

By the Committees on Governmental Oversight and Productivity;
 Commerce and Economic Opportunities; and Senators Grant,
 Campbell, Klein, Brown-Waite and Bronson

302-1782A-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 and limiting damages;
 10 prescribing conditions precedent to maintaining
 11 or defending actions; barring certain class
 12 actions; requiring that actions be brought
 13 within a specified time; providing immunity
 14 from personal liability for directors and
 15 officers of businesses under specified
 16 circumstances; prohibiting solution providers
 17 from misusing or disclosing specified
 18 information provided to them; providing for
 19 remedies and damages for unlawful use or
 20 disclosure of that information; providing
 21 criminal penalties; exempting the exchange of
 22 certain information among businesses from
 23 action under the Florida Antitrust Act of 1980;
 24 prescribing alternative dispute-resolution
 25 procedures; providing for liability for costs
 26 and attorney's fees under specified
 27 circumstances; prescribing circumstances under
 28 which the maker of a year-2000 statement is not
 29 liable under state law with respect to that
 30 statement; providing for construction of the
 31 act; repealing s. 282.4045, F.S., which grants

1 immunity from liability to governmental
2 entities for certain computer calculation
3 failures; providing for severability; providing
4 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 an entity engaged in providing goods or services in this
14 state, but the term excludes any governmental agency or any
15 agency of the legislative or judicial branch of state
16 government.

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

19 (3) DIRECT ECONOMIC DAMAGES.--The term "direct
20 economic damages" includes only economic compensatory damages
21 that follow both immediately and necessarily from the failure
22 of a business or governmental agency to be year-2000
23 compliant. The term excludes other compensatory damages, such
24 as special, incidental, or consequential damages, and excludes
25 exemplary or punitive damages.

26 (4) GOVERNMENTAL AGENCY.--The term "governmental
27 agency" includes any agency of the executive branch of state
28 government or any agency of a political subdivision of the
29 state as defined in section 1.01, Florida Statutes.

30 (5) INFORMATION TECHNOLOGY PRODUCT.--
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1 (a) The term "information technology product" includes
2 software, firmware, microcode, hardware, and equipment
3 containing embedded chips or microprocessors that create,
4 read, write, calculate, compare, sequence, or otherwise
5 operate on date data.

6 (b) The "information technology products" of a
7 business or governmental agency are those that are owned,
8 leased, or licensed by or under the exclusive control of the
9 business or governmental agency and are used by it in
10 providing its goods or services.

11 (6) SOLUTION PROVIDER.--The term "solution provider"
12 means any nongovernmental entity that enters into an agreement
13 with a business or governmental agency to:

14 (a) Provide information technology products or
15 services that have been specifically designated as year-2000
16 compliant;

17 (b) Test information technology products or services
18 to determine whether they are year-2000 compliant; or

19 (c) Repair or correct information technology products
20 or services to make them year-2000 compliant. However, an
21 entity does not become a solution provider merely by repairing
22 or correcting an information technology product or service
23 unless that entity expressly agrees that part of the repair or
24 correction is designed to make the information technology
25 product year-2000 compliant.

26 (7) YEAR-2000 COMPLIANT.--An information technology
27 product is "year-2000 compliant" if the product, when used in
28 accordance with its associated documentation or recommended
29 user intervention, is capable of correctly processing,
30 providing, and receiving date data, and will do so for all
31 dates occurring between February 28, 1996, and March 1, 2000,

1 when all other information technology products that are used
2 with the product properly exchange date data with it. An
3 information technology product does not fail to be year-2000
4 compliant merely because it contains a defect that is
5 unrelated to the manner in which the product processes,
6 provides, or receives date data and that only incidentally
7 causes the product to fail to properly process, provide, or
8 receive date data.

9 Section 3. Exclusive remedies for failure to be
10 year-2000 compliant.--The exclusive remedies in this state for
11 recovering from a business or governmental agency damages
12 resulting from the failure of its information technology
13 products to be year-2000 compliant are those available for
14 breach of a contract with or a tariff filed by the business or
15 governmental agency; and all terms of that contract or tariff,
16 including limitations on and exclusions of liability and
17 disclaimers of warranty, remain fully enforceable, unaffected
18 by the provisions of this act. If there is no contract or
19 tariff, the exclusive remedies in this state for recovering
20 from a business or governmental agency damages resulting from
21 the failure of its information technology products to be
22 year-2000 compliant are those provided in section 4 of this
23 act.

24 Section 4. Damages for failure to be year-2000
25 compliant; conditions precedent to bringing or defending
26 actions; limitation on class actions; statute of
27 limitations.--

28 (1) In the absence of a contract or tariff, any
29 business may be liable only for direct economic damages caused
30 by the failure of its information technology products to be
31 year-2000 compliant, as provided in this section.

1 (2) In the absence of a contract or tariff, any
2 governmental agency may be liable only for direct economic
3 damages caused by the failure of its information technology
4 products to be year-2000 compliant, and only within the limits
5 on the waiver of sovereign immunity established in section
6 768.28, Florida Statutes.

7 (3) The provisions of section 768.81, Florida
8 Statutes, apply to the award of damages under this section.

