICES YEAR 2000-READY.

27 (D) A DIRECTOR OR OFFICER OF A CORPORATION OR ANY PERSON DULY
28 AUTHORIZED TO DIRECT OR GOVERN THE ACTIVITIES OF A PARTNERSHIP,
29 ASSOCIATION, UNINCORPORATED ASSOCIATION, OR ANY OTHER ENTITY THAT IS NOT
30 A CORPORATION IS NOT PERSONALLY LIABLE FOR DAMAGES RESULTING FROM THE
31 FAILURE OF THE CORPORATION OR OTHER ENTITY TO BECOME YEAR 2000-READY IF
32 THAT DIRECTOR, OFFICER, OR OTHER PERSON HAS DETERMINED AND
33 IMPLEMENTED ACTIONS NECESSARY FOR THE CORPORATION OR OTHER ENTITY TO
34 BECOME YEAR 2000-READY IN ACCORDANCE WITH THE REQUIREMENTS AND
35 STANDARDS SET FORTH IN § 2-405.1 OF THE CORPORATIONS AND ASSOCIATIONS
36 ARTICLE.

37 21-105.

38 THE EXCHANGE OF INFORMATION AMONG GOVERNMENTAL ENTITIES AND
39 PERSONS CONCERNING MEASURES THAT HAVE BEEN TAKEN OR ARE TO BE TAKEN

1 IN ORDER FOR THE GOVERNMENTAL ENTITIES' OR PERSONS' PRODUCTS OR
2 SERVICES TO BECOME YEAR 2000-READY DOES NOT CONSTITUTE AN ACTIVITY OR
3 CONDUCT IN THE RESTRAINT OF TRADE OR COMMERCE.

4 21-106.

5 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
6 INDICATED.

7 (2) "READINESS REVIEW" MEANS AN AUDIT, INFORMATION
8 TECHNOLOGY REVIEW, OR OTHER REVIEW OF WHETHER A GOVERNMENTAL
9 ENTITY'S OR PERSON'S PRODUCTS OR SERVICES ARE YEAR 2000-READY.

10 (3) "READINESS REVIEW DOCUMENTS" MEANS ANY DOCUMENTS
11 PREPARED FOR OR IN CONJUNCTION WITH A READINESS REVIEW.

12 (B) THIS SECTION APPLIES TO ANY READINESS REVIEW DOCUMENT
13 PREPARED AS PART OF A READINESS REVIEW TO EVALUATE AND SEEK TO IMPROVE
14 YEAR 2000 READINESS OF A GOVERNMENTAL ENTITY'S OR PERSON'S PRODUCTS OR
15 SERVICES.

16 (C) EXCEPT AS PROVIDED IN SUBSECTION (D) OF THIS SECTION:

17 (1) READINESS REVIEW DOCUMENTS ARE CONFIDENTIAL AND ARE NOT
18 DISCOVERABLE OR ADMISSIBLE IN EVIDENCE IN ANY CIVIL ACTION ARISING OUT OF
19 MATTERS RELATED TO THE SUBJECT OF A READINESS REVIEW; AND

20 (2) READINESS REVIEW DOCUMENTS DELIVERED TO A FEDERAL OR
21 STATE GOVERNMENTAL AGENCY REMAIN CONFIDENTIAL AND ARE NOT
22 DISCOVERABLE OR ADMISSIBLE IN EVIDENCE IN ANY CIVIL ACTION ARISING OUT OF
23 MATTERS RELATED TO THE SUBJECT OF A READINESS REVIEW.

24 (D) TO THE EXTENT APPLICABLE LAW EXPRESSLY AUTHORIZES ITS
25 DISCLOSURE, SUBSECTION (C) OF THIS SECTION DOES NOT APPLY TO THE
26 DISCLOSURE OF ANY INFORMATION REQUIRED BY STATUTE OR REGULATION TO BE
27 MAINTAINED BY OR PROVIDED TO A GOVERNMENTAL AGENCY WHILE THE
28 INFORMATION IS IN THE POSSESSION OF THE GOVERNMENTAL AGENCY.

