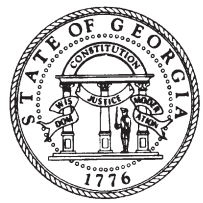
OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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and the Georgia Appeals Reports

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 3rd day of June, in the year of our Lord Two Thousand and Twenty-Four and of the Independence of the United States of America the Two Hundred and Forty-Eighth.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the 2017 edition of Volume 8 of the Official Code of Georgia Annotated, as supplemented by the 2023 Cumulative Supplement. The 2017 Volume 8 and its 2023 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 10 by the General Assembly through the 2024 Regular and Extraordinary Sessions. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 19, 2024. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated and the Official Compilation of the Rules and Regulations of the State of Georgia.

This volume retains amendment notes and effective date notes for Acts passed during the 2022, 2023, and 2024 Regular and Extraordinary Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2022 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Law reviews.

For note on 1999 amendments and enactments of Code sections in this chapter, see 16 Ga. St. U.L. Rev. 12 (1999).

For annual survey article discussing developments in commercial law, see 52 Mercer L. Rev. 143 (2000).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Violation of the Truth-In-Lending Act and Regulation Z, 73 POF3d 275.

ALR.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Suits or Claims for Rescission of Franchise Agreements for Retail and Service Businesses Other than Restaurants and Car Dealerships, 77 A.L.R.7th 4.

ARTICLE 1

RETAIL INSTALLMENT AND HOME SOLICITATION SALES

Cross references.

Criminal penalty for offense of improper solicitation of money, § 16-9-52.

Criminal penalty for false statements by telephone solicitors, § 16-9-54.

Law reviews.

For article discussing federal truth-in-lending provisions and their relation to state laws, see 6 Ga. St. B. J. 19 (1969).

For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).

For article, "Acceleration Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-In-Lending Act," see 27 Mercer L. Rev. 969 (1976).

For article discussing methods of computation of finance charges in Georgia consumer credit contracts, see 30 Mercer L. Rev. 281 (1978).

For annual survey of commercial law, see 35 Mercer L. Rev. 53 (1983).

For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

JUDICIAL DECISIONS

Construction. — Ga. L. 1967, p. 659, § 1 et seq. must be strictly construed. Busby v. Sea Island Bank, 151 Ga. App. 412, 260 S.E.2d 485, 1979 Ga. App. LEXIS 2550 (1979).

Decisions are sui generis. — Decisions under Ga. L. 1967, p. 659, § 1 et seq. are to be treated sui generis. Bell v. Loosier of Albany, Inc., 140 Ga. App. 393, 231 S.E.2d 142, 1976 Ga. App. LEXIS 1491 (1976).

Ga. L. 1967, p. 659, § 1 et seq. and Ga. L. 1955, p. 431, § 1 et seq. are different in their purpose and effect, and the provisions of one are not controlling in the interpretation of the other. Liberty Loan Corp. v. Childs, 140 Ga. App. 473, 231 S.E.2d 352, 1976 Ga. App. LEXIS 1525 (1976).

Decisions under this article as evidence of intent of Ch. 3, T. 7. — Judicial construction of O.C.G.A. Art. 1, Ch. 1, T. 10 is weak evidence of legislative intent in enacting the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq. Ford v. Termplan, Inc., 528 F. Supp. 1016, 1981 U.S. Dist. LEXIS 10030 (N.D. Ga. 1981).

Decisions under O.C.G.A. § 7-3-1 et seq. inapplicable. — Decisions rendered under Ga. L. 1955, p. 431, § 1 are not applicable to Ga. L. 1967, p. 659, § 1 et seq. Bell v. Loosier of Albany, Inc., 140 Ga. App. 393, 231 S.E.2d 142, 1976 Ga. App. LEXIS 1491 (1976).

Sales of motor vehicles. — Ga. L. 1967, p. 659, § 1 et seq. does not apply to the sale of a motor vehicle. Holder v. Brock, 129 Ga. App. 732, 200 S.E.2d 912, 1973 Ga. App. LEXIS 1128 (1973), overruled, Tucker v. Chung Studio of Karate, Inc., 142 Ga. App. 818, 237 S.E.2d 223, 1977 Ga. App. LEXIS 1386 (1977).

Conflict with UCC as to security agreement. — Parties may contract to create a security interest which will then be governed by provisions of Ga. L. 1962, p. 156, § 1 unless those provisions conflict with the specific terms in Ga. L. 1967, p. 659, § 1 et seq. Brown v. Jenkins, 135 Ga. App. 694, 218 S.E.2d 690, 1975 Ga. App. LEXIS 1787 (1975).

Assignee or transferee of a retail installment contract is not given holder in due course status under Ga. L. 1967, p. 659, § 1 et seq. Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 182 S.E.2d 521, 1971 Ga. App. LEXIS 1378 (1971) (commented on in 8 Ga. St. B.J. 400 (1972)).

Assignee or transferee takes contract subject to defenses against assignor. — Under simple contract law, an assignee or transferee takes a retail installment contract subject to any defenses that could be asserted against the assignor. Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 182 S.E.2d 521, 1971 Ga. App. LEXIS 1378 (1971) (commented on in 8 Ga. St. B.J. 400 (1972)).

RESEARCH REFERENCES

Am. Jur. 2d.

67 Am. Jur. 2d, Sales, § 589 et seq.

ALR.

Quantum, degree, or weight of evidence to sustain usury charge, 51 A.L.R.2d 1087.

Scope and exceptions of state deceptive trade practice and consumer protection acts, 85 A.L.R.3d 399.

Coverage of insurance transactions under state consumer protection statutes, 77 A.L.R.4th 991.

What constitutes Truth in Lending Act

violation which "was not intentional and resulted from bona fide error not withstanding maintenance of procedures reasonably adapted to avoid any such error" within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 A.L.R. Fed. 193.

10-1-1. Short title.

This article shall be known and may be cited as "The Retail Installment and Home Solicitation Sales Act."

History.
Ga. L. 1967, p. 659, § 1.

10-1-2. Definitions; construction.

(a) As used in this article, the term:

(1) "Cash sale price" means the price for which the seller would have sold or furnished to the buyer and the buyer would have bought or obtained from the seller the goods or services which are the subject matter of the retail installment transaction if such sale had been a sale for cash. The cash sale price may include any applicable taxes and charges for delivery, installation, servicing, repairs, alterations, or improvements.

(2) "Goods" means all personalty when purchased primarily for personal, family, or household use, including certificates or coupons issued by a retail seller exchangeable for personalty or services, but not including motor vehicles. The term "goods" includes such personalty which is furnished or used at the time of sale or subsequently in the modernization, rehabilitation, repair, alteration, improvement, or construction of real property so as to become a part thereof, whether or not severable therefrom.

(3) "Holder" of a retail installment contract means the retail seller of the goods or services under the contract or, if the contract is purchased by a sales finance company or other assignee, the sales finance company or other assignee at the time of the determination.

(4) "Home solicitation sale" means a consumer credit sale in which the purchase price is payable in installments and the seller or his representative solicits the sale in person and the buyer's agreement or offer to purchase is made at a home other than that of the person soliciting the sale and the contract is signed at the time of such solicitation.

(5) "Motor vehicle" means any device or vehicle operated over the public highways and streets of this state and propelled by other than muscular power but does not include traction engines, road rollers, implements of husbandry and other agricultural equipment, and such vehicles as run only upon a track.

(6) "Official fees" means the fees prescribed by law for filing, recording, or otherwise perfecting or releasing or satisfying any title or lien retained or taken by a seller in connection with a retail installment transaction.

(7) "Person" means an individual, partnership, corporation, association, and any other group however organized.

(8) "Retail buyer" or "buyer" means a person who buys goods or obtains services from a retail seller in a retail installment transaction and not principally for the purpose of resale.

(9) "Retail installment contract" or "contract" means an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments. The term includes a series of transactions made pursuant to an instrument or instruments providing for the addition of the amount financed plus the time price differential for the current sale to an existing balance. It does not include a revolving account or an instrument reflecting a sale pursuant thereto.

(10) "Retail installment transaction" or "transaction" means any transaction to sell or furnish or the sale of or the furnishing of goods or services evidenced by a retail installment contract or a revolving account.

(11) "Retail seller" or "seller" means a person regularly engaged in, and whose business consists to a substantial extent of, selling goods or services to a retail buyer. The term also includes a seller who regularly grants credit to retail buyers for the purpose of purchasing goods or services from any other person pursuant to a retail installment contract or a revolving charge account.

(12) "Revolving account" or "account" means an instrument or instruments prescribing the terms of retail installment transactions which may be made thereafter from time to time pursuant thereto, under which the buyer's total unpaid balance, whenever incurred, is payable in installments over a period of time and under the terms of which a time price differential or finance charge is to be computed in relation to the buyer's balance from time to time.

(13) "Sales finance company" means a person engaged in the business of purchasing retail installment contracts from one or more retail sellers. Such term includes but is not limited to a bank, trust company, or installment loan company, if so engaged. Such term does not include the pledge of an aggregate number of such contracts to secure a bona fide loan thereon.

(14) "Services" means:

(A) Work, labor, or other personal services furnished for personal, family, or household use, whether or not furnished in connection with the delivery, installation, servicing, repair, or improvement of goods, and includes such work, labor, or personal services furnished in connection with the modernization, rehabilitation, repair, alteration, improvement, or construction upon or in connection with real property;

(B) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, and the like; and

(C) Insurance provided in connection with a retail installment transaction.

(15) "Time price differential" means the amount, however denominated or expressed, paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments; such term does not include the amounts, if any, charged for insurance premiums, delinquency charges, attorneys' fees, court costs, or official fees.

(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to this article.

History.

Ga. L. 1967, p. 659, § 2; Ga. L. 1968, p. 1088, §§ 1, 2; Ga. L. 1976, p. 721, § 1; Ga. L. 1978, p. 1455, § 1; Ga. L. 1982, p. 3, § 10; Ga. L. 2020, p. 156, § 8/SB 462; Ga. L. 2024, p. 1052, § 2(1)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "Such term" for "The term" twice in paragraph (a)(13) and substituted "such term does" for "it does" in paragraph (a)(15).

Cross references.

Finished goods defined for purposes of Level 2 Freeport Exemption, § 48-5-48.6.

Editor's notes.

Ga. L. 2020, p. 156, § 10/SB 462, not codified by the General Assembly, provides that: "This Act shall apply to all installment loan agreements entered into on and after July 1, 2020."

JUDICIAL DECISIONS

Motor vehicles. — Ga. L. 1967, p. 659, § 1 et seq. does not apply to the sale of a motor vehicle in view of paragraph (a)(2) of Ga. L. 1967, p. 659, § 2. Holder v. Brock, 129 Ga. App. 732, 200 S.E.2d 912, 1973 Ga. App. LEXIS 1128 (1973), overruled, Tucker v. Chung Studio of Karate, Inc., 142 Ga. App. 818, 237 S.E.2d 223, 1977 Ga. App. LEXIS 1386 (1977).

Mobile homes. — A mobile home falls within the definition of a "motor vehicle". Holder v. Brock, 129 Ga. App. 732, 200 S.E.2d 912, 1973 Ga. App. LEXIS 1128 (1973), overruled, Tucker v. Chung Studio of Karate, Inc., 142 Ga. App. 818, 237 S.E.2d 223, 1977 Ga. App. LEXIS 1386 (1977).

Farm equipment. — O.C.G.A. Art. 1, Ch. 1, T. 10 is not applicable to farm equipment such as a tobacco combine. Rigdon v. Walker Sales & Serv., Inc., 161 Ga. App. 459, 288 S.E.2d 711, 1982 Ga. App. LEXIS 3046 (1982).

Commercial accounts. — Charges of 1½ percent on the unpaid balance on a commercial account were not authorized

by the Retail Installment and Home Solicitation Sales Act, O.C.G.A. § 10-1-1 et seq., even though the agreement involved was in the form set forth in the Retail Installment and Home Solicitation Sales Act because that statute applies only to purchases for personal, family, or household use. Gold Kist, Inc. v. McNair, 166 Ga. App. 66, 303 S.E.2d 290, 1983 Ga. App. LEXIS 2069, cert. denied, Officenters International Corp. v. Interstate North Associates, 464 U.S. 937, 104 S. Ct. 347, 78 L. Ed. 2d 313, 1983 U.S. LEXIS 2135 (1983).

Obligation arising out of farm supplies supplied to a farmer in the farmer's business is clearly a commercial account and is not a retail installment transaction. McNair v. Gold Kist, Inc., 166 Ga. App. 782, 305 S.E.2d 478, 1983 Ga. App. LEXIS 2330 (1983).

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 5 et seq.
ALR.
Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 A.L.R.2d 447.

10-1-3. Requirements for retail installment contracts; limitations on time price differential; prepayment; inclusion of construction permit costs.

(a) Every retail installment contract shall be in writing and shall be completed as to all essential provisions prior to the signing thereof by the buyer, except as provided in subsection (f) of this Code section. The printed portion of the contract, other than instructions for completion, shall be in at least six-point type. The contract shall contain substantially the following notice in clear and conspicuous type:

"Notice to the Buyer

> Do not sign this before you read it or if it contains any blank spaces. You are entitled to an exact copy of the paper you sign. You have the right to pay in advance the full amount due and under certain conditions to obtain a partial refund of the time price differential."

The contract shall contain the names of the seller and the buyer, the place of business of the seller, and the residence or place of business of the buyer as specified by the buyer.

(b) The maximum number of payments and the amount and date of each payment need not be separately listed if the payments are stated in terms of a series of scheduled amounts and if the amount of the final payment does not exceed by more than 50 percent the scheduled amount of any of the preceding installments; in such cases, the amount of the scheduled final payment shall be stated as the remaining unpaid balance. The initial date for the payment of the first installment may be a calendar date or may refer to the time of delivery or installation.

(c) A retail installment contract need not be contained in a single

document. If the contract is contained in more than one document, then one such document may be an original document applicable to purchases of goods or services to be made by the retail buyer from time to time.

(d)(1) Notwithstanding any other law, the seller under a retail installment contract may charge, receive, and collect a time price differential, which shall not exceed 13¢ per $1.00 per year on the unpaid balance.

(2) The time price differential under this subsection shall be computed on the unpaid balance of each transaction on contracts payable in successive monthly payments substantially equal in amount for the period from the date of the contract to and including the date when the final installment thereunder is payable. When a retail installment contract is payable other than in successive monthly payments substantially equal in amount, the time price differential may be at the effective rate provided in this subsection, having due regard for the schedule of payments. The time price differential may be computed on the basis of a full month for any fractional month period in excess of ten days. Notwithstanding the other provisions of this subsection, a minimum time price differential not in excess of the following amounts may be charged on any retail installment contract: $12.00 on any retail installment contract involving an initial unpaid balance of $50.00 or more, $7.50 on a retail installment contract involving an initial unpaid balance of more than $25.00 and less than $50.00, and $5.00 on a retail installment contract involving an initial unpaid balance of $25.00 or less. As used in this subsection, the term "unpaid balance" shall be determined in accordance with Section 226.8(c) of Regulation Z promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146, et seq.) as the same existed upon its becoming effective on July 1, 1969.

(e) The seller shall present a completed copy of the retail installment contract to the buyer at the time it is signed by the buyer. Any acknowledgment by the buyer of receipt of a copy of the contract shall be in clear and conspicuous type and, if contained in the contract, shall appear directly above the buyer's signature.

(f) No retail installment contract shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed, except that, if delivery of the goods or services is not made at the time of execution of the contract, the identification of the goods or services and the due date of the first installment may be left blank and later inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer. The buyer's written acknowledgment, conforming

to the requirements of subsection (e) of this Code section, of delivery of a copy of a contract shall be presumptive proof in any action or proceeding of such delivery and that the contract, when signed, did not contain any blank spaces as provided in this subsection.

(g) The seller under any retail installment contract shall, within 30 days after execution of the contract, deliver or mail or cause to be delivered or mailed to the buyer at his or her aforesaid address any policy or policies of insurance the seller has agreed to purchase in connection therewith or in lieu thereof a certificate or certificates of such insurance. The amount, if any, included for insurance shall not exceed the applicable premiums chargeable in accordance with the rates filed with the Department of Insurance; if any such insurance is canceled, unearned insurance premium refunds received by the holder shall be credited to the final maturing installment of the contract except to the extent applied toward the payment for similar insurance protecting the interests of the seller and the holder or either of them. Nothing in this article shall impair or abrogate the right of a buyer to procure insurance from an agent and company of his or her own selection, as provided by the insurance laws of this state; and nothing contained in this article shall modify, alter, or repeal any of the insurance laws of this state.

(h) If the buyer so requests, the holder shall give or forward to the buyer a receipt for any payment when made in cash.

(i) Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may prepay in full at any time before maturity the unpaid balance of any retail installment contract and in so paying the unpaid balance shall receive a refund credit thereon for such anticipation of payments. The amount of the refund shall represent at least as great a proportion of the time price differential after first deducting therefrom an acquisition cost of $20.00 as the sum of the monthly time balances, beginning one month after prepayment is made, bears to the sum of all the monthly time balances under the schedule of payments in the contract. This method of refund upon prepayment is commonly referred to as the “Rule of 78” or the “Sum of the Digits” refund method. Where the amount of the refund credit is less than $1.00, no refund need be made.

(j) In a retail installment transaction involving the modernization, rehabilitation, repair, alteration, improvement, or construction of real property, the buyer may be charged for and there may be collected from him or there may be added to the cash sale price the reasonable fees and costs actually to be paid for construction authorizations and similar permits issued by public agencies.

History.

Ga. L. 1967, p. 659, § 3; Ga. L. 1970, p. 98, § 1; Ga. L. 1981, p. 1797, § 1; Ga. L. 1998, p. 569, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2019, p. 337, § 1-95/SB 132; Ga. L. 2024, p. 1052, § 2(2)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "the term" near the beginning of the fifth sentence in paragraph (d)(2).

Cross references.

Prohibition against suspension of gas or electrical service for failure to make payments on appliances purchased from or repaired by gas or electric utility company, § 16-12-3.

Editor's notes.

Ga. L. 1998, p. 569, § 2, not codified by the General Assembly, provided that the 1998 amendment was applicable to all retail installment contracts entered into on or after July 1, 1998.

U.S. Code.

Title I of the Consumer Credit Protection Act, referred to in paragraph (d)(2) of this Code section, is codified as 15 U.S.C. § 1601 et seq.

Title V of the Consumer Credit Protection Act, referred to in paragraph (d)(2) of this Code section, appears as various sections throughout 15 U.S.C.

Law reviews.

For note discussing impact of federal truth-in-lending legislation on state law, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

All provisions of signed contract are "essential". — Once a retail installment contract is reduced to writing and signed, all the contract's provisions must be regarded as "essential provisions." Cook-Davis Furn. Co. v. Duskin, 134 Ga. App. 264, 214 S.E.2d 565, 1975 Ga. App. LEXIS 1984 (1975).

Amount due under acceleration clause. — Since a contract contained a time price, payable in installments and the balance was declared due after a default by the vendee, the vendor was entitled to judgment for the full amount of the time price, not just the cash price plus interest on the judgment. Carter v. Whatley, 97 Ga. App. 10, 101 S.E.2d 899, 1958 Ga. App. LEXIS 690 (1958) (decided prior to enactment of this section).

Effective date of insurance if contract is silent. — If a retail installment contract fails to state when insurance on purchased items would become effective, the contemplated effective date must be one which would afford protection at the time the risk of loss shifted to the buyer, which is the purpose of the insurance. Cook-Davis Furn. Co. v. Duskin, 134 Ga. App. 264, 214 S.E.2d 565, 1975 Ga. App. LEXIS 1984 (1975).

Violation in calculating interest rebate held no defense to recovery of goods. — Violation of Ga. L. 1967, p. 659, § 3, in calculating the interest rebate does not constitute a willful violation of Ga. L. 1967, p. 659, § 1 et seq., and it is not a defense to the grant of a writ of possession in the goods in which a secured creditor holds the security interest. Fluellen v. Commercial Credit Corp., 151 Ga. App. 373, 259 S.E.2d 648, 1979 Ga. App. LEXIS 2600 (1979).

RESEARCH REFERENCES

ALR.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 A.L.R. 238.

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 A.L.R.2d 447.

What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 A.L.R.3d 421.

Reformation of usurious contract, 74 A.L.R.3d 1239.

10-1-4. Requirements for revolving accounts; limitations on time price differential.

(a) Every revolving account shall be in writing and shall be completed prior to the signing thereof by the retail buyer. The printed portion, other than instructions for completion, of any revolving account shall be in at least six-point type. Any such account shall contain the names of the seller and the buyer, the place of business of the seller, and the residence or place of business of the buyer as specified by the buyer, and substantially the following notice in clear and conspicuous type:

"Notice to the Buyer

Do not sign this before you read it or if it contains any blank spaces. You are entitled to an exact copy of the paper you sign. You have the right to pay in advance the full amount due."

A copy of any such account shall be delivered or mailed to the retail buyer by the retail seller prior to the date on which the first payment is due thereunder. Any acknowledgment by the buyer of delivery of a copy of the account shall be in clear and conspicuous type and, if contained in the account, shall appear directly above the buyer's signature. No account shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed. The buyer's acknowledgment, conforming to the requirements of this subsection, of delivery of a copy of an account shall be presumptive proof in any action or proceeding of such delivery and that the account, when signed, did not contain any blank spaces as provided in this subsection. A revolving account shall be presumed to be signed or accepted by the buyer if, after a request for a revolving account, such revolving account or application for a revolving account is in fact signed by the buyer or if such revolving account is used by the buyer or if such revolving account is used by another person authorized by the buyer to use it. The revolving account is not effective until: the buyer has received the disclosures required pursuant to the federal Truth in Lending Act, 15 U.S.C. Section 1601, et seq., as amended; the buyer or a person authorized by the buyer uses the revolving account; and the seller or its assignee extends credit to the buyer for transactions on the revolving account.

(b) Notwithstanding any other law, the seller under a revolving account may charge, receive, and collect a time price differential which shall not exceed 17.5¢ per $10.00 per month computed on all amounts unpaid thereunder from month to month (which need not be a calendar month) or other regular period. If the amount of time price differential so computed shall be less than $1.00 for any such month, a time price differential of $1.00 for any such month may be charged, received, and collected. If the regular period is other than such monthly period or if the unpaid amount is less than or greater than $10.00, the permitted

time price differential shall be computed proportionately. Such time price differential may be computed for all unpaid balances within a range of not in excess of $10.00 on the basis of the median amount within such range if as so computed such time price differential is applied to all unpaid balances within such range.

History.
Ga. L. 1967, p. 659, § 4; Ga. L. 1970, p. 98, § 2; Ga. L. 1981, p. 1795, § 1; Ga. L. 1997, p. 1403, § 1.

Law reviews.
For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 38 (1997).

JUDICIAL DECISIONS

Rate of interest on judgments. — Although former Code 1933, § 57-101 et seq. was inapplicable to revolving accounts, former Code 1933, § 57-108 did apply to the interest rates chargeable on judgments for actions on such accounts. Farmers Mut. Exch. of Wrens, Inc. v. Rabun, 145 Ga. App. 798, 245 S.E.2d 52, 1978 Ga. App. LEXIS 2138 (1978).

Security interest. — A security interest can be created in a credit transaction pursuant to a revolving account. Brown v. Jenkins, 135 Ga. App. 694, 218 S.E.2d 690, 1975 Ga. App. LEXIS 1787 (1975).

RESEARCH REFERENCES

C.J.S.
77A C.J.S., Sales, § 358 et seq.

ALR.
Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 A.L.R. 238.

Validity and construction of revolving charge account contract or plan, 41 A.L.R.3d 682.

Reformation of usurious contract, 74 A.L.R.3d 1239.

10-1-5. Retail installment contracts entered into by mail or telephone.

Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by salesmen or other representatives of the seller, where a catalogue of the seller or other printed solicitation of business which is distributed and made available generally to the public clearly sets forth the cash price and other terms of sales to be made through such medium, may be made as provided in this Code section. All of the provisions of this article relating to contracts shall apply to such sales, except that the seller shall not be required to deliver a copy of the contract to the buyer as provided in subsection (e) of Code Section 10-1-3; and, if the contract when received by the seller contains any blank spaces, the seller may insert in the appropriate blank space the amounts of money and other terms which are set forth in the seller's catalogue or other printed solicitation which is then in effect. In lieu of presenting the buyer with a copy of the contract as provided in subsection (e) of Code Section 10-1-3, the seller

shall furnish to the buyer a written statement of any items inserted in the blank spaces in the contract received from the buyer.

History.
Ga. L. 1967, p. 659, § 5; Ga. L. 2017, p. 774, § 10/HB 323.

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, §§ 114, 127 et seq.

C.J.S.
77A C.J.S., Sales, §§ 50 et seq., 54.

10-1-6. Buyer's right to cancel home solicitation sale.

(a) The buyer shall have a right to cancel a home solicitation sale agreement until 12:00 Midnight of the third business day after the day on which the buyer signs the agreement.

(b) Notice of cancellation under this Code section shall be given to the seller at the place of business as set forth in the agreement by certified mail or statutory overnight delivery, return receipt requested, which shall be posted not later than 12:00 Midnight on the third business day following execution of the agreement.

(c) In the event of cancellation pursuant to this Code section, the installment seller shall refund to the buyer within ten days after the cancellation all deposits, including any down payment made under the agreement, and redeliver any goods traded in to the seller on account or in contemplation of the home solicitation sale agreement.

(d) In the event of cancellation pursuant to this Code section, the seller shall have the right to charge the buyer 5 percent of the gross sales price of the merchandise purchased by the buyer or $25.00, whichever is less, as liquidated damages. The seller shall also be entitled to reclaim and the buyer shall return, whenever possible, the home solicitation sale agreement. The buyer shall incur no additional liability for cancellation pursuant to this Code section.

(e) If the buyer has received the merchandise sold, the buyer must return that merchandise unused, in the same condition as received by the buyer. The seller shall pick up the merchandise at the place sold within a reasonable time after notice of cancellation; and the seller shall receive from the buyer at that time the actual cost of picking up the merchandise or $5.00, whichever is less.

(f) Notice of cancellation given by the buyer need not take any particular form and, however expressed, is effective if it indicates the intention of the buyer not to be bound by the home solicitation sale.

History.
Ga. L. 1967, p. 659, § 6; Ga. L. 1971, p. 560, § 1; Ga. L. 1972, p. 432, § 1; Ga. L. 2000, p. 1589, § 3.

Law reviews.
For note, "Pyramid Marketing Plans and Consumer Protection: State and Federal Regulation," see 21 J. of Pub. L. 445 (1972).

RESEARCH REFERENCES

ALR.
Nature, construction, and effect of "lay away" or "will call" plan or system, 10 A.L.R.3d 456.

10-1-7. Providing for payment of delinquency charges, attorneys' fees, court costs, and bad instrument fees.

(a) A retail installment contract or a revolving account may provide for payment by the buyer of a delinquency charge on any installment which is not paid within ten days from the date the payment is due. The charge may not exceed $25.00. A delinquent charge shall not be collected more than once for the same default. A retail installment contract or a revolving account may provide for the payment of reasonable attorneys' fees, if referred for collection to an attorney not a salaried employee of the retail seller, and for the payment of court costs.

(b) A retail installment contract or a revolving account may provide that if the buyer submits to the retail seller as payment for an unpaid balance, or portion thereof, in that account or pursuant to that contract, a check, draft, or order for the payment of money on any bank or other depository, which check, draft, or order is not honored by the drawee, then a delinquency charge as specified in subsection (a) of this Code section may be charged; and a bad instrument fee not to exceed the amount specified in subsection (j) of Code Section 16-9-20 and Code Section 13-6-15 may be charged to the buyer and added to the unpaid balance on the buyer's account if ten days have elapsed since the retail seller has mailed to the buyer at his or her last known address written notice of the failure to honor the check, draft, or order without the check, draft, or order having been made good. A fee authorized by this Code section shall not be deemed to be time price differential, interest, or any other type of finance charge and shall not be included in determining whether any limitations on time price differential, interest, or other finance charges have been exceeded.

History.
Ga. L. 1967, p. 659, § 7; Ga. L. 1983, p. 1430, § 1; Ga. L. 1986, p. 207, § 1; Ga. L. 1991, p. 913, § 1; Ga. L. 1991, p. 1299, § 1; Ga. L. 1995, p. 346, § 1; Ga. L. 2000, p. 1352, § 2; Ga. L. 2001, p. 782, § 1; Ga. L. 2003, p. 809, § 1; Ga. L. 2007, p. 597, § 1/HB 240.

RESEARCH REFERENCES

ALR.

Contractual provision for attorney's fees as including allowance for services rendered upon appellate review, 52 A.L.R.2d 863.

Award of attorneys' fees under § 813(a)(3) of Fair Debt Collection Practices Act (15 USCS § 1692k(a)(3)), 132 A.L.R. Fed. 477.

10-1-8. Limitations on security interest; application of payments to revolving accounts.

(a) Any security interest taken pursuant to a retail installment contract or revolving account shall not be taken with respect to clothing, softwares, and other nondurable items. Each payment with respect to a revolving account shall be applied to goods and services as follows: first to unpaid time price differential or finance charge; then, as to goods purchased on different dates, the first purchased shall be deemed first paid for; as to goods purchased on the same date, the lowest priced shall be deemed first paid for.

(b) Nothing contained in subsection (a) of this Code section shall prevent the parties from agreeing in writing for the payments to be otherwise applied; provided, however, that this Code section shall be construed consistently with Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975." Nothing in this Code section shall be deemed to authorize any act or practice which would otherwise be deemed unfair and deceptive under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975."

History.

Ga. L. 1976, p. 721, § 2; Ga. L. 1994, p. 696, § 1.

JUDICIAL DECISIONS

Section does not apply to duration of security interest. — This section, which provides that payments on revolving accounts are to be applied first to goods which are first purchased has nothing to do with the creation, duration, definition, or enforcement of purchase money security interests in consumer goods and, specifically, does not purport to terminate a security interest contrary to the clear terms of a security agreement. In re Norrell, 426 F. Supp. 435, 1977 U.S. Dist. LEXIS 17620 (M.D. Ga. 1977).

RESEARCH REFERENCES

Am. Jur. 2d.

67 Am. Jur. 2d, Sales, §§ 253 et seq., 589.

ALR.

Validity and construction of revolving charge account contract or plan, 41 A.L.R.3d 682.

10-1-9. Transfer of retail installment contracts or revolving accounts.

(a) Any retail seller may assign, pledge, hypothecate, or otherwise transfer a retail installment contract or revolving account to any person, firm, or corporation on such terms and conditions and for such price as may be mutually agreed upon. Unless the buyer has notice of the assignment, payment thereunder made by the buyer to the last known owner of the contract or account shall be binding on all subsequent owners thereof.

(b) In no event will any such assignment bar any right of action against the seller arising as a result of this article, nor will any such assignment bar any defense against the sales finance company or other assignee arising as a result of subsection (b) of Code Section 10-1-15.

History.
Ga. L. 1967, p. 659, § 8.

JUDICIAL DECISIONS

Assignee or transferee of a retail installment contract is not given holder in due course status under Ga. L. 1967, p. 659, § 1 et seq. Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 182 S.E.2d 521, 1971 Ga. App. LEXIS 1378 (1971) (commented on in 8 Ga. St. B.J. 400 (1972)).

Assignee or transferee takes contract subject to defenses against assignor. — Under simple contract law, an assignee or transferee takes a retail installment contract subject to any defenses that could be asserted against the assignor. Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 182 S.E.2d 521, 1971 Ga. App. LEXIS 1378 (1971) (commented on in 8 Ga. St. B.J. 400 (1972)).

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, §§ 325 et seq, 589 et seq.

ALR.
Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 A.L.R.2d 447.

10-1-10. Disposition of goods repossessed after default; right to recover deficiency.

When any goods have been repossessed after default in accordance with Part 6 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after said repossession he forwards by registered or certified mail or statutory overnight delivery to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of his rights of redemption, as well as

his right to demand a public sale of the repossessed goods. In the event the buyer exercises his right to demand a public sale of the goods, he shall in writing so advise the seller or holder of his election by registered or certified mail or statutory overnight delivery addressed to the seller or holder at the address from which the seller's or holder's notice emanated, within ten days after the posting of the original seller's or holder's notice.

In the event of election of such public sale by the buyer, the seller or holder shall dispose of the repossessed goods at a public sale as provided by law, to be held in the state and county where the original sale took place or the state and county of the buyer's residence, at the seller's election.

This Code section is cumulative of Part 6 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing in this Code section shall be deemed to repeal said part.

History.

Ga. L. 1967, p. 659, § 9; Ga. L. 2000, p. 1589, § 3.

Cross references.

Uniform Commercial Code provisions regarding secured party's right to dispose of collateral after default, § 11-9-402.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2009, "Part 6" was substituted for "Part 5" twice in this Code section.

Law reviews.

For annual survey on commercial law, see 36 Mercer L. Rev. 115 (1984).

For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B. J. 43 (1987).

JUDICIAL DECISIONS

Debtor to be notified debtor can redeem collateral at any time before sale. — When the debtor is told by notification letter that the debtor has ten days to redeem the debtor's repossessed collateral, but the collateral is sold after the tenth day, the debtor has not, as a matter of law, been notified that the debtor can redeem the debtor's collateral at any time before the sale, as required by O.C.G.A. §§ 10-1-10 and 11-9-506, and a verdict should be directed for the debtor when the creditor sues for a deficiency judgment. Credithrift of Am., Inc. v. Smith, 168 Ga. App. 45, 308 S.E.2d 53, 1983 Ga. App. LEXIS 2670 (1983).

Summary judgment to debtors when creditor did not dispute lack of notice. — Because a credit company did not dispute the factual accuracy of the debtors' assertion that the company's deficiency claim was barred by the company's failure to send the debtors notice, after repossession, of the company's intention to pursue a deficiency claim, as required by O.C.G.A. § 10-1-10, the debtors were entitled to summary judgment. Fin. Fed. Credit Inc. v. Smith, No. CV204-209, 2005 U.S. Dist. LEXIS 17603 (S.D. Ga. Aug. 16, 2005).

Notice insufficient. — Notice, within ten days of the repossession of a debtor's equipment, was not provided of an intent to pursue a deficiency claim as required under O.C.G.A. § 10-1-10 as the notices on August 27 and 28 were more than ten days after the July 30 repossession and more than 60 days after the debtor signed the release on June 11; no indication was given that the notices were sent by registered or certified mail or statutory overnight delivery, and the notices also did not inform the debtor of the debtor's rights of redemption as well as the

debtor's right to demand a public sale of the repossessed goods. Parham v. Peterson, Goldman & Villani, 296 Ga. App. 527, 675 S.E.2d 275, 2009 Ga. App. LEXIS 247 (2009).

RESEARCH REFERENCES

Am. Jur. 2d.
67A Am. Jur. 2d, Sales, § 370 et seq.

10-1-11. Second mortgage statutes not affected; exemption from loan and interest statutes.

Nothing contained in this article shall be construed so as to amend, modify, supersede, or repeal Article 2 of Chapter 4 of Title 7, relating to charges and interest on loans secured by secondary security deeds, as now or hereafter amended, nor shall any of the provisions of the loan or interest statutes of this state affect or apply to any retail installment and home solicitation sale.

History.
Ga. L. 1967, p. 659, § 11; Ga. L. 1968, p. 1088, § 3.

10-1-12. Prior contracts or accounts not affected.

This article shall not make unlawful contracts or accounts in effect prior to October 1, 1967.

History.
Ga. L. 1967, p. 659, § 12.

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 76 et seq.
ALR.
Illegality as basis for denying remedy of specific performance for breach of contract, 58 A.L.R.5th 387.

10-1-13. Waiver of this article void.

Any waiver of this article shall be unenforceable and void.

History.
Ga. L. 1967, p. 659, § 13.

JUDICIAL DECISIONS

Oral agreement not to furnish insurance is void. — Any oral agreement that insurance would not be procured by the seller as provided for by the written contract is void and unenforceable. Cook-Davis Furn. Co. v. Duskin, 134 Ga. App. 264, 214 S.E.2d 565, 1975 Ga. App. LEXIS 1984 (1975).

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 68.
C.J.S.
77A C.J.S., Sales, § 118 et seq.
ALR.
Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 A.L.R.2d 447.

10-1-14. Limitation of actions.

(a) No action shall be brought under this article more than four years after the person bringing the action knew or should have known of the occurrence of the alleged violation.

(b) The period of time specified by this Code section shall only apply to violations of this article which occur after July 1, 1979.

History.
Ga. L. 1979, p. 1011, § 1.

RESEARCH REFERENCES

C.J.S.
77A C.J.S., Sales, §§ 530 et seq., 580 et seq.

10-1-15. Criminal and civil penalties.

(a) Any person who shall willfully and intentionally violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $500.00 for the first offense and shall be punished as for a misdemeanor for each subsequent offense.

(b) A violation of subsection (d) of Code Section 10-1-3 shall bar recovery of any finance charge, delinquency, or collection charge on the contract. A violation of subsection (b) of Code Section 10-1-4 shall bar recovery of any finance charge, delinquency, or collection charge stated on or collected in connection with the statement on which any such violation shall occur.

(c) In case of a willful violation of any provision of this article, with respect to any transaction, the retail buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of $100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction; but the retail seller may recover from the retail buyer an amount equal to the cash price of the goods or services in such

transaction and the cost of any insurance purchased by the retail seller for the retail buyer in connection therewith.

(d) Notwithstanding this Code section, any failure to comply with any provisions of subsection (d) of Code Section 10-1-3 may be corrected within ten days after the date of execution of the retail installment contract by the buyer; and, if so corrected, neither the seller nor the holder is subject to any penalty under this Code section.

(e) A seller or holder shall not be held liable in any action brought under this Code section for a violation of this article if the seller or holder shows by clear and convincing evidence that the violation was not intentional and resulted from a bona fide clerical or typographical error.

(f) The penalties under this Code section shall be the sole remedy for violations of this article and a claim of violation of this article may be asserted in an individual action only.

History.

Ga. L. 1967, p. 659, § 10; Ga. L. 1996, p. 1506, § 1.

Law reviews.

For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B. J. 43 (1987).

For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

JUDICIAL DECISIONS

Legislative intent as to proof of willful violation. — Legislature obviously intended that there be some showing that the violation be "willful" other than the mere fact of the violation itself. Martin v. Glenn's Furn. Co., 126 Ga. App. 692, 191 S.E.2d 567, 1972 Ga. App. LEXIS 1254 (1972).

Cases do not apply to truth-in-lending situations. — This section deals specifically with the terms of the contract. Truth-in-lending violations have no direct effect on the contractual terms of payment. Thus, cases involving this section are not authority regarding truth-in-lending situations. First Citizens Bank & Trust Co. v. Owings, 151 Ga. App. 389, 259 S.E.2d 747, 1979 Ga. App. LEXIS 2609 (1979).

Violation is determined by amount charged, not amount collected. — The amount that a creditor may ultimately collect is not determinative of whether the creditor violates this article. Rather, it is the amount that a creditor charges the debtor at the time the creditor accelerates the unpaid balance that places the creditor in violation of this article. Harrison v. Goodyear Serv. Stores, 137 Ga. App. 223, 223 S.E.2d 261, 1976 Ga. App. LEXIS 2389 (1976).

Acceleration clause is not violation until collection of unearned interest attempted. — An acceleration clause purporting to collect unearned interest does not violate Ga. L. 1967, p. 659, § 1 et seq., but the same clause plus an attempt under it to collect unearned interest does; once the creditor uses that clause to demand unearned interest, the clause states a default charge. Thomas v. Universal Guardian Corp., 144 Ga. App. 869, 243 S.E.2d 101, 1978 Ga. App. LEXIS 1827 (1978).

Acceleration by the seller plus filing a complaint against the buyer without deducting unearned interest from the alleged indebtedness constituted a "charge" by the seller in violation of the Retail Installment and Home Solicitation Sales Act, O.C.G.A. § 10-1-1 et seq., and such conduct amounted to a willful violation of

the Act. Palace Indus., Inc. v. Craig, 177 Ga. App. 338, 339 S.E.2d 313, 1985 Ga. App. LEXIS 2586 (1985).

Premature acceleration of entire unpaid balance bars recovery of charges. — To accelerate the entire unpaid balance as due long before the time provided in the contract obviously discloses a claim exceeding the maximum finance charge allowable, which, under provisions of this article, shall bar recovery of any finance charge, delinquency, or collection charge on the contract. Reese v. Termplan, Inc., 125 Ga. App. 473, 188 S.E.2d 177, 1972 Ga. App. LEXIS 1374 (1972).

Recovery of amount equal to cash price. — This section does not bar the seller from recovering an amount equal to the cash price of the goods. Fluellen v. Commercial Credit Corp., 151 Ga. App. 373, 259 S.E.2d 648, 1979 Ga. App. LEXIS 2600 (1979).

Mere violations or hazardous acts are not willful. — Mere violations of this article and the doing of hazardous acts, where the danger is obvious, do not, without more, as a matter of law, constitute willful misconduct. Martin v. Glenn's Furn. Co., 126 Ga. App. 692, 191 S.E.2d 567, 1972 Ga. App. LEXIS 1254 (1972).

Bare failure or refusal to perform duty is not willful. — When the misconduct consists of a failure or refusal to perform a duty required by this section, a bare failure or refusal, without more, does not constitute a willful failure or refusal to perform such duty. Such violations, failures, or refusals generally constitute mere negligence, and such negligence, however great, does not constitute willful misconduct, willful failure, or refusal to perform a duty required by this section. Martin v. Glenn's Furn. Co., 126 Ga. App. 692, 191 S.E.2d 567, 1972 Ga. App. LEXIS 1254 (1972).

Violation in calculating interest rebate is not willful. — Violation of this article in calculating the interest rebate does not constitute a willful violation of this article and it is not a defense to the grant of a writ of possession in the goods in which a secured creditor holds the security interest. Fluellen v. Commercial Credit Corp., 151 Ga. App. 373, 259 S.E.2d 648, 1979 Ga. App. LEXIS 2600 (1979).

RESEARCH REFERENCES

ALR.

Right to private action under state consumer protection act, 62 A.L.R.3d 169.

Coverage of insurance transactions under state consumer protection statutes, 77 A.L.R.4th 991.

What constitutes Truth in Lending Act violation which "was not intentional and resulted from bona fide error not withstanding maintenance of procedures reasonably adapted to avoid any such error" within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 A.L.R. Fed. 193.

10-1-16. Inapplicability of this article to educational entities and student loan transactions.

This article shall not apply to the University System of Georgia or its educational units, to private colleges and universities in this state and associations thereof, or to student loan transactions of such educational entities, which educational entities and student loan transactions thereof are expressly exempted from the operation of its provisions.

History.

Code 1981, § 10-1-16, enacted by Ga. L. 1985, p. 251, § 1.

Law reviews.

For article, "The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?," see 32 Georgia St. U.L. Rev. 603 (2016).

ARTICLE 1A

DOOR-TO-DOOR SALES

Effective date.
This article became effective July 1, 2023.

10-1-20. Short title.

This article shall be known and may be cited as the "Georgia Door-to-Door Sales Act."

History.
Code 1981, § 10-1-20, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-21. Definitions.

As used in this article, unless the context otherwise requires, the term:

(1) "Business days" means any calendar day except Saturdays, Sundays, and any federal holiday.

(2)(A) "Door-to-door sale" means a sale, lease, or rental of goods or services:

(i) Solicited in person by the seller or seller's representative, including, but not limited to, solicitations in response to or following an invitation by the buyer;

(ii) For which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business; and

(iii) That includes the following three components:

(I) Payments of $10,000.00 or more;

(II) A lease, financing arrangement, or other agreement with a term of more than 120 months; and

(III) Is eligible, or is alleged by the seller or seller's representative to be eligible, for federal tax credits.

(B) "Door-to door sale" shall not include a transaction:

(i) Conducted without any in-person contact between the buyer and the seller or seller's representative prior to delivery of the goods or performance of the services;

(ii) In which the buyer has initiated the contact and specifically requested the seller or seller's representative to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's property. If, in the course of such a

visit, the seller sells the buyer the right to receive additional goods or services, other than replacement parts necessarily used in performing maintenance or making repairs, the sale of those additional goods or services would not fall under this exclusion; or

(iii) Pertaining to the sale or rental of real property or to the sale of insurance.

(3) "Place of business" means the main or permanent branch, office, or local address of a seller.

(4) "Purchase price" means the total price paid or to be paid for the goods or services, including all interest and service charges.

History. Code 1981, § 10-1-21, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-22. Seller's obligation to provide sales receipt or contract; obligation of buyer upon cancellation.

(a) The seller shall furnish the buyer with a fully completed receipt of the purchase price or copy of the contract pertaining to any door-to-door sale at the time of its execution. Such receipt or contract shall:

(1) Be in each language used in the oral sale presentation and the in-person interaction between seller and buyer;

(2) Show the date of the transaction and contain the name and address of the seller;

(3) Be in at least ten-point boldface type;

(4) Have adjacent to the contract's signature lines, or on the front page of the receipt if a contract is not used, the following statement:

"You, the buyer, may cancel this transaction at any time prior to midnight of the thirtieth business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."; and

(5) Provide the buyer with a duplicate notice of cancellation as outlined in Code Section 10-1-23.

(b) In the event of cancellation, the buyer must be able to retain a complete copy of the receipt or contract.

History. Code 1981, § 10-1-22, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-23. Notice of cancellation; form.

(a) The seller in a door-to-door sale shall provide to each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy goods or services from the seller, a notice of cancellation form meeting the requirements of subsection (b) of this Code section that may be used by the buyer.

(b) The form shall be captioned "NOTICE OF CANCELLATION" and shall provide the following information in at least ten-point boldface type:

(1) That the buyer has 30 business days to cancel the sale;

(2) That upon cancellation all of the buyer's payments will be returned within ten business days;

(3) That the buyer may keep or dispose of the goods if the seller fails to pick them up within 20 business days of the date of the notice of cancellation;

(4) The seller's name and the address or email address to which notices of cancellation must be sent;

(5) That the buyer has until midnight of the thirtieth business day to cancel the transaction; and

(6) A signature and date line for the buyer.

(c) The seller shall inform the buyer orally, at the time that the buyer signs the contract or purchases the goods or services, of the buyer's right to cancel.

(d) The seller shall notify the buyer within ten days of receipt of the buyer's notice of cancellation whether the seller intends to repossess or to abandon any shipped, delivered, or installed goods.

History. Code 1981, § 10-1-23, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-24. Timing of assignments of note or other evidence of indebtedness.

The seller in a door-to-door sale shall not negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight on the second day following the end of the period during which the buyer has a right to cancel pursuant to this article.

History. Code 1981, § 10-1-24, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-25. Utilization of federal forms and notices.

The use of the forms and notices of the right to cancel prescribed by the Federal Trade Commission's trade regulation rule, 16 C.F.R. Part 429, establishing a cooling-off period for door-to-door sales, may be used to comply with Code Sections 10-1-22 and 10-1-23; provided, however, that they are altered to accurately reflect the provisions of such Code sections and are in compliance with all provisions of this article.

History. Code 1981, § 10-1-25, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-26. Buyers' continuing rights under other statutory provisions.

The rights of buyers in a door-to-door sale shall be not limited to those provided for in this article. Buyers in a door-to-door sale shall also have all applicable rights and remedies afforded under any other state or federal laws.

History. Code 1981, § 10-1-26, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

10-1-27. Exemptions.

(a) The requirements of this article shall not apply to sellers of automobiles, vans, trucks, motorized farm equipment, or other motor vehicles that are sold at auctions, tent sales, or other temporary places of business, provided that the seller is a seller of vehicles with a permanent place of business.

(b) The requirements of this article shall not apply to sellers of arts, crafts, food, beverages, or other goods or services that are sold at fairs, carnivals, festivals, or other community events.

(c) The requirements of this article shall not apply to sellers of goods or services that are sold at events sponsored, licensed, or hosted by this state, any local government, a church, or a public charity.

History. Code 1981, § 10-1-27, enacted by Ga. L. 2023, p. 537, § 1/SB 149, effective July 1, 2023.

ARTICLE 2

MOTOR VEHICLE SALES FINANCING

Cross references.

Purchase and resale of motor vehicles and parts generally, § 40-4-1 et seq.

Used car dealers, § 43-47-1 et seq.

Law reviews.

For article discussing federal

truth-in-lending provisions and their relation to state laws, see 6 Ga. St. B. J. 19 (1969).

For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).

For article discussing methods of computation of finance charges in Georgia consumer credit contracts, see 30 Mercer L. Rev. 281 (1978).

For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration
Federal Preemption

General Consideration

Mobile homes. — The sale of a mobile home comes within the provisions of Ga. L. 1967, p. 674, § 1. Holder v. Brock, 129 Ga. App. 732, 200 S.E.2d 912, 1973 Ga. App. LEXIS 1128 (1973), overruled in part, Tucker v. Chung Studio of Karate, Inc., 142 Ga. App. 818, 237 S.E.2d 223, 1977 Ga. App. LEXIS 1386 (1977); Smith v. Society Nat'l Bank, 141 Ga. App. 19, 232 S.E.2d 367, 1977 Ga. App. LEXIS 1738 (1977); Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, 1978 Ga. App. LEXIS 1943, rev'd, 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

Article not violated by acceleration clause. — The mere presence of an acceleration clause is not violative of Ga. L. 1967, p. 674, § 1. Green v. Citizens & S. Bank, 153 Ga. App. 342, 265 S.E.2d 286, 1980 Ga. App. LEXIS 1798 (1980).

Documentary preparation fee as finance charge. — A "documentary preparation" fee explicitly identified as such in an automobile finance contract and added to the unpaid balance of the purchase price as an "other charge" was not a finance charge since it was charged to all consumer purchasers (both cash and credit). Therefore, the contract complied with state and federal law. Ferris v. Chrysler Credit Corp., 764 F.2d 1475, 1985 U.S. App. LEXIS 30883 (11th Cir. 1985).

Contract's choice of law provisions governs. — Georgia law, rather than South Carolina law, governed a mobile home retail installment sales contract entered into by South Carolina buyers with a Georgia dealer since the contract contained a choice of law provision indicating that the contract should be construed in accordance with the laws of the state in which the seller's place of business was located. Moyer v. Citicorp Homeowners, Inc., 799 F.2d 1445, 1986 U.S. App. LEXIS 30971 (11th Cir. 1986).

Federal Preemption

Protection of federal preemption from state law interest ceilings. — A mobile home financing contract which did not affirmatively misrepresent the debtor's federal statutory guarantees satisfied the prerequisites for obtaining the protection of federal preemption from state law interest ceilings. Grant v. GECC, 764 F.2d 1404, 1985 U.S. App. LEXIS 26366 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673, 1986 U.S. LEXIS 3167 (1986).

Contracts in compliance with regulations of Federal Home Loan Bank Board. — Federal law preempted the application of O.C.G.A. Art. 2, Ch. 1, T. 10 to contracts which were made in compliance with regulations promulgated by the Federal Home Loan Bank Board. Moyer v. Citicorp Homeowners, Inc., 799 F.2d 1445, 1986 U.S. App. LEXIS 30971 (11th Cir. 1986).

OPINIONS OF THE ATTORNEY GENERAL

Mobile homes. — Mobile homes are included in the definition of motor vehicles contained in Ga. L. 1967, p. 674, § 2 and thereby subject to Ga. L. 1967, p. 659, § 1. 1967 Op. Att'y Gen. No. 67-410.

RESEARCH REFERENCES

Am. Jur. Proof of Facts.
Proof of Statutory Unfair Business Practices, 36 POF3d 221.
ALR.
Civil rights and liabilities as affected by failure to comply with statute upon sale of motor vehicle, 63 A.L.R. 688; 94 A.L.R. 948.
Quantum, degree, or weight of evidence to sustain usury charge, 51 A.L.R.2d 1087.

10-1-30. Short title.

This article shall be known and may be cited as the "Motor Vehicle Sales Finance Act."

History.
Ga. L. 1967, p. 674, § 1.
Law reviews.
For annual survey of commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985).
For annual survey of commercial law in 1990-1991, see 43 Mercer L. Rev. 119 (1991).
For survey article on insurance law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 277 (2003).

10-1-31. Definitions; construction.

(a) As used in this article, the term:

(1) "Cash sale price" means the price stated in a retail installment contract for which the seller would have sold to the buyer and the buyer would have bought from the seller the motor vehicle which is the subject matter of the retail installment contract if such sale had been a sale for cash instead of a retail installment transaction. The cash sale price may include any taxes; registration, certificate of title, license, and other fees; and charges for accessories and their installation and for delivery, servicing, repairing, or improving the motor vehicle. The cash sale price may also include any amount paid to the buyer or to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on the motor vehicle which is the subject of a retail installment transaction under this article.

(2) "Finance charge" means the amount agreed upon between the buyer and the seller, as limited in this article, to be added to the cash sale price, the amount, if any, included for insurance and other benefits, if a separate charge is made therefor, and official fees, in determining the time sale price.

(3) "Holder" of a retail installment contract means the retail seller

of the motor vehicle under the contract or, if the contract is purchased by a sales finance company or another assignee, the sales finance company or other assignee at the time of the determination.

(4) "Motor vehicle" means any device or vehicle including automobiles, motorcycles, motor trucks, trailers, and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power but does not include traction engines, road rollers, implements of husbandry and other agricultural equipment, and such vehicles as run only upon a track.

(5) "Official fees" means the fees prescribed by law for filing, recording, or otherwise perfecting and releasing or satisfying a retained title or a lien created by a retail installment contract.

(6) "Person" means an individual, partnership, corporation, association, or any other group however organized.

(7) "Purchase price" means the time balance shown in the contract plus the down payment.

(8) "Retail buyer" or "buyer" means a person who buys a motor vehicle from a retail seller not principally for the purpose of resale and who executes a retail installment contract in connection therewith or a person who succeeds to the rights and obligations of such person.

(9) "Retail installment contract" or "contract" means an instrument or instruments creating a purchase money security interest.

(10) "Retail installment seller" or "seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions.

(11) "Retail installment transaction" means any transaction evidenced by a retail installment contract.

(12) "Sales finance company" means a person engaged in the business of purchasing retail installment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, or installment loan company, if so engaged. The term does not include the pledge of an aggregate number of such contracts to secure a bona fide loan thereon.

(13) "Time sale price" means the cash sale price of a motor vehicle, the amount included for insurance and other benefits if a separate charge is made therefor, official fees, and finance charges. The time sale price may also include, if it has not been included in the cash sale price, any amount paid to the buyer or to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor

vehicle used as a trade-in on the motor vehicle which is the subject of a retail installment transaction under this article.

(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to this article.

History.

Ga. L. 1967, p. 674, § 2; Ga. L. 1999, p. 1229, § 1; Ga. L. 2020, p. 156, § 8/SB 462.

Editor's notes.

Ga. L. 2020, p. 156, § 10/SB 462, not codified by the General Assembly, provides that: "This Act shall apply to all installment loan agreements entered into on and after July 1, 2020."

Law reviews.

For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Article: Bankruptcy," see 60 Mercer L. Rev. 1141 (2009).

For article, "The Over-Encumbered Trade-In in Chapter 13," see 29 Emory Bankr. Dev. J. 15 (2012).

JUDICIAL DECISIONS

Analysis

Retail Installment Transaction
Motor Vehicle

Retail Installment Transaction

Not "retail installment transaction" when bank, not seller, obtains lien. — When seller sold mobile home for a "cash sales price" and bank financed loan for the "cash sales price," the proceeds of which were then paid to the seller, the bank, not the seller, had a purchase money security interest in the mobile home, and the actual sale was not a "retail installment transaction" under paragraphs (a)(9) and (a)(11) of this section. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Motor Vehicle

Caterpillar 977L Traxcavator does not fall under the definition of "motor vehicle" found either in paragraph (a)(4) of O.C.G.A. § 10-1-31 or the general definition of "motor vehicle" under O.C.G.A. § 40-1-1(33) but does fit the definition of "special mobile equipment" under § 40-1-1(59). Battle v. Yancey Bros. Co., 157 Ga. App. 277, 277 S.E.2d 280, 1981 Ga. App. LEXIS 1779 (1981).

Purchase money interest in negative equity financed as part of trade-in. — Because the definition of "cash sales price" included any amount paid to the buyer or to a third party to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in, pursuant to O.C.G.A. § 10-1-31, that entire amount was included in the purchase money security interest under 11 U.S.C. § 1325(a). In re Graupner, 356 B.R. 907, 2006 Bankr. LEXIS 3515 (Bankr. M.D. Ga. 2006), aff'd, No. 4:07-CV-37, 2007 U.S. Dist. LEXIS 46144 (M.D. Ga. June 26, 2007).

Monies paid on debtor's behalf for an extended service contract and gap insurance were part of the purchase price of the debtor's vehicle for purposes of O.C.G.A. § 11-9-103 and the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9). The service contract was a charge for "servicing" the motor vehicle under O.C.G.A § 10-1-31(a)(1), and applying the close nexus standard in § 11-9-103 led the court to believe that gap insurance was also included in the purchase money security interest. In re Spratling, 377 B.R. 941, 2007 Bankr. LEXIS 3556 (Bankr. M.D. Ga. 2007).

Under O.C.G.A. §§ 10-1-31(a) and 11-9-103, negative equity in a debtor's trade-in vehicle was properly regarded as a purchase money security interest under the hanging paragraph referencing 11 U.S.C. § 1325(a)(5) in that there was a close nexus to the purchase of a vehicle for

personal use within 910 days of filing for Chapter 13 relief. Thus, 11 U.S.C. § 506 did not apply to cram down the creditor's secured claim. Graupner v. Nuvell Credit Corp., 537 F.3d 1295, 2008 U.S. App. LEXIS 16582 (11th Cir. 2008).

Notice objection did not apply. — With respect to the creditor's deficiency claim arising from a sale of a truck in which the creditor had perfected a first-priority lien, the debtor's objection based on O.C.G.A. § 10-1-31, which requires additional notice to recover a deficiency against a buyer, did not apply to bar the claim because the creditor was not a sales finance company under the Georgia statute given that it had not purchased a retail installment contract from a seller and was not engaged in the business of purchasing retail installment contracts. Ambrose v. Advantage Funding Commer. Capital Corp. (In re Ambrose), 568 B.R. 716, 2017 Bankr. LEXIS 665 (Bankr. N.D. Ga. 2017).

10-1-32. Requirements for retail installment contracts; insurance; providing for payment of delinquency charges, attorney's fees, and court costs.

(a) A retail installment contract shall be in writing, shall be signed by both the buyer and the seller, and shall be completed as to all essential provisions prior to the signing of the contract by the buyer.

(b) The printed portion of the contract, other than instructions for completion, shall be in at least six-point type. The contract shall contain, in clear and conspicuous type, the following:

(1) A specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case; and

(2) The following notice:

"Notice to the Buyer

Do not sign this contract before you read it or if it contains any blank spaces. You are entitled to an exact copy of the contract you sign."

(c) The seller shall present a completed copy of the contract to the buyer at the time it is signed by the buyer. Unless the seller does so, a buyer who has not accepted delivery of the motor vehicle shall have the right to rescind his agreement and to receive a refund of all payments made and return of all goods traded in to the seller on account of or in contemplation of the contract or, if such goods cannot be returned, the value thereof. Any acknowledgment by the buyer of receipt of a copy of the contract shall be in clear and conspicuous type and, if contained in the contract, shall appear directly above the buyer's signature. This subsection provides cumulative additional rights and is cumulative of Code Section 11-2-302.

(d) The contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or place of business of the buyer as specified by the buyer, and a description of the motor

vehicle, including its make, model, year, and identification number or marks.

(e)(1) If any insurance is purchased by the holder of the retail installment contract, the amount charged therefor shall not exceed the applicable premiums chargeable in accordance with the rates filed with the Department of Insurance. If dual interest insurance on the motor vehicle is purchased by the holder, it shall, within 30 days after execution of the retail installment contract, send or cause to be sent to the buyer a policy or policies or certificate of insurance, written by an insurance company authorized to do business in this state, clearly setting forth the amount of the premium, the kind or kinds of insurance, the coverages, and all the terms, exceptions, limitations, restrictions, and conditions of the contract or contracts of insurance.

(2) Nothing in this article shall impair or abrogate the right of a buyer, as defined in Code Section 10-1-31, to procure insurance from an agent and company of his own selection as provided by the insurance laws of this state; and nothing contained in this article shall modify, amend, alter, or repeal any of the insurance laws of the state.

(f) If any insurance is canceled or the premium adjusted, unearned insurance premium refunds received by the holder shall be credited to the final maturing installment of the contract except to the extent applied toward payment for a similar insurance protecting the interests of the buyer and the holder or either of them.

(g) The holder may, if the contract or refinancing agreement so provides, collect a delinquency charge on any installment which is not paid within ten days from the date the payment is due. Such charge may not exceed 5 percent of the installment or $50.00, whichever is less; provided, however, that, if the contract or refinancing agreement is related to a truck with a gross vehicle weight rating (GVWR) exceeding 6,000 pounds (size Class 3 and above), truck tractor, trailer, or semi-trailer used primarily for business or commercial purposes, such delinquency charge may not exceed 5 percent of the installment. A delinquent charge shall not be collected more than once for the same default. In addition to the delinquency and collection charge, the contract may provide for the payment of reasonable attorneys' fees where the contract is referred for collection to an attorney not a salaried employee of the holder of the contract, plus the court costs.

(h) No retail installment contract shall be signed by any party thereto when it contains blank spaces to be filled in after it has been signed except that, if delivery of the motor vehicle is not made at the time of the execution of the contract, the identifying numbers or marks

of the motor vehicle or similar information and the due date of the first installment may be left blank and later inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer. The buyer's written acknowledgment, conforming to the requirements of subsection (c) of this Code section, of delivery of a copy of a contract shall be presumptive proof of such delivery in any action or proceeding by or against the holder of the contract and that the contract, when signed, did not contain any blank spaces except as provided in this subsection.

(i) If the buyer so requests, the holder shall give or forward to the buyer a receipt for any payment when made in cash.

History.

Ga. L. 1967, p. 674, § 3; Ga. L. 1970, p. 101, §§ 1, 2; Ga. L. 1985, p. 698, § 1; Ga. L. 1996, p. 1058, § 1; Ga. L. 2019, p. 337, § 1-96/SB 132; Ga. L. 2024, p. 1052, § 2(3)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "model, year," for "year model, model," in subsection (d) and revised punctuation in subsection (g).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1996, the (1) and (2) designations were added in subsection (e).

Law reviews.

For article, "Acceleration Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-In-Lending Act," see 27 Mercer L. Rev. 969 (1976).

JUDICIAL DECISIONS

O.C.G.A. § 10-1-32 establishes requirements and prohibitions as to "retail installment contracts." Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Not "retail installment transaction" when bank, not seller, obtains lien. — When seller sold mobile home for a "cash sales price" and bank financed loan for the "cash sales price," the proceeds of which were then paid to the seller, the bank, not the seller, had a purchase money security interest in the mobile home and the actual sale was not a "retail installment transaction" under paragraphs (a)(9) and (a)(11) of this section. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Effect of signing contract without reading it. — When one who can read signs a contract without apprising oneself of the contract's contents otherwise than by accepting representations made by the opposite party with whom there exists no fiduciary or confidential relation, one cannot defend an action based on the contract, or have the contract canceled or reformed, on the ground that the contract does not contain the contract actually made, unless it should appear that at the time one signed the contract some such emergency existed as would excuse one's failure to read the contract or that one's failure to read the contract was brought about by some misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent one from reading the contract. Green v. Ford Motor Credit Co., 146 Ga. App. 531, 246 S.E.2d 721, 1978 Ga. App. LEXIS 2443 (1978).

No civil remedy for inadvertent failure to meet disclosure requirements. — It being uncontroverted that the seller's failure to meet the disclosure requirements of O.C.G.A. § 10-1-32 was inadvertent rather than intentional, O.C.G.A. § 10-1-38(c) did not provide a civil remedy. Vickery v. Mobile Home Indus., Inc., 171 Ga. App. 566, 320 S.E.2d 633, 1984 Ga. App. LEXIS 2274 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Balloon payment permissible. — Balloon payment on a retail installment contract is permissible under the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq. 1985 Op. Att'y Gen. No. 85-10.

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 589 et seq.
ALR.
Construction of statutes regulating form and contents of motor vehicle installment sales contracts, 73 A.L.R.2d 1430; 46 A.L.R. Fed. 657.

10-1-33. Finance charge limitations; assignment of contract.

(a) Notwithstanding any other law, the finance charge, exclusive of insurance and other benefits and official fees, shall not exceed the following rates:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled — $10.00 per $100.00 per year.

Class 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made — $13.00 per $100.00 per year.

Class 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made — $15.00 per $100.00 per year.

Class 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made — $17.00 per $100.00 per year.

(b) Such finance charge shall be computed on the unpaid balance on contracts payable in successive monthly payments substantially equal in amount. Such finance charge may be computed on the basis of a full month for any fractional month period in excess of ten days. A minimum finance charge of $25.00 may be charged on any retail installment transaction. As used in this subsection, the term "unpaid balance" shall be determined in accordance with Section 226.8(c) of Regulation Z promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321, 82 Stat. 146, et seq.), as the same existed upon its becoming effective on July 1, 1969.

(c) When a retail installment contract provides for unequal or

irregular installment payments, the finance charge may be at a rate which will provide the same yield as is permitted on monthly payment contracts under subsections (a) and (b) of this Code section, having due regard for the schedule of payments. Notwithstanding the foregoing, a seller who computes a finance charge on an actuarial basis may charge a finance charge, exclusive of insurance and other benefits and official fees, which, when calculated according to the actuarial method, does not exceed the yield which would have been permitted on monthly contracts under subsections (a) and (b) of this Code section, having due regard for the schedule of payments; provided, however, that when a seller computes the finance charge according to the actuarial method, then for purposes of computing the rate the entire term of the contract shall be considered to be the number of whole months within the scheduled payment period, disregarding any odd days.

(d) Notwithstanding the provisions of subsection (a) of this Code section, a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than $5,000.00.

(e) Any sales finance company may purchase or acquire or agree to purchase or acquire from any seller any contract on such terms and conditions as may be agreed upon between them. Unless the buyer has notice of the assignment of his contract, payment thereunder made by the buyer to the last known holder of such contract shall be binding upon all subsequent holders.

(f) In no event will any such assignment bar any right of action against the seller arising as a result of this article nor will any such assignment bar any defense against the sales finance company or other assignee arising as a result of subsection (b) of Code Section 10-1-38.

History.

Ga. L. 1967, p. 674, § 4; Ga. L. 1970, p. 101, § 3; Ga. L. 1980, p. 523, §§ 1, 2, 5; Ga. L. 1981, p. 703, § 1; Ga. L. 1985, p. 698, § 2; Ga. L. 2000, p. 136, § 10.

Cross references.

Inapplicability of section to retail installment contracts pertaining to any manufactured home with a cash sale price of more than $3,000, § 7-4-3.

Code Commission notes.

Subsection (a) of this Code section was amended by Ga. L. 1980, p. 523, § 1 to increase Class 1 and 2 rates from $8.00 per $100.00 and $11.00 per $100.00 to $10.00 per $100.00 and $13.00 per $100.00, respectively, and to make Class 1 applicable to all vehicles not previously registered. Section 5 of the 1980 Act provided for the repeal of this amendment on July 1, 1981, but § 5 was in turn repealed by Ga. L. 1981, p. 703, § 1, effective April 7, 1981. Thus, the language of subsection (a) of this Code section correctly reflects the Ga. L. 1980, p. 523, § 1 amendment.

U.S. Code.

Title I of the Consumer Credit Protection Act, referred to in subsection (b) of this Code section, is codified as 15 U.S.C. § 1601 et seq.

Title V of the Consumer Credit Protection Act, referred to in subsection (b) of this Code section, appears as various sections throughout 15 U.S.C.

Law reviews.

For note discussing impact of federal truth-in-lending legislation on state law, see 12 Ga. L. Rev. 814 (1978).

For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).

For article, "Bankruptcy Jurisdiction Under the 1984 Amendments: One Step Backward, One Step Forward," see 3 Bank. Dev. J. 127 (1986).

JUDICIAL DECISIONS

Analysis

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General Consideration

"Year" construed. — The term "year" in O.C.G.A. § 10-1-33 refers to "calendar year" rather than "model year." Lee v. National Bank & Trust Co., 153 Ga. App. 656, 266 S.E.2d 315, 1980 Ga. App. LEXIS 1937 (1980).

Construction of "any person" and "the person committing the violation." — In pari materia with O.C.G.A. § 10-1-33, the language "any person" and "the person committing the violation" found in subsections (a) and (c) of O.C.G.A. § 10-1-38 refers only to the seller or holder and was not intended to expand the class of persons liable for usury violations. This is emphasized by § 10-1-38(d), which provides that if a violation is corrected within ten days after execution of the contract "neither the seller nor the holder is subject to any penalty under this Code section." Tollett v. Green Tree Acceptance, Inc., 190 Ga. App. 295, 379 S.E.2d 2, 1989 Ga. App. LEXIS 216 (1989).

Retroactivity of subsection (d). — O.C.G.A. § 10-1-36.1, added to Georgia Motor Vehicles Sales Finance Act in 1985, expresses an intent by the General Assembly that neither the 1983 amendment of O.C.G.A. § 7-4-3, nor the addition of new subsection (d) to O.C.G.A. § 10-1-33 in 1985 (assuming it did apply to mobile home loans) was intended to apply retroactively. Southern Guar. Corp. v. Doyle, 256 Ga. 790, 353 S.E.2d 510, 1987 Ga. LEXIS 657 (1987).

Subsection (d) of O.C.G.A. § 10-1-33, which abolishes the interest limit for motor vehicle installment sales contracts in excess of $5,000, is not applicable to a refinancing agreement dated prior to the effective date of O.C.G.A. § 10-1-33. Parten v. GMAC, 187 Ga. App. 516, 370 S.E.2d 778, 1988 Ga. App. LEXIS 786 (1988).

Mobile home loans. — "Motor vehicle" loans are defined to include mobile home loans, but O.C.G.A. § 10-1-33 does not apply to other types of home loans or mortgages. Doyle v. Southern Guar. Corp., 795 F.2d 907, 1986 U.S. App. LEXIS 27236 (11th Cir. 1986).

Mobile home installment sales contracts. — Since the General Assembly, beginning in 1983, has distinguished between mobile home loans and motor vehicle loans, and since O.C.G.A. § 7-4-3(a)(1) and (b)(1), as amended in 1983, deal specifically with mobile home installment sales contracts, whereas subsection (d) of O.C.G.A. § 10-1-33, as amended in 1985, does not, § 7-4-3(a)(1) and (b)(1) express the controlling legislation and legislative intent on mobile home installment sales contracts in excess of $3,000. Southern Guar. Corp. v. Doyle, 256 Ga. 790, 353 S.E.2d 510, 1987 Ga. LEXIS 657 (1987).

Finance Charges

Finance charge is figured as percentage of unpaid (principal) balance. — The term "principal balance" in the original Motor Vehicle Sales Act has been changed to "unpaid balance" in subsection (b) of O.C.G.A. § 10-1-33, as used in § 226.8(c), Regulation Z, relating to the Truth in Lending Act as therein set out. Both terms refer to the same thing — that is, the balance arrived at by deducting from the cash price any down payment made and adding to that sum all other authorized charges and expenses except the finance charge itself. The finance charge is then figured as a given percentage of this unpaid (principal) balance per year throughout the lifetime of the installment payments. Pike v. Universal C.I.T. Credit Corp., 125 Ga. App. 83, 186 S.E.2d 482, 1971 Ga. App. LEXIS 741 (1971).

Unpaid balance may include insurance costs and other charges. — Insurance costs and other authorized charges are properly included in the "unpaid balance" and subject to the finance charge. Pitts v. Peoples Loan & Fin. Corp., 135 Ga. App. 38, 217 S.E.2d 181, 1975 Ga. App. LEXIS 1545 (1975); Busby v. Sea Island Bank, 151 Ga. App. 412, 260 S.E.2d 485, 1979 Ga. App. LEXIS 2550 (1979).

Acceleration clauses are not per se unenforceable. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

Collection of unearned interest is not per se improper under Georgia law. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

If an acceleration of unearned interest causes a note to become usurious, then there is a violation of the usury provision of Ga. L. 1967, p. 674, § 4, and, thus, under Ga. L. 1967, p. 674, § 8, the creditor is barred from recovering any finance charge, delinquency, or collection charge on the contract. McDaniel v. Fulton Nat'l Bank, 395 F. Supp. 422, 1974 U.S. Dist. LEXIS 11532 (N.D. Ga. 1974), rev'd, 543 F.2d 568, 1976 U.S. App. LEXIS 5962 (5th Cir. 1976).

Acceleration without credit for unearned rates. — Plaintiff's acceleration under the contract, followed by the filing of the plaintiff's petition for a writ of possession seeking recovery of a balance due, without deducting therefrom unearned rates that would have been earned except for acceleration, amounted to a "charge" by the seller in violation of O.C.G.A. § 10-1-33. Bozeman v. Tifton Fed. Sav. & Loan Ass'n, 164 Ga. App. 260, 297 S.E.2d 49, 1982 Ga. App. LEXIS 2767 (1982).

In computing the accelerated balance on an installment sales contract in a petition for a writ of possession of mobile homes sold under the contract, the contract assignee's initial failure to rebate any unearned interest and subsequent rebating of such charges according to the Rule of 78's method violated O.C.G.A. Art. 2, Ch. 1, T. 10. Carter v. First Fed. Sav. & Loan Ass'n, 179 Ga. App. 532, 347 S.E.2d 264, 1986 Ga. App. LEXIS 1952 (1986).

Rebate of unearned finance charges on a monthly basis is harmonious with the provisions of O.C.G.A. Art. 2, Ch. 1, T. 10. Fitch v. GMAC, 181 Ga. App. 7, 351 S.E.2d 215, 1986 Ga. App. LEXIS 2335 (1986).

Application of Rule of 78. — In cases of acceleration of contracts under the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq., any refund credit for unearned finance charges may not be calculated under the Rule of 78. Bozeman v. Tifton Fed. Sav. & Loan Ass'n, 164 Ga. App. 260, 297 S.E.2d 49, 1982 Ga. App. LEXIS 2767 (1982).

Creditor suing for deficiency cannot use "Rule of 78". — The "Rule of 78" cannot be used to compute the interest refund in a suit for a deficiency balance resulting from a sale under an installment contract. Cook v. First Nat'l Bank, 130 Ga. App. 587, 203 S.E.2d 870, 1974 Ga. App. LEXIS 1191 (1974).

Use of "Rule of 78" results in charging more interest than allowed. — When the interest refund, calculated using the "Rule of 78," results in interest totaling two-thirds of the total amount being charged for a period of less than half the time of the note, this is in excess of the maximum allowable for the period in question on the unpaid balance to finance. Hence, a violation of subsection (a) of Ga.

Finance Charges (Cont'd)

L. 1967, p. 674, § 4 is shown by the evidence. Under Ga. L. 1967, p. 674, § 8 this bars recovery of any finance charge, delinquency, or collection charge on the contract. Cook v. First Nat'l Bank, 130 Ga. App. 587, 203 S.E.2d 870, 1974 Ga. App. LEXIS 1191 (1974).

Presumption that contract rate applied overcome. — Annual percentage rate of 22.55 percent should be applied to debtor's obligation to creditor since the creditor had overcome the presumption that the contract rate applied by showing that on a vehicle of the same age as debtor's vehicle, the creditor would obtain a 13 percent add-on rate. In re McMichen, 23 B.R. 497, 1982 Bankr. LEXIS 3136 (Bankr. N.D. Ga. 1982).

Federal Law

1. FHA and VA

Overriding of FHA and VA provisions. — Notwithstanding the inclusion of FHA and VA consumer protections, the lenders could not avail themselves of either preemption statute, since when the General Assembly amended O.C.G.A. § 10-1-33 in 1980 (raising the interest rate limit from 8 percent add-on to 10 percent add-on), it invoked other provisions of the FHA and VA preemption statutes which under certain circumstances permit the states to override the FHA and VA preemptions. Southern Guar. Corp. v. Doyle, 256 Ga. 790, 353 S.E.2d 510, 1987 Ga. LEXIS 657 (1987).

Georgia overrode the FHA and VA preemptions when it amended its usury limit on mobile home transactions in 1980 and 1981, even though the amendments referred to neither the FHA/VA statutes nor to FHA/VA-insured loans. Doyle v. Southern Guar. Corp., 795 F.2d 907, 1986 U.S. App. LEXIS 27236 (11th Cir. 1986).

2. Depository Institutions Deregulation and Monetary Control Act

Lender may still qualify for federal preemption by complying with the Depository Institutions Deregulation and Monetary Control Act regulations unless, of course, the state has also overridden the DIDMCA preemption. Doyle v. Southern Guar. Corp., 795 F.2d 907, 1986 U.S. App. LEXIS 27236 (11th Cir. 1986).

Federal Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) was applicable, in that the transaction in question, entered into after March 31, 1980, and before the enactment of exempting state legislation, involved a federally related residential mortgage loan, made by a "creditor" as defined in DIDMCA and secured by a first lien on a residential manufactured home. Vickery v. Mobile Home Indus., Inc., 171 Ga. App. 566, 320 S.E.2d 633, 1984 Ga. App. LEXIS 2274 (1984).

DIDMCA contracts not containing required protections. — When lenders' mobile home contracts fell under § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), but it was undisputed that the contracts did not contain the consumer protections required by DIDMCA, DIDMCA did not exempt those contracts from O.C.G.A. § 10-1-33. Southern Guar. Corp. v. Doyle, 256 Ga. 790, 353 S.E.2d 510, 1987 Ga. LEXIS 657 (1987).

3. Bankruptcy

Applicability to Ch. 13 bankruptcy plan. — When debtor's car has value less than debt and debtor proposes to pay creditor under a Ch. 13 bankruptcy plan, it is not an arms-length consumer transaction in which the debtor is buying and financing a used car. Creditor is not entitled to receive maximum interest allowable under Georgia law in this context. In re Clements, 16 B.R. 196, 1981 Bankr. LEXIS 2620 (Bankr. N.D. Ga. 1981).

Rate of interest of 22.75%, specified in a purchase-money motor vehicle contract, arguably steep given the rehabilitative nature of the subsequent bankruptcy proceeding, but less than the statutory maximum, and while containing an element of profit, was the rate applied, given the risks involved, in calculating the total amount of payments that the bankruptcy debtor had to make. In re Smith, 42 B.R. 198, 1984 Bankr. LEXIS 5197 (Bankr. N.D. Ga. 1984).

Violation of O.C.G.A. 10-1-33

Violation forfeits charges. — A violation of Ga. L. 1967, p. 674, § 4 invokes the penalty provisions of subsection (b) of Ga. L. 1967, p. 674, § 8 and results in forfeiture of "any finance charge, delinquency, or collection charge on the contract." Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, 1978 Ga. App. LEXIS 1943, rev'd, 242 Ga. 1, 247 S.E.2d 743, 1978 Ga. LEXIS 1066 (1978).

Principal is still collectible. — Once the court has determined that the creditor is in fact attempting to extort usurious interest, the lender is allowed to collect the principal, but the lender loses at least all unearned interest. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

OPINIONS OF THE ATTORNEY GENERAL

Balloon payment on a retail installment contract is permissible under the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq. 1985 Op. Att'y Gen. No. 85-10.

RESEARCH REFERENCES

Am. Jur. 2d.

67 Am. Jur. 2d, Sales, § 325 et seq.

ALR.

What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 A.L.R.3d 421.

Reformation of usurious contract, 74 A.L.R.3d 1239.

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 USCS § 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173.

What constitutes violation of requirements of Truth in Lending Act (15 USCS § 1601 et seq.) concerning disclosure of information in credit transactions — civil cases, 113 A.L.R. Fed. 197.

What constitutes "finance charge" under § 106(a) of the Truth in Lending Act (15 USCA § 1605(a)) or applicable regulations, 154 A.L.R. Fed. 431.

Preemptive effect of Truth in Lending Act (TILA), 61 A.L.R. Fed. 2d 505.

Validity, construction, and application of Truth in Lending Act (TILA) and regulations promulgated thereunder — United States Supreme Court cases, 67 A.L.R. Fed. 2d 567.

10-1-33.1. Advancement of money for satisfaction of lease, lien, or security interest in motor vehicle.

A retail installment seller may advance money to a buyer or pay money to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on a motor vehicle which is the subject of a retail installment transaction under this article. Any amount so advanced or paid may be financed as part of a retail installment contract and shall not be considered a loan. The transaction and the seller making such advance or payment shall be exempt from the provisions of Chapter 3 of Title 7, relating to installment loans, from the provisions of Chapter 4 of Title 7, relating to interest and usury, and from any other provision of Georgia law regulating loans.

History.

Code 1981, § 10-1-33.1, enacted by Ga. L. 1999, p. 1229, § 2; Ga. L. 2020, p. 156, § 8/SB 462.

Editor's notes.
Ga. L. 2020, p. 156, § 10/SB 462, not codified by the General Assembly, provides that: "This Act shall apply to all installment loan agreements entered into on and after July 1, 2020."

10-1-34. Right to prepay debt; credit upon anticipation of payments.

Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may pay in full at any time before maturity the debt of any retail installment contract and, in so paying the debt, shall receive a refund credit thereon for the anticipation of payments. The amount of the refund shall represent at least as great a proportion of the finance charge as the sum of the monthly time balance after the month in which prepayment is made bears to the sum of all the monthly time balances under the schedule of payments in the contract. This method of refund upon prepayment is commonly referred to as the "Rule of 78" or the "Sum of the Digits" refund method. Where the amount of credit is less than $1.00, no refund need be made. This Code section shall not apply to credit upon anticipation of payments or upon acceleration in those cases where the seller or holder of the contract has computed finance charges according to the actuarial method as set forth in Code Section 10-1-33.

History.
Ga. L. 1967, p. 674, § 5; Ga. L. 1980, p. 523, § 3.

JUDICIAL DECISIONS

Rebate of unearned finance charges on a monthly basis is harmonious with provisions of O.C.G.A. Art. 2, Ch. 1, T. 10. Fitch v. GMAC, 181 Ga. App. 7, 351 S.E.2d 215, 1986 Ga. App. LEXIS 2335 (1986).

RESEARCH REFERENCES

Am. Jur. 2d.
9A Am. Jur. 2d, Bankruptcy, § 1131.
50 Am. Jur. 2d, Larceny, § 62.

C.J.S.
8B C.J.S., Bankruptcy, § 833.

10-1-35. Refinancing retail installment contract.

The holder of a contract, upon request by the buyer, may extend the scheduled due date of all or any part of any installment or installments or deferred payment or payments or renew or restate the unpaid time balance of such contract, the amount of the installments, and the time schedule therefor and may collect for such extension, deferment, renewal, or restatement a refinance charge computed as follows: In the event the unpaid time balance of the contract is extended, deferred, renewed, or restated, the holder may compute the refinance charge on such amount by adding to the unpaid time balance the cost for

insurance and other benefits incidental to the refinancing plus any accrued delinquency and collection charges after deducting any refund which may be due the buyer at the time of the renewal or restatement by prepayment pursuant to Code Section 10-1-34, at the rate of the finance charge specified in subsection (a) of Code Section 10-1-33, and by reclassifying the motor vehicle by its then year model, for the term of the refinancing agreement, but otherwise subject to the provisions of this article governing computation of the original finance charge. The provisions of this article relating to minimum finance charges under subsection (b) of Code Section 10-1-33 and acquisition costs under the refund schedule in Code Section 10-1-34 shall not apply in calculating refinance charges on the contract extended, deferred, renewed, or restated. If all unpaid installments are deferred for not more than two months, the holder may, at his election, charge and collect for such deferment an amount equal to the difference between the refund required for prepayment in full under Code Section 10-1-34 as of the scheduled due date of the first deferred installment and the refund required for prepayment in full as of one month prior to said date times the number of months in which no scheduled payment is made.

History.
Ga. L. 1967, p. 674, § 6.

JUDICIAL DECISIONS

Inapplicable when deficiency judgment not being sought. — O.C.G.A. § 10-1-35 is inapplicable to a case which is not seeking a deficiency judgment but, instead, is a suit on a note. F & M Bank v. Smith, 162 Ga. App. 410, 291 S.E.2d 80, 1982 Ga. App. LEXIS 2190 (1982).

O.C.G.A. § 10-1-35 complements O.C.G.A. § 11-9-504 and provides some guidance as to what constitutes reasonable notice. Lacy v. General Fin. Corp., 651 F.2d 1026, 1981 U.S. App. LEXIS 11051 (5th Cir. 1981).

Actual notice to debtor not required. — There is no requirement in O.C.G.A. § 10-1-35 that the debtor actually receive notice. Calcote v. Citizens & S. Nat'l Bank, 179 Ga. App. 132, 345 S.E.2d 616, 1986 Ga. App. LEXIS 1838 (1986).

Caterpillar 977L Traxcavator does not fall within purview of "motor vehicle" under O.C.G.A. § 10-1-35. Battle v. Yancey Bros. Co., 157 Ga. App. 277, 277 S.E.2d 280, 1981 Ga. App. LEXIS 1779 (1981).

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, §§ 325 et seq., 589.

10-1-36. Disposition of motor vehicle repossessed after default; right to recover deficiency.

(a) When any motor vehicle has been repossessed after default in accordance with Part 6 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after the repossession he or she forwards by registered or certified mail or statutory overnight delivery to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of his or her rights of redemption, as well as his or her right to demand a public sale of the repossessed motor vehicle. In the event the buyer exercises his or her right to demand a public sale of the goods, he or she shall in writing so advise the seller or holder of his or her election by registered or certified mail or statutory overnight delivery addressed to the seller or holder at the address from which the seller's or holder's notice emanated within ten days after the posting of the original seller's or holder's notice.

(b) In the event of election of such public sale by the buyer, the seller or holder shall dispose of said repossessed motor vehicle at a public sale as provided by law, to be held in the state and county where the original sale took place, or the state and county where the motor vehicle was repossessed, or the state and county of the buyer's residence, at the seller's election.

(c) This Code section is cumulative of Part 6 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing herein shall be deemed to repeal said part.

History.
Ga. L. 1967, p. 674, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 995, § 9.

Law reviews.
For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B. J. 43 (1987).

For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

JUDICIAL DECISIONS

Analysis

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General Consideration

Section is cumulative to UCC. — Ga. L. 1967, p. 674, § 7 provided that it was cumulative of former Code 1933, Ch. 109A-9-5 and provided cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer. Georgia

Cent. Credit Union v. Coleman, 155 Ga. App. 547, 271 S.E.2d 681, 1980 Ga. App. LEXIS 2668 (1980).

Application of both federal and state statutes. — No inconsistency exists in applying both the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7, and the Georgia Motor Vehicle Sales Finance Act (MVSFA), O.C.G.A. § 10-1-30 et seq., as DIDMCA speaks only to procedures to be followed prior to foreclosure and the notice requirements of O.C.G.A. § 10-1-36(a) only apply to procedures that take place after repossession. Chambliss v. Oakwood Acceptance Corp., 315 B.R. 166, 2004 Bankr. LEXIS 1505 (Bankr. S.D. Ga. 2004).

Leases. — The commercially reasonable sale provision under O.C.G.A. § 11-9-504 and the notice provision under O.C.G.A. § 10-1-36 were not applicable to a lease which was a "true lease" rather than a disguised secured transaction. Citizens & S. Nat'l Bank v. Thomas, 188 Ga. App. 312, 372 S.E.2d 687, 1988 Ga. App. LEXIS 970 (1988).

Compliance required for recovery of deficiency. — Compliance with this section is a condition precedent to recovery of any deficiency claim against a defaulting purchaser of a motor vehicle. Doughty v. Associates Com. Corp., 152 Ga. App. 575, 263 S.E.2d 493, 1979 Ga. App. LEXIS 3044 (1979).

Trial court properly granted judgment to a debtor, finding that a repossessor failed to comply with O.C.G.A. § 10-1-36, and therefore was precluded from collecting a deficiency from the debtor following the sale of the debtor's vehicle, as the repossessor waived strict compliance with O.C.G.A. § 10-1-36 by admitting that it received a facsimile notice sent by the debtor, and raised no issue as to the timeliness of the notice or whether it was received by the proper person, and failed to send the required notice thereunder to the debtor's address shown on the contract or later designated by the debtor, opting instead to send the notice to a post office box. Consumer Portfolio Servs. v. Rouse, 282 Ga. App. 314, 638 S.E.2d 442, 2006 Ga. App. LEXIS 1377 (2006).

Noncompliance bars recovery. — A creditor's failure to comply with the notice provisions of O.C.G.A. § 10-1-36 is an absolute bar to recovery of a deficiency judgment. Bryant Int'l, Inc. v. Crane, 188 Ga. App. 736, 374 S.E.2d 228, 1988 Ga. App. LEXIS 1192 (1988).

Compliance not required when creditor was not a "seller". — Compliance with O.C.G.A. § 10-1-36 was not required in disposing of a tractor and trailer given as collateral for a promissory note since the lender was not engaged in the business of selling motor vehicles to retail buyers in retail installment actions. The repossession at issue was governed only by O.C.G.A. § 11-9-504(3). Ervin v. Arnold, 197 Ga. App. 841, 399 S.E.2d 548, 1990 Ga. App. LEXIS 1471 (1990).

Statute of limitations. — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney's state court deficiency action against the plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act claim was dismissed; other parts of the Georgia Code, such as O.C.G.A. §§ 10-1-36 and 40-3-50, and applicable case law indicated that Georgia's highest courts would most likely hold that the case fell within Ga. U.C.C. Art. 9 and not Ga. U.C.C. Art. 2. Almand v. Reynolds & Robin, P.C., 485 F. Supp. 2d 1361, 2007 U.S. Dist. LEXIS 31907 (M.D. Ga. 2007).

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Notice required within ten days of repossession, not acquisition of interest. — This section makes no mention of sending a notice within ten days after an interest in the property is acquired. To give this section such a construction would be to allow a party who is a subsequent holder of the note to give notice six months, or perhaps even a year, after the repossession occurred based merely on the fact that the party then acquired a right to possession of the vehicle. This section is clear in its import to protect the debtor by giving the debtor

Notice (Cont'd)

notice within ten days of the repossession so that the debtor might act to prevent the loss of any rights the debtor might have. Barnett v. Trussell Ford, Inc., 129 Ga. App. 176, 198 S.E.2d 903, 1973 Ga. App. LEXIS 928 (1973).

Cure period does not stop 10 days. — Creditor had the right to repossess debtor's truck on the date the debtor surrendered the truck, not at the end of a ten-day period extended by the creditor for the debtor to "cure" the debtor's default, and the "cure" period did not stop the running of the ten-day notice requirement of O.C.G.A. § 10-1-36. Welch v. Ford Motor Credit Co., 227 Ga. App. 904, 490 S.E.2d 206.

Triggering of ten-day period. — It is only when the debtor is in default and the right to repossess exists that no distinction should be made between repossession and voluntary surrender with regard to triggering the running of the ten-day period within which the required notice must be sent. Central & S. Bank v. Williford, 192 Ga. App. 843, 386 S.E.2d 688, 1989 Ga. App. LEXIS 1254 (1989).

Because the lessor was not bound to renew a vehicle lease agreement or become the owner of the vehicle and the residual purchase option price was not nominal or unreasonably low, the lease agreement did not serve as a security interest that triggered notice requirements under O.C.G.A. § 10-1-36. Lewis v. Lease Atlanta, Inc., 234 Ga. App. 812, 508 S.E.2d 188, 1998 Ga. App. LEXIS 1362 (1998).

No requirement that notice be received. — Under O.C.G.A. § 10-1-36, there is no requirement that the required notice be received, but only that it be sent within ten days of repossession by registered or certified mail to the address shown on the contract or later designated by the buyer. Brack Rowe Chevrolet Co. v. Walls, 201 Ga. App. 822, 412 S.E.2d 603, 1991 Ga. App. LEXIS 1593 (1991).

Two attempts to deliver certified mail to the buyer's correct address met the requirements of O.C.G.A. § 10-1-36. Hill v. Federal Employees Credit Union, 193 Ga. App. 44, 386 S.E.2d 874, 1989 Ga. App. LEXIS 1290 (1989).

Use of language "you may redeem said collateral" is sufficient compliance with the terms of this section. Gary v. GMAC, 128 Ga. App. 10, 195 S.E.2d 458, 1973 Ga. App. LEXIS 1362 (1973).

Statement of balance is not required. — Although a statement of the balance owed would be preferable in advising the buyer of the buyer's rights of redemption, this section does not require such specification. Cook v. First Nat'l Bank, 130 Ga. App. 587, 203 S.E.2d 870, 1974 Ga. App. LEXIS 1191 (1974).

Compliance with notice requirements. — After the Chapter 13 debtors objected to a secured creditor's amended proof of claim that alleged the existence of a deficiency balance after it had repossessed and sold the collateral, the creditor complied with the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7, by giving the debtors 30 days notice of default and right to cure before it repossessed their mobile home, and complied with the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq., by sending the post-repossession notice to the debtors within 10 days of repossession; therefore, its post-repossession notice was timely. Chambliss v. Oakwood Acceptance Corp., 315 B.R. 166, 2004 Bankr. LEXIS 1505 (Bankr. S.D. Ga. 2004).

Creditor's notice of an intention to seek a deficiency judgment sent to the debtors was sufficient. Although the certified mail receipt did not indicate the date the letter was sent, the creditor's agent gave a sworn statement based on personal knowledge that the letter was sent two days after the car was repossessed, and the address used was current and correct, although it was not the address listed in the sales contract. Versey v. Citizens Trust Bank, 306 Ga. App. 479, 702 S.E.2d 479, 2010 Ga. App. LEXIS 968 (2010).

Trial court erred by granting summary judgment to a finance company in the company's suit against a debtor to collect a deficiency from the sale of the debtor's repossessed vehicle because there was a genuine issue of material fact as to

whether the finance company complied with the requirement under O.C.G.A. § 10-1-36(a) to mail a notice to the debtor's designated address or the address in the contract. Shell v. Tidewater Fin. Co., 318 Ga. App. 69, 733 S.E.2d 375, 2012 Ga. App. LEXIS 848 (2012).

Noncompliance with notice requirements. — When a bank forwarded separate deficiency notices to a loan cosigner and the cosigner's daughter by certified mail within 10 days after repossession of a financed vehicle but mailed both notices to the daughter's address, even though the cosigner's address was the one shown on the contract, the notice was not in compliance with O.C.G.A. § 10-1-36. Whatley v. Bank S., 185 Ga. App. 896, 366 S.E.2d 182, 1988 Ga. App. LEXIS 38 (1988).

The repossession of defendant's automobile occurred when the defendant notified the bank of the defendant's intention to allow repossession, not when the bank physically removed the car from the seller's premises; the bank therefore did not comply with the 10-day notice requirements of O.C.G.A. § 10-1-36 by sending notice on the day after the car was returned. Sikes & Swanson Pontiac-GMC Truck, Inc. v. Cantrell, 194 Ga. App. 818, 392 S.E.2d 36, 1990 Ga. App. LEXIS 352 (1990).

Failure to comply with the notice provisions of O.C.G.A. § 10-1-36 is an absolute bar to recovery. Brack Rowe Chevrolet Co. v. Walls, 201 Ga. App. 822, 412 S.E.2d 603, 1991 Ga. App. LEXIS 1593 (1991).

The absence of any proof that the notice was sent by certified mail coupled with evidence that it was never received, left the trial court with a disputed fact regarding whether the notice was properly sent in compliance with O.C.G.A. § 10-1-36. Pitts v. Bank S. Corp., 209 Ga. App. 124, 433 S.E.2d 96, 1993 Ga. App. LEXIS 798 (1993).

Creditor, who did not comply with the notice requirements of O.C.G.A. § 10-1-36 in repossessing and selling a debtor's vehicle, was not entitled to assert a deficiency claim over the debtor's objection, despite the language of the bankruptcy plan and the creditor's belief that the practice in the district was to allow such claim. Gibson v. Citifinancial Auto Corp. (In re Gibson), No. 05-40782-MGD, 2005 Bankr. LEXIS 2672 (Bankr. N.D. Ga. Nov. 15, 2005).

Creditor, who was secured by debtor's car, was not entitled to a deficiency claim after the sale of the car failed to satisfy the full amount of the debt owed since the creditor did not give notice under state law of the creditor's intention to seek a deficiency claim. Baxter v. Sys. & Servs. Techs., Inc., 287 B.R. 298, 2002 Bankr. LEXIS 1418 (Bankr. S.D. Ga. 2002).

Notice not required in car lease. — Lessor was not required to comply with the notice provisions of O.C.G.A. §§ 10-1-36 and 11-9-504 because the motor vehicle lease agreement the lessor entered into with the lessee was intended to be a true lease and not to evince a secured transaction; the lessor retained a meaningful reversionary interest in the car because the option price was more than nominal since the purchase option price was approximately one-third of the car's value, and the agreement contained no provision purporting to grant the lessee equity in the vehicle prior to exercise of the purchase option. Aniebue v. Jaguar Credit Corp., 308 Ga. App. 1, 708 S.E.2d 4, 2011 Ga. App. LEXIS 103 (2011).

Plaintiff's good faith held question of fact. — When it cannot be determined if notice of the sale was returned prior to or after the sale, the plaintiff's good faith in the transaction is a question for the trier of fact. Slocum v. First Nat'l Bank, 152 Ga. App. 632, 263 S.E.2d 516, 1979 Ga. App. LEXIS 3071 (1979).

Notice objection did not apply. — With respect to the creditor's deficiency claim arising from a sale of a truck in which the creditor had perfected a first-priority lien, the debtor's objection based on O.C.G.A. § 10-1-36, which requires additional notice to recover a deficiency against a buyer, did not apply to bar the claim because the creditor was not a sales finance company under the Georgia statute given that it had not purchased a retail installment contract from a seller and was not engaged in the business of purchasing retail installment contracts. Ambrose v. Advantage Funding Commer. Capital Corp. (In re Ambrose),

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568 B.R. 716, 2017 Bankr. LEXIS 665 (Bankr. N.D. Ga. 2017).

RESEARCH REFERENCES

Am. Jur. 2d.
67A Am. Jur. 2d, Sales, §§ 337, 370.

10-1-36.1. Prohibition on class actions.

(a) A claim of violation on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action under Code Section 9-11-23 or any other provisions of law.

(b) Nothing contained in this Code section shall apply to class actions involving mobile homes or manufactured homes pending in any courts of this state, including any United States courts, on February 22, 1985, as to the parties to and subject matter then before such courts.

History.
Code 1981, § 10-1-36.1, enacted by Ga. L. 1985, p. 698, § 3.

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Purpose of section. — Subsection (a) of O.C.G.A. § 10-1-36.1 is intended to prohibit class action certification for a claim that any loan or contract secured by an interest in a motor vehicle violates the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq. Taylor Auto Group, Inc. v. Jessie, 241 Ga. App. 602, 527 S.E.2d 256, 1999 Ga. App. LEXIS 1680 (1999), cert. denied, No. S00C0694, 2000 Ga. LEXIS 464 (Ga. May 26, 2000).

10-1-37. Waiver of this article void.

Any waiver of this article shall be unenforceable and void.

History.
Ga. L. 1967, p. 674, § 9.

JUDICIAL DECISIONS

Waiver prohibited. — Code section expressly prohibits any waiver of the provisions of Ga. L. 1967, p. 674, § 1 et seq. Barnett v. Trussell Ford, Inc., 129 Ga. App. 176, 198 S.E.2d 903, 1973 Ga. App. LEXIS 928 (1973).

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 68.

C.J.S.
77A C.J.S., Sales, § 118 et seq.

10-1-38. Criminal and civil penalties.

(a) Any person who shall willfully and intentionally violate this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $500.00 for the first offense and shall be punished as for a misdemeanor for each subsequent offense.

(b) A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

(c) In case of a willful violation of this article with respect to any transaction, the buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of $100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction, but the seller may recover from the buyer an amount equal to the cash price of the goods or services in such transaction and the cost of any insurance purchased by the seller for the buyer in connection therewith.

(d) Notwithstanding this Code section, any failure to comply with Code Section 10-1-33 may be corrected within ten days after the date of execution of the retail installment contract by the buyer; and, if so corrected, neither the seller nor the holder is subject to any penalty under this Code section.

History.
Ga. L. 1967, p. 674, § 8.

Law reviews.
For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B. J. 43 (1987).

JUDICIAL DECISIONS

Analysis

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General Consideration

Construction of "any person" and "the person committing the violation." — In pari materia with O.C.G.A. § 10-1-33, the language "any person" and "the person committing the violation" found in subsections (a) and (c) of O.C.G.A. § 10-1-38 refers only to the seller or holder and was not intended to expand the class of persons liable for usury violations. This is emphasized by subsection (d), which provides that if a violation is corrected within ten days after execution of the contract, "neither the seller nor the holder is subject to any penalty under this Code section." Tollett v. Green Tree Acceptance, Inc., 190 Ga. App. 295, 379 S.E.2d 2, 1989 Ga. App. LEXIS 216 (1989).

Insurance costs and other authorized charges are properly included in the "unpaid balance" and are properly subject to the finance charge; therefore, if included, there is no violation of Ga. L. 1970, p. 101, § 3 and no resultant

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forfeiture of interest. Busby v. Sea Island Bank, 151 Ga. App. 412, 260 S.E.2d 485, 1979 Ga. App. LEXIS 2550 (1979).

Retroactivity of 1983 amendment to § 7-4-3(a). — The 1983 amendment to O.C.G.A. § 7-4-3(a), which provides that O.C.G.A. § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than $3,000.00 does not operate retroactively so as to eliminate any cause of action a manufactured home purchaser may have acquired under O.C.G.A. § 10-1-38 by a transaction prior to the 1983 act's effective date. Southern Guar. Corp. v. Doyle, 256 Ga. 790, 353 S.E.2d 510, 1987 Ga. LEXIS 657 (1987).

No civil remedy for inadvertent failure to disclose. — It being uncontroverted that the seller's failure to meet the disclosure requirements of O.C.G.A. § 10-1-32 was inadvertent rather than intentional, subsection (c) of O.C.G.A. § 10-1-38 did not provide a civil remedy. Vickery v. Mobile Home Indus., Inc., 171 Ga. App. 566, 320 S.E.2d 633, 1984 Ga. App. LEXIS 2274 (1984).

Subsection (c) of O.C.G.A. § 10-1-38 does not provide a civil remedy for nonwillful violations of the relevant statutory provisions. Ogletree v. Brokers S., Inc., 192 Ga. App. 53, 383 S.E.2d 900, 1989 Ga. App. LEXIS 869 (1989).

Acceleration clauses are not per se unenforceable. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

Collection of unearned interest is not per se improper under Georgia law. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

Acceleration clause not bad unless usurious. — An acceleration clause is bad only if it attempts to accelerate unearned interest and enforcement of the clause would cause the note to become usurious. McDaniel v. Fulton Nat'l Bank, 395 F. Supp. 422, 1974 U.S. Dist. LEXIS 11532 (N.D. Ga. 1974), rev'd, 543 F.2d 568, 1976 U.S. App. LEXIS 5962 (5th Cir. 1976).

Excess finance charge alone does not show willfulness. — A finding of willfulness is not authorized merely because it has been established that a finance charge exceeds the legal limit set forth in subsection (a) of Ga. L. 1970, p. 101, § 3. Lee v. National Bank & Trust Co., 153 Ga. App. 656, 266 S.E.2d 315, 1980 Ga. App. LEXIS 1937 (1980).

Award of attorneys' fees. — In determining appropriate award of attorneys' fees, contingency nature of fee arrangement should be considered. Stokes v. Fidelity Acceptance Corp., 644 F.2d 355, 1981 U.S. App. LEXIS 13845 (5th Cir. 1981).

When the jury was asked to indicate the jury's finding as to whether there had been any "willful and intentional violation" on the part of the plaintiff, by striking out this language on the verdict form, the jury obviously found that there had not been such a violation and, therefore, the verdict showed, on the verdict's face, that there was no predicate for any recovery of attorney's fees. First Union Nat'l Bank v. Big John's Auto Sales, Inc., 203 Ga. App. 797, 417 S.E.2d 416, 1992 Ga. App. LEXIS 626 (1992).

O.C.G.A. § 10-1-38 permits a recoupment of attorney's fees previously paid to a seller who had willfully violated the Motor Vehicle State Finance Act, O.C.G.A. § 10-1-30 et seq., but it does not permit a recovery of any attorney's fees incurred in litigating the seller's willful violation of that statute. First Union Nat'l Bank v. Big John's Auto Sales, Inc., 203 Ga. App. 797, 417 S.E.2d 416, 1992 Ga. App. LEXIS 626 (1992).

Evidence held to support findings as to usury. — When less than $100.00 of the total $540.96 finance charge was refunded upon acceleration of one note prior to the half-way point in the contract and no interest was refunded to the promisor upon acceleration of the second note, there was ample evidence to support the trial court's finding usurious both contracts which were the basis for the bank's counterclaim. Adamson v. Trust Co. Bank, 155 Ga. App. 646, 271 S.E.2d 899, 1980 Ga. App. LEXIS 2718 (1980).

Penalties

Minimum penalty. — General Assembly did not intend by the

legislature's language in O.C.G.A. § 10-1-38 to allow courts to choose the $100.00 penalty in cases involving willful violations; rather, the $100.00 minimum was meant to apply only in cases when the illegal finance charge amounted to less than $50.00. Stokes v. Fidelity Acceptance Corp., 644 F.2d 355, 1981 U.S. App. LEXIS 13845 (5th Cir. 1981).

No provision as to degree of overcharge or penalty. — There is no provision in O.C.G.A. § 10-1-38 for degrees of overcharging or degrees of penalty. The penalty for overcharging is forfeiture of any finance charge, delinquency, or collection charge on the contract. The language used is absolute and the trial court is without authority to decline to apply the language. Kelly v. Sylvan Motors, Inc., 160 Ga. App. 420, 287 S.E.2d 359, 1981 Ga. App. LEXIS 3139 (1981).

Forfeiture of finance charge. — O.C.G.A. § 10-1-38 provides for forfeiture of finance charge as a consequence of any violation of O.C.G.A. Art. 2, Ch. 1, T. 10, regardless of the violation's character. Stokes v. Fidelity Acceptance Corp., 644 F.2d 355, 1981 U.S. App. LEXIS 13845 (5th Cir. 1981).

Usury violation bars recovery of charges. — If an acceleration of unearned interest caused a note to become usurious, then there was a violation of the usury provision of Ga. L. 1970, p. 101, § 3 and, thus, under former Code 1933, § 96-1008, the creditor was barred from recovering any finance charge, delinquency, or collection charge on the contract. McDaniel v. Fulton Nat'l Bank, 395 F. Supp. 422, 1974 U.S. Dist. LEXIS 11532 (N.D. Ga. 1974), rev'd, 543 F.2d 568, 1976 U.S. App. LEXIS 5962 (5th Cir. 1976).

When the interest refund in a suit for a deficiency balance resulting from a sale under an installment contract, calculated using the "Rule of 78," results in interest totaling two-thirds of the total amount being charged for a period of less than half the time of the note, this is in excess of the maximum allowable on the unpaid balance to finance. Hence, a violation of subsection (a) of Ga. L. 1970, p. 101, § 3 is shown by the evidence. Under Ga. L. 1967, p. 674, § 8 this bars recovery of any finance charge, delinquency, or collection charge on the contract. Cook v. First Nat'l Bank, 130 Ga. App. 587, 203 S.E.2d 870, 1974 Ga. App. LEXIS 1191 (1974).

Principal may be collected. — Once the court has determined that the creditor is in fact attempting to extort usurious interest, under this article the lender is allowed to collect the principal, but the lender loses at least all unearned interest. Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904, 1975 U.S. Dist. LEXIS 13508 (N.D. Ga. 1975).

RESEARCH REFERENCES

ALR.

Right to private action under state consumer protection Act, 62 A.L.R.3d 169.

10-1-39. Additional definitions.

As used in Code Sections 10-1-40 through 10-1-42, the term:

(1) "Induce" means to cause a buyer of a motor vehicle under a retail installment contract or a lessee of a motor vehicle under a motor vehicle lease contract to sublease the subject motor vehicle or to arrange for or cause such a buyer or lessee to be so induced.

(2) "Lessee" means a person who obtains possession and use of a motor vehicle through a motor vehicle lease contract.

(3) "Lessor" means any person who in the regular course of

business or as a part of regular business activity leases motor vehicles under motor vehicle lease contracts or purchases motor vehicle lease contracts or any sales finance company that purchases motor vehicle lease contracts.

(4) "Motor vehicle lease contract" means an agreement between a lessor and a lessee whereby the lessee obtains the possession and use of a motor vehicle for such period of time, for such purposes, and for such consideration as set forth in the agreement.

(5) "Subject motor vehicle" means the motor vehicle sold to a buyer under a retail installment contract or the motor vehicle obtained by a lessee under a motor vehicle lease contract.

(6) "Sublease" means:

(A) To transfer possession of a motor vehicle which is the subject of a retail installment contract to a person who is not a party to that contract or to transfer or assign any of the buyer's rights or interests under the retail installment contract to such a person, whether or not such transfer or assignment is effective; or

(B) To transfer possession of a motor vehicle which is the subject of a motor vehicle lease contract to a person who is not a party to that contract or to transfer or assign any of the lessee's or lessor's rights or interests under the motor vehicle lease contract to such a person, whether or not such transfer or assignment is effective.

History.
Code 1981, § 10-1-39, enacted by Ga. L. 1988, p. 861, § 1; Ga. L. 1999, p. 1229, § 3; Ga. L. 2024, p. 1052, § 2(4)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "As used" for In addition to the definitions provided for in Code Section 10-1-31, as used" at the beginning of the introductory language.

10-1-40. Unlawful inducement of motor vehicle buyer or lessee under contract to sublease vehicle; unlawful offering of vehicle for hire by sublessee.

(a) It is unlawful for any person to induce the buyer of a motor vehicle under a retail installment contract to sublease the subject motor vehicle to that person or to any other sublessee without first obtaining written consent to the sublease from the holder of the retail installment contract.

(b) It is unlawful for any person to induce the lessee of a motor vehicle under a motor vehicle lease contract to sublease the subject motor vehicle to that person or to any other sublessee without first

obtaining written consent to the sublease from the lessor under the motor vehicle lease contract.

(c) It is unlawful for any person who is the sublessee of a motor vehicle to offer the motor vehicle for hire or to offer it to another person to offer for hire if such person induced the sublease of the motor vehicle in violation of subsection (a) or (b) of this Code section or if such person knew or reasonably should have known that the sublease of the motor vehicle was induced in violation of subsection (a) or (b) of this Code section.

(d) Any person who violates any provision of subsection (a), (b), or (c) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature.

History.
Code 1981, § 10-1-40, enacted by Ga. L. 1988, p. 861, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1988, an "a" was inserted following "guilty of" in subsection (d).

10-1-41. Civil action for unlawful inducement for sublease of motor vehicle; remedies.

(a) Any one or more of the following persons may suffer damage as a result of a violation of subsection (a) or (b) of Code Section 10-1-40:

(1) The holder of a retail installment contract;

(2) The lessor of a motor vehicle under a motor vehicle lease contract;

(3) The buyer of a motor vehicle under a retail installment contract or the lessee of a motor vehicle under a motor vehicle lease contract;

(4) The sublessee of the subject motor vehicle when such sublessee did not know and could not reasonably be expected to have known that the sublease of the motor vehicle was induced in violation of subsection (a) or (b) of Code Section 10-1-40.

(b) A person who suffers damage as described in subsection (a) of this Code section may bring an action against the person who induced the sublease of the subject motor vehicle in violation of subsection (a) or (b) of Code Section 10-1-40. The person who suffers damage may recover or obtain against the person who induced such sublease any of the following:

(1) Actual damages;

(2) Equitable relief, including, but not limited to, an injunction or restitution of money and property;

(3) Punitive damages;

(4) Reasonable attorney's fees and costs; and

(5) Any other relief which the court deems proper.

(c) The rights and remedies provided for in this Code section are in addition to any other rights and remedies provided by law.

History.
Code 1981, § 10-1-41, enacted by Ga. L. 1988, p. 861, § 1.

10-1-42. Advancement of money to satisfy lease, lien, or security interest in motor vehicle; inclusion in gross capitalized cost.

A lessor or the entity which sells the motor vehicle to the lessor for lease to a lessee may advance money to a lessee or pay money to a third party on behalf of the lessee to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on a motor vehicle which is the subject of a motor vehicle lease contract. Any amount so advanced or paid may be included in the gross capitalized cost under the motor vehicle lease contract and shall not be considered a loan. Such advance and the seller or lessor making such advance or payment shall be exempt from the provisions of Chapter 3 of Title 7, relating to installment loans, from the provisions of Chapter 4 of Title 7, relating to interest and usury, and from any other provision of Georgia law regulating loans.

History.
Code 1981, § 10-1-42, enacted by Ga. L. 1999, p. 1229, § 4; Ga. L. 2020, p. 156, § 8/SB 462.

Editor's notes.
Ga. L. 2020, p. 156, § 10/SB 462, not codified by the General Assembly, provides that: "This Act shall apply to all installment loan agreements entered into on and after July 1, 2020."

ARTICLE 3

UNSOLICITED MERCHANDISE

10-1-50. Sale of unsolicited merchandise prohibited; payment after expiration of trial period; available remedy.

(a) As used in this Code section, the term "person" shall have the meaning as provided in Code Section 10-1-2.

(b) No person shall, in any manner or by any means, offer for sale goods, wares, or merchandise where the offer includes the voluntary and unsolicited sending of such goods, wares, or merchandise not actually ordered or requested by the recipient, either orally or in

writing. The receipt of any such goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient, who may use or dispose of such goods, wares, or merchandise, unless such goods, wares, or merchandise were delivered to the recipient as a result of a bona fide mistake, in any manner he or she sees fit without any obligation to the sender.

(c) No person shall require payment for the continued provision of any goods, wares, or merchandise following the expiration of a trial period during which similar goods, wares, or merchandise were provided free of charge unless the recipient of such goods, wares, or merchandise provides affirmative oral, written, or electronic assent to the continued receipt thereof on a paid basis. In the absence of any such assent, the receipt of any such goods, wares, or merchandise following such trial period shall for all purposes be deemed an unconditional gift to the recipient, who may use or dispose of such goods, wares, or merchandise, unless such goods, wares, or merchandise were delivered to the recipient as a result of a bona fide mistake, in any manner he or she sees fit without any obligation to the sender.

(d) Any violation of this Code section shall be considered a violation of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975." Any remedy available under such part shall be available to any recipient under this Code section, and any action by the Attorney General authorized under such part for a violation thereof shall be authorized for a violation of this Code section.

History.
Ga. L. 1970, p. 565, § 1; Ga. L. 2016, p. 369, § 1/HB 697.

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, §§ 27, 546.

10-1-51. Unordered merchandise sent after membership terminated deemed gift; enjoining payment requests.

If a person is a member of an organization which makes retail sales of any goods, wares, or merchandise to its members and the person notifies the organization of his termination of membership by certified mail or statutory overnight delivery, return receipt requested, any unordered goods, wares, or merchandise which are sent to the person after 30 days following execution of the return receipt for the certified letter by the organization shall for all purposes be deemed unconditional gifts to the person, who may use or dispose of the goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the organization.

If the termination of a person's membership in such organization breaches any agreement with the organization, nothing in this Code section shall relieve the person from liability for damages to which he might be otherwise subjected to pursuant to law; but he shall not be subject to any damages with respect to any goods, wares, or merchandise which are deemed unconditional gifts to him under this Code section.

If, after any receipt deemed to be an unconditional gift under this Code section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party.

History.
Ga. L. 1970, p. 565, § 2; Ga. L. 2000, p. 1589, § 3.

ARTICLE 4

FURNISHING NAMES OF PROSPECTIVE PURCHASERS

10-1-70. Disclosure of consideration required in contract; penalty.

(a) It shall be unlawful for any person, firm, or corporation engaged in the business of selling any type of merchandise in the State of Georgia to promise a consideration, either cash or otherwise, to a buyer of such merchandise for providing the names or other information relative to other prospective purchasers of such merchandise, unless the promise of such consideration is contained in the contract of sale between the seller and the buyer.

(b) Any person, firm, or corporation violating subsection (a) of this Code section shall be guilty of a misdemeanor.

History.
Ga. L. 1965, p. 247, §§ 1, 2.

ARTICLE 5

LABELING REMANUFACTURED OR REBUILT ITEMS

RESEARCH REFERENCES

C.J.S.
77A C.J.S., Sales, § 118 et seq.

ALR.
Sales: Liability for warranty or representation that article, other than motor vehicle, is new, 36 A.L.R.3d 237.

10-1-80. Definitions.

As used in this article, the term:

(1) "Rebuilt" means the reconditioning of a motor, engine, well pump, or other mechanical item by the replacement of parts of the motor, engine, well pump, or other mechanical item without changing the original size, shape, or tolerance of the item except by the use of parts therefor.

(2) "Remanufactured" means the changing of the size, shape, or tolerance in any motor, engine, well pump, or other mechanical item by machinery grinding or cutting away of the original item.

History.
Ga. L. 1959, p. 372, § 3.

10-1-81. Label required for remanufactured item sold at retail.

Any remanufactured item sold at retail in the State of Georgia shall be labeled "Remanufactured." Such label shall be placed adjacent to and shall be of the same size and type of marking as the old marking on the remanufactured item.

History.
Ga. L. 1959, p. 372, § 1.
Cross references.
Labeling of secondhand watches, § 43-49-1 et seq.

10-1-82. Label required for rebuilt item sold at retail.

Any rebuilt item sold at retail in the State of Georgia shall be labeled "Rebuilt." Such label shall be placed adjacent to and shall be of the same size and type of marking as the old marking on the rebuilt item.

History.
Ga. L. 1959, p. 372, § 2.
Cross references.
Labeling of secondhand watches, § 43-49-1 et seq.

10-1-83. Penalty for violation of this article.

Noncompliance with this article shall be a misdemeanor, and punishment shall be as provided by law.

History.
Ga. L. 1959, p. 372, § 4.

ARTICLE 6

INTERSTATE PURCHASE OF RIFLES AND SHOTGUNS

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weapons and Firearms, §§ 4, 5, 9.
C.J.S.
94 C.J.S., Weapons, § 8 et seq.
ALR.
Applicability of state anti-trust act to interstate transaction, 24 A.L.R. 787.
Application of statute or regulation dealing with registration or carrying of weapons to transient nonresident, 68 A.L.R.3d 1253.

10-1-100. Out-of-state purchase of rifles and shotguns by residents.

Residents of the State of Georgia may purchase rifles and shotguns in any state of the United States, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the State of Georgia, and of the state in which the purchase is made.

History.
Ga. L. 1969, p. 804, § 1; Ga. L. 2002, p. 977, § 1.
Cross references.
Regulation of sale, possession of weapons generally, § 16-11-100 et seq.

10-1-101. Purchase of rifles and shotguns by nonresidents.

Residents of any state of the United States may purchase rifles and shotguns in the State of Georgia, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the State of Georgia, and of the state in which such persons reside.

History.
Ga. L. 1969, p. 804, § 2; Ga. L. 2002, p. 977, § 1.
Cross references.
Regulation of sale, possession of weapons generally, § 16-11-100 et seq.

ARTICLE 7

SALE OF PAINTS AND FLAXSEED OR LINSEED OIL

RESEARCH REFERENCES

Am. Jur. 2d.
45B Am. Jur. 2d, Job Discrimination, § 929.
ALR.
Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals, 58 A.L.R.4th 76.

10-1-120. "Paint" defined.

The term "paint," as used in this article, shall include white lead

basic, carbonate, or sublimate, in any kind of oil, or any compound intended for the same use, paste or semipaste, and liquid or mixed paint ready for use.

History.
Ga. L. 1920, p. 225, § 3; Code 1933, § 73-102.

RESEARCH REFERENCES

Am. Jur. Trials.
Childhood Lead-Based Paint Poisoning Litigation, 66 Am. Jur. Trials 47.

10-1-121. Enforcement of article; rules and regulations.

The director of the Georgia Drugs and Narcotics Agency is charged with the proper enforcement of this article and is empowered to formulate and promulgate such rules and regulations as may be necessary in carrying out the purposes of this article.

History.
Ga. L. 1920, p. 225, § 7; Code 1933, § 73-101.

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agriculture, §§ 19 et seq., 26.

C.J.S.
3 C.J.S., Agriculture, § 21 et seq.

10-1-122. Labels on paint containers.

The labels on containers of paints shall clearly and distinctly state the name and residence of the manufacturer of the paint or the distributor thereof or of the party for whom the same is manufactured. The label shall also clearly state the quantity contained in the package; the quantity, in the case of liquid or mixed paints, to be designated in United States standard gallons or fraction thereof and, in the case of paste or semipaste paints, such as are commonly sold by weight, to be shown by weight avoirdupois. Said labels shall be printed in the English language in plain, legible type.

History.
Ga. L. 1920, p. 225, § 2; Code 1933, § 73-103.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 159.

C.J.S.
2 C.J.S., Adulteration, § 1 et seq.

ALR.
Constitutionality of statutes requiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 A.L.R. 572.

10-1-123. Purity of flaxseed or linseed oil; requirement for boiled linseed oil.

No person, firm, corporation, or agent or employee of any person, firm, or corporation shall manufacture for sale or offer or expose for sale any flaxseed or linseed oil unless the same shall answer all the chemical tests for purity recognized in the United States Pharmacopoeia or offer or expose for sale any flaxseed or linseed oil as "boiled linseed oil" unless in its manufacture the same shall have been put to a temperature of 225 degrees Fahrenheit.

History.
Ga. L. 1920, p. 225, § 4; Code 1933, § 73-104.

RESEARCH REFERENCES

C.J.S.
3 C.J.S., Agriculture, §§ 88, 89.

10-1-124. Flaxseed or linseed oil to be sold under true name; labeling tank cars, tanks, barrels, or vessels of such oil.

No person, firm, corporation, or agent or employee of any person, firm, or corporation shall sell or expose or offer for sale any flaxseed or linseed oil unless it shall be done under its true name; and each tank car, tank, barrel, keg, or any vessel of such oil shall have distinctly and durably printed, stamped, stenciled, or labeled thereon the true name of such oil and in ordinary boldface capital letters the words "PURE LINSEED OIL RAW" or "PURE LINSEED OIL BOILED" and the name and address of the manufacturer thereof or of the party for whom the same is manufactured and under whose brand the same is sold.

History.
Ga. L. 1920, p. 225, § 5; Code 1933, § 73-105.

RESEARCH REFERENCES

C.J.S.
3 C.J.S., Agriculture, §§ 88, 89.
ALR.
Constitutionality of statutes requiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 A.L.R. 572.

10-1-125. Possession of improperly labeled article prima-facie evidence of violation.

Possession by any person, firm, or corporation, or agent or employee of any person, firm, or corporation dealing in said articles, of any article described in Code Sections 10-1-120 through 10-1-124 and not properly labeled shall be considered prima-facie evidence that the same is kept by such person, firm, or corporation in violation of this article and punishable under it.

History.
Ga. L. 1920, p. 225, § 6; Code 1933, § 73-106.

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agriculture, § 50 et seq.

C.J.S.
2 C.J.S., Adulteration, § 9.

10-1-126. Requirements for timber-marking paint; penalty for violation; enjoining violation.

(a) It shall be unlawful for any person, firm, or corporation to distribute, sell, or offer for sale within this state any paint used specifically for marking timber if such paint will not remain effective for a period of at least 12 months if applied to timber in a nondiluted state. The label on the container of any such paint sold in this state shall have clearly printed thereon in bold type the following: "EFFECTIVE FOR A MINIMUM OF 12 MONTHS IF USED IN A NONDILUTED STATE."

(b) As used in this Code section, the term "paint" means any substance or mixture of substances, liquid, powder, or paste intended for use primarily for marking timber.

(c) Any person violating this Code section shall be guilty of a misdemeanor.

(d) In addition to the remedies provided in this Code section, the director and drug agents of the Georgia Drugs and Narcotics Agency may apply to an appropriate court for, and such court shall have jurisdiction upon hearing and for cause shown to grant, a temporary or permanent injunction restraining any person from violating this Code section irrespective of whether or not there exists an adequate remedy at law.

History.
Code 1933, § 73-107, enacted by Ga. L. 1976, p. 1556, § 1.

RESEARCH REFERENCES

C.J.S.
2 C.J.S., Adulteration, §§ 1 et seq., 14.

10-1-127. Penalty for sale of deceptively labeled paint.

Whoever shall sell or offer or expose for sale any paint which shall be labeled or marked in such manner as to tend to deceive the purchaser as to its nature or composition or which shall not be accurately labeled as required in this article shall be guilty of a misdemeanor and, upon conviction thereof, for each offense shall be punished by a fine of not less than $25.00 and not more than $100.00 or by imprisonment in the county jail not exceeding 60 days.

History.
Ga. L. 1920, p. 225, § 1; Code 1933, § 73-9901.

RESEARCH REFERENCES

C.J.S.
2 C.J.S., Adulteration, § 5.

ARTICLE 8

SALE OF PETROLEUM PRODUCTS, BRAKE FLUID, AND ANTIFREEZE

Administrative rules and regulations.
Standards for Petroleum Products, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Rule 40-20-1-.01 et seq.

RESEARCH REFERENCES

ALR.
Public regulation or authorization of gas filling stations, 49 A.L.R. 767; 55 A.L.R. 256; 79 A.L.R. 918; 96 A.L.R. 1337.
Constitutionality and construction of gasoline inspection and tax statutes, 111 A.L.R. 185.
Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 A.L.R.2d 488; 94 A.L.R.3d 291; 15 A.L.R.4th 909; 18 A.L.R.4th 206.

Part 1

Petroleum Products

Cross references.
Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

10-1-140. Definitions.

As used in this part, the term:

(1) "Gasoline" means gasoline, naphtha, benzol, and other products of petroleum, under whatever name designated, used for heating or power purposes.

(2) "Kerosene" means kerosene and other products of petroleum, under whatever name designated, used for illuminating, heating, or cooking purposes.

(3) "Lubricating oils" means rerefined, reprocessed, or reconditioned used oils as well as virgin petroleum oils or blends thereof.

History.
Ga. L. 1927, p. 279, § 1; Code 1933, § 73-209; Ga. L. 1979, p. 981, § 2.

10-1-141. "Petroleum products" not to include liquefied petroleum gas.

The term "petroleum products," as used in this part, shall in no way be construed to include liquefied petroleum gas as defined in Code Section 10-1-262.

History.
Ga. L. 1960, p. 1043, § 18.

10-1-142. Appointment and duties of state oil chemist.

The Commissioner of Agriculture is required to appoint, in accordance with Chapter 20 of Title 45, a chemist, who shall be an expert oil analyst, to be designated as the state oil chemist, whose duty it shall be to analyze all samples of gasoline and kerosene and all fluids purporting to be substitutes therefor or motor fuel improvements or other like products of petroleum, under whatever name they may be designated, and used for illuminating, heating, cooking, power, or lubricating purposes, submitted by the Commissioner of Agriculture or any duly authorized inspector or inspectors.

History.
Ga. L. 1927, p. 279, § 9; Code 1933, § 73-201; Ga. L. 1960, p. 1043, §§ 1, 2; Ga. L. 1972, p. 1015, § 505; Ga. L. 1979, p. 981, § 1.

OPINIONS OF THE ATTORNEY GENERAL

Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist as the duly authorized agent of the Commissioner of Agriculture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att'y Gen. No. 66-141.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-143. Employment of oil inspectors; expenses.

The Commissioner of Agriculture is authorized to employ, in accordance with Chapter 20 of Title 45, oil inspectors as he deems necessary to enforce this part. Oil inspectors so appointed shall be allowed such expenses as shall be approved by the Commissioner of Agriculture.

History.
Ga. L. 1927, p. 279, § 10; Code 1933, § 73-202; Ga. L. 1937, p. 475, § 1; Ga. L. 1960, p. 1043, § 3; Ga. L. 1972, p. 1015, § 505.

Cross references.
Reimbursement of certain travel expenses, § 45-7-29 et seq.
Expense of travel by private automobile, § 50-19-7.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-144. Additional expenses; Commissioner of Agriculture to be chief oil inspector.

In addition to the expenses of inspectors as provided for in Code Section 10-1-143, there shall be allowed such further sums for the purchase of equipment, supplies, and clerical help and to pay any other expenses incident to and necessary for the enforcement of this part as may hereafter be appropriated. The Commissioner of Agriculture is constituted chief oil inspector for the purpose of the enforcement of this part.

History.
Ga. L. 1927, p. 279, § 19; Ga. L. 1931, p. 7, § 78; Code 1933, § 73-203; Ga. L. 1960, p. 1043, §§ 1, 4; Ga. L. 1972, p. 1015, § 505.

OPINIONS OF THE ATTORNEY GENERAL

Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist as the duly authorized agent of the Commissioner of Agriculture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att'y Gen. No. 66-141.

10-1-145. Payment of compensation and expenses.

The compensation of the state oil chemist and state oil inspectors and the expenses of enforcing this part shall be paid in the same manner as compensation and expenses of other employees of the Department of Agriculture are paid.

History.
Ga. L. 1927, p. 279, § 20; Code 1933, § 73-204; Ga. L. 1960, p. 1043, § 5.

10-1-146. Bonds of state oil chemist and inspectors.

The Commissioner of Agriculture is authorized to have the state oil chemist and state oil inspectors bonded for the faithful performance of their respective duties at the expense of the Department of Agriculture if and to the extent he deems it necessary for the proper protection of the state and the public.

History.
Ga. L. 1927, p. 279, § 23; Code 1933, § 73-205; Ga. L. 1960, p. 1043, § 6.

10-1-147. Filling vacancies in offices of state oil chemist and inspectors.

The Commissioner of Agriculture is authorized to fill any vacancies which may occur in the offices of state oil chemist and oil inspector on account of death, resignation, or other cause.

History.
Ga. L. 1927, p. 279, § 25; Code 1933, § 73-207; Ga. L. 1960, p. 1043, § 1.

10-1-148. Right to inspect premises; search warrants; refusal of admission as evidence of violation.

In the performance of their duties, the Commissioner of Agriculture or any of his duly authorized agents shall have free access at all reasonable hours to any store, warehouse, factory, storage house, or railway depot where petroleum products are kept or otherwise stored, for the purpose of examination or inspection and drawing samples. If such access shall be refused by the owner of such premises or his agent or other persons occupying and using the same, the Commissioner of Agriculture or his duly authorized inspectors or agents may apply for a search warrant, which shall be obtained in the same manner as provided for obtaining search warrants in other cases. Their refusal to admit an inspector to any of the above-mentioned premises during reasonable hours shall be construed as prima-facie evidence of a violation of this part.

History.
Ga. L. 1927, p. 279, § 16; Code 1933, § 73-208; Ga. L. 1960, p. 1043, §§ 1, 7.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-149. Gasoline and kerosene subject to inspection and analysis; manufacturers and wholesalers to file statements.

For the purpose of this part, all gasoline and kerosene sold or offered or exposed for sale shall be subject to inspection and analysis as provided in this part. All manufacturers, refiners, wholesalers, and jobbers, before selling or offering for sale any gasoline or kerosene or like products, under whatever name designated, for power, lubricating, illuminating, heating, or cooking purposes, shall file with the Commissioner of Agriculture a declaration or statement that they desire to sell such products in this state and shall furnish the name, brand, or a trademark of the product which they desire to sell, together with the name and address of the manufacturer thereof, and that all such products are in conformity with the specifications established pursuant to this part by the state oil chemist and approved by the Commissioner of Agriculture.

History.
Ga. L. 1927, p. 279, § 2; Code 1933, § 73-210; Ga. L. 1960, p. 1043, §§ 1, 8; Ga. L. 1979, p. 981, § 3.
Administrative rules and regulations.
Petroleum Products to be Inspected, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Substantive Regulations; Petroleum Products, Rule 40-20-1-.09.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-150. Approval of substitutes or improvers of fuels or other motor fuels.

All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for or improvers of fuels or other motor fuels to be used for power, cooking, or heating purposes, shall, before

being sold or exposed or offered for sale, be submitted to the Commissioner of Agriculture for examination and inspection and shall receive the approval of the state oil chemist and the Commissioner of Agriculture and shall be sold or offered for sale only when properly labeled with a label, the form and contents of which shall have been approved by the state oil chemist and the Commissioner of Agriculture.

History.
Ga. L. 1927, p. 279, § 3; Code 1933, § 73-211; Ga. L. 1960, p. 1043, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-151. Sale of substandard gasoline and kerosene illegal; confiscation and destruction.

It shall be illegal to sell or offer for sale any gasoline or kerosene which is described and designated in this part and which is used or intended to be used for power, lubricating, illuminating, cooking, or heating purposes, when sold under whatever name, and which falls below the standard provided in this part. Any such gasoline or kerosene shall be subject to confiscation and destruction by order of the Commissioner of Agriculture.

History.
Ga. L. 1927, p. 279, § 4; Code 1933, § 73-212; Ga. L. 1960, p. 1043, § 1; Ga. L. 1979, p. 981, § 4.
Administrative rules and regulations.
Water in Retail Tanks; Dispenser Filters, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Substantive Regulations; Petroleum Products, Rule 40-20-1-.10.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, § 417 et seq.
ALR.
Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 A.L.R.2d 488; 94 A.L.R.3d 291; 15 A.L.R.4th 909; 18 A.L.R.4th 206.

10-1-151.1. Production and sale of biodiesel fuel.

It shall be unlawful for any person to produce, offer for sale, or sell any biodiesel fuel to be used in blending such biodiesel fuel with

petroleum diesel fuel to create a blended fuel for subsequent sale for use in diesel engines unless the biodiesel fuel meets the specifications of American Society for Testing and Materials Standard D 6751.

History.
Code 1981, § 10-1-151.1, enacted by Ga. L. 2006, p. 547, § 1/SB 636.

Cross references.
Study and review of gasoline additives, § 12-9-70.

10-1-152. Labeling gasoline and kerosene containers; cleaning kerosene containers of gasoline.

Every person, firm, or corporation delivering at wholesale or retail any gasoline in this state shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "gasoline" plainly stenciled or labeled thereon in vermilion red, in English. Such dealers shall not deliver kerosene oil in any barrel, cask, can, or other container which shall have been so stenciled or labeled or that has ever contained gasoline unless such barrel, cask, can, or other container shall have been thoroughly cleaned and all traces of gasoline removed. Every purchaser of gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as provided in this Code section. Every person delivering at wholesale or retail any kerosene in this state shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "kerosene" in English, plainly stenciled or labeled thereon in vermilion red; and every person purchasing the same for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as provided in this Code section. Nothing in this Code section shall prohibit the delivery of gasoline by hose or pipe from a tank directly into the tank of any automobile or other motor. In cases where gasoline or kerosene is sold in bottles, cans, or other containers of not more than one gallon, for cleaning and other similar purposes, such bottles, cans, or other containers shall bear a label with the words "unsafe when exposed to heat or fire."

History.
Ga. L. 1927, p. 279, § 5; Code 1933, § 73-213; Ga. L. 2024, p. 1052, § 2(5)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, in the fourth sentence, substituted "deliver the same" for "deliver same" and "purchasing the same" for "purchasing same".

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.

ALR.

Validity of regulations as to keeping or storage of gasoline, 43 A.L.R. 858; 128 A.L.R. 364.

Gasoline or other fuel storage tanks as nuisance, 50 A.L.R.3d 209.

10-1-153. Notice and sample of petroleum products shipped into state.

When gasoline or kerosene or other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes are shipped into this state in any manner whatsoever, the manufacturer, refiner, or jobber shall promptly give notice to the Commissioner of Agriculture of the date of shipment and shall furnish a sample of such size as designated by the Commissioner of Agriculture, but not in excess of 16 ounces, of the gasoline or kerosene and other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes shipped and labeled, giving the tank car number, truck number, or other container number, with the name and address of the person, company, firm, or corporation to whom it is sent and the number of gallons contained in the shipment made. In each instance where gasoline or kerosene and other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes are shipped in tank cars, the record of the capacity of each tank car furnished by the railroad company shall be accepted.

History.

Ga. L. 1927, p. 279, § 6; Code 1933, § 73-214; Ga. L. 1960, p. 1043, §§ 1, 9; Ga. L. 1979, p. 981, § 5.

Administrative rules and regulations.

Sample Size, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Substantive Regulations; Petroleum Products, Rule 40-20-1.06.

RESEARCH REFERENCES

Am. Jur. 2d.

38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.

58 C.J.S., Mines and Minerals, § 451.

10-1-154. Requests for analysis of gasoline, illuminating oils, or heating oils by a purchaser.

Any person purchasing any gasoline or illuminating or heating oils from any manufacturer, refiner, jobber, or vendor for his own use may submit fair samples of said gasoline or illuminating or heating oils to the Commissioner of Agriculture to be tested or analyzed by the state oil chemist. In order to protect the manufacturer or vendor from the submission of spurious samples, the person selecting the same shall do so in the presence of two or more disinterested persons, which samples shall be not less than one pint in quantity and shall be bottled, corked, and sealed in the presence of said witnesses and the sample shall be

placed in the hands of a disinterested person, who shall forward the same at the expense of the purchaser to the Commissioner of Agriculture. Upon the receipt by the Commissioner of any such sample he shall have the state oil chemist promptly test and analyze the sample. The Commissioner shall return to such purchaser or purchasers a certificate of analysis, which, when verified by the affidavit of the state oil chemist, shall be competent evidence in any court of law or equity.

History.
Ga. L. 1927, p. 279, § 7; Code 1933, § 73-215; Ga. L. 1960, p. 1043, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-155. Rules and regulations; specifications for petroleum products; penalty for violations.

(a) The Commissioner of Agriculture shall have authority to prescribe such rules and regulations, consistent with the terms, intent, and purposes of this part, as he finds necessary for the proper administration and enforcement thereof. He shall establish by regulation specifications for the various petroleum products used for heating, cooking, illuminating, power, or lubricating purposes in this state so as to provide quality control and suitability for the intended use of such products and the effective enforcement of the laws pertaining to the sale, distribution, or use of such products and shall have authority to change such specifications, but only after giving a 60 days' notice and a public hearing in regard to such changes to refiners and distributors doing business in this state.

(b) Any manufacturer, refiner, wholesaler, jobber, or vendor who shall violate this Code section or any regulation issued pursuant thereto prescribing specifications for the various petroleum products regulated by this part shall be guilty of a misdemeanor.

History.
Ga. L. 1927, p. 279, § 8; Code 1933, §§ 73-216, 73-9904; Ga. L. 1943, p. 303, § 1; Ga. L. 1960, p. 1043, §§ 10, 16; Ga. L. 1972, p. 1015, § 504; Ga. L. 1979, p. 981, § 6.

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Signs indicating price is for "self-service" pumps. — Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to "self-service" pumps if there is a differentiation in price for the same

gasoline sold from "self-service" pumps and "full-service" pumps. 1975 Op. Att'y Gen. No. 75-124.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.
ALR.
Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 A.L.R.2d 488; 94 A.L.R.3d 291; 15 A.L.R.4th 909; 18 A.L.R.4th 206.

10-1-156. Enjoining marketing in violation of part, specifications, or rules and regulations.

Whenever the Commissioner of Agriculture shall find any person willfully marketing petroleum products in this state which are regulated by this part and which do not comply with the prescribed specifications therefor or otherwise willfully marketing petroleum products in violation of this part and rules and regulations promulgated pursuant to this part, the Commissioner shall be authorized to apply to the superior court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate superior court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

History.
Ga. L. 1960, p. 1043, § 11; Ga. L. 1979, p. 981, § 6.

10-1-157. Collecting and testing samples of petroleum products; rules and regulations.

The Commissioner of Agriculture shall, from time to time, collect or cause to be collected samples of all petroleum products subject to regulation under this part which are sold, offered, or exposed for sale in this state and cause such samples to be tested or analyzed by the state oil chemist. The Department of Agriculture shall have the power to implement rules and regulations necessary to carry out inspection of gasoline samples as provided for by this Code section.

History.
Ga. L. 1927, p. 279, § 13; Code 1933, § 73-218; Ga. L. 1960, p. 1043, § 13; Ga. L. 2010, p. 9, § 1-23/HB 1055; Ga. L. 2011, p. 99, § 12/HB 24.
Editor's notes.
Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.
Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-158. Registration of gasoline dealers.

Every dealer in gasoline, before selling or exposing or offering for sale any gasoline, and annually thereafter, shall be required to register and shall make known to the Commissioner of Agriculture his desire to sell gasoline giving the name and manner and kind of pump or pumps he will use and the location of same, and shall keep the certificate or certificates of registration issued by the Commissioner of Agriculture posted in a prominent and accessible place in his place of business where such gasoline is sold. The form of such certificate shall be designated by the Commissioner of Agriculture.

History.
Ga. L. 1927, p. 279, § 14; Code 1933, § 73-219; Ga. L. 1960, p. 1043, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 160.

C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-159. Inspection of self-measuring pumps; sealing accurate pumps; condemnation of inaccurate pumps; rules and regulations.

(a) It shall be the duty of the inspectors provided for in this part to familiarize themselves with the accuracy and adjusting devices on the various makes of self-measuring pumps in use; and they shall carefully inspect all of such pumps located in the territory assigned to them.

(b) All such pumps found to be giving accurate measure within the tolerance established by regulations of the Commissioner of Agriculture shall have the adjusting device sealed with an official lead and wire seal applied by an inspector duly authorized by the Commissioner of Agriculture in such a manner that the adjustment cannot be altered without breaking the seal.

(c) If any pump shall be found to be giving inaccurate measure in

excess of the tolerance established by regulations of the Commissioner of Agriculture, the inspector shall then and there notify the operator of the pump, whether owner or lessee, to make the necessary adjustments, the inspector to lend his assistance with the standard measure provided for testing such pumps. After the adjustments have been made, the adjusting devices shall be sealed in the manner provided for those pumps found originally accurate. The inspector shall notify the operator, whether owner or lessee, of every pump that apparently has been altered for the purpose of giving short measure in excess of eight ounces on a measure of five gallons or that cannot be adjusted within a range of eight ounces, either over or under, on a measure of five gallons that it must immediately be adjusted, the inspector to lend his assistance with the standard measure for testing such pumps. Should the operator fail or refuse to then and there make such adjustments as shall be necessary to bring the measure within the allowed variation, the same shall be condemned and rendered inoperable immediately by the inspector examining the same; and such pump shall not again be operated without the written consent of the Commissioner of Agriculture. Inspectors shall be required to report to the Commissioner of Agriculture immediately the name and number of all pumps condemned and rendered inoperable.

(d) When any pump shall be condemned under this part by any inspector, it shall be the duty of the inspector immediately to make affidavit before the judge of the probate court of the county in which the pump is located that the pump is being operated by the person who shall be named in the affidavit, contrary to law. Thereupon the judge of the probate court shall issue an order to the person named in the affidavit to show cause before him on the day named in the order, not more than ten days nor less than three days from the issuance of the order, why the pump should not be confiscated and dismantled. On the day named in the order, it shall be the duty of the judge of the probate court to hear the respective parties and to determine whether or not the pump has been operated contrary to the provisions of this part. If the judge of the probate court shall find that the pump has been so operated, he shall forthwith issue an order adjudging the pump to be forfeited and confiscated to the state and direct the sheriff of the county to dismantle the pump and take it into his possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash. The proceeds of sale, or as much thereof as may be necessary, shall be used by the sheriff, first, to pay the costs, which shall be the same as in cases of attachment, and the sheriff shall thereupon pay over and deliver the residue, if any, to the person from whose possession the pump has been taken.

(e) It shall be unlawful to install or operate any self-measuring pump which can be secretly manipulated in such manner as to give short

measure. Such inaccurate self-measuring pump shall be condemned as provided in this Code section, and thereafter it shall be unlawful for any person to sell any kerosene or gasoline from such pump until such pump has been made or altered to comply with this part and has been inspected and approved for service by the inspector.

(f) It shall be unlawful for anyone to break a seal applied by an inspector to a pump without first securing consent of the Commissioner of Agriculture, which consent may be given through one of the duly authorized inspectors.

(g) The Department of Agriculture shall have the power to implement rules and regulations necessary to carry out inspections of self-measuring pumps provided for by this Code section.

History.
Ga. L. 1927, p. 279, § 15; Code 1933, § 73-220; Ga. L. 1960, p. 1043, §§ 1, 14; Ga. L. 2010, p. 9, § 1-24/HB 1055.

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Applicability to tank wagons and trucks. — The laws providing for the inspection and calibration of pumps used in the sale of petroleum products are applicable to tank wagons and transport trucks used by wholesale dealers making delivery of petroleum products in Georgia, as well as retail dealers. 1952-53 Ga. Op. Att'y Gen. 484 (rendered prior to enactment of Code Section 10-1-160).

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.

10-1-160. Calibration of tank trucks, meters, containers, and other measures; condemnation of inaccurate measures.

The Commissioner of Agriculture is authorized to prescribe regulations governing the calibration of tank trucks, meters, containers, and other measures used in dispensing petroleum products subject to regulation under this part; and, when any such measure is found giving inaccurate measure and such condition cannot be or is not adjusted to the requirements of the regulations, then such measures shall be seized by the Commissioner or his agents and subject to condemnation in a manner similar to that prescribed in subsections (c) and (d) of Code Section 10-1-159 or destroyed if the court shall find that the measure cannot be properly adjusted.

History.
Ga. L. 1960, p. 1043, § 15; Ga. L. 1972, p. 1015, § 505.

10-1-161. [Reserved] No fee for gasoline or kerosene inspection.

History.
Ga. L. 1927, p. 279, § 24; Code 1933, § 73-221; repealed by Ga. L. 2010, p. 9, § 1-25/HB 1055, effective May 12, 2010.

Editor's notes.
Ga. L. 2010, p. 9, § 1-25/HB 1055 repealed and reserved this Code section, effective May 12, 2010.

10-1-162. Substitution or misbranding of petroleum products; sale of used or reclaimed lubricants; action to enjoin violations; enforcement.

(a) As used in this Code section and in Code Section 10-1-163, the term "person" means natural persons; partnerships, firms, associations, joint-stock companies, syndicates, and corporations; any receiver, trustee, conservator, or other officer appointed by any state or federal court; counties, municipalities, or other political subdivisions of this state, singular or plural; and the State of Georgia. The use of the singular number shall include the plural number.

(b) No person shall store, sell, expose, or offer for sale any liquid fuels, lubricating oils, greases, or other similar products:

(1) In or from any container, receptacle, tank, pump, or other distributing device other than those products manufactured or distributed by the manufacturer or distributor indicated by the trademark, trade name, name, symbol, sign, or other distinguishing mark or device displayed upon the container, receptacle, tank, pump, or other distributing device in or from which such products are stored, sold, exposed, or offered for sale or distributed; or

(2) Under any trademark, trade name, name, symbol, sign, or other distinguishing mark or device other than those products manufactured or distributed by the manufacturer or distributor marketing such products under such trademark, trade name, name, symbol, sign, or other distinguishing mark or device; or

(3) In any manner whatsoever which may deceive or have the effect of deceiving the purchaser of such products as to the nature, price, quality, or quantity of the products so stored, sold, exposed, or offered for sale.

(c) No person shall store, sell, expose, or offer for sale any previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants unless such person shall at all times have each and every container or item of equipment in or through which any of such products are sold, kept for sale, displayed, or dispensed plainly labeled "reprocessed or rerefined." No person shall cause to be published, displayed, or circulated any advertising matter offering for sale any previously used or previously

used and reclaimed, used, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants unless he shall state in such advertising the fact that such products have been previously used. Nothing in this Code section shall apply to the sale of unfiltered crankcase drainings, and nothing in this Code section shall apply to the sale of crankcase drainings for use on livestock.

(d) Any person dealing in previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants without having each and every container or item of equipment in or through which any of such products are sold, kept for sale, displayed, or dispensed plainly labeled as required in this Code section or advertising any of such products for sale without inserting in such advertising a statement as required in this Code section may upon proper hearing be enjoined from selling any of such products or offering, displaying, or advertising any of the same for sale. Action for such injunction may be brought in any court having jurisdiction to hear and decide equity cases in the county in which the defendant resides and may be brought either by the Attorney General of this state or by the district attorney in and for such county. The authority granted by this Code section shall be in addition to and not in lieu of authority to prosecute criminally any person for a violation of this Code section. The granting or enforcing of any injunction under this Code section is a preventive measure for the protection of the people of this state, not a punitive measure; and the fact that a person has been charged or convicted of a violation of this Code section shall not prevent the issuance of a writ of injunction to prevent further unlawful dealing in previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants, nor shall the fact that a writ of injunction has been granted under this Code section preclude the institution of criminal prosecution or punishment.

(e) No person shall disguise or camouflage his equipment by imitating the trademark, trade name, name, symbol, sign, or other distinguishing mark or device under which recognized brands of liquid fuels, lubricating oils, greases, or other similar products are generally marketed.

(f) No person shall mix, blend, or compound the liquid fuels, lubricating oils, greases, or similar products of a manufacturer or distributor with the products of any other manufacturer or distributor or adulterate the same or store, sell, expose, or offer for sale such mixed, blended, or compounded products under the trademark, trade name, name, symbol, sign, or other distinguishing mark or device of either of said manufacturer or distributor or as the adulterated products of such manufacturer or distributor.

(g) No person shall aid or assist any other person in violating any of the provisions of this Code section by depositing or delivering into any

container, receptacle, tank, pump, or other distributing device any liquid fuels, lubricating oils, greases, or other similar products other than those intended to be stored therein as indicated by the name of the manufacturer or distributor or the trademark, trade name, name, symbol, sign, or other distinguishing mark or device of the product displayed on the container, receptacle, tank, pump, or other distributing device used in connection therewith or shall by any other means aid or assist another in the violation of any of the provisions of this Code section.

(h) Nothing in this Code section shall prevent the lawful owner thereof from applying his or its own trademark, trade name, name, symbol, sign, or other distinguishing mark or device to any product or material.

(i) The state oil chemist and all law enforcement officers in the State of Georgia are charged with the enforcement of this Code section.

History.
Code 1933, §§ 73-222, 73-223, enacted by Ga. L. 1937, p. 477, § 1; Ga. L. 1952, p. 391, §§ 1-3; Ga. L. 1958, p. 618, § 1; Ga. L. 1959, p. 128, § 1; Ga. L. 1979, p. 981, § 7.

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Subsections (f) and (h) of this section are consistent. 1965-66 Op. Att'y Gen. No. 66-139.

Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist as the duly authorized agent of the Commissioner of Agriculture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att'y Gen. No. 66-141.

Selling below advertised price is not proscribed. — Advertising one price and selling a product at a lower price is not the kind of deception proscribed by this section. 1965-66 Op. Att'y Gen. No. 66-141.

Signs indicating price is for "self-service" pumps. — Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to "self-service" pumps if there is a differentiation in price for the same gasoline sold from "self-service" pumps and "full-service" pumps. 1975 Op. Att'y Gen. No. 75-124.

RESEARCH REFERENCES

C.J.S.
2 C.J.S., Adulteration, §§ 1 et seq., 14.

ALR.
Constitutionality of statutes requiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 A.L.R. 572.

10-1-163. Penalty for violating Code Section 10-1-162; individual liability.

(a) Any person who shall violate any of the provisions of Code Section 10-1-162 for preventing deception, substitution, and misbranding of

liquid fuel, oil, grease, and similar products shall be guilty of a misdemeanor.

(b) If any partnership, firm, association, joint-stock company, syndicate, or corporation violates any of the provisions of Code Section 10-1-162, every director, officer, agent, employee, or member participating in, aiding, or authorizing the act or acts constituting the violation of Code Section 10-1-162 shall be guilty of a misdemeanor.

History. Code 1933, § 73-223, enacted by Ga. L. 1937, p. 477, §§ 1, 2; Ga. L. 1979, p. 981, § 7.

10-1-164. (Effective until January 1, 2026.) Requirements for signs advertising price of retail motor fuel; advertisements offering free gifts or services; enforcement; penalty.

(a) Any sign or placard or other means used to advertise the price of motor fuel for sale at retail for use in motor vehicles may contain a separate listing of the price and a separate listing of each tax thereon, but must contain a total of such price and taxes which shall be at least as large as the listing of the price or any tax thereon. Numbers used to advertise the total price of such motor fuel shall be of uniform size; and, where fractions are used, the numerator and denominator thereof combined shall be of the same size as any whole numbers used. It shall not be necessary that a denominator be used to indicate fractions; but, if one is not used, the numerator must be at least half the size of the whole number used. If the price of motor fuel is advertised on any sign, billboard, placard, or other advertising medium, it shall be unlawful to place a higher price on any pump dispensing such motor fuel or to charge a higher price for such motor fuel. Any person dispensing motor fuel shall not be precluded from giving a discount from the posted or advertised price if the purchaser of the motor fuel buys additional merchandise.

(b) It shall be unlawful for any person dispensing motor fuel to advertise upon the purchase of motor fuel either free:

(1) Gifts or other products unless such person has sufficient number of gifts or products on hand to supply the reasonably expectable demand or the advertisement discloses a limitation of quantity; or

(2) Car washes or other services unless such person is prepared, in the absence of causes beyond the reasonable control of the offerer, to perform such car washes or the services advertised at the time of the purchase at such person's place of business or at a place of business affiliated by trademark or agreement with such person. If the free car washes or other services advertised are to be performed

at a place of business affiliated by trademark or agreement but in a separate location, such fact shall be so stated on the sign, billboard, placard, or other advertising medium used.

(c) Nothing in this Code section shall preclude posting on any pumps dispensing motor fuel a separate statement of taxes included in the total purchase price for the purpose of complying with Chapter 8 of Title 48.

(d) The state oil chemist and any and all law enforcement officers in the State of Georgia are charged with enforcement of this Code section.

(e) Any person, firm, association, or corporation violating this Code section shall be guilty of a misdemeanor.

History.
Ga. L. 1959, p. 135, §§ 1-3; Ga. L. 1960, p. 826, § 1; Ga. L. 1973, p. 790, § 2.
Delayed effective date.
Code Section 10-1-164 is set out twice in this Code. This version is effective until January 1, 2026. For version effective January 1, 2026, see the following version.

OPINIONS OF THE ATTORNEY GENERAL

Signs indicating price is for "self-service" pumps. — Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to "self-service" pumps if there is a differentiation in price for the same gasoline sold from "self-service" pumps and "full-service" pumps. 1975 Op. Att'y Gen. No. 75-124.

Sign indicating that sales tax in addition to price shown on pump. — A regulation requiring that a statement be posted on each pump dispensing motor fuel that the Georgia sales tax is in addition to the price shown on the pump would be reasonable, would be in furtherance of the enforcement of the former Georgia Retailers' and Consumers' Sales and Use Tax Act and would not be inconsistent with such Code sections or the laws or Constitution of the United States and the State of Georgia. 1967 Op. Att'y Gen. No. 67-139.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Garages, and Filling and Parking Stations, § 16.
C.J.S.
16D C.J.S., Constitutional Law, §§ 2241, 2269.
ALR.
Validity and construction of statute or ordinance requiring or prohibiting posting or other publication of price of commodity or services, 89 A.L.R.2d 901; 80 A.L.R.3d 740.

10-1-164. (Effective January 1, 2026.) Requirements for signs advertising retail motor fuel; advertisements offering free gifts or services; enforcement; penalty.

(a) For purposes of this Code section, the term "motor fuel" means

automotive gasoline and blended fuel, as such terms are defined in Code Section 10-1-232.

(a.1) Any sign or placard or other means used to advertise the price of motor fuel for sale at retail for use in motor vehicles may contain a separate listing of the price and a separate listing of each tax thereon, but must contain a total of such price and taxes which shall be at least as large as the listing of the price or any tax thereon. Numbers used to advertise the total price of such motor fuel shall be of uniform size; and, where fractions are used, the numerator and denominator thereof combined shall be of the same size as any whole numbers used. It shall not be necessary that a denominator be used to indicate fractions; but, if one is not used, the numerator must be at least half the size of the whole number used. If the price of motor fuel is advertised on any sign, billboard, placard, or other advertising medium, it shall be unlawful to place a higher price on any pump dispensing such motor fuel or to charge a higher price for such motor fuel. Any person dispensing motor fuel shall not be precluded from giving a discount from the posted or advertised price if the purchaser of the motor fuel buys additional merchandise.

(b) It shall be unlawful for any person dispensing motor fuel to advertise upon the purchase of motor fuel either free:

(1) Gifts or other products unless such person has sufficient number of gifts or products on hand to supply the reasonably expectable demand or the advertisement discloses a limitation of quantity; or

(2) Car washes or other services unless such person is prepared, in the absence of causes beyond the reasonable control of the offerer, to perform such car washes or the services advertised at the time of the purchase at such person's place of business or at a place of business affiliated by trademark or agreement with such person. If the free car washes or other services advertised are to be performed at a place of business affiliated by trademark or agreement but in a separate location, such fact shall be so stated on the sign, billboard, placard, or other advertising medium used.

(c) Nothing in this Code section shall preclude posting on any pumps dispensing motor fuel a separate statement of taxes included in the total purchase price for the purpose of complying with Chapter 8 of Title 48.

(d) The state oil chemist and any and all law enforcement officers in the State of Georgia are charged with enforcement of this Code section.

(e) Any person, firm, association, or corporation violating this Code section shall be guilty of a misdemeanor.

History.
Ga. L. 1959, p. 135, §§ 1-3; Ga. L. 1960, p. 826, § 1; Ga. L. 1973, p. 790, § 2; Ga. L. 2023, p. 376, § 2-1/SB 146, effective January 1, 2026; Ga. L. 2024, p. 1052, § 2(6)/SB 448, effective July 1, 2024.
Delayed effective date.
Code Section 10-1-164 is set out twice in this Code. This version is effective January 1, 2026. For version effective until January 1, 2026, see the preceding version.
Amendments.
The 2023 amendment, effective January 1, 2025, added subsection (a.1).
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, redesignated former subsection (a) as present subsection (a.1) and former subsection (a.1) as present subsection (a), respectively.
Editor's notes.
Ga. L. 2024, p. 752, § 7/HB 516, not codified by the General Assembly, updated Ga. L. 2023, p. 376/SB 146 by revising subsection (b) of Section 5-1 to read as follows: "(b) Part II of this Act, which provides for the regulatory authority of the Department of Agriculture, and Part III of this Act, relating to revenue and taxation, shall become effective on January 1, 2026."
The reference to "January 1, 2025" in the directory language of Ga. L. 2024, p. 1052, § 2(6)/SB 448, should read "January 1, 2026".

10-1-164.1. Self-service gasoline price for drivers holding special disability permit; penalty.

(a) Any owner or operator of a gasoline station which sells gasoline at one price when an employee of the station dispenses the gasoline into a motor vehicle and at a lower price when the customer dispenses the gasoline on a self-service basis shall comply with this Code section. Any such owner or operator shall conduct the operations of the station so that the holder of a special disability permit provided for in subsection (e) of Code Section 40-2-74.1 will, upon request, have gasoline dispensed by an employee of the station at the self-service pump and will be allowed to purchase such gasoline at the price otherwise charged for gasoline purchased on a self-service basis if:

(1) The holder of the permit is driving the motor vehicle into which the gasoline is to be dispensed; and

(2) The holder of the permit is not accompanied by another person 16 years of age or older who is not mobility impaired or blind. However, in such cases, the employee shall not be required to provide any other service.

(b) Any owner or operator who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

History.
Code 1981, § 10-1-164.1, enacted by Ga. L. 1987, p. 1464, § 1; Ga. L. 2020, p. 493, § 10/SB 429.

10-1-165. Civil penalty.

Any person violating any provision of:

(1) This part relating to the inspection and sale of gasoline, kerosene, and other petroleum products; or

(2) Code Section 10-1-164 providing for the regulation of signs advertising the price of motor fuel which are displayed by retailers of motor fuel; or

(3) Any rule, regulation, or standard promulgated or adopted by the Commissioner of Agriculture or the Department of Agriculture under the provisions of any of the above

shall be liable to a civil penalty not to exceed $1,000.00 for such violation. The Commissioner, after a hearing, shall determine whether any person has violated this Code section and upon a proper finding may issue his order imposing a civil penalty as provided in this Code section. All hearings and proceedings under this Code section shall be held and taken under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Code 1933, § 73-223.1, enacted by Ga. L. 1973, p. 790, § 1.

RESEARCH REFERENCES

ALR.
Recovery of cumulative statutory penalties, 71 A.L.R.2d 986.

10-1-166. Penalty for chemist or inspector having interest in sale or manufacture of gasoline.

Any chemist or inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any gasoline shall be guilty of a misdemeanor.

History.
Ga. L. 1927, p. 279, § 11; Code 1933, § 73-9903.

10-1-167. Penalty for operating condemned self-measuring gasoline pumps.

Any person, company, firm, or corporation who shall operate any pump, without the written consent of the Commissioner of Agriculture, which has been condemned by a duly authorized inspector as provided for in this part because of giving short measure in excess of the tolerance established by regulation of the Commissioner shall be guilty of a misdemeanor.

History.
Ga. L. 1927, p. 279, § 15; Code 1933, § 73-9905; Ga. L. 1960, p. 1043, § 17.

10-1-168. Penalty for operating short-measure gasoline pump.

Any person, company, firm, or corporation who shall install or operate a self-measuring pump which has a device or other mechanical means used for the purpose of giving short measure shall be guilty of a misdemeanor.

History.
Ga. L. 1927, p. 279, § 15; Code 1933, § 73-9906.

10-1-169. Penalty for violation of this part or regulations.

Any person or association of persons, firm, or corporation who shall violate any of the provisions of this part relating to inspection, labeling, sale, etc., of gasoline, kerosene, and other petroleum products or any rule or regulation promulgated by the Commissioner of Agriculture for the enforcement of this part shall be guilty of a misdemeanor.

History.
Ga. L. 1927, p. 279, § 17; Code 1933, § 73-9902; Ga. L. 1960, p. 1043, § 1.

Part 2

Brake Fluid

Administrative rules and regulations. Brake Fluid; Definitions; Standards, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Substantive Regulations; Petroleum Products, Rule 40-20-1-.02.

OPINIONS OF THE ATTORNEY GENERAL

Only federal standards enforceable. — Georgia is unable to enforce brake fluid standards unless such standards are identical to the federal standards regulating brake fluids. 1968 Op. Att'y Gen. No. 68-320.

10-1-180. Definitions.

As used in this part, the term:

(1) "Brake fluid" means the liquid medium through which force is transmitted in the hydraulic brake system of any motor vehicle operated in this state.

(2) "Chemist" means the state oil chemist.

(3) "Commissioner" means the Commissioner of Agriculture.

History.
Ga. L. 1956, p. 237, § 1; Ga. L. 1972, p. 1015, § 505.

10-1-181. Adulterated brake fluid.

Brake fluid shall be deemed to be adulterated unless it meets the minimum standard for brake fluid as provided in this part. Brake fluid shall also be deemed to be adulterated if it contains any substance which will render it injurious to the hydraulic brake system of any motor vehicle or that will impair the normal operation of the hydraulic brake system.

History.
Ga. L. 1956, p. 237, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
2 C.J.S., Adulteration, § 1 et seq.

10-1-182. Misbranded brake fluid.

A brake fluid shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular;

(2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, seller, or distributor; an accurate statement of quantity of the contents in terms of weight or measure; and the words "brake fluid" and "heavy duty"; and if such information is not plainly and clearly stated on the outside of the package or container.

History.
Ga. L. 1956, p. 237, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 255.

C.J.S.
2 C.J.S., Adulteration, § 6 et seq.

ALR.
Constitutionality of statutes requiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 A.L.R. 572.

10-1-183. Use of misbranded or adulterated brake fluid prohibited.

No person shall sell, have for sale, offer for sale, give, donate,

distribute, or add to the hydraulic brake system of a motor vehicle in this state any brake fluid which is misbranded or adulterated.

History.
Ga. L. 1956, p. 237, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
2 C.J.S., Adulteration, § 6 et seq.

10-1-184. Establishing minimum brake fluid standard and specifications.

The Commissioner shall establish by rule or regulation the minimum standard and specifications for brake fluid. The Commissioner shall not adopt a minimum standard or specification that is below the minimum standard and specifications established by the Society of Automotive Engineers for heavy-duty type brake fluids No. 70R1.

History.
Ga. L. 1956, p. 237, § 5.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.
2 C.J.S., Adulteration, § 6 et seq.

ALR.
Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle, 99 A.L.R.3d 179.

10-1-185. Inspection of brake fluid samples; annual license to sell.

Before any brake fluid shall be sold, exposed for sale, or stored, packed, or held with intent to sell within this state, a sample thereof must be inspected or approved by the state oil chemist. Upon application of the manufacturer, packer, seller, or distributor and the payment of a license or inspection fee of $25.00 for each brand or type of brake fluid submitted, the state oil chemist shall subject to inspection or analysis the brake fluid so submitted. If the brake fluid is not adulterated or misbranded and meets the standards established and promulgated by the Commissioner and is not such a type or kind that is in violation of this part, the Commissioner may issue the applicant a written license or permit authorizing the sale of such brake fluid in this state for the calendar year in which the license or inspection fee is paid, which license or permit shall be subject to renewal annually upon payment of a $25.00 renewal fee. If, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," the Commis-

sioner shall find that any brake fluid has been materially altered or adulterated or a change has been made in the name, brand, or trademark under which the brake fluid is sold or that it violates this part, he shall notify the applicant; and the license or permit shall be canceled forthwith. No license or permit for the sale of brake fluid in this state shall be issued until application has been made as provided by this part and such samples of the brake fluid as may be necessary for the state oil chemist to inspect it have been submitted and until the state oil chemist notifies the Commissioner that said brake fluid meets the specifications adopted by the Commissioner.

History.
Ga. L. 1956, p. 237, § 6.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 160. 42
Am. Jur. 2d, Inspection Laws, § 8 et seq.

10-1-186. Enforcement; right of inspection; "stop-sale" orders; condemnation of adulterated or misbranded brake fluid.

(a) The Commissioner shall administer and enforce this part by inspections, chemical analyses, or by any other appropriate methods. All quantities or samples of brake fluid submitted for inspection or analysis shall be taken from stocks in this state or intended for sale in this state; or the Commissioner, through his agents, may call upon the manufacturer or distributor applying for an inspection or analysis of brake fluid to supply such sample thereof for inspection or analysis. The Commissioner, through his agents or inspectors, shall have free access during business hours to all places of business, buildings, vehicles, cars, and vessels used in the manufacture, transportation, sale, or storage of any brake fluid; and the Commissioner, acting through his agents, may open any box, carton, parcel, package, or container holding, containing, or supposed to contain any brake fluid and may take therefrom samples for analysis.

(b) If it appears that any of the provisions of this part have been violated, the Commissioner, acting through his authorized agents, inspectors, or representatives, is authorized to issue a "stop-sale" order which shall prohibit further sale or gift of any brake fluid being sold, exposed for sale, or held with intent to sell within this state in violation of this part until this part has been complied with.

(c) Any brake fluid not in compliance with this part shall be subject to seizure upon complaint of the Commissioner or any of his agents, inspectors, or representatives to a superior court in the county in which

said brake fluid is located. In the event the court finds that any brake fluid is adulterated or misbranded, it may order the condemnation of said brake fluid; and such brake fluid shall be disposed of in any manner consistent with the rules and regulations of the Commissioner and the laws of this state, provided that in no instance shall the disposition of said brake fluid be ordered by the court without first giving the claimant or owner of same an opportunity to apply to the court for the release of said brake fluid or for permission to process or label said brake fluid so as to bring it into compliance with this part.

(d) In case any "stop-sale" order shall be issued under this part, the agents, inspectors, or representatives of the Commissioner shall release the brake fluid so withdrawn from sale when the requirements of this part have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal.

History.
Ga. L. 1956, p. 237, § 7; Ga. L. 1983, p. 884, § 3-9.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 160. 42 Am. Jur. 2d, Inspection Laws, § 1 et seq.
ALR.
Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

10-1-187. Rules and regulations; powers of Commissioner's agents; list of inspected and licensed brands; advertising of licensing.

The Commissioner shall have authority to establish and promulgate such rules and regulations as are necessary promptly and efficiently to enforce this part. All authority vested in the Commissioner by virtue of this part may, with like force and effect, be executed by such employees, agents, inspectors, and representatives of the Commissioner as he may, from time to time, designate for such purpose. The Commissioner may publish in print or electronically or furnish, upon request, a list of the brands and classes or types of brake fluid inspected by the chemist which have been found to be in accord with this part and for which a license or permit for sale has been issued; and it shall be lawful for any manufacturer, packer, seller, or distributor of brake fluid to show, by advertising, in any manner, that his or its brand of brake fluid has been inspected, analyzed, and licensed for sale by the Commissioner, acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, seller, or distributor of brake fluid to advertise, in any manner, that such brake fluid so advertised for sale has been approved by the Commissioner.

History.
Ga. L. 1956, p. 237, § 8; Ga. L. 2010, p. 838, § 10/SB 388.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 160. 42 Am. Jur. 2d, Inspection Laws, § 11.

10-1-188. [Reserved] Certified analyses as evidence.

History.
Ga. L. 1956, p. 237, § 9; repealed by Ga. L. 2011, p. 99, § 13/HB 24, effective January 1, 2013.
Editor's notes.
Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

10-1-189. Penalty for violations; instituting prosecutions.

Any person, firm, association, or corporation violating or failing to comply with this part or any rule, regulation, standard, or specification issued pursuant to this part shall be guilty of a misdemeanor; and each day that any violation of this part shall exist shall be deemed to be a separate offense. Whenever the Commissioner or his agents or representatives shall discover that any brake fluid is being sold or has been sold in violation of this part, the Commissioner or his agents or representatives may furnish the facts to the prosecuting attorney of the court having jurisdiction in the county in which such violation occurred; and it shall be the duty of such prosecuting attorney promptly to institute appropriate legal proceedings.

History.
Ga. L. 1956, p. 237, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 255. 42 Am. Jur. 2d, Inspection Laws, § 21 et seq.

C.J.S.
2 C.J.S., Adulteration, § 13 et seq.

Part 3

Antifreeze

Cross references.
Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.
Administrative rules and regulations.
Regulations and Standards for Antifreeze, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Fuel Oil Inspection Unit, Substantive Regulations; Petroleum Products, Rule 40-20-1-.03.

10-1-200. Definitions.

As used in this part, the term:

(1) "Antifreeze" means all substances and preparations intended for use as the cooling medium or to be added to the cooling liquid in the cooling system of internal combustion engines to prevent freezing of the cooling liquid or to lower its freezing point.

(2) "Person" means individuals, partnerships, corporations, companies, and associations.

History.
Ga. L. 1975, p. 706, § 1.

10-1-201. Adulterated antifreeze.

An antifreeze shall be deemed to be adulterated:

(1) If it consists in whole or in part of any substance which will render it injurious to the cooling system of an internal combustion engine or will make the operation of the engine dangerous to the user;

(2) If its strength, quality, or purity falls below the standard of strength, quality, or purity under which it is sold; or

(3) If it consists of or is compounded with calcium chloride, magnesium chloride, petroleum distillates, or other chemicals or substances in quantities harmful to the cooling system of internal combustion engines.

History.
Ga. L. 1975, p. 706, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 172.

C.J.S.
2 C.J.S., Adulteration, § 1 et seq.

10-1-202. Misbranded antifreeze.

An antifreeze shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular; or

(2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, or distributor and an accurate statement of quantity of the contents in terms of weight or measure and they are not plainly and correctly stated on the outside of the package or container.

History.
Ga. L. 1975, p. 706, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, §§ 1, 13 et seq.

C.J.S.
2 C.J.S., Adulteration, §§ 6 et seq. 94 C.J.S., Weights and Measures, § 8 et seq.

10-1-202.1. Addition of denatonium benzoate to certain antifreeze; applicability; limitation on civil liability and criminal responsibility.

(a) Antifreeze sold in this state that is manufactured after July 1, 2012, containing more than 10 percent ethylene glycol shall include denatonium benzoate at a minimum of 30 parts per million and a maximum of 50 parts per million as an aversive agent to render the antifreeze unpalatable.

(b) The requirements of subsection (a) of this Code section shall apply only to manufacturers, packagers, distributors, recyclers, or sellers of antifreeze and shall apply to recyclers notwithstanding the provisions of Code Section 10-1-208.1.

(c) The requirements of subsection (a) of this Code section shall not apply to the sale of a motor vehicle, as defined in Code Section 40-1-1, that contains antifreeze or to wholesale containers containing 55 gallons or more of antifreeze.

(d) A manufacturer, packager, distributor, recycler, or seller of antifreeze that is required to contain denatonium benzoate pursuant to this Code section shall not be liable to any person for personal injury, death, property damage, damage to the environment including without limitation natural resources, or economic loss that results solely from the inclusion of denatonium benzoate in the antifreeze; provided, however, that such limitation on liability shall only be applicable if denatonium benzoate is included in antifreeze in the concentrations mandated by subsection (a) of this Code section. Such limitation on liability shall not apply to a particular liability to the extent that the cause of that liability is unrelated to the inclusion of denatonium benzoate in antifreeze.

(e) In any criminal prosecution under this part or civil action for damages relating to the requirements of this part, a distributor or seller of antifreeze who is not the manufacturer, packager, or recycler of such antifreeze and who sells or distributes antifreeze that is labeled as containing denatonium benzoate shall not be criminally responsible for, and shall be immune from civil liability for, failure to include denatonium benzoate in such labeled package, bill of lading, receipt, or container of antifreeze; provided, however, that, if such distributor or seller of antifreeze has actual knowledge that the labeled product does not contain denatonium benzoate in the concentrations mandated by

subsection (a) of this Code section, such distributor or seller shall not receive the immunity provided by this subsection.

History.

Code 1981, § 10-1-202.1, enacted by Ga. L. 2011, p. 331, § 2/HB 40; Ga. L. 2012, p. 775, § 10/HB 942; Ga. L. 2024, p. 1052, § 2(7)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (e).

Editor's notes.

Ga. L. 2011, p. 331, § 1/HB 40, not codified by the General Assembly, provides: "This Act shall be known and may be cited as 'Chief's Law.'"

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Offenses arising from a violation of O.C.G.A. § 10-1-202.1 do not, at this time, appear to be offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

10-1-203. Inspection of antifreeze samples; annual license to sell.

Before any antifreeze shall be sold, exposed for sale, or stored, packed, or held with intent to sell within this state, a current certified test report thereof prepared by an independent laboratory recognized by the Department of Agriculture to do such testing must be submitted and evaluated under the supervision of the state oil chemist in the Department of Agriculture. Upon application of the manufacturer or packer or distributor, submission of container label, and the payment of a license fee of $50.00 for each brand or type of antifreeze submitted, the state oil chemist shall evaluate the test report so submitted. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. If the antifreeze is not adulterated or misbranded, if it meets the standards established and promulgated by the Commissioner of Agriculture, and if the antifreeze is not a type or kind that is in violation of this part, the Commissioner shall issue the applicant a written license or permit authorizing the wholesale and retail sale by the applicant and by others of such antifreeze in this state for the fiscal year in which the license is issued, which license or permit shall be subject to renewal annually. If the Commissioner shall find at a later date that the antifreeze product or substance to be sold, exposed for sale, or held with intent to sell has been materially altered or adulterated or that a change has been made in the name, brand, or trademark under which the antifreeze is sold or that it violates this part, the Commissioner is authorized to revoke or suspend the license or permit issued under this part of the licensee found in violation of this part after notice and hearing before the Commissioner. No license or permit for the sale of antifreeze in this state shall be issued until the application, fee, and label submission have been made as provided by this part, the certified test report has

been evaluated by the state oil chemist, and the state oil chemist notifies the Commissioner of Agriculture that said antifreeze meets the requirements of this part.

History.
Ga. L. 1975, p. 706, § 4; Ga. L. 1997, p. 416, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 9, § 1-26/HB 1055.

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Inspection Laws, §§ 1 et seq., 8 et seq.

10-1-204. Enforcement; right of inspection; "stop-sale" orders.

It shall be the duty of the Commissioner of Agriculture to administer and enforce this part by inspections, chemical analysis, or any other appropriate methods and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. All quantities or samples of antifreeze submitted for inspection or analysis shall be taken from stocks in this state or intended for sale in this state, or the Commissioner may require the manufacturer or distributor applying for an inspection of antifreeze to supply such sample thereof for analysis. The Commissioner and his inspectors shall have free access during business hours to all places of business, buildings, vehicles, cars, and vessels used in the manufacture, transportation, sale, or storage of any antifreeze and may open any box, carton, parcel, package, or container holding or containing or supposed to contain any antifreeze and may take therefrom samples for analysis. If it appears that any provisions of this part have been violated, the Commissioner and his inspectors or representatives are authorized to issue a "stop-sale" order which shall prohibit further sale of any antifreeze being sold, exposed for sale, or held with intent to sell within this state in violation of this part until this part has been complied with or said violation has otherwise been legally disposed of. In case any "stop-sale" order shall be issued under this part, the Commissioner shall release the antifreeze so withdrawn from sale when this part has been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal.

History.
Ga. L. 1975, p. 706, § 5.

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Inspection Laws, § 8 et seq.

10-1-205. Seizure and condemnation of noncomplying antifreeze.

Any antifreeze not in compliance with this part shall be subject to seizure upon complaint of the Commissioner of Agriculture or his inspectors or representatives to the superior court in the county in which said antifreeze is located. In the event the superior court finds said antifreeze to be in violation of this part, it may order the condemnation of said antifreeze; and the same shall be disposed of in any manner consistent with the rules and regulations of the Department of Agriculture and the laws of this state, provided that in no instance shall the disposition of the antifreeze be ordered by the court without first affording the claimant or owner of the antifreeze an opportunity to apply to the court for the release of the antifreeze or for permission to process or relabel the antifreeze so as to bring it into compliance with this part.

History.
Ga. L. 1975, p. 706, § 6.

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Inspection Laws, § 19 et seq.

10-1-206. List of inspected and licensed brands; advertising references to licensing.

The Commissioner of Agriculture may publish in print or electronically or furnish upon request a list of the brands and classes or types of antifreeze inspected by the state oil chemist during the fiscal year which have been found to be in compliance with this part and for which a license or permit for sale has been issued. It shall be lawful for any manufacturer, packer, or distributor of antifreeze to show, by advertising, in any manner, that its brand of antifreeze has been inspected, analyzed, or licensed for sale by the Commissioner of Agriculture acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, or distributor of antifreeze to advertise in any manner that such antifreeze so advertised for sale has been "approved" by the Commissioner of Agriculture.

History.
Ga. L. 1975, p. 706, § 7; Ga. L. 2010, p. 838, § 10/SB 388.

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Inspection Laws, § 11.

10-1-207. Requiring statement of formula or contents; confidentiality of information furnished.

When any manufacturer, packer, or distributor applies to the Commissioner of Agriculture for a license or permit to sell antifreeze in this state, the Commissioner may require the manufacturer, packer, or distributor to furnish to the state oil chemist a statement of the formula or contents of the antifreeze, which statements shall conform to rules and regulations established by the Commissioner, provided that the statement of the formula or contents need not include the inhibitor ingredients if such inhibitor ingredients total less than 5 percent by weight of the antifreeze and if in lieu thereof the manufacturer, packer, or distributor furnishes to the state oil chemist satisfactory evidence, other than by disclosure of the inhibitor ingredients, that the antifreeze is not adulterated as defined in Code Section 10-1-201. All statements of contents, formula, or trade secrets furnished under this Code section shall be privileged and confidential and shall not be subject to subpoena nor shall the same be exhibited or disclosed before any administrative or judicial tribunal by virtue of any order or subpoena of such tribunal unless with the consent of the person, firm, association, or corporation owning or furnishing to the state oil chemist such statement of contents.

History.
Ga. L. 1975, p. 706, § 8.

RESEARCH REFERENCES

ALR.
Actions Under Defend Trade Secrets Act, 18 U.S.C.A. § 1836, 30 A.L.R. Fed. 3d (2018).

10-1-208. [Reserved] Certified analyses as evidence.

History.
Ga. L. 1975, p. 706, § 9; repealed by Ga. L. 2011, p. 99, § 14/HB 24, effective January 1, 2013.
Editor's notes.
Ga. L. 2011, p. 99, § 14/HB 24, reserved the designation of this Code section, effective January 1, 2013.
Law reviews.
For article on the 2011 repeal of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

10-1-208.1. Sale or other dispersal of recycled, reclaimed, or reprocessed antifreeze; violations.

This part shall not apply to recycled, reclaimed, or reprocessed antifreeze processed in Georgia which meets standards of suitability for

automobile or other vehicle engine cooling systems, which has conspicuous labeling or notice of its nature as "recycled," and which is dispensed in an approved manner in bulk or by replenishing during servicing. The department shall establish by regulation such standards, testing requirements, labeling and notice requirements, and manner of dispensing. Each sale or other dispersal of a product which fails to meet such standards, which does not have the proper labeling or on which adequate notice is not given, or which is dispensed in an unapproved manner shall constitute a separate violation of this Code section.

History.
Code 1981, § 10-1-208.1, enacted by Ga. L. 1996, p. 1020, § 1.

10-1-209. Rules and regulations.

The Commissioner of Agriculture shall be authorized to promulgate rules and regulations to implement this part and to accomplish its purpose.

History.
Ga. L. 1975, p. 706, § 10.

10-1-210. Enjoining violations.

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy at law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court in the appropriate county; and such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction or ex parte restraining order enjoining or restraining any person from violating or continuing to violate any of this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part.

History.
Ga. L. 1975, p. 706, § 11.

10-1-211. Penalty for violations.

Any person who violates any provision of this part or the rules and regulations promulgated hereunder shall be guilty of a misdemeanor.

History.
Ga. L. 1975, p. 706, § 12.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 255. 42 Am. Jur. 2d, Inspection Laws, § 14.

C.J.S.
2 C.J.S., Adulteration, § 13 et seq.

ARTICLE 8A

ELECTRIC VEHICLE CHARGING STATIONS

Effective date.
This article becomes effective January 1, 2026.

Editor's notes.
Ga. L. 2024, p. 752, § 7/HB 516, not codified by the General Assembly, updated Ga. L. 2023, p. 376/SB 146 by revising subsection (b) of Section 5-1 to read as follows: "(b) Part II of this Act, which provides for the regulatory authority of the Department of Agriculture, and Part III of this Act, relating to revenue and taxation, shall become effective on January 1, 2026."

10-1-220. (Effective January 1, 2026.) Definitions.

As used in this article, the term:

(1) "Commissioner" means the Commissioner of Agriculture.

(2) "Department" means the Department of Agriculture.

(3) "Digital network" means internet enabled technology or digital media, including, but not limited to, consumer applications accessible through computers or mobile electronic devices, offered or used by an electric vehicle charging provider that allows a user to initiate a retail transaction to deliver electricity from an electric vehicle charging station to an electric vehicle.

(4) "Electric vehicle" means a vehicle that is propelled by one or more electric motors fueled by energy stored in the form of a rechargeable battery.

(5) "Electric vehicle charging provider" means the owner of an electric vehicle charging station.

(6) "Electric vehicle charging station" means any device or group of devices that delivers electricity from a power source outside an electric vehicle into one or more electric vehicles and that is located somewhere other than a residence.

(7) "Residence" means a single-family dwelling, multifamily dwelling, or a building which is an extended stay rental, as such term is defined in Code Section 48-13-50.3, where a device delivers electricity to an electric vehicle from a power source upon the property of such a dwelling or building for purposes other than commercial or for the exclusive use of certain persons located upon such property.

History.
Code 1981, § 10-1-220, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-221. (Effective January 1, 2026.) Administration; electric vehicle charging station inspectors; cooperation with other agencies.

(a) The administration of this article shall be vested in the Commissioner of Agriculture.

(b) The Commissioner shall be authorized to employ, in accordance with Chapter 20 of Title 45, electric vehicle charging station inspectors to enforce this article. Such inspectors shall be allowed expenses to be approved by the Commissioner. There shall be allowed such further sums for the purchase of equipment, supplies, and clerical help and to pay any other expenses incident to and necessary for the enforcement of this article as may hereafter be appropriated.

(c) The Commissioner shall be authorized to require electric vehicle charging station inspectors to be bonded for the faithful performance of their duties at the expense of the department if and to the extent such Commissioner deems it necessary for the proper protection of the state and the public.

(d) The Commissioner shall be authorized to appoint and employ investigators who shall have, in any case that there is reason to believe a violation of this article has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(e) The Commissioner may promulgate such rules and regulations, not inconsistent with the provisions of this article, necessary for the administration and enforcement of this article. Such rules and regulations shall take into consideration and provide for consistency with any rules and regulations of the National Institute for Standards and Technology of the United States Department of Commerce. Such rules and regulations shall be promulgated in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(f) The Commissioner and the Department of Revenue shall be authorized to share information necessary to efficiently administer and enforce the provisions of this article and Article 1 of Chapter 9 of Title 48, the "Motor Fuel Tax Law." Any confidential information furnished pursuant to this Code section shall retain its character as confidential and privileged information. Any person who divulges confidential information obtained pursuant to this Code section shall be subject to the same penalties as provided under Code Section 48-7-61 for unlawful divulgence of confidential tax information.

History.
Code 1981, § 10-1-221, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026; Ga. L. 2024, p. 1052, § 2(8)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "station" following "charging" in subsection (c).

10-1-222. (Effective January 1, 2026.) Charging stations to be capable of measuring and displaying amount of electricity delivered; annual registration.

(a) All electric vehicle charging stations shall be capable of accurately measuring and prominently displaying the amount of electricity delivered to each electric vehicle on a per kilowatt-hour basis, either directly upon the station or remotely through the use of a digital network. Such stations shall be further equipped with meters to record the total kilowatt-hours dispensed.

(b) All electric vehicle charging stations shall be subject to inspection as provided for in this article. Prior to operation of any electric vehicle charging station and annually thereafter, an electric vehicle charging provider shall register with the Commissioner in the form and manner prescribed by such Commissioner. Such registration shall include the location of the electric vehicle charging station; the name, brand, or manufacturer of the type of electric vehicle charging station, together with the name and address thereof; and certification that the electric vehicle charging station is in conformity with the specifications established pursuant to this article by the Commissioner. Certificates of registration issued by the Commissioner pursuant to this Code section shall be posted in a prominent and accessible place upon the electric vehicle charging station.

History.
Code 1981, § 10-1-222, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-223. (Effective January 1, 2026.) Injunctions for violations.

Whenever the Commissioner shall find any person willfully marketing the delivery of electricity for use in electric vehicles in violation of the laws of this state, of prescribed specifications of this article, or rules and regulations promulgated pursuant to this article, the Commissioner shall be authorized to apply to the superior court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate superior court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

History.
Code 1981, § 10-1-223, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-224. (Effective January 1, 2026.) Inspection of stations; seal of accurate stations; condemnation of inaccurate stations; secrete manipulation prohibited; regulatory authority.

(a) Electric vehicle charging station inspectors shall inspect all electric vehicle charging stations located in the territory assigned to them.

(b) All electric vehicle charging stations found to be giving accurate measure of the amount of electricity delivered within the tolerance established by regulations of the Commissioner shall have the electric vehicle charging station sealed with an official seal applied by an inspector duly authorized by the Commissioner.

(c) If any electric vehicle charging station shall be found to be giving inaccurate measure of the amount of electricity delivered in excess of the tolerance established by regulations of the Commissioner, the inspector shall then and there notify the electric vehicle charging provider, whether owner or lessee. Should the electric vehicle charging provider fail or refuse to then and there make such adjustments as shall be necessary to bring the measure within the allowed variation, the same shall be condemned and rendered inoperable immediately by the inspector examining the same; and such electric vehicle charging station shall not again be operated without the written consent of the Commissioner. Inspectors shall be required to report to the Commissioner immediately the name and number of any electric vehicle charging station condemned and rendered inoperable.

(d) When any electric vehicle charging station is condemned under this article by any inspector, it shall be the duty of the inspector immediately to make affidavit before the judge of the probate court of the county in which the electric vehicle charging station is located that such station is being operated contrary to law by the electric vehicle charging provider who shall be named in the affidavit. Thereupon the judge of the probate court shall issue an order to the electric vehicle charging provider named in the affidavit to show cause before him or her on the day named in the order, not more than ten days nor fewer than three days from the issuance of the order, why the electric vehicle charging station should not be forfeited, confiscated to the state, and dismantled. On such day named in the order, it shall be the duty of the judge of the probate court to hear the respective parties and to determine whether or not the electric vehicle charging station has been operated contrary to the provisions of this article. If the judge of the probate court finds that the electric vehicle charging station has been so

operated, he or she shall forthwith issue an order adjudging the electric vehicle charging station to be forfeited and confiscated to the state and directing the sheriff of the county to dismantle the electric vehicle charging station and take it into his or her possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the electric vehicle charging station to the highest bidder for cash. The proceeds of sale, or as much thereof as may be necessary, shall be used by the sheriff, first, to pay the costs associated with sale, which shall be the same as in cases of attachment, and the sheriff shall thereupon pay over and deliver the residue, if any, to the person from whose possession the electric vehicle charging station has been taken.

(e) It shall be unlawful to install or operate any electric vehicle charging station which can be secretly manipulated in such manner as to give short measure. Such inaccurate electric vehicle charging station shall be condemned as provided in this Code section, and thereafter it shall be unlawful for any person to resell any electricity from such electric vehicle charging station until such station has been made or altered to comply with this article and has been inspected and approved for service by the inspector.

(f) It shall be unlawful for anyone to remove a seal applied by an inspector to an electric vehicle charging station without first securing consent of the Commissioner, whose consent may be given through one of the duly authorized inspectors.

(g) The department shall have the power to implement rules and regulations necessary to carry out the inspections of electric vehicle charging stations as provided for by this Code section.

History.
Code 1981, § 10-1-224, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-225. (Effective January 1, 2026.) Advertising requirements for electric vehicle charging stations; advertisements offering free gifts or services; enforcement; penalties.

(a) Any sign or placard or other means used to advertise the price of electricity for sale at retail through an electric vehicle charging station may contain a separate listing of the price and a separate listing of each tax thereon, but must contain a total of such price and taxes which shall be at least as large as the listing of the price or any tax thereon. Numbers used to advertise the total price of such electricity shall be of uniform size; and, where fractions are used, the numerator and denominator thereof combined shall be of the same size as any whole numbers used. It shall not be necessary that a denominator be used to indicate fractions; but, if one is not used, the numerator must be at least half the size of the whole number used. When the price of electricity for

sale at retail through an electric vehicle charging station is advertised on any sign, billboard, placard, or other advertising medium, it shall be unlawful to place a higher price on any electric vehicle charging station delivering such electricity or to charge a higher price for such electricity. An electric vehicle charging station provider shall not be precluded from giving a discount from the posted or advertised price if the purchaser of the electricity buys additional merchandise.

