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CRIMES AND OFFENSES Payday Lending: Amend Title 7 of the Official Code of Georgia Annotated, Relating to Banking and Finance, so as to Provide for Licensing of Persons Who Provide Deferred Presentment Services; Provide for a Short Title; Define Certain Terms; Provide for Licenses, Qualifications, and Application Therefore; Provide for Fees; Provide for Limitations; Provide for Consumer Notices; Provide for Rules and Regulations; Provide for Penalties and Hearings; Provide for Complaint Investigation; Provide for Annual Reports; Amend Chapter 17 of Title 16 of the Official Code of Georgia Annotated, Relating to

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CRIMES AND OFFENSES

Payday Lending: Amend Title 7 of the Official Code of Georgia Annotated, Relating to Banking and Finance, so as to Provide for Licensing of Persons Who Provide Deferred Presentment Services; Provide for a Short Title; Define Certain Terms; Provide for Licenses, Qualifications, and Application Therefor; Provide for Fees; Provide for Limitations; Provide for Consumer Notices; Provide for Rules and Regulations; Provide for Penalties and Hearings; Provide for Complaint Investigation; Provide for Annual Reports; Amend Chapter 17 of Title 16 of the Official Code of Georgia Annotated, Relating to Payday Lending, so as to Delete References to Deferred Presentments as Payday Loans; Prohibit Unlicensed Payday Lenders from Operating in this State; Provide for Legislative Findings; Provide for Related Matters; Provide for Severability; Provide for Preemption; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 16-17-1 to -2, -7 to -8 (amended); O.C.G.A. §§ 7-9-1 to -21 (new)

BILL NUMBER: HB 163

SUMMARY: The bill would have repealed the prohibition in Georgia on payday lending by non-bank lenders and allowed deferred presentment services providers to operate in Georgia. Deferred presentment service lenders would have been permitted to charge a fee of \$15 for every \$100 advanced, provided the transaction did not exceed the lesser of \$750 or 25% of the consumer's monthly gross income. The loan would be due at the consumer's next payday.

The bill would have contained consumer protections that would have required the lender to inform the

consumer of the right to rescind the transaction by the next business day and would have required the lender to provide a mandatory repayment plan if a consumer was unable to make the required payments. Consumers would also have been prohibited from entering into multiple transactions with the same lender. There would have been a mandatory five-day waiting period between transactions with the same lender.

In addition, the bill would have set up statewide licensing procedures for payday lenders. Each applicant must have satisfied objective criteria involving fiscal responsibility and moral integrity. Moreover, a license would have been refused or revoked if an applicant, employee or 10% owner were convicted of a felony involving moral turpitude or violated the provision of the bill. A license would have been subject to annual review prior to renewal.

EFFECTIVE DATE:

N/A

History

Payday lending is a practice where lenders offer individuals “short term loans, typically of between \$100 to \$500, to workers who need cash in advance of their next paycheck.”¹ The loans usually come with a high interest rate, at times reaching at high as 1300%.² A borrower must give the lender a post-dated check in exchange for the

1. Editorial, *Mayday for Payday Loans*, WALL ST. J., Apr. 2, 2007, at A16.

2. See EZPayDayCash.com, Fees, <http://www.ezpaydaycash.com/Fees.aspx> (last visited May 10, 2007).

loan.³ If the borrower cannot repay the debt, then typically the lender will perform a “rollover,” renewing the loan and adding fees.⁴ Historically, the rollover is one of the biggest concerns involving payday lending because it traps the borrower in a lending cycle—“once the loan rolls over, the borrower incurs more debt and often cannot pay the rollover debt.”⁵ Often loans of hundreds of dollars can cost borrowers thousands of dollars in fees.⁶ Consumer advocates equate the payday lending cycle with “a drug dealer providing the next hit of cocaine.”⁷

Georgia is one of thirteen states where payday lending is illegal.⁸ Payday lending is legal and regulated in thirty-seven states.⁹ Georgia eliminated payday lending, deferred presentment services, and cash advance services (hereinafter, collectively known as “payday lending”) in 2004.¹⁰

The 2004 bill made payday lending a felony, allowed for racketeering charges, and permitted class action lawsuits.¹¹ The purpose of the legislation was to reiterate that payday lending was illegal and “to strengthen the penalties for those engaged in such activities.”¹² Commanders from Georgia’s military bases lobbied for the 2004 prohibition, saying “military personnel ended up trapped in a cycle of high-interest debt after taking out payday loans.”¹³

Before 2004, prosecutors did not enforce payday lending laws because they only carried a misdemeanor charge for an offense.¹⁴

3. See Interview with Mark Budnitz, Professor, Georgia State University College of Law (Apr. 3, 2007) [hereinafter Budnitz Interview].

4. Tia Martarella, *Crimes and Offenses*, 21 GA. ST. U. L. REV. 59, 60 (2004).

5. *Id.*

6. Rhonda Cook, *Payday Loan Law Goes to the Courts; Interest and Stakes are High*, ATLANTA J.-CONST., Apr. 26, 2004, at A1, available at 2004 WLNR 6353336.

7. Kevin Duffy, *Payday Loan Foes Cry Foul When Unable to Comment*, ATLANTA J.-CONST., Feb. 15, 2007, at D4, available at 2007 WLNR 2965400.

8. Trevor Anderson, *Bill Might Legalize Payday Lending in Georgia*, SPARTANBURG HERALD-J., Mar. 21, 2007, available at 2007 WLNR 5445424.

9. Carrie Teegardin, *Fierce Debate over Payday Loans*, ATLANTA J.-CONST., Feb. 28, 2007, at A1, available at 2007 WLNR 3835165.

10. 2004 Ga. Laws 60, § 3 at 61-67 (codified at O.C.G.A. § 16-17-2 (2004)).

11. *Id.* at 62-63 (codified at O.C.G.A. § 16-17-2 (2004)).

12. 2004 Ga. Laws 60, § 3 at 62 (codified at O.C.G.A. § 16-17-1(e) (2004)).

