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NOTES

THE GEORGIA SALE OF BUSINESS OPPORTUNITIES ACT

INTRODUCTION

The following advertisement appeared in the “Business Opportunities” section of the *Atlanta Journal-Constitution* in February, 1980:

\$57,000 GROSS PER YEAR GUARANTEED SUCCESS PROGRAM. If you have \$10,000, . . . we will train you in the operation of our business at our expense. We will set you up and fully equip an office for you in your area This is a highly unusual, completely proven, and very real opportunity Our systems have been successfully marketed, are patent pending, have unlimited marketing potential and fantastic consumer appeal¹

Advertisements similar to these have frequently appeared in Georgia newspapers in the last ten years. They attract the unsophisticated investor who has little experience or ability to investigate the company to determine if the representations made are true. Prior to 1980, if the company offering the business opportunity made fraudulent misrepresentations or breached its contract with the investor, the investor had limited legal recourse if the company suddenly closed or filed for bankruptcy.

The Georgia Sale of Business Opportunities Act (BOA)² was passed by the General Assembly in 1980 to “prevent and prohibit fraudulent and deceptive practices in the sale of business opportunities.”³ The BOA defined business opportunities as “the sale or lease of, or offer to sell or lease, any products, equipment, supplies, or services which requires a total initial payment of an amount ex-

1. *Atlanta J.-Const.*, Feb. 3, 1980, at Classified 27, col. 10.

2. O.C.G.A. §§ 10-1-410 — 10-1-416 (1982 & Supp. 1985).

3. 1980 Ga. Laws 1233.

ceeding \$500.00 for the purpose of enabling the purchaser to start a business"⁴

This Note will set forth the historical development of business opportunity laws and discuss the cases which engendered such laws. The BOA will be compared and contrasted with the North Carolina business opportunity law upon which it is based and with the Federal Trade Commission Act provisions regulating franchises and business opportunities. The Note will conclude with proposed modifications of the BOA to remedy weaknesses in the statute.

I. HISTORY

Prior to the BOA, no Georgia statute had specifically addressed the issue of fraud in the sale of business opportunities. The Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act (Franchise Practices Act),⁵ a prior law, regulated only motor vehicle, farm machinery, and construction equipment franchises. This law was held unconstitutional in *Georgia Franchise Practices Commission v. Massey-Ferguson*.⁶ The Georgia Supreme Court in this case reasoned that the Franchise Practices Act encouraged monopolies by restricting competition in the retail sale of motor vehicles and by allowing a market allocation to be established among franchised dealers.⁷ Such allocation of sales area in effect protected the dealers by preventing competition between dealers and companies. The court found that the Franchise Practices Act improperly impaired existing contractual obligations between manufacturers and dealers by delegating to the Franchise Practices Commission the power to revoke dealer licensing contracts, rather than allowing the parties to the contract the freedom to establish the terms by which the contract could be terminated.⁸ Finally, the Franchise Practices Act failed to set up specific guidelines by which the Commission was authorized to deny or to revoke an application for a franchise license.⁹

4. O.C.G.A. § 10-1-410(1)(A) (Supp. 1985). The BOA subsequently defines "business opportunity" with greater specificity. See O.C.G.A. § 10-1-410(1)(A) and (B) (Supp. 1985).

5. Ga. Code Ann. §§ 84-6601 — 84-6613 (1979).

6. 244 Ga. 800, 262 S.E.2d 106 (1979).

7. *Id.* at 801, 262 S.E.2d at 107-08.

8. *Id.* at 802, 262 S.E.2d at 108. (The court also found that the Franchise Practices Act violated due process by attempting to regulate an "industry not affected with a public interest.") *Id.*, (citing *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977)).

9. *Id.* (citing *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976)).

The Georgia Securities Act of 1973,¹⁰ although broadly construed to protect investors,¹¹ also excludes most business opportunity transactions except for those offering investment contracts in the form of investment guarantees¹² or buy-back options.¹³ In *Georgia Market Centers, Inc. v. Fortson*,¹⁴ the Georgia Supreme Court approved the test of an investment contract formulated by the U.S. Supreme Court in *SEC v. W.J. Howey Co.*¹⁵ In *Howey*, the Court defined an investment contract as "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or of a third party"¹⁶ In *Tech Resources, Inc. v. Estate of Hubbard*, the Georgia Supreme Court stated that in considering whether an instrument was a security, it would consider substance over form, with an emphasis on the underlying economic reality.¹⁷ However, in determining whether a transaction constitutes a secur-

10. O.C.G.A. §§ 10-5-1 — 10-5-24 (1982 & Supp. 1985). The Georgia Securities Act defines a security as

any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of indebtedness, investment certificate, certificate of interest or participation in any profit-sharing agreement, certificate of interest in oil, gas, or other mineral rights, collateral trust certificates, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, limited partnership interest, or beneficial interest in profits or earnings, or any other instrument commonly known as a security

. . . .

O.C.G.A. § 10-5-2(a)(16) (1982).

11. *Fortier v. Ramsey*, 136 Ga. App. 203, 206, 220 S.E.2d 753, 755 (1975); *see also Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 241, 253 S.E.2d 700, 705 (1979).

