

## ACT 115

H.B. NO. 1111

A Bill for an Act Relating to Year 2000 Errors By Computer-Based Systems.

*Be It Enacted by the Legislature of the State of Hawaii:*

## PART I

SECTION 1. The legislature finds that virtually every business and consumer in the State of Hawaii is potentially affected by the practice in many computer-based systems of utilizing the two low order digits to represent a four digit year. While this is common practice for handwriting dates, such as 1/1/98 as an abbreviation of January 1, 1998, it will lead to errors in computer-based systems that handle date data in and after the year 2000. This practice, along with the use of other erroneous date-related computer logic, came to be known as the "year 2000 problem."

The legislature further finds that in the absence of remedial legislation, the usual methods of determining responsibility and providing remedies for year 2000-related errors through the courts are likely to result in a multitude of lawsuits and the expenditure of substantial time and money in the litigation process. Additionally, the legislature finds that businesses are diverting money and other resources away from programs to remedy the year 2000 problem at this critical time to work on litigation defense and claims preservation strategies. This diversion of resources has the potential to impair completion of these essential year 2000 compliance programs.

The pervasive nature and fixed deadline of the year 2000 problem creates a unique situation which justifies a modification to the usual legal rights, remedies, and dispute resolution procedures available under the law.

This part is intended to provide protection for persons who exercise commercially reasonable efforts to identify and find solutions for computer-based systems that may be affected by year 2000 errors.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**"CHAPTER  
YEAR 2000 ERRORS IN COMPUTER-BASED SYSTEMS**

§ -1 **Definitions.** As used in this chapter:

"Claimant" means the plaintiff in a lawsuit or a person otherwise asserting a claim.

"Computer-based system" includes any computer or other information technology system, and any electronic device that controls, operates, monitors, or assists in the operation or functioning of equipment, machinery, plant, or a device using an embedded or installed microprocessor or chip.

"Consumer" means a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services.

"Core activities" means those business activities of a person which are supported by computer-based systems and which have been identified by the person, based on reasonable internal criteria, as being central to the continued operation of the business.

"Respondent" means the defendant in a lawsuit or a person otherwise defending against a claim, and includes those persons who are liable on a claim, but who were not made a party to the lawsuit or other assertion of the claim.

“Year 2000 error” means the failure of a computer-based system to accurately store, display, transmit, receive, process, calculate, compare, or sequence date and time data from, into, or between the years 1999 and 2000 and beyond, and leap year calculations.

**§ -2 Applicability.** (a) Claims properly filed by consumers in the small claims division of the district courts shall be excluded from the alternative dispute resolution procedure contained in section -4.

(b) The provisions in this chapter shall not apply to claims asserted by or against the State, its political subdivisions, a board, or a government employee, arising out or relating to a year 2000 error produced, calculated, or generated by a government computer system or other computer-based system, regardless of the cause for the year 2000 error.

As used in this subsection:

“Board” means any agency, board, commission, authority, or committee of the State or its political subdivisions that is created by constitution, statute, rule, or executive order to have supervision, control, jurisdiction, or advisory power over specific matters.

“Government employee” includes an officer or employee of the State, its political subdivisions, or board, including a person acting on behalf of a board in an official capacity, temporarily or permanently, whether with or without compensation.

(c) The provisions in section -4 may be modified or waived by express agreement. Any such modification or waiver shall be explicit, and no intent to modify or waive these protections shall be inferred.

(d) The provisions in this chapter shall not apply to claims for physical injury or death.

**§ -3 Blanket protections.** (a) No statutory minimum, treble damages, or non-economic damages shall be awarded under any theory of recovery for claims arising out of a year 2000 error unless one of the following is found to have occurred in addition to the other facts necessary for the award of such damages:

- (1) The year 2000 error was intentionally created by the respondent with the intent to cause damage or injury;
- (2) The respondent had entered into an agreement to discover or remedy year 2000 errors with the intent to defraud the claimant;
- (3) The damage or injury was caused by the dissemination of corrupted data to recipients:
  - (A) With actual knowledge that errors were occurring;
  - (B) Without reasonable efforts at warning; and
  - (C) Without reasonable efforts to correct the cause of the errors.

**§ -4 Procedure; alternative dispute resolution.** In any dispute in which a year 2000 error is alleged as a claim or a defense, within twenty days of service of the last pleading, the plaintiff shall contact the court in which the action has been filed and shall schedule a conference with the court. The court and the attendees shall discuss alternative dispute resolution options. The court may require each party to submit to the court prior to the conference a statement of any objections to alternative dispute resolution and the reasons for objecting. The court, in its discretion or upon motion by a party, during the conference or at a later date, may order the parties to participate in an alternative dispute resolution process subject to conditions imposed by the court. The cost for the alternative dispute resolution process shall be apportioned in accordance with the agreement of the parties, or as otherwise ordered by the court.