13. Carrie Teegardin, *Harm vs. Good Weighed in Payday Loans Debate*, ATLANTA J.-CONST., Mar. 27, 2007, at B1, available at 2007 WLNR 5788685.

14. Carrie Teegardin & Ann Hardie, *Bill Proposes to Revive Payday Loans*, ATLANTA J.-CONST., Jan. 25, 2007, at D1, available at 2007 WLNR 1565353.

Also, before the 2004 legislation there was no regulation of the payday industry.¹⁵ The 2004 bill passed the House by a vote of 150 to 20.¹⁶ The bill came out of the Senate with a vote of 49 to 2.¹⁷ Governor Sonny Perdue signed the bill into law on April 9, 2004.¹⁸

As a result of the 2004 legislation, all payday lending in Georgia ceased, greatly affecting the payday industry.¹⁹ Advance America, the nation's largest payday lender, closed eighty-nine stores in Georgia that produced \$19.9 million of income in 2003 alone.²⁰ At least two companies in south Georgia were convicted for RICO violations under the 2004 legislation.²¹ However, payday loan advocates claim that another result of the legislation is that over 500,000 Georgians cross into South Carolina, Tennessee, Alabama, and Florida each year to obtain payday loans.²²

In 2007, O.C.G.A. § 16-17-1 *et seq.* was constitutionally challenged by two individuals who were charged and convicted of violating the prohibition on payday loans.²³ The challengers asserted that the payday lending law was an unconstitutional violation of equal protection because the law "grants explicit exemptions to out-of-state banks that make payday loans in Georgia."²⁴ The Georgia Supreme Court upheld the law against the equal protection challenge because the statute satisfied the "rational relationship" test: the classification bore "an obvious and direct relation to the legitimate object or purpose of the legislation."²⁵

15. See Electronic Mail Interview with Rep. Steve Tumlin (R-38th) (May 9, 2007) [hereinafter Tumlin Interview].

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

17. Georgia Senate Voting Record, SB 157 (Mar. 4, 2004).

18. See Georgia General Assembly Voting Record, http://www.legis.state.ga.us/legis/2003_04/sum/sb157.

19. See Carrie Teegardin, *Payday Lenders Hope to Return*, ATLANTA J.-CONST., Mar. 18, 2007, at A1, available at 2007 WLNR 5098949.

20. *Id.*

21. Video Recording of Banking and Finance Committee Meeting, Feb. 22, 2007 at 46 min., 27 sec. (remarks by District Attorney Joe Mulholland), http://www.legis.state.ga.us/legis/2007_08/house/Committees/banks/b&bArchives.htm [hereinafter Committee Video].

22. See Jabo Covert, Editorial, *Tight Rules Make Case for Short-Term Cash Advances*, ATLANTA J.-CONST., Mar. 1, 2007, at A19, available at 2007 WLNR 3904576.

23. See *Glenn v. State*, 644 S.E.2d 826 (Ga. 2007).

24. *Id.* at 28.

25. *Id.*

Seeing the 2004 legislation as “overkill,” Representative Steve “Thunder” Tumlin (R-38th) responded to requests of the payday industry and introduced House Bill 163.²⁶ HB 163 would highly regulate the payday lending industry and provide a loan option for those with insufficient credit.²⁷ This legislation was the first bill introduced involving payday lending since the passage of the 2004 Act.²⁸ HB 163 took a tumultuous road that included fierce debate from Democrats, Republicans, an Insurance Commissioner, and even a popular radio talk show host.²⁹

The bill brought together an unlikely group of sponsors, including both the chairman of the House Rules Committee, Representative Earl Ehrhart (R-36th), and the chairman of the Georgia Legislative Black Caucus, Representative Al Williams (D-165th).³⁰ Proponents of the bill wanted to allow the payday industry to return to Georgia but with strict regulations for both licensing and the terms of each loan.³¹ Opponents included Georgia Insurance Commissioner John Oxendine, who called payday loans “economic servitude,”³² and consumer talk show host Clark Howard, who stated that payday loans put “people into an economic ghetto.”³³ Jabo Covert, a lobbyist for Check Into Cash, one of the premier payday loan companies, countered that Georgia citizens were seeking payday loans out of state and that the bill would provide for unforeseen circumstances that Georgians may encounter.³⁴

26. See Committee Video, *supra* note 21, at 4 min., 52 sec. (remarks by Rep. Steve Tumlin (R-38th)); Teegardin, *supra* note 9.

27. See Tumlin Interview, *supra* note 15.

28. *Id.*

29. See Video Recording of House Floor Debate, Mar. 20, 2007 at 1 hr., 56 min., 44 sec. (remarks by Rep. Georganna Sinkfield (D-60th)), http://www.georgia.gov/00/article/0,2086,4802_72682804,00.htm [hereinafter House Video] (opposing payday lending); *id.* at 2 hr., 8 min., 45 sec. (remarks by Rep. Al Williams (D-165th)) (supporting payday lending); *id.* at 2 hr., 6 min., 28 sec. (remarks by Rep. Clay Cox (R-102nd)) (supporting payday lending); Committee Video, *supra* note 21, at 51 min., 55 sec. (remarks by talk show host and consumer advocate Clark Howard) (opposing payday lending).

30. See Teegardin & Hardie, *supra* note 14.

31. Committee Video, *supra* note 21, at 6 min. 13 sec. (remarks by Rep. Steve Tumlin (R-38th)).

32. See Carrie Teegardin & Ann Hardie, *Oxendine Calls Payday Loans “Servitude,” Insurance Chief Says Deal on Bill Rejected*, ATLANTA J.-CONST., Jan. 30, 2007, at D4, available at 2007 WLNR 1762004.

33. See Committee Video, *supra* note 21, at 52 min., 42 sec. (remarks by Clark Howard).

34. *Id.* at 1 hr., 1 min., 27 sec. (remarks by Jabo Covert, lobbyist for Check Into Cash).

