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YEAR 2000 & COMPUTERS - YOU CAN RUN BUT YOU CAN'T HIDE -

LEGAL AND BUSINESS ISSUES ABOUND

By Robert Kain and Greg Medalie

As we approach the year 2000 (Y2000), old computer systems, computer hardware, and software must operate and accept the digital equivalent of "2000." Some computers and software use the binary equivalent of two digits, e.g. "97" to represent "1997," rather than four digits. The year 2000 may be recognized as "1900" by these computers. This is the so-called "millennium bug." Some commentators predict massive and catastrophic consequences [1] including a world wide recession. [2] As of late 1997, credit cards with year 2000 (herein "Y2000") have been rejected by credit card readers in cash registers and stores [3] and a class action lawsuit has been filed in California against a software developer alleging that a computer system sold prior to March 1997 fails to properly recognize year dates beyond December 31, 1999. [4]

Computers and computerized systems are widely utilized in society. They operate machines that manufacture goods, monitor cash flow, inventory and raw goods used in manufacturing processes. The date fields utilized in automated teller machines (ATMs) and credit card readers confirm card expiration dates to ensure that the credit or ATM card is initially valid. Lawyers use calendaring and docketing systems to track production and use accounting programs to age accounts receivable and monitor year-to-year and quarter-to-quarter performance by comparing revenues and expenses. Will the existing accounting programs recognize that a check written on January 1, 2000 is dated after the check written on December 31, 1999? Will the database program maintained by the litigation paralegals recognize that the "smoking gun" letter written on January 15, 2000 was written after a letter dated December 15, 1999? In electronic ordering and invoicing systems, computer date fields showing the year date are critical elements in the electronic transaction. Will the client's computerized billing system, which electronically sends bills to Medicare and third party insurers, work on January 1, 2000? Will the client's million dollar health care practice be bankrupt in two weeks if the company cannot process these current invoices?

Attorneys are both counselors and advocates for clients. Counselors provide pro-active consulting services establishing and preserving our client's assets, intellectual property rights, and contractual rights and obligations. This pro-active consulting and transactional work can be compared to litigation services which are generally reactive and seek to shift an economic burden from clients to third parties. Solutions to the Y2000 problem are initially presented herein from the perspective of a pro-active transactional lawyer (a counselor) and subsequently presented from the viewpoint of a litigator (an advocate). This article also generally addresses the issue from the viewpoint of users or consumers of computer systems as compared with sellers or vendors of those systems and products.

The Transactional Lawyer

Risk assessment is the key element to handle Y2000 problems. Lawyers can assist their clients in identifying, quantifying and developing solutions to solve Y2000 computer failures or deficiencies. In order to establish a framework to analyze the Y2000 business risk, the Business Model in Table 1 may be utilized to isolate mission critical aspects of the business. Mission critical functions or tasks are operations which are so important that, if the function fails or if the task is not completed

with a period of time, the business fails to achieve an important business goal, e.g., delivering product on time to a large customer for sale during a stated retailing season.

BUSINESS MODEL
Table 1

Inputs		Client's Business		Outputs
Goods		Production		Goods
Services	- - - - - - -		- - - - - - -	Services
Information		Management Controls		Information

The Business Model is helpful in compartmentalizing, isolating and initiating a solution to the Y2000 problem. As an example of a manufacturing operation, the client purchases certain raw materials and goods from its suppliers. These goods are "inputs" to the client's business. In addition, the client retains the services of an accountant who delivers accounting services to the managers and directors. These accounting services are "inputs" which are utilized and are sometimes further processed in the client's business as "management controls." Management controls are information systems which monitor the operation and efficiency of a business. For example, monthly, internally generated accounting reports are part of a management control system. Year end accounting statements from the accounting firm may be delivered to the client's business electronically as "information inputs." Further, the manufacturing client may receive other information inputs which are digitally formatted, such as electronic orders to purchase goods. These electronic purchase orders include a date field. Accordingly, if the date field is not Y2000 compliant, the client's business will be adversely affected. If the electronic order form has a four digit year date field but the client's computerized input interface is not similarly formatted, either the electronic order will be rejected as being improperly formatted or the longer year date field will adversely affect other data fields in the order.

