

Senate Bill 157

By: Senators Cheeks of the 23rd, Cagle of the 49th, Starr of the 44th and Stephens of the 51st

AS PASSED

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 define crimes and declare penalties; to provide for civil remedies of borrowers;
12 to provide for civil penalties; to provide for collection of civil penalties in actions by the state
13 or by private parties; to declare a tax on profits from payday loans; to declare sites or
14 locations on which payday lending is taking place to be public nuisances; to provide
15 disclosure and notice requirements regarding loans made to members of the military; to
16 provide for severability; to provide for related matters; to provide an effective date; to repeal
17 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 later
 19 date, notwithstanding the fact that the transaction contains one or more other elements and
 20 a 'payday lender' shall be one who engages in such transactions. This definition of 'payday
 21 lending' expressly incorporates the exceptions and examples contained in subsections (a)
 22 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 Official
 24 Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of Georgia
 25 law and despite the fact that the Industrial Loan Commissioner has issued cease and desist
 26 orders against various payday lenders in the State of Georgia, the General Assembly has
 27 determined that payday lending continues in the State of Georgia and that there are not
 28 sufficient deterrents in the State of Georgia to cause this illegal activity to cease.

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

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

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

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

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

27 16-17-2.

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

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

33 (A) The laws regulating financial institutions as defined under Chapter 1 of Title 7, the
34 'Financial Institutions Code of Georgia';

35 (B) The laws regulating state and federally chartered credit unions;

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

- 1 (D) Chapter 3 of Title 7, the 'Georgia Industrial Loan Act';
- 2 (E) Chapter 4 of Title 7, relating to interest and usury;
- 3 (F) Chapter 5 of Title 7, 'The Credit Card and Credit Card Bank Act,' including
- 4 financial institutions and their assignees who are not operating in violation of said
- 5 chapter; or
- 6 (G) Paragraph (2) of subsection (a) of Code Section 7-4-2 in which the simple interest
- 7 rate is not greater than 16 percent per annum;
- 8 (2) Such loans are lawful under the terms of:
- 9 (A) Article 1 of Chapter 1 of Title 10, 'The Retail Installment and Home Solicitation
- 10 Sales Act';
- 11 (B) Article 2 of Chapter 1 of Title 10, the 'Motor Vehicle Sales Finance Act'; or
- 12 (C) Part 5 of Article 3 of Chapter 12 of Title 44, relating to pawnbrokers;
- 13 (3) Subject to the provisions of paragraph (4) of subsection (b) of this Code section, such
- 14 person is a bank or thrift chartered under the laws of the United States, a bank chartered
- 15 under the laws of another state and insured by the Federal Deposit Insurance Corporation,
- 16 or a credit card bank and is not operating in violation of the federal and state laws
- 17 applicable to its charter; or
- 18 (4) Such loan is made as a tax refund anticipation loan. In order to be exempt under this
- 19 paragraph the tax refund anticipation loan must be issued using a borrower's filed tax
- 20 return and the loan cannot be for more than the amount of the borrower's anticipated tax
- 21 refund. Tax returns that are prepared but not filed with the proper government agency
- 22 will not qualify for a loan exemption under this paragraph.
- 23 (b) Subject to the exceptions in subsection (a) of this Code section, this Code section shall
- 24 apply with respect to all transactions in which funds are advanced to be repaid at a later
- 25 date, notwithstanding the fact that the transaction contains one or more other elements.
- 26 Without limiting the generality of the foregoing, the advance of funds to be repaid at a later
- 27 date shall be subject to this Code section, notwithstanding the fact that the transaction also
- 28 involves:
- 29 (1) The cashing or deferred presentment of a check or other instrument;
- 30 (2) The selling or providing of an item, service, or commodity incidental to the advance
- 31 of funds;
- 32 (3) Any other element introduced to disguise the true nature of the transaction as an
- 33 extension of credit; or
- 34 (4) Any arrangement by which a de facto lender purports to act as the agent for an
- 35 exempt entity. A purported agent shall be considered a de facto lender if the entire
- 36 circumstances of the transaction show that the purported agent holds, acquires, or
- 37 maintains a predominant economic interest in the revenues generated by the loan.

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

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

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

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

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

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

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

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

28 16-17-3.