Bill Tracking

Consideration by the House

Representatives Steve Tumlin (R-38th), Al Williams (D-165th), Don Wix (D-33rd), Bobby Franklin (R-43rd), Earl Erhart (R-36th), and Mark Williams (R-178th) sponsored HB 163.³⁵ Representative Erhart sponsored the bill in part because he believed payday lenders were pushed out of the state in 2004 for the wrong reasons.³⁶ He said the passage of the 2004 law prohibiting payday lending in Georgia was a result of “a desire by the state’s finance companies to push out the competition” rather than a desire to protect consumers.³⁷ Some proponents of the bill thought the 2004 prohibition went too far when it prohibited lending by “reputable companies that require customers to prove they hold a job and bank account.”³⁸

The House first read HB 163 on January 5, 2007.³⁹ The House read the legislation for a second time on January 26, 2007.⁴⁰ The bill was assigned to the House Banks and Banking Committee.⁴¹

On February 15, 2007, the Legislative Black Caucus voted amongst itself to oppose HB 163.⁴²

On February 22, 2007, the Banks and Banking Committee voted 17 to 11 in favor of the measure to allow payday lenders to return to Georgia.⁴³ The Committee also approved an amendment that would require customers to wait five days, instead of two, after paying off

35. HB 163, as introduced, 2006 Ga. Gen. Assem.

36. See Teegardin, *supra* note 13; see also *Georgians Suffering Higher Interest and Fees from Small, Storefront GILA Operators*, PR NEWswire, March 13, 2007 at 16:45:00, available at 3/13/07 PR Newswire 16:45:00 (Westlaw).

37. See Teegardin, *supra* note 13.

38. See *Ga. House Refuses to Repeal Ban on Payday Lending*, ASSOCIATED PRESS ALERT, March 21, 2007, available at 3/21/07 APALERTGA 03:46:08 (Westlaw).

39. State of Georgia Final Composite Status Sheet, HB 163, June 5, 2007.

40. *Id.*

41. *Id.*

42. See *Georgia State Senator Vincent Fort, State Senator Praises Legislative Black Caucus Decision on Predatory Lending*, U.S. ST. NEWS, Feb. 18, 2007, available at 2007 WLNR 7624875.

43. See Committee Video, *supra* note 21, at 1 hr., 50 min., 44 sec. (remarks by Rep. James Mills (R-25th)).

one loan before taking out another loan.⁴⁴ That Committee favorably reported HB 163, by substitute, on February 27, 2007.⁴⁵

An emotional debate ensued after Representative Tumlin introduced the bill to the House on March 20, 2007.⁴⁶ Representative Rob Teilhet (D-40th) argued that the bill would be injurious to Georgians, noting that “[w]hat you are voting on is something that can best be characterized as an amnesty bill for racketeers.”⁴⁷ Opponents expressed worry about trapping consumers into endless cycles of loans with high interest rates, something commonly referred to as “loan flipping” or “the debt trap.”⁴⁸ Representative Virgil Fludd (D-66th) noted “[n]o matter how many revisions, no matter how many attempts to compromise . . . it still is a bad bill. It’s bad public policy. And I to submit to you that it is bad public policy to take advantage of Georgia consumers who are in a financial bind. It’s bad public policy to lock consumers into a long cycle of debt.”⁴⁹

Representative Ehrhart, one of the authors of the bill, maintained that the representatives should “trust the citizens of Georgia to promote their own freedom” by limiting the government and allowing Georgians to “exercise their own personal responsibility.”⁵⁰ Representative Tyrone Brooks (D-63rd) argued the bill would not allow abusive practices and that HB 163 would meet the need of many consumers who cannot get traditional bank loans.⁵¹

The bill failed to achieve a simple majority of 91 votes when it tied in the House by a vote of 84 to 84 on March 20, 2007.⁵² Representative Ehrhart immediately requested that the House

44. See Carrie Teegardin, *Vote Opens Door for Payday Loans, House Committee Approves Lending Bill*, ATLANTA J.-CONST., Feb. 23, 2007, at D1, available at 2007 WLNR 3526599.

45. State of Georgia Final Composite Status Sheet, HB 163, June 5, 2007.

46. See Carrie Teegardin, *House Deadlocks on Payday Loans; New Vote Sought*, ATLANTA J.-CONST., Mar. 21, 2007, at D1, available at 2007 WLNR 5332842.

47. See *id.*

48. See GA. WATCH, DON’T FIX WHAT AIN’T BROKE: THE PAYDAY LENDING BAN IN GEORGIA WORKS (2007) (on file with the Georgia State University Law Review) [hereinafter GA. WATCH]; see also Ann Hardie, *Legislature 2007: AG: Payday Lender Bill Lacks Teeth*, ATLANTA J.-CONST., Feb. 3, 2007, at B4, available at 2007 WLNR 2096601.

49. See House Video, *supra* note 29, at 2 hr., 58 min., 18 sec. (remarks by Rep. Virgil Fludd (R-66th)).

50. See *id.* at 3 hr., 27 min., 27 sec. (remarks by Rep. Earl Ehrhart (D-36th)).

51. See Teegardin, *supra* note 46.

52. State of Georgia Final Composite Status Sheet, HB 163, June 5, 2007.

reconsider the vote when the House next convened.⁵³ The motion to reconsider was passed by a vote of 99 to 61.⁵⁴ However, the same version of the bill failed in the House by a vote of 82 to 77 on March 27, 2007.⁵⁵

The Bill

The bill would have added Code section 7-9-1, giving the chapter the title of the “Deferred Presentment Services Act.”⁵⁶ Section 7-9-2 set out definitions for the terms found in the bill.⁵⁷

Section 7-9-3 required each payday lender to obtain a license. It also authorized the Department of Banking and Finance (“the department”) to create rules and regulations governing the application process and required each location operated by a single provider to be approved by the department.⁵⁸

Section 7-9-4 outlined the procedure for obtaining a license and the criteria for acceptance to operate a payday lending company.⁵⁹ The procedure required that the application be in writing and include: (1) all legal information such as name, address, and corporate information; (2) the registered agent’s name and address; (3) the location where the services will be provided; (4) any criminal record of any employee or applicant; (5) a surety bond of \$50,000 per location, not to exceed \$250,000; (6) an annual licensing fee of \$1,000 that must accompany the application and the licensing period begins July 1 of each year; (7) a sample form that consumers will fill out; and (8) a one-time, non-refundable investigation fee.⁶⁰ Further, an applicant was required to satisfy objective criteria for acceptance, including: (1) financial responsibility; (2) financial condition; (3) business experience; (4) character; and (5) general fitness

53. *See id.*; see also House Video, *supra* note 29, at 3 hr., 34 min., 31 sec. (remarks by Rep. Earl Ehrhart (R-36th)).

