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COMMERCE AND TRADE Selling and Other Trade Practices: Provide for Civil Remedies and Criminal Penalties in Cases of Intentional Theft While Engaged in Telemarketing, Internet, or Other Computerized Activities; Provide for Investigation and Enforcement Authority

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COMMERCE AND TRADE

Selling and Other Trade Practices: Provide for Civil Remedies and Criminal Penalties in Cases of Intentional Theft While Engaged in Telemarketing, Internet, or Other Computerized Activities; Provide for Investigation and Enforcement Authority

CODE SECTIONS:	O.C.G.A. §§ 10-1-393.5 (new), -399, 10-5B-6, 16-8-12 (amended)
BILL NUMBER:	HB 1400
ACT NUMBER:	611
GEORGIA LAWS:	1996 Ga. Laws 231
SUMMARY:	The Act addresses theft committed while engaged in telemarketing or activity on any computerized system that utilizes a computer and a modem. It provides for criminal penalties, as well as civil or equitable remedies by individuals. The Act authorizes double civil and criminal penalties for such unlawful activities targeted at elderly or disabled persons. Under the Act, telemarketing investigators are designated as certified peace officers, with all associated enforcement powers.
EFFECTIVE DATE:	April 1, 1996[1]

History

Telemarketing fraud consistently ranks as one of the top three consumer problems in every state in the country.[2] Approximately $500,000,000 is lost to telemarketing fraud each year in Georgia.[3]

Prior to the passage of the Act, Georgia's laws provided criminal penalties for deceptive, fraudulent, or abusive telemarketing.[4] However, these provisions applied only in the context of charitable solicitations, securities, commodities, and certain utility contracting and

1. The Act became effective upon approval by the Governor.
2. Telephone Interview with Jim Hurt, Georgia Governor's Office of Consumer Affairs (May 3, 1996) [hereinafter Hurt Interview].
3. *Id.*; Record of Proceedings in the Senate Finance and Public Utilities Committee (Feb. 21, 1996) (remarks by Lewis Massey, Georgia Secretary of State) (available in Georgia State University College of Law Library).
4. 1994 Ga. Laws 536 (codified at O.C.G.A. §§ 10-5B-1 to -8 (1994)).

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plumbing activities.[5] The Secretary of State's Office and the Governor's Office of Consumer Affairs shared jurisdiction over these matters, and the Georgia Elder Consumer Action Program (GCAP) investigated telemarketing fraud against the elderly for possible civil action.[6]

The bill was a joint effort between the Secretary of State's Office and the Governor's Office of Consumer Affairs and was sponsored by Representative Sonny Watson.[7] It was intended to address the true scope of unlawful telemarketing activity, to provide penalties consistent with the severity of the offense, and to enhance enforcement mechanisms.[8]

HB 1400

Definitions

The Act amends the Fair Business Practices Act[9] by adding Code section 10-1-393.5.[10] The definition of an "unlawful, unfair, and deceptive trade practice" is expanded to include "any offense involving theft . . . while engaging in telemarketing or while engaging in any activity on the internet or any similar computerized system which individuals connect to by use of a computer and a modem."[11]

The Act defines "telemarketing" using the definition provided in the Code of Federal Regulations under the Telemarketing Sales Rule of the Federal Trade Commission.[12] For purposes of Georgia law, however, the definition adds telephone calls made in intrastate as well as interstate commerce.[13]

Remedies and Penalties

Previously, Code section 10-1-399 of the Fair Business Practices Act provided only for civil and equitable remedies for individuals injured by deceptive or unfair practices.[14] The Act amends this section and

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5. *Id.* at 538 (codified at O.C.G.A. § 10-5B-3 (1994)).
6. Hurt Interview, *supra* note 2.
7. *Id.*; Telephone Interview with Rep. Sonny Watson, House District No. 139 (May 1, 1996).
8. Hurt Interview, *supra* note 2.
9. 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-390 (1994)).
10. O.C.G.A. § 10-1-393.5 (Supp. 1996).
11. *Id.* § 10-1-393.5(b).
12. *Id.* § 10-1-393.5(a). Telemarketing is defined as "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." 16 C.F.R. § 310.2(u) (1996).
13. O.C.G.A. § 10-1-393.5(a) (Supp. 1996).
14. 1987 Ga. Laws 794, § 3, at 796 (formerly found at O.C.G.A. § 10-1-399(a) (1994)).

