

Y2K Meets ADR:

Monitoring Y2K Filings Encouraged

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Rarely, if ever, have courts had such advance warning of potentially calamitous levels of litigation as we now have with the possible deluge of Year 2000 (Y2K) computer problem litigation. Some commentators estimate that more than \$500 billion in business costs will be incurred in an attempt to avoid Y2K problems — and that as much as \$1 trillion may be incurred in business delays and attorney fees generated from Y2K computer-related problems. In addition to direct litigation, there will also no doubt be litigation over insurance coverage and exclusions, particularly since the projected Y2K losses are said to exceed the combined reserves of all North American property and casualty insurers. Many law firms now sport Y2K divisions, and the number of law firm web sites offering Y2K legal counsel is growing weekly.

Since only a few law suits have thus far specifically identified Y2K incompatibility as the chief claim, the judiciary's assessment of the likely level of Y2K litigation remains in the realm of speculation. However, there are a few steps courts can take now to begin making assessments and to plan for the future. These include monitoring Y2K litigation, nationally and locally, and ensuring that appropriate dispute resolution processes are in place to accommodate Y2K litigation.

Of course, for courts, as with other governmental entities and the private sector, the first priority must be to ensure that internal systems will not be affected. Court information officers should be working closely with consultants and/or hardware and software vendors to ensure that dockets run smoothly and that the integrity of fiscal records will be maintained. This is particularly important for courts to monitor since, according to a recent survey by the National Association of Counties, only half of the nation's 3,069 counties had strategic plans in place to deal with

potential computer failure caused by the Y2K problem. At a minimum, courts should ensure that language is added to existing contracts with vendors to ensure negotiation and mediation of Y2K problems that may affect the courts' internal functions.

Our purpose in this essay, though, is to discuss how courts can handle the Y2K litigation of others, not how to handle shortcomings in a court's own computer systems. Y2K cases may not be like the mass torts of the past few decades. They may not slide easily into the similar damages classifications of the asbestos cases, nor have the causation similarities of the silicone gel implant cases. Although some disputes allow for easy consolidation, this may not be true for many Y2K cases because they will arise in many different ways, involving diverse parties. More than ever before, and to borrow a quote from Frank Sander and Stephen Goldberg, we'll need to examine how to "fit the forum to the fuss."

If the legal web sites offer any clues as to the likely causes of action, courts are most likely to see personal injury claims, product warranty cases, board of director breach of fiduciary duty claims (for non-disclosure of Y2K problems), and contract disputes. Although the traditional litigation track may be appropriate in certain cases, courts should give consideration to assessing whether alternative dispute resolution (ADR) processes might be more appropriate. Among the most amenable dispute resolution processes for Y2K disputes might be mediation, non-binding arbitration, specialized dockets and masters, and early neutral evaluation.

MEDIATION

Mediation is a confidential, structured process through which a neutral person or persons assist the disputing parties themselves to arrive at a mutually satisfactory and binding resolution

of a dispute. Mediators do not have the power to impose a decision. Instead, they are trained to help parties communicate and explore creative solutions to their problems. Mediators keep parties focused on the future instead of dwelling exclusively on the past.

Looking forward is critical when continuing relationships are involved, such as with vendors and consultants. And mediation can be successful even if parties cannot settle the entire dispute, because it can help them to resolve those issues capable of resolution, and isolate issues only courts can decide, thereby speeding the pace of litigation.

NON-BINDING ARBITRATION

Court-annexed, non-binding arbitration programs for personal injury cases are commonplace in many areas. Generally, courts refer cases likely to be limited in damages. Upper limits for these programs vary by jurisdiction, but range from damage ceilings of \$25,000 up to \$150,000 in some programs. Arbitrators are often volunteer attorneys or attorneys compensated on a per case basis; honorariums may range from \$50 to \$300 per case. Usually programs allow either party an appeal to a court, but sanctions and costs (sometimes including the other side's attorney fees or costs incurred after arbitration award) may be imposed on a party that does not significantly better its award.

