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## COMMERCE AND TRADE Fair Business Practices Act: Amended to Regulate "Going Out of Business" Sales

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## COMMERCE AND TRADE

### *Fair Business Practices Act: Amended to Regulate "Going Out of Business" Sales*

CODE SECTIONS:	O.C.G.A. §§ 10-1-392(a)(5.1) (new), 10-1-393(b)(24) (new)
BILL NUMBER:	HB 193
ACT NUMBER:	464
SUMMARY:	The Act defines and sets forth regulations for "going out of business" sales. The penalties provided under the Fair Business Practices Act of 1975 apply to violations of the new Code subsections.
EFFECTIVE DATE:	July 1, 1989

#### *History*

In 1975, the Georgia General Assembly passed the Fair Business Practices Act (FBPA)<sup>1</sup> to "protect consumers and legitimate business enterprises from unfair or deceptive practices."<sup>2</sup> The intent was that such practices "be swiftly stopped."<sup>3</sup> The FBPA enumerated examples of unfair or deceptive practices in consumer transactions.<sup>4</sup> This list did not include distress merchandise sales or "going out of business" sales.<sup>5</sup>

Constituents' complaints regarding unfair business practices in "going out of business" sales prompted the introduction of the bill.<sup>6</sup> Several Georgia business people observed that some companies had "going out of business" sales that never resulted in the termination of the business.<sup>7</sup> Consumers complained they thought they were getting a better deal at

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1. O.C.G.A. §§ 10-1-390 to -407 (1989).

2. O.C.G.A. § 10-1-391 (1989).

3. *Id.*

4. *See* O.C.G.A. § 10-1-393(b) (1989). Examples of unfair and deceptive acts in the Code include: "passing off goods or services as those of another," causing confusion or misunderstanding as to certification, sponsorship, or approval of goods and services, using deceptive representations in connection with goods and services, representing that goods are original when they are not, "advertising goods or services with intent not to sell them as advertised," or "making false or misleading statements concerning the reasons for . . . the price reductions." *Id.*

5. *Id.*

6. Telephone interview with Representative DuBose Porter, House District No. 119 (Mar. 23, 1989) [hereinafter Porter Interview]. Representative Porter was one of the bill's sponsors. *Id.*

7. *Id.*

these sales, only to find out they were sometimes paying more.<sup>8</sup> The business people and the bill's sponsors believed these practices constituted deceptive or false advertising that should be stopped.<sup>9</sup> Therefore, the bill's sponsors introduced legislation to regulate distress and "going out of business" sales to correct this perceived deficiency in Georgia law.<sup>10</sup>

### HB 193

In an attempt to expedite the introduction of legislation to control and regulate distress and "going out of business" sales, the bill's sponsors borrowed from the Alabama Code the chapter entitled "Going Out of Business or Distress Merchandise Sales."<sup>11</sup> Once the sponsors introduced the bill and it reached the House Industry Committee, the bill's sponsors asked that the bill be simplified by amending the provisions of the existing FBPA.<sup>12</sup> As a result, the Industry Committee and the bill's sponsors, with the help of the Office of Consumer Affairs, drafted a House committee substitute incorporating the regulation of distress merchandise and "going out of business" sales into the FBPA.<sup>13</sup> This version of the bill easily passed the House.<sup>14</sup>

The Senate Industry and Labor Committee made further changes to the bill. Because many "going out of business" sales take longer than sixty days, such as remnant sales in the carpet industry which often take more than ninety days, the Committee substitute lengthened the time to conduct a sale to ninety days.<sup>15</sup>

Some senators believed that distress merchandise sales should not be subject to the same regulation as "going out of business" sales, because distress sales often take longer than the proposed ninety days,

8. *Id.*

9. *Id.*

10. *Id.* See also *Denny v. D.J.D., Inc.*, 186 Ga. App. 727, 368 S.E.2d 329 (1988). The breach of contract case involved a claim of concealment of previous distress merchandise sales, where the contract was to conduct a "cash raising and/or going out of business sale." No interpretation was made, however, by the court regarding such sales under the FBPA. *Denny*, 186 Ga. App. at 727, 368 S.E.2d at 329.