29 (E) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE DISCOVERY OR
30 ADMISSIBILITY IN ANY CIVIL ACTION OF ANY DOCUMENTS THAT ARE NOT
31 READINESS REVIEW DOCUMENTS.

32 21-107.

33 THIS TITLE SHALL BE KNOWN AND MAY BE CITED AS THE MARYLAND YEAR 2000
34 COMMERCE PROTECTION ACT.

35 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be
36 construed only prospectively and may not be applied or interpreted to have any effect
37 on or application to any case filed before the effective date of this Act.

1 SECTION 3. AND BE IT FURTHER ENACTED, That nothing in this Act shall
2 be construed to:

3 (1) Recognize, endorse, or suggest the existence or validity of any purported
4 cause of action;

5 (2) Create a cause of action where none otherwise existed;

6 (3) Limit the ability of contracting parties to enter into agreements as they
7 deem appropriate on the issue of liability and damages;

8 (4) Affect the validity of existing contracts created on or before the effective
9 date of this Act regarding issues of liability and damages; or

10 (5) Be indicative of any type of industry standard relating to year 2000
11 readiness of information technology products or goods and services that rely on
12 information technology products.

13 SECTION 4. AND BE IT FURTHER ENACTED, That it is the intent of the
14 Maryland General Assembly that parties contemplating any litigation regarding year
15 2000 readiness should engage in alternative dispute resolution prior to entering into
16 any litigation and that the courts actively encourage parties to seek to address legal
17 issues through an alternative dispute resolution mechanism before allowing any trial
18 on year 2000 issues to go forward.

19 SECTION 5. AND BE IT FURTHER ENACTED, That nothing in this Act may
20 be construed to preclude or limit the effect of any legislation enacted by the United
21 States relating to year 2000 readiness.

22 SECTION 6 AND BE IT FURTHER ENACTED, That this Act shall take effect
23 June 1, 1999.

1999 Montana Legislature

About Bill -- Links

SENATE BILL NO. 16

INTRODUCED BY B. KEENAN

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "~~AN ACT LIMITING LIABILITY FOR COMPUTER ERRORS AND RESULTING HARM CAUSED BY THE MILLENNIUM CHANGE; PROVIDING GOVERNMENTAL IMMUNITY TO GOVERNMENTAL ENTITIES AND HEALTH CARE FACILITIES FOR SUCH COMPUTER ERRORS AND RESULTING HARM; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE.~~"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

(Refer to Introduced Bill)

Strike everything after the enacting clause and insert:

NEW SECTION. Section 1. Millennium change -- immunity for governmental entities and health care facilities for computer errors and resulting harm -- exceptions. (1) Except as provided in subsection (2), a governmental entity, as defined in 2-9-101, or a health care facility, as defined in 50-5-101, is not liable, in the absence of gross negligence or willful or wanton misconduct, for any civil damages arising from any failure or malfunction that occurs before January 1, 2005, and that is caused directly or indirectly by the failure of an electronic computing device to accurately or properly recognize, calculate, display, sort, compare, project, sequence, or otherwise process dates or times.

(2) The immunity provided by subsection (1) does not apply to a health care facility if death or bodily injury results from the failure or malfunction.

(3) This section may not be interpreted to interfere with rights to receive statutorily mandated services, entitlements, or compensation from governmental entities. If the failure or malfunction directly or indirectly causes a governmental entity to fail to deliver services, entitlements, or compensation, the remedies available are the existing administrative procedures or remedies provided by law, except as expressly limited by this section. The only compensation for the failure or malfunction is the value of the service, amount of entitlement, or amount of compensation that was due.

(4) This section does not limit the ability of contracting parties to enter into agreements as they consider appropriate with regard to liability and damages. This section does not apply to actions based upon fraud.

