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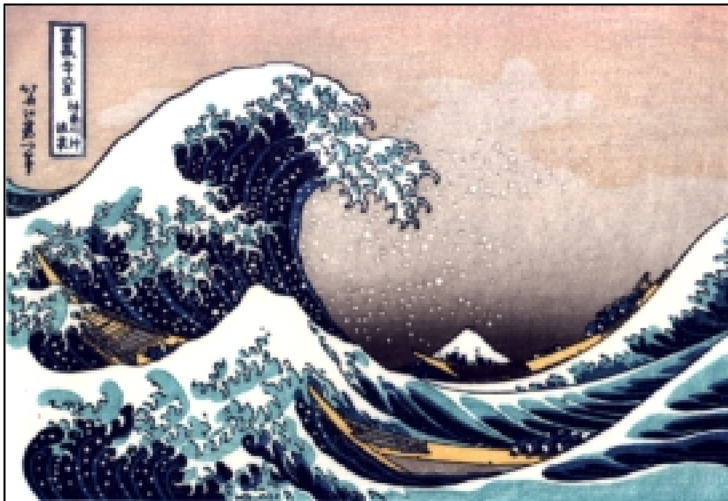
Column

The Y2K Tsunami:
Directors & Officers Should Prepare to Be Deluged†

Gavin Clarkson*



Great Wave off the Coast of Kanagawa‡

1. An earth-quake's first impact can cause rapid and devastating damage, but the impact of subsequent waves can be far worse and extend far beyond the epicenter of the original earthquake. Such may be the legacy of the so-called "Millennium Bug," or Y2K problem. The pundits disagree on exactly what will happen in the first week of January 2000: There may be a global, catastrophic meltdown of all systems, but probably not.

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† © 1999 by Gavin Clarkson. Cite to this Column as 5 B.U. J. SCI. & TECH. L. 3 (1999). Pin cite using the appropriate paragraph number. For example, cite the first paragraph of this Column as 5 B.U. J. SCI. & TECH. L. 3 para. 1 (1999). Tsunami is the Japanese word meaning "harbor wave" and scientific term for seismic sea waves generated by undersea earthquakes, landslides, or volcanic eruptions. *See* MERIAM WEBSTER'S COLLEGIATE DICTIONARY 1270 (10th ed. 1994). The term "Y2K Tsunami," as meaning the wave of litigation spawned by the Y2K computing crisis, was coined by Gavin Clarkson in 1998.

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‡ The Great Wave off the Coast of Kanagawa, by Hokusai, a famous late eighteenth- and early nineteenth-century Japanese artist. Part of the Thirty-Six Views of Fuji series (1823-29), this print, though often used in tsunami literature, is somewhat misleading in that context because tsunamis do not always manifest themselves as the huge breaking wave depicted in the print. Many tsunamis manifest themselves as hurricane storm surges.

There will, however, be some interruptions, which could lead to the largest wave of litigation the world has ever seen. With litigation costs estimated at anywhere from $300 billion[1] to $2 trillion,[2] Y2K has the potential to dwarf the asbestos and pollution litigation of the 1970s and 80s. Even the venerable Lloyd's of London has told underwriters that "the Year 2000 problem will lead to litigation costing $1 trillion in the United States alone."[3]

2. Most people have probably heard of the impending Y2K problem, but the potential litigation wave has been noticeably absent from popular discussions except in certain legal and insurance circles. It is hoped that this Column will give corporate officers and directors an overview of Y2K sources of legal liability and provide incentives to take appropriate steps with the aid of legal counsel. Unlike previous estimates of Y2K litigation costs, I have attempted to quantify officers and directors' exposure based on actual numbers, not estimates. Limiting my analysis to the S&P 500 companies, I have calculated the litigation exposure of the directors and officers of those companies to be approximately $75 billion dollars. This study, conducted at the Harvard Business School, is detailed later in this Column.

How did the Y2K Problem Arise?

