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HOUSE BILL 552

44TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1999

INTRODUCED BY

J. "Andy" Kissner

AN ACT

RELATING TO CIVIL ACTIONS; IMPOSING RESTRICTIONS AND
LIMITATIONS ON ACTIONS SEEKING DAMAGES FOR COMPUTER DATE
FAILURE; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Computer Date Failure Act".

Section 2. DEFINITIONS.--As used in the Computer Date
Failure Act:

A. "computer" means an electronic, magnetic,
optical electrochemical or other high-speed data processing
device that performs logical, arithmetic or memory functions
by the manipulations of electronic or magnetic impulses and
includes all input, output, processing, storage or
communication facilities that are connected or related to the

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1 device, and includes a component of a computer, such as a
2 microprocessor, memory chip, storage or input-output device;

3 B. "computer date failure" means:

4 (1) a present or future inability of the
5 computer product or computer service to properly handle or
6 process dates of calendar year 1999 or subsequent years; or

7 (2) an incompatibility between:

8 (a) the computer product or computer
9 service; and

10 (b) any other product, service or
11 electronic data in any form, with respect to the handling or
12 processing of dates of calendar year 1999 or subsequent years;

13 C. "computer date statement" means a statement
14 material to a transaction made by a person about a computer
15 product manufactured or sold by the person or about a computer
16 service provided or sold by the person regarding:

17 (1) the present or future ability of the
18 product or service to properly handle or process dates of
19 calendar year 1999 or subsequent years; or

20 (2) the compatibility of the product or
21 service with other computer products, computer services or
22 electronic data in any form, with respect to the handling or
23 processing of dates of calendar year 1999 or subsequent years;

24 D. "computer network" means the interconnection of
25 two or more computers or computer systems by satellite,

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1 microwave, line or other communication medium with the
2 capability to transmit information among the computers;

3 E. "computer product" includes a computer,
4 computer network, computer program, computer software,
5 computer system or any component of any of those items;

6 F. "computer program" means an ordered set of data
7 representing coded instructions or statements that when
8 executed by a computer cause the computer to process data or
9 perform specific functions;

10 G. "computer service" means the product of the use
11 of a computer, the information stored in the computer or the
12 personnel supporting the computer, including time, data
13 processing and storage functions;

14 H. "computer software" means a set of computer
15 programs, procedures and associated documentation related to
16 the operation of a computer, computer system or computer
17 network;

18 I. "computer system" means any combination of a
19 computer or computer network with the documentation, computer
20 software or physical facilities supporting the computer or
21 computer network;

22 J. "repair" means to correct or eliminate a defect
23 that has or would cause a computer date failure or to instruct
24 how to avoid or work around such defect; and

25 K. "restitution" means an amount of money that

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1 would restore the claimant to the position he was in prior to
2 the transaction or occurrence involving the computer product
3 or computer service. In the context of a contract,
4 "restitution" includes the contract price paid by the claimant
5 and the cost reasonably incurred by the claimant to perform
6 under the contract, less the value of any benefit from the
7 product or service received by the claimant under the
8 contract. In the context of a personal injury claim,
9 "restitution" means the economic damages resulting from bodily
10 injury to the claimant proximately caused by the defendant's
11 conduct. In the context of an action for fraud,
12 misrepresentation or a similar tort action, "restitution"
13 means the amount by which the person was unjustly enriched at
14 the expense of the claimant.

15 Section 3. ACTION FOR COMPUTER DATE FAILURE. --

16 A. No action for harm caused by a computer date
17 failure may be brought by any person, or on behalf of any
18 person, unless the action alleges with specificity the defect
19 or inadequacy of the computer product that has caused an
20 alleged computer date failure and the actual damages resulting
21 therefrom.

22 B. Notwithstanding any other provision of law, no
23 action for harm caused by a computer date failure may be
24 brought by any person, or on behalf of any person, later than
25 two years from the earlier of:

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1 (1) the date the person discovered, or in the
2 exercise of reasonable diligence should have discovered, that
3 the computer product or computer service manifested the
4 computer date failure; or

5 (2) the first date processed improperly by
6 the computer product or computer service or, if that date is
7 not an actual calendar date, the next date that is an actual
8 calendar date.