(5) For purposes of this section, "electronic computing device" means any computer hardware, software, firmware, computer chip, embedded chip, process control equipment, timing device, or other information system that:

(a) captures, stores, manipulates, or processes data; or

(b) controls, monitors, or assists in the operation of physical apparatus that is not primarily used as a computer and that relies on automation or digital technology to function, including but not limited to buildings, structures, facilities, vehicles, vessels, elevators, medical equipment, traffic signals, factory machinery, and similar appliances, equipment, instruments, and machinery.

NEW SECTION. **Section 2. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 3. Two-thirds vote required.** Because [section 1] limits governmental liability, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for passage.

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 5. Termination.** [This act] terminates January 1, 2005.

- END -

Latest Version of SB 16 (SB0016.02)
Processed for the Web on February 12, 1999 (4:47PM)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted. See the status of the bill for the bill's primary sponsor.

[Status of this Bill](#) | [1999 Legislature](#) | [Leg. Branch Home](#)
[This bill in WP 5.1](#) | [All versions of all bills in WP 5.1](#)

Prepared by Montana Legislative Services
(406)444-3064

LEGISLATURE OF NEBRASKA
NINETY-SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 661

Introduced by Kristensen, 37

Read first time January 20, 1999

Committee: Judiciary

A BILL

- 1 FOR AN ACT relating to civil procedure; to provide for damages and
- 2 procedures in actions relating to computer date failures;
- 3 and to define terms.
- 4 Be it enacted by the people of the State of Nebraska,

1 Section 1. For purposes of sections 2 and 3 of this act:

2 (1) Actual damages means damages which are immediately
3 attributable to a computer date failure as the natural result of a
4 computer date failure, but does not include damages which are
5 immediately attributable to an intervening act or damages which
6 flow immediately from the consequences or results of a computer
7 date failure; and

8 (2) Computer date failure means the present or future
9 inability of a computer system, program, or software to accurately
10 store, process, provide, or receive data from, into, and between
11 the years 1999 and 2000 and beyond, including leap-year
12 calculations, if all other technology used in combination with the
13 system, program, or software properly exchanges data with the
14 system, program, or software.

15 Sec. 2. The only recoverable damages in a civil action
16 for damages resulting directly or indirectly from a computer date
17 failure shall be actual damages based in contract if (1) the
18 defendant has made all reasonable efforts to protect its computer
19 systems, programs, or software from a computer date failure or (2)
20 the defendant has complied with federal guidelines, rules, or
21 regulations applicable to the defendant to protect against a
22 computer date failure.

23 Sec. 3. Section 25-319 shall not apply in a civil action
24 for damages resulting directly or indirectly from a computer date
25 failure if (1) the defendant has made all reasonable efforts to
26 protect its computer systems, programs, or software from a computer
27 date failure or (2) the defendant has complied with federal
28 guidelines, rules, or regulations applicable to the defendant to

LB 661

LB 661

- 1 protect against a computer date failure.

ASSEMBLY, No. 2666

STATE OF NEW JERSEY

208th LEGISLATURE

INTRODUCED NOVEMBER 23, 1998

Sponsored by:

Assemblyman JOEL WEINGARTEN

District 21 (Essex and Union)

SYNOPSIS

Provides that claims for damages resulting from computer date failure shall sound in contract.

CURRENT VERSION OF TEXT

As introduced.

An Act concerning certain civil actions arising from computer date failure and supplementing Title 2A of