§ **-5 Software and hardware manufacturer liability.** Nothing in this chapter shall relieve a computer software or hardware manufacturer or vendor of any liability for a year 2000 error. A computer software or hardware manufacturer or vendor shall be directly liable to a person harmed by a year 2000 error to the same extent that the computer software or hardware manufacturer or vendor would be liable to a person in the absence of the provisions of this chapter. As used in the section, “computer software or hardware manufacturer or vendor” shall not include the State, its political subdivisions, a board, or a government employee.

§ **-6 Liability.** (a) All alternative dispute resolution awards and all judgments in a court proceeding which award damages on a claim arising out of a year 2000 error shall state whether the claimant and the respondent engaged in commercially reasonable efforts to avoid the impact of year 2000 errors.

(b) The trier of fact shall make an independent determination that the actions taken by a claimant or respondent constitute commercially reasonable efforts, based on the totality of the circumstances, and notwithstanding that the party’s efforts failed to avoid all year 2000 errors affecting its computer-based systems. In making the determination, the trier of fact shall examine the party’s efforts as a whole and shall take into consideration the sophistication of and resources available to the party. The burden of proof shall be on the party claiming that it engaged in commercially reasonable efforts, and the standard of proof shall be a preponderance of the evidence.

(c) A claimant or respondent shall not be found to have undertaken commercially reasonable efforts unless it has, at a minimum:

- (1) Implemented the remediation steps in timely fashion; and
- (2) Complied with any data formats established by a government regulation, a governing body (such as the National Automated Clearing House Association for certain financial transactions) or reasonably requested by the other party where the parties exchange electronic information which was impacted by the alleged year 2000 error.

(d) “Remediation steps” means, for a person addressing potential year 2000 errors, awareness, assessment, renovation, validation, and implementation. The reasonableness of those steps shall be determined by the circumstances, including the sophistication of and resources available to the person carrying them out.

- (1) The awareness step generally includes providing any supervisory personnel with information about the year 2000 problem and the designation of personnel to deal with the person’s potential for year 2000 errors.
- (2) The assessment phase generally includes a determination of the impact of potential year 2000 errors on the person (including those caused by computer-based systems controlled by the person and those controlled by others), identification of core activities, a physical inventory of potentially affected computer-based systems supporting core activities, prioritization of items with potential year 2000 errors to create a remediation schedule, determining whether the item records dates or processes date information, identifying and obtaining resources to address potential year 2000 errors, the development of a remediation strategy for each item with the potential for year 2000 errors, and the development of a recovery plan to handle those year 2000 errors which are reasonably likely to occur.
- (3) The renovation step generally includes the conversion, upgrade, replacement, or elimination of computer-based systems supporting core activities which are subject to year 2000 errors.

- (4) The validation step generally includes validating existing, converted, or replaced computer-based systems supporting core activities. "Validating" means:
  - (A) Testing the item to actually simulate the transition from December 31, 1999, to January 1, 2000, the processing of other date data which may reasonably be expected to trigger a year 2000 error, and a determination that no year 2000 error occurs; and
  - (B) Where the item has been renovated to correct known or suspected year 2000 errors, testing to assure that the item continues to properly perform its functions without error. This testing includes but is not limited to integration and acceptance testing. When testing is not reasonably possible, the validation step consists of securing documentation from the developer or vendor of a computer-based system supporting core activities that it is free of potential year 2000 errors. This includes vendors of core business functions, services, or supplies to understand the risk posed by the person's supply chain.
- (5) The implementation step generally includes the placing of renovated or replaced computer-based systems into production use. Where a computer-based system cannot reasonably be renovated, the implementation step generally includes the implementation of a work-around designed to avoid the effect of the potential year 2000 error. Additionally, this step includes the implementation of contingency or recovery plans for those year 2000 errors which are reasonably likely to occur.

Where applicable, the person's highest level of management should determine what efforts are to be made and what resources are to be used in carrying out the remediation steps, and should monitor the progress of the remediation steps.

(e) Upon a finding that the respondent engaged in commercially reasonable efforts, the respondent's liability shall be limited to the claimant's out of pocket expenses directly caused by the year 2000 error.

(f) Upon a finding that the respondent failed to engage in commercially reasonable efforts, the respondent shall be liable for economic damages directly caused by the year 2000 error.

