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One Trillion Dollars? An Analysis of Y2K Employment Implications for Attorneys*

I. INTRODUCTION

The potential litigation arising from the Year 2000 computer bug (Y2K) has sent attorneys scrambling to position themselves as advocates in the somewhat ethereal, yet intriguing, new legal field of technological entomology. "We've seen the \$1 trillion estimate of costs, and nobody really knows what it will be But the number is so huge that even if it's just a fraction of the estimate, it's still a huge number."¹ Whether Y2K will actually create such an unprecedented source of employment revenue for lawyers is a question that will likely remain without a definitive answer until late in the year 2000. This article undertakes a predictive analysis of the effects of Y2K on attorney employment trends, identifying the viable analytical factors which both support and undermine the prediction of a Y2K employment jackpot for attorneys.

Part II provides a rudimentary introduction to the Y2K problem itself, including the media-reported predictions for Y2K-generated legal work and examples of documented Y2K malfunctions. Part III reviews Y2K legal work to date, specifically focusing on a sampling of Y2K lawsuits already filed. The legal theories supporting potential Y2K claims and prospective parties to such claims are addressed in Part IV. Finally, Part V balances the pro and con factors relating to Y2K attorney employment, resulting in the conclusion in Part VI that Y2K will not revolutionize the world of work for attorneys.

* This article entered the publication process in October 1999. As the year 1999 comes to a close, developments on Y2K issues have become almost a daily occurrence. And although attempts have been made to update the article's substance during the publication process, some of the most recent developments may not be fully addressed due to publication constraints.

1. Steve Raabe, *Millennium Bug a Boon for Lawyers - Legal Firms Seek to Exploit New Market*, DENVER POST, Apr. 27, 1998, at E1 (quoting Steven Segal of LeBoeuf, Lamb, Greene & MacRae).

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II. BACKGROUND

A. A Layperson's Definition of Y2K

"Y2K" is the less-than-ingenious abbreviation for the widely anticipated "Year 2000 computer problem." It bears the alias of the "millennium bug" and other related variations.² In most basic terms, Y2K is a three-character shorthand for describing the procedure whereby computers of many varieties attempt to change their internal calendars from December 31, 1999, to January 1, 2000. Unlike other predicted catastrophes, the precise moment of the Y2K attack has been known, to the nanosecond, for years. Y2K will arrive in all its glory (or maybe without attending glory) at 12:00:00 A.M. on January 1, 2000. The much-debated question is whether computers will recognize the end of the millennium as the year 2000, or, having long since been programmed to assess year dates in only two digits, will interpret the digits "00" as "1900." To the "nontechie" masses, the practical application of this little glitch could represent the difference between having two weeks to pay a January 15 Visa bill before interest accrues and being more than ninety-nine years late on your payments at 17.5% interest. Even nonmathematicians can appreciate the difference.

Although Y2K is arguably a recent phenomenon, it actually had its inauspicious beginning decades ago during the infancy of the computer era. In the "dark ages" of computer use, prior to the time when computers could fit on top of a desk, be set on one's lap, or be held in the palm of the hand, computer programmers, using the COBOL programming language, were limited to eighty-digit program sequences on computer "punch cards."³ By punching holes in these cards, the functional equivalent of modern-day keyboards, programmers were able to input critical data applications.

At some unknown point, facing the expense of computer memory and the scarcity of disk space, an executive decision

2. As part of a city public awareness campaign in St. Paul, Minnesota, the Y2K problem has its own mascot, a "cuddly-looking caterpillar called Millie the Millennium Bug." Kevin Duchschere & Mark Brunswick, *Governments Act to Ensure that Y2K's Impact is Minimal*, STAR TRIB. (Minneapolis), Aug. 24, 1998, at 1B.

3. Chris Taylor, *The History and the Hype; Computer Scientists May Disarm the Y2K Bomb in Time, But That Doesn't Mean They Didn't Screw Up*, TIME, Jan. 18, 1999, at 72.

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was likely made by a high-ranking wearer of pocket protectors to exclude the “1” and the “9” from the first two digits of the year designation, thus saving two spaces on the eighty-digit computer punch card.⁴ This frugality in the face of exponential growth in technological knowledge and production planted the insidious Y2K seed that not only provides hope of increased income for attorneys, but also, according to the media, possibly threatens the continuation of civilization itself.

B. Media Hype on Y2K Attorney Employment

The hype on Y2K and attorney pocketbooks is that one trillion dollars of litigation will result from Y2K legal issues.⁵ If the hype somehow becomes reality, Y2K may become the largest employment gold mine lawyers have ever known—larger than asbestos, tobacco, and Dalkon shield combined. Moreover, Y2K litigation costs will surpass the cost of fixing the computer problem itself. The whopping thirteen-digit prediction is not uniquely a prognostication of media extremists; even Congress is reportedly concerned that litigation costs could reach the lofty trillion dollar figure.⁶ Although one trillion dollars seems to be the popular media figure for predicted litigation costs, some reports have doubled⁷ and even tripled⁸ that amount.

Y2K buzz is also rapidly permeating legal circles. Some of the nation’s largest law firms have created Y2K practice groups or task forces. Many of these firms are scrambling to educate themselves on the legal issues that will flow from a Y2K computer meltdown. Many of the hours spent investigating Y2K material are considered by these firms to be a “nonbillable investment.”⁹ Firms are also investing considerable time writing

4. *See id.*

5. *See supra* note 1 and accompanying text.

6. *See* Pradnya Joshi & Richard Dalton Jr., *As Revelers Ring in the 2000 Will There Be Chaos the World Over?*, *NEWSDAY* (New York), Dec. 14, 1998, at C8 (“The Senate subcommittee studying the issue fears that litigation costs alone will hit \$1 trillion as shareholders sue heads of public corporations or companies sue each other for loss of business, computer failures and other difficulties that crop up.”).

7. *See* Deidra-Ann Parrish, *Y2K Legal Risks*, *VARBUSINESS*, Mar. 2, 1998, at 18.

8. Thomas Donohue, President of the United States Chamber of Commerce, purportedly indicated that the “trial bar is preparing to file lawsuits seeking between \$1 trillion and \$3 trillion.” Aaron Zitner, *Another Y2K Pest: Lawsuits; Businesses Gear Up to Lobby Congress to Block Threats*, *B. GLOBE*, Jan. 19, 1999, at D1.

9. Jenna Greene, *Joining the Y2K Parade*, *LEGAL TIMES*, Jan. 25, 1999, at S31 (quoting Matthew Jacobs, a partner at the 450-lawyer firm of Kirkpatrick & Lockhart,

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Y2K memoranda for clients and speaking at Y2K conferences.¹⁰

Given the enormity of the predicted financial figures, however, the current legal activities are not yet even beginning to scratch the surface of what lawyers hope will be a new paradigm of legal employment.

C. Actual Reported Y2K Incidents

Unlike the Y2K “analysts” who have forecasted a trillion dollar windfall for attorneys, some critics have posited that Y2K is entirely a figment of media-generated propaganda. Such critics have already been proven wrong, as evidenced by the following reports of Y2K problems that have already surfaced:

- A freeze-dried food company lost thousands of dollars of inventory when the automated monitoring system interpreted the expiration date of “00” as 1900 instead of 2000.¹¹
- A limousine company assessed delinquency fees on credit accounts because its computer system read expiration dates of 2002 as 1902.¹²
- A chocolate company’s computerized register system was routinely unable to process credit cards with an expiration date of 2000 or beyond. All credit card purchases had to be entered manually by employees with an alternate expiration date.¹³
- In Sacramento, California, during a Y2K computer check, jail computers, forwarded to the date of January 1, 2000, unlocked all the jail doors based on the interpretation that something catastrophic had occurred.¹⁴
- In Frederick County, Maryland, another jail computer system test yielded a miscalculation of release dates for in-

who spends 15 to 20 hours per week of nonbillable time reading Y2K materials).

10. *See id.* at S31-S32.

11. *See Joshi & Dalton, supra* note 6.

12. *See id.*

13. *See* Ronald Rosenberg, *The Millenium Bug and the Law; Potential Liability from Computer Pest Has Legal Eagles Bolstering Their Ranks*, BOSTON GLOBE, Feb. 1, 1998, at F4.

14. *See* Duchscherer & Brunswick, *supra* note 2.

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mates which would have mistakenly allowed some back on the streets.¹⁵

- In what was called “ ‘the biggest visible occurrence of Y2K impact on the public,’ ” \$30 million of premature food-stamp credits were dispersed to New Jersey recipients when the Department of Human Services attempted to correct Y2K computer problems.¹⁶

This sampling is viewed by Y2K alarmists as being the ominous foreshadowing of the devastation to come. Y2K nonbelievers counter that computer problems will be corrected by the time the millenium ends and no such problems will occur. To lawyers, however, the potential for liabilities and damages under the foregoing scenarios is mind boggling.

III. Y2K ATTORNEY EMPLOYMENT TO DATE

A. Advisory Roles—“Preventive Maintenance”

Much of the Y2K-related employment created for attorneys to date is not representative of the prognosticated litigation overload that will occur sometime during the year 2000. An overwhelming majority of Y2K work thus far has centered on consultation regarding Y2K “preventive maintenance.” Some firms have strategically played into the Y2K frenzy by speaking at Y2K conferences, sending Y2K newsletters to clients, and creating Y2K Websites.¹⁷

Most Y2K work thus far has been either transactional or advisory. The standard fare includes reviewing contracts, licensing agreements, and insurance policies in an attempt to avoid the Y2K litigation monster.¹⁸ The general content of much Y2K attorney advice, however, has been more generic than Y2K-specific: perform internal audits of contracts, make proper disclosures, document the vendor and client relationship, and make a good-faith effort to correct problems.¹⁹ Essen-

15. *See id.*

16. Mike Allen, *\$30 Million Error May Be a Precursor of Year 2000 Flaws*, N.Y. TIMES, Mar. 23, 1999, at B1 (quoting Dr. Howard A. Rubin of Hunter College).

17. *See* Greene, *supra* note 9, at 531-32.

