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Planning Ahead

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Y2K bug calls for ADR as part of broad conflict management strategy

By F. Peter Phillips

The adage that "crisis begets opportunity" is as timely as ever. We approach the new millennium with predictions of a technological crisis, accompanied by fears that waves of systems failures will yield waves of business disruption, provoking waves of litigation.

In fact, however, we may be confronting not a disaster, but rather an opportunity to improve the way we approach social and economic problems. The "Y2K bug" may precipitate not an onslaught of disputatious finger-pointing, but rather a new model of rational, economically self-interested problem solving. Lawyers have a unique opportunity to lead, and many of the bar are taking welcome advantage of that opportunity.

ADR in Complex Litigation

The real Y2K problem

For corporate America, the Y2K bug presents complicated problems that are difficult to solve. Remediating these glitches is more complex than one may first think. It is not simply a question of going into mainframes and personal computers and fixing hundreds of thousands of program lines, daunting though that task may be. There are also embedded chips in machines, cars, gates, sprinklers, timers and robotics. Chips that are not used in date-sensitive operations may nevertheless be date-capable, raising the chance of unanticipated malfunction.

The real Y2K challenge for the business community, however, isn't even this costly remediation. Rather, it arises from the global interconnectiveness of computer and telecommunications systems. Company "A's" Y2K-compliant system is of little use if Company "B's" system, with which it must communicate to do business, is not also Y2K compliant. Moreover, both companies can be compliant but still not be able to communicate with each other if the system through which they communicate has not also been fixed. By way of illustration, a phone that works is useless unless the phone of the person with whom you wish to communicate also works – and both are useless unless the telephone line functions.

The real Y2K challenge for the business community isn't in upgrading chips and other hardware. Rather, it is the set of problems that arises from the global interconnectiveness of computer and telecommunications systems, and recognizing that disputes can be managed.

Major global corporations, as well as leading governments – including the United States and the European industrialized countries – have devoted enormous resources to the challenge of avoiding or minimizing Y2K disruptions. Smaller companies and less developed countries, however, have many fewer resources, and many more competing demands on those resources. Governmental subdivisions, such as counties and municipalities, are particularly vulnerable. These entities often provide or regulate natural gas, water, electricity, traffic lights, emergency response systems and other services vital to our everyday lives. Yet these are the entities least likely to have expended the resources necessary to be Y2K ready.

Types of disputes

Most informed observers assume that there will be some degree of business disruption, though no one can predict the scope or the consequences. Nevertheless, Year 2000 business disputes share certain salient characteristics:

- They are predictable in time – we know when they will happen;
- They are as a practical matter unavoidable;
- They will likely arise among mature and valued business relationships, such as a company's vendors, suppliers or customers;
- They will be numerous, and may be iterative in fact and/or legal theory;
- They will be multiparty and multivenue, often involving more than one claim against more than one defendant that could be asserted in more than a single jurisdiction; and
- A given entity will sometimes be a claimant (i.e., asserting a claim against a supplier who failed to deliver) and sometimes be a defendant (i.e., defending a claim brought by a customer by virtue of its own failure to deliver).

These characteristics suggest that,

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For a discussion of the AAA, the CPR and the JAMS/Endispute's Y2K efforts, see The Year 2000 Alternative Dispute Resolution: Diffusing the Litigation Time Bomb *by Judy Smith on the DR Section web site at www.abanet.org/dispute.*

overall, these disputes share one final characteristic: They are manageable!

Managing Y2K disputes through traditional legal procedures – seeking a finding that allocates fault and awards traditional contract or tort remedies – is of questionable practicality. A global manufacturer whose important supplier has failed to deliver an essential component is not made whole by an award of the cost of replacement, because replacements may not be found on the market in the time and quantities needed. In addition, the consequence of delivery failure may disrupt an entire assembly process, resulting in lost revenues far exceeding the value of the undelivered goods.

