

By Senators Grant, Campbell, Klein, Brown-Waite and Bronson

13-52-99

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 damages; expanding the
10 waiver of sovereign immunity; providing for
11 costs and attorney's fees; barring certain
12 class actions; providing immunity from personal
13 liability for directors and officers of
14 businesses under specified circumstances;
15 creating a lien in favor of certain lending
16 institutions on proceeds received by a business
17 as a result of its failure or the failure of
18 another to be year-2000 compliant; imposing
19 insurance and warranty requirements on persons
20 who undertake to assess whether information
21 technology resources are year-2000 compliant or
22 make such resources so compliant and
23 prescribing remedies against such persons;
24 prohibiting such persons from misusing or
25 disclosing specified information provided to
26 them; providing for remedies and damages for
27 unlawful use or disclosure of that information;
28 providing for costs and attorney's fees;
29 providing criminal penalties; exempting the
30 exchange of certain information among specified
31 entities from action under the Florida

1 Antitrust Act of 1980; prescribing incentives
2 to use alternative dispute-resolution
3 procedures; providing for liability for costs
4 and attorney's fees under specified
5 circumstances; providing an effective date.
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7 Be It Enacted by the Legislature of the State of Florida:
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9 Section 1. Short title.--This act may be cited as the
10 "Commerce Protection Act."

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

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

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

19 (3) GOVERNMENTAL AGENCY.--The term "governmental
20 agency" includes the state or any of its political
21 subdivisions, or any agency of either.

22 (4) INFORMATION TECHNOLOGY PRODUCT.--The term
23 "information technology product" includes software, firmware,
24 microcode, hardware, and embedded chips that create, read,
25 write, calculate, compare, sequence, or otherwise process date
26 data.

27 (5) SOLUTION PROVIDER.--The term "solution provider"
28 means any entity that accepts compensation or other valuable
29 consideration from a business or governmental agency either to
30 assess whether it or any of its information technology
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1 products is year-2000 compliant or to make it or any of its
2 information technology products year-2000 compliant.

3 (6) YEAR-2000 COMPLIANT.--

4 (a) An information technology product is "year-2000
5 compliant" if it processes all of its data accurately and
6 if it will do so even for data that contain dates occurring
7 before February 29, 1996, and dates occurring after February
8 29, 2000.

9 (b) A business or governmental agency is "year-2000
10 compliant" if all of its information technology products are
11 year-2000 compliant.

12 Section 3. Remedies for failure to be year-2000
13 compliant; waiver of sovereign immunity; costs and attorney's
14 fees; limitation on class actions.--

15 (1) Effective January 1, 2000, the exclusive remedies
16 in this state for recovering from a business or governmental
17 agency damages caused by its failure to be year-2000 compliant
18 are those provided by this act or by contract with the
19 business or governmental agency. However, if a contract
20 provides exclusive or limited remedies and circumstances cause
21 those remedies to fail of their essential purpose, remedy may
22 be had as provided in this act.

23 (2) Effective January 1, 2000, any business that is
24 not year-2000 compliant is liable:

25 (a) For compensatory damages caused by its failure to
26 be year-2000 compliant; and

27 (b) For punitive damages in an amount equal to three
28 times the amount of any compensatory damages caused by its
29 intentional or grossly negligent misrepresentation that it is
30 year-2000 compliant.

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1 (3) Effective January 1, 2000, any governmental agency
2 that is not year-2000 compliant is liable for compensatory
3 damages caused by its failure to be year-2000 compliant:

4 (a) Within the limits on the waiver of sovereign
5 immunity established in sections 282.4045 and 768.28, Florida
6 Statutes; and

7 (b) Beyond the limits on the waiver of sovereign
8 immunity established in sections 282.4045 and 768.28, Florida
9 Statutes, if it is shown by clear and convincing evidence that
10 the damages occurred because of its gross negligence.

11 (4) Compensatory damages awarded under this section
12 shall exclude any damages that the plaintiff should reasonably
13 have avoided as a result of any disclosure actually made to
14 the plaintiff before September 1, 1999, by the business or
15 governmental agency concerning whether it or any of its
16 information technology products were year-2000 compliant.

17 (5) The prevailing party in an action brought under
18 this section is entitled to recover costs and reasonable
19 attorney's fees. However, a business or governmental agency is
20 not liable for such costs and fees if, before September 1,
21 1999, it has:

22 (a) Exercised due diligence in assessing whether it is
23 year-2000 compliant and, based on that assessment, holds a
24 reasonable good-faith belief that it is year-2000 compliant or
25 has adequately disclosed to the other party before that date
26 that it is not year-2000 compliant; and

27 (b) Exercised due diligence in assessing its legal
28 liability for failure to be year-2000 compliant, with respect
29 to both claims by its customers and claims by third parties,
30 and, based on that assessment, has before that date insured
31 itself against all foreseeable claims.

1 (6) Effective January 1, 2000, a class action may not
2 be maintained in this state:

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

6 (b) Against a business for damages caused by the
7 failure of the business to be year-2000 compliant, unless each
8 member of the class has suffered damages in excess of \$50,000.
9 However, the limitation in this paragraph does not apply to
10 class actions against a manufacturer or vendor of information
11 technology products for damages resulting from the failure of
12 those products to be year-2000 compliant.

13 Section 4. Immunity from liability for directors and
14 officers of businesses.--A director or officer of a business
15 is not personally liable for any damages resulting from the
16 failure of the business to become year-2000 compliant if the
17 officer or director has in good faith and with due diligence
18 secured an assessment by qualified persons to determine
19 actions necessary for the business to become year-2000
20 compliant and that assessment can reasonably be expected to:

21 (1) Allow the business to become year-2000 compliant
22 by September 1, 1999; and

23 (2) Identify those persons who are likely to suffer
24 damages as a result of the failure of the business to be
25 year-2000 compliant and allow the business to disclose to them
26 by September 1, 1999, that it is not year-2000 compliant.