(b) It shall be unlawful for any electric vehicle charging provider to advertise upon the purchase of electricity either free:

(1) Gifts or other products unless such provider has sufficient number of gifts or products on hand to supply the reasonably expectable demand or the advertisement discloses a limitation of quantity; or

(2) Car washes or other services unless such provider is prepared, in the absence of causes beyond the reasonable control of the offerer, to perform such car washes or the services advertised at the time of the purchase at such provider's place of business or at a place of business affiliated by trademark or agreement with such provider. If the free car washes or other services advertised are to be performed at a place of business affiliated by trademark or agreement but in a separate location, such fact shall be so stated on the sign, billboard, placard, or other advertising medium used.

(c) Nothing in this Code section shall preclude posting on any electric vehicle charging station a separate statement of taxes included in the total purchase price for the purpose of complying with Chapter 8 of Title 48.

(d) Electric vehicle charging station inspectors and any and all law enforcement officers in this state are charged with enforcement of this Code section.

(e) Any person, firm, association, or corporation violating this Code section shall be guilty of a misdemeanor.

History.

Code 1981, § 10-1-225, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026; Ga. L. 2024, p. 1052, § 2(9)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "An electric vehicle charging station" for "Any electric vehicle charging" at the beginning of the fifth sentence in subsection (a) and inserted "station" following "charging" in subsection (d).

10-1-226. (Effective January 1, 2026.) Civil penalty for violations.

Any person violating any provision of:

(1) This article relating to the inspection of electric vehicle charging stations and the resale of electricity;

(2) Code Section 10-1-225 providing for the regulation of signs advertising the price for the resale of electricity by electric vehicle charging providers; or

(3) Any rule, regulation, or standard promulgated or adopted by the Commissioner or the department under the provisions of this article

shall be liable for a civil penalty not to exceed $1,000.00 for each violation. The Commissioner, after a hearing, shall determine whether any person has violated this Code section and upon a proper finding may issue his or her order imposing a civil penalty as provided in this Code section. All hearings and proceedings under this Code section shall be held and taken under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History. Code 1981, § 10-1-226, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-227. (Effective January 1, 2026.) Prohibited activities of electric vehicle charging station inspectors.

Any electric vehicle charging station inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any electric vehicle charging station shall be guilty of a misdemeanor and shall be disqualified from providing services as an electric vehicle charging station inspector until such interest no longer exists.

History. Code 1981, § 10-1-227, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

10-1-228. (Effective January 1, 2026.) Penalty for violations.

Any person or association of persons, firm, or corporation that violates any of the provisions of this article relating to inspection of electric vehicle charging stations and the resale of electricity or any rule or regulation promulgated by the Commissioner for the enforcement of this article shall be guilty of a misdemeanor.

History. Code 1981, § 10-1-228, enacted by Ga. L. 2023, p. 376, § 2-2/SB 146, effective January 1, 2026.

ARTICLE 9

GASOLINE MARKETING PRACTICES

Cross references.
Regulation of advertising by retail dealers of motor fuel, § 10-1-164.

JUDICIAL DECISIONS

Article not void for vagueness. — Given the extreme tolerance with which a federal court must scrutinize a state law in a vagueness challenge, an attack on the imprecision of the language employed in this article cannot be sustained. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

Even with the imprecise language of this article, a gasoline distributor is well apprised of the contours of the prohibited activity so as to defeat a void for vagueness challenge. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

Article not preempted by federal law. — Article does not legislate in an interstate area reserved exclusively for Congress. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

Article does not conflict with Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

RESEARCH REFERENCES

ALR.
Right of manufacturer, producer, or wholesaler to control resale price, 7 A.L.R. 449; 19 A.L.R. 925; 32 A.L.R. 1087; 103 A.L.R. 1331; 125 A.L.R. 1335.

Public regulation or authorization of gas filling stations, 18 A.L.R. 101; 29 A.L.R. 450; 34 A.L.R. 507; 42 A.L.R. 978; 49 A.L.R. 767; 55 A.L.R. 256; 79 A.L.R. 918; 96 A.L.R. 1337.

Rights and remedies of parties in respect to lease of filling station, 126 A.L.R. 1375.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 A.L.R.3d 399.

What constitutes adequate compliance with notice requirements, under § 104 of Petroleum Marketing Practices Act (15 USCS § 2804), in connection with termination or nonrenewal of gasoline station franchise relationship, 101 A.L.R. Fed. 813.

10-1-230. Short title.

This article shall be known and may be cited as the "Gasoline Marketing Practices Act."

History.
Ga. L. 1973, p. 438, § 1.

10-1-231. Legislative findings.

The General Assembly finds and declares that the distribution and sales through marketing agreements of gasoline in the State of Georgia vitally affects the general economy of the state, the public interest, and public welfare and that it is necessary, therefore, in the public interest to define the relationships and responsibilities of the parties to such agreements.

History.
Ga. L. 1973, p. 438, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 144 et seq.

C.J.S.
58 C.J.S., Mines and Minerals, §§ 417 et seq., 451.

10-1-232. Definitions.

As used in this article, the term:

(1) "Automotive gasoline" or "gasoline" means octane rated fuels made from petroleum products for use in the propulsion of motor vehicles.

(2) "Automotive gasoline dealer" or "gasoline dealer" means any person or firm engaged primarily in the retail sale of automotive gasoline and related products and services under a marketing agreement entered into with an automotive gasoline distributor.

(3) "Automotive gasoline distributor" or "gasoline distributor" means any person or firm engaged, whether as a jobber or supplier, in the sale, consignment, or distribution of gasoline to automotive gasoline dealers pursuant to marketing agreements.

(3.1) "Blended fuel" means a mixture composed of automotive gasoline and another liquid, other than a de minimis amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a motor vehicle.

(3.2) "Blender" means a person or firm which produces blended fuel outside a terminal transfer system.

(3.3) "Fuel alcohol" means alcohol or fuel grade ethanol.

(3.4) "Gasohol" means a blended fuel composed of gasoline and fuel grade ethanol.

(3.5) "Jobber" means an automotive gasoline distributor which is not a supplier.

(4) "Marketing agreement" or "agreement" means a written

agreement, including a franchise, and all related written agreements between an automotive gasoline distributor and an automotive gasoline dealer under which such dealer is supplied automotive gasoline for retail sale or an agreement between an automotive gasoline distributor and an automotive gasoline dealer under which the automotive gasoline dealer is granted the right to occupy premises owned, leased, or controlled by the automotive gasoline distributor for the purpose of engaging in the retail sale of gasoline of the automotive gasoline distributor.

(4.1) "Position holder" means a person or firm which holds the inventory position in automotive gasoline in a terminal, as reflected on the records of the terminal operator. A person or firm holds the inventory position in automotive gasoline when that person or firm has a contract with the terminal operator for the use of storage facilities and terminaling services for gasoline at the terminal. The term includes a terminal operator which owns gasoline in the terminal.

(4.2) "Rack" means a mechanism for delivering automotive gasoline from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.

(4.3) "Refiner" means a person or firm which owns, operates, or controls a refinery, wherever located.

(4.4) "Refinery" means a facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into automotive gasoline and from which automotive gasoline may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.

(4.5) "Removal" means a physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside a terminal transfer system is complete upon delivery into the means of conveyance.

(5) "Retail sale of automotive gasoline" means the sale thereof for consumption, and not for resale, at a retail outlet serving the motoring public.

(6) "Supplier" means:

(A) A position holder or a person or firm which receives automotive gasoline pursuant to a two-party exchange; or

(B) A refiner.

(7) "Terminal" means an automotive gasoline storage and distribution facility that has been assigned a terminal control number by

the United States Internal Revenue Service, is supplied by pipeline or marine vessel, and from which automotive gasoline may be removed at a rack.

(8) "Terminal operator" means a person or firm which owns, operates, or otherwise controls a terminal.

(9) "Terminal transfer system" means an automotive gasoline distribution system consisting of refineries, pipelines, marine vessels, and terminals. The term has the same meaning as "bulk transfer/terminal system" under 26 C.F.R. Section 48.4081-1.

(10) "Two-party exchange" means a transaction in which automotive gasoline is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver automotive gasoline to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder.

History.
Ga. L. 1973, p. 438, § 3; Ga. L. 1978, p. 2249, §§ 1-3; Ga. L. 2009, p. 201, § 1/SB 30.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2009, "de minimis" was substituted for "de minimus" in paragraph (3.1).

10-1-233. Acts of distributor violating article.

It shall be a violation of this article for any gasoline distributor who has a marketing agreement with a gasoline dealer, directly or indirectly, through any officer, agent, or employee, to commit any of the following acts:

(1) To terminate or cancel such marketing agreement without good cause prior to the expiration date;

(2) To terminate or cancel an existing marketing agreement prior to this expiration date or to fail to enter into subsequent agreements without having first given written notice setting forth all the reasons for such action to the gasoline dealer at least 60 days in advance of such termination, cancellation, or expiration of the existing agreement; provided, however, that such notice shall not be required of a gasoline distributor acting with reasonable cause to believe the dealer is maliciously and willfully damaging the property rights of the gasoline distributor or if the dealer has voluntarily abandoned the marketing relationship or after five days' notice has failed to pay his just debts when due to the distributor;

(3) By the use of coercion, intimidation, or threats, to force or induce such gasoline dealer to deal exclusively in products manufactured, distributed, or sponsored by the gasoline distributor or to participate in promotions. Hours of operation which are set in any

written agreement in effect prior to July 1, 1978, can only be changed by mutual consent. It shall also be the duty of the distributor to advise the dealer in writing prior to execution of the agreement the projected potential gallonage and the dealer shall acknowledge same in writing prior to execution of the marketing agreement that he is willing to accept same;

(4) To engage in any acts which have the purpose, intent, or effect of fixing or maintaining prices or of forcing or inducing adherence to prices at which such gasoline distributor's products are to be resold by such gasoline dealers, provided that nothing in this paragraph shall be deemed to prohibit recommendation, suggestion, urging, or discussion;

(5) To require a gasoline dealer, at the time of entering into a marketing agreement, to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this article;

(6) To require or prohibit any change in management of any gasoline dealer unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the gasoline distributor;

(7) To impose standards of performance upon the gasoline dealer other than those in the marketing agreement;

(8) To provide any term or condition in any marketing agreement, or other agreement ancillary or collateral thereto, which term or condition directly or indirectly violates this article;

(9) After July 1, 1978, to require operation in excess of a six-day week or in excess of a 12 hour day if the dealer can prove it results in substantially lessening the profits earned in his entire operation to the extent that it is not economically feasible to continue said operation; provided, however, that this paragraph shall in no way impair the obligation of contracts made prior to July 1, 1978; and provided, further, that this paragraph shall not impair the writing of a contract for hours in excess of the hours expressed in this paragraph or impair the right to enforce the hours contained in any contract until sufficient evidence is available to a dealer to exercise the rights provided in this article; and provided, further, that this paragraph shall not be applicable to dealers or distributors who operate a food or convenience store in conjunction with the retail sale of automotive gasoline and related products.

History.
Ga. L. 1973, p. 438, § 4; Ga. L. 1978, p. 2249, §§ 4, 5; Ga. L. 1983, p. 3, § 8.

JUDICIAL DECISIONS

Paragraph (6) of O.C.G.A. § 10-1-233 is unconstitutional under the due process clause of the Georgia Constitution in that the paragraph purports to regulate an industry not affected with a public interest. O'Brien v. Union Oil Co., 699 F. Supp. 1562, 1988 U.S. Dist. LEXIS 13210 (N.D. Ga. 1988).

Paragraph (6) of O.C.G.A. § 10-1-233 is contrary to public policy in that the paragraph adversely impacts upon the rights of gasoline distributors with respect to the individual personal service contracts between themselves and their retailers. O'Brien v. Union Oil Co., 699 F. Supp. 1562, 1988 U.S. Dist. LEXIS 13210 (N.D. Ga. 1988).

Paragraphs (8) and (9) of this section are not preempted by the federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

10-1-234. Selling controlled product to another distributor for retail sale when selling to dealers at distress prices.

It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls a product supply, controls the price of that product, and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this state to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards, and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area. As used in this Code section, the term "distress prices" shall not be construed to include or embrace a price established for the purpose of meeting competition.

History.

Ga. L. 1978, p. 2249, § 6; Ga. L. 1984, p. 1679, § 1; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2024, p. 1052, § 2(10)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

Law reviews.

For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

JUDICIAL DECISIONS

This section not void for vagueness. — Parties are sufficiently apprised of proscribed conduct under this section so as not to be deprived of due process of law by its application, so this section is not void for vagueness. Exxon Corp. v. Georgia

Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

O.C.G.A. § 10-1-234 is, while most assuredly not a model of clarity, at least amenable to some sensible construction; thus, it is constitutional because it does alert parties to character of proscribed conduct and does amount to something more than no rule at all. Exxon Corp. v. Busbee, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239, 1981 U.S. LEXIS 4057 (1981).

O.C.G.A. § 10-1-234 violates the due process clause of Ga. Const. 1983, Art. I, Sec. I, Para. I, in that the statute seeks to regulate a business not affected with a public interest. Batton-Jackson Oil Co. v. Reeves, 255 Ga. 480, 340 S.E.2d 16, 1986 Ga. LEXIS 584 (1986).

Constitutional evaluation. — While the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes and in the area of First Amendment rights, the United States Supreme Court has recognized that vague laws in any area suffer a constitutional infirmity; thus, O.C.G.A. § 10-1-234 may not escape scrutiny simply because the statute is a commercial regulatory statute. But, because this statute is not concerned with either the First Amendment or the definition of criminal conduct a court must be lenient in evaluating the statute's constitutionality. Exxon Corp. v. Busbee, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239, 1981 U.S. LEXIS 4057 (1981).

Standard for evaluating constitutionality of nonpenal, commercial regulatory statutes. — Because O.C.G.A. § 10-1-234 is a nonpenal, commercial regulatory statute, the standard for evaluating the statute's constitutionality is whether the statute is so indefinite as to amount to no rule or standard at all. Exxon Corp. v. Busbee, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239, 1981 U.S. LEXIS 4057 (1981).

Section must be substantially incomprehensible to be unconstitutional. — For O.C.G.A. § 10-1-234 to constitute a deprivation of due process, the statute must be so vague and indefinite as really to be no rule or standard at all, that is, uncertainty in the statute is not enough for the statute to be unconstitutionally vague; rather, the statute must be substantially incomprehensible. Exxon Corp. v. Busbee, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239, 1981 U.S. LEXIS 4057 (1981).

Section does not conflict with federal Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 751 et seq. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

Section does not conflict with Sherman Act. — There presently exists no conflict with the Sherman Act, 15 U.S.C. §§ 1-7, sufficient to invalidate this section. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008, 1979 U.S. Dist. LEXIS 7715 (N.D. Ga. 1979), aff'd, 644 F.2d 1030, 1981 U.S. App. LEXIS 13419 (5th Cir. 1981).

10-1-234.1. Suppliers may not inhibit gasoline distributors from being blenders.

Regardless of other products offered, any supplier which, pursuant to a marketing agreement, supplies gasoline from a terminal in this state to a gasoline distributor shall offer to supply such party with gasoline that has not been blended with, but is suitable for blending with, fuel alcohol. No supplier shall prevent or inhibit a gasoline distributor in

this state from being a blender or from qualifying for any federal or state tax credit due to blenders. If a supplier supplies gasoline to a gasoline distributor pursuant to this Code section which is then blended, the gasoline distributor shall indemnify and hold harmless such supplier against any losses or damages arising out of claims, costs, judgments, and expenses, including reasonable attorney's fees, or suits relating to or arising out of such blending.

History.
Code 1981, § 10-1-234.1, enacted by Ga. L. 2009, p. 201, § 2/SB 30.

10-1-235. Action by dealer against distributor for violation of article authorized; nature of relief; attorneys' fees.

(a) Any automotive gasoline dealer may bring an action against its automotive gasoline distributor for violation of this article in the superior court of the county where such distributor resides or, if the distributor is a corporation, in accordance with Title 14, to recover damages sustained by reason of any violation of this article, provided that the dealer shall show as a prerequisite to recovery under this Code section that he has:

(1) Complied with the reasonable requirements of the marketing agreement; and

(2) Has acted in good faith in carrying out the terms of the marketing agreement.

(b) The court may grant such equitable relief as is proper, including declaratory judgment and injunctive relief.

(c) Attorneys' fees shall be controlled by Code Section 13-6-11.

History.
Ga. L. 1973, p. 438, § 5; Ga. L. 1978, p. 2249, § 7.

10-1-236. [Reserved] Action by dealer against distributor for violation of article — Defense of termination of agreement.

History.
Ga. L. 1973, p. 438, § 7; Ga. L. 1978, p. 2249, §§ 8-10; and Ga. L. 1981, Ex. Sess., p. 8; repealed by Ga. L. 1983, p. 3, § 8, effective January 25, 1983.

Editor's notes.
Ga. L. 1983, p. 3, § 8 repealed and reserved this Code section, effective January 25, 1983.

10-1-237. Early termination of lease; hold over; hearing; vacating premises.

Upon receipt of notice to cancel or terminate an existing lease prior to expiration date, it shall be the duty of the dealer to notify the distributor within 30 days thereof of his intention to hold over and to set forth in writing to the distributor his reasons and justifications therefor and thereafter within ten days to file his complaint or application for injunction in the court of proper jurisdiction; and the judge of said court shall within 15 days conduct a hearing in said matter and thereafter within five days hand down a ruling based upon evidence presented as to the granting of a temporary injunction; and, upon the judge's failure to grant the injunction, the dealer shall vacate the premises all according to the lease agreement.

History.
Ga. L. 1973, p. 438, § 8.

10-1-238. Action by distributor against dealer for breach of agreement; attorneys' fees.

Any gasoline distributor may bring action against the dealer for failing to fulfill the marketing agreement. Attorneys' fees shall be controlled by Code Section 13-6-11.

History.
Ga. L. 1973, p. 438, § 11; Ga. L. 1978, p. 2249, § 12; Ga. L. 1993, p. 91, § 10.

10-1-239. Limitation of actions.

No action shall be brought under Code Section 10-1-235 or Code Section 10-1-238 unless commenced within two years after the cause of action shall have accrued.

History.
Ga. L. 1973, p. 438, § 12.

RESEARCH REFERENCES

ALR.
Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 A.L.R.2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

Fraud as extending statutory limitations period for contesting will or its probate, 48 A.L.R.4th 1094.

10-1-240. Marketing agreements subject to article.

This article shall apply to all marketing agreements as defined in paragraph (4) of Code Section 10-1-232 that are granted, renewed, or amended to extend the lease period on or after July 1, 2009.

History.
Ga. L. 1973, p. 438, §§ 6, 9; Ga. L. 1978, p. 2249, § 11; Ga. L. 2009, p. 201, § 3/SB 30.

10-1-241. Sale of real property not affected.

This article is not intended to alter or change the present law or regulations pertaining to the sale or transfer of title to real property, and the owner may at any time enter into a contract for the bona fide sale of his property.

History.
Ga. L. 1973, p. 438, § 10.

ARTICLE 9A

BELOW COST SALES

Editor's notes.
Ga. L. 1985, p. 458, § 2, not codified by the General Assembly, provides: "All laws and parts of laws in conflict with this Act are repealed; provided, however, nothing contained in this Act shall be construed to repeal any part of Article 9 of Chapter 1 of Title 10, it being the intent of the General Assembly that this Act shall be in addition to said Code sections."

10-1-250. Short title.

This article shall be known and may be cited as the "Below Cost Sales Act."

History.
Code 1981, § 10-1-250, enacted by Ga. L. 1985, p. 458, § 1; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-251. Definitions.

As used in this article, the term:

(1) "Person" means an individual, partnership, association, corporation, joint-stock company, or business trust.

(2) "Product" means octane or cetane rated fuels for use in the propulsion of motor vehicles.

(3) "Purchase" includes any acceptance or receipt of product by a person from a related entity.

(4) "Related entity" of a person means any person who, directly or through an affiliated person, holds more than 50 percent of the assets or voting securities of such person.

(5) "Sale" or "to sell" includes any transfer or delivery of product to a person from a related entity.

History.
Code 1981, § 10-1-251, enacted by Ga. L. 1985, p. 458, § 1.

10-1-252. Reasonable transfer price.

For the purposes of this article, a transfer price from a related entity to a person is reasonable (1) if it is the same or greater than the price that such related entity contemporaneously charges unrelated persons at the same level of distribution and in the same geographic area as the person for a similar volume of product of like grade and quality or (2) if it is arrived at by including all uniform costs imposed upon purchasers in the operation of the retail business as determined pursuant to generally accepted accounting principles.

History.
Code 1981, § 10-1-252, enacted by Ga. L. 1985, p. 458, § 1.

10-1-253. Computation of cost.

For the purposes of this article, "cost" shall be computed as follows:

(1)(A) When product is purchased by a person from an independent entity, the lowest invoice cost to the person from the independent entity for product of like grade and quality within 15 days prior to the date of resale of the product by the person; or

(B) When product is purchased by a person from a related entity, the lowest transfer price charged to the person for product of like grade and quality within 15 days prior to the date of resale of the product by the person, provided that the transfer price is reasonable; or

(C) If neither subparagraph (A) nor (B) of this paragraph applies, the lowest posted or published wholesale price of all sellers of product of like grade and quality normally serving the geographic area in which the person is located during the 15 days prior to the date of resale of the product by the person; plus

(2) A reasonable cost of doing business as determined pursuant to generally accepted accounting principles; plus

(3) Freight charges and any credit against federal or state motor fuel or sales tax not already included in the invoice cost, transfer price, or lowest posted or published wholesale price of the product; less

(4) All trade discounts, allowances, or rebates actually granted to

the person on the product; provided, however, that such trade discounts, allowances, or rebates are received on proportionally equal terms by all other customers competing in the distribution of such products.

History.
Code 1981, § 10-1-253, enacted by Ga. L. 1985, p. 458, § 1; Ga. L. 2024, p. 1052, § 2(11)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in paragraph (4).

10-1-254. Prohibited acts in sale of octane or cetane fuels; burden of rebutting prima-facie case.

(a) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, either directly or indirectly:

(1) To sell product below cost; or

(2) To discriminate in price between different purchasers of product of like grade and quality, where either or any of the purchases involved in such discrimination is in commerce in this state,

and where the effect of such below-cost sale or discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such below-cost sale or discrimination, or with customers of either of them. Nothing contained in this Code section shall prevent differentials which make only a due allowance for differences in the cost of refining, sale, or delivery resulting from the differing methods or quantities in which such product is sold or delivered to such purchasers. Nothing contained in this Code section shall prevent persons from selecting their own customers in bona fide transactions and not in restraint of trade. Nothing contained in this Code section shall prevent price changes, from time to time, which are in response to changing conditions affecting the market for or the marketability of product of the grade and quality concerned, such as, but not limited to, imperfect or damaged product, obsolescence of product, distress sales under court process, or sales in good faith in discontinuance of business at a particular location or with respect to the product itself.

(b) Upon proof being made in any action to enforce this article that there has been a below-cost sale or discrimination, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this article. Nothing

contained in this article shall prevent a seller from rebutting the prima-facie case thus made by showing that such seller's below-cost sale or lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

(c) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, to pay, grant, receive, or accept any thing of value as a commission or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of product, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf of or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is granted or paid.

(d) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state to pay or contract for the payment of any thing of value to or for the benefit of a customer of such person in the course of such sales as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of product refined, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such product.

(e) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, to discriminate in favor of one purchaser against another purchaser or purchasers of product bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any services or facilities connected with the processing, handling, sale, or offering for sale of such product so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, knowingly to induce or receive a below-cost or discriminatory price which is prohibited by this article.

History.
Code 1981, § 10-1-254, enacted by Ga. L. 1985, p. 458, § 1.

JUDICIAL DECISIONS

Regulation of prices pursuant to O.C.G.A. § 10-1-254 is unconstitutional, inasmuch as the statute engages in price-fixing and the gasoline industry is

not affected with a public interest. Strickland v. Ports Petroleum Co., 256 Ga. 669, 353 S.E.2d 17, 1987 Ga. LEXIS 601 (1987).

RESEARCH REFERENCES

ALR.

Validity, construction, and application of state statutory provisions prohibiting sale of gasoline below cost, 26 A.L.R.6th 249.

Meeting competition defense under § 2(b) of Clayton Act, as amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)), 164 A.L.R. Fed. 633.

10-1-255. Civil actions; effect of written tender of settlement; limitation of actions.

(a) Any person who sustains or is threatened with competitive injury by reason of a violation of this article may maintain an action in any superior court of this state having jurisdiction over the defendant to enjoin such violation. A successful petitioner shall be entitled to recover reasonable attorneys' fees and costs of litigation.

(b) In addition to the action provided in subsection (a) of this Code section, any person who sustains a competitive injury by reason of a violation of this article may maintain an action in any court of this state having jurisdiction over the defendant to recover the actual, or special, damages sustained thereby including, but not limited to, reasonable attorneys' fees and costs of litigation. A successful claimant under this subsection shall be awarded punitive damages not to exceed $1,000.00 for each day on which the defendant continued to commit the violation of this article resulting in competitive injury after having received from the plaintiff a written notice that the defendant was engaging in such violation. The maximum amount of such punitive damages which may be awarded to any one plaintiff from any one defendant, however, shall be $200,000.00.

(c) A claim for damages for violation of this article may be asserted in an individual action only and may not be the subject of a class action under Code Section 9-11-23 or any other provisions of law. It is the intention of the General Assembly that this prohibition against class actions is an integral substantive provision of this article, and that its unenforceability for any reason in any action shall preclude the recovery of damages in such action.

(d) At any time subsequent to the filing of an action for damages under this article, and prior to any award of such damages, the defendant may make a written tender of settlement to the complaining person. If the complaining person is awarded no damages or less damages than the amount of the written tender of settlement, the complaining person shall under no circumstances be entitled to recover any costs of the litigation, including attorneys' fees, that were incurred

after the date of the written tender of settlement. All written tenders of settlement that are made pursuant to this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(e) Any action brought under this article must be brought within two years of the date of the alleged violation. All other actions are forever barred.

History.
Code 1981, § 10-1-255, enacted by Ga. L. 1985, p. 458, § 1; Ga. L. 1986, p. 326, § 1; Ga. L. 1994, p. 97, § 10.

10-1-256. Legislative intent in construction of Code Section 10-1-254.

It is the intent of the General Assembly that, in construing Code Section 10-1-254, due consideration and great weight be given to the interpretation of the federal courts relating to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. Sections 13(a)-(f).

History.
Code 1981, § 10-1-256, enacted by Ga. L. 1985, p. 458, § 1.

RESEARCH REFERENCES

ALR.
Meeting competition defense under § 2(b) of Clayton Act, as amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)), 164 A.L.R. Fed. 633.

ARTICLE 10

SALE AND STORAGE OF LIQUEFIED PETROLEUM GAS

Administrative rules and regulations.
Liquefied Petroleum Gases, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Commissioner of Insurance, Safety Fire Commissioner and Industrial Loan Commissioner, Safety Fire Commissioner, Rule 120-3-16-.01 et seq.

JUDICIAL DECISIONS

Provisions enacted for public benefit. — Ga. L. 1949, p. 1128, § 1 and Ga. L. 1949, p. 1057, § 1 et seq. were passed for the public benefit and are statutes of public policy. Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169, 1954 Ga. App. LEXIS 888 (1954).

O.C.G.A. Art. 10, Ch. 1, T. 10 and O.C.G.A. § 25-2-1 et seq. construed together. — To give effect to the intent of the General Assembly, Ga. L. 1949, p.

1128, § 1 and Ga. L. 1949, p. 1057, § 1 et seq. should be construed together, as both sought to remedy an evil which then existed, and the statutes prescribed a remedy for the public good. Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169, 1954 Ga. App. LEXIS 888 (1954).

Statute authorizing waiver of benefit of law inapplicable to safety regulations. — The exception in former Code 1933, § 102-106 that "a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest" had no application when the contract attempted to release a party from liability for acts violating liquefied gas safety regulations. Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169, 1954 Ga. App. LEXIS 888 (1954).

Distributor not released from liability for negligence. — A liquefied petroleum distributor is without authority of law to release the distributor from liability by a contract or otherwise because of damage resulting from the negligence of such distributor. Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169, 1954 Ga. App. LEXIS 888 (1954).

Gas company is not insurer of safety of customers and their agents and invitees. Womack v. Central Ga. Gas Co., 85 Ga. App. 799, 70 S.E.2d 398, 1952 Ga. App. LEXIS 832 (1952).

Gas company is liable only for acts of negligence. Womack v. Central Ga. Gas Co., 85 Ga. App. 799, 70 S.E.2d 398, 1952 Ga. App. LEXIS 832 (1952).

RESEARCH REFERENCES

ALR.

Rights, under oil and gas lease, deed, or sales contract, to "distillate," "condensate," or "natural gasoline," 38 A.L.R.3d 983.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 A.L.R.3d 782.

Gasoline or other fuel storage tanks as nuisance, 50 A.L.R.3d 209.

10-1-260. Short title.

This article shall be known and may be cited as the "Liquefied Petroleum Safety Act of Georgia."

History.

Ga. L. 1949, p. 1128, § 1; Ga. L. 1992, p. 2134, § 2; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-261. Legislative finding.

The General Assembly of Georgia finds, determines, and declares that this article is necessary for the immediate preservation of the public peace, health, and safety.

History.

Ga. L. 1949, p. 1128, § 10; Ga. L. 1992, p. 2134, § 2.

10-1-262. "Liquefied petroleum gas" defined.

As used in this article, the term "liquefied petroleum gas" means any

material which is composed predominantly of any of the following hydrocarbons or mixtures of the same: propane, propylene, butanes (normal butane or isobutane), and butylenes.

History.
Ga. L. 1949, p. 1128, § 2; Ga. L. 1992, p. 2134, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Energy and Power Sources, § 18 et seq.

C.J.S.
38A C.J.S., Gas and Oil, § 1 et seq.

10-1-263. State fire marshal to enforce article.

The state fire marshal, ex officio, shall be designated as the officer charged with the duty and authority of enforcing this article.

History.
Ga. L. 1949, p. 1128, § 3; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.

10-1-264. Assistants and employees of state fire marshal.

The state fire marshal is authorized to appoint and employ such assistants and employees, fix their salaries, and assign and delegate such duties and responsibilities as he or she may deem necessary to carry out this article in an efficient manner.

History.
Ga. L. 1949, p. 1128, § 6; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-265. Rules and regulations setting standards for liquefied petroleum gas equipment.

(a) The state fire marshal shall make, promulgate, adopt, and enforce rules and regulations setting forth minimum general standards covering the design, construction, location, installation, and operation of equipment for storing, handling, transporting by tank truck or tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof. Said rules and regulations shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using such materials and shall be based upon reasonable substantial conformity with the generally accepted standards of safety concerning the same subject matter.

(b) Rules and regulations promulgated by the state fire marshal based upon reasonable substantial conformity with the published

standards of the National Board of Fire Underwriters for the design, installation, and construction of containers and pertinent equipment for the storage and handling of liquefied petroleum gases as recommended by the National Fire Protection Association shall be deemed to be in substantial conformity with the generally accepted standards of safety concerning the subject matter.

History.
Ga. L. 1949, p. 1128, § 4; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.

JUDICIAL DECISIONS

Violation of rules is negligence per se. — Violation of valid rules and regulations constitutes negligence per se, whether alleged as negligence per se or merely as negligence, and although a violation of such regulations could not be made the basis of criminal prosecution. Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169, 1954 Ga. App. LEXIS 888 (1954).

Filling tank contrary to regulations. — Petitions stated a cause of action for alleged negligence of defendant, as a distributor of butane gas, in filling a gas tank beyond the capacity fixed by the rules and regulations of the state fire marshal promulgated by authority of this article, and in filling the tank at all when the tank was in an unsafe condition, namely, within less than ten feet of the residence, contrary to the rules and regulations of the fire marshal. Harvey v. Zell, 87 Ga. App. 280, 73 S.E.2d 605, 1952 Ga. App. LEXIS 667 (1952).

Installation of gas appliances by one who is not an employee of the gas company and without the company's permission, in violation of regulations issued under this article, is not negligence unless done in an improper manner. Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145, 1965 Ga. App. LEXIS 823 (1965).

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, §§ 417 et seq., 451.

10-1-266. Issuance of licenses or permits; annual fees.

The state fire marshal is authorized and empowered to issue a license or permit to such person, firm, or corporation qualifying under the terms of this article and such rules and regulations as may be adopted by the state fire marshal. For such license or permit issued on or after July 1, 1990, a one-time fee of not less than $100.00 nor more than $500.00 shall be charged on a graduated capacity scale for each installation of such person, firm, or corporation doing business in Georgia. All fees, assessments, and collections made by the state fire marshal shall be paid into the general fund of the state treasury. The license or permit of any licensee or permittee who had paid an annual license or permit fee on or after January 1, 1990, but prior to July 1,

1990, shall be valid for the remainder of the period of time covered by such payment and, upon the expiration of such period of time, the licensee or permittee shall become subject to the one-time fee requirement provided in this Code section.

History.

Ga. L. 1949, p. 1128, § 7; Ga. L. 1955, p. 221, § 2; Ga. L. 1990, p. 647, § 1; Ga. L. 1992, p. 2134, § 2.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1990, a comma was deleted following "charged" in the second sentence and "Code section" was substituted for "subsection" at the end of the last sentence.

JUDICIAL DECISIONS

Authority of Safety Fire Commissioner. — In the absence of the state fire marshal, the Safety Fire Commissioner was authorized to act on an application for a license to maintain a liquefied petroleum gas bulk distribution facility. Safety Fire Comm'r v. U.S.A. Gas, Inc., 229 Ga. App. 807, 494 S.E.2d 706.

Judicial intervention. — Even if the procedures of the Safety Fire Commissioner in acting on an application for a license to maintain a liquefied petroleum gas bulk distribution facility were flawed, the superior court could not substitute the court's own judgment for that of the Commissioner. Safety Fire Comm'r v. U.S.A. Gas, Inc., 229 Ga. App. 807, 494 S.E.2d 706.

OPINIONS OF THE ATTORNEY GENERAL

State fire marshal has no authority to require municipality to obtain license for the municipality's liquefied petroleum plant as may be required of others under the provisions of this section. 1970 Op. Att'y Gen. No. 70-146.

Invalid as conditioned air contractor license. — Persons licensed pursuant to O.C.G.A. § 10-1-266 are not exempt from the requirement of holder of license as a conditioned air contractor pursuant to the requirements of the State Construction Industry Licensing Board, Division of Conditioned Air Contractors, O.C.G.A. § 43-14-1 et seq. 1994 Op. Att'y Gen. No. 94-2.

RESEARCH REFERENCES

Am. Jur. 2d.

38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.

C.J.S.

58 C.J.S., Mines and Minerals, § 451.

10-1-267. Insurance or bond requirements for license or permit holders.

The state fire marshal is authorized and empowered as a prerequisite to a license or permit to require the applicant for such license or permit to furnish insurance, surety bond, or a personal bond with security in such amounts and terms as the state fire marshal may deem advisable and expedient for the protection of the general public and to indemnify for losses and damages which proximately result from any act of negligence of the principal, his agents, or employees while he or they may be engaged in the performance of duties with reference to the

liquefied petroleum business. The state fire marshal is also authorized to adopt and enforce reasonable rules and regulations governing such insurance and bonds. Such regulations shall be adopted by the state fire marshal only after a public hearing thereon.

History.
Ga. L. 1949, p. 1128, § 4; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, §§ 145, 159 et seq.
C.J.S.
38A C.J.S., Gas and Oil, §§ 5, 6, 21 et seq. 58 C.J.S., Mines and Minerals, §§ 417 et seq., 451.

10-1-268. Minimum storage facilities required.

(a) Every entity licensed to sell or distribute liquefied petroleum gas in this state shall have located within the State of Georgia storage capacity for a minimum of 30,000 water gallons of liquefied petroleum gas, except that entities initially licensed prior to July 1, 1990, may continue to operate with the previously approved 18,000 gallons minimum storage capacity. If the 30,000 gallons (water capacity) storage consists of more than one container, then no storage container used to meet this requirement shall be of a size less than 6,000 gallons (water capacity).

(b) The storage capacity required by subsection (a) of this Code section shall be within close proximity to the area serviced.

(c) The state fire marshal, in his discretion and in accordance with such rules and regulations as have been or may be duly promulgated and adopted under this article, may waive the minimum bulk storage facility requirement of subsection (a) of this Code section.

(d) If the storage capacity required by subsection (a) of this Code section is leased or rented, then such storage capacity must be dedicated to the exclusive use of the lessee and must include separate piping and loading/unloading facilities.

History.
Ga. L. 1955, p. 221, § 1; Ga. L. 1960, p. 143, § 1; Ga. L. 1990, p. 1434, § 1; Ga. L. 1992, p. 2134, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
38 Am. Jur. 2d, Gas and Oil, § 158.
C.J.S.
58 C.J.S., Mines and Minerals, § 417 et seq.
ALR.
Gasoline or other fuel storage tanks as nuisance, 50 A.L.R.3d 209.

10-1-269. Suspension or revocation of license or imposition of penalty by state fire marshal.

The state fire marshal, upon ten days' written notice in the form of a show cause order to the licensee stating his contemplated action and in general the grounds therefor and after giving the licensee a reasonable opportunity to be heard, subject to the right to review provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," may, by order in writing, suspend or revoke any license issued under this article or, in lieu thereof, may assess a penalty against said licensee in an amount not to exceed $1,000.00, if the state fire marshal shall find:

(1) That the licensee has failed to pay the license fee or any fee required under this article or any penalty imposed under the article; or

(2) That the licensee knowingly has violated any of the provisions of this article or any of the rules and regulations promulgated under this article; provided, however, that any such suspension or revocation or imposition of penalty shall not become final, pending and subject to the right of review provided in Chapter 13 of Title 50, but the court shall have and is granted power to enter such order as justice shall require pending hearing on the appeal; and provided, further, the court upon the appeal may tax the cost, including the cost of the hearing before the state fire marshal, against the losing party.

History.
Ga. L. 1960, p. 143, § 2; Ga. L. 1990, p. 647, § 2; Ga. L. 1992, p. 2134, § 2.

10-1-270. Conflicting local ordinances or regulations prohibited.

No municipality or other political subdivision of this state shall adopt or enforce any ordinance, rule, or regulation in conflict with this article or with the rules and regulations adopted and promulgated by the state fire marshal under the terms and authority of this article.

History.
Ga. L. 1949, p. 1128, § 9; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.

10-1-271. Reciprocal agreements with other states.

The state fire marshal is authorized to enter into reciprocal agreements with another state to effectuate the purposes of this article.

History.
Ga. L. 1955, p. 221, § 3; Ga. L. 1992, p. 2134, § 2.

10-1-272. Penalty for violating article or rules and regulations.

Any person, firm, association, or corporation violating this article or any of the rules and regulations of the state fire marshal made under this article shall be guilty of a misdemeanor.

History.
Ga. L. 1949, p. 1128, § 8; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.

ARTICLE 11

BIDDING BY MOTION PICTURE EXHIBITORS

10-1-290. Short title.

This article shall be known and may be cited as the "Georgia Motion Picture Fair Competition Act."

History.
Ga. L. 1979, p. 427, § 2; Ga. L. 2024, p. 1052, § 2(12)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "and may be cited" following "known" in this Code section.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. Art. 11, Ch. 1, T. 10 is a valid exercise of a state's regulatory power and violates neither the guarantee of free speech or due process contained in the Georgia Constitution. Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250, 1982 Ga. LEXIS 1245 (1982).

10-1-291. Legislative intent.

The intent of this article is to establish fair and open procedures for the bidding and negotiation for the right to exhibit motion pictures within the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the state, to promote fair and effective competition in that business, and to ensure that exhibitors have the

opportunity to view a motion picture and know its contents before committing themselves to exhibiting it in their municipalities or towns.

History.
Ga. L. 1979, p. 427, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Entertainment and Sports Law, § 30 et seq.
C.J.S.
15 C.J.S., Commerce, § 115. 30A C.J.S., Entertainment and Amusement; Sports, § 11 et seq.

10-1-292. Definitions.

As used in this article, the term:

(1) "Bid" means a written offer or proposal by an exhibitor to a distributor in response to an invitation to bid for the right to exhibit a motion picture, stating the terms under which the exhibitor will agree to exhibit a motion picture.

(2) "Blind bidding" means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of a motion picture at any time before the motion picture has either been trade screened within the state or before the motion picture, at the option of the distributor, otherwise has been made available for viewing within the state by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

(3) "Distributor" means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale, or licensing.

(4) "Exhibit" or "exhibition" means showing a motion picture to the public for a charge.

(5) "Exhibitor" means any person engaged in the business of operating one or more theaters.

(6) "Invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid for the right to exhibit a motion picture.

(7) "License agreement" means any contract, agreement, understanding, or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

(8) "Person" means one or more individuals, partnerships, associations, societies, trusts, organizations, or corporations.

(9) "Run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area; a "second run" is the second exhibition; and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theater in a defined geographic area, and a "nonexclusive run" is any run in more than one theater in a defined geographic area.

(10) "Theater" means any establishment in which motion pictures are exhibited to the public regularly for a charge.

(11) "Trade screening" means the showing of a motion picture by a distributor at the location of the film exchange that distributes his picture in Georgia, which is open to any exhibitor from whom the distributor intends to solicit bids or with whom the distributor intends to negotiate for the right to exhibit the motion picture.

History.
Ga. L. 1979, p. 427, § 3.

JUDICIAL DECISIONS

For discussion of history of "blind bidding" motion pictures, see Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250, 1982 Ga. LEXIS 1245 (1982).

10-1-293. Blind bidding prohibited; trade screening required; notice of screening; waivers void.

(a) Blind bidding is prohibited within the state. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place, and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion picture before the motion picture has either been trade screened or before the motion picture, at the option of the distributor, otherwise has been made available for viewing within the state by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

(b) A distributor shall provide reasonable and uniform notice of the trade screening of any motion picture to those exhibitors within the state from whom he intends to solicit bids or with whom he intends to negotiate for the right to exhibit that motion picture.

(c) Any purported waiver of the prohibition against blind bidding in this article shall be void and unenforceable.

History.
Ga. L. 1979, p. 427, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Entertainment and Sports Law, § 30 et seq.
C.J.S.
15 C.J.S., Commerce, § 115. 30A C.J.S., Entertainment and Amusement; Sports, § 11 et seq.

10-1-294. Enforcement by civil action; damages; attorneys' fees; injunctions.

In any civil action for damages against a person for violation of this article, the court may award damages to the prevailing party and reasonable attorneys' fees. This article may be enforced by injunction or any other available equitable or legal remedy.

History.
Ga. L. 1979, p. 427, § 5.

ARTICLE 12

ORGANIZED RETAIL CRIME PREVENTION

Editor's notes.
Ga. L. 2021, p. 273, § 1-1/HB 327, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Organized Retail Crime Prevention Act.'"

10-1-310. Definitions; record keeping; offenses; cooperation with law enforcement.

(a) As used in this article, the term:

(1) "Corporate authorized reseller" means any person or entity authorized by the corporate issuer or a corporate issuer agent to sell the stored value cards of a corporate issuer.

(2) "Corporate issuer" means a company that issues or contracts with an affiliate or third party to issue stored value cards that may be used by the cardholder to purchase goods or services at the retail locations of the corporate issuer or its affiliates or online from the corporate issuer or its affiliates.

(3) "Corporate issuer agent" means a third party authorized by the corporate issuer to facilitate the sale of its stored value cards by corporate authorized resellers.

(4) "Stored value card" means any "gift certificate" or "store gift card," as such terms are defined in subparagraph (b)(33)(B) of Code Section 10-1-393, issued with or without a fee for the use of the cardholder to obtain money, goods, services, or anything else of value. The term shall not include a "general use gift card" as such term is

defined in subparagraph (b)(33)(B) of Code Section 10-1-393, demand deposit account, share draft account, savings account, prepaid debit card, or any card sold by a financial institution or access device associated therewith.

(5) "Third-party card" means a stored value card for which the merchant buying or selling the card is neither the corporate issuer, a corporate issuer agent, nor a corporate authorized reseller.

(6) "Third-party card dealer" means a merchant in the business of buying and selling third-party cards.

(b) When a third-party card dealer makes a sale or purchase of a stored value card, including any transaction that occurs in this state, such third-party card dealer shall record the information provided for in subsection (c) of this Code section and maintain a copy of such record for at least three years.

(c) Third-party card dealers shall maintain a permanent record in which shall be entered in legible English at the time of each purchase of a third-party card:

(1) The date of the transaction;

(2) The name of the person conducting the transaction;

(3) The name, age, and address of the seller and the distinctive number from the customer's driver's license or other similar identification card;

(4) An identification of the purchased stored value card, including the retailer for which the stored value card is intended and the stored value card number;

(5) The amount of stored value on the stored value card;

(6) The price paid; and

(7) The signature of the customer.

(d) Entries shall appear in ink or be logged into a secure data base, software system, or other technology platform and shall be in chronological order. No obliterations, alterations, or erasures may be made. If handwritten corrections are made, such corrections shall be made by drawing a line of ink through the entry without destroying its legibility. The permanent record shall be open to the inspection of any duly authorized law enforcement officer during the ordinary hours of business or at any reasonable time.

(e) Any third-party card dealer and any clerk, agent, or employee of such third-party card dealer who knowingly:

(1) Fails to make an entry of any material matter in his or her permanent record;

(2) Makes any false entry therein;

(3) Falsifies, obliterates, destroys, or removes from his or her place of business such permanent record;

(4) Refuses to allow any duly authorized law enforcement officer who is certified by the Georgia Peace Officer Standards and Training Council, or who is a federal officer, to inspect his or her permanent record or any stored value cards in his or her possession during the ordinary hours of business or at any reasonable time; or

(5) Fails to maintain a record of each stored value card transaction for at least three years

shall be guilty of a misdemeanor.

(f) Upon filing an official report to a law enforcement agency of competent jurisdiction by any person alleging to be a victim of theft of one or more stored value cards with an aggregate value exceeding $500.00, such law enforcement agency may request that the issuer or its agents preserve and provide to law enforcement all relevant evidence reasonably foreseeable to assist in future criminal actions in accordance with the laws of evidence in criminal proceedings.

History.

Code 1981, § 10-1-310, enacted by Ga. L. 2021, p. 273, § 2-1/HB 327; Ga. L. 2022, p. 352, § 10/HB 1428.

Amendments.

The 2022 amendment, effective May 2, 2022, part of an Act to revise, modernize, and correct the Code, substituted "Third-party" for "Third party" and "third-party" for "third party" throughout paragraphs (a)(5) and (a)(6), subsection (b), and the introductory language of subsections (c) and (e).

Cross references.

Offense of organized retail theft, § 16-8-14.2.

Editor's notes.

Former Article 12, consisting of Code Sections 10-1-310 and 10-1-311, relating to ticket scalping, was based on Ga. L. 1966, p. 207, §§ 1, 3; Ga. L. 1970, p. 172, §§ 1, 2; Ga. L. 1973, p. 96, § 1; Ga. L. 1983, p. 1468, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1988, p. 324, § 1; Ga. L. 1994, p. 1368, § 1, and was repealed by Ga. L. 2001, p. 752, § 1, effective July 1, 2001.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — A violation of subsection (e) is not an offense for which fingerprinting is required. 2021 Op. Att'y Gen. No. 21– 2021 Ga. Op. Att'y Gen. 6.

ARTICLE 13

BOOK, PERIODICAL, OR NEWSPAPER TIE-IN SALES

Cross references.

Contracts contravening public policy, § 13-8-2.

10-1-330. Refusal to sell books, periodicals, or magazines to dealers refusing others not ordered.

It shall be unlawful for any distributor of any book, magazine, periodical, or newspaper to refuse to sell to any dealer for his subsequent sale at retail any book, magazine, periodical, or newspaper if the distributor predicates his refusal to sell the publications desired solely upon the dealer's refusal to purchase from the distributor other books, magazines, periodicals, or newspapers not originally requested by the dealer.

History.
Ga. L. 1968, p. 998, § 1.

10-1-331. Penalty.

Any person, firm, or corporation violating this article shall be guilty of a misdemeanor.

History.
Ga. L. 1968, p. 998, § 2.

ARTICLE 14

SECONDARY METALS RECYCLERS

Cross references.
Penalty for theft of ferrous metals or regulated metal property, § 16-8-12.
Regulation of business of junk dealers generally, § 43-22-1 et seq.
Dealers in precious metals and gems, § 43-37-1 et seq.

Editor's notes.
Ga. L. 1992, p. 2452, § 1, effective April 20, 1992, repealed the Code sections formerly codified as this article and enacted the current article. The former article consisted of Code Sections 10-1-350 and 10-1-351 and was based on Ga. L. 1967, p. 603, §§ 1-3; Ga. L. 1970, p. 693, § 1; and Ga. L. 1981, Ex. Sess., p. 8.

10-1-350. Definitions.

As used in this article, the term:

(1) "Aluminum property" means aluminum forms designed to shape concrete.

(2) "Burial object" means any product manufactured for or used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted.

(3) "Business license" means a business license, an occupational tax certificate, and other document required by a county or municipal corporation and issued by the appropriate agency of such county or municipal corporation to engage in a profession or business.

(4) "Coil" means any copper, aluminum, or aluminum-copper condensing coil or evaporation coil including its tubing or rods. The term shall not include coil from a window air-conditioning system, if contained within the system itself, or coil from an automobile condenser.

(5) "Copper property" means any copper wire, copper tubing, copper pipe, or any item composed completely of copper.

(6) "Copper wire" means any wires, cables, bus bars, or waveguides containing any portion of copper, whether or not coated with insulation.

(7) "Deliverer" means any individual who takes or transports the regulated metal property to the secondary metals recycler.

(8) "Ferrous metals" means any metals containing significant quantities of iron or steel.

(9) "Law enforcement officer" means any duly constituted peace officer of the State of Georgia or of any county, municipality, or political subdivision thereof.

(10) "Nonferrous metals" means stainless steel beer kegs and metals not containing significant quantities of iron or steel, including, without limitation, copper, brass, aluminum, bronze, lead, zinc, nickel, and alloys thereof.

(11) "Person" means an individual, partnership, corporation, joint venture, trust, association, or any other legal entity.

(12) "Personal identification card" means a current and unexpired driver's license or identification card issued by the Department of Driver Services or a similar card issued by another state, a military identification card, or a current work authorization issued by the federal government, which shall contain the individual's name, address, and photograph.

(13) "Purchase transaction" means a transaction in which the secondary metals recycler gives consideration in exchange for regulated metal property.

(14) "Registered agent" means an individual who has been listed on a secondary metals recycler registration form at a Georgia sheriff's office as the affiant and completes and executes the registration form in accordance with Code Section 10-1-359.1.

(15) "Regulated metal property" means any item composed primarily of any ferrous metals or nonferrous metals and includes aluminum property, copper property, and catalytic converters but shall not include aluminum beverage containers, used beverage containers, or similar beverage containers.

(16) "Secondary metals recycler" means any person who is engaged, from a fixed location or otherwise, in the business in this state of paying compensation for regulated metal property that has served its original economic purpose, whether or not engaged in the business of performing the manufacturing process by which regulated metal property is converted into raw material products consisting of prepared grades and having an existing or potential economic value.

(17) "Seller" means the rightful owner of the regulated metal property or the individual authorized by the rightful owner of the regulated metal property to conduct the purchase transaction.

(18) "Used communications copper" means utility-grade copper that is commonly used by a lawful provider of telecommunications services for providing telecommunications services, including, without limitation, utility-grade wires or cables, bus bars, and waveguides.

(19) "Used utility wire" means any wire or cable containing aluminum or copper, or any ferrous metals or other nonferrous metals, that is commonly used by a utility that provides electric or telecommunications service.

History.

Code 1981, § 10-1-350, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2002, p. 415, § 10; Ga. L. 2005, p. 334, § 4-1/HB 501; Ga. L. 2007, p. 650, § 1/SB 203; Ga. L. 2009, p. 731, § 1/SB 82; Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2015, p. 588, § 1/HB 461; Ga. L. 2023, p. 71, § 1-1/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, added paragraph (6), redesignated former paragraphs (6) through (12) as present paragraphs (7) through (13), added paragraph (14), redesignated former paragraphs (13) through (15) as present paragraphs (15) through (17), and added paragraphs (18) and (19). See Editor's notes for applicability.

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-351. Verifiable documentation required; unlawful activities pertaining to used, detached catalytic converters.

(a) No secondary metals recycler shall purchase any coil unless it is purchased from:

(1) A contractor licensed pursuant to Chapter 14 of Title 43 or by another state that provides a copy of such valid license at the time of the purchase transaction that is scanned or photocopied by the

secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A seller with verifiable documentation, such as a receipt or work order, indicating that such coil is the result of a replacement of condenser coils or a heating or air-conditioning system performed by a contractor licensed pursuant to Chapter 14 of Title 43; or

(3) A secondary metals recycler who provides proof of registration pursuant to Code Section 10-1-359.1 and a signed statement stating that the required information concerning the purchase transaction involving such coil was provided by such secondary metals recycler to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5.

(b) No secondary metals recycler shall purchase any copper wire which appears to have been exposed to heat, charred, or burned in an attempt to remove insulation surrounding it unless it is purchased from:

(1) A contractor licensed pursuant to Chapter 14 of Title 43 or by another state that provides a copy of such valid license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A seller with a copy of a police report showing that such seller's real property was involved in a fire; or

(3) A secondary metals recycler who provides proof of registration pursuant to Code Section 10-1-359.1 and a signed statement stating that the required information concerning the purchase transaction involving such copper wire was provided by such secondary metals recycler to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5.

(c) No secondary metals recycler shall purchase a catalytic converter unless such catalytic converter is:

(1) Attached to a vehicle; or

(2) Purchased from:

(A) A used motor vehicle dealer or used motor vehicle parts dealer licensed pursuant to Chapter 47 of Title 43 or by another state that provides a copy of such valid license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(B) A new motor vehicle dealer that provides a copy of a valid business license at the time of the purchase transaction that is

scanned or photocopied by the secondary metals recycler or whose scanned or photocopied business license is on file with the secondary metals recycler;

(C) A motor vehicle repairer that provides a copy of a valid business license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied business license is on file with the secondary metals recycler;

(D) A manufacturer or distributor of catalytic converters that provides a copy of a valid business license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied business license is on file with the secondary metals recycler;

(E) A seller with:

(i) Verifiable documentation, such as a receipt or work order, indicating that the catalytic converter is the result of a replacement of a catalytic converter performed by a used motor vehicle dealer, new motor vehicle dealer, or motor vehicle repairer. Such documentation shall include a notation as to the make, model, and year of the vehicle in which such catalytic converter was replaced; and

(ii) A copy of a certificate of title or registration showing ownership of or interest in the vehicle in which the catalytic converter was replaced; or

(F) A secondary metals recycler who provides proof of registration pursuant to Code Section 10-1-359.1 and a signed statement stating that the required information concerning the purchase transaction involving such catalytic converter was provided by such secondary metals recycler to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5.

(d)(1) As used in this subsection, the term "used, detached catalytic converter" means motor vehicle exhaust system parts that are used for controlling the exhaust emissions from motor vehicles and that contain a catalyst metal, but shall not include a catalytic converter that has been tested, certified, and labeled for reuse, in accordance with applicable federal Clean Air Act regulations, as may from time to time be amended.

(2) It shall be unlawful for any person to purchase or to solicit or advertise for the purchase of a used, detached catalytic converter, or any nonferrous metal parts of a catalytic converter, unless such person is a registered secondary metals recycler in accordance with Code Section 10-1-359.1 and in full compliance with all requirements prescribed by this article.

(3) It shall be unlawful for any person to purchase, possess, transport, or sell a used, detached catalytic converter, or any nonferrous metal parts of a catalytic converter, unless such person is authorized to purchase, possess, transport, or sell catalytic converters pursuant to subsection (c) of this Code section and is in possession of the licenses, registrations, or other documentation required by subsection (c) of this Code section.

(4) Each unlawfully possessed or obtained used, detached catalytic converter shall be considered a separate offense.

History.

Code 1981, § 10-1-351, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2015, p. 588, § 2/HB 461; Ga. L. 2023, p. 71, § 1-2/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, added subsection (d). See Editor's notes for applicability.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-351 as present Code Section 10-1-353.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 10-1-351 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

10-1-352. Requirements for purchase of burial objects.

No secondary metals recycler shall purchase a burial object unless it is purchased from:

(1) A funeral director licensed pursuant to Chapter 18 of Title 43 or by another state who provides a copy of his or her valid license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A cemetery owner registered pursuant to Code Section 10-14-4 or with another state that provides a copy of such valid registration at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied registration is on file with the secondary metals recycler;

(3) A manufacturer or distributor of burial objects that provides a copy of a valid business license at the time of the purchase transaction that is scanned or photocopied by the secondary metals recycler;

(4) A seller with verifiable documentation, such as a receipt from or contract with a licensed funeral director, registered cemetery owner, or manufacturer or distributor of burial objects, evidencing that such person is the rightful owner of the burial object; or

(5) A secondary metals recycler who provides proof of registration pursuant to Code Section 10-1-359.1 and a signed statement stating that the required information concerning the purchase transaction involving such burial object was provided by such secondary metals recycler to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5.

History.
Code 1981, § 10-1-352, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2015, p. 588, § 3/HB 461.

Editor's notes.
Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-352 as present Code Section 10-1-354.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews.
For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 10-1-352 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

10-1-352.1. Redesignated.

Editor's notes.
Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-352.1 as present Code Section 10-1-355.

10-1-353. Record of transaction; false statements; penalty for making false statement.

(a) Except as provided in subsection (c) of this Code section, a secondary metals recycler shall maintain a legible record of all purchase transactions. Such record shall include the following information:

(1) The name and address of the secondary metals recycler;

(2) The date of the transaction;

(3) The weight, quantity, or volume and a description of the type of regulated metal property purchased in a purchase transaction. For purposes of this paragraph, the term "type of regulated metal property" shall include a general physical description, such as wire, tubing, extrusions, or castings;

(4) A digital photograph or photographs or a digital video image or

images of the regulated metal property which shows the regulated metal property in a reasonably clear manner;

(5) The amount of consideration given in a purchase transaction for the regulated metal property and a copy of the check or voucher or documentation evidencing the cash or electronic funds transfer given as consideration for such purchase transaction;

(6) A signed statement from the seller stating that such person is the rightful owner of the regulated metal property or has been authorized to sell the regulated metal property being sold;

(7) A signed statement from the seller stating that he or she understands that: "A secondary metals recycler is any person who is engaged, from a fixed location or otherwise, in the business in this state of paying compensation for regulated metal property that has served its original economic purpose, whether or not engaged in the business of performing the manufacturing process by which regulated metal property is converted into raw material products consisting of prepared grades and having an existing or potential economic value. No ferrous metals, nonferrous metals, aluminum property, copper property, or catalytic converters (aluminum beverage containers, used beverage containers, or similar beverage containers are exempt) may be purchased by a secondary metals recycler unless such secondary metals recycler is registered pursuant to Article 14 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated";

(8) A scanned or photocopied copy of a valid personal identification card of the seller and of the deliverer, if such person is different from the seller;

(9) The type of and distinctive number from the personal identification card of the seller and of the deliverer, if such person is different from the seller;

(10) The name and date of birth of the seller and of the deliverer, if such person is different from the seller;

(11) A photograph, videotape, or digital recording depicting a recognizable facial image of the seller and of the deliverer, if such person is different from the seller, employing technology allowing the image to be retained in electronic storage and in a transferable format;

(12) The vehicle license tag number or vehicle identification number, state of issue, and the make, model, and color of the vehicle used to deliver the regulated metal property to the secondary metals recycler; and

(13) A scanned or photocopied copy of the verifiable documenta-

tion, reports, licenses, certificates, and registrations required pursuant to Code Sections 10-1-351 and 10-1-352.

(b) A secondary metals recycler shall maintain or cause to be maintained the information required by subsection (a) of this Code section for not less than two years from the date of the purchase transaction.

(c) When the regulated metal property being purchased is a vehicle, the secondary metals recycler shall:

(1) If Code Section 40-3-36 is applicable, purchase such vehicle in compliance with such Code section and shall not be required to maintain a record of the purchase transaction as provided in subsection (a) of this Code section or to provide such record to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5; or

(2) If Code Section 40-3-36 is not applicable, maintain a record of such purchase transaction as provided in subsection (a) of this Code section and provide such record to the Georgia Bureau of Investigation pursuant to Code Section 10-1-359.5.

(d) It shall be a violation of this article to sign the statement required by either paragraph (6) or (7) of subsection (a) of this Code section knowing it to be false, and such violation shall subject the seller to the civil and criminal liability provided in Code Section 10-1-359.2.

History.

Code 1981, § 10-1-351, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2009, p. 731, § 2/SB 82; Code 1981, § 10-1-353, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2015, p. 588, § 4/HB 461; Ga. L. 2023, p. 71, § 1-3/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, in subsection (a), inserted "of this Code section" in the introductory language, and inserted "cash or" in paragraph (a)(5). See Editor's notes for applicability.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-353 as present Code Section 10-1-356.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 10-1-353 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

10-1-354. Inspections by law enforcement officers.

During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall, after properly identifying himself or herself as a law enforcement officer, have the right to inspect:

(1) Any and all regulated metal property in the possession of the secondary metals recycler; and

(2) Any and all records required to be maintained under Code Section 10-1-353.

History.

Code 1981, § 10-1-352, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-354, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-354 as present Code Section 10-1-357.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-355. (Effective until January 1, 2026.) Conditions and limitations on payments for regulated metal property; exception for transaction between business entities.

(a) A secondary metals recycler shall pay only by check, electronic funds transfer, cash, or voucher for regulated metal property and shall make any such payment as specifically provided for in this Code section.

(b) Any check, electronic funds transfer, or voucher shall be payable only to the person recorded as the seller of the regulated metal property to the secondary metals recycler.

(c) Any voucher shall be provided to the seller at the time of the purchase transaction or mailed to the seller at the address indicated on the personal identification card of the seller presented at the time of such transaction. If the voucher is provided to the seller at the time of the purchase transaction and not mailed to the seller, the secondary metals recycler shall not redeem the voucher for three days from the date of the purchase transaction. The voucher shall include the date of purchase, name of the seller, the amount paid for the regulated metal property, a detailed description of the regulated metal property purchased, information as to whether the voucher was mailed or provided at the time of the purchase transaction, the first date on which the voucher may be redeemed, and the date on which the voucher expires. The voucher may only be redeemed for cash by the person whose name appears on the voucher as the seller or by such person's heirs or legal representative. If a voucher is not redeemed by the person whose name

appears on the voucher as the seller or by such person's heirs or legal representative within six months of the date of the transaction, the voucher shall expire and the secondary metals recycler shall not be required to honor the voucher after the expiration date.

(d) No secondary metals recycler shall:

(1) Pay to any seller more than $100.00 in cash for any transaction or complete more than two transactions per seller, per day, per registered secondary metals recycler location;

(2) Pay cash to any seller for used, detached catalytic converters or coils;

(3) Pay cash to any seller for used utility wire;

(4) Pay cash to any seller for used communications copper;

(5) Pay cash to any seller for copper wire; or

(6) Pay cash to any seller for a battery.

(e) A secondary metals recycler shall be prohibited from:

(1) redeeming or cashing any check or electronic funds transfer paid to a seller for regulated metal property; and

(2) providing or permitting any mechanism on the premises of the secondary metals recycler for the redemption or cashing of any check or electronic funds transfer.

(f) The provisions of this Code section shall not apply to any transaction, other than a transaction related to used, detached catalytic converters, between business entities.

History.

Code 1981, § 10-1-352.1, enacted by Ga. L. 2009, p. 731, § 3/SB 82; Code 1981, § 10-1-355, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 71, § 1-4/SB 60, effective January 1, 2024.

Delayed effective date.

Code Section 10-1-355 is set out twice in this Code. This version is effective until January 1, 2026. For version effective January 1, 2026, see the following version.

Amendments.

The 2023 amendment, effective January 1, 2024, in subsection (a), inserted "cash" following "transfer" and added "and shall make any such payment as specifically provided for in this Code section" at the end; added subsection (d); redesignated former subsections (d) and (e) as present subsections (e) and (f); and, in present subsection (f), inserted ", other than a transaction related to used, detached catalytic converters,". See Editor's notes for applicability.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-355 as present Code Section 10-1-358.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that Section 1-4 of this Act shall become effective on January 1, 2024, and shall apply to all transactions occurring on and after such date.

Law reviews.
For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-355. (Effective January 1, 2026.) Conditions and limitations on payments for regulated metal property; exception for transaction between business entities.

(a) A secondary metals recycler shall pay only by check, electronic funds transfer, cash, or voucher for regulated metal property and shall make any such payment as specifically provided for in this Code section.

(b) Any check, electronic funds transfer, or voucher shall be payable only to the person recorded as the seller of the regulated metal property to the secondary metals recycler.

(c) Any voucher shall be provided to the seller at the time of the purchase transaction or mailed to the seller at the address indicated on the personal identification card of the seller presented at the time of such transaction. If the voucher is provided to the seller at the time of the purchase transaction and not mailed to the seller, the secondary metals recycler shall not redeem the voucher for three days from the date of the purchase transaction. The voucher shall include the date of purchase, name of the seller, the amount paid for the regulated metal property, a detailed description of the regulated metal property purchased, information as to whether the voucher was mailed or provided at the time of the purchase transaction, the first date on which the voucher may be redeemed, and the date on which the voucher expires. The voucher may only be redeemed for cash by the person whose name appears on the voucher as the seller or by such person's heirs or legal representative. If a voucher is not redeemed by the person whose name appears on the voucher as the seller or by such person's heirs or legal representative within six months of the date of the transaction, the voucher shall expire and the secondary metals recycler shall not be required to honor the voucher after the expiration date.

(d) A secondary metals recycler shall be prohibited from:

(1) redeeming or cashing any check or electronic funds transfer paid to a seller for regulated metal property; and

(2) providing or permitting any mechanism on the premises of the secondary metals recycler for the redemption or cashing of any check or electronic funds transfer.

(e) The provisions of this Code section shall not apply to any transaction between business entities.

History.
Code 1981, § 10-1-352.1, enacted by Ga. L. 2009, p. 731, § 3/SB 82; Code 1981, § 10-1-355, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 71, § 1-4/SB 60, effective January 1, 2024;

Ga. L. 2023, p. 71, § 2-1/SB 60, effective January 1, 2026.

Delayed effective date.

Code Section 10-1-355 is set out twice in this Code. This version is effective January 1, 2026. For version effective until January 1, 2026, see the preceding version.

Amendments.

The first 2023 amendment, effective January 1, 2024, in subsection (a), inserted "cash" following "transfer" and added "and shall make any such payment as specifically provided for in this Code section" at the end; added subsection (d); redesignated former subsections (d) and (e) as present subsections (e) and (f); and, in present subsection (f), inserted ", other than a transaction related to used, detached catalytic converters,".

The second 2023 amendment, effective January 1, 2026, deleted subsection (d), which read: "No secondary metals recycler shall:

"(1) Pay to any seller more than $100.00 in cash for any transaction or complete more than two transactions per seller, per day, per registered secondary metals recycler location;

"(2) Pay cash to any seller for used, detached catalytic converters or coils;

"(3) Pay cash to any seller for used utility wire;

"(4) Pay cash to any seller for used communications copper;

"(5) Pay cash to any seller for copper wire; or

"(6) Pay cash to any seller for a battery."; redesignated former subsections (e) and (f) as present subsections (d) and (e); and, in present subsection (e), deleted ", other than a transaction related to used, detached catalytic converters," following "any transaction". See Editor's notes for applicability.

Editor's notes.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that Part II of this Act shall become effective on January 1, 2026, and shall apply to all transactions occurring on and after such date, provided that Part II of this Act shall not affect the prosecution of any crimes for conduct under the previous law while such law was effective and shall not abate any prosecutions thereunder.

10-1-356. Hold on regulated metal property believed to be stolen; notice; release of hold.

(a) Whenever a law enforcement officer has reasonable cause to believe that any item of regulated metal property in the possession of a secondary metals recycler has been stolen, the law enforcement officer may issue a hold notice to the secondary metals recycler. The hold notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the notice issued in accordance with this Code section, the secondary metals recycler receiving the notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof, from the premises of or place of business of the secondary metals recycler for 15 calendar days after receipt of the notice by the secondary metals recycler, unless sooner released by a law enforcement officer.

(b) No later than the expiration of the 15 day period, a law enforcement officer may issue a second hold notice to the secondary metals recycler, which shall be an extended hold notice. The extended hold

notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the extended hold notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the extended hold notice issued in accordance with this Code section, the secondary metals recycler receiving the extended hold notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof, from the premises of or place of business of the secondary metals recycler for 30 calendar days after receipt of the extended hold notice by the secondary metals recycler, unless sooner released by a law enforcement officer.

(c) At the expiration of the hold period or, if extended in accordance with this Code section, at the expiration of the extended hold period, the hold is automatically released and the secondary metals recycler may dispose of the regulated metal property unless other disposition has been ordered by a court of competent jurisdiction.

History.

Code 1981, § 10-1-353, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-356, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-356 as present Code Section 10-1-359.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-357. Contesting identification or ownership of regulated metal property; action to recover property.

(a) If the secondary metals recycler contests the identification or ownership of the regulated metal property, the party other than the secondary metals recycler claiming ownership of any regulated metal property in the possession of a secondary metals recycler may, provided that a timely report of the theft of the regulated metal property was made to the proper authorities, bring an action in the superior or state court of the county in which the secondary metals recycler is located. The petition for such action shall include a description of the means of identification of the regulated metal property utilized by the petitioner to determine ownership of the regulated metal property in the possession of the secondary metals recycler.

(b) When a lawful owner recovers stolen regulated metal property from a secondary metals recycler who has complied with the provisions of this article, and the seller or deliverer is convicted of theft by taking, theft by conversion, a violation of this article, theft by receiving stolen

property, or criminal damage to property in the first degree, the court shall order the defendant to make full restitution, including, without limitation, attorneys' fees, court costs, and other expenses to the secondary metals recycler or lawful owner, as appropriate.

History.
Code 1981, § 10-1-354, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 1.1/SB 203; Code 1981, § 10-1-357, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.

Editor's notes.
Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-357 as present Code Section 10-1-361.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews.
For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-358. Purchases of regulated metal property exempted from application of article.

This article shall not apply to purchases of regulated metal property, other than used, detached catalytic converters, from:

(1) Organizations, corporations, or associations registered with the state as charitable, philanthropic, religious, fraternal, civic, patriotic, social, or school-sponsored organizations or associations or from any nonprofit corporations or associations;

(2) A law enforcement officer acting in an official capacity;

(3) A trustee in bankruptcy, executor, administrator, or receiver who has presented proof of such status to the secondary metals recycler;

(4) Any public official acting under judicial process or authority who has presented proof of such status to the secondary metals recycler;

(5) A sale on the execution, or by virtue, of any process issued by a court if proof thereof has been presented to the secondary metals recycler; or

(6) A manufacturing, industrial, or other commercial vendor that generates and sells regulated metal property in the ordinary course of its business, provided that such vendor is not a secondary metals recycler.

History.
Code 1981, § 10-1-355, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-358, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 71, § 1-5/SB 60, effective July 1, 2023.

Amendments.
The 2023 amendment, effective July 1, 2023, inserted ", other than used, detached catalytic converters," in the introductory language, and substituted "generates and sells" for "generates or sells" in

paragraph (6). See Editor's notes for applicability.

Editor's notes.

Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-358 as present Code Section 10-1-363.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-358.1. Exclusions from article's applicability.

The provisions of this article shall not apply to a vehicle purchased in compliance with Code Section 40-3-36 by a used motor vehicle dealer or used motor vehicle parts dealer licensed pursuant to Chapter 47 of Title 43.

History.

Code 1981, § 10-1-358.1, enacted by Ga. L. 2015, p. 588, § 5/HB 461.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2015, "to" was inserted following "pursuant".

10-1-359. Prohibited acts.

It shall be unlawful for:

(1) A secondary metals recycler to engage in the purchase or sale of regulated metal property between the hours of 7:00 P.M. and 7:00 A.M.; and

(2) Any person to give a false or altered personal identification card, vehicle license tag number, or vehicle identification number to a secondary metals recycler as part of a purchase transaction.

History.

Code 1981, § 10-1-356, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-359, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-27 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

10-1-359.1. Registration of secondary metals recycler; electronic data base; authority of sheriff; penalty for violation.

(a) It shall be unlawful for any secondary metals recycler to purchase regulated metal property in any amount without being registered pursuant to this Code section. If the secondary metals recycler is a person other than an individual, such person shall register with the sheriff of each county in which the secondary metals recycler maintains a place of business. If the secondary metals recycler is an individual, he or she shall register with the sheriff of the county in which he or she resides or if such individual is a nonresident of this state, he or she shall register with the sheriff of the county in Georgia where he or she primarily engages or intends to primarily engage in business as a secondary metals recycler. The secondary metals recycler shall declare on a form promulgated by the Secretary of State and provided by the sheriff that such secondary metals recycler is informed of and will comply with the provisions of this article. The forms and information required for such registration shall be promulgated by the Secretary of State. The sheriff shall register the secondary metals recycler and shall keep a record of each registration. Each registration shall be valid for a 12 month period beginning January 1, 2024, and shall be renewed annually by January 1 of each year.

(b) The record of each registration shall be entered into an electronic data base accessible state wide. Such data base shall be established through coordination with the Secretary of State and shall be searchable by all law enforcement agencies in this state.

(c) The sheriff shall be authorized to:

(1) Assess and require payment of $200.00 for a new registration and an annual registration renewal for a secondary metals recycler;

(2) If applicable, require a secondary metals recycler to submit a current and valid business license in the county or municipality that is associated with the address on the registration form prior to approving the registration or registration renewal;

(3) Require the registered agent of a secondary metals recycler to submit to a criminal background check and fingerprinting for a new registration with the costs paid by the secondary metals recycler in an amount not to exceed $75.00;

(4) Deny the new registration or registration renewal of a secondary metals recycler if such person's registration has been revoked in another Georgia county, information submitted on the registration form has been determined to be invalid or false, or it is determined by the criminal background check that such person has been convicted of

a felony offense under this article more than three times in the previous five years;

(5) Revoke the registration of a secondary metals recycler's registered agent if the registered agent has been convicted of a felony offense in the previous five years under this article while serving as a registered agent;

(6) Require secondary metals recyclers to provide on the registration form the customer identification number for the current data base contractor maintained by the Georgia Bureau of Investigation;

(7) Require a secondary metals recycler to submit a signed and sworn statement that such person has not had such secondary metals recycler's registration or business license revoked during the previous year and that the registered agent has not been convicted of a metal theft offense in the previous year;

(8) Delegate to personnel in the sheriff's office the registration of secondary metals recyclers and entering into the data base of the records of such registrations; and

(9) Enter into contracts with the governing authority of a county, municipality, or consolidated government for such governing authority to provide for the registration of secondary metals recyclers and the entering into the data base of the records of such registrations by other law enforcement agencies or by staff of the governing authority. Any such contract shall provide for reimbursement to such governing authority for the registrations or entry of the records of such registrations into the data base.

(d) A secondary metals recycler's registered agent shall be ineligible to obtain a new registration or registration renewal if such person is under indictment for a felony offense for violation of this article or has been convicted of a felony offense in the past five years under this article.

(e) Any secondary metals recycler convicted of violating this Code section shall be guilty of a misdemeanor of a high and aggravated nature.

History.

Code 1981, § 10-1-359.1, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 71, § 1-6/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, added "beginning January 1, 2024, and shall be renewed annually by January 1 of each year" at the end of subsection (a); substituted "state wide" for "statewide" at the end of the first sentence of subsection (b); rewrote subsection (c), which read: "The sheriff shall be authorized to:

"(1) Assess and require payment of a reasonable registration fee prior to registering the secondary metals recycler, not to exceed $200.00;

"(2) Delegate to personnel in the sheriff's office the registration of secondary

metals recyclers and entering into the data base of the records of such registrations; and

"(3) Enter into contracts with the governing authority of a county, municipality, or consolidated government for such governing authority to provide for the registration of secondary metals recyclers and the entering into the data base of the records of such registrations by other law enforcement agencies or by staff of the governing authority. Any such contract shall provide for reimbursement to such governing authority for the registrations or entry of the records of such registrations into the data base."; added subsection (d); and redesignated former subsection (d) as present subsection (e). See Editor's notes for applicability.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-360, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.1.

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-27 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

10-1-359.2. Penalties for violations.

(a) Except as provided for in subsection (e) of Code Section 10-1-359.1, any person who buys or sells regulated metal property in violation of any provision of this article:

(1) For a first offense, shall be guilty of a misdemeanor;

(2) For a second offense, shall be guilty of a misdemeanor of a high and aggravated nature; and

(3) For a third or subsequent offense or when such regulated metal property is unlawfully obtained and results in property damage exceeding the aggregate amount of $1,500.00, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

Each unlawfully possessed or obtained used, detached catalytic converter, as such term is defined in subsection (d) of Code Section 10-1-351, shall be considered a separate offense under this Code section.

(b) Any person who buys or sells regulated metal property in violation of any provision of this article shall be liable in a civil action to any person who was the victim of a crime involving such regulated

metal property for the full value of the regulated metal property, any repairs and related expenses incurred as a result of such crime, litigation expenses, and reasonable attorneys' fees.

History.

Code 1981, § 10-1-357, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 2/SB 203; Code 1981, § 10-1-359.2, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 71, § 1-7/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, substituted "subsection (e)" for "subsection (d)" in the introductory language of subsection (a), inserted "or when such regulated metal property is unlawfully obtained and results in property damage exceeding the aggregate amount of $1,500.00" in paragraph (a)(3), and added the undesignated language at the end of subsection (a). See Editor's notes for applicability.

Cross references.

Penalty for theft of ferrous metals or regulated metal property, § 16-8-12.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-361, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.2. In the introductory language of subsection (a), "Code Section 10-1-359.1" was substituted for "Code Section 10-1-360".

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 amendment of this Code section, see 29 Georgia St. U.L. Rev. 238 (2012).

10-1-359.3. Forfeiture; items declared contraband.

(a) As used in this Code section, the term:

(1) "Crime" means:

(A) Theft by taking in violation of Code Section 16-8-2, theft by conversion in violation of Code Section 16-8-4, or theft by receiving stolen property in violation of Code Section 16-8-7 if the subject of the theft was regulated metal property;

(B) Criminal damage to property in the first degree in violation of paragraph (2) of subsection (b) of Code Section 16-7-22; or

(C) A criminal violation of this article.

(2) "Proceeds" shall have the same meaning as set forth in Code Section 16-13-49.

(3) "Property" shall have the same meaning as set forth in Code Section 16-13-49.

(b) The following are declared to be contraband, and no person shall have a property right in them:

(1) Any property which is, directly or indirectly, used or intended

for use in any manner to facilitate a crime and any proceeds derived or realized therefrom;

(2) Any weapon possessed, used, or available for use in any manner to facilitate a crime; and

(3) Any used, detached catalytic converter, as such term is defined in subsection (d) of Code Section 10-1-351, possessed in violation of subsection (d) of Code Section 10-1-351 and any vehicle used in the transportation of such used, detached catalytic converter, provided that any civil forfeiture proceedings for any vehicle seized pursuant to this subsection, including the reporting requirements set forth in Code Section 9-16-7, shall be stayed during the pendency of criminal proceedings unless otherwise agreed to by the owner or interest holder of such vehicle.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

History.

Code 1981, § 10-1-359.3, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872; Ga. L. 2023, p. 69, § 1/HB 227, effective July 1, 2023; Ga. L. 2023, p. 71, § 1-8/SB 60, effective July 1, 2023.

Amendments.

The first 2023 amendment, effective July 1, 2023, substituted "subsection (b) of" for "subsection (a) of" in subparagraph (a)(1)(B).

The second 2023 amendment, effective July 1, 2023, in subsection (b), deleted "and" at the end of paragraph (b)(1), substituted "; and" for a period at the end of paragraph (b)(2), and added paragraph (b)(3), and, in subsection (c), substituted "Chapter 16 of Title 9" for "Code Section 16-13-49" at the end. See Editor's notes for applicability.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-362, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.3.

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359.4. Authority of localities.

(a) The General Assembly finds that this article is a matter of state-wide concern. This article supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by any county, municipality, consolidated government, or other local governmental agency regarding the sale or purchase of regulated metal property except as allowed in this Code section.

(b) Political subdivisions of this state may enact rules, regulations, codes, ordinances, and other laws:

(1) Affecting the land use and zoning relating to secondary metals recyclers; and

(2) Issuing occupational tax certificates to secondary metals recyclers, imposing occupational taxes, imposing regulatory fees as allowed in Code Section 48-13-9, or revoking their occupational tax certificates.

History.
Code 1981, § 10-1-358, enacted by Ga. L. 2007, p. 650, § 3/SB 203; Code 1981, § 10-1-359.4, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-363, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.4.
Editor's notes.
Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

10-1-359.5. Required information from secondary metals recyclers; role of Georgia Bureau of Investigation.

(a)(1) Each secondary metals recycler shall provide to the Georgia Bureau of Investigation or its designee for each purchase transaction which takes place on or after July 1, 2015, all of the information required by subsection (a) of Code Section 10-1-353, except for the amount of consideration given in a purchase transaction for the regulated metal property specified in paragraph (5) of subsection (a) of such Code section, and a statement as to whether such secondary metals recycler's registration or business license has been revoked, suspended, or canceled in the previous year. A secondary metals recycler who maintains on file with the Georgia Bureau of Investigation or its designee a copy of the statement forms such secondary metals recycler requires each seller to sign pursuant to paragraphs (6) and (7) of subsection (a) of Code Section 10-1-353 may satisfy the requirements of such paragraphs by providing to the Georgia Bureau of Investigation or its designee a copy of the individual seller's signature and shall not be required to provide the actual statement signed by each seller, provided the actual statements are maintained by the secondary metals recycler pursuant to subsection (b) of Code Section 10-1-353 and available for inspection pursuant to Code Section 10-1-354. The information required to be provided by the secondary metals recyclers to the Georgia Bureau of Investigation or its designee pursuant to this subsection shall be provided electronically.

(2) Each secondary metals recycler shall electronically submit to the Georgia Bureau of Investigation a record of the receipt of each

purchase of a used, detached catalytic converter as defined in subsection (d) of Code Section 10-1-351, or any nonferrous metal parts of a catalytic converter, from an industrial account or a secondary metals recycler. Such report shall include:

(A) The name and address of the seller;

(B) The date, time, and place of the transaction; and

(C) The number of used, detached catalytic converters or pounds of catalyst metal purchased.

(b) The Georgia Bureau of Investigation or its designee shall establish and maintain a data base of all information required to be provided pursuant to subsection (a) of this Code section. Such information shall be considered to be a trade secret and shall be exempt from disclosure under the provisions of Article 4 of Chapter 18 of Title 50; provided, however, that such exemption shall not relieve the secondary metals recycler of the obligation or requirement to provide such information to the Georgia Bureau of Investigation or its designee.

(c) The data base shall be accessible and searchable by:

(1) All law enforcement agencies in this state; and

(2) Employees of electric suppliers, as defined in Code Section 46-3-3, and employees of telecommunications companies, as defined in Code Section 46-5-162, provided that such employees have been certified by the Georgia Peace Officer Standards and Training Council as having successfully completed the course of training required by Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act."

(d)(1) It shall be unlawful to use the data base established pursuant to subsection (b) of this Code section for any purpose other than the investigation of an alleged crime.

(2) Any person who violates or conspires to violate paragraph (1) of this subsection shall be guilty of a felony and, upon conviction, shall receive the following punishment:

(A) Upon a first conviction, imprisonment for not less than one nor more than five years or a fine of not more than $5,000.00, or both; or

(B) Upon a second or subsequent conviction, imprisonment for not less than five nor more than ten years or a fine of not more than $40,000.00, or both.

(e) The Georgia Bureau of Investigation shall promulgate rules and regulations and establish procedures necessary to carry into effect, implement, and enforce the provisions of this Code section and ensure

compliance with applicable federal and state laws. Such rules and regulations shall include, but shall not be limited to:

(1) The time, manner, and method of the transmittal of the information by the secondary metals recyclers to the Georgia Bureau of Investigation;

(2) The manner and method by which employees of electric suppliers and telecommunications companies may access and search the data base and any prerequisites thereto; and

(3) The specific information the employees of the electric suppliers and telecommunications companies may access and search within the data base.

History.

Code 1981, § 10-1-359.5, enacted by Ga. L. 2012, p. 112, § 2-1/HB 872; Ga. L. 2015, p. 588, § 6/HB 461; Ga. L. 2023, p. 71, § 1-9/SB 60, effective July 1, 2023.

Amendments.

The 2023 amendment, effective July 1, 2023, redesignated the former provisions of subsection (a) as paragraph (a)(1), added ", and a statement as to whether such secondary metals recycler's registration or business license has been revoked, suspended, or canceled in the previous year" at the end of the first sentence in paragraph (a)(1), and added paragraph (a)(2). See Editor's notes for applicability.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-360.1, as enacted by Ga. L. 2012, p. 112, § 2-1/HB 872, was redesignated as Code Section 10-1-359.5.

Editor's notes.

Ga. L. 2012, p. 112, § 4-1(b)/HB 872, not codified by the General Assembly, provided that this Code section shall become effective upon specific appropriation of funds for the purposes of this Act as expressed in a line item making specific reference to such funds in a General Appropriations Act enacted by the General Assembly. Funds were appropriated at the 2014 session of the General Assembly.

Ga. L. 2023, p. 71, § 3-1/SB 60, not codified by the General Assembly, provides, in part, that this part and all of Part I of this Act except Section 1-4 shall become effective on July 1, 2023, and shall apply to all transactions occurring on and after such date.

Law reviews.

For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

ARTICLE 14A

FLEA MARKET VENDORS' RECORD KEEPING

10-1-360. Records of purchase transactions; penalties; applicability.

(a) As used in this Code section, the term:

(1)(A) "Flea market" means any event:

(i) At which two or more persons offer personal property for sale or exchange; and

(ii) At which a fee is charged for the privilege of offering or displaying personal property for sale or exchange; or

(iii) At which a fee is charged to prospective buyers for admission to the area where personal property is offered or displayed for sale or exchange; or

(iv) Regardless of the number of persons offering or displaying personal property or the absence of fees, at which used personal property is offered or displayed for sale or exchange if the event is held more than six times in any 12 month period.

(B) The term "flea market" is interchangeable with and applicable to "swap meet," "indoor swap meet," or other similar terms regardless of whether these events are held inside a building or outside in the open. The primary characteristic is that these activities involve a series of sales sufficient in number, scope, and character to constitute a regular course of business.

(C) The term "flea market" shall not mean and shall not apply to:

(i) An event which is organized for the exclusive benefit of any community chest, fund, foundation, association, or corporation organized and operated for religious, educational, or charitable purposes, provided that no part of any admission fee or parking fee charged vendors or prospective purchasers or the gross receipts or net earnings from the sale or exchange of personal property, whether in the form of a percentage of the receipts or earnings, as salary, or otherwise, inures to the benefit of any private shareholder or person participating in the organization or conduct of the event; or

(ii) Any event at which all of the personal property offered for sale or displayed is new, and all persons selling, exchanging, or offering or displaying personal property for sale or exchange are manufacturers or licensed retail or wholesale merchants.

(2) "Nonregistered vendor" means a person who, without a certificate of registration issued by the state revenue commissioner pursuant to Chapter 8 of Title 48, engages in the retail sale of personal property to the general public.

(3) "Used personal property" includes personal property which has previously been sold or delivered to a retailer prior to being acquired by a vendor when the vendor's cost exceeds $50.00 per item.

(4) "Vendor" means a person who engages in the retail sale of personal property at a flea market.

(b) Every nonregistered vendor and vendor shall maintain a permanent record book in which shall be entered in ink and in legible English at the time any property is acquired for the purpose of retail sale:

(1) The date of the transaction;

(2) The name, age, and address of the person, corporation, or entity from whom the property was acquired, a description of the general appearance of any such person, and the distinctive number from such person's driver's license or other similar identification card;

(3) An identification and description of the property acquired including, if reasonably available, the serial, model, or other number and all identifying marks inscribed thereon;

(4) The price paid for such property; and

(5) The signature of the seller.

All entries shall appear in ink and shall be in chronological order. No blank lines may be left between entries. No obliterations, alterations, or erasures may be made. Corrections shall be made by drawing a line of ink through the entry without destroying the legibility. Such record book shall be open to the inspection of any law enforcement officer during the ordinary hours of business or at any reasonable time.

(c) The record of each purchase transaction provided for in this Code section shall be maintained for a period of not less than two years and shall be kept by the nonregistered vendor or vendor and made available during any period at which such person is open for business or is offering property for sale.

(d) Any nonregistered vendor or vendor required to maintain a record book under the provisions of this Code section who shall:

(1) Fail to make an entry of any material matter in his or her permanent record book;

(2) Make any false entry therein;

(3) Falsify, obliterate, destroy, or remove such record book from his or her place of business during any time such record book is required to be present;

(4) Refuse to allow any law enforcement officer to inspect his or her permanent record book or any goods or property in his or her possession during the ordinary hours of business or at any reasonable time; or

(5) Fail to maintain the records required by this Code section for at least two years

shall be guilty of a misdemeanor.

(e) This Code section shall apply to property purchased or acquired on or after July 1, 1994.

History.
Code 1981, § 10-1-360, enacted by Ga. L. 1994, p. 1915, § 1; Ga. L. 2000, p. 136, § 10.

10-1-361. Exemptions from article.

This article shall not apply to the following:

(1) The sale of a motor vehicle or trailer required to be registered or subject to a certificate of title law of this state;

(2) The sale of food products, agricultural products, or forestry products;

(3) Business conducted at any industry or association trade show;

(4) The sale of arts or crafts by the person who produced such arts or crafts.

History.
Code 1981, § 10-1-361, enacted by Ga. L. 1994, p. 1915, § 1.

10-1-362. Local ordinances or regulations.

Nothing in this article shall prohibit ordinances or resolutions by counties and municipal corporations which provide regulations that are as stringent or more stringent than the requirements of this article.

History.
Code 1981, § 10-1-362, enacted by Ga. L. 1994, p. 1915, § 1.

ARTICLE 15

DECEPTIVE OR UNFAIR PRACTICES

Cross references.
Misidentification of onions as Vidalia onions, § 2-14-130 et seq.
Restrictions on sale of goods manufactured by inmates of county correctional institutions, § 42-5-60.

Law reviews.
For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 31 (1995).

PART 1

UNIFORM DECEPTIVE TRADE PRACTICES ACT

Law reviews.
For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law proposed in Georgia in 1973, see 10 Ga. St. B. J. 281 (1973).
For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B. J. 409 (1974).
For note discussing the Uniform Deceptive Trade Practices Act and consumer protection, see 25 Emory L. J. 445 (1976).

For article, "Trademark Protection: Judicial Inconsistency in the Fifth Circuit," see 32 Mercer L. Rev. 1167 (1981).

For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable?," see 22 Ga. St. B. J. 30 (1985).

JUDICIAL DECISIONS

Crux of complaint based on this part is likelihood of confusion between goods. Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689, 1976 U.S. Dist. LEXIS 12523 (N.D. Ga. 1976); Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 1980 U.S. App. LEXIS 18834 (5th Cir.), cert. denied, 449 U.S. 899, 101 S. Ct. 268, 66 L. Ed. 2d 129, 1980 U.S. LEXIS 3487 (1980).

Consumer's failure to show the plaintiff had to establish a likelihood of damage to the plaintiff by an automobile dealer's fraudulent practices made summary judgment denying the plaintiff's claim under the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., proper. Catrett v. Landmark Dodge, Inc., 253 Ga. App. 639, 560 S.E.2d 101, 2002 Ga. App. LEXIS 168 (2002).

Requirements for injunctive relief under O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10 are less stringent than under any other sections dealing with protection of trade names and trademarks. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Standing. — Patentee of a weight loss drug who had not produced or marketed a weight control product, and was not a person likely to be damaged by the practices of alleged competitors, lacked standing to bring suit under the Uniform Deceptive Trade Practice Act, O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10. Friedlander v. HMS-PEP Prods., 226 Ga. App. 123, 485 S.E.2d 240, 1997 Ga. App. LEXIS 454 (1997), cert. denied, No. S97C1268, 1997 Ga. LEXIS 851 (Ga. Oct. 3, 1997).

No basis for claim. — See Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 1985 U.S. App. LEXIS 15284 (Fed. Cir. 1985).

The Uniform Deceptive Trade Practices Act, O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10, did not apply to an action by students against schools and student loan guarantors based on allegations that the schools recruited the students, induced the students to sign up for federally guaranteed student loans, and then failed to provide the promised quality of education or job placement. Bartels v. Alabama Commer. College, 918 F. Supp. 1565, 1995 U.S. Dist. LEXIS 20447 (S.D. Ga. 1995), aff'd in part, rev'd, 189 F.3d 483, 1999 U.S. App. LEXIS 19902 (11th Cir. 1999).

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1104, 1106.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 434 et seq.

ALR.

Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 17 A.L.R. 784; 28 A.L.R. 114.

Application of principles of unfair competition to artistic or library property, 19 A.L.R. 949.

Seller's advertisements as affecting rights of parties to sale of personal property, 28 A.L.R. 991; 158 A.L.R. 1413.

Former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use his knowledge of customer lists acquired in earlier employment, 28 A.L.R.3d 7.

Unfair competition: geographical extent of protection of word or symbol under doctrine of secondary meaning, 41 A.L.R.3d 434.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Validity of express statutory grant of

power to state to seek, or to court to grant, restitution of fruits of consumer fraud, 59 A.L.R.3d 1222.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 A.L.R.3d 399.

Trade dress simulation of cosmetic products as unfair competition, 86 A.L.R.3d 505.

Unfair competition by imitation in sign or design of business place, 86 A.L.R.3d 884.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 A.L.R.3d 449.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 A.L.R.4th 1340.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts, 35 A.L.R.4th 12.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes, 72 A.L.R.4th 282.

Coverage of leases under state consumer protection statutes, 89 A.L.R.4th 854.

10-1-370. Short title.

This part shall be known and may be cited as the "Uniform Deceptive Trade Practices Act."

History.

Ga. L. 1968, p. 337, § 6; Ga. L. 2017, p. 774, § 10/HB 323.

Law reviews.

For article, "Do's and Don'ts When Handling a Product Liability Matter in Georgia," see 25 Ga. St. B.J. 17 (Aug. 2019).

JUDICIAL DECISIONS

Analogy with Lanham Act. — In an action by a manufacturer against a competitor under the Lanham Act (15 U.S.C. § 1125(a)) for trade dress infringement, it was error to apply the statute of limitations in the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. 10-1-370 et seq., is the proper analogous statute to apply for such purpose. Kason Indus. v. Component Hdwe. Group, 120 F.3d 1199, 1997 U.S. App. LEXIS 22846 (11th Cir. 1997).

Statute of limitations. — Four-year period of O.C.G.A. § 9-3-31 was applicable for purposes of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. 10-1-370 et seq., not the 20-year period of O.C.G.A. § 9-3-22. Kason Indus. v. Component Hdwe. Group, 120 F.3d 1199, 1997 U.S. App. LEXIS 22846 (11th Cir. 1997).

No valid claim. — When an employee resigned while in the process of trying to obtain certain business for the employer, and the employee formed a company, which later obtained this business, the employer did not show that the employee violated the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because the employer did not show that the employee caused any confusion as to the source, sponsorship, approval, or certification of goods or services. Looney v. M-Squared, Inc., 262 Ga. App. 499, 586 S.E.2d 44, 2003 Ga. App. LEXIS 875 (2003), cert. denied, No. S03C1783, 2003 Ga. LEXIS 1032 (Ga. Nov. 17, 2003).

Standing. — Company's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through

Fed. R. Bankr. P. 7012, was denied because nothing in the language of Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the "consumer" issue was irrelevant to standing under the UDTPA. Johnston Indus. Ala., Inc. v. Nat'l Contract Assocs. (In re Johnston Indus.), 300 B.R. 821, 2003 Bankr. LEXIS 1384 (Bankr. M.D. Ga. 2003).

Sovereign immunity barred claims against Georgia Lottery Corporation. — Trial court erred in denying the Georgia Lottery Corporation's motion to dismiss the appellee's claim under Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., as the appellee's UDTPA claim for injunctive relief against the Georgia Lottery Corporation was barred by sovereign immunity because the UDTPA did not expressly waive the state's sovereign immunity; did not specifically create a cause of action against the state; and exempted conduct in compliance with a statute administered by a state agency, and the Georgia Lottery Corporation was a state agency created by statute to administer the lottery. Ga. Lottery Corp. v. Patel, 353 Ga. App. 320, 836 S.E.2d 634, 2019 Ga. App. LEXIS 688 (2019).

Amended complaint alleging violation of Georgia Deceptive Trade Practices Act granted. — In an action in which an interexchange carrier asserted the carrier was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, an amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims. ITC Deltacom Communs. v. US LEC Corp., No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

Unfair insurance practices not subject to Georgia's Uniform Deceptive Trade Practices Act. — Pursuant to O.C.G.A. § 10-1-374(a)(1), insurance transactions are exempt from Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq. Claims of unfair trade practices in insurance transactions are instead governed by the Georgia Insurance Code. Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 297 Ga. App. 28, 676 S.E.2d 428, 2009 Ga. App. LEXIS 350 (2009), cert. denied, No. S09C1241, 2009 Ga. LEXIS 805 (Ga. Sept. 28, 2009).

Trade name infringement. — Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., provides for injunctive relief to prevent damage caused by a deceptive trade practice, including the use of a confusingly similar trade name which infringes on a protected trade name. Relief may be obtained from the deceptive practice, whether or not the protected trade name was registered, and without proof that the alleged infringer intended to deceive the public by causing confusion. Inkaholiks Luxury Tattoos Georgia, LLC v. Parton, 324 Ga. App. 769, 751 S.E.2d 561, 2013 Ga. App. LEXIS 929 (2013).

Residential mortgage transactions not covered. — In a suit asserting wrongful foreclosure and other claims, the trial court properly dismissed the plaintiff's claims asserting unfair business and deceptive trade practices because those statutory acts did not apply to residential mortgage transactions. Marques v. JP Morgan Chase Bank, N.A., 370 Ga. App. 305, 896 S.E.2d 1, 2023 Ga. App. LEXIS 552 (2023).

Dismissal when injunction would serve no purpose as information on dark web. — Patients' claim under the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was properly dismissed because, pretermitting whether the patients alleged an unfair trade practice, an injunction would serve no purpose because the patients' personal information was already sold and was available on the dark web. Collins v. Athens Orthopedic Clinic, 356 Ga. App. 776, 849 S.E.2d 213, 2020 Ga. App. LEXIS 524 (2020).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

False Advertising Under Lanham Act § 43(a)(1)(B), 44 POF3d 1.

U.L.A.

Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 6.

ALR.

Right to private action under state consumer protection act — Equitable relief available, 115 A.L.R.5th 709.

Unfair or Deceptive Mortgage Fees Under State Unfair or Deceptive Trade Practice Laws, 60 A.L.R. 7th 1.

Enforceability of trial period plans (TPP) under the home affordable modification program (HAMP), 88 A.L.R. Fed. 2d 331.

What Matters Not Contained in Pleadings may be Considered in Ruling on Motion to Dismiss Under Rule 12(b)(6) of Federal Rules of Civil Procedure or Motion for Judgment on Pleadings Under Rule 12(c) without Conversion to Motion for Summary Judgment — Sixth Circuit, 77 A.L.R. Fed. 3d 2.

10-1-371. Definitions.

As used in this part, the term:

(1) "Article" means a product as distinguished from its trademark, label, or distinctive dress in packaging.

(2) "Certification mark" means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.

(3) "Collective mark" means a mark used by members of a cooperative, association, or other collective group or organization to identify goods or services and distinguish them from those of others or to indicate membership in the collective group or organization.

(4) "Mark" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement.

(5) "Person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(6) "Service mark" means a mark used by a person to identify services and to distinguish them from the services of others.

(7) "Trademark" means a mark used by a person to identify goods and to distinguish them from the goods of others.

(8) "Trade name" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others.

History.
Ga. L. 1968, p. 337, § 1.
Law reviews.
For article, "A Patent and Trademark Primer," see 15 Ga. St. B. J. 58 (1978).
For article, "Trademark Litigation," a brief overview of the subject, see 17 Ga. St. B. J. 158 (1981).

JUDICIAL DECISIONS

Trade names. — Georgia Supreme Court held that trade names are only protected from use by others to the extent that such use is deceptive or there is a likelihood of confusion by the public. Edible IP, LLC v. Google, LLC, 313 Ga. 305, 869 S.E.2d 481, 2022 Ga. LEXIS 29 (2022).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 1 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1 et seq., 17 et seq., 142 et seq.. 90 C.J.S., Trusts, § 275.
U.L.A.
Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 1.
ALR.
Who is a "consumer" entitled to protection of state deceptive trade practice and consumer protection acts, 63 A.L.R.5th 1.

10-1-372. Deceptive trade practices.

(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(1) Passes off goods or services as those of another;

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) Represents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(9) Advertises goods or services with intent not to sell them as advertised;

(10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(b) In order to prevail in an action under this part, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Code section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

History.
Ga. L. 1968, p. 337, § 2.

Cross references.
Criminal penalties for unauthorized reproduction and sale of recorded materials, § 16-8-60.
Criminal penalty for deceptive business practices, § 16-9-50.
Fraud generally, § 23-2-50 et seq.
Misbranding of food generally, § 26-2-28.
Labeling of meat, §§ 26-2-107, 26-2-111, 26-2-112.
Misbranding of drugs, § 26-3-8.
Misbranding and false advertisement of cosmetics, § 26-3-12 et seq.
Time-share program sales, deceptive practices, § 44-3-185 et seq.

Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Analysis

General Consideration
Relief
1. Medical Field
2. Other Businesses

General Consideration

Preemption by federal Food, Drug, and Cosmetic Act. — District court properly dismissed the plaintiff's claim under the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because the federal Food, Drug, and Cosmetic Act's, 21 U.S.C. § 301 et seq., express-preemption provision barred the claim as it would impose liability for conduct that did not violate the Act. Hi-Tech Pharms., Inc. v. HBS Int'l Corp., 910 F.3d 1186, 2018 U.S. App. LEXIS 34051 (11th Cir. 2018).

Standing. — Company's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through Fed. R. Bankr. P. 7012 was denied because nothing in the language of Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the "consumer" issue was irrelevant to standing under the UDTPA.

Johnston Indus. Ala., Inc. v. Nat'l Contract Assocs. (In re Johnston Indus.), 300 B.R. 821, 2003 Bankr. LEXIS 1384 (Bankr. M.D. Ga. 2003).

Failure to register or otherwise protect name. — Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., does not require a party seeking relief thereunder to have registered the relevant trade or service mark or name. To the extent this court ruled otherwise in Elite Personnel, Inc. v. Elite Personnel Services, Inc., 259 Ga. 192, 378 S.E.2d 117, 1989 Ga. LEXIS 204 (1989) that opinion is hereby overruled. Future Professionals v. Darby, 266 Ga. 690, 470 S.E.2d 644, 1996 Ga. LEXIS 238 (1996).

Failure to authorize use of name. — Customer sufficiently pled a counterclaim for false endorsement under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because there was evidence in the record that the customer did not authorize a copyright owner's use of the customer's name and quote when the owner initially displayed the material on its website and the owner continued to display the material after the customer expressly withdrew any authorization. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 2006 U.S. Dist. LEXIS 68407 (N.D. Ga. 2006).

In a suit by owner of a registered mark that consisted of the name of a well-known racehorse against companies that filmed a fictionalized movie of the horse's career, further discovery under Fed. R. Civ. P. 56(f) was allowed as to owner's state law claim of false endorsement under O.C.G.A. § 10-1-372 because consumers might have been confused by marketing that stated that the film was a true story, even though it lacked endorsement of the horse's well-known trainer and jockey, who were portrayed by actors in the film. Thoroughbred Legends, LLC v. Walt Disney Co., No. 1:07-CV-1275-BBM, 2008 U.S. Dist. LEXIS 19960 (N.D. Ga. Feb. 12, 2008).

Protection despite failure to register. — Because a sole proprietor's use of "ATG" had acquired secondary meaning as a trade name, the proprietor was entitled to enjoin a corporation from using the same name since it was shown that the corporation's use caused confusion and misunderstanding on the part of the public. Eckles v. Atlanta Tech. Group, 267 Ga. 801, 485 S.E.2d 22, 1997 Ga. LEXIS 105 (1997).

Jurisdiction of issue involving similar names. — A claim under the Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., involving deceptively similar business logos was a claim for equitable relief and was not within the jurisdiction of the court of appeals. Akron Pest Control v. Radar Exterminating Co., 216 Ga. App. 495, 455 S.E.2d 601, 1995 Ga. App. LEXIS 216 (1995).

Confusingly similar names. — Claims for service mark infringement under the federal Lanham Act, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., and the Georgia law of unfair competition turn on the same question — confusion of similar names. Jellibeans, Inc. v. Skating Clubs of Ga., Inc., 716 F.2d 833, 1983 U.S. App. LEXIS 16353 (11th Cir. 1983).

Plaintiffs made requisite showing for injunction that trade name reacquired upon foreclosure of their security interest had acquired a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar name, which had in fact confused the plaintiffs' former customers. Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40, 1983 Ga. LEXIS 614 (1983).

Showing that, on more than one occasion, customers misdirected their inquiries and that legal documents were misserved was evidence that the corporation's use of the plaintiff's trade name caused confusion and misunderstanding on the part of the public entitling the plaintiff to injunctive relief. Eckles v. Atlanta Tech. Group, 267 Ga. 801, 485 S.E.2d 22, 1997 Ga. LEXIS 105 (1997).

Promoter presented sufficient evidence of the strength of the promoter's marks and of actual confusion amongst the relevant consumer class to avoid summary judgment, and the appellate court reversed the district court's grant of summary judgment for the group and remanded for trial on the claims of

General Consideration (Cont'd)

infringement under the Lanham Act, 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125, deceptive trade practices under O.C.G.A. § 10-1-372 and unfair competition under O.C.G.A. § 23-2-55 et seq. because: (1) the car dealership promoter had shown actual confusion and the district court erred by overvaluing lack of confusion exhibited by the general public, an audience with no experience in the advertisement buying market; (2) "Slash-It! Sales Event" attained federal incontestable status, so the district court erred in holding that the mark was merely descriptive, and not entitled to strong protection; (3) the promoter created a disputed issue of material fact that the slasher slogans left the same impression, weighing in favor of likelihood of confusion; and (4) the similarities between the two sales allowed for the inference that a reasonable consumer could possibly attribute the products here to the same source. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931, 2010 U.S. App. LEXIS 9373 (11th Cir. 2010).

Summary judgment was inappropriate as to trademark infringement liability and a deceptive trade practices claim because while the "Xylem" mark was at least suggestive, the marks were substantially similar, and the trademark holder documented over 100 instances of actual confusion resulting from misdirected checks, phone calls, faxes, and emails; the court could not find that no reasonable juror would find there was no confusion created by the accused infringer's use of the Xylem name and mark. ITT Corp. v. Xylem Group, LLC, 963 F. Supp. 2d 1309, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. 2013).

Disparaging remarks actionable. — Dismissal of a claim under O.C.G.A. § 10-1-372(a)(2) was ordered since that section was deemed to prohibit confusion of trade names, of which there were no allegations in a complaint by a dialysis center against its former medical directors arising from breaches of a non-competition clause; however, there were sufficient statements to deny dismissal of a claim under O.C.G.A. § 10-1-372(a)(8) since it was alleged that disparaging and damaging comments were made about the services at the center, which were entirely untrue, and which were made with the intent to convey the impression that the center's facilities were inferior to other competing facilities. DaVita Inc. v. Nephrology Assocs., P.C., 253 F. Supp. 2d 1370, 2003 U.S. Dist. LEXIS 4770 (S.D. Ga. 2003).

Presumption against a likelihood of confusion is raised if marks have coexisted in the marketplace over a significant period of time with no evidence of actual confusion. However, the presumption may be rebutted by evidence of other factors tending to support a finding of a likelihood of confusion. Ackerman Sec. Sys. v. Design Sec. Sys., 201 Ga. App. 805, 412 S.E.2d 588, 1991 Ga. App. LEXIS 1577 (1991).

False impression not given. — Supplier's claims of unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and under the Georgia Uniform Deceptive Trade Practices Act, specifically O.C.G.A. § 10-1-372(a), failed on summary judgment because there was no evidence that a distributor substituted its product on store shelves while suggesting that the source was a supplier or that the distributor's product was manufactured by anyone other than the distributor; further, the supplier failed to allege evidence to support a claim of passing off at the level of retail stores. Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 2007 U.S. App. LEXIS 19918 (11th Cir. 2007).

Relief

Injunctive relief is sole remedy. — Sole remedy provided for a violation of O.C.G.A. § 10-1-372 is injunctive relief. Lauria v. Ford Motor Co., 169 Ga. App. 203, 312 S.E.2d 190, 1983 Ga. App. LEXIS 3026 (1983).

Injunctive relief and damages available for infringement of trade name. — If the right to protection of a trade name exists, the injured party may seek both injunctive relief and damages. Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308, 1985 Ga. LEXIS 849 (1985).

Injunctive relief was denied to plaintiff business association pursuant to Georgia's Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because the association failed to show that the actions taken by a federal advisory committee in adopting more stringent threshold limit values for certain chemicals appeared unrelated to the course of a person's business, vocation, or occupation. Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, Inc., No. 5:04CV394, 2004 U.S. Dist. LEXIS 27605 (M.D. Ga. Nov. 26, 2004), dismissed, 393 F. Supp. 2d 1362, 2005 U.S. Dist. LEXIS 5802 (M.D. Ga. 2005).

Monetary relief not available. — A count alleging violation of the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., could not provide a basis for relief because the remedy sought in the complaint, i.e., monetary relief, is not available under the Act. Taylor Auto Group, Inc. v. Jessie, 241 Ga. App. 602, 527 S.E.2d 256, 1999 Ga. App. LEXIS 1680 (1999), cert. denied, No. S00C0694, 2000 Ga. LEXIS 464 (Ga. May 26, 2000).

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No confusion with doctor's business. — Doctor's claims alleging that defendants initiated a peer review process for the purpose of driving the doctor's competing dialysis center out of business were not actionable under O.C.G.A. § 10-1-372(a)(2) of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because nothing in the complaint suggested that defendants used a trade name to cause confusion with the doctor's business. Wood v. Archbold Med. Ctr., No. 6:05-CV-53, 2006 U.S. Dist. LEXIS 44292 (M.D. Ga. June 28, 2006).

Disparaging remarks by doctor not actionable. — Doctor's claims alleging that defendants initiated a peer review process for the purpose of driving the doctor's competing dialysis center out of business were not actionable under O.C.G.A. § 10-1-372(a)(8) of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because none of defendants' alleged conduct, including the solicitation of the doctor's patients and the refusal to make community-donated blood available to the doctor, involved false or misleading statements of fact. Wood v. Archbold Med. Ctr., No. 6:05-CV-53, 2006 U.S. Dist. LEXIS 44292 (M.D. Ga. June 28, 2006).

Privilege and lack of malice bars recovery by hospital. — Because the defendant's direct testimony was that the defendant was motivated to report the defendant's concerns about the level of emergency room care solely out of a sense of duty and concern for patient safety and that the defendant bore no animus against the plaintiff, because there was no other evidence of ill will, and because there was a showing of privilege in the disclosure of patient information, the plaintiff's failure to show express malice made summary judgment against the plaintiff proper for failure to state a claim under O.C.G.A. § 10-1-372. Dominy v. Shumpert, 235 Ga. App. 500, 510 S.E.2d 81, 1998 Ga. App. LEXIS 1550 (1998).

Claims against hospital dismissed. — Court dismissed, without prejudice, an uninsured patient's Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., claims against a non-profit hospital and an affiliated health company because: (1) the patient alleged that the defendants violated state and federal law with regard to the defendant's billing practices for uninsured and/or indigent patients and the patient should not have to pay the treatment costs because the hospital was a non-profit hospital; and (2) I.R.S. § 501(c)(3) did not confer subject matter jurisdiction on the court over the patient's trade practice claims because the claims were based on the theory that § 501(c)(3) created an enforceable trust between the hospital and the federal government, and no such trust was created under federal law. Ellis v. Phoebe Putney Health Sys., No. 1:04-CV-80, 2005 U.S. Dist. LEXIS 19935 (M.D. Ga. Apr. 8, 2005).

Because the uninsured patients failed to allege that a non-profit hospital made false or misleading statements with respect to price reductions, but merely alleged that the hospital's disparate pricing was confusing and likely to create a misunderstanding, it failed to adequately

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state a claim under O.C.G.A. § 10-1-372. Cox v. Athens Reg'l Med. Ctr., Inc., 279 Ga. App. 586, 631 S.E.2d 792, 2006 Ga. App. LEXIS 647 (2006), cert. denied, No. S06C1722, 2006 Ga. LEXIS 721 (Ga. Sept. 8, 2006).

Claims against health provider dismissed. — Mere fact that the "chargemaster" rates for medical care charged to two uninsured patients pursuant to their contracts with a health care provider exceeded the rates the provider normally charged for medical care covered by insurance and Medicare/Medicaid benefits, even assuming the patients were unaware of the pricing difference, did not establish a violation of the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. Morrell v. Wellstar Health Sys., Inc., 280 Ga. App. 1, 633 S.E.2d 68, 2006 Ga. App. LEXIS 736 (2006), cert. denied, No. S06C1867, 2006 Ga. LEXIS 848 (Ga. Oct. 16, 2006).

Cancellation of agreement to sell insurance and surgical products. — Insurer's verbal cancellation of a written contract with a marketer to sell health, medical, and surgical insurance products did not constitute the type of deceptive trade practice covered by Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because its actions were not directed at misleading the general public in connection with one of its products. Med S. Health Plans, LLC v. Life of the S. Ins. Co., No. 4:07-CV-134, 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).

2. Other Businesses

Use of existing trademark. — Corporate poultry producer and marketer, by adopting and using the trademark GOLDEN MEDALLION on its frozen poultry products, infringed poultry cooperative's existing MEDALLION trademark and engaged in unfair competition and deceptive trade practices. Gold Kist, Inc. v. ConAgra, Inc., 708 F. Supp. 1291, 1989 U.S. Dist. LEXIS 2438 (N.D. Ga. 1989).

Descriptive mark without acquired distinctiveness. — Genuine fact issues existed under § 43(a) of the Lanham Act and the Georgia Unfair Trade Practices Act, O.C.G.A. § 10-1-372(a)(1)-(2), (12), as to whether a corporation's unique coating numbering system, which it accused a competitor of usurping in order to sell surface coating services to mutual clients, was merely a descriptive mark that had not acquired distinctiveness through secondary meaning. Impreglon, Inc. v. Newco Enters., 508 F. Supp. 2d 1222, 2007 U.S. Dist. LEXIS 23640 (N.D. Ga. 2007).

Use of family name. — This part authorizes injunction restraining use of family name previously appropriated by another as a trade name, when under all the circumstances, such as the other descriptive words of the trade name, the type of business carried on, the geographical area in which the trade name has acquired a meaning, and other distinguishing factors, there remains a likelihood of confusion and misunderstanding among the general public. Baker Realty Co. v. Baker, 228 Ga. 766, 187 S.E.2d 850, 1972 Ga. LEXIS 902 (1972); Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Copyright owner sufficiently stated a claim of violation of the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. because the customer's employees who received a manual and training materials created by the customer copied in part from an owner's copyrighted manual qualified as members of the public and the limited distribution did not foreclose such a claim. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 2006 U.S. Dist. LEXIS 68407 (N.D. Ga. 2006).

Use of balloons, costumes, and names of comic book characters by singing telegram company created confusion. DC Comics Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110, 1984 U.S. Dist. LEXIS 22828 (N.D. Ga. 1984).

Liability of telephone directory company for copying directory. — As a result of the special treatment of

directories in copyright law, a telephone directory company's copying of the telephone company's compilation was infringement, and the use of a confusing solicitation made the directory company liable for both unfair competition and deceptive trade act violations. Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 1985 U.S. App. LEXIS 28735 (11th Cir. 1985).

Sufficient allegations of unfair practices involving cellular phones. — Because plaintiff cellular telephone trademark holder's complaint properly alleged that defendant competitor was a knowing and willing participant in an enterprise that bought the holder's phones in bulk then altered the phones to circumvent prepaid airtime then resold those phones under the holder's marks, the complaint properly stated claims for unfair competition and deceptive trade practices. Tracfone Wireless, Inc. v. Zip Wireless Prods., 716 F. Supp. 2d 1275, 2010 U.S. Dist. LEXIS 60639 (N.D. Ga. 2010).

Use of "mutual" in name and advertisement of insurance company. — Use of the word "mutual" in the name and advertising of defendant insurance company and defendant's statement, which plaintiffs claimed gave the false impression, in promotional materials that it would pass along to policy holders any savings resulting from efficient operations did not constitute a violation of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., given the clear statements and the company's policy that the plaintiff is entitled to share the company's earnings and savings only to the extent dividends were declared by the board in the board's discretion. A name or promotion violates that Act only if it is misleading or confusing to those using reasonable care. Boynton v. State Farm Mut. Auto. Ins. Co., 207 Ga. App. 756, 429 S.E.2d 304, 1993 Ga. App. LEXIS 356 (1993).

False impression not given. — Hotel franchisor's use of its name and the term "airport" for a hotel in competition with a franchisee did not violate O.C.G.A. § 10-1-372, since the designation was accurate and did not create a false impression. Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1998 U.S. App. LEXIS 8337 (11th Cir. 1998).

Joint software venture had no likelihood of confusion. — In a lawsuit between business entities over a failed joint venture to develop a multimedia e-mail software program to be marketed to a certain company, there was no showing of a likelihood of confusion as to the source of the program to support a claim under the Unfair and Deceptive Trade Practices Act, O.C.G.A. § 10-1-372(a). OnBrand Media v. Codex Consulting, Inc., 301 Ga. App. 141, 687 S.E.2d 168, 2009 Ga. App. LEXIS 1347 (2009).

Trade dress claim infringement. — Plaintiff adequately stated a claim for trade dress infringement; the plaintiff alleged that the plaintiff had a protectable trade dress in the overall shape and profile of the product and the configuration, design, and placement of the door of the plaintiff's electric digital smoker, which adequately identified the features that comprised the plaintiff's alleged trade dress. Masterbuilt Mfg. v. Bruce Foods Corp., No. 4:10-CV-35, 2011 U.S. Dist. LEXIS 4009 (M.D. Ga. Jan. 14, 2011).

Opening office near competitor. — Defendant did not engage in a deceptive trade practice when the defendant leased an office in the same building as the plaintiff, with which it competed, since the defendant used its own name and a different telephone number and there was no evidence that it attempted to pass itself as the plaintiff. Wolff v. Protege Sys., 234 Ga. App. 251, 506 S.E.2d 429.

Evidence of improper competition with former employer. — Evidence that a former employee solicited an employer's former students and clients on behalf of the employee's new company, despite promising not to do so, falsely held out as being Project Management Professional certified, falsely represented that the employer's customers were the employee's company's customers, and used nearly duplicate versions of certain course materials without the employer's consent, supported a jury's finding that the

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employee violated the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. Trotman v. Velociteach Project Mgmt., LLC, 311 Ga. App. 208, 715 S.E.2d 449, 2011 Ga. App. LEXIS 664 (2011), cert. denied, No. S11C1920, 2012 Ga. LEXIS 66 (Ga. Jan. 9, 2012).

Amended complaint alleging violation of Georgia Deceptive Trade Practices Act granted. — In an action in which an interexchange carrier asserted it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, it's amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims. ITC Deltacom Communs. v. US LEC Corp., No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

Two decades for actual confusion to result. — Claims of trademark infringement and false advertising under 15 U.S.C. § 1125, and violation of the Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372, were not barred under the doctrine of estoppel by laches, because even though the plaintiff did not take action for over two decades of the parties' coexistence using the disputed mark, the claims did not ripen until the plaintiff learned that the defendant intended to open an office inside the plaintiff's territory, at which time incidents of actual confusion began to occur. Angel Flight of Ga., Inc. v. Angel Flight Southeast, Inc., 424 F. Supp. 2d 1366, 2006 U.S. Dist. LEXIS 16422 (N.D. Ga. 2006).

Association issuing opinion on safety standards not misrepresentation. — Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a)(8), did not bar a nonprofit professional association from issuing an opinion on workplace safety standards for chemicals because the opinion did not constitute a misleading representation of fact. Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, 625 F. Supp. 2d 1310, 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. 2008).

Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a)(7), does not apply to an entity's formation and dissemination of opinions on workplace safety if the entity is not engaged in the business practices it is evaluating. Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, 625 F. Supp. 2d 1310, 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. 2008).

Association offering workplace safety opinions. — Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was inapplicable to a national trade group's suit alleging that a nonprofit professional association disparaged the association's members by forming and disseminating the association's opinion about acceptable workplace-safety exposure levels for chemicals because the association was not a consumer or engaged in trade. Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, 625 F. Supp. 2d 1310, 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. 2008).

Evidence of improper competition with former employer. — Evidence that a former employee solicited an employer's former students and clients on behalf of the employee's new company, despite promising not to do so, falsely held out as being Project Management Professional certified, falsely represented that the employer's customers were the employee's company's customers, and used nearly duplicate versions of certain course materials without the employer's consent, supported a jury's finding that the employee violated the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. Trotman v. Velociteach Project Mgmt., LLC, 311 Ga. App. 208, 715 S.E.2d 449, 2011 Ga. App. LEXIS 664 (2011), cert. denied, No. S11C1920, 2012 Ga. LEXIS 66 (Ga. Jan. 9, 2012).

Amended complaint alleging violation of Georgia Deceptive Trade Practices Act granted. — In an action

in which an interexchange carrier asserted it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, it's amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims. ITC Deltacom Communs. v. US LEC Corp., No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

Color trademark owner's infringement claim under 15 U.S.C. § 1114 was not barred by laches because the four year limitations period of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, applied and the relevant time period for purposes of laches was the date that the competitors began selling their tennis racquet overgrips that were similar in color to the owner's color mark, which was less than four years prior. Unique Sports Prods., Inc. v. Babolat VS, 403 F. Supp. 2d 1229, 2005 U.S. Dist. LEXIS 40023 (N.D. Ga. 2005).

Claims of trademark infringement and false advertising under 15 U.S.C. § 1125. — Claims of trademark infringement and false advertising under 15 U.S.C. § 1125, and violation of the Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-372, were not barred under the doctrine of estoppel by laches, because even though the plaintiff did not take action for over two decades of the parties' coexistence using the disputed mark, the claims did not ripen until the plaintiff learned that the defendant intended to open an office inside the plaintiff's territory, at which time incidents of actual confusion began to occur. Angel Flight of Ga., Inc. v. Angel Flight Southeast, Inc., 424 F. Supp. 2d 1366, 2006 U.S. Dist. LEXIS 16422 (N.D. Ga. 2006).

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54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1066 et seq., 1104 et seq. 74 Am. Jur. 2d, Trademarks and Tradenames, § 125 et seq.

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False Advertising Under Lanham Act, § 43 (a)(1)(B), 44 POF3d 1.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names and Unfair Competition, §§ 186 et seq., 196 et seq., 434 et seq.

U.L.A.

Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 2.

ALR.

Right to protection against appropriation of advertising matter or methods, 17 A.L.R. 760; 30 A.L.R. 615; 5 A.L.R. Fed. 625.

Statute or ordinance in relation to advertising as interference with interstate commerce, 57 A.L.R. 105; 115 A.L.R. 952.

Right of producer or distributor to protection against use of his containers, 60 A.L.R. 285.

Opportunity of buyer of personal property to ascertain facts as affecting claim of fraud on part of seller in misrepresenting property, 61 A.L.R. 492.

Protection of business or trading corporation against use of same or similar name by another corporation, 66 A.L.R. 948; 72 A.L.R.3d 8; 115 A.L.R. 1241.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.

Damages recoverable for wrongful registration of trademark, 26 A.L.R.2d 1184.

Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 A.L.R.3d 760.

Rights and remedies with respect to another's use of a deceptively similar advertising slogan, 2 A.L.R.3d 748.

Former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use his knowledge of customer lists acquired in earlier employment, 28 A.L.R.3d 7.

Unfair competition by direct reproduction of literary, artistic, or musical property, 40 A.L.R.3d 566.

Validity, construction, and effect of state legislation regulating or controlling "bait-

and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Validity of pyramid distribution plan, 54 A.L.R.3d 217.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 A.L.R.4th 1257.

Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade practice under state law, 49 A.L.R.4th 1240.

What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 A.L.R.4th 1192.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 A.L.R.5th 1.

Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 A.L.R.6th 511.

Judicial remedies for proceeds and funds from Ponzi schemes, 100 A.L.R.6th 281.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

Consumer Claims Arising out of Alleged Use of Child or Forced Labor, Human Trafficking, and Slavery in Production of Consumer Goods, 82 A.L.R.7th 6.

Copyright, Under Federal Copyright Act (17 USCS § 1 et seq.), in Advertising Materials, Catalogs, and Price Lists, 5 A.L.R. Fed. 625.

What Matters Not Contained in Pleadings may be Considered in Ruling on Motion to Dismiss Under Rule 12(b)(6) of Federal Rules of Civil Procedure or Motion for Judgment on Pleadings Under Rule 12(c) without Conversion to Motion for Summary Judgment — Sixth Circuit, 77 A.L.R. Fed. 3d 2.

10-1-373. Enjoining deceptive trade practices; costs and attorney's fees; relief cumulative.

(a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

(b) Costs shall be allowed to the prevailing party unless the court otherwise directs. The court, in its discretion, may award attorney's fees to the prevailing party if:

(1) The party complaining of a deceptive trade practice has brought an action which he knew to be groundless; or

(2) The party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.

(c) The relief provided in this Code section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

History.
Ga. L. 1968, p. 337, § 3.

Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Consumer. — Company's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through Fed. R. Bankr. P. 7012, was denied because nothing in the language of Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the "consumer" issue was irrelevant to standing under the UDTPA. Johnston Indus. Ala., Inc. v. Nat'l Contract Assocs. (In re Johnston Indus.), 300 B.R. 821, 2003 Bankr. LEXIS 1384 (Bankr. M.D. Ga. 2003).

Injunction is sole remedy. — Sole remedy provided under O.C.G.A. § 10-1-373 is injunctive relief. Lauria v. Ford Motor Co., 169 Ga. App. 203, 312 S.E.2d 190, 1983 Ga. App. LEXIS 3026 (1983).

Sole remedy available under O.C.G.A. § 10-1-373 was injunctive relief; however, a plaintiff had to establish a likelihood of damage to plaintiff by a deceptive trade practice of another. Moore-Davis Motors, Inc. v. Joyner, 252 Ga. App. 617, 556 S.E.2d 137, 2001 Ga. App. LEXIS 1100 (2001), cert. dismissed, No. S02C0541, 2002 Ga. LEXIS 359 (Ga. Apr. 16, 2002).

Because a marketer did not seek injunctive relief, an insurer's verbal cancellation of a written contract with the marketer to sell health, medical, and surgical insurance products did not give rise to a cause of action under Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because an injunction was the sole remedy available under O.C.G.A. § 10-1-373. Med S. Health Plans, LLC v. Life of the S. Ins. Co., No. 4:07-CV-134, 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).

In a deceptive trade case, the trial court erred in granting permanent injunctive relief at the interlocutory hearing as the defendant had no notice that the trial court intended at that hearing to consider the merits of permanent injunctive relief. McHugh Fuller Law Group, PLLC v. PruittHealth-Toccoa, LLC, 297 Ga. 94, 772 S.E.2d 660, 2015 Ga. LEXIS 297 (2015).

Proof of neither direct competition nor actual confusion is required to obtain relief under O.C.G.A. § 10-1-373. All that is required is that use of name cause confusion to others using reasonable care. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Proof of falsity is sufficient to sustain a finding of irreparable injury for purposes of a preliminary injunction. Energy Four, Inc. v. Dornier Medical Sys., 765 F. Supp. 724, 1991 U.S. Dist. LEXIS 7139 (N.D. Ga. 1991).

Proof of lost sales. — Plaintiff who can prove actual lost sales is entitled to an injunction even though the decline in the plaintiff's sales is mostly attributable to factors other than the plaintiff's competitor's allegedly false or misleading representations. Because detailed proof of individual lost sales goes to the issue of damages, it is not a prerequisite for equitable relief. Energy Four, Inc. v. Dornier Medical Sys., 765 F. Supp. 724, 1991 U.S. Dist. LEXIS 7139 (N.D. Ga. 1991).

Proof of monetary damages may not be necessary to sustain every cause of action based on the plaintiff's disparagement claim, but a showing that some customer's buying decision was adversely affected is a threshold requirement for each. Servicetrends, Inc. v. Siemens Medical Sys., 870 F. Supp. 1042, 1994 U.S. Dist. LEXIS 11383 (N.D. Ga. 1994), amended, No. 1:93-CV-299-JTC, 1994 U.S. Dist. LEXIS 15997 (N.D. Ga. June 24, 1994).

Confusingly similar names. — This part authorizes injunctions restraining use of a family name previously

appropriated by another as a trade name, where under all the circumstances, such as the other descriptive words of the trade name, the type of business carried on, the geographical area in which the trade name has acquired a meaning, and other distinguishing factors, there remains a likelihood of confusion and misunderstanding among the general public. Baker Realty Co. v. Baker, 228 Ga. 766, 187 S.E.2d 850, 1972 Ga. LEXIS 902 (1972).

Infringement of trade names. — If the right to protection of a trade name exists, the injured party may seek both injunctive relief and damages. Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308, 1985 Ga. LEXIS 849 (1985).

Chapter 11 debtor was entitled to a preliminary injunction under the Lanham Act, 11 U.S.C. § 1125(a), and O.C.G.A. §§ 10-1-373 and 10-1-451, against a competing user of its trade name "Reliable Heating and Air" because the debtor clearly demonstrated a substantial likelihood of success on the merits of its claims and demonstrated that it would suffer irreparable harm if an injunction were not issued. Reliable Air, Inc. v. Jape (In re Reliable Air, Inc.), No. 05-85627, No. 07-6352, 2007 Bankr. LEXIS 3711 (Bankr. N.D. Ga. Sept. 14, 2007).

Denial of interlocutory injunction reversed only for abuse of discretion. — The denial of an interlocutory injunction against alleged deceptive trade practices will not be reversed unless it appears that the trial court has abused the court's discretion. Baker Realty Co. v. Baker, 228 Ga. 766, 187 S.E.2d 850, 1972 Ga. LEXIS 902 (1972).

Requirement of harm. — *Unpublished decision:* O.C.G.A. § 10-1-373(a) of the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., required the plaintiff dry cleaners to allege they were likely to be damaged by a deceptive trade practice and the allegations that the defendant natural gas supplier disseminated information about future natural gas prices did not pose any future harm, nor were the dry cleaners entitled to injunctive relief for a hypothetical future harm; thus, the Deceptive Trade Practices Act claims failed. Byung Ho Cheoun v. Infinite Energy, Inc., 363 Fed. Appx. 691, 2010 U.S. App. LEXIS 1866 (11th Cir. 2010).

Punitive damages. — Trademark holder was not entitled to summary judgment regarding punitive damages under Georgia state law because O.C.G.A. § 10-1-373 applied only to causes of action for torts arising before July 1, 1987, and this issue was required to be decided only if there was an award of damages in the action for trademark infringement. ITT Corp. v. Xylem Group, LLC, 963 F. Supp. 2d 1309, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. 2013).

Attorneys' fees determined in bifurcated proceeding. — When an alleged Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370, et seq., violation is one of several claims being tried, the UDTPA contemplates a bifurcated proceeding. The statute anticipates that the fact finder will first determine the prevailing party before the trial court makes a decision as to whether an award of attorney fees is warranted. Logically, therefore, neither party would present evidence as to their attorney fees during the trial, and the issue is not required to be raised in the pretrial order. Bearoff v. Craton, 350 Ga. App. 826, 830 S.E.2d 362, 2019 Ga. App. LEXIS 384 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1066 et seq. 74 Am. Jur. 2d, Trademarks and Tradenames, § 125 et seq.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 391 et seq., 436 et seq.

U.L.A.

Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 3.

ALR.

Right to protection against

appropriation of advertising matter or methods, 17 A.L.R. 760; 30 A.L.R. 615; 5 A.L.R. Fed. 625.

Right of producer or distributor to protection against use of his containers, 60 A.L.R. 285.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.

Punitive or exemplary damages as recoverable for trademark infringement or unfair competition, 47 A.L.R.2d 1117.

Rights and remedies with respect to another's use of a deceptively similar advertising slogan, 2 A.L.R.3d 748.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 A.L.R.3d 277.

Right to private action under state consumer protection Act, 62 A.L.R.3d 169.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 A.L.R.4th 1257.

Right to private action under state consumer protection act — Equitable relief available, 115 A.L.R.5th 709.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

Consumer Claims Arising out of Alleged Use of Child or Forced Labor, Human Trafficking, and Slavery in Production of Consumer Goods, 82 A.L.R.7th 6.

Copyright, Under Federal Copyright Act (17 USCS § 1 et seq.), in Advertising Materials, Catalogs, and Price Lists, 5 A.L.R. Fed. 625.

10-1-374. Exemptions from part.

(a) This part does not apply to:

(1) Conduct in compliance with the orders or rules of or a statute administered by a federal, state, or local governmental agency;

(2) Publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast, or reproduce material without knowledge of its deceptive character; or

(3) Actions or appeals pending on March 19, 1968.

(b) Paragraphs (2) and (3) of subsection (a) of Code Section 10-1-372 do not apply to the use of a service mark, trademark, certification mark, collective mark, trade name, or other trade identification that was used and not abandoned before March 19, 1968, if the use was in good faith and is otherwise lawful except for this part.

History.
Ga. L. 1968, p. 337, § 4.

JUDICIAL DECISIONS

Unfair insurance practices not subject to Georgia's Uniform Deceptive Trade Practices Act. — Pursuant to O.C.G.A. § 10-1-374(a)(1), insurance transactions are exempt from Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq. Claims of unfair trade practices in insurance transactions are instead governed by the Georgia Insurance Code. Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 297 Ga. App. 28, 676 S.E.2d 428, 2009 Ga. App. LEXIS 350 (2009), cert.

denied, No. S09C1241, 2009 Ga. LEXIS 805 (Ga. Sept. 28, 2009).

Conduct in compliance with statute administered by state agency exempt. — Trial court erred in denying the Georgia Lottery Corporation's motion to dismiss the appellee's claim under Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq, as the appellee's UDTPA claim for injunctive relief against the Georgia Lottery Corporation was barred by sovereign immunity because the UDTPA did not expressly waive the state's sovereign immunity; did not specifically create a cause of action against the state; and exempted conduct in compliance with a statute administered by a state agency, and the Georgia Lottery Corporation was a state agency created by statute to administer the lottery. Ga. Lottery Corp. v. Patel, 353 Ga. App. 320, 836 S.E.2d 634, 2019 Ga. App. LEXIS 688 (2019).

RESEARCH REFERENCES

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 186 et seq.
U.L.A.
Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 4.
ALR.
Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 A.L.R.3d 760.

10-1-375. Uniform construction of part.

This part shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

History.
Ga. L. 1968, p. 337, § 5.

RESEARCH REFERENCES

C.J.S.
82 C.J.S., Statutes, § 346 et seq.
U.L.A.
Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 5.

PART 1A

ADMINISTRATIVE RESOLUTION

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1997, this part, enacted as Part 0.5, Code Sections 10-1-365 through 10-1-367, was redesignated as Part 1A and renumbered as Code Sections 10-1-380 through 10-1-382, and internal references were redesignated to reflect the renumbering.
Cross references.
Charitable gift annuities, T. 33, C. 58.

10-1-380. Attorney General defined.

As used in this article, the term "Attorney General" means the Attorney General or his or her designee.

History. Code 1981, § 10-1-380, enacted by Ga. L. 1997, p. 1511, § 1; Ga. L. 1998, p. 128, § 10; Ga. L. 2015, p. 1088, § 1/SB 148.

10-1-381. Entry of judgment upon final order; collection of judgment; disbursement of funds, consumer preventive education plan.

(a) The Attorney General may file in the superior court of the county in which a person under order resides, or in the county in which the violation occurred, or, if the person is a corporation, in the county in which the corporation maintains its principal place of business, a certified copy of a final order issued pursuant to this article by the Attorney General which is unappealed from or a final order of an administrative law judge issued pursuant to this article which is unappealed from or a final order of an administrative law judge issued pursuant to this article which is affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court.

(b) The Attorney General may file in the superior court of the county in which the person obligated to pay funds over to the Attorney General resides, or in the county in which the violation or alleged violation occurred, or, if the person is a corporation, in the county in which the corporation maintains its principal place of business, a certified copy of any document under which funds are due to the Attorney General based on obligations created in the administration of this article, whether obtained through official action, compromise, settlement, assurance of voluntary compliance, or otherwise, and are delinquent according to the terms of the document creating the obligation, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court.

(c) The court shall specify that any funds to be collected under the judgment shall be disbursed by the Attorney General in accordance with the terms of the original order or in accordance with the terms of the original document creating the obligation, subject to the provisions of Code Section 10-1-382. Such funds may have been designated in the original order or in the original document to be applied to consumer restitution, to reimbursement of funds from which investigative expenses were paid, to civil penalties to be disbursed into the consumer preventive education plan, to civil penalties to be disbursed into the state general fund, or any combination thereof.

(d) In original orders or original documents the Attorney General may designate that civil penalties shall be applied to the consumer

preventive education plan; in that event, such funds shall not be applied in an aggregate amount which is any greater than the amount of funds appropriated for the consumer preventive education plan. Any amount of civil penalties which exceeds the appropriation for the consumer preventive education plan shall be disbursed into the state general fund.

(e) All judgments obtained pursuant to this Code section shall be considered delinquent if unpaid 30 calendar days after the judgment is rendered.

(f) The Attorney General is authorized to establish a consumer preventive education plan.

History.
Code 1981, § 10-1-381, enacted by Ga. L. 1997, p. 1511, § 1; Ga. L. 1998, p. 128, § 10; Ga. L. 2015, p. 1088, § 1/SB 148.

10-1-382. Collection fees.

In addition to any amount owed under a judgment rendered under Code Section 10-1-381 or 10-1-397, a delinquent party shall be responsible by operation of law for a collection fee equal to 40 percent of the amount of the judgment as if such collection fee had been included as part of the judgment. The Attorney General may contract with collection attorneys to collect all or any remaining part of such amounts due under a judgment rendered under Code Section 10-1-381 or 10-1-397. All funds collected by any such collection attorneys shall be remitted to the Attorney General for disbursement.

History.
Code 1981, § 10-1-382, enacted by Ga. L. 1997, p. 1511, § 1; Ga. L. 2015, p. 1088, § 1/SB 148.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2015, the subsection (a) designation was deleted.

Part 2

Fair Business Practices Act

Cross references.
Restrictions on sale or advertising of used motor vehicles displayed or parked, § 40-2-39.1.

Law reviews.
For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B. J. 409 (1974).

For note, "Consumer Protection in Georgia: The Fair Business Practices Act of 1975," see 25 Emory L. J. 445 (1976).

For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978).

For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable?," see 22 Ga. St. B. J. 30 (1985).

JUDICIAL DECISIONS

O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 is cumulative of other laws and is not exclusive. Pendigrass v. Edmonds, 247 Ga. 508, 277 S.E.2d 247, 1981 Ga. LEXIS 766 (1981).

Claim under Fair Business Practices Act adjudicated by dismissal of federal suit. — When an accord and satisfaction agreed to between the parties was expressly limited to certain truth-in-lending claims under 15 U.S.C. § 1601 et seq. and 12 C.F.R. § 226.1 et seq. between the parties, the dismissal of the suit brought under that federal Act did not operate as an adjudication of a cause of action under the Fair Business Practices Act, since the two statutes are predicated upon different goals and remedies. Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416, 1979 Ga. App. LEXIS 1850 (1979).

"Intentionally deceiving" buyer not required. — Car dealer violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., when although the dealer had allegedly not "intentionally deceived" a buyer, the dealer had ample reason to know the dealer had misrepresented to the buyer the actual mileage of a car. When the dealer had purchased the vehicle, the dealer received an odometer disclosure statement, signed by the dealer's employee, indicating the vehicle had been driven in excess of 20,000 miles, but furnished the buyer with a statement showing the vehicle's mileage as 4,172 miles, and later informed the state that this mileage figure was inaccurate. Crown Ford v. Crawford, 221 Ga. App. 881, 473 S.E.2d 554, 1996 Ga. App. LEXIS 744 (1996).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Violation of the Truth-In-Lending Act and Regulation Z, 73 POF3d 275.

ALR.

Consumer picketing to protest products, prices, or services, 62 A.L.R.3d 227.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 A.L.R.3d 399.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 A.L.R.3d 449.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes, 72 A.L.R.4th 282.

Coverage of leases under state consumer protection statutes, 89 A.L.R.4th 854.

What constitutes Truth in Lending Act violation which "was not intentional and resulted from bona fide error not withstanding maintenance of procedures reasonably adapted to avoid any such error" within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 A.L.R. Fed. 193.

Fees Expressly Authorized by Costs of Collection Clause in Agreement Under Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692f(1), 53 A.L.R. Fed. 3d 4.

10-1-390. Short title.

This part shall be known and may be cited as the "Fair Business Practices Act of 1975."

History.

Ga. L. 1975, p. 376, § 1; Ga. L. 2015, p. 1088, § 2/SB 148.

Cross references.

Violations of requirement to place security freeze on consumer credit report, § 10-1-914.

Violation of Fair Business Practice Act for selling or holding cigarettes to which tax stamp is illegally affixed, § 48-11-23.1.

Law reviews.

For article, "Consumer Disclosure in the 1990s," see 9 Ga. St. U.L. Rev. 777 (1993).

For article, "Multiple Sources of Consumer Law and Enforcement" (Or: 'Still in Search of a Uniform Policy'), see 9 Ga. St. U.L. Rev. 881 (1993).

For review of 1996 commerce and trade legislation, see 13 Ga. St. U.L. Rev. 33 (1996).

For article, "Problems Arising Out of the Use of 'WWW.Trademark.Com': The Application of Principles of Trademark Law to Internet Domain Name Disputes," see 13 Ga. St. U.L. Rev. 455 (1997).

For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For annual survey on class actions, see 62 Mercer L. Rev. 1107 (2011).

For annual survey on administrative law, see 69 Mercer L. Rev. 15 (2017).

For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

JUDICIAL DECISIONS

Applicability to natural persons. — The 1996 amendment of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., negates any legislative intent that the act apply to business entities. It applies to natural persons. Blue Cross & Blue Shield of Ga., Inc. v. Kell, 227 Ga. App. 266, 488 S.E.2d 735, 1997 Ga. App. LEXIS 879 (1997).

Federal preemption. — Consumer's claim under Georgia's Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., because the consumer alleged that defendants, a business, a debt collector, and a creditor, violated Georgia's act through the use of unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade and commerce. Russell-Allgood v. Resurgent Capital Servs., L.P., 515 F. Supp. 2d 1307, 2007 U.S. Dist. LEXIS 41409 (N.D. Ga. 2007).

Residential mortgage transactions not covered. — Mortgagor's apparent claims under the Georgia Fair Business Practices Act (GFBPA), O.C.G.A. § 10-1-390 et seq., were dismissed because the mortgagor did not identify what the alleged misrepresentations were or the damages; the GFBPA did not apply to residential mortgage transactions that did not affect the consuming public generally. Zinn v. GMAC Mortg., No. 1:05-CV-01747-MHS, 2006 U.S. Dist. LEXIS 8202 (N.D. Ga. Feb. 21, 2006).

In a suit asserting wrongful foreclosure and other claims, the trial court properly dismissed the plaintiff's claims asserting unfair business and deceptive trade practices because those statutory acts did not apply to residential mortgage transactions. Marques v. JP Morgan Chase Bank, N.A., 370 Ga. App. 305, 896 S.E.2d 1, 2023 Ga. App. LEXIS 552 (2023).

Lanham Act not analogous. — In an action by a manufacturer against a competitor under the Lanham Act (15 U.S.C. § 1125(a)) for trade dress infringement, it was error to apply the statute of limitations in the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., is the proper analogous statute to apply for such purpose. Kason Indus. v. Component Hdwe. Group, 120 F.3d 1199, 1997 U.S. App. LEXIS 22846 (11th Cir. 1997).

Construction with Federal Arbitration Act. — Boilerplate, mandatory arbitration clause in a cable television subscription contract was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2, which preempted the

Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the contract's class action waiver clause was not unconscionable under Georgia law. Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 2008 U.S. Dist. LEXIS 19617 (N.D. Ga. 2008).

Fair Business Practices Act claim covered by arbitration clause. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the claim the buyers asserted under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was covered by the arbitration clause of the parties' agreement since the arbitration clause of the agreement was specifically included within the ambit of the Georgia Arbitration Code (GAC) by O.C.G.A. § 9-9-2(c)(8) when the parties initialed the arbitration clause as required by the GAC; because the GAC applied to the agreement's arbitration clause by reason of § 9-9-2(c)(8), the arbitration clause was not excluded from the GAC by the "consumer transactions" exception of § 9-9-2(c)(7). Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304, 2009 Ga. App. LEXIS 967 (2009).

Effect of failure to specify unfair and deceptive act. — Individual's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., counterclaim failed as the individual failed to specify the unfair and deceptive act that constituted a violation of the Act. Alexander v. A. Atlanta Autosave, Inc., 272 Ga. App. 73, 611 S.E.2d 754, 2005 Ga. App. LEXIS 220 (2005).

Relation back of amended complaint. — Creditor's claim for violation of Georgia's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., was based on the construction of the creditor's home, which the creditor attempted to set out in the creditor's original complaint. While the amended complaint was substantially more thorough, it merely asserted a new legal theory arising out of the same conduct asserted in the original complaint, and thus, the FBPA claim was not time-barred because the claim related back to the original complaint. Vanbenschoten v. Turner (In re Turner), No. 15-40525-EJC, No. 16-04004-EJC, 2017 Bankr. LEXIS 918 (Bankr. S.D. Ga. Mar. 31, 2017).

Not deceptive for association to stop water service for nonpayment. — Nothing in Georgia's Fair Business Practices Act (GFBPA), O.C.G.A. § 10-1-390 et seq., arguably implied that it was unfair or deceptive for a homeowners association or the associations' management company, after providing notice, to stop water service for admitted nonpayment (particularly when the other homeowners have to pay higher assessments as a result of the delinquencies). Harris v. Liberty Cmty. Mgmt., 702 F.3d 1298, 2012 U.S. App. LEXIS 26004 (11th Cir. 2012).

Showing required by plaintiff similar to fraud claim. — Like a claim for common-law fraud, a claim under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., requires a showing that a defendant committed a volitional act constituting an unfair or deceptive act or practice conjoined with culpable knowledge of the nature, but not necessarily the illegality, of the act. Paulk v. Thomasville Ford Lincoln Mercury, Inc., 317 Ga. App. 780, 732 S.E.2d 297, 2012 Ga. App. LEXIS 781 (2012), cert. denied, No. S13C0223, 2013 Ga. LEXIS 342 (Ga. Apr. 15, 2013).

Judgment on the pleadings in favor of auto dealership in error. — Trial court erred by granting an auto dealership judgment on the pleadings as to a buyer's consumer fraud suit because it could not be said, as a matter of law, that the buyer would not be unable to show that the reliance on representations that the minivan was undamaged and never had been in a wreck was reasonable. Raysoni v. Payless Auto Deals, LLC, 296 Ga. 156, 766 S.E.2d 24, 2014 Ga. LEXIS 906 (2014).

Trial court erred by granting summary judgment to an auto dealership on a buyer's claim for fraud against the dealership because the record created a question of fact as to whether the dealership issued a substantially inaccurate odometer state-

ment even when more than one employee either knew that the written statement was false or recklessly disregarded the possibility that it was so. Alvear v. Sandy Springs Toyota, Inc., 332 Ga. App. 798, 775 S.E.2d 172, 2015 Ga. App. LEXIS 392 (2015).

Buyer proved violations. — Trial court properly denied an auto sales company's motion for directed verdict as to the buyer's claims of fraud and violation of the fair business and odometer statutes because the company pointed to no evidence that the buyer was put on notice that the odometer reading was false or that the car did not have a valid emissions inspection at the time of the sale plus the buyer testified that the company responded that the odometer reflected the car's actual mileage. Gobran Auto Sales, Inc. v. Bell, 335 Ga. App. 873, 783 S.E.2d 389, 2016 Ga. App. LEXIS 101 (2016).

Debtors were not misled, deceived, or otherwise misled. — Trial court properly granted summary judgment to a creditor because the debtors did not allege or show that the debtors were misled, deceived, or otherwise duped by the different dates given for the assignment of the debt and even if the failure to itemize the court costs in a letter was a false statement, the debtors failed to point to specific evidence that the omission was material in order to have an actionable Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., claim. Summer v. Sec. Credit Servs., LLC, 335 Ga. App. 197, 779 S.E.2d 124, 2015 Ga. App. LEXIS 681 (2015), cert. denied, No. S16C0614, 2016 Ga. LEXIS 284 (Ga. Apr. 4, 2016).

Summary judgment. — Because pool installers failed to respond to a pool purchaser's request for admissions, pursuant to O.C.G.A. § 9-11-36(a), those admissions were deemed admitted and were sufficient to establish the purchaser's claims of fraud and conspiracy to defraud and, accordingly, summary judgment was properly granted to the purchaser on those claims; however, summary judgment to the purchaser was error on the claim that the installers violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as there was no evidence that the actions by the installers were introduced into the stream of commerce or were reasonably intended to impact on any market other than on the purchaser, and the commensurate awards of attorney fees and treble damages, pursuant to O.C.G.A. § 10-1-399(c) and (d), were vacated. Brown v. Morton, 274 Ga. App. 208, 617 S.E.2d 198, 2005 Ga. App. LEXIS 709 (2005).

Trial court erred by failing to grant a succeeding franchisee's motion for summary judgment in a fraud suit brought by car dealership consumers as the consumers failed to establish the succeeding franchisee's participation or involvement in any of the complained of transactions; thus, no unfair business violations were established, and no direct claim against a transferee was permitted under the Bulk Transfer Act, O.C.G.A. § 11-6-101 et seq. Additionally, the consumers' claims under Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq., likewise failed since the uncontroverted evidence established without question that the succeeding franchisee did not make any misrepresentations to the consumers nor participated in any of the transactions that formed the basis of the consumers' claims. Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc., 298 Ga. App. 875, 681 S.E.2d 681, 2009 Ga. App. LEXIS 821 (2009).

Trial court erred in granting summary judgment on the buyers' fraud and Georgia's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claims because the evidence was in conflict regarding the timing of the disclosure of the vehicle's accident history; thus, it could not be said that reliance on any oral representations was unreasonable and therefore inadequate to sustain a fraud or FBPA claim or that the seller did not engage in a deceptive act prohibited by the FBPA. Edel v. Southtowne Motors of Newnan II, Inc., 338 Ga. App. 376, 789 S.E.2d 224, 2016 Ga. App. LEXIS 467 (2016).

Terms of warranty not proved. — Summary judgment should have been granted to a store, pursuant to O.C.G.A. § 9-11-56(c), in an action by a dissatisfied

customer which asserted causes of action for breach of an express warranty and a violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as the customer failed to offer evidence of the terms of the warranty, which made both claims lack any foundation; the alleged warranty was based on a store employee's notation on the customer's receipt that the kitchen cabinets which the customer purchased had a "10-year warranty," but there was no indication of any further terms, so there was no enforceable warranty proven. Home Depot U.S.A., Inc. v. Miller, 268 Ga. App. 742, 603 S.E.2d 80, 2004 Ga. App. LEXIS 1014 (2004).

No violation as Fair Debt Collections Practices Act not violated. — Defendant did not violate the Fair Debt Collections Practices Act (FDCPA), 15 U.S.C. § 1692, and, therefore, did not violate the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because: (1) the defendant timely responded to the plaintiff's first dispute on August 19, 2016; (2) the plaintiff signed for the response on August 24, 2016; (3) the defendant sent the plaintiff the Notice of Foreclosure Sale on August 19, 2016; (4) the defendant caused the first publication of the Notice of Sale on September 7, 2016, after the defendant responded to the plaintiff's dispute and verified the plaintiff's debt; and (5) the FDCPA required a debt collector to validate a debt only after the debt collector's initial communication with the consumer. Hughes v. J.P. Morgan Chase (In re Hughes), No. 17-52260-LRC, No. 17-5169-LRC, 2019 Bankr. LEXIS 927 (Bankr. N.D. Ga. Mar. 28, 2019).

Measure of damages. — Award for general damages under the Fair Business Practices Act (Act), O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by an actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2 are not applicable; furthermore, claims under the Act for equitable relief, exemplary damages, treble damages, and attorney's fees are dependent on actual injury or damage resulting from a violation of the Act. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005).

Judgment was properly entered in favor of the plaintiff on the defendant's counterclaim under the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., as the defendant did not establish damages resulting from a violation of the FBPA because the defendant did not refute the trial court's finding that no evidence was presented that the defendant or the defendant's property was injured or harmed as a result of the repairs made to the defendant's home by the subcontractors; the defendant did not identify any record evidence suggesting that the value of the repairs was less than $41,355.92; and the defendant did not identify evidence of any injury to the defendant or the defendant's property that might have resulted from the existence of the plaintiff's lien. Ussery v. Goodrich Restoration, Inc., 341 Ga. App. 390, 800 S.E.2d 606, 2017 Ga. App. LEXIS 208 (2017).

Treble damages properly awarded. — When punitive damages of $500,000 was awarded in a homeowner's suit against a construction company for failing to remedy a defect in the homeowner's house, in which the homeowner was awarded $100,000 as compensatory damages, and that award was reduced, pursuant to the statutory cap in O.C.G.A. § 51-12-5.1(g), to $250.000, and, under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., treble damages could be awarded for similar conduct, the award did not exceed constitutional limitations. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d 668, 2004 Ga. App. LEXIS 2 (2004), cert. denied, No. S04C0965, 2004 Ga. LEXIS 385 (Ga. May 3, 2004).

RESEARCH REFERENCES

Am. Jur. Trials.
Defense of a Domain Name Dispute, 87 Am. Jur. Trials 75.
ALR.
Right to private action under state consumer protection act — Preconditions to action, 117 A.L.R.5th 155.

Enforceability of trial period plans (TPP) under the home affordable modification program (HAMP), 88 A.L.R. Fed. 2d 331.

10-1-391. Purpose and construction of part.

(a) The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

(b) It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

History.
Ga. L. 1975, p. 376, § 1; Ga. L. 2015, p. 1088, § 2/SB 148.
Cross references.
Certain security and other consumer transactions excluded from Commercial Code, § 11-2-102.
Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For note, "Cybersecurity on my Mind: Protecting Georgia Consumers from Data Breaches," see 51 Ga. L. Rev. 265 (2016).

JUDICIAL DECISIONS

Purpose. — Objective of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is elimination of deceptive acts and practices in "consumer marketplace." Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Liberal construction. — The Fair Business Practices Act is to be liberally construed and applied to promote its underlying purposes and policies, which are to protect consumers. Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416, 1979 Ga. App. LEXIS 1850 (1979).

Part applies to consumers market. — Legislature intended to limit scope of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to the consumer market. Its coverage is limited to activities in the conduct of consumer transactions and consumer acts or practices in trade or commerce. Larson v. Tandy Corp., 187 Ga. App. 893, 371 S.E.2d 663, 1988 Ga. App. LEXIS 1004 (1988).

Part applied to debt collection. — A debtor who was provided medical services could recover against a collection agency under the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq. A consumer transaction occurred when the debtor was provided medical services, and collecting a debt incurred by a consumer for medical services could harm the general consuming public if conducted deceptively; moreover, the trial court found that the agency violated the Fair Debt Collection Practices Act (FDCPA), under 15 U.S.C. § 1692*l*(a), a violation of the FDCPA was a violation of the Federal Trade Commission Act (FTCA), and the FBPA was to be construed consistently with interpretations of the FTCA. 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428, 2007 Ga. App. LEXIS 1222 (2007).

To be subject to the Fair Business Practices Act, the allegedly offensive activity must have taken place "in the conduct of . . . consumer acts or practices," i.e., within the context of consumer marketplace. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Any act or practice which is outside the context of the public consumer marketplace, no matter how unfair or deceptive, is not directly regulated by O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10. O'Brien v. Union Oil Co., 699 F. Supp. 1562, 1988 U.S. Dist. LEXIS 13210 (N.D. Ga. 1988).

Even if a homeowner's debt survived cancellation, a history of the debt was insufficient to prove a chain of valid written assignments from the original creditor to the assignee under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., and the Fair Business Practices Act, O.C.G.A. § 10-1-391 et seq. Arrow Fin. Servs., LLC v. Wright, 311 Ga. App. 319, 715 S.E.2d 725, 2011 Ga. App. LEXIS 676 (2011), cert. denied, No. S11C1924, 2012 Ga. LEXIS 51 (Ga. Jan. 9, 2012).

Part applied to banks. — After the plaintiff bank customers alleged the defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest-to-smallest" transaction posting policy, unqualified by time limits or other restrictions, the plaintiff stated claims under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. White v. Wachovia Bank, N.A., 563 F. Supp. 2d 1358, 2008 U.S. Dist. LEXIS 88112 (N.D. Ga. 2008).

Consumers' lack of diligence not protected. — It is not the intent of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to protect consumers from their own lack of diligence and to render every written and ostensibly final sale of a product a potential source of liability for the seller. Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440, 1987 Ga. App. LEXIS 1582 (1987).

Part inapplicable to actions based on violation of HUD regulations. — Violation of Department of Housing and Urban Development (HUD) regulations by a mortgagee would not support a private action by the mortgagor against the mortgagee under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Krell v. National Mtg. Co., 214 Ga. App. 503, 448 S.E.2d 248, 1994 Ga. App. LEXIS 964 (1994), cert. denied, No. S94C1938, 1995 Ga. LEXIS 224 (Ga. Jan. 19, 1995).

Federal Trade Commission Act standards apply. — Federal Trade Commission Act, 15 U.S.C. § 45, is expressly made the appropriate standard by which purpose and intent of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is to be effectuated, implemented, and construed. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

District court erred when the court denied a consumer's motion for default judgment on the consumer's claim that a debt collector violated Georgia's Fair Business Practices Act of 1975 (FBPA), O.C.G.A. § 10-1-390 et seq., because the

consumer's alleged debt was incurred during a consumer transaction for lawn care services, and the consumer pled facts in the consumer's complaint sufficient to establish that the collector was part of the consumer credit and debt collection industry, and further, the collector's conduct necessarily violated the FBPA when it violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692-92p, as the FBPA was to be interpreted in accordance with the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), pursuant to O.C.G.A. § 10-1-391(b), and for purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of the FDCPA should be deemed an unfair or deceptive act or practice in violation of that Act pursuant to 15 U.S.C. § 1692l(a). Gilmore v. Account Mgmt., 357 Fed. Appx. 218, 2009 U.S. App. LEXIS 27601 (11th Cir. 2009).

Consumer contract not void or voidable. — The purpose of the Fair is to protect consumers from unfair or deceptive practices in conduct of any trade or commerce, but it does not declare a consumer contract which violates it to be void or voidable so as to rescind the contract or otherwise set it aside. Little v. Paco Collection Servs., Inc., 156 Ga. App. 175, 274 S.E.2d 147, 1980 Ga. App. LEXIS 2934 (1980).

Not every breach of contract deemed violation of part. — The Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is no panacea for the congenital ills of the marketplace and does not instantly convert every alleged breach of contract into a violation. DeLoach v. Foremost Ins. Co., 147 Ga. App. 124, 248 S.E.2d 193, 1978 Ga. App. LEXIS 2807 (1978).

Unfair act or deceptive practice is prerequisite. — A prerequisite to stating a claim for relief under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is the commission of some unfair act or deceptive practice from which the Act is designed to protect the public. Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161, 407 S.E.2d 64, 1991 Ga. App. LEXIS 799 (1991).

Private transactions. — O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 does not encompass suits based upon allegedly deceptive or unfair acts or practices which occur in an essentially private transaction. Waller v. Scheer, 175 Ga. App. 1, 332 S.E.2d 293, 1985 Ga. App. LEXIS 1998 (1985); Rivergate Corp. v. McIntosh, 205 Ga. App. 189, 421 S.E.2d 737, 1992 Ga. App. LEXIS 1107 (1992), cert. denied, No. S92C1449, 1992 Ga. LEXIS 880 (Ga. Oct. 16, 1992); Chancellor v. Gateway Lincoln-Mercury, 233 Ga. App. 38, 502 S.E.2d 799, 1998 Ga. App. LEXIS 885 (1998).

Medium used and market impacted are determinative. — In analyzing whether defendant's allegedly wrongful activities are in violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to protect the public or an "isolated" incident not covered under the Act two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Businessperson and consumer in underlying transaction required. — For there to be a "consumer marketplace," the underlying transaction must involve a businessperson as well as a consumer. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Potential harm to consumer public required. — Unless it can be said that defendant's actions had or have potential harm for consumer public, the act or practice cannot be said to have "impact" on consumer marketplace, and any act or practice which is outside that context, no matter how unfair or deceptive, is not directly regulated by the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Though the plaintiff may be a "consumer" with regard to the transaction, if the deceptive or unfair act or practice had or has no potential for harm to general consuming public, the allegedly wrongful act of the defendant was not made in the

context of the consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Misrepresentation as to single parcel. — It is arguable that in order to trigger the applicability of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., misrepresentation concerning a single parcel of real property must be made either in the context of a public medium addressed to the general public or, if not made "public," be made in the context of an overall development of a larger tract of which an individual parcel is a part. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Private suit must implement part's purpose of Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. — Purpose and intent of Ga. L. 1975, p. 376, § 1 et seq. is protection of public, and a private suit under Ga. L. 1975, p. 376, § 10 may be brought only if it implements that underlying purpose and intent. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Notice under Fair Business Practices Act. — A trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser's certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesperson since that provision directly contradicted the express provisions of the Act. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779, 2008 Ga. App. LEXIS 684 (2008).

No remedy for private wrongs not affecting consumer public. — Stated intent of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is to protect public from acts and practices which are injurious to consumers, not to provide additional remedy for private wrongs which do not and could not affect consuming public generally. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Ga. L. 1975, p. 376, § 10, providing for private right of action, was enacted to give effect to intent of General Assembly that such practices be swiftly stopped and is part of the enforcement and regulatory scheme underlying public protection policy of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and as such it does not create an additional remedy for redress of the private wrongs occurring outside the context of the public consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

No deceptive act. — Claim under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., was subject to summary judgment because the disclaimers, indicating that no refunds would be given and the organization was not responsible for loss related to non-performance, were sufficiently prominent and clear, and were clearly delineated. The bidder had the opportunity to read the policy containing the no refund clause before the bidder attended the auction and the opportunity to read the buyer's agreement before the bidder signed. Wright v. Safari Club Int'l, Inc., 322 Ga. App. 486, 745 S.E.2d 730, 2013 Ga. App. LEXIS 550 (2013).

Direct-suit wrongdoer must have used channels of consumer commerce. — Legislature has evidenced a clear intent to limit scope of the Fair Business Practices Act to the consumer market, and to be subject to direct suit under the Act, an alleged offender must have done some volitional act to avail oneself of channels of consumer commerce. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement of Olympic Price Gouging Act. — The Office of Consumer Affairs has jurisdiction under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to address violations of the former Olympic Price Gouging Act, former O.C.G.A. § 43-21-16, arising out of direct transactions between "hotel operators" and consumers. 1995 Op. Att'y Gen. No. 95-32.

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1085, 1104.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 434 et seq., 445 et seq.

ALR.

Criminal liability for misappropriation of trade secret, 84 A.L.R.3d 967.

Enforceability of trial period plans (TPP) under the home affordable modification program (HAMP), 88 A.L.R. Fed. 2d 331.

10-1-392. Definitions; when intentional violation occurs.

(a) As used in this part, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Campground membership" means any arrangement under which a purchaser has the right to use, occupy, or enjoy a campground membership facility.

(3) "Campground membership facility" means any campground facility at which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased the right periodically to use the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(4) "Career consulting firm" means any person providing services to an individual in conjunction with a career search and consulting program for the individual, including, but not limited to, counseling as to the individual's career potential, counseling as to interview techniques, and the identification of prospective employers. A "career consulting firm" shall not guarantee actual job placement as one of its services. A "career consulting firm" shall not include any person who provides these services without charging a fee to applicants for those services or any employment agent or agency regulated under Chapter 10 of Title 34.

(5) "Child support enforcement" means the action, conduct, or

practice of enforcing a child support order issued by a court or other tribunal.

(6) "Consumer" means a natural person.

(7) "Consumer acts or practices" means acts or practices intended to encourage consumer transactions.

(8) "Consumer report" means any written or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity which is used or intended to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:

(A) Credit or insurance to be used primarily for personal, family, or household purposes; or

(B) Employment consideration.

(9) "Consumer reporting agency" or "agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

(10) "Consumer transactions" means the sale, purchase, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes.

(11) "Department" means the Department of Human Services.

(12) "Documentary material" means the original or a copy, whether printed, filmed, or otherwise preserved or reproduced, by whatever process, including electronic data storage and retrieval systems, of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or record wherever situate.

(13) "Examination" of documentary material means inspection, study, or copying of any such material and the taking of testimony under oath or acknowledgment with respect to any such documentary material.

(14) "File" means, when used in connection with information on any consumer, all of the information on that consumer recorded or retained by a consumer reporting agency regardless of how the information is stored.

(14.1) "Food" means articles used for food or drink for human consumption, chewing gum, and articles used for components of any such article.

(15) "Going-out-of-business sale" means any offer to sell to the public or sale to the public of goods, wares, or merchandise on the implied or direct representation that such sale is in anticipation of the termination of a business at its present location or that the sale is being held other than in the ordinary course of business and includes, without being limited to, any sale advertised either specifically or in substance to be a sale because the person is going out of business, liquidating, selling his or her entire stock or 50 percent or more of his or her stock, selling out to the bare walls, selling because the person has lost his or her lease, selling out his or her interest in the business, or selling because everything in the business must be sold or that the sale is a trustee's sale, bankruptcy sale, save us from bankruptcy sale, insolvency sale, assignee's sale, must vacate sale, quitting business sale, receiver's sale, loss of lease sale, forced out of business sale, removal sale, liquidation sale, executor's sale, administrator's sale, warehouse removal sale, branch store discontinuance sale, creditor's sale, adjustment sale, or defunct business sale.

(16) "Health spa" means an establishment which provides, as one of its primary purposes, services or facilities which are purported to assist patrons to improve their physical condition or appearance through change in weight, weight control, treatment, dieting, or exercise. The term includes an establishment designated as a "reducing salon," "health spa," "spa," "exercise gym," "health studio," "health club," or by other terms of similar import. A health spa shall not include any of the following:

(A) Any nonprofit organization;

(B) Any facility wholly owned and operated by a licensed physician or physicians at which such physician or physicians are engaged in the actual practice of medicine; or

(C) Any such establishment operated by a health care facility, hospital, intermediate care facility, or skilled nursing care facility.

(16.1) "Kosher food disclosure statement" means a statement which:

(A) Discloses to consumers practices relating to the preparation, handling, and sale of any unpackaged food, or food packaged at the premises where it is sold to consumers, if the food is represented to be kosher, kosher for Passover, or prepared or maintained under rabbinical or other kosher supervision; and

(B) Complies with the provisions of subsections (b) through (e) of Code Section 10-1-393.11.

(17) "Marine membership" means any arrangement under which a purchaser has a right to use, occupy, or enjoy a marine membership facility.

(18) "Marine membership facility" means any boat, houseboat, yacht, ship, or other floating facility upon which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased a right to use periodically, occupy, or enjoy the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(19) "Obligee" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as the payee to whom an obligor owes child support.

(20) "Obligor" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as required to make child support payments.

(21) "Office" means any place where business is transacted, where any service is supplied by any person, or where any farm is operated.

(22) "Office supplier" means any person who sells, rents, leases, or ships, or offers to sell, lease, rent, or ship, goods, services, or property to any person to be used in the operation of any office or of any farm.

(23) "Office supply transactions" means the sale, lease, rental, or shipment of, or offer to sell, lease, rent, or ship, goods, services, or property to any person to be used in the operation of any office or of any farm but shall not include transactions in which the goods, services, or property is purchased, leased, or rented by the office or farm for purposes of reselling them to other persons.

(24) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity.

(24.1) "Presealed kosher food package" means a food package which bears a kosher symbol insignia and is sealed by the manufacturer, processor, or wholesaler at premises other than the premises where the food is to be sold to the public.

(25) "Private child support collector" means an individual or nongovernmental entity that solicits and contracts directly with obligees to provide child support collection services for a fee or other compensation but shall not include attorneys licensed to practice law in this state unless such attorney is employed by a private child support collector.

(26) "Prize" means a gift, award, or other item intended to be distributed or actually distributed in a promotion.

(27) "Promotion" means any scheme or procedure for the promotion of consumer transactions whereby one or more prizes are

distributed among persons who are required to be present at the place of business or are required to participate in a seminar, sales presentation, or any other presentation, by whatever name denominated, in order to receive the prize or to determine which, if any, prize they will receive. Promotions shall not include any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote if such condition is clearly and conspicuously disclosed in the promotional advertising and literature and the receipt of the prize does not involve an element of chance. Any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote or upon the payment of money and where the receipt of that prize involves an element of chance shall be deemed to be a lottery under Code Section 16-12-20; provided, however, that nothing in this definition shall be construed to include a lottery operated by the State of Georgia or the Georgia Lottery Corporation as authorized by law; provided, further, that any deposit made in connection with an activity described by subparagraph (b)(22)(B) of Code Section 10-1-393 shall not constitute the payment of money.

(27.1) "Representation regarding kosher food" means any direct or indirect statement, whether oral or written, including but not limited to an advertisement, sign, or menu and any letter, word, sign, emblem, insignia, or mark which could reasonably lead a consumer to believe that a representation is being made that the final food product sold to the consumer is kosher, kosher for Passover, or prepared or maintained under rabbinical or other kosher supervision.

(28) "Trade" and "commerce" mean the advertising, distribution, sale, lease, or offering for distribution, sale, or lease of any goods, services, or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever situate and shall include any trade or commerce directly or indirectly affecting the people of this state.

(b) An "intentional violation" occurs when the person committing the act or practice knew that his or her conduct was in violation of this part. Maintenance of an act or practice specifically designated as unlawful in subsection (b) of Code Section 10-1-393 after the Attorney General gives notice that the act or practice is in violation of the part shall be prima-facie evidence of intentional violation. For the purposes of this subsection, the Attorney General gives notice that an act or practice is in violation of this part by the adoption of specific rules promulgated pursuant to subsection (a) of Code Section 10-1-394 and by notice in writing to the alleged violator of a violation, if such written notice may be reasonably given without substantially or materially altering the purposes of this part; provided, however, that no presumption of

intention shall arise in the case of an alleged violator who maintains a place of business within the jurisdiction of this state with sufficient assets to respond to a judgment under this part, unless such alleged violator has received written notice. The burden of showing no reasonable opportunity to give written notice shall be upon the Attorney General.

History.

Ga. L. 1975, p. 376, § 2; Ga. L. 1978, p. 2001, § 1; Ga. L. 1982, p. 1689, §§ 1, 2A, 3; Ga. L. 1984, p. 22, § 10; Ga. L. 1985, p. 938, § 1; Ga. L. 1986, p. 405, § 1; Ga. L. 1986, p. 1046, § 1; Ga. L. 1986, p. 1313, § 1; Ga. L. 1987, p. 794, § 1; Ga. L. 1987, p. 1386, § 1; Ga. L. 1988, p. 13, § 10; Ga. L. 1989, p. 560, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 2001, p. 1245, § 1; Ga. L. 2009, p. 1001, § 2/HB 189; Ga. L. 2010, p. 114, § 3/HB 1345; Ga. L. 2015, p. 1088, § 2/SB 148.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1986, the definitions in subsection (a) were arranged in alphabetical order.

Pursuant to Code Section 28-9-5, in 1989, "Going-out-of-business" was substituted for "Going out of business" in paragraph (a)(5.1) (now paragraph (a)(15)).

Pursuant to Code Section 28-9-5, in 2009, "Department of Human Services" was substituted for "Department of Human Resources" in paragraph (a)(11).

Editor's notes.

Ga. L. 2009, p. 1001, § 6/HB 189, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Ga. L. 2010, p. 114, § 1/HB 1345, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

Law reviews.

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 150 (1989).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Suit alleging fraudulent breach of employment contract did not involve "consumer transaction." Employment is not a consumer item. Larson v. Tandy Corp., 187 Ga. App. 893, 371 S.E.2d 663, 1988 Ga. App. LEXIS 1004 (1988).

Consumer acts not found. — Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim failed as the nurses' false notations in a decedent's medical records, and presumably in others' records, that a treatment was performed pursuant to a doctor's orders, were made in confidential records that were not revealed to the public; the notations had no effect on the general consuming public and could not constitute consumer acts within the meaning of O.C.G.A. § 10-1-392(a)(2.1). Henderson v. Gandy, 270 Ga. App. 827, 608 S.E.2d 248, 2004 Ga. App. LEXIS 1533 (2004), aff'd, 280 Ga. 95, 623 S.E.2d 465, 2005 Ga. LEXIS 856 (2005).

Actions not within consumer marketplace. — Allegation, that the nurses' false notations in a decedent's medical records, and presumably in others' records, that treatment was performed pursuant to a doctor's orders and was based on a medical practice's general policy, did not bring a wife's claim within the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as the actions did not occur within the public consumer marketplace. Henderson v. Gandy, 270 Ga. App. 827, 608 S.E.2d 248, 2004 Ga. App. LEXIS 1533 (2004), aff'd, 280 Ga. 95, 623 S.E.2d 465, 2005 Ga. LEXIS 856 (2005).

"Intentional violation" as contemplated by the Fair Business Practices Act is a volitional act constituting an unfair or

deceptive act or practice conjoined with culpable knowledge of the nature, but not necessarily the illegality, of the act. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820, 1979 Ga. App. LEXIS 2933 (1979).

10-1-393. Unfair or deceptive practices in consumer transactions unlawful; examples.

(a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Causing actual confusion or actual misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causing actual confusion or actual misunderstanding as to affiliation, connection, or association with or certification by another;

(4)(A) Using deceptive representations or designations of geographic origin in connection with goods or services. Without limiting the generality of the foregoing, it is specifically declared to be unlawful:

(i) For any nonlocal business to cause to be listed in any local telephone directory a local telephone number for the business if calls to the local telephone number are routinely forwarded or otherwise transferred to the nonlocal business location that is outside the calling area covered by such local telephone directory or to a toll-free number which does not have a local address and the listing fails to state clearly the principal place of business of the nonlocal business;

(ii) For any person operating a business to cause to be listed in any local telephone directory a toll-free number for the business if the listing fails to state clearly the principal place of business of such business; or

(iii) For any person to use an assumed or fictitious name in the conduct of such person's business, if the use of such name could reasonably be construed to be a misrepresentation of the geographic origin or location of such person's business.

(B) For purposes of this paragraph, the term:

(i) "Local" or "local area" means the area in which any particular telephone directory is distributed or otherwise pro-

vided free of charge to some or all telecommunications services subscribers.

(ii) "Local telephone directory" means any telecommunications services directory, directory assistance data base, or other directory listing which is distributed or otherwise provided free of charge to some or all telecommunications services subscribers in any area of this state and includes such directories distributed by telecommunications companies as well as such directories distributed by other parties.

(iii) "Local telephone number" means any telecommunications services number which is not clearly identifiable as a long-distance telecommunications services number and which has a three-number prefix typically used by the local telecommunications company for telecommunications services devices physically located within the local area.

(iv) "Nonlocal business" means any business which does not have within the local area a physical place of business providing the goods or services which are the subject of the advertisement or listing in question.

(v) "Telecommunications company" shall have the same meaning as provided in Code Section 46-5-162.

(vi) "Telecommunications services" shall have the same meaning as provided in Code Section 46-5-162.

(vii) "Telecommunications services subscriber" means a person or entity to whom telecommunications services, either residential or commercial, are provided;

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparaging goods, services, or business of another by false or misleading representation;

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply

reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Making false or misleading statements concerning the reasons for, existence of, or amounts of price reductions;

(12) Failing to comply with the provisions of Code Section 10-1-393.2 concerning health spas;

(13) Failure to comply with the following provisions concerning career consulting firms:

(A) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution which shows the date of the transaction and the name and address of the career consulting firm;

(B) The contract or an attachment thereto shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me and I understand that the services to be provided under this agreement by the seller do not include actual job placement."

The statement shall be signed by both the consumer and the authorized representative of the seller;

(C) Any advertising offering the services of a career consulting firm shall contain a statement which contains the following language: "A career consulting firm does not guarantee actual job placement as one of its services.";

(14) Failure of a hospital or long-term care facility to deliver to an inpatient who has been discharged or to his or her legal representative, not later than six business days after the date of such discharge, an itemized statement of all charges for which the patient or third-party payor is being billed;

(15) Any violation of 49 U.S.C. Sections 32702 through 32704 and any violation of regulations prescribed under 49 U.S.C. Section 32705. Notwithstanding anything in this part to the contrary, all such actions in violation of such federal statutes or regulations shall be consumer transactions and consumer acts or practices in trade or commerce;

(16) Failure to comply with the following provisions concerning promotions:

(A) For purposes of this paragraph, the term:

(i) "Conspicuously," when referring to type size, means either a larger or bolder type than the adjacent and surrounding material.

(ii) "In conjunction with and in immediate proximity to," when referring to a listing of verifiable retail value and odds for each prize, means that such value and odds must be adjacent to that particular prize with no other printed or pictorial matter between the value and odds and that listed prize.

(iii) "Notice" means a communication of the disclosures required by this paragraph to be given to a consumer that has been selected, or has purportedly been selected, to participate in a promotion. If the original notice is in writing, it shall include all of the disclosures required by this paragraph. If the original notice is oral, it shall include all of the disclosures required by this paragraph and shall be followed by a written notice to the consumer of the same disclosures. In all cases, written notice shall be received by the consumer before any agreement or other arrangement is entered into which obligates the consumer in any manner.

(iv) "Participant" means a person who is offered an opportunity to participate in a promotion.

(v) "Promoter" means the person conducting the promotion.

(vi) "Sponsor" means the person on whose behalf the promotion is conducted in order to promote or advertise the goods, services, or property of that person.

(vii) "Verifiable retail value," when referring to a prize, means:

(I) The price at which the promoter or sponsor can substantiate that a substantial number of those prizes have been sold at retail by someone other than the promoter or sponsor; or

(II) In the event that substantiation as described in subdivision (I) of this division is not readily available to the promoter or sponsor, no more than three times the amount which the promoter or sponsor has actually paid for the prize;

(A.1) Persons who are offered an opportunity to participate in a promotion must be given a notice as required by this paragraph. The written notice must be given to the participant either prior to the person's traveling to the place of business or, if no travel by the participant is necessary, prior to any seminar, sales presen-

tation, or other presentation, by whatever name denominated. Written notices may be delivered by hand, by mail, by newspaper, by periodical, or by electronic mail or any other form of electronic, digital, or internet based communication. Any offer to participate made through any other medium must be preceded by or followed by the required notice at the required time. It is the intent of this paragraph that full, clear, and meaningful disclosure shall be made to the participant in a manner such that the participant can fully study and understand the disclosure prior to deciding whether to travel to the place of participation or whether to allow a presentation to be made in the participant's home; and that this paragraph be liberally construed to effect this purpose. The notice requirements of this paragraph shall be applicable to any promotion offer made by any person in the State of Georgia or any promotion offer made to any person in the State of Georgia;

(B) The promotion must be an advertising and promotional undertaking, in good faith, solely for the purpose of advertising the goods, services, or property, real or personal, of the sponsor. The notice shall contain the name and address of the promoter and of the sponsor, as applicable. The promoter and the sponsor may be held liable for any failure to comply with the provisions of this paragraph;

(C) A promotion shall be a violation of this paragraph if a person is required to pay any money including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller or furnish any consideration for the prize, other than the consideration of traveling to the place of business or to the presentation or of allowing the presentation to be made in the participant's home, in order to receive any prize; provided, however, that the payment of any deposit made in connection with an activity described in subparagraph (B) of paragraph (22) of this subsection shall not constitute a requirement to pay any money under this subparagraph;

(D) Each notice must state the verifiable retail value of each prize which the participant has a chance of receiving. Each notice must state the odds of the participant's receiving each prize if there is an element of chance involved. The odds must be clearly identified as "odds." Odds must be stated as the total number of that particular prize which will be given and of the total number of notices. The total number of notices shall include all notices in which that prize may be given, regardless of whether it includes notices for other sponsors. If the odds of winning a particular prize would not be accurately stated on the basis of the number of notices, then the odds may be stated in another manner, but must

be clearly stated in a manner which will not deceive or mislead the participant regarding the participant's chance of receiving the prize. The verifiable retail value and odds for each prize must be stated in conjunction and in immediate proximity with each listing of the prize in each place where it appears on the written notice and must be listed in the same size type and same boldness as the prize. Odds and verifiable retail values may not be listed in any manner which requires the participant to refer from one place in the written notice to another place in the written notice to determine the odds and verifiable retail value of the particular prize. Verifiable retail values shall be stated in Arabic numerals;

(E) Upon arriving at the place of business or upon allowing the sponsor to enter the participant's home, the participant must be immediately informed which, if any, prize the participant will receive prior to any seminar, sales presentation, or other presentation; and the prize, or any voucher, certificate, or other evidence of obligation in lieu of the prize, must be given to the participant at the time the participant is so informed;

(F) No participant shall be required or invited to view, hear, or attend any sales presentation, by whatever name denominated, unless such requirement or invitation has been conspicuously disclosed to the participant in the written notice in at least ten-point boldface type;

(G) Except in relation to an activity described in subparagraph (B) of paragraph (22) of this subsection, in no event shall any prize be offered or given which will require the participant to purchase additional goods or services, including shipping fees, handling fees, or any other charge by whatever name denominated, from any person in order to make the prize conform to what it reasonably appears to be in the mailing or delivery, unless such requirement and the additional cost to the participant is clearly disclosed in each place where the prize is listed in the written notice using a statement in the same size type and boldness as the prize listed;

(H) Any limitation on eligibility of participants must be clearly disclosed in the notice;

(I) Substitutes of prizes shall not be made. In the event the represented prize is unavailable, the participant shall be presented with a certificate which the sponsor shall honor within 30 days by shipping the prize, as represented in the notice, to the participant at no cost to the participant. In the event a certificate cannot be honored within 30 days, the sponsor shall mail to the participant a valid check or money order for the verifiable retail value which was represented in the notice;

(J) In the event the participant is presented with a voucher, certificate, or other evidence of obligation as the participant's prize, or in lieu of the participant's prize, it shall be the responsibility of the sponsor to honor the voucher, certificate, or other evidence of obligation, as represented in the notice, if the person who is named as being responsible for honoring the voucher, certificate, or other evidence of obligation fails to honor it as represented in the notice;

(K) The geographic area covered by the notice must be clearly stated. If any of the prizes may be awarded to persons outside of the listed geographical area or to participants in promotions for other sponsors, these facts must be clearly stated, with a corresponding explanation that every prize may not be given away by that particular sponsor. If prizes will not be awarded or given if the winning ticket, token, number, lot, or other device used to determine winners in that particular promotion is not presented to the promoter or sponsor, this fact must be clearly disclosed;

(L) Upon request of the Attorney General, the sponsor or promoter must within ten days furnish to the Attorney General the names, addresses, and telephone numbers of persons who have received any prize;

(M) A list of all winning tickets, tokens, numbers, lots, or other devices used to determine winners in promotions involving an element of chance must be prominently posted at the place of business or distributed to all participants if the seminar, sales presentation, or other presentation is made at a place other than the place of business. A copy of such list shall be furnished to each participant who so requests;

(N) Any promotion involving an element of chance which does not conform with the provisions of this paragraph shall be considered an unlawful lottery as defined in Code Section 16-12-20. Except as provided in Code Section 16-12-35 and Article 3 of Chapter 27 of Title 50, any promotion involving an element of chance which involves the playing of a game on a computer, mechanical device, or electronic device at a place of business in this state shall be considered an unlawful lottery as defined in Code Section 16-12-20 and shall not be permitted under this chapter. Any promotion involving the playing of a no-skill game on a computer, mechanical device, or electronic device at a place of business in this state shall be considered an unlawful lottery as defined in Code Section 16-12-20. The Attorney General may prosecute persons who promote and sponsor promotions which constitute an unlawful lottery or may seek and shall receive the assistance of the prosecuting attorneys of this state in the commencement and prosecution of such persons;

(N.1) All prizes offered and awarded shall be noncash prizes only and shall not be redeemable for cash;

(O) Any person who participates in a promotion and does not receive an item which conforms with what that person, exercising ordinary diligence, reasonably believed that person should have received based upon the representations made to that person may bring the private action provided for in Code Section 10-1-399 and, if that person prevails, shall be awarded, in addition to any other recovery provided under this part, a sum which will allow that person to purchase an item at retail which reasonably conforms to the prize which that person, exercising ordinary diligence, reasonably believed that person would receive; and

(P) In addition to any other remedy provided under this part, where a contract is entered into while participating in a promotion which does not conform with this paragraph, the contract shall be voidable by the participant for ten business days following the date of the participant's receipt of the prize. In order to void the contract, the participant must notify the sponsor in writing within ten business days following the participant's receipt of the prize;

(17) Failure to furnish to the buyer of any campground membership or marine membership at the time of purchase a notice to the buyer allowing the buyer seven days to cancel the purchase. The notice shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Buyer

Please read this form completely and carefully. It contains valuable cancellation rights.

The buyer or buyers may cancel this transaction at any time prior to 5:00 P.M. of the seventh day following receipt of this notice.

This cancellation right cannot be waived in any manner by the buyer or buyers.

Any money paid by the buyer or buyers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and mail by certified mail or statutory overnight delivery, return receipt requested, by 5:00 P.M. of the seventh day following the transaction. Be sure to keep a photocopy of the signed form and your post office receipt.

_____

Seller's Name

_____

Address to which cancellation is to be mailed

_____

I (we) hereby cancel this transaction.

_____

Buyer's Signature

_____

Buyer's Signature

_____

Date

_____

Printed Name(s) of Buyer(s)

_____

Street Address

_____

City, State, ZIP Code"

(18) Failure of the seller of a campground membership or marine membership to fill in the seller's name and the address to which cancellation notices should be mailed on the form specified in paragraph (17) of this subsection;

(19) Failure of the seller of a campground membership or marine membership to cancel according to the terms specified in the form described in paragraph (17) of this subsection;

(20)(A) Representing that moneys provided to or on behalf of a debtor, as defined in Code Section 44-14-162.1 in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property and any such misrepresentation upon which is based the execution of a quitclaim deed or warranty deed by that debtor shall authorize that debtor to bring an action to reform such deed into a deed to

secure debt in addition to any other right such debtor may have to cancel the deed pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law.

(B) Advertising to assist debtors whose loan for property the debtors use as a dwelling place is in default with intent not to assist them as advertised or making false or misleading representations to such a debtor about assisting the debtor in connection with said property.

(C) Failing to comply with the following provisions in connection with the purchase of property used as a dwelling place by a debtor whose loan for said property is in default and who remains in possession of this property after said purchase:

(i) A written contract shall be employed by the buyer which shall summarize and incorporate the entire agreement between the parties, a fully completed copy of which shall be furnished to the debtor at the time of its execution. Said contract shall show the date of the transaction and the name and address of the parties; shall state, in plain and bold language, that the subject transaction is a sale; and shall indicate the amount of cash proceeds and the amount of any other financial benefits that the debtor will receive;

(ii) This contract shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me. I understand that under this agreement I am selling my house to the other undersigned party."

This statement shall be signed by the debtor and the buyer;

(iii) If a lease or rental agreement is executed in connection with said sale, it shall set forth the amount of monthly rent and shall state, in plain and bold language, that the debtor may be evicted for failure to pay said rent. Should an option to purchase be included in this lease, it shall state, in plain and bold language, the conditions that must be fulfilled in order to exercise it; and

(iv) The buyer shall furnish to the seller at the time of closing a notice to the seller allowing the seller ten days to cancel the purchase. This right to cancel shall not limit or otherwise affect the seller's right to cancel pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law. The notice shall serve as the cover sheet to the closing documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Seller

Please read this form completely and carefully. It contains valuable cancellation rights.

The seller or sellers may cancel this transaction at any time prior to 5:00 P.M. of the tenth day following receipt of this notice.

This cancellation right cannot be waived in any manner by the seller or sellers.

Any money paid to the seller or sellers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and return it to the buyer by 5:00 P.M. of the tenth day following the transaction. It is best to mail it by certified mail or statutory overnight delivery, return receipt requested, and to keep a photocopy of the signed form and your post office receipt.

_____

Buyer's name

_____

Address to which cancellation is to be returned.

_____

I (we) hereby cancel this transaction.

_____

Seller's Signature

_____

Seller's Signature

_____

Date

_____

Printed name(s) of seller(s)

_____

Street address

_____

City, State, ZIP Code"

(D) The provisions of subparagraph (C) of this paragraph shall only apply where all three of the following conditions are present:

(i) A loan on the property used as a dwelling place is in default;

(ii) The debtor transfers the title to the property by quit-claim deed, limited warranty deed, or general warranty deed; and

(iii) The debtor remains in possession of the property under a lease or as a tenant at will;

(21) Advertising a telephone number the prefix of which is 976 and which when called automatically imposes a per-call charge or cost to the consumer, other than a regular charge imposed for long-distance telephone service, unless the advertisement contains the name, address, and telephone number of the person responsible for the advertisement and unless the person's telephone number and the per-call charge is printed in type of the same size as that of the number being advertised;

(22) Representing, in connection with a vacation, holiday, or an item described by terms of similar meaning, or implying that:

(A) A person is a winner, has been selected or approved, or is in any other manner involved in a select or special group for receipt of an opportunity or prize, or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a winner or select group will receive an opportunity or prize, when in fact the enterprise is designed to make contact with prospective customers, or in which all or a substantial number of those entering such competitive enterprise receive the same prize or opportunity; or

(B) In connection with the types of representations referred to in subparagraph (A) of this paragraph, representing that a vacation, holiday, or an item described by other terms of similar meaning, is being offered, given, awarded, or otherwise distributed unless:

(i) The item represented includes all transportation, meals, and lodging;

(ii) The representation specifically describes any transportation, meals, or lodging which is not included; or

(iii) The representation discloses that a deposit is required to secure a reservation, if that is the case.

