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/CS/SB 80

SPONSOR: Governmental Oversight and Productivity Committee, Commerce and Economic Opportunities Committee, SenatorGrant, and others

SUBJECT: Information Technology Resources

DATE: March 17, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	CM	Favorable/CS
2.	Lombardi	Wilson	GO	Favorable/CS
3.			FP	
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 maybe liable for direct economic damages caused by failure of its information technology products to be Y2K compliant. The measure also specifies that a governmental agency whose information technology products are not Y2K compliant maybe liable for direct economic damages only within the existing statutory limitations of the waiver of sovereign immunity.

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 limitation date of March 1, 2002, for commencement of 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 bill will take effect upon becoming law.

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.[1] 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 ch. 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:

[1]Section 14.025(1), F.S. (1998 Supp.).

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.[2] 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.

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;[3] provides for the exclusion or modification of warranties;[4] and prescribes the contractual modification or limitation of remedies.[5]

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.[6] Among other things, the act provides that every contract, combination, or conspiracy in restraint of trade or commerce in Florida is unlawful.[7] 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.

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[2]Section 768.28(5), F.S. (1998 Supp.).

[3] Sections 672.313, 672.314, and 672.315, F.S.

[4] Section 672.316, F.S.

[5] Section 672.719, F.S.

[6] Section 542.16, F.S.

[7] Section 542.18, F.S.

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," "direct economic damages," "governmental agency," "information technology product," "solution provider," and "Year-2000 compliant."

The term "business" means a person or any entity engaged in Florida in providing goods or services. "Direct economic damages[8]" means those economic compensatory damages that follow both immediately and necessarily for the failure of a business or a governmental agency to be Y2K compliant. 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. An "information technology product" includes software, firmware, microcode, hardware, and equipment containing embedded chips or microprocessors which process or operate on date data and are owned, leased, or licensed by or under the exclusive control of the business or governmental agency. A "solution provider" means a non-governmental entity that agrees to: provide information technology products designated as Y2K compliant; test such products or services to assess their Y2K compliance; or, make repairs to or corrects information technology products or services designed to make them Y2K compliant.

"Year-2000 compliant" means information technology products capable of correctly processing, providing, and receiving date data. Information technology products containing defects not operatively related to how date data is processed, provided, or received is exempt from the description of year-2000 compliance failure.

Section 3 specifies that the exclusive remedies for damages caused by a business' or governmental agency's failure of its information technology products 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 of its information technology products to be Y2K compliant; designates that law of comparative fault apply to the award of damages; 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 date sensitive limitation for commencement of actions under the new act.

[8] Sec. 768.81, F.S. further defines "economic damages" as applied in this instance to mean past lost income and future lost income reduced to present value; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any economic loss which would not have occurred but for the injury giving rise to the cause of action.

- *Business Liability:* A business whose information technology products are not Y2K compliant maybe liable *only* for direct economic damages caused by its failure to be compliant.

- *Agency Liability*: A governmental agency whose information technology products are not compliant maybe liable for direct economic damages caused by its failure to be compliant however, *only* within the limits on the waiver of sovereign immunity under s. 768.28, F.S.

- *Determination of Damages Based on Comparative Fault*: The bill specifies that any contributory fault charged to the claimant diminishes proportionally the amount of the award as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

- *Damage Limitations Based on Disclosure*: The bill 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*: Businesses and agencies may avoid liability for direct economic damages given proof of an on-site assessment from a qualified individual competent of determining Y2K compliance. The findings of the assessment must be before December 1, 1999, and the business or agency must in reasonable good-faith believe, that based on the assessment, it is in compliance. Liability may also be waived provided that before December 1, 1999, the business or agency conducts date-data tests resulting in a good-faith belief that its information technology products are in Y2K compliance. 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 bill 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, in addition to any other condition precedent imposed by law, 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 bill prohibits class actions from being maintained in Florida against a governmental agency for failure of its information technology products 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 commence before March 1, 2002, 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 bill 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 plaintiff's highest 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. The cost of mediation must be equally shared by the parties.

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 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 11 repeals s. 282.4045, F.S., 1998 Supp., which provides that the state, its agencies, and units of local government are immune from damages for Y2K computer date failures consistent with the statute providing for waiver of sovereign immunity in tort actions.

Section 12 provides for a severablility clause.

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:

The bill provides that ". . . Scientific, technical, or commercial information acquired by a solution provider concerning the information technology operations, programs, equipment, and data of a business or governmental agency, including, without limitation, any formula, design, process, procedure, list of suppliers, list of customers, or business code that is for use in the operation of the business or governmental agency remains the property of the business or governmental agency and must be kept confidential." This information may be used only in a manner expressly permitted by the business or governmental agency and disclosure of "information" to another without their express written consent is prohibited unless otherwise required by law.