12. Investment guarantees are agreements that the buyer will recoup his investment (usually his original purchase price) within a certain period. If not, the seller will refund the entire purchase price or the difference between the purchase price and the income which he received, thereby protecting the buyer's initial payment from loss.

13. Buy-back options are similar to investment guarantees in that the seller agrees to buy back all or part of the investor's business if the buyer is dissatisfied. Buy-back options may also include representations in which the seller agrees to buy from the investor any items made, modified, or developed by the investor from products initially sold by the seller. O.C.G.A. § 10-1-410(1)(A)(ii), (iii) (Supp. 1985).

14. 225 Ga. 854, 171 S.E.2d 620 (1969).

15. 328 U.S. 293 (1946). The definition of a security under Georgia law is similar to the definitions in the federal Securities Act of 1933 and Securities Exchange Act of 1934, and Georgia courts frequently rely on the federal laws for their interpretation of a security. *See Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 584, 272 S.E.2d 314, 316 (1980); *Fortier v. Ramsey*, 136 Ga. App. 203, 205, 220 S.E.2d 753, 755 (1975).

16. 328 U.S. at 298-99.

17. 246 Ga. 583, 585, 272 S.E.2d 314, 316 (1980) (*citing Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) and *Georgia Market Centers, Inc. v. Fortson*, 225 Ga. 854, 171 S.E.2d 620 (1969)).

ity, Georgia courts "have focused primarily upon one issue: do persons other than the investors provide the *essential managerial efforts* from which the investors expect profits?"¹⁸ Consequently, since most business opportunity schemes require such managerial efforts on the part of the investor, the Georgia Securities Act generally does not provide a remedy to aggrieved purchasers of business opportunities.

Prior to the enactment of the BOA,¹⁹ the majority of investors who believed that they had been defrauded in a business opportunity investment scheme resorted to common law remedies. An investor could sue in tort for damages on the theory of fraud or deceit, or could sue to rescind the contract and to recoup the initial investment on the grounds that the business opportunity seller had breached the contract. These rights of action offered remedies only if the company was still operational and solvent at the time of judgment. Litigation did not resolve the problem of the sophisticated business opportunity offeror who intentionally misrepresented various aspects of the investment, who never intended to comply with the terms of the contract, or who disappeared before suit was filed.

Consequently, the BOA was enacted to provide a deterrent to the sale of fraudulent business opportunities by requiring the sellers of business opportunity investments to provide specific disclosure documents to the prospective purchasers.²⁰ Sellers must file a copy of the disclosure statement with the administrator appointed by the Governor pursuant to O.C.G.A. § 10-1-395,²¹ and are also required to provide a bond or trust account when they make certain representations or guarantees in connection with the sale of business opportunities.²² Additionally, all business opportunity sales are subject to the escrow provisions of the BOA.²³ Finally, the statute provides for civil and criminal penalties for misrepresentations in the offering of business opportunities.²⁴

An antecedent of business opportunity legislation was the California Franchise Investment Law, enacted in 1970.²⁵ This law regu-

18. *D.K. Properties v. Osborne*, 143 Ga. App. 832, 834, 240 S.E.2d 293, 295-96 (1977) (emphasis in original).

19. O.C.G.A. §§ 10-1-410 — 10-1-416 (1982 & Supp. 1985).

20. O.C.G.A. § 10-1-411 (1982 & Supp. 1985).

21. O.C.G.A. § 10-1-413 (1982 & Supp. 1985).

22. O.C.G.A. § 10-1-412 (1982 & Supp. 1985).

23. *Id.*

24. O.C.G.A. § 10-1-416 (1982 & Supp. 1985).

25. Cal. Corp. Code §§ 31000 — 31516 (West 1977 & Supp. 1984).

lated franchise operations, but not distributorships or dealerships. The California Franchise Investment Law, or a variant of it, was eventually adopted by seventeen other states.²⁶

In Georgia franchise investments did not generate complaints as did business opportunity investments. The Office of Consumer Affairs received complaints concerning typical business opportunity schemes such as the sale of "worm farms." Worm farm investors initially spent \$1,500 to \$7,000 for earthworms (variously called "California Golden Giant Earthworms," "Superworms," or "Wonderworms") which are guaranteed to reproduce rapidly and generate vast profits. Business opportunity sellers promised a tremendous market for such worms at ten dollars per pound and even guaranteed to repurchase the growers' yield. Investors soon discovered that the worm market had been exaggerated and that the companies often did not honor their repurchase agreements. In some cases the initial shipment consisted of dead or dying worms. Also popular during the 1970s were rabbit "farms" and chinchilla "ranches," based on the same formula for success as worm farms, with generally the same results. The Office of Consumer Affairs received other complaints concerning considerably more sophisticated business opportunities, requiring investments of as much as \$200,000 for distributorships and warehouse operations. These types of investment complaints²⁷ required specific legislation which was not addressed by the various franchise laws.

