

By Representative Hart

1 A bill to be entitled
2 An act relating to information technology
3 resources; creating the "Commerce Protection
4 Act"; defining terms; prescribing exclusive
5 remedies against persons, businesses, and
6 governmental agencies for damages caused by the
7 failure of their information technology
8 resources to function properly with respect to
9 date data; prescribing and limiting damages;
10 expanding the waiver of sovereign immunity;
11 prescribing conditions precedent to maintaining
12 or defending actions; barring certain class
13 actions; requiring that actions be brought
14 within a specified time; providing immunity
15 from personal liability for directors and
16 officers of businesses under specified
17 circumstances; prohibiting solution providers
18 from misusing or disclosing specified
19 information provided to them; providing for
20 remedies and damages for unlawful use or
21 disclosure of that information; providing
22 criminal penalties; exempting the exchange of
23 certain information among businesses from
24 action under the Florida Antitrust Act of 1980;
25 prescribing alternative dispute-resolution
26 procedures; providing for liability for costs
27 and attorney's fees under specified
28 circumstances; prescribing circumstances under
29 which the maker of a year-2000 statement is not
30 liable under state law with respect to that
31 statement; providing for scope and construction

1 of the act; repealing s. 282.4045, F.S., which
2 grants immunity from liability to governmental
3 entities for certain computer calculation
4 failures; providing an effective date.

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6 Be It Enacted by the Legislature of the State of Florida:

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8 Section 1. Short title.--This act may be cited as the
9 "Commerce Protection Act."

10 Section 2. Definitions.--For the purposes of this act,
11 the following terms have the following meanings:

12 (1) BUSINESS.--The term "business" means a person or
13 any entity, however organized, which is routinely engaged in
14 this state in providing goods or services in the stream of
15 commerce, but the term excludes any governmental agency or any
16 agency of the legislative or judicial branch of state
17 government.

18 (2) DATE DATA.--The term "date data" means data that
19 contain dates or that contain both dates and times.

20 (3) GOVERNMENTAL AGENCY.--The term "governmental
21 agency" includes any agency of the executive branch of state
22 government or any agency of a political subdivision of the
23 state as defined in section 1.01, Florida Statutes.

24 (4) INFORMATION TECHNOLOGY PRODUCT.--The term
25 "information technology product" includes software, firmware,
26 microcode, hardware, and equipment containing embedded chips
27 or microprocessors that create, read, write, calculate,
28 compare, sequence, or otherwise operate on date data.

29 (5) SOLUTION PROVIDER.--The term "solution provider"
30 means any nongovernmental entity that enters into an agreement
31 with a business or governmental agency to:

1 (a) Provide information technology products or
2 services that have been specifically designated as year-2000
3 compliant; or

4 (b) Test information technology products or services
5 to determine whether they are year-2000 compliant.

6 (6) YEAR-2000 COMPLIANT.--

7 (a) An information technology product is "year-2000
8 compliant" if the product, when used in accordance with its
9 associated documentation or recommended user intervention, is
10 capable of correctly processing, providing, and receiving date
11 data, and will do so for all dates occurring between February
12 28, 1996, and March 1, 2000, when all other information
13 technology products that are used with the product properly
14 exchange date data with it.

15 (b) A business or governmental agency is "year-2000
16 compliant" if all information technology products that are
17 owned or leased by or under the exclusive control of the
18 business or governmental agency are year-2000 compliant.

19 Section 3. Exclusive remedies for failure to be
20 year-2000 compliant.--The exclusive remedies in this state for
21 recovering from a business or governmental agency damages
22 resulting from its failure to be year-2000 compliant are those
23 available for breach of a written contract or tariff with the
24 business or governmental agency or, if there is no written
25 contract or tariff, those provided in this act.

