

Commercial Insurance Update

Topics Affecting Buyers of Commercial Insurance

MSP C 12/98 – “Preparing for Year 2000”

December, 1998

Year 2000 Information and Readiness Disclosure Act

Your rights and liabilities for Y2K problems

We want to take this opportunity to alert you to a new law that may impact your rights and potential liabilities concerning the Year 2000 situation.

Because this Act will affect firms in different ways, and because it is, like much legislation, not entirely clear as to its coverage and protections, we urge you to consult with legal counsel to evaluate its impact on your individual business. Together, you can determine how you can best take advantage of the new law's provisions to minimize your potential Year 2000 liabilities and preserve your Year 2000 rights.

Overview of the Act

The law, entitled the “Year 2000 Information and Readiness Disclosure Act,” was signed by President Clinton on October 19, 1998. The announced purpose of the Act is to “encourage the disclosure and exchange of information about computer processing problems, solutions, test practices and test results, and related matters, in connection with the transition to the Year 2000.” To facilitate the exchange of Year 2000 compliance information, the Act limits the type of information that can be used as evidence in a civil liability case.

The Act's scope is vast; it will apply to lawsuits whether they allege federal law or state law

claims. Moreover, the Act provides those who have made representations concerning their Year 2000 processing capabilities with a one-time opportunity to limit the admissibility of those earlier statements in future lawsuits.

The Act is intended to provide protection for two kinds of Year 2000 disclosures:

1. “Year 2000 Statements” and
2. “Year 2000 Readiness Disclosures.”

Each is entitled to a different form of protection. A “Year 2000 Statement” is essentially any communication about Year 2000 readiness. The definition is extremely broad, and encompasses statements – written or verbal – about Y2K readiness, plans or testing. It also includes statements that review, comment on, or “directly or indirectly relate” to others' Year 2000 readiness.

In contrast, a “Year 2000 Readiness Disclosure” is a subset of a “Year 2000 Statement.” A “Year 2000 Readiness Disclosure” is a “Year 2000

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Statement” which also:

- Bears a label that it is a “Year 2000 Readiness Disclosure”
- Is in writing or electronically inscribed
- Is about the Year 2000 readiness of the products or services of the entity that makes the statement.

Protections for “Year 2000 Readiness Disclosures”

The Act provides the broadest protections for statements that qualify as “Year 2000 Readiness Disclosures.” Subject to limited exceptions, any document that is a “Year 2000 Readiness Disclosure” issued between October 19, 1998 and July 14, 2001 cannot be admitted in evidence against the person or entity that made the “Year 2000 Readiness Disclosure.”

In addition, the Act provides that the information contained in a “Year 2000 Readiness Disclosure” will not be deemed to amend a contract previously entered into.

What does this mean for you?

The “Year 2000 Readiness Disclosure” provisions of the Act may impact you in several ways. First, you have probably received inquiries from others (e.g., your clients, trading partners, vendors, suppliers, etc.) asking about your Year 2000 readiness.

From now until July 14, 2001, you can largely prevent your written responses from being admitted into evidence in future litigation by clearly identifying each written or electronic statement that you make about your Year 2000 readiness as a “Year 2000 Readiness Disclosure.”

If you follow this procedure, those responses cannot be introduced into evidence against you in a lawsuit that is based on that disclosure (e.g., if you have acted in bad faith or committed fraud). On the other hand, you have probably made inquiries of others about the Year 2000 readiness of their products or services.

From now on, you should be aware that you will be similarly limited in using those responses if they are labeled as “Year 2000 Readiness Disclo-

ures.” If a document so labeled goes to the heart of a contract you have with a third party, you may want to renegotiate any such contract with those trading partners who label their descriptions of their Year 2000 readiness as “Year 2000 Readiness Disclosures.”

Protections for “Year 2000 Statements”

A “Year 2000 Statement” is far broader than a “Year 2000 Readiness Disclosure” in that it need not be written, need not bear a label, and further, can “directly or indirectly” relate to someone else’s Year 2000 processing capabilities as well as your own. There is no procedure under the Act for retroactively designating previous “Year 2000 Statements” as protected by law; to the contrary, it applies solely to “Year 2000 Statements” that are made from October 19, 1998 until July 14, 2001.

The Act provides that in a lawsuit based on an allegedly false or misleading “Year 2000 Statement,” the plaintiff, in addition to proving all other necessary elements of the cause of action, must prove by clear and convincing evidence that the statement was material, and also that the maker of the statement:

1. Knew that it was false; or
2. Made the statement with an intent to deceive; or
3. Made the statement with reckless disregard as to the accuracy of the statement.

What this does in general is to make it more difficult to sue based on Year 2000 statements in two ways.

First, it forces anyone suing on the basis of false or misleading Year 2000 statements to prove his case by “clear and convincing evidence,” which is a more difficult evidentiary standard than the usual preponderance of the evidence test used in most civil litigation.

Second, the Act adds other elements (such as “materiality”) that a plaintiff must prove in order to prevail. Again, this will apply automatically to any “Year 2000 Statements” made on or after October, 19, 1998. The Act, however, does include a provi-

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sion stating that it will not alter any standard of care owed by a fiduciary.

What does this mean for you?

Business people in general, when they act solely in those capacities, are generally not fiduciaries vis-à-vis their clients, and therefore, their Year 2000 statements will be entitled to the protections of the Act as briefly described above.

On the other hand, attorneys are more frequently fiduciaries in respect to their clients and, to that extent, will be less protected by the Act in lawsuits based on Year 2000 statements.

Whether or not accountants are in a fiduciary relationship with their clients will depend upon the

scope of the work that they are performing and the facts surrounding the accountant's relationship.

Conclusion

We cannot emphasize enough that the Act is complicated and in some cases open to interpretation. The purpose of this article is only to alert you to its effect in the most general terms. You should consult counsel to explore the impact of this Act on your individual firm as well as your relationships with your trading partners. ✦

***Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

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Have you displayed employee posters?

When defending against lawsuits such as sexual harassment or family leave, it's important that you have properly displayed the required employer posters demonstrating that the employee was advised of his or her rights.

Make sure your firm is complying with employer regulations with the California Chamber of Commerce's employer packet containing federal and state rights within the workplace.

The packet includes the two required posters on issues such as safety, harassment and discrimination, equal employment opportunity, and workers compensation. For a complete set of the required posters, contact your local Chamber of Commerce, the Better Business Bureau, or the Department of Labor. ✦