18. *See id.*

19. *See* Joshi & Dalton, *supra* note 6.

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tially, attorneys have been paid to counsel vendors and other corporations to give heightened scrutiny to the normal due diligence paper trail. This trail includes supporting documentation that a company followed industry practices and devoted time and resources to the potential problem—i.e., show that the company did everything that was feasibly within its power to prevent Y2K problems.²⁰

A sizeable chunk of Y2K consultation has focused on corporate directors, a group considered to be at particular risk with regard to potential class action and shareholder suits. Advice to this group has focused on limiting liability for Y2K problems. Adequate insurance coverage (when possible), corporate bylaws that provide the utmost protection within the bounds of the law, and informed good faith seem to be the calling cards for corporate protection. Directors and officers have been counseled to maintain documentation indicating that attempts have been made to stay informed regarding Y2K business and legal issues rather than relying without qualification on mainstream reports.²¹

In efforts somewhat more specific to Y2K, many attorneys have found an early pre-Y2K niche by assisting clients with Y2K compliance strategies using various assessment models.²² For example, attorneys have suggested that directors and officers circulate questionnaires²³ among members of their com-

20. See Raabe, *supra* note 1.

21. See *id.*

22. An example risk assessment model is as follows:

1. Create a Y2K task force or committee comprised of both the requisite technical specialists and upper-level managers with decision-making authority.
2. Review all corporate computer systems to identify noncompliant systems.
3. Assess the economics of repair versus abandonment of noncompliant systems.
4. Identify all software licenses and contracts for noncompliant systems.
5. Identify all software and hardware dependencies.
6. Determine whether to conduct repairs in house or to hire outside consultants.
7. Establish test pilot programs for repair work.
8. Establish a timetable for repair and testing systems.
9. Develop contingency plans for all mission-critical systems.
10. Make a record of all corrective actions and systems modifications.

Daniel W. Patterson, *Advising Clients Regarding Year 2000 Compliance*, COLO. LAW., Sept. 1998, at 6.

23. A sample six-step questionnaire is as follows:

1. Has the company prepared an inventory of its computer systems to determine its ability to become Y2K compliant?
2. Does the company have a plan to become Y2K compliant? If so, has the

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pany's supply chain. These questionnaires attempt to determine compliance standings of a company's subcontractors, consultants, distributors, etc., as well as measure the company's own progress toward compliance. The questionnaires have been the subject of controversy, however, because of the general reticence on the part of business owners to make binding statements regarding Y2K compliance.²⁴ As discussed more fully in Part V, the Federal Year 2000 Information and Readiness Disclosure Act has served to quell these fears somewhat.

In short, the widely proliferating speculation regarding the potential dangers of the millennium bug has already created Y2K-related work for attorneys. Although most lawyer employment from Y2K has arguably been advisory work resulting from Y2K hype, some current court cases have provided a glimpse into the predicted avalanche of Y2K litigation.

B. Litigation: A Look at "Pre-Y2K" Y2K Cases

As early as January 1999, a reported 711 Y2K disputes hovered at the prefiling stage.²⁵ Many more cases are filling the legal pipelines daily. By the beginning of the last quarter of 1999, at least seventy-five Y2K-related actions had been filed.²⁶ This section will highlight the summaries of some of these cases.

In looking at a sampling of Y2K cases, three variables will be assessed: (1) the basis of current actions; (2) the types of suits; and (3) alternative forums for dispute resolution. Focusing on these variables places into context the foundation for

company's Board of Directors approved the plan?

3. Has the company reviewed all of its license and maintenance agreements to determine whether its vendors have any obligations to make their software Y2K compliant?

4. Has the company made a determination whether its critical suppliers will be Y2K compliant?

5. Does the company have a plan to monitor its suppliers' progress in becoming Y2K compliant?

6. Will the company agree to supplement its responses and provide periodic updated information regarding its progress toward compliance?

Id. at 7.

24. *See id.* at 6-7

25. *See* Marcia Stepanek, *A Better Vaccine Against Y2K Lawsuit Fever*, *BUS. WK.*, Jan. 11, 1999, at 48, 48.

26. *See* Federation of Insurance & Corporate Counsel, *Year 2000 Lawsuits and Arbitrations That Have Been Filed* (visited Sept. 16, 1999) <<http://www.thefederation.org/Public/Y2K/lawsuits.htm>> [hereinafter FICC Website].

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current and future Y2K disputes.

1. Basis of current Y2K suits

The majority of current Y2K suits focus on Y2K malfunction and noncompliant software. Other bases of Y2K litigation have included readiness disclosures, duty to remediate, and insurance coverage.²⁷

a. Y2K malfunction. The first Y2K malfunction to surface in a court setting occurred in *Produce Palace International v. TEC-America Corp.*²⁸ Produce Palace (Palace), a grocery store chain, alleged that it suffered actual losses due to the failure of its credit card scanners to read expiration dates after December 31, 1999. In what some commentators consider to be a microcosmic foreshadowing of future Y2K litigation, Produce Palace brought suit against TEC-America Corp. (TEC), the manufacturer of the computerized cash register system, alleging the following causes of action: (1) breach of warranty; (2) violations of the Magnusson-Moss Warranty Act; (3) breach of warranty of fitness; (4) revocation; (5) breach of duty of good faith; (6) negligent repair; (7) misrepresentation; and (8) violations of the Michigan Consumer Protection Act.²⁹

TEC cross-claimed against All American Cash Register, Inc. (All American), the retailer and installer of the computerized register and inventory system. TEC contended that it lacked privity of contract with Palace and sought sanctions against Palace for filing a meritless claim. In a June 15, 1998 bench ruling, the court denied TEC's argument for sanctions against Palace, while dismissing five of the nine counts alleged against TEC in the complaint. The counts that survived dismissal were (1) breach of warranty; (2) breach of warranty of fitness; (3) negligent repair; and (4) misrepresentation.³⁰ All American, meanwhile, remained subject to all nine counts. The case was eventually settled for \$260,000, with TEC footing \$250,000 of the bill and All American paying the remaining \$10,000. Ironically, the settlement figure had been suggested months earlier by mediators.³¹

27. *See id.*

28. No. 97-3330-CK (Mich. Cir. Ct., Macomb County filed June 12, 1997). Information regarding the case can be found at FICC Website, *supra* note 26.

29. *See id.*

30. *See id.*

31. *See id.*

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The *Produce Palace* case provides an insight into potential parties to and causes of action for Y2K malfunctions. Advocates of the one trillion dollar litigation figure feel that the unique relationships between suppliers and vendors and the issues of causation demonstrated in *Produce Palace* are but a few of the matters which will require the litigation expertise of attorneys in the future.

b. Noncompliant software. Most Y2K cases to date have not included actual Y2K malfunctions, but rather have been class action suits relating to noncompliant software. These suits have been brought in conjunction with currently functional software that happens to be noncompliant for the year 2000. The trend to date has been for courts to reject arguments of potential or imminent damages resulting from software flaws.³²

*Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc.*³³ was a class action suit in which the plaintiffs alleged that defendant Synchronics sold noncompliant business software. Synchronics moved for a six-month stay, offering to research and subsequently fix the problem at no charge to the public, noting that the alleged damages were purely speculative. In granting a limited stay of six weeks, the court summarized the current pulse of most Y2K actions: "I can see no prejudice in granting a limited stay to allow the defendant to potentially cure the problem and avoid the need for litigation (and the transaction costs that go with it) altogether."³⁴

In a software upgrade case, *Atlaz International, Inc. v. Software Business Technologies*,³⁵ the plaintiffs, a class of software purchasers, brought suit when the defendant software manufacturer, Software Business Technologies (SBT), attempted to charge for its Y2K compliant software upgrade. SBT argued that its upgrade provided many features in addition to Y2K compliance. The case eventually settled with SBT agree-

32. United States District Court Judge Ruben Castillo, in prefacing the court's holding, aptly summarized the state of pre-Year 2000 Y2K litigation: "As we near the Twenty-First Century, the media has focused on many potential Y2K problems. This focus will inevitably lead to much litigation, . . . which the courts will need to determine is meritorious or meritless. Unfortunately for the plaintiff, we find this lawsuit falls in the latter category." *Kaczmarek v. Microsoft Corp.*, 39 F. Supp. 2d 974, 974 (N.D. Ill. 1999).

33. No. 98-1084, 1998 U.S. Dist. LEXIS 20147 (W.D. Pa. Nov. 19, 1998).

34. *Id.* at *3.

35. No. 172539 (Cal. Super. Ct., Marin County filed Dec. 2, 1997). Information regarding the case can be found at FICC Website, *supra* note 26.

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ing to provide a free “no frills” upgrade to its existing customers. In connection with the settlement, SBT agreed not to oppose plaintiffs’ attorney fees and costs of up to \$565,000.³⁶

2. Types of Y2K suits

Not only do the factual foundations for pre-Y2K suits fall into predictable patterns, but the legal classifications in which they have been couched are also identifiable: class actions, shareholder actions, and non-litigation, dispute resolution alternatives.

a. Class actions. Six class action suits have been filed against Intuit, Inc., three in New York and three in California.³⁷ The complaints filed against Intuit, the manufacturer of the popular personal accounting software Quicken, alleged that the on-line banking features of certain versions of Quicken were not Y2K compliant.³⁸ The general causes of action, common to each of the suits, included breach of implied and express warranties, anticipatory repudiation, and failure to provide adequate assurances. Based on these alleged violations by Intuit, the plaintiff groups sought injunctive relief to prevent Intuit from selling defective versions of Quicken.³⁹ In addition, the complaint sought refunds to those who purchased noncompliant software, compensatory damages, treble damages, punitive damages, attorneys fees, and court costs.⁴⁰ Although all of the complaints were nearly identical in substance, one complaint made an additional allegation. In *Faegenburg v. Intuit, Inc.*,⁴¹ the plaintiff argued that the Y2K compliancy issue has been common knowledge in the computer software industry since the early 1970s, but nonetheless had been purposely ignored because of the expense of correcting the problem.⁴²

36. *See id.*

37. Citation material regarding these cases is not available in any widely distributed database; however, the information on these case which is pertinent to this article is available through the FICC Website. *See supra* note 26.

