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SFA BILL ANALYSIS

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House Bill 4424 (Substitute S-1 as reported by the Committee of the Whole)
House Bill 4469 (Substitute S-1 as reported by the Committee of the Whole)
House Bill 4587 (Substitute H-1 as reported without amendment)
House Bill 4588 (Substitute H-3 as reported by the Committee of the Whole)
House Bill 4737 (Substitute S-1 as reported by the Committee of the Whole)
Sponsor: Representative Janet Kukuk (House Bill 4424)
Representative Eileen DeHart (House Bill 4469)
Representative Patricia Birkholtz (House Bill 4487)
Representative Marc Shulman (House Bill 4588)
Representative Andrew Richner (House Bill 4737)
House Committee: Family and Civil Law
Senate Committee: Technology and Energy

Date Completed: 12-7-99

RATIONALE

As most people are aware, there is a possibility of some computer failure when the calendar changes to the year 2000. Sometimes called the "Millennium Bug" or the "Y2K problem", this situation is associated with the fact that many computers record the year with two, rather than with four, digits. Thus, these computers and many electronic products indicate the current year as "99". As a result, when the new year arrives, this equipment might interpret the year "00" as 1900, instead of 2000. Thus, many people are concerned that some computers and computer-dependent systems might malfunction or become incapacitated. In turn, this could affect the performance of such services and operations as public utilities, financial institutions, medical facilities, manufacturing, governmental payments, and public safety systems.

Many public and private entities have made, and continue to make, considerable efforts and expenditures to bring their computer systems into "Y2K compliance", in order to minimize the potential disruptions to governmental operations, commerce, industry, and the public. According to the *State Legislatures* magazine (June 1999), fixing state computer systems nationwide could cost in the neighborhood of $3.5 billion; counties will spend $1.7 billion; and cities' costs may exceed $300 million. According to the Michigan Department of Management and Budget, $55.6 million was appropriated several years ago to bring State departments into Y2K compliance and, of that amount, approximately $31 million has been spent to date. In addition, it is reported that American businesses already have spent almost $1 trillion for Y2K compliance (*Detroit News*, 6-11-99).

Although it appears that considerable progress has been made toward ensuring that computers remain functional, the possibility of failure remains. Consequently, many people are concerned about the potential for litigation against governmental agencies, financial institutions, businesses, and individuals. In fact, the first Y2K lawsuit was filed by a produce store in Michigan two years ago, when cash registers could not recognize credit cards with '00 expiration dates (*Detroit News*, 10-5-99). Reportedly, more than 80 companies already have been sued for Y2K problems, and the cost of Y2K-related litigation has been estimated at more than $1.5 trillion (*Detroit News*, 6-11-99).

In order to avert the expected litigation, and its impact on the economy, the legal system, and commerce, last July the President signed into law the "Y2K Act" (P.L. 106-37). This legislation contains various provisions that govern Y2K lawsuits and limit defendants' liability for Y2K failures. (A brief overview of the Act in presented in **BACKGROUND**, below.) Although this Act supersedes inconsistent state laws, it also allows state laws that provide stricter limits on damages and liabilities. The Y2K Act also provides that it does not alter or diminish the ability of a state to defend itself against any claim on the basis of sovereign immunity. Thus, it has been suggested that Michigan also should enact legislation to limit the liability of defendants, including governmental agencies, in Y2K litigation.

CONTENT

House Bill 4424 (S-1) would amend the Revised Judicature Act to limit the liability of a person for damages relating to a computer date failure. The bill would apply to actions against a person who

had made a substantial, good faith effort to implement a "year 2000 readiness plan".

House Bills 4469 (S-1) and 4588 (H-3) would amend the governmental immunity law to limit the liability of municipal corporations and political subdivisions, and their employees, officers, members, and volunteers, for damages resulting from a computer date failure. House Bill 4588 (H-3) also would include immunity for governmental agencies with respect to the ownership or operation of a hospital or county medical facility. House Bill 4587 (H-1) would create a new act to prohibit political subdivisions from collecting fees or fines on billing errors caused by a computer date failure. The three bills are tie-barred to each other.

