

STORAGE NAME: h1523s1a.ca

DATE: April 20, 1999

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
COMMUNITY AFFAIRS
ANALYSIS**

BILL #: CS/HB 1523

RELATING TO: Information Technology Resources

SPONSOR(S): Committee on Judiciary and Rep. Hart

COMPANION BILL(S): CS/CS/CS/SB 80 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 7 NAYS 1
 - (2) FINANCIAL SERVICES (W/D)
 - (3) COMMUNITY AFFAIRS YEAS 7 NAYS 1
 - (4) CLAIMS
 - (5) GENERAL GOVERNMENT APPROPRIATIONS
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I. SUMMARY:

On April 20, 1999, the House Committee on Community Affairs adopted a "strike-everything" amendment to CS/HB 1523. The amendment conformed the CS to Senate CS/CS/CS/SB 80 and made certain additions. The "strike-everything" for the CS provides, as follows:

- Creates the "Commerce Protection Act;
- Defines terms;
- Prescribes and limits damages;
- Provides for mediation;
- Prescribes exclusive remedies;
- Bars certain class actions;
- Provides immunity from personal liability for certain persons under specified circumstances;
- Exempts the exchange of certain information from state antitrust statutes;
- Prescribes alternative dispute-resolution procedures;
- Provides for liability costs and attorney's fees under specified circumstances;
- Prescribes limitations to liability with respect to making certain year-2000 statements;
- Provides for the construction of the act;
- Repeals immunity from liability to governmental entities for certain computer calculation failures; and
- Provides for severability;

The bill's fiscal impact upon local governments and state agencies is unknown.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The "Year 2000" or "Y2K" problem refers to the inability of computers to recognize the first two digits of a four-digit year. In the early days of computer programming, programmers represented four-digit years by the last two digits, i.e., 1968 would be programmed as '68' in order to save the computers' memory space. The first two digits ('19') were implied. Consequently, many computers are unable to distinguish dates in the twentieth century from dates in the twenty first century, as '01' would currently be read as '1901' by many computers, when in fact '01' may be intended to mean '2001.' Computer systems that are not Y2K compatible will not be able to properly process date-sensitive information. "Investigating the Impact of the Year 2000 Problem, A Summary of the Special United States Senate's Committee on the Year 2000 Problem," Feb. 24, 1999.

While the impact of the Y2K problem is yet unknown, there are widely varying speculations ranging from mere inconvenience to wide-spread panic. In an effort to coordinate the state's Y2K issues, the Legislature authorized the creation of a Year 2000 Project Office within the Executive Office of the Governor. In 1998, the Legislature also created s. 14.025, F.S., which allows the Governor to reassign resources from one or more agencies or departments to an agency with a projected or actual computer system failure. The transfer of personnel or moneys for more than 90 days must have the concurrence of the President of the Senate, the Speaker of the House of Representatives, and a majority of the members of each of the House and Senate fiscal committee members. S. 14.025(4), F.S. Section 14.025, F.S. repeals on July 1, 2000.

The 1998 Legislature also created s. 282.4045, F.S., which attempts to specify that the state, its agencies, and units of local government shall be immune from damages for Y2K computer date failures consistent with the waiver of sovereign immunity found at s. 768.28, F.S.

In addition to the technological issues surrounding the year 2000, there are also a multitude of legal issues raised by the Y2K computer date problem. The following items represent several of the legal concerns, and the status of current Florida law regarding those concerns:

Contract Warranties: There is concern that representations by computer vendors that products are year-2000 compliant may give rise to contract and warranty claims. The Uniform Commercial Code - Sales, found at chapter 672, Florida Statutes, governs transactions in goods. Generally, the obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. S. 672.301, F.S. Express and implied warranties are covered by ss. 672.313, 672.314, 672.315, and 672.316, F.S.

Director Liability: Directors of businesses and corporations may face liability for failure to disclose Y2K problems to shareholders, or for failing to take sufficient remedial action to make the business or corporation Y2K compliant. Section 607.0831, F.S., provides that directors are not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, by a director, unless:

- the director breached or failed to perform his or her duties as director; and
- the breach or failure to perform constitutes:
 - a violation of the criminal law, unless the director had reasonable cause to believe his or her conduct was lawful;
 - a transaction from which the director derived an improper personal benefit;
 - unlawful distribution;
 - conscious disregard for the best interest of the corporation, or willful misconduct; or
 - recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Section 617.0834, F.S., provides similar liability provisions for officers and directors of corporations and associations not for profit.

