

Limiting the Liabilities of the Year 2000

BY REED BOOKER

That ticking sound you hear is the countdown to the millennium, when two-digit year fields will try to make sense of 00 and – to hear some tell it – all the computers in the world will go bananas. For several years now the Year 2000 problem has been identified for its soaring business opportunities with commensurate down-in-flames risks of failure. Prudent technologists are pursuing the opportunities while preparing to manage the risks.

Year 2000 isn't just a computer problem but a lurking crisis for a world that has come to rely on digital function. This will effect not only date-dependent systems such as computer networks, telecommunications including the Internet, global positioning systems for aircraft and ship guidance, and manufacturing systems, but also automated teller machines (ATMs), stock market trading, mortgages, distribution and accounting processes, and even dated prescriptions.

Debate on Year 2000 debugging methods escalates as technological brainstorming produces tactics such as windowing, application triage and others; however, those closest to the problem are in danger of missing its elemental threat: the problem is a not just an IS' problem but rather a fundamental business problem. Many corporations have assumed the stance of the ostrich that hides from trouble by sticking its head in the sand. Bruce Webster of the Year 2000 Group in Washington, D.C., was quoted by *Computerworld* as saying: "I don't think it's a technically overwhelming problem, but I think it's going to whack us on the head just because I know how poorly corporations deal with software development in general."

One Year 2000 expert has predicted that approximately half of all companies may

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not become Year 2000 compliant in time and will suffer the failure of their computer systems or their systems will start producing garbage on or after January 1, 2000. According to the Gartner Group, for those companies that have started to work on Year 2000 leading edge estimates to correct it worldwide now reach \$600 billion. One insurance company expects to spend about \$150 million to correct approximately 125 million lines of code. Most companies can expect to spend \$1 or more per line of source code to correct the date field problem. Paraphrasing a former U.S. senator, "A few hundred billion here, a few hundred billion there, pretty soon you're talking about real money."

The implied benefit to computer professionals is that if someone is spending billions, someone else is making billions. However, for many large corporations, the money will be paid in very small increments to many different firms or consultants, as the Year 2000 is a very fragmented subindustry.

We can't expect lawyers to wait until the millennium begins to sample its torts. In my November 1997 column I cited the case of a software provider of a cash register system who was sued because the program crashed

every time a credit card with an expiration date of 2000 or beyond was scanned. Indeed, whole new kinds of professional liability claims are likely to arise when Year 2000 really kicks into gear after that once-in-a-lifetime New Year's Eve on December 31, 1999. The "Millennium Bug" may escalate into the "Millennium Virus" as systems that are Year 2000-compliant receive contaminated programs or data from third-party suppliers or other sources that are not compliant. As damage mounts, recovery will be sought from the guilty and innocent alike.

That is why Year 2000 corrective plans should be formulated both by companies reorganizing their systems and the consultants or firms who will assist them. A common element of the plan could be risk management. Insurance programs have been developed to protect Year 2000 compliant organizations from losses, and professional liability insurance is available to protect against losses due to the errors or omissions of consultant firms.

Certainly from this point on, contracts for any installation or maintenance of software should include assignments of responsibility to fix Year 2000 noncompliance problems. Usually, there is a difference between modifications to fix bugs for which the vendor pays and customer-requested enhancements for which the end user pays. Problems such as Year 2000 are beyond the usual scope of a software deal, and liability is likely to be determined on the basis of contract language.

However, no matter how careful a vendor or consultant is on the structure of contracts, it is prudent to consider insurance coverage to protect against claims of liability for damages caused by mistakes. Under the professional malpractice theory, "professionals" have historically been held to a higher

standard of care than ordinary business operators. A vendor that presents itself as having special professional expertise usually remains vulnerable to a higher level of damage recovery. Thus, professional malpractice claims are expected in the wake of failed Year 2000 software performance because so much will be riding on its successful operation. This is likely to apply especially to custom-designed software that is developed by specialized software firms or consultants.

Year 2000 systems repair and maintenance opportunities abound, but each has its potential for losses when something goes wrong, and, according to Murphy's Law, if something can go wrong, it will.

Now, you may resume listening to the clock tick. As of February 1, 1998, there are 699 days to prepare for the millennium. **fs**



Reed Booker is director of association marketing for MIMS International, Ltd., an insurance program administrator serving NaSPA and its members. For more information on the types of coverage available, contact Debbie Zarecki at (800) 899-1399.

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