SPECIALIZED DOCKETS/SPECIAL MASTERS

Some Y2K cases may be extremely complicated, calling for specialized technological expertise to assist in unraveling complex computer hardware or software issues. And damages may be difficult to calculate, calling for an in-depth understanding of accounting and business practices.

If there truly is a flood of Y2K litigation, a specialized docket may be attractive to litigants, as well as to the judges

in the jurisdiction. Panels of judges skilled in Y2K issues could be designated to hear these cases. Alternatively, or in tandem, special masters could be appointed by judges to help resolve complex discovery issues or to make fact findings.

EARLY NEUTRAL EVALUATION

Early neutral evaluation is a non-binding settlement technique designed to assist parties and counsel in resolving disputes early, rather than later in the life of a case. A respected neutral with experience in the field serves as the evaluator. After hearing a brief presentation of the evidence from all parties, the evaluator provides a non-binding analysis of the case. The evaluator may then help the parties negotiate a resolution if mutually agreed to by the parties.

MONITORING Y2K

Information technologists, business people, and lawyers all seem to agree that Y2K problems will begin surfacing in the first quarter of 1999 as businesses running two-year budget (or other) projections run beyond December 31, 1999. And while difficult to gauge at first whether an action is filed as a Y2K dispute (unless a special case code is adopted to better identify filings), courts should closely monitor whether actions appear grounded in Y2K issues.

Judges, at early scheduling or settlement conferences, can recommend any of the above processes, particularly for cases in which the parties to the suit (e.g., businesses and computer consultants or vendors) need to continue working together to solve an urgent computer systems problem. The collaborative mediation process, for example, would help parties focus on immediate solutions better than parties engaging in the adversarial litigation process.

Another option would be to enact a rule of general application — or to enter an early order in a specific case — requiring parties to engage in an ADR process by a time certain in the case (for example, sixty days after the answer is filed). Another, less intrusive, alternative is to require parties to state (perhaps in a pre-trial statement) that they considered an ADR option, to discuss what process they used, or, if they didn't use an ADR option, why not, and which

party declined. Hawaii currently has such a rule for all civil cases in its court of general jurisdiction. See Hawaii Cir. Ct. R. 12.

If it becomes clear that Y2K filings will seriously impact the court's caseload and that ADR is required to assist in managing the cases, creating special mandatory programs, such as non-binding arbitration or mediation programs, may be the most appropriate response. Because the programs will be court-connected or supervised, there will be adequate judicial supervision of both the procedural and substantive aspects of the programs. There are many models the programs could follow, including referral to panels paid by the courts, volunteer panels, and private providers.

It is imperative that courts monitor the Y2K situation in the months ahead. If Y2K litigation does become problematic for docket management, as many speculate, courts may have some months to create appropriate solutions. For some states, creating a new category to complaint filing forms may be viable. This case code or category would be one that asks plaintiffs to note (in addition to all existing requirements) whether the cause of action arises out of a Y2K problem. By monitoring the number of these cases, in addition to existing contract, tort and other pre-existing categories, court administrators can determine whether there really is a Y2K litigation caseload problem. If so, they will have a better understanding of the magnitude of the problem, its potential impact on the courts, and the types of cases that fall into the Y2K category. All of these steps will give decision makers more information to help them best craft reasonable alternatives. The Hawaii Judiciary has already begun to implement a system to monitor filings in its trial courts and at the appellate level. Michigan's State Court Administrative Office is monitoring Y2K litigation at both the state and national level.

CONCLUSION

The crystal ball is not yet sufficiently clear for anyone to see what anticipated Y2K problems will mean for courts. But there are steps courts can take to keep a current inventory of Y2K disputes and to create processes to facilitate their resolution. At a minimum, courts should

closely monitor Y2K litigation nationally to best guide the development of Y2K case management strategies.



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