

9-1-2004

CRIMES AND OFFENSES Racketeer Influenced and Corrupt Organizations: Allow Class Actions to Be Brought Against Unlicensed Lenders; Include Payday Lending in the Definition of Racketeering Activity; Declare a Legislative Intent to Prohibit Activities Commonly Referred to as Payday Lending, Deferred Presentment Services, or Advance Cash Services; Strengthen and Increase the Criminal and Civil Penalties Therefore; Void Payday Lending Loans; Declare that Forum Selection Clauses in Payday Lending Contracts Are Unenforceable in Georgia; Provide for Civil

Recommended Citation

Tia Martarella, *CRIMES AND OFFENSES Racketeer Influenced and Corrupt Organizations: Allow Class Actions to Be Brought Against Unlicensed Lenders; Include Payday Lending in the Definition of Racketeering Activity; Declare a Legislative Intent to Prohibit Activities Commonly Referred to as Payday Lending, Deferred Presentment Services, or Advance Cash Services; Strengthen and Increase the Criminal and Civil Penalties Therefore; Void Payday Lending Loans; Declare that Forum Selection Clauses in Payday Lending Contracts Are Unenforceable in Georgia; Provide for Civil Remedies of Borrowers; Provide for Civil Penalties; Declare a Tax on Profits from Payday Loans*, 21 GA. ST. U. L. REV. (2004).

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Remedies of Borrowers; Provide for Civil Penalties; Declare a Tax on Profits from Payday Loans

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CRIMES AND OFFENSES

Racketeer Influenced and Corrupt Organizations: Allow Class Actions to Be Brought Against Unlicensed Lenders; Include Payday Lending in the Definition of Racketeering Activity; Declare a Legislative Intent to Prohibit Activities Commonly Referred to as Payday Lending, Deferred Presentment Services, or Advance Cash Services; Strengthen and Increase the Criminal and Civil Penalties Therefore; Void Payday Lending Loans; Declare that Forum Selection Clauses in Payday Lending Contracts Are Unenforceable in Georgia; Provide for Civil Remedies of Borrowers; Provide for Civil Penalties; Declare a Tax on Profits from Payday Loans; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 7-3-29 (amended), 16-14-3 (amended), 16-17-1 to -10 (new)
BILL NUMBER:	SB 157
ACT NUMBER:	440
GEORGIA LAWS:	2004 Ga. Laws 60
SUMMARY:	The Georgia General Assembly determined that, despite actions by the Attorney General and the Industrial Loan Commissioner, payday lending continues in the State of Georgia. The Act declares a legislative intent to prohibit payday lending and provides for civil remedies to those borrowers harmed by payday lenders. The Act includes payday lending in the definition of racketeering activities. It also defines and increases the penalties for payday lending, with some exceptions for licensed lenders.
EFFECTIVE DATE:	May 1, 2004

History

Payday lending is a common practice whereby lenders give individuals short-term loans of less than \$500 for post-dated checks.¹ The loans often come with a high price—interest rates and fees well over Georgia’s usury cap.² The rates can sometimes be as high as 1200%.³ If the borrower cannot repay the debt, the lender performs a “rollover,” renewing the loan and adding fees.⁴ This rollover is one of the biggest concerns that lawmakers have about payday loans because it tends to trap the borrower in a lending cycle—once the loan rolls over, the borrower incurs more debt and often cannot pay the rollover debt.⁵ Loans of hundreds of dollars can often cost borrowers thousands of dollars in fees.⁶ Some compare the practice to drug addiction due to the high interest rates and rollovers; once borrowers get involved in payday loans, it is difficult to get out.⁷

Payday lending has been illegal in Georgia for years.⁸ The General Assembly first attempted to regulate this practice in 1904.⁹ In 1953, the General Assembly established a special commission to study the “salary buying” statutes.¹⁰ This Commission found that the regulations were ineffective because the laws were often contradictory and because lenders ignored them.¹¹ In 1955, the General Assembly enacted the Industrial Loan Act.¹² The Industrial Loan Act regulates small-time lenders in Georgia and requires them to apply for licenses.¹³

1. See Rhonda Cook, *Judge Upholds Payday Loan Law*, ATLANTA J. CONST., May 14, 2004, at C3, available at 2004 WL 77161903 [hereinafter *Judge Upholds*].

2. See Telephone Interview with Rep. Johnny Floyd, House Banking Committee Chairman (May 14, 2004) [hereinafter *Floyd Interview*].