54. Georgia House of Representatives Voting Record, HB 163 (Mar. 27, 2007).

55. State of Georgia Final Composite Status Sheet, HB 163, June 5, 2007.

56. HB 163 (HCS), 2007 Ga. Gen. Assem.

57. *See id.*

58. *Id.*

59. *Id.*

60. *Id.*

requirements.⁶¹ The department was given the power to refuse or revoke a license if it found an applicant, employee, or 10% owner to have been convicted of a felony involving moral turpitude.⁶² If a licensee was found to knowingly employ someone against whom a final cease and desist order had been issued for violation of this law, then the department was authorized to revoke, suspend, or decline to grant their license.⁶³

Upon application, section 7-9-5 requires the commissioner to investigate whether the applicant had satisfied the requirements and, if the requirements are satisfied, to issue a one-year license that had to be conspicuously posted on each place of business.⁶⁴

Section 7-9-6 provided that if an applicant failed to comply with the prescribed requirements that the application be denied, subject to notice and a hearing.⁶⁵ The burden of proving entitlement rested on the applicant.⁶⁶ However, the commissioner was allowed to deny an application without hearing if a director, officer, manager, member, or shareholder of 10% or more was found to have a felony conviction involving moral turpitude or her license for payday lending suspended or revoked within the past five years.⁶⁷

The bill would have added Code section 7-9-7, which provided that a license issue was not transferable or assignable.⁶⁸ It also defined the term “control” and gave a procedure for requesting a change in control.⁶⁹ It further required written approval of the commissioner for continued operation whenever change in control of a licensee was proposed.⁷⁰ The commissioner could require more information that it deemed necessary whenever change in control was requested.⁷¹ A licensee was also required to notify the commission

61. *Id.*

62. HB 163 (HCS), 2007 Ga. Gen. Assem.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. HB 163 (HCS), 2007 Ga. Gen. Assem.

69. *Id.*

70. *Id.*

71. *Id.*

five days before making any changes in the licensee's business location or name.⁷²

Section 7-9-8 provided that within fifteen days of a license being denied or revoked in any state, any arrest or charge of felony, or any felony conviction, that the licensee must file a written report with the commission and that any of those may be grounds for revocation or suspension of the license.⁷³

Section 7-9-9 addressed renewal fees, providing for collections on previously made loans and fees if renewal were denied.⁷⁴

Section 7-9-10 would have placed the following requirements on payday lenders: compliance with any state or federal law regarding cash transactions; displaying the license in a conspicuous location; conspicuously displaying the toll-free number of a consumer counseling service in each location; maintaining books and records that the commissioner may require; posting notice of charges somewhere in the location; keeping books, accounts, and records for at least five years and maintaining those records separately from any other business the licensee may be engaged in; providing the following notice in a prominent place on each agreement in at least 10-point font: "A deferred presentment services transaction is not intended to meet long-term financial needs. A deferred presentment services transaction should be used only to meet short term cash needs."; and providing the following notice in at least 12-point boldface type: "State law prohibits deferred presentment services transactions exceeding \$750 total debt or 25% of your monthly gross income from any single deferred presentment services provider. Exceeding this amount may create financial hardships for you and your family. You have the right to rescind this transaction on or before the close of the next business day following this transaction."⁷⁵

Section 7-9-10 further would have required that each loan be signed by both the consumer and the provider.⁷⁶ The agreement was required to contain: (1) the name of the consumer; (2) the transaction

72. *Id.*

73. *Id.*

74. HB 163 (HCS), 2007 Ga. Gen. Assem.

75. *Id.*

76. *Id.*

date; (3) the amount of the check; (4) the annual percentage rate charged; and (5) a statement of the total amount of service fees charged, expressed as both a dollar amount and an APR.⁷⁷ However, the agreement could not contain: (1) a hold harmless clause; (2) a confession of judgment clause; (3) a mandatory arbitration clause that does not comply with the principles of the American Arbitration Association; (4) any provision where the consumer agrees not to assert any claim or defense against the lender; (5) any assignment of wages in order to pay for the service; or (6) any waiver by the consumer of anything in the Act.⁷⁸

Section 7-9-10 also specified that a transaction would be considered completed when the lender deposits the check or debits the consumers checking account.⁷⁹ After completion of a transaction the consumer was barred from entering into another transaction for five business days.⁸⁰ The section also limited a lender's service fee to \$15 per \$100 borrowed and gave consumers the right to rescind the loan, at no cost, on or before the close of the next business day.⁸¹ The section also conferred upon the maker of the check the right to redeem the check from the licensee before the date of presentment upon payment of the full amount in cash or the equivalent.⁸² The loan could be given to the borrower in the form of a business check, money order, debit, or cash.⁸³ A consumer could make partial payments under 7-9-12.⁸⁴ Before a check could be given to the borrower it was to be endorsed with the actual name of the business.⁸⁵ If a check were returned to the licensee from a bank due to a closed account or stop payment order then the licensee was allowed sue in civil court, though double damages were disallowed.⁸⁶ If a check were returned under 16-9-20, then the borrower could be subject to criminal penalties.⁸⁷

77. *Id.*

78. *Id.*

79. *Id.*

80. HB 163 (HCS), 2007 Ga. Gen. Assem.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. HB 163 (HCS), 2007 Ga. Gen. Assem.