The provisions of this paragraph shall not apply where the party making the representations is in compliance with paragraph (16) of this subsection;

(23) Except in relation to an activity which is in compliance with paragraph (16) or (22) of this subsection, stating, in writing or by telephone, that a person has won, is the winner of, or will win or receive anything of value, unless the person will receive the prize without obligation;

(24)(A) Conducting a going-out-of-business sale for more than 90 days.

(B) After the 90 day time limit in subparagraph (A) of this paragraph has expired, continuing to do business in any manner contrary to any representations which were made regarding the nature of the going-out-of-business sale.

(C) The prohibitions of this paragraph shall not extend to any of the following:

(i) Sales for the estate of a decedent by the personal representative or the personal representative's agent, according to law or by the provisions of the will;

(ii) Sales of property conveyed by security deed, deed of trust, mortgage, or judgment or ordered to be sold according to the deed, mortgage, judgment, or order;

(iii) Sales of all agricultural produce and livestock arising from the labor of the seller or other labor under the seller's control on or belonging to the seller's real or personal estate and not purchased or sold for speculation;

(iv) All sales under legal process;

(v) Sales by a pawnbroker or loan company which is selling or offering for sale unredeemed pledges of chattels as provided by law; or

(vi) Sales of automobiles by an auctioneer licensed under the laws of the State of Georgia;

(25) The issuance of a check or draft by a lender in connection with a real estate transaction in violation of Code Section 44-14-13;

(26) With respect to any individual or facility providing personal care services or assisted living care:

(A) Any person or entity not duly licensed or registered as a personal care home or assisted living community formally or informally offering, advertising to, or soliciting the public for residents or referrals; or

(B) Any personal care home, as defined in subsection (a) of Code Section 31-7-12, or any assisted living community, as defined in Code Section 31-7-12.2, offering, advertising, or soliciting the public to provide services:

(i) Which are outside the scope of personal care services or assisted living care, respectively; and

(ii) For which it has not been specifically authorized.

Nothing in this subparagraph prohibits advertising by a personal care home or assisted living community for services authorized by the Department of Community Health under a waiver or variance pursuant to subsection (b) of Code Section 31-2-7.

For purposes of this paragraph, "personal care" means protective care and watchful oversight of a resident who needs a watchful environment but who does not have an illness, injury, or disability which requires chronic or convalescent care including medical and nursing services, and "assisted living care" includes services provided for in Code Section 31-7-12.2. The provisions of this paragraph shall be enforced following consultation with the Department of Community Health which shall retain primary responsibility for issues relating to licensure of any individual or facility providing personal care services;

(27) Mailing any notice, notification, or similar statement to any consumer regarding winning or receiving any prize in a promotion, and the envelope or other enclosure for the notice fails to conspicuously identify on its face that the contents of the envelope or other enclosure is a commercial solicitation and, if there is an element of chance in winning a prize, the odds of winning as "odds";

(28) Any violation of the rules and regulations promulgated by the Department of Driver Services pursuant to subsection (e) of Code Section 40-5-83 which relates to the consumer transactions and business practices of DUI Alcohol or Drug Use Risk Reduction Programs, except that the Department of Driver Services shall retain primary jurisdiction over such complaints;

(29) With respect to any consumer reporting agency:

(A) Any person who knowingly and willfully obtains information relative to a consumer from a consumer reporting agency under false pretenses shall be guilty of a misdemeanor;

(B) Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be guilty of a misdemeanor; and

(C) Each consumer reporting agency which compiles and maintains files on consumers on a nation-wide basis shall furnish to any consumer who has provided appropriate verification of his or her identity two complete consumer reports per calendar year, upon request and without charge;

(29.1) With respect to any credit card issuer:

(A) A credit card issuer who mails an unsolicited offer or solicitation to apply for a credit card and who receives by mail a completed application in response to the solicitation which lists an address that is not substantially the same as the address on the solicitation may not issue a credit card based on that application until steps have been taken to verify the applicant's valid address to the same extent required by regulations prescribed pursuant to subsection (l) of 31 U.S.C. Section 5318. Any person who violates this paragraph commits an unlawful practice within the meaning of this Code section; and

(B) Notwithstanding subparagraph (A) of this paragraph, a credit card issuer, upon receiving an application, may issue a credit card to a consumer or commercial customer with whom it already has a business relationship provided the address to which the card is mailed is a valid address based upon information in the records of the credit card issuer or its affiliates;

(30) With respect to any individual or facility providing home health services:

(A) For any person or entity not duly licensed by the Department of Community Health as a home health agency to regularly hold itself out as a home health agency; or

(B) For any person or entity not duly licensed by the Department of Community Health as a home health agency to utilize the words "home health" or "home health services" in any manner including but not limited to advertisements, brochures, or letters. Unless otherwise prohibited by law, nothing in this subparagraph shall be construed to prohibit persons or entities from using the words "home health" or "home health services" in conjunction with the words "equipment," "durable medical equipment," "pharmacy," "pharmaceutical services," "prescription medications," "infusion therapy," or "supplies" in any manner including but not limited to advertisements, brochures, or letters. An unlicensed person or entity may advertise under the category "home health services" in any advertising publication which divides its advertisements into categories, provided that:

(i) The advertisement is not placed in the category with the intent to mislead or deceive;

(ii) The use of the advertisement in the category is not part of an unfair or deceptive practice; and

(iii) The advertisement is not otherwise unfair, deceptive, or misleading.

For purposes of this paragraph, the term "home health agency" shall have the same definition as contained in Code Section 31-7-150, as now or hereafter amended. The provisions of this paragraph shall be enforced by the Attorney General;

(30.1) Failing to comply with the following provisions in connection with a contract for health care services between a physician and an insurer which offers a health benefit plan under which such physician provides health care services to enrollees:

(A) As used in this paragraph, the term:

(i) "Enrollee" means an individual who has elected to contract for or participate in a health benefit plan for that individual or for that individual and that individual's eligible dependents and includes that enrollee's eligible dependents.

(ii) "Health benefit plan" means any hospital or medical insurance policy or certificate, health care plan contract or certificate, qualified higher deductible health plan, health maintenance organization subscriber contract, any health benefit plan established pursuant to Article 1 of Chapter 18 of Title 45, or any managed care plan.

(iii) "Insurer" means a corporation or other entity which is licensed or otherwise authorized to offer a health benefit plan in this state.

(iv) "Patient" means a person who seeks or receives health care services under a health benefit plan.

(v) "Physician" means a person licensed to practice medicine under Article 2 of Chapter 34 of Title 43.

(B) Every contract between a physician and an insurer which offers a health benefit plan under which that physician provides health care services shall be in writing and shall state the obligations of the parties with respect to charges and fees for services covered under that plan when provided by that physician to enrollees under that plan. Neither the insurer which provides that plan nor the enrollee under that plan shall be liable for any amount which exceeds the obligations so established for such covered services.

(C) Neither the physician nor a representative thereof shall intentionally collect or attempt to collect from an enrollee any

obligations with respect to charges and fees for which the enrollee is not liable and neither such physician nor a representative thereof may maintain any action at law against such enrollee to collect any such obligations.

(D) The provisions of this paragraph shall not apply to the amount of any deductible or copayment which is not covered by the health benefit plan.

(E) This paragraph shall apply to only such health benefit plan contracts issued, delivered, issued for delivery, or renewed in this state on or after July 2, 2001;

(31) With respect to telemarketing sales:

(A) For any seller or telemarketer to use any part of an electronic record to attempt to induce payment or attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber. Nothing in this paragraph shall be construed to:

(i) Prohibit the seller or telemarketer from introducing, as evidence in any court proceeding to attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber, an electronic record of the entirety of such telephone conversation or series of telephone conversations; or

(ii) Expand the permissible use of an electronic record made pursuant to 16 C.F.R. Part 310.3(a)(3), the Federal Telemarketing Sales Rule.

(B) For purposes of this paragraph, the term:

(i) "Covered communication" shall have the same meaning as the term "telemarketing" in subsection (a) of Code Section 10-1-393.5.

(ii) "Electronic record" means any recording by electronic device of, in part or in its entirety, a telephone conversation or series of telephone conversations with a residential subscriber that is initiated by a seller or telemarketer in order to induce the purchase of goods, services, or property. This term shall include, without limitation, any subsequent telephone conversations in which the seller or telemarketer attempts to verify any alleged agreement in a previous conversation or previous conversations.

(iii) "Residential subscriber" means any person who has subscribed to residential phone service from a local exchange

company or the other persons living or residing with such person.

(iv) "Seller or telemarketer" means any person or entity making a covered communication to a residential subscriber for the purpose of inducing the purchase of goods, services, or property by such subscriber. This term shall include, without limitation, any agent of the seller or telemarketer, whether for purposes of conducting calls to induce the purchase, for purposes of verifying any calls to induce the purchase, or for purposes of attempting to collect on any payment under the purchase;

(32) Selling, marketing, promoting, advertising, providing, or distributing any card or other purchasing mechanism or device that is not insurance or evidence of insurance coverage and that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same or making any representation or statement that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same, when:

(A) Such card or other purchasing mechanism or device does not contain a notice expressly and prominently providing in boldface type that such discounts are not insurance; or

(B) Such discounts or access to such discounts are not specifically authorized under a separate contract with a provider of health care goods or services to which such discounts are purported to be applicable;

(33)(A) For any person, firm, partnership, association, or corporation to issue a gift certificate, store gift card, or general use gift card without:

(i) Including the terms of the gift certificate, store gift card, or general use gift card in the packaging which accompanies the certificate or card at the time of purchase, as well as making such terms available upon request; and

(ii) Conspicuously printing the expiration date, if applicable, on the certificate or card and conspicuously printing the amount of any dormancy or nonuse fees on:

(I) The certificate or card; or

(II) A sticker affixed to the certificate or card.

A gift certificate, store gift card, or general use gift card shall be valid in accordance with its terms in exchange for merchandise or services.

(B) As used in this paragraph, the term:

(i) "General use gift card" means a plastic card or other electronic payment device which is usable at multiple, unaffiliated merchants or service providers; is issued in an amount which amount may or may not be, at the option of the issuer, increased in value or reloaded if requested by the holder; is purchased or loaded on a prepaid basis by a consumer; and is honored upon presentation by merchants for goods or services.

(ii) "Gift certificate" means a written promise that is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and cannot be increased in value on the face thereof; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo.

(iii) "Store gift card" means a plastic card or other electronic payment device which is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and may or may not be increased in value or reloaded; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo;

(34) For any person, firm, partnership, business, association, or corporation to willfully and knowingly accept or use an individual taxpayer identification number issued by the Internal Revenue Service for fraudulent purposes and in violation of federal law; and

(35) Failure to comply with the provisions of Code Section 10-6A-9 or 10-6A-10 regarding brokerage engagements and options to enter into brokerage engagements.

(c) A seller may not by contract, agreement, or otherwise limit the operation of this part notwithstanding any other provision of law.

(d)(1) Notwithstanding any other provision of the law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive acts or practices shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the Attorney General or the Attorney General's employees.

(2) Nothing contained in this subsection shall be construed:

(A) To prevent the Attorney General from disclosing the complainant's identity if the Attorney General believes that disclosure will aid in resolution of the complaint;

(B) To prohibit any valid discovery under the relevant discovery rules; or

(C) To prohibit the lawful subpoena of such information.

History.

Ga. L. 1975, p. 376, § 3; Ga. L. 1978, p. 2001, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 1982, p. 1689, §§ 2, 4; Ga. L. 1983, p. 1298, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 463, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1985, p. 938, § 2; Ga. L. 1985, p. 1183, § 1; Ga. L. 1986, p. 405, § 2; Ga. L. 1986, p. 1313, § 2; Ga. L. 1987, p. 794, § 2; Ga. L. 1987, p. 1386, § 2; Ga. L. 1988, p. 13, § 10; Ga. L. 1988, p. 399, §§ 1-3; Ga. L. 1988, p. 983, § 1; Ga. L. 1988, p. 1657, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 560, § 3; Ga. L. 1989, p. 1606, § 1; Ga. L. 1990, p. 1653, § 2; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 1129, § 1; Ga. L. 1992, p. 2139, § 1; Ga. L. 1993, p. 91, § 10; Ga. L. 1993, p. 1076, §§ 1, 2; Ga. L. 1993, p. 1676, § 1; Ga. L. 1995, p. 729, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1997, p. 1507, § 1; Ga. L. 1998, p. 643, § 1; Ga. L. 2000, p. 557, § 1; Ga. L. 2000, p. 1181, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1170, § 2; Ga. L. 2004, p. 149, § 1; Ga. L. 2005, p. 334, § 4-2/HB 501; Ga. L. 2005, p. 1183, § 2/SB 13; Ga. L. 2009, p. 86, § 18/HB 141; Ga. L. 2009, p. 453, §§ 1-4, 1-11/HB 228; Ga. L. 2010, p. 302, § 1/SB 368; Ga. L. 2011, p. 227, § 2/SB 178; Ga. L. 2011, p. 705, § 4-6/HB 214; Ga. L. 2012, p. 1136, § 1/SB 431; Ga. L. 2014, p. 866, § 10/SB 340; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2023, p. 255, § 1/SB 90, effective January 1, 2024; Ga. L. 2024, p. 1052, § 2(13)/SB 448, effective July 1, 2024.

Amendments.

The 2023 amendment, effective January 1, 2024, deleted "and" at the end of paragraph (b)(33), substituted "; and" for a period at the end of paragraph (b)(34), and added paragraph (b)(35).

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in subdivision (b)(16)(A)(vii)(II) and capitalization in subparagraph (b)(16)(A.1).

Cross references.

Criminal penalties for unauthorized reproduction and sale of recorded materials, § 16-8-60.

Criminal penalty for deceptive business practices, § 16-9-50.

Fraud generally, § 23-2-50 et seq.

Misbranding of food generally, § 26-2-28.

Labeling of meat, §§ 26-2-107, 26-2-111, 26-2-112.

Misbranding of drugs, § 26-3-8.

Misbranding and false advertisement of cosmetics, § 26-3-12 et seq.

Time-share program sales, deceptive practices, § 44-3-185 et seq.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1986, paragraphs (16), (17), and (18) of subsection (b), as enacted by Ga. L. 1986, p. 405, § 2, were redesignated as paragraphs (17), (18), and (19) of subsection (b), respectively.

Pursuant to Code Section 28-9-5, in 1986, in subsection (b), punctuation was revised, "or" was deleted at the end of paragraph (15), and the references in paragraphs (18) and (19) were adjusted accordingly.

Pursuant to Code Section 28-9-5, in 1988, paragraphs (21) and (22) of subsection (b) enacted by Ga. L. 1988, p. 1657 were redesignated as paragraphs (22) and (23) of subsection (b), respectively.

Pursuant to Code Section 28-9-5, in 1988, semi-colons were substituted for periods at the end of paragraphs (b)(20) and (b)(21).

Pursuant to Code Section 28-9-5, in 1989, "spas;" was substituted for "spas." in

paragraph (b)(12) and "going-out-of-business" was substituted for "going out of business" in subparagraphs (b)(24)(A) and (b)(24)(B).

Pursuant to Code Section 28-9-5, in 2004, "Code section; and" was substituted for "Act." in subparagraph (b)(29.1)(A).

Pursuant to Code Section 28-9-5, in 2009, a semicolon was substituted for a period at the end of subparagraph (b)(30.1)(E) and "or" was deleted at the end of paragraph (b)(32).

Editor's notes.

Ga. L. 1985, p. 938 contained a § 2 which amended this Code section and a second § 2, not codified by the General Assembly, which contained a standard repeal provision.

Ga. L. 1989, p. 14, § 10 which amended paragraph (b)(12) was superseded by Ga. L. 1989, p. 1606, § 1.

Ga. L. 1990, p. 1653, § 3, not codified by the General Assembly, provides that the Act shall not be construed to repeal or modify any provisions of law relative to the utterance or delivery of a worthless check and the provisions of the Act shall be cumulative of such other provisions.

Ga. L. 2001, p. 1170, § 1, not codified by the General Assembly, provides: "The General Assembly finds that managed health care has benefited consumers by negotiating contracts with physicians which prohibit such physicians from billing consumers for fees above and beyond the amount paid by the managed care plan. In order to ensure that the consumers of this state continue to receive such benefits, it is imperative that physicians adhere to their contractual obligations to charge only those fees contractually agreed to and not attempt to pass additional or hidden costs along to consumers. The purpose of Section 2 of this Act is to ensure that consumers are not charged fees above and beyond those already contracted for between their physician and their health benefit plans."

Ga. L. 2004, p. 149, § 1, which amended this Code section, did not specify which subsection was amended but actually amended subsection (b).

Ga. L. 2005, p. 1183, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Gift Card Integrity Act of 2005.'"

Ga. L. 2005, p. 1183, § 3, not codified by the General Assembly, provides that the second 2005 amendment applies to any gift certificates, store gift cards, or general use gift cards sold on or after October 1, 2005.

Ga. L. 2012, p. 1136, § 4/SB 431, not codified by the General Assembly, provides, in part, that this Code section shall apply to conduct that occurs on and after May 2, 2012. It is not the intention of this Act to abate any prosecution undertaken for conduct occurring under the law in effect prior to such date, and any offense committed before May 2, 2012, shall be prosecuted and punished under the statutes in effect at the time the offense was committed.

Law reviews.

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 150 (1989).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 265 (1992).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 29 (1997).

For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U.L. Rev. 9 (1998).

For note on the 2001 amendment to this Code section, see 18 Ga. St. U.L. Rev. 241 (2001).

For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For comment, "Unwrapping Escheat: Unclaimed Property Laws and Gift Cards," see 60 Emory L. J. 971 (2011).

For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Automobiles
Medical Professionals
Real Property
Trademarks, Names

General Consideration

Purpose. — Objective of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is elimination of deceptive acts and practices in "consumer marketplace". For there to be a "consumer marketplace," the underlying transaction must involve a businessperson as well as a consumer. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Test as to whether activities covered. — In analyzing whether defendant's allegedly wrongful activities are in violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to protect the public or an "isolated" incident not covered under this Act, two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Transaction must be part of ongoing, public business. — This section requires that alleged wrongful act in "consumer transaction" occur in context of ongoing business in which defendant holds oneself out to the public. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

No impact on general consuming public and beyond reach of FBPA. — Although the department store deviated from the store's credit fraud policy by not promptly investigating the plaintiff's claim after the plaintiff sent the information requesting the store to correct the plaintiff's account, there was no evidence of other instances in which the store failed to follow the store's policy, and any deviation this time was viewed as a isolated event that had no impact on the general consuming public and is therefore beyond the reach of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Davis v. Rich's Dep't Stores, Inc., 248 Ga. App. 116, 545 S.E.2d 661, 2001 Ga. App. LEXIS 193 (2001).

Trial court correctly determined that the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., did not apply to the matter since the case involved an apartment complex's alleged denial of reasonable accommodations that were specific to the tenant alone, and it did not involve any promises or representations that were held out to the general consumer public at large. Leslie v. 1125 Hammond LP, 368 Ga. App. 793, 889 S.E.2d 148, 2023 Ga. App. LEXIS 255 (2023).

Activity must be in context of consumer marketplace. — To be subject to direct suit under the Fair Business Practices Act, an alleged offender must perform some volitional act to avail the offender of the channels of consumer commerce and the allegedly offensive activity must take place within the context of the consumer marketplace. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Any act or practice which is outside the context of the public consumer marketplace, no matter how unfair or deceptive, is not directly regulated by O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10. O'Brien v. Union Oil Co., 699 F. Supp. 1562, 1988 U.S. Dist. LEXIS 13210 (N.D. Ga. 1988).

Since a bank's commercial checking accounts were not offered to consumers, the bank's practices concerning those ac-

General Consideration (Cont'd)

counts were outside the consumer market place and the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., did not apply to an action against the bank based on misrepresentation of the "standard, quality, or grade" of the bank's services. Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899, 1995 Ga. App. LEXIS 587 (1995).

Claim against a private school after a student was dismissed from the school due to misbehavior was properly denied since the school's alleged acts and conduct did not arise in the context of the consumer marketplace. Pryor v. CCEC, Inc., 257 Ga. App. 450, 571 S.E.2d 454, 2002 Ga. App. LEXIS 1178 (2002).

Bankruptcy trustee failed to show that a loan servicer engaged in unfair and deceptive practices since the loan was secured by real property which the debtor held as an investment property and, thus, the serviced debt did not arise from a consumer transaction. Gordon v. Bank of Am., N.A. (In re Merriweather), No. 13-53022-BEM, No. 15-5096-BEM, 2015 Bankr. LEXIS 3664 (Bankr. N.D. Ga. Aug. 28, 2015).

Consumer sufficiently alleged that a lender's deceptive practice of collecting on debt which was paid reasonably had potential to harm the general consuming public. Goodwyn v. Capital One, N.A., No., 127 F. Supp. 3d 1367, 2015 U.S. Dist. LEXIS 114786 (M.D. Ga. 2015).

Plaintiff's allegation that the defendant violated the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., by engaging in a pattern of unfair and deceptive acts and practices both in the conduct of consumer transactions and in trade and commerce did not state a claim under the FBPA because the plaintiff did not allege any deceptive acts or practices in the conduct of consumer transactions such as passing off goods or services as those of another or causing confusion as to the source of goods or services. Vanbenschoten v. Turner (In re Turner), No. 15-40525-EJC, No. 16-04004-EJC, 2017 Bankr. LEXIS 918 (Bankr. S.D. Ga. Mar. 31, 2017).

No complaint when goods and services not provided at all. — Trial court did not err in ruling that the complaint failed to state a claim under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-393, because the plaintiff alleged that the goods and services were not provided at all — not that the defendant advertised the defendant's donation of a safari without any intention of performing. Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd., 330 Ga. App. 508, 767 S.E.2d 513, 2014 Ga. App. LEXIS 842 (2014).

Nonconsumers do not have a cause of action under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., when nonconsumers allege an injury due to a competitor's misrepresentations to the general public. Friedlander v. PDK Labs, Inc., 266 Ga. 180, 465 S.E.2d 670, 1996 Ga. LEXIS 41 (1996).

Action under § 40-1-5. — Court properly granted the plaintiff's motion for partial summary judgment on plaintiff's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim because the undisputed facts established a violation of O.C.G.A. § 40-1-5 and, thus, a per se violation of the FBPA. Neal Pope, Inc. v. Garlington, 245 Ga. App. 49, 537 S.E.2d 179, 2000 Ga. App. LEXIS 904 (2000), cert. denied, No. S00C1893, 2001 Ga. LEXIS 7 (Ga. Jan. 5, 2001).

Part applied to banks. — After the plaintiff bank customers alleged the defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest-to-smallest" transaction posting policy, unqualified by time limits or other restrictions, the plaintiffs stated claims under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. White v. Wachovia Bank, N.A., 563 F. Supp. 2d 1358, 2008 U.S. Dist. LEXIS 88112 (N.D. Ga. 2008).

Unpublished decision: Borrower failed on summary judgment to state a claim against two banks under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the borrower

presented no evidence that the application of funds to an escrow account was improper, that any unfair business practice existed, or that any damages were suffered under O.C.G.A. § 10-1-393 of the Act. Cornelius v. Home Comings Fin. Network, Inc., 293 Fed. Appx. 723, 2008 U.S. App. LEXIS 19745 (11th Cir. 2008).

Private transactions not covered. — Even though a single instance of an unfair or deceptive act can be a sufficient basis for a claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., the Act does not apply to suits based upon deceptive practices which occur in transactions that are essentially private. Borden v. Pope Jeep-Eagle, Inc., 200 Ga. App. 176, 407 S.E.2d 128, 1991 Ga. App. LEXIS 793 (1991).

Fraudulent failure to furnish an ample supply of yarn was a matter strictly between private business parties, who are nonconsumers, and therefore does not give rise to the application of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc., 168 Ga. App. 932, 311 S.E.2d 216, 1983 Ga. App. LEXIS 2958 (1983); Medley v. Boomershine Pontiac-GMC Truck, Inc., 214 Ga. App. 795, 449 S.E.2d 128, 1994 Ga. App. LEXIS 1062 (1994), cert. denied, No. S95C0214, 1995 Ga. LEXIS 292 (Ga. Feb. 17, 1995).

Genuine issues of fact existed as to terms of contract. — College trust did not establish entitlement to summary judgment on the borrower's counterclaim under Georgia's Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., since a genuine issue of material fact existed as to the terms of the contract. Zahler v. Nat'l Collegiate Student Loan Trust 2006-1, 355 Ga. App. 458, 844 S.E.2d 530, 2020 Ga. App. LEXIS 331 (2020).

Contract provision that it is "absolutely noncancellable". — If the contract on the contract's face fails to state clearly "the cancellation and refund policies of seller" and states that the contract "is absolutely noncancellable," the contract is violative of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., in attempting to limit operation of the statute. Little v. Paco Collection Servs., Inc., 156 Ga. App. 175, 274 S.E.2d 147, 1980 Ga. App. LEXIS 2934 (1980).

Failure of consumer to exercise requisite diligence. — There was no violation of subsection (c) of O.C.G.A. § 10-1-393 in precluding the introduction of testimony as to an alleged oral misrepresentation because the proffered evidence was inadmissible to vary the terms of the written contract, when the nonviability of the purchaser's claim was not the result of defendant's contractual limitation of the applicability of O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 but was the result of the purchaser's own failure to exercise the requisite diligence to read the contract that the purchaser signed. Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440, 1987 Ga. App. LEXIS 1582 (1987).

Consumer's remedies in satellite transaction. — Motion to compel arbitration of a putative class action was improperly denied under 9 U.S.C. §§ 2 and 16 because it was not unconscionable to require arbitration of the validity of an early cancellation fee charged by a satellite television provider in that the subscriber had the ability to recoup fees and expenses under the Georgia Fair Business Practices Act under O.C.G.A. §§ 10-1-393 and 10-1-399 if the subscriber prevailed individually. Cappuccitti v. DirecTV, Inc., 623 F.3d 1118, 2010 U.S. App. LEXIS 21348 (11th Cir. 2010).

Incentive fund cards. — Licensors of an incentive funds card that was marketed and sold by a charter jet company were not liable to a purchaser who bought an incentive funds card from the jet company under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the licensors made no statements verbally or in writing to the purchaser prior to the purchaser's signing the incentive card purchase agreement. Williams v. Jet One Jets, Inc., 755 F. Supp. 2d 1281, 2010 U.S. Dist. LEXIS 134810 (N.D. Ga. 2010).

Damages. — Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., authorized punitive damages in addition

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to mandating treble damages for intentional violations. Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774, 556 S.E.2d 468, 2001 Ga. App. LEXIS 1284 (2001).

Statute of limitations. — *Unpublished decision:* Because plaintiff dry cleaners sued defendant natural gas supplier 33 months after the alleged misdeeds, and it was not alleged that any Georgia Public Service Commission proceedings had been initiated that would have postponed the accrual date, the O.C.G.A. § 10-1-393(a) claim was time-barred by O.C.G.A. § 10-1-401(a)'s two-year limitations period. Byung Ho Cheoun v. Infinite Energy, Inc., 363 Fed. Appx. 691, 2010 U.S. App. LEXIS 1866 (11th Cir. 2010).

Appeal of order compelling investigative demand. — Corporation's direct appeal of a trial court order compelling the corporation to comply with an investigative demand issued by the Governor's Office of Consumer Affairs was dismissed because under binding Georgia Supreme Court authority, an investigative demand constitutes the decision of an administrative agency for the purpose of the discretionary appeal provisions of O.C.G.A. § 5-6-35(a)(1) and, consequently, the corporation was required to apply for a discretionary appeal. Financial Education Services, Inc. v. State of Ga., 336 Ga. App. 606, 785 S.E.2d 544, 2016 Ga. App. LEXIS 104 (2016), cert. denied, 580 U.S. 1173, 137 S. Ct. 1234, 197 L. Ed. 2d 465, 2017 U.S. LEXIS 1717 (2017).

Automobiles

Sale between two non-businesspeople. — Sale of motor vehicle in the course of private negotiations between two individual parties, neither of whom was a businessperson, did not constitute a transaction "in the conduct of any trade or commerce." Reilly v. Mosley, 165 Ga. App. 479, 301 S.E.2d 649, 1983 Ga. App. LEXIS 1917 (1983).

Transaction between auto dealer and finance company. — After a dealer paid a discount to a finance company to take the assignment of an auto buyer's retail installment sales contract, the transaction was essentially private and outside the protection of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Chancellor v. Gateway Lincoln-Mercury, 233 Ga. App. 38, 502 S.E.2d 799, 1998 Ga. App. LEXIS 885 (1998).

Seller's claims as to condition of car. — Trial court properly granted summary judgment as to a car buyer's claims based on the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., after the seller's claims as to the condition of the car, which were relied on by the buyer to support the buyer's claim of fraud, were mere sales puffing. Hill v. Jay Pontiac, Inc., 191 Ga. App. 258, 381 S.E.2d 417, 1989 Ga. App. LEXIS 560 (1989).

Misrepresentation by car dealer's salesperson that used vehicle was a demonstrator was within the scope of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Catrett v. Landmark Dodge, Inc., 253 Ga. App. 639, 560 S.E.2d 101, 2002 Ga. App. LEXIS 168 (2002).

Pre-sale notice to seller of defects in title to merchandise. — It would constitute an unfair business practice if, before merchandise is sold in the consumer marketplace, a seller is placed on reasonable notice that the seller's claim of title to the merchandise could be legally defective and thereafter in blatant disregard of the rights of innocent purchasers fails to take reasonable measures to ascertain the true state of facts concerning title before consummating the sale. Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467, 1990 Ga. App. LEXIS 253 (1990).

Seller's knowledge of discrepancy in vehicle identification number. — It was not error, in an action alleging violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to refuse to grant summary judgment in favor of the defendant automobile seller, since the truck sold to the plaintiff buyer was confiscated as a stolen vehicle, and the evidence was that the seller's agent was timely notified of a model number discrepancy on the vehicle identification number plate. Regency Nissan, Inc. v.

Taylor, 194 Ga. App. 645, 391 S.E.2d 467, 1990 Ga. App. LEXIS 253 (1990).

Failure of manufacturer to notice defective door and the manufacturer's refusal to give the buyers, upon the buyer's refusal to allow the manufacturer to attempt to repair the vehicle, a new car, are not by themselves an unfair or deceptive practice affecting the consuming public. DeLoach v. General Motors, 187 Ga. App. 159, 369 S.E.2d 484, 1988 Ga. App. LEXIS 653 (1988).

Lease of "used demo" automobile. — Automobile leased by plaintiffs from defendant dealer as a "used demo" was a "new" car, not a "used" car, and the fact that the car was previously titled to the dealer's son-in-law did not create an issue of fraud in violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Toirkens v. Willett Toyota, Inc., 192 Ga. App. 109, 384 S.E.2d 218, 1989 Ga. App. LEXIS 959 (1989).

Fraud involving representing vehicle as more valuable model, which vehicle was not. — Trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser's certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesperson since that provision directly contradicted the express provisions of the Act. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779, 2008 Ga. App. LEXIS 684 (2008).

Advertisement offering option between lease and financed sale. — Automobile dealer's advertisement offering either an annual finance rate of 7.7 percent or a 48-month lease was not misleading or deceptive, when, although the customer may have misunderstood the distinction between the various offers made in the advertisement, the consumer admitted the consumer understood the difference between a financed sale and a lease. Blum v. GMAC, 185 Ga. App. 714, 365 S.E.2d 474, 1988 Ga. App. LEXIS 243 (1988).

Negligent repair of individual vehicle. — Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., does not apply to negligent repair of individual vehicle when the damaged vehicle's owner brings the vehicle to a body shop and enters into a repair agreement and the body shop represents only that the vehicle has been repaired when the vehicle has not. Burdakin v. Hub Motor Co., 183 Ga. App. 90, 357 S.E.2d 839, 1987 Ga. App. LEXIS 1896 (1987).

Dealership's role in odometer statement. — Trial court erred by granting summary judgment to an auto dealership on a buyer's claim for fraud against the dealership because the record created a question of fact as to whether the dealership issued a substantially inaccurate odometer statement even when more than one employee either knew that the written statement was false or recklessly disregarded the possibility that it was so. Alvear v. Sandy Springs Toyota, Inc., 332 Ga. App. 798, 775 S.E.2d 172, 2015 Ga. App. LEXIS 392 (2015).

Arbitration agreement enforceable. — Car buyer's claim against a lender's assignee under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., could be compelled to arbitration pursuant to an agreement signed by the buyer. O.C.G.A. § 10-1-393(c) was preempted by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., to the extent it conflicted with the FAA. Wells Fargo Auto Fin., Inc. v. Wright, 304 Ga. App. 621, 698 S.E.2d 17, 2010 Ga. App. LEXIS 589 (2010).

Medical Professionals

Application to sperm bank. — Parents' Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim against a sperm bank was erroneously dismissed; the parents' claims that the sperm bank

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made misrepresentations about the quality of their product (sperm) and services (screening process) to the public could have resulted in injuries other than the life of the child (for which no damages were recoverable). At a minimum, the parents may have paid more for the sperm than the sperm was worth, and injunctive relief and punitive damages were potentially available. Norman v. Xytex Corp., 310 Ga. 127, 848 S.E.2d 835, 2020 Ga. LEXIS 662 (2020).

FBPA not a substitute for medical malpractice action. — Touchstone for a legally sufficient Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services aside from medical competence is implicated, or aside from medical malpractice based on the adequacy of staffing, training, equipment or support personnel, so medical malpractice claims recast as FBPA claims cannot form the basis for an FBPA violation. Henderson v. Gandy, 280 Ga. 95, 623 S.E.2d 465, 2005 Ga. LEXIS 856 (2005).

Claim not related to business of medical practice. — When a widow sued a physician for allowing nurses to manage the care of the deceased husband's pressure sore, and for allegedly falsifying medical records to reflect that the care was done pursuant to the physician's orders, when the care was not, this did not state a claim involving the entrepreneurial, commercial, or business aspects of the physician's practice, and did not state a claim within the contemplation of the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq. Henderson v. Gandy, 280 Ga. 95, 623 S.E.2d 465, 2005 Ga. LEXIS 856 (2005).

Application to medical profession. — It was the Georgia legislature's stated intent that the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., be interpreted and construed consistently with interpretations given by the Federal Trade Commission in federal court pursuant to 15 U.S.C. § 45(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., pursuant to O.C.G.A. § 10-1-391(b), and federal courts had determined that the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., applied to the commercial aspects of the medical profession. Henderson v. Gandy, 280 Ga. 95, 623 S.E.2d 465, 2005 Ga. LEXIS 856 (2005).

Application to dentists. — Patient's suit against a dentist, alleging the dentist failed to disclose treatment alternatives and associated risks prior to commencing dental work, did not establish a violation of Georgia's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., as there was no evidence showing that this omission resulted in the patient's damages as required by the FBPA. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209, 2009 Ga. App. LEXIS 532 (2009), cert. denied, No. S09C1492, 2009 Ga. LEXIS 613 (Ga. Oct. 5, 2009).

Physician's statements about nurse-midwife. — Physician's allegedly disparaging statements about a nurse-midwife, which were made during a conversation between the two at a hospital nurses' station, took place outside the context of consumer commerce and therefore did not fall within the regulatory authority of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563, 1989 U.S. Dist. LEXIS 2721 (M.D. Ga. 1989).

Parole evidence could not contradict written agreement in patient's claim. — Patient's claim that a dentist violated Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., was based on an allegation that a member of the dentist's staff told the patient that a loan for dental work would be at a lower interest rate than that stated in the financing authorization. The claim failed as such parol evidence was inadmissible to contradict the clear written provisions of the authorization, which the patient signed, and the promissory note referenced therein. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209, 2009 Ga. App. LEXIS 532 (2009), cert. denied, No. S09C1492, 2009 Ga. LEXIS 613 (Ga. Oct. 5, 2009).

Real Property

Misrepresentation by homeowner selling own house is not likely recurring "consumer" threat and, therefore, has no potential "impact" on general consuming public. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Any misrepresentation made by seller in context of selling the seller's own home is not made "in the conduct of any trade or business" but rather in course or private negotiations between two individual parties who have countervailing rights and liabilities established under common-law principles of contract, tort, and property law. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Misrepresentation by mortgage lender. — Homeowner's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim against the homeowner's mortgage lender arising out of foreclosure of the homeowner's home failed because the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000 et seq., prohibited mortgage businesses from, among other things, pursuing a course of misrepresentation by use of fraudulent or unauthorized documents or other means, O.C.G.A. § 7-1-1013(1), foreclosing a claim under the FBPA, pursuant to O.C.G.A. § 10-1-396. Stewart v. SunTrust Mortg., Inc., 331 Ga. App. 635, 770 S.E.2d 892, 2015 Ga. App. LEXIS 216 (2015).

Misrepresentation by real estate broker. — Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., incorporates the "reliance" element of the common law tort of misrepresentation into the causation element of an FBPA claim; thus, a claim by purchasers against a real estate broker and sales associates for a violation of FBPA was barred for failure to show reasonable or justifiable reliance on the broker's representations. Allen v. Remax N. Atlanta, Inc., 213 Ga. App. 644, 445 S.E.2d 774, 1994 Ga. App. LEXIS 693 (1994), cert. denied, No. S94C1590, 1994 Ga. LEXIS 1113 (Ga. Oct. 17, 1994).

Residential mortgage transactions not covered. — In a suit asserting wrongful foreclosure and other claims, the trial court properly dismissed the plaintiff's claims asserting unfair business and deceptive trade practices because those statutory acts did not apply to residential mortgage transactions. Marques v. JP Morgan Chase Bank, N.A., 370 Ga. App. 305, 896 S.E.2d 1, 2023 Ga. App. LEXIS 552 (2023).

Sale of farm private transaction. — Trial court properly concluded that the defendants were entitled to summary judgment on the plaintiff's claim for a violation of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the sale of the farm to the plaintiffs, and any representations preceding the sale, involved a private transaction which would not affect the consuming public generally. Condon v. Kunse, 208 Ga. App. 856, 432 S.E.2d 266, 1993 Ga. App. LEXIS 703 (1993).

Single misrepresentation by business in isolated sale. — Single oral misrepresentation made by real estate business in context of isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Misrepresentation made to public or in connection with larger development. — It is arguable that in order to trigger the applicability of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., misrepresentation concerning a single parcel of real property must be made either in the context of a public medium addressed to the general public or, if not made "public," be made in context of an overall development of a larger tract of which an individual parcel is a part. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Landlord's failure to repair fuse box. — Evidence that a landlord failed to repair a fuse box which malfunctioned in the tenant's trailer did not establish a prima facie cause of action under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Simpson v. Yonts, 197

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Ga. App. 311, 398 S.E.2d 407, 1990 Ga. App. LEXIS 1323 (1990).

Trademarks, Names

Use of existing trademark. — Corporate poultry producer and marketer, by adopting and using the trademark GOLDEN MEDALLION on its frozen poultry products, infringed poultry cooperative's existing MEDALLION trademark and engaged in unfair competition and deceptive trade practices. Gold Kist, Inc. v. ConAgra, Inc., 708 F. Supp. 1291, 1989 U.S. Dist. LEXIS 2438 (N.D. Ga. 1989).

Use of trade names. — Buyers' claim that the buyers were confused by the use of trade names belied the record because one buyer testified that the buyer knew exactly who the buyer was dealing with. Isbell v. Credit Nation Lending Serv., LLC, 319 Ga. App. 19, 735 S.E.2d 46, 2012 Ga. App. LEXIS 1021 (2012).

Trade name infringement. — Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., protects businesses from unfair or deceptive practices in the conduct of trade or commerce, including passing off goods or services as those of another, or causing actual confusion as to the source, sponsorship, approval, or certification of goods or services. Thus, the FBPA broadly protects against infringement on a protected trade name by use of a confusingly similar name. Inkaholiks Luxury Tattoos Georgia, LLC v. Parton, 324 Ga. App. 769, 751 S.E.2d 561, 2013 Ga. App. LEXIS 929 (2013).

Use of balloons, costumes, and names of comic book characters by singing telegram company created confusion. DC Comics Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110, 1984 U.S. Dist. LEXIS 22828 (N.D. Ga. 1984).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — A violation of paragraph (b)(29) of O.C.G.A. § 10-1-393 is an offense for which those charged with a violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17.

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1066 et seq., 1085 et seq., 1216.

Am. Jur. Trials.

Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 434 et seq.

ALR.

Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 A.L.R. 784; 28 A.L.R. 114.

Application of principles of unfair competition to artistic or literary property, 19 A.L.R. 949.

Protection of business or trading corporation against use of same or similar name by another corporation, 66 A.L.R. 948; 72 A.L.R.3d 8.

Right of manufacturer to question reasonableness of regulation by individual or private corporation which excludes use of manufacturer's products, 81 A.L.R. 1422.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 A.L.R. 1241.

Unfair competition in use of geographical trade name by persons carrying on business elsewhere, 174 A.L.R. 496.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 A.L.R.2d 1156; 72 A.L.R.3d 8.

Construction and effect of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 54 A.L.R.2d 1187.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925.

Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 A.L.R.3d 760.

Unfair competition by direct reproduction of literary, artistic, or musical property, 40 A.L.R.3d 566.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Right of state, public official, or governmental entity to seek, or power of court to allow, restitution of fruits of consumer fraud, without specific statutory authorization, 55 A.L.R.3d 198.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

Trade dress simulation of cosmetic products as unfair competition, 86 A.L.R.3d 505.

Unfair competition by imitation in sign or design of business place, 86 A.L.R.3d 884.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Right to private action under state consumer protection act — Preconditions to action, 117 A.L.R.5th 155.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 83 A.L.R.6th 419.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

Criminal Simulation Under State Laws, 79 A.L.R.7th 6.

Rescission of Automobile Sales Contracts, 85 A.L.R.7th 1.

Application of Federal Trade Commission Act (15 U.S.C.A. §§ 41 et seq.) to web sites and their operators, 70 A.L.R. Fed. 2d 1.

10-1-393.1. Office supply transactions; solicitations for telephone directory listings.

(a) Unfair or deceptive acts or practices by an office supplier in the conduct of office supply transactions in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices by office suppliers in the conduct of office supply transactions are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Falsely representing to any person that the office supplier is the usual supplier of goods, services, or property purchased by that person;

(3) Falsely representing to any person that the goods, services, or property sold, leased, rented, or shipped by the office supplier are the same brand as that person usually uses;

(4) Misrepresenting in any manner, including the use of a confusingly similar name, the manufacturer, supplier, or seller of the goods, services, or property;

(5) Representing that the prices an office supplier charges are less than a person usually pays for goods, services, or property, unless the goods, services, or property compared are identical and the representation is true;

(6) Shipping or supplying an amount or quantity of goods, services, or property to a person which is substantially greater than the amount or quantity which the person actually orders;

(7) Misrepresenting in any manner, including but not limited to failure to disclose material facts regarding the value of, any gift, prize, or award which will be given by an office supplier in conjunction with any office supply transaction;

(8) Falsely representing that there is an imminent price increase;

(9) Substituting any brand or quality of goods, services, or property for that actually ordered without prior approval of such substitution from the person ordering; or

(10)(A) Solicitation for inclusion in the listing of a telephone classified advertising directory unless such solicitation form has prominently printed therein at least one inch apart from any other text on the form and in type size and boldness equal to or greater than any other type size and boldness on the form the words:

"THIS IS NOT A BILL. THIS IS A SOLICITATION."

(B) For the purposes of this paragraph, the term "telephone classified advertising directory" refers to any telephone classified advertising directory which is distributed to some or all telephone subscribers in any area of the state and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(c) An office supplier may not by contract, agreement, or otherwise limit the operation of this part, notwithstanding any other provision of law.

History.
Code 1981, § 10-1-393.1, enacted by Ga. L. 1986, p. 1046, § 2; Ga. L. 1995, p. 733, § 1; Ga. L. 2015, p. 1088, § 2/SB 148.

Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

10-1-393.2. Requirements for health spas.

(a) Health spas shall comply with the provisions of this Code section.

(b) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution and

which shall show the date of the transaction and the name and address of the seller; provided, however, that no contract shall be valid which has a term in excess of 36 months. Contracts may be renewable at the end of each 36 month period of time at the option of both parties to the contract.

(c) The contract or an attachment thereto shall state clearly any rules and regulations of the seller which are applicable to the consumer's use of the facilities or receipt of its services.

(d) The contract shall state clearly on its face the cancellation and refund policies of the seller.

(e) The health spa member shall have the right to cancel the contract within seven business days after the date of the signing of the contract by notifying the seller in writing of such intent and by either mailing the notice before 12:00 Midnight of the seventh business day after the date of the signing of the contract or by hand delivering the notice of cancellation to the health spa before 12:00 Midnight of the seventh business day following the date of the signing of the contract. The notice must be accompanied by the contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to the buyer. If the health spa member so cancels, any payments made under the contract will be refunded and any evidence of indebtedness executed by the health spa member will be canceled by the seller, provided that the member shall be liable for the fair market value of services actually received, which in no event shall exceed $100.00. The preparation of any documents shall not be construed to be services; provided, however, that any documents prepared which are merely ancillary to services which are actually rendered shall not prevent the health spa from charging for such services actually rendered up to the limits specified in this subsection. Each health spa contract shall contain the following paragraphs separated from all other paragraphs:

"You (the buyer) have seven business days to cancel this contract. To cancel, mail or hand deliver a letter to the following address:

_____

Name of health spa

_____

Street address

_____

City, State, ZIP Code

Do not sign this contract if there are any blank spaces above. In the event optional services are offered, be sure that any options you have

not selected are lined through or that it is otherwise indicated that you have not selected these options. It is recommended that you send your cancellation notice by registered or certified mail or statutory overnight delivery, return receipt requested, in order to prove that you did cancel. If you do hand deliver your cancellation, be sure to get a signed statement from an official of the spa acknowledging your cancellation.

To be effective, your cancellation must be postmarked by midnight, or hand delivered by midnight on _____(date)_____, _____, and must include all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to you."

The health spa shall fill in the blank spaces in the above paragraph before the consumer signs the contract. In the event a consumer fails to provide with the cancellation notice all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered, the health spa shall either cancel the contract or provide written notice by certified mail or statutory overnight delivery to the consumer that such documents must be provided within 30 days in order for the cancellation to be effective. In the event that the consumer provides the documents within 30 days, the contract shall be canceled as of the date on which the cancellation notice was delivered; provided, however, that should the consumer continue to use the facilities or services during the 30 day period, the cancellation shall be effective on the first business day following the last day on which the consumer uses the facilities or services.

(f) In the event a health spa no longer offers a substantial service which was offered at the time of the initiation of the contract, or in the event a health spa which previously limited its membership to members of one sex should become coeducational or one which was previously coeducational should become limited to members of one sex, the member shall have 30 days from the time the member knew or should have known of the change to cancel the remainder of the membership and receive a refund. The refund shall be calculated by dividing the total cost of the membership by the total number of months under the membership and refunding the monthly cost for any months or fractions of months remaining under the membership. The contract shall contain a clause in at least ten-point boldface type which reads as follows:

"You (the buyer) may cancel this agreement within 30 days from the time you knew or should have known of any substantial change in the services or programs available at the time you joined. Substantial changes include, but are not limited to, changing from being coed to being exclusively for one sex and vice versa. To cancel, send written notice of your cancellation to the address provided in this contract for

sending a notice of cancellation. The best way to cancel is by keeping a photocopy and sending the cancellation by registered or certified mail or statutory overnight delivery, return receipt requested."

The provisions of this subsection shall not apply in any instance where a court has ordered that a change be made in the sexual character of the health spa. The Attorney General is authorized upon petition to issue a declaratory ruling under Code Section 50-13-11 as to whether any planned change in a health spa is a substantial change or whether alternate locations are substantially similar under this Code section. Such declaratory rulings shall be subject to review as under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(g) Every contract for health spa services shall contain a clause providing that if the member becomes totally and permanently disabled during the membership term, he or she may cancel his or her contract and that the health spa is entitled to a reasonable predetermined fee in such event in addition to an amount equal to the value of services made available for use. This amount shall be computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months expired under the membership term. The health spa shall have the right to require and verify reasonable evidence of total and permanent disability. For purposes of this subsection, "total and permanent disability" means a condition which has existed or will exist for more than 45 days and which will prevent the member from using the facility to the same extent as the member used it before commencement of the condition.

(h) The health spa contract shall state that if a consumer has a history of heart disease, he should consult a physician before joining a spa.

(i) Every health spa contract shall comply with either paragraph (1) or paragraph (2) of this subsection:

(1)(A) The written contract used shall contain the following clause: "Under this contract, no further payments shall be due to anyone, including any purchaser of any note associated with or contained in this contract, in the event the health spa at which the contract is entered into ceases operation and fails to offer an alternate location, substantially similar, within ten miles."

(B) All payments due under the contract must be in equal monthly installments spread over the entire term of the contract.

(C) There can be no payments of any type, including, but not limited to, down payments, enrollment fees, membership fees, or

any other direct payment to the health spa, other than the equal monthly installment payments.

(D) There can be no complimentary, compensatory, or other extensions of the term incident to the term of the contract, including but not limited to a promise of lifetime renewal for a minimal annual fee, provided that an agreement of both parties to extend the term of the contract to compensate for time during which the member could not fully utilize the spa due to a temporary physical or medical condition arising after the member joined shall not be considered to bring the spa into noncompliance under this paragraph; or

(2)(A) The written contract used shall contain the following clause: "Under this contract, no further payments shall be due to anyone, including any purchaser of any note associated with or contained in this contract, in the event the health spa at which the contract is entered into ceases operation and fails to offer an alternate location, substantially similar, within ten miles."

(B) The written contract shall contain the following statement in boldface type which is larger and bolder than any other type which is in the contract and in at least 14 point boldface, which statement must be separately signed by the consumer:

"NOTICE

State law requires that we inform you that should you (the buyer) choose to pay for any part of this agreement in advance, be aware that you are paying for future services and may be risking loss of your money in the event this health spa ceases to conduct business. Health spas do not post a bond, and there may be no other protections provided to you should you choose to pay in advance."

(j) An alternate location for a health spa shall not be considered substantially similar if:

(1) The original facility was limited to use by members of one sex and the alternate facility is used by members of both sexes;

(2) The original facility was for use by members of both sexes and the alternate facility's use is limited to members of one sex; or

(3) The size, facilities, equipment, or services available to the member at the alternate location are not substantially equal to or do not exceed the size, facilities, equipment, or services available to the member at the health spa location at which the contract was entered into.

(k) Every contract for health spa services shall contain a clause providing that if the member dies during the membership term or any

renewal term, his or her estate may cancel the contract and that the health spa is entitled to a reasonable predetermined fee in such event in addition to an amount computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months expired under the membership term. The contract may require the member's estate seeking relief under this subsection to provide reasonable proof of death.

(l)(1) A health spa shall not enter or offer to enter into a health spa agreement with a consumer unless the health spa is fully operational and available for use.

(2) For purposes of this subsection, "fully operational and available for use" means that all of the facilities, equipment, or services which are promised at the time of entering into the membership contract are operational and available for use at that time. Nothing contained in this subsection shall be construed to prohibit a health spa from selling a membership for existing services and facilities at a location under construction which can be converted at a later date to a membership for additional services and facilities, provided that:

(A) The additional services and facilities are fully operational and available for use at the time of the conversion;

(B) Additional consideration, other than just a nominal consideration, is required from the consumer under the terms of the conversion; and

(C) The member has until seven days following the date the additional consideration or a part of the additional consideration becomes due and owing to cancel the remainder of the contract and receive a refund computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months remaining under the membership term.

(3) The provisions of this subsection shall not apply if all of the following conditions are met:

(A) The health spa has submitted forms prescribed by the Attorney General requiring, in addition to whatever other information the Attorney General may require, as much detail as to the size, facilities, equipment, or services to be provided as the Attorney General may require;

(B) The health spa has obtained the approval in writing of the Attorney General to sell memberships to a health spa before it is fully operational and available for use;

(C) The health spa has agreed in writing with the Attorney

General, on forms prescribed by the Attorney General, to deposit all funds obtained by selling memberships before a health spa is fully operational and available for use in a single account in a bank or trust company domiciled in the State of Georgia. Such deposits are to be held in safekeeping for release only upon authorization of the Attorney General. The bank or trust company must be approved by the Attorney General. The Attorney General may consult with the commissioner of banking and finance or with any of the employees of the commissioner of banking and finance regarding whether the bank or trust company should be approved and may disapprove the bank or trust company if he or she has reason to believe any deposits into the account might not be secure;

(D) Each deposit to the single account established under this paragraph shall be identified by the name and address of the individual who purchased the membership. The bank or trust company and the health spa shall maintain a list of the deposits, their amount, and the name and address of the membership purchaser, which list shall be available to the Attorney General or for inspection or copying by the Attorney General;

(E) The condition of the account established under this paragraph shall be that no funds shall be released from the account to any person unless the Attorney General has certified in writing to the bank or trust company that either the health spa is fully operational and available for use or that the health spa has not complied and does not appear likely to comply with its obligation to make the health spa fully operational and available for use in accordance with the documents submitted to the Attorney General or in accordance with representations made to membership purchasers. No action may be maintained in any court against the Attorney General or any of his or her employees for any determination or as a consequence of any determination made by the Attorney General under this subparagraph. Nothing contained or implied in this subparagraph shall operate or be construed or applied to deprive the Attorney General or any employee of any immunity, indemnity, benefits of law, rights, or any defense otherwise available by law;

(F) If the Attorney General certifies to the bank or trust company that the health spa is fully operational and available for use, then the funds in the account shall be released to the health spa, along with any accrued interest. If the Attorney General certifies to the bank or trust company that the health spa has not complied and does not appear likely to comply with its obligation to make the health spa fully operational and available for use,

then the funds in the account shall be released to the Attorney General on behalf of the individuals who purchased memberships prior to the health spa's being fully operational and available for use. Any accrued interest on the account shall be paid on a pro rata basis to the membership purchasers;

(G) Any costs imposed by the bank or trust company for administering the account shall be borne by the health spa; and

(H) The member shall have until seven business days following the date upon which the health spa becomes fully operational and available for use to cancel the contract and receive a full refund of any payments and the cancellation of any evidence of indebtedness, provided that the member shall be liable for the fair market value of any services actually received, which in no event shall exceed $50.00. The preparation of any documents shall not be construed to be services; provided, however, that all documents prepared which are merely ancillary to services which are actually rendered shall not prevent the health spa from charging for such services actually rendered up to the limits specified in this subparagraph.

(m) All moneys due the consumer under contracts canceled for the reasons contained in this Code section shall be refunded within 30 days of receipt of such notice of cancellation. The notice must be accompanied by the contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to the buyer, except in the case of a deceased member. In the event a consumer fails to provide with the cancellation notice all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered, the health spa shall either cancel the contract or provide written notice by certified mail or statutory overnight delivery to the consumer that such documents must be provided within 30 days in order for the cancellation to be effective. In the event that the consumer provides the documents within 30 days, the contract shall be canceled as of the date on which the cancellation notice was delivered; provided, however, that should the consumer continue to use the facilities or services during the 30 day period, the cancellation shall be effective on the first business day following the last day on which the consumer uses the facility or services.

(n) Any contract which does not comply with this Code section shall be void and unenforceable; no purchaser of any note associated with or contained in any health spa contract shall make any attempt to collect on the note or to report the buyer as delinquent to any consumer reporting or consumer credit reporting agency if there has been any violation by the health spa of subsections (b) through (m) or of subsection (o) of this Code section. Any attempt by any purchaser or by

any agent of any purchaser to collect on the note or to report the buyer as delinquent as described in this subsection shall be considered an unfair and deceptive act or practice as provided in Code Section 10-1-393.

(o) After November 15, 1989, no health spa contract shall be valid or enforceable unless the health spa operator has on file a statement signed by the Attorney General certifying that a copy of the contract is on file with the Attorney General and is in compliance with this part. Health spas may begin submitting a copy of their contract for approval by the Attorney General on July 1, 1989, and shall submit all contract changes thereafter for approval prior to entering or offering to enter into that contract with a consumer. In addition to any action which may be taken by the Attorney General under this part, and in addition to any recovery of a consumer in the private action provided for under this part, any consumer who has entered into a contract which has not been approved by the Attorney General prior to the date of the contract shall be entitled to recover as an additional penalty an amount equal to any amount paid plus any amount claimed owing on the contract.

(p) In addition to any other penalties provided for in this part, any person who operates or aids or assists in the operation of a health spa in violation of any of the provisions of subsection (i) or (o) of this Code section shall be guilty of a misdemeanor. Each day of operation of a health spa in violation of subsection (i) or (o) shall be considered a separate and distinct violation. In addition to any other penalties provided in this part, any person who violates subsection (l) of this Code section shall be guilty of a felony. Each sale of a membership in violation of subsection (l) of this Code section shall be considered a separate and distinct violation. Each failure to place properly all of the funds generated from a particular membership agreement into a properly approved and established trust account shall be considered a separate and distinct violation.

History.

Code 1981, § 10-1-393.2, enacted by Ga. L. 1989, p. 1606, § 2; Ga. L. 1999, p. 81, § 10; Ga. L. 2000, p. 1589, § 3; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2016, p. 846, § 10/HB 737; Ga. L. 2017, p. 774, § 10/HB 323.

Law reviews.

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Violation of O.C.G.A. § 10-1-393.2. — Since it was apparent from the face of the health club contracts that the contracts did not comply with the requirements of O.C.G.A. § 10-1-393.2, summary judgment was properly granted to

defendants. Georgia Receivables, Inc. v. Te, 240 Ga. App. 292, 523 S.E.2d 352, 1999 Ga. App. LEXIS 1307 (1999).

Contract was void and unenforceable for failing to comply with statute. — If the required language was not set out in three separate paragraphs as the statute requires, the language in the contract regarding the buyer's rights was not separated from all other paragraphs as the statute requires, and the consumer was not given a specific date for the last date to cancel the contract, then the health spa membership contract was void and unenforceable. Georgia Receivables, Inc. v. Welch, 242 Ga. App. 146, 529 S.E.2d 164, 2000 Ga. App. LEXIS 114 (2000).

Compliance with O.C.G.A. § 10-1-393.2 required. — In an action to collect payment under a health spa contract, grant of summary judgment to defendant based upon violations of O.C.G.A. § 10-1-393.2 was authorized even though defendant failed to raise the issue because any contract that does not comply with § 10-1-393.2 is void and unenforceable under subsection (n). Georgia Receivables, Inc. v. Kirk, 242 Ga. App. 801, 531 S.E.2d 393, 2000 Ga. App. LEXIS 355 (2000).

Exculpatory clauses upheld in gym contract. — Trial court properly granted various gym defendants summary judgment in a member's suit for negligence because three agreements signed by the member contained unambiguous exculpatory clauses and constituted clear and express waivers and releases from liability. Herren v. Sucher, 325 Ga. App. 219, 750 S.E.2d 430, 2013 Ga. App. LEXIS 873 (2013), cert. denied, No. S14C0576, 2014 Ga. LEXIS 339 (Ga. Apr. 22, 2014).

RESEARCH REFERENCES

ALR.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 A.L.R.4th 127.

Construction and applicability of state statutes governing health club membership contracts or fees, 48 A.L.R.6th 223.

10-1-393.3. Prohibited use of purchaser's credit card information by merchant.

(a) As used in this Code section, the term "merchant" means any person who offers goods, wares, merchandise, or services for sale to the public and shall include an employee of a merchant.

(b) A merchant shall be prohibited from requiring a purchaser to provide the purchaser's personal or business telephone number as a condition of purchase when payment for the transaction is made by credit card.

(c) A merchant shall be prohibited from using a purchaser's credit card to imprint the information contained on the credit card on the face or back of a check or draft from the purchaser as a condition of acceptance of such check or draft as payment for a purchase.

(d) A merchant shall be prohibited from recording in any manner the number of a purchaser's credit card as a condition of acceptance of a check or draft of the purchaser as payment for a purchase.

(e) Any merchant who violates the provisions of this Code section shall be subject to the penalties provided in this part.

(f) This Code section shall not prohibit a merchant from:

(1) Recording a credit card number and expiration date as a condition to cashing or accepting a check where the merchant has agreed with the credit card issuer to cash or accept such checks as a service to the issuer's cardholders and the issuer has agreed with the merchant to guarantee payment of all cardholder checks cashed or accepted by the merchant;

(2) Requesting a purchaser to display a credit or charge card as a means of identification or as an indication of credit worthiness or financial responsibility;

(3) Recording on the check or elsewhere the type of credit or charge card displayed for the purposes of paragraph (2) of this subsection and the credit or charge card expiration date; or

(4) Recording the address or telephone number of a credit cardholder if the information is necessary for the shipping, delivery, or installation of consumer goods or for special orders of consumer goods or services.

(g) This Code section shall not require acceptance of a check or draft because a credit card is presented.

History.

Code 1981, § 10-1-393.3, enacted by Ga. L. 1991, p. 1101, § 1; Ga. L. 1992, p. 6, § 10; Ga. L. 2015, p. 1088, § 2/SB 148.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1991, in subsection (f), a semicolon was substituted for the period at the end of paragraph (f)(1) and a comma was deleted following "identification" in paragraph (f)(2).

Law reviews.

For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 7 (1992).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

10-1-393.4. Pricing practices during state of emergency.

(a) It shall be an unlawful, unfair, and deceptive trade practice for any person, firm, or corporation doing business in any area in which a state of emergency, as such term is defined in Code Section 38-3-3, has been declared, for so long as such state of emergency exists, to sell or offer for sale at retail any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency; provided, however, that such price may be increased only in an amount which accurately reflects an increase in cost of the goods or services to

the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.

(b) Notwithstanding the provisions of subsection (a) of this Code section, a retailer may increase the price of goods or services during a state of emergency if the price charged for those goods or services is no greater than the cost to the retailer of those goods or services, plus the retailer's average markup percentage applied during the ten days immediately prior to the declaration of a state of emergency.

History.
Code 1981, § 10-1-393.4, enacted by Ga. L. 1995, p. 1362, § 1; Ga. L. 2010, p. 213, § 1/SB 237; Ga. L. 2015, p. 1088, § 2/SB 148.

Editor's notes.
For application of this chapter in 2021 and 2022, see Executive Orders 06.30.21.01, 07.22.21.01, 08.19.21.01, 09.20.21.01, 10.21.21.01, 11.19.21.01, 12.17.21.01, 01.18.22.01, 02.18.22.01, and 03.21.22.01.

10-1-393.5. Prohibitions related to telemarketing, computer activities, and home repair or improvement work; removal of arrest booking photographs published online; penalties and enforcement.

(a) For purposes of this Code section, the term "telemarketing" shall have the same meaning which it has under 16 Code of Federal Regulations Part 310, the Telemarketing Sales Rule of the Federal Trade Commission, except that the term "telemarketing" shall also include those calls made in intrastate as well as interstate commerce.

(b) Without otherwise limiting the definition of unfair and deceptive acts or practices under this part, it shall be unlawful for any person who is engaged in telemarketing, any person who is engaged in any activity involving or using a computer or computer network, or any person who is engaged in home repair work or home improvement work to:

(1) Employ any device, scheme, or artifice to defraud a person, organization, or entity;

(2) Engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon a person, organization, or entity; or

(3) Commit any offense involving theft under Code Sections 16-8-2 through 16-8-9.

(b.1)(1) As used in this subsection, the term:

(A) "Photograph" means a photograph of a subject individual that was taken in this state by an arresting law enforcement agency.

(B) "Subject individual" means an individual who was arrested and had his or her photograph taken and:

(i) Access to his or her case or charges was restricted pursuant to Code Section 3-3-23.1, 15-1-20, 16-13-2, 35-3-37, or 42-8-62.1;

(ii) Prior to indictment, accusation, or other charging instrument, his or her case was never referred for further prosecution to the proper prosecuting attorney by the arresting law enforcement agency and the offense against such individual was closed by the arresting law enforcement agency;

(iii) Prior to indictment, accusation, or other charging instrument, the statute of limitations expired;

(iv) Prior to indictment, accusation, or other charging instrument, his or her case was referred to the prosecuting attorney but was later dismissed;

(v) Prior to indictment, accusation, or other charging instrument, the grand jury returned two no bills;

(vi) After indictment or accusation, all charges were dismissed or nolle prossed;

(vii) After indictment or accusation, the individual pleaded guilty to or was found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug and was sentenced in accordance with the provisions of Code Section 16-13-2, and the individual successfully completed the terms and conditions of his or her probation; or

(viii) The individual was acquitted of all of the charges by a judge or jury.

(2) Any person who is engaged in any activity involving or using a computer or computer network who publishes on such person's publicly available website a subject individual's arrest booking photograph for purposes of commerce shall be deemed to be transacting business in this state. Within 30 days of the sending of a written request by a subject individual, including his or her name, date of birth, date of arrest, and the name of the arresting law enforcement agency, such person shall, without fee or compensation, remove from such person's website the subject individual's arrest booking photograph. Such written request shall be transmitted via certified mail, return receipt requested, or statutory overnight delivery, to the registered agent, principal place of business, or primary residence of the person who published the website. Without otherwise limiting the definition of unfair and deceptive acts or practices under this part, a failure to comply with this paragraph shall be unlawful.

(c) In addition to any civil penalties under this part, any person who intentionally violates subsection (b) of this Code section shall be subject to a criminal penalty under paragraph (5) of subsection (a) of Code Section 16-8-12. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have prior actual knowledge of the acts violating subsection (b) of this Code section.

(d) Any person who intentionally targets an elder or disabled person, as defined in Article 31 of this chapter, in a violation of subsection (b) of this Code section shall be subject to an additional civil penalty, as provided in Code Section 10-1-851.

(e) Persons employed full time or part time for the purpose of conducting potentially criminal investigations under this article shall be certified peace officers and shall have all the powers of a certified peace officer of this state when engaged in the enforcement of this article, including but not limited to the power to obtain, serve, and execute search warrants. Such Georgia certified peace officers shall be subject to the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," and are specifically required to complete the training required for peace officers by that chapter. Such certified peace officers shall be authorized, upon completion of the required training, with the written approval of the Attorney General, and notwithstanding Code Sections 16-11-126 and 16-11-129, to carry firearms of a standard police issue when engaged in detecting, investigating, or preventing crimes under this article.

(f) The Attorney General shall be authorized to promulgate procedural rules relating to his or her enforcement duties under this Code section.

History.

Code 1981, § 10-1-393.5, enacted by Ga. L. 1996, p. 231, § 1; Ga. L. 1997, p. 1507, § 2; Ga. L. 2004, p. 631, § 10; Ga. L. 2010, p. 963, § 2-1/SB 308; Ga. L. 2013, p. 613, § 1/HB 150; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2016, p. 443, § 6C-1/SB 367; Ga. L. 2020, p. 753, § 2-2/SB 288.

Cross references.

Deceptive, fraudulent, or abusive telemarketing, § 10-5B-1 et seq.

Editor's notes.

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews.

For review of 1996 commerce and trade legislation, see 13 Ga. St. U.L. Rev. 33 (1996).

For article, "Problems Arising Out of the Use of 'www.Trademark.Com': The Application of Principles of Trademark Law to Internet Domain Name Disputes," see 13 Ga. St. U.L. Rev. 455 (1997).

For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 29 (1997).

For note, "Tilting at Windmills: Defamation and the Private Person in Cyberspace," see 13 Ga. St. U.L. Rev. 547 (1997).

For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 139 (2016).

RESEARCH REFERENCES

ALR.

Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 A.L.R.5th 167.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

10-1-393.6. Unlawful telemarketing transactions; criminal penalty.

(a) For purposes of this Code section, the term "telemarketing" shall have the same meaning which it has under Code Section 10-1-393.5.

(b) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part and without limiting any other Code section under this part, it shall be unlawful for any person to:

(1) In connection with a telemarketing transaction, request a fee in advance to remove derogatory information from or improve a person's credit history or credit record;

(2) Request or receive payment in advance from a person to recover, or otherwise aid in the return of, money or any other item lost by the consumer in a prior telemarketing transaction; provided, however, that this paragraph shall not apply to goods or services provided to a person by a licensed attorney; or

(3) In connection with a telemarketing transaction, procure the services of any professional delivery, courier, or other pickup service to obtain immediate receipt or possession of a consumer's payment, unless the goods are delivered with the opportunity to inspect before any payment is collected.

(c) In addition to any civil penalties under this part, any person who intentionally violates subsection (b) of this Code section shall be subject to a criminal penalty under paragraph (5) of subsection (a) of Code Section 16-8-12. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be

subjected to a like penalty if the person did not have prior actual knowledge of the acts violating subsection (b) of this Code section.

History.
Code 1981, § 10-1-393.6, enacted by Ga. L. 1998, p. 643, § 2; Ga. L. 2004, p. 631, § 10; Ga. L. 2015, p. 1088, § 2/SB 148.
Cross references.
Deceptive, fraudulent, or abusive telemarketing, § 10-5B-1 et seq.
Editor's notes.
Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that this Code section shall apply to acts and offenses committed on or after July 1, 1998.
Law reviews.
For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U.L. Rev. 9 (1998).

10-1-393.7. Solicitation during final illness; penalty.

(a) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part, it shall be unlawful for any person to solicit another during such other's final illness or during the final illness of any other person for the purpose of persuading a person who is suffering from his or her final illness or a person acting on behalf of such person to seek refund of moneys paid for an existing preneed contract for burial services or merchandise or funeral services or merchandise.

(b) In addition to any other penalty imposed for the violation of this Code section, the administrative agency which issues a finding of violation shall order the violator to pay restitution in the amount of the refund to the person, corporation, partnership, or other legal entity which refunded moneys paid for an existing preneed contract for burial services or merchandise or funeral services or merchandise.

History.
Code 1981, § 10-1-393.7, enacted by Ga. L. 2000, p. 882, § 2; Ga. L. 2015, p. 1088, § 2/SB 148.
Cross references.
Georgia Cemetery and Funeral Services Act of 2000, § 10-14-1 et seq.

10-1-393.8. Protection from disclosure of an individual's social security number.

(a) Except as otherwise provided in this Code section, a person, firm, or corporation shall not:

(1) Publicly post or publicly display in any manner an individual's social security number. As used in this Code section, the term "publicly post" or "publicly display" means to intentionally communicate or otherwise make available to the general public;

(2) Require an individual to transmit his or her social security number over the internet, unless the connection is secure or the social security number is encrypted; or

(3) Require an individual to use his or her social security number to access an internet website, unless a password or unique personal identification number or other authentication device is also required to access the internet website.

(b) This Code section shall not apply to:

(1) The collection, release, or use of an individual's social security number as required by state or federal law;

(2) The inclusion of an individual's social security number in an application, form, or document sent by mail, electronically transmitted, or transmitted by facsimile:

(A) As part of an application or enrollment process;

(B) To establish, amend, or terminate an account, contract, or policy; or

(C) To confirm the accuracy of the individual's social security number;

(3) The use of an individual's social security number for internal verification or administrative purposes; or

(4) An interactive computer service provider's or a telecommunications provider's transmission or routing of, or intermediate temporary storage or caching of, an individual's social security number.

(c) This Code section shall not impose a duty on an interactive computer service provider or a telecommunications provider actively to monitor its service or to affirmatively seek evidence of the transmission of social security numbers on its service.

(d) Notwithstanding the provisions of this Code section, the clerks of superior court of this state and the Georgia Superior Court Clerks' Cooperative Authority shall be held harmless for filing, publicly posting, or publicly displaying any document containing an individual's social security number that the clerk is otherwise required by law to file, publicly post, or publicly display for public inspection.

History.

Code 1981, § 10-1-393.8, enacted by Ga. L. 2006, p. 486, § 1/SB 588; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2024, p. 1052, § 2(14)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "the term" following "section," in paragraph (a)(1) and revised capitalization in paragraphs (a)(2) and (a)(3).

10-1-393.9. Registration of private child support collectors; surety bond or alternative.

(a) Private child support collectors shall register with the Secretary of State and shall provide information as requested by the Secretary of State, including, but not limited to, the name of the private child support collector, the office address and telephone number for such entity, and the registered agent in this state on whom service of process is to be made in a proceeding against such private child support collector.

(b) An application for registration shall be accompanied by a surety bond filed, held, and approved by the Secretary of State, and the surety bond shall be:

(1) Issued by a surety authorized to do business in this state;

(2) In the amount of $50,000.00;

(3) In favor of the state for the benefit of a person damaged by a violation of this Code section; and

(4) Conditioned on the private child support collector's compliance with this Code section and Code Section 10-1-393.10 and the faithful performance of the obligations under the private child support collector's agreements with its clients.

(c) In lieu of a surety bond, the Secretary of State may accept a deposit of money in the amount of $50,000.00. The Secretary of State shall deposit any amounts received under this subsection in an insured depository account designated for that purpose.

History.
Code 1981, § 10-1-393.9, enacted by Ga. L. 2009, p. 1001, § 3/HB 189; Ga. L. 2015, p. 1088, § 2/SB 148.

Editor's notes.
Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

10-1-393.10. Filing contracts for child support collection; requirements for contracts; role of collector; cancellation of contract; forwarding of payments.

(a) Any contract for the collection of child support between a private child support collector and an obligee shall be filed by the private child support collector with the office of the Attorney General.

(b) Any contract for the collection of child support between a private child support collector and an obligee shall be in writing, in at least ten-point type, and signed by such private child support collector and obligee. The contract shall include:

(1) An explanation of the nature of the services to be provided;

(2) An explanation of the amount to be collected from the obligor by the private child support collector and a statement of a sum certain of the total amount that is to be collected by the private child support collector that has been engaged by the obligee;

(3) An explanation in dollar figures of the maximum amount of fees which could be collected under the contract and an example of how fees are calculated and deducted;

(4) A statement that fees shall only be charged for collecting past due child support, although the contract may include provisions to collect current and past due child support;

(5) A statement that a private child support collector shall not retain fees from collections that are primarily attributable to the actions of the department and that a private child support collector shall be required by law to refund any fees improperly retained;

(6) An explanation of the opportunities available to the obligee or private child support collector to cancel the contract or other conditions under which the contract terminates;

(7) The mailing address, telephone numbers, facsimile numbers, and email address of the private child support collector;

(8) A statement that the private child support collector shall only collect money owed to the obligee and not child support assigned to the State of Georgia;

(9) A statement that the private child support collector is not a governmental entity and that the department provides child support enforcement services at little or no cost to the obligee; and

(10) A statement that the obligee may continue to use or pursue services through the department to collect child support.

(c) A private child support collector shall not:

(1) Improperly retain fees from collections that are primarily attributable to the actions of the department. If the department or an obligee notifies a private child support collector of such improper fee retention, such private child support collector shall refund such fees to the obligee within seven business days of the notification of the improper retention of fees and shall not be liable for such improper fee retention. A private child support collector may require documentation that the collection was primarily attributable to the actions of the department prior to issuing any refund;

(2) Charge fees in excess of one-third of the total amount of child support payments collected;

(3) Solicit obligees using marketing materials, advertisements, or representations reasonably calculated to create a false impression or mislead an obligee into believing the private child support collector is affiliated with the department or any other governmental entity;

(4) Use or threaten to use violence or other criminal means to cause harm to an obligor or the property of the obligor;

(5) Falsely accuse or threaten to falsely accuse an obligor of a violation of state or federal laws;

(6) Take or threaten to take an enforcement action against an obligor that is not authorized by law;

(7) Represent to an obligor that the private child support collector is affiliated with the department or any other governmental entity authorized to enforce child support obligations or fail to include in any written correspondence to an obligor the statement that "This communication is from a private child support collector. The purpose of this communication is to collect a child support debt. Any information obtained will be used for that purpose.";

(8) Communicate to an obligor's employer, or his or her agent, any information relating to an obligor's indebtedness other than through proper legal action, process, or proceeding;

(9) Communicate with an obligor whenever it appears the obligor is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondences, return telephone calls, or discuss the obligation in question, or unless the attorney and the obligor consent to direct communication;

(10) Contract with an obligee who is owed less than three months of child support arrearages; or

(11) Contract with an obligee for a sum certain to be collected which is greater than the total sum of arrearages and the statutory interest owed as of the date of execution of the contract.

(d) In addition to any other cancellation or termination provisions provided in the contract between a private child support collector and an obligee, the contract shall be cancelled or terminate if:

(1) The obligee requests cancellation in writing within 30 days of signing the contract;

(2) The obligee requests cancellation in writing after any 12 consecutive months in which the private child support collector fails to make a collection;

(3) The private child support collector breaches any term of the

contract or violates any provision contained within this Code section; or

(4) The amount to be collected pursuant to the contract has been collected.

(e) When it reasonably appears to the Attorney General that a private child support collector has contracted with obligees on or after July 1, 2009, using a contract that is not in compliance with this Code section, the Attorney General may demand pursuant to Code Section 10-1-403 that such private child support collector produce a true and accurate copy of each such contract. If such private child support collector fails to comply or the contracts are determined by the Attorney General to not be compliant with the provisions of this Code section, the Attorney General may utilize any of the powers vested in this part to ensure compliance.

(f) Upon the request of an obligee, the entity within the department authorized to enforce support orders shall forward child support payments made payable to the obligee to any private child support collector that is in compliance with the provisions of this Code section and Code Section 10-1-393.9.

(g) The remedies provided in this part shall be cumulative and shall be in addition to any other procedures, rights, or remedies available under any other law.

(h) Any waiver of the rights, requirements, and remedies provided by this Code section that are contained in a contract between a private child support collector and an obligee violates public policy and shall be void.

History.

Code 1981, § 10-1-393.10, enacted by Ga. L. 2009, p. 1001, § 3/HB 189; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2017, p. 646, § 2-2/SB 137; Ga. L. 2024, p. 1052, § 2(15)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in paragraph (b)(7).

Editor's notes.

Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Ga. L. 2017, p. 646, § 2-2/SB 137, which amended this Code section, purported to amend subsection (f), but no directory language revising subsection (f) was set out in the Act.

10-1-393.11. Display of disclosure statement concerning kosher foods; required information; exception.

(a) A person who makes a representation regarding kosher food shall prominently and conspicuously display on the premises on which the

food is sold, in a location readily visible to the consumer, a completed kosher food disclosure statement which shall be updated within 14 days of any changes in the information required by subsections (b) through (e) of this Code section.

(b) A kosher food disclosure statement shall set forth the name and address of the establishment to which it applies and the date on which it was completed.

(c) A kosher food disclosure statement shall state in the affirmative or negative whether the person:

(1) Operates under rabbinical or other kosher supervision;

(2) Sells or serves only food represented as kosher;

(3) Sells or serves food represented as kosher, as well as food not represented as kosher;

(4) Sells or serves meat, dairy, and pareve food;

(5) Sells or serves only meat and pareve food;

(6) Sells or serves only dairy and pareve food;

(7) Sells or serves meat and poultry represented as kosher only if it is slaughtered under rabbinical or other kosher supervision and identified at the slaughterhouse to be sold as kosher;

(8) Represents kosher meat sold as "Glatt kosher" or "Glatt";

(9) Sells or serves seafood only if it has or had fins and removable scales;

(10) Keeps separate meat represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(11) Uses separate utensils for meat represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(12) Uses separate work areas for meat and poultry represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(13) Sells or serves wine represented as kosher only if it has rabbinical supervision;

(14) Sells or serves cheese represented as kosher only if it has rabbinical supervision;

(15) Sells or serves food represented as kosher for Passover;

(16) Uses separate utensils for food represented as kosher for Passover and food not represented as kosher for Passover;

(17) Uses separate work areas for food represented as kosher for Passover and food not represented as kosher for Passover;

(18) Keeps food represented as kosher for Passover free from and not in contact with food not represented as kosher for Passover; and

(19) Prepares food represented as kosher for Passover under rabbinical or other kosher supervision.

(d) If a kosher food disclosure statement has an affirmative response to the question contained in paragraph (15) of subsection (c) of this Code section, responses to the questions contained in paragraphs (16) through (19) shall be required; otherwise, such responses shall not be required.

(e) A person who represents to the public that any unpackaged food for sale or a place of business is under rabbinical or other kosher supervision shall also provide in the kosher food disclosure statement the following information about the rabbinical or other kosher supervision:

(1) The name of the supervising rabbi, agency, or other person;

(2) The address of the supervising rabbi, agency, or other person;

(3) The telephone number of the supervising rabbi, agency, or other person;

(4) The frequency with which the supervising rabbi, agency, or other person visits the establishment; and

(5) Any relevant affiliations of the supervising rabbi, agency, or other person that the person making the disclosure wishes to disclose.

(f) The Attorney General shall promulgate a form for the kosher food disclosure statement and any additional information that the Attorney General deems reasonable and necessary for full and complete disclosure. The completion and prominent and conspicuous display of such form shall constitute compliance with subsections (b) through (e) of this Code section.

(g) No person shall display a kosher food disclosure statement or other written document stating that a rabbi, agency, or other person certifies food or a place of business as kosher or kosher for Passover if no such certification is being provided. The person making the display shall remove the statement or document if the rabbi, agency, or other person sends a notice via certified mail or statutory overnight delivery directed to the person making the display that no such certification is being provided.

(h) It shall be unlawful for any person to:

(1) Fail to complete and prominently and conspicuously display a kosher food disclosure statement as required by this Code section;

(2) Otherwise fail to comply with this Code section; or

(3) Knowingly or intentionally, with intent to defraud, make a false affirmation or disclosure in a kosher food disclosure statement.

(i) This Code section shall not apply to:

(1) Food sold in a presealed kosher food package; or

(2) Food represented as "kosher-style" or "kosher-type."

History.
Code 1981, § 10-1-393.11, enacted by Ga. L. 2010, p. 114, § 4/HB 1345; Ga. L. 2015, p. 1088, § 2/SB 148.

Editor's notes.
Ga. L. 2010, p. 114, § 1/HB 1345, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

Law reviews.
For article, "The Establishment Clause's Effect on Kosher Food Laws: Will the Jewish Meal Soon Become Harder to Swallow in Georgia?," see 38 Ga. L. Rev. 1067 (2004).

RESEARCH REFERENCES

ALR.
Validity and construction of regulations dealing with misrepresentation in the sale of kosher food, 52 A.L.R.3d 959.

Validity, construction, and application of regulations dealing with misrepresentation in sale of kosher food, 3 A.L.R.7th 6.

10-1-393.12. Right to cancel contract with residential roofing contractor; notice of cancellation; prohibitions.

(a) As used in this Code section, the term:

(1) "Residential real estate" means a new or existing building constructed for habitation by one to four families, including detached garages.

(2) "Residential roofing contractor" means a person or entity in the business of contracting or offering to contract with an owner or possessor of residential real estate to repair or replace roof systems.

(3) "Roof system" means a roof covering, roof sheathing, roof weatherproofing, roof framing, roof ventilation system, and insulation.

(b) A person who has entered into a written contract with a residential roofing contractor to provide goods or services to be paid from the proceeds of a property and casualty insurance policy may cancel the contract prior to midnight on the fifth business day after the insured has received written notice from the insurer that all or any part of the claim or contract is not a covered loss under such insurance policy.

Cancellation shall be evidenced by the insured giving written notice of cancellation to the residential roofing contractor at the address stated in the contract. Notice of cancellation, if given by mail, shall be effective upon deposit into the United States mail, postage prepaid and properly addressed to the residential roofing contractor. Notice of cancellation need not take a particular form and shall be sufficient if it indicates, by any form of written expression, the intention of the insured not to be bound by the contract.

(c) Before entering a contract as provided in subsection (b) of this Code section, the residential roofing contractor shall:

(1) Furnish the insured a statement in boldface type of a minimum size of ten points, in substantially the following form:

"You may cancel this contract at any time before midnight on the fifth business day after you have received written notification from your insurer that all or any part of the claim or contract is not a covered loss under the insurance policy. This right to cancel is in addition to any other rights of cancellation which may be found in state or federal law or regulation. See attached notice of cancellation form for an explanation of this right"; and

(2) Furnish each insured a fully completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract but easily detachable, and which shall contain in boldface type of a minimum size of ten points the following statement:

"NOTICE OF CANCELLATION"

If you are notified by your insurer that all or any part of the claim or contract is not a covered loss under the insurance policy, you may cancel the contract by mailing or delivering a signed and dated copy of this cancellation notice or any other written notice to (name of contractor) at (address of contractor's place of business) at any time prior to midnight on the fifth business day after you have received such notice from your insurer.

I HEREBY CANCEL THIS TRANSACTION

_____

Date

_____

Insured's signature

(d) In circumstances in which payment may be made from the proceeds of a property and casualty insurance policy, a residential roofing contractor shall not require any payments from an insured until

the five-day cancellation period has expired. If, however, the residential roofing contractor has performed any emergency services, acknowledged by the insured in writing to be necessary to prevent damage to the premises, the residential roofing contractor shall be entitled to collect the amount due for the emergency services at the time they are rendered. Any provision in a contract as provided in subsection (b) of this Code section that requires the payment of any fee for anything except emergency services shall not be enforceable against any insured who has canceled a contract under this Code section.

(e) A residential roofing contractor shall not represent or negotiate, or offer or advertise to represent or negotiate, on behalf of an owner or possessor of residential real estate on any insurance claim in connection with the repair or replacement of roof systems. This subsection shall not apply to a public adjuster licensed under Chapter 23 of Title 33.

History. Code 1981, § 10-1-393.12, enacted by Ga. L. 2011, p. 613, § 1/HB 423; Ga. L. 2015, p. 1088, § 2/SB 148.

10-1-393.13. Requirements of telephone solicitations; class actions for violation.

(a) As used in this Code section, the term:

(1) "ADAD equipment" means any device or system of devices which is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers and disseminating prerecorded messages to the numbers so selected or dialed.

(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, trust, or other legal entity.

(3) "Caller identification service" means a type of telephone service which permits subscribers to see the telephone number of incoming telephone calls.

(4) "In this state" means the call:

(A) Originates from this state; or

(B) Is directed by the caller to this state and received at the place to which it is directed.

(5) "Subscriber" means a person or business that has subscribed to telephone service from a local exchange company or mobile, wireless, or other telephone service provider or other persons living, residing, or working with such person or business.

(6) "Telephone solicitation" means any voice communication from a live operator, through the use of ADAD equipment or by other

means, over a telephone line or computer network for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services or donation to any organization, but shall not include communications:

(A) To any subscriber with that subscriber's prior express invitation or permission;

(B) By or on behalf of any person or entity with whom a subscriber has a prior or current business or personal relationship; or

(C) Which convey a political message.

(b) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part and without limiting any other Code section under this part, in connection with a telephone solicitation:

(1) At the beginning of such call, the person or entity making the call shall state clearly the identity of the person or entity initiating the call;

(2) No person or entity who makes a telephone solicitation to the telephone line of a subscriber in this state shall knowingly utilize any method to block or otherwise circumvent such subscriber's use of a caller identification service;

(3) The telephone number displayed on the caller identification service shall be a working telephone number capable of receiving incoming calls at the time the call is placed; and

(4) The identity of the caller displayed on the caller identification service shall accurately reflect the identity of the caller.

(c) Notwithstanding Code Section 10-1-399, a claim of a violation of this Code section may be brought in a representative capacity and may be the subject of a class action under Code Section 9-11-23. Damages for such violation shall be the greater of actual damages or $10.00 per violation.

History.
Code 1981, § 10-1-393.13, enacted by Ga. L. 2012, p. 640, § 1/HB 1132; Ga. L. 2015, p. 1088, § 2/SB 148.

RESEARCH REFERENCES

ALR.
Validity Under First Amendment of Statutes Limiting Automatic Dialing and Announcing Device (ADAD) and Robocalls, 48 A.L.R.7th Art. 1.

10-1-393.14. Requirements relating to consumer reports furnished for employment purposes.

(a) As used in this Code section, the term:

(1) "Adverse effect" means:

(A) A denial of employment;

(B) Any other decision for employment purposes that negatively affects any current or prospective employee; or

(C) A denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of any license.

(2) "Consumer report" means any written, oral, or other communication of any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for purposes of credit, insurance, or employment.

(3) "Consumer reporting agency" means any person or entity which, for monetary fees or dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

(4) "Employment purposes" means used for the purpose of evaluating a consumer for employment, promotion, reassignment, retention as an employee, or licensing.

(b) A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall:

(1) At the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) Maintain strict procedures designed to ensure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record

relating to arrests, indictments, and convictions shall be considered up to date if the current public record status of the item at the time of the report is reported.

(c) A consumer reporting agency shall be considered to be conducting business in this state if it provides information to any individual, partnership, corporation, association, or any other group however organized that is domiciled within this state or whose principal place of business is within this state.

(d) A consumer reporting agency that provides a consumer report for employment purposes that is in compliance with the federal Fair Credit Reporting Act in existence on March 11, 2015, shall be deemed to have complied with this Code section.

History.
Code 1981, § 10-1-393.14, enacted by Ga. L. 2015, p. 519, § 1-1/HB 328.

RESEARCH REFERENCES

Am. Jur. 2d.
15A Am. Jur. 2d, Collection and Credit Agencies, § 53 et seq.
ALR.
What Constitutes "Consumer Reporting Agency" Within Meaning of Fair Credit Reporting Act, 15 U.S.C.A. § 1681a(f), 48 A.L.R. Fed. 3d Art. 5.
Adverse Action Under Retaliation Provision of Fair Housing Act (42 U.S.C.A. § 3617), 49 A.L.R. Fed. 3d Art. 1.

10-1-393.15. Required notice for solicitation of services to obtain copies of real estate records; penalties.

(a) For purposes of this Code section, the term "instrument conveying real estate" means any documentary material evidencing an interest in real property required under law to be recorded with the superior court in the county in which the land is located, including, but not limited to, a deed to secure debt, a mortgage, a deed under power, and a lien.

(b) Any person who mails a solicitation for services to obtain a copy of an instrument conveying real estate shall include, in at least 16 point Helvetica font at the top of and at least two inches apart from any other text on such solicitation, the words:

"THIS IS NOT A BILL OR OFFICIAL GOVERNMENT DOCUMENT. THIS IS A SOLICITATION."

No text on the solicitation shall be larger than the above required words.

(c) Failure to comply with the provisions of this Code section shall be considered an unfair or deceptive act or practice which is unlawful and which shall be punishable by the provisions of this part.

History.
Code 1981, § 10-1-393.15, enacted by Ga. L. 2017, p. 218, § 1/HB 197.

10-1-393.16. Written solicitations relating to corporate filings, employment or labor posters, or notices; definition; penalty for noncompliance.

(a) For purposes of this Code section, the term "corporate filings" means any documents required by law to be filed with the Secretary of State pursuant to Title 14.

(b) Any written solicitation relating to corporate filings or employment or labor posters or notices shall include, in at least 16 point Helvetica font:

(1) At the top of and at least two inches apart from any other text on such solicitation, the words:

"THIS IS A SOLICITATION. THIS IS NOT A BILL OR OFFICIAL GOVERNMENT DOCUMENT AND HAS NOT BEEN SENT BY THE GEORGIA SECRETARY OF STATE'S OFFICE OR THE GEORGIA DEPARTMENT OF LABOR."

No text on the solicitation shall be larger than the above required words.

(2) On front of the envelope or, if there is no envelope, on the part of the written solicitation that bears the postage stamp or amount, the word:

"SOLICITATION"

(c) Failure to comply with the provisions of this Code section shall be considered an unfair or deceptive act or practice which is unlawful and which shall be punishable by the provisions of this part; provided, however, that notwithstanding Code Section 10-1-399, a claim of a violation of this Code section may be brought in a representative capacity and may be the subject of a class action under Code Section 9-11-23; and provided, further, that damages for such violation shall be the actual damages or $200.00 per violation, whichever is greater.

History.
Code 1981, § 10-1-393.16, enacted by Ga. L. 2021, p. 508, § 1/HB 153; Ga. L. 2022, p. 394, § 1/SB 363.

Amendments.
The 2022 amendment, effective July 1, 2022, rewrote subsection (b) and added the proviso at the end of subsection (c).

Cross references.
Filing documents, § 14-2-120 et seq.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2022, Code Section 10-1-393.16, as enacted by Ga. L. 2022, p. 203, § 1/HB 508, was redesignated as Code Section 10-1-393.17.

10-1-393.17. Protections for vocal or instrumental rights; unlawful advertisements, performances, or productions.

(a) As used in this part, the term:

(1) "Performing group" means a vocal or instrumental act consisting of one or more members that intends to advertise or appear under the name of a recording group or a name substantially similar to a recording group.

(2) "Recording group" means a vocal or instrumental act that consists of one or more members of which:

(A) At least one has previously released a sound recording commercially under such act's name; and

(B) At least one has a legal right to such act's name by virtue of use or operation under such act's name without having abandoned such name or affiliation with such act.

(3) "Service mark" means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify the services of such person and to distinguish such services from the services of others.

(4) "Sound recording" means a work that results from the fixation of a series of musical, spoken, or other sounds, regardless of the nature of the material object, such as a phonograph, disc, tape, wire, digital storage, or other medium in which the sounds are embodied.

(b) It shall be unlawful for a person to advertise or conduct a vocal or instrumental performance or production in this state by using any false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group without the express authorization of the recording group unless:

(1) Such person or performing group is the authorized registrant and owner of a service mark for the recording group that is registered in the United States Patent and Trademark Office;

(2) At least one member of the performing group was a member of the recording group and such member of the recording group has a legal right to use or operate under the name of the recording group;

(3) The performance or production is identified in all advertising and promotion as a salute or tribute and the name of the performing group is not so closely related or similar to the name used by the recording group that it would tend to confuse or mislead the public; or

(4) The advertisement does not relate to a live performance or

production taking place in, streamed into, or broadcasted in this state.

(c) Each advertisement, performance, or production in violation of this Code section shall constitute a separate violation.

History.
Code 1981, § 10-1-393.17, enacted by Ga. L. 2022, p. 203, § 1/HB 508.
Effective date.
This Code section became effective July 1, 2022.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2022, Code Section 10-1-393.16, as enacted by Ga. L. 2022, p. 203, § 1/HB 508, was redesignated as Code Section 10-1-393.17.

10-1-393.18. Required disclosures for commercial financing transactions; exceptions; limitations on brokers; enforcement; civil penalties.

(a) As used in this Code section, the term:

(1) "Accounts receivable purchase transaction" means a transaction in which a business forwards or otherwise sells to a person all or a portion of the business's accounts, as defined in Code Section 11-9-102, or payment intangibles, as defined in Code Section 11-9-102, at a discount to the accounts' or payment intangibles' expected value.

(2) "Advance fee" means any consideration which is assessed or collected prior to the closing of a commercial financing transaction by a broker.

(3) "Broker" means a person who, for compensation or the expectation of compensation, arranges a commercial financing transaction between a third party and a business in the state that would, if executed, be binding upon that third party and communicates that offer to a business located in this state. Such term excludes a "provider," and any individual or entity whose compensation is not based or dependent upon on the terms of the specific commercial financing transaction obtained or offered.

(4) "Business" means a private enterprise carried on for the purpose of gain or economic profit.

(5)(A) "Business purpose transaction" means a transaction from which the resulting proceeds that a business receives are:

(i) Provided to the business; or

(ii) Intended to be used to carry on the business.

(B) Such term shall not include a transaction from which the resulting proceeds are intended to be used for personal, family, or household purposes.

(C) For purposes of determining whether a transaction is a business purpose transaction, a provider may rely on a written statement of intended purpose, signed by an individual authorized to sign on behalf of the business. Such written statement may be contained in an application, agreement, or other document signed by an individual authorized to sign on behalf of the business.

(6) "Commercial financing transaction" means a business purpose transaction:

(A) Under which a person extends a business a commercial loan or a commercial open-end credit plan; or

(B) That is an accounts receivable purchase transaction.

(7) "Commercial loan" means a loan to a business, regardless of whether the loan is secured.

(8) "Commercial open-end credit plan" means commercial financing extended to a business on terms under which:

(A) The creditor reasonably contemplates repeat transactions; and

(B) Subject to any limit set by the creditor, the amount of financing that the creditor may extend to the business during the term of the plan is made available to the extent that any outstanding balance is repaid.

(9) "Motor vehicle dealer" means a dealer as defined in Code Section 40-2-39 or a used motor vehicle dealer as defined in Code Section 43-47-2.

(10) "Provider" means a person who consummates more than five commercial financing transactions in this state during any calendar year and includes, but is not limited to, a person who, under a written agreement with a depository institution, offers one or more commercial financing products provided by the depository institution via an online platform that the person administers.

(b) The provisions of this Code section shall not apply to:

(1) A provider that is a federally insured depository financial institution;

(2) A provider that is:

(A) A subsidiary, an affiliate, or a holding company of a federally insured depository financial institution; or

(B) A service corporation for a federally insured depository financial institution;

(3) A provider that is regulated under the federal Farm Credit Act, 12 U.S.C. Section 2001, et seq.;

(4) A provider that is licensed as a money transmitter in accordance with Article 4 of Chapter 1 of Title 7;

(5) A provider that consummates five or fewer commercial financing transactions in the state during any 12 month period;

(6) A commercial financing transaction secured by real property;

(7) A commercial financing transaction that is a lease as defined in Code Section 11-2A-103;

(8) A commercial financing transaction that is a purchase money obligation as defined in Code Section 11-9-103;

(9) A commercial financing transaction that:

(A) Involves a commercial loan or a commercial open-end credit plan;

(B) Is $50,000.00 or more; and

(C) Extends the commercial loan or the commercial open-end credit plan to:

(i) A motor vehicle dealer or the motor vehicle dealer's affiliate; or

(ii) A motor vehicle rental company as defined in Code Section 40-2-167 or the motor vehicle rental company's affiliate;

(10) A commercial financing transaction offered by a person in connection with the sale or lease of a product or service that:

(A) The person manufactures, licenses, or distributes; or

(B) The person's parent company or any of such parent company's directly or indirectly owned and controlled subsidiaries manufactures, licenses, or distributes;

(11) A commercial financing transaction of more than $500,000.00; or

(12) A commercial financing product that is a factoring transaction, purchase, sale, advance, or similar of accounts receivables owed to a healthcare provider because of a patient's personal injury treated by the healthcare provider.

(c) For purposes of Chapter 1 of Title 7, a provider's characterization of an accounts receivable purchase transaction as a purchase shall be conclusive that the accounts receivable purchase transaction is not a loan or a transaction for the use, forbearance, or detention of money.

(d) For purposes of Chapter 1 of Title 7, a provider extending a specific offer for a commercial financing transaction on behalf of a depository institution shall not be construed to mean that the provider engaged in lending or financing or originated that loan or financing.

(e)(1) Before consummating a commercial financing transaction, a provider shall disclose the terms of the commercial financing transaction in accordance with this Code section.

(2) Only one disclosure must be provided for each commercial financing transaction, and a disclosure is not required as a result of the modification, forbearance, or change to a consummated commercial financing transaction.

(3) A provider shall disclose the following information in connection with each commercial financing transaction:

(A) The total amount of funds provided to the business under the terms of the commercial financing transaction;

(B) The total amount of funds disbursed to the business under the terms of the commercial financing transaction, if less than the amount described in subparagraph (A) of this paragraph, as a result of any fees deducted or withheld at disbursement, any amount paid to the provider to satisfy a prior balance, and any amount paid to a third party on behalf of the business;

(C) The total amount to be paid to the provider under the terms of the commercial financing transaction;

(D) The total dollar cost of the commercial financing transaction, calculated by finding the difference between:

(i) The amount described in subparagraph (A) of this paragraph; and

(ii) The amount described in subparagraph (C) of this paragraph;

(E)(i) The manner, frequency, and amount of each payment; or

(ii) If the amount of each payment may vary, the manner, frequency, and estimated amount of the initial payment; and

(F) A statement of whether there are any costs or discounts associated with prepayment under the commercial financing transaction, including a reference to the paragraph in the commercial financing transaction agreement that creates each cost or discount.

(4) The commercial financing transaction agreement shall include a description of the methodology for calculating any variable pay-

ment amount and the circumstances that may cause a payment amount to vary.

(5) The provisions of this subsection shall apply to any commercial financing transaction consummated on or after January 1, 2024.

(f) No broker shall:

(1) Assess, collect, or solicit an advance fee from a business to provide services as a broker; provided, however, that nothing contained in this paragraph shall preclude a broker from soliciting a potential business to pay for, or preclude a potential business from paying for, actual services necessary to apply for a commercial financing transaction, including, but not limited to, a credit check or an appraisal of security, where such payment is made by check or money order payable to a party independent of the broker;

(2) Make or use any false or misleading representations or omit any material fact in the offer or sale of the services of a broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a broker, notwithstanding the absence of reliance by the buyer; or

(3) Make or use any false or deceptive representation in its business dealings.

(g) The Attorney General may:

(1) Receive and act on complaints;

(2) Take action designed to obtain voluntary compliance with this Code section; and

(3) Commence administrative or judicial proceedings on the Attorney General's own initiative to enforce compliance with this Code section.

(h) A person who violates a provision of this Code section is subject to a civil penalty of $500.00 per violation, not to exceed $20,000.00 for all violations arising from the use of the same transaction documentation or materials.

(i) A person who violates a provision of this Code section after receiving written notice of a prior violation is subject to a civil penalty of $1,000.00 per violation, not to exceed $50,000.00 for all violations arising from the use of the same transaction documentation or materials.

(j) Nothing in this Code section creates a private right of action against any person based on failure to comply with the provisions of this Code section.

(k) A violation of this Code section shall not affect the enforceability of any underlying agreement.

History.
Code 1981, § 10-1-393.18, enacted by Ga. L. 2023, p. 255, § 2/SB 90, effective January 1, 2024.

Effective date.
This Code section became effective January 1, 2024.

10-1-393.19. Requirements of unsolicited inquiries relating to the sale of real estate; penalties.

(a) Any unsolicited written inquiry or mailing by any person or entity that is not licensed or regulated pursuant to the provisions of Chapter 40 or Chapter 41 of Title 43 or Chapter 19 of Title 15 that expresses an interest in buying real property, or an option to buy real property, from the addressee or in buying the real property to which such written inquiry or mailing is addressed or that offers services relating to the sale of real estate shall include:

(1)(A) At the top of and at least two inches apart from any other text on such written inquiry or mailing, the following notice in capital letters:

"THIS IS A SOLICITATION. THE SENDER IS CONTACTING YOU TO INQUIRE AS TO YOUR INTEREST IN SELLING YOUR HOME OR OTHER REAL ESTATE. YOU ARE UNDER NO OBLIGATION TO RESPOND."

(A.1)(i) If the solicitation includes a monetary offer, following the text required in subparagraph (A) of this paragraph, the following notice in capital letters:

"THIS OFFER MAY OR MAY NOT BE THE FAIR MARKET VALUE OF THE PROPERTY."

(ii) If the solicitation includes a monetary offer less than the value of the previous year's assessed value for ad valorem taxation by the county tax assessor for the county in which the property is located, following the text required in subdivision (i) of this subparagraph, the following notice in capital letters:

"THIS OFFER IS LESS THAN THE COUNTY ASSESSED VALUE FOR THIS PROPERTY."

(B) No text contained in such solicitation shall be larger than the text required in subparagraph (A) of this paragraph.

(2) On the front of the envelope or, if there is no envelope, on the part of the written inquiry or mailing that bears the postage stamp or postage amount, the following notice in capital letters:

"SOLICITATION. YOU ARE UNDER NO OBLIGATION TO OPEN OR TO RESPOND."

(3) The notices required in paragraphs (1) and (2) of this subsection shall be:

(A) Of a font that is the same as the majority of the text of the written inquiry or mailing;

(B) Of a size which is no smaller than the text of the written inquiry or mailing, and in no event no smaller than 16 point font; and

(C) Displayed in a distinctly contrasting color.

(b) Failure to comply with the provisions of this Code section shall be considered an unfair or deceptive act or practice which is unlawful and shall therefore be punishable by the provisions of this part; provided, however, that, notwithstanding Code Section 10-1-399, a claim of a violation of this Code section may be brought in a representative capacity and may be the subject of a class action under Code Section 9-11-23; and provided, further, that damages for such violation shall be three times the actual damages sustained or $600.00 per violation, whichever is greater.

(c) Any person who violates the provisions of subsection (a) of this Code section shall be guilty of a misdemeanor.

History.

Code 1981, § 10-1-393.19, enacted by Ga. L. 2023, p. 255, § 2/SB 90, effective January 1, 2024; Ga. L. 2024, p. 553, § 2-1/HB 1292, effective May 2, 2024; Ga. L. 2024, p. 1052, § 2(16)/SB 448, effective July 1, 2024.

Effective date.

This Code section became effective January 1, 2024.

Amendments.

The first 2024 amendment, effective May 2, 2024, added subparagraph (a)(1)(A.1) and subsection (c) and substituted "three times the actual damages sustained or $600.00" for "the actual damages or $200.00" near the end in subsection (b).

The second 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "On the front" for "On front" in paragraph (a)(2) and revised punctuation in subsection (b).

10-1-394. Adoption of rules, regulations, and standards prohibiting unfair or deceptive practices; application of Chapter 13 of Title 50.

(a) The Attorney General is authorized to adopt reasonable rules, regulations, and standards appropriate to effectuate the purposes of this part and prohibit specific acts or practices that are deemed to be a violation of this part. The Attorney General is also authorized to adopt as substantive rules that prohibit specific acts or practices in violation of Code Section 10-1-393 those rules and regulations of the Federal

Trade Commission interpreting Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

(b) Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall apply to the promulgation of rules and regulations by the Attorney General pursuant to subsection (a) of this Code section and in taking testimony pursuant to Code Sections 10-1-403 and 10-1-404.

History.
Ga. L. 1975, p. 376, § 4; Ga. L. 2015, p. 1088, § 2/SB 148.

Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Federal Trade Commission Act standards applicable. — Federal Trade Commission Act, 15 U.S.C. § 45, is expressly made the appropriate standard by which the purpose and intent of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is to be effectuated, implemented, and construed. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

10-1-395. Authority and duties of Attorney General; Consumer Advisory Board; relations with other regulatory agencies.

(a) The Attorney General shall have the necessary powers and authority to carry out the duties vested in him or her pursuant to this title. Any authority, power, or duty vested in the Attorney General by any provision of this title and Code Section 46-5-27 may be exercised, discharged, or performed by any employee of the office of the Attorney General acting in the Attorney General's name and by his or her delegated authority. The Attorney General shall be responsible for the official acts of such persons who act in his or her name and by his or her authority.

(b)(1) A Consumer Advisory Board is created whose duty it shall be to advise and make recommendations to the Attorney General. The board shall consist of 15 members. Appointments of members of this board made after July 1, 2015, shall be made by the Attorney General; however, the Attorney General shall not be an appointee. One member shall be appointed from each congressional district and the remaining members shall be appointed from the state at large. At least four members shall be attorneys representing consumers' interests and two of these consumers' attorneys shall represent Georgia Indigent Legal Services or any other legal aid society. At least four members shall be representatives of the business community, two of which are recommended by the Georgia Retail Association

and two recommended for appointment by the Business Council of Georgia, Inc.

(2) All members appointed to the board by the Attorney General shall be appointed for terms of three years and until their successors are appointed and qualified. In the event of a vacancy during the term of any member by reason of death, resignation, or otherwise, the appointment of a successor by the Attorney General shall be for the remainder of the unexpired term of such member.

(3) The board shall elect its chairman and shall meet not less than once every four calendar months at a time and place specified in writing by the Attorney General. The board may also meet from time to time upon its own motion as deemed necessary by a majority of the members thereof for the purpose of conducting routine or special business. Each member of the board shall serve without pay but shall receive standard state per diem for expenses and receive standard travel allowance while attending meetings and while in the discharge of his or her responsibilities.

(4) The board shall assist the Attorney General in an advisory capacity in carrying out the duties and functions of the office concerning:

(A) Policy matters relating to consumer interests; and

(B) The effectiveness of the state consumer programs and operations.

(5) The board shall make recommendations concerning:

(A) The improvement of state consumer programs and operations;

(B) The elimination of duplication of effort;

(C) The coordination of state consumer programs and operations with other local and private programs related to consumer interests;

(D) Legislation needed in the area of consumer protection; and

(E) Avoidance of unnecessary burdens on business, if any, resulting from the administration of this part.

(c) The Attorney General shall receive all complaints under this part and shall refer all complaints or inquiries concerning conduct specifically approved or prohibited by the Department of Agriculture, Commissioner of Insurance, Public Service Commission, Department of Natural Resources, Department of Banking and Finance, or other appropriate agency or official of this state to that agency or official for initial investigation and corrective action other than litigation.

(d) Any official of this state receiving a complaint or inquiry as provided in subsection (c) of this Code section shall advise the Attorney General of his or her action with respect to the complaint or inquiry.

(e) All officials and agencies of this state having responsibility under this part are authorized and directed to consult and assist one another in maintaining compliance with this part.

(f) In the event a person holding a professional license as defined in Chapter 4 of Title 26 or in Title 43 shall be determined by the Attorney General to be operating a business or profession intentionally, persistently, and notoriously in a manner contrary to this part, the Secretary of State, at the instruction of the Attorney General, shall begin proceedings to revoke such professional license.

(g) The Attorney General shall not be authorized to exercise any powers granted in this part against a person regulated by an agency or department listed in subsection (c), subsection (d), or subsection (e) of this Code section with regard to conduct specifically approved or prohibited by such agency or department if such agency or department certifies to the Attorney General that the exercise of such powers would not be in the public interest.

(h) Nothing contained in this part shall be construed as repealing, limiting, or otherwise affecting the existing powers of the various regulatory agencies of the State of Georgia except that all agencies of this state, in making determinations as to whether actions or proposed actions of persons subject to their jurisdiction and control are in the public interest, shall consider the situation in the light of the policies expressed by this part.

History.

Ga. L. 1975, p. 376, § 5; Ga. L. 1983, p. 743, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1986, p. 855, § 2; Ga. L. 1987, p. 3, § 10; Ga. L. 1988, p. 426, § 1; Ga. L. 2009, p. 453, § 2-6/HB 228; Ga. L. 2015, p. 1088, § 2/SB 148.

Law reviews.

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Administrator may authorize delegate to receive documentary materials. — The administrator does not have to be present and personally receive documentary materials required of persons pursuant to the Fair Business Practices Act; the administrator, on the contrary, may authorize a delegate to perform this function for the administrator. 1975 Op. Att'y Gen. No. 75-134.

Not all complaints need be referred to other agencies. — Pursuant to subsection (c) of Ga. L. 1975, p. 376, § 5 (see now O.C.G.A. § 10-1-393), the administrator is required to refer to the Board of Registration of Used Car Dealers all complaints concerning conduct

specifically approved or prohibited by the board, but those matters involving conduct not specifically approved or prohibited by the Used Car Dealers' Registration Act (see now O.C.G.A.§ 43-47-1 et seq.), or the rules and regulations of the board, need not be referred to the board. 1978 Op. Att'y Gen. No. 78-79.

RESEARCH REFERENCES

Am. Jur. 2d.
54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 770 et seq., 1018.

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 447 et seq.

10-1-396. Acts exempt from part.

Nothing in this part shall apply to:

(1) Actions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States;

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical, radio station or network, or television station or network in the publication or dissemination in print or electronically of:

(A) News or commentary; or

(B) An advertisement of or for another person, when the publisher, owner, agent, or employee did not have actual knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, or did not have a direct financial interest in the sale or distribution of the advertised product or service.

History.
Ga. L. 1975, p. 376, § 6; Ga. L. 2013, p. 613, § 2/HB 150; Ga. L. 2015, p. 1088, § 2/SB 148.

JUDICIAL DECISIONS

Insurance transactions are among those types of transactions which are exempt from the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Ferguson v. United Ins. Co. of Am., 163 Ga. App. 282, 293 S.E.2d 736, 1982 Ga. App. LEXIS 2467 (1982).

Trades by brokerage firms and brokers. — Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., does not apply to an investor's claims against brokerage firms and a broker for allegedly unauthorized trades; the alleged wrongful transactions that provide the basis for the action entail conduct that is "specifically authorized and regulated" by the Securities and Commodity Exchange Acts. Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 1983 U.S. Dist. LEXIS 13167 (N.D. Ga. 1983).

Area of finance charges, disclosure, and truth in lending falls outside the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., except where expressly covered. Chancellor v. Gateway Lincoln-Mercury, 233 Ga. App. 38, 502

S.E.2d 799, 1998 Ga. App. LEXIS 885 (1998).

Publisher of advertising periodical. — Publisher of telephone "yellow pages" was exempt from a claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the allegedly improper acts were committed in the course of the publisher's business as the publisher of an advertising periodical. Robin v. BellSouth Adv. & Publishing Co., 221 Ga. App. 360, 471 S.E.2d 294, 1996 Ga. App. LEXIS 491 (1996).

Regulation under another act. — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., alleging that the lender deceptively and without the consumer's knowledge inflated the amount of the consumer's income on the loan application, causing the loan to be underwritten in a far greater amount and in turn making the loan payments much larger than the consumer could afford, while "settlement services" under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2602, included taking of loan applications, loan processing, and the underwriting and funding of loans, the lender failed to show that the alleged conduct was regulated by RESPA such that, under O.C.G.A. § 10-1-396(a), the Georgia Fair Business Practices Act would not apply. Kitchen v. Ameriquest Mortg. Co., No. 1:04-CV-2750-BBM, 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

Mortgage borrower stated a claim against a loan servicer under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., based on allegations that the servicer failed to properly credit payments, sent harassing collection letters, wrongfully threatened foreclosure, and improperly reported to credit bureaus that the loan was in default. Residential mortgage transactions were not categorically excluded from the FBPA, and the unfair and deceptive conduct alleged by the borrower was not specifically authorized under another statute. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366, 2012 U.S. Dist. LEXIS 54677 (N.D. Ga. 2012).

Homeowner's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim against the homeowner's mortgage lender arising out of foreclosure of the homeowner's home failed because the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000 et seq., prohibited mortgage businesses from, among other things, pursuing a course of misrepresentation by use of fraudulent or unauthorized documents or other means, O.C.G.A. § 7-1-1013(1), foreclosing a claim under the FBPA, pursuant to O.C.G.A. § 10-1-396. Stewart v. SunTrust Mortg., Inc., 331 Ga. App. 635, 770 S.E.2d 892, 2015 Ga. App. LEXIS 216 (2015).

10-1-397. Cease and desist orders; civil penalty; judicial relief; receivers.

(a) As used in this Code section, the term:

(1) "Call" means any communication, message, signal, or transmission.

(2) "Telecommunications company" shall have the same meaning as provided in Code Section 46-5-162.

(3) "Telecommunications services" shall have the same meaning as provided in Code Section 46-5-162.

(b) Whenever it may appear to the Attorney General that any person is using, has used, or is about to use any method, act, or practice declared by this part or by regulations made under Code Section

10-1-394 to be unlawful and that proceedings would be in the public interest, whether or not any person has actually been misled, the Attorney General may:

(1) Subject to notice and opportunity for hearing in accordance with Code Section 10-1-398, unless the right to notice is waived by the person against whom the sanction is imposed, take any or all of the following actions:

(A) Issue a cease and desist order prohibiting any unfair or deceptive act or practice against any person;

(B) Issue an order against a person who willfully violates this part, imposing a civil penalty of up to a maximum of $2,000.00 per violation; or

(C) Issue an order requiring a person whose actions are in violation of this part to pay restitution to any person or persons adversely affected by such actions; or

(2) Without regard as to whether the Attorney General has issued any orders under this Code section, upon a showing by the Attorney General in any superior court of competent jurisdiction that a person has violated or is about to violate this part, a rule promulgated under this part, or an order of the Attorney General, the court may enter or grant any or all of the following relief:

(A) A temporary restraining order or temporary or permanent injunction;

(B) A civil penalty of up to a maximum of $5,000.00 per violation of this part;

(C) A declaratory judgment;

(D) Restitution to any person or persons adversely affected by a defendant's actions in violation of this part;

(E) The appointment of a receiver, auditor, or conservator for the defendant or the defendant's assets; or

(F) Other relief as the court deems just and equitable.

(c) Unless the Attorney General determines that a person subject to this part designs quickly to depart from this state or to remove his or her property therefrom or to conceal himself or herself or his or her property therein or that there is immediate danger of harm to citizens of this state or of another state, the Attorney General shall, unless he or she seeks a temporary restraining order to redress or prevent an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, before initiating any proceedings as provided in this Code section, give notice in writing that such proceedings are

contemplated and allow such person a reasonable opportunity to appear before the Attorney General and execute an assurance of voluntary compliance as provided in this part. The determination of the Attorney General under this subsection shall be final and not subject to judicial review.

(d) With the exception of consent judgments entered before any testimony is taken, a final judgment under this Code section shall be admissible as prima-facie evidence of such specific findings of fact as may be made by the court which enters the judgment in subsequent proceedings by or against the same person or his or her successors or assigns.

(e) When a receiver is appointed by the court pursuant to this part, he or she shall have the power to sue for, collect, receive, and take into his or her possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description derived by means of any practice declared to be illegal and prohibited by this part, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. In the case of a partnership or business entity, the receiver may, in the discretion of the court, be authorized to dissolve the business and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

(f)(1) Whenever the Attorney General issues a cease and desist order to any person regarding the use of a telephone number which when called automatically imposes a per-call charge or other costs to the consumer, other than a regular charge imposed for long distance service, including, but not limited to, a telephone number in which the local prefix is 976 or in which the long distance prefix is 900, the Attorney General may certify to the appropriate local or long distance telecommunications company responsible for billing consumers for the charges that billing for the charges or for certain of the charges should be suspended. The telecommunications company shall then suspend such billing with reasonable promptness to preserve the assets of consumers in accordance with the certification, without incurring any liability to any person for doing so. For the purposes of this Code section, "reasonable promptness to preserve the assets of consumers" shall mean to act as quickly as the telecommunications company would act to preserve its own assets, provided that the telecommunications company cannot be required to make any changes to its existing systems, technologies, or methods used for

billing, other than any minimal procedural changes necessary to actually suspend the billing. The telecommunications company shall not be made a party to any proceedings under this part for complying with this requirement but shall have a right to be heard as a third party in any such proceedings.

(2) The suspension of billing under this subsection shall remain in effect until the Attorney General certifies to the telecommunications company that the matter has been resolved. The Attorney General shall certify to the telecommunications company with reasonable promptness when the matter has been resolved. In this certification, the Attorney General shall advise the telecommunications company to collect none of, all of, or any designated part of the billings in accordance with the documents or orders which resolved the matter. The telecommunications company shall collect or not collect the billings in the manner so designated and shall not incur any liability to any person for doing so.

(3) Nothing contained in this subsection shall limit or restrict the right of the telecommunications company to place its own restrictions, guidelines, or criteria, by whatever name denominated, upon the use of such telecommunications services, provided such restrictions, guidelines, or criteria do not conflict with the provisions of this subsection.

History.

Ga. L. 1975, p. 376, §§ 7, 8; Ga. L. 1986, p. 1046, § 3; Ga. L. 1988, p. 983, § 2; Ga. L. 1988, p. 1659, § 1; Ga. L. 1991, p. 1101, § 2; Ga. L. 1991, p. 1346, § 1; Ga. L. 1995, p. 1362, § 2; Ga. L. 2000, p. 136, § 10; Ga. L. 2001, p. 1245, § 2; Ga. L. 2010, p. 114, § 5/HB 1345; Ga. L. 2010, p. 302, § 2/SB 368; Ga. L. 2015, p. 1088, § 2/SB 148.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "willfully" was substituted for "wilfully" in subparagraph (b)(1)(B).

Editor's notes.

Ga. L. 2010, p. 114, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

Law reviews.

For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 1 (1992).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Opportunity must be given to execute assurance of voluntary compliance. — An administrator must provide an opportunity to execute an assurance of voluntary compliance. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978).

Administrator may reject assurance. — Administrator may reject an assurance the administrator deems, in the exercise of the administrator's discretion, to be inadequate. State ex rel.

Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Investigative demand, notice of contemplated civil action, combinable. — Whenever the administrator has reason to believe that any person has violated or is about to violate any provision of the Fair Business Practices Act or any regulations promulgated thereunder, it would be proper for the administrator to issue an investigative demand and notice of contemplated civil action simultaneously under the Act and such may be included in one document. 1975 Op. Att'y Gen. No. 75-91.

RESEARCH REFERENCES

Am. Jur. 2d.
54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1012 et seq.

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 447 et seq.

10-1-397.1. Initiation or intervention by Attorney General.

The Attorney General is authorized to initiate or intervene as a matter of right or otherwise appear in any federal court or administrative agency to implement the provisions of this article.

History.
Code 1981, § 10-1-397.1, enacted by Ga. L. 2001, p. 1245, § 3; Ga. L. 2015, p. 1088, § 2/SB 148.

10-1-398. Stay of cease and desist order; hearing.

(a) Any person receiving a cease and desist order from the Attorney General, and who demonstrates in any superior court of competent jurisdiction, after petition to the court and notice to the Attorney General, that such order will unlawfully cause him or her irreparable harm, shall receive a temporary stay of the order pending the court's review of that order. Such temporary stay shall not exceed 30 days, during which time the court will review the order to determine if an interlocutory stay will be issued pending a final judicial determination of the issues.

(b) Where the Attorney General has issued any order prohibiting any unfair or deceptive act or practice, he or she shall promptly send by certified or registered mail or statutory overnight delivery or by personal service to the person or persons so prohibited a notice of opportunity for hearing. Hearings shall be conducted pursuant to this Code section by the Attorney General or his or her designated representative. Such notice shall state:

(1) The order which has issued and which is proposed to be issued;

(2) The ground for issuing such order and proposed order;

(3) That the person to whom such notice is sent will be afforded a hearing upon request if such request is made within ten days after receipt of the notice; and

(4) That the person to whom such notice is sent may obtain a temporary stay of the order upon a showing of irreparable harm in any superior court of competent jurisdiction.

(c) Whenever a person requests a hearing in accordance with this Code section, there shall promptly be set a date, time, and place for such hearing and the person requesting such hearing shall be notified thereof. The date set for such hearings shall be within 15 days, but not earlier than five days after the request for hearing has been made, unless otherwise agreed to by the Attorney General and the person requesting the hearing.

(d) In the case of any hearing conducted under this Code section, the Attorney General or his or her designated representative may conduct the hearing.

(e) The Attorney General shall have authority to do the following:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas;

(3) Rule upon offers of proof;

(4) Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing briefs;

(5) Dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground;

(6) Dispose of motions to amend or to intervene;

(7) Provide for the taking of testimony by deposition or interrogatory; and

(8) Reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the agency.

(f) Subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county where the hearing is being heard for an order requiring obedience. Failure to comply with such order shall be cause for punishment as for contempt of court. The costs of securing the attendance of witnesses, including fees and mileage, shall be computed and assessed in the same manner as prescribed by law in civil cases in the superior court.

(g) A record shall be kept in each contested case and shall include:

(1) All pleadings, motions, and intermediate rulings;

(2) A summary of the oral testimony plus all other evidence received or considered except that oral proceedings or any part thereof shall be transcribed or recorded upon request of any party. Upon written request therefor, a transcript of the oral proceedings or any part thereof shall be furnished to any party of the proceedings. The Attorney General shall set a uniform fee for such service;

(3) A statement of matters officially noticed;

(4) Questions and offers of proof and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, including any initial, recommended, or tentative decision, opinion, or report by the officer presiding at the hearing; and

(7) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(h) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(i) If the Attorney General does not receive a request for a hearing within the prescribed time where he or she has issued an order prohibiting any unfair or deceptive act or practices, he or she may permit an order previously entered to remain in effect or he or she may enter a proposed order. If a hearing is requested and conducted as provided in this Code section, the Attorney General shall issue a written order which shall:

(1) Set forth his or her findings with respect to the matters involved; and

(2) Enter an order in accordance with his or her findings.

(j) The Attorney General may promulgate such procedural rules and regulations as may be necessary for the effective administration of the authority granted to the Attorney General under this Code section.

History.
Code 1981, § 10-1-398, enacted by Ga. L. 1988, p. 1659, § 2; Ga. L. 2000, p. 1589, § 4; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2017, p. 774, § 10/HB 323.

Editor's notes.
Ga. L. 1988, p. 1659, § 2, effective July 1, 1988, repealed former Code Section 10-1-398, as enacted by Ga. L. 1975, p. 376, § 9, relating to actions by the administrator for damages, and enacted the current Code section.

10-1-398.1. Judicial review.

Any person who has exhausted all administrative remedies available

and who is aggrieved by a final decision in a contested case is entitled to judicial review in accordance with the procedures, standards, and requirements set forth in Code Section 50-13-19.

History. Code 1981, § 10-1-398.1, enacted by Ga. L. 1988, p. 1659, § 3; Ga. L. 2015, p. 1088, § 2/SB 148.

10-1-399. Civil actions for violations; remedies.

(a) Any person who suffers injury or damages as a result of a violation of Chapter 5B of this title, as a result of consumer acts or practices in violation of this part, as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of such violations may bring an action individually, but not in a representative capacity, against the person or persons engaged in such violations under the rules of civil procedure to seek equitable injunctive relief and to recover his or her general and exemplary damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, that exemplary damages shall be awarded only in cases of intentional violation. Notwithstanding any other provisions of law, a debtor seeking equitable relief to redress an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, upon facts alleged showing a likelihood of success on the merits, may not, within the discretion of the court, be required to make a tender. Nothing in this subsection or paragraph (20) of subsection (b) of Code Section 10-1-393 shall be construed to interfere with the obligation of the debtor to a lender who is not in violation of paragraph (20) of subsection (b) of Code Section 10-1-393. A claim under this Code section may also be asserted as a defense, setoff, cross-claim, or counterclaim or third-party claim against such person.

(b) At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be delivered to any prospective respondent. Any person receiving such a demand for relief who, within 30 days of the delivering of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning this rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state. The 30 day requirement of this subsection shall not apply to a debtor seeking a temporary restraining order to redress or prevent an injury resulting from a violation of

paragraph (20) of subsection (b) of Code Section 10-1-393, provided that said debtor gives, or attempts to give the written demand required by this subsection at least 24 hours in advance of the time set for the hearing of the application for the temporary restraining order. Such respondent may otherwise employ the provisions of this Code section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this Code section. All written tenders of settlement such as described in this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(c) Subject to subsection (b) of this Code section, a court shall award three times actual damages for an intentional violation.

(d) If the court finds in any action that there has been a violation of this part, the person injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with said action; provided, however, that the court shall deny a recovery of attorneys' fees and expenses of litigation which are incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of the written demand for relief required by this Code section; provided, further, that, if the court finds the action continued past the rejection of such reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of litigation to the adverse party. Any award of attorneys' fees and expenses of litigation shall become a part of the judgment and subject to execution as the laws of Georgia allow.

(e) Any manufacturer or supplier of merchandise whose act or omission, whether negligent or not, is the basis for action under this part shall be liable for the damages assessed against or suffered by retailers charged under this part. A claim of such liability may be asserted by cross-claim, third-party complaint, or by separate action.

(f) It shall not be a defense in any action under this part that others were, are, or will be engaged in like practices.

(g) In any action brought under this Code section the Attorney General shall be served by certified or registered mail or statutory overnight delivery with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The Attorney General shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the Attorney General.

History.

Ga. L. 1975, p. 376, § 10; Ga. L. 1985, p. 642, § 1; Ga. L. 1986, p. 1046, § 4; Ga. L. 1987, p. 794, § 3; Ga. L. 1988, p. 983, § 3; Ga. L. 1996, p. 231, § 2; Ga. L. 2000, p. 1589, § 4; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2024, p. 1052, § 2(17)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subsections (a) and (d).

Law reviews.

For article suggesting the tortious nature of a violation of the Fair Business Practices Act, see 10 Ga. L. Rev. 917 (1976).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For article, "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?," see 62 Mercer L. Rev. 449 (2011).

JUDICIAL DECISIONS

Analysis

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General Consideration

Factors determining if part violated. — In analyzing whether defendant's allegedly wrongful activities are in violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., or an "isolated" incident not covered under the statute, two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Impact on consumer marketplace required. — Unless it can be said that defendant's actions had or has potential harm for consumer public, the act or practice cannot be said to have "impact" on consumer marketplace and any act or practice which is outside that context, no matter how unfair or deceptive, is not directly regulated by the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Though the plaintiff may be a "consumer" with regard to the transaction, if the deceptive or unfair act or practice had or has no potential for harm to the general consuming public, the allegedly wrongful act of the defendant was not made in the context of the consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Trade name infringement. — Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., protects businesses from unfair or deceptive practices in the conduct of trade or commerce, including passing off goods or services as those of another, or causing actual confusion as to the source, sponsorship, approval, or certification of goods or services. Thus, the

General Consideration (Cont'd)

FBPA broadly protects against infringement on a protected trade name by use of a confusingly similar name. Inkaholiks Luxury Tattoos Georgia, LLC v. Parton, 324 Ga. App. 769, 751 S.E.2d 561, 2013 Ga. App. LEXIS 929 (2013).

Contractual defense of forum selection clause did not apply. — Trial court erred in granting summary judgment in favor of a health and nutrition multi-level distribution company in a physician's action alleging violations of the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician's claims were not res judicata based on a default judgment entered in favor of the company in a Texas court, and since the four corners of the physician's complaint reveal that the physician's claims were not based on breach of contract but were based on violation of the SBOA, the contractual defense of a forum selection clause did not apply; FBPA claims are not contract claims. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

Court of appeals erred in ruling that a physician's claims that a limited liability company (LLC) violated the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-399(b), were not barred by res judicata because the physician was barred by a Texas judgment from filing an FBPA claim against the LLC in Georgia, and a Georgia court could not make its own determination regarding whether the forum selection clause in the parties' agreement precluded the filing of an FBPA claim in Georgia; there was no public policy exception to the Full Faith and Credit Clause, and the Texas judgment went to the merits of, and adversely controlled, the physician's claim that the forum selection clause was inapplicable to an FBPA claim. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Demand for Relief

Section incorporates common law. — Since subsection (b) contemplates notice of deception relied upon as prerequisite to suit for recovery of damages resulting from that deception, this section is construed as incorporating "reliance" element of common-law tort of misrepresentation into causation element of an individual claim. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Liberal construction. — Notice requirement of subsection (b) of O.C.G.A. § 10-1-399 is to be liberally construed and the sufficiency of notice is a question for the court. Lynas v. Williams, 216 Ga. App. 434, 454 S.E.2d 570, 1995 Ga. App. LEXIS 180 (1995), cert. denied, No. S95C0968, 1995 Ga. LEXIS 585 (Ga. May 15, 1995).

Sufficiency of complaint. — Defendant's motion to dismiss was denied because a claim under the Georgia Fair Business Practices Act (GFBPA), O.C.G.A. § 10-1-399, was not subject to heightened pleading requirements and the plaintiffs did not seek punitive damages; rather, the plaintiffs sought statutory treble damages for a legitimately stated claim available by the statute. Pries v. Greenpath, Inc., No., 528 F. Supp. 3d 1353, 2021 U.S. Dist. LEXIS 819 (M.D. Ga. 2021).

Notice sufficient although Fair Business Practices Act not cited. — Even though a letter of notice does not cite Ga. L. 1975, p. 376, if the letter is sufficient in and of itself to independently apprise defendant of the underlying facts giving rise to the claim, then the letter is sufficient notice. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820, 1979 Ga. App. LEXIS 2933 (1979).

Notice under Fair Business Practices Act. — While the notice pursuant to O.C.G.A. § 10-1-399 is not technically an element of a cause of action for a Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., violation, it is a statutory prerequisite to the filing of a FBPA suit that adequate written notice be

timely sent. Lynas v. Williams, 216 Ga. App. 434, 454 S.E.2d 570, 1995 Ga. App. LEXIS 180 (1995), cert. denied, No. S95C0968, 1995 Ga. LEXIS 585 (Ga. May 15, 1995).

Tenant's letter to a former landlord informing the landlord that the tenant's eviction was unfair and requesting that the landlord pay for damages done to the tenant's family was adequate notice for purposes of the tenant's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim. Stringer v. Bugg, 254 Ga. App. 745, 563 S.E.2d 447, 2002 Ga. App. LEXIS 316 (2002), cert. denied, No. S02C1221, 2002 Ga. LEXIS 696 (Ga. Sept. 6, 2002).

Trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser's certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesperson since that provision directly contradicted the express provisions of the Act. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779, 2008 Ga. App. LEXIS 684 (2008).

Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had the defendant's principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-920). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843, 2009 Ga. App. LEXIS 1452 (2009).

No tolling of limitations period. — The 30-day notice requirement of O.C.G.A. § 10-1-399(b) does not toll or extend the limitations period provided for in O.C.G.A. § 10-1-401 and does not constitute the bringing of an action. Greene v. Team Props., Inc., 247 Ga. App. 544, 544 S.E.2d 726, 2001 Ga. App. LEXIS 27 (2001), overruled in part, Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005), overruled in part, Foster v. Ga. Reg'l Transp. Auth., 297 Ga. 714, 777 S.E.2d 446, 2015 Ga. LEXIS 653 (2015).

Demand not required when claim raised as a counterclaim. — Because a debtor asserted a Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim as a counterclaim, the debtor was not required to deliver a written demand for relief under O.C.G.A. § 10-1-399(b). 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428, 2007 Ga. App. LEXIS 1222 (2007).

Tender of Settlement

Tender of settlement must be in writing. — Subsection (b) of O.C.G.A. § 10-1-399 expressly requires that the tender of settlement be in writing and is so plain and unambiguous that judicial construction is both unnecessary and unauthorized, and the legislature's clear intent that the settlement offer be in writing will not be thwarted by invocation of the rule of substantial compliance. Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467, 1990 Ga. App. LEXIS 253 (1990).

Plaintiff not deprived of cause of action. — Although a tender of settlement may limit the amount of damages recoverable, it does not deprive a plaintiff of the plaintiff's cause of action. Crown Ford v. Crawford, 221 Ga. App. 881, 473 S.E.2d 554, 1996 Ga. App. LEXIS 744 (1996).

Cause of Action

1. In General

Section gives separate cause of action. — There is a separate and distinct cause of action under the

Cause of Action (Cont'd)
1. In General (Cont'd)

provisions of this section, and a consumer who is damaged has an independent right to recover under the Fair Business Practices Act regardless of any other theory of recovery. Attaway v. Tom's Auto Sales, Inc., 144 Ga. App. 813, 242 S.E.2d 740, 1978 Ga. App. LEXIS 1795 (1978); Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416, 1979 Ga. App. LEXIS 1850 (1979); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Suit must serve public interest. — Suits brought pursuant to Ga. L. 1975, p. 376, § 10 must serve public interest and implement purpose of Ga. L. 1975, p. 376 — the end to unfair or deceptive acts or practices in public consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Purpose and intent of Ga. L. 1975, p. 376 is protection of public, and private suit under Ga. L. 1975, p. 376, § 10 may be brought only if the suit implements that underlying purpose and intent. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Justifiable reliance must be shown if misrepresentation is alleged. — O.C.G.A. § 10-1-401(a)(1) did not bar a home buyer's claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the buyer did not suffer any actual damages at the time of the alleged violation, and could not have suffered any such damages at least until the homebuilder conveyed the house to the buyer without complying with code requirements or used the contractual language in question to deny liability; therefore, the buyer's cause of action did not accrue until less than two years prior to the date the buyer filed suit. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005).

In an action in which the injured party alleged that the builder made a misrepresentation in the construction contract by including conflicting provisions regarding liability for construction of the property in accordance with building codes, justifiable reliance, pursuant to O.C.G.A. § 10-1-399, was an essential element of the injured party's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim. Tiismann v. Linda Martin Homes Corp., 276 Ga. App. 846, 625 S.E.2d 32, 2005 Ga. App. LEXIS 1270 (2005), aff'd, 281 Ga. 137, 637 S.E.2d 14, 2006 Ga. LEXIS 827 (2006).

Owner was unable to hold the builder liable under O.C.G.A. § 10-1-399 based upon an alleged misrepresentation in a contract purporting to limit the builder's liability for failing to build the owner's home to code; the owner did not rely on the provision at issue, as the owner had read the provision and signed the agreement anyway, believing the provision to be unenforceable. Tiismann v. Linda Martin Homes Corp., 281 Ga. 137, 637 S.E.2d 14, 2006 Ga. LEXIS 827 (2006).

Case law interpreting O.C.G.A. § 10-1-399 to include an element of reliance in cases involving misrepresentation is still valid despite amendments to § 10-1-399. Tiismann v. Linda Martin Homes Corp., 281 Ga. 137, 637 S.E.2d 14, 2006 Ga. LEXIS 827 (2006).

Purchasers of condominium units could not maintain the purchasers' claims against the developers and a broker for violation of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the purchasers could not show justifiable reliance as the purchasers were estopped from relying on an alleged representation that was made outside of a written agreement into which the purchasers entered. Novare Group, Inc. v. Sarif, 290 Ga. 186, 718 S.E.2d 304, 2011 Ga. LEXIS 939 (2011).

Volitional act and impact on marketplace required. — To be subject to direct suit under the Fair Business Practices Act, an alleged offender must perform some volitional act to avail oneself of the channels of consumer commerce, and the allegedly offensive activity must take place within the context of the consumer marketplace. State ex rel. Ryles v. Meredith Chevrolet,

Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

In action on contract when defendant denied liability on contract on ground of partial failure of consideration and brought a counterclaim against the plaintiff under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., but failed to present evidence of a volitional unfair or deceptive act or practice, O.C.G.A. § 10-1-399 was not applicable and the plaintiff's failure to comply with the statute's terms was irrelevant. Gresham v. White Repair & Contracting Co., 158 Ga. App. 235, 279 S.E.2d 528, 1981 Ga. App. LEXIS 2143 (1981).

Plaintiff's allegation that the defendant violated the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., by engaging in a pattern of unfair and deceptive acts and practices both in the conduct of consumer transactions and in trade and commerce did not state a claim under the FBPA because the plaintiff did not allege any deceptive acts or practices in the conduct of consumer transactions such as passing off goods or services as those of another or causing confusion as to the source of goods or services. Harlander v. Turner (In re Turner), No. 15-40525-EJC, No. 15-04037-EJC, 2017 Bankr. LEXIS 917 (Bankr. S.D. Ga. Mar. 31, 2017).

Damage must be in capacity as member of consuming public. — While suit under this section is brought in the plaintiff's individual capacity, it must be in the plaintiff's capacity as an individual member of a consuming public who has suffered damage as a result of unfair or deceptive act or practice which had or has potential harmful effect on general consuming public. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Owner of a trademark in a trademark infringement case was not a consumer who sustained damage and thus the owner was not entitled to an award of attorney fees under O.C.G.A. § 10-1-399. Lone Star Steakhouse & Saloon v. Longhorn Steaks, Inc., 106 F.3d 355, 1997 U.S. App. LEXIS 3276 (11th Cir.), modified, 122 F.3d 1379, 1997 U.S. App. LEXIS 26388 (11th Cir. 1997).

Right of nonconsumers to bring action unsettled. — Contrary to Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980), subsection (a) of O.C.G.A. § 10-1-399 does not appear to limit actions under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to individual members of the consuming public; instead, it simply allows any person injured as a result of a violation to bring an action and, thus, whether a FBPA plaintiff must be an individual member of the consuming public seems to be an unsettled question of Georgia law. Friedlander v. PDK, Labs, Inc., 59 F.3d 1131, 1995 U.S. App. LEXIS 19935 (11th Cir. 1995) (see annotation under catchline "Damage must be in capacity as member of consuming public").

Injury to individual by breach of duty to consuming public. — One may bring a private suit under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., only if one is individually injured by breach of duty owed to consuming public in general. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Private transactions. — This section does not encompass suits based upon allegedly deceptive or unfair acts or practices which occur in essentially private transactions. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

This section, providing for a private right of action, was enacted to give effect to the intent of the General Assembly that such practices be swiftly stopped, and is part of enforcement and regulatory scheme underlying public protection policy of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and as such does not create an additional remedy for redress of private wrongs occurring outside the context of the public consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

That Ga. L. 1975, p. 376, § 10 provides for equitable injunctive relief and for re-

Cause of Action (Cont'd)
1. In General (Cont'd)

covery of treble damages for intentional violations is evidence that the legislature intended the statute to serve as an aid in enforcing the underlying public protection policy of Ga. L. 1975, p. 376 by enlisting litigative assistance of those individual members of consuming public damaged by unfair or deceptive acts or practices and not as a basis for new private remedy for individuals who are damaged by acts or practices which have no potential for impact on general consuming public. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Private claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., has three elements: violation of the Act, causation, and injury. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980); Moore-Davis Motors, Inc. v. Joyner, 252 Ga. App. 617, 556 S.E.2d 137, 2001 Ga. App. LEXIS 1100 (2001), cert. dismissed, No. S02C0541, 2002 Ga. LEXIS 359 (Ga. Apr. 16, 2002).

Single instance of unfair or deceptive act or practice is sufficient predicate upon which to base claim for damages if public consumer interest would be served thereby. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Jury trial may be ordered. — Despite the inherent equitable nature of the claim, the trial court retains the authority to order a jury trial of claims under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., or as to ex delicto actions involving unliquidated damages which must be determined by a jury. Greenbriar Dodge, Inc. v. May, 155 Ga. App. 892, 273 S.E.2d 186, 1980 Ga. App. LEXIS 2828 (1980).

Question of law and fact. — While the fact of notice under subsection (b) of this section is a question for jury resolution, the sufficiency of notice, if given, is a matter for court determination. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820, 1979 Ga. App. LEXIS 2933 (1979).

Question of sufficiency of notice is one for court. Plaza Pontiac, Inc. v. Shaw, 158 Ga. App. 799, 282 S.E.2d 383, 1981 Ga. App. LEXIS 2425 (1981).

Dismissal of claims against non-profit hospital. — Court dismissed, without prejudice, an uninsured patient's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claims against a non-profit hospital and an affiliated health company because: (1) the patient alleged that the defendants violated state and federal law with regard to its billing practices for uninsured and/or indigent patients and that the patient should not have to pay the patient's treatment costs because the hospital was a non-profit hospital; and (2) I.R.S. § 501(c)(3) did not confer subject matter jurisdiction on the court over the patient's fair business practice claims because the claims were based on the theory that § 501(c)(3) created an enforceable trust between the hospital and the federal government, and no such trust was created under federal law. Ellis v. Phoebe Putney Health Sys., No. 1:04-CV-80, 2005 U.S. Dist. LEXIS 19935 (M.D. Ga. Apr. 8, 2005).

2. Diligence of Plaintiff

Plaintiff must be diligent in discovering truth. — Under Ga. L. 1975, p. 376, p. 10, a claimant who alleges Ga. L. 1975, p. 376 was violated as a result of misrepresentation must demonstrate that the claimant was injured as a result of reliance upon alleged misrepresentation and, therefore, the claimant is not entitled to recover if the claimant had equal and ample opportunity to ascertain the truth but failed to exercise proper diligence to do so. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980); Nims v. Otter, 188 Ga. App. 516, 373 S.E.2d 396, 1988 Ga. App. LEXIS 1081 (1988); Massey v. Thomaston Ford Mercury, 196 Ga. App. 278, 395 S.E.2d 663, 1990 Ga. App. LEXIS 898 (1990).

When any damage purchaser may have suffered was charged to the purchaser's lack of diligence and not to the purchaser's reliance upon any misrepresentation, the purchaser suffered no damage as a

result of a violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440, 1987 Ga. App. LEXIS 1582 (1987).

Failure to read lease agreements. — Trial court erred in denying automobile dealer's motion for summary judgment with respect to the customers' claims that the lease transactions violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. since the customers alleged no artifice or fraud which would have prevented the customers from reading the lease agreements prior to signing the leases. Delta Chevrolet, Inc. v. Wells, 187 Ga. App. 694, 371 S.E.2d 250, 1988 Ga. App. LEXIS 842 (1988).

Diligence not shown as a matter of law. — In a case in which the injured party alleged that the builder violated the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the construction contract contained contradictory language that assured the injured party that the builder was to build the home in accordance with the building codes but also incorporated a limited warranty disclaiming responsibility for any violations of the building codes, the injured party's claim under the Act failed, as the injured party did not, as a matter of law, reasonably rely upon the contradictory contract provisions as required for an action under O.C.G.A. § 10-1-399; there was no confidential relationship between the parties, and the injured party was not prevented by artifice or fraud from making an inspection to determine the truth or falsity of the alleged representation. Tiismann v. Linda Martin Homes Corp., 276 Ga. App. 846, 625 S.E.2d 32, 2005 Ga. App. LEXIS 1270 (2005), aff'd, 281 Ga. 137, 637 S.E.2d 14, 2006 Ga. LEXIS 827 (2006).

3. Evidence

Oral misrepresentation contrary to written agreement. — If the alleged oral misrepresentation attributed to the defendant was contrary to the express terms of the written agreement underlying the sale, the trial court did not err in ruling that the purchaser's testimony regarding that misrepresentation was inadmissible. Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440, 1987 Ga. App. LEXIS 1582 (1987).

A mere showing that a person became sick subsequent to eating food was insufficient to establish a claim for violation of the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., predicated upon the allegation that the plaintiff was injured because of the unfair and deceptive practice of selling foodstuffs after the expiration date. Stevenson v. Winn-Dixie Atlanta, Inc., 211 Ga. App. 572, 440 S.E.2d 465, 1993 Ga. App. LEXIS 1577 (1993), cert. denied, No. S94C0533, 1994 Ga. LEXIS 528 (Ga. Feb. 18, 1994).

Damages

Measure of damages is the actual injury suffered. Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416, 1979 Ga. App. LEXIS 1850 (1979); Givens v. Bourrie, 190 Ga. App. 425, 379 S.E.2d 223, 1989 Ga. App. LEXIS 248 (1989).

An award for general damages under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2(a) are not applicable. Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467, 1990 Ga. App. LEXIS 253 (1990).

Actual injury suffered. — The measure of damages to be applied for in a statutory violation was that of actual injury suffered; the general provisions of O.C.G.A. § 51-12-2(a), damages recoverable without proof of amount, were not applicable. Moore-Davis Motors, Inc. v. Joyner, 252 Ga. App. 617, 556 S.E.2d 137, 2001 Ga. App. LEXIS 1100 (2001), cert. dismissed, No. S02C0541, 2002 Ga. LEXIS 359 (Ga. Apr. 16, 2002).

When a consumer sued a car dealer under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., concerning the car purchased from the dealer, the consumer did not show an actual injury by any alleged violation because there was no evidence of the actual value of the car at the time the car was bought, as actual damages, for

Damages (Cont'd)

purposes of the Act, meant relief other than a refund of the purchase price and restitution. Small v. Savannah Int'l Motors, Inc., 275 Ga. App. 12, 619 S.E.2d 738, 2005 Ga. App. LEXIS 872 (2005).

"Actual damages" more than refund of purchase price. — Within the meaning of the Fair Business Practices Act, "actual damages" means relief other than the refund of the purchase price and the return to the status quo that constitutes restitution. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820, 1979 Ga. App. LEXIS 2933 (1979).

Sperm banks causing damage to parents. — Parents' Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim against a sperm bank was erroneously dismissed; the parents' claims that the sperm bank made misrepresentations about the quality of their product (sperm) and services (screening process) to the public could have resulted in injuries other than the life of the child (for which no damages were recoverable). At a minimum, the parents may have paid more for the sperm than the sperm was worth, and injunctive relief and punitive damages were potentially available. Norman v. Xytex Corp., 310 Ga. 127, 848 S.E.2d 835, 2020 Ga. LEXIS 662 (2020).

Damages award under Fair Debt Collection Practices Act and Fair Business Practices Act. — Damages award was not in error because: (1) the debtor's declaration supported finding a debt collector's false representation of a debt and failure to notify credit reporting agencies that the debt was disputed caused the debtor emotional distress; and (2) those acts constituted violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., for which damages could be recovered under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. Carlisle v. Nat'l Commer. Servs., 722 Fed. Appx. 864, 2018 U.S. App. LEXIS 28 (11th Cir. 2018).

Treble damages and attorney fees may be awarded for certain egregious or intentional misconduct. Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416, 1979 Ga. App. LEXIS 1850 (1979).

Debtor was properly awarded treble damages in the debtor's claim against a collection agency. The trial court found that the agency intentionally violated the Fair Debt Collection Practices Act, 15 U.S.C. § 16921, thereby violating the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428, 2007 Ga. App. LEXIS 1222 (2007).

Trial court erred by awarding treble damages of the entire compensatory damages award for each violation, which amounted to sextuple damages for each violation, as the jury awarded the car buyer compensatory damages of $4,114.50 and, in addition, the jury awarded $24,684 on the basis of both the treble damages provision in the Fair Business Practices Act, O.C.G.A. § 10-1-399(c) , and the treble damages provision in the odometer statute, O.C.G.A. § 40-8-5(g)(1)(A), with no verdict allocation. Gobran Auto Sales, Inc. v. Bell, 335 Ga. App. 873, 783 S.E.2d 389, 2016 Ga. App. LEXIS 101 (2016).

Exemplary damages are not necessarily subsumed in treble damages allowed under subsection (c) of this section. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820, 1979 Ga. App. LEXIS 2933 (1979).

Full trial damages recovered under subsection (b) of O.C.G.A. § 10-1-399. — See Park Leasing Co. v. TWS, Inc., 206 Ga. App. 864, 426 S.E.2d 620, 1992 Ga. App. LEXIS 1817 (1992), cert. denied, No. S93C0573, 1993 Ga. LEXIS 350 (Ga. Apr. 8, 1993).

Awards. — Trial court was authorized to award punitive damages, but not required to award three times the compensatory damages, or any amount at all. Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774, 556 S.E.2d 468, 2001 Ga. App. LEXIS 1284 (2001).

Attorney fees awarded. — When jury rendered a verdict in favor of a beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the

posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-835 and 10-1-399 was proper. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571, 2004 Ga. App. LEXIS 420 (2004), cert. denied, No. S04C1331, 2004 Ga. LEXIS 757 (Ga. Sept. 7, 2004).

Debtor was properly awarded attorney fees in the debtor's claim against a collection agency. The agency, which did not appear at the trial, did not provide the appellate court with a transcript of the nonjury trial sufficient to enable the appellate court to determine the issue at hand; moreover, the affidavit submitted by the debtor's attorneys clearly provided detailed information sufficient to enable the fact finder to determine what each of the attorneys did, to allocate the services provided between successful and unsuccessful claims, and to determine whether any services rendered were duplicative. 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428, 2007 Ga. App. LEXIS 1222 (2007).

Attorney fees, arbitration clauses, and federal law. — Because a cable television subscriber would automatically recover attorney fees if the subscriber prevailed on the subscriber's claim against cable television providers under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(d), and was highly likely to recover fees under O.C.G.A. § 13-6-11 if the subscriber prevailed on intentional tort claims for fraud and trespass, an attorney would have an incentive to represent the subscriber during arbitration. Therefore, a class action waiver contained in an arbitration clause in the parties' subscription contract was not unconscionable under Georgia law, and the arbitration clause was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 2008 U.S. Dist. LEXIS 19617 (N.D. Ga. 2008).

Illustrative Cases

Misrepresentation in selling own home. — Misrepresentation made by homeowner selling the seller's own house is not likely to be a recurring "consumer" threat and, therefore, has no potential "impact" on general consuming public. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Any misrepresentation made by a seller in the context of selling the seller's own home is not made "in the conduct of any trade or business" but rather in the course of private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort, and property law. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Single misrepresentation by business in isolated sale. — Single oral misrepresentation made by real estate business in content of isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on consumer marketplace. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910, 1980 Ga. App. LEXIS 2888 (1980).

Advertisement of "buy one get one free sale." — In an action against a store based on a sign advertising a "buy one get one free" sale without indicating limitations, if the sale actually applied only to certain items, plaintiff was not entitled to recovery because of the plaintiff's inability to prove causation and damages. 232 Ga. App. 708, 502 S.E.2d 735, 1998 Ga. App. LEXIS 721.

Borrower whose loan was disapproved for a bona fide reason unrelated to a lender's allegedly deceptive interest rate commitment could not claim to have been injured by the alleged unfair practice; moreover, statistical evidence of recent loan applications tended to negate the borrower's allegation that the lender engaged in a "bait and switch" operation. Whisenant v. Fulton Fed. Sav. & Loan Ass'n, 200 Ga. App. 31, 406 S.E.2d 793, 1991 Ga. App. LEXIS 759 (1991).

Pressure to purchase more expensive van. — Evidence, which included a showing of an auto dealership's attempt to pressure a customer into

Illustrative Cases (Cont'd)

purchasing a more expensive van, was insufficient to support the jury's award of actual and punitive damages. Miles Rich Chrysler-Plymouth, Inc. v. Mass, 201 Ga. App. 693, 411 S.E.2d 901, 1991 Ga. App. LEXIS 1557 (1991).

Judgment on the pleadings in favor of auto dealership in error. — Trial court erred by granting an auto dealership judgment on the pleadings as to a buyer's consumer fraud suit because it could not be said, as a matter of law, that the buyer would not be unable to show that the reliance on representations that the minivan was undamaged and never had been in a wreck was reasonable. Raysoni v. Payless Auto Deals, LLC, 296 Ga. 156, 766 S.E.2d 24, 2014 Ga. LEXIS 906 (2014).

Pool installation. — Because the pool installers failed to respond to a pool purchaser's request for admissions, pursuant to O.C.G.A. § 9-11-36(a), those admissions were deemed admitted and were sufficient to establish the purchaser's claims of fraud and conspiracy to defraud and, accordingly, summary judgment was properly granted to the purchaser on those claims; however, summary judgment to the purchaser was error on the claim that the installers violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as there was no evidence that the actions by the installers were introduced into the stream of commerce or were reasonably intended to impact on any market other than on the purchaser, and the commensurate awards of attorney fees and treble damages, pursuant to O.C.G.A. § 10-1-399(c) and (d), were vacated. Brown v. Morton, 274 Ga. App. 208, 617 S.E.2d 198, 2005 Ga. App. LEXIS 709 (2005).

Building code. — In a case involving a contract in which a builder limited the builder's liability for failing to build to code, the builder's post-closing refusal to accept responsibility for remedying the code violations was not unfair or deceptive under O.C.G.A. § 10-1-399, as it was based on the contract that the owner had signed, and the builder's decision to litigate the issue was not unfair or deceptive and did not injure the owner, who received a substantial sum in arbitration as a result. Tiismann v. Linda Martin Homes Corp., 281 Ga. 137, 637 S.E.2d 14, 2006 Ga. LEXIS 827 (2006).

Arbitration clause in cable television subscription agreement. — Because the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(a), by the Act's terms, prohibited consumer class actions, an arbitration clause in a cable television subscription agreement that contained a class action waiver clause was not unconscionable under Georgia law and was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 2008 U.S. Dist. LEXIS 19617 (N.D. Ga. 2008).

Arbitration clause in a satellite television provider subscriber agreement. — Motion to compel arbitration of a putative class action was improperly denied under 9 U.S.C. §§ 2 and 16 because it was not unconscionable to require arbitration of the validity of an early cancellation fee charged by a satellite television provider in that the subscriber had the ability to recoup fees and expenses under the Georgia Fair Business Practices Act under O.C.G.A. §§ 10-1-393 and 10-1-399 if the subscriber prevailed individually. Cappuccitti v. DirecTV, Inc., 623 F.3d 1118, 2010 U.S. App. LEXIS 21348 (11th Cir. 2010).

"Largest to smallest" transaction policy by bank. — After plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest to smallest" transaction posting policy, unqualified by time limits or other restrictions, it stated claims under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. White v. Wachovia Bank, N.A., 563 F. Supp. 2d 1358, 2008 U.S. Dist. LEXIS 88112 (N.D. Ga. 2008).

Health and nutrition multi-level distribution company. — Trial court erred in dismissing a physician's

complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415(c)(4), applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

Dealership's role in odometer statement. — Trial court erred by granting summary judgment to an auto dealership on a buyer's claim for fraud against the dealership because the record created a question of fact as to whether the dealership issued a substantially inaccurate odometer statement even when more than one employee either knew that the written statement was false or recklessly disregarded the possibility that it was so. Alvear v. Sandy Springs Toyota, Inc., 332 Ga. App. 798, 775 S.E.2d 172, 2015 Ga. App. LEXIS 392 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Practices, §§ 953 et seq., 1081 et seq.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 339 et seq.

ALR.

Punitive or exemplary damages as recoverable for trademark infringement or unfair competition, 47 A.L.R.2d 1117.

Right to private action under state consumer protection Act, 62 A.L.R.3d 169.

Reasonableness of offer of settlement under deceptive trade practice and consumer protection Acts, 90 A.L.R.3d 1350.

Right to private action under state consumer protection act — Preconditions to action, 117 A.L.R.5th 155.

10-1-400. Limitation on recovery in case of bona fide error.

In any action in which damages are demanded under Code Section 10-1-399, recovery will be limited to the amount, if any, by which the injured party suffered injury or damage caused by the violation if the adverse party proves that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error and that such error was not the result of negligence in the maintenance of such procedures.

History.

Ga. L. 1975, p. 376, § 11; Ga. L. 2015, p. 1088, § 2/SB 148.

RESEARCH REFERENCES

ALR.
Liability for innocent infringement of trademark or trade name, 96 A.L.R. 651.

10-1-401. Limitation of actions; right to set off damages or penalties not limited.

(a) No private right of action shall be brought under this part:

(1) More than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; or

(2) More than two years after the termination of any proceeding or action by the State of Georgia, whichever is later.

(b) Damages or penalties to which a person is entitled pursuant to this part may be set off against the allegation of the person to the seller and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this Code section.

History.
Ga. L. 1975, p. 376, § 17; Ga. L. 2015, p. 1088, § 2/SB 148.

Law reviews.
For article, "Acquisition of Trademark Rights Under United States and Georgia Law," see 7 Ga. St. B. J. 14 (2001).

JUDICIAL DECISIONS

Application to alleged unfair trade practices. — Two-year statute of limitation under O.C.G.A. § 10-1-401 applied to a vending machine purchaser's unfair trade practices claim against the sellers. League v. U.S. Postamatic, Inc., 235 Ga. App. 171, 508 S.E.2d 210, 1998 Ga. App. LEXIS 1374 (1998), cert. denied, No. S99C0342, 1999 Ga. LEXIS 226 (Ga. Feb. 26, 1999).

Commencement of limitations period. — Plaintiffs' cause of action under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., was barred by the two year statute of limitations since the action was commenced more than two years after the defendant obtained the plaintiffs' property without complying with statutory requirements, notwithstanding the plaintiffs' contention that the statute of limitations did not begin to run until the plaintiffs discovered the plaintiffs had been injured, which occurred when the plaintiffs received notice of a dispossessory action, since the failure of the defendant to provide a written contract or notice of the right to rescind as required by statute was evident and complete at the time the property was transferred to the defendant. Greene v. Team Props., Inc., 247 Ga. App. 544, 544 S.E.2d 726, 2001 Ga. App. LEXIS 27 (2001), overruled in part, Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005), overruled in part, Foster v. Ga. Reg'l Transp. Auth., 297 Ga. 714, 777 S.E.2d 446, 2015 Ga. LEXIS 653 (2015).

O.C.G.A. § 10-1-401(a)(1) did not bar a home buyer's claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the buyer did not suffer any actual damages at the time of the alleged violation, and could not have suffered any such damages at least until the homebuilder conveyed the house to the buyer without complying with code requirements or used the contractual

language in question to deny liability; therefore, the buyer's cause of action did not accrue until less than two years prior to the date suit was filed. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005).

Thirty day demand for relief provision does not toll limitations period. — Because plaintiffs knew or should have known of alleged Sale of Business Opportunity Act, O.C.G.A. § 10-1-410 et seq., violations more than two years before bringing claims, the trial court properly held that the plaintiff's claims were time-barred. Touchton v. Amway Corp., 247 Ga. App. 269, 543 S.E.2d 782, 2000 Ga. App. LEXIS 1457 (2000), overruled in part, Pollard v. Great Dane, LLC, No. A24A0545, 2024 Ga. App. LEXIS 236 (Ga. Ct. App. June 18, 2024).

The 30-day notice requirement of O.C.G.A. § 10-1-399(b) does not toll or extend the limitations period provided for in O.C.G.A. § 10-1-401 and does not constitute the bringing of an action. Greene v. Team Props., Inc., 247 Ga. App. 544, 544 S.E.2d 726, 2001 Ga. App. LEXIS 27 (2001), overruled in part, Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005), overruled in part, Foster v. Ga. Reg'l Transp. Auth., 297 Ga. 714, 777 S.E.2d 446, 2015 Ga. LEXIS 653 (2015).

Complaint time-barred. — *Unpublished decision:* Because plaintiff dry cleaners sued defendant natural gas supplier 33 months after the alleged misdeeds, and it was not alleged that any Georgia Public Service Commission proceedings had been initiated that would have postponed the accrual date under O.C.G.A. § 10-1-401(a)(2), the O.C.G.A. § 10-1-393(a) claim was time-barred by § 10-1-401(a)'s two-year limitations period. Byung Ho Cheoun v. Infinite Energy, Inc., 363 Fed. Appx. 691, 2010 U.S. App. LEXIS 1866 (11th Cir. 2010).

RESEARCH REFERENCES

ALR.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 A.L.R.2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

Fraud as extending statutory limitations period for contesting will or its probate, 48 A.L.R.4th 1094.

10-1-402. Assurances of voluntary compliance.

In the administration of this part the Attorney General may accept an assurance of voluntary compliance with respect to any act or practice deemed to be violative of this part from any person who has engaged or was about to engage in such act or practice. Any such assurance shall be in writing and be filed with the clerk of the superior court of the county in which the alleged violator resides or has his or her principal place of business or with the clerk of the Superior Court of Fulton County. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus processed may at any time be reopened by the Attorney General for further proceedings in the public interest, pursuant to Code Section 10-1-397. This Code section shall not bar any claim against any person who has engaged in any act or practice in violation of this part.

History.
Ga. L. 1975, p. 376, § 12; Ga. L. 2015, p. 1088, § 2/SB 148.

Law reviews.
For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

JUDICIAL DECISIONS

Discretion as to acceptance of assurance. — Permissive wording of Ga. L. 1975, p. 376, § 12 indicates that it is not mandatory that the administrator accept an assurance of voluntary compliance with respect to acts or practices violative of Ga. L. 1975, p. 376. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, 1978 Ga. App. LEXIS 1840, aff'd, 242 Ga. 294, 249 S.E.2d 87, 1978 Ga. LEXIS 1180 (1978).

10-1-403. Investigations; demands for evidence.

(a) When it reasonably appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge or to appear and testify or to produce relevant documentary material or physical evidence for examination at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale, or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) If a matter that the Attorney General makes the subject of an investigative demand is located outside the state, the person receiving the investigative demand may either make it available to the Attorney General at a convenient location within this state or pay the reasonable and necessary expenses for the Attorney General or his or her representative to examine the matter at the place where it is located. The Attorney General may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his or her behalf, and may respond to similar requests from officials of other states.

(c)(1) Each such investigative demand shall state the nature of the conduct constituting the alleged violation of this part which is under investigation and the provision of law applicable thereto; describe the

class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; describe the nature, scope, and purpose of the investigation with such definiteness and certainty as to permit any person whose testimony is sought to be fairly appraised of the subject matter of the inquiry; prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction and the person or persons whose testimony is sought may prepare for the same; and identify the person to whom such material shall be made available.

(2) No such investigative demand shall:

(A) Contain any requirement which would be held to be unreasonable as contained in a subpoena for the production of documentary evidence issued by a court of this state in aid of a grand jury investigation of such alleged violation; or

(B) Require the production of any documentary evidence or oral testimony which would be privileged from disclosure if demanded by a subpoena for the production of documentary evidence issued by a court of this state in aid of a grand jury investigation of such alleged violation;

provided, however, that the limitations on the scope of demand contained in this paragraph do not require as a condition to the issuance of an investigative demand that the alleged violation be of sufficient seriousness as to constitute a violation of the criminal laws of this state, as opposed to the civil provisions of this part.

History. Ga. L. 1975, p. 376, § 13; Ga. L. 1988, p. 1659, § 4; Ga. L. 2015, p. 1088, § 2/SB 148.

JUDICIAL DECISIONS

Appeal of investigative demand. — Under binding Georgia Supreme Court authority, an investigative demand issued by the Governor's Office of Consumer Affairs constitutes the decision of an administrative agency for the purpose of O.C.G.A. § 5-6-35(a)(1) and, consequently, that provision requires a party to apply for a discretionary appeal. Financial Education Services, Inc. v. State of Ga., 336 Ga. App. 606, 785 S.E.2d 544, 2016 Ga. App. LEXIS 104 (2016), cert. denied, 580 U.S. 1173, 137 S. Ct. 1234, 197 L. Ed. 2d 465, 2017 U.S. LEXIS 1717 (2017).

Appeal of order compelling compliance with investigative demand. — Corporation's direct appeal of a trial court order compelling the corproation to comply with an investigative demand issued by the Governor's Office of Consumer Affairs was dismissed because under binding Georgia Supreme Court authority, an investigative demand constitutes the

decision of an administrative agency for the purpose of the discretionary appeal provisions of O.C.G.A. § 5-6-35(a)(1) and, consequently, the corporation was required to apply for a discretionary appeal. Financial Education Services, Inc. v. State of Ga., 336 Ga. App. 606, 785 S.E.2d 544, 2016 Ga. App. LEXIS 104 (2016), cert. denied, 580 U.S. 1173, 137 S. Ct. 1234, 197 L. Ed. 2d 465, 2017 U.S. LEXIS 1717 (2017).

OPINIONS OF THE ATTORNEY GENERAL

Investigative demand, notice of contemplated civil action, combinable. — Whenever the administrator has reason to believe that any person has violated or is about to violate any provision of the Fair Business Practices Act or any regulations promulgated thereunder, it would be proper for the administrator to issue an investigative demand and notice of contemplated civil action simultaneously under that Act, and such may be included in one document. 1975 Op. Att'y Gen. No. 75-91.

Forwarding of documentary materials by registered mail authorized. — Administrator would not be acting beyond the scope of the administrator's authority to permit documentary materials to be forwarded to the administrator's office by use of registered mail under the terms of the investigative demand. 1975 Op. Att'y Gen. No. 75-134.

Receipt of documentary materials by administrator's delegate. — The administrator does not have to be present and personally receive documentary materials required of persons pursuant to the Fair Business Practices Act; the administrator, on the contrary, may authorize a delegate to perform this function for the administrator. 1975 Op. Att'y Gen. No. 75-134.

10-1-404. Attorney General's subpoena and hearing powers; procedural rules; court enforcement orders; self-incrimination; confidentiality.

(a) To carry out the duties prescribed by Code Sections 10-1-394, 10-1-395, 10-1-397, 10-1-398, and 10-1-403, the Attorney General, in addition to other powers conferred upon him or her by this part, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms, and promulgate such procedural rules and regulations as may be necessary, which procedural rules and regulations shall have the force of law.

(b) The recipient of an investigative demand or subpoena may file an objection with the Attorney General within the reasonable time allotted for responding on grounds that it fails to comply with this part or upon any constitutional or other legal right or privilege of such person. Upon failure of a person without lawful excuse to obey an investigative demand or subpoena, the Attorney General may apply to a superior court having jurisdiction for an order compelling compliance. The court may issue an order directing compliance with the original demand or subpoena or modifying or setting aside such demand or subpoena based on any objection that was raised before the Attorney General.

(c) The Attorney General may request that a natural person who

refuses to testify or to produce relevant matter on the ground that the testimonial matter may incriminate him be ordered by the court to provide the testimonial matter. With the exception of a prosecution for perjury and an action under Code Section 10-1-397, 10-1-398, 10-1-399, or 10-1-405, a natural person who complies with the court order to provide a testimonial matter after asserting a privilege against self-incrimination to which he is entitled by law shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise.

(d)(1) Information obtained pursuant to investigative demands, subpoenas, oaths, affirmations, or hearings enforced by this part shall not be made public or, except as authorized in paragraph (2) of this subsection, disclosed by the Attorney General or his or her employees beyond the extent necessary for the enforcement of this part.

(2) The Attorney General or his or her employees shall be authorized to provide to any federal, state, or local law enforcement agency any information acquired under this part which is sought pursuant to an investigative demand or subpoena by such agency. State or local law enforcement agencies shall be authorized to provide any information to the Attorney General when the Attorney General issues an investigative demand or subpoena for such information.

History. Ga. L. 1975, p. 376, § 14; Ga. L. 1984, p. 441, § 1; Ga. L. 1988, p. 1659, § 5; Ga. L. 2015, p. 1088, § 2/SB 148.

10-1-405. Civil penalties; individual liability.

(a) Any person who violates the terms of an injunction issued under Code Section 10-1-397 shall forfeit and pay to the state a civil penalty of not more than $25,000.00 per violation. For purposes of this Code section, the superior court issuing an injunction shall retain jurisdiction and the cause shall be continued and in such cases the Attorney General, acting in the name of the state, may petition for recovery of civil penalties.

(b) In the case of a continuing violation under this part, each day shall be regarded as a separate violation.

(c) Any intentional violation by a corporation, partnership, or association shall be deemed to be also that of the individual directors, officers, partners, employees, or agents of the corporation, partnership, or association who knew or should have known of the acts constituting the violation and who directly authorized, supervised, ordered, or did any of the acts constituting in whole or in part the violation; provided, however, that no such individual directors, officers, partners, employees, or agents shall have any individual liability under this subsection

unless the corporation, partnership, or association, as the case may be, which has committed the intentional violation shall fail to pay into the court within 30 days after judgment sufficient moneys or assets to satisfy the judgment.

(d) The Attorney General shall have the authority to compromise or settle claims for penalty brought under this Code section.

History.
Ga. L. 1975, p. 376, § 15; Ga. L. 1988, p. 1659, § 6; Ga. L. 2015, p. 1088, § 2/SB 148; Ga. L. 2024, p. 1052, § 2(18)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subsection (c).
Law reviews.
For article discussing liability, under common-law agency principles, of all persons in the chain of command, for a violation of the Fair Business Practices Act, see 10 Ga. L. Rev. 917 (1976).
For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

RESEARCH REFERENCES

ALR.
Recovery of cumulative statutory penalties, 71 A.L.R.2d 986.

10-1-406. Prosecution of criminal conduct revealed through investigation.

Whenever an investigation has been conducted under this article and such investigation reveals conduct which constitutes a criminal offense, the Attorney General shall have the authority to prosecute the case or forward the results of such investigation to a prosecuting attorney of this state who shall commence any criminal prosecution that such prosecuting attorney deems appropriate.

History.
Ga. L. 1975, p. 376, § 16; Ga. L. 1997, p. 1507, § 3; Ga. L. 2015, p. 1088, § 2/SB 148.
Editor's notes.
Ga. L. 1997, p. 1507, § 3, not codified by the General Assembly, provided that the 1997 amendment was applicable to offenses committed on or after July 1, 1997.
Law reviews.
For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 29 (1997).

10-1-407. Part not exclusive.

This part is cumulative with other laws and is not exclusive. The rights or remedies provided for in this part shall be in addition to any other procedures, rights, remedies, or duties provided for in any other law or in decisions of the courts of this state dealing with the subject matter.

History.
Ga. L. 1975, p. 376, § 19; Ga. L. 2015, p. 1088, § 2/SB 148.

10-1-408. Continuing validity of previously adopted rules, orders, actions, and regulations.

Rules, orders, actions, and regulations previously adopted which relate to functions performed by the administrator appointed pursuant to the Fair Business Practices Act of 1975 which were transferred under this article to the Attorney General shall remain of full force and effect as rules, orders, actions, and regulations of the Attorney General until amended, repealed, or superseded by rules or regulations adopted by the Attorney General.

History.
Code 1981, § 10-1-408, enacted by Ga. L. 2015, p. 1088, § 2/SB 148.

Part 3

Multilevel Distribution Companies; Sale of Business Opportunities

RESEARCH REFERENCES

Am. Jur. 2d.
54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 33, 90 et seq. 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 770 et seq.
C.J.S.
58 C.J.S., Monopolies, §§ 10 et seq., 124, 139.
ALR.
Remedy by mandatory injunction or specific performance for breach of contract to furnish one the requirements of his business, 98 A.L.R. 421.
Contract for exclusive distribution or sales agency as subject of suit for specific performance, 145 A.L.R. 684.
Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 A.L.R.2d 1008.
Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 A.L.R.3d 1436.
Validity and construction of restrictive covenant not to compete ancillary to franchise agreement, 50 A.L.R.3d 746.
Validity, construction, and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 A.L.R.3d 244.
Fraud in connection with franchise or distributorship relationships, 64 A.L.R.3d 1375.
Validity, construction, and effect of state franchising statute, 67 A.L.R.3d 1299.
Validity, construction, and effect of state business opportunity statutes, 84 A.L.R.4th 374.

10-1-410. Definitions.

As used in this part, the term:

(1) "Agreement" means any agreement relating to a business

opportunity or multilevel distribution company, including, but not limited to, the contract.

(2)(A) "Business opportunity" means the sale or lease of, or offer to sell or lease, any products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller or company represents:

(i) That the seller or company will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency operated amusement machines or devices. For purposes of this subparagraph, "assist the purchaser in finding locations" includes but is not limited to supplying the purchaser with names of locator companies, contracting with the purchaser to provide assistance or supply names, or collecting a fee on behalf of or for a locator company;

(ii) That the seller or company will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using, in whole or in part, the supplies, services, or chattels sold to the purchaser; or

(iii) That the company, in conjunction with any agreement which requires a total initial payment of an amount exceeding $500.00, will provide a sales program or marketing program; provided, however, that this subparagraph shall not apply to the sale of a sales program or a marketing program made in conjunction with the licensing of a registered trademark or service mark.

(B) The term "business opportunity" does not include:

(i) The sale of an ongoing business when the owner of that business sells and intends to sell only that one business opportunity;

(ii) Any relationship created solely by or involving:

(I) The relationship between an employer and an employee or among general business partners; or

(II) Membership in a bona fide cooperative association or transactions between bona fide cooperative associations and their members. As used in this subdivision, the term "cooperative association" means either (1) an association of producers of agricultural products organized pursuant to Article 3 of Chapter 10 of Title 2 or statutes similar thereto enacted by other states, or (2) an organization operated on a cooperative basis by and for independent retailers which

wholesales goods or furnishes services primarily to its member-retailers;

(iii) Any agribusiness corporation;

(iv) Any insurance agency;

(v) Any offer or sale of a business opportunity where the seller has a net worth on a consolidated basis of not less than $15 million as determined on the basis of the seller's most recent audited financial statement; and where the seller satisfies all of the following conditions or is a wholly owned subsidiary of a company that satisfies all of the following conditions:

(I) Seller is a publicly traded company;

(II) Seller has a class of securities registered pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934 and has timely filed all reports required under Sections 13 and 14 of the Securities Exchange Act of 1934 for a period of 36 months;

(III) Seller has not failed to pay any dividend or defaulted on any loan payment in the last five fiscal years;

(IV) Seller has an annual trading volume of stock of 3,000,000 shares or more; and

(V) Seller has an aggregate market value of the voting stock held by nonaffiliates of $100 million or more; or

(vi) A landlord, property manager, or owner who licenses or leases pushcarts or kiosks within or adjacent to a retail center containing divided retail floor space and common areas which will be used by any such licensee or lessee to sell goods or services not supplied by the landlord, property manager, or owner or any entity affiliated or associated with the landlord, property manager, or owner. For the purposes of this division, the term "pushcart" means a mobile retail unit from which goods or services are sold in the common area of a retail center, and the term "kiosk" means a temporary retail unit from which goods or services are sold in the common area of a retail center.

(3) "Business opportunity seller or company" means any corporation, whether domestic or foreign, or any business, whether a partnership, limited partnership, sole proprietorship, joint venture, association, trust, unincorporated organization, or other entity, which shall solicit, advertise, offer, or contract for any business opportunity or cause to be solicited, advertised, offered, or contracted for any business opportunity in this state, or which has a principal place of

business in this state, even if solicitations are of nonresidents of Georgia.

(4) "Company" means any multilevel distribution company or business opportunity company or seller.

(5) "Initial payment" means the total amount which a purchaser or participant is obligated or agrees to pay under the terms of an agreement before or at the time of delivery of the goods or services to the purchaser or participant and which a purchaser or participant is obligated to pay within six months of the date that the purchaser or participant commences operation of the business. If the agreement states a total price and provides that the total price is to be paid partially as an initial cash payment and the remainder in specific monthly payments, the term means the total price. The term does not include any amount required by the seller to be deposited as security for the performance by a purchaser or participant of the operation of the business or that secures an extension of credit. If purchasers or participants may enter a multilevel distribution company or business opportunity at different levels, "initial payment" means the total sum the purchaser or participant is obligated to pay to enter at the level chosen by the purchaser or participant.

(6) "Multilevel distribution company" means any person, firm, corporation, or other business entity which sells, distributes, or supplies for a valuable consideration goods or services through independent agents, contractors, or distributors at different levels wherein such participants may recruit other participants and wherein commissions, cross-commissions, bonuses, refunds, discounts, dividends, or other considerations in the program are or may be paid as a result of the sale of such goods or services or the recruitment, actions, or performances of additional participants. The term shall not include licensed insurance agents, insurance agencies, licensed real estate brokers, licensed real estate agents, licensed real estate agencies, licensed securities dealers, licensed limited securities dealers, licensed securities salesmen, or licensed limited securities salesmen. Any multilevel distribution company which operates in any of the forms precluded by paragraphs (1) through (4) of subsection (a) of Code Section 10-1-411 shall be considered an unlawful pyramid club under Code Section 16-12-38.

(7) "Participant" means anyone who participates at any level in a multilevel distribution company.

(8) "Person" means any individual, corporation, partnership, joint venture, association, trust, unincorporated organization, or other entity and shall include any other person that has a substantive interest in or effectively controls such person as well as the individual

officers, directors, general partners, trustees, or other individuals in control of the activities of such person.

(9) "Purchaser" means any person who is solicited to become obligated, or does become obligated, under any agreement.

(10) "Seller" means any multilevel distribution company or it means any person who offers to sell to individuals any business opportunity, either directly or through any agent.

History.

Ga. L. 1980, p. 1233, § 1; Ga. L. 1984, p. 522, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1986, p. 10, § 10; Ga. L. 1988, p. 1868, § 1; Ga. L. 1989, p. 218, § 1; Ga. L. 1992, p. 2370, § 1; Ga. L. 1995, p. 757, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "Code Section 16-12-38" was substituted for "Code Section 10-12-38" at the end of paragraph (6).

Law reviews.

For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

JUDICIAL DECISIONS

"Seller" includes lessors to corporations. — Term "individual", as used in paragraph (10) of O.C.G.A. § 10-1-410, may include artificial persons. Therefore, the fact that the lessee is a corporation would not preclude a finding that the lessor is a "seller" as defined in paragraph (10). Park Leasing Co. v. TWS, Inc., 206 Ga. App. 864, 426 S.E.2d 620, 1992 Ga. App. LEXIS 1817 (1992), cert. denied, No. S93C0573, 1993 Ga. LEXIS 350 (Ga. Apr. 8, 1993).

Defendant found to be "seller." — Because the defendant headed a field installation and maintenance services division of a business engaged in designing, manufacturing, and marketing electronic components and equipment for the coin operated telephone market, defendant was personally a "seller" within the meaning of paragraph (10) of O.C.G.A. § 10-1-410 in that the defendant was an individual who had a substantive interest in a corporation which offered to sell a business opportunity. Hornsby v. Phillips, 190 Ga. App. 335, 378 S.E.2d 870, 1989 Ga. App. LEXIS 231 (1989).

Officers of a limited liability company were "sellers" within the meaning of the Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410(10), because the officers were individuals who had a substantive interest in a multilevel distribution company or effectively controlled such company or the company's activities; accordingly, pursuant to the Fair Business Practices Act, O.C.G.A. § 10-1-399(a), and the SBOA, O.C.G.A. § 10-1-417(b), each officer was subject to personal liability for any violation of the SBOA which he or she had committed and which was proved by a physician. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Sale of franchise not a "business opportunity." — Franchiser's sale of a restaurant franchise to a franchisee did not meet the definition of a business opportunity under O.C.G.A. § 10-1-410(2)(A)(iii) because the sales and marketing program associated with the franchise system were provided to the franchisee in conjunction with the licensing of registered trademarks and service marks; thus, the Georgia Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., did not apply to the sale. Am. Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C., 426 F. Supp. 2d 1356, 2006 U.S. Dist. LEXIS 19422 (N.D. Ga. 2006).

Statute of limitations. — General statute of limitations, providing that an action to enforce a right accruing to an individual under state statute must be

brought within 20 years after the action accrues, governs a cause of action arising solely under the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., since the Act itself contains no statute of limitations. Hornsby v. Phillips, 190 Ga. App. 335, 378 S.E.2d 870, 1989 Ga. App. LEXIS 231 (1989).

Contractual defenses are inapplicable when an action is based not on the contract but solely on an alleged violation of the Sale of Business Opportunities Act, O.C.G.A § 10-1-410 et seq. Hornsby v. Phillips, 190 Ga. App. 335, 378 S.E.2d 870, 1989 Ga. App. LEXIS 231 (1989).

Agribusiness exemption. — Investment in cattle feeding and sales program was exempt under the agribusiness exemption in division (2)(B)(iii) of O.C.G.A. § 10-1-410. Seale v. Miller, 698 F. Supp. 883, 1988 U.S. Dist. LEXIS 11837 (N.D. Ga. 1988).

Claim sufficient against corporate officers. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415, applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers, and the complaint was sufficient to state a claim against the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

RESEARCH REFERENCES

ALR.

Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 A.L.R.6th 511.

Judicial remedies for proceeds and funds from Ponzi schemes, 100 A.L.R.6th 281.

10-1-411. Prohibited activities by multilevel distribution company or participant in marketing program; disclosure statement.

(a) No multilevel distribution company or participant in its marketing program shall:

(1) Operate or, directly or indirectly, participate in the operation of any multilevel marketing program wherein the financial gains to the participants are primarily dependent upon the continued, successive recruitment of other participants and where sales to nonparticipants are not required as a condition precedent to realization of such financial gains;

(2) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing

program solely for the solicitation or recruitment of other participants therein;

(3) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing program in connection with the sale of any product or service unless the participant performs a bona fide supervisory, distributive, selling, or soliciting function in the sale or delivery of such product or services to the ultimate consumer;

(4) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant:

(A) Where payment thereof is or would be dependent on the element of chance dominating over the skill or judgment of such participant;

(B) Where no amount of judgment or skill exercised by the participant has any appreciable effect upon any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration which the participant may receive; or

(C) Where the participant is without that degree of control over the operation of such plan as to enable him substantially to affect the amount of finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration which he may receive or be entitled to receive; or

(5) Represent, directly or by implication, that participants in a multilevel marketing program will earn or receive any stated gross or net amount or represent in any manner the past earnings of participants except as may be permitted under this part; provided, however, that a written or verbal description of the manner in which the marketing plan operates shall not, standing alone, constitute a representation of earnings, past or future. Multilevel distribution companies shall not represent, directly or by implication, that it is relatively easy to secure or retain additional distributors or sales personnel or that most participants will succeed.

(b) At least 48 hours prior to the time the purchaser signs a business opportunity contract or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least ten-point boldface capital letters: "DISCLOSURES REQUIRED BY GEORGIA LAW." Under this title shall appear the statement in at least ten-point type that:

"The State of Georgia has not reviewed and does not approve, recommend, endorse, or sponsor any business opportunity. The

information contained in this disclosure has not been verified by the state. If you have any questions about this investment, see an attorney before you sign a contract or agreement."

Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the company; whether the company is doing business as a proprietorship, partnership, or corporation; the names under which the company has done, is doing, or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with purchasers or which takes responsibility for statements made by the seller;

(2) The names, addresses, and titles of the company's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the company's business activities relating to the sale of business opportunities;

(3) The length of time the company has:

(A) Sold business opportunities; and

(B) Sold business opportunities involving the products, equipment, supplies, or services currently offered to the purchaser;

(4) A full and detailed description of the actual services that the seller or company undertakes to perform for the purchaser;

(5) A copy of a current (not older than 13 months) financial statement of the company, updated to reflect any material changes in the company's financial condition;

(6) If training of any type is promised by the seller or company, a complete description of the training and the length of the training;

(7) If the seller or company promises services to be performed in connection with the placement of equipment, product, or supplies at various locations, the full nature of those services as well as the nature of the agreements to be made with the owners or managers of those locations where the purchaser's equipment, product, or supplies will be placed;

(8) If the company is required to secure a bond or establish a trust deposit pursuant to Code Section 10-1-412, either of the following statements:

(A) "As required by Georgia law, the company has secured a bond issued by _____ (name and address of surety company) a surety company authorized to do

business in this state. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond's current status."; or

(B) "As required by Georgia law, the company has established a trust account _____ (number of account) with _____ (name and address of bank or savings institution). Before signing a contract to purchase this business opportunity, you should check with the bank or savings institution to determine the current status of the trust account.";

(9) The following statement:

"If the company fails to deliver the product, equipment, or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the company in writing and demand that the contract be canceled.";

(10) If the seller or company makes any statement concerning sales or earnings or range of sales or earnings that may be made through this business opportunity, the following disclosures:

(A) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered who, to the company's knowledge, have actually received earnings in the amount or range specified within three years prior to the date of the disclosure statement; and

(B) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered within three years prior to the date of the disclosure statement;

(11) The following statement:

"The company selling a business opportunity or the seller shall collect no more than 15 percent of the purchase price. The balance of the purchase price shall be paid into an escrow account, established with a bank or an attorney, which is agreed upon by both parties. The balance in escrow shall be paid to the company 60 days after the date the purchaser commences operation of the business or upon complete compliance with the terms of the contract, whichever happens first."; and

(12) The seller's principal business address and the name and address of its agent in this state authorized to receive service of process.

(c) In lieu of the disclosures required by paragraphs (1) through (7), (9), and (10) of subsection (b) of this Code section, a seller may utilize the documents prescribed by the Federal Trade Commission, pursuant

to Title 16, Chapter 1, Subchapter D, Trade Regulation Rules, Part 436 — Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, provided that the seller shall provide the prospective purchaser with a separate written cover sheet which is entitled in at least ten-point boldface capital letters: "DISCLOSURES REQUIRED BY GEORGIA LAW." Under this title shall appear the statement in at least ten-point type that:

> "The State of Georgia has not reviewed and does not approve, recommend, endorse, or sponsor any business opportunity. The information contained in this disclosure has not been verified by the state. If you have any questions about this investment, see an attorney before you sign a contract or agreement."

Nothing except the title and required statement shall appear on the cover sheet.

History.
Ga. L. 1980, p. 1233, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 1984, p. 522, § 2; Ga. L. 1988, p. 1868, § 1.

Law reviews.
For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

10-1-412. When bond or trust account required; escrow account required.

(a) Any business opportunity seller or company which represents, in conjunction with any agreement which requires a total initial payment of an amount exceeding $500.00, that the seller or company will refund all or part of the price paid for the business opportunity or will repurchase any of the products, equipment, supplies, or chattels supplied by the seller or company if the purchaser is dissatisfied with the business opportunity and any multilevel distribution company must either have obtained a surety bond issued by a surety company authorized to do business in this state or have established a trust account with a licensed and insured bank or savings institution located in this state. For purposes of this subsection, deposits shall not be considered part of the price paid for the business opportunity. The amount of the bond or trust account shall be an amount not less than $75,000.00. The bond or trust account shall be in favor of the state for the benefit of any person who is damaged by any violation of this part or by the seller's or company's breach of the contract or agreement or of any obligation arising therefrom. Such person may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account. A multilevel distribution company which requires an initial payment of less than $500.00 from each participant shall be exempt from the requirements of this Code section.

(b) In any sale of a business opportunity, the seller shall collect no more than 15 percent of the total purchase price, with the balance to be placed in an independent escrow account agreed upon by both parties. The balance in the escrow account shall be paid to the seller 60 days after the date the purchaser commences operation of the business or upon complete compliance with the terms of the contract, whichever happens first.

History.
Ga. L. 1980, p. 1233, § 3; Ga. L. 1984, p. 522, § 3; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 2.

Law reviews.
For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

10-1-413. Required disclosures; updating; form of notice.

(a) Every multilevel distribution company intending to have participants in this state, with an agreement made in this state, or with its principal place of business in this state shall have readily available to any potential participants, prior to obtaining any participants in this state or elsewhere, a copy of the contract and of any material incorporated by reference into the contract to be used with participants. In every instance in which a multilevel distribution company solicits any initial payment in excess of $500.00, the multilevel distribution company shall also have readily available to the particular potential participant or participants, prior to signing the contract, a disclosure statement containing the following:

(1) The name and principal business address of the company; whether the company is doing business as a proprietorship, partnership, or corporation; the names under which the company has done, is doing, or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with participants;

(2) The names, addresses, and titles of the company's officers, directors, and trustees;

(3) The length of time the company has:

(A) Been engaged in multilevel distribution; and

(B) Been engaged in multilevel distributions involving the types of products, equipment, supplies, or services currently offered to the purchaser; and

(4) A detailed description of the levels of distribution in the multilevel program, the manner in which participants will be compensated, and the extent or amount of any compensation.

(b) Every seller shall update the disclosures required by subsection (b) of Code Section 10-1-411 and by subsection (a) of Code Section

10-1-413 as often as any material change in the required information occurs, but not less than annually.

(c) Whenever a multilevel distribution company must provide the disclosure statement required by subsection (a) of this Code section, the multilevel distribution company, prior to obtaining any participant, shall provide that participant with an 8 ½ inch by 11 inch document in at least ten-point type, which reads as follows:

"NOTICE REQUIRED BY STATE
LAW REGARDING DISCLOSURES

State law requires that a multilevel distribution company shall make available certain disclosures regarding the company prior to obtaining participants. This is your official notice that you have a right to request to see these disclosures prior to entering into any agreement with a multilevel distribution company. This will be the only notice you receive regarding your rights to see these disclosures. If you waive these rights, you are giving up an important consumer protection that the State of Georgia has found you should be provided. If you wish to exercise these rights, please indicate below that you want to see the disclosures before agreeing to be a participant, then do not agree to become a participant until the disclosures have been made available to you.