(g) The amount awarded to any claimant shall be reduced to the extent that the claimant's failure to engage in commercially reasonable efforts contributed in whole or part to the damages sustained. Where two or more respondents are found liable for the claimant's damages, the proportion of liability assessed against each respondent shall be proportionately adjusted based on the extent to which it engaged in commercially reasonable efforts.

**§ -7 Consumer credit protection.** A credit reporting agency or a creditor doing business in the State shall not report negative credit information about a consumer if it knew or should have known that the consumer was unable to meet his or her financial obligation due to a year 2000 error by a computer-based system, including the inability of the consumer to transact financial business or make payments due to a year 2000 error by a computer-based system."

## PART II

**SECTION 3.** The legislature finds that Act 213, Session Laws of Hawaii 1998, established limited government immunity from claims arising out of year 2000 errors generated by a government computer system. The legislature further finds that the intent of this part is to extend the time frame covered by the immunity to beyond June 30, 1999, and expand the scope of the immunity to afford protection

as to claims arising out of year 2000 errors produced, calculated, or generated by a government computer system or other computer-based system. However, the legislature notes that this part shall not be deemed to impose any increased obligation, duty, or standard of care than is otherwise applicable under federal or state law, nor is it intended to create any new cause of action or remedy.

Thus, the purpose of this part is to amend the immunity provisions established by Act 213, Session Laws of Hawaii 1998, including the protection afforded to persons affected by a year 2000 error generated by a government computer system.

SECTION 4. Section 662-15, Hawaii Revised Statutes, is amended to read as follows:

**“§662-15 Exceptions.** This chapter shall not apply to:

- (1) Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;
- (2) Any claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers;
- (3) Any claim for which a remedy is provided elsewhere in the laws of the State;
- (4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;
- (5) Any claim arising out of the combatant activities of the Hawaii national guard and Hawaii state defense force during time of war, or during the times the Hawaii national guard is engaged in federal service pursuant to sections 316, 502, 503, 504, 505, or 709 of Title 32 of the United States Code;
- (6) Any claim arising in a foreign country;
- (7) Any claim arising out of the acts or omissions of any boating enforcement officer; or
- (8) Any claim arising out of [or based upon any failure of or error produced, calculated, or generated by a government computer system, which failure or error occurred prior to June 30, 1999 as a result of the system's not being year 2000 compliant, regardless of the cause for the system's not being year 2000 compliant. “Year 2000 compliant” means, with respect to a government computer system, that the system accurately processes date and time data (including, but not limited to, calculating, comparing, projecting, and sequencing) from, into, and between the twentieth and twenty-first centuries and the years 1999 and 2000,<sup>1</sup> and leap year calculations.] a year 2000 error produced, calculated, or generated by a government computer system or other computer-based system, regardless of the cause for the year 2000 error.

“Government computer system” means a computer-based system owned or operated by or on behalf of the State, its political subdivisions, or a board.

“Computer-based system” includes any computer or other information technology system, and any electronic device that controls, operates, monitors, or assists in the operation or functioning of equip-

ment, machinery, plant, or a device using an embedded or installed microprocessor or chip.

“Year 2000 error” is the failure of a computer-based system to accurately store, display, transmit, receive, process, calculate, compare, or sequence date and time data from, into, or between the twentieth and twenty-first centuries, the years 1999 and 2000 and beyond, and leap year calculations.”

SECTION 5. Chapter 662E,<sup>1</sup> Hawaii Revised Statutes, is amended to read as follows:

**“CHAPTER [1] 662E[1]  
[GOVERNMENT COMPUTER SYSTEMS AND YEAR 2000  
COMPLIANCE]  
CLAIMS AGAINST GOVERNMENT ARISING OUT OF  
YEAR 2000 ERRORS**

**[1]§662E-1[1] Definitions.** As used in this chapter:

“Board” means any agency, board, commission, authority, or committee of the State or its political subdivisions that is created by constitution, statute, rule, or executive order to have supervision, control, jurisdiction, or advisory power over specific matters.

“Computer-based system” includes any computer or other information technology system, and any electronic device that controls, operates, monitors, or assists in the operation or functioning of equipment, machinery, plant, or a device using an embedded or installed microprocessor or chip.

“Government computer system” [includes any computer or other information technology system] means a computer-based system owned or operated by or on behalf of the State, its political subdivisions, or a board.

“Government employee” includes an officer or employee of the State, its political subdivisions, or a board, including a person acting on behalf of a board in an official capacity, temporarily or permanently, whether with or without compensation.