II. COMPARISON WITH THE NORTH CAROLINA ACT

In 1977, North Carolina enacted the Business Opportunity Sales Act (BOSA),²⁸ the first in the country. The BOSA was the forerunner of the Georgia BOA and requires the business opportunity seller to (1) file a disclosure statement with the Secretary of State;²⁹ (2) offer a copy of the company's disclosure statement to

26. A survey of state franchise laws indicates that the following states have adopted such laws: Arkansas, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin.

27. The author processed these complaints in her capacity as Business Opportunity Officer with the Office of Consumer Affairs.

28. N.C. Gen. Stat. §§ 66-94 — 66-100 (1977). A survey of states indicates that the following states, besides Georgia, have adopted the North Carolina law: Connecticut, Florida, Louisiana, Maine, South Carolina, Texas, Virginia, and Washington. Iowa, Kentucky, Utah, and Washington adopted modified versions of the North Carolina law.

29. N.C. Gen. Stat. § 66-97(a) (1981).

the prospective investor prior to his contracting for a business opportunity;³⁰ and (3) post a bond or establish a trust account in the amount of \$50,000 if the company offered income guarantees or refund/repurchase agreements.³¹ Failure to file the disclosure statement as required is a misdemeanor.³² The BOSA regulates distributorships, dealerships, rack jobberships and the like, as well as certain franchise operations.

Georgia followed most provisions in the North Carolina BOSA but varied from the North Carolina approach in the following ways: (1) the \$50,000 bond or trust requirement became \$75,000;³³ (2) violation of the statute became a felony, punishable by a fine of up to \$50,000 and/or imprisonment for not more than five years;³⁴ and (3) an escrow provision was added, which required business opportunity sellers to escrow eighty-five percent of the purchase price in an independent account until complete compliance with the terms of the contract.³⁵ (The Georgia statute is the only law modeled after the North Carolina BOSA which has the escrow provisions.)³⁶

30. N.C. Gen. Stat. § 66-95 (1981).

31. N.C. Gen. Stat. § 66-96 (1981).

32. N.C. Gen. Stat. § 66-97(b) (1981).

33. Compare O.C.G.A. § 10-1-412(a) (1982 & Supp. 1985) with N.C. Gen. Stat. § 66-96 (1981). In both the North Carolina and the Georgia acts the bond or trust account is required whenever the seller makes any of the following representations: (1) that the seller guarantees that the purchaser will derive income exceeding the purchase price of the investment; or (2) that the seller guarantees that if the purchaser becomes dissatisfied with the business opportunity, the company will refund all or part of the price paid for the business opportunity or repurchase any of the products sold to him. See O.C.G.A. §§ 10-1-412 (1982 & Supp. 1985) and 10-1-410(1)(A)(iii) (Supp. 1985) and N.C. Gen. Stat. §§ 66-96 and 66-94(3) (1981). The bond or trust account must be in favor of the state, and anyone damaged by the seller's violation of the BOA, including the seller's breach of contract, may bring an action against the bond or trust account to recover damages. O.C.G.A. § 10-1-412 (1982 & Supp. 1985) and N.C. Gen. Stat. § 66-96 (1981).

34. Compare O.C.G.A. § 10-1-416(h) (1982 & Supp. 1985) with N.C. Gen. Stat. § 66-97(b) (1981). The first two modifications were suggested by former Assistant District Attorney of Fulton County, Gordon Miller, who thought that a higher bond or trust account would be beneficial to compensate investors, whose business opportunity investments generally averaged \$3,000 to \$20,000 per investment. Realistically, few prosecutors would be interested in pursuing a complicated white-collar crime complaint when the criminal penalty was a misdemeanor or insignificant monetary penalty. The escrow account provision was suggested during a legislative hearing by an entrepreneur, Morris Bennett, who had been involved in the sale of business opportunities in the state and was familiar with the types of operations which engendered complaints.

35. O.C.G.A. § 10-1-412(b) (1982 & Supp. 1985).

36. The third provision is analogous to the California Seller Assisted Marketing Plan Act (SAMP Act), which has an 80% escrow provision. Cal. Civ. Code § 1812.210(b) (West 1985). The SAMP Act allows release of the escrowed amount

The BOA was amended in 1984 and in 1985.³⁷ The 1984 amendment corrected the vagueness of the term "seller"³⁸ and revised an important provision regarding the definition of business opportunity. The revision raised the threshold selling price required for regulation under the BOA from fifty dollars to \$500.³⁹ The 1985 amendment⁴⁰ is significant in that it adds another purchaser remedy to the BOA. Under O.C.G.A. § 10-1-416(a), if the business opportunity seller does not file the proper disclosure documents with the administrator as required by O.C.G.A. § 10-1-411, then the purchaser may void the contract and seek restitution. There is no requirement that the business opportunity seller have breached the contract or have acted in bad faith. Presumably, the investor could have "buyer's remorse" or other personal reasons having nothing to do with the seller's conduct and still legally rescind the contract if the seller failed to register. This amendment should serve as a strong deterrent to those sellers who ignore the filing requirements of the statute.⁴¹

III. COMPARISON OF THE FTC RULE CONCERNING FRANCHISING AND BUSINESS OPPORTUNITY VENTURES WITH THE GEORGIA BOA

The Federal Trade Commission rule regarding Franchising and Business Opportunity ventures (FTC Rule)⁴² appears to deal with problems addressed by the Georgia statute, however, there are significant differences between the two. The FTC Rule regulates the typical franchise operation, as well as certain distributorships and

when the purchaser notifies the escrow agent in writing or by presenting a bill of lading indicating that the goods for which he contracted have been delivered within the time specified by the contract. *Id.*

37. 1984 Ga. Laws 522 (effective July 1, 1984) and 1985 Ga. Laws 947 (effective July 1, 1985).