the New Jersey Statutes.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

1. The Legislature finds and declares that:

- a. In a wide variety of computers, embedded chips and other electronic devices, dates are often entered only by the last two digits, which in the case of the Year 2000, means that many computers and other devices will read only "00" as the Year 1900, unless the code of the appropriate operating software or application software is remediated.
- b. The "Year 2000 Computing Issue," or "Y2K Issue," as it is more commonly known, is generally recognized as a present or future inability of the computer or the computer system or component thereof, or computer software, be it operating software or applications software, to process accurately date/time data from, into and between the years 1999 and 2000 and beyond.
- c. This issue requires updating or editing the date component of applications software and operating software to enable it to deal successfully with the coming date change from 1999 to 2000 and beyond, either through windowing, field expansion or other techniques.
- d. Failure to resolve fully the "Y2K Issue" is likely to engender litigation from many segments of society: business; industry; health care; finance; education; utilities; and more, and by some estimates, the litigation costs may ultimately exceed the costs associated with remediation, which is already predicted in terms of billions of dollars.
- e. Uncertainty about the ability of government, industry, retail business and health care and other service components of society, to successfully remediate code in response to the "Y2K Issue" could lead to massive social disruption and untold litigation.
- f. Accordingly, it is the intent of the Legislature to protect the citizenry of New Jersey: consumers; business owners; professionals; service providers; financial institutions; government; and other segments of society, from unnecessary litigation by fostering resolution and encouraging remediation of Y2K problems through communication and disclosure, and to provide some predictability when litigation is unavoidable, as the result of such computer date failure.

2. As used in this act:

"Computer date failure" means, with respect to information technology, that the information technology cannot process accurately date/time data including, but not limited to, calculating, comparing and sequencing, from, into and between the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology, properly exchanges date/time data with it. "Computer date failure" includes any failure or malfunction which is directly or indirectly caused by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort or process dates or times.

"Computer software" means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result, whether it be operating system software, application software, data base driven code, or other computer software.

"Computer system" means any computer hardware or software, computer chip, embedded chip, process control equipment, or other information system used to capture, store, manipulate or process data, or that controls, monitors or assists in the operation of physical apparatus that relies on automation or digital technology to function, including but not limited to: vehicles; vessels; buildings; structures; facilities; elevators; medical equipment; traffic signals; factory machinery; consumer electronics and the like.

"Computer system" is not limited to traditional computers and software programs used in an office setting, but includes computerized items such as traffic lights, elevators, power control devices, bio-medical devices and any products containing a computer chip or embedded chip.

"Person" means any individual, proprietor, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other group of persons acting in concert.

3. a. Notwithstanding the provision of any other law to the contrary, and unless otherwise agreed, the exclusive remedy in any action, including one to recover damages, resulting directly or indirectly from a computer date failure, including breach of contract, derivative, shareholder, or any other action based on an alleged failure properly to detect, disclose, prevent, report on, or remedy a computer date failure, brought against any person shall be based solely in contract if the plaintiff has not suffered any personal injury, other than emotional harm, as a result of the computer date failure.

b. Nothing in this section shall be construed to:

(1) Recognize, endorse or suggest the existence or validity of any purported cause of action.

(2) Create a cause of action where none otherwise existed.

(3) Limit the ability of contracting parties to enter into agreements as they deem appropriate on the issues of liability and damages.

(4) Affect the validity of existing contracts created on or before enactment of this section regarding issues of liability and damages.

c. In any action described in subsection a. of this section, it shall be an affirmative defense that the defendant, or other responding party from whom liability is sought, used reasonable efforts to detect, disclose, prevent, report on or remedy a computer date failure.

4. This act shall take effect immediately and shall apply to causes of action accruing on or after the thirtieth day following enactment.

STATEMENT

This bill provides that an action, including one to recover damages, resulting from a computer data failure shall be based solely in contract when certain conditions apply.

Fifty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2303

Introduced by

Senators Klein, D. Mathern

Representative Berg

1 A BILL for an Act relating to the liability of financial institutions and credit unions for
2 malfunctions or failures of computer or other electronic systems as the result of a year 2000
3 disruption; and to provide an expiration date.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. Definitions.** As used in this Act:

- 6 1. "Comparative responsibility" means any act or omission that is negligent or willful,
7 assumption of risk, breach of warranty, misuse of a product, or failure to use
8 reasonable care to avoid or mitigate damage.
- 9 2. "Economic damages" means actual monetary losses proximately caused by a year
10 2000 disruption. The term does not include projected losses of future income or
11 earnings and lost future business or employment opportunities.
- 12 3. "Year 2000 disruption" means a malfunction or failure of a computer or other
13 electronic information or a malfunction or failure of an operating system or of
14 equipment, including an electrical or telecommunications malfunction or failure,
15 which prevents the system or equipment from correctly reading or processing data
16 fields containing time or date information, functioning consistently regarding that
17 time or date information, or from correctly calculating, comparing, or sequencing
18 time or date information.
- 19 4. "Year 2000 readiness plan" means the process by which a federally insured
20 financial institution or credit union prepares the computers and other electronic
21 information and operating systems and equipment under the financial institution's
22 or credit union's control to correctly read and process time and date information
23 and to function consistently regarding that time and date information.

