

- SUBJECT:** Limiting liability for Year 2000 computer-date failures
- COMMITTEE:** Civil Practices — favorable, with amendment
- VOTE:** 9 ayes — Bosse, Janek, Alvarado, Dutton, Goodman, Hope, Nixon, Smithee, Zbranek  
0 nays
- SENATE VOTE:** On final passage, March 30 — 29-0
- WITNESSES:** *(On House companion bill, HB 9 - original version)*  
For — Gary Baird, Compliance Consortium Corp.; Will Davis, Texas Association of Life and Health Insurers; Eric Glenn, Texas Association of Business and Chambers of Commerce; Anthony Grigsby, Texas Civil Justice League  
Against — Steve Bresnen, Hartley Hampton, Texas Trial Lawyers Association  
On — Carolyn Purcell, Department of Information Resources
- BACKGROUND:** Potential year 2000 (Y2K) computer-date failures could occur because of the way computers read certain dates. Many computer programs, as well as computer chips, have only two digits for a date instead of four. Thus, the computer sees 1999 as 99. When the date changes to 2000, some computers erroneously may interpret the date as 1900 and others may not be able to function, while some computers may not have any problems interpreting that date.
- DIGEST:** SB 598, as amended, would establish prerequisites for bringing an action based on a Y2K date failure and would limit the liability of manufacturers and sellers of computer products when certain conditions, such as notice and offer of a correction, were met.  
**Affirmative defense: notice of cure.** SB 598 would create an affirmative defense to liability if notice was given to a claimant, the claimant was offered a cure or correction for the Y2K failure, and the cure would have prevented

the harm caused by the failure. To assert the affirmative defense for recent consumer products — mass-market products for home or small-business use sold after January 1, 1997, with a retail price of \$300 or less — the defendant also would have to show that the cost of the cure did not exceed the reasonable charge of delivery and installation. For other computer products, the defendant would have to show that the cost of the cure did not exceed the costs to develop, produce, deliver, and install the cure. Any cure or correction designed to work for a limited period of time would not excuse the defendant from liability after that time had expired.

The notice required in order to claim an affirmative defense to liability would have to include the name of the product, a description of the cure, and, for recent consumer products, a statement of the amount to be charged, if any, for delivery and installation of the cure. For other computer products, the notice would have to include the amount charged for development, production, delivery, and installation of the cure.

The notice would have to be received by the claimant 90 days before the harm was suffered or before the time needed to order, deliver, and install the cure before harm was suffered, whichever was longer. Notice could be provided by showing that the defendant delivered notice within that period or that the claimant received notice within the time limits. If DIR's Y2K website and toll-free telephone number, established by the bill, provided access to information from which a person could get the information required to be included in the notice, it would create a rebuttable presumption that notice had been delivered. That presumption could be rebutted by credible evidence that the claimant did not receive notice.

**Affirmative defense: reliance.** In an action based on the alleged falsity or misleading nature of a Y2K statement or warranty, SB 598 would create an affirmative defense to liability when the defendant reasonably relied on the Y2K readiness statement or warranty of an independent, upstream manufacturer or seller of the computer product, when such a statement or warranty was false or misleading, and when the defendant did not have actual knowledge that the statement was false or misleading.

**Admissibility of Y2K statements.** Statements made in an offer to settle or in the required notice would not be admissible to prove liability for a Y2K failure. Evidence of offering or promising to offer a cure would not be

admissible to prove liability except to the extent that it was evidence of a guarantee or warranty of the cure. Statements made while in the process of curing or attempting to cure the Y2K problem also would not be admissible to prove liability unless the statement was false, made with knowledge of its falsity, and the claimant relied on that statement to their detriment.

**Applicability.** SB 598 would apply to actions based on harm caused by the failure of a computer product, including a computer chip embedded in another device, or a computer service such as data processing or storage. However, SB 598 also would explicitly state many items the bill would *not* affect, specifically, actions based on death or bodily injury or workers' compensation cases. The bill would not apply to an action enforcing the terms of a written agreement that specifically provides for liability or damages for a Y2K failure.