Class Action Suits: It is anticipated that failure of computer systems will result in extensive litigation, including the possibility of lengthy, complex, and expensive class action suits. The Florida Rules of Civil Procedure provide four prerequisites to the bringing of a class action suit:

- the members of the class are so numerous that separate joinder of each member is impracticable;
- the claim or defense raises questions of law or fact common to the questions of law or fact raised by each member of the class;
- the claim is typical of the claim of each member of the class; and
- the representative party can fairly and adequately protect and represent the interests of each member of the class.

Florida Rules of Civil Procedure 1.220 further requires the court to conclude that the claim and defense are maintainable by finding that one of a host of requirements is met. The Rules do not provide any distinction based on the amount of damages suffered.

Antitrust Actions: The exchange of information among businesses on potential solutions has raised concerns about potential anti-trust violations. The Florida Antitrust Act of 1980 complements the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition. S. 542.16, F.S. The law provides that every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful. S. 542.18, F.S. It is also unlawful to monopolize, attempt to monopolize, or combine or conspire with any other person to monopolize any part of trade or commerce in this state. S. 542.19, F.S. However, any activity or conduct exempt under Florida statutory or common law is exempt from the provisions of the Florida Antitrust Act. S. 542.20, F.S. Violation of the Antitrust Act may result in both civil and criminal penalties.

Alternative dispute resolution: Methods of alternative dispute resolution give parties to legal disputes options to solve their dispute without the necessity of a trial.

- Arbitration is a process whereby a neutral third person or panel considers the facts and arguments presented by the parties and renders a decision which may be binding. S. 44.1011(1), F.S. Voluntary binding arbitration is allowed pursuant to s. 44.104, F.S., as long as no constitutional issue is involved in the dispute. Filing of an application for binding arbitration tolls the running of any applicable statute of limitation, and the Florida Evidence Code applies to all arbitration proceedings. S. 44.104(6) and (9), F.S. Appeal may be made to the circuit court; if no appeal is made within the time provided by court rule, then the decision is referred to the judge in the case who shall enter such orders and judgements as are required to carry out the terms of the decision. Such orders are enforceable by the contempt powers of the court. S. 44.104(11), F.S.
- Mediation is a process whereby a neutral third person acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. Decision making authority rests with the parties. S. 44.1011(2), F.S. Court-ordered mediation is conducted according to the rules of practice and procedure adopted by the Supreme Court. S. 44.102, F.S. Any offer of settlement or an offer or demand for judgment may be made at any time after an impasse has been declared by a mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial. S. 44.102(6)(b), F.S.

CONSTITUTIONAL ISSUES

Sovereign Immunity

Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The doctrine originated in common law, wherein the king and his treasury were immune from suit by his subjects in his own courts. In Florida, section 13 of Article X of the State Constitution provides that provision be made by general law for bringing suit against the state as to all liabilities now existing or hereinafter originating.

Section 768.28, F.S., was enacted by the Legislature in 1973. Pursuant to this law, the state waives sovereign immunity for liability in tort claims in the same manner and to the extent as a private individual under like circumstances. S. 768.28(5), F.S. Liability does not include punitive damages or any interest for the period before the judgment. Notwithstanding the waiver of sovereign immunity, the law caps liability at \$100,000 per person, and \$200,000 per incident. S. 768.28(5), F.S. Any

amounts in excess of these caps may be paid only by further act of the Legislature through the Claims Bills process.

The state or an agency or subdivision may settle a claim or pay a judgment rendered against it within the limits of its insurance coverage. Such coverage neither waives the defense of sovereign immunity, nor serves to increase the limits of liability over the statutory caps of \$100,000 and \$200,000. *Id.*

Section 768.28, F.S., applies to tort claims only. The Legislature has not made an analogous waiver of sovereign immunity for contract claims. However, the legislature has by general law empowered state agencies to enter into contracts. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984). General contract law requires that contracts be mutually enforceable. The Florida Supreme Court has held that where the legislature has authorized entities of the state to enter into contracts, the legislature intended such contracts to be mutually binding. *Id.* at 5. Thus, where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract. *Id.*

In further interpretation of the Pan-Am case, the Fourth District Court of Appeal has held that sovereign immunity will not protect a state agency from action arising out of a breach of either express or implied conditions in that contract. *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So.2d 696 (Fla. 4th DCA 1988). More recently, sovereign immunity has been found to protect a state agency from action arising outside both the express and the implied conditions of a contract. *County of Brevard v. Miorelli Engineering*, 703 So.2d 1049 (Fla. 1997).

