

**STORAGE NAME:** h1523.jud  
**DATE:** March 20, 1999

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
JUDICIARY  
ANALYSIS**

**BILL #:** HB 1523  
**RELATING TO:** Information technology resources  
**SPONSOR(S):** Representative Hart  
**COMPANION BILL(S):** CS/CS/SB 80

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

- (1) JUDICIARY
  - (2) FINANCIAL SERVICES
  - (3) COMMUNITY AFFAIRS
  - (4) CLAIMS
  - (5) GENERAL GOVERNMENT APPROPRIATIONS
- 

**I. SUMMARY:**

HB 1523 creates the Commerce Protection Act, which prescribes the exclusive remedies against businesses and governmental agencies for damages caused by the failure of information technology resources to function properly with respect to date data.

Specifically, this bill:

- Expands the waiver of sovereign immunity for damages caused by the gross negligence of governmental agencies.
- Excludes from compensatory damages those that could have been avoided through the exercise of reasonable care or based upon disclosures.
- Allows businesses and governmental agencies to avoid liability by assessing compliance, holding a reasonable good-faith belief that they are compliant, assessing whether entities upon which they rely are compliant, and disclosing if such entities are not compliant.
- Requires preclaim mediation prior to bringing an action for damages.
- Prohibits class action suits under specified circumstances.
- Establishes a two-year statute of limitations on actions for damages.
- Provides directors and officers of corporations with absolute and complete immunity from personal liability under specified circumstances.
- Prohibits the unauthorized use or disclosure of confidential information technology data, and provides both civil and criminal penalties for violation of confidentiality provisions.
- Exempts the exchange of information concerning year-2000 compliance from anti-trust provisions.
- Provides for alternative dispute resolution procedures.
- Provides immunity under state law for Y2K statements made with respect to the offer of securities under specified conditions.
- Repeals current provision that provides sovereign immunity for the state, its agencies, and units of local government, from damages for Y2K computer date failures.

## 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 section 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:

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- 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 Rule of Civil Procedure 1.220 further requires the court to conclude that the claim and defense is 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.

#### B. EFFECT OF PROPOSED CHANGES:

The Commerce Protection Act sets forth the liability, defenses, and remedies for litigation surrounding the year-2000 issue as follows:

Contract Warranties: Section 10 of the bill provides that the Commerce Protection Act does not apply to any action based on a written contract or tariff as long as all parties to the action are parties to the written contract or tariff. All written terms of such contracts, including limitations on and exclusions of liability and disclaimers of warranty remain fully enforceable. In short, the bill does not change the law with respect to enforcement of contracts and warranties.

**Director Liability:** The bill provides absolute and complete immunity for directors of businesses as long as such director has directed the business to take steps to determine whether the business is year-2000 compliant, developed and implemented a plan to be year-2000 compliant, and inquired whether entities on which the business relies are year-2000 compliant. Current law which provides immunity for personal liability for officers and directors is still applicable.

**Class Action Suits:** The bill prohibits class action suits for damages caused by the failure of governmental agencies to be year-2000 compliant, and limits similar class action suits against businesses unless each member of the class has suffered direct economic damages in excess of \$50,000. See the discussion below regarding the constitutional issues surrounding separation of powers, access to courts, and sovereign immunity.

**Anti-trust actions:** The bill provides an exemption from the prohibition against restraint of trade or commerce, for the exchange of information among businesses concerning measures taken in order for a business to become year-2000 compliant.

### **Non-Contract Claims**

**Remedies:** The bill limits liability to direct economic damages caused by failure to be year-2000 compliant. The bill excludes from damages awarded any damages that the plaintiff could have avoided or mitigated with the exercise of reasonable care, or avoided or mitigated through written disclosure. Liability is eliminated if the business or governmental agency can prove by a preponderance of the evidence that it has secured an on-site assessment and has a reasonable good-faith belief that it is year-2000 compliant, and has assessed whether the entities on which it relies have a reasonable good-faith belief that they are year-2000 compliant, or discloses the noncompliance. As a precondition to bring an action under the Commerce Protection Act, plaintiffs are required by the bill to make a written offer to send the claim to mediation. Both voluntary binding arbitration and mediation are encouraged by the bill.