3. The underlying causes of the Y2K crisis are not as benign as popular opinion surmises. One pervasive myth for why early software programmers used two-digit year dates is that way back when, "[m]emory was too expensive. Saving two digits was economically justified."[4] This myth was given economic verisimilitude in a 1995 study by Professor Leon Kappelman,[5] but even Professor

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[1] *See* Capers Jones, The Global Economic Impact of the Year 2000 Software Problem 58 (Jan. 23, 1997) (unpublished manuscript, version 5.2), *available at* <http://www.spr.com/html/year_2000_problem.htm>.

[2] *See* Joel J. Smith, *'2000 Bug' Keeps Lawyers Busy: Up to $2 Trillion in Lawsuits Expected Over Computer Glitch*, DET. NEWS, Feb. 6, 1998, at A1.

[3] Michael P. Murphy & Aidan M. McCormack, *Dissecting the Millennium Bug: An Analysis of the Insurability of Year 2000 Computer Failure Claims*, *in* UNDERSTANDING, PREVENTING AND LITIGATING YEAR 2000 ISSUES, at 369, 374 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G0-0012).

[4] Paul Strassmann, How We Got Here & Where Are We Going?, Address at the Fulcrum Information Systems Year 2000 Computer Crisis: The Litigation Summit (Nov. 9, 1998) (on file with the *Boston University Journal of Science & Technology Law*).

[5] *See, e.g.,* Leon Kappelman, *Year 2000 Upgrades: A Small Price to Pay*, COMPUTERWORLD, Nov. 25, 1996, at 33.

Kappelman has withdrawn his support of that position.[6] What should be even more troubling for practitioners in this area is the revelation that Y2K is not an accident, but was entirely preventable. Dr. Ed Yardeni, Chief Economist and Global Investment Strategist for Deutsche Bank Securities in New York, states:

> The root cause of the Year 2000 Problem is that we failed to manage the programming process. Our business and government managers liked the results, but took no interest in how it was done. Management rarely established any standards for their programmers and even more rarely insisted on documentation. As the programs became more complex and more vital to us, managers ceded more and more control to information technology staffs that became more independent and less accountable.[7]

Other Y2K experts, such as Paul Strassmann, argue that the Y2K problem resulted from "negligence."[8] In addition to challenging the myth of economic justification, Strassmann, like Yardeni, places the blame for Y2K squarely on management's shoulders.[9] Strassmann has also identified at least six opportunities to include date remediation in software maintenance since 1963.[10] As Machiavelli allegedly said, "Never mistake for conspiracy what simple incompetence can explain."[11] Such revelations make plaintiffs' lawyers drool.

What are the Sources of Y2K Lawsuits?

4. Y2K litigation will occur in three general areas. The first type of claim involves breach of contract or breach of warranty. These type of claims represent a company's attempts to "blame" someone else for its internal Y2K failures and will include problems involving embedded chips. Unlike software programs, these chips

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[6] *See* Leon A. Kappelman, *Millennium Crunch: Time To Debunk Y2K Myths*, INFORMATIONWEEK, Sept. 28, 1998, at 172.

[7] Edward Yardeni, *Year 2000 Recession?, The Problem in Brief: The Root Cause of Y2k* (last modified May 10, 1999) <http://www.yardeni.com/y2kbook.html#TOC>.

[8] *See* Paul A. Strassmann, *Year 2000 a 'Bug"? Swat That Word From Your Dictionary*, COMPUTERWORLD, Mar. 2, 1998, at 61; *see also* Strassmann, *supra* note 4.

[9] *See* Strassmann, *supra* note 8, at 61; Strassmann, *supra* note 4; Yardeni, *supra* note 7.

[10] *See* Strassmann, *supra* note 4.

[11] *See id.*

have defective code hardwired into their circuitry and could cause failures in all sorts of systems, from heart monitors in hospitals to control mechanisms in chemical plants. Most of the Y2K lawsuits already filed have been in this area,[12] with more being filed each week.[13]

5. Even if a company is Y2K compliant, it may still have a large exposure to Y2K liability if the company has suppliers or customers that are not Y2K compliant. The second area of Y2K litigation involves this type of issue. Y2K failures may cause ripple effects up and down supply chains, if non-compliant systems send corrupted data to compliant systems and cause business interruptions. To date, no complaints have been filed alleging this type of situation.

