

WHAT YOU CAN DO NOW TO PREPARE FOR YEAR 2000 LITIGATION

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Introduction

- Today is January 5, 2001
- Your company hasn't been sued for any Y2K problem
- Are you safe from Y2K litigation?

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January 7, 2001: Suit is filed.

- A company with whom you contracted sues
- You think you have an ironclad case
 - How can suit be filed this late?
 - You warned the other side of Y2K problems repeatedly
 - Everything you did is well-documented
 - Your Y2K manager is intimately familiar with the situation

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January 9, 2001: Meet with general counsel

- Key documents were purged, and don't exist in files
- Found old Y2K statement; it doesn't comply with IRDA
- Y2K manager was fired last month
- Y2K consultant subpoenaed; has harmful documents
- Press has picked up on the problem
- SEC is investigating your Y2K disclosures
- Shareholder suit has been filed
- D&O insurer denies coverage

What could you have done?

- You could have acted in 1999, if you had understood that:
 - Some litigation is inevitable
 - Practical, concrete steps could be taken to prepare to defend

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Understand the potential legal claims

- Breach of contract
- Breach of covenant of good faith and fair dealing
- Breach of express warranty, or one implied by law
- Product liability
- Negligence
- Misrepresentation/fraud
- Unfair or deceptive acts or practices
- Director liability

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Know what defenses will work

- Failure to mitigate damages
- Lack of reasonable reliance
- Reasonableness, good faith and due diligence
- “State of the Art”
- Contributory or comparative negligence
- Disclaimers of liability
- Failure to examine
- Adequacy of warning
- Harm not foreseeable
- “Forward looking” statements, “business judgment”

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Documents

- Assemble your documents and prepare an index
 - Contracts
 - Statements to Third Parties
 - Showing “State of the Art”
 - Reflecting Y2K actions taken
 - Disclosing industry view
 - Making clear what directors and officers have done
- Adopt a document retention policy

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Talk to auditors, consultants and third parties

- What documents are they creating
- Obtain the right to review and to have copies

Identify and locate important witnesses

- Review history
- Make and maintain a list of addresses
- Assess whether they are friendly
- Locate and retain leading experts

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Speak with one voice

- Say the same thing to customers, suppliers, government, etc.
- Multiple divisions may be a problem
- Choose and use one definition of “Y2K compliant”
- Try to answer Y2K inquiries with your own statement
- Reduce the number of people who are allowed to speak to third parties regarding Y2K

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Protect your officers and directors

- Check D&O coverage for Y2K issues
- Review adequacy of Board minutes
- Make sure you can demonstrate careful attention to Y2K issues
- Don't let them accept Y2K statements at face value

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Review insurance and indemnification agreements

- Determine whether coverage exists
- Review all policies that apply to times when you acquired, used or sold anything that is not Y2K compliant
- Review all development, acquisition and other contracts for rights to indemnification
- Review applications to see what you disclosed
- Decide whether to give notice of a claim
- Consider Y2K-specific coverage

Consider notifying third parties

- Decide on the conditions for giving notice
- Set a logical and fair policy for upgrades or modifications
- Coordinate with notices to others

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Consider differences between laws of the U.S. and other countries where you operate

- Review of 28 Asian, European and South American countries discloses wide variety of legal consequences of non-compliance
- Examples:
 - The Netherlands (“normal bug”)
 - Australia (duty to disclose)

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Review areas of cooperation with third parties

- Seek to minimize time and cost of any dispute
- Analyze how claims will arise
 - Who are your natural allies?
- Consider:
 - Tolling Agreements
 - Joint Defense Agreements
 - ADR Agreements

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Meet SEC requirements

- Disclosure required if:
 - Y2K assessment not yet complete, or
 - Y2K consequences may have a material effect on business, results of operations or financial condition
- Complete assessment must consider third parties
- “Forward looking” safe harbor applies to future events
- Should address:
 - State of readiness for IT and non-IT systems
 - Historical and estimated costs of remediation
 - Risks: “most reasonably likely worst case” scenarios
 - Contingency plans to handle worst case scenarios

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Comply with IRDA

- What is IRDA?
 - Year 2000 Information and Readiness Disclosure Act
- What statements are protected?
 - “Year 2000 Statements”
 - “Year 2000 Readiness Disclosures”
 - Pre-enactment disclosures (limited protection)
- What type of protection is provided?
 - Inadmissibility as evidence in certain circumstances
 - Heightened evidentiary rules
 - Antitrust exemption
 - No protection against product failures or malfunctions

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Keep up with developments

- Law
 - The *Arthur Andersen* defense
 - Upgrade class actions expand beyond consumer software
- Industry
 - What other companies in your industry are doing and saying
 - How their compliance will affect your company
- Insurance
 - What position your insurance company is taking
 - How the pricing of Y2K coverage for your business is developing

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Conclusion

- Y2K litigation is inevitable
- It will be expensive and long
- You can't avoid it but you can prepare for it

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