

From the Attorneys of Strauss & Troy, Cincinnati, Ohio, and Northern Kentucky

Fall 1999

New Y2K Law Limits Lawsuits

By William K. Flynn

In a previous issue of *Impact*, we told you a little bit about the "Millennium Bug" — the glitch in many computer programs that causes the computer to identify years only by the last two digits (which could be a problem next year if computers read "00" as the year 1900 instead of the year 2000). We also told you about the possible liabilities your business could face if the Millennium Bug actually bites once the clock strikes midnight on December 31, 1999.



New legislation means those liabilities may be fewer. In July of this year, Congress passed the Y2K Act. In a nutshell, this new law limits a person's ability to sue a company for problems that may arise from the Millennium Bug's bite. Although the law does not make your company immune from suit, it does make it more difficult for someone to sue you over Y2K-related issues and, if someone does sue, limits the damages s/he may recover. Here's a summary of some of the Act's key provisions:

- **Pre-lawsuit notice and "cooling off" period.** Before filing a Y2K lawsuit, the plaintiff generally must notify each defendant of the details of the plaintiff's claims. Each defendant then gets 30 days to respond and, if a defendant comes up with a plan to fix the problem or engage in alternative dispute resolution (ADR), it gets another 60 days in which to do so before a suit can be filed.
- **Specificity in pleadings.** The Act requires the factual allegations in the complaint filed with the court to be very specific.
- **Class action lawsuits.** The Act limits the ability to file class action lawsuits. Lawsuits claiming a product was defective may not be brought as class actions unless the alleged defect would be material for most class members.
- **Limits on damages.** The Act limits the amount of damages that may be awarded in a myriad of ways: (Note: Many of these limitations do not apply to a

defendant who acted with specific intent to injure or commit fraud.)

- **Duty to mitigate.** Plaintiffs cannot recover damages they reasonably could have avoided.
- **Bystander liability limited.** The Act limits damages against "bystanders" — that is, defendants who are not manufacturers or providers of the product or service that caused the Y2K failure.
- **Proportional liability.** A company generally must pay only that portion of the total damages that corresponds to the percentage of the company's responsibility for the harm, as determined by the court.
- **Cap on punitive damages.** For certain small businesses and individual defendants, punitive damages generally are limited to the lesser of \$250,000 or three times the actual damages awarded. Governmental entities are completely exempt from punitive damages.
- **"Y2K Upset" defense.** If a Y2K failure causes you to be temporarily (for 15 days or less) and unavoidably unable to comply with a federal regulation, the Act grants you a reprieve. However, the reprieve is not available if the noncompliance (referred to as a "Y2K upset") relates to health or safety or certain other crucial areas, or was caused by negligence or a lack of reasonable preparation for Y2K. The Y2K upset defense expires on June 30, 2000.
- **Lawsuits to which the Act does not apply.** The Act does not apply to any claims for personal injury or wrongful death or to most claims involving the securities laws.
- **Effect of state law.** The Act generally supersedes any state law that is inconsistent with the Act, but any state law that imposes stricter limits on Y2K lawsuits will still apply.
- **Effective date.** The Act applies to lawsuits filed after January 1, 1999, for a "Y2K failure" (as defined in the Act) that occurs prior to January 1, 2003, or a potential failure that could occur or cause harm before that date.

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This new law is good news for businesses concerned about their liability for Y2K-related problems. But it's not a reason to become complacent. Remain proactive in putting your Y2K house in order before the dawn of the millennium.

December Deadline for Nasdaq Settlement Claims

By William K. Flynn

Investors who traded shares of stock on the Nasdaq exchange between 1989 and 1996 may be entitled to share in a \$1.03 billion settlement reached in the price-fixing lawsuit against Nasdaq Stock Market dealers. After fees and administrative expenses, it is estimated that about \$850 million will be available for distribution and will continue to earn interest until checks are written.



Information on the settlement was distributed earlier this year to potential claimants who traded shares on Nasdaq between May 1, 1989, and July 17, 1996. Not every stock is included for the entire class period. Expert economists and consultants studied trading patterns and other data to determine which particular stocks were affected by price fixing and when.

To find out which stocks are eligible during what periods of time, you can either call the main hotline at 1-800-933-8991, visit the Web site at www.nasdaqlitigation.com, e-mail classecurity@nasdaqlitigation.com or write to Nasdaq Market-Markers Antitrust Litigation, P.O. Box 41488, Philadelphia, PA. 19101-1488.

