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FINANCIAL INSTITUTIONS: YEAR 2000 COMPUTER PROBLEMS

House Bill 4737 (Substitute H-3) First Analysis (10-13-99)

Sponsor: Rep. Andrew Richner
Committee: Family and Civil Law

THE APPARENT PROBLEM:

The “Y2K Problem” and the “Millennium Bug” are both expressions that cover a large complex of problems associated with the fact that computer systems record the year with two numbers rather than with four numbers. Thus, computers and many electronic products would indicate the current year as “99” and not “1999”. The fear is that when the year changes from 1999 to 2000, computers and computer-dependent systems will malfunction or even “crash”. This could affect modern equipment from the minor (VCR programming) to the cosmic (the old Cold War hotlines between the United States and the former Soviet Union), and just about everything in between. People are concerned about the functioning of public utilities, banks, telecommunications, alarm systems, large government payment systems, police and other public safety services, heating and air conditioning, elevators, drug manufacturing, hospital operations and medical equipment, and a wide variety of business and manufacturing operations. (On the other hand, while accepting that the problem is real, some skeptics have suggested the main problems associated with Y2K could be caused by alarmism and overreaction.) Many public and private organizations have been diligently expending a large amount of money and energy and being prepared for the coming of the year 2000 in order to minimize disruptions in everyday life. An additional concern is the fear of a “litigation explosion” as a result of Y2K-related problems. The federal and state governments have been examining ways of containing such lawsuits. One method is to provide a certain amount of immunity to private and public entities.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to limit the liability of a financial institution (and its employees, officers and directors) in an action related to a computer date failure. A computer date failure would be defined as a malfunction of an electronic or mechanical device or the inability of a computer, a computer network, computer program, computer

software, embedded chip, or a computer system to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times in the years 1999 and 2000 and beyond. The bill specifies that if a financial institution had made a good faith effort to make and implement a “Year 2000 Readiness Plan” (a plan reasonably calculated to avoid material disruption of its operations due to computer date failures), it would not be liable to a person who was “not in privity of contract” (that did not have a contractual relationship or connection) with the institution for damages or other relief relating to a computer date failure. The bill states that if a financial institution had substantially complied with the requirements of its primary state or federal regulator to address readiness for computer date failures, it is presumed to have made a good faith effort as required by the bill.

Under the bill, the liability of a financial institution that experiences computer date failure would be limited to actual damages. Actual damages would be specifically defined to include direct monetary losses proximately caused by a computer date failure, but not including other indirect, special, or incidental damages, or noneconomic or exemplary damages. If a person had a contract with a financial institution, such damages could also include fees, interest, or penalties charged to that person by either the financial institution or a third party, provided that the fees, interest, or penalties were the result of a computer date failure that was the fault of the financial institution. Actual damages would also be limited to the written contract between the parties except where one of the parties was an individual, or the contract was valued at less than \$100,000.

The bill would also require a court to reduce the recoverable amount of damages in proportion to the amount of a contributing act or omission attributable to a third party engaged by a financial institution to make and implement its Year 2000 Readiness Plan, and in proportion to the amount of responsibility of the person seeking damages.

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Finally, the bill would allow an individual whose residential mortgage payment or payments were late or inaccurate due to a computer date failure to notify the servicer of the mortgage within seven business days of having learned of the failure. After receiving such a notification, the servicer of the mortgage would be prohibited from foreclosing based upon the late or inaccurate payments. In order to be effective, the notice would have to be provided before March 15, 2000 and would have to include any available documentation regarding the computer date failure. However, the notification protections would not apply to residential mortgage payments where default occurs, or with respect to which imminent default is foreseeable, before December 15, 1999. The restrictions on foreclosure would delay, but not prohibit, the enforcement of the individual's financial obligations under his or her residential mortgage. If the individual does not make his or her payment and is not granted an extension, a foreclosure could be instituted or resumed, in spite of the individual's notification of a computer date failure, by the later of January 29, 1999 or 28 days after the servicer received the notification from the individual.

The bill would not create a new cause of action or remedy for computer date failure, but it would apply to all legal and equitable actions relating to a computer date failure, except those to recover damages for wrongful death or injury, that had not been fully and finally adjudicated as of the effective date of the bill. Further, any action that was not commenced prior to January 1, 2001 would be barred and the provisions of the bill would be repealed January 1, 2003.

MCL 600.2969

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (10-13-99)

ARGUMENTS:

For:

The bill is part of a group of bills that will hopefully serve to limit frivolous lawsuits based on Y2K computer failures. This bill will protect banks and other financial institutions; these institutions are strictly regulated and are already required to engage in a wide variety of efforts to avoid Y2K problems. If a financial institution has met all of the requirements set forth by government agencies that regulate it, that financial institution should be protected. It was pointed out in committee testimony that, because banks have "deep pockets", they are often the targets of lawsuits and included as potential

defendants even where they likely have little or no liability. It was also pointed out that federal law provides for proportionate liability and joint and several liability. Thus, a party who has been found liable for even one percent of the fault can be held responsible for the entire amount where the other responsible parties are unable to satisfy the judgment. The bill would provide that a bank or other financial institution would only be liable for the portion of the judgment attributable to its own fault, and would not be liable for the portion of the judgement attributable to other defendants. Financial institutions have done a great deal to prepare for and to cure in advance any potential problems that could occur due to computer date failures; however, they cannot and should not be made to vouchsafe everyone else. If any financial institutions suffer any Y2K problems it will be in spite of all of their efforts and will likely be due to the failure of some other party to be properly prepared. If a financial institution has met all of the requirements set forth by the state and federal governments, it should be given some immunity. Further, if the majority of the fault for a problem lies with a third party, the financial institution should only be responsible for that portion of the damages attributable directly to the financial institution.

Against:

There is no good reason to offer what is essentially a grant of almost full immunity to financial institutions. If they have properly prepared for computer date failures they should not have anything to worry about. By giving these institutions a grant of immunity in advance of any problems, the state could encourage complacency on the part of these institutions and limit or even bring to an end to any efforts that are being made to make certain that Y2K problems do not interfere with or harm customers.

POSITIONS:

The Michigan Credit Union League supports the bill. (10-12-99)

The Michigan Chamber of Commerce supports the bill. (10-12-99)

The Michigan Consumer Federation opposes the bill. (10-12-99)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.