26 Section 4. Damages for failure to be year-2000
27 compliant; waiver of sovereign immunity; conditions precedent
28 to bringing or defending actions; limitation on class actions;
29 statute of limitations.--

30 (1) Unless otherwise provided by written contract or
31 tariff, any business that is not year-2000 compliant is liable

1 for direct economic damages caused by its failure to be
2 year-2000 compliant.

3 (2) Unless otherwise provided by written contract or
4 tariff, any governmental agency that is not year-2000
5 compliant is liable for direct economic damages caused by its
6 failure to be year-2000 compliant:

7 (a) Within the limits on the waiver of sovereign
8 immunity established in section 768.28, Florida Statutes; and

9 (b) Beyond the limits on the waiver of sovereign
10 immunity established in section 768.28, Florida Statutes, if
11 it is shown by clear and convincing evidence that the damages
12 occurred because of its grossly negligent misrepresentations
13 or conduct.

14 (3) Damages awarded under this section shall exclude
15 any damages that the plaintiff:

16 (a) Could have avoided or mitigated with the exercise
17 of reasonable care; or

18 (b) Could have reasonably avoided or mitigated as a
19 result of any written disclosure actually made by the
20 defendant before December 1, 1999, in a manner consistent with
21 that used in the past to give written notifications to the
22 defendant, concerning whether the business or governmental
23 agency or any of its information technology products was
24 year-2000 compliant.

25 (4)(a) A business or governmental agency is not liable
26 for direct economic damages if it proves by a preponderance of
27 the evidence that it has:

28 1. Secured an on-site assessment, by a person who
29 possesses the technical skills and experience with respect to
30 information technology resources to competently evaluate
31 information technology products and services for date-data

1 processing deficiencies, to determine actions necessary for
2 the business or governmental agency to become year-2000
3 compliant and, based on that assessment, holds before December
4 1, 1999, a reasonable good-faith belief that it is year-2000
5 compliant; and
6 2. Assessed through written inquiry whether the
7 entities on whose goods or services it relies and with whom it
8 is in privity are year-2000 compliant and, with respect to
9 each such entity, either:
10 a. Holds before December 1, 1999, a reasonable
11 good-faith belief, based on the response to that inquiry, that
12 the entity is year-2000 compliant; or
13 b. Discloses in writing to the other party before
14 December 1, 1999, in a manner consistent with that used in the
15 past to give written notifications to that party, that, based
16 on the response to that inquiry, the entity is not year-2000
17 compliant or that the entity is presumed not to be year-2000
18 compliant because it failed to respond to that inquiry.
19 (b) Paragraph (a) does not limit in any way the
20 defenses otherwise available to a business or governmental
21 agency; nor does the failure of a business or governmental
22 agency to comply with paragraph (a) create any liability for
23 that business or governmental agency.
24 (5) As a condition precedent to bringing an action for
25 damages under this section, the plaintiff must have made a
26 written offer to the defendant to submit the claim for damages
27 to preclaim mediation; and, as a condition precedent to
28 defending an action brought under this section, the defendant
29 must have accepted that offer in writing within 60 days after
30 receiving it. If an offer of mediation is accepted, the
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1 mediation must be concluded within 120 days after the
2 acceptance is given.

3 (6) A class action may not be maintained in this
4 state:

5 (a) Against a governmental agency for damages caused
6 by the failure of the governmental agency to be year-2000
7 compliant.

8 (b) Against a business for damages caused by the
9 failure of the business to be year-2000 compliant, unless each
10 member of the class has suffered direct economic damages in
11 excess of \$50,000.

12 (7) Any action for damages under this section must be
13 commenced within 2 years after the cause of action accrued,
14 but the running of this time is tolled from the date any offer
15 is made to submit the claim to mediation until the conclusion
16 of mediation.