38. O.C.G.A. § 10-1-410(4) (Supp. 1985).

39. O.C.G.A. §§ 10-1-410(a)(4) (1982) and 10-1-410(1)(A) (Supp. 1985).

40. 1985 Ga. Laws 947.

41. The Sixth Circuit Court of Appeals considered a similar provision in the Michigan Franchise Investment Law. Although the court dismissed the franchisee's complaints of fraudulent misrepresentations and breach of contract by the franchisor, it found that the franchisor's failure to register and to provide disclosure materials prior to the sale of a franchise entitled the franchisee to damages, interest, reasonable attorneys' fees, and costs. *Kohr v. Gropp & Lehman Enterprises*, No. 81-1592/1614 n.1 (6th Cir. Aug. 30, 1983) (available on LEXIS, Genfed library, Cases file). *Cf.* *Country Kitchen of Mount Vernon, Inc. v. Country Kitchen of Western America, Inc.*, 293 N.W.2d 118 (Sup. Ct. N.D. 1980). (The North Dakota Supreme Court held that a franchise agreement was not void for failure of the franchisor to register absent proof that the franchisee had been injured by such failure to register.)

42. 16 C.F.R. § 436.2 (1984).

dealerships.⁴³ The BOA, however, provides an exemption for most franchise operations by excluding the sale of marketing programs made in conjunction with the licensing of registered trademarks and registered service marks.⁴⁴

The FTC Rule requires the franchisor and/or business opportunity offeror to furnish to prospective investors a comprehensive disclosure statement,⁴⁵ which requires considerable time, expense and expertise to prepare. Georgia, on the other hand, requires only a simplified disclosure statement⁴⁶ and an unaudited financial statement.⁴⁷

Under Georgia law, business opportunity offerors must file a copy of their disclosure statement with the administrator and provide such disclosure statement to prospects,⁴⁸ while the FTC Rule has no such provisions. The Georgia statute's filing provision gives the state an opportunity to review the disclosure documents prior to the company's doing business in the state. If the state discovers any discrepancies or irregularities in the disclosure or financial statements, it may require the company to make suitable corrections prior to the solicitation of prospects for the sale of business opportunities. Any company which solicits prospects for business opportunities in the state without filing the required disclosures is in violation of the BOA.⁴⁹ Therefore, the state has a powerful mechanism to regulate offerings and sales of business opportunities *prior* to receiving any investor complaints.

The BOA provides the victims of fraudulent business opportunity schemes with a private right of action against the seller and

43. The FTC Rule covers two types of *continuing* commercial relationships: package and product franchises and business opportunity ventures. A package and product franchise has two basic characteristics: (1) distribution of goods, commodities, or services associated with the franchisor's trademark and (2) significant control of, or assistance to, the franchisee's method of operation by the franchisor. 16 C.F.R. §§ 436.2(a)(1)(i)(A)(1) and 436.2(a)(1)(i)(B)(1), (2) (1984). A business opportunity venture under the Rule also has two characteristics: (1) the business opportunity seller or his supplier furnishes goods or services to the purchaser, and (2) the seller secures the outlets or sites for product display of vending machines or display racks. 16 C.F.R. §§ 436.2(a)(1)(ii)(A) and 436.2(a)(1)(ii)(B) (1984). Franchises which require a downpayment of less than \$500 are not covered by the FTC Rule. 16 C.F.R. § 436.2(a)(3)(iii) (1984).

44. O.C.G.A. § 10-1-410(1)(A)(iv) (Supp. 1985).

45. See 16 C.F.R. § 436.1(a) (1984).

46. O.C.G.A. § 10-1-411 (1982 & Supp. 1985).

47. O.C.G.A. § 10-1-411(a)(5) (1982 & Supp. 1985).

48. O.C.G.A. § 10-1-413(a) (1982 & Supp. 1985).

49. O.C.G.A. § 10-1-413 (1982 & Supp. 1985).

against the bond or trust account.⁵⁰ On the other hand, the FTC Rule does not provide for such a private right of action.⁵¹

The Georgia law's mandatory escrow provision is designed to assure the investor that eighty-five percent of his investment is escrowed until the goods or services for which he contracted are provided.⁵² In contrast, the FTC Rule does not provide for an escrow account. The Georgia statute requires the seller to post a bond or to establish a trust account in the amount of \$75,000.⁵³ The FTC Rule contains no such provision. The BOA provides for criminal penalties as well as civil remedies for violation of the law,⁵⁴ while the FTC Rule provides only civil remedies.