1 **SECTION 2. Year 2000 readiness plan.** Notwithstanding any other provision of law,
2 this Act governs every claim for relief in which damages are sought from a federally insured
3 financial institution or credit union for an alleged year 2000 disruption if the financial institution
4 or credit union has made a good-faith effort to make and implement a year 2000 readiness
5 plan. A financial institution or credit union that has substantially complied with the requirements
6 of the financial institution's or credit union's primary federal regulator to address potential year
7 2000 disruptions is conclusively presumed to have made a good-faith effort to make and
8 implement a year 2000 readiness plan.

9 **SECTION 3. Time for commencing action.** A claim for relief in connection with a
10 year 2000 disruption must be commenced before January 1, 2001. Any claim that is not timely
11 brought is barred.

12 **SECTION 4. Requirement for privity of contract.** A federally insured financial
13 institution or credit union may not be held liable to any person not in privity of contract with the
14 financial institution or credit union for damages or other relief relating to a year 2000 disruption.

15 **SECTION 5. Liability for actual damages.** The liability of a federally insured financial
16 institution or credit union that experiences a year 2000 disruption is limited to actual economic
17 damages.

18 **SECTION 6. Comparative responsibility.** A contributory act or omission does not bar
19 recovery in an action under this Act, unless the contributory act or omission was as great as the
20 combined responsibility of every other person whose act or omission contributed to the
21 economic damages. Any damages allowed, however, must be diminished in proportion to the
22 amount of a contributing act or omission that is attributable to the person making the recovery.
23 The court may, and if requested by any party, shall direct the jury to find separate special
24 verdicts determining the amount of economic damages and the percentage of responsibility
25 attributable to each contributing person, regardless of whether the contributing person is a party
26 to the action. In the case of contribution, the court shall reduce the amount of damages in
27 proportion to the amount of responsibility to the person recovering. If two or more parties
28 contributed, the liability of each party is several only and is not joint, and each party is liable
29 only for the amount of damages attributable to the percentage of responsibility of that particular
30 party.

1 **SECTION 7. Elimination of damages other than economic damages.** A party
2 claiming relief from a federally insured financial institution or credit union as a primary
3 consequence of a year 2000 problem may not be awarded punitive damages, consequential
4 damages, extraordinary damages, noneconomic damages, or any other relief in excess of
5 economic damages.

6 **SECTION 8. EXPIRATION DATE.** This Act is effective through July 31, 2003, and
7 after that date is ineffective.

STATE OF OKLAHOMA

1st Session of the 47th Legislature (1999)

HOUSE BILL NO. 1412

By: Perry

AS INTRODUCED

An Act relating to damages; exempting businesses from liability for losses caused by failure or malfunction of computer software or computer devices in certain circumstances; providing scope of law; providing exception; defining term; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 104 of Title 23, unless there is created a duplication in numbering, reads as follows:

A. A business shall not be liable for losses, from any failure or malfunction occurring before December 31, 2005, which is caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, if:

1. The failure or malfunction causing the loss was unforeseeable;

2. The failure or malfunction causing the loss was foreseeable, but the plan or design or both for identifying and preventing the failure or malfunction was prepared in substantial compliance with generally accepted computer and information system design standards in effect at the time of the preparation of the plan or design;

3. The business exercised due diligence in assessing whether or not the failure or malfunction causing the loss would occur and made a good-faith effort to avoid the failure or malfunction; or

4. The business adequately disclosed to the injured party before the date of the injury that there was a failure or malfunction that could result in injury.

