

Committee Substitute for Committee Substitute for
Committee Substitute for Senate Bill No. 80

An act relating to information technology resources; creating the “Commerce Protection Act”; defining terms; prescribing exclusive remedies against persons, businesses, and governmental agencies for damages caused by the failure of their information technology resources to function properly with respect to date data; prescribing and limiting damages; providing for mediation; barring certain class actions; requiring that actions be brought within a specified time; providing immunity from personal liability for directors and officers of businesses under specified circumstances; exempting the exchange of certain information among businesses from action under the Florida Antitrust Act of 1980; prescribing alternative dispute-resolution procedures; providing for liability for costs and attorney’s fees under specified circumstances; providing for construction of the act; repealing s. 282.4045, F.S., which grants immunity from liability to governmental entities for certain computer calculation failures; providing for severability; providing an effective date.

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

Section 1. Short title.—This act may be cited as the “Commerce Protection Act.”

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

(1) BUSINESS.—The term “business” means a person or an entity engaged in providing goods or services in this state, but the term excludes any governmental agency or any agency of the legislative or judicial branch of state government.

(2) DATE DATA.—The term “date data” means data that contain dates or that contain both dates and times.

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

(4) GOVERNMENTAL AGENCY.—The term “governmental agency” includes any agency of the executive branch of state government or any political subdivision of the state as defined in section 1.01, Florida Statutes, or any agency of such a political subdivision. For purposes of this section, the term also includes any public or private university school of medicine that is part of a public or private university supported in whole or in part by state

funds and that has an affiliation with a local government or state instrumentality under which the medical school's computer systems, or diagnostic or therapeutic equipment dependent upon date logic, are used to provide clinical patient care services to the public.

(5) INFORMATION TECHNOLOGY PRODUCT.—

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

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

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

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

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

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

(2) Unless otherwise provided by a contract or tariff, any governmental agency may be liable only for direct economic damages caused by the failure of its information technology products to be year-2000 compliant, and only

within the limits on the waiver of sovereign immunity established in section 768.28, Florida Statutes.

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

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

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

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

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

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

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

3. If it has five or fewer employees and has a net worth of \$100,000 or less, made reasonable efforts to assess whether the entities on whose goods or services it relies and with whom it is in privity have provided information technology products that are year-2000 compliant and, with respect to each such entity, either:

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

b. Discloses in writing to the other party before December 1, 1999, in a manner consistent with that used in the past to give written notifications to that party, that the entity has provided information technology products that are presumed not to be year-2000 compliant or that, based on the response to inquiries, the entity is making reasonable good-faith efforts to make its information technology products become year-2000 compliant.

(b) All defenses that would otherwise be available to a business or governmental agency in any other action, including an action based on negli-

gence, remain available with respect to an action under this section. Moreover, the failure of a business or governmental agency to comply with paragraph (a) shall not create a presumption of liability and no inference may be drawn from such failure.

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

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

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

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

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

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

(1) A director or officer of a business has absolute and complete immunity from personal liability for any damages resulting from the failure of the information technology products of the business to be year-2000 compliant if the officer or director has either instructed the business or received written assurance from another officer or director that the business has been instructed to:

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

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

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

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

Section 6. Antitrust exemption with respect to exchanges of information.—The exchange of information among businesses concerning measures

that have been taken or are to be taken in order for a business to make its information technology products year-2000 compliant does not constitute an activity or conduct in restraint of trade or commerce under chapter 542, Florida Statutes.

Section 7. Alternative dispute-resolution procedures.—

(1) VOLUNTARY BINDING ARBITRATION.—

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

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

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

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

(2) MEDIATION.—

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

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

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

Section 8. Construction of act.—This act shall not be construed to create a new cause of action or a duty to provide notice concerning year-2000 compliance nor be construed to mandate the content or timing of any notice concerning year-2000 compliance.

Section 9. Section 282.4045, Florida Statutes, as created by section 4 of chapter 98-331, Laws of Florida, is repealed.

Section 10. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the

invalid provision or application, and to this end the provisions of this act are declared severable.

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

Approved by the Governor June 4, 1999.

Filed in Office Secretary of State June 4, 1999.