Manufacturers convert raw materials into finished products as part of a production stage. To do this efficiently, the manufacturer utilizes "management controls" which control the production line (using computer systems embedded or built into the machines on the line), monitor the amount of finished goods or inventory on hand, monitor the amount of raw goods on hand, calculate the shelf life of those raw goods and finished goods and monitor the number of unfilled orders for the product. Book to bill ratios are typical management controls.

On the output side, the manufacturer's business delivers goods to his or her distributors or customers. Some goods contain computer chips or digital circuits which may present Y2000 problems. Additionally, the manufacturer may be involved in repair and warranty work. This work is generally classified as a "service." If a product operates improperly after the new millennium, the manufacturer's repair and warranty service department may be overwhelmed with claims. The manufacturer may also generate information such as electronic invoices to it's customer. These are "information" outputs. If the client operates a services business, such as a law practice, the business model is still useful. The law firm receives raw material in the form of written and oral

communications from its clients, opposing counsel, and third parties. If the law practice contracts out its litigation document processing, it receives services from a contractor. Additionally, the law firm receives electronic information in the form of electronic database search results and legal research data. The firm converts and manipulates this client data, documentation, and legal research information, and generates its own litigation databases as part of the "production" step. The firm generates "outputs," particularly in the form of written documents, to its clients, opposing parties and the courts. Services are also delivered and electronic information is sometimes delivered to its clients in the form of client-attorney interactive database systems. The law firm implements "management controls" which monitor the flow of work. These control systems include calendaring and docketing systems (showing project deadlines), inventory control in the form of work in progress reports and accounting information describing revenues, expenses and historic accounting data.

The transactional lawyer, in a pro-active environment, can assist his or her client to implement a Y2000 process outlined in Table 2. The end product of this process is a Y2000 plan to eliminate or moderate any adverse effectsY2000 problems have on the business. The process begins with a survey of the client's computer systems. An assessment is made to determine the risk of failure of "mission critical" functions.

> "Mission Critical" means applications that must function properly for the organization to meet the definition in the mission statement. Or more directly: Mission Critical means applications that must function properly for the organization to continue to do business, or survive.

> The risk to business if this (Mission Critical) application fails or produces erroneous results:

>> * Fatal --- will not be able to complete required legal or business functions

>> * Critical --- application can operate, but produces erroneous information due to calculations

>> * Manageable ---- application will continue to operate, and may produce erroneous information due to calculations, but a non-invasive workaround exists.

> Mission Critical [are those aspects of the business] ...essential to the effective operation of the business, i.e., without which the business could not function efficiently or competitively. If your company can't survive without it, it's Mission Critical. [5]

The survey outlined in Table 2 involves compiling computer system data, listings hardware and software suppliers who provided the computer systems, and making an assessment of the risk of failure of each computer system. The client's obligations or responsibilities owed to third parties are then assessed. This step focuses on business outputs. The survey then addresses the obligations of others owed to the client. These encompass business inputs. With this data compilation, the business owner and manager can locate a computer consultant and design a Y2000 plan utilizing cost-benefit analysis which accounts for risks, costs and provides a timetable for implementation of the plan.

THE Y2000 PROCESS

Table 2

1. Outline client's business with the Business Model. Utilize existing organizational departments to implement the Y2000 process.

2. Compile a list of all computer hardware, software and integrated systems.

    a. Identify inputs, outputs and management control systems.

    b. Identify the function of each computer system in each organizational department of the business. See form. [6]

3. Compile vendor data with the computer system survey or list.

4. Assess "risk of failure" for each computer system by function in each organizational department. Prioritize and quantify risks. Is the system or function mission critical?

