

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 80

SPONSOR: Commerce and Economic Opportunities Committee, Senator Grant, and others

SUBJECT: Information technology resources

DATE: February 18, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Maclure</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This committee substitute creates the “Commerce Protection Act,” prescribing the liability of businesses and governmental agencies for damages resulting from the Year 2000 (Y2K) computer date problem. Specifically, the committee substitute provides that, unless otherwise provided by contract or tariff, a business is liable for direct economic damages caused by its failure to be Y2K compliant. The measure also specifies that a governmental agency that is not Y2K compliant is liable for direct economic damages within the existing statutory limitations of the waiver of sovereign immunity, and beyond those limitations if the damages are due to the agency’s grossly negligent misrepresentations or conduct.

Among other provisions, this committee substitute also:

- Prohibits a plaintiff from recovering Y2K damages that could have been avoided through the exercise of reasonable care or based upon disclosures by the defendant;
- Enables a business or governmental agency to avoid liability by assessing its Y2K compliance, holding a reasonable good-faith belief by December 1, 1999, that it is compliant, assessing whether entities upon which it relies are compliant, and disclosing if such entities are not compliant;
- Prohibits class action lawsuits against businesses for Y2K damages unless each member of the class has suffered damages in excess of \$50,000, and prohibits such class actions against governmental agencies altogether;
- Establishes a two-year statute of limitations on actions under the act;
- Provides directors and officers with immunity from personal liability for damages due to a business’ failure to be Y2K compliant if the director or officer meets specified conditions, one of which is instructing the business to conduct a Y2K assessment;
- Prohibits the unauthorized disclosure or use of certain information technology data obtained by Y2K solution providers from businesses or governmental agencies;
- Authorizes the exchange of Y2K remediation information without violation of the state antitrust statute;

- Provides incentives for the use of alternative dispute resolution procedures for Y2K claims; and
- Provides immunity under state law for Y2K statements made with respect to the offer or sale of securities under specified conditions.

This committee substitute creates yet unnumbered sections of the Florida Statutes, and it repeals s. 282.4045, F.S.

II. Present Situation:

Year 2000 Problem

The Year 2000 (Y2K) computer date problem, which is sometimes referred to as the “Millennium Bug” or the “Y2K problem,” can be traced to the early days of computers and computer programming. Faced with significant computer storage and memory expenses, programmers in the late 1950s and early 1960s elected to utilize two digits rather than four to represent the year. (For example, the current year may be represented by “99” rather than “1999.”) As a result of the adoption of this space-saving convention, however, many computer applications will not be able to recognize “00” as representing the Year 2000, but will instead assume it is the Year 1900. Computer systems that are not Y2K compatible will not be able to properly process date-sensitive data. [See Glenn Mayne, *The Year 2000 -- The Millennium Is Bearing Down Upon All Of Us*, Year 2000 Project Office, State of Florida; William A. Fenwick and Spencer S. Glende, *The Year 2000 Problem -- Legislative Responses*, 15 No. 10 **Computer Lawyer** 1 (October 1998); James K. Lehman and Kevin A. Hall, *Year 2000 For Lawyers: A Legal Primer On The Millennium Bug*,” 10-August **South Carolina Lawyer** 14 (July/August 1998).]

What the Y2K problem portends for Florida, the United States, and the world is an uncertainty. Opinions on the potential impact range from chaos to inconvenience. There are several factors that complicate assessment of Y2K ramifications but that, at the same time, contribute to the significance of the issue.

- The impending deadline -- January 1, 2000 -- is immovable, and problems may actually begin to surface in advance of that date.
- Microchips with potential Y2K problems can be found in an expansive array of items that effect individuals’ everyday existence.
- Identifying and resolving Y2K problems is time-consuming and labor-intensive.
- Computer systems may require extensive and lengthy testing once Y2K problems are corrected, thus adding pressure to the remediation time frame.

Florida Y2K Legislative Actions

Florida government’s efforts related to the Year 2000 (Y2K) problem are being coordinated by a Year 2000 Task Force, which is chaired by the Governor’s Office of Planning and Budgeting (OPB) and which also includes members representing the Department of Law Enforcement, the Department of Management Services, and the Department of Banking and Finance, as well as ex-officio members from the Senate and the House of Representatives. Through proviso language in the Fiscal Year 1997-98 General Appropriations Act (GAA), the Legislature authorized the

creation of a Year 2000 Project Office within the Executive Office of the Governor to staff the task force activities.

