

9-1-1988

COMMERCE AND TRADE Fair Business Practices Act: Revise Provisions Relating to Administrative Actions

M. Hines

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

M. Hines, *COMMERCE AND TRADE Fair Business Practices Act: Revise Provisions Relating to Administrative Actions*, 5 GA. ST. U. L. REV. (1988).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol5/iss1/50>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

COMMERCE AND TRADE

Fair Business Practices Act: Revise Provisions Relating to Administrative Actions

CODE SECTIONS:	O.C.G.A. §§ 10-1-397, -398 (amended), 10-1-398.1 (new), 10-1-403 to -405 (amended)
BILL NUMBER:	HB 1405
ACT NUMBER:	1416
SUMMARY:	The Act extensively revises provisions relating to actions by the administrator of the Fair Business Practices Act of 1975. The Act permits the administrator to issue cease and desist orders and to impose civil penalties. The Act provides additional court-imposed remedies, including restitution to injured consumers.
EFFECTIVE DATE:	July 1, 1988

History

The purpose of Georgia's Fair Business Practices Act of 1975 (FBPA) is to protect consumers and legitimate businesses from unfair and deceptive practices in the conduct of trade and commerce.¹ The General Assembly, consistent with this purpose, intended that such practices be "swiftly stopped."² Several provisions of the original FBPA, however, included procedural devices which permitted violators to engage in delay tactics.³

1. O.C.G.A. § 10-1-391(a) (1982). The Code section provides:

The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

See also Zeeman v. Black, 156 Ga. App. 82, 82, 273 S.E.2d 910, 913 (1980) ("[T]he stated intent of the FBPA is to protect the public from acts and practices which are injurious to consumers . . .") (emphasis added); State v. Meredith Chevrolet, 145 Ga. App. 8, 11, 244 S.E.2d 15, 18 (1978) ("The legislature has evidenced a clear intent to limit the scope of the Act to the consumer market."), *aff'd*, 242 Ga. 294, 249 S.E.2d 87 (1978).

2. O.C.G.A. § 10-1-391(a) (1982).

3. Interview with Jim Hurt, Legislative Liaison, Georgia Governor's Office of Consumer Affairs, in Atlanta (Apr. 5, 1988) [hereinafter Hurt Interview]. *See, e.g.*, 1975

Moreover, a certain amount of institutional delay was inherent in the FBPA.⁴ For example, only the courts were authorized to restrain or enjoin deceptive practices or to impose civil penalties.⁵ The administrator of the Governor's Office of Consumer Affairs was required to bring an action in the name of the state by filing a civil suit before any sanctions could be imposed.⁶

During periods of delay, violators could cause further harm to consumers by disposing of funds and assets or by leaving the jurisdiction. The professional con artist, aware of delays inherent in the system, was able to engage in flagrantly deceptive practices, quickly raid Georgia's consumers, and then leave the state before the administrator's complaint was filed.⁷

HB 1405 represented the culmination of a long-term effort by the administrator and his staff to prevent further injury to consumers and businesses of the state caused by deceptive practices and exacerbated by administrative delay.⁸ The Code sections added or amended by the Act give the administrator greater discretion to exercise more power so that unfair and deceptive practices may be swiftly stopped.⁹ HB 1405 passed as introduced and encountered very little opposition in either house.¹⁰

HB 1405

Section 1 of the Act amends Code section 10-1-397(a), concerning actions taken by the administrator for injunctions. Prior to the Act, unfair and deceptive practices could be restrained or enjoined only by a court.¹¹ The administrator, if he had "reason to believe" that any person was engaging in or about to engage in unfair and deceptive practices, was required to file a civil complaint in the name of the state.¹² The amendment

Ga. Laws 376 (formerly found at O.C.G.A. § 10-1-403(c) (1982)) (allowing a violator to file a complaint with the administrator in an effort to modify or set aside an investigative demand, halting the time limit within which the violator must comply with the demand).

4. Hurt Interview, *supra* note 3.

5. 1975 Ga. Laws 376.

6. *Id.*

7. Hurt Interview, *supra* note 3.

8. Telephone interview with Representative Calvin Smyre, House District No. 92 (Apr. 27, 1988).

9. The administrator intends to employ carefully and judiciously these new powers to further the purposes of the FBPA. Interview with Barry Reid, Administrator, Governor's Office of Consumer Affairs, in Atlanta (Apr. 5, 1988). See also O.C.G.A. §§ 10-1-397 to -398.1, 10-1-403 to -405 (Supp. 1988).