5. Assess "risk of exposure" from lawsuits, lost business, etc., from third parties if a client based system fails.

6. Identify client's legal obligations to third parties.

    a. List Y2000 problems for goods output, sold or delivered by the client.

        i. Review product manuals, operator instructions, equipment manuals re: Y2000 compliant.

        ii. Check electronic integration of client's goods with the goods of third parties.

    b. Review express and implied warranties in contracts.

    c. Address total quality control issues.

    d. Review repair, replacement and installation services.

    e. Review electronic information output to others.

7. Identify legal obligations of third parties owed to your client.

    a. List Y2000 problems for goods delivered or supplied to the client (inputs). [7]

        i. Newly acquired computer systems should be Y2000 compliant. use simple contract language: "This product is year 2000 compliant."

    b. Analyze services delivered to client (inputs).

        i. Computer maintenance agreements.

        ii. Software update agreements.

    c. Electronic information received as an input by the client.

8. Locate a computer consultant. Design a Y2000 plan with a cost-benefit analysis. Account for risk. Establish organizational mileposts and timelines. Assign tasks to appropriate individuals.

9. Implement plan.

The degree of computerization of the client's business affects Y2000 compliance responsibilities. Further, if the client places greater economic reliance upon certain computerized systems, i.e., mission critical systems, the client's attention to Y2000 issues should be commensurate with the company's degree of reliance. In the earlier example of a health care provider relying primarily upon electronic invoicing to third party payers for payment of services delivered to its patients, the failure of either the client's internal billing software, the failure of the electronic clearinghouse or processing entity and/or the failure of the third party payer system to be Y2000 compliant may result in a severe financial crisis.

The pro-active transactional lawyer may contact his or her clients and initiate a discussion regarding the Y2000 problem. At a minimum, the client may be able to mitigate significant economic disruption to the business simply by requiring all newly acquired computer systems, all software maintenance agreements and all software update agreements to include a clause that "the services and/or product provided under this Agreement are year 2000 compliant."

Simply raising the issue with the client may not immediately result in a request for additional legal

services. However, the client may seek a legal audit of the company's contracts or a review of internal policies and procedures to mitigate Y2000 problems.

From a business standpoint, the client has three options other than to ignore Y2000:

(a) fix it yourself

(b) discard the system and replace it

(c) hire a contractor to fix the problem

The transactional lawyer, assisting in the implementation of the Y2000 business plan, should be concerned about issues relating to ownership of the system and software components affected by the plan and negotiating Y2000 consulting contracts. Table 3 outlines major implementation problems. These problems include (a) locating Y2000 compliant hardware and software (the replace versus repair business option); (b) the legal right of the client to modify his or her systems in accordance with contractual obligations and copyright law; and (c) negotiating and enforcing Y2000 consulting contracts. Attorneys should recognize that Y2000 contractors and critical management personnel involved in the Y2000 project will be in high demand through the year 2000. Use of employment contracts with appropriate confidentiality and non-competition clauses for key Y2000 personnel is important to limit a competitor's access to the client's Y2000 business plan and the knowledge acquired by key individuals. Anti-competition clauses should be carefully drafted in these employment and consulting contracts. [8]

Y2000 IMPLEMENTATION PROBLEMS
Table 3

1. Finding readily available software or hardware upgrades to fix Y2000 problems.

2. Locating source code and/or supporting documentation for existing programs used by the client necessary to fix Y2000 problems.

3. Does client have the legal right to modify computer systems (i.e., make derivative works [9]) in its possession?

    a. Does this Y2000 modification invalidate existing product warranties?

4. Locating qualified vendors to fix Y2000 problems in computer systems.

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5. Negotiating Y2000 contracts (i.e., guidelines, mileposts, performance standards - see Appendix A).

     a. Work for hire copyright clause vs. independent contractor and the need for copyright transfer clause.

     b. Protection of the client's ancillary intellectual property rights (patent, trademark, trade secret and copyrights) during the implementation of the plan.

     c. Non-compete clauses to restrict Y2000 consultants and employees from working with client's competitor.