SIGN ONLY ONE OF THE FOLLOWING STATEMENTS:

I wish to see the disclosures required by law before I agree to become a participant. _____

Date: _____

I do not wish to see the disclosures required by law; I understand that I will not be seeing important information which might affect my decision to participate in this multilevel distribution company. _____

Date: _____"

(d) Every multilevel distribution company shall maintain on file all of the statements as described in subsection (c) of this Code section for a period of two years from the date such statements are signed.

(e) Every seller shall include the following regarding each officer, director, principal, and owner in the disclosures required by subsection (b) of Code Section 10-1-411 and by subsection (a) of Code Section 10-1-413:

(1) Whether he or she has at any time during the previous seven fiscal years been convicted of a felony or pleaded nolo contendere to a felony charge if the felony involved fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business

opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade;

(2) Whether he or she has at any time during the previous seven fiscal years been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action involving fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade;

(3) Whether he or she is currently subject to any state or federal agency or court injunctive or restrictive order or is a party to a proceeding currently pending in which such an order is sought relating to fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade; and

(4) Whether he or she has at any time during the previous seven fiscal years filed in bankruptcy, been adjudged bankrupt, or been reorganized due to insolvency or has been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized during or within one year after the period that such person held such position in such other person.

(f) The disclosures required under subsection (e) of this Code section shall include any of the following which are applicable:

(1) The identity and location of the court or agency;

(2) The date of conviction, judgment, or decision;

(3) The penalty imposed;

(4) The damages assessed;

(5) The terms of settlement or the terms of the order and the date, nature, and issuer of each such order or ruling; and

(6) The name and principal business address of any other person which filed, was adjudged, or was reorganized in bankruptcy.

History.
Ga. L. 1980, p. 1233, § 4; Ga. L. 1984, p. 522, § 4; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 3.

Law reviews.
For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

RESEARCH REFERENCES

ALR.
Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 A.L.R.6th 511.

10-1-414. Prohibited acts by sellers.

Sellers shall not:

(1) Represent that a business opportunity or multilevel program provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential, which data shall be furnished to the Attorney General or his or her representatives upon request;

(2) Use the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller unless it is clear from the circumstances that the owner of the commercial symbol is not involved in the business opportunity or multilevel distribution company; or

(3) Make or authorize the making of any reference to its compliance with this part in any advertisement or other contract with purchasers or participants or in any manner represent, explicitly or implicitly, that the State of Georgia or any department, agency, officer, or employee has reviewed, approved, sanctioned, or endorsed a business opportunity or multilevel program.

History.
Ga. L. 1980, p. 1233, § 5; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 4; Ga. L. 2015, p. 1088, § 3/SB 148.

Law reviews.
For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

10-1-415. Written contract required; delivery of copy; required provisions; cancellation rights.

(a) Every business opportunity or multilevel distribution contract shall be in writing, and a copy shall be given to the purchaser or participant at the time he or she signs the contract.

(b) Every contract or any material incorporated therein by reference shall include the following:

(1) The terms and conditions of payment, including but not limited to compensation paid to a participant by the company and any payments to be made by the participant to the company within the first six months of the agreement;

(2) A full and detailed description of the acts or services that the

seller undertakes to perform for the purchaser or participant, including a specific description of the product or service being marketed;

(3) The seller's principal business address. For purposes of this paragraph, a post office box shall not be considered a principal place of business; and

(4) The approximate delivery date of any products, equipment, supplies, or services that the seller is to deliver to the purchaser or participant.

(c) In addition to the information required in subsection (b) of this Code section, every multilevel distribution contract, or an addendum thereto, shall contain the following:

(1) If training of any type is promised by the seller or company, a complete description of the training and the length of the training;

(2) If a bond is required under Code Section 10-1-412, the following statement, with all blanks properly filled:

> "As required by Georgia law, the company has secured a bond or established a trust account for your protection. This bond or trust account can be identified as # _____ in the name of _____, provided by the following bonding company or trust company: _____, which is located at the following address: _____ in the City of _____, State of _____.";

(3) A participant in a multilevel marketing plan has a right to cancel at any time, regardless of reason. If a participant will be under an obligation to make any payment after the agreement has been entered into, a statement in ten-point boldface type as follows must appear in the contract or an addendum thereto:

> "A participant in this multilevel marketing plan has a right to cancel at any time, regardless of reason. Cancellation must be submitted in writing to the company at its principal business address."; and

(4) A description of any cancellation rights.

(d) Cancellation rights pursuant to paragraph (4) of subsection (c) of this Code section must, at a minimum, provide the following:

(1) If the participant has purchased products or paid for administrative services while the contract of participation was in effect, the seller shall repurchase all unencumbered products, sales aids, literature, and promotional items which are in a reasonably resalable or reusable condition and which were acquired by the participant from the seller; such repurchase shall be at a price not less than 90 percent of the original net cost to the participant of the goods being returned.

For purposes of this paragraph, "original net cost" means the amount actually paid by the participant for the goods, less any consideration received by the participant for purchase of the goods which is attributable to the specific goods now being returned. Goods shall be deemed "resalable or reusable" if the goods are in an unused, commercially resalable condition at the time the goods are returned to the seller. Goods which are no longer marketed by a company shall be deemed "resalable or reusable" if the goods are in an unused, commercially resalable condition and are returned to the seller within one year from the date the company discontinued marketing the goods; provided, however, that goods which are no longer marketed by a multilevel distribution company shall not be deemed "resalable or reusable" if the goods are sold to participants as nonreturnable, discontinued, or seasonal items and the nonreturnable, discontinued, or seasonal nature of the goods was clearly disclosed to the participant seeking to return the goods prior to the purchase of the goods by the participant. Notwithstanding anything to the contrary contained in this paragraph, a multilevel distribution company may not assert that any more than 15 percent of its total yearly sales per calendar year to participants in dollars are from nonreturnable, discontinued, or seasonal items;

(2) The repayment of all administrative fees or consideration paid for other services shall be at not less than 90 percent of the costs to the participant of such fees or services and shall reflect all other administrative services that have not, at the time of termination, been provided to the participant; and

(3) The participant may be held responsible for all shipping expenses incurred in returning sales aids or products to the company but only if such responsibility of a canceling participant is disclosed in the written description of the cancellation rights.

History.

Ga. L. 1980, p. 1233, § 6; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 5.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1992, "#" was deleted following "in the name of" in paragraph (c)(2) and "Goods" was substituted for "Good" in the third sentence of paragraph (d)(1).

Pursuant to Code Section 28-9-5, in 1994, "City" and "State" were substituted for "city" and "state" near the end of paragraph (c)(2).

Law reviews.

For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

For annual survey on business corporations, see 64 Mercer L. Rev. 61 (2012).

JUDICIAL DECISIONS

Cancellation of multi-level distribution agreement. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of

Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415(c)(4), applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

Summary judgment improper. — Trial court erred in holding that a physician failed to allege that the physician sustained damages due to the failure of a health and nutrition multi-level distribution company to inform the physician of the physician's buy-back rights under the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician presented sufficient evidence of reliance and damages to withstand a motion for summary judgment since the physician alleged that the physician relied on the company to disclose the physician's rights under Georgia law and that the company refused to comply with the product repurchase requirements of the SBOA, O.C.G.A. § 10-1-415(d)(1); the company's contract clause providing that state laws on termination applied if the laws were inconsistent with the contract was insufficient to constitute compliance with O.C.G.A. § 10-1-415(c)(3), and whether the company gave proper "notice" to the physician that the company amended the company's online policies and procedures to comply with Georgia law and whether the physician should have asserted the physician's legal rights earlier were genuine issues of material fact for a jury to decide. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

Contractual defense of forum selection clause did not apply. — Trial court erred in granting summary judgment in favor of a health and nutrition multi-level distribution company in a physician's action alleging violations of the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician's claims were not res judicata based on a default judgment entered in favor of the company in a Texas court, and since the four corners of the physician's complaint reveal that the physician's claims were not based on breach of contract but were based on violation of the SBOA, the contractual defense of a forum selection clause did not apply; FBPA claims are not contract claims. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100, 2010 Ga. App. LEXIS 1017 (2010), aff'd in part and rev'd in part, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011), vacated in part, 313 Ga. App. 584, 722 S.E.2d 201, 2012 Ga. App. LEXIS 28 (2012).

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Opportunities Act. — Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in the officers' corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the

state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

10-1-416. Appointment of Secretary of State as agent for service of process.

(a) Each seller numbering among its participants or purchasers any resident of this state, which has agreements made in this state, or which has its principal place of business in this state, shall irrevocably appoint the Secretary of State of this state as its agent for service of process for any alleged violation of this part and shall pay a $10.00 filing fee. Compliance with this Code section shall not in and of itself subject any seller to the provisions or consequences of any other statute of this state.

(b) Any seller which numbers among its participants or purchasers any resident of this state, which has agreements made in this state, or which has its principal place of business in this state, and which fails to comply with subsection (a) of this Code section shall be deemed to have thereby irrevocably appointed the Secretary of State as its agent for service of process for any alleged violation of this part.

(c) Service shall be made by delivering to and leaving with the Secretary of State duplicate copies of such process, notice, or demand, together with an affidavit giving the last known post office address of such seller; and such service shall be sufficient if notice thereof and a copy of the process, notice, or demand are forwarded by registered mail or certified mail or statutory overnight delivery addressed to such seller at the address given in such affidavit.

History.

Code 1981, § 10-1-416, enacted by Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 6; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 989, § 1.

Editor's notes.

Ga. L. 1988, p. 1868, § 1, effective July 1, 1988, redesignated former Code Section 10-1-416 as present Code Section 10-1-417.

Law reviews.

For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

10-1-417. Purchaser and participant remedies; violations as unfair or deceptive acts; penalty.

(a) If a business opportunity seller or multilevel distribution company uses any untrue or misleading statements; or fails to comply with Code Section 10-1-411; or fails to deliver the equipment, supplies, or products necessary to begin substantial operation within 45 days of the delivery date stated in the contract; or if the business opportunity seller or multilevel distribution company does not comply with the requirements of Code Sections 10-1-410 through 10-1-416, then, within

one year of the date of the contract, upon written notice to the seller, the purchaser or participant may void the contract and shall be entitled to receive from the seller all sums paid to the seller. Upon receipt of such sums, the purchaser or participant shall make available to the seller at the purchaser's or participant's address or at the places at which they are located at the time notice is given, all products, equipment, or supplies received by the purchaser or participant. However, the purchaser or participant shall not be entitled to unjust enrichment by exercising the remedies provided for in this subsection.

(b) The violation of any provision of this part shall constitute an unfair or deceptive act or practice in the conduct of a consumer act or practice or consumer transactions under Part 2 of this article, the "Fair Business Practices Act of 1975," and shall authorize an affected participant or purchaser to seek the remedies provided for in Code Section 10-1-399 and in subsection (a) of Code Section 10-1-417.

(c) Nothing contained in this part shall be construed to limit, modify, or repeal any provisions of Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008," including, but not limited to, the definition of the term "security" as contained in paragraph (31) of Code Section 10-5-2.

(d) Any person who fails to comply with this part shall be guilty of a misdemeanor of a high and aggravated nature. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; and, if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have actual knowledge of the acts violating this part.

History.

Ga. L. 1980, p. 1233, § 7; Ga. L. 1985, p. 947, § 1; Code 1981, § 10-1-416; Code 1981, § 10-1-417, as redesignated by Ga. L. 1988, p. 1868, § 1; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 2370, § 7; Ga. L. 2008, p. 381, § 5/SB 358.

Law reviews.

For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

JUDICIAL DECISIONS

Remedies dependent on written notice. — Statutory right to rescind the transaction and recover the investment that is derived from the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., is not available to a plaintiff who has not notified the seller of the exercise of that right within one year. League v. U.S. Postamatic, Inc., 235 Ga. App. 171, 508 S.E.2d 210, 1998 Ga. App. LEXIS 1374 (1998), cert. denied, No. S99C0342, 1999 Ga. LEXIS 226 (Ga. Feb. 26, 1999).

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Opportunities Act. — Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited

liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in the officers' corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Corporate officers personally liable. — Officers of a limited liability company were "sellers" within the meaning of the Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410(10), because the sellers were individuals who had a substantive interest in a multilevel distribution company or effectively controlled such company or the company's activities; accordingly, pursuant to the Fair Business Practices Act, O.C.G.A. § 10-1-399(a), and the SBOA, O.C.G.A. § 10-1-417(b), each officer was subject to personal liability for any violation of the SBOA which he or she had committed and which was proved by a physician. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Part 4

False Advertising

Cross references.

Regulation of advertising of instruments purported to be insured or guaranteed in manner comparable to insured deposit or share account in financial institution, § 7-1-133.

Advertising of child-adoption services, § 19-8-24.

False advertisements relating to food, §§ 26-2-29, 26-2-30.

Advertisement and sale of meat generally, § 26-2-150 et seq.

Misrepresentation of food as Kosher, § 26-2-331.

Restrictions on use of outdoor advertising signs, § 32-6-75.

Prohibition against persons or organizations misleading public as to involvement with law enforcement agency, § 35-10-1 et seq.

Prohibition against use of state or Confederate flag for advertising purposes, § 50-3-8.

Law reviews.

For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law, proposed in Georgia in 1973, 10 Ga. St. B. J. 281 (1973).

For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, 10 Ga. St. B. J. 409 (1974).

RESEARCH REFERENCES

ALR.

Right to protection against appropriation of advertising matter or methods, 30 A.L.R. 615.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Trade dress simulation of cosmetic products as unfair competition, 86 A.L.R.3d 505.

Unfair competition by imitation in sign

or design of business place, 86 A.L.R.3d 884.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 A.L.R.3d 449.

Actionable nature of advertising impugning quality or worth of merchandise or products, 42 A.L.R.4th 318.

Validity, construction, and application of regulations dealing with misrepresentation in sale of kosher food, 3 A.L.R.7th 6.

10-1-420. Advertising without intending to sell on stated terms; disclaimers as to availability.

(a) No person, firm, or corporation shall offer for sale merchandise, commodities, or services by making, publishing, disseminating, circulating, or placing before the public within this state in a newspaper or other publication, or in the form of a book, notice, handbill, poster, sign, billboard, bill, circular, pamphlet, letter, photograph, motion picture, or by radio, loud-speaker, telephone, television, telegraph, or in any other way, or advertise merchandise, commodities, or services with intent, design, or purpose not to sell the merchandise, commodities, or services so advertised or offered for sale at the price or upon the terms stated therein or otherwise communicated, or with intent not to sell the merchandise, commodities, or services so advertised.

(b) Any disclaimer that merchandise, commodities, or services advertised for sale may not be available or that availability may be limited or any statement containing the conditions of a lease or rental agreement shall be in the same style as the advertisement and, if in written or printed form, such disclaimer and any asterisk or other symbol directing the attention of the reader to such disclaimer shall be not smaller than one-fifth of the type size used in the main body of the advertisement, provided that the minimum type size shall be not smaller than six-point type in Helvetica font.

(c) Any person, firm, or corporation violating this Code section shall be guilty of a misdemeanor.

History.

Ga. L. 1958, p. 411, §§ 1, 3; Ga. L. 1993, p. 701, § 1.

Law reviews.

For note discussing the evolution and interpretation of this section, see 12 Mercer L. Rev. 260 (1960).

For note criticizing this provision and proposing an alternative, see 12 Mercer L. Rev. 360 (1961).

JUDICIAL DECISIONS

Standing. — Patentee of a weight loss drug who had not produced or marketed a weight control product, and was not a person likely to be damaged by the practices of alleged competitors, lacked standing to bring suit under the False Advertising Act, O.C.G.A. § 10-1-420 et seq. Friedlander v. HMS-PEP Prods., 226 Ga. App. 123, 485 S.E.2d 240, 1997 Ga. App. LEXIS 454 (1997), cert. denied, No. S97C1268, 1997 Ga. LEXIS 851 (Ga. Oct. 3, 1997).

OPINIONS OF THE ATTORNEY GENERAL

Advertising one price and selling product at lower price is not the kind of deception proscribed by this section. 1965-66 Op. Att'y Gen. No. 66-141.

RESEARCH REFERENCES

Am. Jur. 2d.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1127.

ALR.

Seller's advertisements affecting rights of parties to sale of personal property, 28 A.L.R. 991; 158 A.L.R. 1413.

Advertisement addressed to public relating to sale or purchase of goods at specified price as an offer the acceptance of which will consummate a contract, 43 A.L.R.3d 1102.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Validity and construction of regulations dealing with misrepresentation in the sale of kosher food, 52 A.L.R.3d 959.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

10-1-421. False or fraudulent statements in advertising prohibited; broadcaster or publisher acting in good faith excepted; penalties.

(a) No person, firm, corporation, or association or any employee thereof, with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto, shall make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, radio, television, or advertising device or by public outcry or proclamation or any other manner or means whatever, any statement concerning such real or personal property or services, professional or otherwise, or concerning any circumstances or matter of fact connected with the proposed performance or disposition thereof which is untrue or fraudulent and which is known or which by the exercise of reasonable care should be known to be untrue or fraudulent.

(b) Nothing in this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false or fraudulent character.

(c) Whoever violates this Code section shall be fined not less than $200.00 nor more than $1,000.00 or imprisoned not more than 20 days, or both.

History.

Ga. L. 1961, p. 197, § 1; Ga. L. 1963, p. 507, § 1.

Cross references.

Solicitation of professional employment by or on behalf of attorneys, §§ 15-19-54, 15-19-55.

Prohibition against persons or organizations misleading public as to involvement with law enforcement agency, § 35-10-1 et seq.

Unauthorized use of terms "certified public accountant," "public accountant," etc., § 43-3-31.

Advertising for architectural services by unqualified persons, § 43-4-10.

Advertising of chiropractic services by unqualified persons, § 43-9-19.

Unauthorized use of persons' names for purpose of soliciting charitable contributions, § 43-17-12.

Advertising by dispensing opticians, § 43-29-15.

Unauthorized use of terms "M.D.," "Doctor," "Doctor of Osteopathy," etc., §§ 43-34-22, 43-34-40.

Authority of Georgia Real Estate Commission to take disciplinary action against real estate brokers in connection with false, misleading, etc., advertising of property, § 43-40-25.

Time-share program false advertising prohibited, § 44-3-185.

Law reviews.

For note criticizing this provision and proposing an alternative, see 12 Mercer L. Rev. 360 (1961).

JUDICIAL DECISIONS

Anti-SLAPP suit involving lawyer placed ad challenging nursing home standards. — In a suit involving ads placed by a lawyer challenging nursing home standards, the Supreme Court of Georgia held that the trial court overlooked certain preliminary questions as the court did not properly apply the required two step analysis under the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, with respect to the plaintiffs' claims as there was no discussion or analysis of whether the plaintiffs had stated and substantiated a legally sufficient claim for the violations of the statutes. Wilkes & McHugh, P.A. v. LTC Consulting, L.P., 306 Ga. 252, 830 S.E.2d 119, 2019 Ga. LEXIS 440 (2019).

RESEARCH REFERENCES

ALR.

Seller's advertisements as affecting rights of parties to sale of personal property, 28 A.L.R. 991; 158 A.L.R. 1413.

Legal aspects of television, 15 A.L.R.2d 785; 51 A.L.R.3d 8; 56 A.L.R.3d 386; 65 A.L.R.4th 346.

Validity and construction of regulations dealing with misrepresentation in the sale of kosher food, 52 A.L.R.3d 959.

Application of state law to sex discrimination in employment advertising, 66 A.L.R.3d 1237.

Increase in tuition as actionable in suit by student against college or university, 99 A.L.R.3d 885.

What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 A.L.R.4th 1192.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 A.L.R.4th 346.

Fraudulent representations concerning price, discount, condition, quality, availability or shipping costs of consumer goods and services sold on internet, 38 A.L.R.7th Art. 4.

10-1-422. Designation required for use of term "Doctor" or "Dr."; exceptions.

(a)(1) Each individual who uses the term "Doctor" or "Dr." in con-

junction with his name in any letter, business card, advertisement, sign, public listing, display, or circular of any nature shall designate:

(A) The degree to which he is entitled by reason of his diploma of graduation from a school or other entity, professional or otherwise;

(B) The degree as honorary when an honorary acknowledgment has been made;

(C) "No degree" if he is not entitled to any such recognition.

(2) The designation required by this subsection shall not be necessary:

(A) If the term is a part of the person's legal name;

(B) In the case of the use in a corporate charter of the name of a professional association or professional corporation organized in this state as provided by law.

(b) Any person willfully violating, with intent to defraud, subsection (a) of this Code section shall be guilty of a misdemeanor.

History.
Ga. L. 1978, p. 2046, § 1; Ga. L. 1979, p. 628, § 1.

Cross references.
Unauthorized use of terms "M.D.," "Doctor," "Doctor of Osteopathy," etc., §§ 43-34-22, 43-34-40.

RESEARCH REFERENCES

ALR.
Practice of medicine, dentistry, or law through radio broadcasting stations, newspapers, or magazines, 114 A.L.R. 1506.

10-1-423. Enjoining prohibited advertising.

Any person, firm, or corporation offering through advertising merchandise, commodities, or services for sale in violation of Code Section 10-1-420, 10-1-421, or 10-1-422 may be enjoined from such advertising by the superior court having jurisdiction, upon the suit of any person aggrieved or about to be aggrieved thereby.

History.
Ga. L. 1958, p. 411, § 2; Ga. L. 1963, p. 507, § 2.

OPINIONS OF THE ATTORNEY GENERAL

Section does not authorize a state suit. 1965-66 Op. Att'y Gen. No. 66-141.

RESEARCH REFERENCES

ALR.
Validity and construction of regulations dealing with misrepresentation in the sale of kosher food, 52 A.L.R.3d 959.

Right to private action under state consumer protection Act, 62 A.L.R.3d 169.

10-1-424. Misrepresenting nature of business.

It shall be unlawful:

(1) For any person, firm, association, or corporation to misrepresent the true nature of its business by use of the words "manufacturer," "wholesaler," "retailer," or words of similar import; or

(2) For any person, firm, association, or corporation to represent itself as selling at wholesale or use the word "wholesale" in any form of sale or advertising,

unless such person, firm, association, or corporation is actually selling at wholesale those items advertised for the purpose of resale. For the purpose of this Code section the term "wholesale" means a sale made for the purpose of resale and not one made to the consuming purchaser.

History.
Ga. L. 1962, p. 129, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1157 et seq.

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 108 et seq.

ALR.
Seller's advertisements as affecting rights of parties to sale of personal property, 28 A.L.R. 991; 158 A.L.R. 1413.

10-1-424.1. False solicitations regarding legal services prohibited; required rules and regulations concerning legal services solicitations; civil penalties.

(a) As used in this Code section, the term:

(1) "Duly licensed attorney at law" means a person authorized to provide legal services in this state.

(2) "Legal services" means acts recited in Code Section 15-19-50 and in subsection (a) of Code Section 15-19-51.

(3) "Media" means any publication, including, but not limited to, any radio or television advertising device, public outcry, proclama-

tion, internet search engine advertisement, or any other such manner or means of public outreach.

(4) "Solicit" means actions taken directly or indirectly to perform or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto.

(b) It shall be unlawful for any person, firm, association, or corporation to solicit in any media regarding the provision of legal services by:

(1) Misrepresenting the true nature of its business by use of the words "legal services," "practice of law," "law firm," "attorney," "attorney at law," "lawyer," or equivalent terms in any language in such manner as to convey the impression that such person, firm, association, or corporation is entitled to practice law or is entitled to furnish legal advice, services, or counsel;

(2) Representing itself as providing legal services or use the words "practice of law," "law firm," "attorney," "attorney at law," "lawyer," or equivalent terms in any language in such manner as to convey the impression that such person, firm, association, or corporation is entitled to practice law or is entitled to furnish legal advice, services, or counsel, unless such person is a duly licensed attorney at law;

(3) Representing that any person featured in media for legal services is licensed to practice law in this state when such person in such media is not a duly licensed attorney at law, even if such representation is made by a person featured in such media, who is not a duly licensed attorney at law, employs a person who is a duly licensed attorney at law; or

(4) Otherwise failing to disclose or otherwise provide qualifying language that accurately reflects the legal services, abilities, practice areas, scope of work, success rate, claim or case management and oversight, or fees of a person.

(c) The State Bar of Georgia shall promulgate rules and regulations relative to soliciting in any media regarding the provision of legal services. Such rules and regulations shall include, but shall not be limited to, the following:

(1) Prohibitions against and penalties for false representations, misrepresentations, and misleading claims covered by this Code section;

(2) A requirement that each solicitation include the disclosure of the location of the principal place of business of the soliciting person, firm, association, or corporation;

(3) A prohibition against depicting an individual who is not employed by the soliciting person, firm, association, or corporation as

being so employed or in such a manner that a reasonable person could believe such individual is so employed; provided, however, that such prohibition shall not apply to depictions of individuals who are immediate family members of the soliciting person or immediate family members of individuals employed by the soliciting firm, association, or corporation;

(4) A prohibition against depicting an individual who is not a client of the soliciting person, firm, association, or corporation as being such a client or in such a manner that a reasonable person could believe such individual is such a client; provided, however, that such prohibition shall not preclude sponsorships with local organizations or the depictions of such sponsorships by the soliciting person, firm, association, or corporation; and

(5) A requirement that disclosures provided for in such rules and regulations shall comprise no less than 10 percent of the total composition of the solicitation.

(d)(1) The State Bar of Georgia, any member of the State Bar of Georgia in good standing, such member's firm, association, or corporation, or any individual who sees or hears a solicitation that violates this Code section or any rule or regulation of the State Bar of Georgia promulgated pursuant to this Code section, shall have a cause of action against the soliciting person, firm, association, or corporation for violating this Code section or any rule or regulation of the State Bar of Georgia promulgated pursuant to this Code section.

(2) A soliciting person, firm, association, or corporation found by a court of competent jurisdiction to have violated this Code section or any rule or regulation of the State Bar of Georgia promulgated pursuant to this Code section shall be liable for a civil penalty in the amount of $10,000.00 per violation.

(3) A successful petitioner shall be entitled to reasonable attorney's fees, expert witness costs, and other costs necessary to bring a cause of action under this subsection.

(e) For purposes of this Code section, the term "soliciting person, firm, association, or corporation" shall mean only the individual or entity seeking to market legal services and not the owner of any media that displays or otherwise publishes such solicitation.

History.

Code 1981, § 10-1-424.1, enacted by Ga. L. 2023, p. 248, § 2-2/SB 74, effective May 1, 2023; Ga. L. 2024, p. 912, § 1/SB 73, effective July 1, 2024; Ga. L. 2024, p. 1052, § 2(19)/SB 448, effective July 1, 2024.

Effective date.

This Code section became effective May 1, 2023. See Editor's notes for applicability.

Amendments.

The first 2024 amendment, effective

July 1, 2024, added subsections (c) through (e).

The second 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "internet search engine advertisement," for "Internet search engine ad," in paragraph (a)(3) and, in paragraph (b)(3), substituted "licensed to practice law" for "admitted to the Georgia bar or may offer legal services" and "is a duly licensed" for "is duly licensed".

Cross references.

Freedom of religion, U.S. Const., Amend. I.

Damages for false solicitation in media of legal services, § 51-1-57.

Advertising by attorneys, Ga. R. & Regs. St. Bar 7.2.

Editor's notes.

Ga. L. 2023, p. 248, § 2-1/SB 74, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) The First Amendment protects commercial speech unless it involves illegal conduct or is misleading or fraudulent;

"(2) Commercial speech that does no more than propose a commercial transaction through advertising or solicitation is entitled to First Amendment free speech protection, but only if it concerns lawful activity and is not misleading;

"(3) The state should take necessary actions to ensure that all Georgians have their constitutional rights protected and appropriately vindicated when violated;

"(4) The government has a substantial interest in protecting Georgians from false or misleading commercial practices relating to the handling of legal matters before the courts of this state and the courts of the United States;

"(5) These practices have been particularly damaging to Georgia's older residents who may have become confused or misled by such treatment; and

"(6) A ban on commercial speech falsely claiming to handle legal matters before the courts of this state and the courts of the United States is necessary to directly advance the government's interest in protecting Georgians from false or misleading business advertising and solicitations that offer to protect or vindicate constitutional rights of Georgians."

Ga. L. 2023, p. 248, § 4-1/SB 74, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval, provided that:

"(1) Part II of this Act shall:

"(A) Apply to contracts entered into on and after such effective date; and

"(B) Not apply to contracts entered into before such effective date; provided, however, that any contract in violation of the provisions of Part II of this Act entered into before such effective date shall be void after the initial period set forth in such contract and shall not be renewed or otherwise extended on terms in violation of Part II of this Act; and

"(2) Part III of this Act shall apply only to causes of action occurring on or after July 1, 2023."

10-1-425. Misrepresenting ownership in advertising liquidation, auction, or going-out-of-business sale prohibited.

It shall be unlawful for any person, firm, association, or corporation to misrepresent the true ownership of a business for the purpose of carrying on a liquidation sale, auction sale, or other sale which represents that the firm is going out of business; and any person, firm, association, or corporation which advertises in any manner whatever a liquidation sale, auction sale, or going-out-of-business sale shall clearly state the true name and permanent address of the actual owner or owners of such business in any and all such advertising.

History.

Ga. L. 1962, p. 129, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Advertising, § 9 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 108 et seq.
ALR.
Regulations affecting auctions or auctioneers, 39 A.L.R. 773; 111 A.L.R. 473.

10-1-426. Penalty for violations of Code Sections 10-1-424 and 10-1-425; good faith exceptions.

Any person, firm, association, or corporation violating any of the provisions of Code Section 10-1-424, 10-1-424.1, or 10-1-425 shall be guilty of a misdemeanor. Nothing in Code Section 10-1-424, 10-1-424.1, or 10-1-425 or this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of online or printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false or fraudulent character.

History.
Ga. L. 1962, p. 129, § 3; Ga. L. 1993, p. 91, § 10; Ga. L. 2023, p. 248, § 2-3/SB 74, effective May 1, 2023.
Amendments.
The 2023 amendment, effective May 1, 2023, substituted "Code Section 10-1-424, 10-1-424.1, or 10-1-425" for "Code Sections 10-1-424 and 10-1-425" in the first sentence, inserted ", 10-1-424.1," following "Code Section 10-1-424" and inserted "online or" following "other form of" in the second sentence. See Editor's notes for applicability.
Editor's notes.
Ga. L. 2023, p. 248, § 2-1/SB 74, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) The First Amendment protects commercial speech unless it involves illegal conduct or is misleading or fraudulent;

"(2) Commercial speech that does no more than propose a commercial transaction through advertising or solicitation is entitled to First Amendment free speech protection, but only if it concerns lawful activity and is not misleading;

"(3) The state should take necessary actions to ensure that all Georgians have their constitutional rights protected and appropriately vindicated when violated;

"(4) The government has a substantial interest in protecting Georgians from false or misleading commercial practices relating to the handling of legal matters before the courts of this state and the courts of the United States;

"(5) These practices have been particularly damaging to Georgia's older residents who may have become confused or misled by such treatment; and

"(6) A ban on commercial speech falsely claiming to handle legal matters before the courts of this state and the courts of the United States is necessary to directly advance the government's interest in protecting Georgians from false or misleading business advertising and solicitations that offer to protect or vindicate constitutional rights of Georgians."

Ga. L. 2023, p. 248, § 4-1/SB 74, not codified by the General Assembly, provides: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval, provided that:

"(1) Part II of this Act shall:

"(A) Apply to contracts entered into on and after such effective date; and

"(B) Not apply to contracts entered into before such effective date; provided, however, that any contract in violation of the provisions of Part II of this Act entered into before such effective date shall be void after the initial period set forth in such contract and shall not be renewed or

otherwise extended on terms in violation of Part II of this Act; and

"(2) Part III of this Act shall apply only to causes of action occurring on or after July 1, 2023."

10-1-427. False advertising of legal services; good faith exemptions; investigation and enforcement by Attorney General; penalties for violation of cease and desist order.

(a) As used in this Code section, the term:

(1) "Duly licensed attorney at law" means a person authorized to provide legal services in this state.

(2) "Legal services" means acts recited in Code Section 15-19-50 and in subsection (a) of Code Section 15-19-51.

(3) "Media" means any publication, including, but not limited to, any radio or television advertising device, public outcry, proclamation, Internet search engine ad, or any other such manner or means of public outreach.

(4) "Misleading statement" means any communication that is untrue, fraudulent, or deceptive and is known, or which by the exercise of reasonable judgment, should be known to be untrue, fraudulent, or deceptive. Such term shall include, but shall not be limited to, communications that:

(A) Contain a material misrepresentation of fact or law;

(B) Omit a fact or law resulting in the information conveyed being a material misrepresentation or unsubstantiated;

(C) Are presented with such specificity as would lead a reasonable person to conclude that the claim or comparison can be substantiated, but cannot;

(D) Are substantially likely to lead a reasonable person to:

(i) Formulate erroneous conclusions:

(I) About the legal services, abilities, practice areas, scope of work, success rate, claim or case management and oversight, or fees of a duly licensed attorney at law;

(II) Regarding comparing a duly licensed attorney at law to another or similarly situated duly licensed attorney at law; or

(III) To take action to preserve such person's rights or claims when, in fact, no action is required; or

(ii) Have an unjustifiable expectation of future success based on prior performances;

(E) Fail to disclose or otherwise provide qualifying language to preclude a person from being deceived or otherwise having a mistaken impression;

(F) Falsely portray individuals as clients; or

(G) Falsely portray individual circumstantial outcomes in a light where an ordinary person would be misled to believe hiring such duly licensed attorney at law would create or lead to a similar outcome.

(5) "Person" means an individual or a firm, corporation, or association, or any employee thereof.

(6) "Solicit" means actions taken directly or indirectly to perform or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto.

(b) No duly licensed attorney at law shall solicit in any media by any misleading statement concerning legal services or concerning any circumstances or matter of fact connected with the proposed performance of legal services.

(c) Nothing in this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false, fraudulent, deceptive, or misleading character.

(d) The Attorney General is authorized and empowered, upon the receipt of a complaint or upon his or her own initiative, to investigate any advertising which might be in violation of subsection (b) of this Code section. If the Attorney General determines that any advertising is in violation of subsection (b) of this Code section, he or she is authorized and empowered, after providing the offender with reasonable notice and an opportunity for a hearing, to issue a public reprimand, to issue a cease and desist order against the offender, to report any such action to any board, agency, commission, association, or other entity governing or supervising the legal profession, and to publicize any such action in a medium or media likely to reach the recipients of the improper advertising. Any person against whom the Attorney General issues an adverse decision may, as his or her sole remedy in equity or at law, seek a restraining order against such adverse decision in the superior court.

(e) Any person who violates a cease and desist order issued pursuant to subsection (d) of this Code section shall be guilty of a misdemeanor in the county in which such person resides. Nothing in this subsection shall prohibit any board, agency, commission, association, or other entity governing or supervising the legal profession from taking any

lawful action against such person as a result of such improper practices. Each publication of an advertisement in violation of any such cease and desist order shall constitute a separate offense.

History.

Code 1981, § 10-1-427, enacted by Ga. L. 1992, p. 1556, § 1; Ga. L. 2015, p. 1088, § 4/SB 148; Ga. L. 2023, p. 248, § 2-4/SB 74, effective May 1, 2023.

Amendments.

The 2023 amendment, effective May 1, 2023, added subsection (a), redesignated former subsections (a) through (d) as present subsections (b) through (e), rewrote present subsection (b), which formerly read: "(a) No person, firm, corporation, or association or any employee thereof, with intent directly or indirectly to perform legal services or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto, shall make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, radio, television, or advertising device or by public outcry or proclamation or any other manner or means whatever, any statement concerning such legal services or concerning any circumstances or matter of fact connected with the proposed performance thereof which is untrue, fraudulent, deceptive, or misleading and which is known or which by the exercise of reasonable care should be known to be untrue, fraudulent, deceptive, or misleading."; substituted "subsection (b)" for "subsection (a)" in two places in subsection (d); and substituted "subsection (d)" for "subsection (c)" in subsection (e). See Editor's notes for applicability.

Cross references.

Misrepresentation of notary services as deceptive trade practice, § 45-17-8.2.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2024, "or" was deleted from the end of subparagraph (a)(4)(C) and a semicolon was substituted for a period at the end of subparagraph (a)(4)(E).

Editor's notes.

Ga. L. 2023, p. 248, § 2-1/SB 74, not codified by the General Assembly, provides: "The General Assembly finds that:

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"(2) Part III of this Act shall apply only to causes of action occurring on or after July 1, 2023."

Law reviews.

For note on 1992 enactment of this Code section, see 9 G. St. U.L. Rev. 159 (1992).

For annual survey on legal ethics, see 44 Mercer L. Rev. 281 (1992).

JUDICIAL DECISIONS

Anti-SLAPP suit involving lawyer placed ad challenging nursing home standards. — In a suit involving ads placed by a lawyer challenging nursing home standards, the Supreme Court of Georgia held that the trial court overlooked certain preliminary questions as the court did not properly apply the required two step analysis under the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, with respect to the plaintiffs' claims as there was no discussion or analysis of whether the plaintiffs had stated and substantiated a legally sufficient claim for the violations of the statutes. Wilkes & McHugh, P.A. v. LTC Consulting, L.P., 306 Ga. 252, 830 S.E.2d 119, 2019 Ga. LEXIS 440 (2019).

RESEARCH REFERENCES

ALR.

Propriety of radio and television attorney advertisements, 20 A.L.R.6th 385.

Part 5

Limited Edition Art Reproductions

10-1-430. Definitions.

As used in this part, the term:

(1) "Art dealer" means a person who is in the business of dealing exclusively or nonexclusively in fine art multiples, a person who by his occupation holds himself out as having knowledge or skill peculiar to fine art multiples or persons to whom that knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having that knowledge or skill, or an auctioneer who sells fine art multiples at public auction. The term shall not include consignors or principals of auctioneers unless such consignors or principals are otherwise specifically defined as art dealers by this paragraph.

(2) "Artist" means the person who created the image which is contained in or constitutes the master or who conceived of and approved the image which is contained in or constitutes the master.

(3) "Fine art multiple" or "multiple" means any print, positive or negative photograph, or similar art object produced in more than one copy. The term includes pages or sheets taken from books or magazines but shall not include books or magazines.

(4) "Limited edition" means fine art multiples produced from a

master all of which are the same image and which bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples or which are otherwise held out as limited to a maximum number of multiples.

(5) "Master" means a printing plate, stone, block, screen, photographic negative, or other device which contains an image and is used to produce fine art objects in multiples.

(6) "Person" means an individual, partnership, corporation, association, or other entity.

(7) "Print" means a multiple produced by, but not limited to, engraving, etching, woodcutting, lithography, and serigraphy and a multiple produced or developed from photographic negatives.

(8) "Proofs" means multiples which are the same as and which are produced in a limited edition from the same master as the multiples but which, whether so designated or not, are set aside from and are in addition to the limited edition to which they relate.

(9) "Signed" means autographed by the artist's own hand, and not by mechanical means of reproduction, after the multiple is produced.

(10) "Written instrument" means a written or printed agreement, bill of sale, invoice, certificate of authenticity, catalogue, note, memorandum, or label describing a multiple which is to be sold, exchanged, or consigned by an art dealer.

History.
Code 1981, § 10-1-430, enacted by Ga. L. 1986, p. 635, § 1.

10-1-431. Requirements relating to the advertisement and sale of multiples.

(a) An art dealer shall not sell or consign a multiple in, into, or out of this state unless a written instrument is furnished to the purchaser or consignee prior to the sale or consignment which sets forth as to each multiple the descriptive information required by Code Section 10-1-432. If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such a multiple, this information shall be supplied at the time of or prior to delivery. With respect to auctions, this information may be furnished in catalogues or other written materials which are made readily available for consultation and purchase prior to sale, provided that a bill of sale, receipt, or invoice describing the transaction is then provided which makes reference to the catalogue and lot number in which this information is supplied. Information supplied pursuant to this

subsection shall be clearly, specifically, and distinctly addressed to each of the items listed in Code Section 10-1-432 unless the required data is not applicable. This Code section is applicable to transactions by and between art dealers and others considered to be art dealers for the purposes of this part.

(b)(1) An art dealer shall not cause a catalogue, prospectus, flyer, or other written material or advertisement to be distributed in, into, or from this state which solicits a direct sale, by inviting transmittal of payment for a specific multiple, unless it clearly sets forth, in close physical proximity to the place in such material where the multiple is described, the descriptive information required by Code Section 10-1-432. In lieu of this required information, the written material or advertising may set forth the material contained in the following quoted passage, or the passage itself, if the art dealer then supplies the required information prior to or with delivery of the multiple. The nonobservance of the terms within the following passage shall constitute a violation of this part:

"Georgia law provides for disclosure in writing of information concerning certain fine prints and photographs prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist's signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the plate which produced the multiple, and the number of multiples in a 'limited edition.' If a prospective purchaser so requests, the information shall be transmitted to him prior to payment or the placing of an order for a multiple. If payment is made by a purchaser prior to delivery of the multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he returns the multiple in the condition in which received within 30 days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies, including refund upon return of the multiple in the condition in which received."

(2) This requirement is not applicable to general written material or advertising which does not constitute an offer to effect a specific sale.

(c) In each place of business in the state where an art dealer is regularly engaged in sales of multiples, the art dealer shall post in a conspicuous place, a sign which, in a legible format, contains the information included in the following passage:

"Georgia law provides for the disclosure in writing of certain information concerning prints and photographs. This information is available to you, and you may request to receive it prior to purchase."

(d) If an art dealer offering multiples by means of a catalogue, prospectus, flyer, or other written material or advertisement distributed in, into, or from this state disclaims knowledge as to any relevant detail referred to in Code Section 10-1-432, he shall so state specifically and categorically with regard to each such detail to the end that the purchaser shall be able to judge the degree of uniqueness or scarcity of each multiple contained in the edition so offered. Describing the edition as an edition of "reproductions" eliminates the need to furnish further informational details unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished.

(e) Whenever an artist sells or consigns a multiple of his own creation or conception, the artist shall disclose the information required by Code Section 10-1-432, but an artist shall not otherwise be regarded as an art dealer.

History.
Code 1981, § 10-1-431, enacted by Ga. L. 1986, p. 635, § 1.

10-1-432. Information to be disclosed.

(a) Except as provided in subsections (c), (d), and (e) of this Code section, the following information shall be provided as required by Code Section 10-1-431:

(1) The name of the artist;

(2) If the artist's name appears on the multiple, a statement whether the multiple was signed by the artist; or if the multiple was not signed by the artist, a statement of the source of the artist's name on the multiple, such as whether the artist placed his signature on the multiple or on the master, whether his name was stamped or estate stamped on the multiple or on the master, or was from some other source or in some other manner placed on the multiple or on the master;

(3) A description of the medium or process, and where pertinent to photographic processes, the material used in producing the multiple, such as whether the multiple was produced through the etching, engraving, lithographic, serigraphic, or a particular method or material used in photographic developing processes. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made;

(4) If the multiple or the image on or in the master constitutes a photomechanical or photographic type of reproduction of an image

produced in a different medium, for a purpose other than the creation of the multiple being described, a statement of this information and the respective mediums;

(5) If paragraph (4) of this subsection is applicable, and the multiple is not signed, a statement whether the artist authorized or approved in writing the multiple or the edition of which the multiple being described is one;

(6) If the purported artist was deceased at the time the master was made which produced the multiple, this shall be stated;

(7) If the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, this shall be stated;

(8) If the multiple was made from a master which produced a prior limited edition, or from a master which constitutes or was made from a reproduction of a prior multiple or the master which produced the prior limited edition, this shall be stated as shall the total number of multiples, including proofs, of all other editions produced from that master;

(9) As to multiples produced after 1949, the year or approximate year the multiple was produced shall be stated. As to multiples produced prior to 1950, state the year, approximate year, or period when the master was made which produced the multiple and when the particular multiple being described was produced. The requirements of this paragraph shall be satisfied when the year stated is approximately accurate;

(10) Whether the edition is being offered as a limited edition, and if so the authorized maximum number of signed or numbered impressions, or both, in the edition; the authorized maximum number of unsigned or unnumbered impressions, or both, in the edition; the authorized maximum number of artist's, publisher's, or other proofs, if any, outside of the regular edition; and the total size of the edition; and

(11) Whether or not the master has been destroyed, effaced, altered, defaced, or canceled after the current edition.

(b) If the multiple is part of a limited edition and was printed after July 1, 1986, the statement of the size of the limited edition, as stated pursuant to paragraph (10) of subsection (a) of this Code section, shall also constitute an express warranty that no additional multiples of the same image, including proofs, have been produced in this or in any other limited edition.

(c) If the multiple was produced in the period from 1950 to July 1, 1986, the information required to be supplied need not include the

information required by paragraphs (5) and (8) of subsection (a) of this Code section.

(d) If the multiple was produced in the period from 1900 to 1949, the information required to be supplied need only consist of the information required by paragraphs (1), (2), (3), and (9) of subsection (a) of this Code section.

(e) If the multiple was produced before the year 1900, the information to be supplied need only consist of the information required by paragraphs (1), (3), and (9) of subsection (a) of this Code section.

History.
Code 1981, § 10-1-432, enacted by Ga. L. 1986, p. 635, § 1; Ga. L. 1992, p. 6, § 10.

10-1-433. Warranties.

(a)(1) Except as provided in paragraph (2) of this subsection, whenever an art dealer furnishes information as required by Code Section 10-1-432, such information shall be a part of the basis of the bargain and shall create express warranties as to the information provided. Such warranties shall not be negated or limited because the art dealer in the written instrument did not use formal words such as "warrant" or "guarantee" or because the art dealer did not have a specific intention or authorization to make a warranty or because any required statement is or purports to be the art dealer's opinion. The existence of a basis in fact for information warranted by virtue of this subsection shall not be a defense in an action to enforce such warranty.

(2) With respect to photographic multiples produced prior to 1950 and other multiples produced prior to 1900, the information required by paragraph (3) of subsection (a) of Code Section 10-1-432 shall be deemed to be correct if a reasonable basis in fact exists for the information provided.

(b) When information is not supplied, this shall constitute the express warrant that such information is not required to be disclosed.

(c) Whenever an art dealer disclaims knowledge as to a particular item about which information is required, such disclaimer shall be ineffective unless clearly, specifically, and categorically stated as to the particular item and contained in the physical context of other language setting forth the required information as to a specific multiple.

History.
Code 1981, § 10-1-433, enacted by Ga. L. 1986, p. 635, § 1.

10-1-434. Remedies not exclusive.

(a) The rights, liabilities, and remedies created by this part shall be construed to be in addition to and not in substitution, exclusion, or displacement of other rights, liabilities, and remedies provided by law.

(b) Whenever an artist sells or consigns a multiple of his own creation, the artist shall incur the obligations prescribed by this part for an art dealer.

(c) An artist or merchant who consigns a multiple to an art dealer for the purpose of effecting a sale of the multiple shall have no liability to a purchaser under this part if such consignor, as to the consignee, has complied with the provisions of this part.

(d) When an art dealer has agreed to sell a multiple on behalf of a consignor who is not an art dealer or when an artist has not consigned a multiple to an art dealer, but the art dealer has agreed to act as the agent for an artist for the purpose of supplying the information required by this part, such art dealer shall incur the liabilities of other art dealers prescribed by this part as to a purchaser.

(e) When an art dealer is liable to a purchaser pursuant to the provisions of this part, as a result of providing information in the situations referred to in this Code section, as well as when such an art dealer purchased such a multiple from another art dealer, if the art dealer can establish that his liability results from incorrect information which was provided by the consignor, artist, or art dealer to him in writing, and the art dealer who is liable in good faith relied on such information, the consignor, artist, or art dealer shall similarly incur such liabilities as to the purchaser and such art dealer.

History.
Code 1981, § 10-1-434, enacted by Ga. L. 1986, p. 635, § 1.

10-1-435. Civil remedies for violations.

(a) An art dealer, including a dealer consignee, who offers or sells a multiple in, into, or from this state without providing the information required in Code Sections 10-1-431 and 10-1-432 or who provides information which is mistaken, erroneous, or untrue, except for harmless errors such as typographical errors, shall be liable to the purchaser of the multiple. The art dealer's liability shall consist of the consideration paid by the purchaser for the multiple, with interest at the legal rate thereon, upon the return of the multiple in the condition in which received by the purchaser.

(b) In any case in which an art dealer, including a dealer consignee, willfully offers or sells a multiple in violation of this part, the person

purchasing such multiple may recover from the art dealer, including a dealer consignee, who offers or sells such multiple an amount equal to three times the amount required under subsection (a) of this Code section.

(c) No action shall be maintained to enforce any liability under this Code section unless brought within one year after discovery of the violation upon which it is based and in no event more than three years after the multiple was sold.

(d) In any action to enforce any provision of this part, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the seller as it deems appropriate.

(e) These remedies shall not bar or be deemed inconsistent with a claim for damages or with the exercise of additional remedies otherwise available to the purchaser.

(f) In any proceeding in which an art dealer relies upon a disclaimer of knowledge as to any relevant information set forth in Code Section 10-1-432 for any time period, such disclaimer shall be effective unless the claimant is able to establish that the art dealer failed to make reasonable inquiries, according to the custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries.

History.
Code 1981, § 10-1-435, enacted by Ga. L. 1986, p. 635, § 1.

10-1-436. Civil penalties; injunctions.

(a) Whenever the Attorney General or any district attorney has reason to believe that any person is violating any provision of this part, he may bring an action against such person to restrain or enjoin continued violations. With the exception of consent judgments entered before any testimony is taken, a final judgment under this Code section is admissible as prima-facie evidence of such specific findings of fact as may be made by the court which enters the judgment in subsequent proceedings by or against the same person or his successors or assigns.

(b) Any person who violates any provision of this part may be liable for a civil penalty not to exceed $500.00 for each violation. Such penalty may be assessed and recovered in a civil action brought by the Attorney General or any district attorney.

History.
Code 1981, § 10-1-436, enacted by Ga. L. 1986, p. 635, § 1.

10-1-437. Exemptions.

(a) This part shall not apply to any fine art multiple when offered for sale or sold at wholesale or retail for $100.00 or less, exclusive of any frame.

(b) Any charitable organization which conducts a sale or auction of fine art multiples shall be exempt from the disclosure requirements of this part if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information specified in Code Section 10-1-432 and includes such a disclaimer in a catalogue, if any, distributed by the organization with respect to the sale or auction of fine art multiples. If a charitable organization uses or employs an art dealer to conduct a sale or auction of fine art multiples, the art dealer shall be subject to all disclosure requirements otherwise required of an art dealer under this part.

History.
Code 1981, § 10-1-437, enacted by Ga. L. 1986, p. 635, § 1.

Part 6

Disaster Related Violations

Editor's notes.
Ga. L. 1995, p. 697, § 2, not codified by the General Assembly, provides that this part applies with respect to violations occurring on or after April 18, 1995.

10-1-438. Enhanced penalties for disaster related violations; civil action authorized.

(a) As used in this part, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Disaster related violation" means any violation of Part 1, 2, or 4 of this article, which violation involves:

(A) The sale or offer for sale of supplies for use in the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster; or

(B) The performance of or offer to perform services for the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster.

(3) "Natural disaster" means any natural disaster for which a state of emergency is proclaimed by the Governor.

(b) Whenever the Attorney General or any court is imposing a penalty for any violations of Part 1, 2, or 4 of this article and the violation is a disaster related violation, in addition to any other applicable penalty there may be imposed an additional civil penalty not to exceed $10,000.00 for each transaction.

(c) Any person who suffers damage or injury as a result of a disaster related violation shall have a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Amounts recovered in such an action shall have priority over a civil penalty imposed under this Code section.

History.
Code 1981, § 10-1-438, enacted by Ga. L. 1995, p. 697, § 1; Ga. L. 2015, p. 1088, § 5/SB 148.

Part 7

Firearms Industry Nondiscrimination

Cross references.
Right to bear arms, U.S. Const., amend. 2.

Arms, right to keep and bear, Ga. Const. 1983, Art. I, Sec. I, Para. VIII.

Editor's notes.
Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

10-1-439. Short title.

This part shall be known and may be cited as the "Georgia Firearms Industry Nondiscrimination Act."

History.
Code 1981, § 10-1-439, enacted by Ga. L. 2017, p. 555, § 2/HB 292; Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024.

Editor's notes.
Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024, reenacted this Code section without change.

10-1-439.1. Definitions.

As used in this part, the term:

(1) "Disclose a financial record" means transfer, publish, or distribute protected financial information to another person for any purpose other than to:

(A) Process or facilitate a payment card transaction; or

(B) Take any actions related to dispute processing, fraud management, or protecting transaction integrity from concerns related to illegal activities or cyber risks.

(2) "Financial institution" means any bank, trust company, building and loan association, credit union as defined in Code Section 7-1-4, merchant acquirer limited purpose bank as defined in Code Section 7-9-2, federally chartered banking institution that accepts state deposits, or entity involved in facilitating or processing payment card transactions, including, but not limited to, an acquirer, a payment card network, or a payment card issuer.

(3) "Financial services" means any service or product offered to the consumer or business market by a financial institution.

(4) "Firearms code" means the Merchant Category Code 5723 approved by the International Organization for Standardization or any other merchant category code or indicator that a financial institution assigns to a merchant or to a payment card transaction identifies whether the merchant is a firearms retailer or whether the payment card transaction involves the purchase of a firearm or ammunition.

(5) "Firearms retailer" means any person physically located in this state that is engaged in the lawful business of selling or trading firearms or ammunition.

(6) "Payment card" shall have the same meaning as provided in Code Section 10-15-1.

(7) "Person" means one or more individuals, partnerships, associations, limited liability companies, corporations, unincorporated organizations, mutual companies, joint stock companies, trusts, or other legal or business entities. Such term shall include federally chartered banking institutions that accept state deposits.

(8) "Protected financial information" means any record of a sale, purchase, return, or refund involving a payment card that is retrieved, characterized, generated, labeled, sorted, or grouped based on the assignment of a firearms code.

(9) "Trade association" means any corporation, unincorporated association, federation, business league, or professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual; that is an organization described in Section 501(c)(6) of Title 26 of the United States Code and exempt from tax under Section 501(a) of such title; and two or more members of which are manufacturers or sellers of a qualified product as defined by Section 7903(4) of Title 15 of the United States Code.

History.

Code 1981, § 10-1-439.1, enacted by Ga. L. 2017, p. 555, § 2/HB 292; Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024; Ga. L. 2024, p. 354, § 3-1/HB 876, effective July 1, 2024.

Amendments.

The first 2024 amendment, effective July 1, 2024, rewrote this Code section, which read: "As used in this part, the term:

"(1) 'Financial services' means any service or product offered to the consumer or business market by a bank, trust company, building and loan association, credit union as defined by Code Section 7-1-4, any merchant acquirer limited purpose bank as defined in paragraph (7) of Code Section 7-9-2, or a federally chartered banking institution that accepts state deposits.

"(2) 'Person' means one or more individuals, partnerships, associations, limited liability companies, corporations, unincorporated organizations, mutual companies, joint stock companies, trusts, agents, legal representatives, trustees, trustees in bankruptcy, receivers, labor organizations, public bodies, and public corporations and the State of Georgia and all political subdivisions and agencies thereof. Such term shall include federally chartered banking institutions that accept state deposits.

"(3) 'Trade association' means any corporation, unincorporated association, federation, business league, or professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual; that is an organization described in Section 501(c) (6) of Title 26 of the United States Code and exempt from tax under Section 501(a) of such title; and two or more members of which are manufacturers or sellers of a qualified product as defined by Section 7903(4) of Title 15 of the United States Code."

The second 2024 amendment, effective July 1, 2024, substituted "paragraph (12)" for "paragraph (7)" near the end of paragraph (1).

Code Commission notes.

Pursuant to Code Section 28-9-5, a portion of paragraph (1) (now paragraph (3)) was treated as repealed by Ga. L. 2024, p. 354, § 3-1/HB 876. However, Ga. L. 2024, p. 139, § 1/HB 1018 purported to amend this paragraph by changing a cross reference. For effect of subsequent amendment of a repealed statute, see Lampkin v. Pike, 115 Ga. 827 (1902).

U.S. Code.

Section 7903 of Title 15 of the United States Code, referred to in this Code section, is part of the Protection of Lawful Commerce in Arms provision, 15 U.S.C. § 7901 et seq.

Section 501 of Title 26 of the United States Code, referred to in this Code section, is part of the Internal Revenue Code, 26 U.S.C. § 501 et seq.

10-1-439.2. Discrimination in financial services prohibited.

(a) Unless otherwise precluded by law, regulation, or membership eligibility, it shall be an unlawful discriminatory practice for any person to refuse to provide financial services of any kind to, to refrain from continuing to provide existing financial services to, to terminate existing financial services with, or to otherwise discriminate in the provision of financial services against a person or trade association solely because such person or trade association is engaged in the lawful commerce of firearms or ammunition products and is licensed pursuant to Chapter 44 of Title 18 of the United States Code or is a trade association.

(b) It shall be an unlawful discriminatory practice for any financial institution to require the usage of a firearms code in a way that distinguishes a firearms retailer that is physically located in this state from general merchandise retailers or sporting goods retailers, unless

such required usage of a firearms code is based on a good faith conclusion that such action is required by applicable law or regulation.

(c) It shall be unlawful for any financial institution to discriminate against a firearms retailer by declining a lawful payment card transaction based solely on the assignment or nonassignment of a firearms code; provided, however, that a financial institution may decline or otherwise refuse to process a payment card transaction on the basis of a firearms code if such action is requested by the customer or is the result of fraud prevention procedures or merchant category exclusions offered by the financial institution for the purpose of expenditure control or corporate payment card control.

(d) Except as otherwise required by law or regulation, a financial institution shall not disclose a financial record, including a firearms code that was collected in violation of subsection (b) of this Code section, unless such disclosure is based on a good faith conclusion that it was required by applicable law or regulation.

(e) Nothing in this Code section shall limit the ability of a financial institution to negotiate with responsible parties or otherwise impair the financial institution's actions related to dispute processing, fraud management, or protecting transaction integrity from concerns related to illegal activities or cyber risks.

History.
Code 1981, § 10-1-439.2, enacted by Ga. L. 2017, p. 555, § 2/HB 292; Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, designated the existing provisions of this Code section as subsection (a) and added subsections (b) through (e).
Cross references.
Georgia Fair Lending Act, § 7-6A-1 et seq.

10-1-439.3. Role of Attorney General in prosecuting violators; civil penalties.

(a) Whenever the Attorney General has reason to believe that any person is engaging, has engaged, or is about to engage in any act or practice declared unlawful by this part, the Attorney General shall, upon written request made pursuant to subsection (b) of this Code section or by his or her own initiative, investigate and, upon finding a probable violation of this part, bring an action in the name of the state against such person to:

(1) Obtain a declaratory judgment that the act or practice violates the provisions of this part;

(2) Enjoin any act or practice that violates the provisions of this part by issuance of a temporary restraining order or preliminary or permanent injunction, without bond, upon the giving of appropriate notice; and

(3) Recover civil penalties of up to $10,000.00 per violation of this part or any injunction, judgment, or consent order issued or entered into under the provisions of this chapter and reasonable expenses, investigative costs, and attorney's fees.

Provided, however, that no action shall be brought by the Attorney General under this subsection until after the person who is alleged to have violated this part has received written notice from the Attorney General of the alleged violation and failed to cease the activity that is alleged to be a violation of this part within 30 days of receiving such notice.

(b) Any person who is the subject of an action believed to be in violation of this part may request, in writing, that the Attorney General investigate the alleged violation pursuant to subsection (a) of this Code section.

(c) The remedies set forth in this Code section shall be the exclusive remedies for violations of this part.

History.
Code 1981, § 10-1-439.3, enacted by Ga. L. 2017, p. 555, § 2/HB 292; Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, designated the existing provisions of this Code section as subsection (a); inserted "made pursuant to subsection (b) of this Code section" in the beginning of subsection (a) and added the undesignated text following paragraph (a)(3); and added subsections (b) and (c).

10-1-439.4. Exemptions.

The provisions of this part shall not apply to any bank, trust company, credit union, or merchant acquirer limited purpose bank that is chartered under the laws of this state or any other state to the extent that federal law precludes or preempts or has been determined to preclude or preempt the application of the provisions of this part to any federally chartered bank, trust company, credit union, or merchant acquirer limited purpose bank.

History.
Code 1981, § 10-1-439.4, enacted by Ga. L. 2017, p. 555, § 2/HB 292; Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024.
Editor's notes.
Ga. L. 2024, p. 139, § 1/HB 1018, effective July 1, 2024, reenacted this Code section without change.

Part 8

Online Automatic Renewal Transparency

Effective date.
This part became effective January 1, 2024. See Editor's notes for applicability.
Editor's notes.
Ga. L. 2023, p. 592, § 3/HB 528, not codified by the General Assembly,

provides: "This Act shall become effective on January 1, 2024. Section 1 of this Act shall apply to any automatic renewal or continuous service plan or arrangement entered into on or after that date. Section 2 of this Act shall apply to any acts, practices, or transactions occurring on or after that date."

10-1-439.5. Short title.

This part shall be known and may be cited as the "Georgia Online Automatic Renewal Transparency Act."

History. Code 1981, § 10-1-439.5, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.6. Purpose; construction with federal law.

(a) The purpose of this part shall be to stop the practice of creating unnecessary barriers for customers who wish to cancel automatic renewal or continuous service subscriptions online, particularly when such subscriptions are offered online. It is the intent of the General Assembly that such practice be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

(b) It is the further intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

History. Code 1981, § 10-1-439.6, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.7. Definitions.

As used in this part, the term:

(1) "Automatic renewal" means a plan or arrangement in which an online paid subscription or purchasing agreement is automatically renewed at the end of a definite term of more than 31 days for a subsequent definite term of more than 31 days.

(2) "Consumer" means a natural person residing in this state who enters into a transaction primarily for personal, family, or household purposes.

(3) "Continuous service" means a plan or arrangement for a paid definite term of more than 31 days renewing for a subsequent definite term of more than 31 days in which an online subscription or purchasing agreement continues until the consumer cancels such service.

(4) "Offer terms" means the following clear and conspicuous disclosures to the consumer:

(A) The description of the cancellation policy as applicable to the automatic renewal offer or arrangement;

(B) The recurring charges to be charged to the consumer's credit or debit card or payment account with a third-party payment account as part of the online automatic renewal plan or arrangement, and that the amount of such charge may change, and the amount to which such charge will change, if known;

(C) The length of the automatic renewal term or an indication that the service is continuous, unless the length of the term is chosen by the consumer; and

(D) The minimum purchase obligation, if any.

History. Code 1981, § 10-1-439.7, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.8. Online cancellation of automatic renewal or continuous service; alternate methods of cancellation; required information.

(a) Notwithstanding any law to the contrary, any business that allows a consumer to accept an automatic renewal or continuous service offer online shall allow a consumer to cancel the automatic renewal or continuous service online. The business shall provide a method of cancellation that is available online, which may include:

(1) A clear and conspicuous link to a website or other online cancellation service; or

(2) A cancellation email formatted and provided by the business that a consumer can send to the business without additional information.

(b) Notwithstanding subsection (a) of this Code section, a business that allows a consumer to accept an automatic renewal or continuous service offer online may require a consumer to enter account information or otherwise authenticate their account online before online cancellation of the automatic renewal or continuous service if the consumer has an account with the business. A consumer who is unwilling or unable to enter account information or otherwise authenticate online before online cancellation of the automatic renewal or continuous service shall not be precluded from cancelling the automatic renewal or continuous service offline using an alternate method pursuant to subsection (c) of this Code section.

(c) A business that allows a consumer to accept an automatic renewal

or continuous service offer online shall provide a toll-free telephone number, email address, postal address if the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms, cancellation policy, and information regarding how to cancel.

(d) The requirements of this Code section apply to the automatic renewal terms and continuous service terms of the contract entered into online, and the remaining provisions of the contract shall continue to be governed by all applicable laws and regulations.

History. Code 1981, § 10-1-439.8, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.9. Prohibited activities relating to automatic renewal or continuous service offers; required notices.

(a) It shall be unlawful in this state for any business that allows a consumer to accept an automatic renewal or continuous service offer online to:

(1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consumer consent to the offer;

(2) Charge the consumer's credit or debit card, or the consumer's third-party payment account for an automatic renewal or continuous service without first obtaining the consumer's consent to the agreement containing such automatic renewal offer terms or continuous service offer terms;

(3) Fail to provide an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms. Such acknowledgment may be from the business's own website or it may be provided via a link to a separate resource that provides instructions for unique platforms and services or other means that provide such offer terms in a manner easily retained by the consumer; or

(4) Fail to provide a consumer with notice pursuant to subsection (b) of this Code section.

(b) A business that allows a consumer to accept an automatic renewal or continuous service offer online shall provide the consumer with a notice prior to or within three days after charging the consumer's credit or debit card or payment account with a third party, provided that the consumer has not opted out of receiving such notice. Such notice shall clearly and conspicuously state:

(1) That the automatic renewal or continuous service shall automatically renew unless it is canceled by the consumer;

(2) The length and any additional terms of the renewal period;

(3) If sent electronically, the notice shall include either a link or another reasonably accessible electronic method that directs the consumer to the cancellation process; and

(4) Contact information for the business.

(c) In the case of a material change in the terms of the online automatic renewal offer or continuous service offer that has been accepted by a consumer in this state, a business shall provide the consumer with a clear and conspicuous notice of the material change and shall provide information to the consumer regarding how to cancel such automatic renewal offer or continuous service offer in a manner that is easily retained by the consumer.

History.
Code 1981, § 10-1-439.9, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.10. Consumers' receipt of goods, wares, merchandise, or products without consent deemed unconditional gift.

When a business that allows a consumer to accept an automatic renewal or continuous service offer online sends any goods, wares, merchandise, or products to a consumer under an automatic renewal of purchase or a continuous service agreement, without first obtaining the consumer's consent pursuant to paragraph (2) of subsection (a) of Code Section 10-1-439.9, such goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of such goods, wares, merchandise, and products in any manner he or she sees fit without obligation to the business, including, but not limited to, bearing the cost of or responsibility for shipping any goods, wares, merchandise, or products to the business.

History.
Code 1981, § 10-1-439.10, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024; Ga. L. 2024, p. 1052, § 2(20)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

10-1-439.11. Application.

The requirements of this part shall apply only prior to the completion of the initial order for the online automatic renewal or continuous service; provided, however, that an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms, cancellation policy, and information regarding how to cancel, and the notice

required pursuant to subsection (b) of Code Section 10-1-439.9 may be fulfilled after the completion of the initial order.

History. Code 1981, § 10-1-439.11, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.12. Exemptions.

The following are exempt from the requirements of this part:

(1) Any service provided by a business or its affiliate when either the business or its affiliate is doing business as a franchise issued by a political subdivision of this state;

(2) Any service provided by a business or its affiliate when either the business or its affiliate is regulated by the Georgia Public Service Commission, the Georgia Department of Agriculture, the Federal Communications Commission, or the Federal Energy Regulatory Commission;

(3) Any entity regulated by the Office of Insurance and Safety Fire Commissioner;

(4) Any financial institution as defined in Code Section 7-1-4 or any subsidiary or affiliate of such institution, or any bank holding company as defined in Code Section 7-1-605; and

(5) Any foreign bank maintaining a branch or agency licensed under federal law or under the laws of any state of the United States.

History. Code 1981, § 10-1-439.12, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

10-1-439.13. Role of Attorney General in enforcement; no private right of action; severability.

(a) The Attorney General shall be authorized to bring an action under this part to obtain a temporary or permanent injunction prohibiting the use of any method, act, or practice in violation of this part and to obtain restitution for consumers who are residents of this state and who incurred a loss of money or property as the direct result of a violation of this part.

(b) If a business that allows a consumer to accept an automatic renewal or continuous service offer online complies with the provisions of this part in good faith, it shall not be subject to civil penalty or damages.

(c) There shall be no private right of action for a violation of this part, nor shall a violation of this part serve as the basis for a private right of action under any other provision of law.

(d) If any provision of this part or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this part that can be given effect without the invalid provision or application. To this end, the provisions of this part are severable.

History.
Code 1981, § 10-1-439.13, enacted by Ga. L. 2023, p. 592, § 1/HB 528, effective January 1, 2024.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2023, "part" was substituted for "article" near the end of subsection (b).

Part 9

Online Third-Party Delivery Service Transparency

Effective date.
This part became effective January 1, 2024. See Editor's notes for applicability.

Editor's notes.
Ga. L. 2023, p. 592, § 3/HB 528, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 2024. Section 1 of this Act shall apply to any automatic renewal or continuous service plan or arrangement entered into on or after that date. Section 2 of this Act shall apply to any acts, practices, or transactions occurring on or after that date."

10-1-439.15. Short title.

This part shall be known and may be cited as the "Georgia Online Third-Party Delivery Service Transparency Act."

History.
Code 1981, § 10-1-439.15, enacted by Ga. L. 2023, p. 592, § 2/HB 528, effective January 1, 2024.

10-1-439.16. Purpose.

The purpose of this part shall be to stop the practice of third-party delivery services taking orders for or arranging for the pickup, transportation, or delivery of ready-to-eat food from a food service establishment and from using such establishment's name, likeness, registered trademark, or intellectual property without prior written consent from such establishment.

History.
Code 1981, § 10-1-439.16, enacted by Ga. L. 2023, p. 592, § 2/HB 528, effective January 1, 2024.

10-1-439.17. Definitions.

As used in this part, the term:

(1) "Customer" means the person, business, or other entity placing or receiving an order, for remuneration, for the pickup, transportation, or delivery of ready-to-eat food from a food service establishment through a third-party delivery service.

(2) "Food service establishment" shall have the same meaning as provided in Code Section 26-2-370.

(3) "Ready-to-eat food" means food in a form that is edible without additional preparation to render it safe for consumption.

(4) "Third-party delivery service" means a business, other than a food service establishment, that, for remuneration, operates a platform, website, mobile application, or other electronic service through which the order, pickup, transportation, or delivery of ready-to-eat food from a food service establishment to a customer is arranged.

History.
Code 1981, § 10-1-439.17, enacted by Ga. L. 2023, p. 592, § 2/HB 528, effective January 1, 2024.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2023, the designation of this Code section was changed from 10-1-439-17 to 10-1-439.17 to conform to the statutory designation scheme.

RESEARCH REFERENCES

ALR.
Liability and Regulation of Food or Grocery Delivery App, 79 A.L.R.7th 3.

10-1-439.18. Prohibited activity of third-party delivery services.

A third-party delivery service shall not:

(1) Take an order for or arrange for the pickup, transportation, or delivery of an order from a food service establishment to a customer without such establishment's prior written consent expressly authorizing such service to take such orders or arrange for the pickup, transportation, and delivery of such orders from such establishment to a customer; or

(2) Use a food service establishment's name, likeness, registered trademark, or intellectual property on such service's platform, website, mobile application, or other electronic service or other public-facing materials in a manner that implies association, sponsorship, or endorsement without obtaining such establishment's prior written consent.

History.
Code 1981, § 10-1-439.18, enacted by Ga. L. 2023, p. 592, § 2/HB 528, effective January 1, 2024.

RESEARCH REFERENCES

ALR.
Liability and Regulation of Food or Grocery Delivery App, 79 A.L.R.7th 3.

10-1-439.19. Enforcement; penalties.

(a) An aggrieved food service establishment alleging a third-party delivery service is in violation of this part may seek judicial enforcement of the requirements of this part in an action brought against such service in the county in which the violation occurred. The following civil penalties shall be imposed for a violation of this part: for the first violation, $1,000.00; for the second violation, $2,000.00; and for a third and any subsequent violation, $10,000.00.

(b) In addition to the penalties provided for in subsection (a) of this Code section, an aggrieved food service establishment may bring an action to enjoin a third-party delivery service's violation of this part. If the court finds a violation of this part, the court shall issue an injunction against such service and may require such service to pay the injured establishment all profits derived from or damages resulting from the wrongful acts; provided, however, that, if the court finds that such service committed a wrongful act in bad faith, in the court's discretion, the court shall enter a judgment in an amount not to exceed three times the amount of profits derived and damages resulting from such wrongful acts and award reasonable attorney's fees to such establishment.

History.
Code 1981, § 10-1-439.19, enacted by Ga. L. 2023, p. 592, § 2/HB 528, effective January 1, 2024.

RESEARCH REFERENCES

ALR.
Liability and Regulation of Food or Grocery Delivery App, 79 A.L.R.7th 3.

ARTICLE 16

TRADEMARKS, SERVICE MARKS, AND TRADE NAMES

Cross references.
Fraudulent nature of use of similar trademarks, names, or devices with intention of deceiving and misleading public, § 23-2-55.

Use of word "Georgia" in trademark, trade name, service mark, or advertisement in connection with meat or meat food products, § 26-2-115.

Authority of pharmacists to substitute generic drugs for brand name drugs, § 26-4-80 et seq.

Law reviews.
For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

For article, "The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer," see 43 Ga. L. Rev. 451 (2009).

For note, "The Ongoing Royalty: What Remedy Should a Patent Holder Receive When a Permanent Injunction Is Denied," see 43 Ga. L. Rev. 543 (2009).

For article, "The Globalization of Intellectual Property Rights: Trips, Bits, and the Search for Uniform Protection," see 38 Ga. J. Int'l & Comp. L. 265 (2010).

For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For note, "How to Get the Mona Lisa in your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections," see 18 J. Intell. Prop. L. 567 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Trade Dress (Packaging) Simulation, 3 POF2d 577.

Cancellation of Registration of Trademark That Has Become Generic Term, 37 POF2d 67.

Wrongful Use of Another's Trademark or Tradename, 47 POF2d 643.

Monetary Recovery for Trademark Infringement, 17 POF3d 609.

Common-Law Trademarks or Tradename Rights in Geographical Areas of Prior Use, 22 POF3d 623.

Proof of Distinctiveness and Secondary Meaning of Trademark or Service Mark, 22 POF3d 691.

Proof of Music Sampling in Copyright Infringement, 26 POF3d 537.

Proof of Extraordinary Remedies for Copyright Infringement, 28 POF3d 379.

Extraordinary Remedies for Trademark Infringement, 36 POF3d 255.

Misuse of Intellectual Property, 37 POF3d 315.

Dilution of a Trademark, 38 POF3d 1.

Proof of Copyright Infringement by Unauthorized Use of Software, 52 POF3d 107.

Proof of Trade Dress Infringement, 55 POF3d 383.

Proof of Copyright Infringement by File Sharing, 63 POF3d 1.

Proof of Facts Establishing a Claim for Trade Libel or Product Disparagement under Sec. 43(a) of the Lanham Act, 15 U.S.C.A. Section 1125(a), 79 POF3d 1.

Establishing Liability for Trademark Infringement by Use of Website Metatags, 84 POF3d 93.

ALR.

Use of Pseudonym for Anonymity of Plaintiff in Intellectual Property Actions, 68 A.L.R. Fed.3d 8.

Proof of Access to Copyrighted Work by Widespread Dissemination in Infringement Case, 76 A.L.R. Fed.3d 5.

Part 1

Registration and Use of Trademarks and Service Marks

Law reviews.

For article, "Trademarks and Semantics: The Use and Misuse of Trademarks in Dictionaries and Trade Journals," see 6 Ga. L. Rev. 311 (1972).

For article, "Trademark Litigation," a brief overview of the subject, see 17 Ga. St. B. J. 158 (1981).

For article, "Elite Personnel, Inc. v. Elite Personnel Services, Inc.: Issues of Registration and Suggestion in Trademark Law," see 7 Ga. St. U.L. Rev. 551 (1991).

For article, "Protecting the Trademark 'Coca-Cola' in the Courts," see 28 Ga. St. B. J. 42 (1991).

For article, "Acquisition of Trademark Rights Under United States and Georgia Law," see 7 Ga. St. B. J. 14 (2001).

For article, "Confusion Codified: Why Trademark Remedies Make No Sense," see 17 J. Intell. Prop. L. 245 (2010).

For comment, "Irrational Science Breeds Irrational Law," see 67 Emory L.J. 889 (2018).

For article, "More Property Rules Than

Property? The Right to Exclude in Patent and Copyright," see 68 Emory L.J. 685 (2019).

For note, "Copyright Registration: Why the U.S. Should Berne the Registration Requirement," see 36 Ga. St. U.L. Rev. 873 (2020).

For article, "Consumer Uncertainty in Trademark Law: An Experimental Investigation," see 72 Emory L.J. 489 (2023).

For comment, "Inside Out, Upside Down: Circuit Court Confusion Over Character Copyrightability," see 72 Emory L.J. 629 (2023).

JUDICIAL DECISIONS

Part similar to federal statute. — Georgia law on registration of trademarks and service marks provides for a civil action to remedy infringements and is, both in structure and purpose, similar to the law's federal counterpart. Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689, 1976 U.S. Dist. LEXIS 12523 (N.D. Ga. 1976).

Registration provisions are permissive. — Provisions concerning registration are permissive rather than mandatory. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Trade name previously acquired by another. — Registration will not operate to deprive another of previously acquired trade name. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

RESEARCH REFERENCES

ALR.

Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 A.L.R. 784; 28 A.L.R. 114.

Right of manufacturer, producer, or wholesaler to control resale price, 19 A.L.R. 925; 32 A.L.R. 1087l; 103 A.L.R. 1331; 125 A.L.R. 1335.

Application of principles of unfair competition to artistic or literary property, 19 A.L.R. 949.

"Drive it yourself" and similar phrases in connection with business of renting automobiles as subject of trademark or protection upon ground of unfair competition, 43 A.L.R. 213.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 A.L.R. 706.

Rights and remedies as between originator of uncopyrighted advertising plan or slogan, or his assignee, and another who uses or infringes the same, 104 A.L.R. 1357; 157 A.L.R. 1436.3

Conflict of laws, with respect to trademark infringement or unfair competition, including the area of conflict between federal and state law, 148 A.L.R. 139.

Stockholders' rights to patent, copyright, or trademark owned by corporation on dissolution thereof, 30 A.L.R.2d 938.

Trade dress simulation of cosmetic products as unfair competition, 86 A.L.R.3d 505.

Unfair competition by imitation in sign or design of business place, 86 A.L.R.3d 884.

Name appropriation by employer or former employer, 52 A.L.R.4th 156.

10-1-440. Definitions; when trademark or service mark deemed used in state.

(a) As used in this part, the term:

(1) "Applicant" means the person filing an application for registration of a trademark or service mark under this part and the legal

representatives, successors, or assigns of the person filing an application for registration of a trademark or service mark under this part.

(2) "Person" means any individual, firm, partnership, corporation, association, union, or other organization.

(3) "Registrant" means the person to whom the registration of a trademark or service mark under this part is issued and the legal representatives, successors, or assigns of the person to whom the registration of a trademark or service mark under this part is issued.

(4) "Service mark" means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify the services of one person and to distinguish them from the services of others.

(5) "Trademark" means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others.

(b) For the purposes of this part, a trademark shall be deemed to be "used" in this state when it is placed in any manner on the goods or their containers or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in this state.

(c) For the purposes of this part, a service mark shall be deemed to be "used" in this state when it is used to identify the services of one person and to distinguish them from the services of others and such services are sold or otherwise rendered in this state.

History.

Ga. L. 1952, p. 134, § 6; Ga. L. 1963, p. 463, § 1.

Law reviews.

For article, "Trademark Monopolies," see 48 Emory L.J. 367 (1999).

For article, "Post-Creation Checklist for Georgia Business Entities," see 9 Ga. St. B. J. 24 (2004).

JUDICIAL DECISIONS

"Trademark" distinguished from "trade name". — Provisions of the law restrict the meaning and function of a trademark to the identification of goods and their manufacturer. However, a trade name primarily identifies the owner or operator of a business and may also be used to identify the goods handled by such owner. Gordy v. Dunwody, 209 Ga. 627, 74 S.E.2d 886, 1953 Ga. LEXIS 351 (1953) (commented on in 17 Ga. B.J. 395 (1955)).

Bona fide use of trademark required to make infringement claim. — Trial court did not err in granting the Georgia Lottery Corporation (GLC) and a company summary judgment in trademark holders' action alleging trademark infringement because Georgia

law did not authorize the holders' claims against GLC since the latter used the logo first and extensively on a series of lottery games over ten years when the holders' efforts to market their game were a conspicuous failure, and since there was no likelihood of confusion between the two games; O.C.G.A. § 10-1-440 requires the bona fide use of a trademark to make out a claim concerning the trademark's infringement. Kyle v. Ga. Lottery Corp., 304 Ga. App. 635, 698 S.E.2d 12, 2010 Ga. App. LEXIS 529 (2010), aff'd, 290 Ga. 87, 718 S.E.2d 801, 2011 Ga. LEXIS 934 (2011).

Court of appeals did not err in affirming an order granting the Georgia Lottery Corporation summary judgment as to a trademark infringement claim on the ground that the trademark holders did not make a "bona fide" use of their mark in commerce sufficient to establish protectable rights in the mark because the court of appeals properly ruled that O.C.G.A. § 10-1-440 required the bona fide use of a trademark to make out a claim concerning the trademark's infringement; interpreting O.C.G.A. § 10-1-440(b) to contain a bona fide use requirement is neither inconsistent with the statutory definition nor does it improperly expand the application of the statute because it merely excludes from the definition of "use" any dishonest or bad faith motives on the part of the person obtaining and using a trademark, a result not inconsistent with the language of the General Assembly. Kyle v. Ga. Lottery Corp., 290 Ga. 87, 718 S.E.2d 801, 2011 Ga. LEXIS 934 (2011).

Interlocutory injunction proper in dispute over service marks. — In a suit alleging, inter alia, the infringement of state registered service marks, the trial court properly granted the plaintiff interlocutory relief because it was undisputed that the plaintiff was the last entity to hold the named pageants prior to the interlocutory injunction hearing, regardless of any issues of registration of service marks or abandonment or assignment by the defendant; thus, the status quo was plaintiff being the host of the events using the marks. India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 769 S.E.2d 905, 2015 Ga. LEXIS 149 (2015).

Consumer confusion. — Author failed to state a claim for trademark infringement based on the alleged wrongful appropriation of materials from the author's autobiography, wardrobe, and personal history by the creators of a line of perfumes as it was not sufficiently alleged that the consumers were likely to be misled into associating the author and the author's sibling with the perfumes. Mobley v. Fermont-Langlais, 705 Fed. Appx. 788, 2017 U.S. App. LEXIS 12841 (11th Cir. 2017).

Statutory use requirement not satisfied. — District properly cancelled plaintiff's Georgia registration of a service mark because registration was granted improperly as the plaintiff did not satisfy the statutory use requirement, and there was no basis for reformation of registration. Underwood v. Bank of Am., Corp., 996 F.3d 1038, 2021 U.S. App. LEXIS 12949 (10th Cir. 2021).

OPINIONS OF THE ATTORNEY GENERAL

"Goods" defined. — Word "goods" as used in this section is not defined therein, but is used to mean wares, merchandise, and commodities bought and sold by merchants and traders. 1958-59 Ga. Op. Att'y Gen. 398.

"Trademark" defined. — It has been said by appellate courts in other jurisdictions that a "trademark" consists of the use in trade of a mark placed upon goods manufactured (or sold) by a particular person and placed in market with such marks for sale and trade and does not become a trademark until it is actually stamped on or otherwise becomes affixed to goods to be sold. It may be broadly defined as a mark by which the wares of the owner are known in trade, and its objects are two-fold: first, to protect the party using it from competition of inferior articles; and, second, to protect the public from

imposition of fraud, and this latter is one of the basic concepts of all trademark law. 1957 Ga. Op. Att'y Gen. 330.

Word not used in trade nor used for protection not registerable as trademark. — Holding company, owning outright certain corporations and the controlling stocks in others, which manufactures, sells, or distributes for sale no commodity whatsoever may not register as a trademark a word used on a gummed label obviously intended for the applicant's own use and a director of subsidiaries for the applicant and such subsidiaries, when there is no indication, claim, or evidence of any kind that either of the items are sold, offered for sale, or distributed to any one other than subsidiaries and no indication that they pay for them directly or indirectly, and there is no showing that the use of the name on either piece of material is designed to or does protect the manufacturer or the public against inferior goods of others in the marts of trade. 1958-59 Ga. Op. Att'y Gen. 398.

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Trademarks and Tradenames, § 1 et seq.

Am. Jur. Pleading and Practice Forms.

23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 1.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1 et seq., 188 et seq.

ALR.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 A.L.R. 1241.

Granting of "naked" or unsupervised license to third party as abandonment of trademark, 118 A.L.R. Fed. 211.

10-1-441. Ineligibility of trademark or service mark for registration.

A trademark or service mark shall be entitled to registration unless it:

(1) Consists of or comprises immoral, deceptive, or scandalous matter; or

(2) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt or disrepute; or

(3) Consists of or comprises the flag or coat of arms or other insignia of the United States or of any state, county, or municipality or of any foreign nation or any simulation thereof, except that a county, municipality, or board of education shall be entitled to have registered its own service mark for use by that county, municipality, or board of education; or

(4) Consists of or comprises the name, signature, or portrait of any living individual, except with his or her written consent; or

(5) Consists of a mark which:

(A) When applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or

(B) When applied to the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them; or

(C) Is primarily merely a surname; or

(6) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in this state or a trademark or service mark or trade name previously used in this state by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive; or

(7) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in the United States Patent Office by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive;

provided, however, that, should the applicant prove that the applicant is the owner of a concurrent registration in the United States Patent Office of a trademark or service mark covering an area including this state, the applicant may register such trademark or service mark under this part.

History.

Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 7; Ga. L. 1963, p. 463, § 2; Ga. L. 1988, p. 1458, § 1; Ga. L. 1993, p. 462, § 1; Ga. L. 1994, p. 97, § 10.

Law reviews.

For article, "A Patent and Trademark Primer," see 15 Ga. St. B. J. 58 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Designs and plans may not be registered as trademarks. 1952-53 Ga. Op. Att'y Gen. 269.

Items neither sold nor designed to protect against inferior goods. — Holding company, owning outright certain corporations and the controlling stocks in others, which manufactures, sells, or distributes for sale no commodity whatsoever may not register as a trademark a word used on a gummed label obviously intended for the applicant's own use and a directory of subsidiaries for the applicant and such subsidiaries, when there is no indication, claim, or evidence of any kind that either of the items are sold, offered for sale, or distributed to any one other than subsidiaries and no indication that they pay for them directly or indirectly, and there is no showing that the use of the name on either piece of material is designed to or does protect the manufacturer or the public against inferior goods of others in the marts of trade. 1958-59 Ga. Op. Att'y Gen. 398.

Confederate flag may not be used as trademark. 1957 Ga. Op. Att'y Gen. 328.

Changed trademark should be reregistered. — When a union label registered as a trademark has been changed somewhat, the label should be

reregistered, showing all changes therein.
1952-53 Ga. Op. Att'y Gen. 514.

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 55 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 250 et seq.
ALR.
Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 A.L.R. 1189; 44 A.L.R.2d 1156.
Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 A.L.R.3d 277.
Reverse confusion doctrine under state trademark law, 114 A.L.R.5th 129.
Initial interest confusion doctrine under Lanham Trademark Act, 183 A.L.R. Fed. 553.
Reverse confusion doctrine under Lanham Trademark Act, 187 A.L.R. Fed. 271.
Construction and Application of Trademark Registration Prohibition on Disparaging Marks Under 15 U.S.C.A. § 1052(a), 15 A.L.R. Fed. 3d 8.
Initial Interest or Pre-Sale Confusion Under Lanham Trademark Act, 15 U.S.C.A. § § 1051 et seq., 82 A.L.R. Fed. 3d 1.

10-1-442. Application for registration of marks; filing fee.

(a) Subject to the limitations set forth in this part, any person who adopts and uses a trademark or service mark in this state may file in the office of the Secretary of State, on a form to be furnished by the Secretary of State, an application for registration of such trademark or service mark setting forth, but not limited to:

(1) The name and business address of the person applying for such registration and, if a corporation, the state of incorporation;

(2) A description of the goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with such goods or services and the class in which such goods or services fall; and

(3) The date when the trademark or service mark was first used anywhere, as well as the date when it was first used in this state by the applicant or his predecessor in business.

(b) The application shall be signed and verified by the applicant and shall be accompanied by a specimen or facsimile of such trademark or service mark in triplicate and a filing fee of $15.00, payable to the Secretary of State.

History.
Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 8; Ga. L. 1963, p. 463, § 3; Ga. L. 1983, p. 1470, § 1; Ga. L. 1987, p. 563, § 1.
Law reviews.
For article, "A Patent and Trademark Primer," see 15 Ga. St. B. J. 58 (1978).

JUDICIAL DECISIONS

Registration cannot deprive another of vested right. — Provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions thereof cannot operate to deprive another of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or other person, by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

Statutory use requirement not satisfied. — District properly cancelled plaintiff's Georgia registration of a service mark because registration was granted improperly as the plaintiff did not satisfy the statutory use requirement, and there was no basis for reformation of registration. Underwood v. Bank of Am., Corp., 996 F.3d 1038, 2021 U.S. App. LEXIS 12949 (10th Cir. 2021).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Trademarks and Tradenames, §§ 55 et seq., 73.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 250 et seq.

ALR.

Damages recoverable for wrongful registration of trademark, 26 A.L.R.2d 1184.

10-1-443. Classes of goods and services for purposes of registration of marks; application limited to one class.

(a) The following general classes of goods are established for convenience of administration of this part, but not to limit or extend the applicant's or registrant's rights; and a single application for registration of a trademark may include any or all goods upon which the trademark is actually being used comprised in a single class; but in no event shall a single application include goods upon which the trademark is being used which fall within different classes of goods. The classes are as follows:

(1) Raw or partly prepared materials;

(2) Receptacles;

(3) Baggage, animal equipments, portfolios, and pocketbooks;

(4) Abrasives and polishing materials;

(5) Adhesives;

(6) Chemicals and chemical compositions;

(7) Cordage;

(8) Smokers' articles, not including tobacco products;

(9) Explosives, firearms, equipments, and projectiles;

(10) Fertilizers;

(11) Inks and inking materials;

(12) Construction materials;

(13) Hardware and plumbing and steamfitting supplies;

(14) Metals and metal castings and forgings;

(15) Oils and greases;

(16) Paints and painters' materials;

(17) Tobacco products;

(18) Medicines and pharmaceutical preparations;

(19) Vehicles;

(20) Linoleum and oiled cloth;

(21) Electrical apparatus, machines, and supplies;

(22) Games, toys, and sporting goods;

(23) Cutlery, machinery, and tools, and parts thereof;

(24) Laundry appliances and machines;

(25) Locks and safes;

(26) Measuring and scientific appliances;

(27) Horological instruments;

(28) Jewelry and precious metal ware;

(29) Brooms, brushes, and dusters;

(30) Crockery, earthenware, and porcelain;

(31) Filters and refrigerators;

(32) Furniture and upholstery;

(33) Glassware;

(34) Heating, lighting, and ventilating apparatus;

(35) Belting, hose, machinery packing, and nonmetallic tires;

(36) Musical instruments and supplies;

(37) Paper and stationery;

(38) Prints and publications;

(39) Clothing;

(40) Fancy goods, furnishings, and notions;

(41) Canes, parasols, and umbrellas;

(42) Knitted, netted, and textile fabrics and substitutes therefor;

(43) Thread and yarn;

(44) Dental, medical, and surgical appliances;

(45) Soft drinks and carbonated waters;

(46) Foods and ingredients of foods;

(47) Wines;

(48) Malt beverages and liquors;

(49) Distilled alcoholic liquors;

(50) Merchandise not otherwise classified;

(51) Cosmetics and toilet preparations;

(52) Detergents and soaps.

(b) The following general classes of services are established for convenience of administration of this part, but not to limit or extend the applicant's or registrant's rights; and a single application for registration of a service mark may include any or all services in connection with which the service mark is actually being used comprised in a single class; but in no event shall a single application include services in connection with which the service mark is being used which fall within different classes of services. The classes are as follows:

(1) Miscellaneous;

(2) Advertising and business;

(3) Insurance and financial;

(4) Construction and repair;

(5) Communication;

(6) Transportation and storage;

(7) Material treatment;

(8) Education and entertainment.

History.
Ga. L. 1952, p. 134, § 14; Ga. L. 1963, p. 463, § 9.

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, §§ 3, 30 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 56 et seq., 186 et seq.

10-1-444. Certificate of registration.

Upon compliance by the applicant with the requirements of this part, the Secretary of State shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary of State and the seal of the state and it shall show the name and business address and, if a corporation, the state of incorporation, of the person claiming ownership of the trademark or service mark; the date claimed for the first use of the trademark or service mark anywhere and the date claimed for the first use of the trademark or service mark in this state; the class of goods or services and a description of the goods or services on which the trademark or service mark is used; a reproduction of the trademark or service mark; the registration date; and the term of the registration.

History.
Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 9; Ga. L. 1963, p. 463, § 4; Ga. L. 1982, p. 3, § 10; Ga. L. 2011, p. 99, § 15/HB 24.
Editor's notes.
Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.
Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).
For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Registration cannot deprive another of vested right. — Provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions thereof cannot operate to deprive another of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or other person, by the use of similar trade-marks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 55 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 186 et seq.

10-1-445. Duration of registration; renewal; fee.

(a) Registration of a trademark or service mark under this part shall be effective for a term of ten years from the date of registration; and, upon application filed within six months prior to the expiration of such term on a form to be furnished by the Secretary of State, the registration may be renewed for a like term. A renewal fee of $15.00, payable to the Secretary of State, shall accompany the application for renewal of the registration.

(b) A trademark or service mark registration may be renewed for successive periods of ten years in like manner.

(c) The Secretary of State shall notify registrants of trademarks or service marks under this part of the necessity of renewal within the year next preceding the expiration of the ten years from the date of registration by writing to the last known address of the registrants.

History.
Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 10; Ga. L. 1963, p. 463, § 5; Ga. L. 1983, p. 1470, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 55 et seq.

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 197 et seq.

10-1-446. Assignment of mark and registration; recordation; fee; new certificate.

Any trademark or service mark and its registration under this part shall be assignable with the good will of the business in which the trademark or service mark is used or with that part of the good will of the business connected with the use of and symbolized by the trademark or service mark. Assignment shall be by instruments in writing duly executed and may be recorded with the Secretary of State upon the payment of a fee of $15.00, payable to the Secretary of State, who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this part shall be ineffective as against a subsequent purchaser for value without notice unless it is recorded with the Secretary of State prior to the subsequent purchase.

History.
Ga. L. 1952, p. 134, § 11; Ga. L. 1963, p. 463, § 6; Ga. L. 1983, p. 1470, § 3.

Law reviews.
For article, "Community Defense of Union Free Status," regarding broadening the legal recognition of the interest "good will," see 32 Mercer L. Rev. 679 (1981).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 10 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 250 et seq.
ALR.
Payment of stock subscriptions in good will, 24 A.L.R. 1285.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 A.L.R. 1189; 44 A.L.R.2d 1156.

Sale of business or of real estate upon which business is conducted as transferring good will by implication, in absence of covenant not to compete, 65 A.L.R.2d 502.

10-1-447. Record of registrations and renewals to be kept by Secretary of State.

The Secretary of State shall keep for public examination a record of all trademarks or service marks registered or renewed under this part.

History.
Ga. L. 1952, p. 134, § 12; Ga. L. 1963, p. 463, § 7.

RESEARCH REFERENCES

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 250 et seq.

10-1-448. Cancellation of registrations.

(a) The Secretary of State shall cancel from the register:

(1) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation thereof from the registrant or the assignee of record;

(2) All registrations granted under this part and not renewed in accordance with the provisions of this part;

(3) Any registration concerning which a court of competent jurisdiction shall find that:

(A) The registered trademark or service mark has been abandoned;

(B) The registrant is not the owner of the trademark or service mark;

(C) The registration was granted improperly;

(D) The registration was obtained fraudulently; or

(E) The registered trademark or service mark is so similar to a trademark or service mark registered by another person in the

United States Patent Office prior to the date of the filing of the application for registration by the registrant under this part, and not abandoned, as to be likely to cause confusion or mistake or to deceive; provided, however, that, should the registrant prove he is the owner of a concurrent registration of his trademark or service mark in the United States Patent Office covering an area including this state, the registration under this part shall not be canceled; or

(4) Any registration which a court of competent jurisdiction shall order canceled.

(b) A fee of $15.00, payable to the Secretary of State, shall accompany any voluntary request for cancellation.

History.
Ga. L. 1952, p. 134, § 13; Ga. L. 1963, p. 463, § 8; Ga. L. 1983, p. 1470, § 4.

JUDICIAL DECISIONS

Statutory use requirement not satisfied. — District properly cancelled plaintiff's Georgia registration of a service mark because registration was granted improperly as the plaintiff did not satisfy the statutory use requirement, and there was no basis for reformation of registration. Underwood v. Bank of Am., Corp., 996 F.3d 1038, 2021 U.S. App. LEXIS 12949 (10th Cir. 2021).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 70 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 250 et seq.
ALR.
Abandonment of trademark or trade name, 3 A.L.R.2d 1226.
Reverse confusion doctrine under state trademark law, 114 A.L.R.5th 129.
When does product become generic term so as to warrant cancellation of registration of mark, pursuant to § 14 of Lanham Act (15 USCA § 1064), 156 A.L.R. Fed. 131.
Reverse confusion doctrine under Lanham Trademark Act, 187 A.L.R. Fed. 271.
Application of defense of laches in action to cancel trademark, 64 A.L.R. Fed. 2d 255.

10-1-449. Damages for fraud or false representation in registering mark.

Any person who shall for himself or on behalf of any person procure the filing or registration of any trademark or service mark in the office of the Secretary of State under the provisions of this part, by knowingly making any false or fraudulent representation or declaration, verbally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of such filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction.

History.
Ga. L. 1952, p. 134, § 15; Ga. L. 1963, p. 463, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, § 64.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 364 et seq.
ALR.
Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.
Damages recoverable for wrongful registration of trademark, 26 A.L.R.2d 1184.
Reverse confusion doctrine under state trademark law, 114 A.L.R.5th 129.
Award of Damages or Profits Under § 35(a) of Lanham Act (15 U.S.C.A. § 1117(a)) for False Designation of Origin and False Descriptions (15 U.S.C.A. § 1125(a)), 31 A.L.R. Fed. 3d 13.

10-1-450. Civil action for infringement of registered mark.

Subject to Code Section 10-1-452, any person who shall:

(1) Use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a trademark or service mark registered under this part in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) Reproduce, counterfeit, copy, or colorably imitate any such trademark or service mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services;

shall be liable to a civil action by the owner of such registered trademark or service mark for liquidated damages in the amount of $10,000.00, if such act has been committed with knowledge that the trademark or service mark has been registered under this part and such act has been committed without previously obtaining the consent of the owner thereof, and for any or all of the remedies provided in subsection (a) of Code Section 10-1-451, except that actual damages shall not be recoverable when liquidated damages are sought, and except that under paragraph (2) of this Code section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such trademark or service mark is intended to be used to cause confusion or mistake or to deceive.

History.
Ga. L. 1893, p. 134, § 4; Civil Code 1895, § 1739; Civil Code 1910, § 1991; Code 1933, § 106-103; Ga. L. 1952, p. 134, § 16; Ga. L. 1963, p. 463, § 11; Ga. L. 1988, p. 1458, § 2.

Law reviews.

For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable?," see 22 Ga. St. B. J. 30 (1985).

JUDICIAL DECISIONS

Part similar to federal statute. — Georgia law on registration of trademarks and service marks provides for a civil action to remedy infringements and is, both in structure and purpose, similar to its federal counterpart. Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689, 1976 U.S. Dist. LEXIS 12523 (N.D. Ga. 1976).

Actions involving trademarks or service marks are limited to infringements of registered marks. Miller & Meier & Assocs. v. Diedrich, 174 Ga. App. 249, 329 S.E.2d 918, 1985 Ga. App. LEXIS 1795, aff'd in part and rev'd in part, 254 Ga. 734, 334 S.E.2d 308, 1985 Ga. LEXIS 849 (1985).

Registration required. — Registration of a logo as a service mark or trademark is a prerequisite to relief under O.C.G.A. §§ 10-1-450 and 10-1-451. Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308, 1985 Ga. LEXIS 849 (1985).

Limited liability company was entitled to summary judgment on the investment partnership's claims under § 43(a) (15 U.S.C. § 1125(a)) of the Lanham Act and O.C.G.A. §§ 10-1-450 and 10-1-451 that the company infringed the trademarks and trade dress associated with three brands because: (1) the trademark was not registered with the Georgia Secretary of State pursuant to §§ 10-1-450 and 10-1-451; and (2) there was no evidence to show that the trade dress associated with the products at issue was inherently distinctive as a matter of law and there was no evidence that the mark had secondary meaning identifying the investment partnership as the source of any products. Brown Bark II, L.P. v. Dixie Mills, LLC, 732 F. Supp. 2d 1353, 2010 U.S. Dist. LEXIS 79867 (N.D. Ga. 2010).

Marks found to be substantially similar. — Summary judgment was inappropriate as to trademark infringement liability because while the "Xylem" mark was at least suggestive, the marks were substantially similar, and the trademark holder documented over 100 instances of actual confusion resulting from misdirected checks, phone calls, faxes, and emails; the court could not find that no reasonable juror would find there was no confusion created by the accused infringer's use of the Xylem name and mark. ITT Corp. v. Xylem Group, LLC, 963 F. Supp. 2d 1309, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. 2013).

Preliminary injunction granted. — Tattoo studio owner showed that it had achieved secondary meaning in the name Inkaholics in the metro Atlanta area before the defendants commenced using the similar name Inkaholiks in that area (and evidence of resulting confusion); the trial court did not err in granting the owner a preliminary injunction in the metro Atlanta area. Inkaholiks Luxury Tattoos Georgia, LLC v. Parton, 324 Ga. App. 769, 751 S.E.2d 561, 2013 Ga. App. LEXIS 929 (2013).

Interlocutory injunction properly granted in service mark dispute. — In a suit alleging, inter alia, the infringement of state registered service marks, the trial court properly granted the plaintiff interlocutory relief because it was undisputed that the plaintiff was the last entity to hold the named pageants prior to the interlocutory injunction hearing, regardless of any issues of registration of service marks or abandonment or assignment by the defendant; thus, the status quo was the plaintiff being the host of the events using the marks. India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 769 S.E.2d 905, 2015 Ga. LEXIS 149 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Trademarks and Tradenames, §§ 64 et seq., 122, 142 et seq.

Am. Jur. Pleading and Practice Forms.

23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 73 et seq.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 374 et seq.

ALR.

Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 A.L.R. 784; 28 A.L.R. 114.

Right to protection against use of trademark or trade name beyond the territory in which plaintiff operates, 36 A.L.R. 922.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 A.L.R. 1189; 44 A.L.R.2d 1156.

Liability for innocent infringement of trademark or trade name, 96 A.L.R. 651.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 A.L.R. 1241.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.

Jurisdiction of state court over actions involving patents, 167 A.L.R. 1114.

Damages recoverable for wrongful registration of trademark, 26 A.L.R.2d 1184.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 A.L.R.5th 1.

Reverse confusion doctrine under state trademark law, 114 A.L.R.5th 129.

Validity, construction, and application of State Trademark Counterfeiting Statutes, 63 A.L.R. 6th 303.

What Constitutes "Famous" or "Distinctive" Mark or Trade Dress for Purposes of State Trademark Dilution Laws That Provide Remedies for Dilution of Famous or Distinctive Marks or Trade Dress — 21st Century Cases, 85 A.L.R.7th 5.

Application of secondary meaning test in action for trade dress infringement under § 43(e) of Lanham Act (15 USCS § 1125(a)), 87 A.L.R. Fed. 15.

Parody as trademark or tradename infringement, 92 A.L.R. Fed. 25.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USCS §§ 1063, 1114, and 1125), 98 A.L.R. Fed. 20.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 A.L.R. Fed. 407.

Liability as vicarious or contributory infringer under Lanham Act — Modern cases, 152 A.L.R. Fed. 573.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after Two Pesos, 161 A.L.R. Fed. 327.

Parody as trademark or tradename dilution or infringement, 179 A.L.R. Fed. 181.

Application of doctrine of "reverse passing off" under Lanham Act, 194 A.L.R. Fed. 175.

Lanham Act trademark infringement actions in internet and website context, 197 A.L.R. Fed. 17.

10-1-451. Injunctions against infringement; recovery of profits and damages; destruction or disposal of counterfeit trademarks; seizure.

(a) Any owner of a trademark or service mark registered under this part may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof; and any court of competent jurisdiction may grant injunctions to restrain such manufacture,

use, display, or sale as may be by the court deemed just and reasonable and may require the defendants to pay to such owner all profits derived from such wrongful manufacture, use, display, or sale, and all damages suffered by reason of such wrongful manufacture, use, display, or sale, or both profits and damages. The enumeration of any right or remedy in this part shall not affect a registrant's right to prosecute under any penal law of this state.

(b) Every person, association, or union of working men adopting and using a trademark, trade name, label, or form of advertisement may proceed by action; and all courts having jurisdiction thereof shall grant injunctions to enjoin subsequent use by another of the same or any similar trademark, trade name, label, or form of advertisement if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the trademark, trade name, label, or form of advertisement of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services, except that this Code section shall not deprive any party of any vested lawful rights acquired prior to March 4, 1955.

(c) If, in any action brought under this Code section, the court determines that a trademark or service mark is counterfeit, the court may order the destruction of all such trademarks or service marks and all goods, articles, or other matter bearing the trademarks or service marks, which are in the possession or control of the court or any party to the action; or, after obliteration of the counterfeit trademark or service mark, the court may order the disposal of any of those materials to the State of Georgia, a civil claimant, an eleemosynary institution, or any appropriate private person other than the person from whom the materials were obtained.

(d)(1) The court, upon motion or upon ex parte application by a plaintiff in an action to enjoin the manufacture, use, display, or sale of counterfeits, may order seizure of the counterfeit goods from persons manufacturing, displaying for sale, or selling the goods, upon a showing of good cause and a probability of success on the merits and upon the posting of bond. The amount of the bond shall be set in accordance with the probable recovery of damages and costs under subsection (e) of this Code section if it were ultimately determined that the goods seized were not counterfeit. If it appears from an ex parte application that there is good reason for proceeding without notification to the defendant, the court may, for good cause shown, waive the requirement of notice for the ex parte proceeding. The order of seizure shall be served at the time of seizure upon any person from whom seizure is effected. The order shall specifically set forth:

(A) The date or dates on which the seizure is ordered to take place;

(B) A description of the counterfeit goods to be seized;

(C) The identity of the persons or class of persons to effect seizure;

(D) A description of the location or locations at which seizure is to occur; and

(E) A hearing date not more than ten court days after the last date on which seizure is ordered at which any person from whom goods are seized may appear and seek release of the seized goods.

(2) The order shall include a statement advising the person from whom the goods are seized that bond has been filed, informing the person of the right to object to the bond on the grounds that the surety or the amount of the bond is insufficient, and advising the person from whom the goods are seized that such objection to the bond shall be made within 30 days after the date of seizure.

(e)(1) Any person who causes seizure of goods which are not counterfeits shall be liable in an amount equal to the following:

(A) Any damages proximately caused to any person having a financial interest in the seized goods by the seizure of goods which are not counterfeit;

(B) Costs incurred in defending against seizure of noncounterfeit goods; and

(C) Upon a showing that the person causing the seizure to occur acted in bad faith, expenses, including reasonable attorneys' fees expended in defending against the seizure of any noncounterfeit or noninfringing goods.

(2) A person seeking a recovery pursuant to this subsection may join any surety on a bond posted pursuant to subsection (d) of this Code section, and any judgment of liability shall bind the person liable and the surety jointly and severally, but the liability of the surety shall be limited to the amount of the bond.

(3) Any person entitled to seek recovery under this subsection may, within 30 days after the date of seizure, object to the bond on the grounds that the surety or the amount of bond is insufficient.

History.

Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1739; Civil Code 1910, § 1991; Code 1933, § 106-103; Ga. L. 1952, p. 134, § 17; Ga. L. 1955, p. 453, § 1; Ga. L. 1963, p. 463, § 12; Ga. L. 1984, p. 944, § 1.

Law reviews.

For article, "A Patent and Trademark Primer," see 15 Ga. St. B. J. 58 (1978).

For article criticizing the judicial decisions in the trademark cases of Armstrong Cork Co. v. World Carpets, Inc., 597 F.2d 496 (5th Cir. 1979) and Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252 (5th Cir. 1980), see 34 Mercer L. Rev. 915 (1983).

JUDICIAL DECISIONS

Analysis

General Consideration
Dilution of Distinctive Quality

General Consideration

"Infringement" defined. — Infringement upon the real name or trade name of an individual or corporation is such a colorable imitation of the name that the general public, in the exercise of ordinary care, might think that it is the name of the individual or corporation first appropriating the name. Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc., 223 Ga. 837, 159 S.E.2d 52, 1968 Ga. LEXIS 980 (1968).

Test for trade name infringement. — In a suit to enjoin alleged trade name infringement, the test seems to be whether the public is likely to be deceived and a person of ordinary caution misled. Gordy v. Dunwody, 210 Ga. 810, 83 S.E.2d 7, 1954 Ga. LEXIS 450 (1954) (commented on in 17 Ga. B.J. 395 (1955)).

Basis of relief under O.C.G.A. § 10-1-451 is that use of same or similar name by another injures business reputation or dilutes distinctive quality of trade name even in absence of direct competition between parties or of confusion as to source of goods or services. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Registration required for relief. — Registration of a logo as a service mark or trademark is a prerequisite to relief under O.C.G.A. §§ 10-1-450 and 10-1-451. Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308, 1985 Ga. LEXIS 849 (1985).

Limited liability company was entitled to summary judgment on the investment partnership's claims under § 43(a) (15 U.S.C. § 1125(a)) of the Lanham Act and O.C.G.A. §§ 10-1-450 and 10-1-451 that the company infringed the trademarks and trade dress associated with three brands because: (1) the trademark was not registered with the Georgia Secretary of State pursuant to §§ 10-1-450 and 10-1-451; and (2) there was no evidence to show that the trade dress associated with the products at issue was inherently distinctive as a matter of law and there was no evidence that the mark had secondary meaning identifying the investment partnership as the source of any products. Brown Bark II, L.P. v. Dixie Mills, LLC, 732 F. Supp. 2d 1353, 2010 U.S. Dist. LEXIS 79867 (N.D. Ga. 2010).

Registration cannot deprive another of vested right. — Provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions thereof cannot operate to deprive another of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or other person, by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

Long use may give special meaning to words. — While generic names, geographical names, and names composed of words which are merely descriptive are incapable of exclusive appropriation, words or names which have a primary meaning of their own, such as words descriptive of the goods, service, or place where they are made, or the name of the maker, may nevertheless, by long use in connection with the business of the particular trade, come to be understood by the public as designating the goods, service, or business of a particular trader. Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc., 223 Ga. 837, 159 S.E.2d 52, 1968 Ga. LEXIS 980 (1968).

Secondary meaning may attach to generic and geographical names and names composed of merely descriptive words which, by long use in connection with

business or trade, come to be understood by public as designating goods, services, or business of a particular trader. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Long use may entitle words to protection. — While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trademarks or trade names, such names and words when used so long and exclusively by a trader, manufacturer, or producer that the names and words are generally understood to designate a particular business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trademark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of the other. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

A person by long and exclusive use may acquire a trade name; and when thus acquired, such trade name is as much descriptive of the manufacturer or producer as is the person's own name, and the infringement of such trade name of an individual will be enjoined by a court of equity when a proper case is made. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

To obtain injunction under O.C.G.A. § 10-1-451, plaintiff must show, first, that trade name sought to be protected is one of such originality as to be capable of exclusive appropriation, or one not capable of exclusive appropriation but which has acquired secondary meaning. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683, 1981 Ga. LEXIS 877 (1981).

Subsequent knowing use of name presumed fraudulent. — If the person first appropriating and using a name has a clear right to the name's use, the name's subsequent use by another, knowing of the right, is presumed by law to be fraudulent. Womble v. Parker, 208 Ga. 378, 67 S.E.2d 133, 1951 Ga. LEXIS 380 (1951).

Direct market competition need not be alleged and shown. — It is not an essential prerequisite to the granting of equitable relief in an action for infringement of a trade name that the plaintiff allege and show that the alleged infringer is in actual and direct market competition with the plaintiff in the sense that the parties deal in competitive goods or are engaged in a competitive business. Kay Jewelry Co. v. Kapiloff, 204 Ga. 209, 49 S.E.2d 19, 1948 Ga. LEXIS 561 (1948) (commented on in Ga. B.J. 224 (1948)).

Confusingly similar names. — Plaintiffs made requisite showing for injunction that trade name reacquired upon foreclosure of their security interest had acquired a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar name, which had in fact confused plaintiffs' former customers. Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40, 1983 Ga. LEXIS 614 (1983).

Unpublished decision: Trademark owners were entitled to summary judgment on infringement under 15 U.S.C. §§ 1114 and 1125 and O.C.G.A. § 10-1-451 because the mark used by former agents of the owners was decidedly similar, there was a substantial likelihood of consumer confusion, and the agents intended to capitalize on the reputation and to infringe on the market for money orders and money transfers created by the owners. W. Union Holdings, Inc. v. E. Union, Inc., 316 Fed. Appx. 850, 2008 U.S. App. LEXIS 13226 (11th Cir. 2008), cert. denied, 555 U.S. 1139, 129 S. Ct. 1014, 173 L. Ed. 2d 296, 2009 U.S. LEXIS 630 (2009).

Infringement of trade names. — Chapter 11 debtor was entitled to a preliminary injunction under the Lanham Act, 11 U.S.C. § 1125(a), and O.C.G.A. §§ 10-1-373 and 10-1-451, against a competing user of the debtor's trade name "Reliable Heating and Air" because the debtor clearly demonstrated a substantial

General Consideration (Cont'd)

likelihood of success on the merits of the debtor's claims and demonstrated that the debtor would suffer irreparable harm if an injunction were not issued. Reliable Air, Inc. v. Jape (In re Reliable Air, Inc.), No. 05-85627, No. 07-6352, 2007 Bankr. LEXIS 3711 (Bankr. N.D. Ga. Sept. 14, 2007).

Liability for use of trade names and labels of comic book characters by singing telegram company established. DC Comics Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110, 1984 U.S. Dist. LEXIS 22828 (N.D. Ga. 1984).

Internet advertising. — Because the plaintiff corporation's claim under Georgia's Anti-Dilution Act, O.C.G.A. § 10-1-451, would likely place no greater discovery burdens on the defendant corporation than would the development of the factual record upon the plaintiff's claims alleging that the defendant violated federal trademark laws by contracting with an Internet search engine for a sponsored link to the defendant's website each time an Internet user performed a search for the plaintiff's name, the defendant's motion to dismiss the O.C.G.A. § 10-1-451 claim was denied when the court denied the defendant's motion to dismiss the federal claims on the ground that the novel questions presented in the suit could not be determined as a matter of law at this early stage of the case. Rescuecom Corp. v. Computer Troubleshooters USA, Inc., 464 F. Supp. 2d 1263, 2005 U.S. Dist. LEXIS 43679 (N.D. Ga. 2005).

Corporation was not required to prove actual damages but could seek the award of profits illegally derived by the first purchaser's infringement by showing the first purchaser's gross sales and shifting the burden to the first purchaser to provide an accounting to show which sales, if any, were not derived from the infringement, along with deductible expenses, to show profits derived from the infringement; doing so promoted the statutory intent to make infringement unprofitable, to deprive the infringer of unjust enrichment, and to deter similar activity. DeCelles v. Morgan Cleaners & Laundry, Inc., 261 Ga. App. 690, 583 S.E.2d 462, 2003 Ga. App. LEXIS 614 (2003).

Failure to challenge issue in appellate brief. — Promoter did not in the promoter's brief challenge the adverse judgment on the promoter's dilution of trademark claim under O.C.G.A. § 10-1-451 which the district court did not base on a likelihood of confusion. Therefore, because the appellate court deemed issues not clearly briefed on appeal to be abandoned, it left the state-law dilution of trademark portion of the judgment undisturbed. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931, 2010 U.S. App. LEXIS 9373 (11th Cir. 2010).

Preliminary injunction granted. — Tattoo studio owner showed that it had achieved secondary meaning in the name Inkaholics in the metro Atlanta area before the defendants commenced using the similar name Inkaholiks in that area (and evidence of resulting confusion); the trial court did not err in granting the owner a preliminary injunction in the metro Atlanta area. Inkaholiks Luxury Tattoos Georgia, LLC v. Parton, 324 Ga. App. 769, 751 S.E.2d 561, 2013 Ga. App. LEXIS 929 (2013).

Interlocutory injunction properly granted in service mark dispute. — In a suit alleging, inter alia, the infringement of state registered service marks, the trial court properly granted the plaintiff interlocutory relief because it was undisputed that the plaintiff was the last entity to hold the named pageants prior to the interlocutory injunction hearing, regardless of any issues of registration of service marks or abandonment or assignment by the defendant; thus, the status quo was the plaintiff being the host of the events using the marks. India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 769 S.E.2d 905, 2015 Ga. LEXIS 149 (2015).

Dilution of Distinctive Quality

Term "distinctive quality" in subsection (b) of former Code 1933, § 106-103 meant that the trade name must be one of such originality as to be capable of exclu-

sive appropriation, or one not capable of exclusive appropriation but which acquired a secondary meaning in order to come within the protection of the law. Dolphin Homes Corp. v. Tocomc Dev. Corp., 223 Ga. 455, 156 S.E.2d 45, 1967 Ga. LEXIS 567 (1967).

"Dilution of the distinctive quality" under subsection (b) of former Code 1933, § 106-103 occurs when the use of the trademark by the subsequent user will lessen the uniqueness of the prior user's mark, with the possible future result that a strong mark may become a weak mark. Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 1980 U.S. App. LEXIS 18834 (5th Cir.), cert. denied, 449 U.S. 899, 101 S. Ct. 268, 66 L. Ed. 2d 129, 1980 U.S. LEXIS 3487 (1980).

Required showing in dilution claims. — In order to prevail under a dilution claim in which it is alleged that a defendant has used the same or similar marks in a way that creates an undesirable, unwholesome, or unsavory mental association with the plaintiff's mark, the plaintiff needs to show that the marks in question are similar and that the contested use is likely to injure the plaintiff's commercial reputation or dilute the distinctive quality of the plaintiff's marks. Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1986 U.S. Dist. LEXIS 20947 (N.D. Ga. 1986).

Dilution claim evidence held sufficient for preliminary injunction. — Evidence which included testimony indicating that any association of defendant's "Garbage Pail Kids" with plaintiff's "Cabbage Patch Kids" would disparage the wholesome image plaintiff attempted to present for plaintiff's doll products was sufficient to show that plaintiff was substantially likely to prevail on the merits as to plaintiff's anti-dilution claim for purposes of obtaining a preliminary injunction. Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1986 U.S. Dist. LEXIS 20947 (N.D. Ga. 1986).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Trademarks and Tradenames, § 125 et seq.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 80 et seq., 176 et seq., 195 et seq.

ALR.

Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 A.L.R. 784; 28 A.L.R. 114.

Right to protection against use of trademark or trade name beyond the territory in which plaintiff operates, 36 A.L.R. 922.

Right of one to protection of trade name which he does not use, 48 A.L.R. 1257.

Right to enjoin competitor from selling his produce to dealers with whom plaintiff has exclusive contract or in such form as to enable dealers to palm off competitor's produce on customers as that of plaintiff, 84 A.L.R. 472.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 A.L.R. 1241.

Actual competition as necessary element of trademark infringement or unfair competition, 148 A.L.R. 12.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.

Jurisdiction of state court over actions involving patents, 167 A.L.R. 1114.

Damages recoverable for wrongful registration of trade-mark, 26 A.L.R.2d 1184.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 A.L.R.3d 277.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 A.L.R.5th 1.

What Constitutes "Famous" or "Distinctive" Mark or Trade Dress for Purposes of State Trademark Dilution Laws That Pro-

vide Remedies for Dilution of Famous or Distinctive Marks or Trade Dress — 21st Century Cases, 85 A.L.R.7th 5.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 A.L.R. Fed. 407.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after Two Pesos, 161 A.L.R. Fed. 327.

What constitutes "famous mark" for purposes of federal Trademark Dilution Act, 15 U.S.C.A. § 1125(c), which provides remedies for dilution of famous marks, 165 A.L.R. Fed. 625.

Application of doctrine of "reverse passing off" under Lanham Act, 194 A.L.R. Fed. 175.

Lanham Act trademark infringement actions in internet and website context, 197 A.L.R. Fed. 17.

Nominative fair use defense in trademark law, 84 A.L.R. Fed. 2d 217.

Construction and Application of Trademark Registration Prohibition on Disparaging Marks Under 15 U.S.C.A. § 1052(a), 15 A.L.R. Fed. 3d 8.

10-1-452. Common-law rights in marks not affected.

Nothing in this part shall adversely affect the rights or the enforcement of rights in trademarks or service marks acquired in good faith at any time at common law.

History.
Ga. L. 1952, p. 134, § 18; Ga. L. 1963, p. 463, § 13.

JUDICIAL DECISIONS

Confusion of names. — Claims for service mark infringement under the federal Lanham Act, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., and the Georgia law of unfair competition turn on the same question — confusion of similar names. Jellibeans, Inc. v. Skating Clubs of Ga., Inc., 716 F.2d 833, 1983 U.S. App. LEXIS 16353 (11th Cir. 1983).

Common law claim. — Customer was denied summary judgment as to a copyright owner's common law trademark infringement action because O.C.G.A. § 10-1-452 expressly preserved common law trademark rights and the owner produced sufficient evidence to raise a question of fact on the claim as to the likelihood of confusion. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 2006 U.S. Dist. LEXIS 68407 (N.D. Ga. 2006).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Trademarks and Tradenames, §§ 1 et seq., 50 et seq.

C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1 et seq., 250 et seq.

ALR.
Right of one to protection of trade name which he does not use, 48 A.L.R. 1257.

Common-law copyright in the spoken word, 32 A.L.R.3d 618.

10-1-453. Penalty for unauthorized and deceitful use of name or seal.

Any firm, person, corporation, or association who shall use the name

or seal of any other person, firm, corporation, or association, in and about the sale of goods or otherwise, not being authorized to use the same, knowing that such use is unauthorized, with intent to deceive the public in the sale of goods, shall be guilty of a misdemeanor.

History.

Ga. L. 1893, p. 134, § 6; Ga. L. 1895, p. 63, § 2; Penal Code 1895, § 255; Ga. L. 1896, p. 108, § 4; Penal Code 1910, § 257; Code 1933, § 106-9904.

JUDICIAL DECISIONS

Use of another's name with consent. — By the express provisions of this section, the name of a person can be used by another in the conduct of the other's business with the consent of the person whose name is used. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

In absence of statute, the right to use the name of an individual in a corporate trade name without the individual's consent depends entirely on the law in relation to trademarks, trade names, and unfair competition, and for a corporation or an individual to adopt and use as a part of a trade name a personal surname is not unlawful as against an individual having the same surname but not engaged in the same business, even though no one of that name is connected with such corporation or individual, unless the name is adopted or used purposely to mislead the public as to the identity of the corporation with another establishment, and thus cause injury to the latter, or the adoption is prohibited by statute. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

Use of surname. — Right of a corporation to use the surname of another person with the person's consent is not prohibited. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

Use of trade name other than corporate name. — Corporation may acquire right to use trade name other than corporate name in connection with the corporation's business. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

Right to use own name. — In the absence of license, contract, fraud, or estoppel, every man has the right to use the man's own name in any legitimate way. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

A natural person, in the absence of self-imposed restraint, has a right to the honest use of the person's surname in conducting any business, though such use may be detrimental to other individuals of the same name, or to corporations in the charters of which such name forms the whole or an integral part. Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S.E. 819, 1931 Ga. LEXIS 2 (1931).

RESEARCH REFERENCES

C.J.S.

87 C.J.S. Trademarks, Trade-Names, and Unfair Competition, §§ 176 et seq., 304 et seq.

ALR.

Right to protection in use of initials as a trademark or trade name, or upon the ground of unfair competition, 11 A.L.R. 1286.

Right of one to protection of trade name which he does not use, 48 A.L.R. 1257.

Validity and effect of contract, unconnected with transfer of any business or professional interest, purporting to grant exclusive right to use one's name or likeness for advertising purposes, 101 A.L.R. 492.

Damages recoverable for wrongful registration of trademark, 26 A.L.R.2d 1184.

Right to protection of corporate name, as between domestic corporation and for-

eign corporation not qualified to do business in state, 26 A.L.R.3d 994.

Incorporation of company under particular name as creating exclusive right to such name, 68 A.L.R.3d 1168.

Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.

Right to publicize or commercially exploit deceased person's name or likeness as inheritable, 10 A.L.R.4th 1193.

10-1-454. Penalties for forged or counterfeited trademarks, service marks, copyrighted or registered designs, or unauthorized reproductions; forfeiture.

(a) As used in this Code section, the term "forged or counterfeited trademark, service mark, or copyrighted or registered design" means any mark or design which is identical to, substantially indistinguishable from, or an imitation of a trademark, service mark, or copyrighted or registered design which is registered for those types of goods or services with the Secretary of State pursuant to this part or registered on the Principal Register of the United States Patent and Trademark Office or registered under the laws of any other state or protected by the federal Amateur Sports Act of 1978, 36 U.S.C. Section 380, whether or not the offender knew such mark or design was so registered or protected, if the use of such trademark, service mark, or copyrighted or registered design has not been authorized by the owner thereof. The unregistered symbols, emblems, trademarks, insignias, and words covered by the federal Amateur Sports Act of 1978, 36 U.S.C. Section 380, shall be afforded protection under the trademark law in the same manner as registered trademarks, service marks, and copyrighted or registered designs.

(b) Any person who knowingly and willfully forges or counterfeits any trademark, service mark, or copyrighted or registered design, without the consent of the owner of such trademark, service mark, or copyrighted or registered design, or who knowingly possesses any tool, machine, device, or other reproduction instrument or material with the intent to reproduce any forged or counterfeited trademark, service mark, or copyrighted or registered design shall be guilty of the offense of trademark, service mark, or copyrighted or registered design counterfeiting and, upon conviction, shall be punished as follows:

(1) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of $100,000.00 or more, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than five nor more than 20 years and by a fine not to exceed $200,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(2) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of $10,000.00 or more but less than $100,000.00, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than two nor more than ten years and by a fine not to exceed $20,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(3) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of less than $10,000.00, such person shall be guilty of a misdemeanor of a high and aggravated nature; or

(4) If a person who violates this subsection previously has been convicted of another violation of this subsection, such person shall be guilty of a felony and, upon conviction of the second or subsequent such violation, shall be punished by imprisonment for not less than ten nor more than 20 years and by a fine not to exceed $200,000.00 or twice the retail sale value of the goods or services, whichever is greater.

(c) Any person who sells or resells or offers for sale or resale or who purchases and keeps or has in his or her possession with the intent to sell or resell any goods he or she knows or should have known bear a forged or counterfeit trademark or copyrighted or registered design or who sells or offers for sale any service which is sold or offered for sale in conjunction with a forged or counterfeit service mark or copyrighted or registered design, knowing the same to be forged or counterfeited, shall be guilty of the offense of selling or offering for sale counterfeit goods or services and, upon conviction, shall be punished as follows:

(1) If the goods or services sold or offered for sale to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, have, in the aggregate, a retail sale value of $10,000.00 or more, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one nor more than five years and by a fine not to exceed $50,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(2) If the goods or services to which the forged or counterfeit

trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, have, in the aggregate, a retail sale value of less than $10,000.00, such person shall be guilty of a misdemeanor of a high and aggravated nature; or

(3) If a person who violates this subsection previously has been convicted of another violation of paragraph (1) of this subsection, such person shall be guilty of a felony and, upon conviction of the second or subsequent such violation, shall be punished by imprisonment for not less than five nor more than ten years and by a fine not to exceed $100,000.00 or twice the retail sale value of the goods or services, whichever is greater.

(d)(1) The State of Georgia finds and declares that the citizens of this state have a right to receive those goods and services which they reasonably believe they are purchasing or for which they contract. The state further finds that the manufacture and sale of counterfeit goods or goods which are not what they purport to be and the offering of services through the use of counterfeit service marks constitutes a fraud on the public and results in economic disruption to the legitimate businesses of this state. In order to protect the citizens and businesses of this state it is necessary to take appropriate actions to remove counterfeit goods from the channels of commerce and prevent the manufacture, sale, and distribution of such goods or the offering of such services through the use of counterfeit service marks.

(2) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(3) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them.

(4) Any property subject to forfeiture pursuant to paragraph (3) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(e) An owner, officer, employee, or agent who provides, rents, leases, licenses, or sells real property upon which a violation of this Code section occurs shall not be subject to a criminal penalty pursuant to this Code section unless he or she sells or possesses for sale articles such person knows bear a counterfeit trademark or copyrighted or registered design or offers services through the use of a counterfeit service mark or copyrighted or registered design in violation of this Code section. This subsection shall not be construed to abrogate or limit any civil rights or remedies for a trademark or service mark violation.

History.

Code 1981, § 10-1-454, enacted by Ga. L. 1996, p. 673, § 1; Ga. L. 2015, p. 693, § 3-7/HB 233.

Editor's notes.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews.

For article, "Copyright = Speech," see 65 Emory L.J. 199 (2015).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

JUDICIAL DECISIONS

Plea counsel not ineffective in failing to advise of mandatory deportation. — Plea counsel did not act outside the wide range of reasonable conduct afforded attorneys who represent criminal defendants, including noncitizens, when counsel advised a Nigerian citizen that the Nigerian "could be" deported, rather than that the Nigerian "would be" deported, if the Nigerian pled guilty to counterfeiting under O.C.G.A. § 10-1-454. State v. Aduka, 303 Ga. 309, 812 S.E.2d 266, 2018 Ga. LEXIS 153 (2018).

RESEARCH REFERENCES

ALR.

Validity, construction, and application of State Trademark Counterfeiting Statutes, 63 A.L.R. 6th 303.

Reimbursement of Costs Under § 1603 of American Recovery And Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009), 38 A.L.R. Fed. 3d Art. 2.

Copyright in and Fair Use of Statutory Annotations and Case Headnotes, 38 A.L.R. Fed. 3d Art. 6.

Part 2

Names and Emblems of Fraternal, Charitable, and Other Organizations

Cross references.

Corporations organized for religious, fraternal, or charitable purposes generally, § 14-5-40 et seq.

10-1-470. Imitation of name or emblem prohibited; priority of right to use name.

No person or organization shall assume, use, adopt, become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization previously existing in this state, and which has been incorporated under the laws of this or any other state or of the United States, or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations, or corporations claim the right to the same name or to names substantially similar as above provided, the organization which was first organized and used the name and first became incorporated under the laws of the United States or of any state, whether incorporated in this state or not, shall be

entitled in this state to the prior and exclusive use of such name; and the rights of such societies, associations, or corporations and of their individual members shall be fixed and determined accordingly.

History.
Ga. L. 1909, p. 139, § 1; Civil Code 1910, § 1993; Code 1933, § 106-201.

JUDICIAL DECISIONS

Constitutionality. — Part is not violative of Fourteenth Amendment of the Constitution of the United States. Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S.E. 922, 1913 Ga. LEXIS 149 (1913).

Part creates new remedy without abrogating existing one. — Enactment of this part for the protection of such organizations as are named therein against the infringement and unauthorized use of their names and emblems merely created a new remedy for an existing right and did not expressly, or by necessary implication, abrogate the preexisting remedy. Supreme Grand Lodge v. Most Worshipful Prince Hall Grand Lodge, 209 F.2d 156, 1954 U.S. App. LEXIS 4713 (5th Cir.), cert. denied, 347 U.S. 953, 74 S. Ct. 679, 98 L. Ed. 1099, 1954 U.S. LEXIS 2737 (1954).

Voluntary associations. — Former Civil Code 1910, §§ 1933 and 1934 were for the protection of any benevolent or other organization which was incorporated, against others using or adopting its name, style, or emblems, and the statutes cannot be invoked by voluntary associations. Faisan v. Adair, 144 Ga. 797, 87 S.E. 1080, 1915 Ga. LEXIS 254 (1915); Methodist Episcopal Church S., Inc. v. Decell, 60 Ga. App. 843, 5 S.E.2d 66, 1939 Ga. App. LEXIS 188 (1939).

Exclusive right to use name must be shown. — Under this part, unless the plaintiffs have established that the plaintiffs are entitled to the exclusive use of the name or words in question, the plaintiffs are not entitled to the equitable relief sought. To show that the plaintiffs have obtained a charter, or have organized and are using that name, is not sufficient. Plaintiffs must not only show that the plaintiffs have the right to use the name in question, but that the plaintiffs have the exclusive right to so use the name. Independent Order of Good Samaritans & Daughters v. Mack, 139 Ga. 835, 78 S.E. 336, 1913 Ga. LEXIS 622 (1913).

Right to use name depends upon priority of incorporation. — Right to the exclusive use of a particular name as between incorporated associations organized for beneficial and charitable purposes, etc., depends upon priority of the Act of incorporation, whether the charter is derived from this state, the United States, or any other state in the Union. A fraternal order by adopting the same name which was previously used by a fraternal association, acquires no additional right to the use of the name by incorporation. Incorporation in this state does not give the fraternal corporation an exclusive right to use the corporate name as against prior use of the same name by a fraternal association incorporated under the laws of a sister state. Graves v. District Grand Lodge No. 18, 155 Ga. 147, 116 S.E. 613, 1923 Ga. LEXIS 28 (1923).

Name held colorable imitation. — Name "Ancient Order of Odd Fellows Leeds Unity" is substantially similar to and a colorable imitation of the name "The Grand United Order of Odd Fellows in America." Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S.E. 922, 1913 Ga. LEXIS 149 (1913).

Subsequent use of appropriated name presumed fraudulent. — If the association or corporation first appropriating and using the name has a clear right to the name's use, the name's subsequent use by another corporation knowing of the right is presumed to be fraudulent. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S.E. 783, 1925 Ga. LEXIS 310 (1925).

Burden of proving right to exclusive use of the distinctive name and words in question is upon the organization asserting the right. Independent Order of Good Samaritans & Daughters v. Mack, 139 Ga. 835, 78 S.E. 336, 1913 Ga. LEXIS 622 (1913) (injunction denied).

Sufficiency of evidence. — Since the court was authorized to find from the evidence that the plaintiffs' order existed in this state and had been incorporated under the laws of this state prior to the date upon which the defendants' order sought to organize and become incorporated, and that so far as the record disclosed there was no other order of a similar name having a prior existence and incorporation to that of the plaintiffs in this state, under former Code 1933, § 106-202, the plaintiffs were entitled to injunctive relief. Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S.E. 922, 1913 Ga. LEXIS 149 (1913).

When it is charged that one beneficial incorporated association is using a name which by prior use appertains to another fraternal organization, mere proof by the plaintiff that the defendant was using the name which the plaintiff had adopted to distinguish the plaintiff from similar organizations would not entitle the plaintiff to relief. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S.E. 783, 1925 Ga. LEXIS 310 (1925).

In order for a plaintiff to obtain the aid of this section, it must appear that such plaintiff is: (1) an incorporated association; (2) that it is a benevolent, etc., organization previously existing in this state; and (3) that the defendants propose to use, or are using, the name and style or emblems of such incorporated organization, as so nearly resemble the same as to be a colorable imitation. Methodist Episcopal Church S., Inc. v. Decell, 60 Ga. App. 843, 5 S.E.2d 66, 1939 Ga. App. LEXIS 188 (1939).

RESEARCH REFERENCES

Am. Jur. 2d.

36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.

Am. Jur. Pleading and Practice Forms.

23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 73 et seq.

C.J.S.

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 80 et seq.

ALR.

Application of principles of unfair competition to artistic or literary property, 19 A.L.R. 949.

Right to enjoin use of name of defunct corporation, 27 A.L.R. 1024.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 A.L.R. 1189; 44 A.L.R.2d 1156.

Right of automobile association to exclusive use of name or insignia, 83 A.L.R. 712.

Right of benevolent or fraternal society or organization to protection against use of same or similar name, insignia, or ritual by another organization, 76 A.L.R.2d 1396.

Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 A.L.R.3d 994.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 A.L.R.3d 277.

10-1-471. Injunction against infringement.

Whenever there shall be an actual or threatened violation of Code Section 10-1-470, the organization entitled to the exclusive use of the name in question under the terms of said Code section shall have the right to apply to the proper court for an injunction to restrain the infringement of its name and the use of its emblems; and, if it shall be

made to appear to the court that the defendants are in fact infringing or about to infringe on the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said Code section or that the defendant or the defendants are wearing or using the badge, insignia, or emblems of said organization without the authority thereof and in violation of said Code section, an injunction may be issued by the court under the principles of equity without requiring proof that any person has been in fact misled or deceived by the infringement of such name or the use of such emblem.

History.
Ga. L. 1909, p. 139, § 2; Civil Code 1910, § 1994; Code 1933, § 106-202.

JUDICIAL DECISIONS

Part creates new remedy without abrogating existing remedy. — Enactment of this part for the protection of such organizations as are named therein against the infringement and unauthorized use of their names and emblems merely created a new remedy for an existing right, and did not expressly, or by necessary implication, abrogate the preexisting remedy. Supreme Grand Lodge v. Most Worshipful Prince Hall Grand Lodge, 209 F.2d 156, 1954 U.S. App. LEXIS 4713 (5th Cir.), cert. denied, 347 U.S. 953, 74 S. Ct. 679, 98 L. Ed. 1099, 1954 U.S. LEXIS 2737 (1954).

Voluntary associations. — Former Civil Code 1910, §§ 1993 and 1994 were for the protection of any benevolent or other organization which was incorporated, against others using or adopting its name, style, or emblems, and the statutes cannot be invoked by voluntary associations. Faisan v. Adair, 144 Ga. 797, 87 S.E. 1080, 1915 Ga. LEXIS 254 (1915); Methodist Episcopal Church S., Inc. v. Decell, 60 Ga. App. 843, 5 S.E.2d 66, 1939 Ga. App. LEXIS 188 (1939).

Infringement will be enjoined. — Equity will enjoin a corporation or individuals that are using the name, insignia, and emblems of an existing benevolent fraternal association to the injury of the latter. Under the facts of this case, there was no abuse of discretion in granting the injunction. Faisan v. Adair, 144 Ga. 797, 87 S.E. 1080, 1915 Ga. LEXIS 254 (1915).

Including use of name. — When it is made to appear that the name in question is being used, or indeed if it is shown that it can be used, to mislead the public and induce the belief that the association which is using the name which another is justly entitled to use, the defendant should be enjoined from the use of this name in toto, and not merely partially enjoined. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S.E. 783, 1925 Ga. LEXIS 310 (1925).

Use of ritual, passwords, and tokens. — It was error to omit or refuse to enjoin the use by the defendant of the ritual, passwords, signs, tokens, etc., of the national order. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S.E. 783, 1925 Ga. LEXIS 310 (1925).

Addition of suffix "Incorporated" is not sufficient relief. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S.E. 783, 1925 Ga. LEXIS 310 (1925).

RESEARCH REFERENCES

Am. Jur. 2d.
36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.
Am. Jur. Pleading and Practice Forms.
23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 73 et seq.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 80 et seq.
ALR.
Right to enjoin use of name of defunct corporation, 27 A.L.R. 1024.
Right of one to protection of trade name which he does not use, 48 A.L.R. 1257.
Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067.
Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 A.L.R.2d 1156.
Use of "family name" by corporation as unfair competition, 72 A.L.R.3d 8.
"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 A.L.R. Fed. 407.
When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after Two Pesos, 161 A.L.R. Fed. 327.

10-1-472. Penalty for unauthorized use of emblem or name or false claim of membership.

Any person who shall wear a badge, button, or other emblem or shall use the name or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization which is entitled to the exclusive use of such name and emblems under Code Section 10-1-470, either in the identical form or in such near resemblance thereto as to be a colorable imitation of such emblem or name, unless entitled to do so under the laws, rules, and regulations of such organization, shall be guilty of a misdemeanor.

History.
Ga. L. 1909, p. 139, § 3; Penal Code 1910, § 258; Code 1933, § 106-9905.

RESEARCH REFERENCES

Am. Jur. 2d.
36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.
C.J.S.
87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 80 et seq.

Part 3

Registration of Businesses Using Trade Names

Cross references.
Selection and reservation of corporate names, § 14-2-401 et seq.
Law reviews.
For article, "Acquisition of Trademark Rights Under United States and Georgia Law," see 7 Ga. St. B. J. 14 (2001).

JUDICIAL DECISIONS

Analysis

General Consideration
Effect of Noncompliance

General Consideration

General Assembly repealed the Trade Name Act of 1929 (Ga. L. 1929, p. 233) by the passage of Ga. L. 1937, p. 804. Bullard v. Holman, 184 Ga. 788, 193 S.E. 586, 1937 Ga. LEXIS 640 (1937); Bowers v. Keller, 185 Ga. 435, 195 S.E. 447, 1938 Ga. LEXIS 464 (1938).

Purpose. — Evident purpose of this part is to enable persons making contracts with those trading under a fictitious trade name to know with whom they are dealing. Maxwell v. Pierce, 183 Ga. 856, 189 S.E. 847, 1937 Ga. LEXIS 413 (1937).

Part strictly construed. — Since this part imposes a hitherto unrecognized restriction upon the right to contract, the part's terms will be strictly construed. Maxwell v. Pierce, 183 Ga. 856, 189 S.E. 847, 1937 Ga. LEXIS 413 (1937).

Applicability to corporation using trade name. — If a corporation transacts business in a trade name or a name or style other than its true corporate name, it is amenable to the requirements and prohibitions of this part the same as others. Constitution Publishing Co. v. Lyon, 52 Ga. App. 434, 183 S.E. 653, 1936 Ga. App. LEXIS 658 (1936).

"Company" may be used in individual's trade name. — Under this part, the appellation, "company" may be used by an individual and is as appropriate to unincorporated associations as to corporations. An individual may use the word "company" as a part of the individual's trade name. Dixie Queen Produce Co. v. Brown, 100 Ga. App. 150, 110 S.E.2d 421, 1959 Ga. App. LEXIS 554 (1959).

Allegation of partnership as evidenced by registration must be denied. — Admissions in the answer of allegations in the petition are taken as true, and accordingly, if two or more individuals are sued jointly in connection with the operation of a business under a trade name, and such individuals file an answer admitting that the individuals jointly operate such business, file no denial of partnership, but on the contrary file a joint answer as partners, and the petition is later amended alleging such partnership as evidenced by trade name registration under this part, the defendants by the defendant's pleadings have admitted the existence of such partnership and are estopped to produce evidence to the contrary. Petkas v. Wright Co., 87 Ga. App. 189, 73 S.E.2d 224, 1952 Ga. App. LEXIS 647 (1952).

Effect of Noncompliance

Noncompliance does not prohibit property ownership. — This part does not prohibit ownership of property by persons who may have acquired title under a trade name that has not been registered. Maxwell v. Pierce, 183 Ga. 856, 189 S.E. 847, 1937 Ga. LEXIS 413 (1937).

Liability under contract. — Defendant corporation doing business under a trade name which has not registered as required by this part cannot avoid liability under its contract which is the subject matter of the suit upon the ground of the defendant's not having registered as required by this part. Atlanta Butchers Abattoir & Stock Yard Co. v. Reaves, 54 Ga. App. 138, 187 S.E. 162, 1936 Ga. App. LEXIS 474 (1936).

Forfeiture of lease. — If lease was made to plaintiff and plaintiff's partner in their individual names, the failure of the plaintiff to register plaintiff's trade name in compliance with this part, although plaintiff ran a business on the premises rented from the defendant under the trade name, would not entitle the defendant to declare the lease forfeited, and to evict the plaintiff for that reason alone. Hudgens v. Douglas, 56 Ga. App. 877, 194 S.E. 398, 1937 Ga. App. LEXIS 258 (1937).

Action for conversion of property. — Partners doing business under a trade name that has not been registered as

required by law, who have bought and paid for personal property and have taken from the owner a bill of sale therefor in such trade name, may maintain an action in the trade name against a tort-feasor who has seized and converted the property to the tort-feasor's own use. Maxwell v. Pierce, 183 Ga. 856, 189 S.E. 847, 1937 Ga. LEXIS 413 (1937).

Suit by lessee for trespass. — If lease was made to the plaintiff and the plaintiff's partner in their individual names, the failure of the plaintiff to register the plaintiff's trade name in compliance with this part, although plaintiff ran a business on the premises rented from defendant under the trade name, would not prevent the plaintiff from bringing a tort suit against the defendant for damages growing out of certain alleged acts of trespass committed by defendant if the plaintiff was otherwise entitled to bring such a suit. The failure to register has no causal relation to the injury. Hudgens v. Douglas, 56 Ga. App. 877, 194 S.E. 398, 1937 Ga. App. LEXIS 258 (1937).

Enforcement of note and conditional sale contract. — Fact that a promissory note and conditional sale contract are taken by the payee in a trade name which the payee has failed to register as required by law will not prevent the enforcement of such note and contract in the hands of a holder in due course. Southern Sec. Co. v. American Disct., 184 Ga. 82, 190 S.E. 350, 1937 Ga. LEXIS 440 (1937).

Registration essential to acquiring interest in trade name. — Compliance with the provisions of this part as to registration in the office of the clerk of the superior court is essential to the right of a person to conduct business under another or assumed name, and to acquire such interest in the name as will be protected by a court of equity. National Brands Stores, Inc. v. Muse & Assocs., 183 Ga. 88, 187 S.E. 84, 1936 Ga. LEXIS 276 (1936).

Costs cast on plaintiff not registering. — Since the evidence showed conclusively that the plaintiff had not registered the plaintiff's trade name at the time of filing suit with the clerk of the superior court of the county of the plaintiff's residence, the costs of court included within the judgment must be cast against the plaintiff. Bancroft v. Conyers Realty Co., 63 Ga. App. 106, 10 S.E.2d 286, 1940 Ga. App. LEXIS 20 (1940).

10-1-490. Required registration statement for business using trade, partnership, or other name not showing ownership.

(a) Every person, firm, or partnership carrying on in this state any trade or business under any trade name or partnership name or other name which does not disclose the individual ownership of the trade, business, or profession carried on under such name shall, within 30 days from March 29, 1937, or thereafter before commencing to do business, file in the office of the clerk of the superior court of the county in which the business is chiefly carried on or, in the case of a domestic corporation using any name other than its corporate name, in the county of its legal domicile, a registration statement, verified by affidavit, setting forth the name or names and addresses of the person, persons, firm, or partnership owning and carrying on said trade or business and stating the nature of the business being carried on and the trade, partnership, or other name used and shall, upon any change of ownership, likewise file a new and amended statement of registration. Notice of such filing giving the names and addresses of each person, firm, or partnership to engage in business under such trade name or

partnership name shall be published in the paper in which the sheriff's advertisements are printed once a week for two weeks. No person, firm, or partnership already registered shall be required to reregister except in the event of a change of ownership.

(b) The clerk shall register the same by filing the verified statement in his office and shall keep an alphabetical index of all such registrations in a permanent record book to be kept in his office, the index to show the trade, partnership, or other name registered and in connection therewith the names of the owners. The applicant for registration shall accompany each registration statement with the fee prescribed by Code Section 15-6-77, relating to fees of clerks of the superior courts, as amended.

History.

Ga. L. 1929, p. 233, §§ 1-3; Code 1933, §§ 106-301, 106-302; Ga. L. 1937, p. 804, §§ 1, 2; Ga. L. 1943, p. 398, § 1; Ga. L. 1970, p. 497, § 9; Ga. L. 1981, p. 872, § 2; Ga. L. 1989, p. 14, § 10.

Law reviews.

For article, "Post-Creation Checklist for Georgia Business Entities," see 9 Ga. St. B. J. 34 (2004).

JUDICIAL DECISIONS

Affidavit must be made by person operating under trade name. — This section, requiring registration, in the office of the clerk of the superior court of persons doing business under a trade name by filing an affidavit signed by the person doing business, in which is set forth the name and address of the true owner of the business, requires that the affidavit be made by the person who operates under the trade name referred to in the affidavit. Laurens Glass Works v. Childs, 49 Ga. App. 590, 176 S.E. 665, 1934 Ga. App. LEXIS 501 (1934).

Affidavit does not create presumption against prior registration. — Evidence that the members of a partnership filed an affidavit in the office of the clerk of the superior court to register a partnership trade name does not create a presumption of fact that such trade name had not been previously registered. Butler v. Ragsdale, 54 Ga. App. 565, 188 S.E. 578, 1936 Ga. App. LEXIS 702 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Use of trade name by corporation. — Corporation may do business in Georgia under trade name. 1945-47 Ga. Op. Att'y Gen. 652.

Branch offices under different names. — Licensed real estate broker may establish branch offices under different names, provided that the broker complies with this part. 1952-53 Ga. Op. Att'y Gen. 408.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 1.

ALR.

Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing

the names of the persons interested, 45 A.L.R. 198; 42 A.L.R.2d 516.

"Business sign" statute as affecting order of priority among creditors of person transacting business, 124 A.L.R. 169.

Right to use firm name on dissolution of partnership, 173 A.L.R. 444.

Incorporation of company under particular name as creating exclusive right to such name, 68 A.L.R.3d 1168.

10-1-491. Effect of failing to register on contracts.

The effect of this part shall be that no contract or undertaking entered into by any person, firm, or corporation, whether heretofore or hereafter entered into, shall be invalidated or declared illegal on the ground that the same was entered into in a trade or partnership name not filed or registered in accordance with the laws in force at the time such contract or undertaking was entered into; but all such contracts and undertakings are expressly validated as against any such objection; and no action heretofore or hereafter instituted by any such person, firm, partnership, or corporation, whether sounding in contract or tort, shall be defeated because of any such failure to register. But the party who has failed to register his trade or partnership name at the time action is filed, as required by this part, shall be cast with court costs.

History.
Ga. L. 1937, p. 804, § 5.

JUDICIAL DECISIONS

Ga. L. 1937, p. 804, § 5 applies to contract made before the statute's enactment by any person or partnership conducting or transacting a business in this state under an assumed or fictitious or trade name, other than the real name or names of the individual or individuals conducting or transacting such business without having registered in the office of the clerk of the superior court as required by former Code 1933, §§ 106-301 and 106-302. Walker v. Abbot, 57 Ga. App. 381, 195 S.E. 450, 1938 Ga. App. LEXIS 604 (1938).

Section bars defense of noncompliance in action on contract. — If a suit was filed on a contract entered into between the plaintiff and the defendant in connection with and while the plaintiff was operating a business under an assumed or fictitious name, without having registered that name as required by Ga. L. 1929, p. 233, and the defendant filed a pleading setting up these facts as a defense to the suit, and the judge sustained such defense and entered a judgment of nonsuit, and thereafter the plaintiff brought the case to the Court of Appeals, properly presented the question whether the court erred in sustaining such defense, and it appeared that since the judgment of the trial court, and while the case was in the process of being brought to the Court of Appeals, the legislature, by Ga. L. 1937, p. 804,

repealed Ga. L. 1929, p. 233, and expressly provided by Ga. L. 1937, p. 804, § 5 no suit or action heretofore or hereafter instituted by any such person, firm, partnership, or corporation, whether sounding in contract or tort, should be defeated because of any such failure to register, the Court of Appeals, under Ga. L. 1937, p. 804, should have applied Ga. L. 1937, p. 804, § 5 and reversed the judgment, not because the judge erred at the time of its rendition, but because it had subsequently become erroneous by operation of Ga. L. 1937, p. 804, § 5. Bowers v. Keller, 185 Ga. 435, 195 S.E. 447, 1938 Ga. LEXIS 464 (1938).

Retroactive application of section not unconstitutional. — Section 5 of Ga. L. 1937, p. 804, providing that no contract should be invalidated on the ground that it was entered into in an unregistered trade or partnership name, was not violative of the constitutional prohibition against enactment of retroactive laws as applied to a note which had become barred under Ga. L. 1929, p. 233. Bullard v. Holman, 184 Ga. 788, 193 S.E. 586, 1937 Ga. LEXIS 640 (1937).

Ga. L. 1937, p. 804, § 5 is not unconstitutional as applied to a note which was subject to defense under Ga. L. 1929, p. 233, relating to trade names, and was executed before the passage of Ga. L. 1937, p. 804. Sweat & Gaskins v. Williamson, 185 Ga. 495, 195 S.E. 408, 1938 Ga. LEXIS 448 (1938).

Undertaking by individual in fictitious or trade name is obligation of individual. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Section binds sole proprietor who contracts in unregistered trade name. Goger v. United States (In re Eady), 4 B.R. 1, 1980 Bankr. LEXIS 5428 (Bankr. N.D. Ga. 1980).

Use of trade name on security agreement. — Fact that title-retention contract was signed in a trade name by the owner of such business does not in anyway invalidate the contract. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Recording security agreement gives constructive notice of trade name. — Title-retention contract signed by the purchaser in the purchaser's trade name by the purchaser in the purchaser's individual name is entitled to recording when it otherwise meets the requirements of the statute, and after being duly recorded constitutes constructive notice of the right and interest of the vendor therein as against the purchase of the property at a judicial sale on an execution issued against the purchaser in the purchaser's individual capacity. NCR Co. v. Sikes, 94 Ga. App. 391, 94 S.E.2d 782, 1956 Ga. App. LEXIS 553 (1956).

Use of fictitious names in financing statements. — While this section has the effect of binding those persons who contract in fictitious names to the contract so executed, it does not have the effect of saying that financing statements given in fictitious names are sufficient to notify subsequent creditors of the identity of the party using the fictitious name. Were a court to hold otherwise, the purpose of the statutory scheme of requiring a security interest to be perfected by filing a financing statement — to give notice to future creditors of the debtor — would be seriously undermined. In re Firth, 363 F. Supp. 369, 1973 U.S. Dist. LEXIS 12015 (M.D. Ga. 1973); Goger v. United States (In re Eady), 4 B.R. 1, 1980 Bankr. LEXIS 5428 (Bankr. N.D. Ga. 1980).

Burden of proving registration. — O.C.G.A. § 10-1-491 places no burden on party using trade name to prove that the party has been registered. Barker v. Century 21-Atlanta E. Realty, Inc., 162 Ga. App. 828, 293 S.E.2d 76, 1982 Ga. App. LEXIS 2355 (1982).

Contract entered in unregistered trade name deemed valid. — O.C.G.A. § 10-1-491 expressly provides that a contract entered into in a trade name is valid notwithstanding the failure to register the trade name with the superior court clerk; the only penalty is that the nonregistering party will have to bear court costs. Brooks v. Maryville Loan & Fin. Co., 679 F.2d 837, 1982 U.S. App. LEXIS 17949 (11th Cir. 1982).

10-1-492. Exemption of corporations, limited or professional partnerships, or limited liability companies.

This part shall not apply to corporations doing business under their corporate names, to limited partnerships doing business under their limited partnership names, or to limited liability companies doing business under their limited liability company names which have been filed for record pursuant to Chapter 9, 9A, or 11 of Title 14, as amended, or to persons practicing any profession under a partnership name.

History.
Ga. L. 1929, p. 233, § 4; Code 1933, § 106-304; Ga. L. 1937, p. 804, §§ 1, 6; Ga. L. 1943, p. 398, § 1; Ga. L. 1973, p. 480, § 1; Ga. L. 1981, p. 872, § 2; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 931, § 17; Ga. L. 1994, p. 161, § 1.

Law reviews.
For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

10-1-493. Penalty for failing to register.

Any person, firm, partnership, or corporation carrying on any trade or business subject to registration under Code Section 10-1-490 without filing such registration as required by Code Section 10-1-490 shall be guilty of a misdemeanor but shall suffer no other or further penalty or forfeiture on account of any such failure to register, except costs as provided in Code Section 10-1-491.

History.
Ga. L. 1929, p. 233, § 5; Code 1933, § 106-9906; Ga. L. 1937, p. 804, § 3.

ARTICLE 17

RIGHTS IN WORKS OF FINE ART

Editor's notes.
A former Article 17, containing §§ 10-1-510 through 10-1-514 and based on Ga. L. 1973, p. 336, § 1, relating to multilevel distribution companies, was repealed by Ga. L. 1988, p. 1868, § 2. For similar provisions, see § 10-1-410 et seq.

Law reviews.
For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For note, "How to Get the Mona Lisa in your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections," see 18 J. Intell. Prop. L. 567 (2011).

10-1-510. Conveyance of rights in works of fine art; statement of customer's right or license authorizing duplication; liability.

(a) As used in this Code section, the term:

(1) "Artist" means the creator of a work of fine art.

(2) "Customer" means a person who contracts to have a printer duplicate a work of fine art.

(3) "Duplicate" means to print, copy, or otherwise reproduce.

(4) "Fine art" means a painting, sculpture, drawing, photograph, craft work, fiber art, or work of graphic art, except a work that a customer had specifically created as a work for hire pursuant to federal copyright laws.

(5) "Fine print" includes, but is not limited to, an engraving, etching, woodcut, lithograph, monoprint, or serigraph but does not include industrial designs.

(6) "Industrial design" means the aesthetic appearance of an article used in commerce.

(6.1) "Person" means an individual, partnership, corporation, association, entity, or other group, however organized.

(7) "Printer" means a person who contracts to duplicate a work of fine art for a customer.

(8) "Work of fine art" means any work of visual or graphic art of any media, including, but not limited to, fine art, fine print, or film.

(b) Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it, or the heirs or personal representatives thereof, the right of reproduction thereof is reserved to the grantor until the right passes into the public domain pursuant to federal copyright laws unless the right is sooner expressly transferred by an instrument, note, or memorandum in writing signed by the owner of the rights conveyed or the duly authorized agent thereof. Nothing contained in this Code section is intended to prohibit the fair use, as defined in the federal copyright law (17 U.S.C. Section 107), of such work of fine art.

(c) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, or display publicly a work of fine art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, ownership of the physical work of fine art shall remain with and be reserved to the artist or owner, as the case may be, unless such right of ownership is

expressly transferred by an instrument, note, memorandum, or other writing signed by the artist, the owner, or the duly authorized agent thereof.

(d) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, or publicly display a work of fine art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, any ambiguity with respect to the nature or extent of the rights conveyed shall be resolved in favor of the reservation of rights by the artist or owner unless in any given case the federal copyright law (17 U.S.C. Section 1, et seq.) provides the contrary.

(e) Whenever a customer shall present to a printer for duplication information or images that include a work of fine art stored or duplicated as electronic data or in any digital form or that is transmitted to the printer as electronic data or in any digital form, it shall be the sole responsibility of the customer to provide a signed statement in compliance with the provisions of subsection (h) of this Code section to the printer that the customer has the legal right or license authorizing such duplication or that those rights have passed into the public domain pursuant to federal copyright laws.

(f) Except as provided in subsection (e) of this Code section, no printer shall enter into any agreement with any customer to duplicate a work of fine art when that customer's aggregate paid and unpaid obligations to that printer for all such prior or current duplications of that work of fine art exceed $2,000.00 unless the printer obtains, at the time such aggregate obligation first exceeds $2,000.00, a signed statement from the customer that the customer has the legal right or license authorizing such duplication or that those rights have passed into the public domain pursuant to federal copyright laws.

(g) Any printer who duplicates a work of fine art in reliance upon a statement obtained pursuant to subsection (e) or (f) of this Code section will incur no liability for damages under subsection (j) of this Code section.

(h) The statement required by subsections (e) and (f) of this Code section:

(1) Does not have to be sworn;

(2) May be included on the invoice, purchase order, proposed form, or other document;

(3) May be signed one time and kept on file for all duplications for the same customer;

(4) May be signed by any employee or agent of the customer on the customer's behalf; and

(5) Shall be in substantially the following form:

"STATEMENT

The undersigned customer has obtained in writing the legal right or license which authorizes the duplication of the work of fine art which has been requested by the undersigned or those rights have passed into the public domain pursuant to federal copyright law. A printer to whom this statement is presented may rely upon it in performing the requested duplication of the work of fine art.

_____

(Customer's Signature)

_____

(Date)"

(i) Except for subsection (e) of this Code section, this Code section applies to sales, transfers, and conveyances made on or after July 1, 1990, and applies to agreements to duplicate a work of fine art made on or after July 1, 1991. Subsection (e) of this Code section applies to agreements made on or after July 1, 1996, to duplicate fine art stored, transmitted, or duplicated as electronic data or in a digital form.

(j) Any person who violates subsection (e) or (f) of this Code section or who signs the statement provided for therein knowing it to be false shall be civilly liable therefor and the person damaged thereby may recover trebled actual damages, court costs, and attorney's fees.

History.
Code 1981, § 10-1-510, enacted by Ga. L. 1990, p. 164, § 1; Ga. L. 1991, p. 1161, § 1; Ga. L. 1996, p. 662, §§ 1, 2; Ga. L. 2000, p. 136, § 10.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1990, "et seq." was substituted for "et. seq." near the end of subsection (d).

Law reviews.
For note, "(Don't) Give It Up Or Turn It Loose: State Law Copyright Protection of Pre-1972 Sound Recordings in Blank Slate Jurisdictions Like Georgia," see 49 Ga. L. Rev. 819 (2015).

RESEARCH REFERENCES

ALR.
What constitutes derivative work under the Copyright Act of 1976, 149 A.L.R. Fed. 527.

ARTICLE 17A

CONSIGNMENT OF ART

Law reviews.
For article, "The Protection of Visual Artists Through Consignment of Art Statutes," see 18 J. Intell. Prop. L. 551 (2011).

10-1-520. Short title.

This article shall be known and may be cited as the "Georgia Consignment of Art Act."

History.
Code 1981, § 10-1-520, enacted by Ga. L. 1995, p. 267, § 1.

10-1-521. Definitions.

As used in this article, the term:

(1) "Art dealer" means a person engaged in the business of selling works of art, other than a person exclusively engaged in the business of selling goods at public auction, and other than a nonprofit organization.

(2) "Artist" means the person who creates a work of art, or, if such person is deceased, such person's heir, legatee, or personal representative.

(3) "Consignment" means that no title to, estate in, or right to possession of the work of art superior to that of the consignor shall vest in the consignee, notwithstanding the consignee's power or authority to transfer and convey to a third person all of the right, title, and interest of the consignor in and to such work of art.

(4) "Cooperative" means an association or group of artists which:

(A) Engages in the business of selling only works of art which are produced or created by such artists;

(B) Jointly owns, operates, and markets such business; and

(C) Accepts such works of art from its members on consignment.

(5) "Person" means an individual, partnership, corporation, association, entity, or other group, however organized.

(6) "Value of the work of art" means an amount agreed upon by written contract as the monetary worth of a work of art which amount shall be used in determining damages in the instance of a violation of this article by an art dealer and shall not be used for any other purpose.

(7) "Work of art" means an original art work which is:

(A) A visual rendition, including a painting, drawing, sculpture, mosaic, or photograph;

(B) A work of calligraphy;

(C) A work of graphic art, including an etching, lithograph, offset print, or silk screen;

(D) A craft work in materials, including clay, textile, fiber, wood, metal, plastic, or glass; or

(E) A work in mixed media, including a collage or a work consisting of any combination of subparagraphs (A) through (D) of this paragraph.

History.
Code 1981, § 10-1-521, enacted by Ga. L. 1995, p. 267, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1995, a hyphen was deleted from "nonprofit" in paragraph (1) and from "Cooperative" in paragraph (4).

10-1-522. Delivery of artwork to dealer for exhibition or sale in exchange for compensation constituting consignment.

Notwithstanding any custom, practice, or usage of the trade to the contrary, whenever an artist delivers or causes to be delivered a work of art of the artist's own creation to an art dealer in this state for the purpose of exhibition or sale, or both, on a commission, fee, or other basis of compensation, the delivery to and acceptance of such work of art by the art dealer shall constitute a consignment, unless the delivery to the art dealer is pursuant to an outright sale for which the artist receives or has received full compensation for the work of art upon delivery.

History.
Code 1981, § 10-1-522, enacted by Ga. L. 1995, p. 267, § 1.

10-1-523. Written contract required for consignment of work of art; violation by art dealer rendering artist's obligation voidable.

(a) An art dealer may accept a work of art on a fee, commission, or other compensation basis on consignment from the artist who created the work of art only if prior to or at the time of acceptance the art dealer enters into a written contract with the artist establishing:

(1) The value of the work of art;

(2) The time within which the proceeds of the sale are to be paid to the artist if the work of art is sold; and

(3) The minimum price for the sale of the work of art.

(b) If an art dealer violates this Code section, a court may, at the request of the artist, void the obligation of the artist to that art dealer

or to a person to whom the obligation is transferred other than a holder in due course.

History.
Code 1981, § 10-1-523, enacted by Ga. L. 1995, p. 267, § 1.

10-1-524. Effects of consignment.

A consignment of a work of art shall result in all of the following:

(1) The art dealer, after delivery of the work of art, shall constitute an agent of the artist for the purpose of sale or exhibition of the consigned work of art within this state;

(2) The work of art shall constitute property held in trust by the consignee for the benefit of the consignor and shall not be subject to claim by a creditor of the consignee;

(3) The consignee shall be responsible for the loss of, or damage to, the work of art; and

(4) The proceeds from the sale of the work of art shall constitute funds held in trust by the consignee for the benefit of the consignor. Such proceeds shall first be applied to pay any balance due to the consignor, unless the consignor expressly agrees otherwise in writing.

History.
Code 1981, § 10-1-524, enacted by Ga. L. 1995, p. 267, § 1.

10-1-525. Art received as consignment to remain trust property; not subject or subordinate to claims, liens, or security interests.

(a) A work of art received as a consignment shall remain trust property, notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for the consignee's own account, until the price is paid in full to the consignor. If such work is thereafter resold to a bona fide purchaser before the consignor has been paid in full, the proceeds of the resale received by the consignee shall constitute funds held in trust for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full.

(b) No such trust property or trust funds shall be or become subject or subordinate to any claims, liens, or security interests of any kind or nature whatsoever of the consignee's creditors, anything in Code Section 11-2-326 or any other provision of Title 11 to the contrary notwithstanding.

History.
Code 1981, § 10-1-525, enacted by Ga. L. 1995, p. 267, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1995, a comma was deleted following "whatsoever" in subsection (b).

10-1-526. Contractual waiver of liability for works of art consigned to cooperative.

Any cooperative may contract with its members to waive liability for the loss of or damage to works of art consigned to such cooperative. Any other provision of a contract or an agreement whereby the consignor purports to waive any provision of this article is void.

History.
Code 1981, § 10-1-526, enacted by Ga. L. 1995, p. 267, § 1.

10-1-527. Use or display of work of art or photograph thereof.

An art dealer who accepts a work of art on a fee, commission, or other compensation basis on consignment from the artist who created the work of art may use or display the work of art or a photograph of the work of art or permit the use or display of the work of art or a photograph of the work of art only if:

(1) Notice is given to users or viewers that the work of art is the work of the artist; and

(2) The artist gives prior written consent to the particular use or display.

History.
Code 1981, § 10-1-527, enacted by Ga. L. 1995, p. 267, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1995, a comma was deleted following "a work of art" preceding "on a fee" near the beginning of the introductory paragraph.

10-1-528. Applicability to contracts executed prior to July 1, 1995.

This article shall not apply to a written contract executed prior to July 1, 1995, unless either the parties agree by mutual written consent that this article shall apply or such contract is extended or renewed after July 1, 1995.

History.
Code 1981, § 10-1-528, enacted by Ga. L. 1995, p. 267, § 1.

10-1-529. Liability for violations by art dealers.

Any art dealer who violates this article is liable to the artist in an amount equal to:

(1) Fifty dollars; and

(2) The actual damages, if any, including the incidental and consequential damages sustained by the artist by reason of the violation and reasonable attorney's fees.

History.
Code 1981, § 10-1-529, enacted by Ga. L. 1995, p. 267, § 1.

ARTICLE 17B

GEORGIA MUSEUM PROPERTY

10-1-529.1. Short title.

This article shall be known and may be cited as the "Georgia Museum Property Act."

History.
Code 1981, § 10-1-529.1, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.2. Definitions.

As used in this article, the term:

(1) "Archives repository" means a nonprofit organization or a public agency whose primary functions include selecting, preserving, and making available records of historical or enduring value and that is open to the public on a regular basis. Archives repository does not include a public library.

(2) "Loan" means the placement of property with a museum or archives repository that is not accompanied by a transfer of title of the property to the museum or archives repository and for which there is some record that the owner intended to retain title to the property. Loan does not include transfers between museums, between archives repositories, or between museums and archives repositories unless the transferring institution specifically provides in writing that the transfer is a loan under this article.

(3) "Museum" means a nonprofit organization or a public agency that is operated primarily for the purpose of collecting, cataloging, preserving, or exhibiting property of educational, scientific, historic, cultural, or aesthetic interest and that is open to the public on a regular basis. Museum does not include a public library.

(4) "Property" means personal property.

History.
Code 1981, § 10-1-529.2, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.3. Duty of museums and archives repositories to keep accurate records of property held on loan; notice of change in ownership of loaned property.

(a) Each museum or archives repository shall keep accurate records of all property on loan to the museum or archives repository, including the name and address of the owner, if known, and the beginning and ending date of the loan period. At the time that a person makes a loan to a museum or archives repository, the museum or archives repository shall give the owner of the property a copy of this article. If a museum or archives repository is notified of a change in the ownership of any property loaned to a museum or archives repository, the museum or archives repository shall inform the new owner of the provisions of the loan agreement and shall send the new owner a copy of this article. Not less than 90 days before a museum or archives repository changes its address or dissolves, the museum or archives repository shall notify all owners of that change of address or dissolution. If a museum or archives repository becomes the owner of property under Code Section 10-1-529.4 or 10-1-529.5, the museum or archives repository shall maintain any records that the museum or archives repository has regarding the property for not less than two years after the date on which the museum or archives repository becomes the owner of the property.

(b) The owner of property loaned to a museum or archives repository shall provide the museum or archives repository with written notice of any change of the owner's address, of the owner's designated agent, of the designated agent's address, and of the name and address of the new owner if there is a change in the ownership of the property loaned to the museum or archives repository.

History.
Code 1981, § 10-1-529.3, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.4. Abandonment of property loaned to a museum or archives repository; museum acquisition of abandoned property.

(a) Property loaned to a museum or archives repository whose loan has an expiration date is abandoned when there has not been written contact between the owner and the museum or archives repository for

at least seven years after that expiration date. If the loan has no expiration date, the property is abandoned when there has not been written contact between the owner and the museum or archives repository or their successors or assigns for at least seven years after the museum or archives repository took possession of the property.

(b)(1) If a museum or archives repository wishes to acquire title to abandoned property, the museum or archives repository shall, not less than 60 days after property is abandoned under subsection (a) of this Code section, send a notice by certified mail or statutory overnight delivery to the owner's last known address. A copy of such notice shall be simultaneously sent to any known lienholder at such lienholder's last known address. The notice shall contain all of the following:

(A) A statement that the loan is terminated and that the property is abandoned;

(B) A description of the property;

(C) A statement that the museum or archives repository will become the owner of the property if the present owner does not submit a written claim to the property to the museum or archives repository within 60 days after receipt of the notice; and

(D) A statement that the museum or archives repository will make arrangements with the owner to return the property to the owner or dispose of the property as the owner requests if the owner submits a written claim to the property to the museum or archives repository within 60 days after receipt of the notice.

(2) The notice provided for in subsection (a) of this Code section shall be substantially in the following form:

NOTICE OF ABANDONMENT OF PROPERTY

To: _____ (name of owner)

_____ (address of owner)

Please be advised that the loan agreement is terminated for the following property (describe the property in sufficient detail to identify the property):

_____

_____

The above-described property that you loaned to _____ (name and address of museum or archives repository) will be considered abandoned by you and will become the property of _____ (name of museum or archives repository) if you fail to submit to the museum or archives repository a written claim to the property within 60 days after receipt of this notice. If you do submit a written claim to the property within 60 days after receipt of this notice, _____ (name of museum or archives repository) will arrange to return the property to you or dispose of the property as you request. The cost of returning the property to you or disposing of the property is your responsibility unless you have made other arrangements with the museum or archives repository. _____ (name of person to contact at museum or archives repository and address of museum or archives repository).

(c) If the notice sent by the museum or archives repository under subsection (b) of this Code section is returned to the museum or archives repository undelivered, the museum or archives repository shall give notice of the abandoned property by publication once a week for two consecutive weeks in the official county organs of the county in which the museum or archives repository is situated and the county of the owner's last known address, and on the organization's website, if applicable, containing the following:

(1) The name and last known address of the present owner;

(2) A description of the property;

(3) A statement that the property is abandoned and that the museum or archives repository will become the owner of the property if no person can prove ownership of the property;

(4) A statement that a person claiming ownership of the property shall notify the museum or archives repository in writing of that claim within 60 days after publication of the last legal notice; and

(5) The name and mailing address of the person who may be contacted at the museum or archives repository if a person wants to submit a written claim to the property.

(d) If the museum or archives repository receives a timely written claim for the property from the owner or the owner's agent in response to the notice provided under subsection (b) or (c) of this Code section the museum or archives repository shall return the property to the owner or dispose of the property as the owner requests. The owner shall advise the museum or archives repository in writing as to how the property shall be disposed of or returned to the owner. Costs of returning the property or disposing of the property shall be the responsibility of the

owner unless the owner and the museum or archives repository have made other arrangements.

(e) If the museum or archives repository receives a timely written claim for the property from a person other than the person who loaned the property to the museum or archives repository in response to the notice provided under subsection (b) or (c) of this Code section, the museum or archives repository shall, within 60 days after receipt of the written claim, determine if the claim is valid. A claimant shall submit proof of ownership with the claim. If more than one person submits a timely written claim, the museum or archives repository may delay its determination of ownership until the competing claims are resolved by agreement or legal action. If the museum or archives repository determines that the claim is valid or if the competing claims are resolved by agreement or judicial action, the museum or archives repository shall return the property to the claimant submitting the valid claim or dispose of the property as the valid claimant requests. Costs of returning the property or disposing of the property shall be the responsibility of the valid claimant.

(f) If the museum or archives repository does not receive a timely written claim to the property or if the museum or archives repository determines that no valid timely claim to the property was submitted, the museum or archives repository becomes the owner of the property. The museum or archives repository becomes the owner of the property on the day after the period for submitting a written claim ends or on the day after the museum or archives repository determines that no valid timely written claim was submitted. The museum or archives repository owns the property free from all claims.

History.
Code 1981, § 10-1-529.4, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.5. Acquisition of undocumented property.

(a) Property in the possession of a museum or archives repository which the museum or archives repository has reason to believe may be on loan and for which the museum or archives repository does not know the owner or have any reasonable means of determining the owner becomes the property of the museum or archives repository if no person has claimed the property within seven years after the museum or archives repository or a predecessor or assignor of such museum or archives repository took possession of the property. The museum or archives repository becomes the owner of the property on the day after the seven-year period ends and after following the notification process outlined in subsection (b) of this Code section free from all claims.

(b) The museum or archives repository that wishes to acquire title to

undocumented property described in subsection (a) of this Code section shall provide public notice in the manner described in Code Section 10-1-529.4.

(c) On or after July 1, 2006, property that:

(1) Is found in or on property controlled by the museum;

(2) Is from an unknown source; and

(3) Might reasonably be assumed to have been intended as a gift to the museum

is conclusively presumed to be a gift to the museum if ownership of the property is not claimed by a person within 90 days of its discovery.

History.
Code 1981, § 10-1-529.5, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.6. Application of conservation measures to property on loan to museum or archives.

(a) Unless there is a written loan agreement to the contrary, a museum or archives repository may apply conservation measures to property on loan to the museum or archives repository without the lender's permission or formal notice if action is required to protect the property on loan or other property in the custody of the museum or archives repository or the property on loan is a hazard to the health and safety of the public or the museum or archives repository staff, and either:

(1) The museum or archives repository is unable to reach the lender at the lender's last known address within three days before the time the museum or archives repository determines action is necessary; or

(2) The lender does not respond or will not agree to the protective measures the museum or archives repository recommends and does not terminate the loan and retrieve the property within three days.

(b) If a museum or archives repository applies conservation measures to property under this article, or with the agreement of the lender, unless the agreement provides otherwise, the museum or archives repository acquires a lien on the property in the amount of the costs incurred by the museum or archives repository.

(c) The museum or archives repository is not liable for injury to or loss of the property if the museum or archives repository:

(1) Had a reasonable belief at the time the action was taken that the action was necessary to protect the property on loan or other

property in the custody of the museum or archives repository or that the property on loan was a hazard to the health and safety of the public or the museum or archives repository staff; and

(2) Exercised reasonable care in the choice and application of conservation measures.

History.
Code 1981, § 10-1-529.6, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

10-1-529.7. American Indian human remains and burial objects excluded.

This article shall not apply to objects held by museums pursuant to Part 1 of Article 7 of Chapter 12 of Title 44, relating to American Indian human remains and burial objects held by museums.

History.
Code 1981, § 10-1-529.7, enacted by Ga. L. 2006, p. 720, § 2/SB 195.

ARTICLE 18

AUCTIONEERS

10-1-530. Liability for sale of stolen horse or mule.

Any auctioneer who may sell or dispose of any horse or mule shall be held responsible to the purchaser for damages in the event it is shown and proved that the horse or mule so sold by him was stolen.

History.
Ga. L. 1865-66, p. 260, § 1; Code 1868, § 1439; Code 1873, § 1426; Code 1882, § 1426; Civil Code 1895, § 3563; Civil Code 1910, § 4143; Code 1933, § 96-502.

Cross references.
Regulation of business of auctioneers generally, § 43-6-1 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
7 Am. Jur. 2d, Auctions and Auctioneers, §§ 69, 70.

Am. Jur. Pleading and Practice Forms.
2C Am. Jur. Pleading and Practice Forms, Auctions and Auctioneers, § 1.

C.J.S.
7A C.J.S., Auctions and Auctioneers, § 24.

ALR.
Withdrawal of property from auction sale, 37 A.L.R.2d 1049.

ARTICLE 19

SUNDAY MOTION PICTURE SHOWS AND ATHLETIC EVENTS

10-1-550 through 10-1-555. [Repealed]

History.
Ga. L. 1949, p. 1007, §§ 1-6; Ga. L. 1982, p. 3, § 10; repealed by Ga. L. 2005, p. 622, § 1/SB 287, effective July 1, 2005.

ARTICLE 20

COMMON DAY OF REST

Cross references.
Status of Sunday as religious holiday, § 1-4-2.

Requiring inmates to do unnecessary work on Sunday, § 42-5-40.

JUDICIAL DECISIONS

As to constitutionality of common day of rest, see Rutledge v. Gaylord's, Inc., 233 Ga. 694, 213 S.E.2d 626, 1975 Ga. LEXIS 1424 (1975).

RESEARCH REFERENCES

Am. Jur. 2d.
73 Am. Jur. 2d, Sundays and Holidays, § 1 et seq.
C.J.S.
83 C.J.S., Sunday, § 1 et seq.
ALR.
Violation of Sunday law as ground for civil action for damages, 11 A.L.R. 1220.

Power of municipality to require closing on Sunday of amusements not forbidden on that day by state law, 18 A.L.R. 738.

Power of municipal corporation to legislate as to Sunday observance, 29 A.L.R. 397; 37 A.L.R. 575.

Constitutionality of discrimination by Sunday law or ordinance as between different kinds of business, 46 A.L.R. 290; 119 A.L.R. 752.

Sports, games, or amusements as work, labor, avocation, business, or the like, within Sunday laws, 50 A.L.R. 1050; 56 A.L.R. 813.

Discrimination as between localities in Sunday law, 62 A.L.R. 642.

Validity of administrative proceedings conducted on Sunday or holiday, 26 A.L.R.2d 996.

Injunction to prevent violation of Sunday law, 76 A.L.R.2d 874.

Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 A.L.R.4th 246.

10-1-570. Short title.

This article shall be known and may be cited as "The Common Day of Rest Act of 1974."

History.
Ga. L. 1974, p. 186, § 13.
Cross references.
Freedom of conscience, Ga. Const. 1983, Art. I, Sec. I, Para. III.

Freedom of religion, U.S. Const., amend. I.

10-1-571. Definitions.

As used in this article, the term:

(1) "Two consecutive days of Saturday and Sunday" means the time between 12:00 Midnight on Friday and 12:00 Midnight on Saturday and from 12:00 Midnight on Saturday to 12:00 Midnight on Sunday.

(2) "Two rest days" means the time between 12:00 Midnight on Friday and 12:00 Midnight on Saturday and from 12:00 Midnight on Saturday to 12:00 Midnight on Sunday.

History.
Ga. L. 1974, p. 186, § 2.

10-1-572. Legislative intent.

The purpose of this article is to promote the health, recreation, welfare, repose, and religious liberty of each individual of this state. This article is not designed to be discriminatory in any way or to any group but rather to provide the public with necessary benefits and services at all times, while at the same time protecting the lawful humanitarian, social, and religious rights of each individual.

History.
Ga. L. 1974, p. 186, § 1.

10-1-573. Employees to be given benefit of day of rest.

Any business or industry which operates on either of the two rest days (Saturday or Sunday) and employs those whose habitual day of worship has been chosen by the employer as a day of work shall make all reasonable accommodations to the religious, social, and physical needs of such employees so that those employees may enjoy the same benefits as employees in other occupations.

History.
Ga. L. 1974, p. 186, § 6.

10-1-574. General exemptions from article.

This article is not applicable to and shall not prohibit:

(1) Casual transactions between persons, none of whom are thereby carrying on a business or business transactions;

(2) Agricultural operations such as farming, animal and poultry husbandry, forestry, and allied activity;

(3) The conduct of the businesses and activities referred to in Code Sections 10-1-575 and 10-1-576;

(4) The practice of the healing arts by persons licensed or otherwise authorized to practice the healing arts under the laws of Georgia.

History.
Ga. L. 1974, p. 186, § 10.

10-1-575. Charitable or religious activities exempt.

The prohibitions of this article are not applicable to a person, nonprofit organization, or nonprofit corporation if its activity is conducted solely for charitable or religious purposes.

History.
Ga. L. 1974, p. 186, § 7.

10-1-576. Governmental departments, agencies, and employees exempt.

The prohibitions of this article are not applicable to any federal, state, county, municipal, or other local government department or agency in the conduct of its official duties nor to the employees thereof in the discharge of their official employment.

History.
Ga. L. 1974, p. 186, § 8.

ARTICLE 21

BUYING SERVICES

OPINIONS OF THE ATTORNEY GENERAL

Article does not apply to cocktail lounges selling memberships for certain fee that will permit patrons buying such memberships to escape the normal cover charge required of customers entering the cocktail lounge. 1976 Op. Att'y Gen. No. 76-94.

10-1-590. Short title.

This article shall be known and may be cited as the "Buying Services Act of 1975."

History.
Ga. L. 1975, p. 529, § 1; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-591. Definitions.

As used in this article, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Business day" means any day other than a Saturday, Sunday, or legal holiday.

(3) "Buying service," "buying club," or "club" means any corporation, partnership, unincorporated association, or other business enterprise which is organized with the primary purpose of providing benefits to members from the cooperative purchase of service or merchandise and which desires to effect such purpose through direct solicitation or other business activity in this state.

(4) "Contract" means any contract or agreement by which a person becomes a member of a buying service or club.

(5) "Member" means any natural person who is entitled to any of the benefits of a buying service or buying club.

History. Ga. L. 1975, p. 529, § 2; Ga. L. 1979, p. 643, § 1; Ga. L. 1982, p. 1073, §§ 1, 3; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-592. Buying services and clubs to obtain licenses.

No buying service or club nor any officer, official, employee, or agent thereof shall sell, advertise, or solicit the sale or purchase of memberships or contracts within this state without having first obtained a license to do business in this state from the Attorney General.

History. Ga. L. 1975, p. 529, § 3; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-593. Conditions of licensure; bonds.

As a condition to the issuance or retention of a license required by this article, each buying service or club shall:

(1) Comply with such reasonable conditions for the issuance of a license as may be required by the Attorney General pursuant to this article;

(2) Maintain a bond in the amount of $25,000.00 with a surety company duly authorized to do business in this state or post a cash bond in such amount, payable to the Governor; in either case, such bond shall be for the use and benefit of any person who has entered into a contract for membership in a buying service or club. Such bond shall be conditioned to pay all losses, damages, and expenses that may be sustained by such member by reason of any fraudulent misrepresentation or by reason of any breach of contract by the club; and

(3) Furnish, if the buying service or club operates buying service

activities at more than one physical location in this state, a surety bond for each location of buying service activity, each bond to be in the amount and subject to the conditions stated in paragraph (2) of this Code section.

History.
Ga. L. 1975, p. 529, § 4; Ga. L. 1979, p. 643, § 2; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1984, p. 22, § 10; Ga. L. 2015, p. 1088, § 6/SB 148; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-594. Application for license; renewal; fee.

(a) Application for a license as a buying service or club shall be made on forms prescribed by the Attorney General and shall contain such information and supporting documents as he may require.

(b) Licenses shall be issued for a period of one year and shall be renewable within 90 days preceding the expiration thereof.

(c) The fee for a license or for the renewal thereof shall be $50.00, payable to the Attorney General for deposit by the Office of the State Treasurer in the general fund of the state.

History.
Ga. L. 1975, p. 529, § 5; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 2/SB 296; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-595. Revocation, suspension, and nonrenewal of licenses; grounds; notice and hearing.

(a) Licenses issued under this article may be revoked, suspended, or not renewed by the Attorney General for:

(1) Any violation of the substantive provisions of this article;

(2) A violation of any rule or regulation issued by the Attorney General pursuant to this article; or

(3) A violation of any law of this state.

(b) Licenses shall be revoked or suspended by the Attorney General only following notice and hearing pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Ga. L. 1975, p. 529, § 6; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-596. Approval of Attorney General as to form of contract of membership required; effect of noncompliance.

No contract of membership shall be used by any buying service or club unless such contract is first approved by the Attorney General as

to form. Any contract or agreement used in violation of this Code section shall be null, void, and of no effect.

History. Ga. L. 1975, p. 529, § 7; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-597. Right to cancel membership; how exercised; entitlement to refund; right not waivable.

(a) Any person who has elected to become a member of a club may cancel such membership by giving written notice of cancellation any time before 12:00 Midnight of the third business day following the date on which membership was attained.

(b) Notice of cancellation may be given personally or by mail. If given by mail, the notice is effective upon deposit in a mailbox, properly addressed and postage prepaid. Notice of cancellation need not take a particular form and is sufficient if it indicates, by any form of written expression, the intention of the member not to be bound by the contract.

(c) Cancellation shall be without liability on the part of the member. The member will be entitled to a total refund, within ten days after notice of cancellation is given, of the entire consideration paid for the contract.

(d) Rights of cancellation may not be waived or otherwise surrendered.

History. Ga. L. 1975, p. 529, § 8; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-598. Requirements of contracts of membership; effect of noncompliance.

(a) A copy of every contract shall be delivered to the member at the time the contract is signed.

(b) Every contract must be in writing, must be signed by the member, must designate the date on which the member signed the contract, and must state, clearly and conspicuously in boldface type of a minimum size of 14 points, the following:

"MEMBER'S RIGHT TO CANCEL

If you wish to cancel this contract, you may cancel by delivering or mailing a written notice to the club. To prove that you canceled, it is recommended that you send the notice by certified mail or statutory overnight delivery. The notice must say that you do not wish to be bound by the contract and must be delivered or mailed before 12:00 Midnight of the third business day after you sign this contract. The notice must be delivered or mailed to: _____(insert name and mailing address of club)_____. If you cancel, the club will return, within ten days of the date on which you give notice of cancellation, a total refund. It is recommended that you mail the notice of cancellation by certified mail or statutory overnight delivery, return receipt requested; check with your post office as to the time when you will be able to mail a certified letter. Be sure to keep a photocopy of the notice of cancellation which you mail."

(c) Every contract which does not contain the notice specified in subsection (b) of this Code section may be canceled by the member at any time, without liability, by giving notice of cancellation by any means. Nothing contained in this Code section shall be construed to require that a member's cancellation notice be sent by certified mail or statutory overnight delivery in order to effect a cancellation.

History.
Ga. L. 1975, p. 529, § 9; Ga. L. 1983, p. 3, § 8; Ga. L. 1987, p. 1347, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-599. Authorized duration of contract of membership; disclosure requirement.

No contract shall be valid for a term longer than 18 months from the date upon which the contract is signed. However, a club may allow a member to convert his or her contract into a contract for a period longer than 18 months after the member has been a member of the club for a period of at least six months. The duration of the contract shall be clearly and conspicuously disclosed in the contract in boldface type of a minimum size of 14 points.

History.
Ga. L. 1975, p. 529, § 10; Ga. L. 1984, p. 22, § 10; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-600. Maintenance of records; inspection.

(a) Each buying service or club licensed in this state shall keep and maintain:

(1) Accurate accounts, books, and records of all transactions in this state;

(2) Copies of all agreements;

(3) Dates and amounts of payments made and accepted thereon; and

(4) The names and addresses of all members in this state.

(b) Such accounts, books, and records shall be open for inspection by the Attorney General during normal business hours on all normal business days.

History. Ga. L. 1975, p. 529, § 11; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-601. Rules, regulations, and orders.

The Attorney General is authorized to promulgate, adopt, and issue rules, regulations, and orders necessary or convenient to carry out the provisions and purposes of this article. Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall apply to the promulgation of rules and regulations by the Attorney General pursuant to this Code section.

History. Ga. L. 1975, p. 529, § 13; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-602. Application of "Georgia Administrative Procedure Act" and "Fair Business Practices Act of 1975."

Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall apply to all actions and proceedings of an administrative nature taken by the Attorney General pursuant to this article, except where the Attorney General is acting under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975." A violation of this article shall also be considered a violation of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975."

History. Ga. L. 1975, p. 529, § 14; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1987, p. 1347, § 2; Ga. L. 2015, p. 1088, § 6/SB 148.

Cross references. Fair Business Practices Act, § 10-1-390 et seq.

10-1-603. Injunctions.

In addition to any other proceedings authorized by this article, the Attorney General may bring a civil action in the superior courts to enjoin any violation or threatened violation of any provision of this article or any rule, regulation, or order issued or enforced by the Attorney General pursuant to this article.

History. Ga. L. 1975, p. 529, § 12; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-604. Civil penalty for violation; administrative hearing and review; judicial review; judgment on final order; remedy concurrent, alternative, and cumulative.