Similarly, the process of determining fault may be complex. Some deliveries will not be made because the maker failed to produce the goods; other failures may occur because the produced goods were not delivered due to a failure of third-party transport. Even commercial contracts featuring *force majeur* provisions will invite uncertain and inconsistent factual and legal determinations as to whether (for example) a trucking company's or an electrical utility's Y2K readiness was within the control of its customer.

Theories of fortuity and avoidability may also come into play in Year 2000 litigation. People have seen Y2K coming for many years, and many hundreds of millions of dollars are being spent to avoid or mitigate losses. The consequences of Y2K systems failures might not be accurately forecast and the responsibility for costs of systems remediation might not be clearly allocated. Nevertheless, particularly in an insurance coverage context, the argument that a disruption caused by a Y2K computer glitch was foreseeable will surely complicate claims for indemnification.

Finally, allocation of fault for Y2K business disruptions might seriously jeopardize the economic welfare of entire sectors of the American economy. No single industry can be looked to as an indemnitor for substantially all the losses that may be incurred by business.

Other considerations undermine the efficacy of litigating Y2K business disruptions. Court delay, endemic in any litigation, may be aggravated to paralysis if everyone who lost money through a Y2K failure filed judicial claims. Interests of confidentiality arise, because additional injury occurs if a systems failure is widely publicized. Antagonism provoked by litigation may seriously mar a valued and long-nurtured business relationship, risking lasting harm. In sum, it may be very unlikely that litigants of Y2K claims will receive a reasonable return on their litigation investment.

A new model

Clearly, if American business is to maximize productivity under these challenging conditions, a new model for resolving business disputes is needed. And it falls to the attorney, I suggest, to assume that burden. This is not the time to draw a neat line between what is a business problem and what is a legal problem. The business attorney's job must be to assist the client to manage business challenges, not to vindicate legal rights.

A new model presents itself: *the lawyer as problem solver.*

It is entirely appropriate that lawyers assume the role of problem solvers. We are trained to analyze problems. We are trained to think strategically. We are trained to counsel those who come to us seeking advice. We are trained to generate alternatives when confronted with complex issues. We are trained to see problems from different perspectives, to parse the underlying business interests of the various parties to a dispute, and to anticipate what one party may do in response to another. We possess substantive knowledge in areas of the law such as insurance, ERISA, tax, employment, commercial transactions, and other fields by which we render unique and distinct service to our clients.

Most important: We are affirmatively sought out by the business community. Clients with problems pick up the phone and call, not their parents or their spouses, but their lawyers. Lawyers are asked every day to help to solve problems, for the best of reasons: Because lawyers are trusted by their clients. We are, fundamentally, problem solvers – dispute resolvers – and it is time that we perceive ourselves as such.

This suggestion is by no means new. It has lain at the heart of our work for generations. Seventy years ago, Karl Llewellyn wrote in *The Bramble Bush*: "This doing of something about disputes, this doing of it reasonably, is the business of law."

Business disputes are not sudden, unexpected diversions. They are an indelible characteristic of commercial transactions, and can be managed just as human resources and inventory and interest rate fluctuations are managed. A business lawyer's job is to assist the avoidance, management and resolution of disputes. To do that job competently, lawyers must be adept at the various tools of dispute resolution, including alternatives to litigation.

The classic consensual ADR process of negotiating to impasse, followed by mediation, is credited with resolving as many as 90 percent of the business disputes to which it is applied. It would be a very substantial contribution to society at large, and a credit to our profession as lawyers, if we could contribute to the resolution of anything like that percentage of Y2K claims.

There is little dispute on the effectiveness of ADR to resolve business problems. The question is how to encourage business to use ADR as part of its dispute resolution management protocol.

The Y2K bug will likely spawn claims that are familiar to most lawyers, such as commercial and insurance issues, although some more novel technology-related issues can be expected.