[“Year 2000 compliant” means, with respect to a government computer system, that the system accurately processes date and time data (including, but not limited to, calculating, comparing, projecting, and sequencing) from, into, and between the twentieth and twenty-first centuries and the years 1999 and 2000, and leap year calculations.]

“Year 2000 error” is the failure of a computer-based system to accurately store, display, transmit, receive, process, calculate, compare, or sequence date and time data from, into, or between the twentieth and twenty-first centuries, the years 1999 and 2000 and beyond, and leap year calculations.”

SECTION 6. Section 662E-2, Hawaii Revised Statutes, is amended to read as follows:

**“[1]§662E-2[1] Immunity against suits.** [No action, including, without limitation, any action for declaratory or injunctive relief, may be brought against any person including, but not limited to, the State, its political subdivisions, a board, or a government employee, arising out of or based upon any failure of or error produced, calculated, or generated by a government computer system, which failure or error occurred prior to June 30, 1999 as a result of the system’s not being year 2000 compliant, regardless of the cause for the system’s not being year 2000 compliant.]

(a) No action, including without limitation, any action for declaratory or injunctive relief, may be brought against the State, its political subdivisions, a board, or a government employee, arising out of a year 2000 error produced, calculated, or generated by a government computer system or other computer-based system, regardless of the cause for the year 2000 error, unless the error is the result of gross negligence on the part of the defendant State, political subdivision, board, or government employee. Failure to fix or prevent an error after a timely, good faith effort to do so shall not constitute gross negligence for the purpose of this subsection.

(b) Except as provided in this section, no action, including without limitation, any action for declaratory or injunctive relief, may be brought against any person arising solely out of a year 2000 error produced, calculated, or generated by a government computer system, regardless of the cause for the year 2000 error; provided, however, that nothing in this subsection shall relieve the manufacturer of the government computer system or the computer software used by the system, or the contractor who provided or serviced the government computer system or the computer software used by the system, of any liability for the year 2000 error. The manufacturer of the government computer system or the computer software used by the system, or the contractor who provided or serviced the government computer system or the computer software used by the system, shall be directly liable to a person harmed by a year 2000 error, as well as the State, a political subdivision, a board, or a government employee, to the same extent that the manufacturer of the government computer system or the computer software used by the system, or the contractor who provided or serviced the government computer system or the computer software used by the system would be liable to persons in the absence of the provisions of this subsection. As used in this subsection:

“Contractor” means a person having a contract with a governmental body, and does not include the State, its political subdivisions, a board, or a government employee.

“Manufacturer of a government computer system or the computer software” does not include the State, its political subdivisions, a board, or a government employee.

The provisions in this chapter shall not apply to any claim for physical injury or death.”

SECTION 7. Section 662E-3, Hawaii Revised Statutes, is amended to read as follows:

**“[[§662E-3]] Remedial measures.** Nothing in this chapter shall be deemed to prevent the State, its political subdivisions, a board, or a government employee, from taking steps to remedy [any failure of or] a year 2000 error produced, calculated, or generated by a government computer system [as a result of the system’s not being year 2000 compliant,] once the [failure or] error [is] has been verified.”

SECTION 8. Section 662E-4, Hawaii Revised Statutes, is amended to read as follows:

**“[[§662E-4]] Exceptions.** Nothing in this chapter shall be deemed to provide immunity or release from liability to any person who:

- (1) Deliberately tampers with a government computer system for the purpose of [preventing it from being year 2000 compliant;] causing the system to produce, calculate, or generate a year 2000 error; provided, however, that the immunity or release from liability shall remain and

not be set aside where the year 2000 error arises out of a test performed to determine whether a government computer system will produce, calculate, or generate a year 2000 error; or

- (2) Receives and fails to immediately return a benefit which the person is not legally entitled to [arising out of or based upon any failure of or error produced, calculated, or generated by a government computer system as a result of the system's not being year 2000 complaint<sup>1</sup>], which benefit was provided to the person as a result of a year 2000 error produced, calculated, or generated by a government computer system."

SECTION 9. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 10. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 11. This Act shall take effect upon its approval; provided that section 4 of this Act shall take effect retroactive to the effective date of Act 213, Session Laws of Hawaii, 1998; and provided further that this Act shall not affect any claim which has been filed in the courts on or before the date of its enactment. Section 2 of this Act shall be repealed on December 31, 2003; provided that nothing in section 2 of this Act shall be deemed to affect rights and obligations which have accrued as of that date. Chapter 662E and section 662-15(8), Hawaii Revised Statutes, shall be repealed on December 31, 2003.

(Approved June 25, 1999.)

**Note**

1. So in original.