(a) In order to enforce this article or any orders, rules, and regulations promulgated pursuant thereto, the Attorney General may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation, whenever he or she determines, after a hearing, that any person has violated any provisions of this article or any rules, regulations, or orders promulgated under this article.

(b) The hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the Attorney General shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." All penalties recovered as provided in this Code section shall be paid into the state treasury.

(c) The Attorney General may file, in the superior court of the county in which the person under an order resides, or if the person is a corporation, in the superior court of the county in which the corporation under an order maintains its principal place of business, or in the superior court of the county in which the violation occurred, a certified copy of the final order of the Attorney General unappealed from or of a final order of the Attorney General affirmed upon appeal. Thereupon, the court shall render judgment in accordance therewith and shall notify the parties. Such judgment shall have the same effect and proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by such court.

(d) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Attorney General with respect to any violation of this article and any order, rules, or regulations promulgated pursuant thereto.

History. Ga. L. 1979, p. 643, § 3; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1984, p. 22, § 10; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-605. Penalty.

Any person, firm, corporation, organization, partnership, entity,

buying club, or buying service violating any provision of this article shall be guilty of a misdemeanor.

History.
Ga. L. 1975, p. 529, § 15; Ga. L. 2015, p. 1088, § 6/SB 148.

10-1-606. Continuing validity of previously adopted rules, orders, actions, and regulations.

Rules, orders, actions, and regulations previously adopted which relate to functions performed by the administrator appointed pursuant to the Fair Business Practices Act of 1975 which were transferred under this article to the Attorney General shall remain of full force and effect as rules, orders, actions, and regulations of the Attorney General until amended, repealed, or superseded by rules or regulations adopted by the Attorney General.

History.
Code 1981, § 10-1-606, enacted by Ga. L. 2015, p. 1088, § 6/SB 148.

ARTICLE 22

MOTOR VEHICLE FRANCHISE PRACTICES

Editor's notes.
Ga. L. 1993, p. 1585, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to substantively reenact certain legislation relating to distribution of tractors, farm equipment, heavy equipment, and motor vehicles subsequent to the ratification at the 1992 general election of a constitutional amendment declaring that such distribution vitally affects the general economy of the state and the public interest and public welfare and authorizing the General Assembly to regulate such distribution. This Act is intended to ratify and affirm the validity of such legislation subsequent to the ratification of said constitutional amendment; and this Act shall not in any manner be construed to imply a legislative determination that such legislation was not valid prior to the ratification of said constitutional amendment."

Ga. L. 1993, p. 1585, § 2, effective April 27, 1993, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 10-1-620 through 10-1-628 (Part 1), 10-1-630 and 10-1-631 (Part 2), 10-1-640 through 10-1-644 (Part 3), 10-1-650 through 10-1-654 (Part 4), 10-1-660 through 10-1-663 (Part 5), and 10-1-665 through 10-1-668 (Part 6), and was based on Ga. L. 1983, p. 1548, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1990, p. 1004, §§ 2-5; Ga. L. 1991, p. 94, § 10; and Ga. L. 1991, p. 797, § 2.

Part 1

General Consideration

RESEARCH REFERENCES

ALR.
Validity, construction, and application of state statutes regulating dealings between automobile manufacturers,

dealers, and franchisees, 82 A.L.R.4th 624.

10-1-620. Short title.

This article shall be known and may be cited as the "Georgia Motor Vehicle Franchise Practices Act."

History.
Code 1981, § 10-1-620, enacted by Ga. L. 1993, p. 1585, § 2.

Law reviews.
For annual survey on business associations, see 65 Mercer L. Rev. 55 (2013).

JUDICIAL DECISIONS

Anti-encroachment provision construed. — Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is engaged in the business of selling new motor vehicles, sells those vehicles, or when a dealer qualified as such because the dealer engages exclusively in the repair of motor vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269, 2012 Ga. LEXIS 777 (2012).

10-1-621. Legislative findings.

The General Assembly finds and declares that:

(1) The distribution and sale of motor vehicles within this state are vital to the general economy of this state and to the public interest and public welfare;

(2) The provision for warranty service and the repair of predelivery transportation damages to motor vehicles is of substantial concern to the people of this state;

(3) The maintenance of full and fair competition among dealers and others is in the public interest; and

(4) The maintenance of strong and sound dealerships is essential to provide continuing and necessary reliable services to the consuming public in this state and to provide stable employment to the citizens of this state.

History.
Code 1981, § 10-1-621, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-622. Definitions.

As used in this article, the term:

(.1) "Consumer data" means "nonpublic personal information" as such term is defined in 15 U.S.C. Section 6809(4) as it existed on January 1, 2019, that is:

(A) Collected by a dealer; and

(B) Provided by the dealer directly to a manufacturer or third party acting on behalf of a manufacturer. Such term shall not include the same or similar data obtained by a manufacturer from any source other than the dealer or dealer's data management system.

(.2) "Data management system" means a computer hardware or software system that:

(A) Is owned, leased, or licensed by a dealer, including a system of web based applications, computer software, or computer hardware;

(B) Is located at the dealership or hosted remotely; and

(C) Stores and provides access to consumer data collected or stored by a dealer.

Such term shall include, but shall not be limited to, dealership management systems and customer relations management systems.

(1) "Dealer" means any person engaged in the business of selling, offering to sell, soliciting, or advertising the sale of new motor vehicles and who is licensed or otherwise authorized to utilize trademarks or service marks associated with one or more makes of motor vehicles in connection with such sales. The term "dealer" shall also include any person who engages exclusively in the repair of motor vehicles, except motor homes, if such repairs are performed pursuant to the terms of a franchise or other agreement with a franchisor or such repairs are performed as part of a manufacturer's or franchisor's warranty. The term "dealer" shall not mean any person engaged solely in the business of selling used motor vehicles.

(2) "Dealership" means:

(A) The dealer, if the dealer is a corporation, partnership, or other business organization; or

(B) All business assets used in connection with the dealer's business pursuant to the franchise including, but not limited to, the dealership facilities, the franchise, inventory, accounts receivable, and good will if the dealer is an individual.

(3) "Dealership facilities" means the location at which a dealer, pursuant to a franchise, maintains a permanent showroom for new motor vehicles.

(4) "Designated successor" means any person or child who, in the case of the owner's death, is entitled to inherit the ownership interest

in the dealership under the owner's will or who, in the case of an incapacitated owner, has been appointed by a court as the legal representative of the owner's property or has been otherwise lawfully nominated or constituted to manage the dealership on behalf of the owner. A "designated successor" may also mean a person specifically named in the franchise agreement or any addendum to the franchise agreement.

(5) "Distributor" means any person, resident or nonresident, who directly or indirectly in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale if such person is the principal supplier of any make of motor vehicle for two or more dealers.

(6) "Franchise" means the written agreement or contract between any franchisor and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract and pursuant to which the dealer purchases and resells motor vehicles or leases or rents the dealership facilities. A franchisor is prohibited from effectuating through any letter, memo, or other document or electronic communication any action or terms that this article makes unlawful when included in a franchise agreement.

(7) "Franchisor" means:

(A) Any person, resident or nonresident, who directly or indirectly licenses or otherwise authorizes one or more dealers to use a trademark or service mark associated with a make of motor vehicle in connection with the retail sale of new motor vehicles bearing such trademark or service mark;

(B) Any person who in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale; and

(C) Any person, other than a person who finances the purchase or lease of motor vehicles, who is controlled by a franchisor or more than 10 percent owned by a franchisor, as that term is defined in subparagraphs (A) and (B) of this paragraph.

(8) "Good faith" means honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as defined in Code Section 11-1-201.

(8.1) "Line-make" is a collection of models, series, or groups of motor vehicles manufactured by or for a particular manufacturer, distributor, or importer that are offered for sale, lease, or distribution pursuant to a common brand name or mark; provided, however, that:

(A) Multiple brand names or marks may constitute a single line-make, but only when included in a common dealer agreement

and the manufacturer, distributor, or importer offers such vehicles bearing the multiple names or marks together only, and not separately, to its authorized dealers; and

(B) Motor vehicles bearing a common brand name or mark may constitute separate line-makes when pertaining to motor vehicles subject to separate dealer agreements or when such vehicles are intended for different types of use.

(9) "Manufacturer" means any person who performs the major portion of the assembly of a new motor vehicle.

(10) "Motor vehicle" means every self-propelled vehicle intended primarily for use and operation on the public highways, except farm tractors and other machines and tools used in the production, harvesting, and care of farm products, construction equipment, and recreational vehicles as defined in paragraph (5) of subsection (a) of Code Section 10-1-679.

(11) "New motor vehicle" means a motor vehicle on which the original motor vehicle title has not been issued.

(12) "Owner" means any person holding an ownership interest in a dealership.

(13) "Person" means every natural person, partnership, corporation, association, trust, estate, or any other legal entity.

(13.1) "Relevant market area" means the area located within an eight-mile radius of an existing dealership.

(14) "Warrantor" means any person who gives a warranty in connection with a new motor vehicle.

(15) "Warranty" means a written document signed or authorized by the party on whose behalf it is given which is made or given incident to the sale or lease of a new motor vehicle which contains either statements or promises that said new motor vehicle meets or will meet certain standards or promises to perform certain repairs or other services in connection with said new motor vehicle if necessary. Such term does not include service contracts, mechanical or other insurance, or "extended warranties" sold for separate consideration by a dealer or other person not controlled by a manufacturer or distributor.

History.

Code 1981, § 10-1-622, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 1; Ga. L. 2005, p. 1233, § 1/SB 155; Ga. L. 2010, p. 988, § 2/HB 1072; Ga. L. 2015, p. 951, § 1/HB 393; Ga. L. 2015, p. 996, § 3C-3/SB 65; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2019, p. 517, § 1/SB 122; Ga. L. 2020, p. 493, § 10/SB 429; Ga. L. 2024, p. 1052, § 2(21)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modern-

ize, and correct the Code, substituted "however, that:" for "however:" in the beginning of paragraph (8.1).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, capitalization was revised in paragraph (6).

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: "(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Law reviews.

For annual survey on business corporations, see 64 Mercer L. Rev. 61 (2012).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 23 (2015).

JUDICIAL DECISIONS

Franchise agreement not created. — Acknowledgment document between automobile dealer and automobile manufacturer did not meet the definitional requirements of the Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., and neither the intent of the parties nor their acknowledged course of conduct could create a statutory franchise agreement between them where none was executed. Hoyt's Cycle Store, Inc. v. American Suzuki Motor Corp., 202 Ga. App. 15, 413 S.E.2d 455, 1991 Ga. App. LEXIS 1649 (1991), cert. denied, No. S92C0299, 1992 Ga. LEXIS 34 (Ga. Jan. 10, 1992).

Franchisee's standing to seek to enjoin establishment of competing dealership. — Franchisee did not have standing to seek to enjoin the establishment of a competing dealership within eight miles of the franchisee's service center because: (1) for purposes of the statute, the franchisee's relevant market area was the area within eight miles of an existing dealership; (2) "dealership" meant the "person" of the corporate franchisee; (3) the franchisee's principal place of business and registered office were at a location other than the service center, which location was more than eight miles from the new dealership's proposed location; so, (4) under the plain language of O.C.G.A. § 10-1-664(b), the service center was not, by definition, an existing dealership in whose relevant market area the franchisor intended to establish a new dealership since, under O.C.G.A. § 10-1-622(1) and (2)(A), "dealership" or "dealer" was defined as the "person," which in this case was a corporation, and a corporate "dealership" or "dealer" was not defined according to the corporation's facilities. WMW, Inc. v. Am. Honda Motor Co., 311 Ga. App. 1, 714 S.E.2d 689, 2011 Ga. App. LEXIS 686 (2011), aff'd on other grounds, 291 Ga. 683, 733 S.E.2d 269, 2012 Ga. LEXIS 777 (2012).

Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is

engaged in the business of selling new motor vehicles, sells those vehicles, or where a dealer qualified as such because the dealer engages exclusively in the repair of motor vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269, 2012 Ga. LEXIS 777 (2012).

Applicability of paragraph (11). — Paragraph (11) of O.C.G.A. § 10-1-622 applies to transactions between automobile manufacturers and their franchisees not to transactions between car dealers and their retail customers. Toirkens v. Willett Toyota, Inc., 192 Ga. App. 109, 384 S.E.2d 218, 1989 Ga. App. LEXIS 959 (1989).

Finance company was not a franchisor and could not be liable under the Georgia Motor Vehicle Dealer's Day in Court Act, O.C.G.A. § 10-1-630 et seq. Nissan Motor Acceptance Corp. v. Stovall Nissan, 224 Ga. App. 295, 480 S.E.2d 322, 1997 Ga. App. LEXIS 50 (1997).

10-1-623. Action for violation of article; punitive damages; equitable relief; standing; venue.

(a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise or other terms or provisions of any novation, waiver, or other written instrument, any person who is or may be injured by a violation of a provision of this article or any party to a franchise who is so injured in his or her business or property by a violation of a provision of this article relating to that franchise or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this article may file a petition with the Department of Revenue as provided in Code Section 10-1-667 or may bring an action in any court of competent jurisdiction for damages and equitable relief including injunctive relief. Said person may recover damages therefor in any amount equal to the greater of (1) the actual pecuniary loss or (2) three times the actual pecuniary loss, not to exceed $750,000.00. In addition, said person may recover costs and reasonable attorney's fees as damages. Upon a prima-facie showing by the person filing the petition or cause of action that a violation of this article has occurred, the burden of proof shall then be upon the opposing party to prove that such violation did not occur.

(b) If the franchisor engages in aggravated or continued multiple intentional violations of a provision or provisions of this article, the court may award punitive damages in addition to any other damages authorized under this part.

(c) A dealer, owner, or other party, if he has not suffered any loss of money, property, employment rights, or business opportunity, may obtain final equitable relief if it can be shown that the violation of a provision of this article by a franchisor may have the effect of causing such loss of money, property, employment rights, or business opportunity.

(d) This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement to resolve a specific claim,

dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration.

(e) Any corporation or association which is primarily owned by or comprised of dealers and which primarily represents the interests of dealers shall have standing to file a petition or cause of action with the Department of Revenue or with any court of competent jurisdiction for itself or by, for, or on behalf of any dealer or group of dealers for an alleged violation of this article or for the determination of any rights created by this article.

(f) In addition to any county in which venue is proper in accordance with any provision of the Constitution of this state or any other provision of this Code, in any cause of action brought against a manufacturer, franchisor, or distributor which is a corporation by a dealer for any alleged breach of the franchise agreement or alleged violation of this article or for the determination of any rights created by the franchise agreement or this article, venue shall be proper in the county in which the dealer engaged in the business of selling the products or services of such manufacturer, franchisor, or distributor, and the manufacturer, franchisor, or distributor which is a corporation shall be deemed to reside in such county for venue purposes. Any provision of a franchise or other agreement, under which the parties determine, agree to, control, restrict, establish, limit, or direct the venue in which a cause of action under this article shall be brought, shall be void.

History.

Code 1981, § 10-1-623, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 2; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 988, § 3/HB 1072.

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

JUDICIAL DECISIONS

Punitive damages. — In an action by an automobile dealership franchisee against the franchisor for wrongful termination of the franchise agreement, the trial court was authorized to substitute the court's award of punitive damages for that of the jury. Moore v. American Suzuki Motor Corp., 211 Ga. App. 337, 439 S.E.2d 43, 1993 Ga. App. LEXIS 1533 (1993), cert. denied, No. S94C0470, 1994 Ga. LEXIS 536 (Ga. Mar. 1, 1994), cert. denied, No. S94C0489, 1994 Ga. LEXIS 547 (Ga. Feb. 28, 1994).

No legal duty to consumer. — Trial court erred by denying a franchisor's motion for summary judgment with

regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737, 2008 Ga. App. LEXIS 1057 (2008).

10-1-624. Applicability; use of subsidiary to accomplish illegal act prohibited.

(a) Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering of advertising for sale or has business dealings with respect to a new motor vehicle sale within this state shall be subject to the provisions of this article and shall be subject to the jurisdiction of the courts of this state.

(b) The applicability of this article shall not be affected by a choice of law clause in any franchise, agreement, waiver, novation, or any other written instrument.

(c) Any provision of any franchise, agreement, waiver, novation, or any other written instrument executed, modified, extended, or renewed after July 1, 1983, which is in violation of any Code section of this article, and any amendments thereto, shall be deemed null and void and without force and effect.

(d) No franchisor shall use any subsidiary corporation, affiliated corporation, or any other controlled corporation, partnership, association, or person to accomplish what would otherwise be illegal conduct under this article on the part of the franchisor.

History.

Code 1981, § 10-1-624, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2010, p. 988, § 4/HB 1072.

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-625. Limitations of actions.

Actions arising out of any provision of this article shall be commenced within a four-year period of the accrual of the cause of action; however, if a person liable under this article conceals the cause of action from the knowledge of the person entitled to bring the action, the period prior to the discovery of his cause of action by the person entitled to bring such action shall be excluded in determining the time limited for the commencement of the action.

History.
Code 1981, § 10-1-625, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-626. Remedies not exclusive.

The rights, remedies, and duties contained in this article are not exclusive but are cumulative with the rights, remedies, and duties otherwise provided by law. The rights and duties contained in the various parts of this article are not exclusive but are cumulative with the rights and duties provided in other parts of this article.

History.
Code 1981, § 10-1-626, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-627. Waiver of article void; voluntary releases valid.

No franchisor, nor any agent nor employee of a franchisor, shall use a written instrument, agreement, or waiver to attempt to nullify any of the provisions of this article and any such agreement, written instrument, or waiver shall be null and void. This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement to resolve a specific claim, dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration.

History.
Code 1981, § 10-1-627, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2010, p. 988, § 5/HB 1072.

Editor's notes.
Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-628. Attorney's fees.

Whenever any person brings an action or complaint to enforce any provision of this article in any court of competent jurisdiction and prevails or substantially prevails in such action or complaint, the court may award the person bringing such action or complaint his reasonable attorney's fees. Such attorney's fees shall be taxed and collected as part of the costs and shall be in addition to any other costs or penalties imposed.

History.
Code 1981, § 10-1-628, enacted by Ga. L. 1993, p. 1585, § 2.

Part 2

Motor Vehicle Dealer's Day in Court

JUDICIAL DECISIONS

No retroactive effect. — Because Georgia Motor Vehicle Dealer's Day in Court Act, O.C.G.A. § 10-1-630 et seq., and the Georgia Motor Vehicle Fair Practices Act, O.C.G.A. § 10-1-660 et seq., affect the substantive rights of the parties, the statutes cannot be given retroactive effect. Stamps v. Ford Motor Co., 650 F. Supp. 390, 1986 U.S. Dist. LEXIS 18434 (N.D. Ga. 1986) (decided prior to 1993 reenactment).

Georgia Motor Vehicle Dealer's Day in Court Act, O.C.G.A. § 10-1-630 et seq., in Georgia applied only to acts after July 1, 1983. Ewers v. Ford Motor Co., 843 F.2d 1331, 1988 U.S. App. LEXIS 5714 (11th Cir. 1988) (decided prior to 1993 reenactment).

10-1-630. Short title.

This part shall be known and may be cited as the "Georgia Motor Vehicle Dealer's Day in Court Act."

History.
Code 1981, § 10-1-630, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-631. Unlawful acts of franchisor.

(a) It is declared to be violative of the existing law of the State of Georgia for any franchisor:

(1) To fail to act in good faith with any dealer in connection with the sale, transfer, termination, or succession of a franchise or in connection with the operation of a dealer's business pursuant to a franchise or to fail to act in good faith in any of its business transactions with a dealer; or

(2) To utilize a boycott, refusal to deal, threat of refusal to deal, coercion, threat of punitive action, withholding of benefits, or other unconscionable business practices in any of its business transactions with a dealer.

(b) Without limitation as to other actions which may violate this Code section, it shall be evidence of a violation of this Code section if a franchisor commits any action which would be a violation of any part of Part 1 of this article, the "Georgia Motor Vehicle Franchise Practices Act."

History.
Code 1981, § 10-1-631, enacted by Ga. L. 1993, p. 1585, § 2.

JUDICIAL DECISIONS

Bad faith required. — A violation of O.C.G.A. § 10-1-631 was not established by the prospective transferee of a franchise who failed to show that the franchisor acted in bad faith in rejecting the transfer. Hickman v. American Honda Motor Co., 982 F. Supp. 881, 1997 U.S. Dist. LEXIS 20786 (N.D. Ga. 1997), aff'd, 138 F.3d 958, 1998 U.S. App. LEXIS 7062 (11th Cir. 1998).

Finance company was not a franchisor and could not be liable under Georgia Motor Vehicle Dealer's Day in Court Act, O.C.G.A. § 10-1-630 et seq. Nissan Motor Acceptance Corp. v. Stovall Nissan, 224 Ga. App. 295, 480 S.E.2d 322, 1997 Ga. App. LEXIS 50 (1997).

No legal duty to consumer. — Trial court erred by denying a franchisor's motion for summary judgment with regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737, 2008 Ga. App. LEXIS 1057 (2008).

10-1-632. Protection of consumer data in motor vehicle sales or lease transactions; burden of proof for violations.

(a) With respect to consumer data, a franchisor, manufacturer, distributor, or a third party acting on behalf of a franchisor, manufacturer, or distributor:

(1) Shall comply with and shall not cause a dealer to violate any applicable restrictions on reuse or disclosure of the consumer data established by federal or state law;

(2) Shall provide a written statement to the dealer upon request describing the established procedures adopted by such franchisor, manufacturer, distributor, or third party acting on behalf of the franchisor, manufacturer, or distributor which meet or exceed any federal or state requirements to safeguard the consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. Section 6801, et seq.;

(3) Shall, upon the written request of the dealer, provide a written list of the consumer data obtained from the dealer and all persons to whom any consumer data has been provided by the franchisor, manufacturer, distributor, or a third party acting on behalf of a franchisor, manufacturer, or distributor during the preceding six months. The dealer may make such a request no more than once every six months. The list must indicate the specific fields of consumer data which were provided to each person. Notwithstanding the foregoing, such a list shall not be required to include:

(A) A person to whom consumer data was provided, or the

specific consumer data provided to such person, if the person was, at the time such consumer data was provided, a service provider, subcontractor, or consultant acting in the course of performance of services on behalf of or for the benefit of the franchisor, manufacturer, distributor, third party, or dealer, provided that the franchisor, manufacturer, distributor, third party, or dealer has entered into an agreement with such person requiring that such person comply with the safeguard requirements of applicable state and federal law, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. Section 6801, et seq.; and

(B) A person to whom consumer data was provided, or the specific consumer data provided to such person, if the dealer has previously consented in writing to such person receiving such consumer data and the dealer has not withdrawn such consent in writing;

(4) May not require that a dealer grant the franchisor, manufacturer, distributor or a third party acting on behalf of a franchisor, manufacturer, or distributor direct or indirect access to such dealer's data management system to obtain consumer data. A franchisor, manufacturer, distributor, or a third party acting on behalf of a franchisor, manufacturer, or distributor must permit a dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the dealer. However, a franchisor, manufacturer, or distributor, or a third party acting on behalf of a franchisor, manufacturer, or distributor may access or obtain consumer data directly from a dealer's data management system with the express consent of the dealer. The consent must be in the form of a written document that is separate from the parties' franchise agreement, is executed by the dealer, and may be withdrawn by the dealer upon 30 days' written notice to the franchisor, manufacturer, or distributor as applicable. For incentive programs beginning on or after July 1, 2019, such consent shall not be required as a condition to a motor vehicle dealer's participation in an incentive program unless such consent is necessary to obtain consumer data to implement the program; and

(5) Shall indemnify the dealer for any third-party claims asserted against or damages incurred by the dealer to the extent caused by access to, use of, or disclosure of consumer data in violation of this Code section by the franchisor, manufacturer, distributor or a third party to whom the franchisor, manufacturer or distributor has provided consumer data.

(b) Nothing contained in this Code section shall limit the ability of the franchisor, the manufacturer, or distributor, to require that the

dealer provide, or use in accordance with the law, such customer information related solely to such manufacturer's or distributor's own vehicle makes to the extent necessary to do any of the following:

(1) Satisfy any safety or recall notice obligations or other legal notice obligations on the part of the manufacturer;

(2) Complete the sale and delivery of a new motor vehicle to a customer;

(3) Validate and pay customer or dealer incentives;

(4) Submit to the franchisor, manufacturer, or distributor claims for any services supplied by the dealer for any claim for warranty parts or repairs;

(5) Market analysis;

(6) Evaluate sales and service customer satisfaction with the dealer, including surveys; or

(7) Reasonable marketing purposes that benefit the dealer.

(c) In any cause of action against a franchisor, manufacturer, or distributor for a violation of this Code section, the party bringing the action shall have the burden of proof.

History.
Code 1981, § 10-1-632, enacted by Ga. L. 2019, p. 517, § 2/SB 122; Ga. L. 2020, p. 493, § 10/SB 429.

Part 3

Motor Vehicle Warranty Practices

10-1-640. Short title.

This part shall be known and may be cited as the "Motor Vehicle Warranty Practices Act."

History.
Code 1981, § 10-1-640, enacted by Ga. L. 1993, p. 1585, § 2.

RESEARCH REFERENCES

ALR.
Validity, construction and effect of state motor vehicle warranty legislation, 88 A.L.R.5th 301.

10-1-641. Requirements of franchisor, manufacturer, and distributor; reasonable compensation for parts and labor; recall notices; stop-sales.

(a)(1) Each franchisor, manufacturer, or distributor:

(A) Shall specify in writing to each of its dealers in this state the dealer's obligations for predelivery preparation including the repair of damages incurred in the transportation of vehicles as set forth in Code Section 10-1-642, recall work, and warranty service on its products;

(B) Shall, at the election of the dealer, reasonably compensate the dealer for parts and labor provided for such warranty service work as provided in paragraph (2) of this subsection;

(C) Shall provide the dealer with a schedule of compensation to be paid such dealer for parts, work, and service in connection therewith; and

(D) Shall provide the dealer with a schedule of the time allowance for the performance of such work and service. Any such schedule of compensation shall include reasonable compensation for diagnostic work, repair service, and labor. Time allowances for the diagnosis and performance of such work and service shall be reasonable and adequate for the work to be performed.

(2)(A) In the determination of what constitutes reasonable compensation for parts and labor under this Code section, the principal factors to be considered shall be the retail rates customarily charged by the dealer, as established pursuant to this paragraph, and the rates for parts and labor charged by other similarly situated franchised dealers in a comparable geographic area in this state offering the same line-make vehicles.

(B) The retail rate customarily charged by the dealer for parts shall be established by the dealer submitting to the franchisor, manufacturer, or distributor 100 sequential nonwarranty customer-paid service repair orders which contain warranty-like repairs or 90 consecutive days of nonwarranty customer-paid service repair orders which contain warranty-like parts, whichever is less. Such service repair orders shall cover repairs made no more than 180 days before the submission. If the franchisor, manufacturer, or distributor determines, from any set of repair orders submitted under this subparagraph, that the retail markup rate for parts calculated is substantially higher or lower than the rate currently on record with the franchisor, manufacturer, or distributor, then the franchisor, manufacturer, or distributor may request additional documentation for a period of either 60 days prior to or 60 days subsequent to the time period for which the repair orders were submitted for purposes of an adjustment. The dealer's retail rate percentage for parts shall be calculated by determining the dealer's total parts sales in the submitted repair orders and dividing that amount by the dealer's

total cost for purchase of those parts, subtracting one from that amount, and then multiplying by 100. The declared retail rate shall be approved or disapproved within 30 days following submission by the dealer. The declared retail rate shall go into effect 30 days following approval by the franchisor, manufacturer, or distributor, unless such franchisor, manufacturer, or distributor disapproves and timely contests the dealer's declared rate. If a franchisor, manufacturer, or distributor fails to disapprove within 30 days following submission by the dealer, the declared retail rate shall be deemed approved. A franchisor, manufacturer, or distributor may contest the dealer's declared parts rate not later than 30 days after submission and declaration of the parts rate by the dealer by reasonably substantiating that the rate is unreasonable in light of the practices of all other similarly situated franchised dealers in a comparable geographic area in this state offering the same line-make vehicles. In contesting the dealer's declared rate, a franchisor, manufacturer, or distributor shall provide a written explanation of the reasons for disagreement with the declared rate. If the declared parts rate is contested, then the franchisor, manufacturer, or distributor shall propose an adjustment of the rate. If the franchisor, manufacturer, or distributor contests the dealer's declared parts rate, the parties shall attempt to resolve the dispute through an internal dispute resolution procedure of the franchisor, manufacturer, or distributor, if available, provided that such procedure occurs within a reasonable amount of time, not to exceed 30 days after notification of disagreement with the dealer's declared rate. If the internal dispute resolution procedure is unsuccessful or does not occur in a timely manner, the dealer may file a petition with the commissioner not later than 60 days after receipt of the proposed adjustment by the franchisor, manufacturer, or distributor or not later than 30 days after conclusion of the internal dispute resolution procedure, whichever is later. If such a petition is filed, the commissioner shall inform the franchisor, manufacturer, or distributor that a timely petition has been filed and that a hearing will be held on such issue. In any hearing held pursuant to this subparagraph, the burden of proof shall be upon the franchisor, manufacturer, or distributor to demonstrate that the parts rate declared by the dealer was unreasonable and not in accordance with this subparagraph.

(C) The retail rate customarily charged by the dealer for labor may be established by submitting to the franchisor, manufacturer, or distributor 100 sequential nonwarranty customer-paid service repair orders for warranty-like repairs or 90 consecutive days of customer-paid service repair orders for warranty-like

repairs, whichever is less. Such service repair orders shall cover repairs made no more than 180 days before the submission. If the franchisor, manufacturer, or distributor determines, from any set of repair orders submitted under this subparagraph, that the retail rate for labor calculated is substantially higher or lower than the rate currently on record with the franchisor, manufacturer, or distributor, then the franchisor, manufacturer, or distributor may request additional documentation for a period of either 60 days prior to or 60 days subsequent to the time period for which the repair orders were submitted for purposes of an adjustment. The retail rate for labor shall be calculated by determining the dealer's total labor sales from the submitted repair orders and dividing that amount by the total number of hours that generated those sales. The declared retail labor rate shall be approved or disapproved within 30 days following submission by the dealer. The declared retail labor rate shall take effect 30 days following approval by the franchisor, manufacturer, or distributor unless such franchisor, manufacturer, or distributor disapproves and timely contests the dealer's declared rate. A franchisor, manufacturer, or distributor may contest the dealer's declared labor rate not later than 30 days after submission and declaration of the labor rate by the dealer by reasonably substantiating that such rate is unreasonable in light of the practices of all other similarly situated franchised motor vehicle dealers in a comparable geographic area in this state offering the same line-make vehicles. If the declared labor rate is contested, then the franchisor, manufacturer, or distributor shall propose an adjustment of the declared retail labor rate. If the franchisor, manufacturer, or distributor contests the dealer's declared labor rate, the parties shall attempt to resolve the dispute through an internal dispute resolution procedure of the franchisor, manufacturer, or distributor, if available, provided that such procedure occurs within a reasonable amount of time not to exceed 30 days after notification of disagreement with the dealer's declared rate. If the internal dispute resolution procedure is unsuccessful or does not occur in a timely manner, the dealer may file a petition with the commissioner not later than 60 days after receipt of the proposed adjustment by the franchisor, manufacturer, or distributor or not later than 30 days after conclusion of the internal dispute resolution procedure, whichever is later. If such a petition is filed, the commissioner shall inform the franchisor, manufacturer, or distributor that a timely petition has been filed and that a hearing will be held on such issue. In any hearing held pursuant to this subparagraph, the burden of proof shall be upon the franchisor, manufacturer, or distributor to demonstrate that the labor rate declared by the dealer was unreasonable and not in accordance with this subparagraph.

(D) In calculating the retail rate customarily charged by the dealer for parts and labor for purposes of this paragraph, the following work shall not be included in the calculation:

(i) Repairs for franchisor, manufacturer, or distributor special events, specials, or promotional discounts for retail customer repairs;

(ii) Parts sold at wholesale;

(iii) Routine maintenance not covered under any retail customer warranty, such as fluids, filters, and belts not provided in the course of repairs;

(iv) Nuts, bolts, fasteners, and similar items which contain no individual part number;

(v) Tires; and

(vi) Vehicle reconditioning.

(E) If a franchisor, manufacturer, or distributor furnishes a part or component to a dealer to use in performing repairs under a recall, campaign service action, or warranty repair at no cost to the dealer, the franchisor, manufacturer, or distributor shall compensate the dealer for the authorized repair part or component in the same manner as warranty parts compensation under this Code section by paying the dealer the retail rate markup on the cost for the part or component as listed in the price schedule of the franchisor, manufacturer, or distributor less the cost for the part or component.

(F) No franchisor, manufacturer, or distributor shall require a dealer to establish the retail rate customarily charged by the dealer for parts and labor by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time consuming to provide, including, but not limited to, part-by-part or transaction-by-transaction calculations. No dealer shall declare a retail rate for parts or labor or both more than once in one calendar year.

(b)(1) Franchisors, manufacturers, and distributors shall include in written notices of factory recalls to dealers the expected date by which necessary parts and equipment will be available to dealers for the repair or replacement of recalled parts and equipment. Franchisors, manufacturers, and distributors shall compensate any dealers in this state for repairs affected by all recalls.

(2) All such claims shall be either approved or disapproved within 30 days after their receipt on forms and in the manner specified by the franchisor, manufacturer, or distributor, and any claim not

specifically disapproved in writing within 30 days after the receipt shall be construed to be approved and payment must follow within 30 days.

(c) Subject to Code Section 10-1-645, a franchisor, manufacturer, or distributor shall not recover its costs from dealers within this state, including a surcharge imposed on a dealer solely intended to recover the cost of reimbursing the dealer for parts and labor pursuant to this Code section, provided that a franchisor, manufacturer, or distributor shall not be prohibited from increasing prices for vehicles or parts in the normal course of business.

(d)(1) For purposes of this subsection, the term "stop-sale" means a notification issued by a manufacturer to its franchised dealers stating that certain used motor vehicles in inventory shall not be sold or leased, at either retail or wholesale, due to a federal safety recall for a defect or a noncompliance or a federal emissions recall.

(2) A franchisor, manufacturer, or distributor shall compensate its dealers for all labor and parts required by the manufacturer to perform recall repairs. Compensation for recall repairs shall be reasonable. If parts or a remedy are not reasonably available to perform a recall service or repair on a used vehicle held for sale by a dealer authorized to sell and service new motor vehicles of the same line-make within 30 days of the manufacturer issuing the initial notice of recall, and the manufacturer has issued a stop-sale or do not drive order on the vehicle, the manufacturer shall compensate the dealer at a prorated rate of at least 1 percent of the value of the vehicle per month beginning on the date that is 30 days after the date on which the stop-sale or do not drive order was provided to the dealer to the earlier of the date the recall or repair parts or remedy are made available or the date the dealer sells, trades, transfers, or otherwise disposes of the affected used motor vehicle.

(3) The value of a used motor vehicle shall be the average trade-in value for used motor vehicles as indicated in an independent third-party guide for the year, make, and model of the recalled vehicle.

(4) This subsection shall apply only to used motor vehicles subject to safety or emissions recalls pursuant to and recalled in accordance with federal law and regulations adopted thereunder and where a stop-sale or do not drive order has been issued and repair parts or remedy remain unavailable for 30 days or longer.

(5) This subsection shall apply only to dealers holding an affected used motor vehicle for sale in inventory at the time a stop-sale or do not drive order is issued or which was taken into the used motor vehicle inventory of the dealer as a consumer trade-in incident to the purchase of a new motor vehicle from the dealer after the stop-sale or

do not drive order was issued, and that are a line-make that the dealer is franchised to sell or on which the dealer is authorized to perform recall repairs.

(6) It shall be a violation of this subsection for a manufacturer to reduce the amount of compensation otherwise owed to an individual dealer, whether through a chargeback, removal of the individual dealer from an incentive program, or reduction in amount owed under an incentive program, solely because the dealer has submitted a claim for reimbursement under this subsection. This subsection shall not apply to an action by a manufacturer that is applied uniformly among all dealers of the same line-make in this state.

(7) All reimbursement claims made by dealers pursuant to this subsection for recall remedies or repairs, or for compensation where no part or repair is reasonably available and the vehicle is subject to a stop-sale shall be subject to the same limitations and requirements as a warranty reimbursement claim made under this subsection. In the alternative, a manufacturer may compensate its franchised dealers under a national recall compensation program provided the compensation under the program is equal to or greater than that provided under this subsection; or the manufacturer and dealer otherwise agree.

(8) A manufacturer may direct the manner and method in which a dealer must demonstrate the inventory status of an affected used motor vehicle to determine eligibility under this subsection, provided that the manner and method may not be unduly burdensome and may not require information that is unduly burdensome to provide.

(9) Nothing in this subsection shall require a manufacturer to provide total compensation to a dealer which would exceed the total average trade-in value of the affected used motor vehicle as originally determined under paragraph (3) of this subsection.

(10) Any remedy provided to a dealer under this subsection is exclusive and may not be combined with any other state or federal recall compensation remedy.

History.

Code 1981, § 10-1-641, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 3; Ga. L. 2010, p. 988, § 6/HB 1072; Ga. L. 2017, p. 515, § 1/HB 469; Ga. L. 2019, p. 517, § 3/SB 122; Ga. L. 2021, p. 922, § 10/HB 497; Ga. L. 2024, p. 1052, § 2(22)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "time-consuming method" for "time consuming method" in subparagraph (a)(2)(F) and deleted "The provisions under" from the beginning of the second sentence in paragraph (d)(6).

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to

make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-642. Risk of loss for vehicle in transit.

Notwithstanding the terms, provisions, or conditions of any agreement of franchise, a manufacturer or distributor selling motor vehicles to dealers is liable for all damages to such motor vehicles before delivery to a carrier or transporter. If a dealer selects the carrier, the risk of loss passes to the dealer upon delivery of the vehicle to the carrier. In every other instance, the risk of loss remains with the franchisor until such time as the dealer or his designee accepts the vehicle from the carrier.

History.
Code 1981, § 10-1-642, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-643. Payment of dealer's attorney's fees by manufacturer, distributor, or warrantor.

All manufacturers, distributors, and warrantors shall reimburse their dealers for reasonable attorney's fees incurred by the dealer in defending any action in which the dealer is named as a defendant and in which the allegations set forth in the action are based solely upon claims of alleged defective or negligent manufacture, assembly, design of new motor vehicles, parts, or accessories, or other functions by the distributor, manufacturer, or warrantor which are beyond the control of the dealer. For this Code section to be applicable, the dealer must give notice to the manufacturer, distributor, and warrantor within 30 days of the receipt of the action if the manufacturer, distributor, or warrantor is not a named defendant in the action. In addition, this Code section only applies to actions in which a judgment or finding of fault is returned only against the manufacturer, distributor, or warrantor or in which the manufacturer, distributor, or warrantor enters into an agreement which settles or makes final disposition of the action.

History.
Code 1981, § 10-1-643, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-644. Exemptions from part.

This part shall not be applicable with respect to vehicles shipped or contracted to be shipped prior to July 1, 1983, pursuant to contracts which contain provisions which are contrary to matters contained in this part.

History.
Code 1981, § 10-1-644, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-645. Uniform warranty reimbursement agreement amongst dealers.

(a) Any manufacturer or franchisor and at least a majority of its dealers of the same line make may agree to a uniform warranty reimbursement agreement in an express written contract executed by a dealer principal or authorized designee of the dealer principal that specifically cites this Code section. The agreement shall only involve either reimbursement for parts used in warranty repairs or the use of a uniform time standards manual, or both. Reimbursement for parts under the agreement shall be used instead of the dealers' prevailing retail rate charged by that dealer for the same parts as defined in Code Section 10-1-641 to calculate compensation due from the franchisor for parts used in warranty repairs. This Code section does not authorize a franchisor and its dealers to establish a uniform hourly labor reimbursement.

(b) A manufacturer or franchisor that proposes a uniform reimbursement agreement must provide all of its line make dealers a minimum of 30 days to consider such proposal which shall be in writing and provided to the dealer principal or authorized designee of the dealer principal via certified mail or other trackable delivery method, including electronic transmission, to which a notice containing the following language in all capital letters shall be affixed:

GEORGIA LAW ALLOWS TWO ALTERNATIVE METHODS OF WARRANTY REIMBURSEMENT:

1. DEALERS MAY SUBMIT A REQUEST TO RECEIVE RETAIL RATE PURSUANT TO O.C.G.A. SECTION 10-1-641; OR

2. A MAJORITY OF LINE MAKE DEALERS MAY AGREE TO A UNIFORM WARRANTY REIMBURSEMENT AGREEMENT, AS PROPOSED WITH THIS NOTICE.

IN THE EVENT A MAJORITY OF THE SAME LINE MAKE DEALERS AGREE TO THE ATTACHED UNIFORM WARRANTY REIMBURSEMENT AGREEMENT, DEALERS THAT OPT TO SEEK RETAIL RATE PURSUANT TO O.C.G.A. SECTION 10-1-641 MAY BE SUBJECT TO A COST RECOVERY SURCHARGE ON ALL NEW VEHICLE INVOICES.

(c) Each franchisor shall only have one such agreement with each line make. Any such agreement shall:

(1) Establish a uniform parts reimbursement rate. The uniform parts reimbursement rate shall be not less than the greater of the

nationally established rate set forth in the franchisor's sales and service agreement or other warranty manual or policy or the franchisor's national average warranty parts reimbursement rate at the time such agreement becomes effective;

(2) Apply to all warranty repair orders written during the period that the agreement is effective;

(3) Be available, during the period it is effective, to any dealer of the same line make at any time and on the same terms; and

(4) Be for a term not to exceed three years so long as any party to the agreement may terminate the agreement upon the annual anniversary of the agreement and with 30 days' prior written notice; however, the agreement shall remain in effect for the term of the agreement regardless of the number of dealers of the same line make that may terminate the agreement.

(d)(1) As used in this subsection, the term "costs" means the difference between the uniform reimbursement rate set forth in an agreement entered into pursuant to this Code section and the retail rate received by an individual dealer pursuant to Code Section 10-1-641.

(2) A manufacturer or franchisor that enters into a uniform warranty reimbursement agreement as provided in this Code section may seek to recover its costs from only those dealers that are receiving their retail rate pursuant to Code Section 10-1-641 as follows:

(A) The costs shall be recovered only by increasing the invoice price on new vehicles received by those dealers not a party to an agreement under this Code section; and

(B) Price increases imposed for the purpose of recovering costs under this Code section may vary from time to time and from model to model but shall apply to all dealers of the same line make in the State of Georgia that have requested reimbursement for warranty repairs at their prevailing retail rate.

(e) If a manufacturer or franchisor enters into a uniform reimbursement agreement with its dealers, the manufacturer or franchisor shall, within 60 days of entering into such agreement, certify under oath to the Department of Revenue that a majority of the dealers of that line make have entered into such an agreement and shall file a sample copy of the agreement, the required notice, a list of the line make dealers that have agreed to the uniform warranty reimbursement, and the date upon which such agreement was made. On an annual basis, the manufacturer shall certify under oath to the department that the parts warranty reimbursement in the agreement is no less than the greater

of the franchisor's nationally established rate or the national average parts reimbursement rate and that the reimbursement costs it recovers under subsection (d) of this Code section do not exceed the amounts authorized by subsection (d) of this Code section. The manufacturer or franchisor shall maintain for a period of three years a file that contains the information upon which its certification is based.

(f) If a manufacturer or franchisor and its dealers do not enter into an agreement pursuant to this Code section, and for any matter that is not the subject of an agreement, this Code section shall have no effect whatsoever.

(g) For purposes of this Code section, a uniform time standard manual is a document created by a franchisor that establishes the time allowances for the diagnosis and performance of warranty work and service. The allowances shall be reasonable and adequate for the work and service to be performed. Each franchisor shall have a reasonable and fair process that allows a dealer to request a modification or adjustment of a standard or standards included in such a manual.

History.
Code 1981, § 10-1-645, enacted by Ga. L. 2003, p. 445, § 1; Ga. L. 2005, p. 334, § 4-3/HB 501; Ga. L. 2019, p. 517, § 4/SB 122.

Part 4

Motor Vehicle Franchise Continuation and Succession

10-1-650. Short title.

This part shall be known and may be cited as the "Motor Vehicle Franchise Continuation and Succession Act."

History.
Code 1981, § 10-1-650, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-651. Termination of franchise; grounds; notice; dealer costs reimbursed by franchisor; applicability to distributors.

(a) Notwithstanding the terms, provisions, or conditions of any franchise and notwithstanding the terms or provisions of any waiver, no franchisor shall cancel, terminate, or fail to renew any franchise with a dealer unless the franchisor:

(1) Has satisfied the notice requirement of subsection (e) of this Code section; and

(2) Has good cause for cancellation, termination, or nonrenewal.

(b) Notwithstanding the terms, provisions, or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, or nonrenewal when there is a failure by the dealer to comply with a provision of the franchise which is both reasonable and of material significance to the franchise relationship, provided the dealer has been notified in writing of the failure within 180 days after the franchisor first acquired knowledge of such failure or after the dealer is given a reasonable opportunity to correct such failure for a period of not less than 180 days.

(c) If the failure by the dealer, as described in subsection (b) of this Code section, relates to the performance of the dealer in sales or service, then in this Code section the term "good cause" means the failure of the dealer to comply with reasonable performance criteria established by the franchisor in light of existing circumstances, including, but not limited to, current and forecasted economic conditions, provided the following conditions are satisfied:

(1) The dealer was notified by the franchisor in writing of such failure;

(2) Said notification stated that notice was provided of failure of performance pursuant to this Code section;

(3) The performance criteria established by the franchisor was:

(A) Reasonable, fair, and equitable;

(B) Based on accurate information;

(C) Inclusive of relevant and material local and regional data considered by the franchisor that was provided by the dealer that was beyond the control of the dealer and that adversely affected the dealer's performance; and

(D) Based on a statistically significant and valid random sample, if such performance criteria included a survey; and

(4) The dealer was afforded a reasonable opportunity, for a period of not less than six months, to comply with such criteria.

(d) The franchisor shall have the burden of proof under this Code section.

(e)(1) Notwithstanding franchise terms to the contrary, prior to the termination, cancellation, or nonrenewal of any franchise, the franchisor shall furnish notification, as provided in paragraph (2) of this subsection, of such termination, cancellation, or nonrenewal to the dealer as follows:

(A) Not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal;

(B) Not less than 15 days prior to the effective date of such termination, cancellation, or nonrenewal with respect to any of the following:

(i) Insolvency of the dealer, or filing of any petition by or against the dealer under any bankruptcy or receivership law;

(ii) Failure of the dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the dealer;

(iii) Conviction of the dealer, general manager, or managing executive or any owner with a substantial interest therein of any crime which materially relates to the operation of the dealership or any felony which is punishable by imprisonment;

(iv) Suspension for a period of more than 14 days or revocation of any license which the dealer is required to have to operate a dealership; or

(v) Fraud or intentional misrepresentation by the dealer which materially affects the franchise, provided the franchisor gives notice within one year of the time when the fraud or misrepresentation occurred or was discovered, whichever is later; or

(C) Not less than 180 days prior to the effective date of such termination or cancellation where the franchisor is discontinuing the sale of the product line.

(2) Notification under this Code section shall be in writing and shall be by certified mail or statutory overnight delivery or personally delivered to the dealer and shall contain:

(A) A statement of intention to terminate, cancel, or not to renew the franchise;

(B) A statement of the reasons for the termination, cancellation, or nonrenewal; and

(C) The date on which such termination, cancellation, or nonrenewal is to take effect.

(f)(1)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall repurchase from the dealer any new and undamaged motor vehicles of the current and one year prior model year and acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so long as such motor vehicles have been acquired from the franchisor or from another dealer of the same line-make in the

ordinary course of business prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession. Any new motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this subparagraph, a motor vehicle shall be considered new if it has less than 500 miles on the odometer and has not been issued a certificate of title.

(B) In addition to the motor vehicles repurchased under subparagraph (A) of this paragraph, the franchisor shall repurchase demonstration motor vehicles acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed and so long as such motor vehicles do not have more than 6,000 miles each on their odometers. Any such demonstration motor vehicle shall be repurchased at the net cost to the dealer less an allowance for use equal to the net cost to the dealer times the current mileage divided by 100,000. The franchisor shall repurchase a number of demonstration motor vehicles equal to 10 percent of the number of motor vehicles repurchased under subparagraph (A) of this paragraph; however, in no event shall the number of demonstration motor vehicles which the franchisor is required to repurchase ever be less than two or more than 15 motor vehicles.

(C) For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstriping, interior conditioning, or paint sealant.

(2) Upon the termination, cancellation, or nonrenewal of any franchise by the dealer, the franchisor shall repurchase from the dealer any new and undamaged motor vehicles, except motorcycles as defined in paragraph (29) of Code Section 40-1-1 and except motor homes as defined in paragraph (31) of Code Section 40-1-1 and except school buses as defined in paragraph (55) of Code Section 40-1-1, of the current and prior model year acquired by the dealer within 12 months prior to the effective date of the termination so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor of the same line-make and in the normal course of business and so long as such motor vehicles have not

been altered, damaged, or materially changed while in the dealer's possession. Any new motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this paragraph, a motor vehicle shall be considered new if it has less than 500 miles on the odometer and has not been issued a certificate of title. For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstriping, interior conditioning, or paint sealant.

(3)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor or upon the termination, cancellation, or nonrenewal of any franchise by the franchisee, the franchisor shall repurchase, at fair and reasonable compensation, from the dealer the following:

(i) Any unused, undamaged, and unsold parts which have been acquired from the franchisor, provided such parts are currently offered for sale by the franchisor in its current parts catalogue and are in salable condition. Such parts shall be repurchased by the franchisor at the current catalogue price, less any applicable discount;

(ii) Any supplies, equipment, and furnishings, including manufacturer or line-make signs, purchased from the franchisor or its approved source within three years of the date of termination, cancellation, or nonrenewal; and

(iii) Any special tools purchased from the franchisor within three years of the date of termination, cancellation, or nonrenewal or any special tools or other equipment which the franchisor required the dealer to purchase regardless of the time purchased.

(B) Except as provided in division (i) of subparagraph (A) of this paragraph, fair and reasonable compensation shall be the net acquisition price if the item was acquired in the 12 months preceding the effective date of the termination, cancellation, or nonrenewal; 75 percent of the net acquisition price if the item was acquired between 13 and 24 months preceding the effective date of the termination, cancellation, or nonrenewal; 50 percent of the net acquisition price if the item was acquired between 25 and 36 months preceding the effective date of the termination, cancellation, or nonrenewal; 25 percent of the net acquisition price if the item was acquired between 37 and 60 months preceding the effective date of the termination, cancellation, or nonrenewal; or

fair market value if the item was acquired more than 60 months preceding the effective date of the termination, cancellation, or nonrenewal.

(4) The repurchase of any item under this subsection shall be accomplished within 60 days of the effective date of the termination, cancellation, or nonrenewal or within 60 days of the receipt of the item by the franchisor, whichever is later in time, provided the dealer has clear title to the inventory and other items or is able to convey such title to the franchisor and does convey or transfer title and possession of the inventory and other items to the franchisor.

(5) In the event the franchisor does not pay the dealer the amounts due under this subsection or subsection (h) of this Code section within the time period set forth in this subsection, the franchisor shall, in addition to any amounts due, pay the dealer interest on such amount. This interest shall not begin to accrue until the time for payment has expired. The interest shall be computed monthly on any balance due and the monthly interest rate shall be one-twelfth of the sum of the then current *Wall Street Journal* Prime Interest Rate and 1 percentage point.

(g) If a termination or nonrenewal of a franchise is the result of a bankruptcy filing or reorganization of a franchisor or the sale or other change in the business operation of the franchisor, the franchisor shall be required to pay the fair market value of the franchise as of the date of the notice of termination or nonrenewal or 12 months prior to the date of notice of termination or nonrenewal, whichever is greater. Fair market value shall be the goodwill value of the dealer's franchise in the dealer's community or territory. In addition, if a termination or nonrenewal of a franchise is the result of a bankruptcy filing or reorganization of a franchise or the sale or other change in the business operation of the franchisor, the franchisor shall also be required to reimburse the dealer for the cost of facility upgrades and renovations required by the franchisor within two years prior to termination or nonrenewal. Termination assistance provided for in this subsection shall be in addition to repurchase obligations otherwise set forth in this Code section.

(h) Within 60 days of the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall commence to reimburse the dealer for one year of the dealer's reasonable cost to rent or lease the dealership's facility or location or for the unexpired term of the lease or rental period, whichever is less, or, if the dealer owns the facility or location, for the equivalent of one year of the reasonable rental value of the facilities or location. If more than one franchise is being terminated, canceled, or not renewed, the reimbursement shall be prorated equally among the different franchisors. However, if a franchise is terminated, canceled, or not renewed but the dealer continues

in business at the same location under a different franchise agreement, the reimbursement required by this subsection shall not be required to be paid. The provisions of this subsection shall not apply if the dealer is convicted of any criminal offense which conviction is cause of the termination, cancellation, or nonrenewal. In addition, any reimbursement due under this subsection shall be reduced by any amount received by the dealer by virtue of the dealer leasing, subleasing, or selling the facilities or location during the year immediately following the termination, cancellation, or nonrenewal. If reimbursement is made under this subsection, the franchisor is entitled to possession and use of the facilities or location for the period covered by such reimbursement.

(i) If, in an action for damages under this Code section, the franchisor fails to prove that there was good cause for the franchise termination, cancellation, or nonrenewal, then the franchisor may pay the dealer an amount equal to the value of the dealership as an ongoing business, at which time the franchisor shall receive any title to the dealership facilities which the dealer may have and the franchisee shall surrender his franchise agreement to the franchisor. If the dealer receives an amount equal to the value as an ongoing business, the dealer shall have no other recovery from the franchisor absent a showing such as would warrant punitive damages under Code Section 10-1-623.

(j) Without limitation as to factors which may constitute or indicate a lack of good cause, no termination shall be considered to be for good cause:

(1) If such termination relates to the death or disability of an owner and the franchisor has not complied with Code Section 10-1-652; or

(2) If such termination relates to a change in ownership or management and the franchisor has not complied with Code Section 10-1-653.

(k) All procedures, protections, and remedies afforded to a motor vehicle dealer under this Code section shall be available to a motor vehicle distributor whose distributor agreement is terminated, canceled, not renewed, modified, or replaced by a manufacturer or an importer.

History.

Code 1981, § 10-1-651, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 988, § 7/HB 1072; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2019, p. 517, § 5/SB 122.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" in the first sentence of subparagraph (f)(1)(A).

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the

legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

JUDICIAL DECISIONS

Burden of proof on franchisor. — Burden is placed on the franchisor to prove the franchisor's refusal to approve the transfer of the franchise was not arbitrary and that the franchisor had good cause to terminate the franchise. Moore v. American Suzuki Motor Corp., 203 Ga. App. 189, 416 S.E.2d 807, 1992 Ga. App. LEXIS 467 (1992).

No legal duty to consumer. — Trial court erred by denying a franchisor's motion for summary judgment with regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737, 2008 Ga. App. LEXIS 1057 (2008).

10-1-652. Designated successor of a deceased or incapacitated owner.

(a) Unless there exists good cause for refusal to honor succession on the part of the franchisor, any designated successor of a deceased or incapacitated owner may succeed to the ownership interest of the owner under the existing franchise if:

(1) The designated successor gives the franchisor written notice of his or her intention to succeed to the ownership interest within 60 days of the owner's death or incapacity or within a longer period if so provided in the franchise agreement; and

(2) The designated successor agrees to be bound by all the terms and conditions of the franchise.

(b) The franchisor may request, and the designated successor shall provide promptly upon said request, personal and financial data that is customarily required by the franchisor to determine whether the succession should be honored.

(c) If a franchisor believes that good cause exists for refusing to honor the succession to the ownership interest of an owner by a designated successor of a deceased or incapacitated owner, the franchisor may, within 60 days following receipt of notice of the designated successor's intent to succeed to the ownership interest of the owner or any personal or financial data which the franchisor has requested, serve upon the designated successor notice of its refusal to honor the succession and of its intent to discontinue the existing franchise with the dealer; however, if the franchisor shall enter into one or more interim or trial agreements

with the designated successor, which interim or trial agreements may not extend more than three years from the owner's death or disability, then and in such event such notice shall be deemed timely if sent within 60 days of the termination of such interim or trial agreement. The notice must state the specific grounds for the refusal to honor the succession and of its intent to discontinue the existing franchise with the dealer.

(d) If a franchisor refuses to honor the succession to the ownership interest of a deceased or incapacitated owner, then and in such event:

(1) The franchisor shall allow the designated successor a reasonable period of time which shall not be less than six months in which to negotiate a sale of the dealership. Any such sale shall be subject to Code Section 10-1-653; and

(2) Upon termination of the franchise pursuant to such refusal, the provisions of Code Section 10-1-651 shall apply.

(e) If notice of refusal and discontinuance is not timely served upon the designated successor, the franchise shall continue in effect subject to termination only as otherwise permitted by this part.

(f) In determining whether good cause for the refusal to honor the succession exists, the franchisor has the burden of proving that the designated successor is a person who is not of good moral character or does not meet the franchisor's existing and reasonable standards.

(g) No franchisor shall terminate, cancel, or fail to renew any franchise solely because of the death or incapacity of an owner who is not listed in the franchise as one on whose expertise and abilities the franchisor relied in the granting of the franchise.

(h) This Code section does not preclude a new motor vehicle dealer from time to time designating any person as his or her successor by written instrument filed with the manufacturer or distributor and, if such instrument is currently on file with such manufacturer or distributor, it alone shall determine the succession rights to the management and operation of the dealership.

History.
Code 1981, § 10-1-652, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-653. Sale of dealership franchise; notice to franchisor.

If a new motor vehicle dealer desires to make a change in its executive management or ownership or to sell its principal assets, the new motor vehicle dealer will give the franchisor prior written notice of the proposed change or sale. The franchisor shall not arbitrarily refuse to agree to such proposed change or sale and may not disapprove or

withhold approval of such change or sale unless the franchisor can prove that its decision is not arbitrary and that the new management, owner, or transferee is unfit or unqualified to be a dealer based on the franchisor's prior written, reasonable, objective, and uniformly applied, within reasonable classifications, standards or qualifications which directly relate to the prospective transferee's business experience, moral character, and financial qualifications. A franchisor may not disapprove or withhold approval of a change or sale if the new management, owner, or transferee is an owner of a dealership in the State of Georgia which sells the same line-make motor vehicle as the dealership being transferred unless such management, owner, or transferee is not in substantial compliance with its existing franchise agreement relating to performance in the areas of customer satisfaction or sales or unless such management, owner, or transferee does not meet the franchisor's prior written, reasonable, objective, and uniformly applied standards or qualifications relating to its financial qualifications or moral character. Where the franchisor rejects a proposed change or sale, the franchisor shall give written notice of his reasons to the new motor vehicle dealer within 60 days. If no such notice is given to the new motor vehicle dealer, the change or sale shall be deemed approved.

History.
Code 1981, § 10-1-653, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 4.

JUDICIAL DECISIONS

Right of first refusal under O.C.G.A. § 10-1-663.1 not subject to the requirements of O.C.G.A. § 10-1-653. — In a dispute between a car dealership franchisor and a franchisee that sought to acquire another dealership, the franchisor's right of first refusal under O.C.G.A. § 10-1-663.1 was not subject to the requirements of the Transfer Statute, O.C.G.A. § 10-1-653; the two statutes operated independently, and the trial court erred in granting an interlocutory injunction to the franchisee. Nissan N. Am., Inc. v. Walker-Jones Nissan, LLC, 345 Ga. App. 447, 812 S.E.2d 130, 2018 Ga. App. LEXIS 215 (2018).

Burden of proof on franchisor. — Burden is placed on the franchisor to prove the franchisor's refusal to approve the transfer of the franchise was not arbitrary and that the franchisor had good cause to terminate the franchise. Moore v. American Suzuki Motor Corp., 203 Ga. App. 189, 416 S.E.2d 807, 1992 Ga. App. LEXIS 467 (1992).

Rejection of proposed franchise transfer not unreasonable. — Franchisor's rejection of a proposed franchise transfer for reasons unrelated to the proposed franchisee's experience or qualifications was not unreasonable. Hickman v. American Honda Motor Co., 982 F. Supp. 881, 1997 U.S. Dist. LEXIS 20786 (N.D. Ga. 1997), aff'd, 138 F.3d 958, 1998 U.S. App. LEXIS 7062 (11th Cir. 1998).

No transfer by operation of law. — Failure of a franchisor to give notice to a former franchisee of its reasons for rejecting a proposed change in the ownership or sale of the dealership did not cause the dealership to transfer by operation of law. Hickman v. American Honda Motor Co., 982 F. Supp. 881, 1997 U.S. Dist. LEXIS 20786 (N.D. Ga. 1997), aff'd, 138 F.3d 958, 1998 U.S. App. LEXIS 7062 (11th Cir. 1998).

10-1-654. [Reserved] Applicability of part.

History.
Code 1981, § 10-1-654, enacted by Ga. L. 1993, p. 1585, § 2; repealed by Ga. L. 1999, p. 1194, § 5, effective May 3, 1999.

Part 5

Motor Vehicle Fair Practices

JUDICIAL DECISIONS

No retroactive effect. — Because the Georgia Motor Vehicles Day in Court Act, O.C.G.A. § 10-1-630 et seq., and the Motor Vehicle Fair Practices Act, O.C.G.A. § 10-1-660 et seq., affected the substantive rights of the parties, the statutes could not be given retroactive effect. Stamps v. Ford Motor Co., 650 F. Supp. 390, 1986 U.S. Dist. LEXIS 18434 (N.D. Ga. 1986) (decided prior to 1993 reenactment).

10-1-660. Short title.

This part shall be known and may be cited as the "Motor Vehicle Fair Practices Act."

History.
Code 1981, § 10-1-660, enacted by Ga. L. 1993, p. 1585, § 2.

10-1-661. Franchisors prohibited from requiring or coercing dealers to take or refrain from taking certain acts.

(a) For purposes of this Code section, the term "coerce" means to compel or attempt to compel by threat or use of force or to fail to act in good faith in performing or complying with any term or provision of a franchise or dealer agreement.

(b) No franchisor shall require, attempt to require, coerce, or attempt to coerce any dealer in this state:

(1) To order or accept delivery of any new motor vehicle, part, or accessory thereof, equipment, or any other commodity not required by law which shall not have been voluntarily ordered by the dealer, except that this paragraph does not affect any terms or provisions of a franchise requiring dealers to market a representative line of those motor vehicles which the franchisor is publicly advertising;

(2) To order or accept delivery of any new motor vehicle with special features, accessories, or equipment not included in the list price of such new motor vehicle as publicly advertised by the franchisor;

(3) To refrain from participation in the management of, investment in, or the acquisition of any other line of new motor vehicle or

related products. However, this paragraph does not apply unless the dealer maintains a reasonable line of credit for each make or line of new motor vehicle, the dealer remains in compliance with any reasonable facilities requirements of the franchisor, the dealer provides acceptable sales performance, and no change is made in the principal management of the dealer;

(4) To expand, construct, or significantly modify facilities without assurances that the franchisor will provide a reasonable supply of new motor vehicles within a reasonable time so as to justify such an expansion in light of the market and economic conditions;

(5) To sell, assign, or transfer any retail installment sales contract obtained by such dealer in connection with the sale by such dealer in this state of new motor vehicles to a specified finance company or class of such companies or to any other specified persons;

(6) To provide warranty or other services for the account of franchisor, except as provided in Part 3 of this article, the "Motor Vehicle Warranty Practices Act";

(7) To acquire any line-make of motor vehicle or to give up, sell, or transfer any line-make of motor vehicle which has been acquired in accordance with this article once such dealer has notified the franchisor that it does not desire to acquire, give up, sell, or transfer such line-make or to retaliate or take any adverse action against a dealer based on such desire;

(8) To construct, renovate, or maintain exclusive facilities, personnel, or showroom area dedicated to a particular line-make if the imposition of such a requirement would be unreasonable in light of the existing circumstances, including the franchisor's reasonable business considerations, present economic and market conditions, and forecasts for future economic and market conditions in the dealer's retail territory. The franchisor shall have the burden of proof to demonstrate that its demand for exclusivity is justified by reasonable business considerations and reasonable in light of the dealer's circumstances, but this provision shall not apply to a voluntary agreement when separate and adequate consideration was offered and accepted, provided that the renewal of a franchise agreement shall not by itself constitute separate and adequate consideration. The franchisor shall have the burden of proof to show that the dealer has entered into a voluntary, noncoerced agreement regarding exclusivity;

(9)(A) To substantially change, alter, or remodel its dealership or to install new signs or other franchisor image elements that replace or substantially alter those improvements, signs, or franchisor image elements completed within the preceding ten

years that were required and approved by the franchisor, factory branch, distributor, or distributor branch or one of its affiliates as part of a program, standard, or policy.

(B) If, during such ten-year period, the manufacturer revises or discontinues an existing program, standard, or policy or establishes a new program, standard, or policy or other benefit relating to construction or substantial alteration of a dealership, a motor vehicle dealer that completed construction or substantial alteration of a dealership as part of a prior program, standard, or policy and elects not to participate in the new or revised program, standard, or policy, shall not be entitled to bonus, incentive, benefit, or otherwise under the new or revised program but shall remain entitled to all benefits under the prior program, standard, or policy according to the terms of such prior program, standard, or policy. If the prior program, standard, or policy under which the dealer completed a construction or substantial alteration does not contain a specific time period during which the manufacturer or distributor must provide payments or benefits to a dealer, then the manufacturer or distributor may not deny the dealer payment or benefits under the terms of that prior program, as it existed when the dealer began to perform under the prior program, for the balance of the ten-year term, regardless of whether the manufacturer's or distributor's program, standard, or policy has been revised or discontinued.

(C) The provisions of this paragraph shall not prohibit a franchisor from:

(i) Continuing any facility improvement program in effect on July 1, 2019, with more than one franchised dealer in the state;

(ii) Providing lump sum or regularly scheduled payments to assist a franchised dealer in making a facility improvement, including construction, alteration or remodeling, or installing signage or a franchisor image element; or

(iii) Providing compensation or reimbursement to a franchised dealer on reasonable, written terms for a portion of such franchised dealer's costs of making a facility improvement, including construction; alteration or remodeling; the purchase of goods, building materials or services; or installing signage or a franchisor image element which are not paid on a per vehicle basis.

(D) Nothing in this paragraph shall be construed to permit a dealer to erect or maintain signs that do not conform to the manufacturer's intellectual property rights, trademarks, or trade dress usage guidelines.

(E) As used in this paragraph, the term "to substantially change, alter, or remodel" means to make an alteration that has a major impact on the architectural features, characteristics, or integrity of the structure or lot. Such term shall include the relocation or erection of freestanding signs, but shall not include routine maintenance, such as interior painting, reasonably necessary to keep a dealership facility in attractive condition;

(10)(A) To purchase goods or services to make improvements to the dealer's facilities from a vendor selected, identified, or designated by a manufacturer or one of its affiliates by program, incentive provision, or otherwise without making available to the dealer the option to obtain the goods or services of comparable grade, quality, and overall design, and the same or substantially the same materials and characteristics from a vendor chosen by the dealer and approved by the manufacturer; provided, however, that such approval by the manufacturer shall not be unreasonably withheld, and the dealer's option to select a vendor shall not be available if the manufacturer provides substantial reimbursement for the goods or services offered.

(B) If signs, other than signs containing the manufacturer's brand or logo or freestanding signs that are not directly attached to a building, or other franchisor image or design elements or trade dress are to be leased to the dealer by a vendor selected, identified, or designated by the manufacturer, such dealer has the right to purchase the signs or other franchisor image or design elements or trade dress of comparable grade, quality, and overall design, and the same or substantially the same materials and characteristics from a vendor selected by the dealer if such signs, franchisor image or design elements, or trade dress are approved by the manufacturer. Approval by the manufacturer shall not be unreasonably withheld.

(C) Nothing in this paragraph shall be construed to allow a dealer or vendor to impair, infringe upon, or eliminate, directly or indirectly, the intellectual property rights of the manufacturer including, but not limited to, the manufacturer's intellectual property rights in any trademarks or trade dress, or other intellectual property interests owned or controlled by the manufacturer.

(D) As used in this paragraph, the term:

(i) "Goods" shall not include movable displays, brochures, and promotional materials containing material subject to the intellectual property rights of a manufacturer, including copyright, trademark, or trade dress rights or any manufacturer's design or architectural review service.

(ii) "Substantial reimbursement" means an amount equal to or greater than the cost savings that would result if the dealer were to utilize a vendor of the dealer's own selection instead of using the vendor identified by the manufacturer; or

(11) Whether by agreement, program, incentive, or otherwise, to sell, lease, offer to sell or lease, solicit, or advertise the sale or lease of new motor vehicles in a manner that violates a law or any properly promulgated rule or regulation of this state.

History.

Code 1981, § 10-1-661, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1994, p. 97, § 10; Ga. L. 1999, p. 1194, § 6; Ga. L. 2010, p. 988, § 8/HB 1072; Ga. L. 2019, p. 517, § 6/SB 122.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" three times in paragraph (b)(7) and in the first sentence of paragraph (b)(8).

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-662. Unlawful activities by franchisors.

(a) It shall be unlawful for any franchisor:

(1) To delay, refuse, or fail to deliver new motor vehicles or new motor vehicle parts or accessories in a reasonable time and in reasonable quantity if such vehicles, parts, or accessories are publicly advertised as being available for immediate delivery. This paragraph is not violated, however, if such failure is caused by acts or causes beyond the control of the franchisor;

(2) To obtain money, goods, services, or any other benefit from any other person with whom the dealer does business, on account of, or in relation to, the transaction between the dealer and such other person, other than as compensation for services rendered, unless such benefit is promptly accounted for and transmitted to the dealer;

(3) To release to any outside party, except under subpoena or as otherwise required by law or in an administrative, judicial, or arbitration proceeding involving the franchisor or dealer, any business, financial, or personal information which may be from time to time provided by the dealer to the franchisor, without the express written consent of the dealer;

(4) To resort to or to use any false or intentionally deceptive advertisement in the conduct of business as a franchisor in this state;

(5) To make any false or intentionally deceptive statement, either directly or through any agent or employee, in order to induce any dealer to enter into any agreement or franchise or to take any action which is prejudicial to that dealer or that dealer's business;

(6) To require any dealer to assent prospectively to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability to be imposed by law or to require any controversy between a dealer and a franchisor to be referred to any person other than the duly constituted courts of the state or the United States if such referral would be binding upon the dealer, provided that this Code section shall not prevent any dealer from entering into a valid release agreement with the franchisor;

(7) To fail to observe good faith in any aspect of dealings between the franchisor and the dealer;

(8) To deny any dealer the right of free association with any other dealer for any lawful purposes;

(9) To engage in any predatory practice or discrimination against any dealer;

(10) To propose or make any material change in any franchise agreement without giving the dealer written notice by certified mail or statutory overnight delivery of such change at least 60 days prior to the effective date of such change;

(11) To cancel a franchise or to take any adverse action against a dealer based in whole or in part on the failure of the dealer to meet the reasonable performance criteria established by the franchisor in light of existing circumstances, including but not limited to current and forecasted economic conditions, or when that failure is due to the failure of the franchisor to supply, within a reasonable period of time, new motor vehicles ordered by or allocated to the dealer;

(12) To offer to sell or lease or to sell or lease any new motor vehicle or accessory to any dealer at a lower actual price therefor than the actual price offered to any other dealer for the same model vehicle similarly equipped or same accessory or to use any device, including but not limited to an incentive, sales promotion plan, or other similar program, which results in a lower actual price of a vehicle or accessory being offered to one dealer and which is not offered to other dealers of vehicles of the same line-make or the same accessory;

(13) To conduct an audit, investigation, or inquiry of any dealer or dealership as to any activity, transaction, conduct, or other occurrence which took place more than one year prior to such audit, investigation, or inquiry or to base any decision adverse to the dealer or dealership on any activity, transaction, conduct, or other occur-

rence which took place more than one year prior to such decision or which took place more than one year prior to such audit, investigation, or inquiry or to apply the results of an audit, investigation, or inquiry to any activity, transaction, conduct, or other occurrence which took place more than one year prior to such audit, investigation, or inquiry. If the franchisor has reason to believe that fraudulent or intentionally false claims have been submitted, the franchisor may extend the audit, investigation, or inquiry period beyond the time periods provided in this paragraph; provided, however, that in no event shall the time period be extended beyond four years prior to such audit, investigation, or inquiry;

(14) To charge back to, deduct from, or reduce any account of a dealer or any amount of money owed to a dealer by a franchisor any amount of money the franchisor alleges is owed to such franchisor by such dealer as a result of an audit, investigation, or inquiry of such dealer or based upon information obtained by the franchisor through other resources which relates to any transaction that occurred more than one year prior to notice to the dealer of the charge back or deduction, and only if the franchisor can show by a preponderance of evidence that the transaction was fraudulent, intentionally and materially false, not reasonably substantiated, or did not follow the franchisor's written repair or claim submission requirements. A franchisor shall not charge back to, deduct from, or reduce any account of a dealer or any amount owed to a dealer based solely on such dealer's clerical error that does not put into question the legitimacy of the claim. If a claim is rejected for a clerical error, then the dealer may resubmit a corrected claim within 30 days. If a franchisor alleges that a dealer owes such franchisor any amount of money as a result of an audit, investigation, or inquiry, such franchisor shall send a notice to such dealer for such amount and the dealer shall have not less than 30 days to contest such amount or remit payment. If the dealer contests such amount, the charge shall be stayed pending a final resolution as provided in this Code section. Upon the dealer contesting the charge, the parties shall attempt to resolve the dispute through an internal dispute resolution procedure of the franchisor, if available, provided that such procedure occurs within a reasonable amount of time. If the internal dispute resolution procedure is unavailable, unsuccessful, or does not occur in a timely manner, such dealer may file a petition with the commissioner not later than 60 days after receipt of such notice from the franchisor or not later than 30 days after conclusion of the internal dispute resolution procedure, whichever is later. If such a petition is filed, the commissioner shall inform the franchisor, manufacturer, or distributor that a timely petition has been filed and that a hearing shall be held on such issue. In any hearing held pursuant to this paragraph,

the burden of proof shall be upon the franchisor to demonstrate by a preponderance of evidence the transaction was fraudulent, intentionally and materially false, not reasonably substantiated or did not follow the franchisor's written repair or claim submission requirements;

(15) To deny, delay payment for, restrict, or bill back a claim by a dealer for payment or reimbursement for warranty service or parts, incentives, hold-backs, special program money, or any other amount owed to such dealer unless such denial, delay, restriction, or bill back is the direct result of a material defect in the claim which affects the validity of the claim;

(16) To engage in business as a dealer or to manage, control, or operate, or own any interest in a dealership either directly or indirectly, if the primary business of such dealer or dealership is to perform repair services on motor vehicles, except motor homes, pursuant to a manufacturer's or franchisor's warranty;

(17) To refuse to allow, to limit, or to restrict a dealer from maintaining, acquiring, or adding a sales or service operation for another line-make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership unless the franchisor can prove by a preponderance of the evidence that such maintenance, acquisition, or addition will substantially impair the dealer's ability to adequately sell or service such franchisor's motor vehicles;

(18) To directly or indirectly condition a franchise agreement or renewal of a franchise agreement, addition of a line-make, approval of relocation, or approval of a sale or transfer on the dealer's or prospective dealer's willingness to enter into a site control agreement; provided, however, that this paragraph shall not apply to a voluntary agreement when separate and adequate consideration is paid to the dealer. The franchisor shall have the burden of proof to show the voluntary, noncoerced acceptance of the site control agreement by the dealer;

(19) To charge back, withhold payment, deny vehicle allocation, or take other adverse action against a dealer when a new vehicle sold by the dealer has been exported to a foreign country unless the franchisor can demonstrate that the dealer knew or reasonably should have known that the customer intended to export or resell the new vehicle. There shall be a rebuttable presumption that the dealer had no such knowledge if the vehicle is titled or registered in any state in this country;

(20) To take any materially adverse action against a dealer, including a dealer's ability to participate in or receive a benefit or

payment owed from any incentive or reimbursement program, based on criteria it has established, implemented, or enforced for measuring the performance, including, but not limited to, sales or service performance, of a dealer unless such criteria:

(A) Is fair, reasonable, and equitable; and

(B) Is based on accurate and relevant information; or

(21) To deny, delay payment for, restrict, or bill back a claim by a dealer for payment or reimbursement for incentives, hold-backs, sales or service promotion or other special program money, or any other amount owed to such dealer by the franchisor, if based solely on the dealer's compliance with a specific program requirement of the franchisor that would cause the dealer to violate a law or any properly promulgated rule or regulation of this state.

(b) No action shall in any way be based on this Code section with respect to acts occurring prior to July 1, 1983.

History.

Code 1981, § 10-1-662, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1996, p. 1058, § 2; Ga. L. 1999, p. 1194, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 988, § 9/HB 1072; Ga. L. 2019, p. 517, § 7/SB 122.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" near the end of paragraph (a)(12), in the middle of paragraph (a)(17), and in the first sentence of paragraph (a)(18).

Editor's notes.

Ga. L. 2010, p. 988, § 1/HB 1072, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-663. Prohibited acts by franchisors.

(a) No franchisor shall require, attempt to require, coerce, or attempt to coerce any dealer in this state:

(1) To participate monetarily in an advertising campaign or contest or to purchase any promotional materials, training materials, showroom or other display decorations, or materials at the expense of the dealer; or

(2) To change or refrain from changing the capital structure or ownership of the dealer or the means by or through which the dealer finances the operation of the dealership, provided the dealer at all times meets any reasonable capital standards determined by the franchisor in accordance with uniformly applied criteria and provided no change in the capital structure shall cause a change in the

principal management or have the effect of a sale of the franchise without the consent of the franchisor, which consent shall not unreasonably be withheld.

(b) No franchisor shall:

(1) Refuse to disclose to any dealer the manner and mode of distribution of the same line make as handled by the dealer within the dealer's market area;

(2) Increase prices of new motor vehicles which the dealer had ordered for consumers prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a consumer shall constitute evidence of each such order, provided the vehicle is in fact delivered to that customer. Price differences applicable to new models or series shall not be considered a price increase. Price changes caused by the addition to a motor vehicle of required or optional equipment, revaluation of the United States dollar in the case of foreign-make vehicles or components, or an increase in transportation charges due to increased rates imposed by carriers shall not be subject to the provisions of this paragraph;

(3) Discriminate unfairly among its dealers with respect to any aspect of operating a motor vehicle dealership;

(4) Establish or create:

(A) By agreement or otherwise, unreasonable restrictions relative to noncompetition covenants or site control, whether by sublease, collateral pledge of lease, agreement, or other means;

(B) Reserved;

(C) By agreement or otherwise, an option to purchase the dealership or its assets from the dealer; or

(D) By agreement or otherwise, unreasonable requirements to comply with subjective standards or other matters incident to the operation of the dealership; or

(5) Unreasonably change the market area of a dealer as set forth in the dealer's franchise agreement.

History.
Code 1981, § 10-1-663, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, §§ 8, 9; Ga. L. 2000, p. 1175, § 1.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1999, punctuation was revised at the end of subparagraph (b)(4)(B).

10-1-663.1. Right of first refusal.

(a) Notwithstanding the terms of any franchise agreement, sales and services agreement, or similar agreement, a franchisor, manufacturer,

or distributor shall be permitted to exercise a right of first refusal to acquire a dealer's assets or ownership, in the event of a proposed change of ownership, or transfer of dealership assets, if all of the following requirements are met:

(1) The proposed transfer of the dealership or its assets is of more than 50 percent of the ownership or assets;

(2) The franchisor notifies the dealer in writing within 60 days of its receipt of the complete written proposal for the proposed sale or transfer on forms generally utilized by the franchisor for such purpose and containing the information required therein and all documents and agreements relating to the proposed sale or transfer;

(3) The exercise of the right of first refusal will result in the dealer and dealer's owners receiving the same or greater consideration as provided for through the terms of the contract related to the proposed change of ownership or transfer of dealership assets;

(4) The proposed change of 50 percent or more of the ownership or of the dealership assets does not involve the transfer or sale of assets or the transfer or issuance of stock by the dealer or one or more dealer owners to a designated family member or members, including a spouse, child, grandchild, spouse of a child or grandchild, brother, sister, or parent of the dealer owner; to a manager who has been employed in the dealership for at least four years and is otherwise qualified as a dealer operator; or to a partnership or corporation owned and controlled by one or more of such persons;

(5) The franchisor agrees to pay the reasonable expenses, including reasonable attorney's fees, which do not exceed the usual customary, and reasonable fees charged for similar work done for other clients incurred by the proposed new owner and transferee before the franchisor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of ownership or transfer of dealership assets. However, payment of such expenses and attorney's fees shall not be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 20 days after the dealer's receipt of the franchisor's written request for such an accounting. Such an accounting may be requested by the franchisor before exercising its right of first refusal; and

(6) The franchisor agrees to comply with and be subject to the requirements and restraints as set forth in paragraphs (1) and (2) of subsection (a) of Code Section 10-1-664.1 and in subsection (b) of Code Section 10-1-664.1.

(b) Within the terms of a right of first refusal contract related to the proposed change of ownership or transfer of dealership assets:

(1) The franchisor, manufacturer, or distributor shall have the right to assume the dealer's lease for, or acquire the real property on which the franchise is located, on the same terms as those on which the real property or lease was to be sold or transferred to the proposed new owner in connection with the sale of the franchise, unless otherwise agreed to by the dealer and manufacturer or distributor. The franchisor, manufacturer, or distributor shall have the right to assign the lease or to convey the real property; and

(2) The franchisor, manufacturer, or distributor shall assume all of the duties, obligations, and liabilities contained in the agreements that were to be assumed by the proposed new owner and with respect to which the franchisor, manufacturer, or distributor exercised the right of first refusal, provided that the franchisor, manufacturer, or distributor has knowledge of such obligations at the time of the exercise of the right of first refusal.

History.
Code 1981, § 10-1-663.1, enacted by Ga. L. 2000, p. 1175, § 2; Ga. L. 2017, p. 515, § 2/HB 469.

JUDICIAL DECISIONS

Right of first refusal not subject to requirements of O.C.G.A. § 10-1-653. — In a dispute between a car dealership franchisor and a franchisee that sought to acquire another dealership, the franchisor's right of first refusal under O.C.G.A. § 10-1-663.1 was not subject to the requirements of the Transfer Statute, O.C.G.A. § 10-1-653; the two statutes operated independently, and the trial court erred in granting an interlocutory injunction to the franchisee. Nissan N. Am., Inc. v. Walker-Jones Nissan, LLC, 345 Ga. App. 447, 812 S.E.2d 130, 2018 Ga. App. LEXIS 215 (2018).

10-1-664. Establishing a new dealership or relocating an existing dealership in the market area of an existing dealership; notice; petitions to enjoin or prohibit.

(a) Any franchisor which intends to establish a new dealership or to relocate a current dealership for a particular line-make motor vehicle within the relevant market area of an existing dealership of the same line-make motor vehicle shall give written notice of such intent by certified mail or statutory overnight delivery to such existing dealership. The notice shall include:

(1) The specific location of the additional or relocated dealership;

(2) The date on or after which the additional or relocated dealership will commence operation at the new location;

(3) The identity of all existing dealerships in whose relevant market area the new or relocated dealership is to be located; and

(4) The names and addresses of the dealer and principals in the new or relocated dealership.

(b) Any existing dealership in whose relevant market area a franchisor intends to establish a new dealership or to relocate a current dealership may within 60 days of the receipt of the notice petition a superior court to enjoin or prohibit the establishment of the new or relocated dealership within the relevant market area of the existing dealership. The court or other tribunal of competent jurisdiction shall enjoin or prohibit the establishment of the new or relocated dealership within the relevant market area of the existing dealerships unless the franchisor can prove by a preponderance of the evidence that the existing dealership is not providing adequate representation of the line-make motor vehicle in the existing dealership's relevant market area and that the new or relocated dealership is necessary to provide the public with reliable and convenient sales and service within the relevant market area. The burden of proof in establishing adequate representation shall be on the franchisor. In determining whether the existing dealership is providing adequate representation and whether the new or relocated dealership is necessary, the court or other tribunal may consider, but is not limited to considering, the following:

(1) The impact that the establishment of the new or relocated dealership will have on consumers, the public interest, and the existing dealership; provided, however, that financial impact may be considered only with respect to the existing dealership;

(2) The size and permanency of investment reasonably made and the reasonable obligations incurred by the existing dealership to perform its obligations under the dealership's franchise agreement;

(3) The reasonably expected market penetration of the line-make motor vehicle for the relevant market area involved, after consideration of all factors which may affect such penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, and other factors affecting sales to consumers in the relevant market area;

(4) Any actions by the franchisor in denying its existing dealership of the same line make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make motor vehicles in keeping with the reasonable expectations of the franchisor in providing an adequate number of dealerships in the relevant market area;

(5) Any attempts by the franchisor to coerce the existing dealership into consenting to an additional or relocated dealership of the same line make in the relevant market area;

(6) Distance, travel time, traffic patterns, and accessibility between the existing dealership of the same line make and the location of the proposed new or relocated dealership;

(7) Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which benefits cannot be obtained by other geographic or demographic changes or expected changes in the relevant market area;

(8) Whether the existing dealership is in substantial compliance with its franchise agreement;

(9) Whether there is adequate interbrand and intrabrand competition with respect to the line-make motor vehicles, including the adequacy of sales and service facilities;

(10) Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and market conditions pertinent to dealerships competing in the relevant market area, including anticipated changes; and

(11) The volume of registrations and service business transacted by the existing dealership and in which would be the relevant market area of the proposed dealership.

(c) This Code section shall not apply:

(1) To the addition of a new dealership at a location which is within a three-mile radius of a former dealership of the same line make which has been closed for less than two years;

(2) To the relocation of an existing dealership to a new location which is further away from the protesting dealer's location than the relocated dealer's prior location; or

(3) To the relocation of an existing dealership to a new location which is within a three-mile radius of such dealership's current location and it has been at such current location at least ten years.

History.

Code 1981, § 10-1-664, enacted by Ga. L. 1999, p. 1194, § 10; Ga. L. 2000, p. 1589, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, "line make" was substituted for "line-make" in paragraph (b)(5).

JUDICIAL DECISIONS

Dealership. — Franchisee did not have standing to seek to enjoin the establishment of a competing dealership within eight miles of the franchisee's service center because: (1) for purposes of the statute, the franchisee's relevant market area was the area within eight miles of an existing dealership; (2) "dealership" meant the "person" of the corporate franchisee; (3) the franchisee's principal place of business and registered office were at a location other than the service center, which location was more than eight miles from the new

dealership's proposed location; so, (4) under the plain language of O.C.G.A. § 10-1-664(b), the service center was not, by definition, an existing dealership in whose relevant market area the franchisor intended to establish a new dealership since, under O.C.G.A. § 10-1-622(1) and (2)(A), "dealership" or "dealer" was defined as the "person," which in this case was a corporation, and a corporate "dealership" or "dealer" was not defined according to the corporation's facilities. WMW, Inc. v. Am. Honda Motor Co., 311 Ga. App. 1, 714 S.E.2d 689, 2011 Ga. App. LEXIS 686 (2011), aff'd on other grounds, 291 Ga. 683, 733 S.E.2d 269, 2012 Ga. LEXIS 777 (2012).

Anti-encroachment provision construed. — Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is engaged in the business of selling new motor vehicles, sells those vehicles, or when a dealer qualified as such because the dealer engages exclusively in the repair of motor vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269, 2012 Ga. LEXIS 777 (2012).

10-1-664.1. Restrictions on the ownership, operation, or control of dealerships by manufacturers and franchisors; competing unfairly with new dealers.

(a) It shall be unlawful for any manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a manufacturer or franchisor to own, operate, or control or to participate in the ownership, operation, or control of any new motor vehicle dealer in this state within a 15 mile radius of an existing dealer of such manufacturer or franchisor; to own, operate, or control, directly or indirectly, more than a 45 percent interest in a dealer or dealership in this state; to establish in this state an additional dealer or dealership in which such person or entity has any interest; or to own, operate, or control, directly or indirectly, any interest in a dealer or dealership in this state unless such person or entity has acquired such interest from a dealer or dealership which has been in operation for at least five years prior to such acquisition; provided, however, that this subsection shall not be construed to prohibit:

(1) The ownership, operation, or control by a manufacturer or franchisor of a new motor vehicle dealer for a temporary period, not to exceed one year, during the transition from one owner or operator to another;

(2) The ownership, operation, or control of a new motor vehicle dealer by a manufacturer or franchisor during a period in which such new motor vehicle dealer is being sold under a bona fide contract, shareholder agreement, or purchase option to the operator of the dealership;

(3) The ownership, operation, or control of a new motor vehicle

dealer by a manufacturer or franchisor at the same location at which such manufacturer or franchisor has been engaged in the retail sale of new motor vehicles as the owner, operator, or controller of such dealership for a continuous two-year period of time immediately prior to April 1, 1999, where there is no prospective new motor vehicle dealer available to own or operate the dealership in a manner consistent with the public interest;

(4) The ownership, operation, or control by a manufacturer which manufactures only motorcycles or motor homes of a retail sales operation engaged in the retail sale of motorcycles or motor homes;

(5) The ownership, operation, or control by a manufacturer which is selling motor vehicles directly to the public at an established place of business on January 1, 1999, and which has never sold its line make of new motor vehicles in this state through a franchised new motor vehicle dealer unless and until such manufacturer is wholly or partially acquired by another manufacturer or franchisor;

(6) The ownership, operation, or control by a manufacturer which manufactures trucks with a gross vehicle weight rating of 12,500 pounds or more of a new motor vehicle dealer which only sells trucks with a gross vehicle weight rating of 12,500 pounds or more at the same location at which such manufacturer has been engaged in the retail sale of such trucks as the owner, operator, or controller of such dealership for a continuous two-year period of time immediately prior to April 1, 1999, or at one additional location which is not located within the relevant market area of an existing dealer of the same line make of trucks; provided, however, that this exemption shall apply to a manufacturer described in this paragraph only until such manufacturer is wholly or partially acquired by another manufacturer or distributor;

(7) A manufacturer from selling new motor vehicles to customers if such vehicles are manufactured or assembled in accordance with custom design specifications of the customer and such sales are limited to no more than 150 vehicles per year; or

(8) The ownership, operation, or control by a manufacturer of not more than five locations licensed as new motor vehicle dealerships for the sale of new motor vehicles and any number of locations that engage exclusively in the repair of such manufacturer's line make of motor vehicles, provided that such manufacturer was selling or otherwise distributing its motor vehicles at an established place of business in this state as of January 1, 2015, and:

(A) The manufacturer manufactures or assembles zero emissions motor vehicles exclusively and has never sold its line make of motor vehicles in this state through a franchised new motor vehicle dealer; and

(B) The manufacturer has not acquired a controlling interest in a franchisor or a subsidiary or other entity controlled by such franchisor, or sold or transferred a controlling interest in such manufacturer to a franchisor or subsidiary or other entity controlled by such franchisor.

(b) It shall be unlawful for a manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a manufacturer or franchisor to compete unfairly with a new motor vehicle dealer of the same line make, operating under a franchise, in the State of Georgia, and, except as otherwise provided in this subsection, the mere ownership, operation, or control of a new motor vehicle dealer by a manufacturer or franchisor under the conditions set forth in paragraphs (1) through (8) of subsection (a) of this Code section shall not constitute a violation of this subsection. For purposes of this Code section, a manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a manufacturer or franchisor shall be conclusively presumed to be competing unfairly if it gives any preferential treatment to a dealer or dealership of which any interest is directly or indirectly owned, operated, or controlled by such manufacturer or franchisor or any partner, affiliate, wholly or partially owned subsidiary, officer, or representative of such manufacturer or franchisor, expressly including, but not limited to, preferential treatment regarding the direct or indirect cost of vehicles or parts, the availability or allocation of vehicles or parts, the availability or allocation of special or program vehicles, the provision of service and service support, the availability of or participation in special programs, the administration of warranty policy, the availability and use of after warranty adjustments, advertising, floor planning, financing or financing programs, or factory rebates.

(c) Except as may otherwise be provided in subsection (a) and subsection (b) of this Code section, no manufacturer or franchisor shall offer to sell or sell, directly or indirectly, any new motor vehicle to a consumer in this state, except through a new motor vehicle dealer holding a franchise for the line make covering such new motor vehicle. This subsection shall not apply to manufacturer or franchisor sales of new motor vehicles to the federal government, charitable organizations, or employees of the manufacturer or franchisor.

History.

Code 1981, § 10-1-664.1, enacted by Ga. L. 1999, p. 1194, § 11; Ga. L. 2000, p. 1175, § 3; Ga. L. 2015, p. 951, § 2/HB 393; Ga. L. 2024, p. 1052, § 2(23)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in paragraph (a)(6).

Law reviews.

For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 23 (2015).

PART 6

ENFORCEMENT OF ARTICLE AND FEES

10-1-665. Definitions.

As used in this part, the term:

(1) "Commissioner" means the state revenue commissioner.

(2) "Department" means the Department of Revenue.

History. Code 1981, § 10-1-665, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.

10-1-666. Enforcement of article by state revenue commissioner.

As an alternative to and in addition to any civil or criminal enforcement of this article, the state revenue commissioner by and through the Department of Revenue is authorized to enforce the provisions of this article and any order issued pursuant to the enforcement of this article.

History. Code 1981, § 10-1-666, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.

10-1-667. Petitions for review of alleged violations of article.

Any dealer, distributor, or manufacturer who is aggrieved by a violation of any provision of this article may file a petition with the Department of Revenue setting forth the facts supporting the allegation of such violation. The commissioner shall issue an administrative order, whenever the commissioner, after notice to all parties and after a hearing, determines that a violation of this article or any order issued under this article has occurred. The notice and the hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any party who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The commissioner or the prevailing party may file, in the superior court in the county wherein the party under order resides or, if such party is a corporation, in the county wherein the corporation maintains its established place of business or its agent for service of process is located, or in the county wherein the violation occurred, a certified copy of a final order of the commissioner, whether unappealed from or affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and

proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court. The remedy prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available under the laws of this state.

History. Code 1981, § 10-1-667, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.

10-1-668. Annual dealer registration and appropriation to department fund.

(a) In addition to the licensing fee set forth in Code Section 40-2-38, each dealer shall register annually with the department and shall pay an annual registration fee of $25.00. The fee shall be paid on or before January 1 of the registration year and shall be paid with and accompanied by such forms as the commissioner shall prescribe.

(b) It is the intent of the General Assembly of Georgia that an amount equal to the amount collected by the registration fee provided for in this Code section be appropriated to the department to fund the provisions of this part. If the funds appropriated to the department to fund the provisions of this part exceed the actual cost to the department to enforce this part, then the excess funds so appropriated shall lapse. However, if the fees collected under subsection (a) of this Code section do not equal the actual cost to the department to enforce the provisions of this part, then the commissioner may raise the registration fee to an amount which will ensure that the cost to the state to enforce this part is received.

History. Code 1981, § 10-1-668, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2.

Part 7

Impairment of Obligations

10-1-670. Application to franchise agreements.

Any provision of this article which would, in the absence of this Code section, impair an obligation of a franchise agreement or any other agreement between a manufacturer or franchisor and a franchisee shall only apply to any such agreement made, entered into, renewed, extended, modified, or continued after the effective date of such provision. Otherwise, each provision of this article shall apply to all franchise or other agreements.

History.
Code 1981, § 10-1-670, enacted by Ga. L. 1999, p. 1194, § 12.

ARTICLE 22A

MARINE MANUFACTURERS

RESEARCH REFERENCES

Am. Jur. 2d.
12 Am. Jur. 2d, Boats and Boating, §§ 4 et seq., 16, 66.

C.J.S.
72A C.J.S., Products Liability, § 157.

10-1-675. Legislative findings.

The General Assembly finds and declares that the distribution of marine vessels and products in the State of Georgia vitally affects the general economy of the state and the public interest and public welfare and, in the exercise of its police power, it is necessary to regulate marine manufacturers, distributors, and dealers and their representatives doing business in Georgia in order to prevent unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens.

History.
Code 1981, § 10-1-675, enacted by Ga. L. 2001, p. 778, § 1.

10-1-676. Definitions.

As used in this article, the term:

(1) "Distributor" or "wholesaler" means any person, company, or corporation who sells or distributes marine products to marine dealers and who maintains distributor representatives within the state.

(2) "Franchise" means an oral or written agreement for a definite or indefinite period of time in which a manufacturer grants to a marine dealer permission to use a trade name, service mark, or related characteristic and in which there is a community of interest in the marketing of marine products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

(3) "Manufacturer" means any person, firm, association, corporation, or trust, resident or nonresident, that fabricates, manufactures, or assembles new and unused marine products. It does not include a person, firm, association, corporation, or trust which converts, modifies, or otherwise alters a marine product manufactured by another person, firm, association, corporation, or trust.

(4) "Manufacturer sales representative" means any officer, agent, or employee employed by a person, firm, association, corporation, or trust that fabricates, manufactures, or assembles marine products or by a factory branch for the purpose of making or promoting the sale of marine products or supervising or contacting marine dealers or prospective dealers.

(5) "Marine dealer" means any person who holds a bona fide contract, agreement, or franchise with a manufacturer or distributor of marine products.

(6) "Marine product" means a new or used watercraft, boat, vessel, or motor primarily designed for recreational or commercial use on water. The term also includes an outboard motor or a boat outfitted with an inboard or outboard motor. The term shall not mean a watercraft designed primarily for commercial use.

History. Code 1981, § 10-1-676, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 415, § 10.

10-1-677. Termination of contractual relationship between dealer and manufacturer.

(a)(1) Whenever any marine dealer enters into a franchise, selling, or other contractual agreement with a manufacturer, distributor, or wholesaler wherein the dealer agrees to maintain an inventory of marine products or repair parts, the manufacturer, distributor, or wholesaler shall not terminate such agreement in case of breach by the dealer unless and until 90 days after notice of such intention to terminate has been sent by certified mail or statutory overnight delivery, return receipt requested, to the dealer and the dealer has failed to correct the breach within such period.

(2) If the franchise, selling, or other contractual agreement is terminated as a result of any action by the manufacturer and the dealer is not in breach of such agreement, the manufacturer, distributor, or wholesaler shall repurchase the inventory as provided in this article. The dealer may keep the inventory if he or she desires. If the dealer has any outstanding debts to the manufacturer, distributor, or wholesaler, then the repurchase amount may be credited to the dealer's account.

(3) If the franchise, selling, or other contractual agreement is terminated as a result of any action by the dealer and the manufacturer is not in breach of such agreement, the manufacturer shall not be required to repurchase the inventory as provided in this article; provided, however, that, if the franchise, selling, or other contractual agreement is terminated as a result of any action by the dealer and the manufacturer is in breach of such agreement, the manufacturer

shall be required to repurchase the inventory as provided in this article.

(4) It shall be unlawful for the manufacturer, wholesaler, distributor, or franchisor, without due cause and pursuant to its own initiating action, to fail to renew a franchise, selling, or other contractual agreement on terms then equally available to all its marine dealers, unless the manufacturer repurchases the inventory as provided for in this Code section. The tests for determining what constitutes due cause for a manufacturer or distributor to fail to renew a franchise, selling, or other contractual agreement shall include whether the dealer:

(A) Has made a material misrepresentation in applying for or acting under the franchise agreement;

(B) Has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against the dealer which has not been discharged within 30 days after the filing, is in default under the provisions of a security agreement in effect with the manufacturer or distributor, or is in receivership;

(C) Has engaged in an unfair business practice;

(D) Has engaged in conduct which is injurious or detrimental to the public welfare;

(E) Has failed to comply with an applicable licensing law;

(F) Has been convicted of a crime, the effect of which would be detrimental to the manufacturer, distributor, or dealership;

(G) Has failed to operate in the normal course of business for seven consecutive business days; or

(H) Has failed to comply with the terms of the dealership or franchise agreement.

(5) In the event that the manufacturer, wholesaler, distributor, or franchisor does not intend to renew a franchise, selling, or other contractual agreement, such manufacturer, wholesaler, distributor, or franchisor shall give the dealer 90 days' written notice prior to the effective date thereof by certified mail or statutory overnight delivery, return receipt requested.

(b) Within 30 days of the termination of the franchise, selling, or other contractual agreement, the manufacturer, distributor, or wholesaler shall repurchase that inventory previously purchased from him or her, including all new and unused marine products of the current or immediate prior model year and parts on hand and held by the dealer on the date of termination of the contract. The manufacturer, distribu-

tor, or wholesaler shall pay an amount equivalent to the cost actually paid by the dealer less discounts or rebates per unit for any new, unused, undamaged, unaltered from original invoice and delivery, and complete marine vessel. The manufacturer shall also pay an amount equal to the price paid by the dealer for any new, unused, and undamaged repair parts and accessories which are listed in the manufacturer's current parts price list and are not more than two model years old.

(c) Upon payment within a reasonable time of the repurchase amount to the dealer, the title, if any, and right of possession to the repurchased inventory shall transfer to the manufacturer, distributor, or wholesaler, as the case may be.

(d) The provisions of this article shall not require the repurchase from a dealer of:

(1) Any repair part which has a limited storage life or is otherwise subject to deterioration;

(2) Any single repair part which is priced as a set of two or more items;

(3) Any repair part which, because of its condition, is not resalable as a new part without repackaging or reconditioning;

(4) Any inventory for which the dealer is unable to furnish evidence that is reasonably satisfactory to the manufacturer, distributor, or wholesaler of good title, free and clear of all claims, liens, and encumbrances;

(5) Any inventory which the dealer desires to keep, provided that the dealer has a contractual right to do so;

(6) Any marine vessel or product which is not in new, unused, undamaged, and complete condition;

(7) Any repair parts which are not in new, unused, and undamaged condition;

(8) Any inventory which was ordered by the dealer on or after the date of receipt of the notification of termination of the franchise, selling, or other contractual agreement;

(9) Any inventory which was acquired by the dealer from any source other than the manufacturer, distributor, or wholesaler; or

(10) Any boat that has been altered substantially from original delivery.

(e) If any manufacturer, distributor, or wholesaler shall fail or refuse to repurchase any inventory as required by this article within 60 days

after termination of a dealer's contract and submission by the dealer to the manufacturer, by certified mail or statutory overnight delivery, return receipt requested, of a final inventory of marine products and parts on hand, he or she shall be civilly liable not only for the amounts provided in subsection (b) of this Code section but also the dealer's reasonable attorney's fees, court costs, and interest on the amount due for such inventory computed at the legal interest rate from the sixty-first day after termination.

(f) In the event of the death or incapacity of the dealer or the majority stockholder of a corporation operating as a dealer, the manufacturer, distributor, or wholesaler shall, at the option of the heirs at law if the dealer died intestate or the devisees or transferees under the terms of the deceased dealer's last will and testament if said dealer died testate, repurchase the inventory from said heirs or devisees as if the manufacturer, distributor, or wholesaler had terminated the contract, and the inventory repurchase provisions of this Code section shall apply. The heirs or devisees shall have until the end of the contract term or one year from the date of the death of the retailer or majority stockholder, whichever comes first, to exercise their option under this article; provided, however, that nothing in this article shall require the repurchase of inventory if the heirs or devisees and the manufacturer, distributor, or wholesaler enter into a new franchise agreement to operate the retail dealership.

History.

Code 1981, § 10-1-677, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 1021, § 1; Ga. L. 2003, p. 140, § 10; Ga. L. 2006, p. 72, § 10/SB 465; Ga. L. 2024, p. 1052, § 2(24)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that," for "however," in paragraph (a)(3).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2002, "article; provided" was substituted for "article. Provided" in paragraph (a)(3); and, in paragraph (a)(5), "90 days' written" was substituted for "90 days written" and a period was substituted for a semicolon.

JUDICIAL DECISIONS

Dismissal proper. — Trial court's dismissal of a limited liability company's action against a corporation to recover damages pursuant to the marine manufacturers statute, O.C.G.A. § 10-1-677(e), was warranted based on the forum selection and mediation provisions of the parties' dealer agreement; the LLC (1) knowingly signed the agreement and was bound by the forum selection clause, (2) failed to allege in its complaint that it had complied with the mediation provision of the agreement prior to filing the lawsuit, and, (3) absent any evidence of fraud, agreed to be bound by the mediation provision upon signing the agreement. Houseboat Store, LLC v. Chris-Craft Corp., 302 Ga. App. 795, 692 S.E.2d 61, 2010 Ga. App. LEXIS 237 (2010).

10-1-678. Application.

The provisions of this article shall apply to any contract now in effect which has no expiration date and is a continuing contract and any other contract entered into or renewed on or after July 1, 2002. Any contract in force and effect prior to July 1, 2002, which by its own terms will terminate on a date subsequent thereto shall be governed by the law as it existed prior to July 1, 2002.

History. Code 1981, § 10-1-678, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 1021, § 2.

ARTICLE 22B

RECREATIONAL VEHICLE DEALERS

10-1-679. Definitions; considerations in determining "good cause".

(a) As used in this article, the term:

(1) "Community of interest" means a continuing financial interest between the grantor and the grantee in either the operation of the dealership business or the marketing of such goods or services.

(2) "Franchise" means an oral or written agreement for a definite or indefinite period of time in which a manufacturer grants to a recreational vehicle dealer permission to use a trade name, service mark, or related characteristic and in which there is a community of interest in the marketing of recreational vehicle products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

(3) "Grantor" means a person who grants a recreational vehicle dealership.

(4) "Person" means a natural person, partnership, joint venture, corporation, or other entity.

(5) "Recreational vehicle" means a vehicular type unit primarily designed as temporary living quarters for recreational, camping, or travel use which either has its own motive power or is mounted on or towed by another vehicle. The basic entities are as follows: travel trailer, camping trailer, truck camper, motor home, park trailer, and fifth wheel travel trailer.

(6) "Recreational vehicle dealer" or "dealer" means a person who is a grantee of a recreational vehicle dealership situated in Georgia.

(7) "Recreational vehicle dealership" means an established place of business engaged in the marketing of new recreational vehicle

products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise, and which is marked by an appropriate permanent sign, a working telephone with a telephone number listed in the local phone directory, and which derives at least 75 percent of its revenue from the sale of new recreational vehicles and recreational vehicle related products and services.

(8) "Warrantor" means a person, firm, corporation, or business entity that gives a warranty in connection with a new recreational vehicle or parts, accessories, or components thereof. Such term does not include service contracts, mechanical or other insurance, or extended warranties sold for separate consideration by a dealer or other person not controlled by a manufacturer.

(b) For purposes of this article when determining whether there is "good cause" for a proposed action, the trier of fact shall consider:

(1) The volume of the affected dealer's business in the relevant market area;

(2) The nature and extent of the dealer's investment in its business;

(3) The adequacy of the dealer's service facilities, equipment, parts, supplies, and personnel;

(4) The effect of the proposed action on the community;

(5) The extent and quality of the dealer's service under recreational vehicle warranties; and

(6) The dealer's performance under the terms of its franchise agreement.

History.
Code 1981, § 10-1-679, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.1. Legislative intent; variation by contract of article's effect prohibited.

(a) This article shall be liberally construed and applied to promote its underlying remedial purposes and policies.

(b) The underlying purposes and policies of this article are:

(1) To promote the compelling interest of the public in fair business relations between recreational vehicle dealers and grantors and in the continuation of recreational vehicle dealerships on a fair basis;

(2) To protect recreational vehicle dealers against unfair treatment by grantors who inherently have superior economic power and

superior bargaining power in the negotiations of recreational vehicle dealerships;

(3) To provide recreational vehicle dealers with rights and remedies in addition to those existing by contract or common law; and

(4) To govern all franchise agreements for recreational vehicle dealerships, including any renewals or amendments, to the full extent consistent with the Constitutions of Georgia and the United States.

(c) The effect of this article may not be varied by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only.

History.
Code 1981, § 10-1-679.1, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.2. Designated sales area for recreational vehicle dealer.

The grantor shall designate in writing the area of sales responsibility assigned to a recreational vehicle dealer and shall not change such area nor establish another recreational vehicle dealer in the same area unless the grantor can show good cause for the addition of the new recreational vehicle dealer, including reasonable evidence that the market will support the establishment of a new dealership.

History.
Code 1981, § 10-1-679.2, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.3. Published prices, charges, and terms of sale.

Sales of recreational vehicles by grantors or distributors shall be in accordance with published prices, charges, and terms of sale in effect at any given time.

History.
Code 1981, § 10-1-679.3, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.4. Termination or change of dealership agreements; burden of proving good cause.

No grantor, directly or through any officer, agent, or employee, may terminate, cancel, fail to renew, or substantially change the competitive circumstances, including the area of sales responsibility, of a recreational vehicle dealership agreement without good cause. The burden of proving good cause shall be on the grantor.

History.
Code 1981, § 10-1-679.4, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.5. Notice required for termination of or substantial change to dealership agreements.

(a) Except as provided in this Code section, a grantor shall provide a recreational vehicle dealer at least 120 days' prior written notice of termination, cancellation, nonrenewal, or substantial change in competitive circumstances and shall provide that the recreational vehicle dealer has 120 days in which to rectify any claimed deficiency. The notice shall state all the reasons for termination, cancellation, or nonrenewal and shall further state that if, within 30 days following the receipt of the grantor's notice, the recreational vehicle dealer provides to the grantor a written notice to cure all claimed deficiencies, the recreational vehicle dealer shall then have 120 days from the date of the notice to rectify such deficiencies. If the deficiency is rectified within 120 days, the notice shall be void. The notice provisions of this Code section shall not apply if the reason for termination, cancellation, or nonrenewal is insolvency, the occurrence of an assignment for the benefit of creditors, or bankruptcy.

(b) The 120 days' notice shall be reduced to 30 days' notice if the grounds for termination, cancellation, or nonrenewal is due to:

(1) Conviction or pleas of nolo contendere to a felony of a recreational vehicle dealer or one of its principal owners;

(2) The business operation of the recreational vehicle dealer has been abandoned or closed for ten consecutive days, unless the closing is due to an act of God, strike, or labor difficulty or other cause over which the dealer has no control;

(3) The suspension, revocation, or refusal to renew the recreational vehicle dealer's license; or

(4) A significant misrepresentation by the recreational vehicle dealer.

History.
Code 1981, § 10-1-679.5, enacted by Ga. L. 2005, p. 1233, § 2/SB 155; Ga. L. 2006, p. 72, § 10/SB 465.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 10-1-679.5 is an offense for which those charged with a violation are to be fingerprinted. 2006 Op. Att'y Gen. No. 2006-2.

10-1-679.6. Repurchase of inventory, equipment, tools, accessories, and signage on termination of the dealership contract; reimbursement for returned items.

(a) If a recreational vehicle dealership franchise agreement is terminated, canceled, or not renewed by the grantor, the grantor, at the option of the recreational vehicle dealer, shall repurchase:

(1) All new, untitled recreational vehicle inventory acquired from the manufacturer within 12 months prior to the effective date of the termination, cancellation, or nonrenewal which has not been materially altered or substantially damaged. The grantor shall reimburse the dealer for 100 percent of the net invoice cost of such inventory, including transportation, less applicable rebates and discounts to the dealer.

(2) All functioning diagnostic equipment, special tools, other equipment and machinery, accessories and proprietary parts, and signage as were required to meet the dealer's service responsibilities in accordance with manufacturer's guides and applicable customer service bulletins and signs sold under the recreational vehicle dealership agreement.

(b) The manufacturer shall reimburse the dealer for 100 percent of the current net prices as published in the manufacturer's current price lists or catalogs on accessories and parts, including superseded parts, provided it was purchased by the dealer within five years before termination and can no longer be used in the normal course of the dealer's business, plus 5 percent of the current net price of all manufacturer's accessories and parts returned to compensate the dealer for handling, packing, and loading the parts, plus the cost of freight to return said parts. The grantor shall pay the dealer within 30 days of receipt of the returned items. This Code section shall apply only to merchandise with a name, trademark, label, or other mark on it which identifies the grantor or with proof of purchase from the grantor.

History.
Code 1981, § 10-1-679.6, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.7. Unlawful coercive practices.

It shall be unlawful for any grantor, directly or through any officer, agent, or employee:

(1) To coerce, or attempt to coerce, any dealer to accept delivery of any parts or accessories or any other commodities which have not been ordered by such dealer; or

(2) To coerce, or attempt to coerce, any dealer to enter into an

agreement with such grantor or do any other act unfair to such dealer by threatening to cancel any recreational vehicle dealership franchise agreement existing between such grantor and such dealer.

History.
Code 1981, § 10-1-679.7, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.8. Sale or transfer of ownership or change in management of dealerships; unlawful practices; required notices.

It shall be unlawful for any grantor to prevent or refuse to approve the sale or transfer of the ownership of a recreational vehicle dealership by the sale of the business assets, stock transfer, or otherwise, or a change in executive management or principal operator of the dealership if the new owner, principal operator, or management is creditworthy, has not been convicted of a felony, and is properly licensed; the sale or transfer shall not result in a relocation of the business; and the sale or transfer is otherwise reasonable under the circumstances. The recreational vehicle dealer must give the manufacturer 30 days' written notice prior to the closing of such agreement. If the manufacturer rejects a proposed change or sale, the manufacturer shall give written notice of its reasons to the recreational vehicle dealer within 30 days after receipt of the dealer notification and complete documentation. If no such notice is given to the recreational vehicle dealer, the change or sale shall be deemed approved. The burden of proving that any sale or transfer is not reasonable shall be on the grantor.

History.
Code 1981, § 10-1-679.8, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.9. Designated successor due to death, incapacity, or retirement; objection.

(a) It shall be unlawful for any grantor to fail to provide a recreational vehicle dealer with an opportunity, at the time of signing a recreational vehicle dealership franchise agreement or at a reasonable time thereafter, to designate a member of his or her family as a successor to the dealership in the event of the death, incapacity, or retirement of the dealer. A dealer may from time to time during the term of the franchise agreement change the beneficiary by providing a written notification to the manufacturer.

(b) It shall be unlawful to prevent or refuse to honor the succession to a dealership by a family member of the deceased, incapacitated, or retired dealer unless the grantor has provided to the family member so

designated written notice of its objections. The burden of proving that such transfer is not reasonable shall be on the grantor.

(c) Grounds for objection shall be lack of creditworthiness, conviction of a felony, inability to obtain necessary and required licenses by the beneficiary, lack of required licenses, or other conditions which make such succession unreasonable under the circumstances, but the grantor shall bear the burden of proving the unreasonableness of such succession. No family member of the deceased, incapacitated, or retired dealer may succeed to a recreational vehicle dealership unless the succession to the recreational vehicle dealership will not involve, without the grantor's consent, a relocation of the business.

History.
Code 1981, § 10-1-679.9, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.10. Requirements for warranty work and service.

(a) Each grantor or warrantor, where applicable, shall specify in writing to each of its recreational vehicle dealers licensed in Georgia the dealer's obligation for preparation, delivery, and warranty service on its products; shall compensate the dealer for warranty service required of the dealer by the grantor or warrantor; and shall provide the dealer the schedule of compensation to be paid to such dealers for parts, work, and service in connection with warranty service and the time allowances for the performance of such work and service. In no event shall such schedule of compensation fail to include reasonable compensation for diagnostic work as well as repair service and labor.

(b) Time allowances for the diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed. In the determination of what constitutes reasonable compensation under this Code section, the principal factors to be considered shall be the actual wage rates being paid by the dealer and the actual retail labor rates being charged by the dealer in the community in which the dealer is doing business. In no event shall such compensation of a dealer for warranty labor be less than the retail rates charged by the dealer for like service to retail customers for nonwarranty labor and repairs as long as such rates are reasonable.

(c) A grantor or warrantor, where applicable, shall reimburse the dealer for warranty parts at actual wholesale costs plus a minimum 30 percent handling charge and the cost, if any, of freight to return warranty parts to the grantor or warrantor. Warranty audits of dealer records may be conducted by the grantor or warrantor, where applicable, on a reasonable basis. A grantor or warrantor, where applicable, must disapprove warranty claims in writing within 30 days of the date

of submission by the dealer in the manner and form prescribed by the grantor or warrantor. Claims not specifically disapproved in writing within this 30 day period shall be construed to be approved and shall be paid within 45 days.

(d) Dealer claims for warranty compensation shall not be denied except for good cause, such as performance of nonwarranty repairs, lack of material documentation, fraud, or misrepresentation. Claims for dealer compensation must be submitted within 45 days of completing the work. The dealer must notify the warrantor verbally or in writing if the dealer is unable to promptly perform material or repetitive warranty repairs. All claims shall be paid within 30 days of dealer submission or rejected in writing for stated reasons.

(e) It shall be a violation of this article for any grantor or warrantor, where applicable, to:

(1) Fail to perform any of its warranty obligations with respect to a recreational vehicle and recreational vehicle components;

(2) Fail to assume all responsibility for any liability resulting from structural or production defects;

(3) Fail to include written notices of factory recalls to vehicle owners and dealers and the expected date by which necessary parts and equipment will be available to dealers for the correction of such defects. The grantor or warrantor, where applicable, may ship parts in quantity to the dealer to effect such campaign work, and if such parts are in excess of the dealer's requirements, the dealer may return unused parts to the grantor or warrantor for credit after completion of the campaign;

(4) Fail to compensate any of its recreational vehicle dealers licensed in Georgia for repairs effected by such dealer of merchandise damaged in manufacture or transit to the dealer where the carrier is designated by the grantor, factory branch, distributor, or distributor branch;

(5) Fail to compensate its recreational vehicle dealers licensed in this state for warranty parts, work, and service in accordance with the schedule of compensation provided the dealer pursuant to subsection (a) of this Code section if performed in a timely and competent manner, or for legal costs and expenses incurred by such dealers in connection with warranty obligations for which the grantor or warrantor, where applicable, is legally responsible or which the grantor or warrantor imposes upon the dealer;

(6) Misrepresent in any way purchases of recreational vehicles that contain warranties with respect to the manufacture, performance, or design of the vehicles which are made by the dealer, either as warrantor or co-warrantor; or

(7) Require the dealer to make warranties to customers in any manner related to the manufacture of a recreational vehicle.

(f) Notwithstanding the terms of any agreement, it shall be a violation of this article for any grantor or warrantor, where applicable, to fail to indemnify and hold harmless its recreational vehicle dealers against any losses or damages arising out of claims, costs, judgments, and expenses, including reasonable attorney's fees, or suits relating to the manufacture, assembly, or design of recreational vehicles, parts, or accessories, or other functions by the grantor or warrantor beyond the control of the dealer, including, without limitation, the selection by the grantor or warrantor, where applicable, of parts or components for the recreational vehicle or any damages to merchandise occurring in transit to the dealer where the carrier is designated by the grantor or warrantor. The dealer shall give notice to the grantor or warrantor of pending suits in which allegations are made which come within this subsection whenever reasonably practicable to do so. Any recreational vehicle dealer franchise agreement issued to, amended, or renewed for recreational vehicles in Georgia on or after July 1, 2005, shall be deemed to incorporate provisions consistent with the requirements of this subsection.

(g) On any new recreational vehicle, any uncorrected and significant damage, or any corrected damage exceeding 5 percent of the manufacturer's suggested retail price or $500.00 or more in paint damage, must be disclosed to the dealer in writing prior to delivery. Factory mechanical repair and damage to glass, tires, and bumpers is excluded from disclosure when properly replaced by identical manufacturer's or distributor's original equipment or parts.

(h) Whenever a new recreational vehicle is damaged in transit when the carrier or means of transportation is determined by the manufacturer or distributor or whenever a recreational vehicle is otherwise damaged prior to delivery to the recreational vehicle dealer or if a new recreational vehicle is found to have substantial box or chassis defects upon arrival at the recreational vehicle dealership, the dealer must notify the grantor or distributor of such damage or such defects within three business days from the date of delivery or within a reasonable amount of additional time or such time as specified in the recreational vehicle dealership franchise agreement and either:

(1) Request from the grantor, warrantor, or distributor authorization to replace the components, parts, and accessories damaged or otherwise correct the damage; or

(2) Reject the vehicle within the three-day grace period.

If the dealer exercises the option to refuse delivery of the vehicle, the recreational vehicle grantor must immediately repurchase such vehicle.

(i) If the grantor, warrantor, or distributor refuses or fails to authorize repair of such damage within ten days after receipt of notification or if the dealer rejects a recreational vehicle because of damage, ownership of the new recreational vehicle shall revert to the grantor or distributor and the recreational vehicle dealer shall have no obligations, financial or otherwise, with respect to such recreational vehicle.

(j) It shall be a violation of this article for any recreational vehicle dealer to:

(1) Fail to perform predelivery inspection functions, if required, in a competent and timely manner;

(2) Fail to perform warranty service work, authorized by the vehicle warrantor, in a reasonably timely and competent manner on any transient customer's vehicle of the same line-make, whether sold by that dealer or not;

(3) Intentionally misrepresent the terms of any warranty.

(k) All grantors, warrantors, and distributors of recreational vehicle components shall be subject to the provisions of this article.

History.
Code 1981, § 10-1-679.10, enacted by Ga. L. 2005, p. 1233, § 2/SB 155; Ga. L. 2024, p. 1052, § 2(25)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "three-day" for "three day" in paragraph (h)(2).

10-1-679.11. Remedy for violations.

If any grantor or warrantor violates this article, a recreational vehicle dealer may bring an action against such grantor or warrantor in a court of competent jurisdiction in the county of the recreational vehicle dealer for damages sustained as a consequence of the grantor's or warrantor's violation, together with the actual costs of the action including reasonable attorney's fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal, or substantial change of competitive circumstances and refusal to permit transfer of ownership in accordance with Code Sections 10-1-679.2 and 10-1-679.3.

History.
Code 1981, § 10-1-679.11, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.12. Determining issuance of temporary injunction.

In any action brought by a recreational vehicle dealer against a grantor or warrantor under this article, any violation of this article by

the grantor or warrantor shall be deemed an irreparable injury to the recreational vehicle dealer for determining if a temporary injunction should be issued.

History.
Code 1981, § 10-1-679.12, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.13. Requirements for new dealerships.

It shall be unlawful for a grantor to establish a new recreational vehicle dealership unless the dealer meets the requirements and definitions provided in this article.

History.
Code 1981, § 10-1-679.13, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

10-1-679.14. Franchise agreement required for the sale or distribution of new recreational vehicles; exceptions; enforcement.

(a) It shall be unlawful for any dealer to sell or distribute any new recreational vehicle in Georgia unless the dealer has a franchise dealership agreement with a grantor with the express right to sell or distribute recreational vehicles in Georgia and meets the requirements and definitions provided in this article. Any dealer who does not meet the requirements of this article may participate in events where recreational vehicles are exhibited or demonstrated and seminars are provided but shall be prohibited from contracting to sell or distribute recreational vehicles to the public.

(b) Subsection (a) of this Code section shall not apply to:

(1) The sale of recreational vehicles at events sponsored by a Georgia based recreational vehicle grantor with manufacturing facilities located in this state, where recreational vehicles are sold or contracted for by its franchised out-of-state recreational vehicle dealers;

(2) Any convention or rally involving more than 2,500 recreational vehicles which are preregistered with the sponsor of said event, owned by individuals attending such convention or rally, and there for the personal use of their owners for the purpose of camping and not for sale or display; provided, however, that no dealers from outside of this state shall be invited to said event by a participating manufacturer unless all franchised Georgia dealers for such participating manufacturer shall be invited to said event, and there shall be no discrimination in terms of sales by a manufacturer to any franchised Georgia dealer for recreational vehicles to be sold at the

convention or rally; nor shall any franchised Georgia dealer be required by a manufacturer to purchase inventory in addition to that required under a current franchise agreement between the manufacturer and such dealer in order for the dealer to participate in such convention or rally. Out-of-state dealers shall register with the Department of Revenue and purchase a permit 30 days prior to participating in any rally or convention in Georgia. The cost of such permit shall be $500.00 per dealer. Any manufacturer or dealer that violates this paragraph shall not be eligible to participate in any such events; or

(3) Any dealer at a convention or rally if:

(A) There are ten or more dealers from this state participating in such convention or rally; and

(B) Such convention or rally takes place at a location other than the principal place of business of any of the dealers participating in such convention or rally.

Nothing in this subsection shall be applied to impair an obligation of a contract existing on March 14, 2008.

(c) The state revenue commissioner and the Department of Revenue shall enforce this Code section in the same manner as provided by Code Sections 10-1-666 and 10-1-667 for violations of Article 22 of this chapter.

History.
Code 1981, § 10-1-679.14, enacted by Ga. L. 2005, p. 1233, § 2/SB 155; Ga. L. 2006, p. 72, § 10/SB 465; Ga. L. 2008, p. 3, § 1/HB 297.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, subparagraphs (b)(3)(1) and (b)(3)(2) were redesignated as subparagraphs (b)(3)(A) and (b)(3)(B), respectively, and "March 14, 2008" was substituted for "the effective date of this subsection" at the end of the undesignated text of subsection (b).

Editor's notes.
Ga. L. 2008, p. 3, § 2/HB 297, not codified by the General Assembly, provides that the amendment to this Code section shall apply to any agreement entered into on or after March 14, 2008, and to any renewal, modification, or amendment made on or after such date to any such agreement.

10-1-679.15. Penalty for violations.

Any person who violates the provisions of this article shall be guilty of a misdemeanor.

History.
Code 1981, § 10-1-679.15, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.

ARTICLE 23

LEASE-PURCHASE AGREEMENTS

10-1-680. Short title.

This article shall be known and may be cited as the "Lease-purchase Agreement Act."

History.
Code 1981, § 10-1-680, enacted by Ga. L. 1985, p. 1341, § 1.

10-1-681. Definitions.

As used in this article, the term:

(1) "Lease-purchase agreement" means an agreement for the use of personal property by a lessee primarily for personal, family, or household purposes for an initial period of four months or less that is renewable with each payment after the initial period and that permits the lessee to become the owner of the property. Lease-purchase agreements shall not include any of the following:

(A) A lease or agreement which constitutes a credit sale as defined in 12 C.F.R. 226.2(a)(16) and Section 1602(g) of the Truth-in-Lending Act, 15 U.S.C. Section 1601, et seq.;

(B) A lease which constitutes a consumer lease as defined in 12 C.F.R. 213.2(a)(6);

(C) Any lease for agricultural, business, or commercial purposes;

(D) Any lease made to an organization; or

(E) A lease or agreement which constitutes a retail installment transaction as defined in paragraph (10) of subsection (a) of Code Section 10-1-2.

(2) "Lessee" means a person who leases property pursuant to a lease-purchase agreement.

(3) "Lessor" means a person who, in the ordinary course of business, regularly leases, offers to lease, or arranges for the leasing of property under a lease-purchase agreement.

(4) "Period" means a day, week, month, or other subdivision of a year.

History.
Code 1981, § 10-1-681, enacted by Ga. L. 1985, p. 1341, § 1; Ga. L. 2000, p. 136, § 10.

JUDICIAL DECISIONS

Lease-purchase agreement meeting the requirements of O.C.G.A § 10-1-681 constituted a true lease, not a security agreement, and was subject to § 365 of the Bankruptcy Code, 11 U.S.C. § 365. Central Rents, Inc. v. Johnson, 203 B.R. 498, 1996 Bankr. LEXIS 1617 (Bankr. S.D. Ga. 1996).

10-1-682. Requirements for lease-purchase agreement.

(a) A lease-purchase agreement shall be in the form of a written statement which shall include all of the following:

(1) A brief description of the leased property, sufficient to identify the property to the lessee and lessor including whether the property is new or previously rented or, if a lease is for multiple items, a description of each item may be provided in a separate statement which is incorporated by reference in the primary disclosure statement;

(2) The total amount of any initial payment, including any advance payment, delivery charge, or any trade-in allowance to be paid by the lessee at or before consummation of the lease-purchase agreement;

(3) The amount and timing of payments;

(4) The amount of all other charges, individually itemized, payable by the lessee to the lessor which are not included in the periodic payments;

(5) A statement of the party liable for loss, damage in excess of normal wear and tear, or destruction to the leased property;

(6) The lessee's right to reinstate and the amount, or method of determining the amount, of any penalty or other charge for reinstatement as established in Code Section 10-1-686;

(7) The party responsible for maintaining or servicing the leased property together with a brief description of this responsibility;

(8) A statement of the conditions under which the lessee or lessor may terminate the lease;

(9) A statement of the total cost of the lease expressed as the product of the number of payments necessary to acquire ownership of the leased property times the amount of each payment, using the term "cost of lease";

(10) A statement that the lessee has the option to purchase the leased property during the term of the lease-purchase agreement and, at what price, formula, or by what method the price is determined;

(11) A statement that if any part of a manufacturer's warranty continues to cover the leased property at the time the lessee assumes ownership of the property, if allowed by the terms of the warranty, it will be passed on to the lessee;

(12) The fair market value of the leased property at the time it is initially leased to the lessee, using the term "estimated fair market value of the leased property," provided that in the case of property that has been previously leased the lessor may establish a standard value that may be used in lieu of a specific valuation for an individual item; and

(13) The difference between the amount disclosed under paragraph (9) of this subsection and the amount disclosed under paragraph (12) of this subsection, using the term "cost of lease services."

(b) All information required by this Code section shall be stated in a clear and coherent manner, using words and phrases of common meaning. The information shall be appropriately divided and captioned by its sections. All numerical amounts and percentages shall be stated in figures. The information shall also be disclosed by the lessor prior to the signing of the lease by the lessee. All of the information required by this Code section shall be provided directly on the lease contract or instrument or on a separate form. The disclosures described in paragraphs (1), (2), (3), (4), (9), (12), and (13) of subsection (a) of this Code section shall be made clearly, conspicuously, and together in sequence and shall be prominently located on the same page of the contract or other instrument evidencing the lease.

(c) At the lessor's option, information in addition to that required by this Code section may be disclosed if the additional information is not stated, utilized, or placed in a manner which will contradict, obscure, or distract attention from the required information.

History.

Code 1981, § 10-1-682, enacted by Ga. L. 1985, p. 1341, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1986, a misspelling of "agreement" was corrected in paragraph (a)(2).

Law reviews.

For article, "Do's and Don'ts When Handling a Product Liability Matter in Georgia," see 25 Ga. St. B.J. 17 (Aug. 2019).

10-1-683. Advertisements.

(a) An advertisement for any lease-purchase agreement shall not state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease the property at those amounts or terms.

(b) An advertisement for any lease-purchase agreement shall not

state that a payment or a periodic payment is due at the start of a lease of a specific item without disclosing both the payment due at the start of the lease, the periodic payment, the cost of lease services, and the total of all periodic payments necessary to obtain ownership.

History.
Code 1981, § 10-1-683, enacted by Ga. L. 1985, p. 1341, § 1.

10-1-684. Prohibited agreement provisions.

A lease-purchase agreement shall not contain a provision:

(1) Requiring a garnishment of wages or a power of attorney to confess a judgment;

(2) Granting authorization to the lessor or a person acting on the lessor's behalf to unlawfully enter upon the lessee's premises or to commit any breach of the peace in the repossession of goods;

(3) Requiring the lessee to waive any defense, counterclaim, or right of action against the lessor or a person acting on the lessor's behalf (as the lessee's agent on the lessor's behalf or as the lessee's agent) in collection of payments under the lease or in the repossession of goods;

(4) Requiring the lessee to agree not to assert against a lessor or against an assignee a claim or defense arising out of the lease;

(5) Requiring any collection or repossession charges in excess of those allowable under Code Section 10-1-7 and applicable court rules; or

(6) Providing that the lessee cannot return the leased property to the lessor at the end of any term.

History.
Code 1981, § 10-1-684, enacted by Ga. L. 1985, p. 1341, § 1.

Law reviews.
For article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985).

10-1-685. Purchase of insurance; early termination or return of items; late fees.

(a) A lessor shall not require the purchase of insurance by the lessee from the lessor of a leased item.

(b) A lessor shall not impose a penalty for early termination of a lease-purchase agreement or for the return of an item at any point.

(c) A lessor shall not impose a fee for in-home collection of a payment

unless the lessee has expressly agreed to the fee and the amount of the fee is disclosed.

(d) A lessor shall not impose a fee for picking up rental property should the lessee choose to terminate the lease.

(e) A lessor shall not impose a fee for making a late payment except the charge for reinstatement as established in Code Section 10-1-686.

History.
Code 1981, § 10-1-685, enacted by Ga. L. 1985, p. 1341, § 1.

10-1-686. Right to reinstatement of agreement by lessee failing to make timely payments; fees; substitute items.

(a) A lessee who fails to make timely periodic payments shall have the right to reinstate the original lease-purchase agreement without losing any rights or options previously acquired under the lease-purchase agreement if both of the following apply:

(1) The lessee has not missed more than three periodic payments; and

(2) One periodic payment has been missed and the lessee has surrendered the item to the lessor, if requested by the lessor, during the time in which payments were missed.

(b) A lessee shall not be charged more than one reinstatement fee per missed periodic payment. A reinstatement fee shall equal the outstanding balance of any missed payments plus a charge which shall not exceed $5.00 per missed payment. A delivery fee not to exceed the original delivery fee may be charged if redelivery of an item is necessary.

(c) If reinstatement occurs pursuant to this Code section, the lessor shall provide the lessee with either the same item leased by the lessee prior to reinstatement or a substitute item of comparable quality and condition. If a substitute item is provided, the lessor shall provide the lessee with all of the information required in Code Section 10-1-682.

History.
Code 1981, § 10-1-686, enacted by Ga. L. 1985, p. 1341, § 1.

10-1-687. Penalties; grace period for compliance.

(a) Any person who shall willfully and intentionally violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $500.00 for the first offense and as for a misdemeanor for each subsequent offense.

(b) In case of a violation of any provision of this article, with respect to any transaction, the lessee in such transaction may recover from the person committing the violation, or may set off or counterclaim in any action by such person, actual damages with a minimum recovery of $300.00 or 25 percent of the cost of the lease to acquire ownership, whichever is greater, attorneys' fees, and court costs. However, the lessor shall not be liable for any error in estimating the fair market value required in paragraph (12) of subsection (a) of Code Section 10-1-682 unless said estimate shall be proved to have been made in bad faith.

(c) Notwithstanding this Code section, any failure to comply with any provisions in this article may be corrected within ten days after the date of execution of the lease-purchase agreement by the lessee, and, if so corrected, neither the lessor nor any holder is subject to any penalty under this Code section.

History.
Code 1981, § 10-1-687, enacted by Ga. L. 1985, p. 1341, § 1.

10-1-688. Limitation of actions.

No action shall be brought under this article more than four years after the person bringing such action knew or should have known of the occurrence of the alleged violation.

History.
Code 1981, § 10-1-688, enacted by Ga. L. 1985, p. 1341, § 1; Ga. L. 2024, p. 1052, § 2(26)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "such action" for "this action" in this Code section.

10-1-689. Example of form.

The following form is an example of the form which may be used to satisfy the disclosure requirements of subsection (b) of Code Section 10-1-682, requiring that the disclosures described in paragraphs (1), (2), (3), (4), (9), (12), and (13) of subsection (a) of Code Section 10-1-682 be made clearly, conspicuously, prominently, and together in sequence:

LEASE-PURCHASE DISCLOSURES

1. Description of leased property:

Item	Quantity	Serial #	Mfg. Model	Condition
_____	_____	_____	_____	_____

_____ _____ _____ _____ _____

2. Total payment due at beginning of contract:

Lease payment: _____

Delivery charge: _____

Sales tax: _____

Other: _____

Total: _____

3. Lease payments:

1. You may renew the lease weekly or monthly as you choose.

2. The weekly rental is $____.

3. The monthly rental is $____.

4. Other charges:

1. Reinstatement fee $____

2. (Specify all others)

5. Cost of lease:

If you renew this lease each week/month for ____ weeks/ months, you will pay a total of $____ to own this property. This total includes all costs included in the first lease payment.

6. Estimated fair market value of the leased property:

The estimated fair market value of the property you are leasing is $ _____.

7. Cost of lease services:

The difference between the amount in item 5 and item 6 above is $ _____. This is the cost of services to you under this lease if you elect to renew this lease for the number of terms necessary to acquire ownership of the leased property.

I have read the above statement before signing this agreement.

Date: _____ Lessee: _____

Date: _____ Lessee: _____

History. Code 1981, § 10-1-689, enacted by Ga. L. 1985, p. 1341, § 1; Ga. L. 2000, p. 136, § 10.

ARTICLE 24

WHOLESALE DISTRIBUTION BY OUT-OF-STATE PRINCIPAL

Editor's notes. Ga. L. 1986, p. 884, § 2, not codified by the General Assembly, provided that that Act would apply to all contracts entered into on or after July 1, 1986.

10-1-700. Definitions.

As used in this article, the term:

(1) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of orders or sales or as a specified amount per order or per sale.

(2) "Principal" means a person who does business in this state and who:

(A) Manufactures, produces, imports, or distributes a tangible product for wholesale;

(B) Contracts with a sales representative to solicit orders for the product; and

(C) Compensates the sales representative in whole or in part by commission.

(3) "Sales representative" means a person who contracts with a principal to solicit wholesale orders and who is compensated in whole or in part by a commission, but such term does not include one who places orders or purchases for his or her own account for resale.

History. Code 1981, § 10-1-700, enacted by Ga. L. 1986, p. 884, § 1; Ga. L. 1993, p. 1092, § 1.

10-1-701. [Reserved] Contract for services in state.

History.
Ga. L. 1986, p. 884, § 1; repealed by Ga. L. 1992, p. 1320, § 1, effective April 13, 1992.

Editor's notes.
Ga. L. 1992, p. 1320, § 1 repealed and reserved this Code section, effective April 13, 1992.

10-1-702. Payment of commission owed after contract termination; civil action authorized.

(a) When a contract between a principal and a sales representative is terminated, the principal shall within 30 days after the termination of the contract pay all commissions due to the sales representative.

(b) A principal who fails to make timely payment of commissions as required by subsection (a) of this Code section shall be liable to the sales representative in a civil action for:

(1) All amounts due to the sales representative according to the terms of the contract;

(2) Exemplary damages in an amount not to exceed double the amount not timely paid as required by subsection (a) of this Code section; and

(3) Reasonable attorney's fees actually and reasonably incurred by the sales representative in the action.

(c) A person who brings an action under this Code section shall, if the court determines that the action is frivolous, be liable to the defendant for attorney's fees actually and reasonably incurred by the defendant in defending against such action.

History.
Code 1981, § 10-1-702, enacted by Ga. L. 1986, p. 884, § 1; Ga. L. 1992, p. 1320, § 2.

10-1-703. Waiver of law prohibited.

The provisions of this article may not be waived; and, in applying the provisions of this article, the courts of this state shall not recognize any purported waiver of the provisions of this article, whether by expressed waiver or by attempt to make a contract or agreement subject to the laws of another state.

History.
Code 1981, § 10-1-703, enacted by Ga. L. 1986, p. 884, § 1.

10-1-704. Jurisdiction of court.

A principal who is not a resident of this state and who enters into a contract subject to this article is declared to be doing business in this

state for purposes of the exercise of personal jurisdiction over nonresidents under Code Section 9-10-91.

History.
Code 1981, § 10-1-704, enacted by Ga. L. 1986, p. 884, § 1.

ARTICLE 25

RETAIL PETROLEUM PRODUCT DEALERS

10-1-720. Definitions.

As used in this article, the term:

(1) "Adult" means any person who is not a minor.

(2) "Dealer" means any person, other than an agent or employee of a producer or redistributor, who is engaged in the retail sale of petroleum products under a franchise agreement as defined in paragraph (4) of this Code section.

(3) "Designated family member" means the adult spouse, the adult child of the dealer, or the spouse of an adult child of the dealer, who has experience in the service station business and who, in the case of the dealer's death or retirement, is designated in writing by notice from the dealer to the producer or redistributor as entitled to be offered a trial franchise as such term is defined in the federal Petroleum Marketing Practices Act (15 U.S.C. Section 2801, et seq.).

(4) "Franchise" or "franchise agreement" means an agreement between a producer and a dealer or a redistributor and a dealer under which the dealer is granted the right to:

(A) Use a trademark, trade name, service mark, or other identifying symbol or name owned by the producer or redistributor; or

(B) Occupy a service station owned, leased, or controlled by the producer or redistributor for the purpose of engaging in the retail sale of petroleum products of the producer or redistributor.

(5) "Producer" means every person who produces, refines, manufactures, processes, blends, or otherwise alters any motor fuel and other petroleum products for sale or use in this state and every person who distributes any motor fuel and other petroleum products for resale in this state.

(6) "Redistributor" means any person who sells petroleum products for resale at retail.

(7) "Service station" means any filling station, store, garage, or

other place of business in this state engaging in the retail sale of motor fuel and other petroleum products.

History.
Code 1981, § 10-1-720, enacted by Ga. L. 1987, p. 1459, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2000, "U.S.C. Section" was substituted for "U.S.C., paragraph" in paragraph (3).

10-1-721. Right to have trial franchise offered to designated family member; change of designation.

(a) Effective January 1, 1988, no franchise agreement entered into between a producer and a dealer or a redistributor and a dealer shall deny a dealer the rights provided in this Code section.

(b) A dealer shall have the right, effective upon his death or retirement, to have the producer or redistributor offer a trial franchise to the designated family member who has been approved by the producer or redistributor in accordance with the producer's or redistributor's reasonable standard for personal and financial condition unless the producer or redistributor shows that the designated family member no longer meets the reasonable standards set at the time of designation of the previous approval. The foregoing shall not prohibit a producer or redistributor from requiring that the designated family member accept the trial franchise within 30 days of the dealer's death or retirement and that the designated family member attend a training program offered by the producer or redistributor. As used in this Code section, the term "trial franchise" shall have the same meaning as provided in the federal Petroleum Marketing Practices Act (15 U.S.C. Section 2801, et seq.).

(c) A dealer and a producer or a dealer and a redistributor may mutually agree to change the family member designated. The designated family member shall provide, upon the request of the producer or redistributor, personal and financial data that are reasonably necessary to determine whether he or she meets the producer's or redistributor's reasonable standards. The producer or redistributor shall not be obligated to accept a designated family member under this subsection who does not meet the producer's or redistributor's reasonable standards but any refusal to accept the designated family member shall be given by the producer or redistributor in writing to the dealer and shall fairly state the reason therefor.

History.
Code 1981, § 10-1-721, enacted by Ga. L. 1987, p. 1459, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2000, "U.S.C. Section" was substituted for

"U.S.C., paragraph" in the last sentence of subsection (b).

ARTICLE 26

MULTILINE HEAVY EQUIPMENT DEALERS

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1989, the Article 26 that was enacted by Ga. L. 1989, p. 569, § 1, has been renumbered as Article 27 (Code Section 10-1-760).

Editor's notes.

Ga. L. 1993, p. 1585, § 3, effective April 27, 1993, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 10-1-730 through 10-1-740 and was based on Ga. L. 1989, p. 1771, § 1 and Ga. L. 1992, p. 6, § 10.

10-1-730. Short title.

This article shall be known and may be cited as the "Georgia Multiline Heavy Equipment Dealer Act."

History.

Code 1981, § 10-1-730, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-731. Definitions.

As used in this article, the term:

(1) "Agreement" means a commercial relationship, either written or oral, between a supplier and a multiline dealer pursuant to which the multiline dealer has been authorized to distribute one or more of the supplier's heavy equipment products and attachments and repair parts therefor and in connection therewith to use a trade name, trademark, service mark, logo type, or advertising or other commercial symbol.

(2) "Heavy equipment" means self-propelled, self-powered, or pull-type equipment and machinery, including diesel engines, weighing 5,000 pounds or more and primarily employed for construction, industrial, maritime, mining, or forestry uses. The term "heavy equipment" shall not include:

(A) Motor vehicles requiring registration and certificates of title;

(B) Farm machinery, equipment, and implements; or

(C) Equipment that is "consumer goods" within the meaning of Code Section 11-9-102.

(3) "Multiline dealer" means a person in Georgia meeting all the following requirements:

(A) Who is engaged in the business of selling or leasing heavy equipment at retail;

(B) Who customarily maintains a total inventory valued at over $250,000.00 of new heavy equipment and attachments and repair parts therefor;

(C) Who provides repair services for the heavy equipment sold;

(D) Who has agreements with at least six different suppliers; and

(E) Whose retail sales volume of heavy equipment purchased from a single supplier, under all agreements with that supplier, is not greater than 75 percent of such person's total retail sales volume of heavy equipment during:

(i) The 12 month period immediately prior to July 1, 1989, if an agreement or agreements between the supplier and such person is or are in effect on July 1, 1989; or

(ii) The 12 month period immediately following the date the initial agreement between the supplier and such person is entered into, or portion thereof in the event of cancellation, termination, or transfer of the business prior to the end of such 12 month period, if such initial agreement is entered into subsequent to July 1, 1989.

(4) "Person" means a natural person, corporation, partnership, trust, agency, or other entity as well as the individual officers, directors, or other persons in active control of the activities of each such entity. The term "person" also includes heirs, assigns, personal representatives, and guardians.

(5) "Supplier" means every person, including any agent of such person or any authorized broker acting on behalf of that person, that enters into an agreement with a multiline dealer.

History. Code 1981, § 10-1-731, enacted by Ga. L. 1993, p. 1585, § 3; Ga. L. 2001, p. 362, § 26.

10-1-732. Unilateral amendment, cancellation, termination, refusal to renew, or causing resignation from agreement for good cause.

(a) Notwithstanding the terms, provisions, or conditions of any agreement, no supplier shall unilaterally amend, cancel, terminate, or refuse to continue to renew any agreement, or unilaterally cause a dealer to resign from an agreement, unless the supplier has first complied with the provisions of this article and good cause exists for amendment, termination, cancellation, nonrenewal, noncontinuance,

or causing a resignation. The term "good cause" shall not include the sale or purchase of a supplier. The term "good cause" shall be limited to withdrawal by the supplier, its successors, and assigns of the sale of its products in Georgia or multiline dealer performance deficiencies including, but not limited to, the following:

(1) Bankruptcy or receivership of the multiline dealer;

(2) Assignment for the benefit of creditors or similar disposition of the assets of the dealer, other than the creation of a security interest in the assets of a multiline dealer for the purpose of securing financing in the ordinary course of business; or

(3)(A) Failure by the multiline dealer to comply substantially, without reasonable cause or justification, with any reasonable and material requirement imposed upon such dealer in writing by the supplier, including, but not limited to, a substantial failure by a multiline dealer to:

(i) Maintain a sales volume or trend of his supplier's product line or lines comparable to that of other similarly situated dealers of that product line; or

(ii) Render services comparable in quality, quantity, or volume to the services rendered by other dealers of the same product or product line similarly situated.

(B) In any determination as to whether a multiline dealer has failed to comply substantially, without reasonable excuse or justification, with any reasonable and material requirement imposed upon such dealer by the supplier, consideration shall be given to the relative size, population, geographical location, number of retail outlets, and demand for the products applicable to the market area of the multiline dealer in question and to comparable market area.

(b) No supplier shall be required to give notice or show good cause pursuant to subsection (a) of this Code section to amend unilaterally agreements with multiline dealers to comply with federal or state law or, where not inconsistent with this article, to amend uniformly agreements as to all multiline dealers of the supplier in question in all states in which the supplier is marketing its products.

(c) In any dispute as to whether a supplier has acted with good cause as required by this Code section, the supplier shall have the burden of proof to establish that good cause existed.

History.
Code 1981, § 10-1-732, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-733. Amendment, termination, cancellation, or nonrenewal of agreement.

(a) Except as provided in subsection (d) of this Code section, a supplier shall provide a multiline dealer at least 120 days' prior written notice of any intention to amend, terminate, cancel, or decline to renew any agreement. The notice shall state all the reasons for the intended amendment, termination, cancellation, or nonrenewal.

(b) Where such reason or reasons relate to a condition or conditions which may be rectified by action of the multiline dealer, he shall have 75 days in which to take such action and, within such 75 day period, shall give written notice to the supplier if and when such action is taken. If such condition or conditions have been rectified by action of the multiline dealer, then the proposed amendment, termination, cancellation, or nonrenewal shall be void and without legal effect. However, where the supplier contends that action on the part of the multiline dealer has not rectified one or more of such conditions, such supplier must give written notice thereof to the multiline dealer within 15 days after the dealer gave notice to the supplier of the action taken.

(c) During the 120 day notice period provided for in subsection (a) of this Code section, the multiline dealer shall have the right to contract for a transfer of his or her business to another person who meets the material and reasonable qualifications and standards required by the supplier of its multiline dealers. The multiline dealer shall give notice of any such transfer to the supplier at least 45 days prior to the expiration of the 120 day notice period.

(d) An agreement may be immediately terminated, amended, canceled, or allowed to expire and no notice shall be required if the reason for the amendment, termination, cancellation, or nonrenewal is:

(1) The bankruptcy or receivership of the multiline dealer;

(2) An assignment for the benefit of the creditors or similar disposition of the assets of the business, other than the creation of a security interest in the assets of a multiline dealer for the purpose of securing financing in the ordinary course of business;

(3) Willful or intentional misrepresentation made by the multiline dealer with the express intent to defraud the supplier;

(4) Failure of the multiline dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, unless such failure has resulted from acts of God, casualties, strikes, or other similar circumstances beyond the multiline dealer's reasonable control;

(5) Failure to pay any undisputed amount due the supplier continuing for 30 days after written notice thereof; or

(6) A final conviction of the multiline dealer of a felony.

History.
Code 1981, § 10-1-733, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-734. Transfer of business, stock, or other interest in dealership.

(a) No supplier shall unreasonably withhold or delay consent to any transfer of the multiline dealer's business or transfer of the stock or other interest in the dealership whenever the transferee meets the material and reasonable qualifications and standards required in supplying its multiline dealers. Should a supplier determine that a proposed transferee does not meet its qualifications and standards, it shall give the multiline dealer written notice thereof, stating the specific reasons for withholding consent. No prospective transferee shall be disqualified to be a multiline dealer because it is a publicly held corporation. A supplier shall have 45 days to consider a multiline dealer's request to make a transfer under this subsection.

(b) Whenever a transfer of a multiline dealer's business occurs, the transferee shall assume all the obligations imposed on and succeed to all the rights held by the selling multiline dealer by virtue of any agreement consistent with this article between the selling multiline dealer and one or more suppliers entered into prior to the transfer.

(c) In any dispute as to whether a supplier has denied consent in violation of this Code section, the supplier shall have the burden of proving a substantial and reasonable justification for the denial of consent.

History.
Code 1981, § 10-1-734, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-735. Mailing of notice.

Notices required by this article shall be sent by certified or registered mail or statutory overnight delivery, postage prepaid.

History.
Code 1981, § 10-1-735, enacted by Ga. L. 1993, p. 1585, § 3; Ga. L. 2000, p. 1589, § 4.

10-1-736. Change in dealer's management or personnel.

No supplier shall require or prohibit any change in management or personnel of any multiline dealer unless the current or potential management or personnel fails to meet reasonable qualifications and standards required by the supplier for its multiline dealers.

History.
Code 1981, § 10-1-736, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-737. Incorporation of article into agreements; waiver prohibited; good faith settlements.

The provisions of this article shall be deemed to be incorporated into every agreement subject to this article and shall supersede and control all other provisions of any agreement inconsistent with this article. No supplier shall require any multiline dealer to waive compliance with any provision of this article. Any provision or agreement purporting to do so is void and unenforceable to the extent of the waiver or variance. Nothing in this article shall be construed to limit or prohibit good faith settlements of disputes voluntarily entered into between the parties.

History.
Code 1981, § 10-1-737, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-738. Good faith, fair dealing, and reasonableness requirements.

(a) Every agreement entered into under the provisions of this article shall impose on the parties the obligation to act in good faith and deal fairly.

(b) This article shall impose on every term and provision of any agreement a requirement of reasonableness. Every term or provision of any agreement shall be interpreted so that the requirements or obligations imposed therein are reasonable.

History.
Code 1981, § 10-1-738, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-739. Venue; equitable relief; recovery of losses and damages for violation of Code Sections 10-1-732 and 10-1-734; when supplier may not cancel, terminate, or refuse to renew agreement.

(a) Venue to hear and determine cases and controversies arising under the provisions of this article shall be in the superior court of the county wherein the multiline dealer has its principal place of business. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under this article, including, but not limited to, declaratory judgment and injunctive relief.

(b) In addition to any other remedies available at law or in equity, if

a supplier has attempted or accomplished an annulment, cancellation, or termination or has refused to continue or renew an agreement without good cause or has withheld or delayed consent in violation of Code Section 10-1-732 or Code Section 10-1-734, then the multiline dealer shall be entitled to recover losses and damages, both general and special, proximately resulting therefrom, together with the costs of the action and reasonable legal fees. Such damages shall include compensation for the value of the agreement and the loss of good will of the multiline dealer's business, if any, arising therefrom.

(c) No supplier may cancel, terminate, or refuse to continue to renew an agreement during the period set forth in this article or during the pendency of litigation or arbitration with respect thereto except under the conditions set forth in subsection (d) of Code Section 10-1-733.

History.
Code 1981, § 10-1-739, enacted by Ga. L. 1993, p. 1585, § 3.

10-1-740. Applicability of article.

The provisions of this article shall apply to any agreements entered into on or after July 1, 1989. The provisions of this article shall also apply to any agreement modified or amended on or after July 1, 1989. The provisions of this article are also applicable to any renewal or amendment of such agreements.

History.
Code 1981, § 10-1-740, enacted by Ga. L. 1993, p. 1585, § 3.

ARTICLE 27

TRADE SECRETS

Cross references.
Trade secrets in discovery proceedings, § 9-11-26.

Criminal penalty for theft of trade secrets, § 16-8-13.

Editor's notes.
Ga. L. 1990, p. 1560, § 1, effective July 1, 1990, repealed former Article 27 of Chapter 1 of Title 10 and enacted the current article. The former article consisted of Code Section 10-1-760, relating to the definition of a trade secret, and was based on Ga. L. 1989, p. 569, § 1.

Law reviews.
For note on 1990 enactment of this article, see 7 Ga. St. U.L. Rev. 213 (1990).

For survey article on law relating to intellectual property, see 42 Mercer L. Rev. 295 (1990).

For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004).

For article, "Protecting Trade Secrets and Confidential Information in Georgia," see 60 Mercer L. Rev. 533 (2009).

For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Use of Customer List by Former Employee, 3 POF2d 785.

Unfair Competition — Misuse of Trade Secret by Former Employee, 19 POF2d 163.

Abandonment of Trade Secret, 41 POF2d 517.

Misappropriation of Trade Secret under Uniform Trade Secrets Act, 12 POF3d 711.

Misappropriation of Trade Secret under the Restatement of Torts, 14 POF3d 619.

Misuse of Intellectual Property, 37 POF3d 315.

10-1-760. Short title.

This article shall be known and may be cited as the "Georgia Trade Secrets Act of 1990."

History.

Code 1981, § 10-1-760, enacted by Ga. L. 1990, p. 1560, § 1; Ga. L. 2024, p. 1052, § 2(27)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "and may be cited" following "known" in this Code section.

Law reviews.

For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

For article, "Executive Secrecy: Congress, the People, and the Courts," see 72 Emory L.J. 1301 (2023).

JUDICIAL DECISIONS

Elements. — Under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., a claim for misappropriation of trade secrets requires a plaintiff to prove that: (1) the plaintiff had a trade secret; and (2) the opposing party misappropriated the trade secret. Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 2003 U.S. App. LEXIS 1122 (11th Cir. 2003).

Defendant is liable for the misappropriation of a trade secret only if the plaintiff can show that the defendant: (1) disclosed information that enabled a third party to learn the trade secret; or (2) used a "substantial portion" of the plaintiff's trade secret to create an improvement or modification that is "substantially derived" from the plaintiff's trade secret, but if the defendant independently created the allegedly misappropriated item with only "slight" contribution from the plaintiff's trade secret, then the defendant is not liable for misappropriation. Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 2003 U.S. App. LEXIS 1122 (11th Cir. 2003).

Superseding other tort, restitutionary laws. — Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., generally supersedes conflicting tort, restitutionary, and other laws of Georgia providing civil remedies for misappropriation of a trade secret. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374, 2009 Ga. App. LEXIS 1135 (2009).

Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined

the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55, 2012 Ga. LEXIS 133 (2012).

Shareholder lacked standing to assert allegedly fraudulent transfers. — *Unpublished decision:* Shareholder of a corporation lacked standing to assert that allegedly fraudulent transfers of intellectual property constituted misappropriation of trade secrets since the property belonged to the corporation and the shareholder had no actionable interest in the property distinguishable from the interest of the corporation. Harris v. Orange S.A., 636 Fed. Appx. 476, 2015 U.S. App. LEXIS 22905 (11th Cir. 2015).

Definition of trade secret satisfied. — Despite a corporation incorporator's testimony that there was "probably nothing" the corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was presented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373, 2006 Ga. App. LEXIS 738 (2006), cert. denied, No. S06C1871, 2006 Ga. LEXIS 807 (Ga. Oct. 2, 2006).

Patient list is not trade secret. — Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. Vito v. Inman, 286 Ga. App. 646, 649 S.E.2d 753, 2007 Ga. App. LEXIS 736 (2007), cert. denied, No. S07C1859, 2007 Ga. LEXIS 770 (Ga. Oct. 9, 2007).

Personal knowledge gained during employment. — In an action to have a noncompetition agreement declared invalid under Georgia law, O.C.G.A. § 9-2-46(a), which evidenced Georgia's favoritism for the first-filed rule, the employer's counterclaim for misappropriation of trade secrets, asserted under the Georgia Trade Secrets Act (TSA), O.C.G.A. § 10-1-760 et seq., and Ohio law, was properly dismissed rather than stayed pending the outcome of a later-filed suit in Ohio; the employee's utilization of personal knowledge of customer and vendor information was not forbidden and did not state a claim under the TSA. Manuel v. Convergys Corp., 430 F.3d 1132, 2005 U.S. App. LEXIS 24549 (11th Cir. 2005).

Because a nonsolicit/noncompete agreement was overly broad, and because the evidence was insufficient to create a genuine issue of fact as to whether a former employee or a competitor misappropriated a trade secret, or solicited the former employer's employees or customers, the former employee and the competitor were entitled to summary judgment in the former employer's action under O.C.G.A. § 10-1-760 et seq. Wachovia Ins. Servs. v. Fallon, 299 Ga. App. 440, 682 S.E.2d 657, 2009 Ga. App. LEXIS 835 (2009).

Inevitable disclosure doctrine. — Inevitable disclosure doctrine is not an independent claim under which a trial court may enjoin an employee from working for an employer or disclosing trade secrets. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

Claim against state university board. — Public relations firm's claim against a state university board for misappropriation under the Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., was

barred by sovereign immunity; however, because a violation of the Act constituted a tort and the state waived sovereign immunity for torts, the firm could bring suit pursuant to the Tort Claims Act, O.C.G.A. § 50-21-20 et seq. Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, LLC, 351 Ga. App. 133, 830 S.E.2d 503, 2019 Ga. App. LEXIS 409 (2019), cert. denied, No. S19C1521, 2020 Ga. LEXIS 118 (Ga. Feb. 10, 2020).

RESEARCH REFERENCES

ALR.

What constitutes "trade secrets and commercial or financial information obtained from person and privileged or confidential", exempt from disclosure under Freedom of Information Act (5 USCS § 552(b)(4)) (FOIA), 139 A.L.R. Fed 225.

Deliberative Process Exemption from Freedom of Information Act, 5 U.S.C.A. § 552(b) — Investigative and Research Documents and Reports, 77 A.L.R. Fed. 3d 1.

10-1-761. Definitions.

As used in this article, the term:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy or limit use, or espionage through electronic or other means. Reverse engineering of a trade secret not acquired by misappropriation or independent development shall not be considered improper means.

(2) "Misappropriation" means:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of a trade secret;

(ii) At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

(I) Derived from or through a person who had utilized improper means to acquire it;

(II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other for profit or not for profit legal or commercial entity.

(4) "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

History.

Code 1981, § 10-1-761, enacted by Ga. L. 1990, p. 1560, § 1; Ga. L. 1996, p. 894, § 1.

Law reviews.

For article, "Application of the 'Inevitable Disclosure' Doctrine in Georgia," see 4 Ga. St. B. J. 58 (1999).

For survey article on labor and employment law, see 59 Mercer L. Rev. 233 (2007).

For article, "Avoiding the Potholes: A Roadmap for Intellectual Property Due Diligence in Business Transactions," see 14 Ga. St. B. J. 17 (2008).

For article, "Keeping Your Genies in the Bottle: 10 Steps to Protect Your Most Sensitive Secrets," see 14 Ga. St. B. J. 32 (2008).

For article, "Must Government Contractors 'Submit' to Their Own Destruction?: Georgia's Trade Secret Disclosure Exemption and United HealthCare of Georgia, Inc. v. Georgia Department of Community Health," see 60 Mercer L. Rev. 825 (2009).

For annual survey of labor and employment law, see 61 Mercer L. Rev. 213 (2009).

For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Article: Intellectual Property," see 65 Emory L. J. 1049 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Evidence
Application

General Consideration

Tangible form of property not required. — In order to be considered "property," an employer's customer list had to be in tangible form to be protected under the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-760 et seq.; by contrast, the employer's trade secrets were already considered the employer's property; if the employer could show that it was otherwise entitled to protection under the GTSA when its employee began working for a competitor, unless it was complaining of misappropriation of a customer list, Georgia law did not require that the trade secret be in tangible form and, moreover, even without a valid written contract or written covenant, the employee was required to refrain from disclosing the employer's trade secrets. Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc., No. 1:04-CV-1708-RWS, 2005 U.S. Dist. LEXIS 12493 (N.D. Ga. Jan. 5, 2005).

Trade secrets need not be in the form of written data to warrant protection, but Georgia law generally does not prevent a departing employee from using the skills and information the employee acquired at work. Servicetrends, Inc. v. Siemens Medical Sys., 870 F. Supp. 1042, 1994 U.S. Dist. LEXIS 11383 (N.D. Ga. 1994), amended, No. 1:93-CV-299-JTC, 1994 U.S. Dist. LEXIS 15997 (N.D. Ga. June 24, 1994).

Inevitable disclosure doctrine. — Inevitable disclosure doctrine is not an independent claim under which a trial court may enjoin an employee from working for an employer or disclosing trade secrets. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

Evidence

"Trade secret" standard satisfied. — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be maintained, the idea was a trade secret, under O.C.G.A. § 10-1-761(4), because aspects of it were not publicly available, it had economic value, as another manufacturer sought a licensing agreement, and reasonable efforts were made to maintain its secrecy. Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 2003 U.S. App. LEXIS 1122 (11th Cir. 2003).

Given the highly competitive nature of the asphalt industry in the State of Georgia, the trial court did not err in permanently enjoining the DOT from giving unredacted copies of documents, which contained trade secrets and confidential technical specifications relating to the mix design, to a competitor of a group of contractors; further, the public could ascertain whether a contractor's asphalt product met DOT requirements by examining information on the forms, which was not included in the trial court's injunction, and the records did not fall within the exception to Open Records Act disclosure because the contractors were not required by law to submit the information to the DOT. Douglas Asphalt Co. v. E. R. Snell Contr., Inc., 282 Ga. App. 546, 639 S.E.2d 372, 2006 Ga. App. LEXIS 1458 (2006), cert. denied, No. S07C0498, 2007 Ga. LEXIS 140 (Ga. Feb. 5, 2007).

Failure to provide discoverable information. — Summary judgment was unwarranted on the misappropriation of trade secrets and unfair trade practices claims under Georgia statutory and common law because defendant software developer failed to timely provide the plaintiff software developer with discoverable information about the PA system and, therefore, the court should not say that genuine issues of material fact did not exist. TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc., 880 F. Supp. 1572, 1995 U.S. Dist. LEXIS 4138 (N.D. Ga. 1995).

Expert testimony on closely guarded information. — When the plaintiff presented expert testimony showing that the disputed information was closely guarded in the hotel industry and that to the extent the information was disclosed, it was done so on the express condition that it would not be made public, enough evidence existed to allow a reasonable jury to find in its favor, and summary judgment in favor of the defendant should have been denied. Camp Creek Hospitality v. Sheraton Franchise,

139 F.3d 1396, 1998 U.S. App. LEXIS 8337 (11th Cir. 1998).

Inadequate evidence of trade secrets violation. — Claim for misappropriation of trade secrets could not withstand summary judgment because the plaintiff had not presented evidence that the competitor misappropriated the plaintiff's trade secrets by obtaining the trade secrets through improper means, and by using a substantial portion of the trade secrets to create a product that was substantially derived from the plaintiff's trade secrets. Some of the claimed "trade secrets," including camera names and images taken from cameras, were patently frivolous, and no evidence supported the claims that the information gathered in 2006 derived economic value from being a secret not readily ascertainable by proper means. EarthCam, Inc. v. OxBlue Corp., 49 F. Supp. 3d 1210, 2014 U.S. Dist. LEXIS 132388 (N.D. Ga. 2014), aff'd, 703 Fed. Appx. 803, 2017 U.S. App. LEXIS 13565 (11th Cir. 2017).

Application

Computer software. — Computer software programs are trade secrets if the requirements of paragraphs (4)(A) and (4)(B) of O.C.G.A. § 10-1-761 are met. CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337, 1992 U.S. Dist. LEXIS 14776 (M.D. Ga. 1992).

Despite a corporation incorporator's testimony that there was "probably nothing" the corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was presented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373, 2006 Ga. App. LEXIS 738 (2006), cert. denied, No. S06C1871, 2006 Ga. LEXIS 807 (Ga. Oct. 2, 2006).

Unpublished decision: In a suit alleging misappropriation of trade secrets, a software developer's claims that a subsequent provider of services to the client for whom the software was developed violated the Georgia Trade Secrets Act, O.C.G.A. § 10-1-76, by using software given to it by the client after the client ended the software purchasing and servicing relationship with the developer were properly dismissed; the complaint provided no facts from which it could be inferred that the subsequent servicer knew or should have known that the client had misappropriated the developer's trade secrets. S. Nuclear Operating Co. v. Elec. Data Sys. Corp., 273 Fed. Appx. 834, 2008 U.S. App. LEXIS 8571 (11th Cir. 2008).

Unpublished decision: Package-tracking software program was not a misappropriated trade secret since dissemination of the program to authorized users necessarily revealed the program's features and functions which were alleged to be secret, there was no written confidentiality agreement, and efforts to maintain secrecy were not reasonable under the circumstances. Warehouse Solutions, Inc. v. Integrated Logistics, LLC, 610 Fed. Appx. 881, 2015 U.S. App. LEXIS 7633 (11th Cir. 2015).

Software developers were not entitled to summary judgment on joint venturers'/investors' claim for misappropriation of trade secrets because there was evidence that the developers improperly retained and failed to return the software after the parties' venture wound up. Healthy-IT, LLC v. Agrawal, 343 Ga. App. 660, 808 S.E.2d 876, 2017 Ga. App. LEXIS 546 (2017).

Customer lists. — Because purported customer lists sought to be protected consisted of information a former employee had in the employee's memory about nurses and health facilities with which the employer contracted during the period the employer employed the employee, and because there was no evidence the employer made reasonable efforts to maintain the confidentiality of the information the employer sought to protect, the information was not a "trade secret" within the meaning of the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-760 et seq., for the purposes of

Application (Cont'd)

determining whether an interlocutory injunction was appropriate. Smith v. Mid-State Nurses, Inc., 261 Ga. 208, 403 S.E.2d 789, 1991 Ga. LEXIS 214 (1991).

Lists containing the identities of and specific information concerning actual customers of companies were "trade secrets." Avnet, Inc. v. Wyle Lab., Inc., 263 Ga. 615, 437 S.E.2d 302, 1993 Ga. LEXIS 835 (1993).

Information contained in a customer list that was readily obtainable by proper means was not a trade secret. Leo Publications, Inc. v. Reid, 265 Ga. 561, 458 S.E.2d 651, 1995 Ga. LEXIS 519 (1995).

Tangible customer lists are the property of the employer and warrant protection as trade secrets. Leo Publications, Inc. v. Reid, 265 Ga. 561, 458 S.E.2d 651, 1995 Ga. LEXIS 519 (1995).

Only information that may be protected under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., is an actual tangible customer list. AmeriGas Propane, L.P. v. T-Bo Propane, Inc., 972 F. Supp. 685, 1997 U.S. Dist. LEXIS 12664 (S.D. Ga. 1997).

When a car repair company took no precautions to maintain the confidentiality of the company's customer list, which was on computers that were not password protected, the same information in those lists was available to technicians through repair orders that the technicians were permitted to retain indefinitely, and employees were not informed that the information was confidential, such customer lists were not trade secrets. Bacon v. Volvo Serv. Ctr., Inc., 266 Ga. App. 543, 597 S.E.2d 440, 2004 Ga. App. LEXIS 309 (2004), cert. denied, No. S04C1341, 2004 Ga. LEXIS 753 (Ga. Sept. 7, 2004).

There was a genuine issue of fact as to whether a former employee had misappropriated trade secrets as defined by O.C.G.A. § 10-1-761; tangible customer lists could warrant protection as trade secrets, and the employee had signed an agreement to keep customer lists confidential, the employee took an organizer containing contact information for customers when the employee resigned, and the employee used the organizer to look up phone numbers after the employee's resignation. Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley, 284 Ga. App. 591, 644 S.E.2d 862, 2007 Ga. App. LEXIS 369 (2007).

Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. Vito v. Inman, 286 Ga. App. 646, 649 S.E.2d 753, 2007 Ga. App. LEXIS 736 (2007), cert. denied, No. S07C1859, 2007 Ga. LEXIS 770 (Ga. Oct. 9, 2007).

Home healthcare and hospice services provider satisfied the provider's burden of establishing that the provider's referral log and workbook containing doctor referral statistics constituted trade secrets under O.C.G.A. § 10-1-761(4) since the documents contained valuable, proprietary information uniquely known to the provider, the information was not publicly available, the information, which the provider collected, evaluated, analyzed, and arranged, enabled the provider's employees to make informed, fact-based decisions on where to focus their business solicitation efforts, and the provider undertook reasonable efforts to maintain the confidentiality of the documents. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302, 2011 U.S. Dist. LEXIS 59260 (N.D. Ga. 2011).

Because the real estate partnerships failed to demonstrate that the partnerships derived economic value from the secrecy of their investor lists in accordance with O.C.G.A. § 10-1-761(4)(A), the lists did not constitute a trade secret; accordingly, the trial court erred by granting summary judgment to the partnerships and denying an investment manager's motion. Sutter Capital Mgmt., LLC v. Wells Capital, Inc., 310 Ga. App. 831, 714 S.E.2d 393, 2011 Ga. App. LEXIS 666 (2011).

Customer database. — Although the trial court erred by enforcing a restrictive covenant in a former office manager's employment contract since the contract was unenforceable as overbroad because the contract failed to properly limit the territory to which the contract applied, the trial court properly held that the former employer's customer database constituted a trade secret under O.C.G.A. § 10-1-761(4); there was sufficient evidence that the former employer made a reasonable effort to maintain the secrecy of the database by not publishing the database, having established company-wide policies to protect that information from disclosure to third-parties, by counseling company employees regarding those policies, and by limiting access to the database. Paramount Tax & Accounting, LLC v. H & R Block Eastern Enters., 299 Ga. App. 596, 683 S.E.2d 141, 2009 Ga. App. LEXIS 912 (2009).

Drawings. — Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e., the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55, 2012 Ga. LEXIS 133 (2012).

Distribution of information outside company. — Former employee was not guilty of misappropriation of trade secrets and confidential information where it was shown that the allegedly confidential technical data provided to the employee was also distributed to the company's customers which removed any legal protection it might otherwise have had as trade secrets. Servicetrends, Inc. v. Siemens Medical Sys., 870 F. Supp. 1042, 1994 U.S. Dist. LEXIS 11383 (N.D. Ga. 1994), amended, No. 1:93-CV-299-JTC, 1994 U.S. Dist. LEXIS 15997 (N.D. Ga. June 24, 1994).

Manufacturer of a boiler cleaner system was denied a preliminary injunction against a competitor's marketing of a similar product because the manufacturer failed to show it was likely to prevail on a misappropriation of trade secret charge under O.C.G.A. § 10-1-761; the manufacturer could not establish the existence of a trade secret because the product at issue had been sold to the public and was not subject to reasonable efforts to maintain secrecy. Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc., 370 F. Supp. 2d 1339, 2005 U.S. Dist. LEXIS 12492 (N.D. Ga. 2005).

Prohibition on former employee working as executive. — Trial court erred, in part, by ordering an interlocutory injunction prohibiting a former employee from working in an executive capacity for a particular competitor of the former employer for one year based on the inevitable disclosure doctrine because a stand-alone claim under the doctrine, untethered from the provisions of Georgia's trade secret statute, O.C.G.A. § 10-1-760 et seq., was not cognizable in Georgia. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

When automobile title loan companies competed for customers, and the plaintiffs sued the defendants, the laws of trespass and trade secrets (at least in Georgia) did not support the scope of the nationwide interlocutory injunction because, to the extent the defendants were collecting information about the plaintiffs' customers in parking lots or using that information to search databases of motor vehicles was based on a finding that the identities of the plaintiffs' customers were trade secrets, which they were not, the injunction could not be sustained. TMX Fin.

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Holdings, Inc. v. Drummond Fin. Servs., LLC, 300 Ga. 835, 797 S.E.2d 842, 2017 Ga. LEXIS 167 (2017).

When automobile title loan companies competed for customers, and the plaintiffs sued the defendants, the laws of trespass and trade secrets (at least in Georgia) did not support the scope of the nationwide interlocutory injunction because the plaintiffs had not claimed that the defendants had taken a tangible list of the plaintiffs' customers but rather that the defendants had searched databases of motor vehicles to determine which vehicles had liens held by the plaintiffs, and while such actions might be unlawful under the Driver's Privacy Protection Act, 18 U.S.C. § 2721 et seq., or otherwise, the actions did not constitute a misappropriation of trade secrets in Georgia. TMX Fin. Holdings, Inc. v. Drummond Fin. Servs., LLC, 300 Ga. 835, 797 S.E.2d 842, 2017 Ga. LEXIS 167 (2017).

Lease documents. — When a former employee testified to taking files containing lease documents from the employer with the intent of using the leases to further the former employee's own business, the trial court did not err in finding a genuine issue of material fact as to whether the former employee misappropriated trade secrets and improperly used confidential information. Kuehn v. Selton & Assocs., 242 Ga. App. 662, 530 S.E.2d 787, 2000 Ga. App. LEXIS 293 (2000), cert. denied, No. S00C1149, 2000 Ga. LEXIS 557 (Ga. June 30, 2000).

Names. — If the idea for the geographically descriptive name of a proposed publication was not novel or original, the name was not worthy of protection as a trade secret. Leo Publications, Inc. v. Reid, 265 Ga. 561, 458 S.E.2d 651, 1995 Ga. LEXIS 519 (1995).

List of cities for new franchises. — Names of cities which a franchisor considered good candidates for new franchises could not be considered trade secrets. Allen v. Hub Cap Heaven, Inc., 225 Ga. App. 533, 484 S.E.2d 259.

Particularized information about a logistics system learned by an employee through the employee's position of trust with the company that developed the system was a trade secret. Essex Group v. Southwire Co., 269 Ga. 553, 501 S.E.2d 501, 1998 Ga. LEXIS 719 (1998).

Personal knowledge. — Former employee's personal knowledge of the employer's customer information was not a "trade secret." Avnet, Inc. v. Wyle Lab., Inc., 263 Ga. 615, 437 S.E.2d 302, 1993 Ga. LEXIS 835 (1993).

Injunction prohibiting solicitation and sale to customers that the defendant company knew or had reason to know were the plaintiff company's customers during former employee's employment with the plaintiff and prohibiting contact with any vendor on any list obtained from the plaintiff effectively enjoined the defendant from utilizing personal knowledge of customer and vendor information and was overbroad. DeGiorgio v. Megabyte Int'l, Inc., 266 Ga. 539, 468 S.E.2d 367.

In an annuity company's suit alleging that two former employees violated restrictive covenants of nondisclosure of trade secrets and confidential information and nonsolicitation, the employees' personal knowledge of the company's customers, as well as account information contained in the employees' day planners, both of which the employees used to take business from the company, constituted trade secrets under O.C.G.A. § 10-1-761(4). Variable Annuity Life Ins. Co. v. Joiner, 454 F. Supp. 2d 1297, 2006 U.S. Dist. LEXIS 62400 (S.D. Ga. 2006).

Trade secrets protected under Open Records Act. — Since a company made reasonable efforts to protect the dissemination of trade secret information except for providing the information to the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources, trade secret status was not lost simply because the company did not notify the EPD each time that the company provided the EPD with information containing trade secrets. Theragenics Corp. v. Department of Natural Resources, 244 Ga. App. 829, 536 S.E.2d 613, 2000 Ga. App. LEXIS 884 (2000), aff'd, 273 Ga. 724, 545 S.E.2d 904, 2001 Ga. LEXIS 299 (2001).

Inappropriate to dismiss misappropriation of trade secret count. — Defendant was not entitled to dismissal of the plaintiff's misappropriation of trade

secret count based on the defendant's argument that the plaintiff did not sufficiently allege that the plaintiff undertook steps to keep the plaintiff's alleged idea a secret because the court could not conclude that each of the actions taken by the plaintiff, in combination with one another, failed to plausibly support a claim for violation of the Georgia Trade Secrets Act, O.C.G.A. § 10–1–760 et seq. Schwieterman v. Caterpillar Inc., No. 1:20-CV-2611-SCJ, 2021 U.S. Dist. LEXIS 135003 (N.D. Ga. July 9, 2021).

Factual issues remaining in restrictive employment contract dispute. — In an agent's suit against an insurance company seeking to invalidate restrictive covenants in an agreement to sell insurance products, the court held that the trial court properly denied the agent's motion for judgment on the pleadings as to a confidential and proprietary information provision because it could not be said as a matter of law that the information defined as such did not constitute a trade secret or merely confidential information relating to the company's business. Holland Ins. Group, LLC v. Senior Life Ins. Co., 329 Ga. App. 834, 766 S.E.2d 187, 2014 Ga. App. LEXIS 792 (2014).

Confidentiality agreements not sufficient. — Requiring employees to sign confidentiality agreements was not a reasonable step to maintain the secrecy of computer software because the employees were transferred to work for a competitor on projects involving use of the software without instructions as to the confidentiality of documentation on the projects. Stargate Software Int'l, Inc. v. Rumph, 224 Ga. App. 873, 482 S.E.2d 498.

Plaintiff former employer's Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., claim against the defendants, a former employee and a competitor, failed as to items the employer distributed to the employer's representatives for use at customer sites, without confidentiality markings or copying protection, as those items were not trade secrets under O.C.G.A. § 10-1-761(4) and a general confidentiality agreement the employer required the employees to sign did not create trade secrets in those items. Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 2007 U.S. Dist. LEXIS 73032 (N.D. Ga. 2007).

"Misappropriation." — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be maintained, and the manufacturer then asked another company to design a similar concept, the evidence did not show misappropriation by the manufacturer, under O.C.G.A. § 10-1-761(2), because all of the other company's production elements were different from the marketing company's idea, and the concept elements had been presented to the manufacturer by a fourth company, as a result of which the manufacturer legally owned those elements, which were also in the public domain, having been the subject of a fifth company's patent application. Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 2003 U.S. App. LEXIS 1122 (11th Cir. 2003).

Considering the definition of "misappropriation" in O.C.G.A. § 10-1-761(2) in a motion for a preliminary injunction, an employer could show misappropriation by a competitor through acquisition, disclosure, or use of the employer's trade secrets by the competitor hiring one of the employer's former employees. Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc., No. 1:04-CV-1708-RWS, 2005 U.S. Dist. LEXIS 12493 (N.D. Ga. Jan. 5, 2005).

Disclosure. — Record showed defendant competitor's officer sent an e-mail to the officer's superiors speculating on plaintiff former employer's product design, then, the next day, after having lunch with the other defendant, the employer's former employee, the officer knew of the product's inner structure, components, and service history, and the competitor previously failed in an attempt to reverse engineer the product, a question of fact existed concerning whether the employee "disclosed" the employer's trade secrets in violation of O.C.G.A. § 10-1-761(2)(B)(ii)(II). Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 2007 U.S. Dist. LEXIS 73032 (N.D. Ga. 2007).

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Former employee misappropriated a home healthcare and hospice services provider's trade secrets when the employee sent the referral logs to the employee's personal email account when, based on the timing of the transmission, the employee did not need the referral log information to complete a task for the provider's supervisor; the employee's testimony to the contrary was untruthful. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302, 2011 U.S. Dist. LEXIS 59260 (N.D. Ga. 2011).

Former employee had not misappropriated a home healthcare and hospice services provider's trade secrets after the employee's credible testimony established that the employee inadvertently failed to return a workbook after leaving the provider and did not, and had no intent to, use the workbook to compete against the provider. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302, 2011 U.S. Dist. LEXIS 59260 (N.D. Ga. 2011).

Former employer's misappropriation of trade secrets claim failed because the former employer presented only circumstantial evidence to support the employer's allegation that the former employee disclosed or used the employer's trade secrets, while the employee testified unequivocally that the employee did not use or disclose any trade secrets and presented evidence showing how the employee's new company could have independently bid upon the jobs at issue. Contract Furniture Refinishing & Maint. Corp. v. Remanufacturing & Design Group, LLC, 317 Ga. App. 47, 730 S.E.2d 708, 2012 Ga. App. LEXIS 686 (2012).

Pricing data of bidder. — Bidder on a public project failed to provide any evidence to support the bidder's claim that the detailed pricing information in the bidder's unredacted price proposal would enable a competitor to deduce how the bidder designed the bidder's systems and, therefore, merited protection under the trade secrets exemption to the Open Records Act, O.C.G.A. § 50-18-72(b)(1). State Rd. & Tollway Auth. v. Elec. Transaction Consultants Corp., 306 Ga. App. 487, 702 S.E.2d 486, 2010 Ga. App. LEXIS 967 (2010).

Misuse of information by franchisor. — In an action by a franchisee against a franchisor, evidence that the franchisor misused information acquired from the franchisee by legitimate means precluded summary judgment. Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1998 U.S. App. LEXIS 8337 (11th Cir. 1998).

Protectable trade secret. — District court erred in ruling that the subscriber assistance program (SAP) was not described concretely enough to constitute a trade secret, as a jury could reasonably find that the SAP included as components a one-time/out-of-cycle phone upgrade and a corresponding pricing model and that the entire SAP was a protectable trade secret. Further, as the phone upgrade component was non-existent in the industry at the time, the inclusion of that component might have created a trade secret. Subscriber Holdings, LLC v. Brightstar Corp., No. 21-12985, 2022 U.S. App. LEXIS 35963 (11th Cir. Dec. 30, 2022).

10-1-762. Injunctive relief.

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in appropriate circumstances for reasons including, but not limited to, an elimination of commercial advantage that otherwise would be derived from the misappropriation or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means.

(b) In exceptional circumstances, if the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

(d) In no event shall a contract be required in order to maintain an action or to obtain injunctive relief for misappropriation of a trade secret.

History.

Code 1981, § 10-1-762, enacted by Ga. L. 1990, p. 1560, § 1.

Law reviews.

For article, "Application of the 'Inevitable Disclosure' Doctrine in Georgia," see 4 Ga. St. B. J. 58 (1999).

For article, "Georgia's Constitutional Scheme for State Appellate Jurisdiction," see 6 Ga. St. B. J. 24 (2001).

JUDICIAL DECISIONS

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the federal district court in Georgia to give full effect to the Michigan court order. Williams v. GMC, 147 F.R.D. 270, 1993 U.S. Dist. LEXIS 3241 (S.D. Ga. 1993).

Permanent injunction appropriate. — After a company in the cable and wire industry developed a logistics system that constituted a trade secret, it was proper to issue a permanent injunction prohibiting a former employee of the company from working in the logistics department of a competitor for five years, or sooner if the competitor independently develops the competitor's own system. Essex Group v. Southwire Co., 269 Ga. 553, 501 S.E.2d 501, 1998 Ga. LEXIS 719 (1998).

Royalty injunction appropriate. — Trial court did not abuse the court's discretion in imposing a royalty injunction after making findings as to the public's interest in competition, plaintiff's delays in bringing the matter to resolution, and the adequacy of a royalty to protect the parties' respective interests. Electronic Data Sys. Corp. v. Heinemann, 268 Ga. 755, 493 S.E.2d 132, 1997 Ga. LEXIS 712 (1997).

Injunction blocking use of misappropriated trade secret appropriate. — Non-compete clause in a Software Agreement between an employer and employee was unenforceable as a restraint of trade under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c), because it was unlimited as to time and territory. However, under O.C.G.A. § 10-1-762(d), the employee was prohibited from using a software version that incorporated the employer's trade secrets and confidential information, regardless of the non-compete clause. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457, 2009 Ga. LEXIS 700 (2009).

Inevitable disclosure doctrine. — Inevitable disclosure doctrine is not an independent claim under which a trial court may enjoin an employee from working for an employer or disclosing

trade secrets. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

Interlocutory injunction inappropriate. — Trial court erred, in part, by ordering an interlocutory injunction prohibiting a former employee from working in an executive capacity for a particular competitor of the former employer for one year based on the inevitable disclosure doctrine because a stand-alone claim under the doctrine, untethered from the provisions of Georgia's trade secret statute, O.C.G.A. § 10-1-760 et seq., was not cognizable in Georgia. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to state trade secrets. — State entity contending that information requested pursuant to the Open Records Act, § 50-18-70 et seq., constitutes a trade secret to another, may exercise the entity's rights to protect the information under O.C.G.A. § 10-1-762. 1994 Op. Att'y Gen. No. 94-15.

RESEARCH REFERENCES

ALR.

Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 A.L.R.6th 537.

10-1-763. Recovery of damages.

(a) In addition to or in lieu of the relief provided by Code Section 10-1-762, a person is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. If neither damages nor unjust enrichment caused by the misappropriation are proved by a preponderance of the evidence, the court may award damages caused by misappropriation measured in terms of a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret for no longer than the period of time for which use could have been prohibited.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a) of this Code section.

(c) In no event shall a contract be required in order to maintain an action or to recover damages for misappropriation of a trade secret.

History.

Code 1981, § 10-1-763, enacted by Ga. L. 1990, p. 1560, § 1.

JUDICIAL DECISIONS

Claim against state university board. — Public relations firm's claim against a state university board for misappropriation under the Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., was barred by sovereign immunity; however, because a violation of the Act constituted a tort and the state waived sovereign immunity for torts, the firm could bring suit pursuant to the Tort Claims Act, O.C.G.A. § 50-21-20 et seq. Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, LLC, 351 Ga. App. 133, 830 S.E.2d 503, 2019 Ga. App. LEXIS 409 (2019), cert. denied, No. S19C1521, 2020 Ga. LEXIS 118 (Ga. Feb. 10, 2020).

Summary judgment denied. — Summary judgment was unwarranted on the misappropriation of trade secrets and unfair trade practices claims under Georgia statutory and common law because defendant software developer failed to timely provide plaintiff software developer with discoverable information about the PA system and, therefore, the court could not say that genuine issues of material fact did not exist. TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc., 880 F. Supp. 1572, 1995 U.S. Dist. LEXIS 4138 (N.D. Ga. 1995).

Despite a corporation incorporator's testimony that there was "probably nothing" the corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was presented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373, 2006 Ga. App. LEXIS 738 (2006), cert. denied, No. S06C1871, 2006 Ga. LEXIS 807 (Ga. Oct. 2, 2006).

Pleading. — There is no requirement in O.C.G.A. § 10-1-763 that punitive damages be specifically asked for in the complaint, and exemplary damages may be awarded in the absence of such a request, if the evidence shows that willful and malicious misappropriation existed. Brandenburg v. All-Fleet Refinishing, Inc., 252 Ga. App. 40, 555 S.E.2d 508, 2001 Ga. App. LEXIS 1190 (2001).

RESEARCH REFERENCES

ALR.

Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 A.L.R.6th 537.

10-1-764. Award of attorneys' fees.

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party.

History.

Code 1981, § 10-1-764, enacted by Ga. L. 1990, p. 1560, § 1.

RESEARCH REFERENCES

ALR.
Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 A.L.R.6th 537.

10-1-765. Protection of trade secret during action.

In an action under this article, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

History.
Code 1981, § 10-1-765, enacted by Ga. L. 1990, p. 1560, § 1.
Amendments.
For article, "Executive Secrecy: Congress, the People, and the Courts," see 72 Emory L.J. 1301 (2023).

RESEARCH REFERENCES

ALR.
Discovery of trade secret in state court action, 75 A.L.R.4th 1009.
What constitutes "trade secrets and commercial or financial information obtained from person and privileged or confidential," exempt from disclosure under Freedom of Information Act (5 USCS § 552(b)(4)) (FOIA), 139 A.L.R. Fed 225.
Deliberative Process Exemption from Freedom of Information Act, 5 U.S.C.A. § 552(b) — Investigative and Research Documents and Reports, 77 A.L.R. Fed. 3d 1.

10-1-766. Limitation of action.

An action for misappropriation must be brought within five years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this Code section, a continuing misappropriation by any person constitutes a single claim against that person, but this Code section shall be applied separately to the claim against each person who receives a trade secret from another person who misappropriated that trade secret.

History.
Code 1981, § 10-1-766, enacted by Ga. L. 1990, p. 1560, § 1.

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Mere suspicion of misappropriation of trade secrets insufficient. — Because: (1) the trial court erred in holding that mere suspicion of a possible misappropriation of an employer's trade secrets by one of the employer's former employees amounted to objectively reasonable notice sufficient to trigger the running of the statute; and (2) a fact issue existed as to whether the suspicions

reflected in the employer's letters to the former employee's counsel were sufficient to cause a reasonable person to investigate whether its trade secrets had been misappropriated, the trial court erred in granting the former employee partial summary judgment on the basis of the five-year statute of limitations under O.C.G.A. § 10-1-766. Porex Corp. v. Haldopoulos, 284 Ga. App. 510, 644 S.E.2d 349, 2007 Ga. App. LEXIS 358 (2007), cert. denied, No. S07C1154, 2007 Ga. LEXIS 498 (Ga. June 25, 2007).

10-1-767. Applicability of article.

(a) Except as provided in subsection (b) of this Code section, this article shall supersede conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.