11. Porter Interview, *supra* note 6; ALA. CODE §§ 8-13-1 to -23 (1984 & Supp. 1988); HB 193, as introduced, 1989 Ga. Gen. Assem. The FBPA differs from the Alabama law in that the Alabama law requires merchants to file an application to conduct a "going out of business" or "distress merchandise" sale and to post a bond. Prior to issuing a license, a probate judge must conduct an investigation and hold subsequent public hearings. Special rules apply to the actual conduct of the sale. See ALA. CODE §§ 8-13-1 to -23 (1984 & Supp. 1988).

12. Porter Interview, *supra* note 6.

13. *Id.*; HB 193 (HCS), 1989 Ga. Gen. Assem.

14. House vote for the Senate committee substitute was 159 to 0 (House voting record).

15. Porter Interview, *supra* note 6; O.C.G.A. § 10-1-393(b)(24) (1989).

but do not involve false or deceptive advertising.<sup>16</sup> Therefore, the Senate Industry and Labor Committee deleted the section of the bill dealing with distress merchandise sales,<sup>17</sup> without altering the section dealing with "going out of business" sales.<sup>18</sup> This Senate committee substitute passed both houses of the General Assembly on the next to the last day of the 1989 session.<sup>19</sup> No major lobbying effort was directed either for or against the bill.<sup>20</sup> In fact, retail merchants' organizations believed the law was a good idea and chose not to fight its passage.<sup>21</sup>

The Act provides for regulation of "going out of business" sales and defines such sales broadly to include any type of sale that "is in anticipation of the termination of a business" and other similar sales.<sup>22</sup> The Act prohibits "going out of business" sales by a business that intends to continue operations.<sup>23</sup> The Act also prohibits the business from conducting such sales for more than ninety days.<sup>24</sup> Under certain

16. Porter Interview, *supra* note 6. The types of distress sales mentioned in the substitute included sales advertised to be a "fire sale, smoke or water damage sale, adjustment sale, insurance salvage sale, mortgage sale, adjuster's sale, or reorganization sale." HB 193 (HCS), 1989 Ga. Gen. Assem. The 90 day limit on "going out of business" sales was proposed as a reasonable amount of time to conduct such a sale. Longer periods of time were felt to be deceptive by the bill's sponsors and the House Industry Committee. Porter Interview, *supra* note 6.

17. HB 193 (SCS), 1989 Ga. Gen. Assem.

18. *Id.*

19. Final Composite Status Sheet, Mar. 15, 1989.

20. Porter Interview, *supra* note 6.

21. *Id.*

22. O.C.G.A. § 10-1-392(a)(5.1) (1989). The new section reads as follows:

"Going-out-of-business sale" means any offer to sell to the public or sale to the public of goods, wares, or merchandise on the implied or direct representation that such sale is in anticipation of the termination of a business at its present location or that the sale is being held other than in the ordinary course of business and includes, without being limited to, any sale advertised either specifically or in substance to be a sale because the person is going out of business, liquidating, selling his entire stock or 50 percent or more of his stock, selling out to the bare walls, selling because the person has lost his lease, selling out his interest in the business, selling because everything in the business must be sold or that the sale is a trustee's sale, bankrupt sale, save us from bankruptcy sale, insolvent sale, assignee's sale, must vacate sale, quitting business sale, receiver's sale, loss of lease sale, liquidation sale, executor's sale, administrator's sale, warehouse removal sale, branch store discontinuance sale, creditor's sale, adjustment sale, or defunct business sale.

*Id.*

23. *Id.*

24. O.C.G.A. § 10-1-393(b)(24)(A)-(B) (1989). The Code section reads in part as follows:

[T]he following practices are declared unlawful: . . .

(24)(A) Conducting a going-out-of-business sale for more than 90 days; or

(B) After the 90 day time limit in subparagraph (A) of this paragraph has expired, continuing to do business in any manner contrary to any

circumstances, "going out of business" sales are classified as unfair or deceptive acts or practices.<sup>25</sup> The Act does not cover distress merchandise sales.<sup>26</sup>

Certain types of sales are excepted from the penalties under the new sections of the FBPA dealing with "going out of business" sales. The exceptions include sales of the estates of decedents, sales of property conveyed by deed, sales of produce and livestock produced by the seller, legal process sales, pawnbroker sales, and auctioned automobiles.<sup>27</sup>

As part of the FBPA, "going out of business" sales are subject to the same regulations and penalties as other unfair or deceptive business practices.<sup>28</sup> The Administrator of the Office of Consumer Affairs can place injunctions on such sales, and may conduct hearings and investigations into the alleged unlawful practices.<sup>29</sup> The Administrator may also file for general, but not punitive, damages against violators.<sup>30</sup>

Consumers who suffer an injury "as a result of deceptive acts or practices" may bring an action for injunctive relief and damages.<sup>31</sup> A thirty day notice prior to the filing of any action shall be delivered to any prospective defendant.<sup>32</sup> Private claims under the FBPA have three elements: violation of the FBPA, causation, and injury.<sup>33</sup> The court may

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representations which were made regarding the nature of the going-out-of-business sale.