87. *Id.*

Section 7-9-11 provided restrictions on licensed payday lending providers.⁸⁸ There were ten restrictions, the most noted being that the lender could not provide multiple concurrent loans to a single consumer.⁸⁹ In addition, a cap of the lesser of \$750 or 25% of the consumer's monthly gross income was placed on the value of the cash advance.⁹⁰ As introduced, the bill prohibited additional fees not authorized in Chapter 17.⁹¹ The substitute bill included a prohibition on any interest not authorized in Chapter 17 from being charged.⁹²

Further consumer protections in this section included a prohibition on rollovers and a prohibition from engaging in transactions with the active military personnel and their dependants.⁹³ The original bill made it illegal to *knowingly* offer or provide deferred presentment services or cash advances to active duty military personnel and their dependants,⁹⁴ but the substitute bill tightened the restriction by removing "knowingly" from the prohibition.⁹⁵ This was done to put pressure back on the lender to ensure the borrower is not a member of the military.⁹⁶

The bill would have added Code section 7-9-12.⁹⁷ This section provided further consumer protections including a provision requiring the lender to provide written notice of the consumer's right to a repayment plan if the consumer is unable to pay the amount owed under the transaction.⁹⁸ Further, the consumer was given the right to request, in writing on or before the due date of the transaction, a repayment plan at least once in a 12-month period, at no additional charge.⁹⁹ If the consumer requested a repayment plan, the consumer would have been required to repay the transaction in no more than four installments due on the consumer's next four pay

88. *Id.*

89. *Id.*

90. *Id.*

91. HB 163, as introduced, 2007 Ga. Gen. Assem.

92. HB 163 (HCS), 2007 Ga. Gen. Assem.

93. HB 163, as introduced, 2007 Ga. Gen. Assem.

94. *Id.*

95. HB 163 (HCS), 2007 Ga. Gen. Assem.

96. Committee Video, *supra* note 21, at 4 min., 24 sec. (remarks by Rep. Steve Tumlin (R-38th)).

97. *Id.*

98. *Id.*

99. *Id.*

dates.¹⁰⁰ During the time of the repayment plan, the consumer would have been prohibited from entering into another cash advance transaction with any other licensee.¹⁰¹ This prohibition included the seven days following the last payment.¹⁰²

Section 7-9-13 created procedures for apparent violations by those required to be licensed, as well as employees and agents of licensed payday lenders.¹⁰³ First, the Department had to issue a written order requiring the person to discontinue the unauthorized practice.¹⁰⁴ If the cease and desist order were made to an unlicensed person, the order was required to be final within thirty days without opportunity for a hearing.¹⁰⁵ However, the person would be given the opportunity to obtain a license within this time period, and if he did so, the order would be rescinded.¹⁰⁶ If the person did not obtain a license within the proscribed time period, then the order would be final within twenty days unless the recipient made a written request within those twenty days for a hearing.¹⁰⁷ This section further provided that if a licensed person, or their employee or agent, failed to comply with a properly issued cease and desist order, the Department of Banks and Banking could petition the court for a judicial order to compel their obedience.¹⁰⁸ The Department would have been required to first give three days notice to the person before filing the petition to give the person an opportunity to oppose the petition.¹⁰⁹ A violation of a cease and desist order could have created liability for a penalty not to exceed \$1,000 per day, with each day that the violation continues resulting in a separate offense.¹¹⁰ In determining the amount of penalty, the Department could have considered, *inter alia*, the lender's financial resources, good faith efforts to comply with the order, the gravity of the violation, and previous violations.¹¹¹ The

100. *Id.*

101. *Id.*

102. HB 163 (HCS), 2007 Ga. Gen. Assem.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. HB 163 (HCS), 2007 Ga. Gen. Assem.

109. *Id.*

110. *Id.*

111. *Id.*

penalty could be compromised, modified, or refunded at the discretion of the Department.¹¹² The penalty could also have been reviewed at a hearing within ten days of assessment and judicially reviewed in the Superior Court of Fulton County.¹¹³ Further, the Department could refund fees to consumers if the fees were not in compliance with Chapter 17.¹¹⁴

Section 7-9-14 would have allowed for resolution of matters arising under Chapter 17 via consent orders between the Commissioner of Banking and Finance and an authorized person.¹¹⁵ The section would have provided that if a party entered into a consent order with the commissioner, it would not necessarily constitute an admission of any violation of any rules, regulations, or orders put into effect by Chapter 17, nor would it necessarily establish a finding of such.¹¹⁶ The commissioner could still have imposed penalties or fines concerning matters encompassed by the consent order.¹¹⁷

Section 7-9-15 would have allowed consumers to file written complaints with the commissioner.¹¹⁸ The commissioner was required to investigate the complaint and would have the authority to subpoena witnesses administer oaths, examine witnesses under oath, and compel the production of any relevant documents.¹¹⁹ The commissioner could also have referred a situation to law enforcement authorities.¹²⁰ A licensee could have had his license suspended for failure to comply with a subpoena.¹²¹ Under this Code section, a consumer would have had the right to bring a cause of action for a violation of Chapter 17 and could have sought damages and reasonable attorney's fees and costs.¹²² Further, a court could have cancelled any transaction made in willful violation of the Code sections relating to deferred presentment services.¹²³ Additionally,

112. *Id.*

113. *Id.*

114. HB 163 (HCS), 2007 Ga. Gen. Assem.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. HB 163 (HCS), 2007 Ga. Gen. Assem.