10. Hurt Interview, *supra* note 3. See Final Composite Status Sheet, Mar. 7, 1988. The Senate passed the bill by a vote of 45-0. The House vote count was unavailable as it was taken by a show of hands; however, it was reported in the House of Representatives Weekly Legislative Report, Feb. 5, 1988, to be 124-2.

11. 1975 Ga. Laws 376.

12. *Id.*

allows the administrator, subject to the notice and opportunity to be heard requirements of the Act,¹³ to issue a cease and desist order or to exact a civil penalty from the willful violator whenever "it may appear" that any person is engaging in or about to engage in unfair and deceptive practices.¹⁴

Code section 10-1-397(a) is further amended by changing the provisions relating to relief that may be granted by the court. Prior to the Act, the court could appoint a receiver, auditor, or conservator for a defendant or a defendant's assets only "whenever the Administrator . . . prevailed" on the merits and could show that the "defendant . . . engaged in a pattern of willful violations of this Act which . . . resulted in substantial actual damage" to Georgia citizens or that the defendant was outside the state and was actually removing or disposing of his property or was attempting to conceal himself or his property.¹⁵ The language of the provision sometimes resulted in "too little too late."¹⁶ The Act now provides that a receiver, auditor, or conservator may be appointed "upon a showing by the administrator" that a person has violated or is about to violate the FBPA.¹⁷ The administrator now has the means to prevent violators from removing or disposing of assets or funds at a time when such action is most likely to occur, that is, when the violator first has notice that legal action is contemplated.¹⁸

Under the Act, the court also may order that restitution be made to injured consumers.¹⁹ Under prior law, the administrator was not prohibited from requesting restitution; however, such a request was perceived as presenting equal protection problems.²⁰ To request and receive restitution, the administrator was required to name individual consumers to the suit.²¹ The named consumers would benefit by having the power of the state on their side.²² By permitting the court discretion to grant an order for restitution, the Act attempts to resolve this perceived equal protection problem.²³

The Act increases the maximum civil penalty for violations of the

13. O.C.G.A. §§ 10-1-397(a)(1), 10-1-398 (Supp. 1988).

14. O.C.G.A. § 10-1-397(a)(1)(A), (B) (Supp. 1988). The amendments to this section were based in part on language from O.C.G.A. § 10-5-13 of the Georgia Securities Act of 1973 relating to stop orders and injunctions. The phrase "whenever the administrator has reason to believe" was replaced with "whenever it may appear to the administrator" primarily because it is a less difficult evidentiary threshold to meet. Hurt Interview, *supra* note 3. See O.C.G.A. § 10-5-13(a) (Supp. 1988).

15. 1975 Ga. Laws 376, 385 (emphasis added).

16. Hurt Interview, *supra* note 3.

17. O.C.G.A. § 10-1-397(a)(2)(E) (Supp. 1988) (emphasis added).

18. Hurt Interview, *supra* note 3.

19. O.C.G.A. § 10-1-397(a)(2)(D) (Supp. 1988).

20. Hurt Interview, *supra* note 3.

21. 1975 Ga. Laws 376 (formerly found at O.C.G.A. § 10-1-398 (1982)).

22. Hurt Interview, *supra* note 3.

23. *Id.*

FBPA from \$2000 to \$5000 per violation.²⁴ The increase in the maximum penalty is intended to deter those who would otherwise consider the penalties for violations to be part of "the cost of doing business."²⁵ The Act also provides for declaratory judgments²⁶ and other equitable relief in the discretion of the court.²⁷

Section 1 of the Act also amends O.C.G.A. § 10-1-397(b), relating to notice of proceedings and assurances of voluntary compliance.²⁸ Before the administrator may initiate any proceeding, he must give notice that proceedings are contemplated and allow a reasonable opportunity for the execution of an assurance of voluntary compliance.²⁹ Prior to the Act, these provisions could be waived only if the administrator determined that the violator planned to leave the state, to remove his property from the state, or to conceal himself or his property.³⁰ The Act also provides that when "there is immediate danger of harm to the citizens of this state or of another state" the administrator may forego the notice and voluntary compliance provisions.³¹ Since the administrator's actions must be in the public interest,³² there has been some question as to the propriety of the waiver when the harm is to citizens of another state.³³ However, it is arguably in the public interest to prevent Georgia from becoming a haven for those who maintain a base of operations within Georgia in order to engage in unfair and deceptive practices aimed at out-of-state consumers; the new provisions are specifically applicable for the protection of out-of-state consumers.³⁴