Also as part of the FY 1997-98 GAA, \$14.7 million was appropriated toward correction of the date problem in existing computer systems. The Legislature made release of the funds contingent upon submission of information by state agencies and the judicial branch to the task force to assist in the assessment and coordination process. In the FY 1998-99 GAA, an additional \$26.5 million was appropriated toward correction of the Y2K problem. A portion of the state appropriations is being used for employment of consulting services to aid the state and the project office in identifying the computer systems that represent the greatest risk to the state if they are not prepared to properly handle date-sensitive functions and in monitoring the remediation progress of the agencies.

During the 1998 session, the Legislature created s. 14.025, F.S., which authorizes the Governor to reassign resources, including personnel, if he or she believes a computer system may fail, or in the event of an actual failure, related to the Y2K problem (ch. 98-331, L.O.F.). When an agency under the control of the Governor and the Florida Cabinet is involved, the recommendation of the Governor must be approved by the Administration Commission [s. 14.025(1), F.S., (1998 Supp.)]. Funds reassigned under this authority must be transferred as provided in s. 216.177, F.S., and personnel transfers under this authority must be made as provided in part II of chapter 112, F.S.

This 1998 legislation also created s. 282.4045, F.S., which specifies that the state, its agencies, and units of local government shall be immune from damages for Y2K computer date failures consistent with s. 768.28, F.S., which is the statute providing for waiver of sovereign immunity in tort actions. (See discussion of s. 768.28, F.S., below.)

Legal Issues Raised by the Year 2000 Problem

In addition to raising numerous technological issues, the Year 2000 (Y2K) computer date problem raises a wide variety of legal issues. For example, it is anticipated that failures in computer systems worldwide will result in extensive litigation, including actions against, among others, Y2K solution providers, computer hardware and software manufacturers and suppliers, directors and officers of public companies, and businesses and governmental agencies experiencing Y2K-related failures in the delivery of goods and services to their customers.

Following is a brief sampling of some of the potential legal issues raised by the Y2K computer date problem:

Sovereign Immunity: As a major user of computer-based systems in the delivery of services to the public, governmental agencies that are not Y2K compliant may face litigation. Section 13 of Article X of the Florida Constitution authorizes the Legislature to waive the state's sovereign immunity. Section 768.28, F.S., 1998 Supp., prescribes the conditions and limitations governing the waiver of sovereign immunity for the state and its agencies and subdivisions. Under this statute, the state and its agencies and subdivisions shall be liable for tort claims to the same extent as a private individual; however, they shall not be liable for punitive damages or pre-judgment interest (s. 768.28(5), F.S., 1998 Supp.). In addition, there is a \$100,000 per person or \$200,000

per incident limitation on the involuntary collection of any judgment against them. Payment of claims in excess of this statutory limit generally requires passage of a claim bill by the Legislature (*id.*).

Directors and Officers Liability: Corporate directors and officers may face liability for failure to disclose Y2K problems to shareholders or for failing to take sufficient remedial action to make the business Y2K compliant.

Contract Warranties: Representations by computer vendors regarding whether information technology products are Y2K compliant may give rise to warranty and contract claims. Chapter 672, F.S., the “Uniform Commercial Code--Sales,” governs transactions in goods. Among other provisions, the code prescribes conditions under which an express or implied warranty is created (ss. 672.313, 672.314, and 672.315, F.S.); provides for the exclusion or modification of warranties (s. 672.316, F.S.); and prescribes the contractual modification or limitation of remedies (s. 672.719, F.S.).

Antitrust Concerns: Chapter 542, F.S., governs combinations restricting trade or commerce, and is commonly referred to as the “Florida Antitrust Act of 1980.” The act’s purpose is to complement federal law prohibiting restraints of trade or commerce in order to foster competition (s. 542.16, F.S.). Among other things, the act provides that every contract, combination, or conspiracy in restraint of trade or commerce in Florida is unlawful (s. 542.18, F.S.). The exchange of information among businesses on potential solutions to Y2K problems has raised concerns about potential violations of federal and state antitrust provisions.

III. Effect of Proposed Changes:

This committee substitute creates the “Commerce Protection Act,” which, among other provisions, establishes remedies in Florida for recovering damages from a business or a governmental agency caused by the failure of its computer products and systems to process date-sensitive data accurately in connection with the Year 2000 (Y2K) computer date change.