6. The third area of potential Y2K litigation involves management's breach of fiduciary duties. It is in this area that directors and officers will have the greatest liability exposure. Banks, mutual funds, or other investment and fiduciary organizations that fail to monitor the Y2K compliance of companies in their financial portfolios could also be subject to fiduciary or mismanagement claims if their holdings suffer losses from stock fluctuations due to Y2K failures. This area of litigation will most likely include shareholders' derivative suits, investor suits for the recovery of losses resulting from stock price fluctuation, and, perhaps, criminal prosecution for failure to disclose material information in Securities and Exchange Commission ("SEC") filings. At least eight such suits have already been filed.[14]

Why Should Directors and Officers Care?

7. Corporate law commentators have surmised that most Y2K litigation involving directors and officers will be based on the "duty of care."[15] The law imposes on directors and officers the responsibility for managing and directing the business and affairs of the corporation. Along with this responsibility, "the directors owe fiduciary duties of care and loyalty to the corporation and its

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[12] The first Y2K suit, Produce Palace Int'l v. Tec-America Corp., No. 97-3330-CK (Mich. Cir. Ct., filed June 12, 1997), settled in September 1998 for $260,000. *See* Bruce Caldwell, *First Year 2000 Case Settled*, INFORMATIONWEEK, Sept. 21, 1998, at 188. For a list of complaints filed as of March 1, 1999, see Exhibit 1, *infra*.

[13] A number of World Wide Web sites have appeared which provide detailed accounts of the various litigation activities. *See e.g.,* Hancock Rothert & Bunshoft LLP, *Year 2000 Liability Resource to Legal Information* (last modified May 11, 1999) <http://www.2000law.com/> (containing copies of pleadings and litigation updates).

[14] *See infra* Exhibit 1.

[15] *See* Dennis J. Block & Stephen A. Radin, *Year 2000 Liability Issues, Part I*, N.Y. L.J., Jan. 13, 1998, at 1; see *also* J. Travis Laster, *The Year 2000 Problem in Delaware: Preparing to Defend Shareholder Derivative Suits*, INSIGHTS, June 1998, at 12, 12.

shareholders."[16] Within the scope of this duty is the obligation to control, manage, and protect the assets of the corporation.[17] Directors and officers must act with the level of care that a reasonable person in similar circumstances would use.[18] If the directors or officers violate this duty of care, and, as a result, the corporation loses money, the directors and officers can be held personally liable and ordered to pay damages to the corporation.

8. The primary requirement of the duty of care is that directors and officers act on an informed basis. The common law standard of reasonable inquiry has evolved such that directors and officers "have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with the requisite care in the discharge of their duties."[19] Other states have codified the requirements for reasonable inquiry.[20] In either case, the primary requirement is that directors and officers act on an informed basis.[21]

9. It is vitally important to note that while many Y2K claims against directors and officers will be based on affirmative decisions and actions, a large number of potential claims could also focus on a board of directors's failure to act or to supervise adequately those who were responsible for addressing Y2K compliance. The derivative suit, *In re Caremark International Inc. Derivative Litigation*, may provide significant insight into the "duty of oversight" in the Y2K context.[22] In discussing whether directors would be liable for their alleged "unconsidered inaction,"[23] the court said

> [I]t would . . . be a mistake to conclude that . . . corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely,

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[16] Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989).

[17] *See id.*

[18] Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

[19] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[20] *See, e.g.,* CAL. CORP. CODE § 309(a) (West 1999).

[21] *See* Laster, *supra* note 15, at 12.

[22] 698 A.2d 959, 967 (Del. Ch. 1996).

[23] *Id.* at 968.

> accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[24]

The *Caremark International* court was even more direct when it stated that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable."[25] *Caremark International*, thus, indicates that director inaction can constitute a breach of the duty of care. Similarly, in *Rabkin v. Philp A. Hunt Chemical Corp.*, liability may arise when the directors of a corporation "abdicate their managerial responsibilities."[26]

What are Directors and Officers' Y2K Responsibilities?