6. Buying and understanding Y2000 compliant insurance. [10]

7. Bargaining power or ability to revise software and computer system maintenance agreements to add "This product is Y2000 compliant."

     a. Repair or replace clauses.

     b. Time to repair or replace.

     c. The ability of the vendor to perform in a timely manner.

     d. Remedies available for breach.

     e. Alternate sources of supply.

The United States government has proposed contract language for use by federal agencies. See Appendix B. The concepts embodied by these Y2000 contractual provisions are useful to the practitioner. This article does not address the impact of Y2000 problems on mass marketed software with respect to the newly proposed Uniform Commercial Code (UCC) Article 2B. [11] The National Conference of Commissioners on Uniform State Laws is finalizing UCC Article 2B in February, 1998. If UCC Article 2B is adopted in a few key states, such as Washington and Minnesota, under forum selection and choice of law contract clauses, Article 2B will govern a large percentage of mass marketed software because several major suppliers of computer software contractually select the law of these states in their mass market software contracts. [12]

With respect to publicly held companies, the officers and directors of those companies may be liable if they breach their fiduciary duty of care to the shareholders. This duty of care obligates the officers and directors to use reasonable diligence in the performance of their duties. This duty of care may also include a duty to inquire regarding the company's Y2000 compliance. The Securities and Exchange Commission (SEC) has issued a staff bulletin to remind public companies of the need to take into account Y2000 compliance issues, plans and costs. [13] In general, if the company is not Y2000 compliant and this failure has a material effect on the operation and financial condition of the company, SEC disclosure requirements may force the company to address Y2000 issues in publicly disseminated annual and quarterly reports. In mergers and acquisitions, Y2000

compliance issues may also be a factor.[14] Is it a breach of a seller's warranty if the business transferred to the buyer is not Y2000 compliant?

The Litigation Attorney

Generally, litigation attorneys react to crises presented by their clients. Typically, a client seeks legal guidance regarding the following issues: (a) how can the client quickly recover from the crisis and continue producing goods and services as it has in the past (damage control); (b) who will pay for this loss (shifting economic responsibility to a third party); and (c) how quickly can the lawyer and the client overcome the crisis and recover his or her losses from another party. Although some litigators may elect the "sue everyone" strategy, a better approach involves an analysis of the client's business as set forth above. Table 4 lists typical defendants who are at risk for Y2000 failures. Easily recognizable targets are computer hardware and software vendors, third parties who supply inputs to the client's business and consultants who participate in the Y2000 process.

WHO PAYS
Table 4

Computer hardware vendors

Computer software vendors

Consultants who recommended the computer system

Accountants who required the use of accounting software

Third parties who required the use of specified software for input and output data and information

Lawyers who draft the license contract

Economic responsibility can be shifted to others under contract law and tort law. Contractual liability can be established under (a) the terms of the contract; (b) theories of express warranty; and (c) theories of implied warranty.

Liability under an express warranty may arise based upon promotional materials delivered with the computer hardware, software or system, marketing and sales materials, user's manuals, operator's manuals and other technical manuals.[15] Implied warranties may be established under the Uniform Commercial Code (UCC).[16] However, there exists a question regarding whether the item delivered to the client is a good or a service[17] and whether the UCC covers transfers other than sales. Since most software is licensed or leased and not "sold," the UCC may not be applicable. Although goods are covered under the UCC, services are normally not covered unless the services are incidental to the sale of goods. In Florida, the courts apply a "predominant features" test in order to determine whether the UCC provisions are triggered.[18]

Under the UCC, the seller of goods provides implied warranties of merchantability and fitness.[19] The warranty of fitness is further subdivided into a warranty of fitness for a particular purpose[20]

and fitness for ordinary purposes contemplating by the use of the product by the purchaser.[21] For example, if a client acquires a computer program or software product in 1997, is there an implied warranty of fitness that the software will operate beyond January 1, 2000? [22] Is it reasonable to assume that the product life of the software exceeds three years? Does an express, two year warranty shield the provider from liability? If the vendor knows that the purchaser is obtaining the software product or computer system for a particular need, the purchaser may be relying upon the particular skill of the vendor. This may give rise to an implied warranty for a particular purpose.[23] Of course, litigators must review warranty clauses in contracts for computer hardware, software and systems.[24] To identify and locate these contracts, the analysis set forth above under "Transactional Attorney" may be helpful.