38. *See id.*

39. *See id.*

40. *See id.*

41. No. 98602587 (N.Y. Sup. Ct., New York County filed May 26, 1998) (information regarding this case can be found at FICC Website, *supra* note 26).

42. Robert Bemer, a computer programmer who wrote much of the COBOL computer language, published the earliest Y2K warning in 1971. Bemer’s warnings went largely, if not completely, ignored by IBM executives. Again, in 1979, Bemer published a Y2K warning which bluntly stated, “Don’t drop the first two digits. The program

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In response, Intuit contended that it had not been given an opportunity to cure prior to the plaintiffs' institution of litigation. Prior to the filing of the six lawsuits, Intuit had posted on its Website a listing of noncompliant products with a disclaimer that on-line banking users would have access to an upgrade by the end of June 1999. By the time the cases were heard in New York and California courts, Intuit had apparently sent notification to Quicken users that Y2K compliant upgrades would be available free of charge.⁴³

In what might prove to be a precedential foreshadowing of pre-January 1 2000 Y2K adjudication, all six suits were dismissed essentially due to a "lack of harm."⁴⁴ Moreover, all three California suits were dismissed with prejudice. In *In re Intuit, Inc.*,⁴⁵ the plaintiff filed an amended complaint alleging that Intuit's remedial measure of providing free compliant upgrades did not provide a comprehensive solution. Among other things, the amended complaint alleged Intuit could rescind the offer at any time, Quicken's technical support division continued to counsel users to purchase the Quicken 98 upgrade, the compliant upgrade was available only on the Internet, and some customers had already paid for the upgrade. In response, the court ruled that not only had no damage been shown, but no proof of imminent damage had been offered to the court. However, the court did allow the plaintiffs to amend the complaint on the section 17200 claim under the California Unfair Practices Act (permitting only an injunction) to determine whether Intuit engaged in unfair trade practices by purportedly providing misinformation regarding the June 1999 Y2K compliant Quicken upgrade.⁴⁶ However, the amended complaint was ultimately dismissed as well.⁴⁷

At the time of this writing, the most frequently sued defendant has been Medical Manager Corp., the manufacturer of a widely used medical bookkeeping software program. In total, eight class action lawsuits have been filed against Medical

may well fail from ambiguity.' " Taylor, *supra* note 3, at 72 (quoting Bemer).

43. *See id.*

44. *See* FICC Website, *supra* note 26.

45. No. CV773646 (Cal. Super. Ct., Santa Clara County filed April 28, 1998). Information regarding this case can be found at FICC Website, *supra* note 26.

46. For a discussion of the Intuit cases see FICC Website, *supra* note 26. *See also* Walter J. Andrews et al., *Reading Early Returns*, LEGAL TIMES, Jan. 25, 1999, at S34.

47. *See* FICC Website, *supra* note 26.

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Manager.⁴⁸ The claims against Medical Manager have involved the sale of a major noncompliant version of the software with a compliant version being sold shortly after. Six cases having similar claims have been settled with the plaintiff class either receiving a free software upgrade or a share of the settlement pool. The settlement pool of \$1.455 million will be half-depleted by legal expenses.⁴⁹

One of the suits against Medical Manager is substantially different because the plaintiff alleged an actual threat of physical harm to patients treated by the association's 110,000 physicians. In *Highland Park Medical Associates, S.C. v. Medical Manager Corp.*,⁵⁰ the complaint alleged that the critical systems maintained by the software, such as treatment plan maintenance and analysis, inventory management, patient flow tracking, and performance statistics, would be jeopardized by the inability of the software to process post-1999 dates. Although the plaintiffs conceded that no actual injury had occurred, they asserted "a clear and present danger of risk and potential harm to patients of medical specialists."⁵¹ In the trial scheduled to commence at the end of 1999, Highland Park seeks punitive damages, injunctive relief, and compensatory damages.⁵²

b. Shareholder actions. As a result of the multiple class action suits filed against Medical Manager, a Y2K shareholder suit was filed against Medical Manager, its chairman, president, chief financial officer, chief of operations, general counsel, three other directors, and all four of the securities brokers that handled the company's initial public offering in 1997.⁵³ The complaint first alleged that Medical Manager made false statements in its prospectus, thus violating section 11 of the Securities Act.⁵⁴ The remaining allegations were that the brokers failed to perform due diligence investigations, and that the directors and officers of Medical Manager were liable parties

48. *See id.*

49. *See id.*

50. No. 98 C 7022 (N.D. Ill. Am. Compl. filed Nov. 5, 1998). Information regarding this case can be found at FICC Website, *supra* note 26.

51. Andrews et al., *supra* note 46, at S35.

52. *See* FICC Website, *supra* note 26.

53. *See* Ehlert v. Singer, No. 8:98-CV-02168 (M.D. Fla. filed Nov. 2, 1998) (information regarding the case can be found at FICC Website, *supra* note 26).

54. *See* FICC Website, *supra* note 26.

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under section 15.⁵⁵ Specifically, the plaintiffs contended that the original purchasers of the stock were not adequately informed that the company intended to “shorten the life span” of its software by promoting the Y2K compliant version shortly after marketing the original software.⁵⁶

In other Y2K shareholder cases, five suits have been filed against Peritus Software, a provider of Y2K remediation software, and its directors and officers. The suits, expected to be consolidated, assert that Peritus violated federal securities laws by making false and misleading statements and by failing to disclose material information regarding the acquisition of another company, Millennium Dynamics, Inc., which allegedly resulted in an artificial inflation of Peritus stock.⁵⁷

Among the first shareholder cases to be settled were two consolidated cases, *Steinberg v. Command Systems Inc.*⁵⁸ and *Doney v. Command Systems, Inc.*⁵⁹ The plaintiffs alleged that Command Systems leveraged public Y2K hype by falsely representing that the company would focus on selling Y2K solutions to businesses. The terms of the settlement included a pool of \$5.75 million plus interest to be used in paying attorneys fees and expenses and compensating those who purchased the stock between March 12 and April 29, 1998.⁶⁰

In addition to the lack of damages defense, defendants have defeated Y2K claims on contractual grounds. In *Young v. J. Baker, Inc.*,⁶¹ Arthur Andersen & Co. filed an action seeking declaratory relief after one of its consultees demanded that it be reimbursed for a ten-year-old computer system whose Y2K compliancy was at issue. In June 1998, J. Baker, Inc., a national retailer, threatened to sue Arthur Andersen for work it had done on Baker’s computer merchandising system nearly

55. *See id.*

56. Andrews et al., *supra* note 46, at S35. To date, six suits have been filed in connection with the alleged securities fraud. *See id.*

57. *See* FICC Website, *supra* note 26 (referencing Cohen v. Chan, Downey v. Chan, Renslett v. Chan, Lindsay v. Peritus Software, and Teague v. Peritus Software).

58. No. 98-3320 (S.D.N.Y. filed May 8, 1998). Information regarding this case can be found at FICC Website, *supra* note 26.

59. No. 98-3279 (S.D.N.Y. filed May 6, 1998) (information regarding this case can be found at FICC Website, *supra* note 26).

60. *See id.*

61. No. 98-01597 (Mass. Super. Ct. filed Aug. 28, 1998) (information regarding this case can be found at FICC Website, *supra* note 26); *see also* Matthew Schlesinger & Suzette Derrevere, *When Did You Know?*, LEGAL TIMES, Jan. 25, 1999, at S36.

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ten years earlier. In 1990, Baker had hired Arthur Andersen to recommend merchandising and accounting software and to install a functional new system. Arthur Andersen did so without disclosing that the system was not Y2K compliant. Baker asserted that its current costs, spent to make the system Y2K compliant, should be reimbursed by Arthur Andersen. Arthur Andersen contended that its actions fell well within the contractual agreement that had governed the business relationship, noting the following:

During the relevant 1989-1991 time period, making J. Baker's system Year 2000 compliant was not economically viable. At the time, the only mainframe software packages available to support J. Baker's requirements were not Year 2000 compliant. Customizing any of the then available software packages would have been significantly more expensive to J. Baker than the costs of repairs that J. Baker, benefiting from subsequent advances in Year 2000 remediation technology, has incurred to date.⁶²

After submitting their dispute to mediation and receiving an evaluation in favor of Arthur Andersen, J. Baker released the following statement: "J. Baker re-evaluated its claims and is now satisfied that Andersen Consulting had met all of its contractual obligations to J. Baker."⁶³

In *Paragon Networks International v. Macola, Inc.*,⁶⁴ a dispute centered on a contractual disclaimer barring all claims for express and implied warranty. Paragon attempted to invalidate the contract by arguing that no meeting of the minds occurred because it could not negotiate the terms of the disclaimer, and that the disclaimer itself was unconscionable. In dismissing the claim, the court held that defendant Macola had, "in accordance with its licensing agreement, fulfilled all its contractual and legal obligations to its end users."⁶⁵

62. Schlesinger & Derrevere, *supra* note 61, at S36 (quoting statement by Anderson Consulting).

63. FICC Website, *supra* note 26.

64. No. 98CV0119 (Ohio Ct. C.P. filed April 1, 1998). Information regarding the case can be found at FICC Website, *supra* note 26. See also Andrews et al., *supra* note 46, at S34.

65. FICC Website, *supra* note 26 (quoting http://biz.yahoo.com/bw/981221/acola_sof_1.html).

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3. Alternative forums for Y2K dispute resolution

In the first Y2K case decided by arbitration award, INCO Alloys International, Inc. asserted a \$3.9 million claim against ASE Limited for Y2K remediation costs.⁶⁶ ASE, a developer and installer of integrated computer systems and software for industrial companies, actually instigated the action when INCO attempted to terminate the parties' contract. ASE sued INCO, and, according to contractual stipulation, filed for arbitration by the American Arbitration Association (AAA). The AAA arbitrator rejected INCO's \$3.9 million claim, stating that "[t]here was no evidence presented which would indicate that the issue of year 2000 mitigation or remediation was ever added to the contract by a writing signed and agreed to by both parties. . . . [Year 2000] remediation was not clearly called for in the contract documents."⁶⁷

C. Summary of Y2K Litigation to Date

The Y2K cases to date have provided limited, yet interesting insights into potential litigation. Nearly half of the filed cases have involved claims for free Y2K compliant software upgrades, and another fourth have involved shareholder actions. Eighteen of the first twenty Y2K suits filed have either been settled or dismissed.⁶⁸ Courts have been reluctant to buy into the Y2K hype and have maintained the traditional position of requiring damages before adjudicating against the rights of a defendant.