10. The duty of reasonable inquiry would seem to indicate that directors and officers must take an active role in their company's assessment of Y2K risks. Even the "non-technical" are potentially liable for Y2K failures. Directors and officers will not satisfy their obligations by merely accepting an information technology department's assurance that everything "will be fine." The Y2K Tsunami will inundate "those who knew, should have known, or had reasonable grounds to know, and had a duty to act or speak, but did not."[27] Every decision that a director or officer makes regarding Y2K may be examined under a microscope. For every major Y2K decision, directors and officers must make sure that they have both "evidence of [the] facts considered and options available [as well as] evidence of [the] basis for [the] course of action taken."[28]

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[24] *Id.* at 970.

[25] *Id.*

[26] 1987 WL 28436, at *3 (Del. Ch. Dec. 17, 1987).

[27] Reed Katherein, Address at the Fulcrum Information Systems Year 2000 Computer Crisis: The Litigation Summit 13 (Nov. 9, 1998) (transcript on file with the *Boston University Journal of Science & Technology Law*).

[28] Gregory P. Cirillo, Evaluating Legal Exposures With a Structured Audit, Address at the Fulcrum Information Systems Year 2000 Computer Crisis: The Litigation Summit (Nov. 9, 1998) (transcript on file with the *Boston University Journal of Science & Technology Law*).

Why the Business Judgement Rule does not Necessarily Cover Y2K Liability

11. The Business Judgement Rule exempts from judicial review those board decisions based on an informed business judgement, even if those decisions later prove to be disastrous.[29] The rule, however, requires that decisions be *informed* decisions. As Gregory P. Cirillo, a partner at Williams, Mullen, Christian & Dobbins, puts it, "[t]he business judgement rule provides protection for informed decisions, not unsupported inaction. You would rather have to defend an informed decision that turned out poorly, than to defend naked inaction having the same result."[30] If a corporation's board of directors has "not made *any* decisions concerning their company's Y2K problems or [has] made decisions without seeking appropriate input, they may have a more difficult time winning a shareholder suit alleging a breach of fiduciary duty."[31]

12 The business judgement rule does not protect corporate inaction. "[T]he business judgement rule operates only in the context of director action. Technically speaking, it has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act."[32] Directors and officers can incur liability for failing to act to find and correct material problems or failing to act when they had, or should have had, serious suspicions of a problem.[33] In *Rabkin*, the court refused to reverse its earlier decision that "the business judgement rule does not apply to a claim . . . where directors allegedly failed to act because they were ignorant of the operative facts."[34]

13. Furthermore, the business judgement does not protect directors and officers from civil liability arising from false or misleading statements or failure to

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[29] *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

[30] Cirillo, *supra* note 28.

[31] Richard L. Nolan, *Connectivity and Control in the Year 2000 and Beyond*, HARV. BUS. REV., July–Aug. 1998, at 148 (emphasis added) (comments by Dennis J. Block & Stephen A. Radin).

[32] Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984).

[33] *See e.g.,* Hoye v. Meek, 795 F.2d 893, 896 (10th Cir. 1986) ("[D]irectors and officers are charged with knowledge of those things which it is their duty to know and ignorance is not a basis for escaping liability. Where suspicions are aroused, or should be aroused, it is the directors' duty to make necessary inquiries.").

[34] Rabkin v. Philip A. Hunt Chem. Corp., 1987 WL 28436, at *1 (Del. Ch. Dec. 17, 1987). *But see* *Aronson*, 473 A.2d at 813 (stating that "a conscious decision to refrain from acting may nonetheless be a valid exercise of business judgement and enjoy the protections of the rule").

disclose material issues relating to the Y2K problem in SEC filings.[35] In lawsuits by shareholders seeking to recover stock price losses, plaintiffs

> might point to statements by a corporation concerning the Year 2000 issue (for example, that the corporation's computer systems were [Y2K Compliant]) and allege that those statements were false or misleading. A shareholder also might point to the corporation's failure to disclose that its most important supplier or customer was ill-equipped to do business in the year 2000 and that, as a result, the corporation's business would be adversely affected.[36]

Silence, therefore, about Y2K could be false and misleading, particularly in light of the SEC requirements.