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extends its scope to include remedies for violations of the new Code section, as well as violations of chapter 5B of title 10, the previously existing provisions that addressed deceptive, abusive, or fraudulent telemarketing.[15]

Prior to the passage of the Act, the only criminal penalties imposed were associated with violations of chapter 5B of title 10, which were punishable by a fine of not more than $50,000 and imprisonment for one to five years.[16] The Act toughens the criminal penalties in response to the "viciousness" of the fraudulent telemarketing activity that occurs in Georgia.[17]

The Act amends chapter 8 of title 16 of the Code, regarding criminal offenses involving theft, to provide these criminal penalties.[18] Violations of the new Code section, as well as violations of chapter 5B of title 10, are now punishable in the same manner as the theft of a motor vehicle or a motor vehicle part exceeding $100 in value.[19] Specifically, a first offense may be punished by imprisonment from one to twenty years, or in the same manner as a misdemeanor, at the trial judge's discretion.[20] A second offense may be punished by imprisonment for three to twenty years, and a third offense for ten to twenty years.[21] No portion of these sentences may be suspended, probated, deferred, or withheld.[22] The Act also subjects a person who intentionally targets an elder[23] or disabled[24] person to double the applicable civil and criminal penalties.[25]

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15. O.C.G.A. § 10-1-399(a) (Supp. 1996). *See generally id.* § 10-5B-6(b).

16. 1994 Ga. Laws 536, § 1, at 542 (formerly found at O.C.G.A. § 10-5B-6(a) (1994)).

17. Hurt Interview, *supra* note 2; Record of Proceedings in the Senate Finance and Public Utilities Committee (Feb. 21, 1996) (remarks by Barry Reid, Governor's Office of Consumer Affairs) (available in Georgia State University College of Law Library).

18. O.C.G.A. § 16-8-12(a)(4)(A) (1996). The nature of fraudulent telemarketing fits the definition of theft. Hurt Interview, *supra* note 2.

19. O.C.G.A. § 16-8-12(a)(4)(A) (1996). *See generally id.* §§ 10-1-393.5(c), 10-5B-6(a).

20. *Id.* § 16-8-12(a)(4)(A).

21. *Id.*

22. *Id.*

23. 1993 Ga. Laws 1092, § 2, at 1094 (codified at O.C.G.A. § 10-1-850(2) (1994)). An "elder person" is a person who is sixty years of age or older. *Id.*

24. *Id.* at 1093 (codified at O.C.G.A. § 10-1-850(1) (1994)). A "disabled person" is a person who has a physical or mental impairment which substantially limits one or more of such person's major life activities. *Id.*

25. O.C.G.A. §§ 10-1-393.5(d), 10-5B-6(c) (Supp. 1996). The trial judge has the discretion to double the penalties if he or she deems it appropriate. Hurt Interview, *supra* note 2.

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Investigation and Enforcement

The Act requires that full- and part-time employees conducting telemarketing investigations be designated as certified peace officers.[26] These investigators must complete the training required for peace officers[27] and are then fully empowered to enforce the new Code section, including the power to execute search warrants and to carry firearms.[28]

This aspect of the Act is a response to the need for more effective and efficient investigation.[29] Cases of fraudulent telemarketing are difficult to investigate and had not been a high enough priority for criminal authorities to dedicate resources necessary to combat the problem.[30] As peace officers, telemarketing investigators can conduct both civil and criminal investigations simultaneously and can forward cases that warrant criminal action to the District Attorney.[31]

Lynn E. Stapleton

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26. O.C.G.A. § 10-1-393.5(e) (Supp. 1996). In this context, a peace officer is:

> An agent, operative, or officer of this state, a subdivision or municipality thereof, or a railroad who, as an employee for hire or as a volunteer, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws through the power of arrest and whose duties include the preservation of public order, the protection of life and property, and the prevention, detection, or investigation of crime.

1995 Ga. Laws 1238 (codified at O.C.G.A. § 35-8-2(8)(A) (Supp. 1995)). Requirements for appointment or certification as a peace officer are enumerated in 1976 Ga. Laws 1563, § 1, at 1563-64 and 1977 Ga. Laws 1180, § 1, at 1181 (codified at O.C.G.A. § 35-8-8 (1993)).

27. 1988 Ga. Laws 1063 (codified at O.C.G.A. § 35-8-21 (1993)). During each calendar year, a peace officer must complete twenty hours of training sessions approved or recognized by the Georgia Peace Officer Standards and Training Council. *Id.*

28. O.C.G.A. § 10-1-393.5(e) (Supp. 1996).

29. Hurt Interview, *supra* note 2.

30. *Id.*

31. *Id.*

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