3. *Id.*

4. Rhonda Cook, *Payday Loan Law Goes to the Courts: Interest and Stakes Are High*, ATLANTA J. CONST., Apr. 26, 2004, at 1A, available at 2004 WL 77159595 [hereinafter *Payday Loan Goes to the Courts*].

5. See O.C.G.A. §§ 16-17-1 to -2 (Supp. 2004); *Payday Loan Goes to the Courts*, *supra* note 4.

6. *Payday Loan Goes to the Courts*, *supra* note 4.

7. See Audio Recording of House Proceedings, Feb. 12, 2004 (remarks by Rep. Johnny Floyd), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter *House Audio*].

8. See *id.* (discussing the original enactment of the Georgia Industrial Loan Act and a subsequent opinion by the Georgia Attorney General); see also 1955 Ga. Laws 431, § 2, at 432 (codified at O.C.G.A. § 7-3-2 (2003)).

9. See *Payday Loan Goes to the Courts*, *supra* note 4.

10. See *House Audio*, *supra* note 7.

11. See *id.*; *Payday Loan Goes to the Courts*, *supra* note 4.

12. 1955 Ga. Laws 431, § 1, at 445 (codified at O.C.G.A. § 7-3-1 (2003)).

13. 1955 Ga. Laws 431, §§ 1 to 22, at 432-45 (codified at O.C.G.A. §§ 7-3-1 to -29 (2003)).

Although the Attorney General and the General Assembly have declared payday lending illegal, the practice continues today.¹⁴ Legislators introduced SB 157 in 2003 to protect Georgians against the high rates and fees associated with payday lending.¹⁵

Bill Tracking

Consideration and Passage by the Senate

Senators Don Cheeks of the 23rd district and Vincent Fort of the 39th district introduced SB 157 to the Senate on February 18, 2003.¹⁶ The Lieutenant Governor assigned the bill to the Banking and Finance Committee, and the Committee favorably reported on March 24, 2003.¹⁷ Senator Charles Clay of the 37th district proposed an amendment providing that a violation of the Code section would result in a misdemeanor and that upon the third or subsequent violations the offending person would be guilty of a felony.¹⁸ This amendment passed and strengthened the bill's criminal provisions.¹⁹ The Senate passed SB 157 on April 7, 2003 by a vote of 46 to 6.²⁰

Consideration and Passage by the House

The House first read SB 157 on April 7, 2003.²¹ The House Committee on Banks and Banking offered a substitute for the bill on February 5, 2004, and the House passed the substitute on February 12, 2004.²²

14. See House Audio, *supra* note 7.

15. See Floyd Interview, *supra* note 2; SB 157, as introduced, 2003 Ga. Gen. Assem.

16. State of Georgia Final Composite Status Sheet, SB 157, Feb. 18, 2003 (May 19, 2004); SB 157, as introduced, 2003 Ga. Gen. Assem.

17. State of Georgia Final Composite Status Sheet, SB 157, Mar. 24, 2003 (May 19, 2004).

18. SB 157 (SCSFA), 2003 Ga. Gen. Assem.

19. Compare SB 157, as introduced, 2003 Ga. Gen. Assem., with SB 157 (SCSFA), 2003 Ga. Gen. Assem.

20. Georgia Senate Voting Record, SB 157 (Apr. 7, 2003).

21. State of Georgia Final Composite Status Sheet, SB 157, Apr. 7, 2003 (May 19, 2004).

22. State of Georgia Final Composite Status Sheet, SB 157, Feb. 5, 2004 (May 19, 2004); State of Georgia Final Composite Status Sheet, SB 157, Feb. 12, 2004 (May 19, 2004); see SB 157 (HCSFA), 2004 Ga. Gen. Assem.

Representative Lawrence Roberts of the 135th district proposed two amendments.²³ Both amendments sought to exclude payday lending from the definition of racketeering activities because of concerns that the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) preempted the bill.²⁴ The House rejected the amendments by votes of 53 to 115 and 38 to 132, respectively.²⁵

Representatives Ron Sailor, Earl Ehrhart, and Donna Sheldon of the 61st district, Post 1, 28th district, and 71st district, respectively, proposed an amendment that required an annual percentage rate (“APR”) calculation to include “[a]ny fee, insurance premium, late charge, service fee, loan processing fee, or any fee or charge of any description.”²⁶ These representatives believed that the amendment would affect the regulation of all lenders and would protect borrowers from high fees in excess of the APR cap.²⁷ They believed that the bill did not provide enough consumer protection and that this amendment would strengthen existing protections.²⁸