SB 598 would state that its enactment would not create a duty nor a cause of action. It would not affect the immunity of any person under other laws granting immunity, nor would it waive sovereign immunity. It would not apply to disputes over coverage or benefits under insurance contracts. It also would not affect the "innocent retailer" provisions of products liability law that require a manufacturer to indemnify sellers for losses arising from product liability claims. SB 598 would not allow the Texas Tort Claims Act to apply to Y2K failures, nor could a public servant be held personally liable for property damage caused by a Y2K failure.

**Damages.** SB 598 would prohibit the award of damages for mental anguish, loss of consortium or of companionship, exemplary or punitive damages, treble damages under the Deceptive Trade Practices Act (DTPA), or consequential damages, unless reasonably foreseeable. Damage limitations would apply only if the defendant could show a good-faith effort to cure the claimant's possible Y2K problem. Exemplary damages or DTPA treble damages could be awarded if the defendant acted with fraud or malice as defined in the bill.

In actions where liability was alleged against more than one defendant, the judge would have to instruct the jury about proportionate responsibility in accordance with Civil Practices and Remedies Code, sec. 33.003.

**Statutes of limitations and repose.** SB 598 would require a cause of action based on a computer-date failure to be brought within two years of when the failure first caused the harm. It also would require the action to be brought within 15 years after the date of sale by the defendant. The 15-year limit would apply to individual components included in other products if they were sold at different times. This 15-year statute of repose would not apply if the seller expressly represented that the product would not manifest a Y2K problem. It would not reduce the two-year limitation period previously mentioned, nor would it extend any other state limitations period. SB 598 would apply the standard exceptions of being a minor or of unsound mind to the limitations and repose periods.

**Notice required to bring an action.** To bring an action, a plaintiff would have to provide 60 days' notice to a defendant. If the 60-day notice would prevent an action from commencing because of the statutes of limitations or repose, the claimant would have to provide notice within 31 days of bringing the action. Notice also would be required within 31 days of filing a cross claim, counterclaim, or third-party action. All proceedings would be stayed for 60 days after the defendant received the required notice. A defendant who did not receive the required notice could ask the court to abate (stay) or dismiss the action. The court would have to abate the action and require the claimant to provide notice within 31 days of the abatement. If notice still was not provided, the court would have to dismiss the action. A defendant receiving notice could inspect the computer product in a reasonable manner at a reasonable time and place.

**Offer of settlement.** The defendant could offer to settle the claim. The offer could include an offer to cure or correct the Y2K failure. Offers not accepted within 30 days could be filed with the court. If the court later found that the amount proposed in the offer was the same, substantially the same, or more than the amount of damages awarded, the claimant could not be allowed more than the lower of the settlement offer or the damages awarded by the trier of fact. If the court found that the defendant could not have performed the offer when it was made or that the value was misrepresented substantially, the offer could not be used to lower the award.

**Year 2000 website.** The Department of Information Resources (DIR) would have to establish a website and toll-free telephone number that would allow

the posting of information about Y2K computer-date information. The Internet address for the website would be *www.dir.state.tx.us/y2k*. Persons posting information on that site would be responsible for the accuracy of that information. Posting of information on that site would not allow Texas courts to maintain personal jurisdiction over a defendant who otherwise would not be subject to jurisdiction in Texas. The state could not be held liable for damages arising from the website or telephone number. DIR could contract with private vendors to fulfill its duties and those vendors would have the same liability as the state. DIR would have to have fulfill its responsibilities under SB 598 within 31 days after the effective date of the bill.

**Legislative intent.** SB 598 includes a lengthy findings and purpose section discussing the causes of the Y2K problem, the possible disruption of the economy because of that problem, and the hope that the prompt resolution of disputes would minimize the damage. It would state that the purposes of the bill are to:

- ! promote the well-being of citizens, the economy, and governments by avoiding or mitigating Y2K problems;
- ! establish legal incentives that encourage the development and implementation of solutions before the harm occurs;
- ! encourage parties to resolve disputes before litigation;
- ! discourage litigation on speculative theories of recovery seeking damages that are not objectively verifiable; and
- ! preserve the rights of citizens to seek damages for bodily injury or death by excluding those actions from the scope of the bill.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house and would apply to actions commenced on or after that date. The limitations period and statute of repose would apply only to actions commenced on or after September 1, 1999.

