

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

309-2142-99

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          providing for mediation; barring certain class  
 11          actions; requiring that actions be brought  
 12          within a specified time; providing immunity  
 13          from personal liability for directors and  
 14          officers of businesses under specified  
 15          circumstances; exempting the exchange of  
 16          certain information among businesses from  
 17          action under the Florida Antitrust Act of 1980;  
 18          prescribing alternative dispute-resolution  
 19          procedures; providing for liability for costs  
 20          and attorney's fees under specified  
 21          circumstances; prescribing circumstances under  
 22          which the maker of a year-2000 statement is not  
 23          liable under state law with respect to that  
 24          statement; providing for construction of the  
 25          act; repealing s. 282.4045, F.S., which grants  
 26          immunity from liability to governmental  
 27          entities for certain computer calculation  
 28          failures; providing for severability; providing  
 29          an effective date.

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

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

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

5           (1) BUSINESS.--The term "business" means a person or  
6 an entity engaged in providing goods or services in this  
7 state, but the term excludes any governmental agency or any  
8 agency of the legislative or judicial branch of state  
9 government.

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

12          (3) DIRECT ECONOMIC DAMAGES.--The term "direct  
13 economic damages" includes only economic compensatory damages  
14 that follow both immediately and necessarily from the failure  
15 of the information technology products of a business or  
16 governmental agency to be year-2000 compliant. The term  
17 excludes special damages, incidental damages, and exemplary or  
18 punitive damages.

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

24          (5) INFORMATION TECHNOLOGY PRODUCT.--

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

30           (b) The "information technology products" of a  
31 business or governmental agency are those that are owned,

1 leased, or licensed by or under the exclusive control of the  
2 business or governmental agency and are used by it in  
3 providing its goods or services.

4 (6) YEAR-2000 COMPLIANT.--An information technology  
5 product is "year-2000 compliant" if the product, when used in  
6 accordance with its associated documentation or recommended  
7 user intervention, is capable of correctly processing,  
8 providing, and receiving date data, and will do so for all  
9 dates occurring between February 28, 1996, and March 1, 2000,  
10 when all other information technology products that are used  
11 with the product properly exchange date data with it. An  
12 information technology product does not fail to be year-2000  
13 compliant merely because it contains a defect that is  
14 unrelated to the manner in which the product processes,  
15 provides, or receives date data and that only incidentally  
16 causes the product to fail to properly process, provide, or  
17 receive date data.

18 Section 3. Exclusive remedies for failure to be  
19 year-2000 compliant.--The exclusive remedies in this state for  
20 recovering from a business or governmental agency damages  
21 resulting from the failure of its information technology  
22 products to be year-2000 compliant are those available for  
23 breach of a contract with or a tariff filed by the business or  
24 governmental agency; and all terms of that contract or tariff,  
25 including limitations on and exclusions of liability and  
26 disclaimers of warranty, remain fully enforceable and are  
27 unaffected by the provisions of this act. If there is no  
28 contract or tariff, the exclusive remedies in this state for  
29 recovering from a business or governmental agency damages  
30 resulting from the failure of its information technology

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1 products to be year-2000 compliant are those provided in  
2 section 4 of this act.

3 Section 4. Damages for failure to be year-2000  
4 compliant; mediation; limitation on class actions; statute of  
5 limitations.--

6 (1) Unless otherwise provided by a contract or tariff,  
7 any business may be liable only for direct economic damages  
8 caused by the failure of its information technology products  
9 to be year-2000 compliant, as provided in this section.

10 (2) Unless otherwise provided by a contract or tariff,  
11 any governmental agency may be liable only for direct economic  
12 damages caused by the failure of its information technology  
13 products to be year-2000 compliant, and only within the limits  
14 on the waiver of sovereign immunity established in section  
15 768.28, Florida Statutes.

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

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

20 (a) Could have avoided or mitigated with the exercise  
21 of reasonable care; or

22 (b) Could have reasonably avoided or mitigated as a  
23 result of any written or otherwise communicated disclosure  
24 actually made by the defendant before December 1, 1999, in a  
25 manner consistent with that used in the past to give  
26 notifications to the plaintiff or persons similarly situated,  
27 concerning whether any of the information technology products  
28 of the business or governmental agency was year-2000  
29 compliant.

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

4           1. Secured an assessment, by a person who possesses  
5 the technical skills, experience, or competence with respect  
6 to information technology resources to evaluate information  
7 technology products for year-2000 compliance, to determine  
8 actions necessary to make the information technology products  
9 of the business or governmental agency year-2000 compliant  
10 and, based on that assessment, holds before December 1, 1999,  
11 a reasonable good-faith belief that those products are  
12 year-2000 compliant;

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

17           3. Made reasonable efforts to assess whether the  
18 entities on whose goods or services it relies and with whom it  
19 is in privity have provided information technology products  
20 that are year-2000 compliant and, with respect to each such  
21 entity, either:

22           a. Holds before December 1, 1999, a reasonable  
23 good-faith belief, based on the response to inquiries or on  
24 research, that the entity has provided information technology  
25 products that are year-2000 compliant; or

26           b. Discloses in writing to the other party before  
27 December 1, 1999, in a manner consistent with that used in the  
28 past to give written notifications to that party, that the  
29 entity has provided information technology products that are  
30 presumed not to be year-2000 compliant or that, based on the  
31 response to inquiries, the entity is making reasonable

1 good-faith efforts to make its information technology products  
2 become year-2000 compliant.

3 (b) All defenses that would otherwise be available to  
4 a business or governmental agency in any other action,  
5 including an action based on negligence, remain available with  
6 respect to an action under this section. Moreover, the failure  
7 of a business or governmental agency to comply with paragraph  
8 (a) shall not create a presumption of liability and no  
9 inference may be drawn from such failure.

