

The House Committee on Banks & Banking offered the following substitute to SB 157:

A BILL TO BE ENTITLED
AN ACT

1 To amend Code Section 7-3-29 of the Official Code of Georgia Annotated, relating to
2 penalties for violations of the "Georgia Industrial Loan Act," so as to allow class actions to
3 be brought against unlicensed lenders; to amend Title 16 of the Official Code of Georgia
4 Annotated, relating to crimes and offenses, so as to include payday lending in the definition
5 of racketeering activity; to declare a legislative intent to prohibit activities commonly
6 referred to as payday lending, deferred presentment services, or advance cash services and
7 other similar activities; to strengthen and increase the criminal and civil penalties therefor;
8 to void payday lending loans; to declare that forum selection clauses in payday lending
9 contracts are unenforceable in Georgia; to provide that it shall be unlawful to engage in the
10 business of making certain small loans; to provide for exemptions for licensed and regulated
11 activities; to provide for an oversight committee; to define crimes and declare penalties; to
12 provide for civil remedies of borrowers; to provide for civil penalties; to provide for
13 collection of civil penalties in actions by the state or by private parties; to declare a tax on
14 profits from payday loans; to declare sites or locations on which payday lending is taking
15 place to be public nuisances; to provide disclosure and notice requirements regarding loans
16 made to members of the military; to provide for related matters; to provide an effective date;
17 to repeal conflicting laws; and for other purposes.

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

19 style="text-align:center">**SECTION 1.**

20 Code Section 7-3-29 of the Official Code of Georgia Annotated, relating to penalties for
21 violations of the "Georgia Industrial Loan Act," is amended by striking subsection (e) and
22 inserting in its place the following:

23 "(e) A claim of violation of this chapter against a duly licensed lender may be asserted in
24 an individual action only and may not be the subject of a class action under Code Section
25 9-11-23 or any other provision of law. A claim of violation of this chapter against an

1 unlicensed lender may be asserted in a class action under Code Section 9-11-23 or any
 2 other provision of law."

3 **SECTION 2.**

4 Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, is
 5 amended in Code Section 16-14-3, relating to definitions concerning racketeer influenced
 6 organizations, by striking divisions (9)(A)(xxxvi) and (9)(A)(xxxvii) and inserting in lieu
 7 thereof the following:

8 "(xxxvi) Article 8 of Chapter 9 of this title, relating to identity fraud, and Section
 9 1028 of Title 18 of the United States Code, relating to fraudulent identification
 10 documents and information; ~~or~~
 11 (xxxvii) Code Section 33-1-9, relating to insurance fraud; or
 12 (xxxviii) Code Section 16-17-2, relating to payday loans."

13 **SECTION 3.**

14 Said title is further amended by adding a new Chapter 17 to read as follows:

15 "CHAPTER 17

16 16-17-1.

17 (a) Without limiting in any manner the scope of this chapter, 'payday lending' as used in
 18 this chapter encompasses all transactions in which funds are advanced to be repaid at a
 19 later date, notwithstanding the fact that the transaction contains one or more other elements
 20 and a 'payday lender' shall be one who engages in such transactions. This definition of
 21 'payday lending' expressly incorporates the exceptions and examples contained in
 22 subsections (a) and (b) of Code Section 16-17-2.

23 (b) Despite the fact that the Attorney General of the State of Georgia has opined in
 24 Official Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of
 25 Georgia law and despite the fact that the Industrial Loan Commissioner has issued cease
 26 and desist orders against various payday lenders in the State of Georgia, the General
 27 Assembly has determined that payday lending continues in the State of Georgia and that
 28 there are not sufficient deterrents in the State of Georgia to cause this illegal activity to
 29 cease.