## **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.*

Florida courts have recognized two exceptions to the state's waiver of sovereign immunity: discretionary functions and the public duty doctrine. Discretionary functions are planning level functions; the court uses a four-pronged test to determine whether an activity should be classified as discretionary, thus protecting the state from suit. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988). The second exception is the public duty doctrine, which protects the state from suit in situations where the government owes a general duty to all citizens, but no particular injury to the injured party.

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).

In addition to the limited waiver of sovereign immunity for tort action, and the judicially created waiver in contract, this bill opens government agencies to liability beyond the statutory caps provided in s. 768.28, F.S., if it is shown by clear and convincing evidence that the damages occurred because of its grossly negligent misrepresentations or conduct. Such waiver may have the effect of opening the state's treasury to unlimited encroachment, as the state would have to litigate the issue of whether conduct is grossly negligent even if the court ultimately finds that sovereign immunity applies.

### **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 and the precondition to mediate may be found by a court to unconstitutionally encroach on the judiciary's power to promulgate court rules of practice and procedure.

### **Public Records**

Article I, section 24(a) of the Florida Constitution provides that every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted. The Constitution specifically includes the three branches of government and each agency or department created thereunder. As defined by s. 119.011(2), F.S., "agency" includes any other public or private agency, person, partnership, corporation, or business entity acting on behalf of a public agency. Further, if public funds are expended by an agency in payment of dues or membership contributions to any person, corporation, foundation, trust, association, group, or other organization, then all the financial, business, and membership records pertaining to the public agency and to the agency receiving such payments are public records. S. 119.012, F.S.

The Legislature has created a public records exemption for data processing software obtained by an agency under a licensing agreement which prohibits its disclosure and which software is a trade secret, and agency-produced data processing software which is sensitive. "Sensitive" is defined as only that portion of the data processing software used to:

- collect, process, store, and retrieve information which is exempt;
- collect, process, store, and retrieve financial management information of the agency; or

- control and direct access authorizations and security measures for automated systems.

Section 119.07(3)(o), F.S.

“Trade secret” is defined by s.812.081(1)(c), F.S. as the whole or any portion or phrase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. A trade secret is considered to be secret, of value, for use or in use by the business, and of advantage to the business or provides an opportunity to obtain an advantage, over those who do not know or use it. The owner of the trade secret must take measures to prevent it from becoming available to persons other than those selected by the owner. It is a felony of the third degree to steal or embezzle a trade secret. S. 812.081(2), F.S.

The Constitution requires that exemptions be no broader than necessary to accomplish the stated purpose of law, and that laws making exemptions shall relate to one subject. Art. I, s. 24(c), Fla. Const. Because the exemption provided for in section 5 of HB 1523 is broader than the definition of trade secret which is already exempted, in that the bill makes confidential “all information acquired...,” this provision may be found to violate the public records provisions of the Constitution.

### **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.

### **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:

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

E. SECTION-BY-SECTION ANALYSIS:

**Section 1:** Creates the Commerce Protection Act.

**Section 2:** Provides definitions for the terms, "business," "date data," "governmental agency," "information technology product," "solution provider," and "year-2000 compliant."

The definition of "business" excludes any governmental agency or any agency of the legislative or judicial branch of state government.

The term "governmental agency" includes any agency of the executive branch, or any agency of a political  
ion as defined in s. 1.01, F.S. (Counties, cities, towns, villages, special tax school districts  
special road and bridge districts, bridge districts, and all other districts in this state.) The term does not  
or judicial branch of government. Thus, it would appear that the provisions  
of this bill do not apply to the legislative or judicial branches.

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contract are the exclusive remedies for failure to be year-2000 compliant.

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

Business ability: Business are liable for direct economic damages caused by failure to be year-2000

Governmental 0  
compliant, provided by written contract or tariff, as limited by the waiver of sovereign  
immunity established in s. 768.28, F.S. Go  
the limits set forth in s. 768.28,  
occurred because of grossly negligent misrepresentations or conduct.