9 (4) Damages awarded under this section shall exclude
10 any damages that the plaintiff:

11 (a) Could have avoided or mitigated with the exercise
12 of reasonable care; or

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

20 (5)(a) A business or governmental agency is not liable
21 for direct economic damages if it proves by a preponderance of
22 the evidence that it has:

23 1. Secured an assessment, by a person who possesses
24 the technical skills, experience, or competence with respect
25 to information technology resources to evaluate information
26 technology products for year-2000 compliance, to determine
27 actions necessary to make the information technology products
28 of the business or governmental agency year-2000 compliant
29 and, based on that assessment, holds before December 1, 1999,
30 a reasonable good-faith belief that those products are
31 year-2000 compliant; or

1 2. Before December 1, 1999, conducted a date-data test
2 of its information technology products and as a result of such
3 test has a reasonable good-faith belief that they are
4 year-2000 compliant.

5 (b) All defenses that would otherwise be available to
6 a business or governmental agency in any other action,
7 including an action based on negligence, remain available with
8 respect to an action under this section. Moreover, the failure
9 of a business or governmental agency to comply with paragraph
10 (a) does not create any liability for that business or
11 governmental agency.

12 (6) As a condition precedent to bringing an action for
13 damages under this section, in addition to any other condition
14 precedent imposed by law, the plaintiff must have made a
15 written offer to the defendant to submit the claim for damages
16 to preclaim mediation; and, as a condition precedent to
17 defending an action brought under this section, the defendant
18 must have accepted that offer in writing within 60 days after
19 receiving it. If an offer of mediation is accepted, the
20 mediation must be concluded within 120 days after the
21 acceptance is given.

22 (7) A class action may not be maintained in this
23 state:

24 (a) Against a governmental agency for damages caused
25 by the failure of its information technology products to be
26 year-2000 compliant.

27 (b) Against a business for damages caused by the
28 failure of its information technology products to be year-2000
29 compliant, unless each member of the class has suffered direct
30 economic damages in excess of \$50,000.

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1 (8) Any action for damages under this section must be
2 commenced on or before March 1, 2002, but the running of this
3 time is tolled from the date any offer is made to submit the
4 claim to mediation until the conclusion of mediation.

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

7 (1) A director or officer of a business has absolute
8 and complete immunity from personal liability for any damages
9 resulting from the failure of the information technology
10 products of the business to be year-2000 compliant if the
11 officer or director has instructed the business to:

12 (a) Take steps to determine whether those products are
13 year-2000 compliant;

14 (b) Develop and implement a plan to take actions
15 necessary to make those products year-2000 compliant; and

16 (c) Inquire whether the information technology
17 products of the entities on whose goods or services the
18 business relies are year-2000 compliant.

19 (2) A director or officer who does not have absolute
20 and complete immunity from personal liability under subsection
21 (1) nevertheless has immunity from personal liability to the
22 extent provided in chapter 607, Florida Statutes, or chapter
23 617, Florida Statutes.

24 Section 6. Confidentiality of information provided to
25 solution providers; remedies regarding unlawful use or
26 disclosure; penalties.--

27 (1) Scientific, technical, or commercial information
28 acquired by a solution provider concerning the information
29 technology operations, programs, equipment, and data of a
30 business or governmental agency, including, without
31 limitation, any formula, design, process, procedure, list of

1 suppliers, list of customers, or business code that is for use
2 in the operation of the business or governmental agency,
3 remains the property of the business or governmental agency
4 and must be kept confidential. The solution provider:
5 (a) May use the information only in the manner
6 expressly permitted by the business or governmental agency;
7 and
8 (b) May not disclose the information to another
9 without the express written consent of the business or
10 governmental agency or as otherwise required by law.
11 (2) Notwithstanding the limitations of section
12 688.008, Florida Statutes, a business or governmental agency
13 may bring an action to enjoin any actual or threatened
14 violation of subsection (1) or to recover damages resulting
15 from a violation of subsection (1). These damages include:
16 (a) Both the actual monetary loss incurred as a result
17 of the violation and any unjust enrichment caused by the
18 violation which is not otherwise considered in calculating the
19 actual monetary loss incurred; and
20 (b) If the misuse or disclosure was intentional and
21 willful, exemplary damages in an amount not exceeding three
22 times the award made under paragraph (a).
23 (3)(a) Any person who misuses or discloses information
24 in violation of subsection (1) is guilty of a misdemeanor of
25 the first degree, punishable as provided in section 775.082 or
26 section 775.083, Florida Statutes.
27 (b) Any person who for pecuniary gain intentionally
28 misuses or discloses information in violation of subsection
29 (1) is guilty of a felony of the third degree, punishable as
30 provided in section 775.082 or section 775.083, Florida
31 Statutes.

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

8 Section 8. Alternative dispute-resolution
9 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.

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

27 2. If the offer was made by the defendant and rejected
28 by the plaintiff, and if the plaintiff is not ultimately
29 awarded damages in an amount exceeding that specified in the
30 defendant's highest offer, the plaintiff must pay the
31 defendant's costs and reasonable attorney's fees.

