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COMMERCE AND TRADE Selling and Other Trade Practices: Prohibit Certain Practices Relating to Telemarketing, the Use of a Computer or Computer Network, or Home Repair or Improvement Work; Provide for Vicarious Liability, Investigations of Violations, and Criminal and Civil Penalties

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COMMERCE AND TRADE

*Selling and Other Trade Practices: Prohibit Certain Practices
Relating to Telemarketing, the Use of a Computer or Computer Network, or
Home Repair or Improvement Work; Provide for Vicarious Liability,
Investigations of Violations, and Criminal and Civil Penalties*

CODE SECTIONS: O.C.G.A. §§ 10-1-393, -393.5, -406, 16-8-12
(amended)
BILL NUMBER: HB 708
ACT NUMBER: 455
GEORGIA LAWS: 1997 Ga. Laws 1507
SUMMARY: The Act amends the Fair Business Practices Act of 1975 and makes certain practices relating to telemarketing, particularly those practices involving fraud, the use of a computer or computer network, or home repair or improvement work, unlawful. The Act provides for vicarious liability in certain circumstances and for investigations into such practices to be performed by the Administrator for Consumer Affairs. While the Act provides for enhanced penalties when the unlawful activity is targeted at the elderly, some criminal penalties under the Act were reduced.
EFFECTIVE DATE: July 1, 1997

History

In 1996, the Georgia General Assembly amended the Fair Business Practices Act of 1975¹ by adding a new Code section, which provided for civil and criminal penalties for theft committed while engaged in telemarketing or activity on any computerized system or the Internet.² Georgia continues to rank among the top five states in the nation for telemarketing fraud.³ Further, a disproportionate amount of telemarketing fraud is aimed at the elderly, particularly in the South.⁴ Moreover, home repair or improvement scams are the second most common type of fraud scheme committed against the elderly and are

1. 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-390 (1994)).

2. See *Legislative Review*, 13 GA. ST. U. L. REV. 33, 33 (1996).

3. See Telephone Interview with Rep. Mike Polak, House District No. 67 (Apr. 22, 1997) [hereinafter Polak Interview].

4. See Telephone Interview with Jim Hurt, Georgia Governor's Office of Consumer Affairs (Apr. 24, 1997) [hereinafter Hurt Interview].

increasing in number.⁵ HB 708 was introduced to provide consumer protection, particularly for the elderly.⁶ The changes in the language were made to make it easier for the Governor's Office of Consumer Affairs⁷ to investigate telemarketing fraud and gather evidence, which could then be used by prosecutors.⁸

HB 708

Introduction

HB 708 was introduced in the General Assembly on February 21, 1997.⁹ The bill was sponsored by Representatives Jimmy Skipper of the 137th District, and Mike Polak of the 67th District.¹⁰ The bill was referred to the House Industry Committee, which offered a substitute to the bill, and favorably reported the bill in the House on February 27.¹¹ The bill was read for the third time on March 14, and a floor substitute was offered by Representatives Newt Hudson of the 156th District, Sharon Cooper of the 31st District, Mike Polak, Robert Reichert of the 126th District, Glenn Richardson of the 26th District, and others.¹² The floor substitute passed on March 14, and was sent to the Senate where it was read for the first time on March 17, and referred to the Senate Consumer Affairs Committee.¹³ The Committee recommended "do pass" by a substitute.¹⁴ The Senate passed the Committee's substitute version on March 24, and the bill was sent to the House for concurrence.¹⁵ The House concurred with the Senate substitute on

5. *See id.*

6. *See* Polak Interview, *supra* note 3.

7. *See* 1986 Ga. Laws 1313, § 1, at 1314 (codified at O.C.G.A. § 10-1-392(a)(1)(Supp. 1997)). This Code section defines "Administrator" under the Fair Business Practices Act as the administrator appointed pursuant to subsection (a) of O.C.G.A. § 10-1-395 or his delegate. *Id.* O.C.G.A. § 10-1-395(a) in turn provides that the administrator shall be appointed by the Governor and shall serve at his pleasure. 1988 Ga. Laws 426, § 1, at 431 (codified at O.C.G.A. § 10-1-395(a) (1994)). "The office of the administrator shall be attached to the office of the Governor for administrative purposes only. The administrator shall perform all functions formerly performed by the Consumer Services Unit of the Division of Special Programs of the Department of Human Resources." *Id.*

8. *See* Hurt Interview, *supra* note 4.