A new commitment

The CPR Institute for Dispute Resolution has, for 20 years, urged American business to adopt pre-dispute ADR commitments or protocols as management tools. Consistent with this belief, CPR recently promulgated the *CPR Year 2000 ADR Commitment,* which more than 100 corporations have signed on behalf of nearly 1,000 affiliates and subsidiaries. The text of the commitment and list of signatories is available at www.cpradr.org (click "Y2K").

Signers of the *CPR Year 2000 ADR Commitment* will offer to negotiate – and failing negotiation to mediate – defined "Year 2000 Disputes." Yet they waive no legal right to sue anyone anytime, anywhere, for any reason. The commitment thus adds a management tool while taking away none of a signer's legal options, rights or obligations.

The commitment is supply-chain oriented. The full business utility of the commitment is realized when a company executes it, and then persuades its business partners to join it.

Drawing from its pool of skilled neutrals, CPR has also assembled a Year 2000 Panel of Neutrals consisting of individuals with substantive backgrounds in computer and technology law. Among the members of the CPR Year 2000 Panel are Raymond L. Ocampo, Jr., former general counsel of Oracle Corp., and J.T. Westermeier, former president of the Computer Law Association. We anticipate, however, that by far the lion's share of Y2K disputes will involve claims sounding in commercial law, insurance coverage and other familiar areas, not abstruse technological claims. For this reason, all 700 of CPR's Panel of Distinguished Neutrals stand ready to serve.

Indeed, in the main, Y2K does not require us to train new ADR practitioners or create new ADR processes. It just requires that we avail ourselves of the ADR resources and processes that we already have. Very little about Y2K disputes is new – there simply may be far too many of them for courts to handle. In Y2K, there may be no practical alternative to alternative dispute resolution.

Congress recognized this fact when, in the recent Year 2000 legislation, it required claimants to identify an "individual who has authority to negotiate a resolution of the dispute" (Sec. 7(a)(5)), required any prospective defendant to advise "whether [it] is willing to engage in alternative dispute resolution" (Sec. 7(c)(2)), and -- in cases where ADR was offered -- barred commencement of actions for an additional 60 days, to permit the ADR process to take place. (Sec. 7(c)(1)) Moreover, in the Act, "Congress supports good faith negotiations between parties when there is [a Year 2000] dispute, and, if necessary, urges the parties to enter into voluntary, nonbinding mediation rather than litigation." (Sec. 2(8))

By virtue of this new legislation, planning for ADR has now become a necessary component of planning for Y2K.

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For lawyers, the Y2K bug will place renewed emphasis on the fundamental skills of counseling, negotiating and problem-solving.

Lawyers already at work

The attorney's role in this process of managing disputes is multifaceted and pervasive. As foresighted transactional advisors, attorneys ensure that clients weigh the benefits and risks (if any) of adopting an ADR procedure in its contracts or its announced policy. Attorneys draft contractual ADR provisions. When a dispute arises, attorneys counsel their clients on the comparative costs, risks and likely outcomes of initiating ADR as opposed to asserting formal claims in litigation. Attorneys act as skilled advisors in negotiation. In mediation, attorneys are sometimes neutrals (facilitating the process) or sometimes party representatives (serving as sounding board, reality check, advocate, buffer, listener and creator of options). At the conclusion of the mediation, attorneys draft and review the document that memorializes the terms of the resolution.

Thus, the legal profession is already at the heart of problem solving in Y2K. Lawyers are already serving as trained and ethically responsive advisers and leaders in avoiding wasteful litigation – a fact that too few people know.

Public perception of attorneys' responses to Y2K is grossly mistaken. The bar is not gearing up for a litigation bloodbath. Rather, lawyers are counseling corporate clients on alternatives to litigation. Lawyers are drafting and endorsing ADR policies to handle Y2K disruptions. Lawyers are drafting ADR contract provisions, lawyers are signing them, lawyers are enforcing them and lawyers are serving as neutrals under them. Attorneys are helping to fix this problem, and in doing so they are exemplifying a new model of lawyering. The Y2K "crisis" has required the profession to act as problem solvers, and the profession has responded.