Separation of Powers

Article II, section 3 of the Florida Constitution provides that the powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided in the constitution. The Constitution further gives the supreme court authority to adopt rules for the practice and procedure in all of the courts. Art. V, sec. 2(a), Fla. Const. The Florida Supreme Court has declared that the judiciary has exclusive authority over rules of practice and procedure, and that the Legislature lacks the authority to act within this area. *In re Clarification of Florida Rules of Practice and Procedure (Fla. Const. Art. V, sec. 2(a))*, 281 So.2d 204 (Fla. 1973). However, the Legislature can repeal court rules by a 2/3 vote of each house. Art. V, sec. 2(a), Fla. Const. The Court has further determined that to the extent that a statute creates substantive rights, it does not interfere with the court's rule-making authority. *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995).

The determination of what constitutes substantive law and what constitutes practice and procedure has been decided by the courts on a case by case basis. Generally, substantive law creates, defines, and regulates rights and includes principles which fix and declare the primary rights of individuals towards their person and property; and practice and procedure encompasses the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress for their invasion. *Haven Federal Sav. & Loan Ass'n. v. Kirian*, 579 So.2d 730 (Fla. 1991). The provisions of the bill pertaining to class action suits may be found by a court to unconstitutionally encroach on the judiciary's power to promulgate court rules of practice and procedure.

Right of Access to Courts

Article 21, section 21 of the Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay. Generally, the legislature can only eliminate a judicial remedy under two circumstances: valid public purpose combined with a reasonable alternative, or overriding public necessity. The Supreme Court has held that a statute which provided the exclusive remedy under the Workmen's Comp. Act violated the right to access to courts. *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975). The Court has also held that a statute that denied recovery to persons with less than \$1,000 in medical expenses unconstitutionally trespassed upon the right of access to courts. *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974). The provisions of this bill which

provide for exclusive remedy, and the monetary prerequisite for class action suits may be subject to challenge as burdening the right of access to the courts.

B. EFFECT OF PROPOSED CHANGES:

On April 20, 1999, the Committee on Community Affairs adopted a "strike-everything" amendment. The "strike-everything" to the CS provides for the liability, defenses, and remedies for litigation surrounding the year-2000 issue as follows:

- Provides for the creation of the "Commerce Protection Act";
- Provides definitions for terms used in the act;
- Prescribes exclusive remedies against persons, businesses, and governmental agencies for damages caused by the failure of their information technology resources to function properly with respect to date-data;
- Prescribes and limits damages;
- Provides for mediation;
- Bars certain class actions;
- Requires that actions be brought within a specified time;
- Provides immunity from personal liability for directors and officers of businesses under specified circumstances;
- Exempts the exchange of certain information among businesses from action under the Florida Antitrust Act of 1980;
- Prescribes alternate dispute-resolution procedures;
- Provides for liability for costs and attorney's fees under specified circumstances;
- Prescribes circumstances under which the maker of a year-2000 statement is not liable under the state law with respect to that statement;
- Provides for construction of the act; and
- Repeals general law granting immunity from liability to governmental entities for certain computer calculation failures.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

CS/HB 1523 creates yet unnumbered sections of the Florida Statutes, and it repeals s. 282.4045, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section-by-section analysis of CS/HB 1523:

Section 1: Creates the Commerce Protection Act.

Section 2: Provides definitions for the following terms:

- **"Business"** means a person or an entity engaged in providing goods or services in this state. The term excludes any governmental agency or any agency of the legislative or judicial branch of state government.
- **"Date data"** means data that contain dates or that contain both dates and times.

- **"Direct economic damages"** includes only economic compensatory damages that follow both immediately and necessarily from the failure of a business or governmental agency to be year-2000 compliant. The term excludes special damages, incidental damages, and exemplary or punitive damages.
- **"Governmental agency"** includes any agency of the executive branch of state government or any agency of a political subdivision of the state as defined in section 1.01, F.S.
- **"Information technology product"** includes software, firmware, microcode, hardware, and equipment containing embedded chips or microprocessors that create, read, write, calculate, compare, sequence, or otherwise operate on date data.
 - The information technology products of a business or governmental agency are those that are owned, leased, or licensed by, or under the exclusive control of, the business or governmental agency and are used by it in providing its goods or services.
- **"Year-2000 compliant"** means when the produce is used in accordance with its associated documentation or recommended user intervention, is capable of correctly processing, providing, and receiving date data, and will do so for all dates occurring between February 28, 1996, and March 1, 2000, when all other information technology products that are used with the product properly exchange date data with it. An information technology product does not fail to be year-2000 compliant merely because it contains a defect that is unrelated to the manner in which the product processes, provides, or receives date data and that only incidentally causes the product to fail to properly process, provide, or receive date data.