121. *Id.*

122. *Id.*

123. *Id.*

any agreement where a consumer waived the rights and benefits afforded to him by the bill would have been void, with the exception that a consumer could waive the right to a trial by entering into an arbitration agreement.¹²⁴

The bill would have added Code section 7-9-16, permitting the commissioner to examine the business books and records of both a licensee and a person suspected of conducting business which requires a payday lending license.¹²⁵ In doing so, the commissioner would be permitted to charge an examination fee.¹²⁶ Again, the commissioner would have been given the authority to subpoena witnesses and documents and examine individuals under oath.¹²⁷ The substitute bill added that if a licensee obstructed an investigation, the license could be suspended or revoked.¹²⁸

Section 7-9-17 would have required a licensee to file an annual report and license renewal application.¹²⁹ The report would have been required to contain, *inter alia*, the contact information for the corporate officers and directors, partners or the limited liability company's board of governors; the contact information of affiliated entities and persons owning a controlling interest in each licensee; and the location and nature of business of all places operated by the licensee.¹³⁰ The substitute bill deleted the requirement that the report must contain balance sheets, income and expense statements and other accounting information.¹³¹

Section 7-9-18 would have authorized the Department to charge a licensing fee and to assess fines.¹³² Costs incurred above the routine application and renewal process could have been charged to the applicant or licensee.¹³³ These changes were added in the substitute bill.¹³⁴ This section also provided that all penalties and fines

124. *Id.*

125. *Id.*

126. HB 163 (HCS), 2007 Ga. Gen. Assem.

127. *Id.*

128. *Id.*

129. *Id.*

130. HB 163, as introduced, 2007 Ga. Gen. Assem.

131. HB 163 (HCS), 2007 Ga. Gen. Assem.

132. *Id.*

133. *Id.*

134. Compare HB 163(HCS), 2007 Ga. Gen. Assem. with HB 163, as introduced, 2007 Ga. Gen. Assem.

recovered by the department were to be paid into the state treasury's general fund.¹³⁵

Section 7-9-19 would have allowed the commissioner to promulgate rules and regulations.¹³⁶ The substitute bill further provided that the commissioner was authorized to set reasonable fees and fines for violations of the Deferred Presentment Services Act.¹³⁷

Section 7-9-20 provided that if any provision in the Act were to be found invalid then the Act was to be enforced without the invalid provision.¹³⁸ Section 7-9-21 provided that the Act was superior to any other state statutes with which it conflicted.¹³⁹ The bill then would have repealed Code section 16-17-1 so that payday lending would no longer be prohibited.¹⁴⁰

The bill would have amended Code section 16-17-2, adding the word "unlicensed" wherever a lender is mentioned so that criminal penalties only apply to unlicensed lenders.¹⁴¹

The bill would have amended Code section 16-17-7 which previously prohibited business entities engaged in payday lending from obtaining any certificate of authority.¹⁴² As a result, the amended section placed the prohibition solely on unlicensed business entities.¹⁴³ While engaging in payday lending would have previously resulted in the revocation of an existing certificate of authority, the amended section revoked an existing certificate of authority from an unlicensed business lender engaging in payday lending activity.¹⁴⁴

Finally, the bill would have amended Code section 16-17-8.¹⁴⁵ Whereas before any location where payday lending activity took place was a public nuisance, amended Code Section 16-17-8 would have made only a site or location occupied by an unlicensed payday lender a public nuisance.¹⁴⁶

135. HB 163 (HCS), 2007 Ga. Gen. Assem.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. HB 163 (HCS), 2007 Ga. Gen. Assem.

142. HB 163, as introduced, 2007 Ga. Gen. Assem.

143. HB 163 (HCS), 2007 Ga. Gen. Assem.

144. *Id.*

145. *Id.*

146. *Id.*

Analysis

The bill sought to legalize payday lending in Georgia.¹⁴⁷ This bill would prevent Georgia citizens from having to cross state lines or go on the internet to obtain short-term loans.¹⁴⁸ Although payday lending would be allowed, it would be highly regulated with rigorous restrictions and harsh penalties for violators.¹⁴⁹

The bill may have increased the workload for the Department of Banking and Finance (the “Department”), as it required extensive paperwork for a lender to obtain a license.¹⁵⁰ It required a lender to submit an application including corporate information, registered agent, location, criminal record of employees and applicant, and a sample customer application form.¹⁵¹ The Department would have scrutinized all of this data in order to determine if the lender met the requirements for a payday lender in Georgia.¹⁵² The Department would also take into account the potential lender’s financial responsibility, financial condition, business experience, character, and general fitness.¹⁵³ In order to fulfill all these requirements the Department would need an increased budget and increased personnel. However, the bill did not provide increased funding for the Department or for enforcement.¹⁵⁴ This could have resulted in minimal oversight and enforcement, thus eliminating important consumer protections desired by the drafters.

The bill also gave power over the arbitration guidelines to the American Arbitration Association.¹⁵⁵ The bill stated that if a loan contract contains a mandatory arbitration clause, the clause must comply with the principles of the National Consumer Dispute Advisory Committee of the AAA.¹⁵⁶ However, the AAA’s standards are vague: the AAA says the rules must be “reasonable,” but fails to

147. Teegardin, *supra* note 13.

148. Tumlin Interview, *supra* note 15.

149. *Id.*

150. See HB 163 (HCS), 2007 Ga. Gen. Assem.

151. *Id.*

152. See *id.*

153. See *id.*

154. See *id.*

155. *Id.*

156. HB 163 (HCS), 2007 Ga. Gen. Assem.

define “reasonable.”¹⁵⁷ This provision took control of arbitration guidelines out of the hands of Georgia lawmakers and put it under the control of a private company.¹⁵⁸

Additionally, little in the bill “regulates the activity of the borrower, just the lender.”¹⁵⁹ The bill mandated that a consumer cannot obtain a new loan until the fifth day following the completion of the original loan.¹⁶⁰ This could create a problem because a consumer could have paid off a loan with one lender but have other loans with other lenders, possibly leading his original lender to violate the five-day waiting period.¹⁶¹ There is no way to prevent the consumer from getting a payday loan from one vendor and then going down the street to get another loan from another vendor.¹⁶² According to Consumer Advocates, this fails to protect the consumer from going deeper and deeper into debt.¹⁶³ Although Section 7-9-11 would prohibit a licensed lender from allowing any consumer to have multiple transactions from the same payday lender, nothing in the bill prohibits a consumer from simultaneously borrowing from multiple lenders.¹⁶⁴ Representative Georganna Sinkfield (D-60th) expressed concern that there was not a provision in the bill that required the payday lender to know how many loans the borrower has with other lenders.¹⁶⁵ Representative Steve Tumlin (R-38th) noted, however, “we can regulate the lender, but we can’t necessarily regulate the borrower.”¹⁶⁶ In Florida, borrowers are prohibited from having more than one loan at a time.¹⁶⁷ This prohibition on multiple loans is monitored by a statewide database.¹⁶⁸ However, even with this in