House Bill 4737 (S-1) would amend the Revised Judicature Act to limit the liability of a financial institution for damages relating to a computer date failure. The bill would apply to actions against a financial institution that had made a good faith effort to implement a year 2000 readiness plan. The bill also would limit the ability of a person to foreclose on a residential mortgage due to an inaccurate or late payment caused by a computer date failure.

All of the bills would define "computer date failure" as a malfunction, including the malfunction of an electronic or mechanical device or the inability of a computer, computer network, computer program, embedded chip, computer system, or computer software to store, process, receive, or transmit data accurately, that was caused directly or indirectly by the failure of a computer, computer network, computer program, embedded chip, a computer system, or computer software accurately or properly to recognize, calculate, display, sort, or otherwise process dates or times in the years 1999 and 2000, and beyond.

All of the bills would be repealed on January 1, 2003.

House Bill 4424 (S-1)

Under the bill, a person would not be liable to a claimant for damages or other relief relating to a computer date failure unless one or more of the following were met:

-- The person had extended a warranty to the claimant.
-- The claimant was the beneficiary of a trust administered by the person.
-- The claimant was in privity of contract with the person. ("Privity of contract" refers to the relationship that exists between two or more contracting parties.)

("Claimant" would mean a person seeking to recover damages resulting directly or indirectly from an alleged computer date failure in a civil action. "Person" would mean an individual, corporation, partnership, association, limited liability company, trust, or other legal entity, except a financial institution.)

A person would not be liable to a claimant for damages or other relief for a delay or interruption in the performance of an agreement by the person, including the delivery of goods or services by the person, that was the result of or connected with one or both of the following:

-- The person's computer date failure, to the extent the computer date failure was caused by or attributable to the acts or omissions of a third party.
-- A third party's computer date failure.

An employee, officer, director, shareholder, limited partner, member, or manager of a person, if acting in that capacity, would not be liable to a claimant for damages or other relief relating to a computer date failure.

The liability of a person who experienced a computer date failure would be limited to a claimant's actual damages. ("Actual damages" would mean direct economic losses proximately caused by a computer date failure. Actual damages could include fees, interest, or penalties charged to a claimant by a third party if the fees, interest, or penalties resulted from a computer date failure attributable to the defendant. Actual damages would not include other indirect, special, or incidental damages, or exemplary or noneconomic damages.)

The bill would not apply to an action to recover damages for a wrongful death or an injury to a person resulting from a computer date failure. Otherwise, the bill would govern every action against a person or an employee, officer, director, shareholder, limited partner, member, or manager of a person to recover damages resulting directly or indirectly from an alleged computer date failure if the person had made a substantial, good faith effort to make and implement a year 2000 readiness plan. ("Year 2000 readiness plan" would mean a plan under which a person took action that was reasonably calculated to avoid material disruption of its operations as a result of a computer date failure of a computer, computer network, computer program, computer software, embedded chip, or computer system under the person's control.) In determining a substantial, good faith effort of a person regulated by a state or the Federal government, compliance with the requirements of the person's primary state or Federal regulator to address readiness for computer date failures would be prima facie evidence of a

substantial, good faith effort to make and implement a year 2000 readiness plan. (Prima facie evidence is evidence that is sufficient to establish a given fact unless it is rebutted.)

The bill would apply to all legal and equitable actions relating to a computer date failure that had not been fully and finally adjudicated as of the bill's effective date.

The bill specifies that it would not create a new cause of action or remedy for computer date failure.

House Bills 4469 (S-1) & 4588 (H-3)

Immunity of Municipal Corporation or Political Subdivision

House Bill 4469 (S-1) would apply to municipal corporations (cities, villages, townships, and charter townships). House Bill 4588 (H-3) would apply to political subdivisions other than municipal corporations (counties, county road commissions, townships, charter townships, school districts, community college districts, port districts, metropolitan districts, transportation authorities, and agencies, departments, courts, boards, and councils of political subdivisions).