9. *See* Final Composite Status Sheet, Mar. 28, 1997.

10. *See* HB 708, as introduced, 1997 Ga. Gen. Assem.

11. *See* Final Composite Status Sheet, Mar. 28, 1997.

12. *See* HB 708 (HFS), 1997 Ga. Gen. Assem.; Final Composite Status Sheet, Mar. 28, 1997.

13. *See* Final Composite Status Sheet, Mar. 28, 1997.

14. *See id.*; HB 708 (SCS), 1997 Ga. Gen. Assem.

15. *See* Final Composite Status Sheet, Mar. 28, 1997.

March 27, and the bill was sent to the Governor on April 1.¹⁶ The Governor signed the bill on April 29, 1997.¹⁷

Changes from the Introduced Version

House Committee Substitute

The changes made to the bill in the House Industry Committee reflect the lowering of the criminal sentences from twenty years to ten years and the deletion of the language that prohibited such sentences from being subject to suspension, deferral, or probation.¹⁸ The Committee also deleted the language that provided for a sentence of not less than ten nor more than twenty years for a third offense under the Act.¹⁹ This is consistent with the concern of various legislators about the considerable number of activities that have been criminalized and the resulting overcrowding of Georgia prisons.²⁰

House Floor Substitute

Changes were also made on the House floor. The version passed by the House and sent to the Senate reflected the floor changes.²¹ The significant change made to the bill on the House floor was the inclusion of provisions for vicarious liability when the entity engaged in the proscribed activity is a sole proprietorship, a corporation, or a partnership.²² The changes also involved eliminating the doubling of civil and criminal penalties when the target of the proscribed activity is an elderly or disabled person.²³ The floor substitution changed the doubling language by making a reference to Code section 10-1-851 for an additional civil penalty.²⁴

Senate Committee Substitute

The major change to the bill brought about in the Senate Consumer Affairs Committee was the addition of language that prevents the coercive use of recorded conversations to induce payment.²⁵ This issue

16. *See id.*

17. *See id.*

18. HB 708 (HCS), 1997 Ga. Gen. Assem.

19. *Id.*

20. *See* Polak Interview, *supra* note 3; Hurt Interview, *supra* note 4.

21. *Compare* HB 708 (HCS), 1997 Ga. Gen. Assem., *with* HB 708 (HFS), 1997 Ga. Gen. Assem.

22. HB 708 (HFS), 1997 Ga. Gen. Assem.

23. *Id.*

24. *Id.*; O.C.G.A. § 10-1-851 provides for an additional civil penalty of up to \$10,000. 1993 Ga. Laws 1092, § 2, at 1094 (codified at O.C.G.A. § 10-1-851 (1994)).

25. HB 708 (SCS), 1997 Ga. Gen. Assem.; *see also* Telephone Interview with

was not addressed in any prior versions of the bill.²⁶ The new language became the Act's section 1 with all other sections renumbered accordingly.²⁷ This language reflects the concern for prevention of coercive telemarketing schemes perpetrated against the elderly.²⁸