Under theories of tort liability, issues of fraud and misrepresentation in the sale or maintenance of the computer system, hardware or software should be considered. Fraud and misrepresentation requires that the client establish an intent to deceive on the part of the vendor and detrimental reliance on the part of the client.[25] In defense, the vendor may point to the written contract, evoke the parol evidence rule or rely upon the terms of the warranty exclusion, integration and merger clauses in the computer contract. If a vendor intentionally represents that a system is Y2000 compliant and it is not, and that representation caused the client to purchase the product, a negligent misrepresentation cause of action may be established.[26]

The hardware purchaser or software licensee may allege fraud in the inducement in order to shift the economic burden of complying with Y2000 problems to others. To establish this claim, the purchaser or licensee must show (a) that the vendor made a false statement of material fact; (b) that if the fact had been truly presented, the purchaser or licensee would not have entered into the contract; (c) that the defendant vendor made the false statement either with knowledge that it was false or knowing that it did not have sufficient knowledge as to whether it was true or false; (d) that the vendor intended to induce the purchaser or licensee to act on the false statement by entering into the contract; (e) that the purchaser or licensee justifiably relied on the false statement of material fact; and (f) that the purchaser or licensee suffered a damage or injury as a result.[27]

The theory of negligent misrepresentation[28] is closely associated with the theory of fraud in the inducement. If the vendor assures the purchaser or licensee that the computer system, hardware or software is Y2000 compliant when the vendor does not know, potential liability may arise due to negligence on the part of the vendor.[29]

Although not yet fully explored by the courts, there are potential professional malpractice theories that may be employed. Professionals represent themselves as experts or specialists in a certain field based upon their education, training, or experience. The courts sometimes impose a higher standard of care on professionals than on ordinary vendors. If a vendor holds himself out to be a Y2000 expert or at least to know about Y2000 problems and issues with the computer system, the higher standard of care imposed on professionals may establish liability for a Y2000 failure of the system or product. This is especially true with respect to computer systems or software that are custom designed for the client.[30]

Negligent design and strict liability tort theories may also be applicable. Strict liability does not usually attach if the client experiences only economic damages and negligent design claims may be barred by the economic loss rule.[31] However, personal injuries may arise due to the use of non-Y2000 compliant medical devices or avionic or traffic signal device failure.

Defenses

Defenses to Y2000 litigation involve the application of contractual provisions of integration, merger, limitations of liability and the operation of the warranty provisions. The Year 2000 Information and Readiness Disclosure Act, executed on October 16, 1998, enabled business to exchange Y2000 data during a short time frame (which expired December 9, 1998) without exposing the businesses to antitrust claims, defamation claims, and providing a evidentiary exclusion for Y2000 statements. [32] In addition, the purchaser's knowledge of Y2000 year issues may be a factor. Contributory negligence is a defense to an action for breach of warranty. [33] It is difficult to avoid the flood of public information regarding the Y2000 problems. Articles in newspapers, business and trade magazines may establish a threshold level of public knowledge regarding Y2000 issues. These documents may be used to show the degree of knowledge of the plaintiff. [34] If the plaintiff knows of Y2000 problems, and the vendor never made any promises that the product was Y2000 compliant, can the plaintiff recover under any theory? Is the availability of Y2000 updates a mitigating or an exculpatory factor? [35]

Maintenance agreements and computer hardware and software contracts sometimes include maximum monetary limits on the vendor's liability. Further, simple contract clauses providing that "the company will not be responsible for third party system failures" may shield the defendant from Y2000 problems in the distribution of information, goods or services. To avoid liability, governmental units may pass laws which make them immune from lawsuits. [36] Sovereign immunity may also shield government agencies from immunity. [37]

Lastly, a common defense will likely be that the injuries were caused by the actions of a third party. In order for the litigator representing a defendant to shift the economic burden to a third party, an understanding of the client's business and the flow of Y2000 date problems described above is critical.