Most potential claimants should have already received one or more of three different types of claim forms. There are basic, preprinted and electronic forms. The basic comes blank, with space for up to 70 trades. You can file only one basic form. The preprinted form comes with your trade information already included. You can file more than one preprinted form, depending on the number of accounts you have. But if you did more trading than they cover, you can only add 30 trades to each preprinted form. If you go beyond the limited number of trades on the basic or preprinted claim forms, you have to file an electronic-prepared form. If you were not sent an electronic prepared form you can request one through the Web site or call 1-800-933-6363. You cannot request a preprinted form but for \$15, which will be deducted from your eventual payout, you can request, from the Web site or 1-800-933-6363, a computer disk with all the trading data.

If you received a preprinted form or the disk, verify that the information is complete, sign and return the form. For the electronic form, sign the cover sheet that goes with your filing. If you have added trades to the preprinted claim form, you must include back up data for each of those trades, such as copies of the broker confirmation slip, account statements or tax returns. Most small investors were sent the preprinted form. For larger claimants, trustees or guardians, including bank trustees, may submit the claim.

Estimates put the amount investors lost at two cents per share traded. Importantly, what you get will depend not only on the number of shares you traded but, on how many of the more than one million eligible investors file a claim. *If you do not file a claim form, you will not receive any part of the settlement.* Non-institutional claims will be weighted by a factor of 1.5, meaning if you traded 100 shares during the period, you'll be paid as if you traded 150. Institutional customers' (who usually got better prices) claims would be based on the 100 shares. At present, payouts are not expected until December 2000.

The **claim forms must be postmarked by December 8, 1999**, and mailed to Nasdaq Market-Markers Antitrust Litigation, P.O. Box 1710, Philadelphia, Pa. 19105-1710. Mail electronic forms to Nasdaq Market-Markers Antitrust Litigation, P.O. Box 41469, Philadelphia, PA. 19101-1469.

Complying with the ADA: An Update from the U.S. Supreme Court

By Franklin A. Klaine, Jr.

In the final days of its 1998-1999 term, the U.S. Supreme Court issued several decisions of major significance for employers, particularly in the Americans with Disabilities Act (ADA) arena. In three notable decisions, the Court addressed some important questions related to the definition of "disability" under the ADA.



ADA Basics

As most employers know, the ADA prohibits employers from discriminating against a qualified individual with a disability because of that disability. A "qualified individual" is one who can perform the essential functions of a particular job either with or without a reasonable accommodation. A "disability" is a physical or mental impairment that substantially limits one or more major life activities. The law also prohibits an employer from discriminating against an individual because such individual has a record of a disability or the employer "regards" the individual as being disabled (whether or not such individual is actually disabled).

What Is a Disability?

United Airlines rejected two extremely nearsighted sisters who wore corrective lenses and met federal vision standards for airline pilots because they failed to meet the airline's stricter standard — uncorrected visual acuity of 20/100 or better. The Supreme Court ruled that because the sisters used corrective lenses to restore them to 20/20 vision, their vision, as corrected, did not substantially limit them in any major life activity and therefore they were not disabled and United Airlines did not discriminate against them. The sisters also argued that the airline "regarded" them as disabled, that is, it mistakenly believed their poor vision substantially limited them in the major life activity of working. No, the Court said, even if the airline believed the sisters' vision precluded them from performing a single job (airline pilot), only a perception that the sisters could not perform a "class of jobs or broad range of jobs in various classes" would qualify as a perceived "substantial limitation" on their ability to work. In this case, other jobs (such as regional pilot or pilot instructor) were available to the sisters, their eyesight notwithstanding.

UPS fired a truck mechanic (whose job also required some driving) because his high blood pressure exceeded federal requirements for commercial drivers, even though medication kept the condition under control. In this case the Supreme Court ruled that the lower courts were correct in taking the truck mechanic's medication into account in determining whether his high blood pressure caused him to be disabled for ADA purposes. The Court also found that UPS, at most, had regarded the mechanic as unable to perform only a single job, not a class of jobs or broad range of jobs in various classes.

Albertson's, a supermarket chain, fired a truck driver who was virtually blind in one eye (and so didn't meet federal vision standards for commercial drivers), even though his brain had developed subconscious mechanisms for

copied with his monocularity. The Court found that even corrective measures undertaken (consciously or not) with the body's own systems must be considered in determining whether an individual is disabled.

All of these cases centered around whether corrective measures must be taken into account in evaluating whether an individual's impairment "substantially limits" a major life activity (so that the individual would be disabled for ADA purposes).