Changes to the Code

The first section of the Act amends the Fair Business Practices Act of 1975²⁹ by adding specified telemarketing practices to the enumerated examples of unfair or deceptive practices in consumer transactions of which the Act prohibits.³⁰ This language was added to the bill in the Senate Consumer Affairs Committee, at the request of the Secretary of State's Office,³¹ to address the coercive use of recorded conversations by telemarketers to induce payment when an individual is not truly obligated to do so.³² Paragraph (A) prohibits any seller or telemarketer from using any part of an electronic record in an attempt to induce payment or to collect payment that the seller or telemarketer claims is due based on a telephone conversation with a residential subscriber.³³ The Act defines a residential subscriber as any person who has subscribed to residential phone service from a local exchange company or the other persons living or residing with such person.³⁴ Subsection (A)(i) of the new paragraph added by section 1 of the Act provides that a recording may be used in its entirety as evidence in a court proceeding that a payment is owed to the telemarketer.³⁵ The abusive use of these recordings had been occurring, for the most part, in settings outside of a legal proceeding.³⁶ Subsection (A)(ii) provides that the section is not to be interpreted to expand the use of electronic recordings pursuant to the Federal Telemarketing Sales Rule.³⁷ The

Branch Sinkule, Georgia Secretary of State's Office (Apr. 24, 1997) [hereinafter Sinkule Interview].

26. Compare HB 708, as introduced, 1997 Ga. Gen. Assem., and HB 708 (HCS), 1997 Ga. Gen. Assem., and HB 708 (HFS), 1997 Ga. Gen. Assem., with HB 708 (SCS), 1997 Ga. Gen. Assem.

27. See O.C.G.A. § 10-1-393(b)(31) (Supp. 1997).

28. See Sinkule Interview, *supra* note 25.

29. 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-390 (1994)).

30. O.C.G.A. § 10-1-393(b)(31) (Supp. 1997).

31. HB 708 (SCS), 1997 Ga. Gen. Assem.; see Sinkule Interview, *supra* note 25.

32. See Sinkule Interview, *supra* note 25.

33. O.C.G.A. § 10-1-393(b)(31)(A) (Supp. 1997).

34. *Id.* § 10-1-393(b)(31)(B)(iii).

35. *Id.* § 10-1-393(b)(31)(A)(i).

36. See Sinkule Interview, *supra* note 25.

37. O.C.G.A. § 10-1-393(b)(31)(A)(ii) (Supp. 1997). According to 16 C.F.R. § 310.2(u), "[t]elemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call." *Id.*

federal rule allows the use of recordings for the authorization for payment, such as the giving of a credit card number and expiration date.³⁸ The inclusion of this section in the bill was prompted by concern that the permissive use allowed in the federal rule provided an opportunity to record substantive parts of a conversation that could later be used as a pretext to induce someone to believe that they had entered into an oral contract and were bound to make payments thereunder.³⁹ Subsection (B) of the new paragraph provides definitions for terms including “covered communication,” “electronic record,” “residential subscriber,” and “seller or telemarketer.”⁴⁰

Section 2 of the Act is derived from a request by the Governor’s Office of Consumer Affairs.⁴¹ This section of the Act amends Code section 10-1-393.5.⁴² The Act leaves unchanged subsection (a), which provides that the term “telemarketing” shall have the same meaning for the Act as it has under federal regulations.⁴³ The major changes to the Code come from the addition of subsection (b) of Code section 10-1-393.5.⁴⁴ During the course of the year following the enactment of Code section 10-1-393.5, prosecuting attorneys informed the Governor’s Office of Consumer Affairs that the language of the Code section proved difficult to translate into understandable jury instructions, thus making it difficult to succeed in cases under this subsection of the Code.⁴⁵ The Act deletes the language that brought it an unfair and deceptive Act or practice to commit any offense involving theft under Code sections 16-8-2 through -9⁴⁶ while engaging in telemarketing or any activity on the Internet or computerized system that individuals connect to by use of a computer and a modem.⁴⁷ This language is replaced with language

38. See Sinkule Interview, *supra* note 25.

39. See *id.*

40. O.C.G.A. § 10-1-393(b)(31)(B) (Supp. 1997).

41. See Hurt Interview, *supra* note 4.

42. Compare 1996 Ga. Laws 231 § 1, at 232 (formerly found at O.C.G.A. § 10-1-393.5 (1994)), with O.C.G.A. § 10-1-393.5 (Supp. 1997).