In conclusion, the attorney who counsels his or her client may use the year 2000 as a platform to (a) enhance attorney-client relations and (b) help the client through a potentially troublesome time. Application of the ancient engineering theory "If it sain't broke, don't fix it" is a prescription for disaster. For the talented litigator, the foregoing analysis of mapping out a client's business, locating potential obligations and responsibilities and shifting the economic impact to others is helpful to initiate litigation or defend against a Y2000 claim.

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About the Authors:

Robert C. Kain, Jr. has practiced exclusively in the patent, trademark, copyright and computer law fields for almost 15 years in Dade and Broward Counties. His practice involves all phases of intellectual property: patent, trademark, copyright, computer, multimedia and trade secret law, related litigation in state and federal courts and administrative actions before the Patent and Trademark Office and before numerous foreign patent and trademark offices. Mr. Kain is a specialist in patenting computer hardware and software products, Internet-based transactional systems, and protecting computer programs under patent, copyright and trade secret laws.

Mr. Kain is a registered patent attorney with the U.S. Patent and Trademark Office. He taught patent law as an adjunct professor for 5 years at *Nova Southeastern Law School* in Ft. Lauderdale, Florida, and has published numerous articles in the intellectual property field.

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Endnotes:

1. Gartner Group, Inc., a widely regarded group of information technology (IT) and computer consultants, estimates it will cost between $300 billion to $600 billion to correct year 2000 problems. See "Senate Hosts GartnerGroup to Advise on How to Mitigate U.S. Effects of Year 2000" at URL http://www.gartner.com/aboutgg/pressrel/10798year2000.html. The Prudential Insurance Company of America expects to correct 125 million lines of code at a cost of $1560 million. See Roger Lowenstein, "The Year 2000 and CEO's Big Secret," The Wall Street Journal, July 25, 1996, at p.C1, col 3.

2. "Mutual Fund Forum-Time to Buy?" Barron's, November 10, 1997; see also "Millennium Bug :Will Year 2000 Fixes Create Giant Sucking Sound," Barron's, July 14, 1997.

3. To impose corrective measures, VISA has announced it will begin charging its 20,000 member banks $1,000 - $170,000 per month if their ATM's reject Y2000 credit cards.

4. *Caellan v. Symantec Corp.*, Case No. 772147 (Cal. Superior Ct., Santa Clara Cty., 1997); *Atlaz Int'l, Inc. v. Software Business Technologies, Inc.*, Case No. 172539 (Cal. Superior Ct., Marin Ct., filed Dec. 12, 1997) (breach of warranty, fraud and fraudulent and unfair business practices). See also *Produce Palace International v. Tec-America Corp.*, Case No. 97-330-CK (Maccomb Cty., Mich. Cir. Ct. 1997)(settled without trial) wherein supermarket owners allege that they have lost more than $10,000 and experienced more than 100 computer failures (crashes) as a result of allegedly defective cash register systems which do not recognize credit card expiration dates older than year end 1999. The allegations include breach of warranty, negligent repair, misrepresentation and breach of duty of good faith. Year 2000 lawsuits are collected and posted at http://www.2000law.com/html/lawsuits.html.

