

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Admissibility of year 2000 and leap year processing statements

1. Wisconsin statutes do not use the term "reckless indifference". I changed that term to what is used in Wisconsin: "reckless disregard". I left out the term "entity" because it adds nothing to the meaning of the draft and is confusing if you look at what it means in a dictionary. (An independent being or existence.) Proposed s. 904.17 (1) (d) 4. was added although I cannot find anything like it in the federal law.

2. There are no exceptions to the evidentiary exclusion created for information provided to authorities under proposed s. 134.92 (2). At the same time, there *are* exceptions to the evidentiary exclusion created for year 2000 statements generally under proposed s. 904.17, as it was originally drafted. This draft combines the two exclusions by maintaining the total exclusion of information provided to authorities under proposed s. 134.92 (2) and by providing for the limited admissibility for all other year 2000 statements. *See* proposed s. 904.17 (2) and (3). Is that your intent, or should the circumstances for admitting year 2000 statements under proposed s. 940.17 (3) also apply to information provided to authorities under proposed s. 134.92 (2)?

Do you intend to require exclusion of the *information* provided in statements made to authorities, or do you intend only to prevent a civil litigant from getting at those statements during the civil litigation discovery process? By creating a blanket exclusion for *information* provided in statements to authorities, a person could bury all unfavorable information about its year 2000 preparations in a statement to an authority and then the information could never be used in a civil proceeding, no matter how false or misleading and no matter whether the information is available from sources other than the statement made to an authority.

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Information gathering

1. This draft incorporates the federal terms "year 2000 statement" and "year 2000 processing" with the exception of proposed s. 134.92 (1) (f) 4. Note that these terms are very broad, and have the effect of extending the scope of the draft to apply to noncomputer issues.

2. Application of a penalty to individuals who do not participate in an offense under proposed s. 134.92 (3) (b) may not be enforceable in this state under *Elections Board v. Ward*, 105 Wis.2d 543 (1982). However, this principle should not impair the validity of this paragraph as applied to actual participants in an offense.

3. Concerning the definition of “Year 2000 processing”, I realize this change reflects the federal text but syntactically it doesn’t work. Because “calculating” is included in the definition of “processing” the text results in the following: “‘Year 2000 processing’ means the [calculating, comparing, sequencing, displaying, storing], transmitting or receiving of date data ... from leap year calculations”. Also, the federal language extends the scope of the draft beyond the ‘Y2K’ issue to apply to all leap year calculations regardless of the year to which they apply, past or future.

Liability for processing failures

1. This draft covers only reactive ‘Y2K’ errors (processing, calculating comparing, sequencing, displaying, storing, transmitting or receiving) as opposed to errors involving the production or generation of data. Please let me know if this is not in accord with your intent.

2. Currently, the major exception to the sovereign immunity bar against state governmental units is to assert that a state governmental officer, employe or agent was negligent in the performance of a ministerial (nondiscretionary) duty. A state or local governmental officer, employe or agent will generally not be found negligent if the officer, employe or agent can show that he or she made a good faith attempt to resolve the problem that results in the allegedly negligent act or omission. This draft overlays this rule of law with a new rule that is narrower, for purposes of certain ‘Y2K’-related acts or omissions, in that “good faith” means: a) a remediation plan; and b) a reasonable effort to find and rectify flawed electronic computing devices. This may have the effect of limiting a finding of good faith under these circumstances if these two elements are not present.

4. You may also wish to consider the following collateral issues:

a. Currently, the state or a local governmental unit may, by contract, absolve itself of ‘Y2K’ liability. The party with whom the unit contracts must then assume the ‘Y2K’ risk of the governmental unit. This draft eliminates that option. In some cases, this will mean that the cost of this risk is passed back to the governmental unit by way of increased costs for goods or services provided. Because the party with whom the unit contracts has no way of knowing what the unit’s ‘Y2K’ exposure is, it is possible that it will cost that exposure on the basis of a worst case assumption. If the governmental unit is reasonably confident that it has little or no ‘Y2K’ exposure, it may therefore find it advantageous not to shift its contractual ‘Y2K’ liability in order to obtain the best possible price for goods or services.

b. In litigation, damages are of 3 types: 1) general or compensatory (direct, out-of-pocket damages); 2) consequential (indirect damages such as lost profits or increased borrowing costs); and 3) punitive or exemplary (damages awarded as punishment for wrongful conduct). Under ss. 893.80 (3) and 893.82 (6), stats., punitive damages are not recoverable against a local government or a state or local

governmental officer, employe or agent. General damages may include payments to which an injured party is now legally entitled such as a governmental benefit or payment in the ordinary course of business. It is possible that denial of all general damages may not be constitutionally enforceable. You may therefore wish to consider limiting 'Y2K' liability for consequential damages only.

c. Under ss. 16.528 and 66.285, stats., the state and local governments must pay interest on payments that are made late as a result of a 'Y2K' problem. This draft deletes this requirement in the situation covered by the draft because where there is no liability there is no liability for interest. Under ss. 814.04 (4) and 815.05 (8), stats., interest is generally recoverable in civil lawsuits from the time that a verdict or decision is made for the recovery of money, or in some cases from the time that offer of settlement is not accepted, until the judgment is paid (recovery of interest in lawsuits against the state is more limited). This draft does not change these laws. Because under this draft it is still possible to recover damages in some 'Y2K' situations, you may wish to provide an exemption for interest recovery in those situations.

d. You may wish to consider placing an expiration (sunset) date on the liability limitation created by this draft in order to provide an incentive for governmental units to remedy 'Y2K' problems within a reasonable period.

5. Concerning the definition of "remediation plan", because the term "calculate" is included in the definition of the term "process", the text results in the following: "Remediation plan' means a written document ... developed to implement changes to ensure that electronic computing devices will accurately [calculate, compare, sequence, display, store], transmit and receive date data ... from leap year calculations." The syntax in this sentence needs to be corrected. Also, this language extends the scope of the draft beyond the 'Y2K' issue to apply to all leap year calculations regardless of the year to which they apply, past or future.

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