IV. BUSINESS AND PERSONS COVERED BY THE BOA

A "business opportunity" as defined in O.C.G.A. § 10-1-410 has two parts, and both elements must be present for a business opportunity to exist. The first part requires that a business opportunity offeror must sell, lease, or offer to sell or lease, goods or services requiring a payment of more than \$500 which will enable the purchaser to start a business.⁵⁵ The second part requires that the seller must represent that he will: (1) provide locations or assist in providing locations for coin operated machines, display cases or racks;⁵⁶ (2) buy back any products made, grown, or bred by the purchaser using the supplies or services sold to the purchaser;⁵⁷ (3) guarantee that the purchaser will more than recoup his initial investment, or the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the goods supplied by the seller if the purchaser is dissatisfied with his investment;⁵⁸ or (4) provide a sales or marketing program, except for programs which include the licensing of a registered trademark or registered service mark.⁵⁹

Section 10-1-410(1)(A) of the BOA is designed to protect the investor who does not have the experience of one already established in the business, as evidenced by its requirement that the seller's

50. O.C.G.A. §§ 10-1-416(a), (b) and 10-1-412(a) (1982 & Supp. 1985).

51. See *Freedman v. Meldy's, Inc.*, 587 F. Supp. 658 (E.D. Penn. 1984).

52. O.C.G.A. § 10-1-412(b) (1982 & Supp. 1985).

53. O.C.G.A. § 10-1-412(a) (1982 & Supp. 1985).

54. O.C.G.A. §§ 10-1-413(a) and 10-1-416(h) (1982 & Supp. 1985).

55. O.C.G.A. § 10-1-410(1)(A) (Supp. 1985).

56. O.C.G.A. § 10-1-410(1)(A)(i) (Supp. 1985).

57. O.C.G.A. § 10-1-410(1)(A)(ii) (Supp. 1985).

58. O.C.G.A. § 10-1-410(1)(A)(iii) (Supp. 1985).

59. O.C.G.A. § 10-1-410(1)(A)(iv) (Supp. 1985).

offer will enable the purchaser "to start a business."⁶⁰ However, the phrase "to start a business" is ambiguous. For example, would the BOA cover a home builder who buys a distributorship and sets up a new corporation to sell solar water heaters in houses which he builds? The intent of the law would appear to be that protection is to be afforded the investor who is starting an unrelated business, but not to the person who already has expertise in operating an established business. However, a swimming pool contractor who buys a vending machine distributorship should be able to have recourse under the BOA. He would be starting a business, in the sense of being an inexperienced investor in a totally unrelated field in which he would be more likely to depend on the expertise of the business opportunity seller for the success of this distributorship. Unfortunately, the BOA does not elaborate on the phrase "to start a business." Consequently, the scope of O.C.G.A. § 10-1-410(1)(A) is unclear.

The second part of the definition of "business opportunity" deals with representations which the seller makes concerning one of four categories:

1. O.C.G.A. § 10-1-410(1)(A)(i) deals primarily with the sale of vending or video game machines and consumer goods which are sold from display racks, such as panty hose, film, plants, hardware items, ballpoint pens, and children's toys. This includes locations secured by an independent location service, as long as the seller has "assisted" the investor in finding the locations or in providing the location service.

2. O.C.G.A. § 10-1-410(1)(A)(ii) addresses buy-back agreements, often used in the sale of "worm farms" or chinchilla "ranches," in which the seller provides the initial stock and agrees to buy back the offspring.

3. O.C.G.A. § 10-1-410(1)(A)(iii) covers income and refund guarantees. The seller is required to post a bond or to establish a trust account in the amount of \$75,000.⁶¹ A bond or a trust account is required because a guarantee may cause an investor to rely on the company's providing a safety net for him if he becomes dissatisfied with the business opportunity. This section does not refer to a seller's offer of an option to buy back all or part of the investor's equipment, which is often encountered in franchise agreements.⁶²

60. O.C.G.A. § 10-1-410(1)(A) (Supp. 1985).

61. O.C.G.A. § 10-1-412 (1982 & Supp. 1985).

62. Under the BOA, a seller's guarantee is a promise to refund all or part of the purchase price or to repurchase any of the products supplied by the company.

4. O.C.G.A. § 10-1-410(1)(A)(iv) covers sales or marketing programs. These programs may include cooperative advertising, sales training courses, promotional materials, site location assistance, and assistance in hiring sales personnel, as well as on-going sales assistance. This section contains an exemption for franchises, which provides that any seller of a marketing program who licenses a registered trademark or registered service mark is not covered by the BOA. The law does not specify whether the trademarks or service marks are to be federally or state (Georgia) registered.

If the seller does not meet the criteria of both parts of the definition, or is covered by an exemption, then he does not come within the purview of the BOA. Exemptions under the statute include, in addition to franchises, general partnerships, agricultural cooperatives, agribusiness corporations, and ongoing businesses, when the owner "sells and intends to sell only that one business opportunity."⁶³ Interestingly, limited partnerships are not specifically exempted and might come within the purview of the BOA.