The findings of early shareholder cases have followed this theory as several classes of shareholders have successfully demonstrated damage from Y2K-induced or -related discrepancies in stock prices. Defendants have found a haven in contractual agreements, which do not explicitly call for Y2K remedies. This safe harbor was aptly described by Arthur J. Schwab of Buchanan Ingersoll after successfully defending the ASE arbitration claim against INCO Alloys: "[This] decision is a warning to any company purchasing, using, selling or developing software, that contracts involving software development should identify all specific Year 2000 tasks to be performed and clearly

66. See ASE, Ltd. v. INCO Alloys Int'l, Inc., (Wycoff, Arb.). Information regarding the case can be found at FICC Website, *supra* note 26.

67. *Id.*

68. See FICC Website, *supra* note 26.

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describe any Year 2000 obligations.'⁶⁹

In sum, Y2K cases to date provide an inkling of future lawsuits but are far from definitive precedents, especially for post-1999 litigation. Perhaps the clearest indicator evolving from the initial Y2K litigation is that class actions, specifically shareholder class actions, will be the lawsuit of choice. Plaintiff class action giant Milberg, Weiss, Bershad, Hynes & Lerach has led the Y2K litigation bandwagon, having its hand in a third of all Y2K lawsuits to date.⁷⁰ Directors and officers appear to be an early target. Also, assuming that damages occur from Y2K problems, especially damages without a clear causal link, early returns on Y2K litigation would appear to favor defendants who are either contractually protected or who have made good faith efforts to address the problem. The sum total of the early returns, however, does not provide a solid foundation for either confirming or discounting a Y2K financial bonanza for attorneys.

IV. THE THEORETICAL UNDERPINNINGS OF FUTURE Y2K LITIGATION

A. Potential Causes of Action in Y2K Suits

In coming to grips with the potential parameters of Y2K actions, commentators have theorized upon standard causes of action likely to surface if the computer bug is not exterminated by January 1, 2000. One writer described the legal issues as follows: "On the horizon are potential suits involving fraud, breach of warranty, liability, personal injury, and a variety of shareholder actions against company directors for failing to prepare for the year 2000. *The possibilities are endless.*"⁷¹

Most compilers of speculative lists of Y2K causes of action openly admit that the lists are just that—speculative. Many include at least some of the following: (1) breach of express or implied warranty, where a supplier did not deliver a product on time, or delivered a product that did not meet the determined standard of quality; (2) breach of contract; (3) misrepresenta-

69. PRNewswire, Nov. 24, 1998, available at FICC Website, *supra* note 26 (alteration in original) (quoting Arthur J. Schwab).

70. See FICC Website, *supra* note 26.

71. Ashley Dunn, *Year 2000 Bug Likely to Infest Courtrooms*, L.A. TIMES, Sept. 8, 1998, at A1 (emphasis added).

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tion of Y2K compliance; (4) deceptive practice in failing to disclose Y2K compliance; (5) violation of securities law where directors and officers are held liable in class action shareholder suits for devaluation of stock prices due to undisclosed or unaddressed Y2K problems; (6) product liability from injury due to Y2K malfunctions; and (7) criminal charges in states which have criminalized the production or sale of systems or programs that result in damage.⁷²

Thomas Vartanian, the chairman of the American Bar Association's Committee on Cyberspace Law, narrowed the list to three principal scenarios: (1) breach of contract (e.g., a 1992 computer contract indicates that the system will remain functional for ten years but goes haywire during the year 2000); (2) negligence (e.g., a company dismisses Y2K as mere media hype and does not make good faith efforts [based on a reasonably prudent businessperson standard] to correct the problem); and (3) false and intentionally deceiving statements (e.g., a company assures its clients that its computer software is compliant when in fact it is not).⁷³

To date, only some of these potential causes of action have surfaced in Y2K lawsuits, principally because the predicted calling card of Y2K, computer malfunctions, has not occurred on a significant scale. In simple terms, the "real" damage from Y2K computer glitches has not yet reared its ugly head. If or when it does, the true gamut of causes of action will surface.

In addition to couching Y2K litigation in terms of traditional causes of action, the potential exists for the assertion of a cause of action for computer malpractice. And while computer malpractice has not yet garnered significant attention, it could emerge from the Y2K melee. In the past, most courts have been reticent to recognize such a tort; nevertheless, it has not gone completely without support. As early as 1986, in *Data Processing Services, Inc. v. L.H. Smith Oil Corp.*,⁷⁴ computer malpractice was recognized as a tortious cause of action. The court recognized the distinction between contracts for the sale or purchase of goods (falling under article 2 of the UCC) and con-

72. See John Drake, *Courting Trouble: Year 2000 Bug Could Trigger Avalanche of Lawsuits*, BUS. J., Apr. 20, 1998, at 12.

73. See Michael Newman, *Lawyers Wind Up As Time Runs Out; Y2K's Legal Problems May Be Worse than Its Technical Ones*, PITTSBURGH POST-GAZETTE, Nov. 8, 1998, at C-1.

74. 492 N.E.2d 314 (Ind. Ct. App. 1986).

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tracts for the performance of services as it applied uniquely to the arena of "computer programming."⁷⁵

In *Smith Oil*, Smith, a vendor of petroleum products, entered into an oral contract with Data Processing Services (DPS) to develop computer software and a computer accounting system to meet Smith's specific business needs.⁷⁶ When it became apparent to Smith that DPS was unable to implement a system that met Smith's needs, Smith refused to pay DPS's bill of \$7,166.25, and a lawsuit, filed by DPS, ensued.⁷⁷ The court noted that "Smith bargained for DPS's skill in developing a system to meet its specific needs," and furthermore that "[t]he situation here is more analogous to a client seeking a lawyer's advice or a patient seeking medical treatment for a particular ailment than it is to a customer buying seed corn, soap, or cam shafts."⁷⁸ The court then implicitly created the "computer malpractice" standard by stating that "[t]hose who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions impliedly represent they possess the skill and will exhibit the diligence ordinarily possessed by well informed [sic] members of the trade or profession."⁷⁹

To date, however, *Smith Oil* appears to be a lone voice in the wilderness, as other jurisdictions have specifically addressed and rejected the notion of a new tort of computer malpractice. As early as 1979, during the Neanderthal era of computer systems, the Second Circuit rejected a plaintiff's attempt to analogize medical malpractice to the manufacture of computer "machinery."⁸⁰ During that same year, in *Chatlos Systems, Inc. v. National Cash Register Corp.*,⁸¹ a federal district court in New Jersey established a widely-cited precedent by stating:

The novel concept of a new tort called "computer malpractice" is premised upon a theory of elevated responsibility on the part of those who render computer sales and service. Plaintiff

75. *Id.* at 318.

76. *See id.* at 316.

77. *See id.*

78. *Id.* at 319.

79. *Id.*

80. *See* Triangle Underwriters, Inc. v Honeywell, Inc., 604 F.2d 737, 744-46 (2d Cir. 1979).

81. 479 F. Supp. 738 (D.N.J. 1979), *aff'd in part and rev'd in part*, 635 F.2d 1081 (3d Cir. 1980).

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equates the sale and servicing of computer systems with established theories of professional malpractice. Simply because an activity is technically complex and important to the business community does not mean that greater potential liability must attach. In the absence of sound precedential authority, the Court declines the invitation to create a new tort.⁸²

In subsequent cases, during a more “modern” era of computer technology, courts in Connecticut,⁸³ Illinois,⁸⁴ and New Jersey⁸⁵ have also rejected “computer malpractice” arguments. In *Hospital Computer Systems, Inc. v. Staten Island Hospital*, the New Jersey court expounded upon the policy argument behind prohibiting a cause of action for computer malpractice by distinguishing between standards for computer “consultants” and those for professionals such as doctors, lawyers, accountants, engineers, and architects.⁸⁶ The court stated that such professionals, as opposed to computer consultants, could be held to malpractice standards “because the higher standards of care imposed on them by their profession and by state licensing requirements engenders trust in them by clients that is not the norm of the marketplace. When no such higher code of ethics binds a person, such trust is unwarranted.”⁸⁷

Even if the threat of Y2K alters the adjudicative mind of courts to create a computer malpractice cause of action, the ramifications of such a cause of action are unclear. Certainly, “injured” plaintiffs would be given another weapon in their arsenal of legal attack, but the question lingers: what professional standard would be established for computer “professionals?” If the standard were “good faith or best efforts in light of available technology,” many in the computer industry would be indemnified by maintaining efforts that fall within the industry standard.

82. *Id.* at 741 n.1.

83. *See Metpath, Inc. v. IDS Corp.*, No. CV 89-0435312S, 1991 WL 39617 (Conn. Super. Ct. Mar. 12, 1991).

84. *See Rogers Merchandising, Inc. v. Bojangles' Corp.*, No. 87C5001, 1989 WL 6391 (N.D. Ill. Jan. 24, 1989).

85. *See Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992).

86. *See id.* at 1361.