**SUPPORTERS  
SAY:**

The Y2K problem has the potential to become an economic catastrophe if many computer systems are unable process the change in date to January 1, 2000. While only eight months remains before that date, it is essential that the Texas Legislature act now rather than wait until after the damage is done. SB 598 would attempt to limit the harm caused by Y2K by providing incentives for the prompt correction of potential problems. The incentives are framed in the context of the civil liability system because many people have been

reluctant to offer or install offered cures because they hope to preserve rights in the civil justice system. SB 598 is designed to promote solutions to Y2K problems, to encourage a prompt resolution of disputes, and to discourage unbridled litigation in pursuit of “jackpot” verdicts when solutions fail.

Perhaps one of the biggest effects of the Y2K problem could be its impact on the civil justice system. Numerous suits already have been filed with mixed results, and many, many more are sure to follow. According to some predictions, the costs of Y2K lawsuits could reach a trillion dollars. Not only would unlimited Y2K lawsuits prevent people from correcting Y2K problems before they occur, but they could create a serious backlog in civil courts, perhaps preventing other cases such as personal injury or wrongful death cases from being heard in a reasonable amount of time.

SB 598 is a limited bill. It would apply only to certain actions for Y2K failures, and not to death, bodily injury, or workers’ compensation actions. It would not apply to actions based on written contracts dealing with Y2K failures. Many other exclusions, including those for sovereign immunity, insurance coverage questions, innocent retailer liability under products liability law, and tort claims act liability, ensure that SB 598 is narrowly crafted to fulfill its limited purpose of encouraging the resolution of primarily business-to-business disputes. While SB 598 would apply to companies performing Y2K remediation, such inclusion is essential to ensure that these companies continue to perform these services. Without such protection, the potential for lawsuits could drive up the costs of providing remediation services.

By providing a state Y2K website and telephone number, SB 598 would enhance awareness of potential Y2K problems and provide a central location for information about correction of potential problems. Many Y2K problems that consumers and small businesses may experience can be corrected with the downloading of “software patches” that can be installed easily over existing programs to make the software Y2K-compliant. Many people are aware of the Y2K problem and aware that solutions to their problems are available, but most have not taken the time to contact their software vendors or to search the Internet for fixes because of the time involved and the uncertainty of those cures. Others have been warned that if they install a patch on existing software, they could lose their rights to sue if that patch fails to address the full extent of the problem.

SB 598 would create an incentive for potential defendants to post cures on the Y2K website and toll-free telephone number by giving them an affirmative defense to liability if they post such notice. The notice would have to give the potential claimant an opportunity to implement the cure and could not cost that claimant more than the reasonable costs for the cure. A distinction would be made between recent consumer products, for which cures should be available with only the cost of delivery and installation, and other products that could require the manufacturer to develop a cure specifically for that potential claimant. In either case, the costs for the cure still would have to be reasonable. The bill also contemplates that vendors might offer such cures without any cost.

The statutes of limitations and repose included in SB 598 would help ensure that when Y2K claims were brought, they would be brought within a reasonable period of time. The notice required in order to bring a claim would give the defendant a chance to examine the problem and offer a solution to avoid litigation. The offer-of-settlement rules would be designed to create an incentive for claimants to accept an offer to cure a Y2K problem before litigation, rather than wait for the outcome of litigation on that problem. Correcting the problem as quickly as possible would help to limit the harm that could occur from the problem.

SB 598 would allow downstream sellers to rely on statements of upstream manufacturers or sellers about the Y2K compliance of products unless the seller had actual knowledge of the falsity of the compliance statement. That would protect consumers, including small business consumers, who relied on a seller's assurance that the computer product was Y2K-compliant. It also would ensure that sellers would not be held liable whenever a plaintiff, because of jurisdictional issues, could not sue the manufacturer or upstream seller of the product who made the false compliance statement.