In the BOA as enacted in 1980 the term "seller" was not defined. "Seller" may have meant the company offering or contracting for a business opportunity, or its salesman, or both. In 1984 the BOA was amended to define "seller" so as to differentiate salesmen from the company for which they work.⁶⁴ In the original version of the law, confusion arose over whether a salesman could be arrested if he sold a business opportunity in Georgia when the company had not filed a disclosure statement as required by law.

During the summer of 1982, Atlanta police arrested salesmen who were deemed to be selling business opportunities, although their companies had not filed a disclosure statement as required by the statute. The first salesman,⁶⁵ a representative of a company called Cactus Hut, solicited plant distributorships involving the sale of cacti from display racks supposedly placed in grocery stores. After the salesman was indicted, he pled guilty to a reduced charge of misdemeanor, was sentenced by Fulton County Superior Court and served his sentence on probation. The second salesman, Howard Bernard Brown, was bound over in a preliminary hearing, and his charge was dismissed by the Fulton County District Attor-

O.C.G.A. § 10-1-410(1)(A)(iii) (Supp. 1985). An option, on the other hand, indicates that a seller may, but is not obligated to, refund or repurchase the products.

63. O.C.G.A. § 10-1-410(1)(B) (Supp. 1985).

64. O.C.G.A. § 10-1-410(4) (Supp. 1985).

65. The salesman was sentenced under a first-offender status, and therefore, his identity may not be revealed.

ney. The district attorney's rationale for dismissing the case was that the BOA was too vague. It was not clear that a salesman, agent, or employee could be penalized for his company's violation of the law.⁶⁶

Brown's company, National Hardware Wholesalers d/b/a Krown Marketing Associates, and its principals were located out of state. Brown told the undercover investigators as well as prospective investors that an investment in National Hardware Wholesalers display racks and hardware items would recoup an average of six dollars per rack per day because the racks would be located in convenience stores which generated high traffic and good sales. Investors who purchased the hardware distributorships received little or nothing for their investments: they were not provided locations for the sale of their products, nor did they receive the training promised. The racks and inventory were shipped late or not at all, and investors were forced to write off their losses.⁶⁷

This case highlighted one of the major weaknesses of the BOA. The 1980 BOA specifically included a salesman under the definition of a seller. The statute stated that "every person representing or pretending to represent such corporation or business as an agent, salesman, officer, or employee thereof who shall solicit, advertise, offer, or contract for any business opportunity in this state without filing as required in this Code section shall be guilty of a felony"⁶⁸ In contrast, O.C.G.A. § 10-1-411 impliedly considered only the company as a seller in its requirement of providing detailed information in the disclosure documents, which the company would certainly be in a better position to provide than the salesman. O.C.G.A. § 10-1-413(a) also impliedly treated the company as the seller by requiring the filing of disclosure documents and the posting of a bond or establishment of a trust account if applicable. Such ambiguity, once perceived, was fatal to the integrity of the BOA, as demonstrated by the dismissal of the Brown case by the Fulton County District Attorney's office.

In response to the ambiguity of the term "seller," the Georgia General Assembly amended the law. O.C.G.A. § 10-1-410(4) now defines "seller" as "any person who offers to sell to individuals any business opportunity, either directly or through any agent." "Per-

66. Letter from Fulton County Assistant District Attorney Charles Hadaway to Sandra M. Bourbon (Jan. 7, 1983) (discussing Howard Bernard Brown case).

67. These facts were drawn from the complaints filed with the Office of Consumer Affairs.

68. O.C.G.A. § 10-1-413(d) (1982 & Supp. 1985).

son" is defined in § 10-1-410(3) as

any individual, corporation, partnership, joint venture, association, company, trust, unincorporated organization, or other entity and shall include any other person that has a substantial interest in or effectively controls such person as well as the individual officers, directors, general partners, trustees, or other individual in control of the activities of such person.

These definitions are consistent with the legislative intent in drafting the statute, to "prevent and prohibit fraudulent and deceptive practices in the sale of business opportunities."⁶⁹ The other substantive amendment of the BOA is found in O.C.G.A. § 10-1-410(1)(A), which pertains to a buyer's initial investment in a business opportunity. In the original version of the statute the threshold investment amount for a business opportunity was fifty dollars.⁷⁰

The threshold amount was raised to exclude the registration of multilevel distributorships, often called pyramid marketing plans, which in Georgia are covered by the Multilevel Distribution Companies Act (MDCA).⁷¹ One problem with the original BOA was that all multilevel distribution companies, although in compliance with the MDCA, were automatically classified as business opportunities, because they were required to agree to repurchase all or part of any products which they required their participants to purchase and to provide a ninety percent refund of the price paid if the purchasers so elected.⁷² The 1980 BOA not only required the multilevel distribution company to register as a business opportunity, but also required the company to post a bond or to establish a trust account because of its refund/repurchase agreement. Few multilevel distribution companies are qualified to obtain a bond or to establish a trust account in the amount of \$75,000, as the majority of these companies are newly established and thinly capitalized. As a result, the BOA as originally enacted created a "catch 22" situation by requiring the companies to comply or to face the possibility of criminal sanctions. The amended statute remedied the

69. 1980 Ga. Laws 1233.