B. The provisions of this section shall apply to actions arising out of contract and to actions arising independent of contract; provided, if the terms of a contract provide remedies for loss due to the failure or malfunction of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, the terms of the contract shall govern recovery.

C. The provisions of this section shall not apply to medical malpractice claims alleging bodily injury or death.

D. As used in this section, "business" means any entity, however organized, that is routinely engaged in this state in providing goods or services in the stream of commerce.

SECTION 2. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

47-1-5193 SD 2/26/99

By Pitts
76R413 AJA-D

H.B. No. 40

A BILL TO BE ENTITLED
AN ACT

1-1
1-2 relating to limiting liability for damages arising from failure of
1-3 a computer to recognize and accurately process the date January 1,
1-4 1999, or a later date.

1-5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
1-6 SECTION 1. Title 4, Civil Practice and Remedies Code, is

1-7 amended by adding Chapter 97 to read as follows:

1-8 CHAPTER 97. LIABILITY FOR COMPUTER DATE FAILURE

1-9 Sec. 97.001. DEFINITIONS. In this chapter:

1-10 (1) "Computer" means an electronic, magnetic, optical,
1-11 electrochemical, or other high-speed data processing device that
1-12 performs logical, arithmetic, or memory functions by the
1-13 manipulations of electronic or magnetic impulses and includes all
1-14 input, output, processing, storage, or communication facilities
1-15 that are connected or related to the device.

1-16 (2) "Computer date failure" means the failure of a
1-17 computer, computer network, program, software, embedded chip, or
1-18 computer system to recognize, to not cause an error condition on,
1-19 and to accurately process the date January 1, 1999, or a later
1-20 date.

1-21 (3) "Computer network" means the interconnection of
1-22 two or more computers or computer systems by satellite, microwave,
1-23 line, cable, wiring, or other communication medium with the
1-24 capability to transmit information among the computers.

2-1 (4) "Computer program" means an ordered set of
2-2 data-coded instructions or statements that when executed by a
2-3 computer cause the computer system to process data or perform
2-4 specific functions.

2-5 (5) "Computer software" means a set of computer
2-6 programs, procedures, and associated documentation related to the
2-7 operation of a computer, computer system, or computer network.

2-8 (6) "Computer system" means any combination of a
2-9 computer or computer network with the documentation, computer
2-10 software, or physical facilities supporting the computer or
2-11 computer network.

2-12 (7) "Embedded chip" means a single or multiple
2-13 microprocessor chip that operates in conjunction with software,
2-14 including software on the chip itself, designed to control a device
2-15 or equipment in some way.

2-16 Sec. 97.002. LIMITATION OF LIABILITY. In a claim for
2-17 damages arising from a computer date failure, the claimant may
2-18 recover only:

2-19 (1) damages resulting from personal injury or wrongful
2-20 death, excluding mental anguish; and

2-21 (2) costs reasonably incurred to reprogram or replace
2-22 and internally test the relevant computer, computer network,
2-23 computer program, computer software, computer system, or internal
2-24 hardware timer.

2-25 Sec. 97.003. EFFECT ON OTHER LIABILITY. (a) This chapter:

2-26 (1) does not provide an independent basis for a claim
2-27 for computer date failure;

3-1 (2) serves only to limit the recovery of damages if
3-2 the claim is authorized by common law or other statutory law;

3-3 (3) does not relieve a party of any liability that
3-4 would otherwise exist for deliberate, wilful, or malicious injury
3-5 to a person or property;

3-6 (4) applies to a governmental unit; and

3-7 (5) does not waive sovereign immunity.

3-8 (b) To the extent that this chapter limits the liability of

3-9 a governmental unit under circumstances in which the governmental

3-10 unit would be liable under Chapter 101, this chapter controls.

3-11 SECTION 2. This Act applies only to a cause of action that

3-12 accrues on or after the effective date of this Act. An action that

3-13 accrued before the effective date of this Act is governed by the

3-14 law in effect at the time the action accrued, and that law is

3-15 continued in effect only for this purpose.

