
TITANIC II: THE LEGAL FLOODGATES of Y2K

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INTRODUCTION

They call it *RMS Titanic*. This royal mail steamship megamarvel made its maiden voyage from Southampton, England on April 1912. The cost of a first-class, parlor suite, ticket was over \$4,350 or \$50,000 in today's currency. See *The History Of Titanic Webpage* at <http://pw2.netcom.com/~larkee/history.htm> and *Titanic Odds and Ends Webpage*, <http://www.members.global2000.net/~bjackson/t-bits2.htm>. It was attempting to break a speed record. In fact, the captain was making his final voyage before retirement. Less than three hours after departure the luxury liner lay at the bottom of the cold, North Atlantic Ocean floor. Two thirds of the fifteen hundred passengers had perished. An iceberg cut a three-hundred-foot slice out of its majestic side. The unthinkable happened to the unsinkable.

In his 1992 book published by Penguin Press, *The Titanic: End of A Dream*, Wyn Wade details the doom of this mighty ship. The Titanic epitomized grandeur, size and wealth. There are estimates that it would cost \$400,000,000 to build such a vessel today. The Titanic also exemplified man's defiance against the elements, nature and God Himself. It was named after the Titans, a mythical race of people who fought with the gods and later were cast into hell. Most people of the day felt that the liner of the elite too was immortal. Yet this behemoth fell to the most common of elements, sailing into the annals of history as a complete and utter disaster. There were so many warning signs. It is recorded that the ship did not have proper red flares, only generic white ones. Thus, ships that may have passed by would have thought that there was a celebration going on and nothing more. The crewman assigned to the crow's nest did not have proper binoculars so vital to the spotting of icebergs. And, the devices that were to measure water temperature were improperly filled so as to give off false readings. In fact, one of the problems with those devices was that the rope attached to them was too short to reach the ocean in order to give off appropriate readings of danger. Some passengers ignored warnings and actually rode stationary bicycles as the band played on. One of the first lifeboats to leave the ship had the capacity to hold sixty-four people, but carried only twenty-eight survivors. See *Did You Know?* at <http://www.home.gil.com.au/~dalgarry/know.html>. Twenty lifeboats had only a total capacity of about 1200. The ship's original design called for thirty-two such crafts. Finally, the rescue ship, The *Carpathia*, was less than one mile away but was of no use. In reality, the Titanic sank under the weight of doubt, dismay, apathy and unbelief.

LAWSUITS

It is estimated that it took some \$663,000 to settle lawsuits related to this disaster of the early 1900's. (*Titanic Odds and Ends Webpage, supra.*) Today we face another Titanic. This one may not be as deadly but one thing is certain: the legal ramifications will cause damaging ripples and good-sized gashes for some time to come. It is referred to as Y2K. Some call it The Millennium Bug or The 2000 Time Bomb. In essence no one knows what will happen when the clock strikes midnight on January 1 next year. This problem stems from computing days past when memory and data storage were quite expensive. To save money as well as valuable space, computer programmers used two digits to indicate calendar years. To complicate matters much of the problem is literally embedded or sunken into systems worldwide. Computer aficionados believe quite possibly that computers will think that it is 1900 all over again. It is estimated that Year 2000 computer complications will cost Americans one trillion dollars in legal tender. *See, e.g.,* David B. Hassett, *Y2K Legal FAQ*, at <http://legal.y2k.com/legalfaq.htm>, Howard Mintz, *Millennium Bug May Generate Oodles of Lawsuits*, San Jose Mercury News, 3/1/98, at <http://www.sjmercury.com/business/center/yr2000suit030298.htm>, *The Unspeakably High Cost of Noncompliance*, *Information Week*, June 30, 1997, available on the Internet at <http://www.techweb.com/se/directlink.cgi?TWK199706030S0015> and *Lawyers Circle Over 2000 Time Bomb*, USA Today, 1/26/99, at <http://www.usatoday.com/life/cyber/tech/ctb716.htm>.