29 Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be barred from
 30 the collection of any indebtedness created by said loan transaction and said transaction
 31 shall be void ab initio, and any person violating the provisions of subsection (a) or (b) of
 32 Code Section 16-17-2 shall in addition be liable to the borrower in each unlawful
 33 transaction for three times the amount of any interest or other charges to the borrower. A
 34 civil action under Code Section 16-17-2 may be brought on behalf of an individual
 35 borrower or on behalf of an ascertainable class of borrowers. In a successful action to

1 enforce the provisions of this chapter, a court shall award a borrower, or class of borrowers,
2 costs including reasonable attorneys' fees.

3 16-17-4.

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

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

12 16-17-5.

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

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

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

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

26 16-17-6.

27 In regard to any loan transaction that is alleged to be in violation of subsection (a) of Code
28 Section 16-17-2, the trial court shall be authorized to review the terms of the transaction
29 in their entirety in order to determine if there has been any contrivance, device, or scheme
30 used by the lender in order to avoid the provisions of subsection (a) of Code Section
31 16-17-2. The trial court shall not be bound in making such determination by the parol
32 evidence rule or by any written contract but shall be authorized to determine exactly
33 whether the loan transaction includes the use of a scheme, device, or contrivance and
34 whether in reality the loan is in violation of the provisions of subsection (a) of Code

1 Section 16-17-2 based upon the facts and evidence relating to that transaction and similar
2 transactions being made in the State of Georgia. If any entity involved in soliciting or
3 facilitating the making of payday loans purports to be acting as an agent of a bank or thrift,
4 then the court shall be authorized to determine whether the entity claiming to act as agent
5 is in fact the lender. Such entity shall be presumed to be the lender if, under the totality of
6 the circumstances, it holds, acquires, or maintains a predominant economic interest in the
7 revenues generated by the loan. Furthermore, the trial court shall further be authorized to
8 investigate all transactions involving gift cards, telephone cards, the sale of goods or
9 services, computer services, or the like which may be tied to such loan transactions and are
10 an integral part thereof in order to determine whether any such transaction is in fact a
11 contrivance, scheme, or device used by the payday lender in order to evade the provisions
12 of subsection (a) of Code Section 16-17-2.

13 16-17-7.

14 All corporations, limited liability companies, or other business entities which are engaged
15 in payday lending in the State of Georgia are prohibited from obtaining any certificate of
16 authority from the Secretary of State or from the Department of Banking and Finance and
17 engaging in such payday lending activity in the State of Georgia shall result in the
18 revocation of any existing certificate of authority.

19 16-17-8.

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

22 16-17-9.

23 (a) In addition to the other obligations and duties required under this chapter, if the
24 customer is a member of the military services of the United States or a spouse of a member
25 of the military services of the United States, the following duties and obligations apply to
26 any payday lender:

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

28 (2) The lender is prohibited from conducting any collection activity against a military
29 customer or his or her spouse when the military member has been deployed to a combat
30 or combat support posting for the duration of the deployment;

31 (3) The lender is prohibited from contacting the commanding officer of a military
32 customer in an effort to collect on a loan to the military member or his or her spouse;

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

1 (5) The lender agrees to honor any statement or proclamation by a military base
2 commander that a specific payday lender branch location has been declared off limits to
3 military personnel and their spouses.

4 (b) If the customer is a member of the military services of the United States or a spouse
5 of a member of the military services of the United States, the following disclosures shall
6 be made in writing by the payday lender:

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

9 (2) A notice that the lender is prohibited from conducting any collection activity against
10 a military customer or his or her spouse when the military member has been deployed to
11 a combat or combat support posting for the duration of the deployment;

12 (3) A notice that the lender is prohibited from contacting the commanding officer of a
13 military customer in an effort to collect on a loan to the military member or his or her
14 spouse;

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

17 (5) A notice that the lender agrees to honor any statement or proclamation by a military
18 base commander that a specific payday lending branch location has been declared off
19 limits to military personnel and their spouses.

20 16-17-10.

21 If any provision of this chapter or the application of such provision is found by a court of
22 competent jurisdiction in the United States to be invalid or is found to be superseded by
23 federal law, then the remaining provisions of this chapter shall not be affected, and this
24 chapter shall continue to apply to any other person or circumstance."

25 **SECTION 4.**

26 This Act shall become effective on May 1, 2004.

27 **SECTION 5.**

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