SEC Guidelines Have Created a Default Standard of Care for Directors and Officers

14. On July 29, 1998, the SEC issued statements that clearly delineate directors and officers' obligations with respect to Y2K.[37] Among other requirements, the SEC guidelines state that a company must perform a Y2K risk assessment and disclose any Y2K issues that may have a "material effect on the company's business, results of operations, or financial condition, without taking into account the company's efforts to avoid those consequences" or disclose that its risk assessment is not complete.[38] The risk assessment is a non-trivial requirement. In his analysis of the disclosure and risk assessment requirements, Sibley Reppert, President of LawRisk, Inc., states:

> A "complete" risk assessment requires the company performing the assessment to identify the third parties

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[35] *See, e.g.,* Securities Exchange Act of 1934 § 18, 15 U.S.C. § 78r (1999) ("Any person who shall make or cause to be made any statement . . . which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person . . . who in reliance upon such statement, shall have purchased or sold a security at a price affected by such statement . . . .").

[36] Nolan, *supra* note 31.

[37] Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers, Exchange Act Release No. 33-7558, 63 Fed. Reg. 41,394 (July 29, 1998) [hereinafter SEC Statement].

[38] *Id.* at 41,395.

> (vendors, customers, suppliers, etc.) with whom the assessing company possesses a "material relationship", and further requires the assessing company to take reasonable steps to determine whether those key business relationships are endangered because of potential Year 2000 problems. Beyond identification of material business relationships, a "complete" risk assessment also should include consideration of the efforts made to verify the readiness of third parties having a material relationship with the company performing the assessment. In addition, a "complete" assessment under the SEC Statement must take into account potential legal liabilities of the assessing company to third parties, including potential liability for breach of contract. Unstated by the SEC, but surely assumed, is a further requirement that a complete risk assessment must cover a company's own information technology situation and non-IT risks such as embedded systems.[39]

The SEC guidelines also require a company to disclose a "reasonable description of the most reasonably likely worst case Year 2000 scenarios," all of which require that companies be fully aware of their Y2K risks or at least be working towards such awareness.[40]

15. For Investment Advisers and Investment Companies, the requirements are even more rigorous. "In evaluating these risks, investment companies should consider whether Year 2000 issues present material risks for their investment portfolios as well as for investment company operations."[41] This statement and the accompanying guidelines indicate that investment companies must evaluate their investments and the corresponding Y2K risks and then advise their clients of those risks.

16. The net effect of the SEC guidelines is to establish a "standard of care" for Y2K awareness and decision making for companies subject to the SEC's jurisdiction. Directors and officers' ignorance of Y2K problems is indefensible, but so too is their lack of due diligence in seeking out information about their company's Y2K risks, even if they are not directly involved in the company's information technology operations. Although the SEC guidelines only apply to publicly traded companies, plaintiffs' lawyers will certainly adopt this "standard of care" as a

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[39] Sibley P. Reppert, *Year 2000: Assessing the Risks* (last modified Aug. 27, 1998) <http://www.lawrisk.com/dilemma.htm>.

[40] SEC Statement, *supra* note 37, at 41,400.

[41] SEC Statement, *supra* note 37, at 41,402 n.71.

measure for all companies' Y2K risk management. Therefore, all corporations should identify areas of risk in consultation with their attorneys.

Directors & Officers Insurance will not Necessarily Cover Y2K Losses

17. Most medium and large companies carry some form of directors and officers ("D&O") insurance. Compared to other types of insurance, such as business interruption, commercial general liability, errors and omissions, or product liability, D&O insurance is more likely to provide protection against Y2K related litigation. Given the uncertainty as to whether commercial insurance policies cover Y2K failures, however, corporations should carefully examine their D&O policies.

18. In almost all cases, D&O policy coverage will exclude fraudulent or dishonest behavior. According to one of the early pioneers of Y2K litigation issues, "[a]n exclusion of this sort may be asserted for a Year 2000 claim, particularly if the claim relates to SEC reporting failures."[42] Insurers are also likely to deny coverage if the directors and officers "failed to properly and adequately reveal the scope and breadth of their company's Year 2000 problem at the time the policy was purchased. Alternatively, insurers will contend that the failure to reveal information about the company's year 2000 exposure amounted to concealment and that the policy should be rescinded."[43] Regardless of how parties structure or interpret an insurance policy, insureds have a duty to prevent and mitigate losses under any insurance policy.[44] Insurance carriers are likely to cite this duty where a board of directors failed to address Y2K issues or made uninformed decisions.