Consider the following laundry list of probable lawsuits as well as likely defendants as a result of Y2K:

POTENTIAL CAUSES OF ACTION	POTENTIAL DEFENDANTS
<ul style="list-style-type: none"> ● Breach of Contract ● Negligence ● Products Liability ● Breach of Duty of Care ● Breach of Warranty (Merchantability, Fitness, etc.) ● Misrepresentation ● Latent Defect ● Fraud ● Non-Performance ● Property Loss ● Copyright Infringement/Violation ● Commercial Non-Performance ● Loss of Business/Business Interruption ● Improper Denial of Insurance Claims 	<ul style="list-style-type: none"> ● Goods Vendors/Retailers ● Goods Manufacturers ● Internet Service Providers ● Private Companies ● Private Organizations ● Insurance Companies ● Consultants ● Directors and Officers ● Banks ● Stockbrokers ● Hospitals ● Governments (State, Local and Federal) ● Private Citizenry

The most common suits will focus on manufacturers and sellers of computer-related devices and the like. They will be hit the hardest. The actions will probably center around breach of contract or warranty theories rather than on products liability. A civil lawsuit in tort and based upon claims of defective goods, products liability usually requires physical injury rather than economic harm. The concept is that since the maker and/or seller have thrust a product into the stream of commerce they should be responsible for its ultimate effects on the consumer, user and related parties. Apart from product misuse there is little the defendant can do in defending products liability lawsuits. *See, e.g., MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). *MacPherson* is a classic example of how this doctrine works. A plaintiff successfully recovered when defective wooden car wheels caused him harm. Note how easier it is to prove these types of

cases rather than suits based on negligence. Negligence is a tougher standard to meet as the plaintiff must show a duty existed, the defendant breached or violated the duty and damages were caused by the defendant's tortious actions. *See, e.g., Palsgraf v. Long Island Railroad Company*, 162 N.E. 99, 248 N.Y. 339 (1928), another pivotal case in America law that defined the standards regarding negligence actions for years to come. This, if courts do buy the plaintiffs' arguments in these circumstances there could be devastating results for many companies. In fact, the entire economy may be badly damaged, as the stock market will surely fall below levels of safety.

As mentioned breach of contract or warranty will be the wave on which to ride for most legal advocates. The theory is based upon the proof of an enforceable, valid agreement and subsequent breach by the other side involved. Defendant breaches if he or she does not render his or her proper performance. The defendant may argue that it was impossible or commercially impractical to perform due to the Millennium Bug, but again it is up to the courts as to who will win the day in this regard. *See, e.g., Northern Corp. v. Chugach Electrical Association*, 518 P. 2d 76 (1974).

Of course even though negligence is somewhat tougher to prove than products liability regarding goods cases, this will not deter attorneys in other respects. Think of hospitals and other related facilities that render services. Even a short loss of power could cause devastating results. Y2K will potentially leave death, physical harm and mental anguish in its wake. The burden of proof by plaintiffs will most likely be met as juries will have to stare into the faces of affected patrons, family members and loved ones by the score. Sympathy sparked by personal tragedy as well as public opinion will stoke the battleground boilers to the breaking point.

For example, reflect upon the possible consequences for a director or officer in the Year 2000. The corporate fiduciary is a trusted gatekeeper. He or she is required to act in good faith and do what is best for the interests of shareholders. Assume they purchase software or a computer system in 1999. As the new millennium turns the goods in question no longer work. Thousands or even millions of dollars are lost as a result. A shareholder could very well bring a derivative suit against the individual supposedly responsible for the losses. A derivative suit is an action allowed in law by such a corporate owner when he or she feels the business needs relief or damages. The one in that trusted position will have to counter arguments that they breached the duty of reasonable diligence in not planning for or avoiding such damages.

Think of the insurance company that denies claims from Y2K. Angry policyholders will surely seek legal assistance. Stockbrokers may also feel the meltdown blasts of the Year 2000 inferno. In other words, if computerized Internet trading options go down during crucial times, investors may lose opportunities for big profits. Fraud, negligence, non-performance and loss of business suits would abound in this respect. In general attorneys will find themselves in feeding frenzy mode as the millennium motorboat quickly takes on water.

It is estimated that less than fifty per cent of companies will be Y2K compliant in time. *See, e.g., James Zirin, Bug Bites, and Lawyers Litigate*, Forbes Magazine, 7/7/97, at <http://www.forbes.com/forbes/97/0707/6001100a.htm>. Even though the Securities and Exchange Commission (SEC) has already put companies on notice to disclose certain material problems regarding correctional measures most companies will be legally affected. *See SEC Staff Legal Bulletin No. 5*, dated January 12, 1998. This year in West Virginia an eighty-seven-year-old mutual funds seller was fined five thousand dollars. The SEC claimed that he was lax in filling out a seventeen-page survey. He stated simply that he did not own a computer! *See Business With No Computer Fined Over Y2K Compliance*, The Register-Herald, Beckley, WV, 4/21/99.