10 (6) Beginning January 1, 2000, upon the filing of any  
11 lawsuit or the presentation of a claim for arbitration under  
12 section 7 of this act seeking damages under this section, and  
13 prior to the filing of an answer or response, the court having  
14 jurisdiction shall refer the claim to mediation under section  
15 44.102, Florida Statutes, unless the court determines that the  
16 interests of justice would not be served. The time to file the  
17 answer or response shall be tolled for up to 60 days after  
18 service of process on the defendant or until the conclusion of  
19 the mediation, whichever is earlier.

20 (7) A class action may not be maintained in this  
21 state:

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

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

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

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

5 (1) A director or officer of a business has absolute  
6 and complete immunity from personal liability for any damages  
7 resulting from the failure of the information technology  
8 products of the business to be year-2000 compliant if the  
9 officer or director has either instructed the business or  
10 received written assurance from another officer or director  
11 that the business has been instructed 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. Antitrust exemption with respect to  
25 exchanges of information.--The exchange of information among  
26 businesses concerning measures that have been taken or are to  
27 be taken in order for a business to make its information  
28 technology products year-2000 compliant does not constitute an  
29 activity or conduct in restraint of trade or commerce under  
30 chapter 542, Florida Statutes.

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1           Section 7. Alternative dispute-resolution  
2 procedures.--

3           (1) VOLUNTARY BINDING ARBITRATION.--

4           (a) Any party to a dispute under this act for which  
5 there is no prior arbitration agreement may, before a lawsuit  
6 has been filed, make an offer to the other party to submit the  
7 dispute to voluntary binding arbitration under section 44.104,  
8 Florida Statutes. An offer made under this paragraph must set  
9 out the maximum amount of damages that may be imposed pursuant  
10 to arbitration.

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

15           1. If the offer was made by the plaintiff and rejected  
16 by the defendant, and if the defendant is ultimately found to  
17 be liable for damages in an amount equal to or exceeding that  
18 specified in the plaintiff's highest offer, the defendant must  
19 pay the plaintiff's costs and reasonable attorney's fees.

20           2. If the offer was made by the defendant and rejected  
21 by the plaintiff, and if the plaintiff is not ultimately  
22 awarded damages in an amount exceeding that specified in the  
23 defendant's highest offer, the plaintiff must pay the  
24 defendant's costs and reasonable attorney's fees.

25           (2) MEDIATION.--

26           (a) The court may submit a claim for damages under  
27 this act to mediation pursuant to section 44.102, Florida  
28 Statutes.

29           (b) A party may serve its last best offer made in  
30 mediation upon another party as an offer of judgment under  
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1 section 678.79, Florida Statutes, and may make use of all the  
2 rights and remedies provided by this section.

3 (c) The court shall have discretion to require that  
4 the costs of mediation be shared equally by the parties.

5 Section 8. Securities actions.--If an action based on  
6 a year-2000 statement is brought under the securities laws, as  
7 that term is defined in Section 3(a)(47) of the Securities  
8 Exchange Act of 1934, 15 U.S.C. 78c(a)(47), or based on any  
9 document or material filed with the Securities and Exchange  
10 Commission, or with federal banking regulators, pursuant to  
11 Section 12(i) of the Securities Exchange Act of 1934, 15  
12 U.S.C. 781(i), or any disclosure or writing that when made  
13 accompanied the solicitation of an offer or sale of  
14 securities, the maker of that year-2000 statement is not  
15 liable under state law with respect to that statement unless  
16 the claimant establishes, in addition to all other requisite  
17 elements of the applicable action, that the statement was  
18 material and:

19 (1) To the extent that the statement was not a  
20 republication of a year-2000 statement originally made by a  
21 third party, that the maker made the statement:

22 (a) With actual knowledge that it was false,  
23 inaccurate, or misleading;

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

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

26 (2) To the extent that the statement was a  
27 republication of the year-2000 statement originally made by a  
28 third party, that the maker of the republication made the  
29 statement:

30 (a) With actual knowledge that it was false,  
31 inaccurate, or misleading;

1           (b) With intent to deceive or mislead; or  
2           (c) Without notice because:  
3           1. The maker has not verified the contents of the  
4 republication; or  
5           2. The maker is not the source of the republished  
6 statement, the republished statement is based on information  
7 supplied by another person or entity, and the notice or  
8 republished statement identifies the source of the republished  
9 statement.  
10           Section 9. Construction of act.--This act shall not be  
11 construed to create a new cause of action or a duty to provide  
12 notice concerning year-2000 compliance nor be construed to  
13 mandate the content or timing of any notice concerning  
14 year-2000 compliance.  
15           Section 10. Section 282.4045, Florida Statutes, as  
16 created by section 4 of chapter 98-331, Laws of Florida, is  
17 repealed.  
18           Section 11. If any provision of this act or the  
19 application thereof to any person or circumstance is held  
20 invalid, the invalidity does not affect other provisions or  
21 applications of the act which can be given effect without the  
22 invalid provision or application, and to this end the  
23 provisions of this act are declared severable.  
24           Section 12. This act shall take effect upon becoming a  
25 law.  
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STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
COMMITTEE SUBSTITUTE FOR  
CS/CS/SB 0080

Adds language specifying that a business or governmental entity may not be liable for direct economic damages if, among other things, they hold a reasonable good-faith belief that the information technology products they rely upon are year-2000 complaint.

Eliminates the section on confidentiality of information provided to solution providers and the remedies available for the unlawful use of and disclosure of such confidential information.