Section 3: Provides that the remedies allowed in the bill, unless otherwise provided for by contract or tariff, are the exclusive remedies for failure to be year-2000 compliant. Provides that contract and tariff remedies shall control.

Section 4: Provides for liability for failure to be year-2000 compliant.

- **Business liability:** Businesses are liable for direct economic damages caused by failure to be year-2000 compliant, unless otherwise provided by written contract or tariff.
- **Governmental agency liability:** Liable for direct economic damages caused by failure to be year-2000 compliant, unless otherwise provided by written contract or tariff, as limited by the waiver of sovereign immunity established in s. 768.28, F.S. Provides that the doctrine of comparative fault, as codified in s. 768.81, F.S., will apply.
- **Comparative fault:** damages awarded exclude any damages that the plaintiff could have avoided or mitigated with the exercise of reasonable care or by actual disclosure prior to 12/1/99.
- **Defenses:** Businesses and governmental agencies are not liable for direct economic damages if proven by a preponderance of the evidence that they have secured on-site assessment and hold, before 12/1/99, a good faith belief that they are year-2000 compliant, or conduct date-data testing and as a result of such testing hold a good faith belief that they are year-2000 compliant. The bill does not limit any defenses otherwise available. Failure to comply with the defenses provided for in this section do not create liability.
- **Class action suits:** Class action suits are prohibited against governmental agencies which are not year-2000 compliant. Such suits are also prohibited against businesses, unless each member of the class has suffered direct economic damages in excess of \$50,000.
- **Statute of limitations:** Actions for damages must be brought within 2 years after the cause of action accrued, with the time tolling from the date any offer to submit the claim to mediation is made until the conclusion of the mediation.

Section 5: Provides **absolute and complete immunity for directors and officers of businesses** if such person has taken steps to determine whether the business is year-2000 compliant; developed and implemented a plan to make the business year-2000 compliant; and inquired whether entities upon which the business relies are year-2000 compliant. A director or officer who does not have

complete immunity from personal liability is nevertheless immune to the extent provided for in chapter 607 or 617, F.S.

Section 6: Specifies that the **exchange of information among businesses concerning year-2000 compliance does not constitute an activity or conduct in restraint of trade or commerce** under ch. 542, F.S.

Section 7: Provides for **alternative dispute resolution procedures**, including voluntary binding arbitration and mediation.

- **Voluntary binding arbitration:** Prior to filing a lawsuit under the Commerce Protection Act, any party may make an offer to the other party to submit the dispute to voluntary binding arbitration under s. 44.104, F.S. The offer must set out the maximum amount of damages that may be imposed pursuant to arbitration. If the offer to submit to arbitration is rejected, the court is required to award attorney's fees and costs as follows:
 - If the offer was made by the plaintiff and rejected by the defendant, and the defendant is ultimately found liable for damages in an amount equal to or exceeding the maximum amount of damages specified in the offer, then the defendant must pay the plaintiff's costs and reasonable attorney's fees.
 - If the offer was made by the defendant and rejected by the plaintiff, and the plaintiff is not ultimately awarded damages in an amount exceeding the maximum amount of damages specified in the defendant's offer, then the plaintiff must pay the defendant's costs and reasonable attorney's fees.
- **Mediation:** The court may submit a claim for damages to mediation pursuant to s. 44.102, F.S. Allows a party to serve its last best offer in mediation on another party as an offer of judgment under s. 678.79, F.S., and utilize all rights and remedies under that section.

Section 8: Provides that the Commerce Protection Act does not create a duty to provide notice nor mandate the timing of any notice regarding year-2000 compliance.

Section 9: Repeals s. 282.4045, F.S., which provides immunity consistent with s. 768.28, F.S. for state agencies and units of local government for year-2000 computer date calculation failures.

Section 10: Contains a standard severability clause.