Let's face it, the cost of fixing such problems and/or the potential litigation as a result will cut deeply in corporate coffers. Plaintiffs have already filed cases on this subject. *See, e.g., The ITEA Website* at <http://www.consult2000.com/litigati2.htm> as well as The WMCD Website, at <http://legal.y2k.com/whosresp.htm>. Two examples are in California. A suit was filed as early as 1997. In *Atlaz International v. Software Business Technologies, Inc.*, a state law firm has sued for five billion dollars against PC makers. If successful, attorneys will place the monies, after calculating fees of course, in trust for an estimated five million computer users affected in California. *See Happy New Year, Call Your Lawyer*, The Sunday Times, 12/10/97, at <http://www.sunday-times.co.uk/news/pages/tim/97/12/10/timfeafcs01010.html?1733620>. Also, a class action suit was filed against Symantec. Plaintiffs alleged the company improperly required customers who bought Norton AntiVirus software prior to Version 4.0 to pay for Y2K upgrades. *InfoWorld Electric*, by Elizabeth Heichler, February 20, 1998, at <http://www.infoworld.com/cgi-bin/displayStory.pl?980220.ecsymantec.htm>.

LEGISLATION

The year began with Senator John McCain introducing *S. 96, The Y2K Act*. It passed the Senate Commerce Committee two months later. Senators McCain and Wyden released an amendment to the measure in April, referred to as *McCain-Wyden*.

Specifically, *S. 96* includes a(n):

- Provision for dispute resolution,
- Provision for limited state law preemption, and that the Act does not apply to actions for personal injury,
- Requirement of plaintiffs to give a potential defendants notice of problems and opportunities to remedy,
- Establishment of a good faith defense limiting to economic damages,
- Allowance of an appointment of a special master to hear a case brought in federal court,
- Allowance of punitive damages only if *reckless disregard* is established, and
- Limitation as to:
 1. non-economic losses, at a cap of three times their value,
 2. economic losses if defendant exercised due diligence and reasonable care in the prevention or remedy of problems,
 3. further additional damages regarding small businesses,
 4. liability to a several, not joint, status among defendants, and
 5. retailer liability when the retailer has no particular expertise in the computer technology field.

In essence, all Y2K legal suits would be treated as contract actions. And, manufacturers would have thirty days to respond to notice of any defects then an additional sixty days to correct problems. However, some senators are against the bill, claiming that the measure would proverbially let the camel's nose under the tent regarding litigation and is an effort for tort law reform in disguise. It is reported that President Clinton opposes the measure. *See McCain Interview*, Squawkbox, CNBC, 5/4/99, 8:20 a.m.; *see also* <http://thomas.loc.gov/cgi-bin/query/z?c106:s.96>: as well as *Bill Introduced to Limit Y2K Liability*, by Paul Malamud, The Embassy Homepage, at

<http://www.usembassy-amman.org.jo/2Y2Lim.htm>, The Tech Law Journal, January 21,1999, at <http://www.usembassy-amman.org.jo/2Y2Lim.html>, and Press Release, Office of Senator John McCain, January 19,1999.

The Clinton Administration's major concern is that S. 96, as amended by the McCain-Wyden amendment, will not enhance readiness and may, in fact, decrease the incentives organizations have to be ready and assist customers for the transition to the next century. Statement of administration Policy, Executive Office of the President, coordinated by the Office of Management and Budget, 4/27/99.

Compare and contrast the above with H.R. 775 *The Year 2000 Readiness and Responsibility Act*. The bill, passed by the House May 13,1999, retains a wider range of provisions than the bill considered in the Senate, which has been revised several times to build bipartisan support. In essence, the bill:

- Requires defendants to respond to Y2K questions and concerns in 30 days,
- Establishes a 90 day pre-trial notice period in which Y2K related problems can be addressed,
- Encourages mediation and arbitration to help unclog the court systems,
- Limits attorney's fees to \$1,000 dollars an hour,
- Links directly a defendant's share of damages to their share of responsibility,
- Provides incentives for both defendants and plaintiffs to work on solutions,
- Creates a uniform, nationwide Y2K liability standard, and
- Does not affect personal injury lawsuits.