Under the bills, a municipal corporation or political subdivision engaged in the exercise or discharge of a governmental function would be immune from liability in an action to recover damages resulting directly or indirectly from a computer date failure, including an action based on an alleged failure to detect, disclose, prevent, report on, or remediate a computer date failure, or an action based on Section 2, 3, 5, 6, or 7 of the governmental immunity law. (Sections 2 and 3 pertain to actions for defective highways. Sections 5 and 6 govern actions for the negligent operation of a government-owned vehicle and the dangerous or defective condition of a public building, respectively. Section 7 provides immunity for governmental agencies that are engaged in the exercise or discharge of a governmental function, and for governmental employees, officers, and board members who are acting on behalf of a governmental agency.)

Employee Immunity

Without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a municipal corporation or political subdivision, each volunteer acting on behalf of a municipal corporation or political subdivision, and each member of a board, council, commission, or statutorily created task force of a municipal corporation or political subdivision, would be immune from liability in an action to recover damages resulting directly or indirectly from a computer date failure, including an action based on an alleged failure to detect, disclose, prevent, report on, or remediate a computer date failure, or an action based on Section 2, 3, 5, 6, or 7, if all of the following were met:

-- The damage was caused by the officer, employee, or member while in the course of employment or service or by the volunteer while acting on behalf of the municipal corporation or political subdivision.
-- The individual was acting or reasonably believed he or she was acting within the scope of his or her authority.
-- The municipal corporation or political subdivision was engaged in the exercise or discharge of a governmental function.
-- The individual's conduct did not amount to gross negligence that was the proximate cause of the injury or damage. ("Gross negligence" would mean conduct so reckless as to demonstrate a substantial lack of concern for whether an injury or substantial damage resulted.)

Immunity for Hospitals and County Medical Facilities

Under House Bill 4588 (H-3), a governmental agency would be immune from liability in an action to recover damages with respect to the ownership or operation of a hospital or county medical facility resulting directly or indirectly from a computer date failure, including an action based on an alleged failure to detect, disclose, prevent, report on, or remediate a computer date failure, or an action based on another section of the governmental immunity law. (The law defines "governmental agency" as the State, political subdivisions, and municipal corporations.)

Without regard to the discretionary or ministerial nature of the conduct in question, each governmental agency officer and employee, each volunteer acting on behalf of a governmental agency, and each member of a governmental agency board, council, commission, or statutorily created task force would be immune from liability in an action to recover damages with respect to the ownership or operation of a hospital or county medical facility resulting directly or indirectly from a computer date failure, under the same conditions that would apply to officers and employees of a municipal corporation or political subdivision.

Other Provisions

The bills specify that their provisions could not be construed as modifying or restricting the immunity of a governmental agency otherwise provided in the law, and would not limit either of the following:

-- The authority of a municipal corporation or

political subdivision to enter into an agreement that waived or limited its proposed immunity and that contained provisions the municipal corporation or political subdivision found appropriate on the issue of its liability and/or damages for computer date failure.

-- The authority of a governmental agency to enter into an agreement that waived or limited its proposed immunity concerning a hospital or county medical facility, and that contained provisions the governmental agency found appropriate on the issue of its liability and/or damages for computer date failure.

The bills would not apply to an action to recover damages for a wrongful death or injury to a person resulting from a computer date failure.

House Bill 4588 (H-3) specifies that, for purposes of its provisions, the terms "political subdivision" and "governmental agency" would include a municipal health facilities corporation.

House Bill 4587 (H-1)

The bill would prohibit a political subdivision from assessing, charging to, or collecting from a person interest, penalties, fines, or other fees or finance charges on the amount of an error, if a computer date failure, including a failure to detect, disclose, prevent, report on, or remediate a computer date failure, directly or indirectly resulted in a billing error by the political subdivision for goods or services, including utility service, provided to a person, or an error in the determination or assessment of a fee or tax payable by a person to the political subdivision.