(b) This article shall not affect:

(1) Contractual duties or remedies, whether or not based upon misappropriation of a trade secret; provided, however, that a contractual duty to maintain a trade secret or limit use of a trade secret shall not be deemed void or unenforceable solely for lack of a durational or geographical limitation on the duty;

(2) Other civil remedies that are not based upon misappropriation of a trade secret; or

(3) The definition of a trade secret contained in Code Section 16-8-13, pertaining to criminal offenses involving theft of a trade secret or criminal remedies, whether or not based upon misappropriation of a trade secret.

History.
Code 1981, § 10-1-767, enacted by Ga. L. 1990, p. 1560, § 1; Ga. L. 1991, p. 94, § 10.

JUDICIAL DECISIONS

Federal preemption. — Misappropriation claims under Georgia's trade secrets law, O.C.G.A. Art. 27, Ch. 1, T. 10, were not preempted by the federal Copyright Act (17 U.S.C. § 101 et seq.) because the claims involved the additional element of a breach of the confidentiality that was owed to the software owner under the owner's license agreement and common law. CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337, 1992 U.S. Dist. LEXIS 14776 (M.D. Ga. 1992).

Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., generally supersedes conflicting tort, restitutionary, and other laws of Georgia providing civil remedies for misappropriation of a trade secret. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374, 2009 Ga. App. LEXIS 1135 (2009).

Preemption of common law claims. — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be maintained, and the manufacturer then asked another company to design a similar concept, as a result of which the marketing company sued the manufacturer, the marketing company's conversion, breach of confidential relationship and duty of good faith, unjust enrichment, and quantum meruit claims were preempted by O.C.G.A. § 10-1-767, as the subject

matter of each of those claims was a trade secret. Penalty Kick Mgmt. v. Coca Cola Co., 318 F.3d 1284, 2003 U.S. App. LEXIS 1122 (11th Cir. 2003).

In a former employer's suit against a former employee and the new employer, the former employer's conversion, misappropriation, unjust enrichment, quantum merit, and civil theft claims were dismissed, as O.C.G.A. § 10-1-767 was the exclusive remedy for misappropriation of trade secrets, and the other claims were based on the same facts that comprised the trade secret misappropriation claim. Opteum Fin. Servs., LLC v. Spain, 406 F. Supp. 2d 1378, 2005 U.S. Dist. LEXIS 34444 (N.D. Ga. 2005).

Unpublished decision: In a case alleging misappropriation of confidential information and trade secrets, and breach of confidentiality agreements, a district court did not err in finding that the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., preempted the common law claims. FERCO Enters. v. Taylor Recycling Facility, LLC, 291 Fed. Appx. 304, 2008 U.S. App. LEXIS 18967 (11th Cir. 2008).

Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55, 2012 Ga. LEXIS 133 (2012).

Breach of contract not preempted. — After plaintiff former employer also asserted Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., claims, its common law breach of contract claim against defendant former employee was not superseded by the Act because, under O.C.G.A. § 10-1-767(b)(1), such a claim was not superseded, and the employee did not argue that there was an absence of a factual dispute as to whether the employee breached the employee's conflict of interest agreement. Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 2007 U.S. Dist. LEXIS 73032 (N.D. Ga. 2007).

Customer base as trade secret. — Bankruptcy trustee had no action against defendants for their conversion of the debtor's customer base because the remedies provided by the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., for misappropriation of a trade secret are exclusive. Kissner v. Inter-Continental Hotels Corp., No. 97 Civ 8400, 1999 U.S. Dist. LEXIS 1760 (S.D.N.Y. Feb. 18, 1999).

Remedies under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., for misappropriation of a debtor's customer list were not available to a bankruptcy trustee because the debtor did not take the steps necessary to protect the debtor's customer base as a trade secret. Kissner v. Inter-Continental Hotels Corp., No. 97 Civ 8400, 1999 U.S. Dist. LEXIS 1760 (S.D.N.Y. Feb. 18, 1999).

Claim constituted tort actionable under Tort Claims Act. — Public relations firm's claim against a state university board for misappropriation under the Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., was barred by sovereign immunity; however, because a violation of the Act constituted a tort and the state waived sovereign immunity for torts, the firm could bring suit pursuant to the Tort Claims Act, O.C.G.A. § 50-21-20 et seq. Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, LLC, 351 Ga. App. 133, 830 S.E.2d 503, 2019 Ga. App. LEXIS 409 (2019), cert. denied, No. S19C1521, 2020 Ga. LEXIS 118 (Ga. Feb. 10, 2020).

Breach of fiduciary duty claim not preempted. — Trial court erred in dismissing an employer's claims for breach of fiduciary duty, solicitation of

customers, appropriation of tangible property, and breach of a nondisclosure agreement as preempted by the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., because these claims alleged conduct that did come within the Act. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374, 2009 Ga. App. LEXIS 1135 (2009).

ARTICLE 27A

BAD FAITH ASSERTIONS OF PATENT INFRINGEMENT

Law reviews.

For article, "More Property Rules Than Property? The Right to Exclude in Patent and Copyright," see 68 Emory L.J. 685 (2019).

For article, "Automation & Predictive Analytics in Patent Prosecution: USPTO Implications & Policy," see 35 Ga. St. U.L. Rev. 1185 (2019).

10-1-770. Definitions.

As used in this article, the term:

(1) "Claims in the patent" means the extent of protection conferred by a patent.

(2) "Demand letter" means a letter, email, or other written communication asserting or claiming that the target has engaged in patent infringement.

(3) "Target" means a person:

(A) Who has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(B) Who has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(C) Whose customers have received a demand letter asserting that use of such person's product, service, or technology infringes a patent.

History.

Code 1981, § 10-1-770, enacted by Ga. L. 2014, p. 208, § 1/HB 809; Ga. L. 2024, p. 1052, § 2(28)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email," for "e-mail," in paragraph (2).

10-1-771. Bad faith assertion of patent infringement prohibited; factors for determining bad faith.

(a) A person shall not make a bad faith assertion of patent infringement.

(b) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(1) The demand letter does not contain the following information:

(A) The patent number;

(B) The name and address of the patent owner or owners and assignee or assignees, if any; and

(C) Factual allegations concerning the specific areas in which the target's products, services, and technology infringe the patent or are covered by the claims in the patent;

(2) Prior to sending the demand letter, the person fails to conduct an analysis comparing the claims in the patent to the target's products, services, and technology, or such an analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent;

(3) The demand letter lacks the information described in paragraph (1) of this subsection, the target requests such information, and the author of the demand letter fails to provide such information within a reasonable period of time;

(4) The demand letter demands payment of a license fee or response within an unreasonably short period of time;

(5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the patent;

(6) The claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless;

(7) The claim or assertion of patent infringement is deceptive;

(8) The person or its subsidiaries or affiliates have previously filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and:

(A) Those threats or lawsuits lacked the information described in paragraph (1) of this subsection; or

(B) The person attempted to enforce the claim of patent infringement in litigation, and a court found the claim to be meritless; or

(9) Any other factor the court finds relevant.

(c) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(1) The demand letter contains the information described in paragraph (1) of subsection (b) of this Code section;

(2) Where the demand letter lacks the information described in paragraph (1) of subsection (b) of this Code section and the target

requests the information, the author of the demand letter provides the information within a reasonable period of time;

(3) The author of the demand letter engages in a good faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy;

(4) The author of the demand letter makes a substantial investment in the use of the patent or in the production or sale of a product or item covered by the patent;

(5) The author of the demand letter is:

(A) The inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee; or

(B) An institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education;

(6) The author of the demand letter has:

(A) Demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or

(B) Successfully enforced the patent, or a substantially similar patent, through litigation; or

(7) Any other factor the court finds relevant.

History.
Code 1981, § 10-1-771, enacted by Ga. L. 2014, p. 208, § 1/HB 809.

JUDICIAL DECISIONS

Appeal. — Company's inadequate briefing on appeal required affirmance with regard to a bad faith assertion of patent infringement under O.C.G.A. § 10-1-771; the company did not adequately address the district court's decision that its competitor's letters were not demand letters and that the company was not injured by the letters. Digital Ally, Inc. v. Util. Assocs., 882 F.3d 974, 2018 U.S. App. LEXIS 3674 (10th Cir. 2018).

10-1-772. Protective order; posting of bond.

If proceedings are initiated in a court of competent jurisdiction by the author of a demand letter or the author's agent, principal, client, or employee, a target may move that a bad faith assertion of patent infringement has been made in violation of this article and request that a protective order be issued as described in this Code section. Upon such motion and a finding by the court that a target has established a reasonable likelihood that an author of a demand letter has made a bad

faith assertion of patent infringement, the court shall require the author of the demand letter to post a bond in an amount equal to a good faith estimate of the target's expenses of litigation, including an estimate of reasonable attorney's fees, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this Code section shall not exceed $250,000.00. The court may waive the bond requirement if it finds the author of the demand letter has available assets equal to the amount of the proposed bond or for other good cause shown.

History.
Code 1981, § 10-1-772, enacted by Ga. L. 2014, p. 208, § 1/HB 809.

10-1-773. Enforcement; relief from damages.

(a) A violation of this article shall constitute an unfair and deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act," and the enforcement against any such violation shall be by public enforcement by the Attorney General and shall be enforceable through private action.

(b) Whenever it may appear to the Attorney General that any person is using or has used any method, act, or practice declared by this article to be unlawful and that proceedings would be in the public interest, the Attorney General may bring action in a court of competent jurisdiction. Upon a showing by the Attorney General that a person has violated this article, the court may enter or grant any or all of the relief provided for in Code Section 10-1-397.

(c) Any person who suffers injury or damages as a result of a violation of this article may bring an action individually against the person or persons engaged in such violation under the rules of civil procedure to seek equitable injunctive relief and to recover his or her general and exemplary damages sustained as a consequence thereof in any court having jurisdiction over the defendant. Such relief may include:

(1) Restitution to any person or persons adversely affected by a defendant's actions in violation of this article;

(2) Punitive damages in an amount equal to $50,000.00 or three times the combined total of damages, costs, and fees, whichever is greater;

(3) Expenses of litigation, including reasonable attorney's fees; and

(4) Other relief as the court deems just and equitable.

(d) Except as otherwise provided, this article is cumulative with other laws and is not exclusive.

History.
Code 1981, § 10-1-773, enacted by Ga. L. 2014, p. 208, § 1/HB 809; Ga. L. 2015, p. 1088, § 7/SB 148.

10-1-774. Federal actions excluded.

A demand letter or civil action that includes a claim for relief arising under 35 U.S.C. Section 271(e) (2) or 42 U.S.C. Section 262 shall not be subject to the provisions of this article.

History.
Code 1981, § 10-1-774, enacted by Ga. L. 2014, p. 208, § 1/HB 809.
U.S. Code.
Federal provisions on patent infringement and the regulation of biological products is codified at 35 U.S.C. § 271 and 42 U.S.C. § 262, respectively.

RESEARCH REFERENCES

ALR.
Stem Cell Patent Infringement, Inventorship, and Patentability, 78 A.L.R. Fed. 3d 7.

ARTICLE 28

DEFECTIVELY MANUFACTURED NEW MOTOR VEHICLES

Editor's notes.
Ga. L. 2008, p. 746, § 1, effective January 1, 2009, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 10-1-780 through 10-1-794 and was based on Code 1981, §§ 10-1-780 through 10-1-794, enacted by Ga. L. 1990, p. 1013, § 1; Ga. L. 1991, p. 94, § 10; Ga. L. 2000, p. 1589, § 3; Ga. L. 1996, p. 6, § 10; Ga. L. 1991, p. 604, § 1.
Administrative rules and regulations.
Georgia Lemon Law, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Consumer Protection Division, Subject 620-2-1.

RESEARCH REFERENCES

Am. Jur. Proof of Facts.
"Lemon Law" Litigation — Existence of Substantial Defect, 11 POF3d 343.
Am. Jur. Trials.
Automobile Warranty Litigation, 39 Am. Jur. Trials 1.
ALR.
Award of attorney's fees under state motor vehicle warranty legislation (lemon laws), 82 A.L.R.5th 501.
Validity, construction and effect of state motor vehicle warranty legislation, 88 A.L.R.5th 301.

10-1-780. Short title.

This article shall be known and may be cited as the "Georgia Lemon Law."

History.
Code 1981, § 10-1-780, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

Law reviews.
For annual survey on administrative law, see 69 Mercer L. Rev. 15 (2017).

RESEARCH REFERENCES

ALR.
Validity, construction and effect of state motor vehicle warranty legislation, 88 A.L.R.5th 301.

10-1-781. Legislative intent.

The General Assembly recognizes that a new motor vehicle is a major consumer purchase and that a defectively manufactured new motor vehicle is likely to create hardship for, or may cause injury to, the consumer. It is the intent of the General Assembly to create a procedure for expeditious resolution of complaints and disputes concerning nonconforming new motor vehicles, to provide a method for notifying consumers of their rights under this article, and to ensure that consumers receive information, documents, and service necessary to enable them to exercise their rights under this article. In enacting these comprehensive measures, the General Assembly intends to encourage manufacturers to take all steps necessary to correct nonconformities in new motor vehicles and to create the proper blend of private and public remedies necessary to enforce this article.

History.
Code 1981, § 10-1-781, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-782. Definitions.

Unless the context clearly requires otherwise, as used in this article, the term:

(1) "Adjusted capitalized cost" means the amount shown as the adjusted capitalized cost in the lease agreement.

(2) "Attorney General" means the Attorney General or his or her designee.

(3) "Authorized agent" means any person, including a franchised motor vehicle dealer, who is authorized by the manufacturer to service motor vehicles.

(4) "Collateral charges" means charges incurred by a consumer as a result of the purchase of a new motor vehicle including, but not

limited to, charges attributable to factory or dealer installed options, sales tax and title charges, and earned finance charges.

(5) "Consumer" means each of the following:

(A) A person who purchases or leases a new motor vehicle for personal, family, or household use and not for the purpose of selling or leasing the new motor vehicle to another person; and

(B) A person who purchases or leases ten or fewer new motor vehicles a year for business purposes other than limousine rental services.

(6) "Days" means calendar days.

(7) "Express warranty" means a warranty which is given by the manufacturer in writing.

(8) "Incidental costs" means any reasonable expenses incurred by a consumer in connection with the repair of a new motor vehicle, including, but not limited to, payments to new motor vehicle dealers for the attempted repair of nonconformities, towing charges, and the costs of obtaining alternative transportation.

(9) "Informal dispute settlement mechanism" means any procedure established, employed, utilized, or sponsored by a manufacturer for the purpose of resolving disputes with consumers under this article.

(10) "Lemon law rights period" means the period ending two years after the date of the original delivery of a new motor vehicle to a consumer or the first 24,000 miles of operation after delivery of a new motor vehicle to the original consumer, whichever occurs first. The lemon law rights period shall be extended by one day for each day that repair services are not available to the consumer as a direct result of a strike, war, invasion, terrorist act, blackout, fire, flood, other disaster, or declared state of emergency.

(11) "Lessee" means any consumer who enters into a written lease agreement or contract to lease a new motor vehicle for a period of at least one year and is responsible for repairs to such vehicle.

(12) "Lessee cost" means the aggregate payment made by the lessee at the inception of the lease agreement or contract, inclusive of any allowance for a trade-in vehicle, and all other lease payments made by or on behalf of the lessee to the lessor.

(13) "Lessor" means a person who holds title to a new motor vehicle that is leased to a consumer under a written lease agreement or contract or who holds the lessor's rights under such agreement.

(14) "Manufacturer" means any person engaged in the business of constructing or assembling new motor vehicles or engaged in the

business of importing or receiving imports of new motor vehicles into the United States for the purpose of selling or distributing them to new motor vehicle dealers.

(15) "New motor vehicle" means any self-propelled vehicle primarily designed for the transportation of persons or property over the public highways that was leased, purchased, or registered in this state by the consumer or lessor to whom the original motor vehicle title was issued without previously having been issued to any person other than a new motor vehicle dealer. The term "new motor vehicle" does not include any vehicle on which the title and other transfer documents show a used, rather than new, vehicle. The term "new motor vehicle" also does not include trucks with more than 12,000 pounds gross vehicle weight rating, motorcycles, or golf carts. If a new motor vehicle is a motor home, this article shall apply to the self-propelled vehicle and chassis, but does not include those portions of the vehicle designated, used, or maintained primarily as living quarters, office, or commercial space.

(16) "New motor vehicle dealer" means a person who holds a dealer agreement with a manufacturer for the sale of new motor vehicles, who is engaged in the business of purchasing, selling, servicing, exchanging, leasing, or dealing in new motor vehicles, or who is licensed or otherwise authorized to utilize trademarks or service marks associated with one or more makes of motor vehicles in connection with such sales.

(17) "Nonconformity" means a defect, a serious safety defect, or a condition, any of which substantially impairs the use, value, or safety of a new motor vehicle to the consumer or renders the new motor vehicle nonconforming to a warranty. A nonconformity does not include a defect, a serious safety defect, or a condition that is the result of abuse, neglect, or unauthorized modification or alteration of the new motor vehicle.

(18) "Panel" means the new motor vehicle arbitration panel as designated in this article.

(19) "Person" shall have the same meaning as provided in Code Section 10-1-392.

(20) "Purchase price" means, in the case of a sale of a new motor vehicle to a consumer, the cash price of the new motor vehicle appearing in the sales agreement or contract, inclusive of any reasonable allowance for a trade-in vehicle. In the case of a lease executed by a consumer, "purchase price" refers to the agreed upon value of the vehicle as shown in the lease agreement or contract.

(21) "Reacquired vehicle" means a new motor vehicle with an alleged nonconformity that has been replaced or repurchased by the

manufacturer as the result of any court order or judgment, arbitration decision, voluntary settlement entered into between a manufacturer and the consumer, or voluntary settlement between a new motor vehicle dealer and a consumer in which the manufacturer directly or indirectly participated.

(22) "Reasonable number of attempts" under the lemon law rights period shall be as set forth in subsection (a) of Code Section 10-1-784.

(23) "Reasonable offset for use" means an amount calculated by multiplying the purchase price of a vehicle by the number of miles directly attributable to consumer use as of the date on which the consumer first delivered the vehicle to the manufacturer, its authorized agent, or the new motor vehicle dealer for repair of a nonconformity and dividing the product by 120,000, or in the case of a motor home 90,000.

(24) "Replacement motor vehicle" means a new motor vehicle that is identical or at least equivalent to the motor vehicle to be replaced as the motor vehicle to be replaced existed at the time of purchase or execution of the lease.

(25) "Serious safety defect" means a life-threatening defect or a malfunction that impedes the consumer's ability to control or operate the motor vehicle for ordinary use or reasonable intended purposes or creates a risk of fire or explosion.

(26) "Superior court" means the superior court in the county where the consumer resides, except if the consumer does not reside in this state, then the superior court in the county where an arbitration hearing was conducted pursuant to this article.

(27) "Warranty" means any manufacturer's express warranty or any affirmation of fact or promise made by the manufacturer in connection with the sale of a new motor vehicle to a consumer concerning the vehicle's materials, workmanship, operation, or performance which becomes part of the basis of the bargain. The term shall not include any extended coverage purchased by the consumer as a separate item or any statements made by the dealer in connection with the sale of a motor vehicle to a consumer which relate to the nature of the material or workmanship and affirm or promise that such material or workmanship is free of defects or will meet a specified level of performance.

History.
Code 1981, § 10-1-782, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

Cross references.
Georgia vehicle protection product, § 33-34A-1 et seq.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 10-1-782, are included in the annotations for this Code section.

Noncomformity. — Finding that the water leaks met the definition of a nonconformity was not clearly erroneous as the record demonstrated that the motor home experienced leaks in the sealant during the customer's test drive, the customers reported the nonconformity to the manufacturer during the lemon law rights period, reasonable attempts to repair the nonconformity were made, and the motor home was out for service due to repairs for more than 30 days. Winnebago Industries, Inc. v. Simpson, 354 Ga. App. 439, 841 S.E.2d 36, 2020 Ga. App. LEXIS 181 (2020), cert. denied, No. S20C1550, 2021 Ga. LEXIS 91 (Ga. Mar. 1, 2021).

Automobile used as demonstrator was "new car." — In an action alleging violations of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the van leased to plaintiffs was always titled in the dealer and was never the subject of a retail sale or lease, it was a "new car". Therefore, the dealer did not engage in fraudulent or unfair business practices by listing it as "new," even though it had been driven as a demonstrator and had been in a collision. Kondo v. Marietta Toyota, 224 Ga. App. 490, 480 S.E.2d 851, 1997 Ga. App. LEXIS 27 (1997), cert. denied, No. S97C0815, 1997 Ga. LEXIS 441 (Ga. May 9, 1997) (decided under former O.C.G.A. § 10-1-780 et seq.).

Truck was not a reacquired vehicle. — Trial court did not err by concluding that the truck the plaintiff bought from the defendant was not a reacquired vehicle under Georgia's Lemon Law, O.C.G.A. § 10-1-780 et seq., because the defendant, who was a car dealer not the manufacturer, bought the truck from the original owner and sold the original owner another vehicle. It was neither replaced nor repurchased by the manufacturer. Henry v. Griffin Chrysler Dodge Jeep Ram, 362 Ga. App. 459, 868 S.E.2d 827, 2022 Ga. App. LEXIS 49 (2022).

Problems with motor home included under definition of new motor vehicle. — In an action under Georgia's Lemon Law, O.C.G.A. § 10-1-780 et seq., the trial court did not err in denying the manufacturer's motion for summary judgment since the evidence showed that the customers experienced the water leak problems in areas of the motor home not excluded by statute, but were included under the definition of new motor vehicle and, thus, covered by the statute. Winnebago Industries, Inc. v. Simpson, 354 Ga. App. 439, 841 S.E.2d 36, 2020 Ga. App. LEXIS 181 (2020), cert. denied, No. S20C1550, 2021 Ga. LEXIS 91 (Ga. Mar. 1, 2021).

10-1-783. Provision of owner's manual and notice of rights; fully itemized and legible repair order; copies of reports.

(a) The manufacturer shall publish an owner's manual and provide it to the new motor vehicle dealer. The owner's manual shall include a clear and conspicuous listing of addresses, email addresses, facsimile numbers, and toll-free telephone numbers for the manufacturer's customer service personnel who are authorized to direct activities regarding repair of the consumer's vehicle. A manufacturer shall also provide all applicable manufacturer's written warranties to the new motor vehicle dealer, who shall transfer the owner's manual and all applicable manufacturer's written warranties to the consumer at the time of purchase or vehicle acquisition.

(b) At the time of purchase or vehicle acquisition, the new motor

vehicle dealer shall provide the consumer with a written statement that explains the consumer's rights under this article. The statement shall be written by the Attorney General and shall contain information regarding the procedures and remedies under this article.

(c) By October 1 of each year, the manufacturer shall forward to the Attorney General one copy of the owner's manual and the express warranty for each make and model of current year new motor vehicles it sells in this state. To the extent the instructions, terms, and conditions in the owner's manuals and express warranties for other models of the same make are substantially the same, submission of the owner's manual and express warranty for one model and a list of all other models for that make will satisfy the requirements of this subsection.

(d) Each time the consumer's new motor vehicle is returned from being diagnosed or repaired, the manufacturer, its authorized agent, or the new motor vehicle dealer shall provide to the consumer a fully itemized and legible statement or repair order containing a general description of the problem reported by the consumer; the date and the odometer reading when the vehicle was submitted for repair; the date and odometer reading when the vehicle was made available to the consumer; the results of any diagnostic test, inspection, or test drive; a description of any diagnosis or problem identified by the manufacturer, its authorized agent, or the new motor vehicle dealer; and an itemization of all work performed on the vehicle, including, but not limited to, parts and labor.

(e) Upon request of the consumer, the manufacturer, its authorized agent, or the new motor vehicle dealer shall provide a copy of any report or computer reading compiled by the manufacturer's representative regarding inspection, diagnosis, or test drive of the consumer's new motor vehicle.

History.

Code 1981, § 10-1-783, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148; Ga. L. 2024, p. 1052, § 2(29)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in subsection (a).

10-1-784. Opportunity to repair; repurchase or replacement of vehicle.

(a)(1) If a consumer reports a nonconformity during the lemon law rights period, the manufacturer, its authorized agent, or the new motor vehicle dealer shall be allowed a reasonable number of attempts to repair and correct the nonconformity. A reasonable number of attempts shall be deemed to have been undertaken by the

manufacturer, its authorized agent, or the new motor vehicle dealer if, during the lemon law rights period:

(A) A serious safety defect has been subject to repair one time and the serious safety defect has not been corrected;

(B) The same nonconformity has been subject to repair three times and the nonconformity has not been corrected; or

(C) The vehicle is out of service by reason of repair of one or more nonconformities for a cumulative total of 30 days.

If the vehicle is being repaired by the manufacturer through an authorized agent or a new motor vehicle dealer on the date that the lemon law rights period expires, the lemon law rights period shall be extended until that repair attempt has been completed.

(2)(A) If the manufacturer through an authorized agent or a new motor vehicle dealer is unable to repair and correct a nonconformity after a reasonable number of attempts, the consumer shall notify the manufacturer by statutory overnight delivery or certified mail, return receipt requested, of the need to repair and correct the nonconformity. The notice shall be sent to the address provided by the manufacturer in the owner's manual. The manufacturer shall have 28 days from its receipt of the notice to make a final attempt to repair and correct the nonconformity.

(B) By not later than the close of business on the seventh day following receipt of notice from the consumer, the manufacturer shall notify the consumer of the location of a repair facility that is reasonably accessible to the consumer. By not later than the close of business on the fourteenth day following the manufacturer's receipt of notice, the consumer shall deliver the nonconforming new motor vehicle to the designated repair facility.

(C) If the manufacturer fails to notify the consumer of the location of a reasonably accessible repair facility within seven days of its receipt of notice, or fails to complete the final attempt to repair and correct the nonconformity within the 28 day time period, the requirement that it be given a final attempt to repair and correct the nonconformity shall not apply. However, if the consumer delivers the nonconforming new motor vehicle to the designated repair facility more than 14 days from the date the manufacturer receives notice from the consumer, the 28 day time period shall be extended and the manufacturer shall have 14 days from the date the nonconforming new motor vehicle is delivered to the repair facility to complete the final attempt to repair and correct the nonconformity.

(3) No manufacturer, its authorized agent, or new motor vehicle

dealer may refuse to diagnose or repair any alleged nonconformity for the purpose of avoiding liability under this article.

(b)(1) If the manufacturer, through an authorized agent or new motor vehicle dealer to whom the manufacturer directs the consumer to deliver the vehicle, is unable to correct a nonconformity during the final attempt, or if a vehicle has been out of service by reason of repair of one or more nonconformities for 30 days during the lemon law rights period, the manufacturer shall, at the option of the consumer, repurchase or replace the vehicle. The consumer shall notify the manufacturer, in writing by statutory overnight delivery or certified mail, return receipt requested, of which option the consumer elects. The manufacturer shall have 20 days from receipt of the notice to repurchase or replace the vehicle.

(2)(A) If a consumer who is a lessee elects to receive a replacement motor vehicle, in addition to providing the replacement motor vehicle, the manufacturer shall pay to the lessor an amount equal to all charges that the lessor will incur as a result of the replacement transaction and shall pay the lessee an amount equal to all incidental costs that have been incurred by the lessee plus all charges that the lessee will incur as a result of the replacement transaction. If a lessee elects to receive a replacement motor vehicle, all terms of the existing lease agreement or contract shall remain in force and effect, except that the vehicle identification information contained in the lease agreement or contract shall be changed to conform to the vehicle identification information of the replacement vehicle.

(B) If a consumer who is not a lessee elects to receive a replacement motor vehicle, in addition to providing the replacement motor vehicle, the manufacturer shall pay to the consumer an amount equal to all incidental costs incurred by the consumer plus all charges that the consumer will incur as a result of the replacement transaction.

(3)(A) If a consumer who is a lessee elects a repurchase, the manufacturer shall pay to the lessee an amount equal to all payments made by the lessee under the lease agreement or contract, including, but not limited to, the lessee cost, plus all incidental costs, less a reasonable offset for use of the nonconforming new motor vehicle. The manufacturer shall pay to the lessor an amount equal to 110 percent of the adjusted capitalized cost of the nonconforming new motor vehicle. After the lessor has received payment from the manufacturer as specified in this subparagraph and payment from the consumer of all past due charges, if any, the consumer shall have no further obligation to the lessor.

(B) If a consumer who is not a lessee elects a repurchase, the manufacturer shall pay to the consumer an amount equal to the purchase price of the nonconforming new motor vehicle plus all collateral charges and incidental costs, less a reasonable offset for use of the nonconforming new motor vehicle. Payment shall be made to the consumer and lienholder of record, if any, as their interests may appear on the records of ownership.

History.
Code 1981, § 10-1-784, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-785. Compelled replacement or repurchase through arbitration; manufacturer's informal dispute settlement mechanism; revocation of mechanism.

(a)(1) If a manufacturer does not replace or repurchase a nonconforming new motor vehicle after being requested to do so under subsection (b) of Code Section 10-1-784, the consumer may move to compel replacement or repurchase by applying for arbitration pursuant to Code Section 10-1-786. However, if a manufacturer has established an informal dispute settlement mechanism which the Attorney General has certified as complying with the provisions and rules of this article, the consumer shall be eligible to apply for arbitration only after submitting a dispute under this article to the informal dispute settlement mechanism.

(2) A consumer must file a claim with the manufacturer's certified informal dispute settlement mechanism no later than one year after expiration of the lemon law rights period.

(3) After a decision has been rendered by the certified informal dispute settlement mechanism, the consumer is eligible to apply for arbitration pursuant to Code Section 10-1-786.

(4) If a decision is not rendered by the certified informal dispute settlement mechanism within 40 days of filing, the requirement that the consumer submit his or her dispute to the certified informal dispute settlement mechanism shall not apply and the consumer is eligible to apply for arbitration under Code Section 10-1-786.

(b) Certified informal dispute settlement mechanisms shall be required to take into account the principles contained in and any rules promulgated under this article and shall take into account all legal and equitable factors germane to a fair and just decision. A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, and reimbursement for collateral charges and incidental costs. For purposes of this Code section, the phrase "take into account the principles contained in and any rules promulgated

under this article" means to be aware of the provisions of this article, to understand how they might apply to the circumstances of the particular dispute, and to apply them if it is appropriate and fair to both parties to do so.

(c) A certified informal dispute settlement mechanism shall keep such records as prescribed by the Attorney General in rules promulgated under this article and shall allow the Attorney General, without notice, to inspect and obtain copies of the records. Copies of any records requested by the Attorney General shall be provided promptly to the Attorney General at no cost.

(d) A manufacturer may apply to the Attorney General for certification of its informal dispute settlement mechanism. The Attorney General may, in his or her discretion, impose requirements on an informal dispute settlement mechanism in order for it to be certified. Within a reasonable time following receipt of the application, the Attorney General shall certify the informal dispute settlement mechanism or notify the manufacturer of the reason or reasons for denial of the requested certification.

(e) At any time the Attorney General has reason to believe that a certified informal dispute settlement mechanism is no longer in compliance with this article, he or she may notify the manufacturer of intent to revoke the informal dispute settlement mechanism's certification. The notice shall contain a statement of the reason or reasons for the revocation.

(f) The manufacturer shall have ten days from its receipt of notice of denial of requested certification or notice of intent to revoke certification to submit a written request for a hearing to contest the denial or intended revocation. If a hearing is requested, it shall be held within 30 days of the Attorney General's receipt of the hearing request. The hearing shall be conducted by the Office of State Administrative Hearings following the procedures set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(g) No representation shall be made to a consumer that his or her dispute must be submitted to an informal dispute settlement mechanism that is not certified by the Attorney General pursuant to this Code section.

History. Code 1981, § 10-1-785, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-786. Request for arbitration; determination of eligibility; notifications; timing; requirements for decision.

(a) A consumer shall request arbitration by filing a written applica-

tion for arbitration with the Attorney General. The application must be filed no later than one year from the date of expiration of the lemon law rights period or 60 days from the conclusion of the certified informal dispute settlement mechanism's proceeding, whichever occurs later.

(b)(1) After receiving an application for arbitration, the Attorney General shall determine whether the dispute is eligible for arbitration. Manufacturers shall be required to submit to arbitration under this article if the consumer's dispute is deemed eligible for arbitration by the Attorney General. Disputes deemed eligible for arbitration shall be assigned to an arbitrator or arbitrators appointed pursuant to Code Section 10-1-789.

(2)(A) A consumer whose dispute is determined to be ineligible for arbitration by the Attorney General may appeal the determination of ineligibility to an arbitrator or arbitrators appointed pursuant to Code Section 10-1-789.

(B) If the arbitrator or arbitrators determine that the consumer's dispute is eligible for arbitration, the arbitrator or arbitrators shall retain jurisdiction and the consumer's dispute shall proceed in accordance with this Code section.

(C) If the arbitrator or arbitrators determine that the consumer's dispute is not eligible for arbitration, a written decision shall be prepared and sent to the consumer and manufacturer by certified mail, return receipt requested.

(D) The decision of ineligibility may be appealed by the consumer under the provisions set forth in subsection (a) of Code Section 10-1-787. On appeal, the court shall consider only the issue of eligibility for arbitration.

(3) If the court finds that a consumer's appeal from a determination of ineligibility is frivolous or has been filed in bad faith or for the purpose of harassment, the court may require the consumer to pay to the Attorney General all costs incurred as a direct result of the appeals from the Attorney General's determination of ineligibility.

(c) A lessee shall notify the lessor of the pending arbitration, in writing, within ten days of the lessee's receipt of notice that a dispute has been deemed eligible for arbitration and shall provide to the arbitrator or arbitrators proof that notice was given to the lessor. Within ten days of its receipt of notice from the lessee, a lessor may petition the arbitrator or arbitrators to be a party to the arbitration proceeding.

(d) The arbitrator or arbitrators shall make every effort to conduct the arbitration hearing within 40 days from the date the dispute is deemed eligible for arbitration. The hearing shall be held at a location

that is reasonably convenient to the Georgia consumer. Failure to hear the case within 40 days shall not divest authority of the arbitrator or arbitrators to hear the dispute or void any decision ultimately rendered.

(e) If the arbitrator or arbitrators determine:

(1) That a reasonable number of attempts has been undertaken to repair and correct the nonconformity and that the manufacturer was given the opportunity to make a final attempt to repair and correct the nonconformity and was unable to correct it; or

(2) That a new motor vehicle was out of service by reason of repair of one or more nonconformities for a cumulative total of 30 days within the lemon law rights period,

the consumer shall be awarded replacement or repurchase of the new motor vehicle as provided under Code Section 10-1-784. The arbitrator or arbitrators also may award attorney's fees and technical or expert witness fees to a consumer who prevails.

(f) The decision of the arbitrator or arbitrators shall be in writing, be signed, and contain findings of fact and conclusions of law. The original signed decision shall be filed with the Attorney General and copies shall be sent to all parties. The filing of the decision with the Attorney General constitutes entry of the decision.

(g) A decision of the arbitrator or arbitrators that has become final under the provisions of subsection (a) of Code Section 10-1-787 may be filed with the clerk of the superior court, shall have all the force and effect of a judgment or decree of the court, and may be enforced in the same manner as any other judgment or decree.

(h) No arbitrator may be required to testify concerning any arbitration and the arbitrator's notes or other records are not subject to discovery. This provision does not extend to testimony or documents sought in connection with legal claims brought against an arbitrator arising out of an arbitration proceeding.

History.
Code 1981, § 10-1-786, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 10-1-786, are included in the annotations for this Code section.

Right to file action for breach of warranty not barred. — Trial court erred in granting summary judgment to a vehicle manufacturer as to a purchaser's claim for breach of warranty as the purchaser did not waive the right to bring the breach of warranty claim by engaging in arbitration proceedings under the Motor Vehicle Warranty Rights Act, former O.C.G.A. §§ 10-1-786(1) and 10-1-794, because sections of the Uniform Commercial Code which dealt with breach of warranty actions were not included in

former O.C.G.A. § 10-1-786. Rodgers v. GMC, 277 Ga. App. 547, 627 S.E.2d 151, 2006 Ga. App. LEXIS 150 (2006) (decided under former O.C.G.A. § 10-1-786).

10-1-787. Finality of arbitrator's decision; appeals by manufacturers; time for compliance with arbitrator's decision.

(a) The decision of the arbitrator or arbitrators is final unless a party to the arbitration, within 30 days of entry of the decision, appeals the decision to the superior court. A party who appeals a decision shall follow the procedures set forth in Chapter 3 of Title 5, and any appeal shall be de novo; however, the decision of the arbitrator or arbitrators shall be admissible in evidence.

(b) If the manufacturer appeals, the court may require the manufacturer to post security for the consumer's financial loss due to the passage of time for review.

(c) If the manufacturer appeals and the consumer prevails, recovery, in addition to the arbitrator's award, shall include all charges incurred by the consumer during the pendency of, or as a result of, the appeal, including, but not limited to, continuing collateral and incidental costs, technical or expert witness fees, attorney's fees, and court costs.

(d) A manufacturer which does not appeal a decision in favor of a consumer must fully comply with the decision within 40 days of entry thereof. If a manufacturer does not fully comply within the 40 day time period, the Attorney General may issue an order imposing a civil penalty of up to $1,000.00 per day for each day that the manufacturer remains out of compliance. The provisions of Code Sections 10-1-398 and 10-1-398.1 shall apply in connection with the imposition of a civil penalty under this subsection. It shall be an affirmative defense to the imposition of a civil penalty under this subsection that a delay or failure to comply was beyond the manufacturer's control or that a delay was acceptable to the consumer.

History.

Code 1981, § 10-1-787, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148; Ga. L. 2022, p. 767, § 2-3/HB 916.

Amendments.

The 2022 amendment, effective July 1, 2023, deleted "Article 2 of" preceding "Chapter 3" in subsection (a). See Editor's note for applicability.

Editor's notes.

Ga. L. 2022, p. 767, § 3-1/HB 916, not codified by the General Assembly, makes the amendment of this Code section applicable to petitions for review filed in superior or state court on or after July 1, 2023.

10-1-788. Exhaustion of remedies under article required.

The provisions of this article are not available to a consumer in a civil

action unless the consumer has first exhausted all remedies provided for in this article.

History. Code 1981, § 10-1-788, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-789. Establishment of motor vehicle arbitration panel; compensation; conduct; liability.

(a) A motor vehicle arbitration panel shall resolve disputes between consumers and manufacturers arising under this article. The Attorney General, in his or her discretion, may operate the panel by contracting with public or private entities to conduct arbitrations under this article or by appointing individuals to serve as panel member arbitrators. An arbitrator shall be licensed to practice law in the State of Georgia and a member in good standing of the State Bar of Georgia or shall have at least two years' experience in professional arbitration or dispute resolution. No arbitrator shall be affiliated with or involved in the manufacture, distribution, sale, lease, or servicing of motor vehicles.

(b) Panel member arbitrators and entities that contract with the Attorney General to provide arbitration services shall be compensated for time and expenses at a rate to be determined by the Attorney General.

(c) Each arbitration proceeding shall be conducted by either one or three arbitrators, each of whom is to be assigned by the Attorney General or contracted entity.

(d) Neither the Attorney General, an entity with which the Attorney General has contracted, nor any arbitrator shall be civilly liable for any decision, action, statement, or omission made in connection with any proceeding under this article, except in circumstances where the decision, action, statement, or omission was made with malice or gross negligence.

History. Code 1981, § 10-1-789, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-790. Requirements for transfer of reacquired vehicle.

(a) No manufacturer, its authorized agent, new motor vehicle dealer, or other transferor shall knowingly resell, either at wholesale or retail, lease, transfer a title, or otherwise transfer a reacquired vehicle, including a vehicle reacquired under a similar statute of any other state, unless the vehicle is being sold for scrap and the manufacturer has notified the Attorney General of the proposed sale or:

(1) The fact of the reacquisition and nature of any alleged non-

conformity are clearly and conspicuously disclosed in writing to the prospective transferee, lessee, or buyer; and

(2) The manufacturer warrants to correct such nonconformity for a term of one year or 12,000 miles, whichever occurs first.

A knowing violation of this subsection shall constitute an unfair or deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of Chapter 1 of Title 10 and will subject the violator to an action by a consumer under Code Section 10-1-399.

(b) The manufacturer shall have 30 days to notify the Attorney General that a vehicle has been reacquired in this state under the provisions of this article. The notice shall be legible and include, at a minimum, the vehicle year, make, model, and identification number; the date and mileage at the time the vehicle was reacquired; the nature of the alleged nonconformity; the reason for reacquisition; and the name and address of the original consumer. When the manufacturer resells, leases, transfers, or otherwise disposes of a reacquired vehicle, the manufacturer shall, within 30 days of the resale, lease, transfer, or disposition, notify the Attorney General of the vehicle year, make, model, and identification number; the date of the sale, lease, transfer, or disposition of the vehicle; and the name and address of the buyer, lessee, or transferee.

(c) If a manufacturer resells, leases, transfers, or otherwise disposes of a motor vehicle in this state that it reacquired under a similar statute of any other state, the manufacturer shall, within 30 days of the resale, lease, transfer, or disposition, notify the Attorney General of the transaction. The contents of the notice shall comply with the requirements of subsection (b) of this Code section.

(d) Manufacturers shall use forms approved by the Attorney General. The forms shall contain the information required under this Code section and any other information the Attorney General deems necessary for implementation of this Code section.

History.
Code 1981, § 10-1-790, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

Law reviews.
For annual survey on administrative law, see 69 Mercer L. Rev. 15 (2017).

10-1-791. Consumer fees to implement provisions of article; enforcement.

(a) A fee of $3.00 shall be collected by the new motor vehicle dealer from the consumer at completion of a sale or execution of a lease of each new motor vehicle. The fee shall be forwarded quarterly to the Department of Law for deposit in the new motor vehicle arbitration account created in the state treasury. The payments are due and payable the

first day of the month in each quarter for the previous quarter's collection and shall be mailed by the new motor vehicle dealer not later than the twentieth day of such month. The first day of the month in each quarter is July 1, October 1, January 1, and April 1 for each year. Consumer fees in the account shall be used for the purposes of this article. Funds in excess of the appropriated amount remaining in the new motor vehicle arbitration account at the end of each fiscal year shall be transferred to the general treasury. The new motor vehicle dealer shall retain $1.00 of each fee collected to cover administrative costs.

(b) The Attorney General shall have the power to enforce the provisions of this Code section. The Attorney General's enforcement power shall include:

(1) The authority to investigate alleged violations through use of all investigative powers available under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975"; and

(2) The authority to initiate proceedings, pursuant to Code Section 10-1-397, in the event of a violation of this Code section. Such proceedings include, without limitation, issuance of a cease and desist order, a civil penalty order imposing a civil penalty up to a maximum of $2,000.00 for each violation, and proceedings to seek additional relief in any superior court of competent jurisdiction. The provisions of Code Sections 10-1-398, 10-1-398.1, 10-1-402, and 10-1-405 shall apply to proceedings initiated by the Attorney General under this Code section.

History.
Code 1981, § 10-1-791, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148; Ga. L. 2016, p. 518, § 1/HB 871; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-792. Limitation of liability for new motor vehicle dealers.

(a) Except as provided in subsection (a) of Code Section 10-1-790, this article shall not create or give rise to any cause of action by manufacturers or consumers against new motor vehicle dealers. No new motor vehicle dealer shall be held liable by a manufacturer or a consumer for any collateral charges, incidental charges, costs, purchase price refunds, or vehicle replacements. Manufacturers and consumers shall not make new motor vehicle dealers party to an arbitration proceeding or any other proceeding under this article. A new motor vehicle dealer that is named as a party in any proceeding brought by a consumer or a manufacturer under this article, except as provided in subsection (a) of Code Section 10-1-790, shall be entitled to an award of reasonable attorney's fees and expenses of litigation incurred in connection with such proceeding.

(b) The provisions of this article shall not impair any obligation under any manufacturer-dealer franchise agreement; provided, however, that any provision of any manufacturer-dealer franchise agreement which attempts to shift any duty, obligation, responsibility, or liability imposed upon a manufacturer by this article to a new motor vehicle dealer, either directly or indirectly, shall be void and unenforceable, except for any liability imposed upon a manufacturer by this article which is directly caused by the gross negligence of the dealer in attempting to repair the motor vehicle after such gross negligence has been determined by the hearing officer, as provided in Article 22 of this chapter, the "Georgia Motor Vehicle Franchise Practices Act."

History.
Code 1981, § 10-1-792, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

RESEARCH REFERENCES

ALR.
Rescission of Automobile Sales Contracts, 85 A.L.R.7th 1.

10-1-793. Violations constitute unfair and deceptive act or practice; cumulative effect.

(a) A violation of this article shall constitute an unfair and deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975"; provided, however, that enforcement against such violations shall be by public enforcement by the Attorney General and, except as provided in subsection (a) of Code Section 10-1-790, shall not be enforceable through private action under Code Section 10-1-399.

(b) Except as otherwise provided, this article is cumulative with other laws and is not exclusive. The rights and remedies provided for in this article shall be in addition to any other rights and remedies that are otherwise available to a consumer under any other law.

History.
Code 1981, § 10-1-793, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2009, p. 8, § 10/SB 46; Ga. L. 2015, p. 1088, § 8/SB 148; Ga. L. 2017, p. 774, § 10/HB 323.

10-1-794. [Reserved] Staff for administration.

History.
Ga. L. 2008, p. 746, § 1/HB 470; repealed by Ga. L. 2015, p. 1088, § 8/SB 48, effective July 1, 2015.

Editor's notes.
Ga. L. 2015, p. 1088, § 8/SB 48 repealed and reserved this Code section, effective July 1, 2015.

10-1-795. Rules and regulations.

The Attorney General shall promulgate rules and regulations and establish procedures necessary to carry into effect, implement, and enforce the provisions of this article. The authority granted to the Attorney General pursuant to this Code section shall be exercised at all times in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Code 1981, § 10-1-795, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

Law reviews.
For annual survey on administrative law, see 69 Mercer L. Rev. 15 (2017).

10-1-796. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

History.
Code 1981, § 10-1-796, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-797. Consumer cannot waive rights.

Any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this article shall be unenforceable as contrary to public policy.

History.
Code 1981, § 10-1-797, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2015, p. 1088, § 8/SB 148.

10-1-798. Continuing validity of previously adopted rules, orders, actions, and regulations.

Rules, orders, actions, and regulations previously adopted which relate to functions performed by the administrator appointed pursuant to Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," which were transferred under this article to the Attorney General shall remain of full force and effect as rules, orders, actions, and regulations of the Attorney General until amended, repealed, or superseded by rules or regulations adopted by the Attorney General.

History.
Code 1981, § 10-1-798, enacted by Ga. L. 2015, p. 1088, § 8/SB 148.

ARTICLE 29

FARM TRACTOR WARRANTY ACT

10-1-810. Short title.

This article shall be known and may be cited as the "Farm Tractor Warranty Act."

History.
Code 1981, § 10-1-810, enacted by Ga. L. 1991, p. 419, § 1.

10-1-811. Definitions.

As used in this article, the term:

(1) "Consumer" means a purchaser, other than for purposes of resale, of a new farm tractor, a person to whom the new farm tractor is transferred for the same purposes during the duration of an express warranty applicable to the farm tractor, and any other person entitled by the terms of the warranty to enforce the terms of the warranty. In the case of an agricultural vehicle within the warranty period, the sale must be made through an authorized farm tractor dealer.

(2) "Farm tractor" means any self-propelled vehicle which is designed primarily for pulling or propelling agricultural machinery and implements and is used principally in the occupation or business of farming, including an implement of husbandry that is self-propelled, excluding forestry equipment and equipment designed primarily for construction purposes.

(3) "Manufacturer" means a person engaged in the business of manufacturing, assembling, or distributing farm tractors who, under normal business conditions during the year, manufactures, assembles, or distributes to dealers at least ten new farm tractors.

(4) "Manufacturer's express warranty" or "warranty" means the written warranty of the manufacturer of a new farm tractor of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty.

(5) "Nonconformity" means any condition of the farm tractor that makes it impossible to use for the purpose for which it was designed or manufactured.

(6) "Reasonable allowance for prior use" means the number of field hours performed by the farm equipment, divided by eight field hours per day, multiplied by 50 percent of the daily reasonable rental rate, referenced by model, in the most current *North American Equipment Dealers Association Official Guide*.

History. Code 1981, § 10-1-811, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.

10-1-812. Written notice of warranty supplied by manufacturer and presented by dealer to consumer at time of purchase.

The manufacturer must supply to the dealer and the dealer must present directly to the consumer at the time of purchase a written notice stating, in ten-point all-capital type, in substantially the following form:

"This equipment is subject to Article 29 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated, entitled the 'Farm Tractor Warranty Act.' To be entitled to a refund or replacement, you must first notify the manufacturer or its agent and the authorized dealer which was a party to the sale of the problem in writing and give them an opportunity to repair the equipment.

Manufacturer	Agent	Dealer
Name	Name	Name
Address	Address	Address
Telephone number	Telephone number	Telephone number"

History. Code 1981, § 10-1-812, enacted by Ga. L. 1991, p. 419, § 1.

Code Commission notes. Pursuant to Code Section 28-9-5, in 1992, "all-capital" was substituted for "all capital" near the beginning of this Code section.

10-1-813. Opportunity to repair.

If the farm tractor does not conform to applicable express written warranties and the consumer reports the nonconformity to the manufacturer and its authorized dealer within 18 months of the date of the original delivery of the farm tractor to the consumer, the manufacturer or its authorized dealers shall make the repairs necessary to make the farm tractor conform to the express written warranties, notwithstanding that the repairs are made after the expiration of the warranty term or the 18 month period.

History. Code 1981, § 10-1-813, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.

10-1-814. Refund or replacement.

(a) If the manufacturer or its authorized dealers are unable to make the farm tractor conform to any applicable express written warranty by repairing or correcting any condition which substantially impairs the

use or market value of the farm tractor to the consumer within the time periods and after the number of attempts specified in subsection (c) of this Code section, the manufacturer, through its authorized dealer who sold the farm tractor, shall, at the option of the consumer, replace the farm tractor with a comparable farm tractor, charging the consumer only a reasonable allowance for the consumer's use of the farm tractor, or accept the return of the farm tractor from the consumer and refund to the consumer the cash purchase price, including sales tax, license fees, registration fees, and any similar governmental charges, less a reasonable allowance for prior use. Refunds shall be made to the consumer and lienholder, if any, as their interests may appear in the county superior court clerk's office. If no replacement or refund is made, the consumer may bring a civil action against the manufacturer to enforce the obligation. No action may be brought unless the manufacturer has received prior direct written notification from or on behalf of the consumer and has been offered the opportunities, as set forth in subsection (c) of this Code section, to cure the condition alleged within a reasonable time that is not to exceed 30 business days.

(b) No dealer or distributor shall be held liable by the manufacturer or by the consumer for any collateral charges, damages, costs, purchase price refunds, or replacements, and manufacturers and consumers shall not have a cause of action against a dealer or distributor.

(c) The replacement or refund obligation specified in subsection (a) of this Code section shall arise if the manufacturer or its authorized dealers are unable to make the farm tractor conform to applicable express written warranties within 18 months of the original physical delivery of the farm tractor to the consumer and the same nonconformity has been subject to repair four or more times by the manufacturer or its authorized dealers, but such nonconformity continues to exist or the farm tractor is out of service by reason of repair of the same nonconformity for a cumulative total of 30 or more business days when the service department of the authorized dealer in possession of the farm tractor is open for purposes of repair, provided that days when the consumer has been provided by the manufacturer or its authorized dealers with the use of another farm tractor which performs the same function shall not be counted.

History.
Code 1981, § 10-1-814, enacted by Ga. L. 1991, p. 419, § 1.

10-1-815. Extension of reporting and repair periods.

The 18 month period and the 30 day repair period shall be extended by any period of time during which repair services or replacement parts

are not available to the consumer because of a war, invasion, strike, fire, flood, or other natural disaster.

History.
Code 1981, § 10-1-815, enacted by Ga. L. 1991, p. 419, § 1.

10-1-816. Informal dispute settlement procedures; remedy for violation.

(a) If a manufacturer has established, or participates in, an informal dispute settlement procedure which substantially complies with the provisions of the Code of Federal Regulations, Title 16, Part 703, as amended, and the requirements of this Code section, the provisions of Code Section 10-1-814 concerning refunds or replacement do not apply to a consumer who has not first used this procedure.

(b) The findings and decisions in an informal dispute settlement procedure shall address and state in writing whether the consumer would be entitled to a refund or replacement under the presumptions and criteria set out in Code Section 10-1-814, and are admissible as nonbinding evidence in any legal action and are not subject to further evidentiary foundation requirements.

(c) If, in an informal dispute settlement procedure, it is decided that a consumer is entitled to a replacement farm tractor under Code Section 10-1-814, then the consumer has the option of selecting and receiving either the replacement farm tractor or a full refund as authorized by Code Section 10-1-814. Any refund selected by a consumer shall include all amounts authorized by Code Section 10-1-814.

(d)(1) In any informal dispute settlement procedure provided for by this Code section:

(A) No documents shall be received by any informal dispute settlement panel unless those documents have been provided to each of the parties in the dispute prior to the panel's meeting, with an opportunity for the parties to comment on the documents in writing, or with oral presentation at the request of the panel;

(B) Nonvoting manufacturer or dealer representatives shall not attend or participate in the informal dispute settlement procedures unless the consumer is also present and given a chance to be heard or unless the consumer previously consents to the manufacturer or dealer participation without the consumer's presence and participation;

(C) Consumers shall be given an adequate opportunity to contest a manufacturer's assertion that a nonconformity falls

within intended specifications for the farm tractor by having the basis of the manufacturer's claim appraised by a technical expert selected and paid for by the consumer prior to the informal dispute settlement hearing;

(D) No disputes shall be heard where there has been a recent attempt by the manufacturer to repair a consumer's farm tractor, but no response has yet been received by the informal dispute panel from the consumer as to whether the repairs were successfully completed. This provision shall not prejudice a consumer's rights under this Code section nor shall it extend the informal dispute panel's 40 day time limit for deciding disputes, as established by the Code of Federal Regulations, Title 16, Part 703; and

(E) The manufacturer shall provide and the informal dispute settlement panel shall consider all information relevant to resolving the dispute, such as the prior dispute records and information required by the Code of Federal Regulations, Title 16, Part 703.6, and any relevant technical service bulletins which may have been issued by the manufacturer or lessor regarding the farm tractor being disputed.

(2) A settlement reached under this Code section is binding on all participating parties.

(e) No consumer shall be required to participate in an informal dispute settlement procedure before filing an action in court if the informal dispute settlement procedure does not comply with the requirements of this Code section, notwithstanding the procedure's compliance with the Code of Federal Regulations, Title 16, Part 703.

(f) Any consumer injured by a violation of this Code section may bring a civil action to enforce this Code section and recover costs and disbursements, including reasonable attorney's fees.

History. Code 1981, § 10-1-816, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.

10-1-817. Affirmative defenses against claims.

It shall be an affirmative defense to claims under this article that:

(1) An alleged nonconformity does not substantially impair such use and market value; or

(2) A nonconformity is the result of abuse or neglect or of modifications or alterations of the farm tractor not authorized by the manufacturer.

History.
Code 1981, § 10-1-817, enacted by Ga. L. 1991, p. 419, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1992, a comma was deleted following "neglect" in paragraph (2).

10-1-818. Limitations of actions.

Any action brought under this article shall be commenced within 12 months following the 18 month period.

History.
Code 1981, § 10-1-818, enacted by Ga. L. 1991, p. 419, § 1.

10-1-819. Other remedies and rights not limited by article.

Nothing in this article limits the rights or remedies which are otherwise available to a consumer under any other provisions of law.

History.
Code 1981, § 10-1-819, enacted by Ga. L. 1991, p. 419, § 1.

ARTICLE 30

BEAUTY PAGEANTS

10-1-830. Definitions.

As used in this article, the term:

(1) "Beauty pageant" means any contest or competition in which entrants are judged on the basis of physical beauty, skill, talent, poise, and personality and in which a winner or winners are selected as representing an ideal in one or more of these areas. "Beauty pageant" shall not include any such contest or competition in which no application fee or entrance charge is made for contestants, to which no admission charge is made for attendance, and in connection with which no tickets, chances, advertisements, or sponsorships are sold.

(2) "Entrant's fee" means any payment of money or other thing of value including, but not limited to, the selling of advertisements or tickets or the obtaining of sponsors, which activity is a precondition to participation in a beauty pageant.

(3) "Operator" means any person, franchisee, firm or corporation, civil group, or elementary or secondary educational institution which promotes, organizes, or otherwise operates a beauty pageant, participation in which is limited to persons paying an entrant's fee.

History. Code 1981, § 10-1-830, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 1.

10-1-831. Required information from operators.

Before accepting any entrant's fee, all operators shall provide to each entrant a written document in at least ten-point type clearly containing only the following information:

(1) Name, address, and telephone number of the operator;

(2) Name, address, and telephone number of the individual or officer of the organization having full responsibility for the conducting of the pageant;

(3) Names of pageants customarily promoted by the operator;

(4) Name and address of individual authorized to accept service of process;

(5) Name, address, and telephone number of the financial institution in which the entrants' fees are held;

(6) Name, address, and telephone number of the surety company maintaining the bond required by Code Section 10-1-832; and

(7) A statement which reads as follows: "The State of Georgia requires bonding or escrow of pageants conducted for the profit of operators."

History. Code 1981, § 10-1-831, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 2.

JUDICIAL DECISIONS

Attorney fees awarded. — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571, 2004 Ga. App. LEXIS 420 (2004), cert. denied, No. S04C1331, 2004 Ga. LEXIS 757 (Ga. Sept. 7, 2004).

10-1-832. Bond requirements.

Except for operators who are exempt from the requirements of this Code section in accordance with Code Section 10-1-833, each operator shall maintain a bond in the amount of $10,000.00 with a surety company duly authorized to do business in this state or post a cash bond in such amount, payable to the Governor of this state. Such bond shall be for the use and benefit of any person who has paid any entrant's fee

for a beauty pageant. Such bond shall be conditioned to pay all losses, damages, and expenses that may be sustained by such person by reason of any violation of this title. Any person who complies with the requirements of Code Section 10-1-837 shall not be required to post the bond required by this Code section.

History.
Code 1981, § 10-1-832, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 3; Ga. L. 2024, p. 1052, § 2(30)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in the first sentence.

JUDICIAL DECISIONS

Attorney fees awarded. — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571, 2004 Ga. App. LEXIS 420 (2004), cert. denied, No. S04C1331, 2004 Ga. LEXIS 757 (Ga. Sept. 7, 2004).

10-1-833. Exemptions from bond requirements.

No bond shall be required from nonprofit organizations, bona fide civic clubs in existence for at least one year, churches, religious organizations, and groups, fairs, or festivals affiliated with schools or political subdivisions, or from any other pageant which confers no benefit upon any participant other than any or all of the following: a beauty title, a crown, a trophy, a ribbon, or a sash. To be exempt from Code Section 10-1-832 under this Code section, pageants conducted by individuals or businesses to raise funds for nonprofit organizations shall award 100 percent of the moneys generated by the pageant to the nonprofit organization and the nonprofit organization may, if previously agreed, then pay the expenses incurred in producing the pageant.

History.
Code 1981, § 10-1-833, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 4.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1994, a comma was inserted following "a ribbon" near the end of the first sentence, and "Code section" was substituted for "Code Section" near the beginning of the second sentence.

10-1-834. Refund of entrants' fees upon cancellation or default.

If a beauty pageant is canceled or fails to take place, all entrants' fees shall be promptly refunded by the operator. For pageants subject to Code Section 10-1-832, the surety shall be liable for any unrefunded entrants' fees in the case of a default by the operator.

History.
Code 1981, § 10-1-834, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 5.

10-1-835. Civil penalties for violation.

Any violation of this article shall be considered a violation of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," as administered by the Attorney General, and all public and private remedies available under such part shall be available regarding violations of this article.

History.
Code 1981, § 10-1-835, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 6; Ga. L. 2015, p. 1088, § 9/SB 148.

JUDICIAL DECISIONS

Attorney fees. — O.C.G.A. § 10-1-835 adopts the private remedies available under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., which includes awards of reasonable attorney fees and litigation expenses under O.C.G.A. § 10-1-399(d). Galardi v. Steele-Inman, No. A02A0861, No. A02A0860, 2002 Ga. App. LEXIS 1527 (Ga. Ct. App. Nov. 27, 2002), vacated, 259 Ga. App. 249, 576 S.E.2d 555, 2002 Ga. App. LEXIS 1608 (2002).

After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571, 2004 Ga. App. LEXIS 420 (2004), cert. denied, No. S04C1331, 2004 Ga. LEXIS 757 (Ga. Sept. 7, 2004).

10-1-836. Criminal penalty for violation.

Any person, firm, corporation, organization, partnership, entity, or operator violating any provision of this article shall be guilty of a misdemeanor.

History.
Code 1981, § 10-1-836, enacted by Ga. L. 1992, p. 3256, § 1.

10-1-837. Escrow account.

In lieu of obtaining the bond required by Code Section 10-1-832, any operator may place all entrants' fees in an escrow account from which the operator cannot and does not withdraw any funds until the pageant has been held and all awards have been made. If the operator elects this option, in lieu of the information required by paragraph (6) of Code Section 10-1-831 the operator shall provide in the written statement the name, address, and telephone number of the financial institution where the escrow account is maintained and the account number of the

escrow account. The operator shall maintain a record of each escrow account established for a period of five years.

History.
Code 1981, § 10-1-837, enacted by Ga. L. 1994, p. 1165, § 7.

JUDICIAL DECISIONS

Attorney fees awarded. — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571, 2004 Ga. App. LEXIS 420 (2004), cert. denied, No. S04C1331, 2004 Ga. LEXIS 757 (Ga. Sept. 7, 2004).

10-1-838. Liability for failure to post bond or establish escrow account.

Any individual who fails to comply with either Code Section 10-1-832 or 10-1-837 shall be individually liable for any damages or losses suffered by any participant in a pageant, without regard to whether the pageant operator is structured as a corporation, partnership, limited partnership, or any other form of business entity.

History.
Code 1981, § 10-1-838, enacted by Ga. L. 1994, p. 1165, § 7.

ARTICLE 31

UNFAIR OR DECEPTIVE PRACTICES TOWARD ELDER OR DISABLED PERSONS

10-1-850. Definitions.

As used in this article, the term:

(1) "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more of such person's major life activities. As used in this paragraph, the term "physical or mental impairment" means any of the following:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine; and

(B) Any mental or psychological disorder, such as developmental disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, developmental disability, and emotional illness.

(2) "Elder person" means a person who is 60 years of age or older.

(3) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) "Substantially limits" means interferes with or affects over an extended period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds, influenza, or sprains or minor injuries.

History.

Code 1981, § 10-1-850, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 385, § 4-18/HB 252; Ga. L. 2015, p. 1088, § 10/SB 148; Ga. L. 2024, p. 1052, § 2(31)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "the term" following "paragraph," in the introductory language of paragraph (1).

Editor's notes.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act."

JUDICIAL DECISIONS

Complaint only need allege one elderly victim. — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one elderly person. Kitchen v. Ameriquest Mortg. Co., No. 1:04-CV-2750-BBM, 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

10-1-851. Enhanced penalty for violations against elder or disabled person.

When any person who is found to have conducted business in violation of Article 15, 17, or 21 of this chapter is found to have committed said violation against elder or disabled persons, in addition to any civil penalty otherwise set forth or imposed, the court may

impose an additional civil penalty not to exceed $10,000.00 for each violation.

History.
Code 1981, § 10-1-851, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

JUDICIAL DECISIONS

Complaint only need allege one elderly victim. — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; § 10-1-851 required only a showing that FBPA was violated against one elderly person. Kitchen v. Ameriquest Mortg. Co., No. 1:04-CV-2750-BBM, 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

10-1-852. Factors for determining imposition and amount of civil penalty.

In determining whether to impose a civil penalty under Code Section 10-1-851 and the amount thereof, the court shall consider the extent to which one or more of the following factors are present:

(1) Whether the defendant's conduct was in disregard of the rights of the elder or disabled persons;

(2) Whether the defendant knew or should have known that the defendant's conduct was directed to an elder person or disabled person;

(3) Whether the elder or disabled person was more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability than other persons and whether the elder or disabled person actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;

(4) Whether the defendant's conduct caused an elder or disabled person to suffer any of the following:

(A) Mental or emotional anguish;

(B) Loss of or encumbrance upon a primary residence of the elder or disabled person;

(C) Loss of or encumbrance upon the elder or disabled person's principal employment or principal source of income;

(D) Loss of funds received under a pension or retirement plan or a government benefits program;

(E) Loss of property set aside for retirement or for personal or family care and maintenance; or

(F) Loss of assets essential to the health and welfare of the elder or disabled person; or

(5) Any other factors the court deems appropriate.

History.
Code 1981, § 10-1-852, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

JUDICIAL DECISIONS

Complaint only need allege one elderly victim. — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one elderly person. Kitchen v. Ameriquest Mortg. Co., No. 1:04-CV-2750-BBM, 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

10-1-853. Civil action authorized.

An elder or disabled person who suffers damage or injury as a result of an offense or violation described in this article has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Restitution ordered pursuant to this Code section has priority over a civil penalty imposed pursuant to this article.

History.
Code 1981, § 10-1-853, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

JUDICIAL DECISIONS

Complaint only need allege one elderly victim. — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one elderly person. Kitchen v. Ameriquest Mortg. Co., No. 1:04-CV-2750-BBM, 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

10-1-854. Educational initiatives on consumer crimes against elder and disable person.

The Attorney General may develop and implement state-wide educational initiatives to inform elder persons and disabled persons, law enforcement agencies, the judicial system, social services professionals, and the general public as to the prevalence and prevention of consumer crimes against elder and disabled persons, the provisions of Part 1 of Article 15 of this chapter, the "Uniform Deceptive Trade Practices Act," and Articles 17 and 21 of this chapter, the penalties for violations of such articles, and the remedies available for victims of such violations.

History. Code 1981, § 10-1-854, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

10-1-855. Victim intervention and assistance referral procedure.

The Attorney General may establish and maintain referral procedures with the Division of Aging Services within the Department of Human Services in order to provide any necessary intervention and assistance to elder or disabled persons who may have been victimized by violations of this article.

History. Code 1981, § 10-1-855, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2009, p. 453, §§ 2-2, 2-5/HB 228; Ga. L. 2015, p. 1088, § 10/SB 148.

10-1-856. Construction with Part 2 of Article 15 of this chapter; confidentiality.

Nothing in this article shall serve to prevent the Attorney General from investigating and pursuing unfair and deceptive acts or practices committed under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975." Notwithstanding any other provision of law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive practices under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the Attorney General. Nothing contained in this Code section shall be construed to prohibit any valid discovery under the relevant discovery rules, or to prohibit the lawful subpoena of such information.

History. Code 1981, § 10-1-856, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

10-1-857. Complaints, inquiries, investigations, and corrective action.

The Attorney General shall receive all complaints under this article. He or she shall refer all complaints or inquiries concerning conduct specifically approved or prohibited by the Secretary of State, Department of Agriculture, Commissioner of Insurance, Public Service Commission, Department of Natural Resources, Department of Banking and Finance, or other appropriate agency or official of this state to that agency or official for initial investigation and corrective action other than litigation.

History.
Code 1981, § 10-1-857, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2015, p. 1088, § 10/SB 148.

ARTICLE 32

ASSISTIVE TECHNOLOGY WARRANTIES

Cross references.
Motorized wheelchair warranties, § 10-1-890 et seq.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, this article, which was enacted as Article 31, containing Code Sections 10-1-850 through 10-1-855, was redesignated as Article 32, containing Code Sections 10-1-870 through 10-1-875.

10-1-870. Short title.

This article shall be known and may be cited as the "Assistive Technology Warranty Act."

History.
Code 1981, § 10-1-870, enacted by Ga. L. 1993, p. 1797, § 1.

10-1-871. Definitions.

As used in this article, the term:

(1) "Assistive technology device" means any device or equipment with a retail cost to a consumer of $1,000.00 or more, that assists a person with disabilities to perform specific tasks such as moving, walking, standing, speaking, breathing, hearing, seeing, learning, working, sleeping, reaching, grasping, or caring for himself or herself that would not be possible for such person without an assistive technology device.

(2) "Assistive technology device dealer" means a person who is in the business of selling assistive technology devices.

(3) "Assistive technology device lessor" means a person who leases an assistive technology device to a consumer, or who holds the lessor's rights under a written lease.

(4) "Collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of obtaining an alternative assistive technology device or other device used for mobility assistance.

(5) "Consumer" means any of the following:

(A) The purchaser of an assistive technology device, if the assistive technology device was purchased from an assistive technology device dealer or manufacturer for purposes other than resale;

(B) A person to whom the assistive technology device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the assistive technology device;

(C) A person who may enforce the warranty; or

(D) A person who leases an assistive technology device from an assistive technology device lessor under a written lease.

(6) "Demonstrator" means an assistive technology device used primarily for the purpose of demonstration to the public.

(7) "Early termination cost" means any expense or obligation that an assistive technology device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive technology device to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-873. "Early termination cost" includes a penalty for prepayment under a finance arrangement.

(8) "Early termination savings" means any expense or obligation that an assistive technology device lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive technology device to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-873. "Early termination savings" includes an interest charge that the assistive technology device lessor would have paid to finance the assistive technology device or, if the assistive technology device lessor does not finance the assistive technology device, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(9) "Manufacturer" means a person who manufactures or assembles assistive technology devices and agents of that person, including an importer, a distributor, factory branch, distributor

branch, and any warrantors of the manufacturer's assistive technology devices but does not include an assistive technology device dealer.

(10) "Nonconformity" means a condition or defect that substantially impairs the use, value, or safety of an assistive technology device, and that is covered by an express warranty applicable to the assistive technology device or to a component of the assistive technology device, but does not include a condition or defect that is the result of abuse, neglect, or unauthorized modification or alteration of the assistive technology device by a consumer.

(11) "Reasonable attempt to repair" means any of the following occurring within the term of an express warranty applicable to a new assistive technology device or within one year after first delivery of the assistive technology device to a consumer, whichever is sooner:

(A) The same nonconformity with the warranty is subject to repair at least four times by the manufacturer, assistive technology device lessor, or any of the manufacturer's authorized assistive technology device dealers and the nonconformity continues; or

(B) The assistive technology device is out of service for an aggregate of at least 30 days because of warranty nonconformities.

History.
Code 1981, § 10-1-871, enacted by Ga. L. 1993, p. 1797, § 1; Ga. L. 1994, p. 97, § 10.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code Section 10-1-873" was substituted for "Code Section 10-1-853" in paragraphs (7) and (8), and semicolons were substituted for periods at the end of subparagraphs (5)(A), (5)(B), and (5)(C) and subparagraph (11)(A).

10-1-872. Express written warranties; failure to furnish.

A manufacturer who sells an assistive technology device to a consumer, either directly or through an assistive technology device dealer, shall furnish the consumer with an express written warranty for the assistive technology device. The warranty shall as a minimum warrant that there are no defects in parts or performance. The duration of the express written warranty shall be not less than one year after first delivery of the assistive technology device to the consumer. If a manufacturer fails to furnish an express written warranty as required by this Code section, the assistive technology device shall be covered by an express warranty as if the manufacturer had furnished an express written warranty to the consumer as required by this Code section.

History.
Code 1981, § 10-1-872, enacted by Ga. L. 1993, p. 1797, § 1.

10-1-873. Repair of nonconforming assistive technology devices; refund or replacement of devices; sale or lease of returned device.

(a) If a new assistive technology device does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the assistive technology device lessor, or any of the manufacturer's authorized assistive technology device dealers and makes the assistive technology device available for repair before one year after first delivery of the assistive technology device to a consumer, the nonconformity shall be repaired at the manufacturer's expense to correct the nonconformity regardless of whether the repairs are made after expiration of the warranty rights period. If in any subsequent proceeding it is determined that the consumer's repair did not qualify under this article, and the manufacturer was not otherwise obligated to repair the assistive technology device, the consumer shall be liable to the manufacturer for costs of repair.

(b)(1) If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer shall carry out the requirement under paragraph (2) or (3) of this subsection, whichever is appropriate.

(2) At the direction of a consumer as defined in subparagraph (A), (B), or (C) of paragraph (5) of Code Section 10-1-871, the manufacturer shall do one of the following:

(A) Accept return of the assistive technology device and replace the assistive technology device with a comparable new assistive technology device and refund any collateral costs; or

(B) Accept return of the assistive technology device and refund to the consumer and to any holder of a perfected security interest in the consumer's assistive technology device, as their interest may appear, the full purchase price plus any finance charge, amount paid by the consumer at the point of sale, and collateral costs, less a reasonable allowance for use. Under this subparagraph, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the assistive technology device by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the assistive technology device was used before the consumer first reported the nonconformity to the assistive technology device dealer.

(3)(A) At the direction of a consumer as defined in subparagraph (D) of paragraph (5) of Code Section 10-1-871, the manufacturer shall:

(i) Accept return of the assistive technology device;

(ii) Refund to the assistive technology device lessor and to any holder of a perfected security interest in the assistive technology device, as their interest may appear, the current value of the written lease as defined in subparagraph (B) of this paragraph; and

(iii) Refund to the consumer the amount that the consumer paid under the written lease plus any collateral costs, less a reasonable allowance for use as defined in subparagraph (C) of this paragraph.

(B) The current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination plus the assistive technology device dealer's early termination costs and the value of the assistive technology device at the lease expiration date if the lease sets forth that value, less the assistive technology device lessor's early termination savings.

(C) A reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the consumer drove the assistive technology device before first reporting the nonconformity to the manufacturer, assistive technology device lessor, or assistive technology device dealer.

(c) To receive a comparable new assistive technology device or a refund due under paragraph (1) or (2) of subsection (b) of this Code section, a consumer, as defined under subparagraph (A), (B), or (C) of paragraph (5) of Code Section 10-1-871, shall offer to transfer possession of the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the consumer with a comparable new assistive technology device or a refund. When the manufacturer provides the new assistive technology device or refund, the consumer shall return the assistive technology device having the nonconformity to the manufacturer, along with any endorsements necessary to transfer legal possession to the manufacturer.

(d)(1) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a consumer as defined under subparagraph (D) of paragraph (5) of Code Section 10-1-871, shall offer to return the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the refund to the

consumer. When the manufacturer provides the refund, the consumer shall return the assistive technology device having the nonconformity to the manufacturer.

(2) To receive a refund due under paragraph (3) of subsection (b) of this Code section, an assistive technology device lessor shall offer to transfer possession of the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the refund to the assistive technology device lessor. When the manufacturer provides the refund, the assistive technology device lessor shall provide any endorsements necessary to transfer legal possession to the manufacturer.

(3) No person may enforce the lease against the consumer after the consumer receives a refund due under paragraph (3) of subsection (b) of this Code section.

(e) No assistive technology device returned by a consumer or assistive technology device lessor in this state under subsection (b) of this Code section or by a consumer or assistive technology device lessor in another state under a similar law of that state may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.

History.
Code 1981, § 10-1-873, enacted by Ga. L. 1993, p. 1797, § 1; Ga. L. 1994, p. 97, § 10.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code Section 10-1-871" was substituted for "Code Section 10-1-851" in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and paragraph (d)(1), and "paragraph (5)" was substituted for "paragraph (2)" in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and paragraph (d)(1).

10-1-874. Thirty-day return privilege.

A manufacturer or assistive technology device dealer who recommends and sells an assistive technology device to a consumer shall accept a return of the assistive technology device within 30 days after the purchase if the assistive technology device does not meet the needs of the person with the disability. The manufacturer or assistive technology dealer shall provide a refund in conformity with the provisions established within paragraph (2) of subsection (b) of Code Section 10-1-873.

History.
Code 1981, § 10-1-874, enacted by Ga. L. 1993, p. 1797, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code Section 10-1-873" was substituted for "Code Section 10-1-853" in the second sentence.

10-1-875. Rights and remedies under other laws or contracts; waivers void; actions for damages.

(a) This article shall not be deemed to limit rights or remedies available to a consumer under any other law or contract.

(b) Any waiver by a consumer of rights under this article is void.

(c) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this article. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss together with costs, disbursements, and reasonable attorney fees and any equitable relief that the court determines is appropriate.

History.
Code 1981, § 10-1-875, enacted by Ga. L. 1993, p. 1797, § 1.

ARTICLE 33

MOTORIZED WHEELCHAIR WARRANTIES

Cross references.
Assistive technology device warranties, § 10-1-870 et seq.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, this article, which was enacted as Article 31, containing Code Sections 10-1-850 through 10-1-854, was redesignated as Article 33, containing Code Sections 10-1-890 through 10-1-894.

10-1-890. Short title.

This article shall be known and may be cited as the "Motorized Wheelchair Warranty Act."

History.
Code 1981, § 10-1-890, enacted by Ga. L. 1993, p. 1805, § 1.

10-1-891. Definitions.

As used in this article, the term:

(1) "Collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of obtaining an alternative wheelchair or other device used for mobility assistance.

(2) "Consumer" means any of the following:

(A) The purchaser of a motorized wheelchair, if the motorized wheelchair was purchased from a motorized wheelchair dealer or manufacturer for purposes other than resale;

(B) A person to whom the motorized wheelchair is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the motorized wheelchair;

(C) A person who may enforce the warranty; or

(D) A person who leases a motorized wheelchair from a motorized wheelchair lessor under a written lease.

(3) "Demonstrator" means a motorized wheelchair used primarily for the purpose of demonstration to the public.

(4) "Early termination cost" means any expense or obligation that a motorized wheelchair lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motorized wheelchair to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-893. "Early termination cost" includes a penalty for prepayment under a finance arrangement.

(5) "Early termination savings" means any expense or obligation that a motorized wheelchair lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motorized wheelchair to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-893. "Early termination savings" includes an interest charge that the motorized wheelchair lessor would have paid to finance the motorized wheelchair or, if the motorized wheelchair lessor does not finance the motorized wheelchair, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(6) "Manufacturer" means a person who manufactures or assembles motorized wheelchairs and agents of that person, including an importer, a distributor, factory branch, distributor branch, and any warrantors of the manufacturer's motorized wheelchairs but does not include a motorized wheelchair dealer.

(7) "Motorized wheelchair" means any motor driven wheelchair, including a demonstrator, that a consumer purchases or accepts transfer of in this state.

(8) "Motorized wheelchair dealer" means a person who is in the business of selling motorized wheelchairs.

(9) "Motorized wheelchair lessor" means a person who leases a motorized wheelchair to a consumer, or who holds the lessor's rights, under a written lease.

(10) "Nonconformity" means a condition or defect that substantially impairs the use, value, or safety of a motorized wheelchair, and that is covered by an express warranty applicable to the motorized wheelchair or to a component of the motorized wheelchair, but does not include a condition or defect that is the result of abuse, neglect, or unauthorized modification or alteration of the motorized wheelchair by a consumer.

(11) "Reasonable attempt to repair" means any of the following occurring within the term of an express warranty applicable to a new motorized wheelchair or within one year after first delivery of the motorized wheelchair to a consumer, whichever is sooner:

(A) The same nonconformity with the warranty is subject to repair at least four times by the manufacturer, motorized wheelchair lessor, or any of the manufacturer's authorized motorized wheelchair dealers and the nonconformity continues; or

(B) The motorized wheelchair is out of service for an aggregate of at least 30 days because of warranty nonconformities.

History.
Code 1981, § 10-1-891, enacted by Ga. L. 1993, p. 1805, § 1; Ga. L. 1994, p. 97, § 10.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code Section 10-1-893" was substituted for "Code Section 10-1-853" in paragraphs (4) and (5).

10-1-892. Express written warranties; failure to furnish.

A manufacturer who sells a motorized wheelchair to a consumer, either directly or through a motorized wheelchair dealer, shall furnish the consumer with an express written warranty for the motorized wheelchair warranting parts and performance. The duration of the express written warranty shall be not less than one year after first delivery of the motorized wheelchair to the consumer. If a manufacturer fails to furnish an express written warranty as required by this Code section, the motorized wheelchair shall be covered by an express warranty as if the manufacturer had furnished an express written warranty to the consumer as required by this Code section.

History.
Code 1981, § 10-1-892, enacted by Ga. L. 1993, p. 1805, § 1.

10-1-893. Repair of nonconforming assistive motorized wheelchairs; refund or replacement; sale or lease of returned wheelchair.

(a) If a new motorized wheelchair does not conform to an applicable

express warranty and the consumer reports the nonconformity to the manufacturer, the motorized wheelchair lessor, or any of the manufacturer's authorized motorized wheelchair dealers and makes the motorized wheelchair available for repair before one year after first delivery of the motorized wheelchair to a consumer, the nonconformity shall be repaired at the manufacturer's expense to correct the nonconformity regardless of whether the repairs are made after expiration of the warranty rights period. If in any subsequent proceeding it is determined that the consumer's repair did not qualify under this article, and the manufacturer was not otherwise obligated to repair the motorized wheelchair, the consumer shall be liable to the manufacturer for costs of repair.

(b)(1) If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer shall carry out the requirement under paragraph (2) or (3) of this subsection, whichever is appropriate.

(2) At the direction of a consumer as defined in subparagraph (A), (B), or (C) of paragraph (2) of Code Section 10-1-891, the manufacturer shall do one of the following:

(A) Accept return of the motorized wheelchair and replace the motorized wheelchair with a comparable new motorized wheelchair and refund any collateral costs; or

(B) Accept return of the motorized wheelchair and refund to the consumer and to any holder of a perfected security interest in the consumer's motorized wheelchair, as their interest may appear, the full purchase price plus any finance charge, amount paid by the consumer at the point of sale, and collateral costs, less a reasonable allowance for use. Under this subparagraph, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motorized wheelchair by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the motorized wheelchair was driven before the consumer first reported the nonconformity to the motorized wheelchair dealer.

(3)(A) At the direction of a consumer as defined in subparagraph (D) of paragraph (2) of Code Section 10-1-891, the manufacturer shall:

(i) Accept return of the motorized wheelchair;

(ii) Refund to the motorized wheelchair lessor and to any holder of a perfected security interest in the motorized wheelchair, as their interest may appear, the current value of the written lease as defined in subparagraph (B) of this paragraph; and

(iii) Refund to the consumer the amount that the consumer paid under the written lease plus any collateral costs, less a reasonable allowance for use as defined in subparagraph (C) of this paragraph.

(B) The current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination plus the motorized wheelchair dealer's early termination costs and the value of the motorized wheelchair at the lease expiration date if the lease sets forth that value, less the motorized wheelchair lessor's early termination savings.

(C) A reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the consumer drove the motorized wheelchair before first reporting the nonconformity to the manufacturer, motorized wheelchair lessor, or motorized wheelchair dealer.

(c) To receive a comparable new motorized wheelchair or a refund due under paragraph (1) or (2) of subsection (b) of this Code section, a consumer, as defined under subparagraph (A), (B), or (C) of paragraph (2) of Code Section 10-1-891, shall offer to transfer possession of the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the consumer with a comparable new motorized wheelchair or a refund. When the manufacturer provides the new motorized wheelchair or refund, the consumer shall return the motorized wheelchair having the nonconformity to the manufacturer, along with any endorsements necessary to transfer legal possession to the manufacturer.

(d)(1) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a consumer as defined under subparagraph (D) of paragraph (2) of Code Section 10-1-891, shall offer to return the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the refund to the consumer. When the manufacturer provides the refund, the consumer shall return the motorized wheelchair having the nonconformity to the manufacturer.

(2) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a motorized wheelchair lessor shall offer to transfer possession of the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the

refund to the motorized wheelchair lessor. When the manufacturer provides the refund, the motorized wheelchair lessor shall provide any endorsements necessary to transfer legal possession to the manufacturer.

(3) No person may enforce the lease against the consumer after the consumer receives a refund due under paragraph (3) of subsection (b) of this Code section.

(e) No motorized wheelchair returned by a consumer or motorized wheelchair lessor in this state under subsection (b) of this Code section or by a consumer or motorized wheelchair lessor in another state under a similar law of that state may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.

History.
Code 1981, § 10-1-893, enacted by Ga. L. 1993, p. 1805, § 1; Ga. L. 1994, p. 97, § 10.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code Section 10-1-891" was substituted for "Code Section 10-1-851" in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and paragraph (d)(1).

10-1-894. Other rights or remedies under other law or contract; waiver void; action for damages.

(a) This article shall not be deemed to limit rights or remedies available to a consumer under any other law or contract.

(b) Any waiver by a consumer of rights under this article is void.

(c) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this article. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss together with costs, disbursements, and reasonable attorney fees and any equitable relief that the court determines is appropriate.

History.
Code 1981, § 10-1-894, enacted by Ga. L. 1993, p. 1805, § 1.

ARTICLE 34

IDENTITY THEFT

Cross references.
Protection of Personally Identifiable Data of Judges, § 15-5-110 et seq.
Use of personally identifiable data in court documentation, § 15-10-54.
Offense of identity fraud, § 16-9-121.
Reporting suspected identity fraud, § 16-9-125.1.
Law reviews.
For note, "The Online Zoom Lens: Why

Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy'," see 43 Ga. L. Rev. 575 (2009).

For article, "Limiting Law Firm Exposure to HITECH Act Liability: Do You Know Where Your Client's Protected Health Information Is?," see 15 (No. 6) Ga. St. B. J. 24 (2010).

For article, "Cybersecurity Oversight Liability," see 35 Ga. St. U.L. Rev. 663 (2019).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Identity Theft and Other Misuses of Credit and Debit Cards, 81 POF3d 113.

10-1-910. Legislative findings.

The General Assembly finds and declares as follows:

(1) The privacy and financial security of individuals is increasingly at risk due to the ever more widespread collection of personal information by both the private and public sectors;

(2) Credit card transactions, magazine subscriptions, real estate records, automobile registrations, consumer surveys, warranty registrations, credit reports, and internet websites are all sources of personal information and form the source material for identity thieves;

(3) Identity theft is one of the fastest growing crimes committed in this state. Criminals who steal personal information such as social security numbers use the information to open credit card accounts, write bad checks, buy cars, purchase property, and commit other financial crimes with other people's identities;

(4) Implementation of technology security plans and security software as part of an information security policy may provide protection to consumers and the general public from identity thieves;

(5) Information brokers should clearly define the standards for authorized users of its data so that a breach by an unauthorized user is easily identifiable;

(6) Identity theft is costly to the marketplace and to consumers; and

(7) Victims of identity theft must act quickly to minimize the damage; therefore, expeditious notification of unauthorized acquisition and possible misuse of a person's personal information is imperative.

History.

Code 1981, § 10-1-910, enacted by Ga. L. 2005, p. 851, § 1/SB 230; Ga. L. 2024, p. 1052, § 2(32)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised capitalization in paragraph (2).

Law reviews.

For article on 2005 enactment of this article, see 22 Ga. St. U.L. Rev. 1 (2005).

For article, "The Growing Threat of Identity Theft and Its Implications for Employers," see 11 Ga. St. B. J. 27 (No. 6, 2006).

For note, "Cybersecurity on my Mind: Protecting Georgia Consumers from Data Breaches," see 51 Ga. L. Rev. 265 (2016).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Identity Theft and Other Misuses of Credit and Debit Cards, 81 POF3d 113.

10-1-911. Definitions.

As used in this article, the term:

(1) "Breach of the security of the system" means unauthorized acquisition of an individual's electronic data that compromises the security, confidentiality, or integrity of personal information of such individual maintained by an information broker or data collector. Good faith acquisition or use of personal information by an employee or agent of an information broker or data collector for the purposes of such information broker or data collector is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure.

(2) "Data collector" means any state or local agency or subdivision thereof including any department, bureau, authority, public university or college, academy, commission, or other government entity; provided, however, that the term "data collector" shall not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes or for purposes of providing public access to court records or to real or personal property information.

(3) "Information broker" means any person or entity who, for monetary fees or dues, engages in whole or in part in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes.

(4) "Notice" means:

(A) Written notice;

(B) Telephone notice;

(C) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in Section 7001 of Title 15 of the United States Code; or

(D) Substitute notice, if the information broker or data collector demonstrates that the cost of providing notice would exceed $50,000.00, that the affected class of individuals to be notified exceeds 100,000, or that the information broker or data collector does not have sufficient contact information to provide written or electronic notice to such individuals. Substitute notice shall consist of all of the following:

(i) Email notice, if the information broker or data collector has an email address for the individuals to be notified;

(ii) Conspicuous posting of the notice on the information broker's or data collector's website page, if the information broker or data collector maintains one; and

(iii) Notification to major state-wide media.

Notwithstanding any provision of this paragraph to the contrary, an information broker or data collector that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this article shall be deemed to be in compliance with the notification requirements of this article if it notifies the individuals who are the subjects of the notice in accordance with its policies in the event of a breach of the security of the system.

(5) "Person" means any individual, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other entity. The term "person" as used in this article shall not be construed to require duplicative reporting by any individual, corporation, trust, estate, cooperative, association, or other entity involved in the same transaction.

(6) "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted or redacted:

(A) Social security number;

(B) Driver's license number or state identification card number;

(C) Account number, credit card number, or debit card number, if circumstances exist wherein such a number could be used

without additional identifying information, access codes, or passwords;

(D) Account passwords or personal identification numbers or other access codes; or

(E) Any of the items contained in subparagraphs (A) through (D) of this paragraph when not in connection with the individual's first name or first initial and last name, if the information compromised would be sufficient to perform or attempt to perform identity theft against the person whose information was compromised.

The term "personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

History.

Code 1981, § 10-1-911, enacted by Ga. L. 2005, p. 851, § 1/SB 230; Ga. L. 2007, p. 450, § 2/SB 236; Ga. L. 2024, p. 1052, § 2(33)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, in division (4)(D)(i), substituted "Email" for "E-mail" and "email" for "e-mail".

Editor's notes.

Ga. L. 2007, p. 450, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

10-1-912. Notification required upon breach of security regarding personal information.

(a) Any information broker or data collector that maintains computerized data that includes personal information of individuals shall give notice of any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of this state whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (c) of this Code section, or with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system.

(b) Any person or business that maintains computerized data on behalf of an information broker or data collector that includes personal information of individuals that the person or business does not own shall notify the information broker or data collector of any breach of the security of the system within 24 hours following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(c) The notification required by this Code section may be delayed if a law enforcement agency determines that the notification will compromise a criminal investigation. The notification required by this Code section shall be made after the law enforcement agency determines that it will not compromise the investigation.

(d) In the event that an information broker or data collector discovers circumstances requiring notification pursuant to this Code section of more than 10,000 residents of this state at one time, the information broker or data collector shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nation-wide basis, as defined by 15 U.S.C. Section 1681a, of the timing, distribution, and content of the notices.

History.
Code 1981, § 10-1-912, enacted by Ga. L. 2005, p. 851, § 1/SB 230; Ga. L. 2007, p. 450, § 3/SB 236.
Editor's notes.
Ga. L. 2007, p. 450, § 1/SB 236, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"
Law reviews.
For note, "Cybersecurity on my Mind: Protecting Georgia Consumers from Data Breaches," see 51 Ga. L. Rev. 265 (2016).

10-1-913. Additional definitions.

As used in this Code section, Code Section 10-1-914, and Code Section 10-1-914.1, the term:

(1) "Consumer" means a natural person residing in this state.

(2) "Consumer credit report" means a "consumer report" as defined in 15 U.S.C. Section 1681a(d) that a consumer reporting agency furnishes to a person which it has reason to believe intends to use the information as a factor in establishing the consumer's eligibility for credit to be used primarily for personal, family, or household purposes.

(3) "Consumer credit reporting agency" means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer credit reports to third parties.

(4) "Normal business hours" means any day, between the hours of 8:00 A.M. and 9:30 P.M., eastern standard time.

(5) "Person" means any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity.

(6) "Proper identification" means information generally deemed sufficient to identify a person for consumer reporting agency purposes under 15 U.S.C. Section 1681 et seq.

(7) "Protected consumer" means an individual who is:

(A) Under the age of 16 years at the time a request for the placement of a security freeze is made under subsection (a) of Code Section 10-1-914.1; or

(B) An individual for whom a guardian or conservator has been appointed.

(8) "Record" means a compilation of information about a protected consumer that satisfies all of the following:

(A) The compilation identifies the protected consumer; and

(B) The compilation is created by a consumer credit reporting agency solely for the purpose of complying with Code Section 10-1-914.1.

(9) "Representative" means a person who provides to a consumer credit reporting agency sufficient proof of authority to act on behalf of a protected consumer.

(10) "Security freeze" means a restriction placed on a consumer credit report at the request of the consumer that prohibits a consumer credit reporting agency from releasing all or any part of the consumer's consumer credit report or any information derived from the consumer's consumer credit report for a purpose relating to the extension of credit without the express authorization of the consumer.

(11) "Security freeze for a protected consumer" means one of the following:

(A) If a consumer credit reporting agency does not have a file pertaining to a protected consumer, a restriction placed on the protected consumer's record that prohibits the consumer credit reporting agency from releasing the protected consumer's record; or

(B) If a consumer credit reporting agency has a file pertaining to the protected consumer, a restriction placed on the protected consumer's credit report that prohibits the consumer credit reporting agency from releasing the protected consumer's credit report or any information derived from the protected consumer's credit report.

(12) "Sufficient proof of authority" means documentation that shows a representative has authority to act on behalf of a protected consumer, including any of the following:

(A) An order issued by a court;

(B) A lawfully executed and valid power of attorney; or

(C) A written, notarized statement signed by a representative that expressly describes the authority of the representative to act on behalf of a protected consumer.

(13) "Sufficient proof of identification" means information or documentation that identifies a protected consumer or a representative of a protected consumer, including any of the following:

(A) A social security number or a copy of a social security card issued by the Social Security Administration; or

(B) A certified or official copy of a birth certificate issued by the entity authorized to issue the birth certificate.

History.
Code 1981, § 10-1-913, enacted by Ga. L. 2008, p. 594, § 1/HB 130; Ga. L. 2014, p. 668, § 1/HB 915.

Law reviews.
For survey article on business associations, see 60 Mercer L. Rev. 35 (2008).

10-1-914. Consumer requested security freeze on credit report; timing; notifications; temporary lifting of freeze; application; penalty.

(a) A consumer may place a security freeze on the consumer's credit report by making a request in writing by certified mail to a consumer credit reporting agency. No later than August 1, 2008, a consumer credit reporting agency shall make available to consumers an internet based method of requesting a security freeze and a toll-free telephone number for consumers to use to place a security freeze, temporarily lift a security freeze, or completely remove a security freeze. A security freeze shall prohibit, subject to exceptions in subsection (m) of this Code section, the consumer credit reporting agency from releasing the consumer's credit report or credit score without the prior express authorization of the consumer as provided in subsection (d) or (e) of this Code section. Nothing in this subsection prevents a consumer credit reporting agency from advising a third party that a security freeze is in effect with respect to the consumer's credit report.

(b) A consumer credit reporting agency shall place a security freeze on a consumer's credit report no later than three business days after receiving the consumer's written request sent by certified mail.

(c) The consumer credit reporting agency shall send a written confirmation of the security freeze to the consumer within ten business days of placing the security freeze and at the same time shall provide the consumer with a unique personal identification number or password, other than the consumer's social security number, to be used by the consumer when providing authorization for the release of the consumer's credit report for a specific period of time.

(d) If the consumer wishes to allow the consumer's credit report to be accessed for a specific period of time while a security freeze is in place, the consumer shall contact the consumer credit reporting agency through the contact method established by the consumer credit reporting agency, request that the security freeze be temporarily lifted, and provide all of the following:

(1) Proper identification;

(2) The unique personal identification number or password provided by the consumer credit reporting agency pursuant to subsection (c) of this Code section;

(3) The proper information regarding the time period for which the report shall be available to users of the consumer credit report; and

(4) The proper payment as may be required by the consumer credit reporting agency.

(e) A consumer credit reporting agency shall develop procedures involving the use of telephone, facsimile, the internet, or other electronic media to receive and process a request from a consumer to temporarily lift a security freeze on a consumer credit report pursuant to subsection (d) of this Code section.

(f) A consumer credit reporting agency that receives a request from a consumer to temporarily lift a security freeze on a consumer credit report pursuant to subsection (d) or (e) of this Code section shall comply with the request:

(1) No later than three business days after receiving a written request; or

(2) Within 15 minutes after the request and payment are received by telephone or electronically by the contact method chosen by the consumer credit reporting agency during normal business hours and the request includes the consumer's proper identification, correct personal identification number or password, and the proper payment as may be required by the consumer credit reporting agency.

(g) A consumer credit reporting agency need not remove a security freeze within 15 minutes, as specified in paragraph (2) of subsection (f) of this Code section, if:

(1) The consumer fails to satisfy the requirements of subsection (d) of this Code section; or

(2) The consumer credit reporting agency's ability to remove the security freeze within 15 minutes is prevented by:

(A) An act of God, including fire, earthquakes, hurricanes, storms, or similar natural disaster or phenomenon;

(B) Unauthorized or illegal acts by a third party, including terrorism, sabotage, riot, vandalism, labor strikes or disputes disrupting operations, or similar occurrence;

(C) Operational interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, computer hardware or software failures inhibiting response time, or similar disruption;

(D) Governmental action, including emergency orders or regulations, judicial or law enforcement action, or similar directives;

(E) Regularly scheduled maintenance or updates, during other than normal business hours, to the consumer credit reporting agency's systems;

(F) Commercially reasonable maintenance of, or repair to, the consumer credit reporting agency's systems that is unexpected or unscheduled; or

(G) Receipt of a removal request outside of normal business hours.

(h) A consumer credit reporting agency shall only remove or temporarily lift a security freeze placed on a consumer's credit report:

(1) Upon the consumer's request, in compliance with the requirements of this Code section; or

(2) If the consumer's credit report was frozen due to a material misrepresentation of fact by the consumer. If a consumer credit reporting agency intends to remove a security freeze upon a consumer's credit report pursuant to this paragraph, the consumer credit reporting agency shall notify the consumer in writing prior to removing the security freeze on the consumer's credit report.

(i) If a third party requests access to a consumer credit report on which a security freeze is in effect and this request is in connection with an application for credit or any other use related to the extension of credit and the consumer does not allow the consumer's credit report to be accessed for that specific period of time, the third party may treat the application as incomplete.

(j) If a consumer requests a security freeze pursuant to this Code section, the consumer credit reporting agency shall disclose to the consumer the process of placing and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period of time while the security freeze is in place.

(k) A security freeze shall remain in place until the consumer requests that the security freeze be removed. A consumer credit

reporting agency shall remove a security freeze within three business days of receiving a request for removal from the consumer. The consumer shall provide all of the following:

(1) Proper identification; and

(2) The unique personal identification number or password provided by the consumer credit reporting agency pursuant to subsection (c) of this Code section.

(l) A consumer credit reporting agency shall require proper identification of the person making a request to place, temporarily lift, or remove a security freeze.

(m) By way of example only, and not intending to be exclusive, the provisions of this Code section shall not apply to the use of a consumer credit report by any of the following:

(1) A person, or the person's subsidiary, affiliate, agent, subcontractor, or assignee with whom the consumer has, or prior to assignment had, an account, contract, or debtor-creditor relationship for the purposes of reviewing the active account or collecting the financial obligation owing for the account, contract, or debt;

(2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this Code section for purposes of facilitating the extension of credit or other permissible use;

(3) Any person acting pursuant to a court order, warrant, or subpoena;

(4) A state or local agency, or its agents or assigns, which administers a program for establishing and enforcing child support obligations;

(5) A state or local agency, or its agents or assigns, acting to investigate fraud, including Medicaid fraud; acting to investigate or collect delinquent taxes or assessments, including interest, penalties, and unpaid court orders; or acting to fulfill any of its other statutory responsibilities;

(6) A federal, state, or local governmental entity, including a law enforcement agency, court, or its agents or assigns;

(7) Any person for the use of a credit report for purposes permitted under 15 U.S.C. Section 1681b(c);

(8) Any person for the sole purpose of providing a credit file monitoring subscription service to which the consumer has subscribed;

(9) Any person for the purpose of providing a consumer with a copy of the consumer's credit report or credit score upon the consumer's request;

(10) Any depository financial institution for checking, savings, and investment accounts; or

(11) Any person or entity for insurance purposes, including use in setting or adjusting a rate, adjusting a claim, or underwriting.

(n) If a security freeze is in place, a consumer credit reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within 30 days of the change being posted to the consumer's file: name, date of birth, social security number, and address. Written confirmation is not required for technical modifications of a consumer's official information, including name and street abbreviations, complete spellings, or transposition of numbers or letters. In the case of an address change, the written confirmation shall be sent to both the new address and the former address.

(o) The following persons shall not be required to place a security freeze in a consumer credit report pursuant to this Code section; provided, however, that any person that shall not be required to place a security freeze on a consumer credit report under the provisions of paragraph (3) of this subsection shall be subject to any security freeze placed on a consumer credit report by another consumer credit reporting agency from which it obtains information:

(1) A check services or fraud prevention services company, including reports on incidents of fraud, or authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payment;

(2) A deposit account information service company, which issues reports regarding account closures due to fraud, substantial overdrafts, automated teller machine abuse, or other similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution;

(3) Resellers of consumer credit report information that assemble and merge information contained in a data base of one or more consumer credit reporting agencies and do not maintain a permanent data base of consumer credit information from which new consumer credit reports are produced; or

(4) A consumer credit reporting agency's data base or file which consists of information concerning, and used for, one or more of the following: criminal record information, fraud prevention or detection,

personal claim loss history information, and employment, tenant, or individual background screening.

(p) A person that violates this Code section may be investigated and prosecuted under the provisions of the Fair Business Practices Act, Code Section 10-1-390, et seq., and may be fined not more than $100.00 for a violation concerning a specific consumer.

History.
Code 1981, § 10-1-914, enacted by Ga. L. 2008, p. 594, § 1/HB 130; Ga. L. 2018, p. 245, § 1/SB 376; Ga. L. 2024, p. 1052, § 2(34)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsections (a) and (e).

10-1-914.1. Security freezes for protected consumers.

(a) A consumer credit reporting agency shall place a security freeze for a protected consumer if the consumer credit reporting agency receives a request from the protected consumer's representative for the placement of the security freeze and the protected consumer's representative:

(1) Submits the request to the consumer credit reporting agency at the address or other point of contact and in the manner specified by the consumer credit reporting agency;

(2) Provides to the consumer credit reporting agency sufficient proof of identification of the protected consumer and the representative; and

(3) Provides to the consumer credit reporting agency sufficient proof of authority to act on behalf of the protected consumer.

(b) If a consumer credit reporting agency does not have a file pertaining to a protected consumer when the consumer credit reporting agency receives a request under subsection (a) of this Code section, the consumer credit reporting agency shall create a record for the protected consumer. Upon receiving the request, the consumer credit reporting agency shall verify that no file exists pertaining to the protected consumer or to the protected consumer's social security number. A record created under this subsection shall not be used to consider the protected consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

(c) Within 30 days after receiving a request that meets the requirements of subsection (a) of this Code section, a consumer credit reporting agency shall place a security freeze for the protected consumer.

(d) Unless a security freeze for a protected consumer is removed in accordance with subsection (f) or (i) of this Code section, a consumer

credit reporting agency shall not release the protected consumer's credit report, any information derived from the protected consumer's credit report, or any record created for the protected consumer.

(e) A security freeze for a protected consumer placed under subsection (c) of this Code section shall remain in effect until:

(1) The protected consumer or the protected consumer's representative requests the consumer credit reporting agency to remove the security freeze in accordance with subsection (f) of this Code section; or

(2) The security freeze is removed in accordance with subsection (i) of this Code section.

(f)(1) If a protected consumer or a protected consumer's representative wishes to remove a security freeze for the protected consumer, the protected consumer or the protected consumer's representative shall:

(A) Submit a request for the removal of the security freeze to the consumer credit reporting agency at the address or other point of contact and in the manner specified by the consumer credit reporting agency; and

(B) Provide to the consumer credit reporting agency sufficient proof of identification of the protected consumer and:

(i) For a request by the protected consumer, proof that the sufficient proof of authority for the protected consumer's representative to act on behalf of the protected consumer is no longer valid; or

(ii) For a request by the representative of the protected consumer, sufficient proof of identification of the representative and sufficient proof of authority to act on behalf of the protected consumer.

(2) Within 30 days after receiving a request that meets the requirements of paragraph (1) of this subsection, the consumer credit reporting agency shall remove the security freeze for the protected consumer.

(g) A consumer credit reporting agency shall not charge a fee for any service performed under this Code section.

(h) This Code section shall not apply to the use of a protected consumer's credit report or record by:

(1) A person administering a credit file monitoring subscription service to which the protected consumer has subscribed or the representative of the protected consumer has subscribed on behalf of the protected consumer;

(2) A person providing the protected consumer or the protected consumer's representative with a copy of the protected consumer's credit report on request of the protected consumer or the protected consumer's representative; or

(3) A person or entity listed in subsection (m) or (o) of Code Section 10-1-914.

(i) A consumer credit reporting agency may remove a security freeze for a protected consumer or delete a record of a protected consumer if such security freeze was placed or the record was created based on a material misrepresentation of fact by the protected consumer or the protected consumer's representative.

(j)(1) A person who violates this Code section may be investigated and prosecuted under the provisions of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," and may be fined not more than $100.00 for a violation concerning a specific protected consumer.

(2) The Attorney General may bring an action for temporary or permanent injunctive or other relief for any violation of this Code section or an action for the penalty authorized in paragraph (1) of this subsection.

History. Code 1981, § 10-1-914.1, enacted by Ga. L. 2014, p. 668, § 2/HB 915; Ga. L. 2018, p. 245, § 2/SB 376.

10-1-915. Notice of right to security freeze.

At any time that a consumer is required to receive a summary of rights required by 15 U.S.C. Section 1681g(d) of the federal Fair Credit Reporting Act, the consumer shall also be provided with the following notice:

"Georgia Consumers Have the Right to Obtain a Security Freeze.

You have a right to place a 'security freeze' on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. A security freeze must be requested in writing by certified mail or by electronic means as provided by a consumer reporting agency. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. If you are actively seeking a new credit, loan, utility, telephone, or insurance account, you should understand that the procedures involved in lifting a security freeze may slow your applications for credit. You should plan ahead and lift a freeze in advance of actually applying for new credit. When you place a security freeze on your credit report, you will be provided a personal identification number or password to use if you choose to remove the freeze on

your credit report or authorize the release of your credit report for a period of time after the freeze is in place.

To provide that authorization you must contact the consumer reporting agency and provide all of the following:

(1) The personal identification number or password.

(2) Proper identification to verify your identity.

(3) The proper information regarding the period of time for which the report shall be available.

A consumer reporting agency must authorize the release of your credit report no later than fifteen (15) minutes after receiving the above information if the request is by electronic means or by telephone, or no later than three business days when a written request is submitted.

A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account, that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance. You have a right to bring civil action against anyone, including a consumer reporting agency, who improperly obtains access to a file, knowingly or willfully misuses file data, or fails to correct inaccurate file data. Unless you are a victim of identity theft with a police report or other official document acceptable to a consumer reporting agency to verify the crimes, or you are 65 or older, a consumer reporting agency has the right to charge you a fee of no more than $3.00 to place a freeze on your credit report."

History.
Code 1981, § 10-1-915, enacted by Ga. L. 2008, p. 594, § 1/HB 130.

ARTICLE 35

TRUE ORIGIN OF DIGITAL GOODS

Effective date.
This article became effective July 1, 2022.

Cross references.
Georgia Music Hall of Fame Authority, § 12-3-520.
Music therapy, § 43-25A-1 et seq.
Georgia Council for the Arts, § 50-12-20 et seq.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2022, Article 35, as enacted by Ga. L. 2022, p. 506, § 2/SB 332, was redesignated as Article 36.

10-1-930. Short title.

This article shall be known and may be cited as the "Georgia True Origin of Digital Goods Act."

History.
Code 1981, § 10-1-930, enacted by Ga. L. 2022, p. 203, § 2/HB 508; Ga. L. 2024, p. 1052, § 2(35)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "'Georgia True" for "Georgia 'True" in this Code section.

10-1-931. Definitions.

As used in this article, the term:

(1) "Commercial recording or audiovisual work" means a recording or audiovisual work:

(A) Consisting of substantially all of such recording or audiovisual work; and

(B) Whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate for sale, for rental, or for performance or exhibition to the public, regardless of whether a commercial advantage or private financial gain is sought or the person disseminating it owns a license of such recording or audiovisual work.

(2) "Electronic dissemination" or "electronically disseminates" means initiating a transmission of, making available, or otherwise offering a commercial recording or audiovisual work for distribution, display, or performance through the internet or other digital network, regardless of whether such commercial recording or audiovisual work has been previously electronically disseminated by another person.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, unincorporated association, or any other legal or commercial entity.

(4) "Third-party commercial recording" means a commercial recording not belonging to the owner of a website or online service that electronically disseminates it.

(5) "Website" means a set of related web pages served from a single web domain. Such term shall not include a home page or channel page for the user account of a person who is not the owner or operator of the website upon which such user home page or channel page appears.

History.
Code 1981, § 10-1-931, enacted by Ga. L. 2022, p. 203, § 2/HB 508.

10-1-932. Required disclosure to consumers.

(a) A person that owns or operates a website or online service that consists, to a substantial extent, of the electronic dissemination of third-party commercial recordings or audiovisual works, directly or indirectly, and that electronically disseminates such works to consumers in this state shall clearly and conspicuously disclose its true and correct name, physical address, telephone number, and email address on such website or online service in a location readily accessible to a consumer using or visiting the website or online service.

(b) The following locations shall be deemed readily accessible for purposes of this article:

(1) A home page or screen;

(2) An "about" or "about us" web page or screen;

(3) A "contact" or "contact us" web page or screen;

(4) An information web page or screen; or

(5) Another place on the website or online service commonly used to display identifying information to consumers.

History.

Code 1981, § 10-1-932, enacted by Ga. L. 2022, p. 203, § 2/HB 508; Ga. L. 2024, p. 1052, § 2(36)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (a) and substituted "home page" for "landing or home web page" in paragraph (b)(1).

10-1-933. Civil actions authorized; compliance; recovery of expenses.

(a) An owner, assignee, authorized agent, or exclusive licensee of a commercial recording or audiovisual work electronically disseminated by a website or online service in violation of this article may bring a private cause of action to obtain a declaratory judgment that an act or practice violates this article and to obtain an injunction against any person who knowingly has violated, is violating, or is otherwise likely to violate this article. As a condition precedent to filing a civil action under this article, the aggrieved party must make reasonable efforts to place any person alleged to be in violation of this article on notice that such person may be in violation of this article and that failure to cure within 14 days may result in a civil action filed in a court of competent jurisdiction.

(b) Upon motion of the party instituting the action, the court may make appropriate orders to compel compliance with this article.

(c) The prevailing party in a cause under this article is entitled to recover necessary expenses and reasonable attorney's fees.

History.
Code 1981, § 10-1-933, enacted by Ga. L. 2022, p. 203, § 2/HB 508; Ga. L. 2024, p. 1052, § 2(37)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "attorney's" for "attorney" in subsection (c).

10-1-934. Limitation on application and applicability.

(a) This article shall be supplemental to those provisions of state and federal criminal and civil law which impose prohibitions or provide penalties, sanctions, or remedies against the same conduct prohibited by this article.

(b) This article shall not:

(1) Bar any cause of action or preclude the imposition of sanctions or penalties that would otherwise be available under state or federal law; or

(2) Impose liability on providers of an interactive computer service, communications service, commercial mobile service, or information service, including, but not limited to, an internet access service provider, advertising network or exchange, domain name registration provider, and a hosting service provider, if they provide the transmission, storage, or caching of electronic communications or messages of others or provide another related telecommunications service, commercial mobile radio service, or information service for use of such services by another person that is in violation of this article.

History.
Code 1981, § 10-1-934, enacted by Ga. L. 2022, p. 203, § 2/HB 508.

10-1-935. Violations and enforcement.

(a) A violation of this article shall be considered an unfair or deceptive act or practice which is unlawful and which shall be punishable under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975."

(b) A public or private right or remedy prescribed by Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," may be used to enforce this article.

History.
Code 1981, § 10-1-935, enacted by Ga. L. 2022, p. 203, § 2/HB 508.

ARTICLE 36

ONLINE MARKETPLACE REQUIREMENTS

Effective date.

This article became effective January 1, 2023.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2022, Article 35, as enacted by Ga. L. 2022, p. 560, § 2/SB 332, was redesignated as Article 36.

Editor's notes.

Ga. L. 2022, p. 560, § 1/SB 332, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Inform Consumers Act.'"

10-1-940. Definitions.

As used in this article, the term:

(1) "Consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes, including, but not limited to, any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed.

(2) "High-volume third-party seller" means a participant in an online marketplace that is a third-party seller and that, in any continuous 12 month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products of an aggregate total of $5,000.00 or more in gross revenues in this state made by utilizing the online marketplace.

(3) "Online marketplace" means any person or entity that operates a consumer directed, electronically based or accessed platform that:

(A) Includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, payment, storage, shipment, or delivery of a consumer product within this state;

(B) Is used by one or more third-party sellers for such purpose; and

(C) Has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

(4) "Seller" means a person who sells, offers to sell, or contracts to sell a consumer product utilizing an online marketplace's platform.

(5) "Third-party seller" means any seller, independent of an online marketplace, that sells, offers to sell, or contracts to sell a consumer product in this state by utilizing an online marketplace. Such term shall not include, with respect to an online marketplace:

(A) A seller that operates the online marketplace's platform; or

(B) A business entity that has:

(i) Made available to the general public the entity's name, business address, and working contact information;

(ii) An ongoing contractual relationship with the online marketplace to provide the online marketplace with the manufacture, distribution, wholesaling, or fulfillment of shipments of consumer products; and

(iii) Provided to the online marketplace the identity information required under subsection (a) of Code Section 10-1-941 that has been verified in accordance with subsection (d) of Code Section 10-1-941.

(6) "Verify" means to confirm information and documents provided to an online marketplace pursuant to this article through the use of one or more methods that enable an online marketplace to reliably determine that any such information and documents provided are valid, correspond to the seller or an individual acting on the seller's behalf, are not misappropriated, and are not falsified.

History.

Code 1981, § 10-1-940, enacted by Ga. L. 2022, p. 560, § 2/SB 332; Ga. L. 2024, p. 643, § 2/SB 472, effective July 1, 2024; Ga. L. 2024, p. 1052, § 2(38)/SB 448, effective July 1, 2024.

Amendments.

The first 2024 amendment, effective July 1, 2024, in paragraph (2), substituted "by utilizing" for "through" near the end and deleted "and for which payment was processed by the online marketplace or through a third party" from the end; substituted "utilizing" for "through" in paragraph (4); and, in paragraph (5), substituted "by utilizing" for "through" in the first sentence, and substituted "Such term shall" for "The term 'third-party seller' does" at the beginning of the second sentence.

The second 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "consumer directed," for "consumer-directed," in paragraph (a)(3) and substituted "Such term" for "The term 'third-party seller'" in paragraph (a)(5).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2022, "Code Section 10-1-941" was substituted for "Code Section 10-1-931" twice in division (a)(5)(B)(iii).

Pursuant to Code Section 28-9-5, in 2024, the subsection (a) designation was removed.

Editor's notes.

Ga. L. 2024, p. 643, § 1/SB 472, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Combating Organized Retail Crime Act.'"

10-1-941. Required information from high-volume third-party sellers; suspension for noncompliance; verification by online marketplace.

(a) An online marketplace shall require any high-volume third-party

seller on its platform to provide, not later than ten days after qualifying as such, the following information to the online marketplace:

(1) A bank account number or, if the high-volume third-party seller does not have a bank account, the name of the payee for payments issued by the online marketplace to the high-volume third-party seller. This information may be provided by the high-volume third-party seller to the online marketplace or to a third party contracted by the online marketplace to maintain such information; provided, however, that the online marketplace ensures that it can obtain such information on demand from the third party;

(2) Contact information, which shall include:

(A) If the high-volume third-party seller is an individual, such individual's name; or

(B) If the high-volume third-party seller is not an individual, then:

(i) A copy of a valid government issued identification for an individual acting on behalf of such seller that includes the individual's name; or

(ii) A copy of a valid government issued record or tax document that includes the business name and physical address of the high-volume third-party seller;

(3) A business tax identification number or, if the high-volume third-party seller does not have a business tax identification number, a taxpayer identification number; and

(4) A current working email address and telephone number for the high-volume third-party seller.

(b) An online marketplace shall:

(1) Periodically, but not less than annually, notify each high-volume third-party seller on its platform of the requirement to keep current the information required under subsection (a) of this Code section; and

(2) Require each high-volume third-party seller on its platform to, not later than ten days after receiving the notice under paragraph (1) of this subsection, electronically certify as to the information required under subsection (a) of this Code section that:

(A) The high-volume third-party seller has provided any changes to such information, if any such changes have occurred;

(B) There have been no changes to such information; or

(C) The high volume third-party seller has previously provided any changes to such information to the online marketplace.

(c) In the event that a high-volume third-party seller does not provide the information or certification required under this Code section, the online marketplace shall, after providing such seller with written or electronic notice and an opportunity to provide such information or certification not later than ten days after the issuance of such notice, suspend any future sales activity of such seller until such seller provides such information or certification.

(d)(1) An online marketplace shall verify:

(A) The information and documents collected under subsection (a) of this Code section not later than ten days after such collection; and

(B) Any change in such information or to such documents not later than ten days after being notified of such change by a high-volume third-party seller under subsection (b) of this Code section.

(2) If a high-volume third-party seller provides a copy of a valid government issued tax document, any information contained within such tax document shall be presumed to be verified as of the date such document was issued.

History.
Code 1981, § 10-1-941, enacted by Ga. L. 2022, p. 560, § 2/SB 332.

10-1-942. Disclosure of identifying information; failure to comply; notice.

(a) Except as provided in subsection (b) of this Code section, an online marketplace shall require any high-volume third-party seller with an aggregate total of $20,000.00 or more in annual gross revenues on its platform to provide to the online marketplace and disclose to consumers in a clear and conspicuous manner the following identity information:

(1) Full name of the high-volume third-party seller, including the high-volume third-party seller's name or company name or the name by which such seller or company operates on the online marketplace;

(2) Physical address of the high-volume third-party seller;

(3) Contact information for the high-volume third-party seller that will allow for direct, unhindered communication with such seller by consumers of the online marketplace, including:

(A) A current working telephone number;

(B) A current working email address; or

(C) Other means of direct electronic messaging, which may be provided to such high-volume third-party seller by the online marketplace; provided, however, that the requirements of this paragraph shall not prohibit the online marketplace from preventing actual fraud, abuse, or spam through such communication; and

(4) Whether the high-volume third-party seller used a different seller to supply the product to the consumer upon purchase, and, upon the request of an authenticated purchaser, the information described in paragraphs (1) through (3) of this subsection relating to any such seller that is different than the high-volume third-party seller listed on the product listing page prior to purchase.

Such identity information shall be provided on the product listing page, directly or via hyperlink or, after the purchase is finalized, in the order confirmation message or other document or communication made to a consumer and in the consumer's account transaction history.

(b) Upon the request of a high-volume third-party seller, an online marketplace may provide for partial disclosure of the identity information required under subsection (a) of this Code section if the high-volume third-party seller certifies to the online marketplace that such seller:

(1) Does not have a business address and only has a residential street address, or has a combined business and residential address, then the online marketplace:

(A) Shall disclose only the country and, if applicable, the city and state in which such seller resides; and

(B) Shall inform consumers that there is no business address available for the high-volume third-party seller and that consumer inquiries should be submitted to such seller by telephone, email, or other means of electronic messaging provided to such seller by the online marketplace;

(2) Is a business that has a physical address for product returns, then the online marketplace shall disclose such seller's physical address for product returns; or

(3) Does not have a telephone number other than a personal telephone number, then the online marketplace shall inform consumers that there is no telephone number available for such seller and that consumer inquiries should be submitted to such seller's email address or other means of electronic messaging provided to such seller by the online marketplace.

(c) If an online marketplace becomes aware that a high-volume

third-party seller has made a false representation to the online marketplace in order to justify the provision of a partial disclosure of the identity information under subsection (b) of this Code section, or that a high-volume third-party seller that has requested and received such a provision for a partial disclosure has not provided responsive answers within a reasonable time frame to consumer inquiries submitted to the seller by telephone, email, or other means of electronic messaging provided to such seller by the online marketplace, then, after providing the high-volume third-party seller with written or electronic notice and an opportunity to respond not later than ten days after the issuance of such notice, the online marketplace shall suspend any future sales activity of the high-volume third-party seller unless such seller consents to the disclosure of the identity information required under subsection (a) of this Code section.

(d) If a high-volume third-party seller does not comply with the requirements to provide and disclose information under this Code section, then, after providing such seller with written or electronic notice and an opportunity to provide or disclose such information not later than ten days after the issuance of such notice, the online marketplace shall suspend any future sales activities of such seller until the seller complies with such requirements.

History.
Code 1981, § 10-1-942, enacted by Ga. L. 2022, p. 560, § 2/SB 332.

10-1-943. Reporting suspicious marketplace activity.

An online marketplace shall disclose to consumers in a clear and conspicuous manner on the product listing of any high-volume third-party seller a reporting mechanism that allows for electronic and telephonic reporting of suspicious marketplace activity to the online marketplace.

History.
Code 1981, § 10-1-943, enacted by Ga. L. 2022, p. 560, § 2/SB 332.

10-1-944. Use of information or documents; security.

(a) Information or documents collected solely to comply with the requirements of this article shall not be used for any other purpose unless required by law.

(b) An online marketplace shall implement and maintain reasonable security procedures and practices, including administrative, physical, and technical safeguards, appropriate to the nature of the data and the purposes for which the data will be used, to protect the information or

documents collected to comply with the requirements of this article from unauthorized use, disclosure, access, destruction, or modification.

History.
Code 1981, § 10-1-944, enacted by Ga. L. 2022, p. 560, § 2/SB 332.

10-1-945. Civil actions by Attorney General; other remedies.

(a) If the Attorney General has reason to believe that any online marketplace has violated or is violating this article and such violation affects one or more residents of this state, the Attorney General may bring a civil action in any appropriate court to:

(1) Enjoin further such violation by the defendant;

(2) Enforce compliance with this article;

(3) Obtain damages, restitution, or other compensation on behalf of the residents of this state; and

(4) Obtain other remedies permitted under state law.

(b) Any violation of this article shall additionally be a violation of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975"; provided, however, that only public remedies as administered by the Attorney General shall be available under such part for violations of this article.

(c) Nothing in this article shall be construed to prohibit any district attorney, law enforcement officer, official, or agency of this state from initiating or continuing any proceeding in a court against an online marketplace for a violation of any other civil law or a criminal law of this state.

History.
Code 1981, § 10-1-945, enacted by Ga. L. 2022, p. 560, § 2/SB 332.

CHAPTER 2

WEIGHTS AND MEASURES

Article 1

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erant dealer without having weight certified; penalty.
10-2-52. Commissioner of Agriculture to administer article; rules and regulations; regulation of livestock auction barns.
10-2-53. Administrative penalty for violation of article or order, rule, or regulation; judicial review; proceedings for collection.
10-2-54. Criminal penalties for violations; revocation of licenses; forfeiture of seals.

Administrative rules and regulations. Weights and Measures, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Rule 40-15-1-.01 et seq. through Rule 40-15-7-.01 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Duties of Commissioner of Agriculture are not all included in the agricultural provisions and may be found in the provisions governing weights and measures and in other parts of the Code. 1958-59 Ga. Op. Att'y Gen. 4.

ARTICLE 1

GENERAL PROVISIONS

Cross references. Powers and duties of Commissioner of Agriculture with regard to misbranding or false advertisement of food, § 26-2-20 et seq.

10-2-1. Definitions.

As used in this chapter and any rules or regulations promulgated pursuant to this chapter, the term:

(1) "Commissioner" means the Commissioner of Agriculture, the primary constitutional officer of the Georgia Department of Agriculture, charged with the responsibility of enforcing weights and measures laws and regulations.

(2) "Correct," as used in connection with weights and measures, means conformance to all applicable requirements of this chapter.

(3) "Measure" means a volume of standard dry or liquid capacity.

(4) "Package" means any commodity put up or packaged in any manner, in advance of sale, in units suitable for either wholesale or retail sale.

(5) "Person" means and includes individuals, partnerships, firms, corporations, companies, societies, and associations.

(6) "Primary standards" means the physical standards of the

State of Georgia which serve as the legal reference from which all other standards and weights and measures are derived.

(7) "Sale from bulk" or "bulk sale" means the sale of commodities when the quantity is determined at the time of the sale.

(8) "Secondary standards" means the physical standards which are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations.

(9) "Weight," as used in connection with any commodity, means net weight.

(10) "Weights and measures" means all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices.

History.
Ga. L. 1972, p. 654, § 1.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
25 Am. Jur. Pleading and Practice Forms, Weights, Measures, and Labels, § 1.

C.J.S.
94 C.J.S., Weights and Measures, § 1 et seq.

10-2-2. Recognized systems of weights and measures.

The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized; and either one, or both, of these systems shall be used for all commercial purposes in the state. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Institute of Standards and Technology are recognized and shall govern weighing and measuring equipment and transactions in the State of Georgia.

History.
Ga. L. 1972, p. 654, § 1; Ga. L. 2015, p. 385, § 4-1/HB 252.

Editor's notes.
Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, §§ 1 et seq., 28 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 1 et seq.

10-2-3. Primary standards of weights and measures; prescribing and verifying secondary standards.

Weights and measures that are traceable to the United States prototype standards supplied by the federal government, or approved as being satisfactory by the National Institute of Standards and Technology, shall be the State of Georgia's primary standards of weights and measures and shall be maintained in such calibration as prescribed by the National Institute of Standards and Technology. All secondary standards may be prescribed by the Commissioner and shall be verified upon their initial receipt, and as often thereafter as deemed necessary, by the Commissioner.

History.
Ga. L. 1941, p. 510, § 1; Ga. L. 1972, p. 654, § 1; Ga. L. 2015, p. 385, § 4-1/HB 252.
Editor's notes.
Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 28 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 1 et seq.

10-2-4. Technical requirements for commercial weighing and measuring devices.

The specifications, tolerances, and other technical requirements for commercial weighing and measuring devices as adopted by the National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 44, entitled "Specifications, Tolerances, and Other Technical Requirements for Commercial Weighing and Measuring Devices," and supplements thereto or revisions thereof, shall apply to commercial weighing and measuring devices in the State of Georgia, except insofar as modified or rejected by rules and regulations.

History.
Ga. L. 1972, p. 654, § 1; Ga. L. 2015, p. 385, § 4-1/HB 252.
Editor's notes.
Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 17 et seq.

C.J.S.
94 C.J.S., Weights and Measures, §§ 1, 4, 8 et seq.

10-2-5. Powers and duties of Commissioner generally.

The Commissioner shall:

(1) Maintain traceability of the State of Georgia's standards to the National Institute of Standards and Technology;

(2) Enforce this chapter;

(3) Promulgate, adopt, and issue reasonable rules and regulations for the enforcement of this chapter. Such rules and regulations shall have the force and effect of law;

(4) Establish standards of weight, measure, or count and reasonable standards of fill. The Commissioner is authorized to establish standards for the presentation of cost-per-unit information for any packaged commodity;

(5) Grant any exemptions from this chapter or any rules or regulations promulgated pursuant thereto when appropriate to the maintenance of good commercial practices within the state;

(6) Conduct investigations to ensure compliance with this chapter;

(7) Delegate to appropriate personnel any of these responsibilities for the proper administration of his office;

(8) Test the standards of weight and measure used by any inspector of the State of Georgia, adjust where necessary, and approve the same when found to be, or made to be, correct;

(9) Inspect and test weights and measures kept, offered, or exposed for sale;

(10) Inspect and test, to ascertain if they are correct, weights and measures commercially used:

(A) In determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or count; or

(B) In computing the basic charge or payment for services rendered on the basis of weight, measure, or count;

(11) Test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which funds are appropriated by the General Assembly;

(12) Approve for use such weights and measures as he finds to be correct. The Commissioner, in his sole discretion, is authorized to mark approved weights and measures. He shall reject and mark as rejected any weights and measures he finds to be incorrect. Weights

and measures that have been rejected may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The Commissioner shall condemn and may seize weights and measures found to be incorrect that are not capable of being made correct;

(13) Employ, in carrying out this Code section, testing, inspection, and sampling procedures which are in accordance with this chapter, rules and regulations promulgated pursuant to this chapter, or procedures designated in Handbooks 130 and 133 of the National Institute of Standards and Technology;

(14) Prescribe, by regulation, the appropriate term or unit of weight or measure to be used whenever he determines in the case of a specific commodity that an existing practice of declaring the quantity by weight, measure, numerical count, or combination thereof does not facilitate value comparisons by consumers or offers an opportunity for consumer confusion;

(15) Establish, by regulation, a schedule of fees to cover the costs of the inspection and certification of weighing and measuring devices, the registration of scale mechanics, the certifying of weights, and scale registration; and

(16) Allow reasonable variations from the stated quantity of contents. Such variations shall include those caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices only after the commodity has entered intrastate commerce.

History.
Ga. L. 1941, p. 510, §§ 2, 3, 5; Ga. L. 1972, p. 654, § 1; Ga. L. 1991, p. 363, § 1; Ga. L. 1992, p. 1278, § 1; Ga. L. 1994, p. 97, § 10; Ga. L. 2015, p. 385, § 4-1/HB 252.

Editor's notes.
Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 10 et seq.

C.J.S.
94 C.J.S., Weight and Measures, § 8 et seq.

10-2-6. Power of Commissioner to inspect commercial premises and vehicles; stop-use or stop-sale, hold, and removal orders; seizure.

When necessary for the enforcement of this chapter or rules or regulations promulgated pursuant to this chapter, the Commissioner is:

(1) Authorized to enter any commercial premises when open for

business, except that, in the event such premises are not open to the public, he shall first present his credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained;

(2) Empowered to issue stop-use, hold, and removal orders with respect to any commercially used weights and measures and stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale;

(3) Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of this chapter or rules or regulations promulgated pursuant thereto;

(4) Empowered to stop any commercial vehicle and, after presentment of his credentials, inspect the contents, require that the person in charge of the vehicle produce any documents in his possession concerning the contents of the vehicle, and require him to proceed with the vehicle to some specified place, which shall not be more than 25 miles distant from the location where the vehicle was stopped, for inspection;

(5) Authorized to investigate and prosecute any person violating this chapter.

History.
Ga. L. 1941, p. 510, §§ 3, 5; Ga. L. 1972, p. 654, § 1.

Administrative rules and regulations.
Weights and Measures, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Rule 40-15-1-.01 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 10 et seq.

C.J.S.
94 C.J.S., Weights and Measures, §§ 8 et seq., 16 et seq., 25 et seq.

10-2-7. Misrepresentation of quantity in selling or buying prohibited.

No person shall sell, offer, or expose for sale less than the quantity he represents nor take any more than the quantity he represents when, as buyer, he furnishes the weight or measure by means of which the quantity is determined.

History.
Ga. L. 1972, p. 654, § 1.
Cross references.
Unfair or deceptive trade practices or consumer transactions, § 10-1-370 et seq.

Criminal penalty for using or possessing false weight or measure, selling less than represented quality or quantity of a commodity, § 16-9-50.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 28 et seq.

10-2-8. Misrepresentation or deception in pricing by weight, measure, or count prohibited.

No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count nor represent the price in any manner calculated to, or tending to, mislead or in any way deceive a person.

History.
Ga. L. 1972, p. 654, § 1.
Cross references.
Unfair or deceptive trade practices or consumer transactions, § 10-1-370 et seq.

Criminal penalty for using or possessing false weight or measure, selling less than represented quality or quantity of a commodity or other offenses, § 16-9-50.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 28 et seq.

10-2-9. Permissible methods of selling by quantity.

Except as otherwise provided by rules or regulations promulgated by the Commissioner, commodities in a liquid form shall be sold by liquid measure or by weight; and commodities not in the liquid form shall be sold only by weight, measure, or count, so long as the method of sale provides accurate quantity information.

History.
Ga. L. 1941, p. 510, § 4; Ga. L. 1972, p. 654, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
67 Am. Jur. 2d, Sales, § 105. 79 Am. Jur. 2d, Weights and Measures, § 28.
C.J.S.
94 C.J.S., Weights and Measures, § 8 et seq.

ALR.
Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight, 90 A.L.R. 1290.

10-2-10. Delivery tickets for bulk sales and bulk deliveries of heating fuel.

Whenever the quantity is determined by the seller, bulk sales in excess of $20.00 and all bulk deliveries of heating fuel shall be accompanied by a delivery ticket containing the following information:

(1) The name and address of the vendor and purchaser;

(2) The date delivered;

(3) The quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity;

(4) The identity of the goods or commodities in the most descriptive terms commercially practicable, including any quantity representation made in connection with the sale; and

(5) The count of individually wrapped packages, if more than one.

History.
Ga. L. 1972, p. 654, § 1; Ga. L. 2017, p. 774, § 10/HB 323.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 28 et seq.
C.J.S.
94 C.J.S., Weights and Measures, § 8 et seq.
ALR.
Validity of statute or ordinance regulating weighing of merchandise sold in load or bulk lots, 116 A.L.R. 245.

10-2-11. Information required on packages.

Except as otherwise provided in this chapter or by rules or regulations promulgated pursuant to this chapter, any package kept for the purpose of sale or offered or exposed for sale shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

(1) The identity of the commodity in the package, unless the same can easily be identified through the wrapper or container;

(2) The quantity of contents in terms of weight, measure, or count; and

(3) The name and place of business of the manufacturer, packer, or distributor in the case of any package kept, offered, exposed for sale, or sold in any place other than on the premises where packed.

History.
Ga. L. 1972, p. 654, § 1; Ga. L. 2017, p. 774, § 10/HB 323.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 13 et seq.

C.J.S.
94 C.J.S., Weights and Measures, §§ 28 et seq., 43.

10-2-12. Unit price required on packages with random weights.

In addition to the declarations required by Code Section 10-2-11, any package which is one of a lot containing random weights of the same commodity and bearing the total selling price of the package shall contain a plain and conspicuous declaration of the price per single unit of weight on the outside of the package.

History.
Ga. L. 1972, p. 654, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 13 et seq.

C.J.S.
94 C.J.S., Weights and Measures, §§ 12, 21.

10-2-13. Quantity and retail price required on advertising of package commodities.

Whenever a packaged commodity is advertised in any manner with the retail price stated, a declaration of quantity as is required by this article or by rule or regulation of the Commissioner of Agriculture shall appear on the package and shall be closely and conspicuously associated with the retail price. Where a dual declaration is required, only the declaration that sets forth quantity in terms of the smaller unit of weight or measure need appear in the advertisement.

History.
Ga. L. 1972, p. 654, § 1; Ga. L. 1982, p. 3, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 14.

C.J.S.
94 C.J.S., Weights and Measures, §§ 12, 13.

10-2-14. Using or possessing incorrect weight or measure; removing tags, seals, or marks; obstructing enforcement.

It shall be unlawful for any person to:

(1) Use or possess any incorrect weight or measure for use in commerce;

(2) Remove any tag, seal, or mark from any weight or measure without specific written authorization from the Commissioner;

(3) Hinder or obstruct the Commissioner or any deputy or other official designated by the Commissioner and charged with the enforcement of the laws of this state dealing with weights and measures in the performance of his duties.

History.
Ga. L. 1941, p. 510, § 6; Ga. L. 1972, p. 654, § 1.

Cross references.
Gasoline pumps, § 10-1-159.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 28 et seq.

10-2-15. Standards for grain moisture testing equipment; enforcement and inspections.

It shall be the duty of the Commissioner to adopt standards for moisture testing equipment utilized in determining the moisture content of grain offered for sale in this state. Upon the establishment of such standards, it shall be unlawful for any person to utilize any such equipment which does not comply with the standards established pursuant to this Code section. It shall be the duty of the Commissioner to enforce this Code section and to make such inspections as shall be necessary to assure that all moisture testing equipment complies with the standards.

History.
Ga. L. 1962, p. 631, § 1; Ga. L. 1972, p. 654, § 1.

Cross references.
Grain dealers generally, § 2-9-30 et seq.

10-2-16. Permit to operate grain moisture testing equipment.

No person shall operate moisture testing equipment to determine the moisture content of grain offered for sale unless such person shall be trained in the operation thereof and shall have obtained a permit from the Commissioner after submitting proof to the Commissioner of his ability to such equipment. Any such permit shall be valid until suspended or revoked for cause after notice and hearing, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." There shall be no fee for such permit.

History.
Ga. L. 1972, p. 654, § 1.

Cross references.
Official weigher's certificate as constituting prima-facie evidence of its own authenticity and genuineness and of facts stated therein, § 11-1-202.

10-2-17. Inspection of scales used in intrastate shipments.

The Commissioner is authorized to inspect scales used for the calculation and determination of fees or charges for the transportation of bulk materials, packages, goods, and commodities in intrastate shipments by rail, parcel services, motor vehicles, motor transport, buses, and airlines.

History.
Ga. L. 1972, p. 654, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, §§ 17, 18.

C.J.S.
94 C.J.S., Weights and Measures, § 13 et seq.

10-2-18. When weight, measure, or weighing or measuring device presumed used in business.

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a rebuttable presumption that such weight or measure or weighing or measuring device is regularly used in the business conducted at such place.

History.
Ga. L. 1972, p. 654, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 28.

C.J.S.
94 C.J.S., Weights and Measures, § 16 et seq.

10-2-19. Manner of display of measurement of compressed natural gas on dispensing devices.

(a) As used in this Code section, the term "compressed natural gas" means a mixture of hydrocarbon gases and vapors, consisting principally of methane in gaseous form, that has been compressed for use as a motor fuel.

(b) Notwithstanding any provision contained in the National Institute of Standards and Technology Handbook or any other national standard that may be adopted in this state by law or regulation, any dispensing device used to dispense compressed natural gas for use as a motor vehicle fuel may display the measurement of compressed natural gas in gallon equivalent units or fractions thereof and may compute the sales price of compressed natural gas according to such units or

fractions thereof; provided, however, that such gallon equivalent shall contain not less than 110,000 British thermal units.

History.
Code 1981, § 10-2-19, enacted by Ga. L. 1993, p. 811, § 1; Ga. L. 2015, p. 385, § 4-1/HB 252.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, "Code section" was substituted for "Code Section" in subsection (a).
Editor's notes.
Ga. L. 1993, p. 811, § 1, effective July 1, 1993, renumbered former Code Section 10-2-19 as present Code Section 10-2-20.
Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

10-2-20. Enjoining violations.

The Commissioner or his representative, at the discretion of the Commissioner, is authorized to apply to any court of competent jurisdiction for a temporary or permanent injunction restraining any person from violating this chapter.

History.
Ga. L. 1972, p. 654, § 1; Code 1981, § 10-2-19; Code 1981, § 10-2-20, as redesignated by Ga. L. 1993, p. 811, § 1.
Editor's notes.
Ga. L. 1993, p. 811, § 1, effective July 1, 1993, renumbered former Code Section 10-2-20 as present Code Section 10-2-21.

10-2-21. Administrative penalty for violations; judicial review; proceedings for collection.

(a) As an alternative to criminal or other civil enforcement, the Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant thereto, after a hearing, may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated this article or any rules, regulations, or orders promulgated pursuant to this article. The hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(b) Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50.

(c) All penalties recovered as provided in this Code section shall be paid into the state treasury.

(d) The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of busi-

ness, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment had been rendered in an action duly heard and determined by the court.

(e) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any orders, rules, or regulations promulgated pursuant thereto.

History.
Ga. L. 1979, p. 655, § 1; Code 1981, § 10-2-20; Code 1981, § 10-2-21, as redesignated by Ga. L. 1993, p. 811, § 1.

Editor's notes.
Ga. L. 1993, p. 811, § 1, effective July 1, 1993, renumbered former Code Section 10-2-21 as present Code Section 10-2-22.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 25 et seq.

10-2-22. Criminal penalty for violations.

Any person, firm, partnership, corporation, society, or association who shall violate this article, relating to weights and measures in general, or any rule or regulation promulgated pursuant to this article, shall be guilty of a misdemeanor.

History.
Laws 1833, Cobb's 1851 Digest, p. 821.; Ga. L. 1851-52, p. 263, § 1; Code 1863, § 4458; Ga. L. 1865-66, p. 231, § 5; Code 1868, § 4502; Code 1873, § 4590; Code 1882, § 4590; Penal Code 1895, § 661; Penal Code 1910, § 706; Code 1933, § 112-9901; Ga. L. 1941, p. 510, § 9; Ga. L. 1972, p. 654, § 2; Code 1981, § 10-2-21; Code 1981, § 10-2-22, as redesignated by Ga. L. 1993, p. 811, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 25 et seq.

10-2-23. Sale and measurement of pulpwood, sawtimber, poles, and other types of timber.

All pulpwood, sawtimber, poles, and other types of timber sold or measured in this state by weight shall be sold on the basis of tonnage

or pounds, with one ton equaling 2,000 pounds. Nothing in this Code section shall prohibit the sale or measurement of such products by measured volume, so long as such measurement is not calculated by weight.

History.
Code 1981, § 10-2-23, enacted by Ga. L. 1993, p. 446, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1993, this Code section, enacted as Code Section 10-2-22, was redesignated as Code Section 10-2-23.

ARTICLE 2

CERTIFIED PUBLIC WEIGHERS

Cross references.
Provision of certified public weighers by public warehouses, § 10-4-27.
Provision of certified public weigher by person licensed to operate service for receiving flue-cured leaf tobacco for purpose of weighing, redrying, and storage, § 10-4-151.

10-2-40. Persons who may be licensed and known as certified public weighers.

Any person who shall weigh, measure, or record the indications or readings of weighing or measuring and declare the weight, measure, reading, or recording to be the true weight, measure, reading, or recording of any commodity, article, or product may be licensed under this article and shall be known as a certified public weigher of Georgia.

History.
Ga. L. 1949, p. 1179, § 1.

OPINIONS OF THE ATTORNEY GENERAL

Employment of weighers. — The "any person" designation in this section indicates that certified public weighers can be employed by highway contractors or material producers. 1972 Op. Att'y Gen. No. 72-47.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, §§ 19, 24, 26.
C.J.S.
94 C.J.S., Weights and Measures, § 13 et seq.
ALR.
Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 A.L.R.2d 7.

10-2-41. License required; application; issuance.

(a) Any person who desires to be a certified public weigher in this state shall apply for and obtain a license permit from the Commissioner by filing a formal application as follows:

I, _____, a citizen of the United States, residing at _____, County of _____, having familiarized myself with the law relative to licensing of certified public weighers, do hereby make application for license permit as a certified public weigher.

I certify that I am morally and physically fit to perform the duties imposed upon a certified public weigher and that I will, if licensed, faithfully and accurately make true recordings and will comply with the law and rules and regulations relating to certified public weighers to the best of my knowledge and ability.

_____	_____
Name	Address

We, the undersigned, being citizens of Georgia, do certify that the applicant herein is a person of good moral character and that the statements made in the foregoing application are true to the best of our knowledge and belief and that our endorsement is without fear of embarrassment.

_____	_____
Name	Address
_____	_____
Name	Address
_____	_____
Name	Address

(b) Upon his appointment as a certified public weigher, a license permit shall be issued to him authorizing the applicant to weigh, measure, and record any and all commodities.

History.
Ga. L. 1949, p. 1179, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, § 12 et seq.

10-2-42. Duration of license; fees; cost of seals.

Certified public weighers shall be licensed for a period of one year beginning on July 1 and ending on June 30, next. A fee of $15.00 shall be paid to the Commissioner by each person so licensed at the time application is filed. A fee of $15.00 shall be required for each renewal of a license as a certified public weigher. In addition thereto, the applicant shall pay the actual cost of seals required under this article. Any fees

collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

History.
Ga. L. 1949, p. 1179, § 10; Ga. L. 1956, p. 334, § 3; Ga. L. 2010, p. 9, § 1-27/HB 1055.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, § 13 et seq.

10-2-43. Revocation of license permit for malfeasance or violation; notice and hearing.

After reasonable notice and opportunity for a hearing before the Commissioner, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," any license permit as a certified public weigher may be revoked by the Commissioner for malfeasance in office or for the violation of this article or for violation of any rule or regulation promulgated under the terms of this article.

History.
Ga. L. 1949, p. 1179, § 12.
Cross references.
Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, §§ 8 et seq., 25.

10-2-44. [Reserved] Surety bonds.

History.
Ga. L. 1949, p. 1179, § 5; Ga. L. 1956, p. 334, § 1; Ga. L. 1956, p. 631, § 6; and Ga. L. 1981, Ex. Sess., p. 8; repealed by Ga. L. 1991, p. 322, § 1, effective July 1, 1991.
Editor's notes.
Ga. L. 1991, p. 322, § 1 repealed and reserved this Code section, effective July 1, 1991.

10-2-45. Certified public weigher's official seal.

It shall be the duty of every certified public weigher licensed under this article to obtain through the Department of Agriculture an official seal which shall have inscribed thereon the following words: "Georgia Certified Public Weigher" or such other design or legend as the Commissioner may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, count, reading, or recording certificate issued by such certified public weigher. When so

applied, the certificate shall be recognized and accepted as a declaration of the official, true, and accurate weight, measure, count, reading, or recording of the commodity, product, or article weighed, measured, or counted with the tolerance allowed by Article 1 of this chapter.

History.
Ga. L. 1949, p. 1179, § 6.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, § 13 et seq.

10-2-46. Issuance of official seals to licensed tobacco warehousemen.

For the weighing of leaf tobacco sold or offered for sale at a licensed tobacco warehouse, an official seal for certification of all weights made at the warehouse may be issued directly to the licensed warehouseman and may be used for all weighings made at the warehouse, provided that all weighings shall be made by certified public weighers.

History.
Ga. L. 1975, p. 1302, § 1; Ga. L. 1982, p. 3, § 10.

10-2-47. Return of seal on termination of duties.

In the interest of public welfare, the seal provided for a certified public weigher shall be the property of the State of Georgia and shall be returned to the Commissioner upon termination of the duties as a certified public weigher.

History.
Ga. L. 1949, p. 1179, § 11.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, § 13 et seq.

10-2-48. Duties of certified public weighers.

It shall be the duty of bonded certified public weighers licensed under this article to issue certificates of weight, measure, count, or recording on forms to be approved by the Commissioner and to comply with this article and the rules and regulations promulgated relating thereto.

History.
Ga. L. 1949, p. 1179, § 4; Ga. L. 1956, p. 631, § 5.
Cross references.
Requirements regarding weighing of railroad cars by certified public weighers, § 46-9-50.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 19.

C.J.S.
94 C.J.S., Weights and Measures, § 16 et seq.

10-2-49. Use of untested weight, measure, or device prohibited.

It shall be unlawful for any certified public weigher to use any weights, measures, reading, or recording device which has not been tested and approved by the Commissioner or his assistant, deputy, or inspector in accordance with Article 1 of this chapter.

History.
Ga. L. 1949, p. 1179, § 9.

RESEARCH REFERENCES

C.J.S.
94 C.J.S., Weights and Measures, § 34.

10-2-50. Weighing leaf tobacco and livestock.

(a) On and after March 9, 1956, all leaf tobacco sold, or offered for sale, in a tobacco warehouse shall be weighed by a certified public weigher who has been licensed by the Commissioner.

(b) Livestock of any kind sold or offered for sale at any sales or auction barn shall be weighed by a certified public weigher who has been licensed by the Commissioner.

History.
Ga. L. 1956, p. 631, §§ 2, 3; Ga. L. 1991, p. 322, § 2.

OPINIONS OF THE ATTORNEY GENERAL

Section is applicable to any place where livestock is sold or offered for sale. 1954-56 Ga. Op. Att'y Gen. 10.

10-2-51. Sale of coal or coke by itinerant dealer without having weight certified; penalty.

Any itinerant dealer who shall sell or offer to sell coal or coke by a

weight other than a weight certified by a person licensed under this article shall be guilty of a misdemeanor.

History.
Ga. L. 1957, p. 374, § 1.

RESEARCH REFERENCES

C.J.S.
94 C.J.S., Weights and Measures, § 1 et seq.

10-2-52. Commissioner of Agriculture to administer article; rules and regulations; regulation of livestock auction barns.

This article shall be administered by the Commissioner of Agriculture, and he is empowered to make and promulgate rules and regulations necessary for the enforcement of this article and may regulate sales order of livestock at auction sales barns.

History.
Ga. L. 1949, p. 1179, § 2; Ga. L. 1956, p. 631, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, § 10.

C.J.S.
94 C.J.S., Weights and Measures, § 1 et seq.

10-2-53. Administrative penalty for violation of article or order, rule, or regulation; judicial review; proceedings for collection.

(a) As an alternative to criminal or other civil enforcement, the Commissioner, in order to enforce this article or any orders, rules, and regulations promulgated pursuant thereto, after a hearing, may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated this article or any rules, regulations, or orders promulgated under this article. The hearing and any administrative review thereof shall be conducted in accordance with the procedures for contested cases under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(b) Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50.

(c) All penalties recovered as provided in this Code section shall be paid into the state treasury.

(d) The Commissioner may file in the superior court wherein the person under order resides, or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment has been rendered in a suit duly heard and determined by the court.

(e) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any orders, rules, or regulations promulgated pursuant thereto.

History.
Ga. L. 1979, p. 654, § 1.

10-2-54. Criminal penalties for violations; revocation of licenses; forfeiture of seals.

(a) Any certified public weigher who shall issue a certificate giving a false weight, measure, count, or reading, or who shall misrepresent the weight, measure, count, or reading of any commodity, produce, or article, or who shall otherwise violate this article or any of the rules promulgated by authority of this article shall be guilty of a misdemeanor; and, in addition thereto, his license as a certified public weigher shall be revoked and he shall forfeit his seal, which, when so forfeited, shall be turned over to the Commissioner.

(b) Any person, firm, or corporation who shall request a certified public weigher to weigh, measure, count, read, or record any commodity, product, or article falsely or incorrectly or who shall request a false or inaccurate certificate of weight, measure, count, reading, or recording; or any person issuing a certificate of weight, measure, count, or recording within the meaning of this article who is not licensed as a certified public weigher in accordance with this article; or any person who shall in any way impersonate by acting as, or for, a certified public weigher; or any person who shall erase, change, or alter any certificate issued by a certified public weigher, shall be guilty of a misdemeanor.

(c) Failure or refusal of a person licensed as a certified public weigher under this article to surrender the official seal to the Commissioner

upon termination of his license or for malfeasance in office shall be a misdemeanor, and any person convicted thereof shall be punished by a fine of not less than $10.00 nor more than $200.00, or by imprisonment for not more than three months, in the discretion of the court.

History.
Ga. L. 1949, p. 1179, §§ 7, 8, 11; Ga. L. 1956, p. 334, § 2.

RESEARCH REFERENCES

Am. Jur. 2d.
79 Am. Jur. 2d, Weights and Measures, §§ 6 et seq., 24, 26, 40 et seq.

C.J.S.
94 C.J.S., Weights and Measures, § 25 et seq.

ALR.
Liability of public weigher, 23 A.L.R. 1429.

CHAPTER 3

NOTES AND OTHER EVIDENCES OF DEBT

Sec.		Sec.	
10-3-1.	Transfer of secured note carries security.	10-3-4.	Certain notes or contracts for patent rights, copyrights, or proprietary rights; purchaser takes subject to equities.
10-3-2.	Endorser sued with maker, drawer, or acceptor.	10-3-5.	Penalty for violation of Code Section 10-3-3.
10-3-3.	Consideration to be stated on notes, contracts, or other evidences of debt taken for the purchase of any patent right, copyright, or proprietary right.	10-3-6.	Requirement to satisfy definition of issuer.

Law reviews.

For article, "Automation & Predictive Analytics in Patent Prosecution: USPTO Implications & Policy," see 35 Ga. St. U.L. Rev. 1185 (2019).

10-3-1. Transfer of secured note carries security.

The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security. If more than one note is secured and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee if the security is insufficient to pay all the notes.

History.

Civil Code 1895, § 3684; Civil Code 1910, § 4276; Code 1933, § 14-1802.

History of Code section.

This Code section is derived from the decisions in Roberts v. Manfield, 32 Ga. 228 (1861), and Crowder v. Dunbar, 74 Ga. 109 (1884).

JUDICIAL DECISIONS

Analysis

General Consideration
Construction and Application
Effect of Transfer
Enforcement of Rights
1. In General
2. Joinder of Parties
3. Res Judicata

General Consideration

Express assignment not affected. — This section refers to implied transmission of title to the security, but does not purport to exclude transmission by express written assignment of the notes and security, or to qualify the effect of such written assignment. Cross v. Citizens' Bank & Trust Co., 160 Ga. 647, 128 S.E. 898, 1925 Ga. LEXIS 222 (1925);

General Consideration (Cont'd)

Georgia Land & Sec. Co. v. Citizens Bank, 164 Ga. 852, 139 S.E. 557, 1927 Ga. LEXIS 289 (1927).

All or part of debt and security transferrable. — If land has been conveyed by security deed, the creditor may transfer the whole or any part of the debt and with it the real estate as security. Hunt v. New England Mtg. Sec. Co., 92 Ga. 720, 19 S.E. 27, 1893 Ga. LEXIS 238 (1893); Moss & Co. v. Stokely, 107 Ga. 233, 33 S.E. 61, 1899 Ga. LEXIS 37 (1899); Cumming v. McDade, 118 Ga. 612, 45 S.E. 479, 1903 Ga. LEXIS 633 (1903).

Defense of conversion of collateral in suit on note. — In a suit brought upon a note which recites that certain collateral is given to secure its payment and in which suit the collateral is neither tendered nor satisfactorily accounted for, it is error to strike a defense which alleges that such collateral was actually deposited and in which the ability of the plaintiff to produce the collateral is denied. Such an allegation practically amounts to an allegation that the collateral has been converted, and if this was true, the defendant would have the right to recoup the value of the converted security, as against the payment of the note. Turner v. Commercial Sav. Bank, 17 Ga. App. 631, 87 S.E. 918, 1916 Ga. App. LEXIS 822 (1916).

Construction and Application

"Otherwise" defined. — Word "otherwise" includes any form of security which may be taken for the purpose of securing an indebtedness evidenced by a series of notes. Merchants' & Citizens' Bank v. Bogle, 174 Ga. 612, 163 S.E. 489, 1932 Ga. LEXIS 102 (1932).

Word "otherwise," in this section, covers notes secured by a security deed. Alley v. First Nat'l Bank, 46 Ga. App. 527, 168 S.E. 317, 1933 Ga. App. LEXIS 133 (1933).

Section is applicable to security deed when title is transferred to the mortgagee. In re R.H. Elrod & Son, 215 F. 253, 1913 U.S. Dist. LEXIS 1890 (D. Ga. 1913).

This section says that transfer of notes secured by a mortgage or otherwise conveys to transferee the benefit of the security. Alley v. First Nat'l Bank, 46 Ga. App. 527, 168 S.E. 317, 1933 Ga. App. LEXIS 133 (1933).

Title transferred by transfer of secured note. — Whether or not the purported transfer of the security deed by the executors of an estate was effectual either in law or equity, when it appears that the executors also transferred the note secured by the deed, as a result of such transfer the transferee acquired an equitable title to the security. Chapman v. McPherson, 184 Ga. 618, 192 S.E. 423 (1937).

Effect of Transfer

Endorsement of note conveys mortgage lien. — Endorsement by a payee of the payee's name on the back of a mortgage note, for value, conveyed such note together with the mortgage lien to the holder thereof, and the transferee could foreclose the note in the transferee's own name. Setze v. First Nat'l Bank, 140 Ga. 603, 79 S.E. 540, 1913 Ga. LEXIS 195 (1913).

Restricted endorsement. — This section applies when the transfer is by endorsement of the note without recourse as well as when the endorsement is not restricted. Berry v. Van Hise, 148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918).

Delivery of note reserving title to personalty. — Mere delivery of a note containing a reservation of title to personalty, while sufficient to transfer the evidence of the debt, is insufficient to establish such privity between the maker of the note and the transferee as will continue or keep alive the right of retaking the chattel. Swann Davis Co. v. Stanton, 7 Ga. App. 668, 67 S.E. 888, 1910 Ga. App. LEXIS 454 (1910).

Transfer of purchase money note without recourse. — When purchase money notes are transferred by the vendor of land without recourse or without guaranty, the notes lose their character as purchase money notes, insofar as the notes entitle the holder to a lien on the property. McLeod v. Bank of Abbeville, 147 Ga. 33, 147 Ga. 333, 92 S.E. 645, 1917 Ga. LEXIS 35 (1917).

Transfer of purchase money note with reserved title. — When a

promissory note for the purchase money of personal property which contains a reservation of title until the note is paid is by the payee transferred for value to a third person without recourse, the title reserved for securing the payment is divested. If at the time of such transfer the title is not likewise transferred to the purchaser of the note as security in the purchaser's hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker. Mills v. Pope, 20 Ga. App. 820, 93 S.E. 559, 1917 Ga. App. LEXIS 1105 (1917).

"Payment guaranteed" endorsed on note with signature transfers security. — Words "payment guaranteed," signed by the payees and entered upon the back of a promissory note which contains a retention of title to property therein described, to secure the note's payment, is sufficient as an endorsement to transfer the title both of the note and of the property. Hendrix v. Bauhard Bros., 138 Ga. 473, 75 S.E. 588, 1912 Ga. LEXIS 586 (1912); Hooper v. Bank of Hiawassee, 29 Ga. App. 459, 116 S.E. 32, 1923 Ga. App. LEXIS 64 (1923).

Loss of status as purchase money notes does not apply to mortgage. — Decisions such as that in Neal v. Murphey & Co., 60 Ga. 388 (1978), to the effect that when purchase money notes for land for which bond for title has been given are transferred by the vendor without recourse, the notes lose their character as purchase money notes insofar as the notes entitle the vendor to an interest in the land, and have no application to the case of a transfer of a note secured by mortgage. Berry v. Van Hise, 148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918).

Delivery of note transfers security represented by bond for title to land. — Assignee of a note given by the holder of a bond for title for part of the purchase-money of land, payable to the vendor or bearer, and transferred by the vendor by delivery, is subrogated to the rights of the vendor, and is entitled to a lien against the land for the purchase-money. The principle of this section applies when a note is indorsed without recourse. This principle applies when the note is payable to a named payee or order, and is transferred by mere delivery. Holbrook v. Adams, 166 Ga. 871, 144 S.E. 657, 1928 Ga. LEXIS 423 (1928).

General personal verdict against transferor without recourse not authorized. — When note secured by mortgage is transferred without recourse to one who transferred to another and suit was instituted thereon by the last transferee to recover a general judgment and set up the mortgage lien upon the property, while it was proper, under the disputed facts, to direct a verdict setting up a mortgage lien on the property for the amount of the note, it was erroneous to direct a general verdict in personam against the mortgagee who had transferred the note without recourse. Berry v. Van Hise, 148 Ga. 27, 95 S.E. 690, 1918 Ga. LEXIS 175 (1918).

Transferee of one of several notes preferred. — Since a security deed secured several notes, and one of the notes was transferred to the mortgagee's creditor, the latter was entitled to preference out of the proceeds of the sale of the property. In re R.H. Elrod & Son, 215 F. 253, 1913 U.S. Dist. LEXIS 1890 (D. Ga. 1913).

Transferee has preference over secured payee. — Transfer of notes which are in any wise secured conveys to the transferee the benefit of the security, and if several notes thus secured are executed and delivered to a creditor as payee and the latter transfers some and retains others, the holder of the transferred notes has a preference over the secured payee, if the security is insufficient to pay all the notes. Merchants' & Citizens' Bank v. Bogle, 174 Ga. 612, 163 S.E. 489, 1932 Ga. LEXIS 102 (1932).

In the absence of a special contract, when a mortgagee or grantee in a security deed transfers one of the secured notes and the transferee brings an equitable foreclosure thereon, the transferee will have priority over the mortgagee or grantee in the security deed holding the untransferred notes, if the amount realized at the foreclosure sale is insufficient to pay all the notes. Rembert v. Ellis, 195 Ga. 807, 25 S.E.2d 681, 1943 Ga. LEXIS 297 (1943).

Security need not be transferred to give transferee preference. — Holder

Effect of Transfer (Cont'd)

of notes of a series to whom the notes have been transferred has a preference over the secured payee who retains a portion of the evidence of indebtedness, if the security is insufficient to pay all the note, and there need not be a transfer of the security in order to entitle the transferee to this preference. Merchants' & Citizens' Bank v. Bogle, 174 Ga. 612, 163 S.E. 489, 1932 Ga. LEXIS 102 (1932).

Transferee takes general power of sale. — When one becomes owner of title conveyed by security deed and of indebtedness secured thereby, and the power of sale is not expressed in the deed as limited to the grantee, but is conferred upon the grantee or "assigns," one is entitled to exercise the power to the same extent as the grantee. Universal Chain Theatrical Enters., Inc. v. Oldknow, 176 Ga. 492, 168 S.E. 239, 1933 Ga. LEXIS 207 (1933).

Waiver of transferee's right to preference. — Generally, the transferee of one or more of several notes secured by deed to a single tract of land is entitled to preference in payment to the payee of the mortgage or security deed, but this preference may be waived. Such transferee of one of the notes may not only expressly waive one's right to preference in the distribution of funds arising from the sale of the land given as security for the payment of the debt, but one may also expressly contract that preference in the payment of the proceeds of such sale shall be retained by the holder of the security deed, and thereby agree and contract that a distribution of the proceeds of the sale of the land securing both notes shall be different from that ordinarily enforceable by law. Ottauquechee Sav. Bank v. Elliott, 172 Ga. 656, 158 S.E. 316, 1931 Ga. LEXIS 170 (1931).

Enforcement of Rights

1. In General

Transferee may subject land to debt. — Under former Civil Code 1910, §§ 6037 and 6039, the transferee and holder of a promissory note given for the purchase money of land may, in appropriate proceedings, subject the land to the transferee's debt. Guarantee Trust & Banking Co. v. American Nat'l Bank, 15 Ga. App. 778, 84 S.E. 222, 1915 Ga. App. LEXIS 61 (1915).

Recovery of personalty when title reserved. — If one sells personal property, taking a purchase money note reserving title in the property until the note is paid, the holder of such note may recover the property in an action of trover upon failure of the maker of the note to pay the note. Jordan Mercantile Co. v. Brooks, 149 Ga. 157, 99 S.E. 289, 1919 Ga. LEXIS 170 (1919); Hooper v. Bank of Hiawassee, 29 Ga. App. 459, 116 S.E. 32, 1923 Ga. App. LEXIS 64 (1923).

Any transferee may foreclose. — If one or more of several notes secured are held by one person and others of the secured notes are held by other parties, each of the noteholders is entitled to the security executed to secure all the notes, and any one of the holders may foreclose, giving the notice required by law to all holders concerned. Irons v. American Nat'l Bank, 178 Ga. 160, 172 S.E. 629, 1933 Ga. LEXIS 34 (1933).

Enforcement of landlord's lien despite payment to transferor. — If a tenant gives two negotiable promissory notes payable to the landlord for rent and the landlord transfers one of the notes and retains the other, in the absence of any agreement to the contrary, the lien right is split, and the interests of the landlord and the transferee in the security provided by the landlord's liens are several, and the interest of the transferee is not subject to the control of the landlord. If in such a case the tenant sells and disposes of a part of the crops raised upon the premises during the year and pays the entire proceeds to the landlord, who does not produce the transferred note, and if such sale and disposition of the proceeds are without the authority or consent of the transferee, the latter will not be estopped by such application of the proceeds from asserting the fact of such sale and removal as ground for distraining for the amount of rent represented by the transferred note before the note's maturity.

International Agric. Corp. v. Powell, 31 Ga. App. 348, 120 S.E. 668, 1923 Ga. App. LEXIS 942 (1923).

Equity will give effect to transferee's rights. — If the security is a deed conveying the legal title, the transfer carries with the transfer an equitable interest in the security, though not the legal title; and a court of equity will give effect to the transferee's rights in the premises. Henry v. McAllister, 93 Ga. 667, 20 S.E. 66, 1894 Ga. LEXIS 382 (1894); Van Pelt v. Hurt, 97 Ga. 660, 25 S.E. 489, 1895 Ga. LEXIS 548 (1895); Carter v. Johnson, 156 Ga. 207, 119 S.E. 22, 1923 Ga. LEXIS 228 (1923); First Nat'l Bank v. Pounds, 163 Ga. 551, 136 S.E. 528, 1927 Ga. LEXIS 25 (1927).

When the transferee of a purchase money note reduces the note to judgment, it is the duty of the vendor to convey the land by quitclaim deed to the purchasers, to enable the transferee to levy upon and sell the land under an execution issued upon the judgment obtained for the purchase money; and upon refusal of the vendor to make such conveyance when requested to do so by a transferee, a court of equity will compel the vendor to make such conveyance. Holbrook v. Adams, 166 Ga. 871, 144 S.E. 657, 1928 Ga. LEXIS 423 (1928).

Lien enforceable without regard to equitable principles. — Under former Civil Code 1910, §§ 3346 and 4276, a transferee of notes may ask in a court of law, without asking for intervention of equitable principles, that a judgment rendered on such notes be declared to be a special lien on the land or other property which is described in the instrument securing such notes. Alley v. First Nat'l Bank, 46 Ga. App. 527, 168 S.E. 317, 1933 Ga. App. LEXIS 133 (1933).

2. Joinder of Parties

Transferees joinable with mortgagor. — Petition was not rendered multifarious by the joinder of the holders of a transferred note with the mortgagor, because the petition set forth one connected interest among them all, centering in the point in issue in the cause. Conley v. Buck, 100 Ga. 187, 28 S.E. 97, 1897 Ga. LEXIS 25 (1897).

Immaterial whether note preferred or not. — It is immaterial whether the note is preferred or postponed in payment to those held by the mortgagee. Willingham & Cone v. Huguenin, 129 Ga. 835, 60 S.E. 186, 1908 Ga. LEXIS 205 (1908).

All transferees must be made parties, if possible. — All the holders of notes secured by a mortgage must be brought before the court as defendants before a decree is made; it is best, both for the holders of the notes and the mortgagor, that the foreclosure sale shall remove the whole lien from the property, so that contemplating purchasers may bid with the assurance that the lien of the mortgagor will be entirely divested from the land, but this is not to be understood as requiring the impossible; it was not intended to require the exercise of that extraterritorial jurisdiction which is forbidden by law. Irons v. American Nat'l Bank, 178 Ga. 160, 172 S.E. 629, 1933 Ga. LEXIS 34 (1933).

3. Res Judicata

Decrees and orders bind grantee made party or subsequent transferees. — If a foreclosure proceeding by a transferee of one of the secured notes has been completed and the grantee in the security deed was a party to the proceeding, the decree and orders therein are res judicata as to any further rights of the grantee or the grantee's transferees who may acquire title after such decree and orders. Rembert v. Ellis, 195 Ga. 807, 25 S.E.2d 681, 1943 Ga. LEXIS 297 (1943).

When the transferee of a note secured by a deed forecloses thereon in equity and makes the receiver of the insolvent assignor a party, and the receiver raises no question as to a partly erroneous description of the property in the petition and proceedings, but acknowledges service of a petition and rule nisi to confirm the sale of the property, as correctly advertised, sold, and described in the petition for confirmation, and the sale is thus con-

Enforcement of Rights (Cont'd)
3. Res Judicata (Cont'd)

firmed with a correct deed to the purchaser, one who subsequently buys another note secured by the same deed is bound by such foreclosure. One cannot maintain on one's note a second foreclosure on the theory that the first proceeding was void because the pleadings and procedure therein contained the partly erroneous description of the property since one was a privy of the insolvent assignor and its receiver. Accordingly, the judge properly found for the defendants on their pleas of res judicata and estoppel. Rembert v. Ellis, 195 Ga. 807, 25 S.E.2d 681, 1943 Ga. LEXIS 297 (1943).

RESEARCH REFERENCES

Am. Jur. 2d.
55 Am. Jur. 2d, Mortgages, § 1069 et seq.
C.J.S.
10 C.J.S., Bills and Notes; Letters of Credit, § 163 et seq.
ALR.
Assumption of mortgage by grantee as affecting right of mortgagee to proceed against mortgagor, 41 A.L.R. 317.

10-3-2. Endorser sued with maker, drawer, or acceptor.

In all cases the endorser may be sued in the same action and in the same county with the maker or drawer or acceptor.

History.
Laws 1826, Cobb's 1851 Digest, p. 594.; Code 1863, § 2732; Code 1868, § 2740; Code 1873, § 2782; Code 1882, § 2782; Civil Code 1895, § 3691; Civil Code 1910, § 4283; Code 1933, § 14-1803.

Law reviews.
For note discussing problems with venue in Georgia and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B. J. 254 (1972).

JUDICIAL DECISIONS

Former exception as to state-chartered banks. — Section originally excepted notes to be negotiated or deposited with state-chartered banks for collection. Beckwith v. Carleton & Co., 14 Ga. 691 (1854).

Permitting joint suit changed law merchant. — Suit against the maker and endorser in one action is entirely of statutory origin. A suit against the maker and endorser was unknown to the law merchant, under which it was necessary to obtain a judgment against the maker before the liability of the endorser was established. Wilson v. Exchange Bank, 122 Ga. 495, 50 S.E. 357, 1905 Ga. LEXIS 245 (1905).

Formerly, section not applicable to bills of exchange. — Prior to adoption of what is now the state Constitution, while the endorser and maker of a promissory note living in different counties may have been joined in the same action, this rule was not applicable to bills of exchange. Vinson v. Platt & McKenzie, 21 Ga. 135, 1857 Ga. LEXIS 18 (1857); Cox v. Mechanics' Sav. Bank, 28 Ga. 529, 1859 Ga. LEXIS 251 (1859).

Joinder of principal and guarantor. — Under the state Constitution when the contract signed by the defendant was one of guaranty, not endorsement, one cannot be sued jointly with the principal, but a separate suit must be entered against each in the county of one's residence. Geiser Mfg. Co. v. Jones & Toole, 90 Ga. 307, 17 S.E. 81, 1892 Ga. LEXIS 175 (1892); Georgia Cas. Co. v. Dixie Trust & Sec. Co., 23 Ga. App. 447, 98 S.E. 414, 1919 Ga. App. LEXIS 154 (1919).

Joinder of maker and endorser. — Maker of a note and the one who endorses the note, "to be liable in the second instance," cannot be sued together in the

same action. Bartlett v. Byers, 35 Ga. 142, 1866 Ga. LEXIS 179 (1866).

Joinder of maker and one who promised to become joint maker. — If one promised to become the joint maker of a note with another but fails to do so, one cannot be joined with the maker in an action in the county of such maker, if one lives in a different county. Adams v. Williams, 125 Ga. 430, 54 S.E. 99, 1906 Ga. LEXIS 183 (1906).

Joinder of joint makers or maker and endorser. — When one signs one's name on the face of a note with the word "endorser" thereafter, one is either a joint maker or an endorser and may be sued with the other maker. McLendon v. McLendon, 61 Ga. 110, 61 Ga. 111, 1878 Ga. LEXIS 38 (1878).

Endorser may prove different relationship. — When one signs one's name on the back of a nonnegotiable note in blank one is an ordinary endorser and not a guarantor and is, therefore, suable in the same action with the maker in the county of the latter's residence. Such endorser may plead and prove, however, that according to the intention and agreement of the parties one's relationship with the paper was not that of an endorser. Saussy & Huxford v. Weeks, 122 Ga. 70, 49 S.E. 809, 1905 Ga. LEXIS 116 (1905). See Walker v. Carpenter, 5 Ga. App. 427, 63 S.E. 576, 1909 Ga. App. LEXIS 10 (1909).

Defendant sued in two capacities. — Defendant may be sued in the same action as an executor of the maker of a promissory note and as an individual endorser. Roark v. Turner, 29 Ga. 455, 1859 Ga. LEXIS 364 (1859).

Joinder drawer and endorser may be joined without acceptor. — Drawer and the endorser may be sued together without joining the acceptor. If the suit is against such parties the parties should be so described in the plaintiff's pleading, but the failure to do so may be cured by amendment when there is enough set forth to amend by. Ware v. City Bank, 59 Ga. 840, 1877 Ga. LEXIS 415 (1877).

Acceptor of bill of exchange may sue drawer and accommodation endorser in the same action in the county of the drawer. Ross v. Saulsbury, Respess & Co., 52 Ga. 379, 1874 Ga. LEXIS 298 (1874).

Effect of bankruptcy of maker. — If there is a suit against maker and endorser, the suit will not be stayed upon the application of the endorser because of the pending of bankruptcy proceedings against the maker. Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S.E. 56, 1907 Ga. App. LEXIS 19 (1907).

Maker's right to be sued in county of residence. — As a general rule where the endorser and maker reside in different counties, suit may be brought on the note in either county, but the maker of a note cannot be deprived of one's constitutional right to be sued in the county of one's own residence by an endorsement secured by the payee without the knowledge and consent of the maker and for the sole purpose of conferring jurisdiction upon the courts of the county of the endorser's residence. Arnold v. Atlanta Oil & Fertilizer Co., 11 Ga. App. 581, 75 S.E. 900, 1912 Ga. App. LEXIS 110 (1912).

Joint suit must be in county of drawer's residence. — If the drawer of a check and the endorsers thereon are residents of different counties, a joint suit against the drawer and the endorsers must be brought in the county of the drawer's residence, in the absence of a waiver by the drawer of jurisdiction over the drawer's person. Pioneer Prods., Inc. v. Sinclair, 92 Ga. App. 95, 88 S.E.2d 43, 1955 Ga. App. LEXIS 531 (1955).

Court in county of endorsers' residence lacks jurisdiction of nonresident drawer. — If a check was drawn by the defendant corporation incorporated in one county and having and maintaining an office and place of business only in another county, payable to the order of the endorsers, a partnership composed of partners resident in a third county, and plaintiff instituted suit upon the check against the drawer and the endorsers in a city court in the third county, that court was without jurisdiction of the defendant drawer. Pioneer Prods., Inc. v. Sinclair, 92 Ga. App. 95, 88 S.E.2d 43, 1955 Ga. App. LEXIS 531 (1955).

Residence does not confer jurisdiction if suit otherwise barred. — If suit against two makers of a promissory note was barred by reason of a

former recovery, the maker's residence did not confer jurisdiction upon the court of the county in the subsequent suit against the other makers and endorsers. Fullington v. Killen, 65 Ga. 575, 1880 Ga. LEXIS 264 (1880).

RESEARCH REFERENCES

Am. Jur. 2d.

12 Am. Jur. 2d, Bills and Notes, § 397 et seq.

C.J.S.

10 C.J.S., Bills and Notes; Letters of Credit, § 34 et seq.

ALR.

Liability of endorser, other than payee or transferee, of nonnegotiable instrument, 18 A.L.R.3d 647.

10-3-3. Consideration to be stated on notes, contracts, or other evidences of debt taken for the purchase of any patent right, copyright, or proprietary right.

All promissory notes, contracts, or other evidences of debt taken by any person, agent, company, or corporation for the purchase price of any patent right, copyright, or proprietary right or territory for the sale of any such right or for the sale of any patented article or thing or copyrighted article or thing or where there is a proprietary ownership or right and sold by such person, agent, company, or corporation through or by any peddler, agent, or traveling salesman traveling for the purpose of making such sales shall have expressed on the face of such note, contract, or other evidence of debt the consideration of the same, stating the thing or article for which the same was given, provided this Code section shall not apply to merchants or manufacturers selling and delivering such goods directly from their stores or warehouses in the regular course of business.

History.

Ga. L. 1897, p. 81, § 1; Civil Code 1910, § 4293; Code 1933, § 14-1804.

Law reviews.

For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For article, "Copyright = Speech," see 65 Emory L.J. 199 (2015).

JUDICIAL DECISIONS

Purpose. — Main purpose of Ga. L. 1897, p. 81, §§ 1-3 was to so mark patent-right notes that, if possible, purchasers would hesitate to buy the notes even before maturity; and, thus, behind that was the purpose to protect, if possible, those of our population who are too gullible, both by decreasing the number of such purchases (generally worthless) and by affording to those so unwary as to be caught, rights which, as to bona fide purchasers, are not allowed to any other class. Lee v. Hightower, 3 Ga. App. 226, 59 S.E. 597, 1907 Ga. App. LEXIS 604 (1907).

Purpose of former Civil Code 1910,

§§ 4293 and 4294 was to place a purchaser of a note, expressing on the note's face that the consideration was a patent right, in the same position as the payee with reference to the note's enforcement. Hunt v. McKinney, 11 Ga. App. 301, 75 S.E. 144, 1912 Ga. App. LEXIS 377 (1912).

Effect of failure to express consideration. — Note given for a patent right but not expressing upon the note's face its consideration is not void under Ga. L. 1897, p. 81, §§ 1 and 2 in the hands of a bona fide holder. Smith v. Wood, 111 Ga. 221, 36 S.E. 649, 1900 Ga. LEXIS 519 (1900); Parr v. Erickson, 115 Ga. 873, 42 S.E. 240, 1902 Ga. LEXIS 633 (1902); Lee v. Hightower, 3 Ga. App. 226, 59 S.E. 597, 1907 Ga. App. LEXIS 604 (1907); Hunt v. McKinney, 11 Ga. App. 301, 75 S.E. 144, 1912 Ga. App. LEXIS 377 (1912); Heard v. National Bank, 143 Ga. 48, 84 S.E. 129, 1915 Ga. LEXIS 280 (1915) (construing former Ga. L. 1912, p. 153, relating to sales of corporate stock).

If the consideration is not expressed in a patent-right note, the right to enforce the note is governed by the same rules as are applicable to a note founded upon any other valid consideration. Hunt v. McKinney, 11 Ga. App. 301, 75 S.E. 144, 1912 Ga. App. LEXIS 377 (1912).

When endorsee takes subject to defenses. — It is only when the consideration is expressed in the note that the endorsee, before maturity and for value, takes it subject to all defenses. Parr v. Erickson, 115 Ga. 873, 42 S.E. 240, 1902 Ga. LEXIS 633 (1902); Simmons v. Council, 5 Ga. App. 386, 63 S.E. 238, 1908 Ga. App. LEXIS 132 (1908); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (construing former Ga. L. 1912, p. 153, relating to sale of corporate stock).

Defenses limited to those between original parties. — Maker of a note may set up by way of defense, in a suit on the same, all the equities existing between the original parties, or make any defense that one could have made against the original payee; but one cannot set up, against an innocent purchaser of the note before due and without notice, any equities or defenses against every person who may at any time have held the note as a bearer. Tate v. Little, 141 Ga. 799, 82 S.E. 129, 1914 Ga. LEXIS 155 (1914).

RESEARCH REFERENCES

Am. Jur. 2d.

11 Am. Jur. 2d, Bills and Notes, § 121.

C.J.S.

10 C.J.S., Bills and Notes; Letters of Credit, § 53 et seq.

ALR.

Right to inventions as between employer and employee, 32 A.L.R. 1037; 44 A.L.R. 593; 85 A.L.R. 1512; 153 A.L.R. 983; 61 A.L.R.2d 356.

Assignability of licensee's rights under patent licensing contract, 66 A.L.R.2d 606.

Duration of liability to pay royalty under agreement for publication of material subject to copyright not limited as to time, 69 A.L.R.2d 1317.

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date, 3 A.L.R.3d 770.

Construction and effect of provision of employment contract giving employer right to inventions made by employee, 66 A.L.R.4th 1135.

10-3-4. Certain notes or contracts for patent rights, copyrights, or proprietary rights; purchaser takes subject to equities.

Any person, firm, company, or corporation who may purchase any note, contract, or other evidence of debt given for any of the articles or things set forth in Code Section 10-3-3 when the consideration of said note is expressed on the face thereof as is provided in said Code section,

whether before due and without notice or otherwise, where the consideration is so expressed, shall take the same with all the equities existing between the original parties; and the maker of such note, contract, or other evidence of debt shall have the right to make any defense to the payment of same as against such purchasers that could have been made against the original payee.

History.
Ga. L. 1897, p. 81, § 2; Civil Code 1910, § 4294; Code 1933, § 14-1805.

Law reviews.
For article, "Copyright = Speech," see 65 Emory L.J. 199 (2015).

JUDICIAL DECISIONS

Innocent purchaser protected unless consideration stated. — This section clearly contemplates that an innocent purchaser of a negotiable instrument before due and without notice will be protected, except if the consideration is stated on the face of the instrument. Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

Protection extends to defense of want of consideration. — If a note does not express upon the note's face the note's consideration, the principle that a bona fide holder of a negotiable promissory note, purchased for value and before maturity, is protected against a defense that the note was without consideration is applicable. Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

Presumption that holder took before maturity, for value, and without notice. — If a note does not express upon the note's face the note's consideration, the principle that when a negotiable note payable at a future date was endorsed by the payee to the plaintiff, in the absence of proof to the contrary the law will presume that the plaintiff took before maturity, for value, and without notice, is applicable. Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

Actual notice of consideration to director of bank. — Actual notice to a director of a bank, who is also on the loan committee of the bank, as to the consideration for a note about to be discounted by the bank, is sufficient notice to the bank of that fact, so as to let in all defenses against it that existed between the original parties. Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236, 1935 Ga. App. LEXIS 234 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

RESEARCH REFERENCES

Am. Jur. 2d.
11 Am. Jur. 2d, Bills and Notes, § 209.
C.J.S.
10 C.J.S., Bills and Notes; Letters of Credit, § 53 et seq.

ALR.
Right to inventions as between employer and employee, 32 A.L.R. 1037; 44 A.L.R. 593; 85 A.L.R. 1512; 153 A.L.R. 983; 61 A.L.R.2d 356.

10-3-5. Penalty for violation of Code Section 10-3-3.

If any person shall violate Code Section 10-3-3 by selling any of the articles mentioned in that Code section without expressing on the face

of notes or contracts or other evidences of debt given for the purchase price the article or thing for which the same was given, he shall be guilty of a misdemeanor.

History.
Ga. L. 1897, p. 81, § 3; Penal Code 1910, § 635; Code 1933, § 14-9901.

Law reviews.
For article, "Copyright = Speech," see 65 Emory L.J. 199 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.
11 Am. Jur. 2d, Bills and Notes, § 121.
C.J.S.
10 C.J.S., Bills and Notes; Letters of Credit, § 53 et seq.

10-3-6. Requirement to satisfy definition of issuer.

Notwithstanding any provision of law to the contrary, a bank operating under the authority of any territory of the United States shall satisfy the definition of an issuer provided in Code Section 11-5-102.

History.
Code 1981, § 10-3-6, enacted by Ga. L. 2018, p. 245, § 3/SB 376.

CHAPTER 4

WAREHOUSEMEN

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10-4-147. Division of money received above contract sales price plus charges and expenses.
10-4-148. Licensees' records and reports.
10-4-149. Commissioner of Agriculture to keep storage and sale records; publication.
10-4-150. Tender for storage not deemed sale; sale not consummated before next season.
10-4-151. Certified public weighers to be provided by licensees.
10-4-152. Regulations and physical standards for premises; inspection of premises.
10-4-153. Enforcement of part; revocation or suspension of licenses.
10-4-154. Enjoining violations.
10-4-155. Penalty for violating part or rules or regulations.

PART 3

TOBACCO WAREHOUSEMEN'S ASSOCIATIONS

10-4-170. Local boards of trade and state-wide organization of warehousemen authorized.
10-4-171. Arbitrating organization of board of trade.
10-4-172. Rules and regulations of boards of trade and state-wide organization.
10-4-173. Local and state-wide membership fees.
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10-4-176. Appealing suspension or ex-

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pulsion from board of trade or state-wide organization.
10-4-177. Price fixing or restraint of trade not authorized; regulation of leaf tobacco selling unaffected.

Article 4

Convenience Warehousing

10-4-190. Short title.
10-4-191. Definitions; exemption of state licensed or bonded warehouses.
10-4-192. Information required for storage rental or lease; property ownership statement.
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Article 5

Self-Service Storage Facilities

10-4-210. Short title.
10-4-211. Definitions.
10-4-212. Lien of owner of self-service storage facility upon property located at facility; priority; attachment.
10-4-213. Enforcement of lien without judicial intervention; execution of rental agreement.
10-4-214. Compliance with Servicemembers Civil Relief Act; additional rights, duties, and obligations not impaired; rights under article additional.
10-4-215. Rental agreements entered into before July 1, 2013, not affected.
10-4-216. Self-service storage facility not residence; no application of public bonded warehouseman provisions.
10-4-217. Late penalty; calculations; application.
10-4-218. Deemed acceptance of rental agreement; notice of termination or nonrenewal; removal of personal property.

Administrative rules and regulations.
State Warehouse Division, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Rule 40-14-1-.01 et seq. through Rule 40-14-5-.01 et seq.

Law reviews.
For article discussing ambiguity in the law regarding the operation of warehouses storing nonagricultural products as it applies to foreign enterprises, see 27 Mercer L. Rev. 629 (1976).

ARTICLE 1

GENERAL PROVISIONS; AGRICULTURAL PRODUCT WAREHOUSING

Administrative rules and regulations.
State Warehouse Division, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Rule 40-14-1-.01 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Preemption of other laws. — Subject of bonded and licensed warehouses is fully covered by this article and it would appear to preempt all matters pertaining to bonded and licensed warehouses. 1968 Op. Att'y Gen. No. 68-118.

Exemption of federally licensed warehousemen. — Any warehouse storing agricultural products in this state that is licensed for the storage of agricultural products pursuant to the United States Warehouse Act is exempt

from the provisions of this article, including the licensing and bonding requirements contained therein. 1977 Op. Att'y Gen. No. 77-40.

Federally licensed warehousemen do not have to acquire separate bonding and licensing mandated by the Georgia grain dealing legislation, but are accorded the exemption now provided by paragraph (3) of Ga. L. 1977, p. 245, § 1. 1978 Op. Att'y Gen. No. 78-11.

RESEARCH REFERENCES

ALR.

Nature and validity of "hedging" transactions on the commodity market, 20 A.L.R. 1422.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A.L.R. 1502.

Statutory warehousing as determined by character of property stored, 132 A.L.R. 532.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

10-4-1. Short title.

This article shall be known and may be cited as the "Georgia State Warehouse Act."

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 1; Ga. L. 2024, p. 1052, § 2(39)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, inserted "be known and may" following "shall" in this Code section.

10-4-2. Definitions.

As used in this article, the term:

(1) "Agricultural product" means individually and collectively all grains, cotton, meat, fruits, vegetables, and other farm products offered or accepted for storage in their raw or natural state; provided, however, that products which have been processed only to the extent of shelling, cleaning, and grading shall be included; and, provided, further, that any warehouseman storing refrigerated or processed agricultural products may, at his option, come under the operation of this article.

(2) "Commissioner" means the Commissioner of Agriculture.

(3) "Grain" means all products commonly classed as grain, such as wheat, corn, oats, barley, rye, rice, field peas, soybeans, clover, grain sorghum, and other products ordinarily stored in grain warehouses.

(4) "Person" means any individual, partnership, firm, corporation, association, or other organized group having a joint or common interest.

(5) "Producer" means a farmer or grower of agricultural products.

(6) "Public warehouse" or "warehouse" means any building, structure, or other enclosure other than a refrigerated building or structure in this state at which any agricultural product is received from the public for storage for hire.

(7) "Receipt" means a warehouse receipt issued under this article.

(8) "Storer" means the depositor of agricultural products stored under a nonnegotiable receipt or the holder of a negotiable receipt for such products issued by a warehouseman licensed under this article.

(9) "Warehouseman" means a person engaged in the business of operating a warehouse or any person who uses or undertakes to use a warehouse for the purpose of storing agricultural products for compensation for more than one person; provided, however, that any person operating a warehouse not covered by this article may elect to come under this article.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 2024, p. 1052, § 2(40)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in paragraph (9).

OPINIONS OF THE ATTORNEY GENERAL

"Agricultural product" includes pine cones. — Pine cones may come under this article being includable in "agricultural product" as used therein. 1958-59 Ga. Op. Att'y Gen. 14.

Lumber is not an "agricultural product" within the meaning of this article. 1958-59 Ga. Op. Att'y Gen. 12.

Warehouse storing cotton linters, cotton mill waste, and rayon can be licensed under this article if the warehouseman requests to be licensed. 1957 Ga. Op. Att'y Gen. 3.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Warehouses, § 2.

Am. Jur. Pleading and Practice Forms.

24B Am. Jur. Pleading and Practice Forms, Warehouses, § 1.

C.J.S.

93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-3. State warehouse section established; supervisor of section.

Within the police powers of the state and for the general welfare,

there is established as provided in this article a warehouse system for the State of Georgia as a section of the Marketing Division of the Department of Agriculture under the supervision and control of the Commissioner of Agriculture. The Commissioner is authorized to appoint a supervisor of such section, subject to the provisions of Chapter 20 of Title 45. The supervisor shall give bond in such amount as the Commissioner shall determine for the faithful performance of his duties and the proper accounting of all funds coming into his hands.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 4;
Ga. L. 1959, p. 246, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 4, 10.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-4. Exemptions from article; warehousemen electing to be covered.

(a) The provisions of this article shall not be construed to apply to:

(1) Any warehouse licensed under the United States Warehouse Act, as amended, if the licensee has in effect a federal bond in an amount not less than the amount of the bond which would be required under subsections (a) and (b) of Code Section 10-4-12; or

(2) Any warehouse kept or maintained by any warehouseman on the premises of any other person under a contract between the warehouseman and the other person for the primary purpose of storage therein of agricultural products of the other person, provided that no agricultural products are stored therein for the account of any producer other than the other person; provided, however, that such warehouseman may come under this article at his option.

(b) Any person, firm, corporation, or association storing peanuts, cottonseed, or tobacco may be required only, at his or its option, by application, to qualify and come under this article.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 30; Ga. L. 1983, p. 946, § 1.
U.S. Code.
The United States Warehouse Act, referred to in subsection (a) of this section, is codified as 7 U.S.C. § 241 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Warehouse storing cotton linters, cotton mill waste, and rayon can be licensed under this article if the warehouseman requests to be licensed under the article. 1957 Ga. Op. Att'y Gen. 3.

Exemption of federally licensed agricultural warehouse. — Any warehouse storing agricultural products in this state that is licensed for the storage of agricultural products pursuant to the United States Warehouse Act is exempt from this article, including the licensing and bonding requirements contained therein. 1977 Op. Att'y Gen. No. 77-40.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 2, 4, 6, 8, 13 et seq.