1 (2) MEDIATION.--

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

5 (b) If a claim is submitted to mediation under
6 paragraph (a) and the mediation reaches an impasse, the
7 mediator shall file with the court, under seal, both the
8 plaintiff's and the defendant's last best offer, and these
9 offers may not be disclosed to the ultimate trier of fact
10 until after trial.

11 1. If the ultimate trier of fact does not award the
12 plaintiff more than 75 percent of the defendant's last best
13 offer, the plaintiff must pay the defendant's costs and
14 reasonable attorney's fees; and

15 2. If the ultimate trier of fact awards the plaintiff
16 125 percent or more of the plaintiff's last best offer, the
17 defendant must pay the plaintiff's costs and reasonable
18 attorney's fees.

19 (c) The costs of mediation must be shared equally by
20 the parties.

21 Section 9. Securities actions.--If an action is
22 brought under the securities laws, as that term is defined in
23 Section 3(a)(47) of the Securities Exchange Act of 1934, 15
24 U.S.C. 78c(a)(47), or based on any document or material filed
25 with the Securities and Exchange Commission, or with federal
26 banking regulators, pursuant to Section 12(i) of the
27 Securities Exchange Act of 1934, 15 U.S.C. 781(i), or any
28 disclosure or writing that when made accompanied the
29 solicitation of an offer or sale of securities, the maker of
30 that year-2000 statement is not liable under state law with
31 respect to that statement unless the claimant establishes by

1 clear and convincing evidence, in addition to all other
2 requisite elements of the applicable action, that the
3 statement was material and:

4 (1) To the extent that the statement was not a
5 republishing of a year-2000 statement originally made by a
6 third party, that the maker made the statement:

7 (a) With actual knowledge that it was false,
8 inaccurate, or misleading;

9 (b) With intent to deceive or mislead; or

10 (c) With a reckless disregard as to its accuracy; or

11 (2) To the extent that the statement was a
12 republishing of the year-2000 statement originally made by a
13 third party, that the maker of the republication made the
14 statement:

15 (a) With actual knowledge that it was false,
16 inaccurate, or misleading;

17 (b) With intent to deceive or mislead; or

18 (c) Without notice because:

19 1. The maker has not verified the contents of the
20 republishing; or

21 2. The maker is not the source of the republished
22 statement, the republished statement is based on information
23 supplied by another person or entity, and the notice or
24 republished statement identifies the source of the republished
25 statement.

26 Section 10. Construction of act.--This act shall not
27 be construed to create a new cause of action or a duty to
28 provide notice concerning year-2000 compliance nor be
29 construed to mandate the content or timing of any notice
30 concerning year-2000 compliance.

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1 Section 11. Section 282.4045, Florida Statutes, as
2 created by section 4 of chapter 98-331, Laws of Florida, is
3 repealed.

4 Section 12. If any provision of this act or the
5 application thereof to any person or circumstance is held
6 invalid, the invalidity does not affect other provisions or
7 applications of the act which can be given effect without the
8 invalid provision or application, and to this end the
9 provisions of this act are declared severable.

10 Section 13. This act shall take effect upon becoming a
11 law.

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1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
2 COMMITTEE SUBSTITUTE FOR
3 CS for SB 80

4 "Business" is defined to mean a person or entity engaged in
5 providing goods or services in the state of Florida.

6 The bill defines the meaning of "direct economic damages."

7 The meaning of "information technology products" includes
8 owned, leased, or licensed products under the exclusive
9 control of the business or governmental agency used to provide
10 goods and services.

11 The term "solution provider" is modified in scope to include
12 entities that agree to repair or correct information
13 technology products with the sole purpose of making them Y2K
14 compliant.

15 The bill provides that unrelated failures causing improper
16 processing, providing, or receipts of date data due to defect
17 does not constitute failure to be Y2K compliant.

18 The bill provides exclusive remedies for breach of contract or
19 tariff, even if the contract or tariff is unwritten.

20 The bill eliminates provisions extending the waiver of
21 sovereign immunity for damages caused by a governmental
22 agency's grossly negligent misrepresentations or conduct.

23 The bill includes provisions for comparative fault which will
24 apply to the award of damages under this act.

25 The bill modifies the safe harbor provisions for businesses
26 and governmental agencies requiring that either a date-data
27 test be completed before December 1, 1999, of their
28 information technology products or an assessment be secured to
29 evaluate their information technology products for Y2K
30 compliance.

31 The bill clarifies that all defenses that would otherwise be
available to a business or governmental agency in any other
action, including an action based on negligence, remain
available with respect to an action under the act.

The bill requires that any action under this act be commenced
on or before March 1, 2002. Claims submitted to mediation
before that date may run until the conclusion of mediation.

The bill removes language requiring the solution provider to
be liable for treble damages for grossly negligent misuse or
disclosure of proprietary information.

The bill eliminates provisions extending the waiver of
sovereign immunity for damages caused by a governmental
agency's grossly negligent misrepresentations or conduct.

The bill adds a severability clause.

The bill redefines "information" as it applies to property

1 that shall remain confidential and in the possession of the
2 business or governmental agency.
3 The bill provides that the cost of mediation be equally shared
4 by the parties.
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