Following is a section-by-section analysis of the committee substitute:

Section 1 identifies the short title for the act as 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 term “business” means a person or any entity routinely engaged in Florida in providing goods or services in the stream of commerce. A “governmental agency” means a state executive branch agency or any agency of a political subdivision of the state as defined in s. 1.01, F.S. A “solution provider” means a non-governmental entity that agrees to provide information technology products designated as Y2K compliant or that agrees to test such products or services to assess their Y2K compliance.

Section 3 specifies that the exclusive remedies for damages caused by a business’ or governmental agency’s failure to be Y2K compliant shall be those remedies available for breach of

a written contract or tariff with the business or agency, or, in the absence of such a written contract or tariff, those remedies provided by the act.

Section 4 specifies the liability, unless otherwise provided by contract or tariff, of a business or an agency for failure to be Y2K compliant; prohibits recovery for damages that could have been avoided or mitigated; enables businesses and agencies to avoid liability based upon assessment and disclosure of Y2K compliance; requires a plaintiff to offer to submit the claim to mediation as a precondition to bringing an action; places limitations on certain class-action lawsuits; and establishes a two-year statute of limitations for actions under the new act.

- *Business Liability:* A business that is not Y2K compliant is liable for direct economic damages caused by its failure to be compliant.
- *Agency Liability:* A governmental agency that is not compliant is liable for direct economic damages caused by its failure to be compliant within the limits on the waiver of sovereign immunity under s. 768.28, F.S. Further, if it is shown by clear-and-convincing evidence that the damages were due to the agency's grossly negligent misrepresentations or conduct, the agency is liable beyond the statutory limits on the waiver of sovereign immunity.
- *Damage Limitations Based on Disclosure:* The committee substitute specifies that a plaintiff may not recover damages that could have been avoided or mitigated based on the exercise of reasonable care or based on written disclosures from the defendant -- made before December 1, 1999 -- regarding its Y2K compliance.
- *Avoidance of Liability:* A business or an agency may avoid liability for direct economic damages if it proves that it has secured an on-site assessment from a qualified person to determine what it needs to do to become Y2K compliant and, based on that assessment, has before December 1, 1999, a reasonable good-faith belief that it is compliant. In addition, the business or agency must prove that it has assessed whether the entities it relies upon or is in privity with are Y2K compliant, and that the business or agency either has before December 1, 1999, a reasonable good-faith belief that such entities are compliant or has disclosed that the entities are not compliant. The committee substitute specifies that failure to comply with these assessment provisions does not in-and-of-itself create liability.
- *Pre-claim Mediation:* As a precondition to bringing an action for damages under the act, the plaintiff must make a written offer to submit the claim to mediation, and as a precondition for defending such an action, the defendant must have accepted, within 60 days, the offer to enter mediation.
- *Class Actions:* The committee substitute prohibits class actions from being maintained in Florida against a governmental agency for its failure to be Y2K compliant. In addition, the measure prohibits such class actions against a business, unless each member of the class has suffered direct economic damages exceeding \$50,000.
- *Statute of Limitations:* An action for damages under the act must be commenced within two years after the cause of action accrues; however, an offer to submit the claim to mediation tolls the running of this time period until the conclusion of the mediation.

Section 5 shields a director or an officer of a business from personal liability for damages resulting from the business' failure to become Y2K compliant if the director or officer has instructed the business to 1) assess its Y2K compliance, 2) implement a plan to take actions necessary to make the business compliant, and 3) inquire whether entities upon which the business relies are compliant.

Section 6 requires a solution provider to maintain the confidentiality of information technology information acquired by the provider from a business or agency and to use the information solely in the manner permitted by the business or agency. The committee substitute authorizes a business or agency to seek an injunction against disclosure or improper use of such information or to recover damages for disclosure or improper use. Further, the measure declares it a first-degree misdemeanor to misuse or disclose such information, and declares it a third-degree felony to intentionally misuse or disclose such information for pecuniary gain.

Section 7 specifies that the exchange of information among businesses and governmental agencies regarding measures aiding in Y2K compliance does not constitute an activity or conduct in restraint of trade or commerce under ch. 542, F.S., the state antitrust statute.

Section 8 provides incentives to use alternative dispute resolution procedures in cases involving Y2K matters, including voluntary binding arbitration or mediation.