10-4-5. Powers and duties of Commissioner; annual reports; adoption of rules and regulations.

(a) It shall be the duty of the Commissioner to foster and promote in every possible way good warehousing practices so as to afford proper storage of agricultural products; to enforce with vigilance this article; to promulgate such rules and regulations having the force and effect of law as will effectuate the purposes of this article.

(b) The Commissioner shall, on or before January 1, prepare and submit to the Governor and the General Assembly a report covering all the activities of the Commissioner for the preceding year which shall, among other things, show the number of licenses issued, the number of warehouse examinations made on application for license, and the number of examinations of warehouses to ascertain whether their operation, condition, and business are in compliance with this article and the rules and regulations promulgated under this article. The report shall account for all fees collected and money expended and shall indicate the fiscal needs for administration of this article for the succeeding year. The report may be printed by the Commissioner and distributed to any persons, organizations, and public officials as may be interested.

(c) The Commissioner is authorized to investigate the storage and weighing of agricultural products; at any time, to examine or cause to be examined all warehouses under this article and all agricultural products stored therein; to determine whether such warehouses are suitable for the proper storage of the agricultural product or products stored or proposed to be stored therein; and to classify such warehouses in accordance with their ownership, location, surroundings, capacity, conditions, and other qualities, and as to the kinds of licenses issued or that may be issued for them pursuant to this article.

(d) The Commissioner may make such rules and regulations as are necessary or appropriate governing the operation of warehouses under this article with respect to their receipt, care, and delivery of and responsibility for agricultural products received at such warehouses for storage; the issuance, cancellation, division, and consolidation of receipts and other matters relative to the management of the business of such warehouses; and such other rules and regulations as are necessary or appropriate to carry out this article, to the end that any farmer or producer or storer of agricultural commodities may be assured that agricultural products stored by him are maintained in as nearly the same status as practicable according to the grade, standard, and condition as when stored.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, §§ 3, 25; Ga. L. 1989, p. 14, § 10.
Cross references.
Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 4, 13.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 11 et seq.

10-4-6. Procedure for adopting or changing rules and regulations; administrative review of objections.

(a) Prior to the adoption or change of any rule or regulation, the Commissioner shall promulgate the proposed rule or regulation or change and afford interested persons opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule or regulation of the Commissioner and who believes that the Commissioner, in the promulgation or enforcement of such rule or regulation, has exceeded authority vested in him by the General Assembly under the Constitution of Georgia or of the United States shall have the right to petition the Commissioner of Agriculture for the repeal or revision of such rule by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within 30 days and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within 30 days after the hearing to give the petitioner relief in every respect from

any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy; and every person affected by any rule or regulation or any act of the Commissioner is required to exhaust this remedy before taking any other steps, except as otherwise provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) All hearings before the Commissioner shall be stenographically reported by a qualified court reporter and shall be available to any interested party upon payment of the stenographic costs.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 26; Ga. L. 1989, p. 14, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 4, 5 et seq., 13 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 6 et seq.

10-4-7. Uniform application of orders, fees, rules, and regulations.

All rules and regulations, orders, schedules of charges, and fees approved or promulgated or issued by the Commissioner under the terms of this article shall be of uniform application to all warehouses of the same class throughout the state.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 27.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 1, 5 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 6 et seq.

10-4-8. Existing interstate commerce regulations not affected.

Nothing contained in this article shall be interpreted so as to conflict with any existing regulations of the federal government, or of the federal and state governments jointly, governing inspection of goods in interstate commerce.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 31.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 2, 5, 13 et seq.

10-4-9. Judicial review of administrative decision.

Any person aggrieved by a final determination or decision of the Commissioner in any matter in which a hearing is required or authorized by this article or the state or federal constitutions is entitled to judicial review thereof in accordance with the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," for the judicial review of contested cases.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 29.

RESEARCH REFERENCES

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 141 et seq.

10-4-10. Annual license required; issuance by Commissioner; application for license or renewal.

(a) No person shall operate a warehouse as defined under this article in this state unless he or she has a valid, effective license issued by the Commissioner pursuant to this article for such warehouse. All such licenses shall expire on June 30 of each year. No license so issued shall describe more than one warehouse nor grant permission to operate any warehouse other than the one described therein, except that, if a warehouseman operates two or more warehouses in the same county or in adjoining counties or operates two or more grain warehouses in nonadjoining counties in conjunction with each other and if but one set of books and records is kept with respect to weight certificates, scale tickets, inspection certificates, and receipts issued for agricultural products stored in all such warehouses, only one license shall be required for the operation of all such warehouses.

(b) The Commissioner is authorized to issue to any warehouseman a license for the conduct of a warehouse or warehouses in accordance with this article and with such rules and regulations as may be made under this article, provided that each warehouse is found suitable for the proper storage of the particular agricultural product or products for which a license is to be issued and that such warehouseman agrees, as a condition to the granting of the license, to comply with all the terms of this article and the rules and regulations prescribed under this

article. It shall be the duty of the Commissioner to issue a license to any responsible person applying therefor who can show that he is ready, willing, and able to meet the requirements of this article and the regulations under this article.

(c)(1) Each applicant for a license or renewal shall furnish with his application a current financial statement which shall include:

(A) A balance sheet;

(B) A profit and loss statement of income;

(C) A statement of retained earnings; and

(D) A statement of changes in financial position.

(2) The chief executive officer for the business shall certify under penalties of perjury that the statements as prepared accurately reflect the financial condition of the business as of the date named and fairly represent the results of operations for the period named.

(3) Except as otherwise provided in this paragraph, each applicant shall have the financial statements required in paragraph (1) of this subsection audited by an independent certified public accountant. Alternatively, financial statements audited or reviewed by an independent public accountant will be accepted with the understanding that the applicant will be subject to an additional on-site examination by the Commissioner and to an audit by the Commissioner. Audits and reviews by independent certified public accountants and independent public accountants specified in this Code section shall be made in accordance with standards established by the American Institute of Certified Public Accountants. The accountant's certification, assurances, opinion, comments, and notes on such statements, if any, shall be furnished along with the statements. Applicants who cannot immediately meet these requirements may apply to the Commissioner for a temporary waiver of this provision. The Commissioner may grant such waiver for a temporary period not to exceed 180 days if the applicants can furnish evidence of good and substantial reasons therefor. This paragraph shall not be applicable to any applicant who maintains a bond in the maximum amount required by subsection (a) of Code Section 10-4-12.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 5; Ga. L. 1983, p. 946, § 2; Ga. L. 1984, p. 22, § 10; Ga. L. 1985, p. 645, § 1; Ga. L. 1988, p. 750, § 1; Ga. L. 1990, p. 340, § 1; Ga. L. 2001, p. 1070, § 2.

OPINIONS OF THE ATTORNEY GENERAL

Warehouse storing cotton linters, cotton mill waste, and rayon can be licensed under this article if the warehouseman requests to be licensed under this article. 1957 Ga. Op. Att'y Gen. 3.

Pine cone warehouse. — Commissioner of Agriculture may license a warehouse storing pine cones. 1958-59 Ga. Op. Att'y Gen. 14.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.
ALR.
Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 A.L.R. 928.
Right of one who acquires title to, or other interest in, real property to benefit of a license previously issued by the public, permitting use of property for a specified purpose, 131 A.L.R. 1339.

10-4-11. License for person electing to comply with article and regulations.

If not otherwise required by this article, any person operating a warehouse for the storage of agricultural products may elect to come within this article and, upon approval of the Commissioner, may be licensed under this article. As a condition to the granting of a license under this article, the applicant must agree to comply with this article and any and all regulations promulgated under this article, as well as any and all regulations issued by the Commissioner relating to the storage of agricultural products in the warehouse of the applicant.

History.
Ga. L. 1959, p. 246, § 5; Ga. L. 1977, p. 289, § 2.

OPINIONS OF THE ATTORNEY GENERAL

Licensing not restricted to agricultural warehouses. — Although warehousemen engaged in the storage of agricultural products automatically come within the purview of this article, the licensing privilege is not restricted to such persons; any person operating a warehouse not covered by the provisions of the article may elect to become regulated in accordance with the requirements set forth therein. 1974 Op. Att'y Gen. No. 74-18.

Any warehouseman may elect to come under article. — While not automatically covered by this article, any person operating a warehouse for storage of products other than agricultural products may elect to come within its provisions, and upon approval of the Commissioner of Agriculture may be licensed, provided the applicant agrees to comply with the provisions of the article and all regulations promulgated thereunder. 1974 Op. Att'y Gen. No. 74-18.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-12. Bond required; additional bond.

(a) Every person intending to engage in business as a warehouseman under this article shall, prior to commencing such business and periodically thereafter as the Commissioner shall require, execute and file with the Commissioner a good and sufficient bond to the state to secure the faithful performance of his or her obligation as a warehouseman under the terms of this article and the rules and regulations prescribed under this article, such bond to be computed in direct ratio to the licensed storage capacity of the warehouse bonded. The bond shall be executed by a surety corporation authorized to transact business in this state and approved by the Commissioner. Such bond shall be upon forms prescribed by the Commissioner. Any and all bond applications shall be accompanied by a certificate of "good standing" issued by the Commissioner of Insurance. If any company issuing a bond shall be removed from doing business in this state, it shall be the duty of the Commissioner of Insurance to notify the Commissioner of Agriculture within 30 days. The Commissioner shall have authority to fix the bond for any part of licensed storage capacity of the warehouse being used; but in no event shall the amount of the bond be required to exceed 15 percent of the value of the products stored and the bond shall be in such form and amount and shall have such surety or sureties, subject to service of process in actions on the bonds with this state, as the Commissioner may prescribe; provided, however, that the minimum bond to be posted for each warehouse shall be $20,000.00 and the maximum bond to be required for each warehouse shall be $300,000.00.

(b) If a warehouseman is also a grain dealer, the amount of the required bond shall be the greater of the bond required by subsection (a) of this Code section or the bond required under Code Section 2-9-34 for grain dealers who are not licensed under this article.

(c) Whenever the Commissioner shall determine that a previously approved bond has for any cause become insufficient, the Commissioner may require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this Code section. Unless the additional bond or bonds are given within the time fixed by a written demand therefor, or if the bond of the warehouseman is canceled, the license of such warehouseman shall be immediately revoked by operation of law without notice or hearing. Code Sections 10-4-6 and 10-4-7 shall apply to this as well as all other Code sections of this article.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 6; Ga. L. 1956, p. 688, § 1; Ga. L. 1977, p. 289, § 1; Ga. L. 1981, p. 929, § 1; Ga. L. 1983, p. 946, § 3; Ga. L. 1985, p. 645, § 2; Ga. L. 1999, p. 800, § 7; Ga. L. 2010, p. 9, § 1-28/HB 1055; Ga. L. 2024, p. 1052, § 2(41)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subsection (a).

JUDICIAL DECISIONS

Summary judgment denied despite evidence of default and insufficient collateral. — Genuine issue of material fact existed, thus precluding summary judgment in favor of a surety despite overwhelming evidence that the principal was in default during the bond period and failed to maintain and store sufficient inventory as collateral. Planters & Citizens Bank v. Home Ins. Co., 786 F. Supp. 977, 1992 U.S. Dist. LEXIS 2517 (S.D. Ga. 1992), aff'd, No. 92-8468, 1993 U.S. App. LEXIS 10340 (11th Cir. Apr. 29, 1993).

OPINIONS OF THE ATTORNEY GENERAL

Department of Agriculture may fix percentage ratio to be applied to the storage capacity of warehouse facilities in order to set individual warehouse bond amounts. 1976 Op. Att'y Gen. No. 76-60.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Warehouses, § 83 et seq.

C.J.S.

93 C.J.S., Warehousemen and Safe Depositaries, § 26 et seq.

ALR.

Warehouseman's bond as covering warehouse receipts issued by warehouse to itself or for its own property, 61 A.L.R. 331.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 A.L.R. 928.

Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 A.L.R. 950.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 A.L.R. 1155.

Suspicion, or reasons for suspicion, of wrongdoing by officer or employee covered by fidelity bond or policy, as requiring obligee to comply with conditions of bond with respect to notice of discovery or knowledge of loss, 129 A.L.R. 1411.

10-4-13. Bonded and licensed warehouse may be designated as state bonded.

Upon the filing with and approval by the Commissioner of a bond, in compliance with this article, for the conduct of a warehouse under this article, such warehouse may be designated as state bonded under this article; but no warehouse shall be designated as a state bonded warehouse under this article and no name or description conveying the impression that it is so bonded shall be used unless a bond, as provided for in Code Section 10-4-12, has been filed with and approved by the Commissioner and unless a license issued under this article for the conduct of such warehouse is valid and effective.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 8.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 83 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 26 et seq.

10-4-14. Actions on bonds.

(a) Any person claiming that he or she has been damaged by a breach of the conditions of a bond given by a licensee as provided in Code Section 10-4-12 may enter a complaint to the Commissioner. Such complaint shall be a written statement of the facts constituting the complaint and must be made within 180 days of the alleged breach. If the Commissioner determines that the complaint is prima facie a breach of the bond, and the matter can not be amicably resolved within 15 days, the Commissioner shall publish a solicitation for additional complaints regarding breaches of the bond for a period of not less than five consecutive issues in a newspaper of general circulation and in such other publications as the Commissioner shall prescribe. Additional complaints must be filed within 60 days following initial public notification of a breach of the bond. Civil actions on the breach of such bond shall not be commenced less than 120 days nor more than 547 days from the initial date of public notification of such breach of the bond.

(b) Upon the filing of the complaint in the manner provided in this Code section, the Commissioner shall investigate the charges made and, at his discretion, order a hearing before him or his hearing officer giving all parties concerned notice of the filing of such complaint and the time and place of such hearing. At the conclusion of the hearing, the Commissioner shall report his findings and render his conclusion concerning the complaint to the complainant and respondent in the case, who shall have 15 days following such report in which to make effective and satisfy the Commissioner's conclusions.

(c) If such settlement is not effected within such time, the Commissioner or the claimant may institute appropriate legal proceedings to enforce the claim. If the claimant is not satisfied with the ruling of the Commissioner, he may commence and maintain an action against the principal and surety on the bond of the parties against whom the complaint is registered, as in any civil action.

(d) If the bond or collateral posted is insufficient to pay the valid claims of claimants in full, the Commissioner may direct that the proceeds of the bond shall be divided pro rata among the claimants.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 7; Ga. L. 1985, p. 645, § 3; Ga. L. 1998, p. 556, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 83 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 26 et seq.
ALR.
Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 A.L.R. 1155.
Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 A.L.R. 1112.

10-4-15. Inspections of warehouses.

In addition to the general powers conferred by Code Section 10-4-5, the Commissioner and his or her duly authorized agents or employees shall have full power and authority to inspect public warehouses operated under this article, to inventory, and to check the agricultural products stored so as to ascertain the conditions of such products and to determine whether or not the business is conducted in such a manner as to protect the interest of persons who are storing or may store such products. The inspectors shall make sworn reports of their findings to the Commissioner, who shall hold and keep such reports in the records of his or her office. Such inspections shall be made as often as deemed necessary by the Commissioner, but not less than twice during any license period and, in addition, as often as requested by the warehouseman.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 9; Ga. L. 2011, p. 99, § 16/HB 24.
Editor's notes.
Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.
Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).
For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Negligence of inspectors. — Allegations that an inspection of a public warehouseman were negligent and that the reconciliation of inventory reports were inaccurate were insufficient to warrant summary judgment although the warehouse receipt holders submitted the deposition testimony of the inspector and the Assistant Commissioner of the Warehouse Division, in which the inspector's breach of duty appeared clear, the other evidence submitted by the defendant supported the defendant's contention that the receipt holder had not established negligence as a matter of law. Planters & Citizens Bank v. Pennsylvania Millers Mut. Ins. Co., 786 F. Supp. 991, 1992 U.S. Dist. LEXIS 2540 (S.D. Ga. 1992), aff'd, No. 92-8468, 1993 U.S. App. LEXIS 10340 (11th Cir. Apr. 29, 1993).

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-16. Inspectors and examiners to be bonded.

Each inspector and examiner employed by the Commissioner for the inspection and examination of warehouses licensed under this article shall be bonded in an amount not less than $5,000.00, or in such greater amount as the Commissioner deems necessary, for the faithful performance of his duties and for the proper accounting of all funds coming into his hands. The cost of the bond shall be paid by the Department of Agriculture.

History.
Ga. L. 1959, p. 246, § 2.

10-4-17. License fees.

Warehousemen coming under this article shall pay an annual license fee which includes all inspections in an amount based on storage capacity in an amount fixed by rule or regulation of the Commissioner. These fees shall not exceed actual cost of inspections and are inclusive. The amount paid shall be based on storage capacity and shall be at least $600.00 and no more than $2,500.00 for grain or cotton warehouses and $600.00 to $2,500.00 for other agricultural products facilities desiring to come under this article. Each license so issued shall expire on June 30 of each year, and each application for license must be accompanied by the license fee. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 10; Ga. L. 1955, p. 261, § 1; Ga. L. 1992, p. 2553, § 1; Ga. L. 2001, p. 1070, § 3; Ga. L. 2010, p. 9, § 1-29/HB 1055.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-18. Delivery to warehouse presumably for storage.

Any agricultural product delivered to a warehouse under this article shall be presumed to be delivered for storage.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 11.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 126.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 101 et seq., 147 et seq.

10-4-19. Warehouse receipts required; obtaining printed forms; use of electronic receipts authorized.

(a) Unless otherwise required by law or by rule or regulation, an original receipt shall be issued for cotton and, at the option of the warehouseman or depositor, for any other agricultural products owned or stored by the warehouseman under this article. No receipt shall be issued, however, unless such products are actually stored in the warehouse at the time of the issuance of the receipt. The receipted agricultural product will remain the property of the depositor until it is transferred or sold by him or her. Initial receipts for cotton shall be issued in the name of the producer. Transfers or sales from the cotton producer shall be endorsed by his or her signature on forms authorized by the Commissioner.

(b) To regulate receipts issued by warehousemen licensed under this article, receipts issued by such warehousemen shall be obtained by warehousemen from approved printers and delivered through the Department of Agriculture at the expense of the warehousemen. Orders of the warehousemen for receipts from printers approved by the Commissioner shall be forwarded to the Department of Agriculture for approval as to the form and source of supply of the receipts. To regulate further the receipts issued under this article, the printer shall transmit all receipts printed for a warehouseman to the Department of Agriculture, so as to enable the Commissioner to maintain an accurate record of the numbers of such receipts and the quantity delivered. It shall be a violation of this article for any warehouseman to issue any warehouse receipt except upon receipts obtained as provided in this Code section. It shall be unlawful for any printer to print any warehouse receipt for any warehouseman licensed under this article without the approval of the Commissioner.

(c) The Commissioner is authorized to permit the use of warehouse receipts obtained prior to March 17, 1959, upon receipt by the Commissioner of proof satisfactory to the Commissioner of the quantities and sources of such receipts held by the warehouseman.

(d) The Commissioner is authorized to accept as full compliance with

this Code section the submission of a sample of the receipts to be printed and a copy of the invoice covering the shipment of such receipts that shows the quantity and quality of the receipts printed for the warehousemen.

(e) The Commissioner is authorized to permit the use of electronic warehouse receipts and to accept as full compliance with this Code section electronic warehouse receipts obtained by warehousemen from insured electronic warehouse receipt providers approved by and under an operational agreement with the Department of Agriculture. A computer printout issued on behalf of a state licensed warehouse by an approved electronic warehouse receipt provider shall be sufficient to comply with this article if such printout is sufficient to meet existing requirements of the electronic warehouse receipt program administered by the United States Department of Agriculture.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 12; Ga. L. 1955, p. 261, § 2; Ga. L. 1959, p. 246, § 3; Ga. L. 1981, p. 656, § 1; Ga. L. 1996, p. 1200, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1998, p. 1384, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2007, p. 462, § 1/SB 220.

Cross references.

Provisions of the "Uniform Commercial Code" dealing with warehouse receipts, § 11-7-201 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.

78 Am. Jur. 2d, Warehouses, § 28 et seq.

C.J.S.

93 C.J.S., Warehousemen and Safe Depositaries, § 37 et seq.

ALR.

Nature and validity of "hedging" transactions on the commodity market, 20 A.L.R. 1422.

Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.

"Warehouse purchase receipt" as bailment or contract of sale, 91 A.L.R. 907.

Validity as against third person of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 A.L.R. 209.

Warehouseman's liability for loss occasioned by failure to issue a proper receipt to depositor, 168 A.L.R. 945.

10-4-20. Essential terms of warehouse receipts; liability for omission.

(a) Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

(1) The location of the warehouse where the goods are stored;

(2) The date of issue of the receipt;

(3) The consecutive number of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(5) The rate of storage charges;

(6) A description of the goods or of the packages containing them;

(7) The signature of the warehouseman, which may be made by his authorized agent;

(8) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership;

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient; and

(10) The amount and rate of insurance on the goods, provided that, if there is no insurance thereon by reason of an agreement with the depositor, the receipt shall be so stamped.

(b) A warehouseman shall be liable to any person injured thereby for all damage caused by the omission from a negotiable receipt of any of the terms required by this Code section.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 13.

Cross references.
Form of warehouse receipts, § 11-7-202.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 32.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 37 et seq.

ALR.
Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 A.L.R. 1112.

10-4-21. Obligation of warehouseman to deliver; effect of loss or damage.

Every warehouseman conducting a warehouse under this article shall, without unnecessary delay, deliver the agricultural product as described on each warehouse receipt issued by him upon a demand made by the holder of a receipt for such agricultural product if the demand be accompanied by:

(1) An offer to satisfy the warehouseman's lien;

(2) An offer to surrender the receipt and, if negotiable, with such endorsements as would be necessary for the negotiation of the receipt; and

(3) An offer to sign, when the product is delivered, an acknowledgment that it has been delivered if such signature is requested by the warehouseman;

provided, however, that where an agricultural product is stored identity preserved, the actual agricultural product shall be delivered; provided, further, that no warehouseman shall be deemed to have violated this Code section by failure to deliver any agricultural product in accordance with its provisions, if such failure is due to loss or damage of the product from a hazard against which insurance is not required under Code Section 10-4-25 and the regulations issued by the Commissioner pursuant thereto and where such loss or damage does not result from a failure of such warehouseman to exercise that degree of care which an ordinarily prudent person would exercise in the care and protection of his own property; and, provided, further, that in case of an insured loss such demand may be satisfied by payment of the market value of the product lost or damaged.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 15; Ga. L. 1982, p. 3, § 10.

Cross references.
Warehousemen's liens generally, §§ 11-7-209, 11-7-210.

JUDICIAL DECISIONS

Warehouseman may be liable without demand. — Although the general rule is that a warehouseman's duty to deliver goods will not arise until there has been a demand, when a demand would clearly have been unavailing, a warehouseman may be held liable for failure to deliver the goods in the absence of any demand. Planters & Citizens Bank v. Home Ins. Co., 786 F. Supp. 977, 1992 U.S. Dist. LEXIS 2517 (S.D. Ga. 1992), aff'd, No. 92-8468, 1993 U.S. App. LEXIS 10340 (11th Cir. Apr. 29, 1993).

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 126 et seq.

Am. Jur. Proof of Facts.
Warehouseman's Failure to Care for Stored Property — Deterioration of Perishable Goods, 20 POF2d 371.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 102 et seq.

ALR.
Law regarding confusion of goods as applied to live stock, 10 A.L.R. 765.

Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.

Statute of limitations governing damage action against warehouseman for loss of or damage to stored goods, 23 A.L.R.2d 1466.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of a perishable nature, 32 A.L.R.2d 910.

Confusion of goods by accident, mistake, or act of a third person, 39 A.L.R.2d 555.

Warehouseman's liability for injury to or destruction of stored goods from floods, heavy rains, or the like, 60 A.L.R.2d 1097.

Sufficiency of warehouseman's precautions to protect goods against fire, 42 A.L.R.3d 908.

10-4-22. Surrender and cancellation of warehouse receipts on delivery.

Except as provided in Code Section 11-7-601, no warehouseman conducting a warehouse under this article shall deliver any agricultural product for which a warehouse receipt has been issued by him unless the receipt has been first surrendered to him. Immediately upon delivery by him of the agricultural product, he shall cancel upon the face thereof such receipt surrendered to him.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 16.

Cross references.
Warehouse receipts, § 11-7-201 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 130 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 107 et seq.

10-4-23. Records of warehousemen.

Every warehouseman conducting a warehouse under this article shall keep for inspection for such period as the Commissioner may prescribe, in a place of safety, complete and correct records of all agricultural products received at the warehouse for storage or delivered therefrom, including a separate account of all such agricultural products owned by the warehouseman, of all warehouse receipts issued by him, and of the receipts returned to and canceled by him.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 17.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 4.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-24. Inspection of records; preservation of records when license terminated.

The Commissioner is authorized through officials, employees, or agents designated by him to inspect all receipt records and inventory records of warehouses under this article. In the event of suspension, revocation, or other termination of a license issued under this article, the former licensee or his successor in interest, if any, shall preserve, for such period of time as may be prescribed by the Commissioner, all such books, papers, accounts, and other records relating to the operation of

the warehouse during the effective period of the license; and such books, papers, accounts, and other records shall be subject to inspection by the Commissioner or his agents, during such period of time as the Commissioner may prescribe.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 19.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-25. When insurance on stored products required.

All agricultural products stored for the producer in their raw or natural state, and cotton in any form stored for the producer, in storage in a warehouse under this article or deposited temporarily in such a warehouse pending storage shall be kept insured at full market value by the warehouseman against loss or damage by fire or lightning and shall have extended coverage, except that cotton shall be insured against loss or damage by fire and lightning only. Such insurance shall be carried in an insurance company or companies of the warehouseman's choice authorized to do business in this state, and evidence of such insurance coverage in form to be approved by the Commissioner of Insurance shall be filed with the Commissioner of Agriculture. Such insurance shall be provided by, and carried in the name of, the warehouseman; provided, however, that a producer depositing or storing agricultural products who does not wish to have his products insured by the warehouseman may relieve the warehouseman of that duty by notifying the warehouseman in writing that he does not wish his agricultural products insured.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 20; Ga. L. 1989, p. 14, § 10; Ga. L. 2024, p. 1052, § 2(42)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "fire or lightning and shall have" for "fire, lightning, and" in the first sentence.
Cross references.
Placement of risk of loss of goods held by bailee, § 11-2-509.

OPINIONS OF THE ATTORNEY GENERAL

Authorized insurer requirement mandatory. — Requirement that the policy be issued by a company "authorized to do business in this state" is mandatory. 1969 Op. Att'y Gen. No. 69-498.

Insurance not required for nonproducers. — This article does not require insurance on agricultural products stored by a warehouseman for other than producers. 1969 Op. Att'y Gen. No. 69-498.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 116 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 62, 92.
ALR.
Right in proceeds of insurance taken out by warehouseman on goods stored, 53 A.L.R. 1409.
Right of owner to sue on fire or marine policy taken out by warehouseman, bailee, or carrier, 61 A.L.R. 720.

10-4-26. Schedules of charges to be filed; changes in charges; special rates for United States; duplication of charges prohibited.

(a) Prior to transaction of any warehouse business at any warehouse under this article and annually thereafter, the warehouseman shall file with the Commissioner a schedule of charges to be made by the warehouse. All charges and regulations affecting such charges made by any warehouse licensed under this article for the storage of agricultural products shall be just, fair, and reasonable. No additional charge shall be made by any such warehouse other than as specified in its filed schedule. No change shall be made in a filed schedule of charges during a current year unless the Commissioner consents thereto. Any upward revision of charges of any such warehouse during any current year shall be applicable only to products received at such warehouse or services performed pursuant to instructions received from the storer after the Commissioner's approval of the upward revisions.

(b) Notwithstanding the provisions of subsection (a) of this Code section, any warehouseman under this article may establish and charge special rates as required by contract with the United States, or any agency of or corporation controlled by the United States, and none of the restrictions or requirements of subsection (a) of this Code section shall apply to such rates.

(c) No warehouseman shall make any charge for any service unless he has then on file a schedule of charges to be made by the warehouse for that service.

(d) No warehouseman shall make a duplicate collection of tariff charges for the first month's service of the warehouseman. It is the intent and purpose of this Code section to prevent a duplication of the collection of such charges in any manner or fashion.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 21; Ga. L. 1959, p. 246, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 66.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 124 et seq.

10-4-27. Certified public weighers to be provided.

All warehouses licensed under this article shall provide not less than one certified public weigher for each warehouse in accordance with Code Sections 10-2-40 through 10-2-54.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 22.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 15.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-28. Scales to be provided; examination; disapproved scales not to be used.

Each warehouse under this article must be equipped with suitable scales in good order and so arranged that all agricultural products for storage can be weighed by the warehouseman. The scales in any such warehouse shall be subject to examination by representatives of the Commissioner and to disapproval by the Commissioner. If the Commissioner disapproves any weighing apparatus, it shall not thereafter be used in ascertaining the weight of agricultural products for the purposes of this article until such disapproval shall be withdrawn.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 23.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 15.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-29. Suspension of license pending investigation or correction of violation; impoundment of records and commodities.

At such time as the Commissioner or supervisor deems there has been a violation of the law and the rules and regulations, he shall have the power and authority, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," to suspend the license of the warehouseman pending the investigation of the violation or until at such time the violation has been corrected to the satisfaction of the Commissioner or supervisor, and during the period of time of any investigation of a violation the Commissioner or supervisor shall have the power and authority to impound all books and records and withhold all commodities from moving until the investigation is completed.

History.
Ga. L. 1956, p. 688, § 3.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-30. Suspension or revocation of license for violation; liquidation proceedings; impoundment of unused receipts.

(a) The Commissioner, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," may suspend or revoke any license issued to any warehouseman to conduct a public warehouse under this article for any violation of or failure to comply with any provisions of this article or the rules and regulations made under this article.

(b) In the event the Commissioner after a hearing finds and determines that a public warehouse is being operated in violation of the laws and regulations and in jeopardy of the public interest, he, in addition to revoking the license to operate such public warehouse, may, in his discretion, file a petition for receivership and liquidation in the superior court of the county in which the warehouse is located.

(c) When any license has been suspended or revoked, the Commissioner or his authorized agents shall have the power and authority to

take possession of all unused state bonded receipts and impound them until such time that said license has been reinstated.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 28; Ga. L. 1956, p. 688, § 4.

Cross references.
Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-31. Publishing lists of licensed and bonded warehouses, license terminations, and findings as to violations.

The Commissioner may publish in print or electronically the names and locations of warehouses licensed and bonded, the names and addresses of persons licensed under this article, and lists of all licenses terminated under this article and the causes therefor. Whenever it is found, under this article, that such warehouseman is not performing the duties imposed on him by this article and the rules and regulations made under this article, the Commissioner may publish in print or electronically his findings.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 18; Ga. L. 1956, p. 688, § 2; Ga. L. 2010, p. 838, § 10/SB 388.

10-4-32. Criminal penalties for violations; immunity of sureties.

(a) Every person who, without lawful authority, shall convert to his own use, or use for purposes of securing a loan, or remove from a warehouse under this article, contrary to this article or the regulations promulgated under this article, any agricultural product received at such warehouse for storage; or who shall forge, alter, counterfeit, simulate, or falsely misrepresent, or without proper authority use any license issued by the Commissioner under this article; or who shall issue or utter a false or fraudulent receipt or certificate of weight or grade or other class for any agricultural product under this article; or change with fraudulent intent in any manner an original receipt or such a certificate subsequent to issuance, shall be guilty of a felony and shall be fined not less than $2,000.00 nor more than $20,000.00 or double the value of the products involved if such double value exceeds $20,000.00, or imprisoned for not less than two years nor more than ten years, or both.

(b) Every person who shall fraudulently alter or falsely represent a sample drawn under this article; or who shall fraudulently grade,

otherwise classify, or weigh, or draw with intent to deceive a false sample of any agricultural product received at any warehouse under this article for storage; or who otherwise shall violate any provision of this article or of the regulations promulgated under this article, shall be guilty of a misdemeanor.

(c) For the purposes of this Code section the bondsman bonding such person or warehouseman shall not be liable for the criminal penalties provided in this Code section.

History.
Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 24.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 143 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 10 et seq., 162.

10-4-33. Duty of persons accepting warehouse receipts to take adequate measures regarding goods.

This article shall not relieve any person, including, but not limited to, any bank, savings and loan, or other financial lending institution, that requires, solicits, or otherwise accepts warehouse receipts issued in accordance with this article as collateral or security for a debt, account, promissory note, or any type of loan from any duty otherwise imposed to take necessary and reasonable adequate measures to ensure that the goods represented by the warehouse receipts are present and accounted for and are in suitable condition.

History.
Code 1981, § 10-4-33, enacted by Ga. L. 1992, p. 2553, § 2.

ARTICLE 2

STATE WAREHOUSE COMMISSIONER; COTTON WAREHOUSING

PART 1

STATE WAREHOUSE COMMISSIONER

10-4-50. Designation of commissioner.

The Commissioner of Agriculture shall be the state warehouse commissioner.

History.
Ga. L. 1918, p. 246, § 1; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-301.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-51. Bond of commissioner.

The state warehouse commissioner shall give bond payable to the Governor and his successors in office for the faithful performance of his duties, in the sum of $25,000.00, such bond to be approved as other bonds of state officers.

History.
Ga. L. 1918, p. 246, § 14; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-302.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-52. Appointment and bonding of necessary employees; promulgation of rules and regulations.

(a) The commissioner shall have the power to appoint graders, officers, clerks, and all necessary employees to carry out this article and fix the salaries of same. He shall also have the power, and is directed, to safeguard the interests of the state by requiring bonds from such officers, clerks, and employees for the performance of their duties.

(b) The commissioner shall also prescribe rules and regulations not inconsistent with the intent and spirit of this article to carry the same into effect.

History.
Ga. L. 1918, p. 246, § 5; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-303.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-53. Actions by and against commissioner; limitations on liability; "linters" not to be stored.

(a) The commissioner shall have power to sue and be sued, plead and be impleaded, upon the same terms as an individual or corporation, the action to be against or by the commissioner, and not as an individual, except in case of tort or neglect of duty, when the action may be upon the bond of the commissioner. Actions may be brought in Fulton County or in the county in which the cause of action shall arise.

(b) The weights, classes, and grades of cotton on storage are, under this article, only guaranteed by the commissioner in favor of those who lend money or buy cotton through the commissioner, provided the commissioner shall not be responsible for such fluctuation in weight as represents ordinary climatic conditions.

(c) Cotton designated as "linters" shall not be received for storage under this article.

History.
Ga. L. 1918, p. 246, § 6; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-305; Ga. L. 1982, p. 3, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-54. Duties of commissioner generally.

It shall be the duty of the commissioner to study the condition under which cotton is grown, harvested, ginned, baled, covered, stored, and marketed and as a result of such investigation to organize a system that will bring about needed reforms and provide for the most economical and scientific handling of this crop from the fields to the mill and, when he shall have determined upon the best system of ginning, baling, and covering, to recommend its adoption by all ginners as fast as practicable, without undue expense.

History.
Ga. L. 1918, p. 246, § 2; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-307.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-55. Acquisition of property; encouraging erection of warehouses.

The commissioner shall have power to acquire property. It shall be his duty to foster and encourage the erection of warehouses in the various counties, upon plans and specifications adopted by him.

History.
Ga. L. 1918, p. 246, § 4; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-306.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-56. Purchase or lease of, or contracting for, compress plant by commissioner.

The commissioner shall have the right to erect, buy, lease, or otherwise contract for a compress plant, or make contract or contracts with existing compress owners for the compression of cotton, as may be necessary in the conduct of the business under this article.

History.
Ga. L. 1918, p. 246, § 11; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-309.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-57. Fire insurance on property owned by or in possession of commissioner.

The commissioner shall insure against fire all buildings, machinery, or other property owned by the commissioner in the name of the state. The commissioner shall have insured all buildings or machinery leased, owned, or in his possession other than the state's property when requested to do so by the owners thereof. Further, he shall effect fire insurance on cotton that may be insured in such warehouses when so requested by the owner or owners thereof in the name of the owner. All insurance obtained by the commissioner under this Code section shall be placed in fire insurance companies authorized by law to do business in this state, provided that the commissioner shall not act in any capacity for any insurance company or receive any compensation from any insurance company, insurance agent, broker, or any person representing any insurance company as aforesaid, by division of commission or otherwise, in connection with the placing of any insurance.

History.
Ga. L. 1918, p. 246, § 23; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-317.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 116 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 92.

10-4-58. Annual report.

(a) The state warehouse commissioner shall make an annual report to the General Assembly, setting forth:

(1) Number and location of each warehouse where cotton has been received for storage by the state;

(2) Cotton on storage and that delivered on presentation of receipts; and

(3) Such further information as the commissioner may think would be of benefit to the public.

(b) The state warehouse commissioner shall not be required to distribute copies of the annual report to the members of the General Assembly but shall notify the members of the availability of the annual report in the manner which he or she deems to be most effective and efficient.

History.
Ga. L. 1918, p. 246, § 13; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-318; Ga. L. 2005, p. 1036, § 2/SB 49.

10-4-59. Cooperation with other states.

The commissioner shall cooperate with other states where a state warehouse system is in operation and promote the formation of an interstate board so that there may be uniformity in handling and marketing the crop in all the states; and the commissioner is authorized to spend such sums as may be necessary for this purpose.

History.
Ga. L. 1918, p. 246, § 21; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-320.

10-4-60. State debt not to be created.

No debt shall be created against the state by reason or operation of this article.

History.
Ga. L. 1918, p. 246, § 22; Code 1933, § 5-319.

Part 2

Storage of Cotton

Cross references.
Stamping of weight on bales or packages of cottonseed hulls, § 2-14-20.

10-4-70. Standards and classifications of cotton.

The state warehouse commissioner shall accept as authoritative the standards and classifications of cotton established by the federal government.

History.
Ga. L. 1918, p. 246, § 3; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-308.

10-4-71. Storing lint cotton; inspection tags; issuance, contents, transfer, and cancellation of receipts.

(a) The state warehouse commissioner may receive for storage lint cotton, properly baled, with an inspection tag showing that it has been legally weighed and that a federal or state grader has graded such cotton.

(b) There shall be receipts issued for such cotton under the seal in the name of the commissioner, stating location of warehouse, identification mark on each bale, its weight and grade, and whether long or short staple, so as to be able to deliver on surrender of receipts the identical cotton for which each was given. The receipt for cotton so

stored is transferable only by written assignment and actual delivery. The cotton which the receipt represents shall be delivered only upon physical presentation of the receipt or satisfactory proof of loss of the receipt. The receipt shall be marked "canceled" when the cotton is taken from the warehouse.

(c) The grades, weights, and identification marks provided for by this article shall be evidenced by tags affixed to the bale of cotton; and the receipts issued must be a duplicate of the identification upon the tags.

History.
Ga. L. 1918, p. 246, §§ 7, 8; Ga. L. 1920, p. 282, § 1; Code 1933, §§ 5-310, 5-311.

Cross references.
Warehouse receipts generally, § 11-7-101 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 28 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 37 et seq., 124 et seq.

10-4-72. Fixing terms and rate of storage.

The state warehouse commissioner shall settle the terms upon which cotton may be stored in the local warehouses coming under this article and fix the rate of storage thereon in such manner that these warehouses shall pay expenses, it being the declared purpose of this article that the system shall be self-sustaining and without cost to the state.

History.
Ga. L. 1918, p. 246, § 9; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-312.

10-4-73. Commissioner may negotiate loans on receipts and sale of stored cotton.

The state warehouse commissioner may, upon the request of the owner of warehouse receipts, negotiate loans upon the same, or make sale of the cotton on storage, and shall notify the holders of cotton of the steps which will be necessary to avail themselves of aid in obtaining loans upon cotton or making sale thereof.

History.
Ga. L. 1918, p. 246, § 10; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-313.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

ALR.
Federal crop loans, 1 A.L.R.2d 712.

10-4-74. Commissioner's charges and commissions.

The state warehouse commissioner shall provide for the cost of maintaining this system by assessing a charge upon each bale of cotton offered for storage, and for negotiation of loans or selling cotton, a commission, all of which charges shall be uniform, and due notice thereof given, it being the declared purpose of this article to operate at cost, without profit to the state.

History.
Ga. L. 1918, p. 246, § 12; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-314.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 66 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 124 et seq.

ALR.
Federal crop loans, 1 A.L.R.2d 712.

10-4-75. Warehouse receipt books; execution and sealing of receipts.

The warehouse receipt books shall be designed by the state warehouse commissioner and furnished the manager of each warehouse. Receipts shall be numbered, and the warehouse receiving such books shall be accountable for each receipt. The receipts in such books may have the lithographed or engraved signature of the state warehouse commissioner, but the name of the manager of the local warehouse shall be signed by the manager with pen and ink. The state warehouse commissioner shall have a seal, which shall be affixed to each receipt.

History.
Ga. L. 1918, p. 246, § 15; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-315.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 28 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 37 et seq., 44 et seq.

10-4-76. Investigation of liens and titles by warehouseman; priority of claim of receipt holder.

(a) If the warehouseman to whom cotton is offered for storage shall have cause to believe there is an adverse lien, title, or claim to the cotton, he shall make reasonable investigation; and to that end he may require the party so offering the cotton for storage to make affidavit in writing as to such liens, adverse title, or claims.

(b) Any transferee or holder for value of any receipt issued under this article, without notice of any adverse lien, title, or claim to the cotton represented by such receipt, shall have a superior claim to the cotton as against such adverse lien, title, or claim, unless the holder of the adverse lien, title, or claim within seven days after the date on which the cotton was so stored in such warehouse shall begin action on such lien, title, or adverse claim in a court of competent jurisdiction, and give to the warehouse where the cotton is stored written notice of such action.

History.
Ga. L. 1918, p. 246, § 20; Code 1933, § 5-316.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 68 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 131 et seq.

10-4-77. Penalty for failure to give notice of lien on cotton.

Any person who shall deposit, or attempt to deposit, cotton upon which a lien, mortgage, or adverse claim exists, without notifying the manager of the warehouse thereof and having this fact so entered on the warehouse receipt, shall be guilty of a misdemeanor.

History.
Ga. L. 1918, p. 246, § 19; Code 1933, § 5-9905.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 69 et seq.

10-4-78. Penalty for false affidavit as to lien on cotton.

Should any party required by Code Section 10-4-76 to make an affidavit as to an adverse lien, title, or claim to cotton offered to a warehouseman for storage make a false affidavit, he shall be guilty of a

felony and, upon conviction thereof, shall be punished by imprisonment and labor in the penitentiary for not less than three years nor more than ten years.

History.
Ga. L. 1918, p. 246, § 20; Code 1933, § 5-9906.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 34.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 162.

10-4-79. Penalties for delivering cotton without production of receipt or failing to cancel receipt.

Any manager, employee, agent, officer, or other person who shall deliver cotton from a warehouse under this article, except upon the production of the receipt therefor, or who shall fail to mark such receipt "canceled" on the delivery of the cotton shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00, or imprisonment for not more than five years in the state penitentiary, or both, in the discretion of the court.

History.
Ga. L. 1918, p. 246, § 18; Code 1933, § 5-9902.

RESEARCH REFERENCES

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 162.

10-4-80. Penalties for issuing receipt for cotton not in warehouse.

The manager of any warehouse, or agent, employee, or servant, who issues or aids in issuing a receipt for cotton, knowing that such cotton has not been actually placed in the warehouse under the control of the manager thereof, shall be guilty of a felony and, upon conviction thereof, shall be punished for each offense by imprisonment in the state penitentiary for a period of not less than one nor more than five years, or by a fine not exceeding $5,000.00.

History.
Ga. L. 1918, p. 246, § 16; Code 1933, § 5-9903.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 34.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 162.

10-4-81. Penalty for issuing duplicate or additional receipt; lost or destroyed receipts.

Any manager, employee, servant, or other person who shall issue or aid in issuing a duplicate or additional receipt for cotton, knowing that the former receipt or any part thereof is outstanding, commits the offense of forgery in the first degree, provided that the party applying for a duplicate, upon the representation that the original has been lost or destroyed, may receive the same upon giving an indemnifying bond to the state warehouse commissioner to protect the commissioner against any loss that might occur thereby.

History.
Ga. L. 1918, p. 246, § 17; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-9904.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 33.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 162.

ARTICLE 3

TOBACCO WAREHOUSING

Administrative rules and regulations.
Licensing Leaf Tobacco Dealers, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Leaf Tobacco Sales, Rule 40-18-2-.01 et. seq.

PART 1

LEAF TOBACCO SALES AND STORAGE

10-4-100. Legislative intent and findings.

(a) It is the intent and purpose of this part to enable producers to have sufficient time to cure, prepare, and market their flue-cured leaf tobacco in a proper and orderly manner. It is found by the General Assembly that the provisions of this part are necessary to the proper marketing of flue-cured leaf tobacco.

(b) It is further found that external disruptive forces and influences upon buyers and sales opportunity have operated to effect discrimination and disadvantage upon flue-cured leaf tobacco producers in this state in the free entry and sale of their tobacco in interstate commerce. It is the intent and purpose of this part to eliminate discrimination in the entry and sale of tobacco in commerce by providing for equitable allocation of sales opportunity and by providing for licensing of flue-cured leaf tobacco auction sales which will optimize the movement and sale in commerce of tobacco produced in this state and eliminate discrimination against such movement and sale.

History.
Ga. L. 1960, p. 214, § 1; Ga. L. 1968, p. 1052, § 1; Ga. L. 1974, p. 518, § 1; Ga. L. 2024, p. 1052, § 2(43)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, designated the existing provisions of this Code section as subsections (a) and (b).

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 5.

10-4-101. Licenses for flue-cured leaf tobacco auction sales; "clean-up" sale licenses.

No person, real or corporate, shall operate, hold, or conduct an auction sale for the sale of flue-cured leaf tobacco within this state without first having obtained a license for the regular selling season in which the sale is made from the Commissioner of Agriculture. Each license so issued shall automatically expire at the end of the regular selling season. The regular selling season shall be deemed to have ended at the close of business on the marketing day any regulatory group or committee shall cause any of the sets of buyers normally assigned to the Georgia flue-cured leaf tobacco auction markets to be withdrawn for the purpose of reassigning them to auction markets in other tobacco belts. The Commissioner, in his or her discretion, may issue additional licenses to warehousemen at the end of the regular selling season as he or she deems necessary and desirable for "clean-up" sales or special sales, such licenses to terminate at the conclusion of the "clean-up" or special sale. The license fee shall be $150.00 for each regular selling season with no additional fee for licenses issued for "clean-up" or special sales. Licenses shall be subject to renewal from one regular selling season to another under such rules and regulations as the Commissioner shall prescribe. Any fees collected pursuant to this

Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

History.
Ga. L. 1960, p. 214, § 2; Ga. L. 1968, p. 1242, § 2; Ga. L. 1970, p. 4, § 1; Ga. L. 1992, p. 1023, § 1; Ga. L. 2010, p. 9, § 1-30/HB 1055.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, §§ 5 et seq., 13 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-102. Physical standards for leaf tobacco warehouses; compliance as prerequisite for license.

In addition to other authority granted him by this part, the Commissioner of Agriculture shall be authorized to promulgate regulations prescribing physical standards for buildings used as warehouses for the storage or sale of leaf tobacco. Such standards shall be reasonably designed to ensure the protection of producers and others from loss or damage to tobacco while held or stored in such warehouses and to provide for the safety and welfare of such persons while upon the warehouse premises. It shall be a prerequisite to the issuance of a license under this part that the applicant has complied with all standards promulgated pursuant to this Code section.

History.
Ga. L. 1972, p. 351, § 1; Ga. L. 1994, p. 97, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-103. Insurance as prerequisite for license.

As a prerequisite to the issuance of a license under this part, each applicant shall furnish evidence to the Commissioner of Agriculture that he has in force a standard fire and extended coverage insurance policy for the full market value of the tobacco in his sales warehouse for the marketing season for which the license is sought. The insurance policy shall be written by an insurance company, of the warehouseman's choice, authorized to transact business in this state, and such insurance coverage shall be approved in form by the Commissioner of Insurance, and a copy of the insurance policy shall be filed with the Commissioner

of Agriculture. The policy shall cover both first-hand and resale tobacco. The insurance policy shall contain an endorsement requiring notification to the Commissioner of Agriculture by the insurance company of its intention to cancel the policy at least ten days prior to cancellation.

History.
Ga. L. 1960, p. 214, § 3; Ga. L. 1970, p. 222, § 1; Ga. L. 1989, p. 14, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 116 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 63 et seq.

10-4-104. Allocating sales opportunities among licensed warehouses.

In the event sales opportunity shall be designated or allocated to this state by any regulatory group or committee, the Commissioner of Agriculture shall be authorized to allocate such sales opportunity among the warehouses operating under license issued under this part in such manner as to effectuate the expressed intent and purpose of this part. The Commissioner may consider, among other factors, the history factor used by the regulatory group or committee for assigning sales opportunity for cross-belt tobacco, the previous five-year sales history of such licensees, and the previous five-year sales history of such licensees of selling Georgia grown tobacco in order to effectuate an allocation which will eliminate or reduce discrimination against producers in this state in the entry and sale of their tobacco in commerce. In recognition of the unique characteristics of the marketing of tobacco by auction, and the necessity of immediate response to marketing conditions, such allocation of sales time need not be effected by the promulgation of regulations but may be issued and published in such manner as the Commissioner deems necessary and expedient, provided that no such allocation shall be effective upon less than 24 hours' actual notice to the affected licensee.

History.
Ga. L. 1974, p. 518, § 3.

10-4-105. Denial of issuance or suspension or revocation of license.

In addition to other authority granted him by this part, the Commissioner of Agriculture shall be authorized to deny issuance of, or to suspend or revoke, any license provided in this part for any violation of this part, or upon a finding that the applicant or licensee has engaged in conduct contrary to the expressed intent and purpose of this part

with respect to discrimination in the sale of tobacco. In the determination of discrimination in the sale of tobacco, the Commissioner is authorized to consider, among other factors, the solicitation of tobacco for auction by an applicant or licensee in such manner as to deplete unreasonably sales opportunity required for the equitable movement and sale of tobacco produced in this state.

History.
Ga. L. 1974, p. 518, § 2.
Cross references.
Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-106. Georgia Tobacco Marketing Act of 1995.

(a) This Code section shall be known and may be cited as "The Georgia Tobacco Marketing Act of 1995."

(b) The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this part shall not exceed the following schedule, to wit:

(1) Reserved;

(2) Reserved;

(3) For commissions on the gross sales of leaf tobacco in said warehouses, not to exceed 3.5 percent of said gross sales.

History.
Ga. L. 1960, p. 214, § 4; Ga. L. 1990, p. 137, § 1; Ga. L. 1995, p. 104, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1935, p. 476, are included in the annotations for this Code section.

Fixing reasonable maximum charges is not an arbitrary and capricious exercise of state power, repugnant to the Fourteenth Amendment of the federal Constitution, as placing a direct burden upon interstate commerce in violation of the commerce clause. Townsend v. Yeomans, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210, 1937 U.S. LEXIS 300 (1937) (decided under former Ga. L. 1935 p. 476).

OPINIONS OF THE ATTORNEY GENERAL

Tobacco sheet program fees. — When the Flue-Cured Tobacco Cooperative Stabilization Corporation intends to establish a program involving the states of Virginia, North Carolina, South Carolina, Georgia, and Florida to purchase, collect, manage, handle, and make necessary repairs to tobacco sheets (burlap sheets used to wrap the bales of tobacco) used in the tobacco industry, a warehouseman may collect a twenty-five cent fee from the seller and the buyer, and, along with the warehouseman's fees for the program, submit such funds to the corporation as such participation would not be in violation of O.C.G.A. § 10-4-106. 1989 Op. Att'y Gen. No. 89-17.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 66.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 124 et seq.

10-4-107. Warehousemen to render itemized statements.

The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale.

History.
Ga. L. 1960, p. 214, § 5.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 16.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.

10-4-107.1. Requirements of tobacco contracts.

(a) As used in this Code section, the term "tobacco contract" means any contract between a tobacco company and a tobacco grower under which the tobacco company contracts to purchase tobacco to be grown by the tobacco grower other than at a tobacco auction.

(b) No tobacco contract for the purchase of tobacco grown in this state shall be valid or binding unless:

(1) The tobacco grower is given the opportunity to have the proposed tobacco contract reviewed outside the business premises of the tobacco company or its agents by an attorney or adviser of the tobacco grower's choosing prior to execution;

(2) The tobacco contract is written in plain English; and

(3) The tobacco contract quotes the provisions of subsection (c) of this Code section.

(c)(1) The tobacco grower shall have a right to cancel a tobacco contract until 12:00 Midnight of the third business day after the day on which the tobacco grower signs the contract.

(2) Notice of cancellation under this subsection shall be given to the tobacco company at the place of business as set forth in the tobacco contract by certified mail or statutory overnight delivery, return receipt requested, which shall be posted not later than 12:00 Midnight on the third business day following execution of the tobacco contract.

(3) In the event of cancellation pursuant to this subsection, the tobacco grower shall refund to the tobacco company within ten days after the cancellation any consideration received by the tobacco grower from the tobacco company under the tobacco contract.

(4) Notice of cancellation given by the tobacco grower need not take any particular form and, however expressed, is effective if it indicates the intention of the tobacco grower not to be bound by the tobacco contract.

History.
Code 1981, § 10-4-107.1, enacted by Ga. L. 2000, p. 561, § 1; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1212, § 2.

Editor's notes.
Ga. L. 2001, p. 1212, § 7, not codified by the General Assembly, provides that the Act is applicable with respect to notices delivered on or after July 1, 2001.

10-4-108. Records and reports by warehousemen.

Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week and shall transmit each report to the Commissioner of Agriculture. The report shall be so arranged and classified as to show the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto, each licensee shall indicate the number of pounds of Type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of Type 14 flue-cured leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than Type 14 flue-cured leaf tobacco sold for producers

and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner.

History.
Ga. L. 1960, p. 214, § 6.

10-4-109. Commissioner of Agriculture to keep sales records; publication.

The Commissioner of Agriculture shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this state. He shall cause such records to be kept in a manner so as to show the number of pounds of Type 14 tobacco sold by each warehouse as well as the number of pounds of other than Type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of Type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner is authorized to cause such information to be published in a manner that he deems most beneficial.

History.
Ga. L. 1960, p. 214, § 7.

10-4-110. [Reserved] Advisory board; creation; membership; compensation; expenses.

History.
Ga. L. 1960, p. 214, § 8; Ga. L. 1970, p. 6, § 1; repealed by Ga. L. 2008, p. 1015, § 2, effective May 14, 2008.

Editor's notes.
Ga. L. 2008, p. 1015, § 2 repealed and reserved this Code section, effective May 14, 2008.

10-4-111. Meetings of advisory board; duties; fixing opening date of marketing season; revocation of license for early sale.

(a) The board shall meet in June of each year, or upon the call of the chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The chairman shall determine the time and place of the meeting.

(b) The board shall recommend to the Commissioner of Agriculture a date for the opening of the tobacco marketing season. The Georgia Commissioner of Agriculture shall invite the Florida Commissioner of Agriculture and one member of the Florida Tobacco Advisory Board to attend meetings of the Georgia Tobacco Advisory Board to submit evidence as to the opening date best suited to meet the needs of the Florida flue-cured leaf tobacco producers. The Commissioner shall cause two members of the Tobacco Advisory Board to attend the

meeting of the board of governors of the Bright Belt Warehouse Association to make known the recommendations as to the opening of the marketing season in Georgia. One of these members shall be a legislative member and the other member a tobacco farmer member of the board.

(c) The Commissioner shall determine and announce the opening date of the tobacco marketing season in this state. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall be revoked in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided in this subsection shall be in addition to the other penalties provided for the violation of this part. It is the intent and purpose of this Code section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture.

History.
Ga. L. 1960, p. 214, § 9; Ga. L. 1970, p. 6, § 2.

10-4-112. Limitations on sales hours and days of warehouses.

(a) The operating day of each flue-cured leaf tobacco warehouse shall not exceed the number of hours required to handle and sell adequately and efficiently the number of pounds or piles of tobacco allowed to be sold each day.

(b) The operating week of such warehouse shall be limited to five actual selling days, provided that no sale shall be held on Saturday or Sunday.

(c) All tobacco warehouses shall be closed on Sunday for the purpose of receiving, unloading, weighing, or placing tobacco on a warehouse floor between the hours of 12:01 A.M., Sunday and 12:01 A.M., Monday.

History.
Ga. L. 1960, p. 214, § 10; Ga. L. 1968, p. 1242, § 3; Ga. L. 1970, p. 4, § 2.

RESEARCH REFERENCES

ALR.
Power of municipal corporation to legislate as to Sunday observance, 37 A.L.R. 575.
Power to extend Sunday observance laws beyond Sunday hours, 50 A.L.R. 628.
Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 A.L.R.4th 246.

10-4-113. Maximum rate of sales.

The maximum rate of sales at any flue-cured leaf tobacco warehouse shall not exceed 500 baskets during any one hour, nor shall the rate of sales during any one day or week exceed 500 baskets per hour.

History.
Ga. L. 1960, p. 214, § 12; Ga. L. 1969, p. 941, § 1.

10-4-114. Auction tobacco dealers; licenses; regulations as to reports and records; refusal, suspension, or revocation of license.

(a) Any person, firm, or corporation purchasing tobacco at auction at any flue-cured leaf tobacco auction sales establishment licensed under this Code section shall be deemed to be a tobacco dealer. It shall be unlawful for any person, firm, or corporation to engage in the business of a tobacco dealer without first having secured a license therefor from the Commissioner of Agriculture. There shall be no charge for such license, which shall be issued on an annual basis. Employees of a licensed tobacco dealer need not be individually licensed.

(b) The Commissioner is authorized to provide by rule or regulation for the filing of reports and records by licensed tobacco dealers containing such information as the Commissioner shall deem necessary for the proper enforcement of this part.

(c) The Commissioner may refuse, suspend, or revoke any such license upon a showing of violation of this part or any rule or regulation promulgated and adopted pursuant to this part.

History.
Ga. L. 1974, p. 518, § 4.

10-4-114.1. [Repealed] Grading by the Agriculture Marketing Service; alternatives if graders unavailable.

History.
Code 1981, § 10-4-114.1, enacted by Ga. L. 2001, p. 900, § 3; repealed by Ga. L. 2005, p. 622, § 1/SB 287, effective July 1, 2005.

Editor's notes.
Ga. L. 2006, p. 72, § 10/SB 465, repealed the reservation of this Code section.

10-4-115. Nonauction tobacco dealers to be licensed; bond or trust fund agreement; records and reports; certified public weighers provided; penalty.

(a) Any person, firm, or corporation purchasing flue-cured leaf tobacco from producers other than at auction sales shall be required to

apply to and obtain from the Commissioner of Agriculture a nonauction tobacco dealer's license prior to engaging in such purchase operations. Such license shall be renewable on an annual basis. There shall be an annual fee for each such license issued by the Commissioner. The amount of such fee shall be established by the Commissioner in an amount not to exceed $150.00 per annum. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. Each applicant for a nonauction tobacco dealer's license shall indicate in writing to the Commissioner each year before the first auction sale of the tobacco-selling season an intent to buy flue-cured leaf tobaccos from producers other than at auction in order to be eligible for a nonauction tobacco dealer's license for that selling season.

(b) Prior to the issuance or renewal of a nonauction tobacco dealer's license to an applicant or a licensee, the applicant or licensee shall post with the Commissioner a surety bond or trust fund agreement in the amount of 20 percent of the total purchases made by the applicant or licensee of flue-cured leaf tobacco from producers other than at auction during the preceding tobacco-selling season. The bond or trust fund agreement shall guarantee the purchases made by the applicant or licensee from producers other than at auction sales and shall in no instance be less than $20,000.00 nor more than $200,000.00.

(c) Each nonauction tobacco dealer shall compile and maintain such records and periodic reports pertaining to the purchase of tobacco from producers other than at auction sales as the Commissioner may require and shall make such records and reports available for inspection by the Commissioner or his representative during any business hours.

(d) It shall be the duty of each licensed nonauction tobacco dealer to provide or have access to a certified public weigher for the weighing of tobacco purchased by a nonauction dealer from producers other than at auction sales.

(e) It shall be unlawful for any person, firm, or corporation to purchase flue-cured leaf tobacco from producers other than at auction sales without complying with this Code section. Any person violating this Code section shall be guilty of a misdemeanor.

History. Ga. L. 1977, p. 189, § 1; Ga. L. 2001, p. 900, § 2; Ga. L. 2010, p. 9, § 1-31/HB 1055.

10-4-116. Inspection of premises and records.

The Commissioner of Agriculture, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such

manner as to show accurately the origin and disposition of each type of flue-cured leaf tobacco.

History.
Ga. L. 1960, p. 214, § 17.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 4.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-117. Certified public weighers to be provided by licensees.

It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises; and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher.

History.
Ga. L. 1960, p. 214, § 18.
Cross references.
Certified public weigher generally, § 10-2-40 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 15.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-117.1. Detention of tobacco; notice; condemnation; cost of testing.

(a) Whenever a duly authorized agent of the Commissioner finds or has probable cause to believe that any tobacco has been treated with any pesticide not currently registered by the United States Environmental Protection Agency or the Commissioner, or both, for use on tobacco or contains a residue of any pesticide or other substance at a level which exceeds the current residue standard established for that pesticide or other substance by the United States Agricultural Stabilization and Conservation Service to protect and ensure the orderly marketing of Georgia grown tobacco, the agent shall affix to such tobacco or otherwise give to the owner or custodian of such tobacco a notice advising that such tobacco is being detained by the Commissioner. Such notice of detention shall apply to all tobacco produced by that grower during that season, including tobacco already harvested or

tobacco to be harvested. It shall be unlawful for any person to remove any such notice affixed to tobacco or to remove or dispose of such tobacco by sale or otherwise without written permission from the Commissioner's agent or a court of competent jurisdiction.

(b) If the Commissioner finds that no residue of pesticides or other substances in the detained tobacco exceeds any residue standard as specified in subsection (a) of this Code section, the Commissioner shall promptly remove all markings from such tobacco and release it from detention, in writing.

(c) When any tobacco detained under subsection (a) of this Code section has been found by the Commissioner to contain any residue in excess of those specified in subsection (a) of this Code section, the Commissioner shall bring an action for condemnation of such tobacco in the superior court of the county where the tobacco is being detained. After the Commissioner has made an initial finding of any residue in the detained tobacco in excess of any residue standard established by the United States Agricultural Stabilization and Conservation Service as provided for in subsection (a) of this Code section, the costs of all subsequent testing which the Commissioner shall require to confirm that residues in such detained tobacco do not exceed any residue standard established by the United States Agricultural Stabilization and Conservation Service shall be borne by the producers and such tests shall be performed only by a laboratory approved by the Commissioner.

History.
Code 1981, § 10-4-117.1, enacted by Ga. L. 1988, p. 373, § 1.

10-4-118. Enforcement of part; notice and hearing in revocation or suspension proceedings.

It shall be the duty of the Commissioner of Agriculture to enforce this part and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. The Commissioner is authorized to revoke or suspend any license or registration issued under this part to any person violating this part or any rule or regulation adopted pursuant to this part, after notice and hearing before the Commissioner in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Ga. L. 1960, p. 214, § 19.

10-4-119. Suspension or revocation of license or registration pending investigation and correction of violation.

At such time as the Commissioner of Agriculture deems there has been a violation of this part and the rules and regulations promulgated under this part, he shall have the power and authority, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," to suspend the license or registration pending investigation of the violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until the investigation is completed; provided, however, that the investigation shall be completed at the earliest practicable time.

History.
Ga. L. 1960, p. 214, § 23.

10-4-120. Enjoining violations.

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court; and such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part. Such injunction shall be issued without bond.

History.
Ga. L. 1960, p. 214, § 20.

10-4-121. Procedure for adopting or changing rules and regulations; administrative review of objections.

(a) Prior to adoption or change of any rules and regulations, the Commissioner of Agriculture shall promulgate the proposed rule or regulation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule or regulation of the Commissioner and who believes that the Commissioner, in the promulgation or enforcement of such rule or regulation, has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or the United States shall have the right to petition the Commissioner for the repeal or rejection

of such rule or regulation by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within 30 days; and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within 30 days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy; and every person affected by any rule or regulation or any act of the Commissioner is required to exhaust this remedy before taking any other steps, except as otherwise provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost.

History.
Ga. L. 1960, p. 214, § 21.

10-4-122. Judicial review of administrative decision.

Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this part or by the state or federal Constitution is entitled to judicial review thereof in accordance with the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," for the judicial review of contested cases.

History.
Ga. L. 1960, p. 214, § 22.

10-4-123. General penalty for violation of part.

Any person who shall violate any provision of this part for which no specific punishment is provided in this part shall be guilty of a misdemeanor.

History.
Ga. L. 1960, p. 214, § 27.

Part 2

Carry-over Leaf Tobacco Storage and Sale

10-4-140. Legislative intent and findings.

It is the intent and purpose of this part to enable producers of

flue-cured leaf tobacco to avail themselves of an adequate and safe method of storing flue-cured leaf tobacco unsold in the year of production until the subsequent selling season for purposes of marketing at that time. It is found by the General Assembly that the provisions specified in this part are necessary to the proper marketing of carry-over flue-cured leaf tobacco.

History.
Ga. L. 1975, p. 1263, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 5.

10-4-141. Definitions.

As used in this part, the term:

(1) "Carry-over tobacco" means any tobacco unsold in the year of its production and held, for whatever reason, in storage until the subsequent selling season for sale in that season.

(2) "Operator" means any person, firm, partnership, or corporation engaged in the receipt for storage or storage, or both, of tobacco unsold in the year of production until the subsequent selling season for sale in that season.

(3) "Producer" means any flue-cured leaf tobacco grower who has tobacco in excess of his current marketing quota which will be eligible for sale during the subsequent selling season.

History.
Ga. L. 1975, p. 1263, § 15.

10-4-142. Licenses for carry-over tobacco services.

No person, real or corporate, shall operate a service for receiving within this state flue-cured leaf tobacco for the purpose of weighing, redrying, and storing said tobacco from the year of production until the subsequent selling season for sale at that time without first having obtained a license from the Commissioner of Agriculture. Each license so issued shall automatically expire at the termination of the storage period and be subject to renewal annually under such rules and regulations as the Commissioner shall prescribe. The license fee shall be $40.00 for each year. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. Licensed operators of flue-cured leaf tobacco auction warehouses may

be licensed without cost under this part upon application to the Commissioner. This part shall not require licensing of any federal agency, its agents, or contractors who receive carry-over tobacco.

History.
Ga. L. 1975, p. 1263, § 2; Ga. L. 2010, p. 9, § 1-32/HB 1055.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 14.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 8, 9.
ALR.
Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 A.L.R.2d 7.

10-4-143. Fire and extended coverage insurance on stored tobacco.

As a prerequisite to the issuance of a license under this part, each applicant shall furnish evidence to the Commissioner of Agriculture that there is in force an insurance policy against loss or damage by fire and such other perils as are commonly insured against under extended coverage provisions, for its full value, upon the best terms obtainable by individual or reporting form blanket policies on the carry-over tobacco to be received for storage or stored, or both, by him in the year for which the license is sought, either provided by the applicant or the actual storer of the tobacco. The insurance policy shall be written by an insurance company, of the applicant's choice, authorized to transact business in this state or in the state where the tobacco is stored. Such insurance policy shall be effective for the entire storage period and shall be approved in form by the Commissioner of Insurance. A copy of the insurance policy shall be filed with the Commissioner of Agriculture.

History.
Ga. L. 1975, p. 1263, § 3; Ga. L. 1989, p. 14, § 10.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 116 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 63 et seq.

10-4-144. Each licensee to be bonded.

As a prerequisite to the issuance of a license under this part, each applicant shall also furnish evidence to the Commissioner of Agriculture that he has in force for the year for which the license is sought a bond issued by a corporate entity authorized to do business in this state

in the penal sum of $10,000.00. The bond shall be conditioned upon the licensee performing all the duties imposed upon him by law and the accounting for the proceeds of all carry-over flue-cured leaf tobacco received by him for storage and for sale.

History.
Ga. L. 1975, p. 1263, § 4.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 83.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, §§ 7, 26 et seq.

10-4-145. Maximum charges and expenses.

The maximum charges and expenses to be maintained by operators under this part receiving tobacco unsold in the year of production to be stored until sold in the subsequent selling season shall not exceed 5¢ per pound for services rendered, if sold on a green-weight basis. If sold on a dry-weight basis, the charges may also include the actual cost of redrying as leaves or strips and shipping charges.

History.
Ga. L. 1975, p. 1263, § 5.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 66 et seq.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 124 et seq.

10-4-146. Licensees to render statements upon receipt of tobacco.

Each licensee shall render to each producer submitting carry-over tobacco for storage until the next selling season at the time of receipt of the tobacco a statement of the amount of tobacco tendered and the amount to be charged for servicing that tobacco other than actual cost of redrying as leaves or strips and shipping charges.

History.
Ga. L. 1975, p. 1263, § 6.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 30.

C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-147. Division of money received above contract sales price plus charges and expenses.

The contract between the operator and producer shall state the percentage division of money received above the contract sales price plus a service charge and processing cost. The producer shall in no event receive less than 50 percent of this sum.

History.
Ga. L. 1975, p. 1263, § 7.

10-4-148. Licensees' records and reports.

Each licensee shall keep a record of the number of pounds of carry-over tobacco received by him for storage until the next selling season, identifying the amount received from each producer. The records shall also show the final disposition of the tobacco, whether redeemed by the producer or sold by operator for the producer at the subsequent selling season. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner of Agriculture in such manner as to show accurately the origin and disposition of the carry-over tobacco. Each licensee shall transmit this information to the Commissioner in such reports as prescribed by him. The licensee shall submit to the Commissioner a copy of all reports he is required by law or regulation to submit to the United States Department of Agriculture — Agricultural Soil Conservation Service.

History.
Ga. L. 1975, p. 1263, § 7.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 4.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-149. Commissioner of Agriculture to keep storage and sale records; publication.

The Commissioner of Agriculture shall cause to be kept and compiled the information submitted to him as to the storage and sale of carry-over tobacco and is authorized to cause the information to be published in a manner that he deems most beneficial.

History.
Ga. L. 1975, p. 1263, § 8.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 5 et seq.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-150. Tender for storage not deemed sale; sale not consummated before next season.

The tendering of carry-over tobacco by producers to operators to be stored until the next selling season shall not be deemed a sale as of the time of the tender. The sale of carry-over tobacco may not be consummated until after the beginning of the subsequent selling season.

History.
Ga. L. 1975, p. 1263, § 9.

10-4-151. Certified public weighers to be provided by licensees.

It shall be the duty of each licensee to provide a certified public weigher for the weighing of carry-over tobacco at the time and place of receipt of the tobacco by operators for storage until the subsequent selling season, and it shall be unlawful for any person who is not a certified public weigher to weigh such tobacco.

History.
Ga. L. 1975, p. 1263, § 10.
Cross references.
Certified public weighers generally, § 10-2-40 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 15.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

10-4-152. Regulations and physical standards for premises; inspection of premises.

The Commissioner of Agriculture shall be authorized to promulgate regulations to implement this part, to accomplish its purposes, and to prescribe physical standards for buildings and premises used for the receipt or storage, or both, of carry-over tobacco. Such standards shall be reasonably designed to ensure the protection of producers and others

from loss or damage to carry-over tobacco when received or held for storage, or both, until the subsequent selling season. It shall be a prerequisite to the issuance of a license under this part that the applicant has complied with all standards promulgated pursuant to this Code section. The Commissioner, or his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary.

History.
Ga. L. 1975, p. 1263, § 11; Ga. L. 2000, p. 136, § 10.

10-4-153. Enforcement of part; revocation or suspension of licenses.

It shall be the duty of the Commissioner of Agriculture to enforce this part and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. The Commissioner is authorized to revoke or suspend, for violation of this part, any license issued under this part after notice and hearing before the Commissioner, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Ga. L. 1975, p. 1263, § 12.
Cross references.
Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

10-4-154. Enjoining violations.

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy at law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court and the court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part. Such injunction shall be issued without bond.

History.
Ga. L. 1975, p. 1263, § 13.

10-4-155. Penalty for violating part or rules or regulations.

Any person who violates any provision of this part or the rules and regulations issued under this part shall be guilty of a misdemeanor.

History.
Ga. L. 1975, p. 1263, § 14.

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Warehouses, § 4.
C.J.S.
93 C.J.S., Warehousemen and Safe Depositaries, § 1 et seq.

Part 3

Tobacco Warehousemen's Associations

Cross references.
Creation and regulation of cooperative associations for marketing of agricultural products, § 2-10-80 et seq.

RESEARCH REFERENCES

ALR.
Right of manufacturer, producer, or wholesaler to control resale price, 32 A.L.R. 1087; 103 A.L.R. 1331; 125 A.L.R. 1335.
Board of trade or similar organization as affected with public interest subjecting it to state regulation, 54 A.L.R. 304.
Delegation of legislative power to nongovernmental agencies as regards prices, wages, and hours, 3 A.L.R.2d 188.

10-4-170. Local boards of trade and state-wide organization of warehousemen authorized.

(a) Tobacco warehousemen licensed and bonded under the laws of this state to operate warehouses for the sale of leaf tobacco at auction are authorized to organize, either as nonstock corporations or as voluntary associations, tobacco boards of trade in the several municipalities of this state in which leaf tobacco is sold on warehouse floors at auction.

(b) Said tobacco warehousemen may also, by majority vote, authorize any nonstock corporation or voluntary association of tobacco warehousemen, in which a majority of such warehousemen in this state are members, to exercise on a state-wide basis the powers and duties provided in this part. In the event there shall be more than one such nonstock corporation or voluntary association in which a majority of such warehousemen are members, that organization possessing the largest number of such members shall be the organization which may be vested with such authority.

History.
Ga. L. 1962, p. 102, § 1; Ga. L. 1972, p. 918, § 1.

10-4-171. Arbitrating organization of board of trade.

In the event there are two such warehousemen in a municipality and in the event the two cannot agree as to the organization of any such board, or cannot agree as to any matter authorized under this part, it shall be the duty of each, upon notice or request by the other, to appoint one disinterested person; and the two persons so appointed shall appoint a third disinterested person; and the three persons so appointed, with the two warehousemen, shall determine the questions involved in the controversy, on failure to agree, by a majority vote.

History.
Ga. L. 1962, p. 102, § 2.

10-4-172. Rules and regulations of boards of trade and state-wide organization.

(a) Each such tobacco board of trade is authorized to make reasonable rules and regulations not in conflict with the laws of this state and the rules and regulations promulgated under the laws of this state for the economical and efficient handling and sale of leaf tobacco at auction on the warehouse floors in the municipality in which the tobacco board of trade is organized under this part.

(b) A state-wide corporation or association, as provided in this part, is authorized to make such reasonable rules and regulations as provided in this part for the economical and efficient handling and sale of leaf tobacco at auction in the several tobacco markets in this state.

History.
Ga. L. 1962, p. 102, § 3; Ga. L. 1972, p. 918, § 2.

10-4-173. Local and state-wide membership fees.

(a) The tobacco boards of trade in the several municipalities in Georgia are authorized to require as a condition to membership therein the payment of a reasonable fee which shall not exceed:

(1) $50.00 in those municipalities in which less than 3 million pounds of tobacco was sold at auction during the year 1960;

(2) $100.00 in those municipalities in which not less than 3 million pounds but less than 10 million pounds of tobacco was sold at auction during the year 1960;

(3) $150.00 in those municipalities in which not less than 10 million pounds but less than 25 million pounds of tobacco was sold at auction during the year 1960;

(4) $300.00 in those municipalities in which 25 million pounds or more of tobacco was sold at auction during the year 1960.

(b) A state-wide corporation or association, as provided in this part, may require as a condition to membership therein the payment of a reasonable fee which shall not exceed $100.00 per 1 million pounds of producers' tobacco sold at auction during the year preceding the year in which the fee is assessed.

History.
Ga. L. 1962, p. 102, § 4; Ga. L. 1972, p. 918, § 3.

10-4-174. Membership in board of trade and state-wide organization as conditions for operating warehouse.

In addition to complying with the laws of this state relative to the operation of tobacco warehouses, local boards of trade may require membership in good standing in the local board of trade as a condition to participate in the business of operating a tobacco warehouse in such municipality; and, in addition thereto, a state-wide corporation or association, as provided in this part, may require membership in such state-wide organization as a condition to participate in the business of operating a tobacco warehouse in this state; and such requirements shall be deemed reasonable requirements by the board of trade or state-wide organization.

History.
Ga. L. 1962, p. 102, § 5; Ga. L. 1972, p. 918, § 4.

10-4-175. Categories of membership; participation in allocating sale time; liability for board's acts.

Membership in the several boards of trade may be divided into categories as the board may provide in its bylaws and may include, in addition to warehousemen, members other than warehousemen. The holder of a membership other than a warehouseman shall not participate in the allocation of sale time among the warehousemen. The board of trade may provide for the participation of membership other than warehousemen in matters other than the allocation of sales time. Members in any of the several boards of trade authorized by this part shall not be responsible or liable for any of the acts, omissions, or commissions of the several tobacco boards of trade except as to the extent of their participation therein. Membership in a state-wide corporation or association, as provided in this part, shall be limited to warehousemen. The holder of a membership in such state-wide organization who is not the operator of a warehouse in this state shall not

participate in the allocation of sales time among the tobacco markets in this state.

History.
Ga. L. 1962, p. 102, § 6; Ga. L. 1972, p. 918, § 5.

10-4-176. Appealing suspension or expulsion from board of trade or state-wide organization.

Any person suspended or expelled from a tobacco board of trade may appeal from such suspension or expulsion to the superior court of the county in which the board of trade is located. Any person suspended or expelled from the state-wide organization provided for in this part may appeal from such suspension or expulsion to the superior court of the county in which the person's warehouse is located. The appeal shall be a de novo investigation by the court, and the court in considering the appeal may make such findings in relation thereto as the circumstances may warrant.

History.
Ga. L. 1962, p. 102, § 7; Ga. L. 1972, p. 918, § 6.

10-4-177. Price fixing or restraint of trade not authorized; regulation of leaf tobacco selling unaffected.

Nothing in this part shall authorize the organization of any association or corporation having for its purpose the control of prices or the making of rules and regulations in restraint of trade or in conflict with the laws of this state or rules and regulations promulgated under such laws. Nothing contained in this part shall supersede, alter, amend, or repeal the authority of the Commissioner of Agriculture to regulate the sale of leaf tobacco as provided by law.

History.
Ga. L. 1962, p. 102, § 8.

ARTICLE 4

CONVENIENCE WAREHOUSING

10-4-190. Short title.

This article shall be known and may be cited as the "Convenience Warehouse Act of 1975."

History.
Ga. L. 1975, p. 1156, § 1.

10-4-191. Definitions; exemption of state licensed or bonded warehouses.

(a) As used in this article, the term:

(1) "Convenience warehouse" means a series of storage spaces contained in one building or in a series of buildings which are designed and used for the purpose of renting or leasing individual storage spaces to persons in order that any person renting or leasing one or more of such individual storage spaces shall have access for the purpose of storing property therein.

(2) "Person" means an individual, corporation, association, partnership, or other organization.

(b) Nothing in this article shall be construed to apply to a public warehouse licensed pursuant to Article 1 of this chapter, as now or hereafter amended, nor to any person engaged in business as a bonded public warehouseman pursuant to law providing for such bonded public warehouseman.

History.
Ga. L. 1975, p. 1156, § 2.

10-4-192. Information required for storage rental or lease; property ownership statement.

(a) Any person engaged in the business of operating a convenience warehouse shall obtain from each person renting or leasing a storage space the following information:

(1) His name, age, home address, and home telephone number, if any;

(2) His social security number, if any;

(3) His driver's license number, if any; and

(4) The name and address of his employer.

(b) In addition to the requirements of subsection (a) of this Code section, any person renting or leasing a storage space from a convenience warehouse shall sign a written document, under oath, that he is the owner of or has legal possession of any property which he intends to store in the storage space rented or leased by him. A copy of the signed document shall be given to the person executing it, and the original thereof shall be retained in the records of the person engaged in the business of operating the convenience warehouse.

(c) The information required by subsections (a) and (b) of this Code section shall be retained by the person engaged in the business of

operating the convenience warehouse for a period of at least one year following the last date on which the storage space was rented or leased to the person covered by such information.

History.
Ga. L. 1975, p. 1156, § 3.

10-4-193. Penalties.

(a) Any person engaged in the business of operating a convenience warehouse who fails to obtain the information required by subsection (a) of Code Section 10-4-192 or who rents or leases a storage space without first obtaining the written document required by subsection (b) of Code Section 10-4-192 or who knowingly and willfully fails to comply with subsection (c) of Code Section 10-4-192 shall be guilty of a misdemeanor.

(b) Any person who intentionally provides any false information pursuant to subsection (a) of Code Section 10-4-192 shall be guilty of a misdemeanor.

(c) Any person who knowingly provides false information in executing the document required by subsection (b) of Code Section 10-4-192 commits the offense of false swearing within the meaning of Code Section 16-10-71.

History.
Ga. L. 1975, p. 1156, § 4.

ARTICLE 5

SELF-SERVICE STORAGE FACILITIES

10-4-210. Short title.

This article shall be known and may be cited as the "Georgia Self-service Storage Facility Act of 2013."

History.
Ga. L. 1982, p. 2286, § 1; Code 1981, § 10-4-210, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61.

10-4-211. Definitions.

For purposes of this article, the term:

(1) "Email" means an electronic message or an executable program or computer file that contains an image of a message that is transmitted between two or more computers or electronic terminals. The term includes electronic messages that are transmitted within or between computer networks.

(2) "Last known address" means the street address, post office box address, or email address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address by hand delivery, verified mail, or email.

(3) "Occupant" means a person, his or her sublessee, successor, or assign entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(4) "Owner" means the operator, lessor, or sublessor of, or person having an ownership interest in, a self-service storage facility; an agent of such operator, lessor, or sublessor; or any other person authorized to manage the facility or to receive rent from an occupant under a rental agreement.

(5) "Personal property" means movable property not affixed to land and includes, but is not limited to, goods, wares, merchandise, motor vehicles, trailers, watercraft, and household items and furnishings.

(6) "Rental agreement" means any agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of a self-service storage facility.

(7) "Self-service storage facility" means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such for the purpose of storing and removing personal property; provided, however, that such term shall not mean a:

(A) Warehouse within the meaning of Article 1 of this chapter, known as the "Georgia State Warehouse Act"; or

(B) Safe-deposit box or vault maintained by banks, trust companies, or other financial entities.

(8) "Verified mail" means certified mail, registered mail, statutory overnight delivery, or other method of mailing or delivery in which the post office or delivery service furnishes proof that the parcel was sent.

History. Ga. L. 1982, p. 2286, § 2; Code 1981, § 10-4-211, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 2004, p. 976, § 1; Ga. L. 2013, p. 555, § 1/SB 61; Ga. L. 2019, p. 789, § 1/SB 97.

10-4-212. Lien of owner of self-service storage facility upon property located at facility; priority; attachment.

The owner of a self-service storage facility and his or her heirs,

executors, administrators, successors, and assigns have a lien upon all personal property located at a self-service storage facility for rent, fees for the late payment of rent, labor, or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to this article. The lien provided for in this Code section is superior to any other lien or security interest except those which are perfected and recorded prior to the date of the rental agreement in Georgia in the name of the occupant, either in the county of the occupant's last known address or in the county where the self-service storage facility is located, except any tax lien as otherwise provided by law and except any lienholder with an interest in the property of whom the owner has knowledge either through the disclosure provision of the rental agreement or through other written notice. The lien attaches as of the date the personal property is brought to the self-service storage facility.

History.
Ga. L. 1982, p. 2286, § 3; Code 1981, § 10-4-212, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2000, p. 136, § 10; Ga. L. 2013, p. 555, § 1/SB 61; Ga. L. 2019, p. 789, § 2/SB 97.

10-4-213. Enforcement of lien without judicial intervention; execution of rental agreement.

(a) Provided that it complies with the requirements of this Code section, an owner may enforce the lien without judicial intervention. The owner shall obtain from the occupant a written rental agreement which includes the following language:

> This agreement, made and entered into this ____ day of _____, ____, by and between _____, hereinafter called Owner, and _____, hereinafter called Occupant, whose last known address is _____. For the consideration hereinafter stated, Owner agrees to let Occupant use and occupy a space in the self-service storage facility, known as _____, situated in the City of _____, County of _____, State of Georgia, and more particularly described as follows: Building # _____, Space # _____, Size _____. Said space is to be occupied and used for the purposes specified herein and subject to the conditions set forth for a period of _____, beginning on the ____ day of _____, ____, and continuing month to month until terminated.
>
> "Space," as used in this agreement, will be that part of the self-service storage facility as described above. Occupant agrees to pay Owner, as payment for the use of the space and improvements

thereon, the monthly sum of $ _____. Monthly installments are payable in advance on or before the first of each month, in the amount of $ _____, and a like amount for each month thereafter, until the termination of this agreement.

If any monthly installment is not paid by the seventh calendar day of the month due, or if any check given in payment is dishonored by the financial institution on which it is drawn, Occupant shall be deemed to be in default.

Occupant further agrees to pay the sum of one month's fees, which shall be used as a clean-up and maintenance fund, and is to be used, if required, for the repair of any damage done to the space and to clean up the space at the termination of the agreement. In the event that the space is left in a good state of repair, and in a broom-swept condition, then this amount shall be refunded to Occupant. However, it is agreed to between the parties that Owner may set off any claims it may have against Occupant from this fund.

The space named herein is to be used by Occupant solely for the purpose of storing any personal property belonging to Occupant. Occupant agrees not to store any explosives or any highly inflammable goods or any other goods in the space which would cause danger to the space. Occupant agrees that the property will not be used for any unlawful purposes and Occupant agrees not to commit waste, nor alter, nor affix signs on the space, and to keep the space in good condition during the term of this agreement.

OWNER HAS A LIEN ON ALL PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE FOR RENT, FEES FOR THE LATE PAYMENT OF RENT, LABOR, OR OTHER CHARGES, PRESENT OR FUTURE, IN RELATION TO THE PERSONAL PROPERTY, AND FOR ITS PRESERVATION OR EXPENSES REASONABLY INCURRED IN ITS SALE OR OTHER DISPOSITION PURSUANT TO THIS AGREEMENT. PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE WILL BE SOLD OR OTHERWISE DISPOSED OF IF NO PAYMENT HAS BEEN RECEIVED FOR A CONTINUOUS THIRTY-DAY PERIOD AFTER DEFAULT. IN ADDITION, UPON OCCUPANT'S DEFAULT, OWNER MAY WITHOUT NOTICE DENY OCCUPANT ACCESS TO THE PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE UNTIL SUCH TIME AS PAYMENT IS RECEIVED. IF ANY MONTHLY INSTALLMENT IS NOT MADE BY THE SEVENTH CALENDAR DAY OF THE MONTH DUE, OR IF ANY CHECK GIVEN IN PAYMENT IS DISHONORED BY THE FINANCIAL INSTITUTION ON WHICH IT IS DRAWN, OCCUPANT IS IN DEFAULT FROM DATE PAYMENT WAS DUE.

I hereby agree that all notices other than bills and invoices shall be given by hand delivery, verified mail, or email at the following addresses:

_____ (hand delivery)

_____ (verified mail)

_____ (email)

and I further understand that I may designate to owner an agent to receive such notice by providing:

_____ (hand delivery)

_____ (verified mail)

_____ (email).

For purposes of Owner's lien: "personal property" means movable property, not affixed to land, and includes, but is not limited to, goods, wares, merchandise, motor vehicles, trailers, watercraft, household items, and furnishings; "last known address" means the street address or post office box address provided by Occupant in the latest rental agreement or the address provided by Occupant in a subsequent written notice of a change of address by hand delivery, verified mail, or email.

Owner's lien is superior to any other lien or security interest, except those which are evidenced by a certificate of title or perfected and recorded prior to the date of this rental agreement in Georgia, in the name of Occupant, either in the county of Occupant's "last known address" or in the county where the self-service storage facility is located, except any tax lien as provided by law and except those liens or security interests of whom Owner has knowledge through Occupant's disclosure in this rental agreement or through other written notice. Occupant attests that the personal property in Occupant's space(s) is free and clear of all liens and secured interests except for _____. Owner's lien attaches as of the date the personal property is brought to the self-service storage facility.

Except as otherwise specifically provided in this rental agreement, the exclusive care, custody, and control of any and all personal property stored in the leased space shall remain vested in Occupant. Owner does not become a bailee of Occupant's personal property by the enforcement of Owner's lien.

If Occupant has been in default continuously for thirty (30) days, Owner may enforce its lien, provided Owner shall comply with the following procedure:

Occupant shall be notified of Owner's intent to enforce Owner's lien by written notice delivered in person, by verified mail, or by email. Owner also shall notify other parties with superior liens or security interests as defined in this rental agreement. A notice given pursuant to this rental agreement shall be presumed sent when it is deposited with the United States Postal Service or the statutory overnight delivery service properly addressed with postage or delivery fees prepaid or sent by email. If Owner sends notice of a pending sale of property to Occupant's last known email address and does not receive a nonautomated response or a receipt of delivery to the email address, Owner shall send notice of the sale to Occupant by verified mail to Occupant's last known address or to the last known address of the designated agent of the Occupant before proceeding with the sale.

Owner's notice to Occupant shall include an itemized statement of Owner's claim showing the sum due at the time of the notice and the date when the sum became due. Owner's notice shall notify Occupant of denial of access to the personal property and provide the name, street address, email address, and telephone number of Owner or its designated agent, whom Occupant may contact to respond to this notice. Owner's notice shall demand payment within a specified time, not less than fourteen (14) days after delivery of the notice. It shall state that, unless the claim is paid, within the time stated in the notice, the personal property will be advertised for public sale to the highest bidder, and will be sold at a public sale to the highest bidder, at a specified time and place.

After the expiration of the time given in Owner's notice, Owner shall publish an advertisement of the public sale to the highest bidder, once a week, for two consecutive weeks, in the legal organ for the county where the self-service storage facility is located. The sale shall be deemed commercially reasonable if at least three (3) independent bidders attend the sale at the time and place advertised. "Independent bidder" means a bidder who is not related to and who has no controlling interest in, or common pecuniary interest with, Owner or any other bidder. The advertisement shall include: a brief and general description of the personal property, reasonably adequate to permit its identification; the address of the self-service storage facility, and the number, if any, of the space where the personal property is located, and the name of Occupant; and the time, place, and manner of the public sale. The public sale to the highest bidder shall take place not sooner than fifteen (15) days after the first publication. Regardless of whether a sale involves the property of more than one Occupant, a single advertisement may be used to advertise the disposal of property at the sale. A public sale includes offering the property on a publicly accessible website that regularly conducts online auctions of personal property. Such sale shall be

considered incidental to the self-storage business and no license shall be required.

If no one purchases the property at the public sale and if Owner has complied with the foregoing procedures, Owner may otherwise dispose of the property and shall notify Occupant of the action taken. Any sale or disposition of the personal property shall be held at the self-service storage facility or at the nearest suitable place to where the personal property is held or stored.

Before any sale or other disposition of personal property pursuant to this agreement, Occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred and thereby redeem the personal property and thereafter Owner shall have no liability to any person with respect to such personal property.

A Purchaser in good faith of the personal property sold to satisfy Owner's lien takes the property free of any rights of persons against whom the lien was valid, despite noncompliance by Owner with the requirements of this agreement.

In the event of a sale, Owner may satisfy his or her lien from the proceeds of the sale. Owner shall hold the balance of the proceeds, if any, for Occupant or any notified secured interest holder. If not claimed within two years of the date of sale, the balance of the proceeds shall be disposed of in accordance with Article 5 of Chapter 12 of Title 44, the "Disposition of Unclaimed Property Act." In no event shall Owner's liability exceed the proceeds of the sale.

If the property upon which the lien is claimed is a motor vehicle, trailer, or watercraft and rent and other charges related to the property remain unpaid or unsatisfied for 60 days following the maturity of the obligation to pay rent, Owner may have the property towed in lieu of foreclosing on the lien. If a motor vehicle, trailer, or watercraft is towed as authorized in this section, Owner shall not be liable for the motor vehicle, trailer, or watercraft or any damages to the motor vehicle, trailer, or watercraft once the tower takes possession of the property.

If the rental agreement contains a limit on the value of property stored in Occupant's storage space, the limit shall be deemed to be the maximum value of the property stored in that space.

(b) A rental agreement may be executed and delivered electronically.

History.

Ga. L. 1982, p. 2286, § 4; Code 1981, § 10-4-213, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 1984, p. 22, § 10; Ga. L. 1992, p. 6, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 2000, p. 425, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 976, § 2; Ga. L. 2005, p. 60, § 10/HB 95; Ga. L. 2013, p. 555, § 1/SB 61; Ga. L. 2019, p. 789, § 3/SB 97; Ga. L. 2024, p. 675, § 1/HB 934, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, designated the existing provisions of this Code section as subsection (a) and added subsection (b).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, commas were inserted preceding and following the phrase "hereinafter called Owner" in the first paragraph of the rental agreement.

Editor's notes.

Ga. L. 2000, p. 425, § 3, not codified by the General Assembly, provides that the amendment to this Code section is applicable to rental agreements entered into on and after July 1, 2000.

10-4-214. Compliance with Servicemembers Civil Relief Act; additional rights, duties, and obligations not impaired; rights under article additional.

If the rental agreement is with a service member, the owner shall comply with all terms of the Servicemembers Civil Relief Act, 50 U.S.C. Section 3901 et seq. Nothing in this article shall be construed as in any manner impairing or affecting the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement. The rights provided by this article shall be in addition to all other rights allowed by law to a creditor against his or her debtor.

History.

Ga. L. 1982, p. 2286, § 5; Code 1981, § 10-4-214, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61; Ga. L. 2019, p. 145, § 1/HB 25.

Cross references.

Additional contracts terminable by service members, § 13-1-16.

JUDICIAL DECISIONS

Storage facility's sale of property pursuant to a rental contract was valid and enforceable and did not require compliance with the sale provisions under the Georgia Self-Service Storage Facility Act, O.C.G.A. § 10-4-210 et seq. Tompkins v. Mayers, 209 Ga. App. 809, 434 S.E.2d 798, 1993 Ga. App. LEXIS 1029 (1993), cert. denied, No. S93C1808, 1993 Ga. LEXIS 1114 (Ga. Nov. 19, 1993).

10-4-215. Rental agreements entered into before July 1, 2013, not affected.

All rental agreements entered into before July 1, 2013, and not extended or renewed after that date and the rights and duties and interests flowing from them shall remain valid and may be enforced or terminated in accordance with their terms or as permitted by any other statute or law of this state.

History.

Ga. L. 1982, p. 2286, § 6; Code 1981, § 10-4-215, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61.

10-4-216. Self-service storage facility not residence; no application of public bonded warehouseman provisions.

(a) No occupant shall use a self-service storage facility for residential purposes.

(b) The provisions of law relative to bonded public warehousemen shall not apply to any owner of a self-service storage facility.

History.
Code 1981, § 10-4-216, enacted by Ga. L. 2019, p. 789, § 4/SB 97.

10-4-217. Late penalty; calculations; application.

(a) Pursuant to the terms of a rental agreement, an owner may charge and collect a fee from an occupant for the late payment of rent that is to be paid under a rental agreement. Such fee shall be no more than $20.00 per month for each month there is a late payment of rent or 20 percent of the monthly rent for each month there is a late payment of rent, whichever is greater.

(b) This Code section shall only apply to rental agreements entered into, extended, or renewed, and the late payment of rent occurring, on or after July 1, 2019.

History.
Code 1981, § 10-4-217, enacted by Ga. L. 2019, p. 789, § 4/SB 97.

10-4-218. Deemed acceptance of rental agreement; notice of termination or nonrenewal; removal of personal property.

(a) If within 14 days of the delivery of a written rental agreement by hand delivery or verified mail by the owner to the occupant the occupant fails to sign such rental agreement, the occupant's continued use of the storage space shall be deemed an acceptance of the rental agreement and such rental agreement shall be enforceable against the occupant as if it had been signed by the occupant, provided said agreement states in bold type no smaller than 12 point font: "THE OCCUPANT'S CONTINUED USE OF THE STORAGE SPACE SHALL BE DEEMED AN ACCEPTANCE OF THE RENTAL AGREEMENT AND SUCH RENTAL AGREEMENT SHALL BE ENFORCEABLE AGAINST THE OCCUPANT AS IF IT HAD BEEN SIGNED BY THE OCCUPANT".

(b) An occupant shall not use a self-service storage facility after the owner has delivered written notice by hand delivery or verified mail of

the termination or nonrenewal of the occupant's rental agreement. Such notice shall provide the occupant with not less than 14 days after delivery of such notice to remove all personal property from the self-service storage facility.

(c) Prior to the occupant's removal of all personal property from a self-service storage facility pursuant to subsection (b) of this Code section, the owner may place reasonable restrictions on the occupant's use of the self-service storage facility, including denying access to the self-service storage facility except for the occupant to remove personal property during the owner's normal business hours. The owner may dispose of any personal property remaining at the self-service storage facility after the date provided in the written notice pursuant to subsection (b) of this Code section.

History.

Code 1981, § 10-4-218, enacted by Ga. L. 2024, p. 675, § 2/HB 934, effective July 1, 2024.

Effective date.

This Code section became effective July 1, 2024.

CHAPTER 5

GEORGIA UNIFORM SECURITIES

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Editor's notes.

Ga. L. 2008, p. 381, § 1/SB 358, effective July 1, 2009, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 10-5-1 through 10-5-23.1, and 10-5-24, and was based on Code 1933, §§ 97-101–97-113, 97-114, 97-115–97-121, 97-9901, enacted by Ga. L. 1973, p. 1202, §§ 1–22; Code 1933, § 97-114.1, enacted by Ga. L. 1974, p. 284, § 17; Ga. L. 1974, p. 284, §§ 1–16, 18, 19; Ga. L. 1975, p. 928, §§ 1–27; Ga. L. 1979, p. 1296, §§ 1–10; Ga. L. 1981, p. 840, § 1; Ga. L. 1981, p. 1583, § 1; Ga. L. 1982, p. 3, § 10; Ga. L. 1982, p. 1178, § 1; Ga. L. 1983, p. 781, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 529, §§ 2–5; Ga. L. 1985, p. 149, § 10; Ga. L. 1986, p. 1559, §§ 1–8; Ga. L. 1987, p. 3, § 10; Ga. L. 1987, p. 191, § 9; Ga. L. 1987, p. 439, § 1; Code 1981, § 10-5-23, enacted by Ga. L.

1987, p. 984, § 1; Ga. L. 1988, p. 1290, §§ 1–10; Code 1981, § 10-5-23.1, enacted by Ga. L. 1988, p. 1290, § 11; Ga. L. 1989, p. 14, § 10; Ga. L. 1990, p. 1332, §§ 1–5; Ga. L. 1990, p. 1534, §§ 1–16; Ga. L. 1992, p. 6, § 10; Ga. L. 1994, p. 860, §§ 1, 2; Ga. L. 1997, p. 143, § 10; Ga. L. 1998, p. 1617, §§ 1–9; Ga. L. 1999, p. 329, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 792, §§ 1–4.

Cross references.

Applicability to chapter of laws pertaining to sales of business opportunities, § 10-1-417.

Provisions regarding status of investment securities as negotiable instruments, § 11-8-101 et seq.

Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, § 13-9-1 et seq.

Creation, classification, and issuance of shares of corporations, § 14-2-601 et seq.

Uniform transfer on death security registration, § 53-5-60 et seq.

Administrative rules and regulations.

General Provisions, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-1-.01 et seq.

Exemptions, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-2-.01 et seq.

Registration of Securities, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-3-.01 et seq.

Investment Advisors and Representatives, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-4-.01 et seq.

Brokers-Dealers and Agents, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-5-.01 et seq.

Rules Governing Administrative Hearings, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-6-.01 et seq.

Law reviews.

For article discussing the Georgia Securities Act of 1957, see 9 Mercer L. Rev. 332 (1958).

For article advocating uniformity in securities regulation within the states and adoption of the Uniform Act in Georgia, see 22 Ga. B. J. 437 (1960).

For note discussing preincorporation and postincorporation securities transactions exempt from regulation, see 26 Ga. B. J. 461 (1964).

For article advocating revision of former Georgia Securities Act, see 4 Ga. L. Rev. 341 (1970).

For article, "The Regulation of Franchising Under the Securities Laws," see 6 Ga. St. B. J. 357 (1970).

For article, "A Survey of the Georgia Securities Act of 1973," see 10 Ga. St. B. J. 219 (1973).

For article surveying the Georgia Securities Act of 1973 and the 1974 amendments thereto, see 25 Mercer L. Rev. 601 (1974).

For article, "Real Estate Syndications As Securities in Georgia — A Review and Comments on the Recent Opinion of the Attorney General," see 11 Ga. St. B. J. 80 (1974).

For article, "A Response: Real Estate Syndications as Securities in Georgia," see 11 Ga. St. B. J. 153 (1975).

For article discussing provisions pertaining to the regulation of time-shared interests in property ownership, see 12 Ga. St. B. J. 75 (1975).

For article discussing regulation in this state of oil and gas offerings exempt under Regulation B of the Federal Securities and Exchange Commission, and offering proposals for regulations to meet problems posed thereby, see 12 Ga. St. B. J. 149 (1976).

For article, "Securities Investigations Under the Georgia Securities Act," see 17 Ga. St. B. J. 14 (1980).

For article, "Securities," see 32 Mercer L. Rev. 1125 (1981).

For article discussing utility of the central securities broker-dealer registration system (CRD), see 18 Ga. St. B. J. 47 (1981).

For comment, "Insider Trading, the Contemporaneous Trader, and the Corporate Acquirer: Entitlement to Profits Disgorged by the SEC," see 40 Emory L.J. 537 (1991).

For article, "Rereading Section 16(b) of the Securities Exchange Act," see 27 Ga. L. Rev. 183 (1992).

For annual survey article on business associations, see 45 Mercer L. Rev. 53 (1993).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1920, p. 250, Ga. L. 1957, p. 134, and Ga. L. 1973, p. 1202, as amended, which were subsequently repealed but were succeeded by provisions in this chapter, are included in the annotations for this chapter.

Constitutionality. — Criminal provisions of the former chapter were not vague, ambiguous, or contradictory, and an indictment thereunder was not void. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

Criminal provisions not exclusive. — Criminal provisions were not intended by the legislature to be exclusive, as the provisions would ordinarily be, but only cumulative. Cohen v. State, 101 Ga. App. 23, 112 S.E.2d 672, 1960 Ga. App. LEXIS 775 (1960) (decided under former Ga. L. 1957, p. 134, as amended).

Purpose and intent was to prohibit organizers and promoters, whether foreign or domestic, who organize and promote the sale of what is commonly known as "blue sky stock," from doing business without complying with the statutory provisions, and to guard and protect an unsuspecting and trusting public from what are commonly known as "wild cat" organizers and promoters and their agents. Ratliffe v. Hartsfield Co., 181 Ga. 663, 184 S.E. 324, 1935 Ga. LEXIS 174 (1935) (decided under former Ga. L. 1920, p. 250, as amended).

Liberal construction. — Since the former provisions were remedial in nature, it was to be construed broadly to effectuate its aim — protection of investors. Fortier v. Ramsey, 136 Ga. App. 203, 220 S.E.2d 753, 1975 Ga. App. LEXIS 1297 (1975) (construing former Ga. L. 1957, p. 134, as amended); Jaciewicki v. Gordarl Assocs., 132 Ga. App. 888, 209 S.E.2d 693, 1974 Ga. App. LEXIS 1861 (1974); Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977); Novatex Sales, Inc. v. Prince, 159 Ga. App. 559, 284 S.E.2d 65, 1981 Ga. App. LEXIS 2693 (1981) (decided under Ga. L. 1973, p. 1202).

Exemptions are strictly construed. — Exemptions from the securities laws are to be strictly construed, and one who claims the exemption bears the burden of proving the exemption's availability. Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under Ga. L. 1973, p. 1202).

Law was intended for protection of investors and was designed to disclose relevant and material facts to the investor, any exception to a disclosure requirement was to be narrowly construed. Novatex Sales, Inc. v. Prince, 159 Ga. App. 559, 284 S.E.2d 65, 1981 Ga. App. LEXIS 2693 (1981) (decided under Ga. L. 1973, p. 1202).

Investor in stock index futures. — Due to the preclusive and preemptive operation of the federal commodities laws, investor in stock index futures had no claim against broker and account executive under the federal or state securities laws. Mallen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 1105, 1985 U.S. Dist. LEXIS 21328 (N.D. Ga. 1985) (decided under former O.C.G.A. Ch. 5, T. 10).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions,

opinions under former Ga. L. 1957, p. 134 and Ga. L. 1973, p. 1202, as amended, which were subsequently repealed but were succeeded by provisions in this chapter, are included in the annotations for this chapter.

Law was concerned with substance, rather than with form. 1970 Op. Att'y Gen. No. U70-25 (decided under former Ga. L. 1957, p. 134, as amended).

In determining the applicability of the former chapter, it was the substance and not the form of the offering which was determinative. 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134).

Former law continues to govern securities registered under it. — Bonds which are filed in connection with registrations under Georgia Securities Act of 1957, Ga. L. 1957, p. 134, continue to be governed by the 1957 Act, and bonds filed in connection with a registration or renewal after the effective date of Ga. L. 1973, p. 1202, April 1, 1974, must comply with and will be governed by the latter statute. 1973 Op. Att'y Gen. No. 73-159 (decided under Ga. L. 1973, p. 1202).

Chapter does not apply if no sale occurs in Georgia. — Georgia courts would probably hold that the securities registration provisions do not apply to transactions involving a Georgia issuer where no sale or offer to sell occurs within Georgia. 1970 Op. Att'y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

Activities in Georgia may bring transaction under chapter. — If certain activities, as to registration of dealers and salesperson, are carried on in Georgia, this could bring transactions involving a Georgia issuer under the law of this state. 1970 Op. Att'y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

Any security offered must be registered unless exempted. — Unless exempted or involved in an exempt transaction, securities offered for sale must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under Ga. L. 1957, p. 134, as amended).

It does not necessarily follow that a scheme which constitutes a "security" must always be registered with the commissioner of securities; if a scheme falls within any of the exemptions provided by law or if the sale of such a scheme fits any of the exempt transactions, the registration requirements would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

Any person offering securities must be registered. — A person who engages in the business of selling mortgage securities to the public is required to register as a dealer, and the individuals who work for such a dealer are required to register as sales people unless the individuals qualify for one of the exemptions enumerated in Ga. L. 1973, p. 1202, § 3 (see now O.C.G.A. § 10-5-3). 1974 Op. Att'y Gen. No. 74-153 (decided under Ga. L. 1973, p. 1202).

Sale of scotch whiskey investments in Georgia would be a transaction subject to this chapter, and both the investment and the sellers must be registered pursuant to this chapter unless they qualify for some exemption from registration. 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134, as amended).

Sale of time-sharing units in a condominium, when coupled with a rental pool or other profit-sharing arrangement, constitutes a "security" within the definition of former Code 1933, § 97-102 (see former O.C.G.A. § 10-5-2(a)(16)) and, unless exempt, must be registered pursuant to Ga. L. 1973, p. 1202 (see former O.C.G.A. Ch. 5, T. 10); any person offering for sale or selling such securities that are subject to registration must register as a dealer, limited dealer, salesperson, or limited salesperson under Ga. L. 1973, p. 1202 (see former O.C.G.A. Ch. 5, T. 10) unless such a person is a real estate broker or salesperson licensed to sell real estate in Georgia. 1976 Op. Att'y Gen. No. 76-75 (decided under former Ga. L. 1973, p. 1202).

Foreign corporation needs certificate of authority. — Registration as a dealer does not exempt a foreign corporation from needing a certificate of authority. 1975 Op. Att'y Gen. No. 75-38 (decided under former Ga. L. 1973, p. 1202).

All material facts must be disclosed. — Any person who sells

mortgage securities is required to fully and truthfully disclose all material facts concerning the value and risks of the investment. 1974 Op. Att'y Gen. No. 74-153 (decided under former Ga. L. 1973, p. 1202).

Secretary of State may not retain fees. — Fees collected by the Secretary of State as the commissioner of securities must be paid to the Fiscal Division of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), and such fees may not be retained by the Office of Secretary of State as reimbursements for the expenses of that office. 1969 Op. Att'y Gen. No. 69-13 (decided under former Ga. L. 1957, p. 134, as amended).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Fraudulent Representations Inducing the Purchase of a Small Business, 30 POF3d 1.

Am. Jur. Trials.

Broker-Dealer Fraud: Churning, 36 Am. Jur. Trials 1.

ALR.

Right of broker to repledge customer's securities, 24 A.L.R. 452.

Rights inter se of customers whose securities have been repledged by broker, 24 A.L.R. 479; 48 A.L.R. 803; 76 A.L.R. 794.

Section 20a of Interstate Commerce Act (in relation to issuance of securities by carriers) as limitation on powers of state, 57 A.L.R. 671.

Measure of damages for broker's breach of contract with customer as to sales and purchases of stocks on the exchange, 63 A.L.R. 305.

Blue Sky Laws, 87 A.L.R. 42.

Legal aspects of transactions in securities "when issued" or "when, as and if" issued, 88 A.L.R. 311.

What constitutes stock, securities, or investment contracts within contemplation of state and federal statutes regulating sale of securities, 163 A.L.R. 1050.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 A.L.R.3d 1401.

What amounts to participation by corporate officer or agent in illegal issuance of security, in order to impose liability upon him under state securities regulations, 44 A.L.R.3d 588.

Commodities broker's state-law duties to customers, 55 A.L.R.4th 394.

Lockup option defense to hostile corporate takeover, 66 A.L.R.4th 180.

Construction and application of preemption exemption, under Employee Retirement Income Security Act (29 USCS §§ 1001, et seq.), for state laws regulating insurance, banking, or securities (29 USCS § 1144(b)(2)), 87 A.L.R. Fed. 797.

Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under Federal Securities Laws, 112 A.L.R. Fed. 141.

ARTICLE 1

GENERAL PROVISIONS

10-5-1. Short title.

This chapter shall be known and may be cited as the "Georgia Uniform Securities Act of 2008."

History.

Code 1981, § 10-5-1, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2024, p. 1052, § 2(44)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "known" for "known as" in this Code section.

Law reviews.

For survey article on business associations, see 60 Mercer L. Rev. 35 (2008).

JUDICIAL DECISIONS

Complaint alleging mishandling of stock transfer. — Trial court properly denied the defendants' motions to dismiss the complaint for failure to state a claim because the plaintiff satisfied minimal pleading requirements necessary to survive motions by adequately alleging a deprivation of rightful ownership of 9,479 shares of stock due to the defendants' individual and collective conduct and that the defendants failed to exercise ordinary care in the surrender, transfer, exchange and disbursement of shares. Depository Trust & Clearing Corp. v. Jones, 348 Ga. App. 474, 823 S.E.2d 558, 2019 Ga. App. LEXIS 26 (2019).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

22 Am. Jur. Pleading and Practice Forms, Securities Regulation, § 2 et seq. 22A Am. Jur. Pleading and Practice Forms, Securities Regulation, § 35 et seq.

ALR.

What gives rise to right of recession under state blue-sky laws, 52 A.L.R. 5th 491.

Investigative authority of administrative agencies in state regulation of securities, 58 A.L.R.5th 293.

State regulation of viatical life insurance programs, viatical settlements, and viatical investments, 28 A.L.R.6th 281.

Effect of asset freeze obtained by Securities and Exchange Commission on attorney's fees paid or owed by company subject to freeze, 161 A.L.R. Fed. 233.

10-5-2. Definitions.

As used in this chapter, the term:

(1) "Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or who represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer, or director of a broker-dealer or issuer or an individual having a similar status or performing similar functions may be an agent if the individual performs the duties of an agent. This term does not include an individual excluded by rule adopted or order issued under this chapter.

(2) "Bank" means:

(A) A banking institution organized under the laws of the United States;

(B) A member bank of the Federal Reserve System;

(C) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United

States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of P. L. 87-722, 12 U.S.C. Section 92a, and which is supervised and examined by a state or federal agency having supervision over banks and which is not operated for the purpose of evading this chapter; or

(D) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (A), (B), or (C) of this paragraph.

(3) "Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(A) An agent;

(B) An issuer;

(C) A bank, trust company, credit union, or savings institution if its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi) and (viii) through (x) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4); subsection 3(a)(4)(B)(xi) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4) if limited to unsolicited transactions; or subsections 3(a)(5)(B) and 3(a)(5)(C) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(5), or a bank that satisfies the conditions described in subsection 3(a)(4)(E) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4);

(D) An international banking institution; or

(E) A person excluded by rule adopted or order issued under this chapter.

(4) "Central Registration Depository" means a computerized data base that contains information about most brokers, their representatives, and the firms they work for. It can be used to find out if brokers are properly licensed and if they have had previous disputes with regulators or received serious complaints from investors.

(5) "Credit union" means any credit union incorporated under the laws of this state, the United States, or any state or territory of the United States or the District of Columbia.

(6) "Commissioner" means the Secretary of State of Georgia.

(7)(A) "Depository institution" means:

(i) A bank; or

(ii) A savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund or a successor authorized by federal law.

(B) The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A Morris Plan bank; or

(iii) An installment loan company that is not an "insured depository institution" as defined in subsection 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. Section 1813(c)(2), or any successor federal statute.

(8) "Federal covered investment adviser" means a person registered under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq.

(9) "Federal covered security" means a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933, 15 U.S.C. Section 77r(b), or rules or regulations adopted pursuant to that provision.

(10) "Filing" means the receipt under this chapter of a record by the Commissioner or a designee of the Commissioner.

(11) "Fraud," "deceit," or "defraud" is not limited to common law deceit.

(12) "Guaranteed" means guaranteed as to payment of all principal and all interest.

(13) "Institutional investor" means any of the following, whether acting for itself or for others in a fiduciary capacity:

(A) A depository institution or international banking institution;

(B) An insurance company;

(C) A separate account of an insurance company;

(D) An investment company as defined in the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq.;

(E) A broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.;

(F) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of $10 million or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., that is a broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., an investment adviser registered under this chapter, a depository institution, or an insurance company;

(G) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees if the plan has total assets in excess of $10 million or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., that is a broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., an investment adviser registered under this chapter, a depository institution, or an insurance company;

(H) A trust if it has total assets in excess of $10 million, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (F) or (G) of this paragraph, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(I) An organization that is not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $10 million, including an organization described in subsection 501(c)(3) of the Internal Revenue Code, 26 U.S.C. Section 501(c)(3), a corporation, a Massachusetts trust or similar business trust, a limited liability company, or a partnership;

(J) A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958, 15 U.S.C. Section 681(c), with total assets in excess of $10 million;

(K) A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, 15

U.S.C. Section 80b-2(a)(22), with total assets in excess of $10 million;

(L) A federal covered investment adviser acting for its own account;

(M) A qualified institutional buyer as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H),17 C.F.R. 230.144A, adopted under the Securities Act of 1933,15 U.S.C. Section 77a, et seq.;

(N) A major United States institutional investor as defined in Rule 15a-6(b)(4)(I), 17 C.F.R. 240.15a-6, adopted under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.;

(O) Any other person, other than an individual, of institutional character with total assets in excess of $10 million not organized for the specific purpose of evading this chapter; or

(P) Any other person specified by rule adopted or order issued under this chapter.

(14) "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

(15) "Insured" means insured as to payment of all principal and all interest.

(16) "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.

(17) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analysis or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(A) An investment adviser representative;

(B) A lawyer, accountant, engineer, or teacher whose perfor-

mance of investment advice is solely incidental to the practice of the person's profession;

(C) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(D) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(E) A federal covered investment adviser;

(F) A bank or savings institution;

(G) A credit union;

(H) Any other person that is excluded by the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., from the definition of investment adviser; or

(I) Any other person excluded by rule adopted or order issued under this chapter.

(18) "Investment Adviser Registration Depository" means an electronic filing system that facilitates investment adviser registration, regulatory review, and the public disclosure information of investment adviser firms.

(19) "Investment adviser representative" means an individual employed by or associated with an investment adviser or federal covered investment adviser who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(A) Performs only clerical or ministerial acts;

(B) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(C) Is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in this state as that term is defined by rule adopted under Section 203A

of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-3a, and is:

(i) An investment adviser representative as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-3a; or

(ii) Not a supervised person as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-2(a)(25); or

(D) Is excluded by rule adopted or order issued under this chapter.

(20) "Issuer" means a person that issues or proposes to issue a security, subject to the following:

(A) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;

(B) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate; or

(C) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty is the owner of an interest in the lease or in payments out of production under a lease, right, or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale.

(21) "Nonissuer transaction" or "nonissuer distribution" means a transaction or distribution not directly or indirectly for the benefit of the issuer.

(22) "Offer to purchase" includes an attempt or offer to obtain or solicitation of an offer to sell a security or interest in a security for value. The term does not include a tender offer that is subject to Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78n(d).

(23) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association;

joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(24) "Place of business" of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(A) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(B) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients.

(25) "Predecessor Act" means Chapter 5 of this title, the "Georgia Securities Act of 1973," as it existed immediately prior to July 1, 2009.

(26) "Price amendment" means the amendment to a registration statement filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., or, if an amendment is not filed, the prospectus or prospectus supplement filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(27) "Principal place of business" of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser.

(28) "Record," except in the phrases "of record," "official record," and "public record," means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(29) "Sale" includes every contract of sale, contract to sell, or disposition of a security or interest in a security for value. Offer to sell includes every attempt or offer to dispose of or solicitation of an offer to purchase a security or interest in a security for value. Both terms include:

(A) A security given or delivered with or as a bonus on account of a purchase of securities or any other thing constituting part of

the subject of the purchase and having been offered and sold for value;

(B) A gift of assessable stock involving an offer and sale; and

(C) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security.

(30) "Securities and Exchange Commission" means the United States Securities and Exchange Commission.

(31) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. The term:

(A) Includes both a certificated and an uncertificated security;

(B) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period;

(C) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq.;

(D) Includes as an investment contract an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor where common enterprise means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(E) Includes as an investment contract, among other contracts,

an interest in a limited partnership or a limited liability company and an investment in a viatical settlement or similar agreement.

(32) "Self-regulatory organization" means a national securities exchange registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., a national securities association of broker-dealers registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., a clearing agency registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or the Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.

(33) "Sign" means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach or logically associate with the record an electronic symbol, sound, or process.

(34) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

History.
Code 1981, § 10-5-2, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2020, p. 156, § 8/SB 462.

Cross references.
Designation of Secretary of State as commissioner of securities, § 10-5-10.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, "July 1, 2009" was substituted for "the effective date of this chapter" in paragraph (25).

Editor's notes.
Ga. L. 2020, p. 156, § 10/SB 462, not codified by the General Assembly, provides that: "This Act shall apply to all installment loan agreements entered into on and after July 1, 2020."

Law reviews.
For note, "Regulation of the Franchise as a Security," see 19 J. of Pub. L. 105 (1970).

For note discussing the classification of pyramid marketing scheme contracts as securities prior to enactment of Georgia Securities Act of 1973, see 21 J. of Pub. L. 445 (1972).

For note discussing standards used by Georgia courts to define securities, and their application, see 31 Mercer L. Rev. 333 (1979).

For comment, the purchase of all the shares of stock of a business is not the purchase of a "security" within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

For article on the definition of a security in light of the "Georgia Securities Act of 1973" and the need for maximizing investor protection, see 30 Emory L.J. 73 (1981).

For article, "Uniformity under the Securities Laws: Regulation D and the New Georgia Uniform Limited Offering Exemption," see 19 Ga. St. B. J. 74 (1982).

For note, "The Economic Realities of Condominium Registration Under the Securities Act of 1933," see 19 Ga. L. Rev. 747 (1984).

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
"Sale" or "Sell"
"Salesman"
"Security"

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1920, p. 250, Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-102, former O.C.G.A. § 10-5-2, and under 15 U.S.C. § 77(b), which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

Commodity futures dealer not a "dealer". — One who deals in commodity futures is not a "dealer" in securities. Monarch Co. v. Weis, 86 Ga. App. 7, 70 S.E.2d 600, 1952 Ga. App. LEXIS 855 (1952) (decided under former Ga. L. 1920, p. 250, as amended).

"Issuers". — Persons who procure contracts of subscription to the stock of a proposed corporation not in esse but which may be organized in the future are not "issuers" of such stock within the intent and meaning of that term as defined in the securities law. Felton v. Highlands Hotel Co., 165 Ga. 598, 141 S.E. 793, 1928 Ga. LEXIS 35 (1928) (decided under former Ga. L. 1920, p. 250).

"Sale" or "Sell"

Term "sale" or "sell" is not limited to technical common-law sales or transactions ordinarily governed by the commercial law of sales. Peoples Bank v. North Carolina Nat'l Bank, 139 Ga. App. 405, 228 S.E.2d 334, 1976 Ga. App. LEXIS 1827 (1976) (construing similar federal provision, 15 U.S.C. § 77b(3)).

Promissory note was a security. — Borrowers did not commit fraud upon a lender; the borrowers advised the lender that the lender's $150,000 would fund the corporation until the borrowers secured $1.5 million to build the necessary greenhouses, and the borrowers payment of salaries to themselves of $600 per week each was not inconsistent with the borrowers stated purpose. Because there was no intent to defraud, the borrowers were not liable for securities fraud under O.C.G.A. § 10-5-50, although the promissory note was a security under O.C.G.A. § 10-5-2. Sims v. Natural Prods. of Ga., LLC, 337 Ga. App. 20, 785 S.E.2d 659, 2016 Ga. App. LEXIS 248 (2016).

Payment may be made in any medium which the payor and the payee regard as equivalent to money, such as goods, chattels, securities, lands, services, credits, or bank notes. Utzman v. Caribbean & S.E. Dev. Corp., 107 Ga. App. 56, 129 S.E.2d 62, 1962 Ga. App. LEXIS 568 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

Payment by crypto-currency. — Defendants' motion to dismiss was denied, in part, because the crypto-currency was an unregistered security and defendants' offer to purchase the plaintiff's home with the crypto-currency constituted an offer to sell an unregistered security; thus, the complaint stated a violation of the Georgia Uniform Securities Act, O.C.G.A. § 10-5-1 et seq. Shea v. Best Buy Homes, 533 F. Supp. 3d 1321, 2021 U.S. Dist. LEXIS 137995 (N.D. Ga. 2021).

Cancelling or assuming debt as payment. — Payment may be made by cancelling an existing debt owed one by the creditor of another, whether by request or compulsion, or by rendering an account which makes the person rendering it liable for another's debt. Utzman v. Caribbean & S.E. Dev. Corp., 107 Ga. App. 56, 129 S.E.2d 62, 1962 Ga. App. LEXIS 568 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

Determining whether "sale" occurred in Georgia. — Former Code 1933, § 102-108 did not limit the

application of the statutory security provisions; thus, whether a "sale" within the meaning of the statutory security provisions occurred in Georgia must be decided on basic principles. Allen v. Smith & Medford, Inc., 129 Ga. App. 538, 199 S.E.2d 876, 1973 Ga. App. LEXIS 1044, 1973 Ga. App. LEXIS 1686, 1973 Ga. App. LEXIS 1695 (1973) (decided under former Ga. L. 1957, p. 134, as amended).

Although one defendant testified that the plaintiff agreed to lend $50,000.00 in Florida, the agreement which concerned the debenture or security sets forth that the agreement was entered into in Atlanta, Georgia, and that the plaintiff, who resided in Georgia, executed the contract in Georgia and received the stock in Georgia; thus, there was a "sale" in Georgia. Allen v. Smith & Medford, Inc., 129 Ga. App. 538, 199 S.E.2d 876, 1973 Ga. App. LEXIS 1044, 1973 Ga. App. LEXIS 1686, 1973 Ga. App. LEXIS 1695 (decided under former Ga. L. 1957, p. 134, as amended).

After Texas residents sent a Georgia resident letters, brochures and other materials regarding a cattle feeding and sales investment program and, during a telephone conversation, solicited a cash downpayment from the Georgia resident, who then transferred the payment from the Georgia resident's bank account, these contacts were sufficient to establish a "sale" within the state. Seale v. Miller, 698 F. Supp. 883, 1988 U.S. Dist. LEXIS 11837 (N.D. Ga. 1988) (decided under former O.C.G.A. § 10-5-2).

"Salesman"

Sufficiency of evidence. — Whether defendant was a "dealer" under former O.C.G.A. § 10-5-3 was immaterial since the evidence at trial was sufficient for a jury to find that the defendant was a "salesman" pursuant to paragraph (a)(25) of former O.C.G.A. § 10-5-2. Greenhill v. State, 199 Ga. App. 218, 404 S.E.2d 577, 1991 Ga. App. LEXIS 469 (1991), cert. denied, No. S91C0894, 1991 Ga. LEXIS 706 (Ga. May 15, 1991) (decided under former O.C.G.A. § 10-5-2).

"Security"

Treatment similar to federal Acts. — Treatment extended to notes and securities, while not precisely the same under Georgia law and the federal Acts, is virtually identical. Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under former Code 1933, § 97-102).

Test for determining whether an investment is a security is the same under both the former Georgia Securities Act and the federal securities laws. Eberhardt v. Waters, 901 F.2d 1578, 1990 U.S. App. LEXIS 8300 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

"Any note" and "evidence of indebtedness". — Ordinary terms of "any note" or "evidence of indebtedness" in paragraph (a)(19) of this section are self-defining and require no further definition. Peoples Bank v. North Carolina Nat'l Bank, 139 Ga. App. 405, 228 S.E.2d 334, 1976 Ga. App. LEXIS 1827 (1976) (holding note a "security") (construing similar provisions of 15 U.S.C. § 77b(1)); Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under former Code 1933, § 97-102).

To determine whether stock constitutes a "security" under either the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq., or the federal securities acts, it is necessary to apply the test in Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S. Ct. 2297, 85 L.Ed. 692 (1985), which is whether the stock "bears such characteristics usually associated with common stock that a purchaser justifiably may assume that appropriate securit[ies] laws apply." Cohen v. William Goldberg & Co., 202 Ga. App. 172, 413 S.E.2d 759, 1991 Ga. App. LEXIS 1715 (1991), modified, No. A91A1424, No. A91A1425 (Ga. Ct. App. 1991), cert. denied, No. S92C0393, 1992 Ga. LEXIS 185 (Ga. Feb. 6, 1992), vacated in part, reaff'd, 207 Ga. App. 174, 428 S.E.2d 117, 1993 Ga. App. LEXIS 117 (1993) (decided under former O.C.G.A. § 10-5-2).

Appropriate test to be employed in resolving issues of whether particular stock is a security is whether the stock bears such characteristics usually associated with common stock that a purchaser justifiably may assume that appropriate security laws apply. Cohen v. William

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Goldberg & Co., 262 Ga. 606, 423 S.E.2d 231, 1992 Ga. LEXIS 985 (1992) (decided under former O.C.G.A. § 10-5-2).

In determining whether stock is a security, if, and only if, the stock does not meet the statutory definition under either the Georgia or federal securities acts, the next inquiry should be whether the stock meets the Howey economic reality test as tailored by Tech Resources to resolve issues concerning "investment contracts" and any "instrument commonly known as a 'security.'" Cohen v. William Goldberg & Co., 262 Ga. 606, 423 S.E.2d 231, 1992 Ga. LEXIS 985 (1992) (decided under former O.C.G.A. § 10-5-2).

Four tests are applicable in determining whether a transaction falls within the definition of "security": the "Howey" test (Securities & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946)); the "Joiner" test (Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 64 S. Ct. 120, 88 L. Ed. 88 (1943)); the "Risk Capital" test (Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961)); and the "Managerial Efforts" test (Securities & Exch. Comm'n v. Glenn W. Turner Enters., Inc., 474 F.2d 476 (9th Cir. 1973)). Jaciewicki v. Gordarl Assocs., 132 Ga. App. 888, 209 S.E.2d 693, 1974 Ga. App. LEXIS 1861 (1974) (decided under former Ga. L. 1957, p. 134, as amended); D.K. Properties, Inc. v. Osborne, 143 Ga. App. 832, 240 S.E.2d 293, 1977 Ga. App. LEXIS 2526 (1977) (decided under former Code 1933, § 97-102).

A factual situation which falls within the framework of either the "Howey," "Joiner," "Risk Capital," or "Managerial Efforts" test, or any combination thereof, will afford a sufficient basis for a finding that a "security" is involved. Jaciewicki v. Gordarl Assocs., 132 Ga. App. 888, 209 S.E.2d 693, 1974 Ga. App. LEXIS 1861 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

Applying the stock characterization test, shares of stock were securities when stockholders were entitled to receive dividends, the stock was negotiable, the shares could be pledged or hypothecated, the by-laws provided that stockholders were entitled to one vote per share, and the stock apparently had the capacity to increase in value. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-2).

Neither restrictions on the negotiability of stock in a closely held corporation nor its unregistered status negated the stock's character as a security. Cox v. Edelson, 243 Ga. App. 5, 530 S.E.2d 250, 2000 Ga. App. LEXIS 250 (2000), cert. denied, No. S00C1326, 2000 Ga. LEXIS 735 (Ga. Sept. 28, 2000) (decided under former O.C.G.A. § 10-5-2).

Policy to protect investor when success depends on promoter's efforts. — Basic policy behind all the tests for a "security" is to protect the investor with the shield of the securities laws when the promoter or syndicator puts forth the essential managerial efforts which affect the failure or success of the enterprise. D.K. Properties, Inc. v. Osborne, 143 Ga. App. 832, 240 S.E.2d 293, 1977 Ga. App. LEXIS 2526 (1977) (decided under former Code 1933, § 97-102).

Form should be disregarded for substance and emphasis should be on economic reality when making a determination as to whether or not an instrument is a security. Tech Resources, Inc. v. Estate of Hubbard, 246 Ga. 583, 272 S.E.2d 314, 1980 Ga. LEXIS 1209 (1980); Cocklereece v. Moran, 532 F. Supp. 519, 1982 U.S. Dist. LEXIS 10859 (N.D. Ga. 1982) (decided under former Code 1933, § 97-102).

Label used on instrument not determinative. — Label placed on the instrument by the parties or by the courts does not determine whether the instrument is a "security." Instead, the characteristics of the instrument and the underlying economic reality are the significant factors for a court to consider in classifying an instrument as a "security." Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979); Redmond v. Blau, 153 Ga. App. 395, 265 S.E.2d 329, 1980 Ga. App. LEXIS 1819

(1980) (decided under former Code 1933, § 97-102).

As there was no dispute that agreements and notes defendant provided the defendant's victims in exchange for money were investments and that the victims relied on the defendant to manage the investments and to provide a return on the investments, the instruments were "securities" within the meaning of Georgia's blue sky law; that the amount of expected return was fixed was immaterial. Rasch v. State, 260 Ga. App. 379, 579 S.E.2d 817, 2003 Ga. App. LEXIS 390 (2003) (decided under former O.C.G.A. § 10-5-2).

Expectation of profits from efforts of others. — Touchstone of a "security" is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979) (decided under former Code 1933, § 97-102).

In order for a transaction to constitute a securities transaction under the law, there must be an investment, a reasonable expectation of profits, and a reliance on the management of another party to bring about the profits. Tech Resources, Inc. v. Estate of Hubbard, 246 Ga. 583, 272 S.E.2d 314, 1980 Ga. LEXIS 1209 (1980) (decided under former Code 1933, § 97-102).

In determining whether a transaction constitutes a "security," the courts focus primarily upon one issue: do persons other than the investors provide the essential managerial efforts from which the investors expect profits? If the answer to that question is in the affirmative, then, for the protection of the investor, who is thereby seen to lack control over the investor's investment, the courts have found the transaction to be a "security." D.K. Properties, Inc. v. Osborne, 143 Ga. App. 832, 240 S.E.2d 293, 1977 Ga. App. LEXIS 2526 (1977) (decided under former Code 1933, § 97-102).

Stock of closely-held corporation. — Since restrictions on negotiability of stock were usual and customary for closely-held corporations, the restrictions did not negate the stock's character as a security. Cohen v. William Goldberg & Co., 262 Ga. 606, 423 S.E.2d 231, 1992 Ga. LEXIS 985 (1992) (decided under former O.C.G.A. § 10-5-2).

Unregistered stock. — Unregistered status of stock in a closely-held corporation did not negate the stock's character as a security since the Georgia and federal securities acts contemplate that stock may be a "security" and yet be unregistered. Cohen v. William Goldberg & Co., 262 Ga. 606, 423 S.E.2d 231, 1992 Ga. LEXIS 985 (1992) (decided under former O.C.G.A. § 10-5-2).

Limited partnership interests are explicitly included in the definitions of "security." Kleiner v. Silver, 137 Ga. App. 560, 224 S.E.2d 508, 1976 Ga. App. LEXIS 2528 (1976) (decided under former Code 1933, § 97-102).

"Unusual instruments". — Stock not meeting the definition of a security under the test in Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985), may otherwise come within the Georgia or federal securities acts if the stock qualifies as one of the "unusual instruments" not easily characterized as "securities." Cohen v. William Goldberg & Co., 202 Ga. App. 172, 413 S.E.2d 759, 1991 Ga. App. LEXIS 1715 (1991), modified, No. A91A1424, No. A91A1425 (Ga. Ct. App. 1991), cert. denied, No. S92C0393, 1992 Ga. LEXIS 185 (Ga. Feb. 6, 1992), vacated in part, reaff'd, 207 Ga. App. 174, 428 S.E.2d 117, 1993 Ga. App. LEXIS 117 (1993) (decided under former O.C.G.A. § 10-5-2).

If investors control decision essential for profit, no sale of securities. — When the investors have control over the essential decision from which the investors expect profits to flow, the scheme does not involve the sale of securities. D.K. Properties, Inc. v. Osborne, 143 Ga. App. 832, 240 S.E.2d 293, 1977 Ga. App. LEXIS 2526 (1977) (decided under former Code 1933, § 97-102).

Restrictive covenants and pledge of shares did not vest control in another. — When buyer proposed to purchase business of coal mining

"Security" (Cont'd)

companies and to operate and control it as its own and to assume certain financial obligations of the companies, existence of restrictive financial covenants in the agreement and pledge of shares as security for performance of covenants did not vest significant managerial control in anyone other than the purchaser and the sale was not a security transaction. Tech Resources, Inc. v. Estate of Hubbard, 246 Ga. 583, 272 S.E.2d 314, 1980 Ga. LEXIS 1209 (1980) (decided under former Code 1933, § 97-102).

Test applies to "investment contract". — Test of whether there is an "investment contract" is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. Georgia Mkt. Ctrs. v. Fortson, 225 Ga. 854, 171 S.E.2d 620, 1969 Ga. LEXIS 665 (1969) (commented on in 21 Mercer L. Rev. 715 (1970)) (decided under former Ga. L. 1957, p. 134, as amended).

An "investment contract" is a security if the scheme involves an investment of money in a common enterprise in which profits are to come solely from the efforts of others. Goldsmith v. American Food Servs., Inc., 123 Ga. App. 353, 181 S.E.2d 95, 1971 Ga. App. LEXIS 1220 (1971) (decided under former Ga. L. 1957, p. 134, as amended); Brown v. Computer Credit Sys., 128 Ga. App. 429, 197 S.E.2d 165, 1973 Ga. App. LEXIS 1503 (1973) (decided under former Ga. L. 1957, p. 134, as amended).

Elements of an "investment contract" are: (a) the investment of money (b) in a common enterprise (c) with profits to come solely from the efforts of others. The Georgia courts accept this test for an investment contract for purposes of the security law. Plunkett v. Francisco, 430 F. Supp. 235, 1977 U.S. Dist. LEXIS 16180 (N.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

Three elements of an investment contract are: (1) an investment of money; (2) in a common enterprise; and (3) an expectation of profit solely from the efforts of others. Eberhardt v. Waters, 901 F.2d 1578, 1990 U.S. App. LEXIS 8300 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

Sale and lease-back contracts for payphones were found to be investment contracts within the definition of securities pursuant to O.C.G.A. § 10-5-2(a)(26) as the buyer invested money for the purchase, the concept was packaged as an investment venture by the seller, and the purchaser expected to receive a fixed monthly income as a return on each payphone, which represented a fixed return on the purchaser's investment. Garvin v. Sec'y of State, 266 Ga. App. 66, 596 S.E.2d 166, 2004 Ga. App. LEXIS 171 (2004), cert. denied, No. S04C1027, 2004 Ga. LEXIS 517 (Ga. June 7, 2004), rev'd sub nom. Cox v. Garvin, 278 Ga. 903, 607 S.E.2d 549, 2005 Ga. LEXIS 15 (2005), vacated in part, 272 Ga. App. 860, 614 S.E.2d 93, 2005 Ga. App. LEXIS 281 (2005) (decided under former O.C.G.A. § 10-5-2).

Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294, 2012 Ga. App. LEXIS 434 (2012), cert. denied, No. S12C1511, 2012 Ga. LEXIS 917 (Ga. Oct. 29, 2012).

Investment met Howey "economic reality" test. — Plaintiff's payment for a 10% interest in a closely held corporation was an "investment contract" under the Howey "economic reality" test. Huggins v. Chapin, 227 Ga. App. 340, 489 S.E.2d 109, 1997 Ga. App. LEXIS 888 (1997) (decided under former O.C.G.A. § 10-5-2).

Investment arrangement involving the sale of cattle embryos, based on the process of artificially inseminating superovulated "donor cows" for reproduction, constituted the sale of a security under

Georgia law. Eberhardt v. Waters, 901 F.2d 1578, 1990 U.S. App. LEXIS 8300 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

"Security" may include transaction purporting to be real estate sale. — Transaction which purports only to be a sale of real estate can, when the economic realities of the transaction are examined, be determined to be a security. The rule which has developed is that any investment will be deemed an "investment contract" and a "security" if the investor's return is essentially dependent upon the efforts of the syndicator or an affiliate. Fortier v. Ramsey, 136 Ga. App. 203, 220 S.E.2d 753, 1975 Ga. App. LEXIS 1297 (1975) (decided under former Ga. L. 1957, p. 134, as amended).

Franchise agreement is not a "security" within the meaning of the securities law if the investor is entitled to no return under the agreement except through the investor's own efforts. Brown v. Computer Credit Sys., 128 Ga. App. 429, 197 S.E.2d 165, 1973 Ga. App. LEXIS 1503 (1973) (decided under former Ga. L. 1957, p. 134, before it was amended by Ga. L. 1970, p. 450).

Redeemable membership certificate is a certificate of indebtedness, but the certificate of indebtedness does not represent an "investment" within the meaning of the securities law when the certificate creates no expectation of profit because the certificate bears no interest, cannot appreciate, and cannot be pledged or assigned. Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979) (decided under former Code 1933, § 97-102).

Defendant properly convicted for violating Securities Act. — Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294, 2012 Ga. App. LEXIS 434 (2012), cert. denied, No. S12C1511, 2012 Ga. LEXIS 917 (Ga. Oct. 29, 2012).

Pooled money was security. — Trial court did not err in holding that the three notes at issue were securities under Georgia law because the funds pooled from the investors in the three commercial ventures had to reach minimum amounts for participation, which indicated an investment in a common enterprise, and the evidence showed that the investors expected their profit from the financial transactions to be obtained through defendants' managerial efforts. Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898, 2013 Ga. App. LEXIS 678 (2013), cert. denied, No. S13C1810, 2013 Ga. LEXIS 936 (Ga. Nov. 4, 2013), cert. denied, No. S13C1715, 2013 Ga. LEXIS 941 (Ga. Nov. 4, 2013).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-102, and former O.C.G.A. § 10-5-2, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this section.

New York license to sell securities is not valid in Georgia. 1969 Op. Att'y Gen. No. 69-102 (decided under former Ga. L. 1957, p. 134, as amended).

"Dealer" and "Salesperson"

"Commission" construed broadly. — Term "commission," particularly when further expanded to include any remuneration paid related to the sale of securities, should be given an expansive

reading. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

"Dealer" or "salesperson" not limited to one receiving explicit commission. — General partner or executive officer of a real estate syndication should not be excluded from the definition of "salesperson" or "dealer" merely because the partner or officer receives compensation or profit in the form of a profit on sales to the syndication, a real estate brokerage commission, a management fee, or some other form which is not an explicit commission for the sale of securities. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

"Sale" or "Sell"

Guarantee of corporate indebtedness. — Transaction under which a person undertakes to guarantee corporate indebtedness in consideration for the right to receive future corporate profits is a "sale" of a security governed by the statutory provisions on securities. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

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Exact classification of instrument not necessary. — It is not necessary that an instrument be susceptible to exact classification coextensive with one or more of the incremental clauses of paragraph (a)(19) of this section and, in addition, since securities regulation is a function of substance, one should hesitate to hand down any conclusive, all-purpose formulae. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

"Investment contract" involves efforts of another. — If the success of the investment is essentially dependent upon the efforts of the seller or some third person, the security being sold is an "investment contract." 1974 Op. Att'y Gen. No. 75-153 (decided under former Code 1933, § 97-102).

"Investment contract" may involve management of land. — "Investment contract" includes many situations when investors are offered land in such a way that its value is dependent on management by others. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

Agreement to buy land as tenants in common. — An agreement to purchase specifically identified parcels of land which purchasers are to hold as tenants in common with the hope of increase in price is not per se a "security." 1971 Op. Att'y Gen. No. U71-118 (decided under former Ga. L. 1957, p. 134, as amended).

If the purchasers of land are passive in the operation, and depend primarily upon the efforts of promoters of the enterprise for their profits, the transaction may well constitute the sale of a "security." 1971 Op. Att'y Gen. No. U71-118 (decided under former Ga. L. 1957, p. 134, as amended).

Real estate syndication anticipating profits from syndicator's efforts. — Any real estate syndication that is structured or marketed in such a way that the investor anticipates that the investor will realize returns based on the efforts or expertise of the syndicator or some affiliate is a "security". 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

Limited partnership interest. — Offering for sale of limited partnerships constitutes the offering for sale of a "security." 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

Limited partnership interest is explicitly defined to be a "security" by the securities law. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

Investment club interest. — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security. 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

Travelers checks and money orders deemed "securities". — "Travelers check," "money order," or "draft," or any similar instrument by whatever name called, sold, or offered for sale to the public through retail outlets for a consideration

or fee over and above its face value, which instrument may be later endorsed and cashed by the purchaser at another retail outlet or endorsed by the purchaser to another person for the payment of bills or other purposes are "securities" within the meaning of the securities law and are subject to regulation and control by the commissioner of securities. 1957 Ga. Op. Att'y Gen. 233 (decided under former Ga. L. 1957, p. 134).

Franchise agreements. — In every instance when the franchisor is thinly capitalized or so under-capitalized as to require franchisee fees in order to be able to fulfill its obligations to its franchisees, the franchise agreements constitute "securities" within the purview of the securities law. 1969 Op. Att'y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

Securities coverage is not avoided by simply providing franchisor with adequate capital. 1969 Op. Att'y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

When, because of its newness, a franchising system is necessarily preorganizational as a matter of fact, then its franchising agreements constitute preorganization certificates and are "securities" within the meaning of the securities law. 1969 Op. Att'y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

All franchise systems however capitalized are susceptible to securities regulation until such time as the franchise is so well established as a system that the success or failure of an individual franchise is not disproportionately keyed to the success or failure of other franchisees; either the franchisor will have to provide a sufficient number of franchisor-owned and operated outlets to establish the system as a going enterprise without dependence upon the individual activities of the franchisee's cofranchisors or the franchisor will have to comply with the registration requirements of the securities law. 1969 Op. Att'y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

Club memberships deemed securities when promoter seeks profit. — When club property will be the chief capital asset of a recreational program conducted by the developer for profit, and the members are asked to allow a business to use their capital without allowing the members a return on the business, and they are required to supply operating capital, because they are obligated to pay dues assessments, the proposed memberships are securities; they are not exempt as securities of a nonprofit corporation because a substantial purpose of the enterprise is profit for the promoter. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

Use of proceeds to develop common property. — If the transaction otherwise constitutes a security, it does not matter that proceeds were not used to develop the common facility. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

Condominium with rental pool feature. — Condominium, when combined with rental pool feature, constitutes "security" as defined by this section. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

Sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security", unless exempt, must be registered pursuant to the statutory provisions on securities; any person offering for sale or selling such securities that are subject to registration must register as a dealer, limited dealer, salesperson, or limited salesperson unless such a person is a real estate broker or salesperson licensed to sell real estate in Georgia. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-102).

Guaranteeing corporate indebtedness. — Transaction under which a person undertakes to guarantee corporate indebtedness in consideration for the right to receive future corporate profits may be a sale of "security" governed by the statutory provisions on securities. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

Transaction under which a corporation would obtain the guarantees of strangers on the corporation's loans in exchange for

a percentage of profits in a development for which they guarantee the loan would constitute a sale of a "security". 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

Guaranty of a corporate loan by a stockholder if the guarantor expected no direct return from the guaranty, but only the indirect benefit of the increase in value of the corporation should the project be successful and the loan repaid would not constitute the sale of a security. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

Typical scotch whiskey investment is "security." 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134, as amended).

Notes given in commercial transaction. — Notes given in an essentially commercial transaction between a payor and a payee are not subject to the securities law. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

Sales of notes or mortgages will be subject to the securities law if the transaction, as a matter of economic reality, is an investment. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

Variable annuity contract is subject to regulation as "security." 1962 Ga. Op. Att'y Gen. 448 (decided under former Ga. L. 1957, p. 134, prior to its amendment by Ga. L. 1969, p. 722).

"Security" does not include variable annuity contracts provided for and regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under former Ga. L. 1957, p. 134, as amended).

Group variable annuity contracts are subject to the control and direction of the Insurance Commissioner; the words "regulated under" do not necessarily require the formal adoption of regulations under Ga. L. 1964, p. 338, § 1 et seq. so long as the contracts are in fact being regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under former Ga. L. 1957, p. 134, as amended).

RESEARCH REFERENCES

Am. Jur. 2d.

69 Am. Jur. 2d, Securities Regulation — State, § 19 et seq.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 1 et seq.

ALR.

Sale of memberships in club or similar organization as sale of securities within provisions of securities Acts, 87 A.L.R.2d 1140.

Who is "dealer" under state securities Acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

What passes under term "securities" in will, 27 A.L.R.3d 1386.

What constitutes an "investment contract" within the meaning of state Blue Sky Laws, 47 A.L.R.3d 1375.

Validity of pyramid distribution plan, 54 A.L.R.3d 217.

State regulation of viatical life insurance programs, viatical settlements, and viatical investments, 28 A.L.R.6th 281.

"Common enterprise" element of Howey test to determine existence of investment contract regulable as "security" within meaning of federal Securities Act of 1933 (15 USCS § 77a et seq.) and Securities Exchange Act of 1934 (15 USCS § 78a et seq.), 90 A.L.R. Fed. 825.

What is "investment contract" within meaning of § 2(1) of Securities Act of 1933 (15 USCS § 77b(1)) and § 3(a)(10) of Securities Exchange Act of 1934 (15 USCS § 78c(a)(10)), both defining term "security" as including investment contract, 134 A.L.R. Fed 289.

10-5-3. Citations to United States Code.

Any citation in this chapter to a section of the United States Code

includes those statutes and the rules and regulations adopted under those statutes as in effect on July 1, 2009, or as later amended.

History.
Code 1981, § 10-5-3, enacted by Ga. L. 2008, p. 381, § 1/SB 358.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, "July 1, 2009" was substituted for "the date of enactment of this chapter".

10-5-4. Reference to agency or department of United States.

A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department.

History.
Code 1981, § 10-5-4, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-5. Electronic records and signatures.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or order issued under this chapter, in a manner consistent with Section 104(a) of that act, 15 U.S.C. Section 7004(a).

History.
Code 1981, § 10-5-5, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

ARTICLE 2

EXEMPTIONS

10-5-10. Exemptions from registration of securities.

The following securities are exempt from the requirements of Article 3 of this chapter and Code Section 10-5-53:

(1) A security, including a revenue obligation or a separate security as defined in Rule 131, 17 C.F.R. 230.131, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., issued, insured, or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency, or instrumentality of one or more states; by a political subdivision of one or more states; or by a person controlled or supervised by and acting

as an instrumentality of the United States under authority granted by the Congress or a certificate of deposit for any of the foregoing;

(2) A security issued, insured, or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer, or guarantor;

(3) A security issued by and representing or that will represent an interest in or a direct obligation of or be guaranteed by:

(A) An international banking institution;

(B) A banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund or a successor authorized by federal law or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of Currency pursuant to Section 1 of P. L. 87-722, 12 U.S.C. Section 92a; or

(C) Any other depository institution, unless by rule or order the Commissioner proceeds under Code Section 10-5-13;

(4) A security issued by and representing an interest in, or a debt of, or insured or guaranteed by, an insurance company authorized to do business in this state;

(5) A security issued or guaranteed by a railroad, other common carrier, public utility, or public utility holding company that is:

(A) Regulated in respect to its rates and charges by the United States or a state;

(B) Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada, or a Canadian province or territory; or

(C) A public utility holding company registered under the Public Utility Holding Company Act of 1935 or a subsidiary of such a registered holding company within the meaning of that act;

(6) A federal covered security specified in Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1), or by rule adopted under that provision or a security listed or approved for listing on another securities market specified by rule under this chapter; a put

or a call option contract; a warrant; a subscription right on or with respect to such securities; or an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 77a, et seq., and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 77a, et seq., or an offer or sale of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the Securities and Exchange Commission under Section 9(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78i(b);

(7) A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic, or reformatory purposes or as a chamber of commerce and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person; or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940, 15 U.S.C. Section 80b-3(c)(10)(B); except that with respect to the offer or sale of a note, bond, debenture, or other evidence of indebtedness issued by such a person, a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons, and transactions, imposing different requirements for different classes, specifying with respect to Section 3(c)(10)(B) of the Investment Company Act of 1940, 15 U.S.C. Section 80b-3(c)(10)(B), the scope of the exemption and the grounds for denial or suspension, and requiring an issuer:

(A) To file a notice specifying the material terms of the proposed offer or sale and copies of any proposed sales and advertising literature to be used and provide that the exemption becomes effective if the Commissioner does not disallow the exemption within the period established by the rule;

(B) To file a request for exemption authorization for which a rule under this chapter may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process complying with Code Section 10-5-80, and grounds for denial or suspension of the exemption; or

(C) To register under Code Section 10-5-23;

(8) A member's or owner's interest in, retention certificate, or like security given in lieu of a cash patronage dividend issued by, a

cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative; and

(9) An equipment trust certificate with respect to equipment leased or conditionally sold to a person if any security issued by the person would be exempt under this Code section or would be a federal covered security under Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1).

History.

Code 1981, § 10-5-10, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Cross references.

Securities laws exemption for opening and transferring of deposits in building and loan associations and savings and loan associations, § 7-1-787.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, former Code 1933, § 97-108, and former O.C.G.A. § 10-5-8, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

Exemptions viewed narrowly. — Exempted transactions specifying "promissory notes" only must be narrowly viewed since the law was remedial legislation entitled to a broad construction. Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under former Code 1933, § 97-108).

Exemptions from registration are to be strictly construed in favor of investors and one claiming an exemption has the burden of proving the exemption's application. Womack v. State, 270 Ga. 56, 507 S.E.2d 425, 1998 Ga. LEXIS 801 (1998) (decided under former O.C.G.A. § 10-5-8).

Unregistered stock as security. — Unregistered status of stock in a closely-held corporation did not negate the stock's character as a security since the Georgia and federal securities acts contemplate that stock may be a "security" and yet be unregistered. Cohen v. William Goldberg & Co., 262 Ga. 606, 423 S.E.2d 231, 1992 Ga. LEXIS 985 (1992) (decided under former O.C.G.A. § 10-5-8).

Promissory note exemption applies to high quality commercial paper. — Exemption for promissory notes maturing in not more than nine months in paragraph (9) of this section was explicit as to the type of security and was indicative that it was applicable to high quality commercial paper. Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under former Code 1933, § 97-108).

Notes issued by a corporation. — Exemption from registration for promissory notes under former paragraph (9) of O.C.G.A. § 10-5-8 did not apply to notes issued by a corporation, although the corporate notes did not mature more than nine months from the date of issuance as required by the exemption, since the notes had all the characteristics of a security and were offered to the public as investments. Womack v. State, 270 Ga. 56, 507 S.E.2d 425, 1998 Ga. LEXIS 801 (1998) (decided under former O.C.G.A. § 10-5-8).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-108, and former O.C.G.A. § 10-5-8, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

Registration not necessary if exemption applies. — It did not necessarily follow that a scheme which constituted a "security" under former Code 1933, § 97-102 must always be registered with the commissioner of securities; if a scheme fell within any of the exemptions provided in former Code 1933, § 97-108 or if the sale of such a scheme fits any of the exempt transactions set forth in former Code 1933, § 97-109, the registration requirements of the law would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

Investment clubs. — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a "security," since the offering for sale of limited partnerships constitutes the offering for sale of a "security" as the security was defined by former Code 1933, § 97-102; unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

Sales of mortgages. — Sales of mortgages described in paragraph (10) of former Code 1933, § 97-108 were exempt from the registration requirement of former Code 1933, § 97-105, but mortgage offerings which were structured or promoted in such a way that they become investment contracts must be registered pursuant to former Code 1933, § 97-105 unless the mortgages qualify for some exemption from registration other than paragraph (10) of former Code 1933, § 97-108. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-108).

Sale of time-sharing condominium units. — Sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security" within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered pursuant to the law. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-108).

Variable annuity contract is subject to regulation as a security. 1962 Ga. Op. Att'y Gen. 448 (decided under former Ga. L. 1957, p. 134, as amended).

"Security" does not include variable annuity contracts provided for and regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under Ga. L. 1957, p. 134, as amended).

RESEARCH REFERENCES

Am. Jur. 2d.

69A Am. Jur. 2d, Securities Regulation — State, § 106 et seq.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 501 et seq.

ALR.

Sales as "isolated" or "successive" or the like, under state securities Acts, 1 A.L.R.3d 614.

What securities are exempt from registration under § 402(a) of the Uniform Securities Act, 84 A.L.R.3d 575.

10-5-11. Exempt transactions.

The following transactions are exempt from the requirements of Article 3 of this chapter and Code Section 10-5-53:

(1) An isolated nonissuer transaction, whether effected by or through a broker-dealer or not;

(2) A nonissuer transaction by or through a broker-dealer registered, or exempt from registration under this chapter, and a resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq., in a security of a class that has been outstanding in the hands of the public for at least 90 days, if, at the date of the transaction:

(A) The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership, and the issuer is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(B) The security is sold at a price reasonably related to its current market price;

(C) The security does not constitute the whole or part of an unsold allotment to or a subscription or participation by the broker-dealer as an underwriter of the security or a redistribution;

(D) A nationally recognized securities manual or its electronic equivalent designated by rule adopted or order issued under this chapter or a record filed with the Securities and Exchange Commission that is publicly available contains:

(i) A description of the business and operations of the issuer;

(ii) The names of the issuer's executive officers and the names of the issuer's directors, if any;

(iii) An audited balance sheet of the issuer as of a date within 18 months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and

(iv) An audited income statement for each of the issuer's two immediately previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had an audited income statement, a pro forma income statement; and

(E) The issuer of the security has a class of equity securities listed on a national securities exchange registered under the

Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or designated for trading on the National Association of Securities Dealers Automated Quotation System, unless the issuer of the security is a unit investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq.; or the issuer of the security, including its predecessors, has been engaged in continuous business for at least three years; or the issuer of the security has total assets of at least $2 million based on an audited balance sheet as of a date within 18 months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization;

(3) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the Board of Governors of the Federal Reserve System;

(4) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in an outstanding security if the guarantor of the security files reports with the Securities and Exchange Commission under the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78m or 78o(d);

(5) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security that:

(A) Is rated at the time of the transaction by a nationally recognized statistical rating organization in one of its four highest rating categories; or

(B) Has a fixed maturity or a fixed interest or dividend if:

(i) A default has not occurred during the current fiscal year or within the three previous fiscal years or during the existence of the issuer and any predecessor, if less than three fiscal years, in the payment of principal, interest, or dividends on the security; and

(ii) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous 12 months a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with or an acquisition of an unidentified person;

(6) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter effecting an unsolicited order or offer to purchase;

(7) A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;

(8) A nonissuer transaction by a federal covered investment adviser with investments under management in excess of $100 million acting in the exercise of discretionary authority in a signed record for the account of others;

(9) A transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the Commissioner after a hearing;

(10) A transaction between the issuer or other person on whose behalf the offering is made and an underwriter or among underwriters;

(11) A transaction in a note, bond, debenture, or other evidence of indebtedness secured by a mortgage or other security agreement if:

(A) The note, bond, debenture, or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;

(B) A general solicitation or general advertisement of the transaction is not made; and

(C) A commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under this chapter as a broker-dealer or as an agent;

(12) A transaction by an executor, commissioner of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(13) A sale or offer to sell to:

(A) An institutional investor;

(B) A federal covered investment adviser; or

(C) Any other person exempted by rule adopted or order issued under this chapter;

(14) A sale or an offer to sell securities of an issuer if part of a single issue in which:

(A) Not more than 15 purchasers are present in this state during any 12 consecutive months, other than those designated in paragraph (13) of this Code section;

(B) A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(C) A commission or other remuneration is not paid or given, directly or indirectly, to any person for soliciting a prospective purchaser in this state; and

(D) The issuer reasonably believes that all the purchasers in this state, other than those designated in paragraph (13) of this Code section, are purchasing for investment;

(15) A transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options, or warrants if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this state;

(16) An offer to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., if:

(A) A registration or offering statement or similar record as required under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., has been filed but is not effective, or the offer is made in compliance with Rule 165, 17 C.F.R. 230.165, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(B) A stop order of which the offeror is aware has not been issued against the offeror by the Commissioner or the Securities and Exchange Commission, and an audit, inspection, or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

(17) An offer to sell, but not a sale, of a security exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., if:

(A) A registration statement has been filed under this chapter but is not effective;

(B) A solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the Commissioner under this chapter; and

(C) A stop order of which the offeror is aware has not been issued by the Commissioner under this chapter, and an audit,

inspection, or proceeding that may culminate in a stop order is not known by the offeror to be pending;

(18) A transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary, and the other person, or its parent or subsidiary, are parties;

(19) A rescission offer, sale, or purchase under Code Section 10-5-59;

(20) An offer or sale of a security to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter;

(21) Employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, and established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

(A) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisers;

(B) Family members who acquire such securities from those persons through gifts or domestic relations orders;

(C) Former employees, directors, general partners, trustees, officers, consultants, and advisers if those individuals were employed by or providing services to the issuer when the securities were offered; and

(D) Insurance agents who are exclusive insurance agents of the issuer or the issuer's subsidiaries or parents or who derive more than 50 percent of their annual income from those organizations;

(22) A transaction involving:

(A) A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each

stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock;

(B) An act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests or partly in such exchange and partly for cash; or

(C) The solicitation of tenders of securities by an offeror in a tender offer in compliance with Rule 162, 17 C.F.R. 230.162, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(23) A nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this chapter if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this chapter; has been subject to continuous reporting requirements in the foreign jurisdiction for not less than 180 days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by rule adopted or order issued under this chapter or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and The Toronto Stock Exchange, Inc., is a designated securities exchange. After an administrative hearing in compliance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," the Commissioner, by rule adopted or order issued under this chapter, may revoke the designation of a securities exchange under this paragraph, if the Commissioner finds that revocation is necessary or appropriate in the public interest and for the protection of investors.

History.

Code 1981, § 10-5-11, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For article on the definition of a security in light of the "Georgia Securities Act of 1973" and the need for maximizing investor protection, see 30 Emory L.J. 73 (1981).

For comment, the purchase of all the shares of stock of a business is not the purchase of a "Security" within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

For article, "Uniformity Under the Securities Laws: Regulation D and the New Georgia Uniform Limited Offering Exemption," see 19 Ga. St. B. J. 74 (1982).

For article, "Regulatory Evolution of Limited Offerings in Georgia," see 20 Ga. St. B. J. 202 (1984).

For article, "The Uniform Limited Offering Exemption: How 'Uniform' is 'Uniform'? — An Evaluation and Critique of the ULOE," see 36 Emory L.J. 357 (1987).

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-9, which was subsequently repealed but was succeeded by provisions in this Code section, are included in the annotations for this Code section.

Section strictly construed. — Former O.C.G.A. § 10-5-9 required notice of exempt transaction marked for period of one year on any certificate or certificates and because former O.C.G.A. § 10-5-9 created an exemption from registration requirement, it would be strictly construed against anyone claiming application. Novatex Sales, Inc. v. Prince, 159 Ga. App. 559, 284 S.E.2d 65, 1981 Ga. App. LEXIS 2693 (1981) (decided under former O.C.G.A. § 10-5-9).

Burden of proving exemption from registration requirements was on seller of unregistered securities, the party seeking its protection from liability. Novatex Sales, Inc. v. Prince, 159 Ga. App. 559, 284 S.E.2d 65, 1981 Ga. App. LEXIS 2693 (1981) (decided under former O.C.G.A. § 10-5-9).

Section requires notice to be on any certificate or certificates. Novatex Sales, Inc. v. Prince, 159 Ga. App. 559, 284 S.E.2d 65, 1981 Ga. App. LEXIS 2693 (1981) (decided under former O.C.G.A. § 10-5-9).

Owner of stock included in the Georgia Securities Act. — See Jorges v. Griffin, 161 Ga. App. 439, 288 S.E.2d 356, 1982 Ga. App. LEXIS 1908 (1982) (decided under former O.C.G.A. § 10-5-9).

Stock not exempt from registration. — Exemption under paragraph (12) of O.C.G.A. § 10-5-9 did not apply when stock was sold to an individual, not a corporation, and the fact that the buyer later transferred some of the stock to new investors was of no import because the relevant period for determining whether the stock had to be registered was at the time it was offered for sale. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-9).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-109, and former O.C.G.A. § 10-5-9, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

Term "other financial institution," found in paragraph (7) of this section, refers to any institution primarily engaged in banking, extending credit, making investments, or circulating money. 1978 Op. Att'y Gen. No. 78-71 (decided under former Code 1933, § 97-109).

Banks are considered to fall within term "corporation" as used in paragraph (12) of former O.C.G.A. § 10-5-9 since bank shareholders, in merger transactions, were adequately protected by other statutory provisions which effectuate investor protection purpose of the law. In addition, banks should be considered "corporations" because banks are given similar corporate powers as nonbank corporations, thereby evidencing intent on the part of the legislature to treat banks as corporations for purposes of general corporate law. 1981 Op. Att'y Gen. No. 81-103 (decided under former O.C.G.A. § 10-5-9).

Registration not necessary if exempt. — It did not necessarily follow that a scheme which constitutes a "security" under former Code 1933, § 97-102 must always be registered with the Commissioner of Securities; if a scheme fell within any of the exemptions provided in former Code 1933, § 97-108 or if the sale of such a scheme fit any of the exempt transactions set forth in former Code 1933, § 97-109, the registration requirements of the law would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under Ga. L. 1957, p. 134, as amended).

Investment clubs. — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security, since the offering for sale of limited partnerships constitutes the offering for sale of a "security" as security was defined; unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under Ga. L. 1957, p. 134, as amended).

Sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security" within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-109).

Small issue registration provisions. — It would be consistent with the intent of the General Assembly as manifested in the Act as a whole for a syndicator to sell interests to 40 persons concurrently if the investor was afforded the disclosures and rescission right of subsection (e) of former Code 1933, § 97-105, the prohibitions against public advertising of paragraph (13) of former Code 1933, § 97-109 were observed, and the legend and investment letter provisions of the two sections were complied with. 1974 Op. Att'y Gen. No. 74-75 (decided prior to 1975 amendment to paragraph (13) of this section).

Syndicator may sell interests to 40 investors in any 12-month period utilizing the small issue registration procedure of subsection (e) of former Code 1933, § 97-105 and the registration exemption of paragraph (13) of former Code 1933, § 97-109; if this was done in such a way that purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 were not clearly identifiable, all investors must be accorded the rights and disclosures provided for in subsection (e) of former Code 1933, § 97-105. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

In determining whether the maximum number of purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 or subsection (e) of former Code 1933, § 97-105 had been exceeded, the syndicator and the sydicator's affiliates must be counted as purchasers if the syndicators obtain or retain an interest. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

Integration would be virtually demanded if the syndicator commingles funds and other assets belonging to purportedly separate syndications; such commingling reduces the separate syndications to the level of mere window dressing and would preclude treatment of the syndications as separate entities in determining the number of purchasers to which sales have been made. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

Fee for application for exemption nonrefundable. — Law vests the commissioner of securities with no authority to refund the $250.00 filing fee tendered under former subparagraph (C) of paragraph (5) of this section when the party paying the fee subsequently withdraws the federal registration statement on which the exemption provided by that paragraph depends. 1974 Op. Att'y Gen. No. 74-150 (decided under former Code 1933, § 97-109).

The $250.00 filing fee required by former Code 1933, § 97-109 for applications seeking a transactional exemption from the requirements of former Code 1933, § 97-105 was nonrefundable since the legislature, had the legislature intended that a refund be implied, would have explicitly provided for one. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-109).

RESEARCH REFERENCES

Am. Jur. 2d.

69A Am. Jur. 2d, Securities Regulation — State, § 72 et seq.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 516.

ALR.

Applicability of Blue Sky Laws to

preincorporation subscriptions, 50 A.L.R.2d 1103.

Sales as "isolated" or "successive" or the like, under state securities Acts, 1 A.L.R.3d 614.

What constitutes "public" or "private" offering within meaning of state securities regulation, 84 A.L.R.3d 1009.

10-5-12. Exemption of securities, transactions, or offers by adoption of rule or issuance of order.

A rule adopted or order issued under this chapter may exempt a security, transaction, or offer; a rule adopted under this chapter may exempt a class of securities, transactions, or offers from any or all of the requirements of Article 3 of this chapter and Code Section 10-5-53; and an order issued under this chapter may waive, in whole or in part, any or all of the conditions for an exemption or offer under Code Sections 10-5-10 and 10-5-11.

History.

Code 1981, § 10-5-12, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

JUDICIAL DECISIONS

No merger with theft by conversion. — Trial court did not err in failing to merge the theft by conversion counts under O.C.G.A. § 16-8-3, and the securities violation counts under O.C.G.A. § 10-5-12 filed against the defendant because the state had to prove separate facts to find defendant guilty of the theft by conversion offenses and the violations of the Georgia Securities Act, O.C.G.A. § 10-5-1 et seq. Furthermore, the securities violation counts were complete before the theft conversion occurred. Lavigne v. State, 299 Ga. App. 712, 683 S.E.2d 656, 2009 Ga. App. LEXIS 954 (2009).

Subscription agreement's disclosure barred recovery. — Summary judgment for corporation, the corporation's chief executive officer (CEO), and the corporation's chief financial officer on an investor's claims pursuant to the Securities Act was proper; although the investor claimed that the investor had been misled by the CEO's promise that the investor would receive one-third of the corporation's stock in return for the investment, it was undisputed that a subscription agreement which the investor admittedly received and executed did not provide for the interest the investor claimed the investor was orally promised by the CEO, but rather, stated that the investor was receiving, at most, 8.16 percent of the outstanding common stock. Given that the subscription agreement so starkly contradicted the CEO's alleged promise, the investor knew that the latter was untrue, and the investor was not entitled to recover for the alleged violation of the Securities Act. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717, 2009 Ga. App. LEXIS 829 (2009).

Indirect reliance. — *Unpublished decision:* When plaintiff outside investors relied on statements of plaintiff inside investor, not the financials prepared by the defendant, the former chief financial officer (CFO) of plaintiff company, such "indirect reliance" precluded the outside investors' claims of fraud and securities fraud under Georgia law against the CFO. TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C., 260 Fed. Appx. 191, 2007 U.S. App. LEXIS 29724

(11th Cir. 2007), cert. denied, 554 U.S. 919, 128 S. Ct. 2969, 171 L. Ed. 2d 888, 2008 U.S. LEXIS 5227 (2008).

No reliance found. — Because plaintiff limited liability company (LLC1), who sold its interest in another limited liability company (LLC2) to buyers (the other members of LLC2), could not have managed LLC2 or replaced the buyers if it had bought out the buyers under a put and call, LLC1 would have sold its interest even if it had known of defendant financier's involvement with the buyers; LLC1's claims under 15 U.S.C. § 78j(b) and O.C.G.A. § 10-5-12 against the financier failed. Ledford v. Peeples, 657 F.3d 1222, 2011 U.S. App. LEXIS 19500 (11th Cir. 2011).

Defendant properly convicted for violating the Securities Act. — Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294, 2012 Ga. App. LEXIS 434 (2012), cert. denied, No. S12C1511, 2012 Ga. LEXIS 917 (Ga. Oct. 29, 2012).

10-5-13. Denial, suspension, or revocation of exemption.

(a) Except with respect to a federal covered security or a transaction involving a federal covered security, an order issued under this chapter may deny, suspend application of, condition, limit, or revoke an exemption created under subparagraph (C) of paragraph (3) or paragraph (7) or (8) of Code Section 10-5-10 or under Code Section 10-5-11 or an exemption or waiver created under Code Section 10-5-12 with respect to a specific security, transaction, or offer. An order issued under this Code section may be issued only pursuant to the procedures in subsection (d) of Code Section 10-5-25 or 10-5-73 and only prospectively.

(b) A person does not violate Code Section 10-5-20, 10-5-22 through 10-5-25, 10-5-53, or 10-5-59 by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this Code section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

History.

Code 1981, § 10-5-13, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

ARTICLE 3
REGISTRATION OF SECURITIES

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-105, and former O.C.G.A. § 10-5-5, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

Nonprofit corporations. — Prior to April 24, 1975, nonprofit corporations were not subject to registration or regulation under the securities law, but by Ga. L. 1975, p. 928, § 11, the statute became applicable to non-profit corporations. Blau v. Redmond, 143 Ga. App. 897, 240 S.E.2d 273, 1977 Ga. App. LEXIS 2554 (1977) (decided under former Code 1933, § 97-105).

Chapter inapplicable if neither promoter nor investor seeks profit. — If the promoter is not engaged in a profit-making enterprise and the investor cannot secure any financial advantage, the security provisions did not apply. Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979) (decided under former Code 1933, § 97-105).

Chapter may apply if either promoter or investor anticipates financial return. — If the promoter is engaged in a profit-making enterprise but the investor will receive no financial return or if the promoter is a nonprofit corporation but the investor anticipates a financial return (e.g., sale of interest-bearing bonds), the securities provisions may apply. Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979) (decided under former Code 1933, § 97-105).

Securities of nonprofit corporation promising profit to investor. — Former Code 1933, § 97-105 covered instruments issued by nonprofit corporations since the incentive to purchase was the promise of profit to the investor. An example of this type of security would be the sale of interest-bearing bonds by a nonprofit corporation. Dunwoody Country Club of Atlanta, Inc. v. Fortson, 243 Ga. 236, 253 S.E.2d 700, 1979 Ga. LEXIS 866 (1979) (decided under former Code 1933, § 97-105).

Individual desiring to sell stock owned by an individual, not otherwise registered, would have to register as a limited dealer under former O.C.G.A. § 10-5-5. Jorges v. Griffin, 161 Ga. App. 439, 288 S.E.2d 356, 1982 Ga. App. LEXIS 1908 (1982) (decided under former O.C.G.A. § 10-5-5).

Stock not exempt from registration. — Exemption under former Code 1933, § 97-109 did not apply since the stock was sold to an individual, not a corporation and the fact that the buyer later transferred some of the stock to new investors was of no import because the relevant period for determining whether the stock had to be registered was at the time it was offered for sale. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-5).

Right of rescission. — Although security provisions did not define "purchaser" to whom the election of voiding an illegal sale was given, it was apparent that this referred to the one to whom the sale or disposition was made, especially when the certificate was issued directly to a party, designating him or her by name. The word "purchaser" may be used in a broad sense to include those who acquire title for a monetary consideration; however, as commonly employed and as ordinarily used a "purchaser" was understood to be one who obtains through negotiation or the like for a consideration. Utzman v. Caribbean & S.E. Dev. Corp., 107 Ga. App. 56, 129 S.E.2d 62, 1962 Ga. App. LEXIS 568 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

Transaction held not taking place in Georgia. — If a plaintiff, a Georgia resident, and a defendant, a Tennessee

resident, discussed by telephone an arrangement whereby the defendant's company would serve as plaintiff's investment advisor in trading of commodity futures and the defendant mailed to the plaintiff two letter agreements, setting out the contract terms and the plaintiff signed the agreements and returned the agreements for signature of the other party, under Georgia law the transaction did not take place in Georgia. Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 608 F.2d 175, 1979 U.S. App. LEXIS 9744 (5th Cir. 1979) (decided under former Code 1933, § 97-105).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-105, and former O.C.G.A. § 10-5-5, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

Limited partnership interest. — Offering for sale of limited partnerships constitutes the offering for sale of a "security". Unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

Limited partnership is explicitly defined to be a "security" by former Code 1933, § 97-102. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

Investment club interest. — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security. 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

Time-sharing units in condominium with profit-sharing arrangement. — Sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constituted a "security" within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered pursuant to the statutory provisions on securities. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-105).

Mortgages structured or promoted as investment contracts. — Sales of mortgages described in paragraph (10) of former Code 1933, § 97-108 were exempt from the registration requirement of former Code 1933, § 97-105 but mortgage offerings which are structured or promoted in such a way that the mortgages become investment contracts must be registered pursuant to § 97-105 unless the mortgages qualify for some exemption from registration other than paragraph (10) of § 97-108. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

Registration not required unless activity occurs in Georgia. — Georgia courts would probably hold that the securities registration provisions of this chapter do not apply to transactions involving a Georgia issuer when no sale or offer to sell occurs within Georgia; but if certain activities were carried on in Georgia, this could bring the transactions under the law of this state. 1970 Op. Att'y Gen. No. U70-88 (decided under Ga. L. 1957, p. 134, as amended).

Small issue registration and exemption provisions. — It would be consistent with the intent of the General Assembly as manifested in the security law as a whole for a syndicator to sell interests to 40 persons concurrently if the investor was afforded the disclosures and rescission right of subsection (e) of former Code 1933, § 97-105, the prohibitions against public advertising of paragraph (13) of former Code 1933, § 97-109 are observed, and the legend and investment letter provisions of the two sections are complied with. 1974 Op. Att'y Gen. No. 74-75 (decided prior to 1975 amendment to paragraph (13) of former Code 1933, § 97-109; decided under former Code 1933, § 97-105).

Syndicator may sell interests to 40 investors in any 12-month period utilizing the

small issue registration procedure of subsection (e) of former Code 1933, § 97-105 and the registration exemption of paragraph (13) of former Code 1933, § 97-109; if this is done in such a way that purchasers pursuant to paragraph (13) of § 97-109 are not clearly identifiable, all investors must be accorded the rights and disclosures provided for in subsection (e) of § 97-105. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

In determining whether the maximum number of purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 or subsection (e) of former Code 1933, § 97-105 had been exceeded, the syndicator and the syndicator's affiliates must be counted as purchasers if the syndicators obtain or retain an interest. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

Integration would be virtually demanded if the syndicator commingles funds and other assets belonging to purportedly separate syndications; such commingling reduces the separate syndications to the level of mere window dressing and would preclude treatment of the syndications as separate entities in determining the number of purchasers to which sales have been made. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

National banks. — National bank should be viewed as a corporation within the purview of subparagraph (f)(3)(B) of former O.C.G.A. § 10-5-5. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

National banks whose principal offices are located within Georgia must as a matter of federal law be deemed qualified to do business in Georgia. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

In the absence of a superseding provision of federal law, a national bank whose principal office is located in a state other than Georgia may qualify to do business in Georgia under subparagraph (f)(3)(B) of former O.C.G.A. § 10-5-5 by compliance with either former Art. 14, Ch. 2, T. 44 or former Ch. 16, T. 53. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

Fee for application for exemption not refundable. — The $250.00 filing fee required by paragraph (5) of former Code 1933, § 97-109 for applications seeking a transactional exemption from the requirements of former Code 1933, § 97-105 is nonrefundable, since the legislature, had it intended that a refund be implied, would have explicitly provided for one. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-105).

RESEARCH REFERENCES

Am. Jur. 2d.

69A Am. Jur. 2d, Securities Regulation — State, §§ 17 et seq., 25 et seq., 31, 54.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 493 et seq.

ALR.

Applicability of Blue Sky Laws to preincorporation subscriptions, 50 A.L.R.2d 1103.

Sale of memberships in club or similar organization as sale of securities within provisions of securities Acts, 87 A.L.R.2d 1140.

Sales as "isolated" or "successive" or the like, under state securities Acts, 1 A.L.R.3d 614.

Attorney's preparation of legal document incident to sale of securities as rendering him liable under state securities regulation statutes, 62 A.L.R.3d 252.

What securities are exempt from registration under § 402(a) of the Uniform Securities Act, 84 A.L.R.3d 575.

Persons entitled to relief under civil liability provisions of § 12 of Securities Act of 1933 (15 USC § 77l), 113 A.L.R. Fed. 575.

10-5-20. Restrictions on sales of securities.

It is unlawful for a person to offer or sell a security in this state unless:

(1) The security is a federal covered security;

(2) The security, transaction, or offer is exempted from registration under Code Sections 10-5-10 through 10-5-12; or

(3) The security is registered under this chapter.

History.
Code 1981, § 10-5-20, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

JUDICIAL DECISIONS

Complaint survived motion to dismiss. — Defendants' motion to dismiss was denied, in part, because the cryptocurrency was an unregistered security and defendants' offer to purchase plaintiff's home with the cryptocurrency constituted an offer to sell an unregistered security, thus, the complaint stated a violation of the Georgia Uniform Securities Act, O.C.G.A. § 10-5-1 et seq. Shea v. Best Buy Homes, 533 F. Supp. 3d 1321, 2021 U.S. Dist. LEXIS 137995 (N.D. Ga. 2021).

10-5-21. Filing of records.

(a) With respect to a federal covered security, as defined in Section 18(b)(2) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(2), that is not otherwise exempt under Code Sections 10-5-10 through 10-5-12, a rule adopted or order issued under this chapter may require the filing of any or all of the following records:

(1) Before the initial offer of a federal covered security in this state, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., and a consent to service of process complying with Code Section 10-5-80 signed by the issuer and the payment of a fee of $250.00;

(2) After the initial offer of the federal covered security in this state, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(3) To the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this state, if the sales data are not included in records filed with the Securities and Exchange Commission and payment of a fee of $250.00.

(b) A notice filing under subsection (a) of this Code section is effective for one year commencing on the later of the notice filing or the effectiveness of the offering filed with the Securities and Exchange

Commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the Securities and Exchange Commission that are required by rule adopted or order issued under this chapter to be filed and by paying a renewal fee of $100.00. A previously filed consent to service of process complying with Code Section 10-5-80 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) With respect to a security that is a federal covered security under Section 18(b)(4)(D) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(4)(D), a rule adopted under this chapter may require a notice filing by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated by the Securities and Exchange Commission, and a consent to service of process complying with Code Section 10-5-80 signed by the issuer not later than 15 days after the first sale of the federal covered security in this state and the payment of a fee of $250.00.

(d) Except with respect to a federal security under Section 181(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1), if the Commissioner finds that there is a failure to comply with a notice or fee requirement of this Code section, the Commissioner may issue a stop order suspending the offer and sale of a federal covered security in this state. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the Commissioner.

History.
Code 1981, § 10-5-21, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-22. Registration by coordination; additional records; effective date of federal registration statement.

(a) A security for which a registration statement has been filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., in connection with the same offering may be registered by coordination under this Code section.

(b) A registration statement and accompanying records under this Code section must contain or be accompanied by the following records in addition to the information specified in Code Section 10-5-24 and a consent to service of process complying with Code Section 10-5-80:

(1) A copy of the latest form of prospectus filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.;

(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement

with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security that is required by rule adopted or order issued under this chapter;

(3) Copies of any other information or any other records filed by the issuer under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., requested by the Commissioner; and

(4) An undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the Securities and Exchange Commission.

(c) A registration statement under this Code section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) A stop order issued under subsection (d) of this Code section or Code Section 10-5-25 or issued by the Securities and Exchange Commission is not in effect and a proceeding is not pending against the issuer under Code Section 10-5-41; and

(2) The registration statement has been on file for at least 20 days or a shorter period provided by rule adopted or order issued under this chapter.

(d) The registrant shall promptly notify the Commissioner in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the Commissioner may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this Code section. The Commissioner shall promptly notify the registrant of an order by telephone or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this Code section, the stop order is void as of the date of its issuance.

(e) If the federal registration statement becomes effective before each of the conditions in this Code section is satisfied or is waived by the Commissioner, the registration statement is automatically effective under this chapter when all the conditions are satisfied or waived. If the registrant notifies the Commissioner of the date when the federal registration statement is expected to become effective, the Commissioner shall promptly notify the registrant by telephone or electronic means and promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the Commis-

sioner intends the institution of a proceeding under Code Section 10-5-25. The notice by the Commissioner does not preclude the institution of such a proceeding.

History.
Code 1981, § 10-5-22, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-23. Registration by qualification; additional information and records required; effective date.

(a) A security may be registered by qualification under this Code section.

(b) A registration statement under this Code section must contain the information or records specified in Code Section 10-5-24, a consent to service of process complying with Code Section 10-5-80, and, if required by rule adopted under this chapter, the following information or records:

(1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to each director and officer of the issuer and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;

(3) With respect to persons covered by paragraph (2) of this subsection, the aggregate sum of the remuneration paid to those persons during the previous 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer and all predecessors, parents, subsidiaries, and affiliates of the issuer;

(4) With respect to a person owning of record or owning beneficially, if known, 10 percent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) of this subsection other than the person's occupation;

(5) With respect to a promoter, if the issuer was organized within

the previous three years, the information or records specified in paragraph (2) of this subsection, any amount paid to the promoter within that period or intended to be paid to the promoter and the consideration for the payment;

(6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;

(7) The capitalization and long term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, good will, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue its securities;

(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

(9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to

achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including good will, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(10) A description of any stock options or other security options outstanding or to be created in connection with the offering and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8) of this subsection and by any person that holds or will hold 10 percent or more in the aggregate of those options;

(11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years and a copy of the contract;

(12) A description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets and any litigation, action, or proceeding known to be contemplated by governmental authorities;

(13) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with subparagraph (B) of paragraph (17) of Code Section 10-5-11;

(14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) A signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority

for a statement made by the person if the person is named as having prepared or certified a public report or valuation, other than an official record, which is used in connection with the registration statement;

(17) A balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and changes in financial position for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) Any additional information or records required by rule adopted or order issued under this chapter.

(c) A registration statement under this Code section becomes effective 30 days after the date the registration statement or the last amendment other than a price amendment is filed, unless any shorter period is provided by a rule adopted or order issued under this chapter, if:

(1) A stop order is not in effect and a proceeding is not pending under Code Section 10-5-25;

(2) The Commissioner has not issued an order under Code Section 10-5-25 delaying effectiveness; and

(3) The applicant or registrant has not requested that effectiveness be delayed.

(d) The Commissioner may delay effectiveness once for not more than 90 days if the Commissioner determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The Commissioner may also delay effectiveness for a further period of not more than 30 days if the Commissioner determines that the delay is necessary or appropriate.

(e) A rule adopted or order issued under this chapter may require as a condition of registration under this Code section that a prospectus containing a specified part of the information or record specified in subsection (b) of this Code section be sent or given to each person to which an offer is made before or concurrently with the earliest of:

(1) The first offer made in a record to the person, otherwise than by means of a public advertisement, by or for the account of the issuer

or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) The confirmation of a sale made by or for the account of the person;

(3) Payment pursuant to such a sale; or

(4) Delivery of the security pursuant to such a sale.

History.
Code 1981, § 10-5-23, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-24. Filing of registration statement; conditions of registration; amendment.

(a) A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) If a registration statement is withdrawn before the effective date or a pre-effective stop order is issued under Code Section 10-5-25, the Commissioner shall retain the fee.

(c) A registration statement filed under Code Section 10-5-22 or 10-5-23 must specify:

(1) The amount of securities to be offered in this state;

(2) The states in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) Any adverse order, judgment, or decree issued in connection with the offering by a state securities administrator, the Securities and Exchange Commission, or a court.

(d) A record filed under this chapter or the predecessor Act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) In the case of a nonissuer distribution, information or a record shall not be required under subsection (i) of this Code section or under Code Section 10-5-23, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) A rule adopted or order issued under this chapter may require as a condition of registration that a security issued within the previous

five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this state be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this chapter, but the Commissioner may not reject a depository institution solely because of its location in another state.

(g) A rule adopted or order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than five years.

(h) Except while a stop order is in effect under Code Section 10-5-25, a registration statement is effective for one year after its effective date or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the Commissioner.

(i) While a registration statement is effective, a rule adopted or order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current, and to disclose the progress of the offering.

(j) A registration statement may be amended after its effective date. The post-effective amendment becomes effective when the Commissioner so orders. A post-effective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.

History.
Code 1981, § 10-5-24, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-25. Denying, suspending, or revoking the effectiveness of registration statement; publication of conduct constituting violations; notice and hearing.

(a) The Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the Commissioner finds that the order is in the public interest and that:

(1) The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under subsection (j) of Code Section 10-5-24 as of its effective date, or a report under subsection (i) of Code Section 10-5-24 is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) This chapter or a rule adopted or order issued under this chapter or a condition imposed under this chapter has been willfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; by a promoter of the issuer; or by a person directly or indirectly controlling or controlled by the issuer but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this chapter applicable to the offering, but the Commissioner may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the Commissioner may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this Code section;

(4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) With respect to a security sought to be registered under Code Section 10-5-22, there has been a failure to comply with the

undertaking required by paragraph (4) of subsection (b) of said Code section;

(6) The applicant or registrant has not paid the filing fee, but the Commissioner shall void the order if the deficiency is corrected; or

(7) The offering:

(A) Will work or tend to work a fraud upon purchasers or would so operate; or

(B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation or promoters' profits or participations or unreasonable amounts or kinds of options; or

(C) Is being made on terms that are unfair, unjust, or inequitable.

(b) To the extent practicable, the Commissioner by rule adopted or order issued under this chapter shall publish in print or electronically standards that provide notice of conduct that violates paragraph (7) of subsection (a) of this Code section.

(c) The Commissioner may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the Commissioner when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) The Commissioner may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the Commissioner shall promptly notify each person specified in subsection (e) of this Code section that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 30 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) A stop order may not be issued under this Code section without:

(1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) An opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(f) The Commissioner may modify or vacate a stop order issued under this Code section if the Commissioner finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

History.
Code 1981, § 10-5-25, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2010, p. 838, § 10/SB 388.

Law reviews.
For article, "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation," see 26 Ga. L. Rev. 179 (1992).

RESEARCH REFERENCES

Am. Jur. 2d.
69A Am. Jur. 2d, Securities Regulation — State, § 55 et seq.

C.J.S.
79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 535 et seq.

10-5-26. Waiver or modification of requirements by Commissioner.

The Commissioner may waive or modify, in whole or in part, any or all of the requirements of Code Sections 10-5-21, 10-5-22, and subsection (b) of Code Section 10-5-23 or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to subsection (i) of Code Section 10-5-24.

History.
Code 1981, § 10-5-26, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

ARTICLE 4

REGISTRATION OF BROKER-DEALERS, AGENTS, AND INVESTMENT ADVISORS

Law reviews.
For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 97-103 and former O.C.G.A. § 10-5-3, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

Sale of shares of stock. — Shares of stock were "securities" which it was unlawful to sell in violation of former Code 1933, § 97-103 and subsection (a) of

former Code 1933, § 97-112. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-103).

Demand promissory note and option to purchase shares of corporation given in exchange for checks for $12,500.00 was a transaction to which requirements of former Code 1933, §§ 97-103 and 97-112 applied. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-103).

Subsection (a) only violated by listed persons. — Since the defendants did not come within any of the categories of persons, as defined in former Code 1933, § 97-102, which were required by subsection (a) of former Code 1933, § 97-103 to be registered, it follows that the sale of limited partnership interests by the defendants was not violative of subsection (a) of § 97-103. Hirsch v. Equilateral Assocs., 245 Ga. 373, 264 S.E.2d 885, 1980 Ga. LEXIS 803 (1980) (decided under former Code 1933, § 97-103).

Owner of stock included in security provisions. — See Jorges v. Griffin, 161 Ga. App. 439, 288 S.E.2d 356, 1982 Ga. App. LEXIS 1908 (1982) (decided under former O.C.G.A. § 10-5-3).

Burden on controlling officer seeking to avoid liability. — Former Code 1933, § 97-114 imposed liability upon the controlling officer of a corporation for a transaction executed by corporate treasurer administering affairs in the officer's absence, which transaction violated former Code 1933, §§ 97-103 and 97-112, if the officer directly or indirectly controlled the treasurer, unless the officer sustained burden of proof that the officer did not know, and in exercise of reasonable care could not have known, existence of facts by reason of which liability was alleged to exist. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former O.C.G.A. § 10-5-3).

Dealers. — Whether defendant was a "dealer" was immaterial since the evidence at trial was sufficient for a jury to find that the defendant was a "salesman" pursuant to former O.C.G.A. § 10-5-2(a)(25). Greenhill v. State, 199 Ga. App. 218, 404 S.E.2d 577, 1991 Ga. App. LEXIS 469 (1991), cert. denied, No. S91C0894, 1991 Ga. LEXIS 706 (Ga. May 15, 1991) (decided under former O.C.G.A. § 10-5-3).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-103, and former O.C.G.A. § 10-5-3, as amended, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

New York license to sell securities was not valid in Georgia. 1969 Op. Att'y Gen. No. 69-102 (decided under former Ga. L. 1957, p. 134, as amended).

Citizenship is not prerequisite to registration as a dealer, limited dealer, salesperson, or limited salesperson. 1970 Op. Att'y Gen. No. 70-113 (decided under former Ga. L. 1957, p. 134, as amended).

Foreign corporation also needs certificate of authority. — Registration as a dealer does not exempt a foreign corporation from needing a certificate of authority. 1975 Op. Att'y Gen. No. 75-38 (decided under former Code 1933, § 97-103).