87. *Id.*

B. Potential Defenses in Y2K Suits

The possibility of multiple legal defenses further muddies the waters of Y2K predictive analysis. The viability of a comparative negligence defense—specifically, assumption of the risk—improves by the day as Y2K steals media headlines. This defense may be asserted against plaintiffs who fail to identify and remedy problems in the face of a widely publicized concern.⁸⁸ Because Y2K has already been identified as a potential problem well in advance of any actual malfunction, implied assumption of risk and contributory negligence may significantly diminish liability on the part of a Y2K defendant.⁸⁹ The critical assessment will be the plaintiff's conduct and duty of care.⁹⁰

The defense of the economic loss doctrine may apply in cases where a party sustains damage to a "Y2K-infected" product or where losses are sustained due to the malfunctioning product. This doctrine provides a defense for a manufacturer against the commercial purchaser of a product for damages that are purely economic in nature. In part, the adjudicative rationale behind this doctrine is that such purchasers do not warrant special "tort protection" because economic losses are insurable.⁹¹ However, this defense is limited to tort theories based on negligence and strict liability and does not extend to personal injuries nor to damage to other property.⁹² In application, the doctrine is far from clear:

[C]ourts will need to decide, in the context of the Year 2000 Problem, whether the contract in dispute is for goods or for services. Indeed, software licenses may possess both the elements of services (which are excluded from the U.C.C. and may be exempted from the economic loss rule) and goods (which are not so exempted.) [sic]⁹³

The statute of limitations defense may come into play due to the very nature of Y2K claims. Under the UCC, a statute begins to run when a breach of contract is first discovered, or

88. See Patterson, *supra* note 22, at 12.

89. See Charles Kerr et al., *Tort Liability from the Bites of the Millennium Bug*, in UNDERSTANDING, PREVENTING AND LITIGATING YEAR 2000 ISSUES: WHAT EVERY LAWYER NEEDS TO KNOW NOW, 259 *passim*, 506 PLI/Pat 259.

90. See *id.* at 299.

91. See *id.* at 291-94.

92. See Patterson, *supra* note 22, at 12.

93. Kerr et al., *supra* note 89, at 294.

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when it *should* have been discovered.⁹⁴ Even outside of a UCC analysis, statute of limitation issues may be triggered as early as when the company learned of its Y2K problem or when it initiated its remedial expenditures. Given the uncertain nature of Y2K claims, however, many companies may be hesitant to file suit until they have a firmer grasp, in terms of cost-benefit analysis, on whether the recovery of their costs and/or damages is economically worthwhile.⁹⁵

Other defenses could include: *force majeure* (where Y2K qualifies as an impediment beyond the control of a company), disclaimer of warranties and limitations of remedies (if appropriately delineated and agreed to in the party's contract), the business judgment rule (where officers and directors have, in good faith, exercised their business judgment), and, finally, sovereign immunity.⁹⁶

The difficulty of proving causation in tort actions, although not an affirmative defense, may well serve as such. Under most tort law, a plaintiff must show that damages were a direct result of a defendant's action, independent of other causes.⁹⁷ The causation dilemma is perhaps best summed up as follows: "Given the nature of the Year 2000 problem, which involves long time spans, multiple layers and suppliers of software code and computer equipment, intervening measures, and the notorious and widespread publicity, a party attempting to recover its damages in tort will face difficult hurdles of proving causation."⁹⁸

C. Potential Parties in Y2K Suits

Broadly stated, potential parties in Y2K suits include all breathing human beings except, perhaps, mountain cave-dwellers. Indeed, part of the foundation beneath the lofty litigation prognostication is laid by the potentially interconnected web of parties, each with multiple causes of action.

Businesses, ranging from small, privately-owned companies to Fortune 500 giants, are the obvious players in future Y2K lawsuits as plaintiffs, defendants, or even both at once. Possi-

94. See UCC § 2-725(2); see also Patterson, *supra* note 22, at 12.

95. See Patterson, *supra* note 22, at 12.

96. See *id.*

97. See BLACK'S LAW DICTIONARY 956 (4th ed. 1968).

98. Kerr et al., *supra* note 89, at 297-98.

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ble defendants in litigation instigated by businesses are their suppliers, software providers, law firms, accounting firms, and insurers.⁹⁹

Businesses will also be easy targets for lawsuits. They may be sued by both their customers and their vendors. As has been seen in early Y2K litigation, companies may be particularly susceptible to shareholder suits. If the full fury of Y2K is realized, however, it is likely that legal "diagrams" of Y2K litigation will become a convoluted trellis of arrows between multiple parties, as demonstrated in the following hypothetical:

Consider the case of an auto dealer who loses sales in January 2000 because the manufacturer did not ship cars as a result of the computer problem.

The dealer sues the shipper and the carmaker. The carmaker in turn sues any parts supplier that had computer failures. Insurance companies could get dragged into the fray; shareholders could file suit against corporations and directors.¹⁰⁰

Theoretically, one computer glitch anywhere in the manufacturer-to-end-user chain could result in a domino effect reaching a multitude of associated parties. Each Y2K malfunction could implicate the hardware or software vendor, the vendors end-line-using client, the client's shareholders, the client's consultants and contractors, the client's auditors, and the vendor's and client's insurance companies.¹⁰¹

A less-publicized area of potential litigation is that related to employee benefits. A press release issued by the United States Department of Labor (DOL) has warned administrators of employee benefit plans that they will be legally at risk for Y2K-related disturbances to benefit plans.¹⁰² The release further noted that the DOL "will hold fiduciaries personally liable for any loss or interruption of benefits that occur because of Y2K problems that could have been avoided had the fiduciaries acted prudently with regard to the problem."¹⁰³

99. See Sean Horgan, *Y2K-Related Litigation May Reach \$1 Trillion*, INDIANAPOLIS STAR, Dec. 15, 1998, at C13.

100. Doug Abrahms, *Many Fear Year-2000 Bug Will Breed Suits; Case Against Computer Maker Watched Closely*, WASH. TIMES, Jan. 12, 1999, at B8.

101. See Patterson, *supra* note 22, at 8.

102. See Timothy J. Snyder, *Fiduciaries Face Risk from Y2K Noncompliance*, DEL. EMPLOYMENT L. LETTER, Nov. 19, 1998, at 6.

103. *Id.*

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The DOL also warned that plan administrators would be held responsible for noncompliant third-party service providers as well.¹⁰⁴ Even within the niche area of employee benefits, several additional potential parties emerge, adding to the list of potential Y2K litigants. Of course, it should be noted that the United States government itself may not be immune from involvement in litigation.

Finally, lawyers will inevitably be involved in Y2K litigation, not only as advocates, but also as parties. Liability for legal malpractice appears principally on two fronts: (1) a law firm's own computer malfunction, or (2) inadequate advice given to clients. In technologically "modernized" law firms, client files, filing deadlines, statute of limitation dates, billing hours, and many other critical data are stored and manipulated on computer networks. Suppose a law firm computer system were to crash without sufficient hard copy back-up. At a minimum, law firms would be subject to countless nonbillable hours of redoing work, and, at worst, subject to a plethora of malpractice suits.¹⁰⁵ Even if attorney computer systems remain functional, law firms may face malpractice suits. If firms take Y2K too lightly, and problems occur, lawsuits are likely to be filed by non-Y2K-prepared clients. If firms significantly drain client budgets to prepare them for Y2K and nothing happens, attorney-client relations may be irreparably strained.

In sum, the most comprehensive description of *potential* parties in Y2K litigation is "everyone"—literally. If Y2K doom-sayers are correct, the failure of computers, which seemingly link humanity together in our technological age, will affect everyone to one degree or another. To those who feel insulated from the reaches of Y2K because they "don't own a desktop computer or run their business with a computer," a closer look at what makes their everyday life run (i.e., cars, telephones, television, utilities, credit cards, banks, food distribution, etc.) will reveal that computers are nearly as pervasive as oxygen.

V. THE TRILLION DOLLAR QUESTION: A LOOK AT THE BALANCING FACTORS

This section analyzes the contingencies that will influence

104. *See id.*

105. *See* James A.A. Pabarue & Randy J. Maniloff, *Millennial Malpractice Tops List of Lawyers' Y2K Woes*, NAT'L L.J., Mar. 22, 1999, at B9.

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whether or not the employment scheme of attorneys will be radically altered. These indicators are analyzed on a balancing scale, providing support for this paper's ultimate conclusion.

A. Factors Pointing Toward a Y2K Windfall

1. The general pervasiveness of computers

As mentioned in the preceding section, the pervasiveness of computers is perhaps the greatest indicator of a litigation tidal wave. In addition to the disruptions that could occur from computer glitches in utility companies (disrupting electricity, gas, and water services), the following scenarios have been posited as potential Y2K mishaps:

The FAA will ground all aircraft because, according to computer records, all of the planes are 99 years overdue for airframe and engine overhauls.

The FAA will not allow pilots to fly because the computer records indicate that they have been on duty for 875,000 hours, in clear violation of union and FAA work rules.

Those who use calling cards to initiate telephone calls shortly before midnight on December 31, 1999 will be charged for 53 million minutes.

Those with \$1000 in their bank account on December 31, 1999 will have \$400,000 on January 1, 2000.

Visa charges for New Year's Eve will show up on January 2000 bills as \$212 million, due to a ninety-nine year unpaid, outstanding balance.

Video stores will send out bills of \$100,000 per video for seriously overdue video tapes.¹⁰⁶

Though facetious, these tongue-in-cheek scenarios of "Y2K day one" expose many of the problems that could play out under the full wrath of Y2K. Even one of the hypothetical problems ad-

106. Gary E. Clayton et al., *The Year 2000 Headache "Two Thousand Zero-Zero. Party's Over. Oops, Out of Time."* 28 TEX. TECH L. REV. 753, 755-56 (1997) (footnote omitted).

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dressed above could create, at a minimum, inconveniences that unravel the routines of everyday living. Anyone who has ever experienced billing, banking, or similar computer errors can attest to this.

Although it is far from certain that catastrophic computer problems will occur during the year 2000, it is indisputable that the daily routines of American life revolve around computer-influenced systems. Even those fleeing to live in the mountains in an attempt to escape Y2K must watch the night skies for plummeting computer-run airplanes or satellites that might disrupt their rustic seclusion. In less dramatic terms, the fact that computers permeate nearly every aspect of standard living bodes well for attorneys seeking to cash in on Y2K.

2. *The role of small businesses*

Another indicator on the side of an attorney litigation bonanza is the fact that small businesses are a focal point of Y2K problems. Almost without exception, all large businesses spending inordinate amounts of money¹⁰⁷ on Y2K issues rely upon smaller businesses in some fashion. To that degree, they are at the mercy of the compliance efforts of their smaller business suppliers.