The amendment also proposed additional prohibitions for lending to spouses and dependants of military members; the original House Committee substitute did not include these spouses and dependants.²⁹ Some representatives expressed concern that the bill did not provide enough protection to members of the military.³⁰ These concerns arose due to the high rate of bankruptcy filings among military members.³¹ Members of the military frequently use the payday lending services, and the lenders establish shops near military bases.³² Some representatives believed the presence of payday lenders in the military community can become disruptive and may interfere with the military’s battle-readiness.³³ Nonetheless, the amendment failed

23. See Failed House Floor Amendments to SB 157, introduced by Rep. Lawrence Roberts, Feb. 12, 2004.

24. See Failed House Floor Amendments to SB 157, introduced by Rep. Lawrence Roberts, Feb. 12, 2004; House Audio, *supra* note 7 (remarks by Rep. Lawrence Roberts).

25. Georgia House of Representatives Voting Record, SB 157 (Feb. 12, 2004).

26. See Failed House Floor Amendment to SB 157, introduced by Reps. Ron Sailor, Donna Sheldon, and Earl Ehrhart, Feb. 12, 2004.

27. See House Audio, *supra* note 7 (remarks by Rep. Earl Ehrhart).

28. *Id.*

29. Compare Failed House Floor Amendment to SB 157, introduced by Reps. Ron Sailor, Donna Sheldon, and Earl Ehrhart, Feb. 12, 2004, with SB 157 (HCS), 2004 Ga. Gen. Assem.

30. See House Audio, *supra* note 7 (remarks by Reps. Earl Ehrhart and John Douglas).

31. See Floyd Interview, *supra* note 2.

32. See House Audio, *supra* note 7 (remarks by Rep. John Douglas).

33. See *id.*

by a vote of 78 to 95.³⁴ It is important to note, however, that the final version of the bill contained a safeguard for the military.³⁵

Yet, one amendment did pass. Representatives Warren Massey of the 24th district and Ron Sailor of the 61st district, Post 1 introduced an amendment to allow plaintiffs to assert civil claims in class action lawsuits.³⁶ The amendment passed by a vote of 92 to 80.³⁷

Reconsideration by the Senate

SB 157, as passed by the House, returned to the Senate for reconsideration on February 12, 2004.³⁸ Senators Don Cheeks, Casey Cagle, Bill Stephens, and Terrell Starr of the 23rd, 49th, 51st, and 44th districts, respectively, offered a successful amendment to the House Committee substitute of SB 157 on February 14, 2004.³⁹ This amendment provided that a person could assert a claim against a licensed lender under the Industrial Loan Act only in an individual action; however, a person possessed the right to assert a class action claim against an unlicensed lender.⁴⁰ The Senate adopted this amendment to convey the message that they did not want to put lenders out of business but that they merely wanted lenders to comply with the Industrial Loan Act and the usury statute.⁴¹ This amendment also stated that if a United States court invalidated, or if federal law superceded, any provision of the Chapter, the “remaining provisions” of the Chapter would remain intact and that officials would enforce the remainder of the bill.⁴² This amendment reflected concerns among members of the Legislature that federal laws might preempt the bill.⁴³

34. Georgia House of Representatives Voting Record, SB 157 (Feb. 12, 2004).

35. See SB 157 (CCS), 2004 Ga. Gen. Assem.

36. See SB 157 (HCSFA), 2004 Ga. Gen. Assem.

37. Georgia House of Representatives Voting Record, SB 157 (Feb. 12, 2004).

38. See State of Georgia Final Composite Status Sheet, SB 157, Feb. 12, 2004 (May 19, 2004).

39. See SB 157 (SFA), 2004 Ga. Gen. Assem.

40. See *id.*

41. See Telephone Interview with Sen. Terrell Starr, Senate District No. 44 (May 14, 2004) (stating that he was unhappy that the bill would put some lenders out of business) [hereinafter Starr Interview].

42. See SB 157 (SFA), 2004 Ga. Gen. Assem.

43. See House Audio, *supra* note 7 (remarks by Rep. Earl Ehrhart).

Conference Committee

In February of 2004, the Senate and the House appointed a Conference Committee to reach a compromise on the bill.⁴⁴ Both the House and the Senate passed the Conference Committee report on March 4, 2004.⁴⁵

Analysis of the Act

The Act's purpose is to prevent payday lenders from charging excessive fees which "seemed impossible to do under the current laws."⁴⁶ It prevents unscrupulous lenders from exploiting Georgia's poor and makes the laws more consumer friendly.⁴⁷ The Act does not necessarily put the payday lenders out of business because "[a]nyone in the lending business can apply for a license with the Insurance Commission" pursuant to the Industrial Banking Act.⁴⁸ These lenders must then comply with the Banking Act and the usury statute.⁴⁹ While this licensing procedure may put some legitimate lenders out of business, it will also regulate the out-of-control payday lending industry.⁵⁰