17 Section 5. Immunity from liability for directors and
18 officers of businesses.--

19 (1) A director or officer of a business has absolute
20 and complete immunity from personal liability for any damages
21 resulting from the failure of the business to become year-2000
22 compliant if the officer or director has instructed the
23 business to:

24 (a) Take steps to determine whether the business is
25 year-2000 compliant;

26 (b) Develop and implement a plan to take actions
27 necessary to make the business year-2000 compliant; and

28 (c) Inquire whether the entities on whose goods or
29 services the business relies are year-2000 compliant.

30 (2) A director or officer who does not have absolute
31 and complete immunity from personal liability under subsection

1 (1) nevertheless has immunity from personal liability to the
2 extent provided in chapter 607, Florida Statutes, or chapter
3 617, Florida Statutes.

4 Section 6. Confidentiality of information provided to
5 solution providers; remedies regarding unlawful use or
6 disclosure; penalties.--

7 (1) All information acquired by a solution provider
8 concerning the information technology operations, programs,
9 equipment, and data of a business or governmental agency
10 remain the property of the business or governmental agency.

11 The solution provider:

12 (a) May use the information only in the manner
13 expressly permitted by the business or governmental agency;
14 and

15 (b) May not disclose the information to another
16 without the express written consent of the business or
17 governmental agency or as otherwise required by law.

18 (2) Notwithstanding the limitations of section
19 688.008, Florida Statutes, a business or governmental agency
20 may bring an action to enjoin any actual or threatened
21 violation of subsection (1) or to recover damages resulting
22 from a violation of subsection (1). These damages include:

23 (a) Both the actual monetary loss incurred as a result
24 of the violation and any unjust enrichment caused by the
25 violation which is not otherwise considered in calculating the
26 actual monetary loss incurred; and

27 (b) If the misuse or disclosure was intentional or
28 grossly negligent, punitive damages in an amount not exceeding
29 three times the award made under paragraph (a).

30 (3)(a) Any person who misuses or discloses information
31 in violation of subsection (1) is guilty of a misdemeanor of

1 the first degree, punishable as provided in section 775.082 or
2 section 775.083, Florida Statutes.

3 (b) Any person who for pecuniary gain intentionally
4 misuses or discloses information in violation of subsection
5 (1) is guilty of a felony of the third degree, punishable as
6 provided in section 775.082 or section 775.083, Florida
7 Statutes.

8 Section 7. Antitrust exemption with respect to
9 exchanges of information.--The exchange of information among
10 businesses concerning measures that have been taken or are to
11 be taken in order for a business to become year-2000 compliant
12 does not constitute an activity or conduct in restraint of
13 trade or commerce under chapter 542, Florida Statutes.

14 Section 8. Alternative dispute-resolution
15 procedures.--

16 (1) VOLUNTARY BINDING ARBITRATION.--

17 (a) Any party to a dispute under this act for which
18 there is no prior arbitration agreement may, before a lawsuit
19 has been filed, make an offer to the other party to submit the
20 dispute to voluntary binding arbitration under section 44.104,
21 Florida Statutes. An offer made under this paragraph must set
22 out the maximum amount of damages that may be imposed pursuant
23 to arbitration.

24 (b) If at trial, the court finds that an offer was
25 made under paragraph (a) and was rejected, the court shall
26 award attorney's fees and costs in accordance with this
27 paragraph.

28 1. If the offer was made by the plaintiff and rejected
29 by the defendant, and if the defendant is ultimately found to
30 be liable for damages in an amount equal to or exceeding the
31 maximum amount of damages specified in the plaintiff's offer,

1 the defendant must pay the plaintiff's costs and reasonable
2 attorney's fees.

3 2. If the offer was made by the defendant and rejected
4 by the plaintiff, and if the plaintiff is not ultimately
5 awarded damages in an amount exceeding the maximum amount of
6 damages specified in the defendant's offer, the plaintiff must
7 pay the defendant's costs and reasonable attorney's fees.

8 (2) MEDIATION.--

9 (a) The court may submit a claim for damages under
10 this act to mediation upon its own motion or upon the motion
11 of the parties.