70. O.C.G.A. § 10-1-410(a)(4) (1982).

71. O.C.G.A. §§ 10-1-510 — 10-1-514 (1982). A multilevel distribution plan involves the marketing of a product or service through a system of non-exclusive distributorships. Distributors are recruited by the promoting company as well as by other distributors. They may realize a return on their investment by recruiting new distributors or by receiving commissions on their own sales by individuals they have recruited.

72. O.C.G.A. § 10-1-511(b) (1982).

problem by establishing a threshold amount greater than the usual initial multilevel distributorship fee, and the multilevel companies would therefore not be required to file disclosure documents pursuant to the BOA.

V. FILING REQUIREMENTS AND THE DISCLOSURE STATEMENT

The business opportunity offeror must file a disclosure statement with the administrator prior to soliciting, advertising, offering, or contracting for any business opportunities in the state.⁷³ The primary purpose of the disclosure requirements is to provide the prospective investor with the information that he needs to make an informed decision prior to investing in a particular business opportunity. Filing consists of providing a copy of the company's disclosure statement, a current financial statement not older than thirteen months, and payment of a filing fee.⁷⁴ Every contract for the sale of a business opportunity must contain the name and address of the seller's registered agent for service of process.⁷⁵

The disclosure statement must include a description of the seller's business, the names and addresses of its officers, and the names under which the business has previously operated. The seller is required to furnish a detailed description of the services which are offered to the prospect, such as training, marketing assistance, or site locations. The disclosure statement and the seller's financial statement must be given to the prospect at least forty-eight hours before he signs the contract or pays any consideration for the business opportunity.⁷⁶ The seller is required to update the disclosure statement whenever there are any material changes, but not less often than annually.⁷⁷

The BOA prohibits representations of income or potential profits unless the seller can substantiate such representations. This concept is incorporated into the statute by requiring the seller to indicate on the disclosure documents the total number of purchasers of business opportunities involving the same goods or services offered who have actually earned the amount represented. This information is required to be in the disclosure statement filed with

73. See O.C.G.A. § 10-1-413(a) (1982 & Supp. 1985).

74. O.C.G.A. §§ 10-1-411 and 10-1-413(b) (1982 & Supp. 1985).

75. O.C.G.A. § 10-1-415(b)(3) (1982).

76. O.C.G.A. § 10-1-411(a) (1982 & Supp. 1985).

77. O.C.G.A. § 10-1-413(a) (1982 & Supp. 1985).

the administrator and given to the prospect.⁷⁸

VI. REMEDIES AND PENALTIES UNDER THE BOA

The remedies and penalties provided by the BOA are injunctive relief;⁷⁹ a private cause of action for recovery of damages, including reasonable attorneys' fees;⁸⁰ administrative action by the administrator pursuant to the Fair Business Practices Act (FBPA);⁸¹ or criminal sanctions.⁸² If the seller makes any false or misleading statements in the sale of a business opportunity, fails to give proper disclosure or does not deliver the goods necessary to begin substantial operation within forty-five days of the delivery date stated in the contract, the purchaser may rescind the contract and is entitled to receive a refund of the fee paid to the seller.⁸³

As the BOA has incorporated the FBPA by reference,⁸⁴ the administrator may, with the consent of the attorney general, issue an investigative demand in order to determine if a person has engaged or is engaging in an unlawful offer or sale of a business opportunity.⁸⁵ The administrator may also accept an assurance of voluntary compliance⁸⁶ in connection with an investigation of an alleged violation of the BOA.

A business opportunity seller faces three potential difficulties in doing business in Georgia, aside from the obvious ones of failing to file, to post a bond, or to establish a trust account. The first area of difficulty is in deciding whether the company is offering a sales or marketing plan. As the statute does not define the term, it is often difficult to determine if minimal sales assistance constitutes such a plan.

The second difficulty encountered is the prohibition against representations made by the company or salesman concerning an investor's income or earning potential without furnishing documented data indicating the number of investors who have actually earned the figures stated. The use of tables and other data not substantiated by actual earnings figures furnished by investors in a

78. O.C.G.A. § 10-1-411(a)(10) (1982 & Supp. 1985).

79. O.C.G.A. § 10-1-416(c) (1982 & Supp. 1985).

80. O.C.G.A. § 10-1-416(b) (1982 & Supp. 1985).

81. O.C.G.A. § 10-1-416(f) (1982 & Supp. 1985).

82. O.C.G.A. § 10-1-416(h) (1982 & Supp. 1985).

83. O.C.G.A. § 10-1-416(a) (1982 & Supp. 1985).

84. O.C.G.A. § 10-1-416(f) (1982 & Supp. 1985).

85. O.C.G.A. § 10-1-403(a) (1982).

86. O.C.G.A. § 10-1-402 (1982).

similar business in a comparable area is prohibited. In *Martin v. Pilot Industries*⁸⁷ the Fourth Circuit Court of Appeals found that representations made by Pilot, especially the statements concerning gross sales and profits, were guarantees of income under the North Carolina BOSA, even though Pilot did not give a specific guarantee. It was sufficient that a reasonable person would have received the impression that income was being guaranteed.⁸⁸ Failure to disclose the number of purchasers who had earned the amounts of income specified in the promotional literature was also deemed violative of the statute.⁸⁹