Section 2 of the Act amends Code section 10-1-398, concerning actions taken by the administrator for damages, by replacing the existing section with a new section containing provisions relating to temporary stays of cease and desist orders, notice of opportunity for a hearing regarding administrative orders, and procedures for conducting the hearings.³⁵

The Act provides that any person receiving a cease and desist order from the administrator be permitted a temporary stay of the order if, after petition to the court and notice to the administrator, he can demonstrate to the court that the order "will unlawfully cause him irreparable

24. O.C.G.A. § 10-1-397(a)(2)(B) (Supp. 1988).

25. Telephone interview with Senator Roy Barnes, Senate District No. 33 (Apr. 27, 1988).

26. O.C.G.A. § 10-1-397(a)(2)(C) (Supp. 1988).

27. O.C.G.A. § 10-1-397(a)(2)(F) (Supp. 1988).

28. O.C.G.A. § 10-1-397(b) (Supp. 1988). See O.C.G.A. § 10-1-402 (1982) for provisions regarding assurances of voluntary compliance.

29. O.C.G.A. § 10-1-397(b) (Supp. 1988).

30. 1975 Ga. Laws 376.

31. O.C.G.A. § 10-1-397(b) (Supp. 1988).

32. O.C.G.A. § 10-1-397(a) (Supp. 1988).

33. Hurt Interview, *supra* note 3.

34. *Id.*

35. O.C.G.A. § 10-1-398 (Supp. 1988).

harm."³⁶ The stay may not exceed thirty days.³⁷ During the stay, the court will determine whether an interlocutory stay is necessary pending final judicial action.³⁸

The Act requires the administrator to notify those receiving administrative orders of the opportunity for a hearing.³⁹ Prompt notice must be made by certified or registered mail or by personal service.⁴⁰ Notice must also contain certain prescribed information.⁴¹ Upon request, a hearing will be provided if the request is made within ten days after receipt of notice.⁴² If such a request is made, the date, time, and place for the hearing must be set promptly and the person must be notified promptly.⁴³ The hearing must occur within fifteen days of the request, but not earlier than five days after the request, unless the parties agree otherwise.⁴⁴

The administrator or an appointed referee will conduct the hearing if one is held.⁴⁵ The administrator or referee has authority over the proceeding consistent with that of other agencies or agency representatives governed by the Georgia Administrative Procedure Act.⁴⁶ Records will be kept and transcripts made available.⁴⁷ In addition, the administrator must enter a written order consistent with the findings made at the hearing.⁴⁸

36. O.C.G.A. § 10-1-398(a) (Supp. 1988).

37. *Id.*

38. *Id.*

39. O.C.G.A. § 10-1-398(b) (Supp. 1988).

40. *Id.*

41. *Id.* Notice shall state:

- (1) The order which has issued and which is proposed to be issued;
- (2) The ground for issuing such order and proposed order;
- (3) That the person to whom such notice is sent will be afforded a hearing upon request if such request is made within ten days after receipt of the notice; and
- (4) That the person to whom such notice is sent may obtain a temporary stay of the order upon a showing of irreparable harm in any superior court of competent jurisdiction.

Id.

42. O.C.G.A. § 10-1-398(b)(3) (Supp. 1988).

43. O.C.G.A. § 10-1-398(c) (Supp. 1988).

44. *Id.*

45. O.C.G.A. § 10-1-398(d) (Supp. 1988). The language in this section is derived from the Georgia Securities Act, O.C.G.A. § 10-5-16(f) (1982), and from the Administrative Procedure Act, O.C.G.A. § 50-13-13(5) (1986). Hurt Interview, *supra* note 3.

46. O.C.G.A. § 10-1-398(e), (f) (Supp. 1988). The language in subsection (e) is derived from the Georgia Securities Act, O.C.G.A. § 10-5-16(d) (1982), and from the Administrative Procedure Act, O.C.G.A. § 50-13-13(a)(6) (1986); the language in subsection (f) is derived from the Administrative Procedure Act, O.C.G.A. § 50-13-13(7) (1986). Hurt Interview, *supra* note 3.

47. O.C.G.A. § 10-1-398(g) (Supp. 1988). The language in this section is derived from the Administrative Procedure Act, O.C.G.A. § 50-13-13(8) (1986). Hurt Interview, *supra* note 3.