19. Even if a company's insurance covers Y2K losses, the D&O policies' limits may still leave directors and officers exposed to personal liability to the company if the company has indemnified its officers and directors. A further danger is that "future policies will likely include specific exclusions addressing [Y2K]. Thus while existing D&O policies may provide some coverage, the future availability of this coverage is unclear."[45] Even policies that do explicitly cover Y2K losses, however, have limits. Some Y2K analysts predict that the litigation

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[42] Scott Nathan, Year 2000 and Risk Allocation, Address at the Fulcrum Information Systems Year 2000 Computer Crisis: The Litigation Summit 15 (Nov. 9, 1998) (transcript on file with the *Boston University Journal of Science & Technology Law*).

[43] *Id.*

[44] *See* Murphy & McCormack, *supra* note 3, at 383.

[45] James K. Lehman & Kevin A. Hall, *Year 2000 for Lawyers: A Legal Primer on the Millennium Bug, South Carolina Lawyer*, S.C. LAW., July–Aug., 1998, at 14, 17.

exposure for directors and officers of a Fortune 500 company could reach $400 million.[46]

20. Another area of concern is that most D&O policies are "claims made" policies, which means that for the policy to cover a loss, the insured must make a claim for the loss during the policy's coverage period. If a claim arises after the end of the policy's coverage period, or if an insurer adds a Y2K exclusion upon renewal of the policy, the directors and officers will be without any insurance protection.

Estimating the Size of Y2K Liability and Directors & Officers Exposure

21. As discussed above, estimates of the total size of Y2K litigation range from $300 billion to $2 trillion, but these figures are highly speculative. Y2K researchers, however, have attempted to predict directors and officers' exposure. Based on available research, approximately thirty-five percent of executives in the United States are actively addressing Y2K issues.[47] The remaining sixty-five percent are "not really taking actions that are energetic enough to have a high probability of achieving year 2000 compliance [due to starting too late or] applying only token resources to the problem, or both."[48] Researchers estimate that there is an eighty-five percent probability that untreated Y2K problems will cause significant business interruption and lead to litigation.[49]

22. Using the probabilities of various types of Y2K failures, we can develop a rough estimate of the size of the litigation aimed directly at executives. The S&P 500 companies' Y2K budgets average almost $80 million.[50] Capers Jones, the noted Y2K researcher, has developed a simplified model for estimating Y2K costs, using two types of companies: those companies that actively address Y2K problems or those that passively act.[51] For these two types of companies, there are two possible outcomes that could result from untreated Y2K problems: serious business failures

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[46] *See* Capers Jones, Executive Risks from the Year 2000 Software Date Problem (1998) (manuscript, *available at* <http://www.year2000.com/archive/risks.html>.

[47] *See id.*

[48] *Id.*

[49] *See id.*

[50] *See* Edward Yardeni, *Y2K Disclosure S&P 500 Companies: Lots of Laggards Third Quarter 1998*, Y2K REP. (Deutsche Bank Research, New York, N.Y.), Dec. 8, 1998, at 24, *available at* <http://www.yardeni.com/public/y_19981208.pdf>. It is somewhat distressing to note that, despite clear directives from the SEC, only 75% of the S&P 500 filings on record with the SEC contain the necessary Y2K budgeting information. *See id.* at 2.

[51] *See* Jones, *supra* note 46.

or minor business failures.[52] Thus, there are four possible scenarios based on the above possibilities. When actual SEC disclosure figures are plugged into the model, the model predicts a total of almost $75 billion in litigation exposure, with almost ninety-nine percent of that burden falling on the passive companies whose untreated Y2K problems cause significant business failures.[53] These companies comprise approximately 275 of the S&P 500 listed companies.[54] According to the model, each of these passive companies will face a litigation exposure of up to $480 million, with an average litigation cost per company of $265 million.[55]

23. The $75 billion total is only an estimate and is restricted to lawsuits brought against the directors and officers of the S&P 500 companies. It is important to keep in mind that there are numerous other possible types of anticipated Y2K litigation, in addition to the shareholder and derivative actions brought against non-S&P 500 companies.