The third difficulty that a business opportunity seller may encounter is criminal liability for the acts of its agents or employees. O.C.G.A. § 16-2-22 states that such liability may be imposed if the corporation authorizes, requests, commands, performs, or recklessly tolerates the commission of a crime. The Georgia Supreme Court in *State v. Shepherd Construction Co.*⁹⁰ held that a corporation can be prosecuted for violating the law and that a court may sentence a corporation to serve a term for years, even though such sentence is unenforceable. In *Shepherd* the court suspended the sentence and imposed a fine.⁹¹ In *Spahn v. Guild Industries Corp.*, the California First District Court of Appeal held an innocent principal liable for a salesman's selling a franchise without the company's registering and providing disclosure required by California law.⁹²

VII. SUGGESTED MODIFICATION OF THE BOA

Although the BOA requires that the administrator assign an advertising identification number to the business opportunity seller when the seller has complied with the disclosure requirements,⁹³ there is no requirement that the advertising number be displayed in advertisements which the seller places in newspapers or magazines circulated in the state. The statute only requires that the seller disclose the number to the person with whom the advertising is placed.⁹⁴ If publication of the advertising number in the

87. 632 F.2d 271 (4th Cir. 1980).

88. *Id.* at 275.

89. *Id.* at 276.

90. 248 Ga. 1, 281 S.E.2d 151 (1981).

91. *Id.* at 6, 281 S.E.2d at 157.

92. 94 Cal. App. 3d 143, 156-58, 156 Cal. Rptr. 375, 383-85 (1979).

93. O.C.G.A. § 10-1-413(c)(1) (1982 & Supp. 1985).

94. *See* O.C.G.A. § 10-1-413(c)(2) (1982 & Supp. 1985).

actual advertisement was required, a prospective investor could determine at a glance whether the business opportunity offeror had complied with the terms of the BOA.

A company should also be required to provide litigation history in its disclosure statement similar to the provisions in the FTC Rule.⁹⁵ Georgia law should require the litigation history to include any violations of any franchise or business opportunity laws, securities laws, or unfair trade practices acts. Such litigation history should include not only any civil or criminal action taken against the company, but also any administrative action taken. The seller's failure to provide litigation history, or the providing of deceptive or misleading litigation history, should allow the purchaser to void the contract and to receive a refund of his purchase price.

Additionally, if the seller is required to furnish a bond or trust account, it should be worded so that a violation of the BOA itself would allow an aggrieved party to proceed against the bond or trust account to recover damages. The BOA as presently constituted seems to state that recovery against the bond or trust account requires a breach of contract as a prerequisite.⁹⁶

Finally, the exemptions under the BOA should specifically exclude limited partnerships, which are already regulated by the Georgia Securities Act under O.C.G.A. § 10-5-2(a)(16). Limited partnerships are not clearly exempted from the ambit of the BOA as are general partnerships in O.C.G.A. § 10-1-410(1)(B)(ii)(I).

CONCLUSION

Prior to passage of the BOA in 1980, numerous complaints had been received against certain business opportunity sellers. Not only were Georgians victimized, but investors throughout the United States as well. After Georgia and other states passed business opportunity and franchise laws, the pattern of business opportunity fraud appeared to change in Georgia. The number of complaints against individual companies decreased. Part of the decrease in the number of investor complaints may be attributed to the effectiveness of the BOA in putting companies on notice that Georgia investors have specific legal rights and remedies in connection with the offer and sale of business opportunities within the state. Prospective investors are entitled to disclosure materials which provide pertinent information about the company and its

95. 16 C.F.R. § 436.1(a)(4) (1984).

96. See O.C.G.A. § 10-1-412(a) (1982 & Supp. 1985).

officers and which allow them time to investigate the company and to review the contract prior to investing. The investor is entitled to have eighty-five percent of his purchase price escrowed in an independent account until the company has fully complied with the terms of the contract.

The BOA provides the state with broad investigative, enforcement, and remedial powers to deal with fraudulent business opportunity transactions. The state may screen business opportunity advertisements for exaggerated earnings claims and other serious misrepresentations.⁹⁷ If the business opportunity offeror cannot substantiate the earnings claims, makes material misrepresentations, or has not filed disclosure statements at the time that it solicits business opportunities in the state, then the company is in violation of the BOA. At that point the state may expand its investigation, issue an investigative demand to obtain additional information, or take legal action against the company.

Furthermore, a Georgia investor may rescind his contract within one year of the date of the contract and obtain a refund of the purchase price if the company fails to file disclosure documents and if it has otherwise violated the BOA.

Through various enforcement mechanisms and investor remedies, the BOA offers investors strong protection against fraudulent business opportunity transactions in Georgia.

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97. See Atlanta J.-Const., *supra* note 1.