By limiting damages to actual damages suffered due to the Y2K failure, SB 598 would limit incentives to use the civil justice system to gain a windfall recovery beyond what claimants would have been entitled to had they chosen to accept the defendant's good-faith effort to cure the potential problem.

Current law and procedure are inadequate for the efficient and fair resolution of most Y2K disputes. Y2K problems present many unique legal issues and policy considerations not addressed under current law. Consumers and

suppliers alike would benefit from a more predictable, specific law designed to meet those objectives.

Similar legislation is under consideration at the federal level. S. 96 by Sen. John McCain (R-Ariz.) would cap punitive damages, require 90 days' notice before an action could be brought, limit the use of joint and several liability, create affirmative defenses to liability, and set minimum standards for class-action lawsuits. While such limits, if enacted, would apply to state actions, SB 598 would not conflict with S. 96 in its current form but would expand upon it. It is essential that Texas enact this legislation in case Congress fails to act on S. 96 or other Y2K legislation.

**OPPONENTS  
SAY:**

SB 598 and other Y2K liability legislation in other states and on the national level would protect procrastinators in the computer industry from liability for a problem that they have known about for years and have failed to correct, even in many products released during the past five years. This legislation would penalize responsible business people who have spent a great deal of time and money addressing the problem and would reward irresponsible business people who have ignored it and now look to the government to bail them out. The bill also would fail to address the problems of people who bought their computer products before 1985.

SB 598 would place an unfair burden on consumers and small businesses, who would have to solve their own Y2K issues, while manufacturers and vendors of these defective products could escape virtually all responsibility. Many small businesses own software that would not be classified as a recent consumer product under SB 598 and thus could be charged exorbitant amounts for corrective fixes that should have been made to the software even before it was sold.

This bill would not encourage resolution of Y2K problems before it was too late, because in most cases, it already is too late. The year 2000 is only eight months away. That leaves little time for manufacturers and vendors to develop solutions if they have not done so already. Even if solutions are currently available, it will take some time to find consumers of these products, prepare a notice, send out that notice, and have consumers install the corrective solution before it is too late.



SB 598 could be used to limit damages or suits against companies providing Y2K remediation. These are companies recently or currently fixing computer systems, usually by reprogramming the code that operates the computer. These companies should not have their liabilities limited under a bill designed to promote resolution of Y2K problems. Instead, these companies should be held to a strict standard of liability if the remediation they provide fails to achieve the desired results because of the short time frame that their customers have for correcting their Y2K problems.

The evidentiary exclusions in SB 598 limiting the admissibility of certain Y2K statements would broadly exclude a number of communications that could be essential in trying a case, assuming that the plaintiff could overcome the significant obstacles to bringing a case in the first place. Without being able to use such statements, plaintiffs would have their hands tied in proving liability.

This legislation would attempt to make it simple for consumers to find Y2K information by providing a state-run website and telephone number for Y2K information, but a plethora of such sites already are available. Adding one more to the mix and providing for a presumption of notice for postings to that site simply would add to the confusion of consumers.

While it might make sense to have a 60-day cooling-off period to give the defendant an opportunity to fix the problem, this delay actually could hurt consumers and small businesses who need an immediate solution to problems that might arise after January 1. It would be catastrophic to a business if it had to shut down for 60 days while waiting for the computer manufacturer to decide whether to make a cure available. Instead of providing incentives for correcting the Y2K problem, this legislation would create a labyrinth of procedural opportunities to delay and avoid responsibility.

**NOTES:**

The committee amendment would add “or other relief” to the definitions of what parties could be seeking and by requiring the defendant to state the additional charges, if any, to obtain the cure in the notice sent relating to a potential Y2K problem.

Another committee amendment would require the notice for recent consumer products to state the amount that would be charged, if any, for delivery and installation of a Y2K cure. For other computer products, the notice would

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have to include the amount charged for development, production, delivery, and installation of the cure.

SB 472 by Ratliff, the emergency appropriations bill for fiscal 1998-99 enacted by the 76th Legislature effective March 18, provided \$152,585 for DIR to implement the Y2K website and toll-free telephone number.