A study commissioned by Wells Fargo Bank revealed that nearly five million small businesses are at risk of Y2K computer failures. The study, released in May 1998, found that 75% of small-business owners familiar with Y2K had not yet taken remedial measures, and half either had no plans or did not consider it feasible to address the problem prior to January 1, 2000.¹⁰⁸ In a follow-up survey done six months later, the number of delinquent businesses remained high, at approximately 60%, and a third of small businesses still remained without a plan to address the problem.¹⁰⁹ The study also found

107. A review of SEC filings for publicly traded companies reveals that billions of dollars are being spent on Y2K remediation efforts. Of note is the \$600 million being spent by Citicorp, \$500 million by AT&T, and \$250 million by Chase Manhattan Bank. See Patterson, *supra* note 22, at 5.

108. See L.A. Lorek, *Y2K Glitches Could Be Grist for Legal Mill*, SUN-SENTINEL (Fort Lauderdale), May 28, 1998, at 1D.

109. See Joe Stewart-Mash, *Y2K Bug Could Offer New Source of Work for Utah's Computer-Savvy Attorneys*, THE RECORD, Jan. 15, 1999, at A1. One particular industry at risk is the \$1.5 trillion health-care profession, especially independently practicing physicians. A March 1999 Senate committee report revealed that 64% of hospitals were not testing their "Y2K compliant" computer systems and 82% of doctors' offices were

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that a disturbing 18% of small-business owners had either not heard of Y2K or did not understand the nature of the potential problem.¹¹⁰

Regardless of the compliant computer systems of larger business entities, the trend among many small to mid-size businesses has been to leave the dormant Y2K monster well enough alone. If Fortune 500 companies such as General Motors, with nearly 100,000 total suppliers, are left vulnerable by noncompliant smaller companies, Y2K will be provided with its clearest pathway to economic destruction and may open the door for a litigation harvest by attorneys.

3. *Litigation over insurance issues*

Although a clear lack of insurance coverage may hinder the spread of litigation, if insurance coverage is disputed, attorneys are likely to be provided with ample new opportunities to litigate. If Y2K problems come to fruition, insurance claims will likely be contested in a variety of settings. Only two will be discussed in this section: insurance recovery from damage to third parties and insurance claims for damage to an insured's own property and economic relations.

In cases where third parties have been injured by insureds' Y2K malfunctions, the natural inclination will be for insureds to turn to their liability insurance carriers under assertions of negligence. Due to the imprecise nature of Y2K claims, insurance companies will be sure to point fingers at other insurance companies. Questions will arise regarding whose insurers are responsible to pay: the manufacturer's, the retailer's, the installer's, or the consumer's. Another discrepancy involves determining the causal link between Y2K failure and bodily injury or property damage covered under normal liability policies.¹¹¹ In short, if Y2K miscues occur, personal injury actions and property damage to third parties are inevitable. Insurance coverage issues are not well-defined and will certainly be fodder for courtroom banter.

unaware of Y2K ramifications on their operating procedures. Richard Wolf, *Congress Sounds Y2K Alarm*, USA TODAY, Mar. 3, 1999, at 1A. An article on the subject noted, "The health care problems threaten the flow of pharmaceuticals and the functioning of vital equipment. Medicare payments to doctors and hospitals might be delayed." *Id.*

110. See Stewart-Mash, *supra* note 109, at A1.

111. See Marc S. Mayerson, *Insurance Recovery for Year 2000 Losses*, PENSION FUND LITIG. REP., July 23, 1998, at 6.

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Other insurance coverage disputes include “mechanical breakdowns” and interruption of business operations resulting from Y2K computer failures. Standard “first-party property” coverages are generally written on either an “all risk” or a “named peril” basis.¹¹² As the names imply, all-risk policies cover all losses regardless of how they occurred (with several exclusions), and named-peril policies cover only losses occurring in a particular fashion.¹¹³

Although this distinction appears to be straightforward, several intricacies provide employment opportunities for lawyers. Typically, policies exclude several risks that might be realized during a Y2K malfunction, such as utility service failures and mechanical breakdowns.¹¹⁴ In addition, a common exclusion is the “error, omission or deficiency in design” exclusion.¹¹⁵ The question that will likely spark litigation, then, is whether the Y2K failure is a mechanical failure or simply a nonintegrated software failure. Furthermore, the nature of the “design” and the coverage of economic losses may be called into question, because they are generally covered only if related to a first-party property loss covered in the policy.¹¹⁶ The nuances involved in sorting out these issues tend to support predictions of substantial Y2K-related work for attorneys.

4. *Class action and shareholder suits*

“Analysts predict that no sector of the economy will be immune from suits by disgruntled shareholders following a Year 2000 failure.”¹¹⁷ Shareholder suits will be especially common as Y2K becomes the whipping boy for all significant drops or false inflation of stock prices. As has been seen in the early stages of Y2K litigation, the largest percentage of cases has been shareholder suits which have resulted in the largest monetary settlements. Additionally, actions of directors and officers in preparation for Y2K will be scrutinized and subject to class action suits, as already evidenced in multiple Y2K cases.¹¹⁸ Capers Jones, President of Software Productivity Research, has

112. *See id.* at 8.

113. *See id.*

114. *See id.*

115. *Id.*

116. *See id.*

117. *Id.* at 7.

118. *See* Medical Manager cases, *supra* notes 48-52 and accompanying text.

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predicted that the careers of half of the senior executives in the United States will be fatally challenged by the Y2K epidemic.¹¹⁹

The other incentive for class action and shareholder suits belongs to law firms, especially those with established class action "market share." Activities by Milberg Weiss, for example, have already foreshadowed what might be in store for corporations in the Year 2000.¹²⁰ According to Jeffrey Klafter of Bernstein Litowitz Berger & Grossman, another major player in the class action market, the early Y2K cases are merely the tip of the iceberg. Klafter conceded, however, that the early cases were filed as much for marketing reasons as they were for adjudicatory purposes.¹²¹

Regardless of the current public relation reasons for filing Y2K suits, it is evident that the Y2K class-action cash cow will be milked for all it is worth by firms with established expertise in this area. The shareholder suit against officers and directors, however, may be tenuously situated upon judicial precedent. Officer and director activity, long governed by the business judgment rule, could be insulated from Y2K litigation losses, especially if strenuous and well-documented preventive measures are taken now by large, deep-pocketed corporations that logically would be the target of shareholder suits.

B. The Barriers to a One Trillion Dollar Attorney Payday

Despite a variety of factors which substantiate attorney optimism of riding the coattails of Y2K litigation, significant barriers exist which may terminate the ride before it begins. As the ensuing section is developed, it will become obvious that attorney optimism will be objectively transformed into realism as barriers are discussed which indicate that Y2K will not become the financial panacea for a saturated legal job market.

1. Governmental intervention

The government *may* have the largest say of all in limiting Y2K litigation. In other words, even if Y2K problems explode upon the scene in the months following the turn of the year and all the imaginable associated problems come to fruition, litiga-

119. See Dunn, *supra* note 71.

120. See *supra* text accompanying note 70.

121. See *supra* text accompanying note 70.

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tion figures may still be limited by governmental action.

a. Federal legislation. The federal government made its first move in this arena by passing the Year 2000 Information and Readiness Disclosure Act in October 1998.¹²² The Act, also known by the alias of the “Good Samaritan” law, provides companies with an exemption from antitrust laws in order to facilitate the free exchange of Y2K-pertinent information.¹²³

The formal purpose of the Act is three-fold: first, to promote disclosure and exchange of Y2K readiness and compliance information; second, to facilitate rapid response to Y2K problems; and third, to promote a uniformity among states regarding the exchange and disclosure of Y2K readiness information.¹²⁴ In the words of the Act’s two main sponsors, Representatives Christopher Cox and David Dreier of California, the Act is intended to “encourage a voluntary exchange of information between people interested in fixing (the year 2000 problem) . . . so they don’t get bogged down in negotiations of who’s responsible if the repairs don’t work, or face so much liability that they don’t get repairs fixed.”¹²⁵

Despite the statute’s clear purpose, its practical ramifications have been all but clear. The law provided opportunities to companies who made past statements regarding Y2K readiness to retreat and revise the statements at their discretion. The law did not come, however, without limitations. The rub was that statements had to be corrected by December 3, 1998. The law took effect on October 18, 1998.¹²⁶

The dilemma for attorneys, during what amounted to be a forty-five-day grace period, was that even though companies had an inherent interest in reclassifying any suspect statements that might subject them to future litigation, reclassifying their previous statements would be tantamount to admitting previous deception, thus calling even more attention to their suspect statements.¹²⁷ Also, even though the revised “Y2K disclosure statement” could not be entered into evidence in a

122. See Pub. L. No. 105-271, Oct. 19, 1998, 112 Stat. 2386 (codified at 15 U.S.C. §1 note (West Supp. 1999)).

123. See *id.*

124. See *id.*

125. Virginia Baldwin Hick, *Y2K Mania Brings About Readiness Disclosure Alert*, ST. LOUIS POST-DISPATCH, Nov. 30, 1998, at 13 (quoting Christopher Cox).