3-16 SECTION 3. The importance of this legislation and the

3-17 crowded condition of the calendars in both houses create an

3-18 emergency and an imperative public necessity that the

3-19 constitutional rule requiring bills to be read on three several

3-20 days in each house be suspended, and this rule is hereby suspended,

3-21 and that this Act take effect and be in force from and after its

3-22 passage, and it is so enacted.

[summary](#) | [pdf](#)**SENATE BILL NO. 983**

Senate Amendments in [] -- February 5, 1999

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 22, consisting of sections numbered 8.01-227.1, 8.01-227.2, and 8.01-227.3, relating to limiting liability and damages for economic loss in connection with the Year 2000 date change.

 Patron-- Barry

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 8.01 an article numbered 22, consisting of sections numbered 8.01-227.1, 8.01-227.2, and 8.01-227.3, as follows:

*Article 22.
 Year 2000 Liability and Damages.*

§8.01-227.1. Purpose.

A. The General Assembly finds that maintaining the health and stability of the various business enterprises located in the Commonwealth is in the public interest in order to insure the uninterrupted delivery of goods and services to the Commonwealth's citizenry. The General Assembly further finds that the Year 2000 problem is a one-time occurrence for which no one person is accountable and, therefore, the business enterprises of the Commonwealth should not have their ability to continue to deliver goods and services impaired by having to contest lawsuits arising from Year 2000 problems over which such business enterprises have no control. This act is intended to place prudential limitations on the potential liability of the Commonwealth's business enterprises, while preserving the appropriate right of recovery by persons suffering economic losses as a result of another's fault or negligence. This act shall not affect the right of recovery for damages in connection with [wrongful death or] injuries to persons or property. [Nor shall this act limit enforcement of laws, regulations, or permits by state or local governmental bodies or agencies.]

§8.01-227.2. Definitions.

For purposes of this article:

"Person" means the same as defined in §1-13.19.

"Regulated entity" means any insured [~~depository~~ financial] institution or public utility.

"Third party" means, with respect to a person against whom a claim for damages is made based upon a Year 2000 problem, any (i) person having no contractual or affiliate relationship with such person, (ii) state or federal governmental or quasi-governmental agency or entity, or (iii) regulated entity.

"Year 2000 problem" means any computing, physical, enterprise, or distribution system complication that has occurred or may occur as a result of the change of the year from 1999 to 2000 in any person's technology system, including, without limitation, computer hardware, programs, software, or systems;

embedded chip calculations or embedded systems; firmware; microprocessors; or management systems, business processes, or computing applications that govern, utilize, drive, or depend on the Year 2000 processing capabilities of the person's technology systems. Such complications may include the common computer programming practice of using a two-digit field to represent a year, resulting in erroneous date calculations; an ambiguous interpretation of the term or field "00"; the failure to recognize 2000 as a leap year; algorithms that use "99" or "00" to activate another function; or the use of any other applications, software, or hardware that are date-sensitive.

"Year 2000 processing" means the processing, calculating, comparing, sequencing, displaying, storing, transmitting, or receiving of date or date-sensitive data from, into, or between the twentieth and twenty-first centuries, during the years 1999 and 2000, and leap year calculations.

§8.01-227.3. Liability and damages limited.

Notwithstanding any other provision of law to the contrary, the following provisions shall apply in connection with any civil action against a person in which the claim for damages is based upon a Year 2000 problem:

- 1. No person shall be liable to any person: not in privity of contract with such person.*
- 2. No person shall be liable for damages caused by a delay or interruption in performance, or in the delivery of goods or services, resulting from or in connection with a Year 2000 problem to the extent such Year 2000 problem was caused by a third party [or by a third party's Year 2000 problem] .*
- 3. No employee, officer, or director shall be liable in his capacity as such to any person.*
- 4. No person shall be liable for consequential or punitive damages.*
- 5. Total damages shall not exceed actual direct damages.*



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