There is Little Legislative Protection

24. On October 19, 1998, President Clinton signed into law the Year 2000 Information and Readiness Disclosure Act.[56] Although this act provides some liability protection, it does not provide any specific protection for directors and officers. Congress intended the Act to facilitate information sharing among companies and their vendors, suppliers, and customers to ease individual assessments of Y2K readiness.[57] The limitation of liability applies only to certain types of "statements" and in no way modifies the standard of care applicable to directors and officers.[58] Congress has considered several Y2K liability bills, but there is significant disagreement on several issues, including liability caps for directors or officers.[59]

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[52] *See id.*

[53] *See infra* Exhibit 2.

[54] *See infra* Exhibit 2.

[55] *See infra* Exhibit 2.

[56] Pub. L. No. 105-271, 112 Stat. 2386 (1998).

[57] *See id.* § 2.

[58] *See id.* § 3(11) (defining "Year 2000 Statement").

[59] *Compare* H.R. 775, 106th Cong. (1999), *with* S. 96, 106th Cong. (1999).

Conclusion

25. The Y2K Tsunami is just over the horizon, and officers and directors should be concerned. The litigation will be swift, massive, and will extend across all industries. Despite increasing mainstream media attention, most directors and officers may not fully appreciate the extent of their liability exposure. Even if an organization is behind in its Y2K assessments, it is not too late to mitigate the impending liability exposure from the Y2K Tsunami.

Exhibit 1 – Lawsuits as of May 1, 1999 in the Order Filed[60]

Shareholder Suits

25 Steinberg v. PRT Group Inc., et al.
26 Teague v. Peritus Software
27 Lindsay v. Peritus Software
28 Cohen v. Chan
29 Bennett v. Chan
30 Downey v. Chan
34 Ehlert and Ehlert v. Singer, et al.
39 Poller v. Micro Focus and Certain of its Officers and Directors

Insurance Claims

38 Cincinnati Insurance Company v. Source Data Systems, Inc. et al

Contract and Warranty Claims

01 Produce Palace International v. Tec-America Corp.
02 Atlaz Int'l, Ltd. v. Software Business Technologies Inc., et al.
03 Richard Capellan v. Symantec Corp.
04 Jean Marie Cameron v. Symantec Corp.
05 Paragon Networks International v.
06 Issokson v. Intuit, Inc.
07 Rocco Chilelli v. Intuit Inc.
08 Faegenburg v. Intuit, Inc.
09 Rubin v. Intuit, Inc.
10 Colbourn v. Intuit, Inc.
11 Courtney v. Medical Manager Corp.
12 Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.
13 Stein v. Intuit, Inc.
14 Qual-Craft Industries, Inc. v. Realworld Corp.
15 H. Levenbaum Ins. Agency v. Active Voice Corporation
16 Against Gravity Apparel, Inc. v. Quarterdeck Corp.
17 Pineville Community Hospital v. Keane,
18 Women's Institute for Fertility et al. v. Medical Manager Corp.
19 Glusker v. Medical Manager et al.
20 Rockland v. Medical Manager
21 College v. Medical Manager Corporation
22 Andersen Consulting (Young) v. Baker
23 Carder Buick-Olds Co., Inc., v. Reynolds & Reynolds, Inc.
24 Zee's Home Decorating Centers, Inc. v. Daceasy, Inc. et al.
31 SPC, Inc. v. NeuralTech, Inc.
32 Hannah Films Inc. v. Micron Electronics, Inc.
33 MVA Center for Rehabilitation, Inc. v. Medical Manager Corp.
35 Highland Park Medical v. Medical Manager, et al.
36 Cobb & Shealy, et al. v. Equitrac, et al.
37 ASE Limited v. INCO Alloy International, Inc.
40 Kaczmarek v. Microsoft Corporation
41 Mario C. Yu, M.D. v. Internation Business Machines Corp. et al.
42 Beatie, King & Abate, LLP v. Lucent Tech. Inc. and AT&T Corp.
43 Milton Bradley Corp. v. GARPAC Corp.
44 Modern Drummer v. Lucent Technologies
45 Morris v. InfoSoft