126. See *id.*

127. See Newman, *supra* note 73.

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suit against a company, the Act did nothing to prevent suits supported by other evidence. Companies remain responsible for the express terms in existing software warranty agreements.¹²⁸

Y2K opportunists took perhaps what will be their greatest blow when another piece of federal legislation—the “Y2K Act”—was signed into law by President Clinton in July 1999.¹²⁹ Among other things, the Y2K Act provides new protection to defendants in Y2K litigation and requires civil procedure protocol that is specific to Y2K cases. In pertinent part, the Act (1) imposes a prelitigation notice period; (2) caps punitive damages; (3) establishes proportionate liability; (4) imposes a strict duty upon plaintiffs to mitigate damages; (5) bestows original jurisdiction over Y2K class action cases upon federal courts; and (6) exempts claims involving personal injury, death, or violation of federal securities laws from the purview of the Act.¹³⁰

The Y2K Act requires plaintiffs to provide defendants with notice prior to filing suit. A defendant then has thirty days to either initiate remediation of the Y2K failure or enter alternative dispute resolution, either of which must be completed within ninety days of the initial notice. Punitive damages are limited in a majority of cases to the lesser of \$250,000 or three times compensatory damages. Additionally, in tort cases, defendants are only required to pay damages in proportion to the percentage of their responsibility. In contract cases, however, defendants can be jointly and severally liable.¹³¹

The Y2K Act also provides for a reduction in damages where a plaintiff has failed to mitigate. In addition to providing federal district courts with original jurisdiction over Y2K class actions, the Act allows state court Y2K class actions to be removed to federal court, unless (1) the parties are predominantly from one state, (2) the defendants are predominantly governmental entities, (3) the class is not seeking punitive damages, or (4) the claim for damages is less than ten million dollars.¹³²

The stated purpose of the Act is (1) to provide incentive to solve Y2K problems at a point nearest to their inception; (2) to

128. Richard Burnett, *New Millennium-Bug Law May Be Useless, But Not That Harmful*, ORLANDO SENTINEL, Dec. 14, 1998, at 13.

129. Pub. L. No. 106-37, July 20, 1999, 113 Stat. 185.

130. See 113 Stat. at 188-89.

131. See 113 Stat. at 192-93.

132. See 113 Stat. at 201-02.

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encourage continued remediation and testing; (3) to encourage all parties involved to solve Y2K problems by methods of alternative dispute resolution; and (4) “to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief.”¹³³

Additional legislation still pending in committee as of the beginning of the fourth quarter of 1999 includes (1) the “Year 2000 Consumer Protection Plan Act of 1999,”¹³⁴ which establishes judicial and administrative proceedings for resolving Y2K legal disputes; (2) the “Businesses Undergoing the Glitch Act (BUG Act),”¹³⁵ allowing a tax deduction for small business compliancy expenditures; and (3) the “New Year’s Day Holiday 2000,”¹³⁶ a bill designating Monday, January 3, 2000 as a legal holiday where all affected businesses would have “an additional day, prior to the start of the workweek, to begin repairs on failed computer systems caused by the Year 2000 computer problem.”¹³⁷

b. State legislation. As of this writing, twenty-eight states had passed legislation limiting their liability in the case of year 2000 breakdowns.¹³⁸ Most of the proposed legislation has a common theme, such as varying levels of governmental immunity, suits limited to actions brought in contract and limitations on punitive damages. Several states, however, have included unique provisions that will be discussed in the ensuing paragraphs.

Alaska’s legislation, H.B. 82,¹³⁹ provides immunity for businesses and boards of directors based on six basic preventative steps.¹⁴⁰ H.B. 82 further provides a level of immunity for busi-

133. See 113 Stat. at 187.

134. H.R. 192, 106th Cong. (1999).

135. H.R. 179, 106th Cong. (1999).

136. H.R.J. Res. 14, 106th Cong. (1999).

137. Information Technology Association of America Website, *Y2K Federal Legislation—Pending* (visited Mar. 25, 1999) <<http://www.ita.org/year2000/legis1.htm>> (summarizing all federal Y2K legislation, including information on the status of each bill and, where available, links to the texts of the bills).

138. See Information Technology Association of America Website, *Y2K State Legislation—Pending* (visited Mar. 25, 1999) <<http://www.ita.org/year2000/legis2.htm>> (summarizing all state Y2K legislation pending in all fifty states, including information on the status of each bill and, where available, links to the texts of the bills).

139. H.B. 82, 21st Leg., 1st Sess. (Alaska 1999).

140. Businesses or Directors are not liable under the Alaska legislation if they:

(1) inventoried the electronic devices that may experience Year 2000 prob-

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nesses with fewer than twelve employees and allows a recovery only for a showing of fraud. The bill prohibits civil action unless the defendant has been provided with notice and an opportunity to correct the Y2K failure. Class actions under H.B. 82 are prohibited unless the aggregate claim exceeds \$150,000.¹⁴¹

Arizona's S.B. 1294 enacts an emergency measure allowing an affirmative defense against liability suits.¹⁴² The low threshold for use of the affirmative defense includes "reasonable reliance" on false or misleading Y2K information, "reasonable examination" to determine if Y2K problems existed, and "good faith" repair efforts.¹⁴³

Other noteworthy components of either passed or proposed state legislation include Indiana's requirement of arbitration or mediation to resolve Y2K disputes;¹⁴⁴ Massachusetts's immunity for hospitals and health system employees, directors, shareholders, representatives, and agents between the dates of September 30, 1999 and December 31, 2005;¹⁴⁵ and Oklahoma's complete elimination of class action suits and limitation of suits to damages specifically (and not consequentially) caused by computer failures.¹⁴⁶

In short, even if all of the anticipated Year 2000 factors conspire to provide a rich harvest for trial lawyers, the Y2K money tree may be pruned by governments at a variety of levels. This fact alone places a damper on the predicted trillion dollar employment market for attorneys. The fate of pending legislation will continue to affect the possibility of Y2K-related litigation. Currently, however, whether or to what degree gov-

lems;

(2) identified critical electronic computing devices necessary to conduct business operations;

(3) identified the potential for year 2000 date changes;

(4) prepared a plan to fix, repair, replace, or remedy the appropriate devices;

(5) complied with industry regulations or requirements relative to the Year 2000 date change; and,

(6) developed contingency plans.

Id.

141. Information Technology Association of America Website, *Enacted Year 2000 Liability/Immunity Legislation* (visited Mar. 25, 1999) <<http://www.ita.org/year2000/legis2.htm>>.

142. S.B. 1294, 44th Leg., 1st Sess. (Ariz. 1999).

143. *Id.*

144. S.B. 666, 111th Gen. Assembly, 1st Reg. Sess. (Ind. 1999).

145. S.B. 503, 181st Gen. Ct. (Mass. 1999).

146. H.B. 1325, 47th Leg., 1st Sess. (Okla. 1999).

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ernmental intervention will occur are questions that remain unanswered.

2. Use of alternative methods for resolving Y2K disputes

The possibility of alternative forums for resolving Y2K disputes militates against a Wild West-like litigation free-for-all. Arbitration, mediation, and special tribunals are all viable existing systems used in resolving legal disputes. As seen in both *Young v. J. Baker, Inc.*¹⁴⁷ and *ASE Limited v. INCO Alloys International, Inc.*,¹⁴⁸ alternative forums have already been successfully used in resolving Y2K-related cases.

Many technology companies favor the establishment of a solitary arbitration system to deal with Y2K legal problems and are lobbying Congress to create an arbitration forum for Y2K problems which would limit remedies to actual damages.¹⁴⁹ Jan Amundson, general counsel for the National Association of Manufacturers, indicated that many U.S. corporations favor establishing a mandatory arbitration procedure to resolve Y2K disputes,¹⁵⁰ describing such a course of action as “less contentious and more realistic politically.”¹⁵¹

Trial lawyers have opposed such attempts to establish alternative measures, describing them as “tort reform in sheep’s clothing.”¹⁵² As opposed to arbitration, which results in binding adjudication, many corporations are advocating the more flexible forum of mediation. Mediation does not bind the parties, nor does it absolve parties of their right to litigate. It does, however, provide a structured forum to facilitate negotiation and dispute resolution between disputing parties.

Mediation is already the treatment of choice for many U.S. corporations, particularly when the parties have a history of business dealings and intend to preserve working relationships in the future.¹⁵³ As compared to arbitration, and especially to litigation, mediation is inexpensive and quick, often taking one

147. See *supra* note 61 and accompanying text.

148. See *supra* note 66 and accompanying text.

149. See Stepanek, *supra* note 25, at 48.

150. See Abhrams, *supra* note 100.

151. Stepanek, *supra* note 25, at 48 (quoting Jan Amundson).

152. *Id.* (quoting Richard Middleton Jr., president-elect of the Association of Trial Lawyers of America).

153. See F. Peter Phillips, *Pledge Now to Mediate*, LEGAL TIMES, Jan. 25, 1999, at S42, S43.

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day, as opposed to a median duration of sixty days for arbitration. If, for some reason, mediation fails, the options of arbitration or litigation still exist. Most often, however, mediation works. More than eighty-five percent of mediated commercial disputes are settled on mutually favorable terms.¹⁵⁴ Even inconclusive mediation is often beneficial since issues are narrowed and "communications enhanced" as the process moves to either arbitration or litigation.¹⁵⁵

Many companies have already made substantial commitments to mediation. The CPR Year 2000 Commitment, a document committing its signatories to " 'negotiate and, failing to negotiation, to mediate any Year 2000 Dispute,' " has already been signed by numerous corporations. American Standard, Bank of America, CIGNA, General Mills, McDonald's, and Philip Morris are among the many companies that have already committed to mediation in an attempt to avoid an avalanche of civil litigation.¹⁵⁶

Although mediation may be the answer for disputes among huge conglomerates, it may be inherently distasteful to the small plaintiff and especially inappropriate for resolving class action suits. While the "good old boys' " club of corporate giants may be willing to mediate privately their disputes in order to avoid gouging each other, smaller businesses may not be willing to submit their claims before a mediator. Regardless, the option of mediation may forestall a sizeable portion of Y2K disputes that would otherwise be destined for court dockets.

One other suggestion has been for Congress to establish "special tribunals" akin to bankruptcy courts to deal with Y2K legal altercations.¹⁵⁷ However, it may already be too late to establish one. An analogous option, offered by some commentators, is not to create a new court system, but to consolidate Y2K cases in one court.¹⁵⁸ Such an option currently exists for corporate law in Delaware's Chancery Court. By keeping Y2K computer disputes in one court, businesses could resolve disputes in the civil justice system in front of judges with expertise on the pertinent issues.

Despite the fact that no universal decision has been made

154. *See id.*

155. *Id.*

156. *See id.* at S42.

157. *See* Stepanek, *supra* note 25, at 48.

158. *See id.*

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as an alternative to litigation, the existence of alternative options tends to indicate that a potential tidal wave of litigation would be diverted into alternate channels before being allowed to strike shore with full force. Public policy itself may dictate that this be so. Additionally, the increasing commitment of corporate America to proxies for litigation cannot be overlooked.