43. O.C.G.A. § 10-1-393.5 (Supp. 1997); 16 C.F.R. § 310 (1996).

44. See O.C.G.A. § 10-1-393.5(b) (Supp. 1997).

45. See Hurt Interview, *supra* note 4.

46. These Code sections include: 1978 Ga. Laws 2257, § 1, at 2256-58 (codified at O.C.G.A. § 16-8-2 (1994)) (theft by taking); 1968 Ga. Laws 1249, § 1, at 1290-91 (codified at O.C.G.A. § 16-8-3 (1994)) (theft by deception); 1988 Ga. Laws 763, § 1 (codified at O.C.G.A. § 16-8-4 (1994)) (theft by conversion); 1968 Ga. Laws 1249, § 1, at 1293 (codified at O.C.G.A. § 16-8-5 (1994)) (theft of services); 1968 Ga. Laws 1249, § 1, at 1292 (codified at O.C.G.A. § 16-8-6 (1994)) (theft of lost or mislaid property); 1968 Ga. Laws 1249, § 1, at 1292-93 (codified at O.C.G.A. § 16-8-7 (1994)) (theft by receiving stolen property); 1972 Ga. Laws 841, § 2, at 842 (codified at O.C.G.A. § 16-8-8 (1994)) (theft by receiving property stolen in another state); and 1972 Ga. Laws 841, § 1 (codified at O.C.G.A. § 16-8-9 (1994)) (theft by bringing stolen property into state).

47. Compare 1996 Ga. Laws 231, § 1, at 232 (formerly found at O.C.G.A. § 10-1-

making it an unfair and deceptive act or unlawful practice for anyone to engage in telemarketing or any activity involving the use of a computer or computer network, or home repair or improvement work to employ any device, scheme, or artifice to defraud.⁴⁸ The term "Internet" in subsection (b) was changed at the suggestion of the state Attorney General's office.⁴⁹

The Act further makes it unlawful for a person engaged in such activities⁵⁰ to participate in any act, practice, or course of business that operates or would operate as a fraud or deceit upon a person, organization, or entity, or to commit offenses involving theft under Code sections 16-8-2 through -9.⁵¹ The theft provisions were retained and supplemented with the language involving fraud.⁵² The Act makes it a criminal offense to attempt the fraud whether a theft was actually completed.⁵³

Subsection (c) provides for vicarious liability.⁵⁴ This language was added to create liability for the people who are actually managing and controlling the scams rather than those hired merely to operate telephones.⁵⁵ The subsection establishes liability for corporate officers and directors, owners of a sole proprietorship, and partners.⁵⁶ Civil penalties are provided for those who "intentionally" violate the proscriptions of subsection (b).⁵⁷ This subsection also establishes the "prior actual knowledge" standard whereby an individual with prior actual knowledge (of the scam) who failed to stop it is also liable under the Act.⁵⁸

393.5(b) (Supp. 1996)), with O.C.G.A. § 10-1-393.5 (Supp. 1997).

48. O.C.G.A. § 10-1-393.5(b)(1) to (2) (Supp. 1997).

49. Compare 1996 Ga. Laws 231, § 1, at 232 (formerly found at O.C.G.A. § 10-1-393.5(b) (Supp. 1996)), with O.C.G.A. § 10-1-393.5(b) (Supp. 1997); see Hurt Interview, *supra* note 4. The state Attorney General's office had been engaged in litigation over another bill passed in the prior year's General Assembly, which used the term "Internet." The office believed that the use of the term "computer or computer network" would be a better term to use in this Act. See Hurt Interview, *supra* note 4.

50. O.C.G.A. § 10-1-393.5(b) (Supp. 1997). Activities include the activity of telemarketing, any activity involving a computer or computer network, or any activity involving home repair or home improvement work. See *id.*

51. *Id.* § 10-1-393.5(b)(2) to (3); see also *supra* note 46 and accompanying text.

52. Compare 1996 Ga. Laws 231, § 1 (codified at O.C.G.A. § 10-1-393.5 (Supp. 1996)), with O.C.G.A. § 10-1-393.5 (Supp. 1997).