Press Release, Office of Congressman David Dreier, February 23, 1999

Democrats and the Clinton administration oppose the bill.

Below is a summary of measures that have been Congressionally proposed in order combat potential Y2K problems:

Note:

- Senate bills are in **red**
- House bills are in **blue**
- Sponsors *names* and *states* follow each bill

S. 2392 (various Congressmen and women): **Year 2000 Information and Readiness Disclosure Act**; Establishes easier information sharing by limiting liability; signed by President Clinton on October 19,1998.

S. 738: Y2K Fairness in Litigation Act, companion to **H.R. 1319** (Dodd, CT); Lawsuit settlement provision .

S. 461: Year 2000 Fairness and Responsibility Act (Hatch, UT); Protects innocent users and businesses, fosters settlement initiatives for economic safety. S.461 advocates that parties mediate rather litigate. The major focus of includes:

- Reinforcement of the primacy of existing contracts to resolve disputes,
- Encouragement regarding the use of alternate dispute resolution,
- Creation of a cure period,

- Encouragement of potential parties to take corrective action, and
- A requirement of a limitation on Y2K material-defect-related awards to *actual damages*.

The Information Technology Association of America (ITAA) has lent strong support for S461. ITAA consists of 11,000 direct and affiliate members throughout the U.S., which produce products and services in the industry. Press Release, *ITAA Backs Year 2000 Fairness and Responsibility Act of 1999*, 3/1/99, ITAA, <http://www.ita.org/news/pr/pr19990301.htm>.

S. 96: The Y2K Act (McCain, AZ); Note: The Committee on Commerce ordered the bill to be reported with an amendment

S. 314: Small Business Year 2000 Readiness Act (Bond, MO); Loan guarantee program for small businesses (*Passed 3/99*)

S. 174: Y2K State and Local GAP (Government Assistance Programs) Act of 1999 (Moynihan, NY); State funding programs.

H.R. 1319: Y2K Fairness in Litigation Act, companion to **S. 738** above (Eshoo, CA).

H.R. 909: Y2K State and Local Government Assistance Programs Act of 1999 (DeGette, CO); State funding provision for corrective measures by State and local government programs.

H.R. 775 :Year 2000 Readiness and Responsibility Act (Davis, VA); Establishes civil procedural means regarding litigation; House Judiciary Committee approved 4/99 and adopted an amendment in the nature of a substitute to the Y2K Readiness and Responsibility Act. Rep. Bob Goodlatte (VA) offered the amendment adopted by the committee; Passed by the House May 13, 1999.

H.R. 179: Businesses Undergoing the Glitch Act (BUG Act) (Thurman, FL); Provision of gross income deduction for conversion costs of small businesses.

HR Res 14 : New Year's Day Holiday (Linder, GA); Designating January 3, 2000 as a holiday in order to combat potential computer problems.

H.R. 192 : Year 2000 Consumer Protection Plan Act of 1999 (Manzullo, IL); Establishes resolution judicial and administrative proceedings in a variety of areas.

Y2K Legal Web Resources:

<http://legal.y2k.com>

<http://www.year2000.com>

<http://www.comlinks.com/y2kmenu.htm>

The Information Technology Association of America, Arlington, Va.:

For a list of state bills passed by Arizona, California, Colorado, Florida, Georgia, Hawaii, Nevada and South Dakota regarding, see

<http://www.ita.org/year2000/legis3.htm>.

For state legislation pending, see
<http://www.ita.org/year2000/legis2.htm>.

For Federal legislation pending, see
<http://www.ita.org/year2000/legis1.htm>.

For a list of lawsuits pending, see
<http://www.consult2000.com/litigati2.htm>

CONCLUSION

There are no clear solutions on the horizon. It is quite evident that man cannot expect to defy the laws of physics and not suffer the consequences. The Titanic was warned no less than twelve times to change course but failed to heed. We are running out of time as well. In our race to prove ourselves the dominant species and in our haste to put luxury ahead of common sense, we have doomed our ship. We have ripped open a tremendous floodgate of litigation. In essence we may very well face the same fate as many of those aboard The Titanic on that fateful night. We will drown in a sea of useless, frivolous claims as we search for a beacon of hope in the night. Let us pray we will be spared this sorrowful lot as our iceberg awaits.....

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[Back to Journal of Distance Learning Administration Contents](#)