Article I, s. 24(a) of the State Constitution requires that "...every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Further, the term "agency" as used in the Public Records Act includes private entities "acting on behalf of any public agency."[9] The bill prohibits the solution provider from releasing such "information" even though it might otherwise be information available to the public from any agency and subjects it to sanctions for release of that information.

[9] Section 119.011(2), F.S.

> "The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility." *News and Sun-Sentinel Company v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla.1992).

The bill broadens the trade secret language contained in s. 812.081, F.S., by removing language which distinguishes that any information must also "provide the business an advantage, or an opportunity to obtain advantage, over those who do not know or use it." Article I, s. 24(c) of the State Constitution requires exemptions to be ". . . no broader than necessary to accomplish the stated purpose of the law." Typically, public records law exemptions are explicitly created. Without an explicit, narrowly-drawn exemption, there is less clarity regarding what information is to be exempt, as well as less clarity regarding the legislative purpose and reasoning that supports the exemption. Exemptions must state with specificity the public necessity justifying the exemption and they cannot be broader than necessary to accomplish the stated purpose of the law. Any exemption created outside of these parameters will be more difficult to defend.

Further, the lack of an explicit exemption may cause difficulty for state employees who must determine how to respond to a request to inspect or copy the received information. The bill prohibits disclosure of the information without the express written consent of the business or governmental agency "*. . . or as otherwise provided by law.*" Since information made or received in the course of business of an agency is a public record unless made exempt, and since the "information" that is not to be disclosed under the bill is not clearly defined, state employees will have to determine whether to provide access under general principles of public records law or to deny access due to the implied exemption of the bill. In either case, there is risk to the employee because s. 119.02, F.S., provides that a knowing violation of the public records law is a misdemeanor of the first degree. A knowing violation of the bill is also a misdemeanor of the second degree.

The Legislature has created an exemption for data processing software which has been obtained by an agency under licensing agreement prohibiting its disclosure and which is a trade secret as defined in s. 812.081, F.S.[10] In order for the exemption to apply, two conditions must be present: the licensing agreement must prohibit disclosure of the software and the software must meet the statutory definition of "trade secret."

Section 815.04, F.S., also provides that data, programs, or supporting documentation which is a trade secret as defined in s. 812.081, F.S., which resides or exists internal or external to a computer, computer system, or computer system network is confidential and exempt from public records law.

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[10] "Trade Secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain advantage, over those who do not know or use it. "Trade Secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains.

Additionally, it is not clear that another definition of "governmental agency" is required as s. 119.011(2), F.S., defines the term "agency" to mean

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Sovereign Immunity in the State of Florida

Article X, s. 13 of the Florida Constitution, provides that the Legislature may, by general law, make provision for the bringing of suit as to all liabilities. The state has waived its sovereign immunity for liability for torts, but only to the extent specified in s. 768.28 (1), F.S. The types of actions at law that may be prosecuted to recover damages in tort for money damages against the state or its agencies or subdivisions are for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision if the employee was acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant. The law authorizes that any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

State agencies or subdivisions are defined under s. 768.28(2), F.S., to include:

> the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority.

This waiver of sovereign immunity is limited, however. The state and its agencies and subdivisions are liable for tort claims in the same manner and to the same extent as private individuals under like circumstances, but liability cannot not include punitive damages or interest for the period before judgment. The liability of the state is authorized up to a certain dollar amount. Neither the state nor its agencies or subdivisions are liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000.

Nothing precludes a judgment or judgments to be claimed and rendered in excess of the $100,000 or $200,000 amounts. Cases may be settled and paid pursuant to s. 768.28(5), F.S., up to $100,000 or $200,000, as the case may be. Any portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature through the passage of "claims bills."

Notwithstanding the limited waiver of sovereign immunity provided in statute, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature. However, the state or agency or subdivision thereof has not waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided in s. 768.28(5), F.S. The limitations of liability set forth in s. 768.28(5), F.S., apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

There are certain statutory requirements that must be followed for a plaintiff to bring suit against the state. In actions brought pursuant to this section, process must be served upon the head of the agency concerned and also upon the Department of Insurance. The department or the agency being sued has 30 days within which to answer a complaint.[11] Limitations are also statutorily provided regarding suits against the state. For instance, no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.[12]

If an employee of the state or its subdivisions acts within the scope of his or her employment and is found to be liable in torts, that officer, employee, or agent of the state or of any of its subdivisions cannot be held *personally liable* in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his or her employment or function, *unless* such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[13] However, the statutes recognize that such officers, employees, or agents must be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his or her employment or function. According to s. 768.28(9)(a), F.S., the exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers must be by action against the governmental entity, or the head of such entity in his or her official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions will not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his or her employment or when

[11] Section 768.28(7), F.S.