30 (c) The General Assembly has determined that various payday lenders have created certain
 31 schemes and methods in order to attempt to disguise these transactions or to cause these
 32 transactions to appear to be 'loans' made by a national or state bank chartered in another
 33 state in which this type of lending is unregulated, even though the majority of the revenues

1 in this lending method are paid to the payday lender. The General Assembly has further
2 determined that payday lending, despite the illegality of such activity, continues to grow
3 in the State of Georgia and is having an adverse effect upon military personnel, the elderly,
4 the economically disadvantaged, and other citizens of the State of Georgia. The General
5 Assembly has further determined that substantial criminal and civil penalties over and
6 above those currently existing under state law are necessary in order to prohibit this
7 activity in the State of Georgia and to cause the cessation of this activity once and for all.
8 The General Assembly further declares that these types of loans are currently illegal and
9 are in violation of Code Section 7-4-2. The General Assembly declares that the use of
10 agency or partnership agreements between in-state entities and out-of-state banks, whereby
11 the in-state agent holds a predominant economic interest in the revenues generated by
12 payday loans made to Georgia residents, is a scheme or contrivance by which the agent
13 seeks to circumvent Chapter 3 of Title 7, the 'Georgia Industrial Loan Act,' and the usury
14 statutes of this state.

15 (d) Payday lending involves relatively small loans and does not encompass loans that
16 involve interstate commerce and certain payday lenders have attempted to use forum
17 selection clauses contained in payday loan documents in order to avoid the courts of the
18 State of Georgia, and the General Assembly has determined that such practices are
19 unconscionable and should be prohibited.

20 (e) Without limiting in any manner the scope of this chapter, the General Assembly
21 declares that it is the general intent of this chapter to reiterate that in the State of Georgia
22 the practice of engaging in activities commonly referred to as payday lending, deferred
23 presentment services, or advance cash services and other similar activities are currently
24 illegal and to strengthen the penalties for those engaging in such activities.

25 (f) This chapter in no way impairs or restricts the authority granted to the commissioner
26 of banking and finance, the Industrial Loan Commissioner, or any other regulatory
27 authority with concurrent jurisdiction over the matters stated in this chapter.

28 16-17-2.

29 (a) It shall be unlawful for any person to engage in any business, in whatever form
30 transacted, including, but not limited to, by mail, electronic, the Internet, or telephonic
31 means, which consists in whole or in part of making, offering, arranging, acting as an agent
32 for, or assisting a lender in the making of loans of \$3,000.00 or less unless:

33 (1) Such person is engaging in financial transactions expressly permitted pursuant to:

34 (A) Article 13 of Chapter 1 of Title 7, relating to Georgia residential mortgages;

35 (B) Chapter 3 of Title 7, the 'Georgia Industrial Loan Act';

36 (C) Chapter 4 of Title 7, relating to interest and usury;

1 (D) Chapter 5 of Title 7, 'The Credit Card and Credit Card Bank Act'; or

2 (E) Paragraph (2) of subsection (a) of Code Section 7-4-2 in which the simple interest
3 rate is not greater than 16 percent per annum; or

4 (2) Such loans are lawful under the terms of:

5 (A) Article 1 of Chapter 1 of Title 10, 'The Retail Installment and Home Solicitation
6 Sales Act';

7 (B) Article 2 of Chapter 1 of Title 10, the 'Motor Vehicle Sales Finance Act'; or

8 (C) Part 5 of Article 3 of Chapter 12 of Title 44, relating to pawnbrokers.

9 (b) Subject to the exceptions in subsection (a) of this Code section, this Code section shall
10 apply with respect to all transactions in which funds are advanced to be repaid at a later
11 date, notwithstanding the fact that the transaction contains one or more other elements.
12 Without limiting the generality of the foregoing, the advance of funds to be repaid at a later
13 date shall be subject to this Code section, notwithstanding the fact that the transaction also
14 involves:

15 (1) The cashing or deferred presentment of a check or other instrument;

16 (2) The selling or providing of an item, service, or commodity incidental to the advance
17 of funds;

18 (3) Any other element introduced to disguise the true nature of the transaction as an
19 extension of credit; or

20 (4) Any arrangement by which a de facto lender purports to act as the agent for an
21 exempt entity. A purported agent shall be considered a de facto lender if the entire
22 circumstances of the transaction show that the purported agent holds, acquires, or
23 maintains a predominant economic interest in the revenues generated by the loan.