53. O.C.G.A. § 10-1-393.5(b) (Supp. 1997); see Hurt Interview, *supra* note 4.

54. O.C.G.A. § 10-1-393.5(c) (Supp. 1997).

55. See Hurt Interview, *supra* note 4.

56. O.C.G.A. § 10-1-393.5(c) (Supp. 1997).

57. *Id.*

58. *Id.*; see Hurt Interview, *supra* note 4.

Subsection (d) provides for enhanced penalties when an elderly or disabled person is intentionally targeted in the prohibited activities.⁵⁹ This subsection provides for an additional civil penalty of up to \$10,000 for each violation.⁶⁰ The penalty provided for in the Act is actually a reduced penalty because the prior language provided for “double the applicable civil and criminal penalties for such violation or offense.”⁶¹

Subsection (e) changed the characterization of the investigations under this law from “telemarketing” to “potentially criminal.”⁶² The significant change in this subsection, however, is the change from “Code section” to “article.”⁶³ This change means that any prohibitions set forth in article 15 of title 10 of the Code,⁶⁴ which provides for enforcement authority for the administrator of the Governor’s Office of Consumer Affairs and provides for criminal penalties, may be investigated by the Governor’s Office of Consumer Affairs.⁶⁵ Consequently, this agency will be performing more criminal investigations.⁶⁶ Finally, the administrator of the Governor’s Office of Consumer Affairs may issue procedural rules relating to his enforcement duties.⁶⁷

Section 3 of the Act replaces in its entirety Code section 10-1-406,⁶⁸ which relates to the duties of prosecuting attorneys.⁶⁹ The Act provides that when a prosecuting attorney is presented with an investigation completed by the administrator of the Governor’s Office of Consumer Affairs, he or she shall commence criminal prosecution as he or she deems fit.⁷⁰ The Act deletes the previous language, which established a duty for prosecuting attorneys to “lend to the administrator such assistance as the administrator may request in the commencement and

59. O.C.G.A. § 10-1-393.5(d) (Supp. 1997).

60. *Id.* This amount is provided by reference to O.C.G.A. § 10-1-851. The section provides that where a violation is found to have been committed against elderly or disabled persons, in addition to any civil penalty otherwise set forth or imposed, the court may impose an additional civil penalty not to exceed \$10,000 for each violation. 1993 Ga. Laws 1092, § 2, at 1094-95 (codified at O.C.G.A. § 10-1-851 (1994)).

61. *Compare* 1996 Ga. Laws 231, § 1 (codified at O.C.G.A. § 10-1-393.5(d) (Supp. 1996)), *with* O.C.G.A. § 10-1-393.5(d) (Supp. 1997).

62. *Compare* 1996 Ga. Laws 231, § 1 (formerly found at O.C.G.A. § 10-1-393.5(e) (Supp. 1996)), *with* O.C.G.A. § 10-1-393.5(e) (Supp. 1997).

63. *Compare* 1996 Ga. Laws 231, § 1 (formerly found at O.C.G.A. § 10-1-393.5(e) (Supp. 1996)), *with* O.C.G.A. § 10-1-393.5(e) (Supp. 1997).

64. Article 15 of title 10 involves “Deceptive or Unfair Practices” and contains the Fair Business Practices Act.

65. *See* Hurt Interview, *supra* note 4.

66. *See id.*

67. O.C.G.A. § 10-1-393.5(f) (Supp. 1997).

68. 1975 Ga. Laws 376, § 1 (formerly found at O.C.G.A. § 10-1-406 (1994)).

69. *Compare* 1975 Ga. Laws 376, § 1 (formerly found at O.C.G.A. § 10-1-406 (Supp. 1996)), *with* O.C.G.A. § 10-1-406 (Supp. 1997).