157. Budnitz Interview, *supra* note 3.

158. *Id.*

159. See Committee Video, *supra* note 21, at 34 min., 3 sec. (remarks by Rep. Steve Tumlin (R-38th)).

160. HB 163 (HCS), 2007 Ga. Gen. Assem.

161. See Committee Video, *supra* note 21, at 33 min., 55 sec. (remarks by Rep. Darryl Jordan (D-77th)).

162. Budnitz Interview, *supra* note 3.

163. *Id.*

164. HB 163, as introduced, 2007 Ga. Gen. Assem.

165. Committee Video, *supra* note 21, at 18 min., 55 sec. (remarks by Rep. Georganna Sinkfield (D-60th)).

166. *Id.* at 20 min., 13 sec. (remarks by Rep. Steve Tumlin (R-38th)).

167. Teegardin, *supra* note 19.

168. *Id.*

place, Florida consumers borrowed an average of eight payday loans in a twelve-month period from September 2005 to August 2006.¹⁶⁹

The bill also would have given the consumer the right to rescind the loan before the end of the next business day.¹⁷⁰ The rationale behind giving one day to rescind was that the rescission period represents a substantial percentage (roughly 3%) of the entire 31-day loan period.¹⁷¹ However, “rescind” is a vague and obscure term.¹⁷² Other similar statutes give a right to “cancel,” which is more understandable for the average consumer.¹⁷³ The lack of clarity in the term “rescind” would make it less likely for consumers to exercise their right to rescind.¹⁷⁴ Therefore, the “rescind” language did not adequately advise the consumer of his or her right to cancel the payday loan before the next business day.

One of the most hotly contested issues regarded the annual percentage rate (APR) of payday loans.¹⁷⁵ The federal Truth-in-Lending Act requires that payday loans be expressed in terms of APR.¹⁷⁶ Short-term payday loans typically exceed 300% in annual terms.¹⁷⁷ For example, a \$300 loan extended for two weeks would carry with it a maximum \$45 finance charge, which would compute to an APR of 391%.¹⁷⁸ If the borrower took out the same loan for one business week, the APR would be 1095%.¹⁷⁹ The state has a usury limit of 60%, but the bill would allow payday loans to escape this cap.¹⁸⁰ Proponents of the bill said that the “APR is irrelevant” because the loans would never last a year.¹⁸¹ However, Representative Mary Margaret Oliver (D-83rd) disagreed, arguing

169. *Id.*

170. HB 163 (HCS), 2007 Ga. Gen. Assem.

171. See Committee Video, *supra* note 21, at 23 min., 31 sec. (remarks by Rep. Steve Tumlin (R-38th)).

172. Budnitz Interview, *supra* note 3.

173. *Id.*

174. *Id.*

175. See, e.g., House Video, *supra* note 29, at 2 hr., 24 min., 16 sec. (remarks by Rep. Mary Margaret Oliver (D-83rd)); *id.* at 2 hr., 36 min., 2 sec. (remarks by Rep. Carolyn Hugley (D-133rd)).

176. See GA. WATCH, *supra* note 48.

177. See Teegardin, *supra* note 13.

178. See *id.*

179. See Maureen Downey, *Our Opinions: Don't Get Bled Again*, ATLANTA J.-CONST., Mar. 26, 2007, at A12, available at 2007 WLNR 5639299.

180. See *id.*

181. See Teegardin, *supra* note 9.

that the General Assembly was “about to vote on a piece of legislation that create[d] a loop hole to Georgia’s criminal usury rate” which is capped at 60%.¹⁸² In spite of the high APR, a payday loan may be a better alternative than writing a bounced check for which the APR equivalent can exceed 1300%, or incurring a credit card late fee charge which can reach 700%.¹⁸³

Proponents of HB 163 touted the consumer protections that the bill offered.¹⁸⁴ Such protections included penalties for lenders’ violations, renewal prohibitions, limits on the number of outstanding loans, repayment plans, and a military lending prohibition. However, the protections were a point of great contention, with opponents pointing out numerous loopholes.¹⁸⁵ Consumer advocate Clark Howard expressed his disdain for the bill by calling it, “17 pages of garbage.”¹⁸⁶ Some critics have characterized the \$1000 penalty for violations of this law as simply the “cost of doing business,” suggesting that it does not provide enough incentive to obey the provisions of the law.¹⁸⁷ Representative Bob Holmes (D-61st) argued that there should be stricter penalties, such as automatic loss of license for violations, stating “that [such a loss] would be much more effective a deterrent” than a fine.¹⁸⁸ However, proponents of payday lending assert that publicly traded payday lending companies would not risk a \$1000 fine for a \$30 profit.¹⁸⁹

Another consumer protection is the option of requesting a repayment plan.¹⁹⁰ If a consumer were not able to make his payment when due, the bill would have allowed him to request a repayment plan at no additional cost.¹⁹¹ Before payday lending was made illegal in 2004, repayment plans did not exist, resulting in consumers often

182. House Video, *supra* note 29, at 2 hr., 24 min., 16 sec. (remarks by Rep. Mary Margaret Oliver (D-83rd)).

183. See Editorial, *supra* note 1.

184. See, e.g., Committee Video, *supra* note 21, at 4 min., 24 sec. (remarks by Rep. Steve Tumlin (R-38th)); House Video, *supra* note 29, at 1 hr., 53 min., 29 sec. (remarks by Rep. Steve Tumlin (R-38th)).