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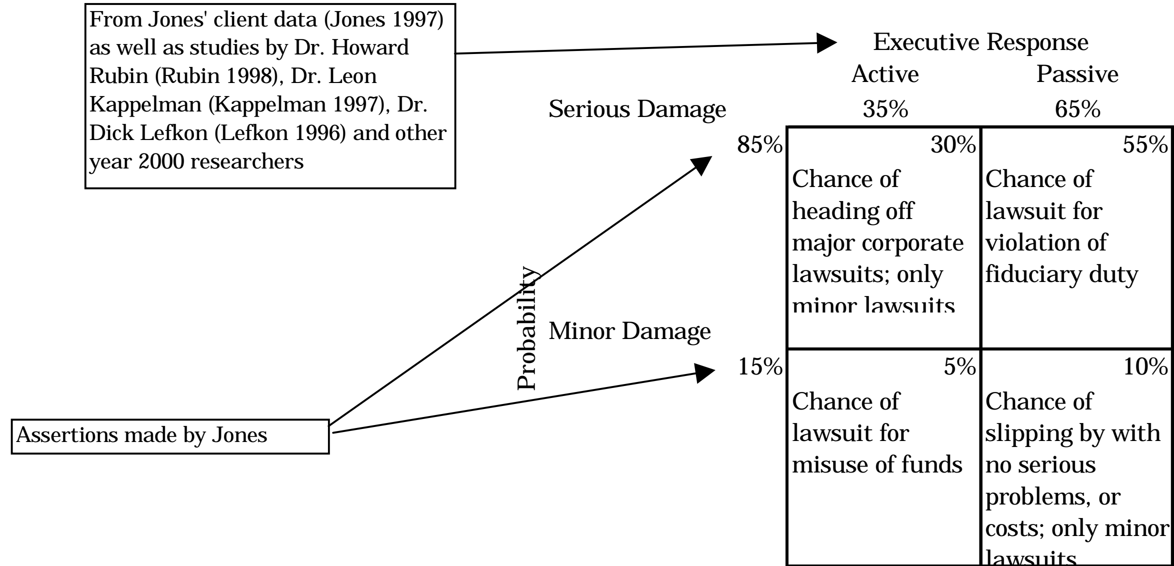
[60] *See* Hancock Rothert & Bunshoft LLP, *Lawsuits* (last modified May 18, 1999) <http://www.2000law.com/html/lawsuits.html>.

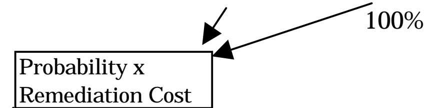
Exhibit 2 - Litigation Exposure for the Directors & Officers of the S&P 500



Average Y2k Remediation costs

Jones	$ 100,000,000	from client base of Fortune 500
SEC	$ 80,000,000	from SEC Edgar Database

Maximum Litigation Exposure (Jones model)		Jones	SEC	Prob
Passive/Serious	6x Remediation Cost	$ 600,000,000	$ 480,000,000	55%
Active/Serious	20% of Remediation Cost	$ 20,000,000	$ 16,000,000	30%
Passive/Minor	10% of Remediation Cost	$ 10,000,000	$ 8,000,000	10%
Active/Minor	30% of Remediation Cost	$ 30,000,000	$ 24,000,000	5%
				100%



Per Company Litigation Exposure (probability adjusted)	Jones	SEC	Probability x 500 = # of Companies
Passive/Serious	$ 331,500,000	$ 265,200,000	276.25
Active/Serious	$ 5,950,000	$ 4,760,000	148.75
Passive/Minor	$ 975,000	$ 780,000	48.75
Active/Minor	$ 1,575,000	$ 1,260,000	26.25

Segment Totals	Fortune 500 Jones	S&P 500 SEC	% of Group Total
Passive/Serious	$ 91,576,875,000	$ 73,261,500,000	98.95%
Active/Serious	$ 885,062,500	$ 708,050,000	0.96%
Passive/Minor	$ 47,531,250	$ 38,025,000	0.05%
Active/Minor	$ 41,343,750	$ 33,075,000	0.04%
Group Total	$ 92,550,812,500	$ 74,040,650,000	
Company Average	$ 185,101,625	$ 148,081,300	