70. O.C.G.A. § 10-1-406 (Supp. 1997).

prosecution of the specific actions⁷¹ under the Fair Business Practices Act.⁷²

Section 4 of the Act reduces the criminal penalties for violations under the Act.⁷³ Now a violation of the Act results in imprisonment of not less than one year and not more than ten years.⁷⁴ The prior maximum sentence had been twenty years.⁷⁵ The Act also struck the language as to suspension, probation, or deferral of such sentences.⁷⁶ The prior language provided that, as to sentences, "no portion of which may be suspended, probated, deferred, or withheld; and any person who is convicted of a third offense under this paragraph shall be punished by imprisonment for not less than ten years nor more than 20 years; no portion of which may be suspended, probated, deferred, or withheld."⁷⁷ The reduction of the criminal penalties is in response to concern in the General Assembly about prison overcrowding in Georgia and the trend in making more crimes felonies.⁷⁸ However, because the penalty language now provides more flexibility for judges, more investigative power for the Governor's Office of Consumer Affairs, and provides a basis for clearer jury instructions, it is possible that more prosecutions may result because of the new legislation.⁷⁹

Opposition to HB 708

There was almost no opposition to HB 708; there was only one vote against the bill in the House,⁸⁰ and there were no votes against it in the Senate.⁸¹ The House member who voted against the measure did so for reasons relating to the application and the enforcement of the Act.⁸²

Representative Breedlove's first concern was about the Act's special emphasis on senior citizens.⁸³ By his interpretation, the new law

71. Compare 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-390 (Supp. 1996)), with O.C.G.A. 10-1-406 (Supp. 1997).

72. 1975 Ga. Laws 376, § 1 (formerly found at O.C.G.A. § 10-1-406 (Supp. 1996)).

73. Compare 1984 Ga. Laws 900 (formerly found at O.C.G.A. § 16-8-12(a)(4) (1996)), with O.C.G.A. § 16-8-12(a)(4) (Supp. 1997).

74. O.C.G.A. § 16-8-12(a)(4)(A) (Supp. 1997).

75. Compare 1984 Ga. Laws 900, § 4, at 901-02 (formerly found at O.C.G.A. § 16-8-12(a)(4) (1996)), with O.C.G.A. § 16-8-12(a)(4)(A) (Supp. 1997).

76. Compare 1984 Ga. Laws 900 (formerly found at O.C.G.A. § 16-8-12(a)(4) (1996)), with O.C.G.A. § 16-8-12(a)(4) (Supp. 1997).

77. 1996 Ga. Laws 611, § 3 (formerly found at O.C.G.A. § 16-8-12(a)(4)(A) (1996)).

78. See Polak Interview, *supra* note 3; see also Hurt Interview, *supra* note 4.

79. See Hurt Interview, *supra* note 4.

80. See Georgia House of Representatives Voting Record, HB 708 (Mar. 14, 1997).

81. See Georgia Senate Voting Record, HB 708 (Mar. 24, 1997).

82. See Telephone Interview with Rep. Keith Breedlove, House District No. 85 (June 24, 1997).

83. See *id.*

enhances a penalty because a senior citizen is the target of the activity.⁸⁴ Thus, in his estimation, this effectively creates two classes of citizens as to the level of protection afforded by the law.⁸⁵ His problem with this situation is two-fold.⁸⁶ First, the term "senior citizen" is somewhat vague, and second, those conducting business over the telephone may find it difficult to determine the age of an individual with whom they are dealing.⁸⁷ Representative Breedlove believes this situation may ultimately create a defense that could defeat the enforcement of this law.⁸⁸

He was also opposed to the enhanced enforcement powers provided by the Act to investigators in the Governor's Office of Consumer Affairs.⁸⁹ Because the language in the Act states that these investigators have the powers of certified peace officers, such investigators will possess all the powers of a police officer.⁹⁰ Thus, they may carry a weapon and make arrests even though they may not be wearing a uniform or carrying a badge.⁹¹ He questions the reasoning of granting such a broad power to such individuals and the tendency to grant such powers to an increasing array of state employees.⁹²

As to the impact of this Act, he believes that disreputable telemarketers will continue their activities unaffected by this new measure.⁹³ These actors currently violate the existing law without fear and move from place to place with regularity.⁹⁴ He believes the new language may in fact enable such actors, when charged with a violation of this law, to defeat its broadened scope of application and enforcement.⁹⁵

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84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*