"Political subdivision" would mean a municipal corporation, county, county road commission, township, charter township, school district, community college district, port district, metropolitan district, or transportation authority, or a combination of those when acting jointly; a district or authority authorized by law or formed by one or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.

House Bill 4737 (S-1)

Financial Institutions

The bill would define "financial institution" as an insured depository institution as defined in Federal law (12 USC 1813(c)(2)), a credit union, an affiliate of a credit union or insured depository institution, or a servicer.

A financial institution and its employees, officers, and directors would not be liable to a person not in privity of contract with the financial institution for damages or other relief relating to a computer date failure. The liability of a financial institution that experienced a computer date failure would be limited to actual damages. ("Actual damages" would mean direct economic losses proximately caused by a computer date failure. Actual damages could include fees, interest, or penalties charged to a person in privity of contract with a financial institution, either by a third party if the fees, interest, or penalties resulted from a computer date failure attributable to the financial institution, or by the financial institution. Actual damages would not include other indirect, special, or incidental damages, or exemplary or noneconomic damages. Actual damages would be limited by a written contract between the parties unless one of the parties was an individual or the contract was valued at less than $100,000.)

The bill would not apply to an action to recover damages for a wrongful death or injury to a person resulting from a computer date failure. Otherwise, the bill would govern every action against a financial institution or an employee, officer, or director of a financial institution to recover damages resulting directly or indirectly from an alleged computer failure, if the financial institution had made a good faith effort to make and implement a year 2000 readiness plan. A financial institution that had substantially complied with the requirements of its primary state or Federal regulator to address readiness for computer date failures would be presumed to have made a good faith effort to make and implement a year 200 readiness plan. ("Year 2000 readiness plan" would mean a plan under which a financial institution took action that was reasonably calculated to avoid material disruption of its operations as a result of a computer date failure of a computer, computer network, computer program, computer software, embedded chip, or computer system under the financial institution's control.)

The bill would require a court to reduce the amount of damages recoverable in an action subject to the bill in proportion to the amount of a contributing act or omission that was attributable to a third party engaged by a financial institution to make and implement all or part of its year 2000 readiness plan and in proportion to the amount of responsibility of the person seeking damages under the bill.

Residential Mortgages

A person that transacted business on matters directly or indirectly affecting residential mortgages could not cause or permit a foreclosure on a residential mortgage against an individual if the basis for the foreclosure were an inaccurate or late payment on the mortgage that was caused by a computer date failure. Within seven business days after an individual learned of the computer date failure that caused his or her inaccurate or late payment, the individual would have to notify his or her mortgage servicer of the computer date failure, and give the servicer available documentation relating to it.

These provisions would not apply unless the seven-business-day notice were strictly complied with and the notice were given before March 15, 2000. These provisions also would not apply to a residential mortgage payment upon which default occurred, or with respect to which imminent default was foreseeable, before December 15, 1999.

The bill states that it would delay, but not prohibit, the enforcement of financial obligations, and would not otherwise effect or extinguish obligations under a residential mortgage. If an individual's mortgage payment were not made and the mortgage's servicer did not grant an expressly written time extension for the payment, a prohibited act to foreclose the mortgage could be initiated or resumed, but not before January 29, 2000, or 28 days after the servicer requested the notice required by the bill, whichever was later.

Other Provisions

The bill would apply to all legal and equitable actions relating to a computer date failure that had not been fully and finally adjudicated as of the bill's effective date.

The bill specifies that it would not create a new cause of action or remedy for computer date failure.

An action subject to the bill would be barred if not commenced before January 1, 2001.

Proposed MCL 600.2970 (H.B. 4424)
Proposed MCL 691.1407b (H.B. 4469)
MCL 491.1407 et al. (H.B. 4588)
Proposed MCL 600.2969 (H.B. 4737)

BACKGROUND

The Federal Y2K Act applies to any Y2K action brought after January 1, 1999, for Y2K failure occurring before January 1, 2003, or for a potential Y2K failure that could occur or has allegedly caused harm or injury before January 1, 2003. The Act states that it does not create a new cause of action, and nothing in it expands any liability otherwise imposed or limits any defense otherwise available under Federal or state law. The Act does not apply to a claim for personal injury or wrongful death.