48. O.C.G.A. § 10-1-398(i) (Supp. 1988).

Section 3 of the Act adds a new Code section, designated as O.C.G.A. § 10-1-398.1, concerning the appellate procedure for administrative orders.⁴⁹ An appeal may be taken from any administrative order if the order adversely affects the appellant.⁵⁰ Within twenty days of the entry of the order, the appellant must give notice of the appeal to the administrator.⁵¹ The notice must include the contested order and the grounds for reversal.⁵²

The court is authorized to affirm or remand cases when the administrator's decision is based on a question of fact; however, the court may not "substitute its judgment for that of the administrator as to the weight of the evidence" on such questions.⁵³ Reversal or modification of the administrator's decision is permitted only when substantial rights of the appellant have been prejudiced⁵⁴ due to the violation of any of six specific provisions.⁵⁵

Section 4 of the Act amends Code section 10-1-403, concerning investigative demands for evidence.⁵⁶ The Act deletes the subsection which authorized the recipient of an investigative demand to file a complaint for an order modifying or setting aside the demand.⁵⁷ Under prior law, when the complaint was filed, the time required for compliance with the inves-

49. O.C.G.A. § 10-1-398.1 (Supp. 1988).

50. O.C.G.A. § 10-1-398.1(a) (Supp. 1988). The language in this section is derived from the Administrative Procedure Act, O.C.G.A. § 50-13-17(a), (b) (1986). Hurt Interview, *supra* note 3.

51. O.C.G.A. § 10-1-398.1(a) (Supp. 1988).

52. O.C.G.A. § 10-1-398.1(a)(1), (2) (Supp. 1988).

53. O.C.G.A. § 10-1-398.1(b) (Supp. 1988). The language in this section is derived from the Administrative Procedure Act, O.C.G.A. § 50-13-19(h) (1986). Hurt Interview, *supra* note 3.

54. O.C.G.A. § 10-1-398.1(b) (Supp. 1988).

55. O.C.G.A. § 10-1-398.1(b)(1)—(6) (Supp. 1988) provides:

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the administrator;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

56. O.C.G.A. § 10-1-403 (Supp. 1988). The investigative demand is the administrator's main discovery device. An investigative demand, issued with the consent of the Attorney General, may compel the recipient to produce a report under oath, to provide documentary evidence, to appear and testify, or all of the above. *Id.* An investigative demand may be included in the notice of contemplated legal action. 1975 Op. Att'y Gen. 173.

57. 1975 Ga. Laws 376 (formerly found at O.C.G.A. § 10-1-403(c) (1982)).

tigative demand was suspended.⁵⁸ The grounds for modification or revocation of the demand were either the failure of the demand to comply with the FBPA or to protect constitutional or legal rights or privileges of the recipient.⁵⁹ The provision was deleted to prevent unnecessary delay.⁶⁰

By removing this subsection, investigative demands may no longer be reviewable as a matter of course⁶¹ nor may they be appealable as "orders" under Code section 10-1-398.1 because they do not result from an administrative hearing.⁶² However, Section 5 of the Act, which amended Code section 10-1-404 relating to subpoena and hearing powers of the administrator, provides that upon failure to comply with an investigative demand or subpoena, and after the administrator has applied to the court for an order compelling compliance, an objection to the demand or subpoena may be made.⁶³ The grounds for the complaint remain unchanged and include any failure of the demand to comply with the FBPA or any constitutional or legal right or privilege of the recipient.⁶⁴ Requiring that objections be raised in the context of an administrator's application for an order compelling compliance should discourage weak or frivolous objections.⁶⁵

Section 6 of the Act amends Code section 10-1-405 by deleting the provision regarding civil penalties imposed by the court.⁶⁶ Civil penalties now are addressed elsewhere in the FBPA.⁶⁷ All other changes in this section are technical.⁶⁸

M. Hines

58. *Id.*

59. *Id.*

60. Hurt Interview, *supra* note 3.

61. *Id.*

62. *Id.*; O.C.G.A. § 10-1-398.1 (Supp. 1988).

63. O.C.G.A. § 10-1-404(b) (Supp. 1988).

64. *Id.*

65. Hurt Interview, *supra* note 3.

66. 1975 Ga. Laws 376 (formerly found at O.C.G.A. § 10-1-405(b) (1982)).

67. Civil penalties are provided for in O.C.G.A. § 10-1-397(a)(1)(B) and O.C.G.A. § 10-1-397(a)(2)(B) (Supp. 1988).

68. To be consistent throughout the Act, the word "offense" is changed to read "violation under this part." Hurt Interview, *supra* note 3.