*Id.*

25. 1989 Ga. Laws 560, preamble.

26. *See* HB 193 (HCS), 1989 Ga. Gen. Assem.

27. O.C.G.A. § 10-1-393(b)(24)(C) (1989). This section reads as follows:

(C) The prohibitions of this paragraph shall not extend to any of the following:

- (i) Sales for the estate of a decedent by the personal representative or his agent, according to law or by the provisions of the will;
- (ii) Sales of property conveyed by security deed, deed of trust, mortgage, or judgment or ordered to be sold according to the deed, mortgage, judgment, or order;
- (iii) Sales of all agricultural produce and livestock arising from the labor of the seller or other labor under his control on or belonging to his real or personal estate and not purchased or sold for speculation;
- (iv) All sales under legal process;
- (v) Sales by a pawnbroker or loan company which is selling or offering for sale unredeemed pledges of chattels as provided by law; or
- (vi) Sales of automobiles by an auctioneer licensed under the laws of the State of Georgia.

*Id.*

28. O.C.G.A. §§ 10-1-390 to -407 (1989).

29. O.C.G.A. §§ 10-1-395, -397 (1989).

30. O.C.G.A. § 10-1-398 (1989).

31. O.C.G.A. § 10-1-399 (1989). *See also* Rothschild, *A Guide to Georgia's Fair Business Practices Act of 1975*, 10 GA. L. REV. 917 (1976).

32. O.C.G.A. § 10-1-399(b) (1989).

33. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980). In analyzing whether

award damages in excess of the purchase price.<sup>34</sup> Punitive or exemplary damages of three times actual damages may be awarded for the intentional violation of the FBPA.<sup>35</sup> Intentional violators may be subject to fines of up to \$25,000 per violation, and each day of a continuing offense is a separate violation.<sup>36</sup>

By placing the new Act under the FBPA, attorneys can look to present case law regarding the FBPA for interpretation by the courts.<sup>37</sup> Of the states adjoining Georgia, there are "going out of business" statutes in Alabama and Florida, but not in North Carolina, South Carolina, or Tennessee. Neither Florida nor Alabama have addressed their respective "going out of business" statutes at the appellate level, and no court precedent exists in the jurisdictions surrounding Georgia regarding this problem.<sup>38</sup> Therefore, current court interpretations of the FBPA are valuable to the enforcement of the Act and will provide precedent for the legal community to follow.

The sponsors of the bill believe the Act will correct a deficiency in Georgia law. Moreover, this Act will help protect Georgia consumers against false and deceptive sales practices associated with "going out of business" sales.<sup>39</sup>

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a defendant "is in violation of the FBPA . . . 'two factors are determinative: (a) the medium through which act or practice is introduced into the stream of commerce; and (b) the market on which act or practice is reasonably intended to impact.'" *Id.* at 85, 273 S.E.2d at 915 (quoting *State v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 12, 244 S.E.2d 15, 18 (1978)). Also, the claimant must be diligent in discovering the truth. *Zeeman*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

34. *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 381-82, 262 S.E.2d 820, 822-23 (1979).

35. O.C.G.A. § 10-1-399(c) (1989). "Intentional violation" occurs when the person committing the act or practice knew that his conduct was in violation of the FBPA. When the Administrator gives notice, any subsequent violation is prima facie evidence of intentional violation. O.C.G.A. § 10-1-392(b) (1989).

36. O.C.G.A. § 10-1-405 (1989).

37. *See also State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978); *Griffith v. Stovall Tire & Marine, Inc.*, 169 Ga. App. 461, 313 S.E.2d 156 (1984); *Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc.*, 168 Ga. App. 932, 311 S.E.2d 216 (1983); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980); *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 262 S.E.2d 820 (1979); *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979); *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740 (1978).

38. ALA. CODE §§ 8-13-1 to -23 (1984); FLA. STAT. ANN. §§ 559.20 to .27 (West 1988).

39. Porter Interview, *supra* note 6.