Section 11: Provides that the act shall take effect upon becoming a law.

Section-by-section analysis of the "strike-everything" amendment to CS/HB 1523:

Section 1: Adds to the definition of "governmental agency" any public or private university school of medicine that is part of a public or private university supported in whole or in part by state funds and that has an affiliation with a local government or state instrumentality under which the medical school's computer system or systems, or diagnostic or therapeutic equipment dependent upon date logic, are used to provide clinical patient care services to the public.

Section 2: Provides definitions for the terms "business," "date data," "direct economic damages," "governmental agency," "information technology product," and "Year-2000 compliant."

- The term "business" means a person or any entity engaged in Florida in providing goods or services.
- The term "date data" means data that contain dates or that contain both dates and times.
- "Direct economic damages" means those economic compensatory damages that follow both immediately and necessarily for the failure of a business or a governmental agency to be Y2K compliant.

[**Note:** S. 768.81, F.S., further defines “economic damages” as applied in this instance to mean past lost income and future lost income reduced to present value; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any economic loss which would not have occurred but for the injury giving rise to the cause of action.]

- A “governmental agency” means a state executive branch agency or any agency of a political subdivision of the state as defined in s. 1.01, F.S., and any public or private university school of medicine that is part of a public or private university supported in whole or in part by state funds and that has an affiliation with a local government or state instrumentality under which the medical school's computer system or systems, or diagnostic or therapeutic equipment dependent upon date logic, are used to provide clinical patient care services to the public.

[**Note:** S. 282.4045, F.S., provides immunity for state agencies and units of local government for year 2000 computer date calculation failures, including the above-mentioned public or private university school of medicine.]

- An “information technology product” includes software, firmware, microcode, hardware, and equipment containing embedded chips or microprocessors which process or operate on date data and are owned, leased, or licensed by or under the exclusive control of the business or governmental agency.
- “Year-2000 compliant” means information technology products capable of correctly processing, providing, and receiving date data. Information technology products containing defects not operatively related to how date data is processed, provided, or received is exempt from the description of year-2000 compliance failure.

Section 3: Specifies that the exclusive remedies for damages caused by a business' or governmental agency's failure of its information technology products to be Y2K compliant shall be those remedies available for breach of a written contract or tariff with the business or agency, or, in the absence of such a written contract or tariff, those remedies provided by the act.

Section 4: Specifies the liability, unless otherwise provided by contract or tariff, of a business or an agency for failure of its information technology products to be Y2K compliant; designates that law of comparative fault apply to the award of damages; prohibits recovery for damages that could have been avoided or mitigated; enables businesses and agencies to avoid liability based upon assessment and disclosure of Y2K compliance; requires a plaintiff to offer to submit the claim to mediation as a precondition to bringing an action; places limitations on certain class-action lawsuits; and establishes a date sensitive limitation for commencement of actions under the new act.

- *Business Liability:* A business whose information technology products are not Y2K compliant maybe liable *only* for direct economic damages caused by its failure to be compliant.
- *Agency Liability:* A governmental agency whose information technology products are not compliant maybe liable for direct economic damages caused by its failure to be compliant however, *only* within the limits on the waiver of sovereign immunity under s. 768.28, F.S.
- *Determination of Damages Based on Comparative Fault:* The bill specifies that any contributory fault charged to the claimant diminishes proportionally the amount of the award as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.
- *Damage Limitations Based on Disclosure:* The bill specifies that a plaintiff may not recover damages that could have been avoided or mitigated based on the exercise of reasonable care or based on written disclosures from the defendant -- made before December 1, 1999 -- regarding its Y2K compliance.
- *Avoidance of Liability:* Businesses and agencies may avoid liability for direct economic damages by doing the following:

- Secured an assessment, by a person who possess the technical skills, experience, or competence with respect to information technology resources to evaluate information technology products for year-2000 compliance, to determine actions necessary to make the information technology products of the business or governmental agency year-2000 compliant and, based on that assessment, holds before December 1, 1999, a reasonable good-faith belief that those products are year-2000 compliant;
 - Before December 1, 1999, conducted a date-data test of its information technology products and as a result of such test has a reasonable good-faith belief that they are year-2000 compliant; or
 - For small businesses, comprised of five persons or less and with a net worth of \$100,000 or less, who made reasonable efforts to assess whether the entities on whose information technology product they rely and with whom it is in privity have provided information technology products that are year-2000 compliant and with respect to each entity, either:
 - ◆ Holds, before December 1, 1999, a reasonable good-faith belief, based on the responses to inquiries or on research or on its own date-data testing of its information technology products, that the entity has provided information technology products that are year-2000 compliant; or
 - ◆ Discloses, in writing to the other party before December 1, 1999, in a manner consistent with that used in the past to give written notification to that party, that the entity has provided information technology products that are presumed not to be year-2000 compliant.
- *Pre-claim Mediation:* As a precondition to bringing an action for damages under the act, and prior to filing an answer, the court with jurisdiction shall refer the claim to mediation under section 44.102, Florida Statutes.
 - *Class Actions:* The bill prohibits class actions from being maintained in Florida against a governmental agency for failure of its information technology products to be Y2K compliant. In addition, the measure prohibits such class actions against a business, unless each member of the class has suffered direct economic damages exceeding \$50,000.
 - *Statute of Limitations:* An action for damages under the act must commence before March 1, 2002, however, an offer to submit the claim to mediation tolls the running of this time period until the conclusion of the mediation.

Section 5: Shields a director or an officer of a business from personal liability for damages resulting from the business' failure to become Y2K compliant if the director or officer has instructed the business to do the following:

- Assess its Y2K compliance;
- Implement a plan to take actions necessary to make the business compliant;
- Inquire whether entities upon which the business relies are compliant.

Retains the shield of immunity from personal liability to the extent provided in chapter 607, F.S., or chapter 617, F.S.

Section 6: Specifies that the exchange of information among businesses and governmental agencies regarding measures aiding in Y2K compliance does not constitute an activity or conduct in restraint of trade or commerce under ch. 542, F.S., the state antitrust statute.

Section 7: Provides incentives to use alternative dispute resolution procedures in cases involving Y2K matters, including voluntary binding arbitration or mediation.

- *Voluntary binding arbitration:* A party to a lawsuit brought under the "Commerce Protection Act" may offer to submit the matter to voluntary binding arbitration, with the offer prescribing the maximum amount of damages that may be imposed under the arbitration. If the trial court finds that the defendant rejected the plaintiff's offer and the defendant is found liable in an amount equal to or exceeding the plaintiff's highest offer, the defendant must pay the plaintiff's costs and reasonable attorney's fees. If the plaintiff rejected the defendant's offer, and the plaintiff is not ultimately awarded damages exceeding the maximum damages specified in the offer, the plaintiff must pay the defendant's costs and reasonable attorney's fees.
- *Mediation:* A court may submit a claim for damages to mediation pursuant to section 44.102, Florida Statutes. A party may make its last best offer of judgement under section 678.79 and the court has the discretion to shared equally by the parties.

Section 8: Provides immunity under state law for Y2K statements made with respect to the offer or sale of securities under certain conditions.

- To the extent that the statement was a republication of a Y2K statement originally made by a third party, liability may exist if the claimant establishes by clear-and-convincing evidence that the statement was material and that the maker of the republication made the statement with actual knowledge that it was false, inaccurate, or misleading; with intent to deceive or mislead; or without notice either because the maker has not verified the contents of the republication; or the maker is not the source of the statement, the statement is based on information supplied by another person, and the notice or republished statement identifies the source of the statement.
- To the extent that the statement was not a republication of a Y2K statement originally made by a third party, liability may exist if the claimant establishes that the statement was material and that the maker made the statement with actual knowledge that it was false, inaccurate, or misleading; with intent to deceive or mislead; or with reckless disregard as to its accuracy.

Section 9: Provides that the act shall not be construed to create a duty to provide notice concerning Y2K compliance; nor shall the act be construed to mandate the content or timing of any notice concerning compliance.

Section 10: Repeals s. 282.4045, F.S., 1998 Supp., which provides that the state, its agencies, and units of local government are immune from damages for Y2K computer date failures consistent with the statute providing for waiver of sovereign immunity in tort actions.

Section 11: Provides for a severability clause.

Section 12: Provides that the act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The fiscal impact of this bill is unknown. State agencies may experience a non-recurring fiscal impact as a result of actions taken to become year-2000 compliant. Costs of becoming year-2000 compliant should be realized as cost-avoidance for future litigation.

2. Recurring Effects:

The fiscal impact of this bill is unknown. Because sovereign immunity is waived for actions that are grossly negligent, the treasuries of state agencies may be exposed to significant liability and litigation costs.

3. Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

The fiscal impact of this bill is unknown. Local governments may experience a non-recurring fiscal impact as a result of actions taken to become year-2000 compliant. Costs of becoming year-2000 compliant should be realized as cost-avoidance for future litigation.

2. Recurring Effects:

The fiscal impact of this bill is unknown. Because sovereign immunity is waived for actions that are grossly negligent, the treasuries of local governments may be exposed to significant liability and litigation costs.

3. Long Run Effects Other Than Normal Growth:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The private sector may experience a fiscal impact by actions taken to become year-2000 compliant. The exact fiscal impact of this bill is unknown.

2. Direct Private Sector Benefits:

The fiscal impact of this bill is unknown. To the extent that the bill contributes certainty to the litigation of claims related to year-2000 compliance, private sector businesses may benefit.

3. Effects on Competition, Private Enterprise and Employment Markets:

This bill may have an effect on competition as it allows private businesses to exchange information among themselves concerning year-2000 compliance measures without violating anti-trust provisions. Further, the confidentiality provisions of the bill allow businesses and government agencies to enjoin solution providers from using or disclosing information regarding technology operations, programs, equipment, and data. While this confidentiality may benefit individual businesses, it may also effect the market as a whole.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with municipalities.

V. COMMENTS:

Committee on Judiciary on the bill as introduced: Neither the legislative nor judicial branches are included in the definition of "governmental agency." Thus, it would appear that the provisions of this bill do not apply to the legislative and judicial branches. Sovereign immunity may protect these two branches in all actions except for those tort actions allowed pursuant to the waiver of immunity provided by s. 768.28, F.S., and the implied waiver of sovereign immunity, developed by the Court, in actions based on contract. Consider mirroring the definition of "agency" as defined by s. 119.011(2), F.S., which includes any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law, including the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. Such cross-reference would also minimize any conflict between the two definitions in regards to the public records issues inherent in this bill.

Businesses and governmental agencies are liable for "direct economic damages," which is not defined in the bill. Consider cross-referencing the definition of "economic damages" found at s. 768.81, F.S. : past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

The statute of limitations provided for in the bill would allow actions as long as they are commenced within 2 years after the cause of action accrued. Consider requiring a date-specific statute of limitations.

The bill currently provides for liability if the business is not year-2000 compliant. It is questionable whether liability stems only from damages caused by information technology products that are not year-2000 compliant, or whether liability might ensue from the use of such products by employees.

The bill does not provide for the costs of mediation or arbitration.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee on Judiciary: On March 30, 1999, the Committee on Judiciary adopted an amendment and made the bill a committee substitute. The amendment 's provisions are included in this analysis. The CS makes the following changes to the bill, as introduced:

- Adds a definition of direct economic damages (in lieu of statutory reference).
- Deletes definition of "solution provider."
- Adds definition of "information technology products."
- Provides limitation on definition of "Year 2000 Compliant" to exclude defects unrelated to date-data processing which incidentally causes data-data processing failures.
- Clarifies that bill applies in absence of contract or tariff.
- Deletes partial waiver of sovereign immunity.
- Clarifies nature of disclosures regarding Y2K readiness by defendants (provides for written or "otherwise communicated" disclosures in a manner consistent with past use).
- Provides that failure of business to undertake "due diligence" (assessment) does not raise presumption of liability.
- Provides for mandatory mediation of claims, post-filing.
- Deletes reference to securities actions.

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- Deletes confidentiality provisions.
- Requires claims to be brought by March 1, 2002.
- Allows party to serve last offer in mediation as offer of judgment.
- Provides revised severability clause.

Committee on Financial Services: On April 15, 1999, the CS/HB 1523 was withdrawn from the Committee on Financial Services.

Committee on Community Affairs: On April 20, 1999, the Committee on Community affairs adopted a "strike everything" amendment to CS/HB 1523. The "strike everything" amendment conforms the House Bill to CS/CS/CS/SB 80. In addition it changes the definition of "agency" to include a certain public and private university school of medicine, clarifies the language regarding businesses not liable for direct economic damages if certain activities are undertaken; and makes certain clarifying changes to the language specifying information technology products. A section-by-section analysis of the "strike everything" amendment to CS/HB 1523, can be found in the section-by-section analysis section of this document.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Michael W. Carlson

Staff Director:

Don Rubottom

AS FURTHER REVISED BY THE COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Tonya Sue Chavis, Esq.

Staff Director:

Joan Highsmith-Smith