5. Marilyn E. Baxter, Year 2000 Project Manager, "Mission Critical," Cornell University.

6. The following form may be useful in compiling a list of software products:

Software Application Description Form

Software Application Name:

Software Acronym:

Number on Data Processing Flow Chart:

Major business functions:

Application receives data from:

Application processes data and distributes it to following software applications:

Is software application owned by your business: _____ YES _____ NO

If YES, identify vendor and identify license agreement:

Is source code available: _____ YES _____ NO

Is application subject to a maintenance agreement: _____ YES _____ NO

If YES, identify maintenance agreement:

The foregoing Software Application Description Form may be used in conjunction with a data processing flow chart which maps data flow through functional blocks. These functional blocks represent routines executed by computer systems or computer programs.

7. Commentators have identified problem areas with credit card and bank card systems, mortgage loan calculation systems, time locks on banks and vaults, security camera systems, automatic document destruction systems, "whopping" erroneous credit card interest and incorrect late mortgage fees.

8. Florida recently revised its statute regulating contracts restricting trade and commerce. §542.331 et. seq., Fla. Stats. (1996). Contracts restricting or prohibiting competition should be carefully drafted to take into account the specific time table which triggers a presumption of unreasonableness. For employees, any contract imposing a restrictive anti-competition covenant in excess of two years is presumed to be unreasonable. §542.335(1)(c)(1), Fla. Stats. (1996). See also John A. Grant and Thomas T. Steele, "Restrictive Covenants : Florida Returns to the Original 'Unfair Competition' Approach for the 21st Century," Fla. Bar J., Nov. 1996, p. 53. For a historic analysis see Tarna R. Kirby, "Defending the Former Employee Against Noncompetition Lawsuit," Fla. Bar J., Mar. 1988, p. 53.

9. If the vendor of the computer system does not provide an upgrade to fix the Y2000 problems and the contract prohibits modification of the software by the client, the client may have a qualified right under the copyright law to revise the code in order to make it operable beyond year 2000. *Ames v. Bonnelli*, 47 F.3d 23 (2 [nd] Cir. 1995)(the rightful owner of a program may make necessary changes to the software in order to continue to use the program).

10. AIG of New York and Minet Group of London have offered Y2000 insurance to selected financial institutions. "New Insurance Reassures Banks on Year 2000 Efforts," EFT Report (Feb. 26, 1997). Other Y2000 specific insurance products include J & H Marsh & McClennan Year 2000 Secure; J & H Marsh & McClennan Twenty First Century Insurance Policy; and AIG Millennium Insurance Policy.

11. A draft of UCC Article 2b (August 1, 1998) is posted at http://www.law.upenn.edu/library/ulc/ucc2b/26898.htm. Commentary can be found at http://www.ali.org/ali/ucc2list.htm

12. Washington is the home state of MicroSoft Corp. and Minnesota is the home state of West Publishing Co.

13. SEC, Division of Corporate Finance, Staff Legal Bulletin 5 (CF/IM) revised Jan. 12, 1998, http://www.sec.gov/rules/othern/slbcf5.htm. (the staff should remind public operating companies, investment advisers, and investment companies to consider their disclosure obligations relating to anticipated costs, problems and uncertainties associated with the year 2000 issue.). See also "SEC Interpretation: Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers," 17 CFR Parts 231, 241, 271, 276, Rel. Nos. 33-7558; 34-40277; IA-1738; IC-23366 (posted at http://www.sec.gov/rules/concept/33-7558.htm).

14. See also Jeff Jinnett, "Legal Issues Concerning the Year 2000 Millennium Bug," http://www.year2000.com/archive/NFlegalissues.html.

15. Express warranties are created by an affirmation of fact or promise which forms the basis of the bargain between the parties, any description of the goods and any sample or model. §672.313, Fla. Stats. (1997).

16. Unless excluded or modified by a written contract, goods sold by a vendor must be merchantable in that the goods pass without objection in the trade, are fit for ordinary purposes and conform to the promises or affirmations of fact made on the packaging. §672.314, Fla. Stats. (1965). If the vendor knows that the goods will be used for a particular purpose, an implied warranty arises. §672.314, Fla. Stats. (1965).