The Court's answer? Yes. If an individual is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures — both positive and negative — must be taken into account when judging whether such individual is "substantially limited" in a major life activity (and is thus disabled).

In the United Airlines and UPS cases, the Court also addressed another issue: When does an employer "regard" an employee as disabled (another way to trigger ADA protection) when the major life activity at issue is work. In both cases, the Court ruled for the employer on this issue.

Recommendations

In determining whether an individual's physical or mental impairment substantially limits a major life activity, keep the following in mind:

An impairment that has been corrected (with medication or otherwise) may not qualify as a disability, if once the corrective measure is considered, the individual is not substantially limited in a major life activity.

Consider both positive and negative effects of any mitigating measures. Medication may improve an individual's condition but may carry negative side effects that substantially limit the individual in a major life activity.

Determining whether an individual is disabled is an individualized inquiry. Use of a corrective measure does not, by itself, mean someone is not disabled. For example, an individual who uses a prosthetic limb or wheelchair may have increased mobility but may still be disabled if the impairment substantially limits the individual's mobility.

Two individuals with the same impairment may be treated differently, depending on how the impairment and any corrective measures taken affect each individual's major life activities. For example, one diabetic may be disabled, while another is not.

Even if an individual's impairment is fully corrected through medication or otherwise, an individual may still be protected by the ADA if an employer "regards" that individual as disabled. However, if work is the major life activity at issue, the perception must be that such individual is unable to perform a class of jobs or broad range of jobs in various classes, not just a single job.

Finally, be careful not to discriminate against an individual based upon a "record" of disability. Employees (or job applicants) with impairments that do not qualify as disabilities, thanks to a corrective measure, may try to get around the Court's recent rulings by claiming discrimination based upon a period of disability prior to the individual's use of the corrective measure.

Certain states, including Kentucky, do not certify specialties of legal practice. Certain states, including Ohio, do not provide for recognition as a specialist in any area or field of law, except for patent, trademark or admiralty. IMPACT is published quarterly to provide information of general interest and not to provide legal advice concerning any specific situation. If you wish additional or more specific information, please contact one of the attorneys at Strauss & Troy.

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NEWS OF THE FIRM

ATTORNEYS ON THE MOVE

Claudia Allen has been appointed to the Cincinnati Bar Association's Admissions Committee. Members of the Committee conduct character and fitness interviews with applicants for admission to the Ohio Bar. She has also been asked to join the Planning Committee for the Western Ohio Tax Institute, a comprehensive tax seminar for attorneys and CPA's held in December each year. This year's annual institute will be held on December 3rd and 4th. Also, Claudia will speak at the "Counseling Small Businesses" seminar for attorneys on December 16, 1999, at the Phoenix. Her topic will be Employee Benefits Issues. Additionally, she will be one of the panel of attorneys involved in a Northern Kentucky University seminar on November 23, 1999, for owners/operators of small businesses. The seminar will cover such topics as "Contracts and Risk Management," "Formation of Entities; Agreements Between Co-Owners," "How to Hire a Lawyer," and "Employment and Agency Law."



Claudia Allen

Steven Stuhlbarg and **Charles Melville** are co-teaching a course in Law and Public Policy for MBA students at Northern Kentucky University.

Steven Stuhlbarg chaired the Education Committee of the Jewish Community Relations Council and organized and moderated a public forum, "Ohio School Funding: Issues and Impact." The Forum was televised on cable and broadcast on WVXU radio. Steve has also been selected to participate in the Civic Forum on the Future of Public Education in Cincinnati at the University of Cincinnati College of Law. He has served as Chair of the Cincinnati Bar Association's Unauthorized Practice of Law Committee and was recently invited to serve on the Ohio State Bar Association's Unauthorized Practice of Law Committee.



Steven Stuhlbarg



Charles Melville

Mark Berliant has accepted a position on the Board of Trustees of the FreeStore/FoodBank.



Mark Berliant



Tom Rink

On December 3, 1999, **Tom Rink** will participate in a panel discussion on current tax practice issues at the Southwest Ohio Tax Institute.

Joseph Braun has accepted an appointment to become a member of the Clermont County Library Board of Trustees.



Joseph Braun

Strauss & Troy recently co-sponsored (with Employee Management Services) a Breakfast and Executive Briefing at the Metropolitan Club in Covington, Kentucky. The subject was Professional Employer Organizations (PEOs), which "lease" employees to businesses. Topics covered were: What is a Professional Employer Organization (PEO)? Why are they becoming so popular? What advantages and benefits do they provide to business owners?