24 (c)(1) A payday lender shall not include in any loan contract made with a resident of this
25 state any provision by which the laws of a state other than Georgia shall govern the terms
26 and enforcement of the contract, nor shall the loan contract designate a court for the
27 resolution of disputes concerning the contract other than a court of competent jurisdiction
28 in and for the county in which the borrower resides or the loan office is located.

29 (2) An arbitration clause in a payday loan contract shall not be enforceable if the contract
30 is unconscionable. In determining whether the contract is unconscionable, the court shall
31 consider the circumstances of the transaction as a whole, including but not limited to:

32 (A) The relative bargaining power of the parties;

33 (B) Whether arbitration would be prohibitively expensive to the borrower in view of
34 the amounts in controversy;

35 (C) Whether the contract restricts or excludes damages or remedies that would be
36 available to the borrower in court, including the right to participate in a class action;

1 (D) Whether the arbitration would take place outside the county in which the loan
2 office is located or any other place that would be unduly inconvenient or expensive in
3 view of the amounts in controversy; and

4 (E) Any other circumstance that might render the contract oppressive.

5 (d) Any person who violates subsection (a) or (b) of this Code section shall be guilty of
6 a misdemeanor of a high and aggravated nature and upon conviction thereof shall be
7 punished by imprisonment for not more than one year or by a fine not to exceed \$5,000.00
8 or both. Each loan transaction shall be deemed a separate violation of this Code section.
9 Any person who aids or abets such a violation, including any arbiter or arbitration
10 company, shall likewise be guilty of a misdemeanor of a high and aggravated nature and
11 shall be punished as set forth in this subsection. If a person has been convicted of
12 violations of subsection (a) or (b) of this Code section on three prior occasions, then all
13 subsequent convictions shall be considered felonies punishable by a fine of \$10,000.00 or
14 five years imprisonment or both.

15 (e) An oversight committee is established to monitor and report on the issuance of licenses
16 under the provisions of Chapter 3 of Title 7, the 'Georgia Industrial Loan Act.' The
17 committee shall consist of one member appointed by the Speaker of the House of
18 Representatives, one member appointed by the President of the Senate, two members
19 appointed by the Governor, and one member appointed by the Insurance Commissioner.
20 The Insurance Commissioner shall also serve on the committee in an advisory capacity.

21 16-17-3.

22 Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be barred
23 from the collection of any indebtedness created by said loan transaction and said
24 transaction shall be void ab initio, and any person violating the provisions of subsection
25 (a) or (b) of Code Section 16-17-2 shall in addition be liable to the borrower in each
26 unlawful transaction for three times the amount of any interest or other charges to the
27 borrower. A civil action under Code Section 16-17-2 may be brought on behalf of an
28 individual borrower or on behalf of an ascertainable class of borrowers. In a successful
29 action to enforce the provisions of this chapter, a court shall award a borrower, or class of
30 borrowers, costs including reasonable attorneys' fees.

31 16-17-4.

32 (a) Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be liable
33 to the state for a civil penalty equal to three times the amount of any interest or charges to
34 the borrowers in the unlawful transactions.

1 (b) A civil action under Code Section 16-17-2 may be brought by the Attorney General,
2 any district attorney, or a private party. Where a successful civil action is brought by a
3 district attorney one-half of the damages recovered on behalf of the state shall be
4 distributed to the office of the district attorney of the judicial circuit of such district
5 attorney to be used by the district attorney in order to fund the budget of that office.

6 16-17-5.

7 (a) There is imposed a state tax on all loans made in violation of this chapter. Such tax
8 shall be administered and collected in connection with the Georgia income taxation of the
9 person making such loans and shall be in addition to any other tax liability of such person.

10 (b) The tax imposed by this Code section shall be at the rate of 50 percent of all proceeds
11 received by a person from loans made in violation of this chapter.

12 (c) A person making loans in violation of this chapter shall declare and return the proceeds
13 subject to taxation under this Code section as a part of such person's Georgia income tax
14 return.