3. The inability of the insurance industry to fund litigation

The question of Y2K-related employment for attorneys explores not simply whether attorneys will get more work, but whether they will get dramatically more *paid* work. On one hand, as mentioned above, the lack of clarity regarding insurance coverage could result in increased litigation and a pipeline of employment opportunities for lawyers. If insurance coverage is implicated, industry reserves could go bankrupt, resulting in a flurry of litigation. On the other hand, if the insurance industry removes its hand from Y2K coverage, then a large source of attorney revenue will be lost.

Part of the lack of insurance coverage is due to the nature of Y2K itself. Most standard commercial liability policies will not cover Y2K computer malfunctions because Y2K does not represent an accident like fire or water damage.¹⁵⁹ Also, the fixed-date nature of Y2K creates a decreasing investment return period (the period between collecting premiums and potentially paying out on losses shortens as the calendar moves into the year 2000). For these reasons, many insurers are either excluding Y2K from their coverage or are charging exorbitant amounts for specific Y2K coverage.¹⁶⁰

The Insurance Services Office has already developed and promulgated standard Y2K exclusion language. The language leaves little room for doubt, as policies explicitly exclude coverage for losses “‘due to the inability of [computer systems] to correctly recognize, process, distinguish, interpret or accept the year 2000 and beyond.’”¹⁶¹ By the beginning of 1999, the Office had already received permission from forty-eight states for insurance companies to deny Y2K claims.¹⁶²

159. See Jennifer Scott, *Marion Software Company Sued Over Y2K Bug*, COLUMBUS DISPATCH, Aug. 19, 1998, at 1F.

160. See Mayerson, *supra* note 111, at 9-10.

161. *Id.* at 9 (quoting Insurance Services Office language).

162. See Patterson, *supra* note 22, at 11.

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Some insurers, fearful of coverage disputes under standard policies, have introduced Y2K-specific coverage. Such coverage, however, is generally attainable only for businesses with a taste for caviar. Most programs require a preliminary risk assessment costing as much as \$50,000,¹⁶³ an expensive nonrefundable application process indeed. Furthermore, the policies often require follow-up assessments, again paid out of the insured's pocket. If a company passes the \$50,000 test, the reward is an up-front premium costing as much as seventy-five percent of the coverage itself. The peace of mind, then, of having \$100 million in Y2K coverage would cost a mere \$75 million. The good news is that many policies will rebate all but ten to fifteen percent of the premium if, come January 1, somehow computers are smart enough to know that "00" is 2000 and not 1900.¹⁶⁴

Insurance coverage issues will likely be related to bankruptcy claims. Uninsured, or even some insured, businesses could file for bankruptcy due to Y2K-related causes. The rate of Y2K-precipitated bankruptcies has been predicted to be as high as five to seven percent.¹⁶⁵ Although the bankruptcy issue may provide more work for attorneys, the dilemma remains as to whether uninsured bankrupt defendants in Y2K suits will have sufficient assets to fill the trillion dollar litigation coffer.

To clarify, the role of insurance is not any clearer than Y2K itself. At best it is a capricious one. Common law precedent will do much to determine the role insurance will play in Y2K disputes. If the insurance industry as a whole shies away from specific Y2K coverage, and legal precedent absolves insurers of liability, attorneys may spend hours in inadvertent pro-bono litigation suing small to midsize businesses without the financial capital to pay significant settlements. If this is the case, a large portion of the trillion dollar attorney boon will certainly go unrealized.

4. *Miscellaneous and x-factors*

Perhaps the most determinative factor discrediting the idea that a new employment paradigm will engulf and enrich attorneys everywhere is the cumulative effect of several key, yet less

163. See Mayerson, *supra* note 111, at 9-10.

164. See *id.* at 10.

165. See Patterson, *supra* note 22, at 5.

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documentable, ingredients. These factors, placed on the balance with governmental intervention, alternate means of dispute resolution, and lack of insurance coverage will tip the scale against a new frontier of attorney employment. These more subtle contingencies will be addressed briefly in this penultimate section.

Heavily ignored by many Y2K litigation optimists is the fact that litigation and Y2K problems, at a certain level, become a zero-sum game. If January 1, 2000, and subsequent days arrive without Y2K incident, attorneys will obviously be out of luck regarding computer-glitch litigation until perhaps Y3K. At the other extreme, if the apocalyptic Y2K doomsayers turn out to be correct, it is likewise unlikely that attorneys will be anteing up for a trillion dollar jackpot. In other words, when attorneys' clients are living without electricity, heat, and plumbing, and their primary focus is upon obtaining or maintaining supplies of food and water, it is unlikely that *one* dollar of litigation will occur, let alone one trillion. Additionally, if Y2K problems are rampant, but do not limit daily life to grinding wheat and hauling buckets of water from the river, the attorney litigation bonanza could be limited by the inability of courts to add Y2K issues to already saturated dockets. Several more radical commentators suggest that if Y2K computer casualties are widespread, courts will necessarily limit Y2K cases to personal injury and criminal cases. Under a similar scenario, for public policy reasons, higher courts may establish stare decisis standards that limit the ability of plaintiff attorneys to successfully litigate and receive lucrative settlements.

It appears, then, that the window of opportunity to change the face of attorney employment is a narrow one. Few or no Y2K problems obviously kills the proposition immediately. Moderate Y2K problems, consistent with what has been seen during 1999, result in "just another day at the office" for lawyers. The window of opportunity lies somewhere in the sliver between catastrophic Y2K disaster and widespread problems that are of less than epidemic proportions.

Even if this window opens for attorneys, another important question must be answered: Will one trillion dollars of employment revenue be distributed per capita among the nation's thousands of attorneys, or will the new employment windfall be only for the rich who will be made *substantially* richer? If the early returns on Y2K litigation are any indicator, it is not a

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radical departure from logical thought to envision a total of one trillion dollars of litigation as a sum result of 1,000 lawsuits filed by Milberg Weiss at one billion dollars each. In such a scenario, small town lawyers and even large town firms that are not substantial class action or shareholder suit players will receive little benefit from the Y2K boon.

Finally, and perhaps the greatest limiting factor in a Y2K-initiated paradigm shift for attorney employment, is the counterproductive effect that Y2K litigation will have on the economic marketplace. It is unlikely that corporations will destroy their longtime symbiotic relationship with suppliers and customers by dragging them into court. Likewise, suppliers may be reticent to "bite the hand that feeds" by suing their clients.

Many businesses have already recognized the counterproductive effect that such litigation would have on supply chains and on business operations in general, and have built antiligation stipulations into contractual language. Such contractual language, if honored, could severely limit Y2K litigation. Furthermore, consumer or shareholder suits against companies will have a counterproductive effect on the marketplace, potentially causing a dramatic increase in the cost of goods and a general devaluation of share worth. In general, if all parties involved in the mechanism of the marketplace are able to "count to ten" before jumping on the litigation bandwagon, they will likely be able to see the larger picture and realize that litigation may be a short term payoff that will be more than spent in paying for long term damage to the national and global economic marketplace.

C. The Tale of the Scale: The Results of the Balancing Test

In summary, an analysis of the pertinent Y2K-related factors reveals that the odds are heavily stacked against a Y2K-created employment paradigm for attorneys. Admittedly, computers have invaded nearly every nook and cranny of our daily routines. Many small businesses, the core of American economic structure, have left themselves open to the ravages of Y2K through foolish unpreparedness. Insurance ambiguities inviting litigation permeate coverage that will be invoked, or at least arguably invoked, by Y2K computer failures. Shareholder and class actions seem to be custom-made suits, tailored specifically to the measurements of Y2K. At first blush, then, the convergence of these factors appears to point toward a litiga-

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tion harvest never before seen by attorneys; a trillion dollar crop that will only increase in worth as computer bugs infest it.

On the other side of the scale, however, are factors that could individually outweigh the total weight of the pro factors, and when placed together, certainly tip the scales against the prospect of a Y2K employment bonanza for lawyers. Governmental intervention may be sufficient in and of itself to end the trillion dollar harvest before it begins. Federal and state legislation is heavily skewed toward preventing a litigation free-for-all in both the public and private sectors. If even a moderate percentage of such legislation is enacted into law, the ceiling, instead of the sky, will be the limit for aggressive Y2K lawyers.

Although not as powerful a deterrent as governmental prohibitions, the existence and current use of alternative forums for dispute resolution seriously negates the prospect of huge compensatory and punitive damages settlements hoped for by plaintiffs' attorneys. Whether arbitration, mediation, a special court system, or issue-concentrated courts, forums outside the traditional court setting will necessarily limit dollar figures arising out of Y2K dispute resolutions.

The insurance factor, found on the pro side of the scale, will be negated by its presence on the con side as well. Explicit exclusion of Y2K issues from insurance policies, leaving a business without the ability to pay claims against it, will certainly hinder the process of filling the trillion dollar piggy bank. Likewise, shareholder and class actions on both sides of the equation will likely cancel each other out. As mentioned above, even if large figures result from class action and shareholder lawsuits, much of that money will remain in the hands of a select few.

The determinative blow against the trillion dollar figure may be the combination of the counterproductive nature of litigation in a Y2K setting and the limited window of opportunity provided by Y2K itself. Potential parties in suits may see the light before seeking to ruin mutually beneficial relationships through cutthroat litigation. Past business relationships and a hope for continued business dealings may serve to quell animosity created by Y2K computer failures. This final factor adds further mass to a balance already tipped heavily against a trillion dollar payday for attorneys.

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VI. CONCLUSION

The question of whether Y2K will open a new field of employment for attorneys will be answered with some clarity by the middle of the year 2000. The trillion dollar legal boon for attorneys is contingent not only upon widespread computer problems but a variety of other factors which must converge to create the narrow window of opportunity for unprecedented attorney employment. After balancing all of the most pertinent factors, it is apparent that this window is unlikely to open, and although Y2K will find itself listed in attorney files and on court dockets, attorney employment resulting from Y2K will be a disappointing distance from one trillion dollars.

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