

The Byting Edge

Year 2000 litigation update

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For Law Times

A growing number of year-2000-related lawsuits have been commenced to date. While some have been publicized, others may not as yet have been made public as the claimants may not want it known that they have a problem on their hands. Potential defendants may also wish to avoid publicity concerning products they have sold that are alleged to be deficient. In other disputes, statements of claim have been drafted but not yet filed due to on-going negotiations between the parties.

Most of the publicized lawsuits to date have predominantly consisted of class-action lawsuits against software vendors attempting to charge an upgrade fee for Y2K-compliant upgrades and fixes. In a number of these cases, separate class-action lawsuits have been filed against the same vendors by different law firms representing various plaintiffs.

The complaints in these cases typically allege that the defendants knew or should have known that the software contained a year 2000 problem at the time it was sold. As well, there are typically allegations of unlawful, fraudulent or unfair business practices, misleading advertising, breach of implied warranties of merchantability and fitness for purposes, breach of express warranties (for instance, conformance with specifications or documentation) and breach of consumer protection legislation.

Where possible, the complaints try to emphasize the serious consequences of the non-compliance.

For instance, some of the later complaints against Medical Manager Corp., a popular target that has been named as defendant in

more than half a dozen class-action lawsuits, allege that the software "poses a clear and present danger" of risk of harm to the plaintiffs' patients who are monitored by the software. Software functions include scheduling patients for chemotherapy, scheduling patients for procedures and post-surgical appointments.

An important issue is whether some of these suits were brought prematurely. In *Chilelli v. Intuit*, the claim concerned the online banking function in Quicken version five, which was not expected to fail until the year 2000. An order issued Aug. 27 by a New York court dismissed the complaint for not adequately alleging any injury since there is no contention that the defect had become manifest (the plaintiff subsequently filed an amended statement of claim).

However, other cases demonstrate that it may not be necessary to wait until the year 2000 in order to suffer harm. For instance, in *Qual-Craft Industries v. RealWorld Corp.*, some users of RealWorld's accounting software attempting long-term financial projections had begun experiencing year 2000 problems as early as 1997.

In *SPC v. NeuralTech*, the plaintiff alleged that they would need to receive the year 2000-compliant release of its credit card processing system by Oct. 31 or it would be impossible to implement the application within the remaining time frame before a malfunction could be expected to occur.

There have also been a small number of well-publicized non-class-action lawsuits over non-compliant systems.

The first, *Produce Palace v. Tec-America Corp.*, was settled, with the manufacturer agreeing to pay \$250,000 (US) and the co-defendant distributor agreeing to

pay \$10,000 (US).

Earlier this year, a number of other class-action lawsuits had also been settled, with the vendors agreeing to provide Y2K upgrades at no charge (and in some cases, legal costs to the plaintiff law firms). Accounting software vendor RealWorld announced in early January that it would provide free and discounted software upgrades at a cost that may total as much as \$50 million.

Interestingly, in some cases, potential defendants are pre-emptively filing actions for declarations that they are not liable. For instance, the dispute in *Andersen Consulting v. Baker Inc.*, concerned assistance that Andersen had provided in the selection, design, customization and implementation of a third-party system in the 1989-90 time period. Shortly after receiving a notice from a contingency-fee plaintiff law firm, Andersen Consulting pre-emptively filed for a declaratory judgment against a former client, claiming that it had fulfilled the terms of its agreement. The parties have reportedly since resolved their differences through mediation. In *Cincinnati Insurance v. Source Data*, after having been advised of a claim arising out of a year 2000 class-action lawsuit, an insurer also filed a claim for declaratory relief against the insured.

In relative terms, it is likely that year-2000-related litigation will be less prevalent in Canada as compared with the United States. This is due to our practice of generally allocating fees to the losing party, which tends to discourage frivolous lawsuits; the fact that contingency-fee arrangements are not generally available in all provinces (although such arrangements are permitted in Alberta); and the fact that class-action legislation

exists only in British Columbia, Ontario and Quebec.

The propensity to sue and the mentality concerning litigation are also very different between the two jurisdictions. For instance, year 2000 "how-to" litigation workshops held in the U.S. since 1997 have been very popular and well-attended. Similar programs are only now emerging in Canada.

Canadian litigation may be more likely to focus on:

- Individual claims against vendors and distributors for having supplied non-compliant products, and against service providers for interruptions in services;
- Claims against consultants and other professionals who assisted in the selection and implementation of non-compliant products;
- Claims against vendors and consultants who are late in the implementation of new year 2000-compliant systems intended to replace existing non-compliant systems; and
- Claims against insurers arising from the foregoing types of claims.

However, class-action legislation in some Canadian jurisdictions, including Ontario, is considered to be more favourable to

plaintiffs than the U.S. legislation. The year 2000 problem may provide the excuse some litigators have been looking for to try their hand at class-action litigation.

Another consideration is that certain types of actions, which may be barred by shorter limitation periods under the Uniform Commercial Code in the U.S., may nevertheless be brought in Canada. Also, based on recent comments made by Canadian securities regulators, many reporting issuers do not appear to be disclosing sufficient information concerning their year 2000 risks. If these companies are unfortunate enough to experience material disruptions, we can expect to see claims based on securities law violations alleging deficient disclosure regarding year 2000 issues in management's discussion and analysis and as part of continuous-disclosure obligations applicable to such reporting issuers. □