12 (b) If a claim is submitted to mediation under
13 paragraph (a) and the mediation reaches an impasse, the
14 mediator shall file with the court, under seal, both the
15 plaintiff's and the defendant's last best offer, and these
16 offers may not be disclosed to the ultimate trier of fact
17 until after trial.

18 1. If the ultimate trier of fact does not award the
19 plaintiff more than 75 percent of the defendant's last best
20 offer, the plaintiff must pay the defendant's costs and
21 reasonable attorney's fees; and

22 2. If the ultimate trier of fact awards the plaintiff
23 125 percent or more of the plaintiff's last best offer, the
24 defendant must pay the plaintiff's costs and reasonable
25 attorney's fees.

26 Section 9. Securities actions.--If an action is
27 brought under the securities laws, as that term is defined in
28 Section 3(a)(47) of the Securities Exchange Act of 1934, 15
29 U.S.C. 78c(a)(47), or based on any document or material filed
30 with the Securities and Exchange Commission, or with federal
31 banking regulators, pursuant to Section 12(i) of the

1 Securities Exchange Act of 1934, 15 U.S.C. 781(i), or any
2 disclosure or writing that when made accompanied the
3 solicitation of an offer or sale of securities, the maker of
4 that year-2000 statement is not liable under state law with
5 respect to that statement unless the claimant establishes by
6 clear and convincing evidence, in addition to all other
7 requisite elements of the applicable action, that the
8 statement was material and:
9 (1) To the extent that the statement was not a
10 republication of a year-2000 statement originally made by a
11 third party, that the maker made the statement:
12 (a) With actual knowledge that it was false,
13 inaccurate, or misleading;
14 (b) With intent to deceive or mislead; or
15 (c) With a reckless disregard as to its accuracy; or
16 (2) To the extent that the statement was a
17 republication of the year-2000 statement originally made by a
18 third party, that the maker of the republication made the
19 statement:
20 (a) With actual knowledge that it was false,
21 inaccurate, or misleading;
22 (b) With intent to deceive or mislead; or
23 (c) Without notice because:
24 1. The maker has not verified the contents of the
25 republication; or
26 2. The maker is not the source of the republished
27 statement, the republished statement is based on information
28 supplied by another person or entity, and the notice or
29 republished statement identifies the source of the republished
30 statement.
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1 Section 10. Written terms of contracts and tariffs
2 enforceable.--This act does not apply to an action based on a
3 written contract or tariff as long as all parties to the
4 action are parties to the written contract or tariff; all
5 written terms of that contract or tariff, including
6 limitations on and exclusions of liability and disclaimers of
7 warranty, remain fully enforceable; and this act does not
8 affect or alter those written terms.

9 Section 11. Construction of act.--This act shall not
10 be construed to create a duty to provide notice concerning
11 year-2000 compliance nor be construed to mandate the content
12 or timing of any notice concerning year-2000 compliance.

13 Section 12. Section 282.4045, Florida Statutes, as
14 created by section 4 of chapter 98-331, Laws of Florida, is
15 repealed.

16 Section 13. This act shall take effect upon becoming a
17 law.

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LEGISLATIVE SUMMARY

Creates the "Commerce Protection 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. Provides for punitive damages under specified circumstances. Expands the waiver of sovereign immunity for damages caused by the gross negligence of governmental agencies. Excludes from compensatory damages those that should have been avoided as a result of disclosures made. Provides for the award of costs and attorney's fees under specified circumstances. Provides for immunity from liability for directors and officers of businesses under specified circumstances. Prohibits solution providers from misusing or disclosing specified information provided to them. Provides for remedies, damages, and criminal penalties for misuse or disclosure of that information. Exempts the exchange of certain information from action under the Florida Antitrust Act of 1980. Provides incentives for seeking voluntary binding arbitration of disputes and for reaching agreement with respect to disputes submitted to mediation. Prescribes circumstances under which the maker of a year-2000 statement is not liable under state law with respect to that statement.