9 C. Except as provided in Subsection D of this
10 section, a person must bring an action against a manufacturer
11 or seller of a computer product or computer service for harm
12 caused by a computer date failure no later than five years
13 after the final product or the service was sold to the first
14 consumer in this state. This subsection does not apply to a
15 manufacturer or seller that expressly warranted that the
16 product would not manifest the computer date failure.

17 D. If a manufacturer or seller of a product that
18 contains a computer product expressly warranted to a person
19 that the product had a useful safe life longer than five
20 years, the person must bring an action against the
21 manufacturer or seller for harm caused by a computer date
22 failure before the end of the number of years warranted after
23 the date of the sale of the product by the manufacturer or
24 seller to that person.

25 Section 4. APPLICATION AND EFFECT OF ACT. --

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1 A. Except as provided in this section, the
2 Computer Date Failure Act applies to an action in which a
3 claimant seeks recovery of damages for harm caused by a
4 computer date failure, regardless of the legal theory or
5 statute on which the action is based, including an action
6 based in tort, contract or breach of an express or implied
7 warranty. It applies also to an action based on an alleged
8 failure to properly detect, disclose, prevent, report or
9 remediate a computer date failure.

10 B. The Computer Date Failure Act does not apply to
11 an action to collect workers' compensation benefits pursuant
12 to the workers' compensation laws of this state.

13 C. The Computer Date Failure Act does not create
14 either a duty or a cause of action.

15 D. Nothing in the Computer Date Failure Act limits
16 or restricts the right of parties to enter into written
17 agreements on the issues of liability and damages for a
18 computer date failure. That act does not limit the right of
19 those parties to recover damages in accordance with the terms
20 of those written agreements.

21 E. The Computer Date Failure Act does not affect
22 the rights or obligations of parties under a contract of
23 insurance.

24 F. The Computer Date Failure Act does not waive
25 governmental immunity of the state or of a political

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1 subdivision of the state.

2 Section 5. OPPORTUNITY TO CURE. --

3 A. Before a claimant may commence an action
4 against a person for harm caused by a computer date failure,
5 the claimant must notify the person of the failure, describe
6 the failure and provide the person a reasonable opportunity to
7 cure the failure or to make restitution.

8 B. The person must have at least three months to
9 cure the failure or to make restitution.

10 C. If a claimant commences an action against a
11 defendant for harm caused by a computer date failure without
12 providing the defendant an opportunity to cure the failure or
13 to make restitution, the court shall dismiss the action with
14 prejudice.

15 Section 6. AFFIRMATIVE DEFENSE-- NOTICE AND REPAIR. --

16 A. It is an affirmative defense to civil liability
17 for harm caused by a computer date failure that:

18 (1) the defendant notified buyers of the
19 computer product or computer service that the product or
20 service may manifest the computer date failure;

21 (2) the defendant offered to repair, replace
22 or upgrade the product or service, or the component that would
23 manifest the computer date failure, at no cost to the buyer
24 other than reasonable and customary charges for shipping,
25 handling, installing and implementing the product or the items

1 needed to repair, replace or upgrade the product or service;
2 and

3 (3) the offered repair, replacement or
4 upgrade would have avoided the harm caused by the computer
5 date problem.

6 B. The notice issued pursuant to Paragraph (1) of
7 Subsection A of this section must:

8 (1) identify the product or service supplied
9 by the defendant that manifests or may manifest the computer
10 date failure; and

11 (2) explain how the buyer may repair, replace
12 or upgrade the product if repair, replacement or upgrade is
13 available.