27 Section 5. Lien in favor of lending institutions.--Any
28 financial institution as defined in section 655.005, Florida
29 Statutes, which holds an interest in any asset of a business
30 as security for a loan made to that business has a lien, in
31 the amount of the outstanding balance of the loan, on all

1 damages received by that business under any civil action,
2 settlement agreement, insurance policy, or indemnity agreement
3 as a result of the failure of that business or of another to
4 be year-2000 compliant. The lien provided by this section is
5 superior to all other liens and claims of creditors other than
6 liens for the payment of taxes.

7 Section 6. Solution providers; warranties; remedies;
8 insurance requirements.--

9 (1) A solution provider who represents to a business
10 or governmental agency that it or any of its information
11 technology products is year-2000 compliant or that the
12 solution provider will make the business or governmental
13 agency or any of its information technology products year-2000
14 compliant thereby gives an express warranty upon which the
15 business or governmental agency may rely; this express
16 warranty supersedes all warranty exclusions, modifications,
17 and disclaimers; and, if circumstances cause an exclusive or
18 limited remedy to fail of its essential purpose, remedy may be
19 had as provided in the Uniform Commercial Code.

20 (2) Each solution provider must maintain liability
21 insurance in an amount that is not less than its annual gross
22 income to cover claims against it by its customers and third
23 parties.

24 Section 7. Confidentiality of information provided to
25 solution providers; remedies regarding unlawful use or
26 disclosure; penalties.--

27 (1) All information acquired by a solution provider
28 concerning the information technology operations, programs,
29 equipment, and data of a business or governmental agency
30 remain the property of the business or governmental agency.

31 The solution provider:

1 (a) May use the information only in the manner
2 expressly permitted by the business or governmental agency;
3 and

4 (b) May not disclose the information to another
5 without the express consent of the business or governmental
6 agency.

7 (2) Notwithstanding the limitations of section
8 688.008, Florida Statutes, a business or governmental agency
9 may bring an action to enjoin any actual or threatened
10 violation of subsection (1) or to recover damages resulting
11 from a violation of subsection (1). These damages include:

12 (a) Both the actual monetary loss incurred as a result
13 of the violation and any unjust enrichment caused by the
14 violation which is not otherwise considered in calculating the
15 actual monetary loss incurred; and

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

19
20 The court shall award costs and reasonable attorney's fees to
21 the prevailing party in any action under this subsection.

22 (3)(a) Any person who misuses or discloses information
23 in violation of subsection (1) is guilty of a misdemeanor of
24 the first degree, punishable as provided in section 775.082 or
25 section 775.083, Florida Statutes.

26 (b) Any person who for pecuniary gain intentionally
27 misuses or discloses information in violation of subsection
28 (1) is guilty of a felony of the third degree, punishable as
29 provided in section 775.082 or section 775.083, Florida
30 Statutes.

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1 Section 8. Antitrust exemption with respect to
2 exchanges of information.--The exchange of information among
3 businesses and governmental agencies concerning measures that
4 have been taken or are to be taken in order for a business or
5 governmental agency to become year-2000 compliant does not
6 constitute an activity or conduct in restraint of trade or
7 commerce under chapter 542, Florida Statutes.

8 Section 9. Incentives to use alternative
9 dispute-resolution procedures.--

10 (1) VOLUNTARY BINDING ARBITRATION.--

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

18 (b) If at trial, the court finds that an offer was
19 made under paragraph (a) and was rejected, the court shall
20 award attorney's fees and costs in accordance with this
21 paragraph regardless of which party is determined to be the
22 prevailing party and notwithstanding the provisions of section
23 3(5).

24 1. If the offer was made by the plaintiff and rejected
25 by the defendant, and if the defendant is ultimately found to
26 be liable for damages in an amount equal to or exceeding the
27 maximum amount of damages specified in the plaintiff's offer,
28 the defendant must pay the plaintiff's costs and reasonable
29 attorney's fees.

30 2. If the offer was made by the defendant and rejected
31 by the plaintiff, and if the plaintiff is not ultimately

1 awarded damages in an amount exceeding the maximum amount of
2 damages specified in the defendant's offer, the plaintiff must
3 pay the defendant's costs and reasonable attorney's fees.

4 (2) MEDIATION.--The court may submit a claim for
5 damages under this act to mediation upon its own motion or
6 upon the motion of the parties. If the mediation reaches an
7 impasse, the mediator shall file with the court, under seal,
8 both the plaintiff's and the defendant's last best offer, and
9 these offers may not be disclosed to the ultimate trier of
10 fact until after trial. Regardless of which party is
11 determined to be the prevailing party and notwithstanding the
12 provisions of section 3(5):

13 (a) If the ultimate trier of fact does not award the
14 plaintiff more than 75 percent of the defendant's last best
15 offer, the plaintiff must pay the defendant's costs and
16 reasonable attorney's fees; and

17 (b) If the ultimate trier of fact awards the plaintiff
18 125 percent or more of the plaintiff's last best offer, the
19 defendant must pay the plaintiff's costs and reasonable
20 attorney's fees.

21 Section 10. This act shall take effect upon becoming a
22 law.

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SENATE 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 officers and directors of businesses under specified circumstances. Creates a lien in favor of lending institutions on damages received by a business as a result of its failure or the failure of another to be year-2000 compliant. Imposes insurance and warranty requirements on persons who undertake to assess whether information technology resources are year-2000 compliant or to make such resources so compliant, and prohibits such persons from misusing or disclosing certain 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.