17. "Goods" are all things movable at the time of identification to the contract. §672.105(1), Fla. Stats. (1965). *Capital Associates, Inc. v. Hudgens*, 455 S.2d 651 (Fla. 4th DCA 1984); (video games, pool table and jukebox are goods); *Cardozo v. True*, 342 So.2d 1053 (Fla. 2d DCA 1977), cert. denied 353 So.2d 674 (books are goods under the UCC); *Hi Neighbor Enterprises v. Burroughs Corp.*, 492 F.Supp. 823 (N.D. Fla. 1980) (the UCC was applied to a transaction involving a computer system.).

18. *U.S. Fidelity & Guar. Co. v. North American Steel Corp.*, 335 So.2d 18 (Fla. 2d DCA 1976).

19. §672.314, Fla. Stats. (1965).

20. §672.315, Fla. Stats. (1965).

21. §672.314(2)(c), Fla. Stats. (1965).

22. *Atlaz Int'l, Inc. v. Software Business Technologies, Inc.*, *supra*. n. 4 (the purchaser of an accounting package for a computer system asserted an implied warranty of fitness that the system would be Y2000 compliant).

23. *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962) (doctrine of implied warranty by vendor of the quality and fitness of the item sold is founded on vendor's superior opportunity to gain knowledge about product).

24. Express and implied warranties may be excluded by a written contract. To exclude an implied warranty of merchantability, the writing must be conspicuous. §672.316, Fla. Stats. (1977).

25. *Babbit Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161 (11th Cir. 1994).

26. Vendor must make a knowing misrepresentation of a material fact. *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253 (Fla. 2d DCA 1994). A material fact is one that, if it had been properly disclosed, the other party would not have entered into the contract. *Atlantic Nat. Bank of Florida v. Vest*, 480 So.2d 1328 (Fla. 2d DCA 1985).

27. *Babbit Electronic Corp. v. Dynascan Cor.*, 38 F.3d 1161 (11th Cir 1994); *Royal Typewriting Co. v. Xerographic Supplies*, 719 F.2d 1092 (11th Cir. 1983); *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253 (Fla. 2d DCA 1994).

28. *Clements Auto Co. v. Service Bureau Corp.*, 298 F. Supp. 115 (D. Minn. 1969) *aff'd* as modified 444 F.2d 169 (8th Cir. 1971).

29. Knowledge by the vendor that the statement, relied upon by the purchaser, was false, or misrepresentations made without knowledge of their truth or falsity, or representations made when the plaintiff should have known of their falsity support a claim of misrepresentation. *Saunders Leasing v. Gulf Central Distrib.*, 513 So.2d 1303 (Fla. 2d DCA 1987).

30. An implied warranty of fitness for which the article was purchased arises where the purchaser notifies the vendor and relies upon the vendor's skill and judgment. *Atlantic Distributors, Inc. v. Alson Mfg. Co.*, 141 So.2d 305 (Fla. 1962).

31. The economic loss rule generally disallows tort recovery where (1) the parties are in a contractual relationship; (2) the injury was to damages of goods sold under the contract; and (3) there was no physical damage. 3 Bender, COMPUTER LAW §11.06, p. 11.28 (1996).

32. P.L. 105-271 (Oct. 19, 1998).

33. *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873 (5th Cir. 1978).

34. If the purchaser can discover the defect, this affects the warranty given with the goods. *David v. Davenport*, 656 So.2d 952 (Fla. 3d DCA 1995).

35. The offer to repair or refund the purchase price of the product affects the product's warranties. *David v. Davenport*, 656So.2d 952 (Fla. 3d DCA 1995).

36. Nevada has passed a law which immunizes state agencies from a failure to provide Y2000 compliant information. For a further analysis of a statewide Y2000 plan, see "Year 2000 Preliminary Analysis - Final Report," June 30, 1997, prepared for the State of Rhode Island, http://www.doa.state.ri.us/year2000/toc.htm.

37. *In re Jove Eng'g, Inc.*, 92 F3d 1539, 1549 (11th Cir. 1996).