14 C. The notice issued pursuant to Paragraph (1) of
15 Subsection A of this section must be sent or published at
16 least three months before the date that constitutes the
17 computer date failure and not more than three years before
18 that date. A defendant satisfies the notice requirement of
19 Paragraph (1) of Subsection A of this section if the
20 defendant:

21 (1) timely delivers the notice to the
22 claimant;

23 (2) timely sends the notice to all registered
24 buyers by mail, courier, electronic mail or telephonic
25 document transfer to the last known address or telecopier

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1 number provided by the buyer; or

2 (3) timely publishes the notice on the
3 defendant's internet site, if the defendant has a site.

4 Section 7. AFFIRMATIVE DEFENSE--RELIANCE.--

5 A. In an action for fraud, misrepresentation,
6 disparagement, libel or other similar action based on the
7 alleged falsity or misleading character of a computer date
8 statement, it is an affirmative defense to liability for harm
9 caused by a computer date failure that the defendant:

10 (1) relied on the representation or express
11 warranty of an independent, upstream vendor or supplier of the
12 computer product or computer service that the product or
13 service would not manifest the computer date failure problem;
14 and

15 (2) the defendant did not have actual
16 knowledge that the representation or warranty was not true.

17 B. For the purposes of this section, a
18 representation that a computer product or computer service is
19 "Year 2000 Compliant", is "Millennium Bug Free", complies with
20 a computer date standard established by state or federal
21 regulatory agency or a national or international service
22 organization or a similar representation satisfies the
23 condition of a representation or express warranty.

24 Section 8. AFFIRMATIVE DEFENSE--COMPLIANCE TESTING.--

25 A. It is an affirmative defense to civil liability

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1 in tort for harm caused by a computer date failure of a
2 computer product or computer service that the defendant:

3 (1) examined the product or service to
4 determine if it would manifest a computer date failure
5 problem;

6 (2) repaired, replaced or upgraded the
7 product or service, or a component of the product or service
8 identified in the examination as manifesting a computer date
9 problem;

10 (3) tested the product or service, or the
11 component of the product or service, after it was repaired to
12 determine if it would manifest a computer date failure; and

13 (4) the product or service successfully
14 passed the test.

15 B. A defendant may satisfy an element of
16 Paragraphs (1) through (4) of Subsection A of this section by
17 hiring an independent contractor to perform the actions
18 prescribed in the element.

19 Section 9. COMPENSATORY DAMAGES.--In an action for harm
20 resulting directly or indirectly from a computer date failure,
21 the court may award against a defendant only the following
22 damages, as allowed by other law and according to the proof:

23 A. economic damages resulting from injury to the
24 claimant proximately caused by the defendant's conduct;

25 B. costs reasonably incurred by the claimant to

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1 examine, to repair, replace or upgrade and to test the
2 relevant product or service, to the extent those costs are
3 incurred by the claimant as a proximate and direct result of
4 the defendant's conduct; or

5 C. damages suffered by the claimant caused by
6 breach of an express warranty made by the defendant that the
7 computer product or computer service sold by the defendant
8 would not manifest the computer date failure.

9 Section 10. EXEMPLARY DAMAGES. --In an action to recover
10 damages for harm caused by a computer date failure, a court
11 may award exemplary damages against a defendant only if the
12 claimant proves by clear and convincing evidence that the
13 defendant acted with fraud or malice with respect to the
14 claimant.

15 Section 11. APPLICABILITY. --

16 A. Except as provided in Subsection B of this
17 section, this act applies to a civil action commenced on or
18 after the effective date of this act or pending on the
19 effective date of this act and in which the trial, or any new
20 trial or retrial following motion, appeal or otherwise, begins
21 on or after that date. In an action commenced before the
22 effective date of this act, a trial, new trial or retrial that
23 is in progress on that date is governed with respect to the
24 subject matter of this act by the applicable law in effect
25 immediately before that date, and that law is continued in

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1 effect for that purpose.

2 B. This act applies to a civil action commenced on
3 or after July 1, 1999. An action commenced before that date
4 is governed by the applicable law in effect immediately before
5 that date, and that law is continued in effect for that
6 purpose.

7 Section 12. EMERGENCY.--It is necessary for the public
8 peace, health and safety that this act take effect
9 immediately.