

FEDERAL Y2K LEGISLATION - SUMMARY

This memorandum is prepared in response to a request for a summary of recent federal legislation (the Y2K Act) addressing year 2000 (Y2K) liability.

On July 20, 1999, the President signed legislation that was designed to establish uniform legal standards governing year 2000 actions, to encourage year 2000 remediation, to promote prompt correction of year 2000 problems and resolutions of disputes through alternative dispute resolution, and to discourage frivolous lawsuits while protecting the rights of parties who suffer actual injury as a result of year 2000 problems. [Pub. L. 106-37; 15 U.S.C. §§ 6601-6617]

The legislation defines a "Y2K action" as a civil action commenced in any federal or state court, or an agency board of contract appeal proceeding, in which the plaintiff allege harm or injury arising from or relating to an actual or potential Y2K failure, or a claim or defense arising from or relating to an actual or potential Y2K failure.

The legislation defines a "Y2K failure" as "a failure by any device or system (including any computer system and any microchip or integrated circuit embedded in another device or project), or any software, firmware, or other set or collection of processing instructions to process, to calculate, to compare, to sequence, to display, to store, or to receive year-2000 date-related data."

The scope of the Y2K Act is limited in that it does not apply to personal injury or wrongful death claims; claims brought under most securities laws; or claims brought by a governmental entity acting in a regulatory, supervisory, or enforcement capacity. The legislation provides that the Act may not be construed to affect the applicability of any state law that provides stricter limits on damages and liabilities, affording greater protection to defendants in Y2K actions, than are provided for in the Act.

The legislation provides a 90-day waiting period before a plaintiff may commence a Y2K action for money damages and requires a plaintiff to give the defendant 30 days written notice before filing a Y2K action seeking money damages. Under the Act, if the defendant responds within the 30-day notice period and proposes a remedy to address the Y2K failure or offers to engage in alternative dispute resolution, the lawsuit must be postponed for 60 days beyond the 30-day notice period to allow time for the proposed remediation or settlement negotiations. If the defendant does not respond within the 30-day notice period or if the 60-day remediation period ends without resolution, the plaintiff may pursue the action.

The legislation provides specific pleading requirements with respect to what the plaintiff must file in a

Y2K action. With the complaint, the plaintiff must file a statement with specific information regarding the nature and amount of each element of damages sought, the manifestations of the material defects alleged, and the facts giving rise to a strong inference that the defendant acted with the required state of mind.

The legislation provides that in a Y2K action a plaintiff may not recover damages that the plaintiff could reasonably have avoided in light of information the plaintiff was or reasonably should have been aware. The legislation also provides that written contractual terms, including limitations or exclusions of liability or disclaimers of warranty, must be strictly enforced unless the given terms manifestly and directly contravene applicable state statutory law or violate the applicable state law doctrine of unconscionability in effect as of January 1, 1999. The legislation prohibits states from enacting special legislation to stiffen liability rules with regard to Y2K actions after January 1, 1999, and restricts the ability of courts to apply common-law rules to declare contractual terms unenforceable.

With respect to tort law, the legislation provides that a plaintiff may recover economic losses only when the losses result directly from damage to tangible property, other than the property that experienced the Y2K failure, and recovery of economic losses is permitted under applicable state or federal law. In addition, if the defendant committed an intentional tort, such as fraud, the plaintiff may recover economic losses.

The legislation provides that in any Y2K action in which punitive damages are permitted by applicable law, the defendant is not liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met. The bill also limits punitive damages against individuals worth less than \$500,000 or small businesses with less than 50 employees to \$250,000 or three times compensatory damages, whichever is less. The legislation also generally provides that each defendant in a Y2K action is liable only for that portion of the plaintiff's damages for which the defendant is responsible. However, a defendant's liability may be joint and several if the defendant is highly culpable for the plaintiff's loss or another defendant cannot pay that defendant's share of the damages.

With respect to class action claims, the legislation provides that a claim involving a defective product or service may be brought as a class action only if the alleged defect is a material defect for the majority of the class members. A "material defect" is a defect

that substantially prevents the item or service from operating or functioning as designed or according to its specifications and does not include a defect that has only de minimis effect on the functioning of an item or program, affects only a component of an item or program that functions properly as a whole, or has a de minimis effect on the efficacy of a service. The legislation requires each prospective class member to be notified of the class action. The notice must include a concise and clear description of the nature of the action, the jurisdiction where the case is pending, and the fee arrangements with class counsel. The legislation provides that class actions may be

brought only in federal courts unless a substantial majority of the class members, the primary defendants, and the primary applicable law are all of the same state, the primary defendants are states or state officials, the plaintiff class seeks less than \$10 million in damages and no punitive damages, or there are fewer than 100 members in the class.

The Y2K Act applies to any Y2K action brought after January 1, 1999, for a Y2K failure occurring before January 1, 2003, or for a potential Y2K failure that could occur or has allegedly caused harm or injury before January 1, 2003.