15 (d) The state revenue commissioner shall retain returns under this Code section apart from
16 all other returns and shall not disclose any part of such a return for any purpose other than
17 the collection of tax owed or a criminal prosecution involving tax matters. In a criminal
18 proceeding under this chapter, a person's return of proceeds under this Code section and
19 any evidence derived as a result of such return shall not be admissible.

20 16-17-6.

21 In regard to any loan transaction that is alleged to be in violation of subsection (a) of Code
22 Section 16-17-2, the trial court shall be authorized to review the terms of the transaction
23 in their entirety in order to determine if there has been any contrivance, device, or scheme
24 used by the lender in order to avoid the provisions of subsection (a) of Code Section
25 16-17-2. The trial court shall not be bound in making such determination by the parol
26 evidence rule or by any written contract but shall be authorized to determine exactly
27 whether the loan transaction includes the use of a scheme, device, or contrivance and
28 whether in reality the loan is in violation of the provisions of subsection (a) of Code
29 Section 16-17-2 based upon the facts and evidence relating to that transaction and similar
30 transactions being made in the State of Georgia. If any entity involved in soliciting or
31 facilitating the making of payday loans purports to be acting as an agent of a bank or thrift,
32 then the court shall be authorized to determine whether the entity claiming to act as agent
33 is in fact the lender. Such entity shall be presumed to be the lender if, under the totality
34 of the circumstances, it holds, acquires, or maintains a predominant economic interest in
35 the revenues generated by the loan. Furthermore, the trial court shall further be authorized

1 to investigate all transactions involving gift cards, telephone cards, the sale of goods or
2 services, computer services, or the like which may be tied to such loan transactions and are
3 an integral part thereof in order to determine whether any such transaction is in fact a
4 contrivance, scheme, or device used by the payday lender in order to evade the provisions
5 of subsection (a) of Code Section 16-17-2.

6 16-17-7.

7 All corporations, limited liability companies, or other business entities which are engaged
8 in payday lending in the State of Georgia are prohibited from obtaining any certificate of
9 authority from the Secretary of State or from the Department of Banking and Finance and
10 engaging in such payday lending activity in the State of Georgia shall result in the
11 revocation of any existing certificate of authority.

12 16-17-8.

13 The site or location of a place of business where payday lending takes place in the State
14 of Georgia is declared a public nuisance.

15 16-17-9.

16 (a) In addition to the other obligations and duties required under this chapter, if the
17 customer is a member of the military services of the United States, the following duties and
18 obligations apply to any payday lender:

19 (1) The lender is prohibited from garnishment of any military wages or salaries;

20 (2) The lender is prohibited from conducting any collection activity against a military
21 customer who has been deployed to a combat or combat support posting for the duration
22 of the deployment;

23 (3) The lender is prohibited from contacting the commanding officer of a military
24 customer in an effort to collect on the loan;

25 (4) The lender agrees to be bound by the terms of any repayment agreement that it
26 negotiates through military counselors or third-party credit counselors; and

27 (5) The lender agrees to honor any statement or proclamation by a military base
28 commander that a specific deferred presentment services provider branch location has
29 been declared off limits to military personnel.

30 (b) If the customer is a member of the military services of the United States, the following
31 disclosures shall be made in writing by the payday lender:

32 (1) A notice that the lender is prohibited from garnishment of any military wages or
33 salaries;

- 1 (2) A notice that the lender is prohibited from conducting any collection activity against
2 a military customer who has been deployed to a combat or combat support posting for
3 the duration of the deployment;
- 4 (3) A notice that the lender is prohibited from contacting the commanding officer of a
5 military customer in an effort to collect on the loan;
- 6 (4) A notice that the lender agrees to be bound by the terms of any repayment agreement
7 that it negotiates through military counselors or third-party credit counselors; and
- 8 (5) A notice that the lender agrees to honor any statement or proclamation by a military
9 base commander that a specific payday lending branch location has been declared off
10 limits to military personnel."

11 **SECTION 4.**

12 This Act shall become effective on July 1, 2004.

13 **SECTION 5.**

14 All laws and parts of laws in conflict with this Act are repealed.