[12] Section 768.28(8), F.S.

[13] Section 768.28(9)(a), F.S.

such acts are committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The liability of the state through its agencies or subdivisions for certain types of private vendors that contract with agencies of the state are specifically addressed in the Florida Statutes. For example, health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system are to be considered agents of the State of Florida, Department of Corrections, for the purposes of s. 768.28, F.S., while acting within the scope of and pursuant to guidelines established in said contract or by rule.[14] The contracts with the private vendors must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in s. 768.28, F.S. Additionally, providers or vendors, or any of their employees or agents that have contractually agreed to act as agents of the state, solely with respect to providing services, statutorily are deemed to be agents of the state for purposes of this section while acting within the scope of and pursuant to guidelines established in the contract or by rule.[15]

Although there are limitations on the liability of the state through its agencies and subdivisions, such entities are not necessarily discouraged from obtaining insurance coverage. For instance, s. 768.28(12), F.S., states "[l]aws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act." Additionally, the state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section.[16] Agencies or subdivisions, and sheriffs that are subject to homogeneous risks, may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding.

Immunity from liability in a federal jurisdiction is also expressly preserved in statute. Section 768.28(17), F.S., states:

> No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

[14] Section 768.28(10)(a), F.S.

[15] Section 768.28(11)(a), F.S.

[16] Section 768.28(15)(a), F.S.

Qualified immunity from suits in tort is also expressly preserved in instances where a contract is entered into with another agency or subdivision of the state. Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state.[17] Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence; however, this does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance.

Legislative Encroachment upon Judicial Authority

The Senate Staff Analysis and Economic Impact Statement for CS/SB 374 (civil litigation reform) discussed potential constitutional infirmities posed by the Legislature's law-making prerogatives relative to the practice and procedure requirements of the Florida Supreme Court. The portion of that analysis relevant to the provisions in CS/SB 80 which limit the filing of class action lawsuits against government agencies, is repeated below:

> The bill raises a concern regarding legislative encroachment upon judicial authority regarding matters of practice and procedure in violation of the state constitutional separation of powers provision. *See* Art. II, s. 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate court rules of practice and procedure. *See* Art. V, s. 2(a), Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. *See* Art. V, s. 2(a), Fla. Const. The Legislature cannot enact law that amends or supersedes existing court rules, it can only repeal them.[18]
>
> What constitutes practice and procedure versus substantive law has been decided by the courts on a case by case basis. With few exceptions, it is not entirely clear or definitive. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress.[19]
>
> Based on current law, the courts tend to find certain provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or intrude in areas of practice and procedure within the province of the court. The bill contains a number of provisions which arguably involve matters of judicial practice and procedure versus substantive law.

[17] Section 768.28(18), F.S.

[18] *See Market v. Johnston*, 367 So.2d 1003 (Fla. 1978).

[19] *See Haven Federal Savings & Loan Assoc.*, 579 So.2d 730 (Fla. 1991).

However, over the years, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the justice system. In this situation, the court will typically invalidate the procedural provision as constitutionally infirm and then adopt the substance of the invalid section as a court rule.[20] Under Florida Rule of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the usefulness of the policy sought to be asserted by the Legislature.[21]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exact impact of this bill on the private sector is unknown. 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 unknown. 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:

On page 2, lines 23-25, the committee substitute for committee substitute provides confusing and contradictory language based on the intended purpose of defining "direct economic damages" both in the bill and pursuant to s. 768.81, F.S.

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[20] *See TGI Friday's, Inc. V. Dvorak*, 663 So.2d 606 (Fla. 1995); *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992)(re: Fla.R.Civ.P. 1.442, Proposals for Settlement).

[21] *See* Fla.R.Civ.P. 1.222- emergency rule adoption of statutory provisions governing Mobile Homeowners' Association.

VII. Related Issues:

In October 1998, the President of the United States, signed into law "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, and 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.

This legislation creates a new felony offense of the intentional disclosure of confidential Y2K information. Since the offense is not specifically slotted in the Offense Severity Ranking Chart contained in s. 921.0022, F.S., the Criminal Punishment Code, it will by default be placed in Level 1.

VIII. Amendments:

None.