The Act defines "Y2K action" as a civil action commenced in any Federal or state court in which the plaintiff's alleged harm or injury arises from or is related to an actual or potential Y2K failure, or a claim or defense arises from or is related to an actual or potential Y2K failure. The term also includes a civil action commenced in any Federal or state court by a government entity (an agency, instrumentality, or other entity of Federal, state, or local government) when acting in a commercial or contracting capacity, but does not include an action brought by a government entity acting in a regulatory, supervisory, or enforcement capacity.

According to the Y2K Act, its purposes are "(1) to establish uniform legal standards that give all businesses and users of technology products reasonable incentives to solve year 2000 computer date-change problems before they develop; (2) to encourage continued remediation and testing efforts to solve such problems by providers, suppliers, customers, and other contracting parties; (3) to encourage private and public parties alike to resolve disputes relating to year 2000 computer date-change problems by alternative dispute mechanisms...; and (4) to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief".

To accomplish these purposes, the Act limits punitive damages in Y2K actions; provides that defendants are liable only for the portion of a judgment that corresponds to their proportionate responsibility; requires plaintiffs to give prelitigation notice and allow defendants to take remedial action or engage in alternative dispute resolution; creates a duty to mitigate; limits damages in Y2K actions for breach or repudiation of contract; limits the recovery of economic losses in tort actions; limits Y2K class actions; and provides for the suspension of penalties for certain Y2K failures by small business concerns. The Act also prohibits foreclosure on a residential mortgage as a result of an actual Y2K failure that results in an inability to process a mortgage payment accurately or on time.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Until the year 2000 actually arrives, no one can be sure of the extent to which computers actually will malfunction or fail. The resulting problems could range from minor inconveniences, such as inoperable VCRs, to life-threatening situations, such as incapacitated air traffic control equipment. As the Federal Act points out, because Y2K computer date-change problems may affect virtually all businesses and other users of technology products to some degree, there is a substantial likelihood that actual or potential computer failures will prompt a significant volume of litigation, much of it insubstantial. The Y2K Act also states that this litigation would have a range of undesirable effects, such as threatening to waste technical and financial resources that are better devoted to curing date-change problems and ensuring that systems remain operational; threatening the network of valued and trusted business and customer relationships; and straining

the nation's legal system, causing particular problems for small businesses and individuals who already find that system inaccessible because of its complexity and expense. Further, "The delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes could exacerbate the difficulties associated with the date change and work against the successful resolution of those difficulties."

The concerns that led to the enactment of the Federal Y2K law also apply at the State level. Despite the steps that already have been taken to bring computers into Y2K compliance, some degree of computer malfunctioning or failure appears inevitable, and litigation is already a reality. To the extent that Y2K problems do arise, these bills would help forestall the lawsuits that could follow. The Federal law now offers considerable limits on liability, and the bills would provide additional protections to governmental agencies, political subdivisions, financial institutions, businesses, and individuals.

Supporting Argument

Although the bills would extend immunity to employees, officers, and volunteers of governmental entities, the legislation would preserve liability for gross negligence. Thus, an individual would remain liable if he or she acted with such a degree of recklessness that it demonstrated a substantial lack of concern for whether an injury or substantial damage resulted.

Legislative Analyst: S. Lowe

FISCAL IMPACT

House Bill 4424 (S-1)

The bill would have no fiscal impact on State or local government.

House Bill 4469 (S-1) & 4588 (H-3)

The bills would have an indeterminate impact on municipal corporations, the State, and local units of government, depending on the number of actions that could arise from computer date failures. The potential savings from expanded immunity cannot be estimated.

House Bill 4587 (H-1)

The bill would have an indeterminate impact on local units of government, depending upon possible future billing errors caused by computer date failures.

House Bill 4737 (S-1)

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: B. Bowerman

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