- *Voluntary binding arbitration:* A party to a lawsuit brought under the "Commerce Protection Act" may offer to submit the matter to voluntary binding arbitration, with the offer prescribing the maximum amount of damages that may be imposed under the arbitration. If the trial court finds that the defendant rejected the plaintiff's offer and the defendant is found liable in an amount equal to or exceeding the maximum damages specified in the offer, the defendant must pay the plaintiff's costs and reasonable attorney's fees. If the plaintiff rejected the defendant's offer, and the plaintiff is not ultimately awarded damages exceeding the maximum damages specified in the offer, the plaintiff must pay the defendant's costs and reasonable attorney's fees.
- *Mediation:* A court may submit a claim for damages to mediation on its own motion or upon motion of the parties. If a claim is submitted to mediation and the mediation reaches an impasse, the plaintiff's and defendant's last best offers shall be filed with the court. If the trier of fact fails to award the plaintiff more than 75 percent of the defendant's last best offer, the plaintiff must pay the defendant's costs and reasonable attorney's fees. If the trier of fact awards the plaintiff 125 percent or more of the plaintiff's last best offer, the defendant must pay the plaintiff's costs and fees.

Section 9 provides immunity under state law for Y2K statements made with respect to the offer or sale of securities under certain conditions. To the extent that the statement was a republication of a Y2K statement originally made by a third party, liability may exist if the claimant establishes by clear-and-convincing evidence that the statement was material and that the maker of the republication made the statement with actual knowledge that it was false, inaccurate, or misleading; with intent to deceive or mislead; or without notice either because the maker has not verified the contents of the republication; or the maker is not the source of the statement, the statement is based on information supplied by another person, and the notice or republished

statement identifies the source of the statement. To the extent that the statement was not a republication of a Y2K statement originally made by a third party, liability may exist if the claimant establishes by clear-and-convincing evidence that the statement was material and that the maker made the statement with actual knowledge that it was false, inaccurate, or misleading; with intent to deceive or mislead; or with reckless disregard as to its accuracy.

Section 10 specifies that the act does not apply to an action based on a written contract or tariff -- so long as all of the parties to the action are parties to the contract or tariff. Further, the committee substitute specifies that written terms of the contract or tariff remain fully enforceable and are not affected or altered by this act.

Section 11 provides that the act shall not be construed to create a duty to provide notice concerning Y2K compliance; nor shall the act be construed to mandate the content or timing of any notice concerning compliance.

Section 12 repeals s. 282.4045, F.S., 1998 Supp., which is the 1998-enacted provision specifying that the state, its agencies, and units of local government shall be immune from damages for Y2K computer date failures consistent with the statute providing for waiver of sovereign immunity in tort actions.

Section 13 provides that the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 6 of the committee substitute requires a solution provider to maintain the confidentiality of certain information acquired by the solution provider from a business or agency and to use the information solely in the manner permitted by the business or agency. The committee substitute authorizes a business or agency to seek an injunction against disclosure or improper use of such information or to recover damages for disclosure or improper use. Further, the measure declares it a first-degree misdemeanor to misuse or disclose such information, and declares it a third-degree felony to intentionally misuse or disclose such information for pecuniary gain. Because, however, the committee substitute excludes governmental entities from the definition of a solution provider, it does not have the effect of creating a public records exemption for information technology records held by an agency of government, which constitutionally would require separate legislation.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The exact impact of this committee substitute on the private sector is not known. To the extent that the measure contributes certainty to the litigation of claims related to the Year 2000 (Y2K) problem, private-sector businesses may benefit. A business, however, may experience costs associated with taking advantage of some of the liability protections in the measure, such as notifying customers of the business' failure to be Y2K compliant.

C. Government Sector Impact:

The exact impact of this committee substitute on the government sector is not known. Under the measure, a governmental agency is subject to liability beyond the existing statutory limitations on the waiver of sovereign immunity if it is shown by clear-and-convincing evidence that the claimant's Year 2000 damages were the result of the agency's grossly negligent misrepresentations or conduct.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In October 1998, the President signed the federal "Year 2000 Information and Readiness Disclosure Act" (Public Law 105-271, Oct. 19, 1998). Among other provisions, the federal act restricts the admissibility, in covered civil actions, of certain Year 2000 readiness disclosures to prove the accuracy of any Y2K statement in that disclosure. The federal law defines covered civil actions to include a civil action of any kind, whether arising under federal or state law. Although the federal law seems to focus on liability based upon Y2K disclosures, while the proposed state measure focuses on liability based upon the failure to be Y2K compliant, it appears that provisions in the federal law may govern the admission of certain evidence in actions envisioned under the committee substitute.

VIII. Amendments:

None.