Section 1 of the Act amends Code section 7-3-29.⁵¹ It allows an individual to bring a claim under the Georgia Industrial Loan Act against a licensed lender, and it allows an individual or a class to bring a claim against an unlicensed lender.⁵² Section 2 of the Act amends Code section 16-4-3 by adding payday loans to the definition of racketeering activities.⁵³ Section 3 of the Act adds Chapter 17 to the Code.⁵⁴ This Chapter prohibits anyone from making loans of \$3000 dollars or less in Georgia unless the lender meets certain

44. See State of Georgia Final Composite Status Sheet, SB 157, Feb. 26, 2004 (May 19, 2004).

45. See State of Georgia Final Composite Status Sheet, SB 157, Mar. 4, 2004 (May 19, 2004).

46. See Starr Interview, *supra* note 41.

47. See *id.*

48. *Id.*; see House Audio, *supra* note 7.

49. See House Audio, *supra* note 7.

50. See Starr Interview, *supra* note 41 ("[S]ometimes, you have to take the bad to get the good.").

51. O.C.G.A. § 7-3-29 (Supp. 2004).

52. Compare O.C.G.A. § 7-3-29 (Supp. 2004), with 1980 Ga. Laws 1784, § 1, at 1786 (formerly found at O.C.G.A. § 7-3-29 (2003)).

53. Compare O.C.G.A. § 16-4-3 (Supp. 2004), with 2003 Ga. Laws 387, § 1, at 389 (formerly found at O.C.G.A. § 16-4-3 (2003)).

54. See O.C.G.A. §§ 16-17-1 to -10 (Supp. 2004).

exemptions, including pawnbrokers and those agents licensed by the Insurance Commissioner.⁵⁵ The Act prohibits non-exempt lenders from lending regardless of whether the lender uses the Internet, phone, or mail.⁵⁶

The Act also prohibits all transactions in which “funds are advanced to be repaid at a later date” unless the lender meets the exemptions.⁵⁷ The law also provides that “[a] purported agent shall be considered a de facto lender if the entire circumstances of the transaction show that the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan.”⁵⁸ Payday lenders commonly used this method to circumvent the old laws.⁵⁹

The Act further states that anyone in violation of Code section 16-17-2 is guilty of a misdemeanor and the lender may face up to one year of imprisonment or a fine of up to \$5000.⁶⁰ After the third conviction, each subsequent conviction is a felony punishable by a fine of \$10,000 and up to five years in prison.⁶¹ Lenders in violation of this Code section are also liable to borrowers for the amount of the loan and three times the amount of the interest.⁶²

In addition to these criminal penalties, violating lenders are liable to the State under a civil penalty for three times the interest charged to the borrowers.⁶³ Furthermore, the State imposes a tax of 50% on loans made in violation of the Code section.⁶⁴ When reviewing these loan agreements, the Act does not restrict trial courts to the customary rules of contract interpretation.⁶⁵ Additionally, the Act authorizes trial courts to determine whether an entity purporting to be an agent is actually acting as a lender.⁶⁶

55. O.C.G.A. § 16-17-2 (Supp. 2004).

56. See O.C.G.A. § 16-17-2(a) (Supp. 2004). The legislature included this provision to protect Georgians from out-of-state lenders who reach into the State and “prey” on Georgians. See House Audio, *supra* note 7. Plaintiffs are currently challenging this provision in federal court, claiming that federal laws preempt the provision. See *Judge Upholds*, *supra* note 1.

57. O.C.G.A. § 16-17-2(b) (Supp. 2004).

58. O.C.G.A. § 16-17-2(b)(4) (Supp. 2004).

59. See House Audio, *supra* note 7.

60. O.C.G.A. § 16-17-2(d) (Supp. 2004).

61. *Id.*

62. O.C.G.A. § 16-17-3 (Supp. 2004).

63. See O.C.G.A. § 16-17-4(a) (Supp. 2004).

64. See O.C.G.A. § 16-17-5 (Supp. 2004).

65. See O.C.G.A. § 16-17-6 (Supp. 2004). The parol evidence rule does not bind the trial court. *Id.*

66. *Id.*

Finally, the Act includes a special provision for lenders that lend to military members or to their spouses.⁶⁷ The Act prohibits specific lending activities and requires lenders to disclose the Act's prohibitions to military members and their spouses.⁶⁸

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67. See O.C.G.A. § 16-17-9 (Supp. 2004).

68. *Id.*