Compar fault: damages awarded exclude any damages that the plaintiff could have avoided or

Defenses: Businesses and governmental agencies are not liable for direct economic damages if proven  
nt and hold, before 12/1/99,  
a good faith belief that they are year-2  
rely and with whom they are in privity, are year-2000 compliant or have disclosed that such entity is not  
compliant. The bill does not limit any defenses otherwise available. Failure to comply with

Precondition 0  
submit the claim to preclaim mediation; defendants are required to accept the offer within 60 days of  
it. If the offer is accepted, the bill requires mediation to be concluded within 120 days o  
acceptance.

Class action suits:  
2000 compliant. Such suits are also prohibited against  
has suffered direct economic damages in excess of \$50,000.

Statute mitations: Actions for damages must be brought within 2 years after the cause of action  
conclusion of the mediation.

**Section** : Provides absolute and complete immunity for directors and officers of businesses if suc  
person has d  
implemented a plan to make the business year-2000 compliant; and  
the business relies are year-2000 compliant. A director or officer who does not have complete immunity

**Section 6** e  
solution r  
governmental entity and is not a  
otherwise provided by law. The bill authorizes a business or government agency to seek an injunction

disclosure of such information is  
for pecuniary gain is a third degree felony.

**Section** : Specifies that the exchange of information among businesses concerning year-2000  
compliance does not constitute  
F.S.

**Section 8:** 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 upon the court's own motion, or by motion of the parties. If such mediation reaches an impasse, the mediator is required to file, under seal, both parties' last best offer. These offers may not be disclosed to the ultimate trier of fact until after trial. Costs and fees are awarded as follows:

- If the plaintiff is not awarded more than 75% of the defendant's last best offer, the plaintiff must pay the defendant's costs and reasonable attorney's fees.
- If the plaintiff is awarded 125% or more of the plaintiff's last best offer, the defendant must pay the plaintiff's costs and reasonable attorney's fees.

**Section 9:** Provides immunity under state law for year-2000 statements made with respect to solicitations of an offer or sale of securities unless the claimant establishes by clear and convincing evidence that the statement was material and if not a republication, was made with actual knowledge that it was false, inaccurate, or misleading; with intent to deceive or mislead; or with reckless disregard as to its accuracy. If the statement was a republication of a year-2000 statement originally made by a third party, the claimant must establish that the maker of the republished statement made such statement with actual knowledge that it was false, misleading, or inaccurate; with intent to deceive or mislead; or without notice because the maker had not verified the contents of the republication, or the maker is not the source of the republished statement and the statement identifies the source of the republished statement.

**Section 10:** Provides that the Commerce Protection Act does not apply to actions based on written contract or tariff as long as all parties to the action are parties to the written contract or tariff. All written terms of such contract or tariff, including limitations on and exclusions of liability and disclaimers of warranty remain fully enforceable.

**Section 11:** 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 12:** 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 13:** 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:

N/A

4. Total Revenues and Expenditures:

N/A

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:

N/A

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:

N/A

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:

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.

Governmental agencies are liable beyond the statutory caps on liability provided for in s. 768.28, if the damages occurred because of grossly negligent misrepresentations or conduct. This language may serve to invite litigation to determine whether the actions of the governmental agency were grossly negligent. Such a waiver of sovereign immunity opens the treasury of the specified governmental agencies to unlimited encroachment, even if the damages are eventually found not to be grossly negligent.

It is unclear whether the information technology products referred to in the bill must be owned, leased, or licensed by the business or governmental agency in order to be included as part of the definition of "information technology product."

It is unclear whether persons who repair or correct information technology products would be included in the definition of "solution providers."

The comparative fault provisions of s. 768.81, F.S. are not specifically referenced in the bill, and thus the applicability of such provisions to actions brought pursuant to the Commerce Protection Act are questionable.

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.

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

Because of the numerous constitutional issues inherent in the bill, consider including a severability clause.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

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Stephanie O. Birtman

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Don Rubottom