185. See, e.g., Committee Video, *supra* note 21, at 46 min., 4 sec. and 40 min., 35 sec. (remarks by District Attorney Joe Mulholland).

186. See Downey, *supra* note 179.

187. See Hardie, *supra* note 48.

188. See Committee Video, *supra* note 21, at 25 min., 0 sec. (remarks by Rep. Bob Holmes (D-61st)).

189. See *id.* at 1 hr., 2 min., 46 sec. (remarks by Jabo Covert, lobbyist).

190. HB 163, § 1, as introduced, 2007 Ga. Gen. Assem.

191. See GA. WATCH, *supra* note 48.

renewing loans with new fees, “creating endless cycles of debt for borrowers.”¹⁹² However, there is evidence that many consumers often do not elect the repayment plan. For example, in Oklahoma less than 0.5% of transactions employ a repayment plan, and in Washington less than 0.8% of transactions employ the repayment plan.¹⁹³ Representative Randy Nix (R-69th), questioning the ability to repay a loan, asked, “What’s going on [that is] different in ninety days than it is today?”¹⁹⁴ Less than 1% of payday loans are repaid on time.¹⁹⁵ Although consumer advocates note that it is not realistic to expect “struggling borrowers” to repay a loan by the next payday, the bill would have allowed for repayment in four installments over the next four pay dates.¹⁹⁶ The repayment plan is a consumer protection because there are no additional fees or interest charges for using the repayment plan.

Code Section 7-9-11 contained a consumer protection prohibiting a renewal or roll over loan.¹⁹⁷ A renewal or roll over loan is a loan that is extended past the original payment due date with a new fee.¹⁹⁸ To make it more difficult for borrowers to roll over their loans, the section also placed a seven-day cool-off period between transactions, prohibiting back-to-back loans.¹⁹⁹ However, this protection would not have completely avoided the debt trap since a borrower is still able to re-borrow money before the next payday.²⁰⁰ Statistics show that two-thirds of payday revenues come from consumers who take out twelve or more loans in a 12-month period.²⁰¹ However, Jabo Covert, a lobbyist for Check Into Cash, noted that often he will see a customer use a deferred presentment services loan six times out of a total of twenty-six pay periods in the course of a year, but after that, the

192. Teegardin, *supra* note 9.

193. See GA. WATCH, *supra* note 48 (citing VERITEC SOLUTIONS, LLC, OKLAHOMA DEFERRED DEPOSIT PROGRAM: OKLAHOMA TRENDS IN DEFERRED DEPOSIT LENDING (2006), http://www.veritecs.com/OK_Trends_Aug_2006.pdf, and WASH. STATE DEP’T OF FIN. INSTS., PAYDAY LENDING REPORT (2005), http://www.dfi.wa.gov/cs/pdf/2005_payday_report.pdf).

194. See Committee Video, *supra* note 21, at 1 hr., 21 min. (remarks by Rep. Randy Nix (R-69th)).

195. See Allison Wall, *Share Your Viewpoint: This is Viewpoints for Thursday*, MACON TELEGRAPH, at A7, available at 2007 WLNR 4848246.

196. See Teegardin, *supra* note 13.

197. HB 163, as introduced, 2007 Ga. Gen. Assem.

198. GA. WATCH, *supra* note 48.

199. HB 163, as introduced, 2007 Ga. Gen. Assem.

200. See GA. WATCH, *supra* note 48.

201. See Downey, *supra* note 179.

borrower does not come back.²⁰² Mr. Covert labeled these borrowers “intermittent users” who often have something occurring during that period, such as an illness, reduction in pay, or a divorce.²⁰³ While on its face prohibiting roll overs appears to be a consumer protection, this protection lacks teeth because a consumer can borrow from a different payday lender within the cool-off period or even on the same day as the original loan.

Section 7-9-11 would have prohibited providing deferred presentment services transactions to members of the military.²⁰⁴ Congress has put a nation-wide cap of 36% on the annual percentage rate paid by military personnel.²⁰⁵ However, this consumer protection may have prompted many opponents of the bill to question the logic behind the provision; as Insurance Commissioner John Oxendine asked: “Does that mean it’s OK to rip off regular, civilian hardworking people? . . . It’s bad for fighting men and women and their spouses and family members, but it’s OK for you and me?”²⁰⁶ Many soldiers in Georgia turn to payday loans because, unlike civilians, they cannot take on a second job or work overtime to meet their financial needs.²⁰⁷ However, the Community Financial Services Association points out that consumer groups have never been able to prove that payday lenders target the military.²⁰⁸ But it is not just soldiers who turn to neighboring states for the cash advances they can no longer get in Georgia since the prohibition on payday lending passed in 2004. District Attorney Joe Mulholland noted that the elderly, blue-collar workers and college students are often targeted.²⁰⁹

Even so, those in favor of removing the prohibition on payday lending in Georgia cite to consumer choice as the biggest reason for

202. See Committee Video, *supra* note 21, at 1 hr., 17 min., 48 sec. (remarks by Jabo Covert, lobbyist).

203. See *id.*

204. HB 163, as introduced, 2007 Ga. Gen. Assem. It also prohibits providing such services to the dependants of members of the military. See *id.*

205. See Downey, *supra* note 179.

206. See *id.*

207. See Laura Youngs, *On the Prowl, Military Personnel Often Become Easy Mark for Predatory Lenders*, ATLANTA J.-CONST., Dec. 10, 2006, at D1, available at 2006 WLNR 23446598.

208. See *id.*

209. See Downey, *supra* note 179.

supporting the bill.²¹⁰ Representative Earl Ehrhart (R-36th) favored “limit[ing] the government, [and] accept[ing] that people want to exercise their own personal responsibility.”²¹¹

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210. See, e.g., House Video, *supra* note 29, at 3 hr., 20 min., 47 sec. (remarks by Rep. Mable Thomas (D-55th)).

211. See *id.* at 3 hr., 27 min., 27 sec. (remarks by Rep. Earl Ehrhart (R-36th)).