Partner or officer in real estate syndicate may be "dealer" or "salesperson". — A general partner or executive officer of a real estate syndication should not be excluded from the definition of "salesperson" or "dealer" merely because the person receives compensation or profit in the form of a profit on sales to the syndication, a real estate brokerage commission, a management fee, or some other form which is not an explicit commission for the sale of securities. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-103).

Sellers of mortgage securities. — Person who engages in the business of

selling mortgage securities to the public is required to register as a dealer, and the individuals who work for such a dealer are required to register as salesperson unless the individuals qualify for one of the exemptions enumerated in this section. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-103).

Sellers of time-sharing units in condominiums with profit-sharing arrangements. — Sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security" within the definition of former Code 1933, § 97-103, and any person offering for sale or selling such securities must register as a dealer, limited dealer, salesperson, or limited salesperson unless such a person was a real estate broker or salesperson licensed to sell real estate in Georgia. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-103).

Activities described in section bring transaction under chapter. — Georgia courts would probably hold that the securities registration provisions did not apply to transactions involving a Georgia issuer if no sale or offer to sell occurred within Georgia; but if activities described in Ga. L. 1957, p. 134 are carried on in Georgia, this could bring the transactions under the law of this state. 1970 Op. Att'y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

Fees part of application. — General Assembly intended registration fees to be part of the application process without which the application for registration could not be considered complete and hence could not be acted upon. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-103).

Refund of fees if application withdrawn not authorized. — Statutory security provisions did not vest the commissioner of securities with authority to refund the registration fees required as part of the application for registration as a dealer, limited dealer, salesperson, or limited salesperson should an applicant withdraw an application. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-103).

RESEARCH REFERENCES

Am. Jur. 2d.

69A Am. Jur. 2d, Securities Regulation — State, § 15 et seq.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 493 et seq.

ALR.

Liability of seller to purchaser of invalid nonnegotiable public warrants, bonds, certificates, or other documents, 139 A.L.R. 1426.

Applicability of Blue Sky Laws to pre-incorporation subscriptions, 50 A.L.R.2d 1103.

Who is "dealer" under state securities Acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

10-5-30. Registration requirements for broker-dealers; exemptions.

(a) It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d) of this Code section.

(b) The following persons are exempt from the registration requirement of subsection (a) of this Code section:

(1) A broker-dealer without a place of business in this state if its only transactions effected in this state are with:

(A) The issuer of the securities involved in the transactions;

(B) A person registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;

(C) An institutional investor;

(D) A nonaffiliated federal covered investment adviser with investments under management in excess of $100 million acting for the account of others pursuant to discretionary authority in a signed record;

(E) A bona fide preexisting customer whose principal place of residence is not in this state and the person is registered as a broker-dealer under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities act of the state in which the customer maintains a principal place of residence;

(F) A bona fide preexisting customer whose principal place of residence is in this state but was not present in this state when the customer relationship was established, if:

(i) The broker-dealer is registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(ii) Within 45 days after the customer's first transaction in this state, the person files an application for registration as a broker-dealer in this state and a further transaction is not effected more than 75 days after the date on which the application is filed, or, if earlier, the date on which the Commissioner notifies the person that the Commissioner has denied the application for registration or has stayed the pendency of the application for good cause;

(G) Not more than three customers in this state during the previous 12 months, in addition to those customers specified in subparagraphs (A) through (F) and subparagraph (H) of this paragraph, if the broker-dealer is registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not

required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities act of the state in which the broker-dealer has its principal place of business; and

(H) Any other person exempted by rule adopted or order issued under this chapter; and

(2) A person that deals solely in United States government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, or the Federal Deposit Insurance Corporation.

(c) It is unlawful for a broker-dealer or for an issuer engaged in offering, offering to purchase, purchasing, or selling securities in this state, directly or indirectly, to employ or associate with an individual to engage in an activity related to securities transactions in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser, or a federal covered investment adviser by an order of the Commissioner under this chapter, the Securities and Exchange Commission, or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer did not know and in the exercise of reasonable care could not have known of the suspension, revocation, or bar. Upon request from a broker-dealer or issuer and for good cause, an order under this chapter may modify or waive, in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

(d) A rule adopted or order issued under this chapter may permit:

(1) A broker-dealer that is registered in Canada or other foreign jurisdiction and that does not have a place of business in this state to effect transactions in securities with or for or attempt to effect the purchase or sale of any securities by:

(A) An individual from Canada or other foreign jurisdiction who is temporarily present in this state and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(B) An individual from Canada or other foreign jurisdiction who is present in this state and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(C) An individual who is present in this state, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

(2) An agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this state as permitted for a broker-dealer described in paragraph (1) of this subsection.

History. Code 1981, § 10-5-30, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2015, p. 5, § 10/HB 90.

10-5-31. Registration requirements for agents; exemptions.

(a) It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this Code section.

(b) The following individuals are exempt from the registration requirement of subsection (a) of this Code section:

(1) An individual who represents a broker-dealer in effecting transactions in this state limited to those described in Section 15(h)(2) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h)(2);

(2) An individual who represents a broker-dealer that is exempt under subsection (b) or (d) of Code Section 10-5-30;

(3) An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(4) An individual who represents an issuer and who effects transactions in the issuer's securities exempted by Code Section 10-5-11, with the exception of paragraphs (11) and (14) of that Code section;

(5) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, but an individual who effects transactions in a federal covered security under Section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(3) or 77r(b)(4)(D), is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(6) An individual who represents a broker-dealer registered in this state under subsection (a) of Code Section 10-5-30 or exempt from registration under subsection (b) of Code Section 10-5-30 in the

offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of $100 million acting for the account of others pursuant to discretionary authority in a signed record;

(7) An individual who represents an issuer in connection with the purchase of the issuer's own securities;

(8) An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

(9) Any other individual exempted by rule adopted or order issued under this chapter.

(c) The registration of an agent is effective only while the agent is employed by or associated with a broker-dealer registered under this chapter or an issuer that is offering, selling, or purchasing its securities in this state.

(d) It is unlawful for a broker-dealer or an issuer engaged in offering, selling, or purchasing securities in this state to employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection (a) of this Code section or exempt from registration under subsection (b) of this Code section.

(e) An individual may not act as an agent for more than one broker-dealer or one issuer at a time, unless the broker-dealers and the issuers for which the agent acts are affiliated by direct or indirect common control or are authorized by rule adopted or order issued under this chapter.

History. Code 1981, § 10-5-31, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2019, p. 1056, § 10/SB 52.

10-5-32. Registration requirements for investment advisors; exemptions.

(a) It is unlawful for a person to transact business in this state as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser under subsection (b) of this Code section.

(b) The following persons are exempt from the registration requirement of subsection (a) of this Code section:

(1) A person without a place of business in this state that is registered under the securities act of the state in which the person has its principal place of business if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers

registered under this chapter, or broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state if the investment adviser is registered under the securities act of the state in which the clients maintain principal places of residence; or

(D) Any other client exempted by rule adopted or order issued under this chapter;

(2) A person without a place of business in this state if the person has had, during the preceding 12 months, not more than five clients that are resident in this state in addition to those specified under paragraph (1) of this subsection; or

(3) Any other person exempted by rule adopted or order issued under this chapter.

(c) It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser, or broker-dealer by an order issued under this chapter, the Securities and Exchange Commission, or a self-regulatory organization unless the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar. Upon request from the investment adviser and for good cause, the Commissioner, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

(d) It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this chapter as an investment adviser representative who transacts business in this state on behalf of the investment adviser unless the individual is registered under subsection (a) of Code Section 10-5-33 or is exempt from registration under subsection (b) of Code Section 10-5-33.

History.
Code 1981, § 10-5-32, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-33. Registration requirement for investment adviser representatives; exemptions.

(a) It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is

registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser under subsection (b) of this Code section.

(b) The following individuals are exempt from the registration requirement of subsection (a) of this Code section:

(1) An individual who is employed by or associated with an investment adviser that is exempt from registration under subsection (b) of Code Section 10-5-32 or a federal covered investment adviser that is excluded from the notice filing requirements of Code Section 10-5-34; and

(2) Any other individual exempted by rule adopted or order issued under this chapter.

(c) The registration of an investment adviser representative is not effective while the investment adviser representative is not employed by or associated with an investment adviser registered under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under Code Section 10-5-34.

(d) An individual may transact business as an investment adviser representative for more than one investment adviser or federal covered investment adviser unless a rule adopted or order issued under this chapter prohibits or limits an individual from acting as an investment adviser representative for more than one investment adviser or federal covered investment adviser.

(e) It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to conduct business in this state on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser representative is suspended or revoked or the individual is barred from employment or association with an investment adviser or a federal covered investment adviser by an order issued under this chapter, the Securities and Exchange Commission, or a self-regulatory organization. Upon request from a federal covered investment adviser and for good cause, the Commissioner, by order, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

(f) An investment adviser registered under this chapter, a federal covered investment adviser that has filed a notice under Code Section 10-5-34, or a broker-dealer registered under this chapter is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this chapter, a federal covered investment adviser who

has filed a notice under Code Section 10-5-34, or a broker-dealer registered under this chapter with which the individual is employed or associated as an investment adviser representative.

History.
Code 1981, § 10-5-33, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-34. Registration requirements for federal covered investment advisers.

(a) Except with respect to a federal covered investment adviser described in subsection (b) of this Code section, it is unlawful for a federal covered investment adviser to transact business in this state as a federal covered investment adviser unless the federal covered investment adviser complies with subsection (c) of this Code section.

(b) The following federal covered investment advisers are not required to comply with subsection (c) of this Code section:

(1) A federal covered investment adviser without a place of business in this state if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state; or

(D) Other clients specified by rule adopted or order issued under this chapter;

(2) A federal covered investment adviser without a place of business in this state if the person has had, during the preceding 12 months, not more than five clients that are resident in this state in addition to those specified under paragraph (1) of this subsection; and

(3) Any other person excluded by rule adopted or order issued under this chapter.

(c) A person acting as a federal covered investment adviser, not excluded under subsection (b) of this Code section, shall file a notice, a consent to service of process complying with Code Section 10-5-80 and such records as have been filed with the Securities and Exchange Commission under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., required by rule adopted or order issued under this chapter and pay the fees specified in subsection (e) of Code Section 10-5-39.

(d) The notice under subsection (c) of this Code section becomes effective upon its filing.

History.
Code 1981, § 10-5-34, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.
For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

10-5-35. Application for registration; consent to service of process.

(a) A person shall register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with Code Section 10-5-80, and paying the fee specified in Code Section 10-5-39 and any reasonable fees charged by the Commissioner for processing the filing. The application must contain:

(1) The information or records required for the filing of a uniform application as required for applicants registering through the Central Registration Depository and the Investment Adviser Registration Depository, as applicable; and

(2) Upon request by the Commissioner, any other financial or other information or record that the Commissioner determines is appropriate.

(b)(1) Each individual filing an application to become a salesperson, limited salesperson, designated salesperson, investment adviser, federal covered adviser, or investment adviser representative shall be fingerprinted and have a criminal record check as required by this subsection.

(2) Fingerprints shall be in such form and quality as shall be acceptable for submission to the National Crime Information Center under standards adopted by the Federal Bureau of Investigation or the United States Department of Justice. It shall be the duty of each law enforcement agency in this state to fingerprint those persons required to be fingerprinted by this subsection.

(3) At the discretion of the Commissioner, fees required for a criminal record check by the Georgia Crime Information Center, the National Crime Information Center, the Federal Bureau of Investigation, or the United States Department of Justice shall be paid by the applicant.

(4) The Commissioner shall transmit two sets of fingerprints to the Georgia Crime Information Center, which shall submit one set of fingerprints to the Federal Bureau of Investigation for a search of

bureau records and an appropriate report and shall retain one set of fingerprints and promptly conduct a search of state records. After receiving a report from the Georgia Crime Information Center and the Federal Bureau of Investigation, the Commissioner shall determine whether the applicant shall be licensed. If the applicant's fingerprints had been previously submitted for review to the Central Registration Depository in connection with federal or state licensing, the Commissioner may review and rely upon the criminal history reported pursuant thereto.

(5) The Commissioner shall notify the applicant of his or her rights to challenge the accuracy and completeness of any information provided by the Georgia Crime Information Center or the National Crime Information Center.

(6) Information provided by the Georgia Crime Information Center or the National Crime Information Center shall be used only for those purposes allowed by Code Section 35-3-35 or by applicable federal laws, rules, or regulations.

(7) Neither the Georgia Crime Information Center, the Commissioner, any law enforcement agency, nor the employees of any such entities shall be responsible for the accuracy of the information contained in the criminal background check nor incur any liability for defamation, invasion of privacy, negligence, or any other claim in connection with any dissemination of information or determination based thereon pursuant to this subsection.

(8) The Commissioner shall be authorized to adopt rules and regulations necessary to implement the provisions of this subsection.

(c) If the information or record contained in an application filed under subsection (a) of this Code section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(d) If an order is not in effect and a proceeding is not pending under Code Section 10-5-41, registration becomes effective at noon on the forty-fifth day after a completed application is filed unless the registration is denied. A rule adopted or order issued under this chapter may set an earlier effective date or may defer the effective date until noon on the forty-fifth day after the filing of any amendment completing the application.

(e) A registration is effective until midnight on December 31 of the year for which the application for registration is filed. Unless an order is in effect under Code Section 10-5-41, a registration may be automatically renewed each year by filing such records as are required by rule adopted or order issued under this chapter, by paying the fee

specified in Code Section 10-5-39, and by paying costs charged by the Commissioner for processing the filings.

(f) A rule adopted or order issued under this chapter may impose such other conditions, not inconsistent with the National Securities Markets Improvement Act of 1996, 15 U.S.C. Section 80b-1, et seq. An order issued under this chapter may waive, in whole or in part, such requirements in connection with registration as are in the public interest and for the protection of investors.

History.
Code 1981, § 10-5-35, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2024, p. 1052, § 2(45)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation at the end of paragraph (a)(2).

10-5-36. Successors to registration; change of name, form of organization, and control.

(a) A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser by filing as a successor an application for registration pursuant to Code Section 10-5-30 or 10-5-32 or a notice pursuant to Code Section 10-5-34 for the unexpired portion of the current registration or notice filing.

(b) A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the registrant in its filing. The new organization is a successor to the original registrant for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for registration. A predecessor registered under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser registration within 45 days after filing its amendment to effect succession.

(c) A broker-dealer or investment adviser that changes its name may continue its registration by filing an amendment to its registration. The amendment becomes effective when filed or on a date designated by the registrant.

(d) A change of control of a broker-dealer or investment adviser may

be made in accordance with a rule adopted or order issued under this chapter.

History.
Code 1981, § 10-5-36, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-37. Notice of termination.

(a) If an agent registered under this chapter terminates employment by or association with a broker-dealer or issuer or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser or federal covered investment adviser or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser or federal covered investment adviser shall promptly file a notice of termination. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant may do so.

(b) If an agent registered under this chapter terminates employment by or association with a broker-dealer registered under this chapter and begins employment by or association with another broker-dealer registered under this chapter or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under Code Section 10-5-34 and begins employment by or association with another investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under Code Section 10-5-34, then upon the filing by or on behalf of the registrant, within 30 days after the termination, of an application for registration that complies with the requirement of subsection (a) of Code Section 10-5-35 and payment of the filing fee required under Code Section 10-5-39, the registration of the agent or investment adviser representative is:

(1) Immediately effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record does not contain a new or amended disciplinary disclosure within the previous 12 months; or

(2) Temporarily effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record contains a new or amended disciplinary disclosure within the preceding 12 months.

(c) The Commissioner may withdraw a temporary registration if there are or were grounds for discipline as specified in Code Section 10-5-41 and the Commissioner does so within 30 days after the filing of the application. If the Commissioner does not withdraw the temporary registration within the 30 day period, registration becomes automatically effective on the thirty-first day after filing.

(d) The Commissioner may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection (b) of this Code section based on the public interest and the protection of investors.

(e) If the Commissioner determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser, or investment adviser representative or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator, or guardian or cannot reasonably be located, a rule adopted or order issued under this chapter may require the registration be canceled or terminated or the application denied. The Commissioner may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive.

History.
Code 1981, § 10-5-37, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-38. Withdrawal of registration.

Withdrawal of registration by a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective 60 days after the filing of the application to withdraw or within any shorter period as provided by rule adopted or order issued under this chapter unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by rule adopted or order issued under this chapter. The Commissioner may institute a revocation or suspension proceeding under Code Section 10-5-41 within one year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending.

History.
Code 1981, § 10-5-38, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-39. Fees.

(a) A person shall pay a fee of $250.00 when initially filing an

application for registration as a broker-dealer and a fee of $100.00 when filing a renewal of registration as a broker-dealer. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(b) The fee for an individual is $50.00 when filing an application for registration as an agent, $40.00 when filing a renewal of registration as an agent, and $30.00 when filing for a change of registration as an agent. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(c) A person shall pay a fee of $250.00 when filing an application for registration as an investment adviser and a fee of $100.00 when filing a renewal of registration as an investment adviser. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(d) The fee for an individual is $250.00 when filing an application for registration as an investment adviser representative, a fee of $100.00 when filing a renewal of registration as an investment adviser representative, and a fee of $50.00 when filing a change of registration as an investment adviser representative. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(e) A federal covered investment adviser required to file a notice under Code Section 10-5-34 shall pay an initial fee of $250.00 and an annual notice fee of $100.00.

(f) A person required to pay a filing or notice fee under this Code section may transmit the fee through or to a designee as a rule adopted or order issued provides under this chapter.

(g) An investment adviser representative who is registered as an agent under Code Section 10-5-31 and who represents a person that is both registered as a broker-dealer under Code Section 10-5-30 and registered as an investment adviser under Code Section 10-5-32 or required as a federal covered investment adviser to make a notice filing under Code Section 10-5-34 is not required to pay an initial or annual registration fee for registration as an investment adviser representative.

History.
Code 1981, § 10-5-39, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-40. Financial requirements.

(a) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, a rule adopted or order issued under this chapter may establish minimum financial requirements for broker-dealers registered or required to be registered under this

chapter and investment advisers registered or required to be registered under this chapter.

(b) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222(b) of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, a broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall file such financial reports, if any, as are required by a rule adopted or order issued under this chapter. If the information contained in a record filed under this subsection is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22:

(1) A broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall make and maintain the accounts, correspondence, memoranda, papers, books, and other records required by rule adopted or order issued under this chapter;

(2) Broker-dealer records required to be maintained under paragraph (1) of this subsection may be maintained in any form of data storage acceptable under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78q(a), if they are readily accessible to the Commissioner; and

(3) Investment adviser records required to be maintained under paragraph (1) of this subsection may be maintained in any form of data storage required by rule adopted or order issued under this chapter.

(d) The records of a broker-dealer registered or required to be registered under this chapter and of an investment adviser registered or required to be registered under this chapter are subject to such reasonable, periodic, special, or other audits or inspections by a representative of the Commissioner, inside or outside this state, as the Commissioner considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The Commissioner may copy, and remove for audit or inspection copies of, all records the Commissioner reasonably considers necessary or appropriate to conduct the audit or inspection. The Commissioner may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of

1940, 15 U.S.C. Section 80b-22, a rule adopted or order issued under this chapter may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security in an amount not to exceed $25,000.00. The Commissioner may determine the requirements of the insurance, bond, or other satisfactory form of security. Insurance or a bond or other satisfactory form of security may not be required of a broker-dealer registered under this chapter whose net capital exceeds or of an investment adviser registered under this chapter whose minimum financial requirements exceed the amounts required by rule adopted or order issued under this chapter. The insurance, bond, or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond, or other satisfactory form of security if instituted within the time limitations in paragraph (2) of subsection (j) of Code Section 10-5-58.

(f) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, an agent may not have custody of funds or securities of a customer except under the supervision of a broker-dealer and an investment adviser representative may not have custody of funds or securities of a client except under the supervision of an investment adviser or a federal covered investment adviser. A rule adopted or order issued under this chapter may prohibit, limit, or impose conditions on a broker-dealer regarding custody of funds or securities of a customer and on an investment adviser regarding custody of securities or funds of a client.

(g) With respect to an investment adviser registered or required to be registered under this chapter, a rule adopted or order issued under this chapter may require that information or other record be furnished or disseminated to clients or prospective clients in this state as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(h) A rule adopted or order issued under this chapter may require an individual registered under Code Section 10-5-31 or 10-5-33 to participate in a continuing education program approved by the Securities and Exchange Commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or order issued under this chapter may require continuing education for an individual registered under Code Section 10-5-33.

History.
Code 1981, § 10-5-40, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-41. Denial of or placement of conditions or limitations on registration; civil penalties.

(a) If the Commissioner finds that the order is in the public interest and subsection (d) of this Code section authorizes the action, an order issued under this chapter may deny an application or may condition or limit registration:

(1) Of an applicant to be a broker-dealer, agent, investment adviser, or investment adviser representative; and

(2) If the applicant is a broker-dealer or investment adviser, of any partner, officer, director, person having a similar status or performing similar functions, or person directly or indirectly controlling the broker-dealer or investment adviser.

(b) If the Commissioner finds that the order is in the public interest and subsection (d) of this Code section authorizes the action, an order issued under this chapter may revoke, suspend, condition, or limit the registration of a registrant and if the registrant is a broker-dealer or investment adviser, any partner, officer, or director, any person having a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser. However, the Commissioner:

(1) May not institute a revocation or suspension proceeding under this subsection based on an order issued by another state that is reported to the Commissioner later than one year after the date of the order on which it is based; and

(2) Under subparagraphs (d)(5)(A) and (d)(5)(B) of this Code section may not issue an order on the basis of an order under the state securities act of another state unless the other order was based on conduct for which subsection (d) of this Code section would authorize the action had the conduct occurred in this state.

(c) If the Commissioner finds that the order is in the public interest and paragraphs (1) through (6) and (8) through (13) of subsection (d) of this Code section authorize the action, an order under this chapter may censure, impose a bar, or impose a civil penalty in an amount not to exceed a maximum of $50,000.00 for a single violation or $500,000.00 for several violations on a registrant and if the registrant is a broker-dealer or investment adviser, any partner, officer, or director, any person having similar functions or any person directly or indirectly controlling the broker-dealer or investment adviser.

(d) A person may be disciplined under subsections (a) through (c) of this Code section if the person:

(1) Has filed an application for registration in this state under this chapter or the predecessor Act within the previous ten years,

which, as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) Willfully violated or willfully failed to comply with this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act within the previous ten years;

(3) Has been convicted of a felony or within the previous ten years has been convicted of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;

(4) Is enjoined or restrained by a court of competent jurisdiction in an action instituted by the Commissioner under this chapter or the predecessor Act, a state, the Securities and Exchange Commission, or the United States from engaging in or continuing an act, practice, or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;

(5) Is the subject of an order, issued after notice and opportunity for hearing by:

(A) The securities, depository institution, insurance, or other financial services administrator of a state or by the Securities and Exchange Commission or other federal agency denying, revoking, barring, or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative;

(B) The securities administrator of a state or by the Securities and Exchange Commission against a broker-dealer, agent, investment adviser, investment adviser representative, or federal covered investment adviser;

(C) The Securities and Exchange Commission or by a self-regulatory organization suspending or expelling the registrant from membership in the self-regulatory organization;

(D) A court adjudicating a United States Postal Service fraud order;

(E) The insurance regulator of a state denying, suspending, or revoking the registration of an insurance agent; or

(F) A depository institution regulator suspending or barring a person from the depository institution business;

(6) Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, a federal depository institution regulator, or a depository institution, insurance, or other financial services administrator of a state that the person willfully violated the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq., or the Commodity Exchange Act, 7 U.S.C. Section 1, et seq., the securities or commodities law of a state, or a federal or state law under which a business involving investments, franchises, insurance, banking, or finance is regulated;

(7) Is insolvent, either because the person's liabilities exceed the person's assets or because the person cannot meet the person's obligations as they mature, but the Commissioner may not enter an order against an applicant or registrant under this paragraph without a finding of insolvency as to the applicant or registrant;

(8) Refuses to allow or otherwise impedes the Commissioner from conducting an audit or inspection under subsection (d) of Code Section 10-5-40 or refuses access to a registrant's office to conduct an audit or inspection under subsection (d) of Code Section 10-5-40;

(9) Has failed to reasonably supervise an agent, investment adviser representative, or other individual, if the agent, investment adviser representative, or other individual was subject to the person's supervision and committed a violation of this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act within the previous ten years;

(10) Has not paid the proper filing fee within 30 days after having been notified by the Commissioner of a deficiency, but the Commissioner shall vacate an order under this paragraph when the deficiency is corrected;

(11) After notice and opportunity for a hearing, has been found within the previous ten years:

(A) By a court of competent jurisdiction to have willfully violated the laws of a foreign jurisdiction under which the business of securities, commodities, investment, franchises, insurance, banking, or finance is regulated;

(B) To have been the subject of an order of a securities administrator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative, or similar person; or

(C) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;

(12) Is the subject of a cease and desist order issued by the Securities and Exchange Commission or issued under the securities, commodities, investment, franchise, banking, finance, or insurance laws of a state;

(13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years; or

(14) Is not qualified on the basis of factors such as training, experience, and knowledge of the securities business. However, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser representative, a denial order may not be based on this paragraph if the individual has successfully completed all examinations required by subsection (e) of this Code section. The Commissioner may require an applicant for registration under Code Section 10-5-31 or 10-5-33 who has not been registered in a state within the two years preceding the filing of an application in this state to successfully complete an examination.

(e) A rule adopted or order issued under this chapter may require that an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all individuals. An order issued under this chapter may waive, in whole or in part, an examination as to an individual and a rule adopted under this chapter may waive, in whole or in part, an examination as to a class of individuals if the Commissioner determines that the examination is not necessary or appropriate in the public interest and for the protection of investors.

(f) The Commissioner may suspend or deny an application summarily; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon the issuance of an order, the Commissioner shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within 30 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

(g) Except under subsection (f) of this Code section, an order may not be issued under this Code section without:

(1) Appropriate notice to the applicant or registrant;

(2) Opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(h) A person that controls, directly or indirectly, a person not in compliance with this Code section may be disciplined by order of the Commissioner under subsections (a) through (c) of this Code section to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this Code section.

(i) The Commissioner may not institute a proceeding under subsection (a), (b), or (c) of this Code section based solely on material facts actually known by the Commissioner unless an investigation or the proceeding is instituted within one year after the Commissioner actually acquires knowledge of the material facts.

History.
Code 1981, § 10-5-41, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

ARTICLE 5

VIOLATIONS, PENALTIES, AND CIVIL LIABILITY

Law reviews.

For article examining interface between law and business in regards to marketing of thrift notes, see 26 Mercer L. Rev. 311 (1974).

For comment, the purchase of all the shares of stock of a business is not the purchase of a "Security" within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

For article, "Uniformity Under the Securities Laws: Regulation D and the New Georgia Uniform Limited Offering Exemption," see 19 Ga. St. B. J. 74 (1982).

For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985).

For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

For article, "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation," see 26 Ga. L. Rev. 179 (1992).

For article, "Common Fact Patterns of Stock Broker Fraud and Misconduct," see 7 Ga. St. B.J. 14 (2002).

For article, "Theories of Stockbroker and Brokerage Firm Liability," see 9 Ga. St. B. J. 12 (2004).

For article, "Georgia Securities Act — Let the Buyer Beware," see 10 Ga. St. B. J. 14 (2005).

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
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Statute of Limitations

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, former Code 1933, §§ 97-112, 97-113, 97-114, and former O.C.G.A. §§ 10-5-12, 10-5-13, and 10-5-14, as amended, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

Section resembles federal regulation. — Although the defenses available may differ between this section and federal Rule 10(b)-5, the resemblance goes beyond each requiring an element of culpability, as this section bears a close resemblance to Rule 10(b)-5 and shares a commonality of purpose with that rule. Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 1978 U.S. Dist. LEXIS 17822 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

As there was no dispute that agreements and notes defendant provided the victims in exchange for money were investments and that the victims relied on defendant to manage the investments and to provide a return on the investments, the instruments were "securities" within the meaning of Georgia's blue sky law; that the amount of expected return was fixed was immaterial. Rasch v. State, 260 Ga. App. 379, 579 S.E.2d 817, 2003 Ga. App. LEXIS 390 (2003) (decided under former O.C.G.A. § 10-5-12).

Standing. — Because plaintiff's injuries did not flow directly from the commission of predicate acts by defendant, the plaintiff did not have standing to bring a RICO action. Longino v. Bank of Ellijay, 228 Ga. App. 37, 491 S.E.2d 81 (decided under former O.C.G.A. § 10-5-12).

State limitation period applies in federal action for securities fraud. — Two-year statute of limitations was applicable to an action alleging violations of 15 U.S.C. §§ 78j(b) and 78g, 17 C.F.R. 240.10b-5, and the common law of Georgia, in that plaintiffs were induced to trade their stock in a corporation for stock in another by misrepresentations in the latter's financial statements. Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 1978 U.S. Dist. LEXIS 17822 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

Georgia Blue Sky Law are most analogous to § 10(b) of the federal Securities Exchange Act, and federal Rule 10b-5, and thus the two-year statute of limitations applies to § 10(b) and Rule 10b-5 claims. Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1986 U.S. App. LEXIS 25076 (11th Cir. 1986) (decided under former O.C.G.A. §§ 10-5-12 and 10-5-14).

Limitation period for federal action by defrauded seller. — Since under the securities law defrauded sellers have no remedy, the applicable statute of limitations for federal 10b-5 cases brought in Georgia by allegedly defrauded sellers is the four-year limitation associated with Georgia's fraud remedy (see O.C.G.A. §§ 9-3-31, 51-6-1 et seq.) and not the two-year period found in the securities law. Kirk v. First Nat'l Bank, 439 F. Supp. 1141, 1977 U.S. Dist. LEXIS 13358 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

Limitation period for action against broker for churning, margin violations. — Four-year period of limitations applicable to actions under Georgia's general fraud statute (see O.C.G.A. §§ 9-3-31, 51-6-1 et seq.), and not the two-year limitation applicable to actions brought under former Code 1933, § 97-114, was applicable to causes of action alleged under both 15 U.S.C. § 78j(b) and 15 U.S.C. § 78g. McNeal v.

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Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 1979 U.S. App. LEXIS 13305 (5th Cir. 1979) (Action not against principal in securities transaction for rescission; decided under former Ga. L. 1957, p. 134, as amended).

State limitation period applied as existed when action accrued. — In a federal security case, the state statute of limitations was looked to as it existed when the cause of action accrued, for example, when the alleged churning by a broker took place. McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 1979 U.S. App. LEXIS 13305 (5th Cir. 1979) (decided under former Ga. L. 1957, p. 134, as amended).

State need only prove date within period of limitations. — Defendant's conviction for misstating a material fact to a victim in connection with the sale of a security for an indictment dated December 22, 2004, was properly proven by the state to have occurred within the four year statute of limitations period by the state establishing that the victim invested in the stock by two checks, dated November 28 and December 13, 2001, and the victim testified that the investment was made based on conversations with defendant during the months of October and November of 2001; as a result, the evidence was sufficient to show that defendant's violative acts as to the sale of securities occurred within the period provided by the statute of limitations. Haupt v. State, 290 Ga. App. 616, 660 S.E.2d 383, 2008 Ga. App. LEXIS 250 (2008) (decided under former O.C.G.A. § 10-5-12).

Shares of stock are "securities" which it is unlawful to sell in violation of subsection (a) of former Code 1933, § 97-103 and former Code 1933, § 97-112. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-112).

Demand promissory note and option to purchase shares of corporation given in exchange for checks for $12,500,000 was a transaction to which requirements of subsection (a) of former Code 1933, § 97-112 and former Code 1933, § 97-103 applied. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-112).

Cause of action is expressly provided by former O.C.G.A. § 10-5-14(a) in favor of purchasers for the violation of paragraph (a)(2) of former O.C.G.A. § 10-5-12. Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-12).

Intent not element of crime under subsection (b). — Under counts charging the defendants with representations to the effect that the securities commissioner had passed upon the merits of the stock, an intent to deceive is not an essential element of the crime charged; the criminal act is complete upon the making of the representation. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Scienter is element under subsection (a). — Trial court did not err in charging a jury that scienter was an element of securities fraud under former O.C.G.A. §§ 10-5-12(a)(2) and 10-5-14(a); further, the trial court properly charged the jury that justified reliance was an element of securities fraud. Keogler v. Krasnoff, 268 Ga. App. 250, 601 S.E.2d 788, 2004 Ga. App. LEXIS 886 (2004), cert. denied, No. S04C1876, 2005 Ga. LEXIS 106 (Ga. Jan. 24, 2005) (decided under former O.C.G.A. § 10-5-12).

Two types of crimes are prohibited by this section: (1) the making of an intentional representation that by the filing of a registration statement, the commissioner of securities had passed upon the merits of the security and (2) the use of a device, scheme, or artifice to defraud, or the commission of any act, practice, or course of business which would operate as a fraud on the purchaser. In the former instance the making of the representation completes the criminal act, whereas in the latter instance an intent to defraud has to be shown. Curtis v. State, 102 Ga. App.

790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Physical presence unnecessary for venue of conspiracy. — If the jury finds defendants conspired to sell stock by means of practices and misrepresentations inhibited by this section, and pursuant to such conspiracy stock was in fact offered and the misrepresentations made in Hall County, the fact that the defendants were not physically present in the county at the time their agents put the scheme into operation does not operate to relieve the agents from being tried and convicted in such county. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Transaction held as not taking place in Georgia. — When a plaintiff, a Georgia resident, and a defendant, a Tennessee resident, discussed by telephone an arrangement whereby the defendant's company would serve as plaintiff's investment advisor in trading of commodity futures, and the defendant mailed to the plaintiff two letter agreements setting out the contract terms, and the plaintiff signed the letters and returned the letters for signature of the other party, under Georgia law the transaction did not take place in Georgia. Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 608 F.2d 175, 1979 U.S. App. LEXIS 9744 (5th Cir. 1979) (decided under former Code 1933, § 97-112).

Transaction held as taking place in Georgia. — With regard to defendant's convictions on two counts of making an untrue material statement of fact and omitting other material facts in selling stock, the state unequivocally proved venue in Chatham County, Georgia, by establishing, via a victim's testimony, that the offense occurred within the Chatham County area and the evidence otherwise showed that the victim executed a relevant stock purchase agreement that included the language in the "State of Georgia, County of Chatham." Haupt v. State, 290 Ga. App. 616, 660 S.E.2d 383, 2008 Ga. App. LEXIS 250 (2008) (decided under former O.C.G.A. § 10-5-12).

Burden on controlling officer seeking to escape liability under subsection (a). — Former Code 1933, § 97-114 imposed liability upon controlling officer of corporation for transaction executed by corporate treasurer administering affairs in the officer's absence, which transaction violated subsection (a) of former Code 1933, § 97-112 and former Code 1933, § 97-103, if the officer directly or indirectly controlled treasurer, unless the officer sustained burden of proof that the officer did not know, and in exercise of reasonable care could not have known, of existence of facts by reason of which liability was alleged to exist. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-112).

To hold an individual to be an agent who has participated or aided in making sales of securities, the court must find that the individual was so entangled in the actual sale of securities that the individual's activities were at least a substantial factor in the purchaser's decision to buy the security and that the individual's activities were either authorized or ratified by the issuer. In re N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608, 1981 U.S. Dist. LEXIS 18595 (N.D. Ga. 1981) (decided under former O.C.G.A. § 10-5-12).

Civil liability for pre-1974 violations of anti-fraud provisions. — While Ga. L. 1973, p. 1202 now provides for express civil liability for anyone who violates its general anti-fraud provisions, former Code 1933, §§ 97-104, 97-112, 97-114, which apply to transactions occurring before April 1, 1974, provide for civil liability only as provided for in former Code 1933, § 97-114. In re N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608, 1981 U.S. Dist. LEXIS 18595 (N.D. Ga. 1981) (decided under former O.C.G.A. § 10-5-12).

Prosecution did not abate due to the 1986 repeal and reenactment of former O.C.G.A. § 10-5-12 since the conduct with

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which the defendant was charged and convicted was not decriminalized at any time during the various redefinitions of the statute. Greenhill v. State, 199 Ga. App. 218, 404 S.E.2d 577, 1991 Ga. App. LEXIS 469 (1991), cert. denied, No. S91C0894, 1991 Ga. LEXIS 706 (Ga. May 15, 1991) (decided under former O.C.G.A. § 10-5-12).

Federal equitable tolling principles inapplicable. — As a claim under former O.C.G.A. § 10-5-12 could not be characterized as a federally created remedy, federal equitable tolling principles did not apply, and such a claim, brought over two years after the purchase of stock, was time-barred by former O.C.G.A. § 10-5-14. Wilkinson v. Paine, Webber, Jackson & Curtis, Inc., 585 F. Supp. 23, 1983 U.S. Dist. LEXIS 18251 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-12).

Complaint not showing intent to defraud dismissed. — Motion to dismiss a complaint alleging violations of the Georgia Securities Act, the Uniform Limited Partnership Act, and common-law fraud was granted on the ground that the complaint did not show an intent to defraud. Currie v. Cayman Resources Corp., 595 F. Supp. 1364, 1984 U.S. Dist. LEXIS 23274 (N.D. Ga. 1984), aff'd in part and rev'd in part, 835 F.2d 780, 1988 U.S. App. LEXIS 217 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-12).

Evidence of fraud possibly sufficient. — Trial court erred in granting the defendant broker's motion to dismiss plaintiff's claim of securities fraud for failure to state a claim upon which relief can be granted because a statement of the broker made in connection with the sale of stock was possibly sufficient to warrant a grant of the relief sought. GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., 245 Ga. App. 460, 537 S.E.2d 677, 2000 Ga. App. LEXIS 922 (2000) (decided under former O.C.G.A. § 10-5-12).

No claim where profits dependent on purchaser's efforts. — When the return to be expected from the purchase of securities depended in part upon the purchaser's own efforts and not solely from the efforts of others, the purchaser has no claim under subsections (a)(2) or (d)(1) of former O.C.G.A. § 10-5-12. Nicholson v. Harris, 179 Ga. App. 35, 345 S.E.2d 63, 1986 Ga. App. LEXIS 1817 (1986) (decided under former O.C.G.A. § 10-5-12).

Theft by taking did not merge with securities violation. — Defendant's convictions for theft by taking under O.C.G.A. § 16-8-2 and for violating the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12 et seq., did not merge for sentencing purposes because the language of the statutes indicated that the offenses were separate offenses as a matter of law and because while theft required that the victim sustain a loss, a securities violation did not. Branan v. State, 285 Ga. App. 717, 647 S.E.2d 606, 2007 Ga. App. LEXIS 628 (2007) (decided under former O.C.G.A. § 10-5-12).

Requested jury instruction properly refused. — Trial court did not err by failing to charge the jury that the reckless representation of facts as true without knowledge was actionable as a species of fraud without scienter; the proposed charge was an incorrect statement of law because it obviated the necessity to prove that the party making the alleged reckless misrepresentation intended to deceive the party relying thereon and the proposed charge was not precisely tailored or adjusted to the evidence. Keogler v. Krasnoff, 268 Ga. App. 250, 601 S.E.2d 788, 2004 Ga. App. LEXIS 886 (2004), cert. denied, No. S04C1876, 2005 Ga. LEXIS 106 (Ga. Jan. 24, 2005) (decided under former O.C.G.A. § 10-5-12).

Court had no duty to charge jury on definition of "security." — Trial court did not err, with regard to the defendant's convictions on two counts of making an untrue material statement of fact and omitting other material facts in selling stock, by failing to sua sponte charge the jury on the statutory definition of the word "security" and other specifics as the record showed that the trial court properly charged the jury that the term security meant any stock or share or any

other instrument commonly known as a security, which was in consonance with the evidence and the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12(a)(1) and (2)(B); further, since the defendant made no request to charge, the trial court had no sua sponte duty to give a charge. Haupt v. State, 290 Ga. App. 616, 660 S.E.2d 383, 2008 Ga. App. LEXIS 250 (2008) (decided under former O.C.G.A. § 10-5-12).

Scienter contemplates intent to deceive. — Scienter, for purposes of former O.C.G.A. § 10-5-12(a)(2), even if based on a reckless misrepresentation, contemplates the intent to deceive. Keogler v. Krasnoff, 268 Ga. App. 250, 601 S.E.2d 788, 2004 Ga. App. LEXIS 886 (2004), cert. denied, No. S04C1876, 2005 Ga. LEXIS 106 (Ga. Jan. 24, 2005) (decided under former O.C.G.A. § 10-5-12).

It is not essential that criminal proceedings be instituted, but the commissioner has the right to issue an order to prohibit sales people from continuing the sale of questionable securities and also to apply for an injunction to restrain such acts and, further, to turn over any evidence to the district attorney, who may institute the necessary criminal proceedings. Cohen v. State, 101 Ga. App. 23, 112 S.E.2d 672, 1960 Ga. App. LEXIS 775 (1960) (decided under former Ga. L. 1957, p. 134).

Provisions for initiating criminal proceedings not exclusive. — This section is permissive in character and provides for a manner of initiating criminal proceedings through the commissioner and Attorney General, but the statute is by no means intended to be exclusive, and the fact that the district attorney rather than the Attorney General appears before the grand jury, or that warrants are sworn out in the first instance and prior to the grand jury proceedings by affidavit of the individual prosecutors, in no way renders the indictment illegal. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

"Willfully." — Court of Appeals of Georgia, First Division, concludes that the term "willfully" in former O.C.G.A. § 10-5-13(a)(1)(A)(iv) has the same meaning that it has been construed to have in former O.C.G.A. § 10-5-24. Before any of the civil penalties of up to $50,000 for single violations and up to $500,000 for multiple violations can be imposed under former O.C.G.A. § 10-5-13(a)(1)(A)(iv), there must be a knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq. Garvin v. Sec'y of State, 266 Ga. App. 66, 596 S.E.2d 166, 2004 Ga. App. LEXIS 171 (2004), cert. denied, No. S04C1027, 2004 Ga. LEXIS 517 (Ga. June 7, 2004), rev'd sub nom. Cox v. Garvin, 278 Ga. 903, 607 S.E.2d 549, 2005 Ga. LEXIS 15 (2005), vacated in part, 272 Ga. App. 860, 614 S.E.2d 93, 2005 Ga. App. LEXIS 281 (2005) (decided under former O.C.G.A. § 10-5-13).

Civil fines and cease and desist order. — Seller of investment contracts, whereby the seller sold an investment venture of payphones to a purchaser, who then leased back the phones for an expected fixed monthly return, was not properly sanctioned with a fine by the Commissioner of Securities pursuant to former O.C.G.A. § 10-5-13(a)(1)(A)(iv) since it was found that the seller had acted willfully, but there was no showing that the seller had acted in knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq.; the Commissioner's issuance of a cease and desist order which was not limited solely to the willful acts of the seller was proper under former O.C.G.A. § 10-5-13(a)(1). Garvin v. Sec'y of State, 266 Ga. App. 66, 596 S.E.2d 166, 2004 Ga. App. LEXIS 171 (2004), cert. denied, No. S04C1027, 2004 Ga. LEXIS 517 (Ga. June 7, 2004), rev'd sub nom. Cox v. Garvin, 278 Ga. 903, 607 S.E.2d 549, 2005 Ga. LEXIS 15 (2005), vacated in part, 272 Ga. App. 860, 614 S.E.2d 93, 2005 Ga. App. LEXIS 281 (2005) (decided under former O.C.G.A. § 10-5-13).

Construction with O.C.G.A. § 13-6-11. — Ancillary award of attorney fees and expenses in favor of a seller was ordered struck, pursuant to O.C.G.A. § 9-12-8, as: (1) the jury failed to find the buyers liable on the seller's underlying

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substantive claims; (2) the award was based on O.C.G.A. § 13-6-11, not former O.C.G.A. § 10-5-14; and, as a result, (3) the lack of a damages award in favor of the seller did not support the award. Davis v. Johnson, 280 Ga. App. 318, 634 S.E.2d 108, 2006 Ga. App. LEXIS 846 (2006) (decided under former O.C.G.A. § 10-5-14).

Remedy afforded by section is not sole remedy which a purchaser of securities is entitled to pursue. Turpin v. Wilson, 133 Ga. App. 239, 211 S.E.2d 316, 1974 Ga. App. LEXIS 1031 (1974) (noting subsection (e) of former Code 1933, § 97-114 preserves former Ga. L. 1957, p. 134, § 13(c)).

Although former O.C.G.A. § 10-5-14 prevented a purchaser of unregistered securities from pursuing civil damages arising from their sale, this statute of limitation did not otherwise prevent the purchaser from arguing that the contract remained unlawful and unenforceable because the passage of two years did not erase the unlawful nature of the underlying contract, but merely limited the remedies available. Carter v. Moody, 236 Ga. App. 262, 511 S.E.2d 520 (decided under former O.C.G.A. § 10-5-14).

Cause of action is expressly provided by subsection (a) of former O.C.G.A. § 10-5-14 in favor of purchasers for the violation of former O.C.G.A. § 10-5-12(a)(2). Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983) (considering sales made before April 1, 1974, the effective date of this chapter, but noting two-year limitation appears in both Ga. L. 1957, p. 134, § 13(a), and subsection (c) of former O.C.G.A. § 10-5-14).

Remedy limited to buyer. — This section limits the civil remedy to the buyer of a security. Kirk v. First Nat'l Bank, 439 F. Supp. 1141, 1977 U.S. Dist. LEXIS 13358 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

It is clear that only buyers of security shall have a remedy for fraud. Kirk v. First Nat'l Bank, 439 F. Supp. 1141, 1977 U.S. Dist. LEXIS 13358 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

Party who was both attorney for the transfer and a transferee of the stock was a purchaser and had standing to sue the sellers under subsection (a) of former O.C.G.A. § 10-5-14. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-14).

Right of action against any transferor. — Legislative intent under the securities laws has been to give the right of action against the party transferring the title to the unregistered stock, whether the title was transferred by the original issuance of the stock or a transfer of stock already issued. Such an intent provides protection for different transferees who might have paid various prices for the stock. Utzman v. Caribbean & S.E. Dev. Corp., 107 Ga. App. 56, 129 S.E.2d 62, 1962 Ga. App. LEXIS 568 (1962) (decided under Ga. L. 1957, p. 134, as amended).

Any sale violating securities law voidable by purchaser. — This section provides that any sale of securities in violation of the securities law shall be voidable at the election only of the purchaser. Collins v. Norton, 136 Ga. App. 105, 220 S.E.2d 279, 1975 Ga. App. LEXIS 1262 (1975) (decided under former Code 1933, § 97-114).

No action for violation of former O.C.G.A. § 10-5-12(d). — Although the Georgia Securities Act does have a provision tracking the language of Securities and Exchange Rule 10b-5, former O.C.G.A. § 10-5-12(d), no cause of action was expressly provided for its violation. Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983) (decided under former O.C.G.A. §§ 10-5-12 and 10-5-14).

Right of rescission. — Purchaser of securities sold without compliance with the prescribed regulations, who is not in pari delicto with the seller, may, within a specified or reasonable time, rescind the transaction and recover the money or other compensation paid therefore. Nash v. Jones, 224 Ga. 372, 162 S.E.2d 392, 1968 Ga. LEXIS 785 (1968) (decided under former Ga. L. 1957, p. 134, as amended).

Purported offers of rescission, stating that "you have the opportunity to rescind your subscription ... by letter notice to us within 72 hours after receipt of this letter," did not meet the specific requirements of paragraph (d)(1) of former O.C.G.A. § 10-5-14 in that they did not (1) offer repayment of consideration; (2) within 30 days from the date of acceptance with (3) accrued interest thereon. Binder v. Gordian Sec., Inc., 742 F. Supp. 663, 1990 U.S. Dist. LEXIS 8915 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

Action for money had and received is substitute for suit in equity and, while founded on causes of action arising out of application of equitable principles, is an action at law by reason of its origin as a mode of action in the common-law courts. Turpin v. Wilson, 133 Ga. App. 239, 211 S.E.2d 316, 1974 Ga. App. LEXIS 1031 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

Securities not delivered, refund refused. — It is not inappropriate for a purchaser to pursue recovery on a theory of assumpsit or money had and received when the defendant fails to deliver the securities contracted for and refuses to refund the moneys received from the purchaser. Turpin v. Wilson, 133 Ga. App. 239, 211 S.E.2d 316, 1974 Ga. App. LEXIS 1031 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

Trial court did not err in charging a jury that scienter is an element of securities fraud under former O.C.G.A. §§ 10-5-12(a)(2) and 10-5-14(a); further, the trial court properly charged the jury that justified reliance is an element of securities fraud. Keogler v. Krasnoff, 268 Ga. App. 250, 601 S.E.2d 788, 2004 Ga. App. LEXIS 886 (2004), cert. denied, No. S04C1876, 2005 Ga. LEXIS 106 (Ga. Jan. 24, 2005) (decided under former O.C.G.A. § 10-5-14).

Tender of security into court is sufficient tender, even though no other tender has been made. Rushing v. Williams, 125 Ga. App. 601, 188 S.E.2d 437, 1972 Ga. App. LEXIS 1421 (1972) (decided under former Ga. L. 1957, p. 134, as amended).

Purchaser was not required to tender the original stock certificates when the purchaser tendered certificates equal to the number of shares purchased. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-14).

Purchaser's issuance of additional shares of stock to new investors following the sale did not affect the purchaser's entitlement to the repurchase remedy. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-14).

Attorney's fees. — Purchaser of securities who became director and key employee of corporation had no claim for attorney's fees in an abortive action for violation of the Securities Act. Nicholson v. Harris, 179 Ga. App. 35, 345 S.E.2d 63, 1986 Ga. App. LEXIS 1817 (1986) (decided under former O.C.G.A. § 10-5-14).

Former O.C.G.A. § 10-5-114 did not permit recovery of all attorney fees in a multicount action; only fees attributable to claims under the Georgia Securities Act are recoverable. Huggins v. Chapin, 233 Ga. App. 109, 503 S.E.2d 356.

Schemes to Defraud

Editor's notes. — Subsection (d) was added to former O.C.G.A. § 10-5-12 by Ga. L. 1975, p. 928, § 24, and amended by Ga. L. 1979, p. 1296, § 8. As amended, it was now similar to the last paragraph of former Ga. L. 1957, p. 134, § 11, which was repealed by Ga. L. 1973, p. 1202, § 26. Most of the cases cited below were decided under the 1957 Act, as indicated.

What constitutes "securities." — For purposes of a criminal conviction under the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12 et seq., a scheme whereby the defendant convinced the victims to invest in boat docks, slips, or storage docks with a return on the victims' investment in a year involved "securities" because there was an investment and a reasonable expectation of profits and the victims relied on the defendant to bring about the profits. Branan v. State, 285 Ga. App. 717, 647 S.E.2d 606, 2007 Ga. App. LEXIS 628 (2007) (decided under former O.C.G.A. § 10-5-12).

Only buyers have remedy. — Only buyers of security shall have a remedy for

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fraud. Kirk v. First Nat'l Bank, 439 F. Supp. 1141, 1977 U.S. Dist. LEXIS 13358 (M.D. Ga. 1977) (decided under former Code 1933, § 97-112).

Inhibits use of scheme with intent to defraud. — Existence of the scheme, device, or artifice, and its use with an intent to defraud, regardless of outcome, constitutes the inhibited act. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134); Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Whether fraud results or not. — Under this section, which penalizes any device, scheme or artifice to defraud, it is necessary only to prove the false statement and that the statement was made with an intent to defraud, whether fraud resulted or not. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

This section makes it a penal offense to do certain acts which would operate as a fraud regardless of whether a fraud was in fact successfully perpetrated or not. Cohen v. State, 101 Ga. App. 23, 112 S.E.2d 672, 1960 Ga. App. LEXIS 775 (1960) (decided under former Ga. L. 1957, p. 134).

This section does not require the accomplished overt act of defrauding a person, but it is the use of the scheme, trick, or artifice with an intent to deceive which is prohibited. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Intent, not loss, subject matter of crime. — Scheme to defraud is such a scheme as is initiated by the perpetrator with an intent to defraud another and cause the other to suffer a pecuniary loss, but the intent, not the loss, is the subject matter of the crime. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134); Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Intent to defraud is the gist of an offense under that portion of this section which prohibits the use of a device, scheme, or artifice to defraud. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Victim's reaction to fraudulent practice is not essential element before a conviction is authorized. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Defrauding in fact need not be alleged. — It is not necessary in an indictment to allege that the victim was in fact defrauded. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

Purpose of this section, making it unlawful in any transaction involving an offer to sell or buy securities to employ any scheme or device to defraud or engage in any act which would operate as a fraud upon a purchaser or seller, is to prevent practices in connection with the purchase or sale of such securities which are carried on with intent to defraud. An indictment alleging such a scheme or transaction is not subject to general demurrer (now motion to dismiss) although it fails to allege that the victim was in fact defrauded, since the only criminal intent necessary to be proved is the intent to defraud in the commission of the act or acts denounced by the statute. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

Section also punishes scheme that operates or would operate as fraud. — While this section penalizes a false statement made with intent to defraud, whether loss is sustained or not, it also provides for punishment of a scheme or artifice which "operates or would operate" as a fraud, and thus subjects the offender to punishment (a) in the event the scheme to defraud actually operates as a fraud or (b) would, if successfully consummated according to the intentions of the perpetrator, be a fraud on the purchaser, even though it did not in fact so result. Curtis v. State, 99 Ga. App. 732, 109

S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

If operation alleged as fraud, allegations must support conclusion. — When it is alleged that a certain act, practice, or transaction operated as a fraud and the indictment sets out the facts on which the state relies to prove this allegation, it is necessary, as against appropriate special demurrer, that the facts alleged sustain the conclusion that the transaction did in fact operate as a fraud against the named purchaser of stock. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

If operation alleged as fraud, pecuniary loss must be alleged. — Indictment is defective which alleges that a certain scheme did operate as a fraud upon the person who purchased the stocks, but does not also allege that the person defrauded also suffered a pecuniary loss. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868, 1959 Ga. App. LEXIS 950 (1959) (decided under former Ga. L. 1957, p. 134).

Each count of defrauding separate person charges separate offense. — When each count of the indictment charges the accused with defrauding a separate and distinct person in a separate and distinct transaction of a stated amount of money, each count therefore charges the commission of a separate and distinct offense, which is clearly authorized. Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302, 1968 Ga. LEXIS 977 (1968) (decided under Ga. L. 1957, p. 134).

Defrauding in fact must be proved. — When a completed fraud is alleged, it is necessary to show the elements thereof, that is, that some person was in fact defrauded. Cohen v. State, 101 Ga. App. 23, 112 S.E.2d 672, 1960 Ga. App. LEXIS 775 (1960) (decided under former Ga. L. 1957, p. 134).

Fact that misrepresentations are occasional and isolated will not constitute defense so long as defendants direct the misrepresentations to be made, the misrepresentations are falsely made, the misrepresentations are made with intent to defraud, and are such as would operate as a fraud on the purchaser. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Jury may consider activities during formation of corporation. — Activities occurring during the formation of the corporation, including the sale of the stock, from which transaction the alleged violation of the securities law occurred, are properly considered by the jury when determining the defendants' intentions. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Isolated transaction might or might not be sufficient evidence of scheme to defraud, and it cannot be said that such is not contemplated by the law. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

Evidence sufficient to prove scheme to defraud. — Considering the victim's testimony concerning representations made by defendant and the statements in the defendant's proposal regarding profitable investment portfolio applications of the victim's funds, the evidence was sufficient to prove a scheme in violation of subsection (h) of former O.C.G.A. § 10-5-12. Moss v. State, 209 Ga. App. 486, 433 S.E.2d 692, 1993 Ga. App. LEXIS 902 (1993), cert. denied, No. S93C1612, 1993 Ga. LEXIS 899 (Ga. Oct. 5, 1993) (decided under former O.C.G.A. § 10-5-12).

Evidence was sufficient to support the defendant's convictions on those securities fraud counts in which the state proved the defendant made misrepresentations to the defendant's victims that the defendant would invest the money the victims gave the defendant; but on those counts when no such evidence was presented, the defendant's convictions were reversed. Rasch v. State, 260 Ga. App. 379, 579 S.E.2d 817, 2003 Ga. App. LEXIS 390 (2003) (decided under former O.C.G.A. § 10-5-12).

Evidence held sufficient to support conspiracy convictions. — When the

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evidence discloses that sales people were instructed by the defendants to make certain representations, which were ultimately shown to be false, for the purpose of securing purchasers of stock in the corporation, a finding that an unlawful scheme was entered into by and between the defendants and was perpetrated to defraud the investors is authorized, and supports conspiracy convictions. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under Ga. L. 1957, p. 134).

Instruction on right to rely on statements properly refused. — It is not error for the trial court to refuse a requested charge based on the theory that without a relationship of trust or fiduciary relationship a purchaser has no right blindly to rely on general statements and must exercise precaution to ascertain their basis of fact. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264, 1960 Ga. App. LEXIS 752 (1960) (decided under former Ga. L. 1957, p. 134).

No cause of action for violation of subsection (d). — Although the Georgia Securities Act does have a provision tracking the language of Securities and Exchange Rule 10b-5, subsection (d) of former O.C.G.A. § 10-5-12, no cause of action was expressly provided for subsection (d)'s violation. Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-12).

Liability of Controlling Persons, Partners, Executive Officers, and Directors

Liability under former subsection (b) was predicated on control of agent, and habit and course of dealing may be considered in determining agency. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-114).

Director or officer not liable absent participation. — Director or officer of a corporation is not liable, merely because of the director's official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in the wrong. Hamilton Bank & Trust Co. v. Holliday, 469 F. Supp. 1229, 1979 U.S. Dist. LEXIS 12582 (N.D. Ga. 1979) (decided under former Code 1933, § 97-114).

Outside directors exercising reasonable care deemed exempt. — Outside directors of a corporation — i.e., those who are not full-time employees of the corporation — who exercise reasonable care in carrying out their duties are exempt from liability as controlling persons. Hamilton Bank & Trust Co. v. Holliday, 469 F. Supp. 1229, 1979 U.S. Dist. LEXIS 12582 (N.D. Ga. 1979) (decided under former Code 1933, § 97-114).

Burden of establishing defendant as "controlling person". — Plaintiff bears the burden of establishing that a given defendant is a "controlling person" under the provisions of subsection (c) of former O.C.G.A. § 10-5-14. Such defendant, however, may then assert the so-called "good faith" affirmative defense to "controlling person" liability. Binder v. Gordian Sec., Inc., 742 F. Supp. 663, 1990 U.S. Dist. LEXIS 8915 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

Controlling officer estopped from asserting lack of responsibility. — In action seeking to impose liability under former subsection (c) of this section upon controlling officer of corporation, when there was evidence from which inference is authorized that sums from transaction were deposited in accounts controlled by such officer, the officer's failure to offer to return these amounts, if the jury believed the officer had in fact received them, estops the officer from asserting any lack of responsibility for the transaction. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-114).

Assumption of risks inferred from affirmation of unauthorized act. — Under former subsection (c) of this section, when one becomes aware of facts

sufficient to put one on notice of an unauthorized act and affirms the act without further investigation, there may be an inference of willingness to assume concomitant risks. DeBoard v. Schulhofer, 156 Ga. App. 158, 273 S.E.2d 907, 1980 Ga. App. LEXIS 2923 (1980) (decided under former Code 1933, § 97-114).

Purchaser who was given power of attorney to record the transfer of stock on the books of the corporation at the time of the sale was not thereby rendered jointly and severally liable for the sale of unregistered securities. Bell v. Sasser, 238 Ga. App. 843, 520 S.E.2d 287, 1999 Ga. App. LEXIS 966 (1999) (decided under former O.C.G.A. § 10-5-14).

Statute of Limitations

Common-law fraud. — Common-law fraud claim, governed by four-year statute of limitations, was not reduced to the two-year period applicable to violations of securities laws simply because the alleged fraud involved the sale of stock. Stricker v. Epstein, 213 Ga. App. 226, 444 S.E.2d 91, 1994 Ga. App. LEXIS 524 (1994), cert. denied, No. S94C1353, 1994 Ga. LEXIS 927 (Ga. Sept. 8, 1994) (decided under former O.C.G.A. § 10-5-14).

Federal equitable tolling principles inapplicable. — As a claim under former O.C.G.A. § 10-5-12 could not be characterized as a federally created remedy, federal equitable tolling principles did not apply, and such a claim, brought over two years after the purchase of stock, was time-barred. Wilkinson v. Paine, Webber, Jackson & Curtis, Inc., 585 F. Supp. 23, 1983 U.S. Dist. LEXIS 18251 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-14).

Action for gross negligence. — Cause of action for gross negligence in failing to discover and communicate the true facts and circumstances surrounding a corporation could arise solely by virtue of the securities laws as the laws exist at the time of the sales involved. No action to recover the purchase price of a security in violation of the securities law can be brought after two years from the date of such sale or contract for sale. Dehler v. Setliff, 143 Ga. App. 430, 238 S.E.2d 723, 1977 Ga. App. LEXIS 2349 (1977) (considering sales made before April 1, 1974, but noting two-year limitation appears in both Ga. L. 1957, p. 134, § 13(a), and subsection (c) of former Code 1933, § 97-114; decided under former Code 1933, § 97-114).

Section 10(b) and Rule 10(b)(5) claims. — Applicable statute of limitations to be applied with respect to claims brought pursuant to § 10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10(b)(5) is the two-year limitations period found in former O.C.G.A. § 10-5-14. Pidcock v. Sunnyland Am., Inc., 682 F. Supp. 1563, 1987 U.S. Dist. LEXIS 10703 (S.D. Ga. 1987), rev'd, 854 F.2d 443, 1988 U.S. App. LEXIS 12138 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

For purposes of a suit brought pursuant to § 10(b) of the federal Securities Exchange Act and Rule 10b-5 promulgated thereunder, against the actual sellers of the securities in question, Georgia's two-year statute of limitations applies. Currie v. Cayman Resources Corp., 595 F. Supp. 1364, 1984 U.S. Dist. LEXIS 23274 (N.D. Ga. 1984), aff'd in part and rev'd in part, 835 F.2d 780, 1988 U.S. App. LEXIS 217 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

Federal action for securities fraud. — Two-year limitation period in this section, rather than the four-year limitation period pertinent to common-law fraud actions (see now O.C.G.A. §§ 9-3-31 and 51-6-1 et seq.), is applicable to federal security cases, as the state security law more nearly effectuates the goals of the federal securities laws. Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 1978 U.S. Dist. LEXIS 17822 (N.D. Ga. 1978) (plaintiffs allegedly induced to trade stock by misrepresentations in financial statements; decided under former Code 1933, § 97-114).

Federal churning claims. — Two-year state limitation applies to federal churning claims asserted under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. Miller v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 572

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F. Supp. 1180, 1983 U.S. Dist. LEXIS 13018 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-14).

When limitations period begins to run. — Two-year period under former O.C.G.A. § 10-5-14 begins to run at the moment plaintiff actually discovered, or in the exercise of reasonable diligence should have discovered the alleged federal securities law violation. Pidcock v. Sunnyland Am., Inc., 682 F. Supp. 1563, 1987 U.S. Dist. LEXIS 10703 (S.D. Ga. 1987), rev'd, 854 F.2d 443, 1988 U.S. App. LEXIS 12138 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

Federal law determines when period begins to run. — When a state limitation period is applied in an action for violating federal securities law, federal law determines when the limitation period begins to run. Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 1978 U.S. Dist. LEXIS 17822 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

Statute of limitations in an action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 is taken from the state law remedy which bears the closest resemblance since the federal securities laws do not establish a specific time period in which an action must be filed, but the time at which the action accrues and the statute begins to run is a question of federal law. Kennedy v. Tallant, 710 F.2d 711, 1983 U.S. App. LEXIS 25431 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-14).

Tolling of limitations by fraudulent concealment. — Statements made to investors to the effect that counsel were working to recover misappropriated assets, which would be used to repay the investors, were essentially opinions that did not support fraudulent concealment so as to toll the two-year limitation of subsection (d). Barton v. Peterson, 733 F. Supp. 1482, 1990 U.S. Dist. LEXIS 3727 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

Tolling of limitations in federal action for securities fraud. — Former O.C.G.A. § 10-5-14 applied in an action brought under § 10(b) of the federal Securities and Exchange Act of 1934. Though the statute of limitations is borrowed from state law, tolling is governed by federal law. Leonard v. Stuart-James Co., 742 F. Supp. 653, 1990 U.S. Dist. LEXIS 8497 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

RESEARCH REFERENCES

Am. Jur. 2d.

69A Am. Jur. 2d, Securities Regulation — State, §§ 10 et seq., 80, 81, 92, 96.

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, §§ 495 et seq., 579 et seq., 590 et seq.

ALR.

Rights inter se of customers whose securities have been repledged by broker, 1 A.L.R. 664; 24 A.L.R. 479; 48 A.L.R. 803; 76 A.L.R. 794.

Liability of public corporation for money received by it for unlawfully issued instrument of indebtedness, 7 A.L.R. 353.

Measure of damages for fraud inducing the purchase of corporate securities, 57 A.L.R. 1142; 108 A.L.R. 1060.

Fraud: necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock or other securities, 73 A.L.R. 1120.

Duty of stockbroker, in performance of obligation to deliver certificate of stock or other security, to tender identical certificate or security, 75 A.L.R. 746.

Duty of stockbroker in respect of demand for additional margins before selling securities carried on margin, 76 A.L.R. 1517.

Delay by stockbroker in executing customer's order to buy or sell, or in tendering to customer securities purchased on his account, 77 A.L.R. 308.

Liability of transferrer of corporate stock for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 86 A.L.R. 57.

Personal liability of directors to holders

of corporate securities because of false statements therein, 99 A.L.R. 852.

Damages for fraud inducing the purchase of corporate securities, 108 A.L.R. 1060.

Assignability or survivability of cause of action to enforce civil liability under securities Acts, 133 A.L.R. 1038.

Liability of seller to purchaser of invalid nonnegotiable public warrants, bonds, certificates, 139 A.L.R. 1426.

Personal civil liability of corporate officers and directors in case of sale of bonds or stock in violation of statutory requirements, 144 A.L.R. 1356.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 A.L.R.2d 500.

Who, other than officers and directors of a corporation, is civilly liable under the state securities Acts (Blue Sky Laws) for purchase price of unauthorized securities, 59 A.L.R.2d 1030.

Corporate insider's nondisclosure of information to seller or purchaser of corporation's stock as manipulative or deceptive device prohibited by § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), 22 A.L.R.3d 793.

Stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity, 32 A.L.R.3d 635.

What amounts to participation by corporate officer or agent in illegal issuance of security, in order to impose liability upon him under state securities regulations, 44 A.L.R.3d 588.

Attorney's preparation of legal document incident to sale of securities as rendering him liable under state securities regulation statutes, 62 A.L.R.3d 252.

Duty to disclose material facts to stock purchaser, 80 A.L.R.3d 13.

What gives rise to right of recession under state blue-sky laws, 52 A.L.R. 5th 491.

When is it unnecessary to show direct reliance on misrepresentation or omission in civil securities fraud action under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)) and SEC Rule 10b-5 (17 CFR § 240.10b-5), 93 A.L.R. Fed. 444.

Who may be liable in civil action, under § 12(1) of Securities Act of 1933 (15 USCS § 77l(1)), for selling or offering securities for sale in violation of registration or prospectus provisions of Act — post-Pinter cases, 105 A.L.R. Fed. 725.

Who may be liable in actions under § 12(2) of Securities Act of 1933 (15 USCS § 77l (2)), on basis of false or misleading statement in prospectus or oral communication, 106 A.L.R. Fed. 753.

Defense of ignorance of untruth or omission in civil action under § 12(2) of Securities Act of 1933 (15 USCS § 771(2)), 109 A.L.R. Fed. 444.

Conduct creating civil liability, under § 12(2) of Securities Act of 1933 (15 USC § 77l(2)), based on misrepresentations in or omissions from prospectus or oral communication regarding sale of security, 112 A.L.R. Fed. 387.

Standard of liability in private actions under § 14(a) of Securities Exchange Act of 1934 (15 USCS § 78n(a)) and SEC rules thereunder, 125 A.L.R. Fed. 377.

Scienter requirement in actions under antifraud provision of Investment Advisers Act (15 USCS § 80b-6), 133 A.L.R. Fed. 549.

What constitutes "willfulness" for purposes of criminal provisions of federal securities laws, 136 A.L.R. Fed 457.

Limitations of actions with respect to actions for contribution under § 10(b) of Securities Exchange Act of 1934 (15 USCA § 78j(b)) and SEC Rule 10b-5 (17 CFR § 240.10b-5), 146 A.L.R. Fed. 643.

Assertion of double jeopardy defense based on sanction sought or imposed during civil or administrative proceeding initiated by securities and exchange commission or national securities organization or exchange, 147 A.L.R. Fed. 585.

What constitutes "inquiry notice" sufficient to commence running of statute of limitations in securities fraud action — Post-Lampf cases, 148 A.L.R. Fed. 629.

10-5-50. Unlawful practices with offer, sale, or purchase of security.

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) To employ a device, scheme, or artifice to defraud;

(2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or

(3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

History.
Code 1981, § 10-5-50, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

JUDICIAL DECISIONS

Scienter not sufficiently pled. — Investors' reliance on the defendants' positions as directors and officers, their attendance at meetings, and access to internal documents and reports was insufficient to allege a strong inference of scienter to support their securities fraud claims under O.C.G.A. § 10-5-12(a)(2), 15 U.S.C. § 78j(b), and 15 U.S.C. § 78u-4. Patel v. Patel, 761 F. Supp. 2d 1375, 2011 U.S. Dist. LEXIS 7081 (N.D. Ga. 2011).

No intent to defraud found. — Borrowers did not commit fraud upon a lender; the borrowers advised the lender that the $150,000 the borrowers sought would fund the corporation for a few months until the borrowers secured a total of $1.5 million to build the necessary greenhouses, and the payment of salaries to themselves of $600 per week each was not inconsistent with the borrowers stated purpose. Because there was no intent to defraud, the borrowers were not liable for securities fraud under O.C.G.A. § 10-5-50. Sims v. Natural Prods. of Ga., LLC, 337 Ga. App. 20, 785 S.E.2d 659, 2016 Ga. App. LEXIS 248 (2016).

10-5-51. Fraud or deceit unlawful; adoption of rule.

(a) It is unlawful for a person that advises others for compensation, either directly or indirectly, or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

(1) To employ a device, scheme, or artifice to defraud another person; or

(2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

(b) A rule adopted under this chapter may define an act, practice, or

course of business of an investment adviser or an investment adviser representative, other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive, or manipulative and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, other than supervised persons of a federal covered investment adviser, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive, or manipulative.

(c) A rule adopted under this chapter may specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser.

History.
Code 1981, § 10-5-51, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

JUDICIAL DECISIONS

Subscription agreement's disclosure barred recovery. — Summary judgment for corporation, the corporation's chief executive officer (CEO), and the corporation's chief financial officer on an investor's claims pursuant to the Securities Act was proper; although the investor claimed that the investor had been misled by the CEO's promise that the investor would receive one-third of the corporation's stock in return for the investment, it was undisputed that a subscription agreement which the investor admittedly received and executed did not provide for the interest the investor claimed the investor was orally promised by the CEO, but rather, stated that the investor was receiving, at most, 8.16 percent of the outstanding common stock. Given that the subscription agreement so starkly contradicted the CEO's alleged promise, the investor knew that the latter was untrue, and the investor was not entitled to recover for the alleged violation of the Securities Act. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717, 2009 Ga. App. LEXIS 829 (2009).

Failure to show fraud. — Guarantor of a bank loan could not show securities fraud by a bank based upon a consultant's representations as to the proposed imminent purchase of another bank in which the guarantor's company owned stock because the guarantor could not show either actionable misrepresentations or justifiable reliance regarding the consultant's representations. Furthermore, the consultant was not associated with the bank which made the loan to the guarantor's company. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35, 2011 Ga. App. LEXIS 899 (2011).

RESEARCH REFERENCES

ALR.

Heightened Pleading Requirements for Alleging Securities Fraud-Post-Iqbal/Twombly — First Circuit Cases, 31 A.L.R. Fed. 3d 11.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly D.C. Circuit Cases, 37 A.L.R. Fed. 3d Art. 1.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Fourth Circuit Cases, 37 A.L.R. Fed. 3d Art. 2.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Sixth Circuit Cases, 37 A.L.R. Fed. 3d Art. 3.

Effect of 8 U.S.C.A. § 1252(g) Upon

Jurisdiction to Hear Federal Tort Claims Act Claims of Noncitizen Wrongfully Removed in Violation of Court Order or Automatic Stay, 37 A.L.R. Fed. 3d Art. 4.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Tenth Circuit Cases, 37 A.L.R. Fed. 3d Art. 14.

What Constitutes Insolvency in Bankruptcy Preference Statute, 11 U.S.C.A. § 547(b)(3), 40 A.L.R. Fed. 3d Art. 2.

"Covered Person" Under the Consumer Financial Protection Act of 2010 (12 U.S.C.A. § 5481(6)(A)), 40 A.L.R. Fed. 3d Art. 3.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Second Circuit Cases, 40 A.L.R. Fed. 3d Art. 5.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Seventh Circuit Cases, 41 A.L.R. Fed. 3d Art. 3.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Eleventh Circuit Cases, 41 A.L.R. Fed. 3d Art. 4.

Issues Arising Under Enumeration Clause, U.S. Const. Art. I, § 2, cl. 3, 41 A.L.R. Fed. 3d Art. 6.

2018 to 2019 A.L.R. United States Supreme Court Review, 42 A.L.R. Fed. 3d Art. 1.

Actions Under Medicaid Federally Qualified Health Center (FQHC) Reimbursement Statute, 42 U.S.C.A. § 1396a(bb), 42 A.L.R. Fed. 3d Art. 4.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Third Circuit Cases, 42 A.L.R. Fed. 3d Art. 5.

Application of National Environmental Policy Act (NEPA) Anti-segmentation Principle to Natural Gas, Oil, or Petroleum Products Pipeline Projects, 42 A.L.R. Fed. 3d Art. 6.

Claims of Sentencing Factor Manipulation and Sentencing Entrapment Under Federal Sentencing Guidelines in Drug Prosecutions, 42 A.L.R. Fed. 3d Art. 7.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Ninth Circuit Cases, 43 A.L.R. Fed. 3d Art. 2.

Housing Protections for Victims of Intimate Partner Violence Under Violence Against Women Act, 34 U.S.C.A. § 12491, 43 A.L.R. Fed. 3d Art. 4.

Derivative Standing in Chapters 7, 11, and 13 Bankruptcy Proceedings, 43 A.L.R. Fed. 3d Art. 6.

Suggestion of Immunity from Executive Branch for Foreign Sovereigns and Officials, 43 A.L.R. Fed. 3d Art. 7.

Heightened Pleading Requirements for Alleging Securities Fraud — Post-Iqbal/Twombly Fifth Circuit Cases, 46 A.L.R. Fed. 3d Art. 4.

10-5-52. Burden on person claiming exemption, preemption, or exclusion in civil and criminal proceedings.

(a) In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.

(b) In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden of going forward with evidence of the claim.

History.

Code 1981, § 10-5-52, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

10-5-53. Order or rule may require filing of prospectus and additional information.

(a) Except as otherwise provided in subsection (b) of this Code section, a rule adopted or order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

(b) This Code section does not apply to sales and advertising literature specified in subsection (a) of this Code section which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by Code Sections 10-5-10 through 10-5-12, except as required pursuant to paragraph (7) of Code Section 10-5-10.

History.
Code 1981, § 10-5-53, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-54. Unlawful to make false or misleading statements.

It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

History.
Code 1981, § 10-5-54, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-55. Acceptance of filings not indicative of accuracy, merit, or qualification.

The filing of an application for registration, a registration statement, a notice filing under this chapter, the registration of a person, the notice filing by a person, or the registration of a security under this chapter does not constitute a finding by the Commissioner that a record filed under this chapter is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a transaction does not mean that the Commissioner has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction. It

is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client a representation inconsistent with this Code section.

History.
Code 1981, § 10-5-55, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-56. Liability for defamation related to information contained in record.

A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the Commissioner, or a designee of the Commissioner, the Securities and Exchange Commission, or a self-regulatory organization, unless the person knew that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

History.
Code 1981, § 10-5-56, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-57. Penalties for violations.

(a) A person that willfully violates this chapter, or a rule adopted or order issued under this chapter, except Code Section 10-5-53 or the notice filing requirements of Code Section 10-5-21 or 10-5-34, or that willfully violates Code Section 10-5-54 knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than $500,000.00 or imprisoned not more than five years, or both. An individual convicted of violating a rule adopted or order issued under this chapter may be fined but may not be imprisoned if the individual did not have knowledge of the rule or order.

(b) The Attorney General or the proper prosecuting attorney with or without a reference from the Commissioner may institute criminal proceedings under this chapter.

(c) This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

History.
Code 1981, § 10-5-57, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134 and former O.C.G.A. § 10-5-24, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

Punishment not jury issue. — Trial court's failure to submit the issue of punishment to the jury does not deny the defendant a substantial right. Bowler v. State, 145 Ga. App. 633, 244 S.E.2d 142, 1978 Ga. App. LEXIS 2072 (1978) (decided under former Ga. L. 1957, p. 134, as amended).

"Willfully." — Court of Appeals of Georgia, First Division, concludes that the term "willfully" in former O.C.G.A. § 10-5-13(a)(1)(A)(iv) had the same meaning that it had been construed to have in former O.C.G.A. § 10-5-24. Before any of the civil penalties of up to $50,000 for single violations and up to $500,000 for multiple violations can be imposed under former O.C.G.A. § 10-5-13(a)(1)(A)(iv), there must be a knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq. Garvin v. Sec'y of State, 266 Ga. App. 66, 596 S.E.2d 166, 2004 Ga. App. LEXIS 171 (2004), cert. denied, No. S04C1027, 2004 Ga. LEXIS 517 (Ga. June 7, 2004), rev'd sub nom. Cox v. Garvin, 278 Ga. 903, 607 S.E.2d 549, 2005 Ga. LEXIS 15 (2005), vacated in part, 272 Ga. App. 860, 614 S.E.2d 93, 2005 Ga. App. LEXIS 281 (2005) (decided under former O.C.G.A. § 10-5-24).

RESEARCH REFERENCES

C.J.S.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 586 et seq.

10-5-58. Enforcement of civil liability; damages.

(a) Enforcement of civil liability under this Code section is subject to the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227.

(b) A person is liable to the purchaser if the person sells a security in violation of Code Section 10-5-20, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and reasonable attorney fees determined by the court upon the tender of the security or for actual damages as provided in paragraph (3) of this subsection;

(2) The tender referred to in paragraph (1) of this subsection may

be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3) of this subsection; and

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate of interest from the date of the purchase, costs, and reasonable attorney fees determined by the court.

(c) A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security and any income received on the security, costs, and reasonable attorney fees determined by the court upon the tender of the purchase price or for actual damages as provided in paragraph (3) of this subsection;

(2) The tender referred to in paragraph (1) of this subsection may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph (3) of this subsection; and

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability and interest at the legal rate of interest from the date of the sale of the security, costs, and reasonable attorney fees determined by the court.

(d) A person acting as a broker-dealer or agent that sells or buys a security in violation of subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, or Code Section 10-5-55 is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsection (b) of this Code section, or, if a seller, for a remedy as specified in subsection (c) of this Code section.

(e) A person acting as an investment adviser or investment adviser

representative that provides investment advice for compensation in violation of subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, or Code Section 10-5-55 is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest from the date of payment, costs, and reasonable attorney fees determined by the court.

(f) A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest from the date of the fraudulent conduct, costs, and reasonable attorney fees determined by the court, less the amount of any income received as a result of the fraudulent conduct; and

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f) of this Code section:

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f) of this Code section, unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f) of this Code section, including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) of this Code section and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not

know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f) of this Code section, unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) A person liable under this Code section has a right of contribution as in cases of contract against any other person liable under this Code section for the same conduct.

(i) A cause of action under this Code section survives the death of an individual who might have been a plaintiff or defendant.

(j) A person may not obtain relief under subsection (b) of this Code section:

(1) For a violation of Code Section 10-5-20 or for a violation of subsection (d) or (e) of this Code section, unless the action is instituted within two years after the violation occurred; or

(2) Other than for a violation of Code Section 10-5-20 or for a violation of subsection (c) or (f) of this Code section, unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation occurred.

(k) A person that has made or has engaged in the performance of a contract in violation of this chapter or a rule adopted or order issued under this chapter or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter may not base an action on the contract.

(l) A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.

(m) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this Code section or subsection (e) of Code Section 10-5-40.

History.
Code 1981, § 10-5-58, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.
For article, "Holmes v. Grubman: The Supreme Court of Georgia Balances

Financial Advisor Common Law Liability and Investor Protection," see 16 (No. 5) Ga. St. B.J. 20 (2011).

JUDICIAL DECISIONS

Material aid or participation. — *Unpublished decision:* Custodian did not materially aid or participate in the sale because the investors alleged no facts tending to show that the custodian contributed to the fraudulent transactions in any way other than by fulfilling its contractual duties to act as custodian because the custodian executed the transactions on behalf of the parties, but did not procure the investments for the investors or recommend them; the custodian reported values of the securities to the investors, but expressly disclaimed any investigation; and the custodian held the securities on behalf of the investors, but undertook no duty to scrutinize the financial health of the investment funds. Curry v. TD Ameritrade, Inc., 662 Fed. Appx. 769, 2016 U.S. App. LEXIS 18996 (11th Cir. 2016).

Control person liability. — *Unpublished decision:* Investors' federal and state control person liability claims were properly dismissed because, while the investors alleged that the investment advisor committed and pled guilty to numerous violations of the securities laws, the custodian did not control the advisor, and there were no factual allegations tending to show that the custodian controlled the general business affairs of the advisor, much less had the power to direct the specific policies resulting in the fraud. Curry v. TD Ameritrade, Inc., 662 Fed. Appx. 769, 2016 U.S. App. LEXIS 18996 (11th Cir. 2016).

10-5-59. Exemptions to liability.

A purchaser, seller, or recipient of investment advice may not maintain an action under Code Section 10-5-58 if:

(1) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(A) An offer stating the respect in which liability under Code Section 10-5-58 may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale, or investment advice;

(B) If the basis for relief may have been a violation of subsection (b) of Code Section 10-5-58, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid and interest from the date of the purchase, less the amount of any income received on the security; or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and interest from the

date of the purchase in cash equal to the damages computed in the manner provided in this subparagraph;

(C) If the basis for relief may have been a violation of subsection (c) of Code Section 10-5-58, an offer to tender the security on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser, and interest from the date of the sale; or, if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest from the date of the sale;

(D) If the basis for relief may have been a violation of subsection (d) of Code Section 10-5-58 and if the customer is a purchaser, an offer to pay as specified in subparagraph (B) of this paragraph; or, if the customer is a seller, an offer to tender or to pay as specified in subparagraph (C) of this paragraph;

(E) If the basis for relief may have been a violation of subsection (e) of Code Section 10-5-58, an offer to reimburse in cash the consideration paid for the advice and interest from the date of payment; or

(F) If the basis for relief may have been a violation of subsection (f) of Code Section 10-5-58, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest from the date of the violation causing the loss;

(2) The offer under paragraph (1) of this Code section states that it must be accepted by the purchaser, seller, or recipient of investment advice within 30 days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any shorter period, of not less than three days, that the Commissioner, by order, specifies;

(3) The offeror has the present ability to pay the amount offered or to tender the security under paragraph (1) of this Code section;

(4) The offer under paragraph (1) of this Code section is delivered to the purchaser, seller, or recipient of investment advice or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and

(5) The purchaser, seller, or recipient of investment advice that accepts the offer under paragraph (1) of this Code section in a record within the period specified under paragraph (2) of this Code section is paid in accordance with the terms of the offer.

History.
Code 1981, § 10-5-59, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

ARTICLE 6

ADMINISTRATION

Law reviews.
For article, "Securities Investigations Under the Georgia Securities Act," see 17 Ga. St. B. J. 14 (1980).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-11, which was subsequently repealed but was succeeded by provisions in this article, are included in the annotations for this article.

Privilege against incrimination. — Generally, corporate books and records cannot be insulated from reasonable demands by governmental authorities by claim of personal privilege as the privilege only applies to private property of a person claiming a privilege; thus, a corporate officer may not withhold testimony or documents on the ground that the corporation would be incriminated, nor may the custodian of corporate books or records withhold the books or records on the ground that the custodian personally might be incriminated by their production. Jacobs v. State, 157 Ga. App. 466, 278 S.E.2d 21, 1981 Ga. App. LEXIS 1870 (1981) (decided under former O.C.G.A. § 10-5-11).

Custodian of corporate or association books, by accepting custodianship, voluntarily assumes duty which overrides a claim of privilege with respect to production of records themselves, but does not waive a constitutional privilege as to oral testimony; therefore, a corporate officer who is a custodian of records may not resist production of corporate books in response to a subpoena even though such books may tend to incriminate the officer as an individual. Jacobs v. State, 157 Ga. App. 466, 278 S.E.2d 21, 1981 Ga. App. LEXIS 1870 (1981) (decided under former O.C.G.A. § 10-5-11).

Custodian must produce and identify records. — Custodian of corporate records must produce records if the custodian has the records and the custodian may also be required to identify the records. Jacobs v. State, 157 Ga. App. 466, 278 S.E.2d 21, 1981 Ga. App. LEXIS 1870 (1981) (decided under former O.C.G.A. § 10-5-11).

Disclosure of whereabouts of records or who has possession. — Custodian of corporate records may not be required to disclose whereabouts of such records or who has possession of the records if the custodian claims personal privilege of refusing to answer on ground that to do so would tend to incriminate the custodian. Jacobs v. State, 157 Ga. App. 466, 278 S.E.2d 21, 1981 Ga. App. LEXIS 1870 (1981) (decided under former O.C.G.A. § 10-5-11).

RESEARCH REFERENCES

Am. Jur. 2d.
69A Am. Jur. 2d, Securities Regulation — State, § 79.

C.J.S.
79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 533.

10-5-70. Administration of chapter; Commissioner of Securities; authority.

(a) The administration of this chapter shall be vested in the Secretary of State, who is designated as the Commissioner of Securities.

(b) The Commissioner shall have the authority to administer oaths in and to prescribe forms for all matters arising under this chapter. The Commissioner shall cooperate with the administrators of the securities laws of other states and of the United States with a view to assisting those administrators in the enforcement of their securities and investment adviser laws and to achieving maximum uniformity in the interpretation of like provisions of the laws administered by them and in the forms which are required to be filed under such laws.

(c) The Commissioner shall have authority to employ examiners, clerks and stenographers, and other employees as the administration of this chapter may require. The Commissioner shall also have authority to appoint and employ investigators who shall have, in any case that there is reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(d) The Commissioner shall have the power to make such rules and regulations from time to time as he or she may deem necessary and proper for the enforcement of this chapter. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(e) The Commissioner or any persons employed by the Commissioner shall be paid, in addition to their regular compensation, the transportation fare, board, lodging, and other traveling expenses necessary and actually incurred by each of them in the performance of their duties under this chapter.

(f) The Commissioner shall appoint, with the approval of the Governor, a person as assistant Commissioner and delegate such powers and duties under this chapter to such assistant Commissioner as he or she desires.

(g) To encourage uniform interpretation and administration of this chapter and effective securities regulation and enforcement, the Commissioner may cooperate with the securities agencies or administrators of one or more states, Canadian provinces or territories, another country, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor Protection Corporation, any self-regulatory organization, any national or international organization, securities officials or agencies, or any governmental law enforcement or regulatory agency. The cooperation authorized may

include, but is not limited to, participation in a central registration depository under this chapter for documents or records required or allowed to be maintained under this chapter and the designation of any such system as an agent for registration or receipt.

(h) Neither the Commissioner, the assistant Commissioner, nor any employee of the Commissioner may use for personal gain or benefit information filed with or obtained by the Commissioner which is not public information nor may the Commissioner, assistant Commissioner, or any employee of the Commissioner conduct securities dealings based upon information filed with or obtained by the Commissioner, even though such information is known to the public, if there has not been a sufficient period for the securities markets to assimilate the information.

(i) This chapter does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(j) The Commissioner may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the Commissioner may collaborate with public and nonprofit organizations with an interest in investor education. This subsection does not authorize the Commissioner to require participation or monetary contributions of a registrant in an investor education program.

History.

Code 1981, § 10-5-70, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Cross references.

Authority of Secretary of State to employ assistants to discharge functions imposed by chapter, § 45-13-25.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-21, which was subsequently repealed but was succeeded by provisions in this Code section, are included in the annotations for this Code section.

Constitutionality. — Former O.C.G.A. § 10-5-21 was not unconstitutional for precluding counterclaims against the state Commissioner of Securities because immunity from suit is a legislative prerogative, and the legislature prescribed the terms and conditions upon which the state agreed to be sued. Womack v. State, 270 Ga. 56, 507 S.E.2d 425, 1998 Ga. LEXIS 801 (1998) (decided under former O.C.G.A. § 10-5-21).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, an opinion under former Ga. L. 1957, p. 134, as amended, which was subsequently repealed but was succeeded by provisions in this Code section, is included in the annotations for this Code section.

Secretary of State may not retain

fees. — Fees collected by the Secretary of State as the commissioner of securities must be paid to the Fiscal Division of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), and such fees may not be retained by the office of Secretary of State as reimbursements for the expenses of that office. 1969 Op. Att'y Gen. No. 69-13 (decided under Ga. L. 1957, p. 134).

RESEARCH REFERENCES

Am. Jur. 2d.
69A Am. Jur. 2d, Securities Regulation — State, §§ 69, 77 et seq.
C.J.S.
79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 532 et seq.

10-5-71. Powers of Commissioner.

(a) The Commissioner may:

(1) Conduct public or private investigations inside or outside this state which the Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

(3) Publish in print or electronically a record concerning an action, proceeding, or investigation under or a violation of this chapter or a rule adopted or order issued under this chapter if the Commissioner determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) For the purpose of an investigation under this chapter, the Commissioner or his or her designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Commissioner considers relevant or material to the investigation.

(c) If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the Commissioner under this chapter, the Commissioner may refer the matter to the Attorney General or the proper district attorney, who may apply to the superior court or a court of another state to enforce compliance. The court may:

(1) Hold the person in contempt;

(2) Order the person to appear before the Commissioner;

(3) Order the person to testify about the matter under investigation or in question;

(4) Order the production of records;

(5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

(6) Impose a civil penalty of not less than $5,000.00 and not greater than $50,000.00 for each violation; and

(7) Grant any other necessary or appropriate relief.

(d) This Code section does not preclude a person from applying to superior court or a court of another state for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the Commissioner under this chapter or in an action or proceeding instituted by the Commissioner under this chapter on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the Commissioner may apply to superior court to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) At the request of the securities administrator of another state or a foreign jurisdiction, the Commissioner may provide assistance if the requesting administrator states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting administrator regulates or enforces. The Commissioner may provide the assistance by using the authority to investigate and the powers conferred by this Code section as the Commissioner determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this state if occurring in this state. In deciding whether to provide the assistance, the Commissioner may consider whether the

requesting administrator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the Commissioner on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the Commissioner to carry out the request for assistance.

(g) In the case of any investigation conducted under this Code section, the Commissioner may appoint an investigative agent who shall have the same investigative powers and authority as the Commissioner. The agent shall possess such qualifications as the Commissioner may require.

History.
Code 1981, § 10-5-71, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2010, p. 838, § 10/SB 388; Ga. L. 2024, p. 1052, § 2(46)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "or investigation" for "or an investigation" in paragraph (a)(3).

10-5-72. Violations; remedies and penalties.

(a) If the Commissioner believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this chapter or a rule adopted or order issued under this chapter, the Commissioner may maintain an action in the superior court to enjoin the act, practice, or course of business and to enforce compliance with this chapter or a rule adopted or order issued under this chapter.

(b) In an action under this Code section and on a proper showing, the court may:

(1) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(2) Order other appropriate or ancillary relief, which may include:

(A) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Commissioner, for the defendant or the defendant's assets;

(B) Ordering the Commissioner to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) Imposing a civil penalty up to $50,000.00 for a single violation or up to $500,000.00 for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act; and

(D) Ordering the payment of prejudgment and postjudgment interest; or

(3) Order such other relief as the court considers appropriate.

(c) The Commissioner may not be required to post a bond in an action or proceeding under this chapter.

History.
Code 1981, § 10-5-72, enacted by Ga. L. 2008, p. 381, § 1/SB 358.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, this Code section, which was enacted as Code Section 10-5-67, was redesignated as Code Section 10-5-72.

10-5-73. Cease and desist orders; denying, revoking, or conditioning exemptions for broker-dealers; civil penalties.

(a) If the Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter, the Commissioner may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter;

(2) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under subparagraph (b)(1)(D) or (b)(1)(F) of Code Section 10-5-30 or an investment adviser under subparagraph (b)(1)(C) of Code Section 10-5-32; or

(3) Issue an order under Code Section 10-5-13.

(b) An order under subsection (a) of this Code section is effective on the date of issuance. Upon issuance of the order, the Commissioner shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the Commissioner will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within 30 days after receipt of a request in a record

from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(c) If a hearing is requested or ordered pursuant to subsection (b) of this Code section, a hearing must be held pursuant to the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act" and this chapter. A final order may not be issued unless the Commissioner makes findings of fact and conclusions of law in a record. The final order may make final, vacate, or modify the order issued under subsection (a) of this Code section.

(d) In a final order under subsection (c) of this Code section, the Commissioner may impose a civil penalty up to $50,000.00 for a single violation or up to $500,000.00 for more than one violation.

(e) In a final order under subsection (c) of this Code section, the Commissioner may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or order issued under this chapter.

(f) If a petition for judicial review of a final order is not filed in accordance with Code Section 10-5-78, the Commissioner may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) If a person does not comply with an order under this Code section, the Commissioner may petition a court of competent jurisdiction to enforce the order. The court may not require the Commissioner to post a bond in an action or proceeding under this Code section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than $5,000.00 but not greater than $50,000.00 for each violation and may grant any other relief the court determines is just and proper in the circumstances.

History.

Code 1981, § 10-5-73, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

10-5-74. Issuance of forms and orders; adoption and amendment of rules.

(a) The Commissioner may:

(1) Issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records;

(2) By rule, define terms, whether or not used in this chapter, but those definitions may not be inconsistent with this chapter; and

(3) By rule, classify securities, persons, and transactions and adopt different requirements for different classes.

(b) Under this chapter, a rule or form may not be adopted or amended or an order issued or amended unless the Commissioner finds that the rule, form, order, or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this chapter. In adopting, amending, and repealing rules and forms, Code Section 10-5-77 applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of registration statements, applications, reports, and other records, including the adoption of uniform rules, forms, and procedures.

(c) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., the Commissioner may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or order issued under this chapter. A rule adopted or order issued under this chapter may establish:

(1) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and Section 222 of the Investment Advisors Act of 1940, 15 U.S.C. Section 80b-1, et seq., the form and content of financial statements required under this chapter;

(2) Whether unconsolidated financial statements must be filed; and

(3) Whether required financial statements must be audited by an independent certified public accountant.

(d) The Commissioner may provide interpretative opinions or issue determinations that the Commissioner will not institute a proceeding

or an action under this chapter against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this chapter. A rule adopted or order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations that the Commissioner will not institute an action or a proceeding under this chapter.

(e) A hearing in an administrative proceeding under this chapter shall be conducted in public unless the Commissioner for good cause consistent with this chapter determines that the hearing shall not be so conducted.

History.
Code 1981, § 10-5-74, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-75. Register of applications for registration of securities; registration statements; notice filings; notices of claims; furnishing certain information to the public.

(a) The Commissioner shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor Act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor Act; and interpretative opinions or no action determinations issued under this chapter.

(b) The Commissioner shall make all rules, forms, interpretative opinions, and orders available to the public.

(c) The Commissioner shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted under this chapter may establish a reasonable charge for furnishing the record or certification. A copy of the record certified or a certificate by the Commissioner of a record's nonexistence is prima-facie evidence of a record or its nonexistence.

History.
Code 1981, § 10-5-75, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-76. Public records; exceptions.

(a) Except as otherwise provided in subsection (b) of this Code section, records obtained by the Commissioner or filed under this

chapter, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

(b) The following information and documents do not constitute public information under subsection (a) of this Code section and shall be confidential:

(1) Information or documents obtained by the Commissioner in connection with an investigation under Code Section 10-5-71;

(2) Information or documents filed with the Commissioner in connection with a registration statement or exemption filing under this chapter which constitute trade secrets or commercial or financial information of a person for which that person is entitled to and has asserted a claim of confidentiality or privilege authorized by law;

(3) Any document or record specifically designated as confidential in accordance with this chapter; and

(4) Any document, record, or information designated as confidential by federal statute, rule, or regulation.

History. Code 1981, § 10-5-76, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2011, p. 752, § 10/HB 142.

10-5-77. Intergovernmental cooperation, coordination, and consultation; sharing of records and information.

(a) The Commissioner shall, in his or her discretion, cooperate, coordinate, consult, and, subject to Code Section 10-5-76, share records and information with the securities administrator of another state, Canada, a Canadian province or territory, a foreign jurisdiction, the Securities and Exchange Commission, the United States Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection Corporation, a self-regulatory organization, a national or international organization of securities administrators, a federal or state banking or insurance regulator, or a governmental law enforcement agency to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments.

(b) In cooperating, coordinating, consulting, and sharing records and information under this Code section and in acting by rule, order, or waiver under this chapter, the Commissioner shall, in his or her discretion, take into consideration in carrying out the public interest the following general policies:

(1) Maximizing effectiveness of regulation for the protection of investors;

(2) Maximizing uniformity in federal and state regulatory standards; and

(3) Minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

(c) The cooperation, coordination, consultation, and sharing of records and information authorized by this Code section includes:

(1) Establishing or employing one or more designees as a central depository for registration and notice filings under this chapter and for records required or allowed to be maintained under this chapter;

(2) Developing and maintaining uniform forms;

(3) Conducting a joint examination or investigation;

(4) Holding a joint administrative hearing;

(5) Instituting and prosecuting a joint civil or administrative proceeding;

(6) Sharing and exchanging personnel;

(7) Coordinating registrations under Code Sections 10-5-20 and Code Section 10-5-30 through 10-5-33 and exemptions under Code Section 10-5-12;

(8) Sharing and exchanging records, subject to Code Section 10-5-76;

(9) Formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases;

(10) Formulating common systems and procedures;

(11) Notifying the public of proposed rules, forms, statements of policy, and guidelines;

(12) Attending conferences and other meetings among securities administrators, which may include representatives of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and

(13) Developing and maintaining a uniform exemption from registration for small issuers and taking other steps to reduce the burden of raising investment capital by small businesses.

History.
Code 1981, § 10-5-77, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-78. Rules and orders issued under this chapter subject to judicial review.

(a) A final order issued by the Commissioner under this chapter is subject to judicial review in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(b) A rule adopted under this chapter is subject to judicial review in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Code 1981, § 10-5-78, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

10-5-79. Applicability of chapter to certain offers to purchase or sell.

(a) Code Sections 10-5-20 and 10-5-21, subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, and Code Sections 10-5-42, 10-5-55, 10-5-58, and 10-5-59 do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) Subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, and Code Sections 10-5-42, 10-5-55, 10-5-58, and 10-5-59 do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) For the purpose of this Code section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

(1) Originates from within this state; or

(2) Is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) For the purpose of this Code section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance:

(1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and

(2) Has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state or that is published in this state but has had more than two-thirds of its circulation outside this state during the previous 12 months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:

(1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;

(2) The program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;

(3) The program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or

(4) The program or communication consists of an electronic communication that originates in this state but is not intended for distribution to the general public in this state.

(f) Subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, subsection (a) of Code Section 10-5-34, and Code Sections 10-5-51, 10-5-54, and 10-5-55 apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state.

History.
Code 1981, § 10-5-79, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.
For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

10-5-80. Consent to service of process.

(a) A consent to service of process complying with this Code section and required by this chapter must be signed and filed in the form

required by a rule or order under this chapter. A consent appointing the Commissioner the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative under this chapter or a rule adopted or order issued under this chapter after the consent is filed has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

(b) If a person, including a nonresident of this state, engages in an act, practice, or course of business prohibited or made actionable by this chapter or a rule adopted or order issued under this chapter and the person has not filed a consent to service of process under subsection (a) of this Code section, the act, practice, or course of business constitutes the appointment of the Commissioner as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.

(c) Service under subsection (a) or (b) of this Code section may be made by providing a copy of the process to the office of the Commissioner, but it is not effective unless:

(1) The plaintiff, which may be the Commissioner, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address or takes other reasonable steps to give notice; and

(2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the Commissioner in a proceeding before the Commissioner, allows.

(d) Service pursuant to subsection (c) of this Code section may be used in a proceeding before the Commissioner or by the Commissioner in a civil action in which the Commissioner is the moving party.

(e) If process is served under subsection (c) of this Code section, the court, or the Commissioner in a proceeding before the Commissioner, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

History.

Code 1981, § 10-5-80, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Law reviews.

For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B. J. 18 (2009).

ARTICLE 7

APPLICABILITY OF PREDECESSOR PROVISIONS

10-5-90. Predecessor Act governs actions pending and registrations, orders, and rules in effect on July 1, 2009.

(a) The predecessor Act exclusively governs all actions or proceedings that are pending on July 1, 2009, or may be instituted on the basis of conduct occurring before July 1, 2009, but a civil action may not be maintained to enforce any liability under the predecessor Act unless instituted within any period of limitation that applied when the cause of action accrued or within five years after July 1, 2009, whichever is earlier.

(b) All effective registrations under the predecessor Act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations under the predecessor Act remain in effect while they would have remained in effect if this chapter had not been enacted. They are considered to have been filed, issued, or imposed under this chapter but are exclusively governed by the predecessor Act.

(c) The predecessor Act exclusively applies to an offer or sale made within one year after July 1, 2009, pursuant to an offering made in good faith before July 1, 2009, on the basis of an exemption available under the predecessor Act.

History.
Code 1981, § 10-5-90, enacted by Ga. L. 2008, p. 381, § 1/SB 358.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, "July 1, 2009," was substituted for "the effective date of this chapter" in subsections (a) and (c).

ARTICLE 8

FINANCIAL PROTECTIONS FOR ELDERLY OR DISABLED ADULTS

Effective date.
This article became effective July 1, 2023.

10-5-100. Definitions.

As used in this article, the term:

(1) "Account" means any account with a broker-dealer or investment adviser for which a client has the authority to transact business.

(2) "Adult protective agency" means any office, division, department, or unit in this state that is charged with the investigation of abuse, neglect, or exploitation of an elder person or disabled adult.

(3) "Eligible adult" means:

(A) A person 65 years of age or older; or

(B) A person 18 years of age or older who is mentally or physically incapacitated, has Alzheimer's disease, or has dementia.

(4) "Financial exploitation" means:

(A) The wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or property of an eligible adult; or

(B) Any act or omission taken by a person, including, but not limited to, through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to:

(i) Obtain the control, use, or benefit of the eligible adult's money, assets, or property to deprive the eligible adult of the ownership, use, benefit, or possession of his or her money, assets, or property through deception, intimidation, or undue influence or by the use of any scheme, device, or artifice to defraud; or

(ii) Convert the money, assets, or property of the eligible adult to deprive the eligible adult of the ownership, use, benefit, or possession of his or her money, assets, or property.

(5) "Qualified individual" means any agent, investment adviser representative, or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

History.
Code 1981, § 10-5-100, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023; Ga. L. 2024, p. 1052, § 2(47)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "adviser" for "advisor" in paragraph (5).

10-5-101. Prompt notification to Commissioner of exploitation; requirements.

(a) If a qualified individual has reasonable cause to believe that the financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, then the qualified individual shall promptly notify the Commissioner.

(b) The notification required by subsection (a) of this Code section

may be made by oral or written communication or by form as issued by the Commissioner. Such notice shall include, to the extent possible:

(1) The name and address of the eligible adult;

(2) The name and address of the eligible adult's caretaker;

(3) The age of the eligible adult;

(4) The nature and extent of the eligible adult's potential or actual injury or condition resulting from the financial exploitation;

(5) Any other pertinent information; and

(6) Any additional information that is required by a rule adopted or form or order issued by the Commissioner.

History.
Code 1981, § 10-5-101, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2023, "Commissioner" was substituted for "Commission" at the end of paragraph (b)(6).

10-5-102. Notifications to designated third parties.

If a qualified individual has reasonable cause to believe that the financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, then a qualified individual may notify any third party previously designated by the eligible adult; provided, however, that a qualified individual shall not notify any designated third party that is suspected of the financial exploitation or other abuse of the eligible adult.

History.
Code 1981, § 10-5-102, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

10-5-103. Delayed disbursement if financial exploitation suspected; expiration; judicial extension of delay.

(a) A broker-dealer or investment adviser may delay a disbursement from, or a transaction in connection with, an account of an eligible adult or an account on which an eligible adult is a beneficiary if the broker-dealer, investment adviser, or qualified individual has reasonable cause to believe that, after initiating an internal review of the requested disbursement or transaction and the suspected financial exploitation, the requested disbursement or transaction may result in the financial exploitation of the eligible adult.

(b) If a broker-dealer or investment adviser delays a disbursement or transaction under subsection (a) of this Code section, the broker-dealer, investment adviser, or qualified individual shall:

(1) Immediately, and in no event more than two business days after the requested disbursement or transaction was delayed, provide written notification of the delay and the reason for the delay to all parties authorized to transact business on the account, unless there is reasonable cause to believe such party engaged in the suspected or attempted financial exploitation of the eligible adult;

(2) Immediately, and in no event more than two business days after the requested disbursement or transaction was delayed, notify the Commissioner pursuant to Code Section 10-5-101; and

(3) Continue an internal review of the suspected or attempted financial exploitation of the eligible adult, as necessary, and report the investigation's results to the Commissioner within seven business days of the requested disbursement or transaction.

(c) The authorization of any delay of a disbursement or transaction pursuant to this Code section shall expire upon the sooner of:

(1) A determination by the broker-dealer or investment adviser that the disbursement or transaction will not result in the financial exploitation of the eligible adult; or

(2) Fifteen business days after the date on which the broker-dealer or investment adviser first delayed the requested disbursement or transaction, unless the Commissioner requests that the broker-dealer or investment adviser extend the delay, in which case the delay shall expire no more than 25 business days after the date on which the broker-dealer or investment adviser first delayed the disbursement or transaction, unless sooner terminated by either the Commissioner or an order of a court of competent jurisdiction.

(d) A court of competent jurisdiction may enter an order extending the delay of a disbursement or transaction under this Code section, or may order other protective relief, upon the petition of the Commissioner; adult protective agency of competent jurisdiction; a broker-dealer or investment adviser that initiated the delay under this Code section; or another interested party.

History.
Code 1981, § 10-5-103, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023; Ga. L. 2024, p. 1052, § 2(48)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "or qualified individual" for "or a qualified individual" in the introductory language of subsection (b).

10-5-104. Limitations on administrative and civil liability.

No broker-dealer, investment adviser, or qualified individual who, in

good faith and exercising reasonable care, complies with this article shall be subject to administrative or civil liability based on:

(1) A delay of a disbursement or transaction pursuant to this article;

(2) A disclosure made pursuant to this article; or

(3) The failure to notify an eligible adult of disclosures made pursuant to this article.

History. Code 1981, § 10-5-104, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

10-5-105. Disclosure on investigations.

Notwithstanding any provision of law to the contrary, the Commissioner may disclose to any notifying broker-dealer, investment adviser, or qualified individual the general status or final disposition of any investigation that arose from a report made by the broker-dealer, investment adviser, or qualified individual under this article.

History. Code 1981, § 10-5-105, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

10-5-106. Accessibility of books and records.

(a) A broker-dealer or investment adviser shall provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to the Commissioner, adult protective agency of competent jurisdiction, or law enforcement pursuant to an investigation. Such records may include historical records and records pertaining to a disbursement or transaction related to the suspected or attempted financial exploitation of an eligible adult. Records made available under this Code section shall not be public records and shall not be available for public examination.

(b) Nothing in this Code section shall limit or otherwise impede the authority of the Commissioner from accessing or examining the books and records of a broker-dealer or investment adviser as otherwise provided by law.

History. Code 1981, § 10-5-106, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

10-5-107. Administrative and civil liability.

Nothing in this article shall limit or shield, in any manner, a broker-dealer, investment adviser, or qualified individual from any administrative or civil liability for any claim, or for reasonable attorneys' fees, costs, and litigation expenses related to such claim, for

participating in or materially aiding the financial exploitation of an eligible adult. Any such civil claim may be asserted by the eligible adult, or on his or her behalf by an appropriate guardian or representative who is not involved in or otherwise suspected of participating in the financial exploitation of the eligible adult, by filing a civil action in a court of competent jurisdiction.

History. Code 1981, § 10-5-107, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

10-5-108. Reporting requirements remain.

Nothing in this article shall limit a broker-dealer or investment adviser from being absolved of any applicable reporting duties under Code Section 30-5-4 and other laws of this state.

History. Code 1981, § 10-5-108, enacted by Ga. L. 2023, p. 550, § 1/SB 84, effective July 1, 2023.

CHAPTER 5A

COMMODITIES AND COMMODITY CONTRACTS AND OPTIONS

Article 1

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Cross references.

Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, § 13-9-1 et seq.

Administrative rules and regulations.

Commodities, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Commissioner of Securities, Rule 590-4-9-.01 et seq.

ARTICLE 1

GENERAL PROVISIONS

10-5A-1. Definitions.

As used in this chapter, the term:

(1) "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for

sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange, or other form of marketplace.

(2) "Commissioner" means the Commissioner of Securities.

(3) "Commodity" means, except as otherwise specified by the Commissioner by rule, regulation, or order, any agricultural, grain, or livestock product or by-product, any metal or mineral (including a precious metal set forth in paragraph (12) of this Code section), any gem or gemstone (whether characterized as precious, semiprecious, or otherwise), any fuel (whether liquid, gaseous, or otherwise), any foreign currency, all other goods, articles, products, or items of any kind or any other "commodity" as defined in the Commodity Exchange Act or Commodity Futures Trading Commission rule, provided that the term commodity shall not include (A) a numismatic coin whose fair market value is at least 15 percent higher than the value of the metal it contains, (B) real property or any timber, agricultural, or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property, or (C) any work of art offered or sold by art dealers, at public auction, or through a private sale by the owner thereof.

(4) "Commodity contract" means any account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether or not delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. Any commodity contract offered or sold, in the absence of evidence to the contrary, shall be presumed to be offered or sold for speculation or investment purposes. A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, physical delivery of the total amount of each commodity to be purchased under the contract or agreement within 29 calendar days from the date of payment in good funds of any portion of the purchase price.

(5) "Commodity Exchange Act" means the act of Congress codified at 7 U.S.C. Section 1, et seq., known as the Commodity Exchange Act, as amended to July 1, 1988, and all subsequent amendments, additions, or other revisions thereto.

(6) "Commodity Futures Trading Commission" means the independent regulatory agency designated by Congress to administer the Commodity Exchange Act.

(7) "Commodity Futures Trading Commission rule" means any rule, regulation, or order of the Commodity Futures Trading Commission in effect on July 1, 1988, and all subsequent amendments, additions, or other revisions thereto.

(8) "Commodity merchant" means any of the following, as defined or described in the Commodity Exchange Act or by Commodity Futures Trading Commission rule:

(A) Futures commission merchant;

(B) Commodity pool operator;

(C) Commodity trading adviser;

(D) Introducing broker;

(E) Leverage transaction merchant;

(F) An associated person of any of the foregoing;

(G) Floor broker; and

(H) Any other person (other than a futures association) required to register with the Commodity Futures Trading Commission.

(9) "Commodity option" means any account, agreement, or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise, but shall not include an option traded on a national securities exchange registered with the United States Securities and Exchange Commission.

(10) "Financial institution" means a bank, savings institution, or trust company organized under, or supervised pursuant to, the laws of the United States or of any state.

(11) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government, but shall not include a contract market designated by the Commodity Futures Trading Commission or any clearing-house thereof or a national securities exchange registered with the Securities and Exchange Commission (or any employee, officer, or director of such contract market, clearing-house, or exchange acting solely in that capacity).

(12) "Precious metal" means the following in either coin, bullion, or other form:

(A) Silver;

(B) Gold;

(C) Platinum;

(D) Palladium;

(E) Copper; and

(F) Such other items as the Commissioner may specify by rule, regulation, or order.

History. Code 1981, § 10-5A-1, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 2000, p. 136, § 10.

10-5A-2. Prohibited activities concerning purchase or sale of commodities.

Except as otherwise provided in Code Section 10-5A-3 or 10-5A-4, no person shall solicit the purchase or sale of or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into as seller or purchaser any commodity contract or any commodity option.

History. Code 1981, § 10-5A-2, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-3. Exempt purchasers and sellers.

The prohibitions in Code Section 10-5A-2 shall not apply to any transaction offered by and in which any of the following persons or any employee, officer, or director thereof acting solely in that capacity is the purchaser or seller:

(1) A person registered with the Commodity Futures Trading Commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(2) A person registered with the Securities and Exchange Commission as a broker-dealer whose activities require such registration;

(3) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in paragraph (1) or (2) of this Code section;

(4) A person who is a member of a contract market designated by the Commodity Futures Trading Commission or any clearing-house thereof;

(5) A financial institution;

(6) A person registered under the laws of this state as a securities broker-dealer whose activities require such registration; or

(7) A person engaged in business as a bullion or precious metals dealer having and maintaining a net worth of at least $500,000.00, provided that such person has filed with the Commissioner a sworn statement, in form and substance satisfactory to the Commissioner, that such person meets the minimum net worth requirement and that such person will notify the Commissioner immediately in the event its net worth falls below $500,000.00.

The exemption provided by this Code section shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or Commodity Futures Trading Commission rule.

History.
Code 1981, § 10-5A-3, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-4. Exempt transactions and contracts; rules and regulations.

(a) The prohibitions in Code Section 10-5A-2 shall not apply to the following:

(1) An account, agreement, or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;

(2) A commodity contract or the purchase of one or more precious metals which requires, and under which the purchaser receives within seven calendar days from the date of payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such seven-day period, such quantity of precious metals purchased by such payment is delivered (whether in specifically segregated or fungible bulk form) into the possession of a depository (other than the seller) which is either (A) a financial institution, (B) a depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (C) a storage facility licensed or regulated by the United States or any agency thereof, or (D) a depository designated by the Commissioner, and such depository (or other person which itself qualifies as a depository) issues and the purchaser receives a certificate, document of title, confirmation, or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the

purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(3) A commodity contract solely between persons engaged in producing, processing, using commercially, or handling as merchants each commodity subject thereto or any by-product thereof; or

(4) A commodity contract under which the offeree or the purchaser is a person referred to in Code Section 10-5A-3, an insurance company, or an investment company as defined in the Investment Company Act of 1940.

(b) The Commissioner may issue rules, regulations, or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this chapter which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act, exempting any person or transaction from any provision of this chapter conditionally or unconditionally, and otherwise implementing the provisions of this chapter for the protection of purchasers and sellers of commodities.

History.
Code 1981, § 10-5A-4, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-5. Conditions for acting as commodity merchant; designation of board of trade.

(a) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person:

(1) Is registered or temporarily licensed with the Commodity Futures Trading Commission for each activity constituting such person as a commodity merchant and such registration or temporary license shall not have expired or been suspended or revoked; or

(2) Is exempt from such registration by virtue of the Commodity Exchange Act or of a Commodity Futures Trading Commission rule.

(b) No board of trade shall trade or provide a place for the trading of any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the Commodity Futures Trading Commission unless such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, suspended, or revoked.

History.
Code 1981, § 10-5A-5, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-6. Fraudulent or deceitful acts or willful misappropriation prohibited.

No person shall directly or indirectly:

(1) Cheat or defraud, or attempt to cheat or defraud, any other person or employ any device, scheme, or artifice to defraud any other person;

(2) Willfully make any false report, enter any false record, or make any untrue statement of a material fact or fail to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(3) Engage in any transaction, act, practice, or course of business, including, without limitation, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person; or

(4) Willfully misappropriate or convert the funds, security, or property of any other person in connection with the solicitation of a purchase or sale of, the offer to sell, the offer to purchase, the offer to enter into, or the entry into of any commodity contract or commodity option subject to the provisions of Code Section 10-5A-2, Code Section 10-5A-3, or paragraph (2) or (4) of subsection (a) of Code Section 10-5A-4.

History.
Code 1981, § 10-5A-6, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-7. Liability for acts or omissions of employees, officers, or agents.

(a) The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

(b) Every person who directly or indirectly controls another person liable under any provision of this chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, and every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person

who is also liable by virtue of this subsection sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

History.
Code 1981, § 10-5A-7, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-8. Applicability of securities law.

Nothing in this chapter shall impair, derogate, or otherwise affect the authority or powers of the Commissioner under Chapter 5 of this title, known as the "Georgia Uniform Securities Act of 2008," or the application of any provision of such chapter to any person or transaction subject to such chapter.

History.
Code 1981, § 10-5A-8, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 2008, p. 381, § 10/SB 358.

10-5A-9. Construction of chapter.

This chapter may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts, and to maximize coordination with federal laws and the laws of other states and the administration and enforcement thereof. This chapter is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this chapter.

History.
Code 1981, § 10-5A-9, enacted by Ga. L. 1988, p. 1636, § 1.

ARTICLE 2
ENFORCEMENT

10-5A-20. Investigations.

(a) The Commissioner at his discretion:

(1) May make such public or private investigations within or outside of this state as he deems necessary to determine whether any person has violated or is about to violate this chapter or any rule, regulation, or order under this chapter or to aid in the enforcement of this chapter or in the prescribing of rules and regulations under this chapter;

(2) May require or permit any person to file a statement in

writing, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning the matter to be investigated; and

(3) May publish in print or electronically information concerning any violation of this chapter or any rule, regulation, or order under this chapter.

(b)(1) For the purpose of conducting any investigation as provided in this Code section, the Commissioner shall have the power to administer oaths, to call any party to testify under oath at such investigations, to require the attendance of witnesses, to require the production of books, records, and papers, and to take the depositions of witnesses; and for such purposes the Commissioner is authorized to issue a subpoena for any witness or a subpoena for the production of documentary evidence. Such subpoenas may be served by registered or certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Commissioner or shall be directed for service to the sheriff of the county where such witness resides or is found or where the person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Commissioner in the same manner that other expenses of the Commissioner are paid.

(2) The Commissioner may issue and apply to enforce subpoenas in this state at the request of a securities agency or commissioner of another state if the activities constituting an alleged violation for which the information is sought would be a violation of this chapter if the activities had occurred in this state.

(c) In case of refusal to obey a subpoena issued under any Code section of this chapter to any person, a superior court of appropriate jurisdiction, upon application by the Commissioner, may issue to the person any order requiring him to appear before the court to show cause why he should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

(d) In the case of any investigation conducted under this Code section, the Commissioner may hold hearings or he may appoint an investigative agent to conduct the hearings who shall have the same powers and authority in conducting the hearings as are granted to the Commissioner in this Code section. The agent shall possess such qualifications as the Commissioner may require. A transcript of the testimony and evidence and objections resulting from such hearings shall be taken unless waived in writing by all parties present at the

hearings. Copies of the transcript shall be available to all parties present at the hearing upon payment of the reasonable expense of reproducing the transcript. All recommendations of the investigative agent shall be advisory only and shall not have the effect of an order of the Commissioner.

(e) In any case where a hearing is conducted by an investigative agent, he shall submit to the Commissioner a written report, including the transcript of the testimony in evidence if requested by the Commissioner, the findings of the hearing, and a recommendation of the action to be taken by the Commissioner. The recommendation of the agent shall be approved, modified, or disapproved by the Commissioner. The Commissioner may direct an investigative agent to take additional testimony or permit introduction of further documentary evidence.

(f) In addition to any other hearings and investigations which the Commissioner is authorized or required to hold by this chapter, the Commissioner is also authorized to hold general investigative hearings on his own motion with respect to any matter under this chapter. A general investigative hearing as provided for in this subsection may be conducted by any person designated by the Commissioner for that purpose and may, but need not, be transcribed by the Commissioner or by any other interested party. No formal action may be taken as a result of such investigative hearing; but the Commissioner may take such action as he deems appropriate, based on the information developed in the hearing and on any other information which he may have.

(g) The Commissioner may disclose information obtained in connection with an investigation under this Code section to the extent provided in this Code section and if disclosure is for the purpose of a civil, administrative, or criminal investigation or proceeding by a securities agency or law enforcement agency and the receiving agency represents that, under the applicable law, protections exist to preserve the integrity, confidentiality, and security of the information.

History. Code 1981, § 10-5A-20, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 838, § 10/SB 388.

RESEARCH REFERENCES

ALR. Investigative authority of administrative agencies in state regulation of securities, 58 A.L.R.5th 293.

10-5A-21. Actions by Commissioner if chapter, rule, or order violated.

(a) If the Commissioner believes, whether or not based upon an investigation conducted under Code Section 10-5A-20, that any person has engaged or is about to engage in any act or practice constituting a

violation of any provision of this chapter or any rule or order issued under this chapter, the Commissioner may:

(1) Issue a cease and desist order;

(2) Issue an order imposing a civil penalty in an amount which may not exceed $10,000.00 for any single violation or $100,000.00 for multiple violations in a single proceeding or a series of related proceedings; or

(3) Initiate any of the actions specified in subsection (b) of this Code section.

(b) The Commissioner may institute any of the following actions in the appropriate courts of this state or in the appropriate courts of another state, in addition to any legal or equitable remedies otherwise available:

(1) A declaratory judgment;

(2) An action for a prohibitory or mandatory injunction to enjoin the violation of and to ensure compliance with this chapter or any rule or order of the Commissioner;

(3) An action for disgorgement; or

(4) An action for appointment of a receiver or conservator for the defendant or the defendant's assets.

History.
Code 1981, § 10-5A-21, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-22. Legal or equitable remedies; special remedies.

(a)(1) Upon a proper showing by the Commissioner that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the Commissioner, a superior court of appropriate jurisdiction may grant appropriate legal or equitable remedies.

(2) Upon a showing of a violation of this chapter or a rule or order of the Commissioner, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(A) Imposition of a civil penalty in an amount which may not exceed $10,000.00 for any single violation or $100,000.00 for multiple violations in a single proceeding or a series of related proceedings;

(B) Disgorgement;

(C) Declaratory judgment;

(D) Restitution to investors wishing restitution; and

(E) Appointment of a receiver or conservator for the defendant or the defendant's assets.

(3) Appropriate remedies when the defendant is shown only about to violate this chapter or a rule or order of the Commissioner shall be limited to:

(A) A temporary restraining order;

(B) A temporary or permanent injunction;

(C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver or conservator for the defendant or the defendant's assets.

(b) The court shall not require the Commissioner to post a bond in any official action under this chapter.

(c)(1) Upon a proper showing by the commissioner or securities or commodity agency of another state that a person other than a government or governmental agency or instrumentality has violated, or is about to violate, any provision of the commodity act of that state or any rule or order of the commissioner or securities or commodity agency of that state, a superior court of appropriate jurisdiction may grant appropriate legal and equitable remedies.

(2) Upon a showing of a violation of the securities or commodity act of a foreign state or a rule or order of the commissioner or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(A) Disgorgement; and

(B) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

(3) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a rule or order of the commissioner or securities or commodity agency of the foreign state shall be limited to:

(A) A temporary restraining order;

(B) A temporary or permanent injunction;

(C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

History.
Code 1981, § 10-5A-22, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-23. Venue for civil and criminal actions.

For the purposes of venue for any civil or criminal action under this chapter, any violation of this chapter or of any rule, regulation, or order promulgated under this chapter shall be considered to have been committed in any county in which any act was performed in furtherance of the transaction which violated this chapter, in the county of any violator's principal place of business in this state, in the county of the issuer's principal place of business in this state, and in any county in which any violator had control or possession of any proceeds of the violation or of any books, records, documents, or other material or objects which were used in furtherance of the violation.

History.
Code 1981, § 10-5A-23, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-24. Commissioner of Securities; employees; compensation and expenses; assistant commissioner; prohibited use of information; confidential information.

(a) This chapter shall be administered by the office of the Secretary of State who is designated Commissioner of Securities.

(b) The Commissioner shall have authority to employ examiners, clerks, stenographers, and other employees as the administration of that portion of this chapter vested in him may require. The Commissioner shall also have authority to appoint and employ investigators who shall have, in any case that there is reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(c) The Commissioner and any persons employed by him shall be paid, in addition to their regular compensation, the transportation, board, lodging, and other travel expenses necessary and actually incurred by each of them in the performance of their duties under this chapter.

(d) The Commissioner shall appoint, with the approval of the Gov-

ernor, a person as assistant commissioner and delegate such of his powers and duties under this chapter to such assistant commissioner as he desires.

(e) Neither the Commissioner nor any employees of the Commissioner shall use any information which is filed with or obtained by the Commissioner which is not public information for personal gain or benefit, nor shall the Commissioner or any employees of the Commissioner conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate such information.

(f)(1) Except as provided in paragraph (2) of this subsection, all information collected, assembled, or maintained by the Commissioner is public information and is available for examination by the public.

(2) The following are exceptions to paragraph (1) of this subsection and are deemed to be confidential:

(A) Information obtained in private investigations pursuant to Code Section 10-5A-20;

(B) Information designated as confidential by any rule, regulation, or order of the Commissioner; and

(C) Information obtained from federal agencies which may not be disclosed under federal law.

(3) The Commissioner in his discretion may disclose any information made confidential under subparagraph (A) of paragraph (2) of this subsection to persons identified in subsection (a) of Code Section 10-5A-25.

(4) No provision of this chapter either creates or derogates any privilege which exists at common law, by statute, or otherwise when any documentary or other evidence is sought under a subpoena directed to the Commissioner or any employee of the Commissioner.

History. Code 1981, § 10-5A-24, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 1989, p. 14, § 10.

10-5A-25. Cooperation with agencies, administrators, and organizations.

(a) To encourage uniform application and interpretation of this chapter and securities regulation and enforcement in general, the Commissioner and the employees of the Commissioner may cooperate, including bearing the expense of the cooperation, with the securities agencies or administrator of another jurisdiction, Canadian province or

territory, or such other agencies administering laws similar to this chapter, the Commodity Futures Trading Commission, the Securities and Exchange Commission, any self-regulatory organization established under the Commodity Exchange Act or the Securities Exchange Act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

(b) The cooperation authorized by subsection (a) of this Code section shall include, but need not be limited to, the following:

(1) Making joint examinations or investigations;

(2) Holding joint administrative hearings;

(3) Filing and prosecuting joint litigation;

(4) Sharing and exchanging personnel;

(5) Sharing and exchanging information and documents;

(6) Formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes, and releases; and

(7) Issuing and enforcing subpoenas at the request of the agency administering laws similar to this chapter in another jurisdiction, the securities agency of another jurisdiction, the Commodity Futures Trading Commission, or the Securities and Exchange Commission if the information sought would also be subject to lawful subpoena for conduct occurring in this state.

History.
Code 1981, § 10-5A-25, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-26. Rules and regulations.

The Commissioner shall have the power to make such rules and regulations from time to time as he may deem necessary and proper for the enforcement of this chapter. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

History.
Code 1981, § 10-5A-26, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-27. Applicability of Code Sections 10-5A-2, 10-5A-5, and 10-5A-6.

(a) Code Sections 10-5A-2, 10-5A-5, and 10-5A-6 apply to persons who offer to sell or solicit a purchase when:

(1) An offer to sell or solicitation of a purchase is made in this state; or

(2) An offer to sell or solicitation of a purchase is made and accepted in this state.

(b) Code Sections 10-5A-2, 10-5A-5, and 10-5A-6 apply to persons who offer to buy or solicit a sale when:

(1) An offer to buy or solicitation of a sale is made in this state; or

(2) An offer to buy or solicitation of a sale is made and accepted in this state.

(c) For the purpose of this Code section, an offer to sell or to buy or a solicitation of a purchase or sale is made in this state, whether or not either party is then present in this state, when the offer or solicitation:

(1) Originates from this state; or

(2) Is directed by the offeror or solicitor to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer or solicitation.

(d) For the purpose of this Code section, an offer to buy or to sell or solicitation of a sale or purchase is accepted in this state when acceptance:

(1) Is communicated to the offeror or solicitor in this state; and

(2) Has not previously been communicated to the offeror or solicitor, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror or solicitor in this state, reasonably believing the offeror or solicitor to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(e) An offer to sell or to buy or solicitation of a purchase or sale is not made in this state when:

(1) The publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past 12 months; or

(2) A radio or television program originating outside this state is received in this state.

History.
Code 1981, § 10-5A-27, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-28. Administrative proceedings.

(a) The Commissioner shall commence an administrative proceeding under this chapter by entering either a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but must be in writing.

(b) Upon entry of a notice of intent or summary order, the Commissioner shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the Commissioner shall inform all interested parties of the date, time, and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the Commissioner shall inform all interested parties that they have 30 business days from the entry of the order to file a written request for a hearing on the matter with the Commissioner and that the hearing will be scheduled to commence within 30 business days after the receipt of the written request.

(c) If the proceeding is pursuant to a summary order, the Commissioner, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the Commissioner's own motion.

(d) If no hearing is requested and none is ordered by the Commissioner, the summary order will automatically become a final order after 30 business days.

(e) If a hearing is requested or ordered, the Commissioner, after notice of, and opportunity for, hearing to all interested persons, may modify or vacate the order or extend it until final determination.

(f) No final order or order after hearing may be returned without:

(1) Appropriate notice to all interested persons;

(2) Opportunity for hearing by all interested persons; and

(3) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under this chapter shall be public unless the Commissioner grants a request joined in by all the respondents that the hearing be conducted privately.

History.
Code 1981, § 10-5A-28, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-29. Judicial review of Commissioner's orders.

(a) Any person aggrieved by a final order of the Commissioner may obtain a review of the order in a superior court of appropriate jurisdiction by filing in court, within 60 days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition for review shall be served upon the Commissioner.

(b) Upon the filing of a petition for review, except where the taking of additional evidence is ordered by the court pursuant to subsection (e) or (f) of this Code section, the court shall have exclusive jurisdiction of the matter, and the Commissioner may not modify or set aside the order, in whole or in part.

(c) The filing of a petition for review under subsection (a) of this Code section does not, unless specifically ordered by the court, operate as a stay of the Commissioner's order, and the Commissioner may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

(d) Upon receipt of the petition for review, the Commissioner shall certify and file in the court a copy of the order and the transcript or record of the evidence upon which it was based. If the order became final by operation of law under subsection (d) of Code Section 10-5A-28, the Commissioner shall certify and file in court the summary order and evidence of its service upon the parties to it and an affidavit certifying that no hearing has been held and that the order became final pursuant to subsection (d) of Code Section 10-5A-28.

(e) If either the aggrieved party or the Commissioner applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Commissioner or other good cause, the court may order the additional evidence to be taken by the Commissioner under such conditions as the court considers proper.

(f) If new evidence is ordered taken by the court, the Commissioner may modify the findings and order by reason of the additional evidence and shall file in the court the additional evidence together with any modified or new findings or order.

(g) The court shall review the petition based upon the original record before the Commissioner as amended under subsections (e) and (f) of this Code section. The findings of the Commissioner as to the facts, if supported by competent, material, and substantive evidence, are conclusive. Based upon this review, the court may affirm, modify, enforce, or set aside the order, in whole or in part.

History.
Code 1981, § 10-5A-29, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-30. Burden of proving exemptions.

It shall not be necessary to prove the negative as to any of the exemptions of this chapter in any complaint, information, indictment, writ, or proceeding brought under this chapter; and the burden of proof of any such exemption shall be upon the party claiming the same.

History.
Code 1981, § 10-5A-30, enacted by Ga. L. 1988, p. 1636, § 1.

10-5A-31. Criminal penalties for violating chapter; institution of criminal proceedings.

(a) Any person who willfully violates any provision of this chapter shall be guilty of a felony and, upon conviction, shall be fined not more than $50,000.00 or imprisoned for not more than ten years, or both, for each violation.

(b) The Commissioner may refer such evidence as is available concerning violations of this chapter or any rule or order of the Commissioner to the Attorney General or the proper district attorney, who may, with or without such a reference from the Commissioner, institute the appropriate criminal proceedings under this chapter.

History.
Code 1981, § 10-5A-31, enacted by Ga. L. 1988, p. 1636, § 1.

CHAPTER 5B

DECEPTIVE, FRAUDULENT, OR ABUSIVE TELEMARKETING

Sec.		Sec.	
10-5B-1.	Legislative findings and intent.		ject to other provisions of the Code.
10-5B-2.	Definitions.	10-5B-6.	Criminal and civil penalties; right to punish under other laws not limited.
10-5B-3.	Rules to prohibit deceptive, fraudulent, or abusive telemarketing activities authorized.	10-5B-7.	Remedies, duties, prohibitions, and penalties not exclusive; construction with other provisions of the Code.
10-5B-4.	Required and prohibited telephone conduct and activities; liability.	10-5B-8.	When offer to sell or buy is made in state.
10-5B-5.	Applicability to persons sub-		

Cross references.

Prohibited telemarketing activities, §§ 10-1-393.5, 10-1-393.6.

Penalties for violation of this chapter, § 16-8-12.

Telecommunications Marketing Act of 1998, § 46-5-180 et seq.

RESEARCH REFERENCES

ALR.

Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 A.L.R.5th 619.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Unsolicited Calling and Messaging Under Communications Act of 1934, as Amended by Telephone Consumer Protection Act of 1991, as Amended, (TCPA) (47 U.S.C.A. § 227) and Regulations Thereunder (47 C.F.R. § 64.1200) — Federal Cases, 52 A.L.R. Fed. 3d 1.

10-5B-1. Legislative findings and intent.

(a) The General Assembly finds that a problem is posed in this state by the increasing use of the telephone in a fraudulent or abusive manner as a means of solicitation in certain currently regulated commercial businesses and professions and that the power and reach of the telephone as a medium for such conduct increases the risk to the legitimate economy of the state.

(b) The General Assembly declares that the intent of this chapter is to impose sanctions against the fraudulent use of the telephone in certain currently regulated commercial businesses and professions. This chapter shall be construed to further that intent.

History.
Code 1981, § 10-5B-1, enacted by Ga. L. 1994, p. 536, § 1.

Law reviews.
For review of 1996 commerce and trade legislation, see 13 Ga. St. U.L. Rev. 33 (1996).

10-5B-2. Definitions.

(a) As used in this chapter, the term:

(1) "Charitable contribution" means the promise or grant of any money or property of any kind or value to be used for any charitable purpose, as that term is defined in Code Section 43-17-2.

(2) "Control," "controlling," "controlled by," or "under common control with" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(3) "Executive officer" means the chief executive officer, the president, the principal financial officer, the principal operating officer, each vice president with responsibility involving policy-making functions for a significant aspect of a person's business, the secretary, the treasurer, or any other person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(4) "Person" means an individual, a corporation, a partnership, a limited liability company, an association, a joint-stock company, a trust, or any unincorporated organization.

(5) "Secretary of State" means the Secretary of State of the State of Georgia.

(6) "Telephone soliciting business" means a sole proprietorship, partnership, limited liability company, corporation, or other association of individuals engaged in a common effort to solicit sales regulated under this chapter.

(7) "Telephone solicitor" or "solicitor" means a person, partnership, limited liability company, corporation, or other entity that makes or places telephone calls for the purpose of selling or solicitation of sales as defined in paragraph (8) of this subsection over the telephone, whether the call originates in the State of Georgia or is received in the State of Georgia.

(8) "Telephonic sale," "sell telephonically," "telephonic selling," "telephonic offer for sale," or "telephonic solicitation of sale," and "telemarketing" means a sale or solicitation of goods or services, a sale or offer to sell a security as defined in paragraph (31) of Code Section 10-5-2, or a solicitation of a charitable contribution, in which:

(A) The seller solicits the sale or charitable sale or contribution over the telephone;

(B) The purchaser's agreement to purchase or contribute is made over the telephone; and

(C) In the case of a sale of goods or services only, the purchaser, over the telephone, pays for or agrees to commit to payment for goods or services prior to or upon receipt by the purchaser of the goods and services.

(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to the interpretation of this chapter.

History.
Code 1981, § 10-5B-2, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1998, p. 643, § 3; Ga. L. 2008, p. 381, § 6/SB 358.

Editor's notes.
Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that the amendment to this Code section is applicable to acts and offenses committed on or after July 1, 1998.

Law reviews.
For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U.L. Rev. 9 (1998).

10-5B-3. Rules to prohibit deceptive, fraudulent, or abusive telemarketing activities authorized.

(a) The Secretary of State shall be authorized to promulgate rules to prohibit deceptive or fraudulent telemarketing activities and other abusive telemarketing activities by persons subject to the provisions of Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008"; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the "Georgia Charitable Solicitations Act of 1988."

(b) Any rules promulgated by the Secretary of State pursuant to subsection (a) of this Code section may include but not be limited to:

(1) A definition of deceptive telemarketing activities;

(2) A list of criteria that are symptomatic of deceptive telemarketing as distinguished from ordinary telemarketing business practices;

(3) A requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;

(4) A requirement that goods or services offered by telemarketing be shipped or provided within a specified period and that, if the goods

or services are not shipped or provided within such period, a refund shall be required; and

(5) Authority for a person who orders any goods or services through telemarketing to cancel the order within a specified period.

(c) No rules promulgated pursuant to this Code section shall in any way limit the scope or application of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975."

History.
Code 1981, § 10-5B-3, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2008, p. 381, § 10/SB 358.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, a comma was deleted following "2008" in subsection (a).

10-5B-4. Required and prohibited telephone conduct and activities; liability.

(a) It shall be unlawful for any person who is jurisdictionally subject to the provisions of Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008"; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the "Georgia Charitable Solicitations Act of 1988," and who makes any telephonic offer to sell or telephonic sale in this state:

(1) To fail to promptly state clearly the name of the business on whose behalf the call is being made before any sales solicitation can begin and provide a telephone number or address at which the business can be contacted and shall not by electronics block their name and phone number from being identified by caller ID;

(2) To violate any rule, regulation, or order promulgated or issued by the Secretary of State under this chapter;

(3) In connection with a telephonic sale, selling telephonically, or telephonic solicitation of sale in or from this state, to employ a device, scheme, or artifice to defraud;

(4) In connection with a telephonic sale, selling telephonically, or telephonic solicitation of sale in or from this state, to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon a person;

(5) Knowingly to cause to be made, in any document filed with the Secretary of State or in any proceeding under this chapter, any statement which is, at the time it is made and in light of the circumstances under which it is made, false or misleading in any material respect; or

(6) In connection with a telephonic solicitation of a monetary charitable contribution, to use the services of any person as a courier or otherwise to obtain personally receipt or possession of a monetary contribution from a residence.

(b) Every person who directly or indirectly controls a person culpable under subsection (a) of this Code section, every general partner, executive officer, or director of such person culpable under subsection (a) of this Code section, every person occupying a similar status or performing similar functions, and every telephone soliciting business or telephone solicitor who participates in any material way in the sale or solicitation of sale is culpable to the same extent as the person whose culpability arises under subsection (a) of this Code section unless the person whose culpability arises under this subsection sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which culpability is alleged to exist.

History.

Code 1981, § 10-5B-4, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1998, p. 643, § 4; Ga. L. 2000, p. 1200, § 1; Ga. L. 2008, p. 381, § 10/SB 358.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2000, a semicolon was substituted for a period at the end of paragraph (a)(1).

Pursuant to Code Section 28-9-5, in 2008, a comma was deleted following "2008" in the introductory language of subsection (a).

Editor's notes.

Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that the amendment to this Code section is applicable to acts and offenses committed on or after July 1, 1998.

Law reviews.

For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U.L. Rev. 9 (1998).

10-5B-5. Applicability to persons subject to other provisions of the Code.

(a) With respect to any person who is jurisdictionally subject to the provisions of Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008," the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 5 of this title were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 5 of this title who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 5 of this title in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 5 of this title were incorporated into and made a part of this chapter.

(b) With respect to any person who is jurisdictionally subject to the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options, the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 5A of this title were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 5A of this title who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 5A of this title in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 5A of this title were incorporated into and made a part of this chapter.

(c) With respect to any person who is jurisdictionally subject to the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors, the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 14 of Title 43 were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 14 of Title 43 who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 14 of Title 43 in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 14 of Title 43 were incorporated into and made a part of this chapter.

(d) With respect to any person who is jurisdictionally subject to the provisions of Chapter 17 of Title 43, known as the "Georgia Charitable Solicitations Act of 1988," the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 17 of Title 43 were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 17 of Title 43 who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 17 of Title 43 in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 17 of Title 43 were incorporated into and made a part of this chapter.

History.
Code 1981, § 10-5B-5, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2008, p. 381, § 10/SB 358.

10-5B-6. Criminal and civil penalties; right to punish under other laws not limited.

(a) Any person who shall willfully violate any provision of this chapter shall be guilty of a felony and, upon conviction thereof, shall be punished as described under subparagraph (a)(5)(A) of Code Section 16-8-12.

(b) Any person who suffers injury or damages as a result of a violation of this chapter may bring an action and may recover under Code Section 10-1-399, relating to private rights of action.

(c) Any person who intentionally targets an elder or disabled person, as defined in Article 31 of Chapter 1 of this title, in a violation of this chapter shall be subject to double the applicable civil and criminal penalties for such violation or offense.

(d) Nothing in this chapter shall limit any statutory or common-law right of the state to punish any person for violation of any law.

History.
Code 1981, § 10-5B-6, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1996, p. 231, § 3; Ga. L. 2004, p. 631, § 10.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1996, a misspelling of the word "defined" in subsection (c) was corrected.

10-5B-7. Remedies, duties, prohibitions, and penalties not exclusive; construction with other provisions of the Code.

(a) The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties provided by law.

(b) Nothing in this chapter shall amend, alter, or repeal any of the provisions of Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008"; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the "Georgia Charitable Solicitations Act of 1988."

History.
Code 1981, § 10-5B-7, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2008, p. 381, § 10/SB 358.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2008, a comma was deleted following "2008" in subsection (b).

10-5B-8. When offer to sell or buy is made in state.

For purposes of this chapter, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:

(1) Originates from this state; or

(2) Is directed by the offeror to this state and received at the place to which it is directed.

History.
Code 1981, § 10-5B-8, enacted by Ga. L. 1994, p. 536, § 1.

CHAPTER 6

AGENCY

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10-6-87. Assignment of credit.
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10-6-89. Contract for nonexisting principal void; right of action against purported agent.

Article 5

Agents Receiving Moneys for Third Persons

Sec.
10-6-100. Bond to be posted by agent in business of receiving cash for payment to third persons; exceptions.
10-6-101. Right to restitution from bond; agent's civil liability or criminal responsibility to patron not affected.
10-6-102. Penalties for failure to post bond.

Article 6

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10-6-120. Overseer's duties and powers.
10-6-121. Parol contract between employer and overseer.

Article 7

Financial Power of Attorney

10-6-140 through 10-6-142. [Reserved].

Cross references.

Registered agents of corporations, § 14-2-501 et seq.

Rights, duties, and liabilities arising out of partnership status, § 14-8-40 et seq.

Equitable principles relating to powers of appointment, sale, and other powers, § 23-2-110 et seq.

Law reviews.

For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Fiduciary's Breach of Investment Duties, 1 POF2d 467.

Existence of Joint Venture, 12 POF2d 295.

Expansion of Agent's Authority by Necessity, 14 POF2d 483.

Principal's Repudiation of Agent's Unauthorized Act, 37 POF2d 739.

Vicarious Liability Under Doctrine of Ostensible or Apparent Agency, 6 POF3d 457.

Real Estate Broker's Misrepresentation or Nondisclosure as to Condition or Value of Realty, 39 POF3d 309.

Real Estate Seller's Claims for Relief for Fraudulent-Concealment of Identity of True Purchaser of Realty, 63 POF3d 257.

ALR.

Validity and application of regulation prohibiting licensed real-estate broker from negotiating sale or lease with owner known to have exclusive listing agreement with another broker, 17 A.L.R.4th 763.

Real-estate broker's rights and liabili-

ties as affected by failure to disclose agreement to loan purchase money to purchaser, 17 A.L.R.4th 788.

ARTICLE 1

CREATION AND NATURE OF RELATIONSHIP

Cross references.
Confidential nature of relationship between principal and agent, § 23-2-58.

10-6-1. Creation of agency relationship.

The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf.

History.
Orig. Code 1863, § 2157; Code 1868, § 2152; Code 1873, § 2178; Code 1882, § 2178; Civil Code 1895, § 2997; Civil Code 1910, § 3569; Code 1933, § 4-101.

JUDICIAL DECISIONS

Analysis

General Consideration
Agency by Ratification
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General Consideration

"Agency". — "Agency" is the relationship which results from the manifestation of consent by one person to another that the other shall act on one's behalf and subject to one's control, and consent by the other so to act. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326, 1950 Ga. LEXIS 354 (1950); Aetna Ins. Co. v. Glens Falls Ins. Co., 453 F.2d 687, 1972 U.S. App. LEXIS 11693 (5th Cir. 1972); Flournoy v. City Fin. of Columbus, Inc., 679 F.2d 821, 1982 U.S. App. LEXIS 18438 (11th Cir. 1982).

Word "agency" may refer to that relationship created by express or implied contract or by law, whereby one party delegates the transaction of some lawful business with more or less discretionary power to another, who undertakes to manage the affair and to render an account thereof. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326, 1950 Ga. LEXIS 354 (1950).

Consent essential for liability for other's act. — Relationship of master and servant cannot be imposed upon a person without the person's consent, express or implied; hence, the defendant was free to select the defendant's own servant, and was responsible for the acts of the defendant's servant within the scope of the defendant's employment, but the defendant was not responsible for the act of an assistant permitted, without the defendant's authority, to act for the defendant. Carter v. Bishop, 209 Ga. 919,

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76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

No liability beyond scope of agency. — Beyond the scope of agency, a principal is not bound by the acts of the agent. Abercrombie v. Ford Motor Co., 81 Ga. App. 690, 59 S.E.2d 664, 1950 Ga. App. LEXIS 973, rev'd, 207 Ga. 464, 62 S.E.2d 209, 1950 Ga. LEXIS 636 (1950).

Agency relationship may arise by implication as well as by express authority. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432, 1964 Ga. App. LEXIS 730 (1964).

Agent or servant is frequently employed by contract or express agreement, but this is not necessary to establish the relationship, which may arise by implication as well as expressly. Griffin v. Russell, 144 Ga. 275, 87 S.E. 10, 1915 Ga. LEXIS 167 (1915).

Confidential relationship rising to agency. — Confidential relationship between employer and employee may rise to agency dimensions when a showing is made of a relationship which in fact justifies the reposing of confidence in one party by another. Remediation Servs., Inc. v. Georgia-Pacific Corp., 209 Ga. App. 427, 433 S.E.2d 631, 1993 Ga. App. LEXIS 907 (1993), cert. denied, No. S93C1657, 1993 Ga. LEXIS 1005 (Ga. Oct. 22, 1993).

Law of agency is not confined to business transactions. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, 1935 Ga. LEXIS 52 (1935).

Manual service. — "Agency" relates to business transactions, while the work of a servant relates to manual service. Headrick v. Fordham, 154 Ga. App. 415, 268 S.E.2d 753, 1980 Ga. App. LEXIS 2203 (1980).

Contractual relationships. — Relationship between a gas station and the company that leased property and sold gas to the station was a purely contractual one between two independent businesses, not an agency or joint venture. Wells v. Vi-Mac, Inc., 226 Ga. App. 261, 486 S.E.2d 400, 1997 Ga. App. LEXIS 592 (1997), cert. denied, No. S97C1353, 1997 Ga. LEXIS 856 (Ga. Oct. 3, 1997).

Trial court erred in granting a rental company summary judgment in a car owner's action alleging that the company breached a settlement agreement because the company was obligated to pay any settlement amounts negotiated by the company's agent, an independent third party administrator, and issues of fact remained as to whether the company issued payment according to the terms of the settlement agreement, which were also disputed. Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661, 2012 Ga. App. LEXIS 338 (2012).

Trial court did not abuse the court's discretion in denying a temporary staffing agency's motion for a new trial based on the failure of a widow and a hospital to spontaneously disclose their litigation agreement because there was nothing in the record to show that the agency's ignorance of the litigation agreement rendered the trial fundamentally unfair; even if the widow benefitted from the hospital's efforts to enforce the hospital's right to indemnity, such incidental benefit did not make the hospital the widow's agent. Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 722 S.E.2d 370, 2012 Ga. App. LEXIS 46 (2012), cert. denied, No. S12C0940, 2012 Ga. LEXIS 533 (Ga. May 29, 2012).

Trial court did not err by finding that the surgeons were not vicariously liable for the medical student's negligence as a matter of law under agency principles because there was no agency or employment relationship between the parties, as the agreement between the medical school and the host agency specified that the medical student was not considered an employee or agent of the practice nor was the agreement intended to create any agency, employer/employee, or fiduciary relationship between the parties. Statham v. Quang, 371 Ga. App. 55, 899 S.E.2d 275, 2024 Ga. App. LEXIS 82 (2024).

Agency held not created by business relationship. — Trial court erred by denying summary judgment to a subcontractor on the contractor's breach of fiduciary claim because the evidence did not raise an issue of fact regarding the existence of a special agency or any other confidential relationship between the parties as the business relationship was

an arms-length one and even adversarial. UWork.com, Inc. v. Paragon Techs., Inc., 321 Ga. App. 584, 740 S.E.2d 887, 2013 Ga. App. LEXIS 355 (2013), cert. denied, No. S13C1277, 2013 Ga. LEXIS 823 (Ga. Oct. 7, 2013).

Control by employer determines agency relationship. — Test to be applied in determining whether the relationship of the parties constitutes an agency is whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432, 1964 Ga. App. LEXIS 730 (1964); McMullan v. Georgia Girl Fashions, Inc., 180 Ga. App. 228, 348 S.E.2d 748, 1986 Ga. App. LEXIS 2093 (1986).

Agent creates obligations on behalf of principal. — An employee performs work for the master, but an agent, within the ambit of the employee's authority, represents the employee's principal in some business dealing and is vested with authority, real or ostensible, to create obligations on behalf of the employee's principal, bringing third parties into contractual relations with the principal. Lagerstrom v. Beers Constr. Co., 157 Ga. App. 396, 277 S.E.2d 765, 1981 Ga. App. LEXIS 1837 (1981).

Apparent authority to do act is created as to a third person when the statements or conduct of the alleged principal reasonably cause the third person to believe that the principal consents to have the act done on the principal's behalf by the purported agent. Hinely v. Barrow, 169 Ga. App. 529, 313 S.E.2d 739, 1984 Ga. App. LEXIS 1625 (1984).

Apparent authority to offer stock in a company did not arise from the fact that the person making the offer was a part owner of the company and a company officer, particularly as a promise of transfer of company stock was not ordinary company business. Reindel v. Mobile Content Network Co., LLC, 652 F. Supp. 2d 1278, 2009 U.S. Dist. LEXIS 73044 (N.D. Ga. 2009).

No principal/agent relation exists if employee has no delegated authority to act for the business except to pay bills in the absence of the owner and if the employee has no authority to purchase, to contract, to hire or fire, or even supervise other personnel. Commercial Union Ins. Co. v. Taylor, 169 Ga. App. 177, 312 S.E.2d 177, 1983 Ga. App. LEXIS 3016 (1983).

Dual agent. — Acts of an individual in procuring liability insurance for a company, of which the individual was the chairperson, and issuing liability insurance policies on behalf of an insurer of which the individual was the president, had been occurring and recurring for more than 30 years with the knowledge and consent of all parties, and made the individual a dual agent. The individual's misconduct in procuring a policy which did not cover certain acts of employees could not be imputed to either of the principals, who were not actually at fault. Edwards-Warren Tire Co. v. Cole, Sanford & Whitmire, 188 Ga. App. 395, 373 S.E.2d 83, 1988 Ga. App. LEXIS 1048 (1988).

Liability for subagent's acts. — Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive the automobile on the business of the owner, is personally expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

Liability when employment of subagent is ratified. — If a servant who is employed to do certain work for a master employs another person to assist the master, the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the assistant, or when the act of employment is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master, engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444

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(1953); Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961).

Independent contractor may also be agent; thus, a person may be an independent contractor and at the same time act as an agent for a particular purpose. National Home Life Assurance Co. v. Hawkins, 151 Ga. App. 60, 258 S.E.2d 913, 1979 Ga. App. LEXIS 2423 (1979).

Existence of agency relationship must be determined from all facts and circumstances. Aetna Ins. Co. v. Glens Falls Ins. Co., 453 F.2d 687, 1972 U.S. App. LEXIS 11693 (5th Cir. 1972).

Contract of agency signed by both parties is not essential to the creation of the principal-agent relationship. Clyde Chester Realty Co. v. Stansell, 151 Ga. App. 357, 259 S.E.2d 639, 1979 Ga. App. LEXIS 2595 (1979).

Payment of compensation is not necessary ingredient of principal and agent. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

Payment of compensation does not alone create agency. — If landowners entered into a contract of sale with a prospective purchaser, conditioned upon furnishing satisfactory title, designating a certain firm of brokers as the owners' agent, and stipulating that, in the event the sale was consummated, the purchaser would pay such brokers' commission, the mere fact that the purchaser undertook to pay such commission did not of itself alone create the relation of principal and agent between the purchaser and the brokers under former Civil Code 1910, §§ 3569 and 3574. Richardson v. DuPree, 32 Ga. App. 3, 122 S.E. 707, 1924 Ga. App. LEXIS 211 (1924).

Contracts of agency involve assuming legal rights and duties. — Contracts of agency, to be cognizable in law, must, like other agreements, have reference to the assumption of legal rights and duties, as opposed to engagements of a mere civic or social character, or of such other nature as to exclude monetary values. Huckeby v. Smith, 42 Ga. App. 719, 157 S.E. 234, 1931 Ga. App. LEXIS 119 (1931).

Obligations imposed on agent as soon as agency created. — At the very moment a property owner accepts the offer of a corporation engaged in the real estate business to sell the property, the latter becomes the owner's agent, and thereupon all the obligations of an agent to a principal become operative. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Sales of securities. — To hold an individual to be an agent who has participated or aided in making sales of securities, the court must find that the individual was so entangled in the actual sale of the security that the individual's activities were at least a substantial factor in the purchaser's decision to buy the security and that the individual's activities were either authorized or ratified by the issuer. In re N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608, 1981 U.S. Dist. LEXIS 18595 (N.D. Ga. 1981).

Creating agency under franchise agreement. — Franchise contract under which one operates a type of business on a royalty basis does not create an agency or a partnership relationship. Whitco Produce Co. v. Bonanza Int'l, Inc., 154 Ga. App. 92, 267 S.E.2d 627, 1980 Ga. App. LEXIS 2051 (1980).

Franchise agreement giving no control, or right of control, over the methods or details of doing the work of the franchisee does not create an agency relationship. Holiday Inns, Inc. v. Newton, 157 Ga. App. 436, 278 S.E.2d 85, 1981 Ga. App. LEXIS 1859 (1981).

When indicia of agency were missing from a franchise agreement, the trial court did not err in granting summary judgment to the franchisor in a suit for false imprisonment based on actions of the franchisee and the franchisee's employees. McMullan v. Georgia Girl Fashions, Inc., 180 Ga. App. 228, 348 S.E.2d 748, 1986 Ga. App. LEXIS 2093 (1986).

No agency relationship created by franchise agreement. — Franchisor's motion for j.n.o.v. on the real estate

investment company's negligence claim was improperly denied as there was no evidence that the franchisee was an actual agent of the franchisor for purposes of vicarious liability because the franchise agreement contained no provisions giving the franchisor supervisory control over the day-to-day activities of the franchisee; the franchisor did not exercise supervisory control over the franchisee's escrow account; and the owner of the franchisee clarified that individual franchisees could get help and advice, but that franchisees had their own decisions to make, and that the franchisor did not have to approve individual real estate deals before the franchisee could accept the deals. New Star Realty, Inc. v. Jungang PRI USA, LLC, 346 Ga. App. 548, 816 S.E.2d 501, 2018 Ga. App. LEXIS 415 (2018), cert. denied, No. S18C1532, 2019 Ga. LEXIS 167 (Ga. Mar. 4, 2019).

Ineffective agreement to modify sublease did not create agency relationship between the plaintiff (sublessee) and the lessee whereby the plaintiff had the right to exercise a lease renewal option as the lessee's agent, since the agreement by the agreement's terms purported to grant the plaintiff the same rights as held by the lessee and did not purport to authorize the plaintiff to assert those rights on behalf of the lessee. Regional Pacesetters, Inc. v. Halpern Enters., Inc., 165 Ga. App. 777, 300 S.E.2d 180, 1983 Ga. App. LEXIS 2016 (1983).

Nurse is agent of hospital rather than a patient's attending psychiatrist as the nurse works for the hospital and not a particular psychiatrist, taking only such orders from hospital psychiatrists as are indicated on a patient's chart. Myers v. State, 251 Ga. 883, 310 S.E.2d 504, 1984 Ga. LEXIS 533 (1984).

Liability for child's tort. — Relationship of principal and agent must appear in order to create liability on the father for the tort of the minor child. Lacey v. Forehand, 27 Ga. App. 344, 108 S.E. 247, 1921 Ga. App. LEXIS 886 (1921).

Principal/agency relationship may exist between husband and wife as to establishment of a boundary line. Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828, 1945 Ga. LEXIS 412 (1945).

Services performed by spouse for another. — When a husband and wife are living together, the husband is entitled to the services of the wife, and any valuable services which she may render to another are rendered by the husband, by and through the instrumentality of the wife as his agent. Cooper v. Cooper, 59 Ga. App. 832, 2 S.E.2d 145, 1939 Ga. App. LEXIS 417 (1939).

Where an aged father comes to live in the home of his son, and, while living there, the father becomes ill and is cared for by the son's wife during his sickness, and his wants are ministered to by her, and the son and his wife are living together, the services thus rendered to the father are rendered by the son, through the agency of the wife. If the husband then agrees with his wife that she perform the services and shall herself be entitled to compensation therefor from the father, such agreement is in the nature only of an assignment by the husband to the wife of the husband's right of title and interest in any chose in action which he may have against the father to recover for the services rendered, which are rendered by the husband through the agency and instrumentality of the wife. Such an agreement, even if it confers on the wife the right to her earnings under the alleged contract, creates no contract where none existed and confers upon her no right which the husband did not possess to recover of the father's estate. Cooper v. Cooper, 59 Ga. App. 832, 2 S.E.2d 145, 1939 Ga. App. LEXIS 417 (1939).

Husband permitted to manage wife's property. — If a wife permitted her husband to manage and control her property or allowed him so to deal with it as to induce others to believe that it was his property or that he was acting as her authorized agent, such facts were sufficient to establish the agency in favor of persons who dealt with him in such belief, when she knew that her husband was so managing and controlling her property and made no objection thereto. Aronoff v. Woodard, 47 Ga. App. 725, 171 S.E. 404, 1933 Ga. App. LEXIS 627 (1933).

Foreclosure sale valid when no duties violated. — Foreclosure sale was valid because there was no defect in the assignment of the power of sale from the nominee to the lender when the security

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deed did not lack any essential terms regarding the nominee's role, rights, or duties under O.C.G.A. § 10-6-1 and no consideration was needed under O.C.G.A. § 44-14-64(a). The lender did not violate the automatic stay of 11 U.S.C. § 362(a) by recording the sale post-petition because the Chapter 13 debtor retained no interest in the property after the sale. Bishop v. GMAC Mortg., LLC (In re Bishop), 470 B.R. 633, 2011 Bankr. LEXIS 5123 (Bankr. M.D. Ga. 2011).

No express or implied consent to sign arbitration agreement. — Nursing home was not entitled to compel arbitration of a wrongful death suit because the plaintiff, the decedent's child, did not have the decedent's power of attorney or the decedent's express or implied consent to sign the arbitration agreement on the decedent's behalf; the child, by signing the agreement, did not express an intent to surrender any of the child's own rights; and the child was not estopped by signing it from pursuing a wrongful death claim in the child's individual capacity. Hogsett v. Parkwood Nursing & Rehab. Ctr., Inc., 997 F. Supp. 2d 1318, 2014 U.S. Dist. LEXIS 19436 (N.D. Ga. 2014).

Upon admitting a parent to a nursing home, an adult child's signature on an arbitration agreement did not bind the parent because the child was not the parent's agent by virtue of being the child and there was no evidence that the parent had authorized the child to act for the parent as required by O.C.G.A. § 10-6-1. McKean v. GGNSC Atlanta, LLC, 329 Ga. App. 507, 765 S.E.2d 681, 2014 Ga. App. LEXIS 725 (2014).

Motion to enforce an arbitration agreement was properly denied as a valid and enforceable arbitration agreement did not exist because, although the decedent's daughter signed a nursing home admission agreement and an arbitration agreement, the decedent did not personally assent to the arbitration agreement; and the daughter did not have express or implied authority to sign the arbitration agreement on the decedent's behalf as the decedent did not execute any written document expressly authorizing the daughter to act for the decedent, and none of the words or conduct of the decedent could have caused the nursing home to believe that the decedent consented to having the arbitration agreement signed on the decedent's behalf by the daughter. United Health Servs. of Ga., Inc. v. Alexander, 342 Ga. App. 1, 802 S.E.2d 314, 2017 Ga. App. LEXIS 302 (2017), cert. denied, No. S17C1926, 2017 Ga. LEXIS 1020 (Ga. Dec. 11, 2017).

Nursing home patient's authorization of the patient's brother-in-law (BIL) to act as the patient's agent for health care decisions allowed the BIL to sign an admission agreement for a nursing facility, but it did not encompass signing a voluntary arbitration agreement that was not a precondition to admission or the furnishing of services at the facility. Coleman v. United Health Servs. of Ga., 344 Ga. App. 682, 812 S.E.2d 24, 2018 Ga. App. LEXIS 122 (2018).

Agency held created. — Landlord's agent having authority generally to look after the landlord's farming business in a certain community, whose conduct in respect to the agent's dealings with one of the landlord's tenants will, in the language of the landlord, be "satisfactory" to the landlord, is an agent, having such general authority that it may be inferred that the agent possesses authority to bind the landlord in the purchase of supplies such as fertilizer furnished to the tenant which is necessary in the farming operations. Jolly v. Chattahoochee Fertilizer Co., 28 Ga. App. 194, 110 S.E. 639, 1922 Ga. App. LEXIS 381 (1922).

If a corporation receives funds from a bank with direction to place them on call loan for the bank and the corporation undertakes to place the funds on call loan, a fiduciary relationship of principal and agent arises between the parties. Bank of Dania v. Farmers' & Traders' Bank, 169 Ga. 846, 151 S.E. 803, 1930 Ga. LEXIS 46 (1930).

When, in order to secure an unpaid balance on the purchase price of an automobile, the defendant executed a retention of title note to a third-party motor company, payable in installments in certain definite amounts on various consecu-

tive dates, and, before the payment and maturity of any of the installments, the third-party motor company, without the defendant's knowledge, transferred the note to the plaintiff bank, and the defendant thereafter continued to pay to the motor company certain installments as they fell due, which payments the motor company transmitted to the bank, which accepted the same in payment of the installments due, such a course of dealing was sufficient to authorize the inference that the bank had constituted the motor company its secret agent in dealing with the defendant to collect the installments as they fell due, despite the fact that the defendant had found out from the bank that it held the note, the defendant asking the bank at that time if the motor company had remitted the payments to it and the bank informing the defendant that it had, and that the defendant had continued to make payments to the motor company. Powell v. Bank of Manchester, 46 Ga. App. 264, 167 S.E. 343, 1933 Ga. App. LEXIS 22 (1933).

When for some time alleged agent of the defendant purchased agricultural products for the defendant with drafts drawn upon the defendant, on which drafts the plaintiff bank advanced to the defendant's agent the cash, the defendant was bound by such acts of the agent and estopped to deny that such person was acting as the defendant's agent or set up that the defendant was not liable for the amount of the plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

Evidence supported findings that a stepchild, who bought a salvage business from a stepparent, had a legal right to control its operation and the stepchild created a relation of principal and agent by telling the stepparent that the stepparent could continue as operator. Vessell v. Walker, 231 Ga. App. 713, 499 S.E.2d 688, 1998 Ga. App. LEXIS 331 (1998).

Pursuant to O.C.G.A. § 10-6-1, a verbal authorization from a decedent was sufficient to create a valid agency relationship between the decedent and a brother and a wife so as to allow them to withdraw money for the decedent from the accounts on a periodic basis; the equal dignity rule did not apply in this case because the instruments at issue were not subject to the statute of frauds. Rowland v. Rowland, No. 1:04-CV-2068-TWT, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Trial court properly determined that a police officer who did moonlighting as a security guard for an apartment complex was acting as an agent, pursuant to O.C.G.A. § 10-6-1, for the owners of the complex when the officer retrieved a rape kit and held it for a period of time, as there was no police purpose for having done so, nor was there any purpose from a police standpoint to have the kit processed, as the police case was closed; the officer's order to have the rape kit destroyed, even though the rape victim's lawyer had asked that the evidence relevant to the rape be preserved, constituted spoliation of evidence that was attributable to the owners, and sanctions against the owners for that conduct were proper. Bouve & Mohr, LLC v. Banks, 274 Ga. App. 758, 618 S.E.2d 650, 2005 Ga. App. LEXIS 772 (2005), cert. denied, No. S05C2015, 2005 Ga. LEXIS 877 (Ga. Nov. 18, 2005).

Joint insured clause of a fidelity bond that gave a holding company the right to "act for" the company's subsidiary, a bank, created an agency relationship and did not entitle the trustee in the holding company's bankruptcy case to pursue a breach of contract action based on the insurer's failure to pay the bank's claim; the cause of action was not part of the bankruptcy estate. Lubin v. Cincinnati Ins. Co., 677 F.3d 1039, 2012 U.S. App. LEXIS 2276 (11th Cir. 2012).

In a breach of fiduciary duty and fraud action wherein an investment company obtained a jury verdict in the company's favor as against a site manager, the manager's spouse, and others, the trial evidence supported the conclusion that a fiduciary relationship arose between the site manager and the investment company as the investment company entrusted significant financial responsibility and authority to the site manager, who

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engaged in a financial kickback scheme diverting thousands of dollars from the investment company. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779, 2012 Ga. App. LEXIS 367 (2012), cert. denied, No. S12C1410, 2012 Ga. LEXIS 915 (Ga. Oct. 29, 2012).

Agency held not created. — By using intermediaries as channels of transmission for papers, relying upon the intermediaries inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through the intermediaries also at the borrower's instance, the lender does not constitute such intermediaries as agents to make the loan and is not chargeable with the consequences of dealings between the intermediaries and the borrower, whether those dealings be public or private, known or unknown. Davis v. Metropolitan Life Ins. Co., 196 Ga. 304, 26 S.E.2d 618, 1943 Ga. LEXIS 350 (1943).

When, in an action by a landowner for the negligent burning of an outbuilding, pasture land, and personal property thereon, the evidence showed that the defendant's fiancé went to his property, which adjoined that of the plaintiff's, to clean up around the house and while so doing started a trash fire which she allowed to spread, causing the damage sued for, that she did this while the defendant was at work, and that the defendant had no notice of her actions until he was notified of the fire, the evidence was insufficient to show the relationship of principal and agent between the defendant and his fiancé so as to charge the defendant with her negligence in the burning of the plaintiff's property, notwithstanding the fact that the defendant testified that though he did not know at that time that his fiancé was out at his place, had he known it, it would have been all right with him. Basinger v. Huff, 98 Ga. App. 288, 105 S.E.2d 362, 1958 Ga. App. LEXIS 568 (1958).

Chief underwriter of an insurance company who was authorized under a reinsurance treaty to cede a portion of insurance risks to reinsurers, who were, in the normal course of business, liable from the moment the reinsurance was ceded to the reinsurers, was not an agent of the reinsurers, because the reinsurers had no right to regulate the underwriter's conduct, the reinsurers obligations would not have been affected by the underwriter's death, retirement, or replacement, and the reinsurers were liable under the treaty regardless of the identity of the underwriter. Aetna Ins. Co. v. Glens Falls Ins. Co., 453 F.2d 687, 1972 U.S. App. LEXIS 11693 (5th Cir. 1972).

Since the evidence simply showed that the plaintiff was solicited by A as A's "working partner"; that plaintiff did not meet or converse with B before entering into an agreement with A to become a partner; that plaintiff gave A a check for "half dealership partnership investment"; and that plaintiff and A, as partners, signed a "Dealership Agreement" with B, there was no showing of an agency relationship between A and B. McCulley v. Dunson, 149 Ga. App. 551, 254 S.E.2d 877, 1979 Ga. App. LEXIS 1927 (1979).

Leasing director who was an at-will employee of a real estate broker was not an agent of the broker because the director was not authorized to obligate the broker by entering into contracts on its behalf. Atlanta Mkt. Ctr. Mgt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (reversing McLane v. Atlanta Mkt. Ctr. Mgt. Co., 225 Ga. App. 818, 486 S.E.2d 30 (1997)).

Real estate broker was not acting as an agent for its real estate director, an at-will employee, in negotiations with a client regarding the payment of commissions when the director had not authorized the broker to create obligations on the director's behalf during the negotiations. Atlanta Mkt. Ctr. Mgt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (reversing McLane v. Atlanta Mkt. Ctr. Mgt. Co., 225 Ga. App. 818, 486 S.E.2d 30 (1997)).

No agency was created since there was no evidence showing that employees could create obligations on behalf of their employer or bring third parties into contractual relations with their employer. The employees were not agents owing a fiduciary duty to the employer. Physician Specialists in Anesthesia, P.C. v. Wildmon,

238 Ga. App. 730, 521 S.E.2d 358, 1999 Ga. App. LEXIS 924 (1999).

When the homeowners contracted with a home builder independent of any dealing with the developer and the realtor, and that contract failed to contain any evidence that an agency was established between the developer, realtor, and the homebuilder, the developer and realtor were entitled to a directed verdict on the homeowners' breach of contract and fraudulent conversion claims; further, since those two claims provided the only basis for a verdict, the homeowners were not entitled to recover litigation expenses. Fountainhead Dev. Corp. v. Dailey, 263 Ga. App. 677, 588 S.E.2d 768, 2003 Ga. App. LEXIS 1205 (2003), cert. denied, No. S04C0405, 2004 Ga. LEXIS 232 (Ga. Mar. 1, 2004).

Because no evidence was presented that a lessee's child acted as an agent for the lessee when the lease on the rented premises was entered into, and the lessee never ratified the child's actions on the lease, the lessee was not liable for unpaid rents on the leased premises; as a result, since such was the basis for the lessor's counterclaim, an award of attorney's fees under O.C.G.A. § 13-6-11 was reversed. Ellis v. Fuller, 282 Ga. App. 307, 638 S.E.2d 433, 2006 Ga. App. LEXIS 1375 (2006).

Mobile home dealer failed to show that a debtor which resold loans to a bank was acting as the bank's agent; actual authority had not been shown as there was no evidence that the bank had the right to control the time, manner, and method of the debtor's work, and the facts that the debtor earned money from the loans it sold to the bank and that the bank required that the loans it purchased meet certain criteria did not show such control. Satisfaction & Serv. Hous., Inc. v. SouthTrust Bank, Inc., 283 Ga. App. 711, 642 S.E.2d 364, 2007 Ga. App. LEXIS 163 (2007).

Mobile home dealer failed to show that a debtor which resold loans to a bank had apparent authority to act as the bank's agent; the dealer had not provided any evidence that the bank engaged in any conduct that caused the dealer to believe that the debtor was the bank's agent. Satisfaction & Serv. Hous., Inc. v. SouthTrust Bank, Inc., 283 Ga. App. 711, 642 S.E.2d 364, 2007 Ga. App. LEXIS 163 (2007).

Because a decedent patient's husband did not have the actual or apparent authority to bind the decedent to an arbitration agreement, which was part of the documents the husband signed for the decedent to be cared for by a nursing home, the agreement was not enforceable against the decedent or the decedent's estate; thus, the trial court properly denied the nursing home's motion to compel arbitration of the wrongful death claims filed by the decedent's administrator. Ashburn Health Care Ctr., Inc. v. Poole, 286 Ga. App. 24, 648 S.E.2d 430, 2007 Ga. App. LEXIS 678 (2007), cert. denied, No. S07C1614, 2007 Ga. LEXIS 611 (Ga. Sept. 10, 2007).

Because: (1) evidence demonstrating an agency relationship between the grantees and the grantor of a security deed was lacking, and (2) the mere lapse of time was insufficient to establish the affirmative defense of laches, partial summary judgment was properly entered in the trustee's favor on that claim based on mutual mistake as well as an order invalidating the foreclosure sale upon that deed. Thus, any testimony as to the intent of the parties upon entering into the security deed was immaterial. Harvey v. Bank One, N.A., 290 Ga. App. 55, 658 S.E.2d 824, 2008 Ga. App. LEXIS 244 (2008).

Jury issue as to agency determination. — In a disputed commodities transaction, there was at least a jury issue regarding which party or parties the merchants' broker represented in brokering the sale at issue and in signing and sending the confirmation of sale order. Brooks Peanut Co. v. Great S. Peanut, LLC, 322 Ga. App. 801, 746 S.E.2d 272, 2013 Ga. App. LEXIS 618 (2013).

Agency by Ratification

Ratification creates agency. — One acts as agent for another whenever the principal ratifies the acts done on the principal's behalf. Travelers Ins. Co. v. Ansley, 111 Ga. App. 784, 143 S.E.2d 422, 1965 Ga. App. LEXIS 1097 (1965).

Agency by Ratification (Cont'd)

Unauthorized agent. — Act of one holding oneself out as an agent in consummating a sale for one's principal may be ratified by the principal, even if the agent was unauthorized in the first place to make the sale. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

Principal bound. — Unauthorized act of an agent, when subsequently ratified, will bind the principal. Penn Mut. Life Ins. Co. v. Blount, 33 Ga. App. 642, 127 S.E. 892, 1925 Ga. App. LEXIS 660 (1925).

Ratification of particular act is co-extensive with act, and only makes the person who performed the act a special agent pro hac vice. Merchants' Bank v. Rawls, 7 Ga. 191, 1849 Ga. LEXIS 124 (1849).

Acceptance of benefits flowing from acts of agent is "implied ratification," whether the principal intends to ratify the agency or not. Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765, 1976 Ga. App. LEXIS 2021 (1976).

Action against principal who benefitted from act. — If the principal has obtained the benefits of a transaction in which a draft was given by the agent, the injured party may bring an action on the original transaction against the principal. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

Knowledge of act required. — Unauthorized act of an agent, done in the principal's behalf, cannot be ratified without actual knowledge of the act. Penn Mut. Life Ins. Co. v. Blount, 165 Ga. 193, 140 S.E. 496, 1927 Ga. LEXIS 351 (1927).

Knowledge of all material facts required. — In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. City of Atlanta v. Smith, 84 Ga. App. 815, 67 S.E.2d 480, 1951 Ga. App. LEXIS 803 (1951).

Ratification presumed unless act repudiated. — If a principal is informed by an agent of what the agent has done, unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

By accepting the benefits of a pest treatment contract, by making payments on the contract, and by filing an earlier suit claiming breach of the contract, a customer and the customer's spouse ratified the contract even if the signature on the contract was irregular, and were bound by the contract's arbitration clause. Lankford v. Orkin Exterminating Co., 266 Ga. App. 228, 597 S.E.2d 470, 2004 Ga. App. LEXIS 351 (2004).

Mere act of pleading stranger's act as satisfaction is of itself ratification. Jordan v. Belvin, 57 Ga. App. 719, 196 S.E. 132, 1938 Ga. App. LEXIS 373 (1938).

Knowingly accepting notes to principal's order. — When certain foreign bills of exchange were drawn by the defendants as shipping agents and factors of the plaintiff, payable to the plaintiff's order, though not signed by the defendants as agents, but drawn so as to enable the plaintiff to receive the proceeds thereof, according to the usage and custom of the cotton trade, and the plaintiff received such bills, without objection and with full knowledge of such facts, it amounts to ratification, and the defendants are not individually liable to the principal as the drawers of the bills. Jones v. J.W. Lathrop & Co., 44 Ga. 398, 1871 Ga. LEXIS 393 (1871).

Expressing regret, offering to pay for damage, not ratification. — Action of the defendant and the defendant's spouse a few days after a fire caused by the spouse, in going to the plaintiff and expressing regret for the damage and offering to pay for the damage, was not such a ratification of the spouses's acts as would charge the defendant with the spouse's negligence as the defendant's agent. Basinger v. Huff, 98 Ga. App. 288, 105 S.E.2d 362, 1958 Ga. App. LEXIS 568 (1958).

Nightclub not liable for injuries inflicted by patron. — Doctrine of ratification was inapplicable in an action for injuries at defendant's nightclub from actions of a patron since the evidence showed that the unidentified patron acted

in an individual capacity and not as one holding oneself out as acting in the name of or under the authority of the defendant. Ginn v. Renaldo, Inc., 183 Ga. App. 618, 359 S.E.2d 390, 1987 Ga. App. LEXIS 2023 (1987).

Knowledge, acquiescence, obtaining benefits was ratification of lease agreement. — Company was liable for rent due on a lease that was assigned to the company's subsidiary, although permission had only been obtained to assign the lease directly to the company, under a piercing the corporate veil theory; it was found that the company ratified the original tenant's conduct in having the lease assigned to it, pursuant to O.C.G.A. § 10-6-1, since the company was aware of the tenant's assignment, acquiesced therein, and obtained the benefits from such assignment. Multi-Media Holdings, Inc. v. Piedmont Ctr., 15 LLC, 262 Ga. App. 283, 583 S.E.2d 262, 2003 Ga. App. LEXIS 714 (2003).

Evidence of spouse's actual or apparent authority insufficient. — Although it was undisputed that the patient did not sign the arbitration agreement personally, the operator asserted that the patient's spouse was the patient's agent and, therefore, had the authority to bind the patient to the agreement by signing the spouse's name; in Georgia, an agency relationship was created whenever one person, expressly or by implication, authorized another to act for the person or subsequently ratified the acts of another in the person's behalf, O.C.G.A. § 10-6-1, and because the operator had not proven, by a preponderance of the evidence, that the patient expressly authorized the operator to act on the patient's behalf in signing the arbitration agreement, an agency relationship was created, if at all, by implication. Under Georgia law, the agent's authority shall be construed to include all necessary and usual means for effectually executing it; even assuming that the version of events put forth by the operator's witnesses was true, the operator failed to meet the operator's burden of proving that the patient's spouse had actual or apparent authority to bind the patient by signing the arbitration agreement; accordingly, the arbitration agreement was not enforceable against the patient pursuant to 9 U.S.C. § 4, and the operator's motion to compel arbitration and stay discovery was denied. Gentry v. Beverly Enterprises-Georgia Inc., 714 F. Supp. 2d 1225, 2009 U.S. Dist. LEXIS 127194 (S.D. Ga. 2009).

Plausible that jury concluded account owner ratified by adding beneficiary's name. — Trial court properly denied the challenger's motion for judgment notwithstanding the verdict because there was evidence to support the jury's special verdict that the named beneficiary owned the IRA account at issue since it was plausible that the jury concluded that the owner ratified the act of placing the beneficiary's name on the account. Lucas v. Charles Schwab & Co., 354 Ga. App. 522, 841 S.E.2d 150, 2020 Ga. App. LEXIS 201 (2020).

Franchisors. — Plaintiffs did not plausibly allege that the franchisors had "full knowledge of all the material facts" regarding the franchise employees' actions in assisting and facilitating sex trafficking. Accordingly, the plaintiffs did not plausibly allege that the franchisors ratified the franchise employees' actions, and the district court did not err in dismissing the negligence claims. Doe v. Red Roof Inns, Inc., 21 F.4th 714, 2021 U.S. App. LEXIS 38060 (11th Cir. 2021).

Operation of Automobile

Parent liable when child operates car with consent. — When a mother keeps an automobile to be used for the comfort and pleasure of her family, including her minor son as a member thereof, his driving the car for the comfort and pleasure of himself and his friends, allegedly with her knowledge and consent and as her agent and chauffeur, is her business or affair within the meaning of the rule of law that the master is liable for the negligence of a servant acting within the scope of the servant's employment and in regard to the master's business. Griffin v. Russell, 144 Ga. 275, 87 S.E. 10, 1915 Ga. LEXIS 167 (1915).

Use of vehicle solely for owner's benefit. — It is not necessary to show a true master-servant relationship or the

Operation of Automobile (Cont'd)

payment of compensation, but if the owner of a vehicle expressly procures another to do something solely for the owner's benefit, an agency relationship exists, regardless of whether the direction is couched as a request or as a demand, and regardless of whether the agent receives monetary compensation. Walker Hall, Inc. v. Fincher, 120 Ga. App. 193, 169 S.E.2d 745, 1969 Ga. App. LEXIS 713 (1969); Reese v. Sanders, 153 Ga. App. 654, 266 S.E.2d 313, 1980 Ga. App. LEXIS 1936 (1980).

Bailment where vehicle furnished as accommodation. — If the furnishing of an automobile is within what may be said to be a "business" of the owner, one to whom the car is entrusted for such purpose is not a bailee, as in a case of lending, but is a servant or agent; if on the other hand, the car is furnished by the owner merely as an accommodation to the other, with no interest or concern in the purpose for which the other will use it, then its use, whether for recreation or otherwise, is not within the business of the owner, and the transaction is a mere bailment. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, 1935 Ga. LEXIS 52 (1935).

"Loaner" arrangement between car dealers and mechanics and their customers is a bailment, not an agency. Stallings v. Sylvania Ford-Mercury, Inc., 242 Ga. App. 731, 533 S.E.2d 731, 2000 Ga. App. LEXIS 321 (2000).

Family purpose doctrine. — When the evidence shows that the driver's operation of the car was not on appellee's behalf, agency principles other than the family purpose doctrine do not apply to establish that the driver was appellee's agent in driving the car. Chambers v. Scarboro, 149 Ga. App. 172, 253 S.E.2d 798, 1979 Ga. App. LEXIS 1773 (1979).

Hirer of rented automobile not owner's agent. — If a person rents or hires an automobile from the automobile's owner under a contract by which the hirer or an employee, and none other, is to operate the automobile, and, after a stipulated period of time, return it to the owner, and when it does not appear that the hirer, when using the automobile pursuant to this contract, is on the business of the owner and therefore acting as the owner's agent, the relationship between the parties as established by the contract is not alone sufficient to establish the relationship of principal and agent between the owner of the automobile and the hirer or the latter's employee, when the hirer or the hirer's employee afterwards operates the automobile pursuant to the terms of the contract. Cantrell v. Hertz Drivurself Stations, 40 Ga. App. 840, 151 S.E. 694, 1930 Ga. App. LEXIS 726 (1930).

Spouse driving family car deemed agent. — When a person maintained an automobile for use by the person's family, including the person's spouse, and which was at the disposal of the spouse to use at any time and was kept for that purpose, and since the spouse, with the person's consent, used the automobile for the purpose of going on a trip, the spouse, in taking and operating the car while on the trip, did so as the authorized agent of the person, and any negligence on the spouse's part in the operation of the automobile pursuant to the purpose for which the spouse was using it was imputable to the person. Petway v. McLeod, 47 Ga. App. 647, 171 S.E. 225, 1933 Ga. App. LEXIS 588 (1933).

Procedure

1. Pleading

Allegation of agency tested by facts alleged. — If the pleader in seeking to allege an agency relationship sets out the facts as the facts really exist or are deemed to exist, the allegations that the parties are principal and agent is a legal conclusion which must be tested by the facts as alleged. Powell v. Kitchens, 84 Ga. App. 701, 67 S.E.2d 203, 1951 Ga. App. LEXIS 770 (1951).

Agency sufficiently alleged. — Simple direct allegation that the operator of an automobile, in driving the defendant's family to a designated point in the defendant's automobile, was acting as the defendant's agent, is a sufficient allegation of agency. Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636, 1953 Ga. App. LEXIS 1074 (1953).

Since it was alleged that at the defendant's special request an individual was using the defendant's vehicle for the purpose of looking after the needs of the defendant's aged parents and the defendant's sister, two of whom were ill; that the individual had been spending several nights at their home and carrying them groceries and medicines; that the individual was at the time of a collision proceeding toward their home to attend to their needs during the night; that all of these acts were at the defendant's request and for the defendant's benefit; and that this was the purpose for which the car had been entrusted to the individual, which purpose the individual was actually attempting to effectuate at the time of the collision, it could not be said as a matter of law that the plaintiff's pleading failed on its face to show an agency relationship. Powell v. Kitchens, 84 Ga. App. 701, 67 S.E.2d 203, 1951 Ga. App. LEXIS 770 (1951).

Allegations not showing agency. — See Cantrell v. Hertz Drivurself Stations, 40 Ga. App. 840, 151 S.E. 694, 1930 Ga. App. LEXIS 726 (1930).

Plaintiff did not sufficiently allege any actual agency relationship between an insurer and either defendant; the complaint alleged no facts as to the level of control, did not elaborate on the nature of control, and made no allegations about any express agency agreement or other facts to suggest that the insurer was a defendant's agent. Moreover, the allegations did not plausibly suggest that the plaintiff justifiably relied on the care or skill of the alleged agent based upon the alleged principal's representation. CHIS, LLC v. Liberty Mut. Holding Co., No., No. 5:14-CV-277, 2015 U.S. Dist. LEXIS 90175 (M.D. Ga. July 13, 2015).

Debtor failed to allege any facts from which the court could reasonably conclude that anyone other than the manager and sole owner of an LLC had the power to authorize others to act on behalf of the LLC in negotiating a settlement agreement. Nor did the debtor allege any course of dealings or special circumstances from which the court could reasonably infer that any other defendants, their employees, or their attorneys were acting with apparent authority. Rohrig Invs., LP v. Knuckle P'ship, LLLP (In re Rohrig Invs., LP), 584 B.R. 382, 2018 Bankr. LEXIS 1004 (Bankr. N.D. Ga. 2018).

2. Evidence

Circumstantial evidence. — Proof of agency may be made by showing circumstances, apparent relations, and the conduct of the parties. Nichols v. Lindsey, 45 Ga. App. 648, 165 S.E. 868, 1932 Ga. App. LEXIS 641 (1932); Ross v. Durrence, 181 Ga. 52, 181 S.E. 581, 1935 Ga. LEXIS 20 (1935); Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307, 1949 Ga. LEXIS 514 (1949); Southern Mills, Inc. v. Newton, 91 Ga. App. 738, 87 S.E.2d 109, 1955 Ga. App. LEXIS 857 (1955); Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432, 1964 Ga. App. LEXIS 730 (1964); Fordham v. Garrett-Schwartz Motor Co., 121 Ga. App. 237, 173 S.E.2d 450, 1970 Ga. App. LEXIS 1184 (1970); Bearlund v. Webb, 127 Ga. App. 555, 194 S.E.2d 328, 1972 Ga. App. LEXIS 948 (1972); Davidson v. Ramsby, 133 Ga. App. 128, 210 S.E.2d 245, 1974 Ga. App. LEXIS 988 (1974); Allstate Ins. Co. v. Christian Brokerage Co., 145 Ga. App. 126, 243 S.E.2d 281, 1978 Ga. App. LEXIS 1889 (1978); Clyde Chester Realty Co. v. Stansell, 151 Ga. App. 357, 259 S.E.2d 639, 1979 Ga. App. LEXIS 2595 (1979); Hadden v. Owens, 154 Ga. App. 467, 268 S.E.2d 760, 1980 Ga. App. LEXIS 2230 (1980); Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980); Collins v. Martin, 157 Ga. App. 45, 276 S.E.2d 102, 1981 Ga. App. LEXIS 1691 (1981).

A claim of agency may be proved, as any other fact, by circumstantial evidence. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432, 1964 Ga. App. LEXIS 730 (1964); Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980); Collins v. Martin, 157 Ga. App. 45, 276 S.E.2d 102, 1981 Ga. App. LEXIS 1691 (1981).

Agency may be proved by circumstantial evidence alone. Fordham v. Garrett-Schwartz Motor Co., 121 Ga. App. 237, 173 S.E.2d 450, 1970 Ga. App. LEXIS

Procedure (Cont'd)
2. Evidence (Cont'd)

1184 (1970); Bearlund v. Webb, 127 Ga. App. 555, 194 S.E.2d 328, 1972 Ga. App. LEXIS 948 (1972).

Way to show agency. — Proof of agency and of the nature of the agency may be made by showing circumstances, apparent relations, and the conduct of the parties; for the relation of principal and agent arises when one, by implication, authorizes another to act for that one. Martin & Hicks v. Bridges & Jelks Co., 18 Ga. App. 24, 88 S.E. 747, 1916 Ga. App. LEXIS 87 (1916).

Breach of fiduciary duty claim survived summary judgment because the plaintiff employer asserted that the defendant, a former employee, was the employer's agent while employed as a plant engineer. The undisputed evidence showed that the employee was intimately involved in the negotiations leading up to and the continuous administration of the contracts with a contractor; and not only was the employee responsible for bringing the contractor to the employer, the employee was charged with supervision and inspection of the contractor's contract work; the employee was authorized to prepare bid documentation and enter into contracts to carry out the employee's work, and the employee was also authorized to oversee contractors, inspect the contractor's work, and verify that the work was completed correctly. GIW Indus. v. JerPeg Contr., Inc., 530 F. Supp. 2d 1323, 2008 U.S. Dist. LEXIS 2051 (S.D. Ga. 2008).

Declarations of alleged agent. — Declarations of one alleged to be an agent or one assuming to be an agent would not, by themselves, be admissible to prove agency, yet when such declarations of the alleged agent are accompanied by other evidence as to the conduct of the person in the character of agent and an acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence as a part of the res gestae and as such may be considered in the establishment of the agency. Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846, 1940 Ga. App. LEXIS 528 (1940).

Agency is a fact, and one who is in fact the agent of another is as competent to testify that one is such agent as the principal personally would be to testify to the fact of such agency; yet the fact of an agency cannot be proved by mere unsworn declarations of one assuming to be an agent. Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846, 1940 Ga. App. LEXIS 528 (1940).

Agency cannot be established by the declarations of the alleged agent alone. Greble v. Morgan, 69 Ga. App. 641, 26 S.E.2d 494, 1943 Ga. App. LEXIS 158 (1943); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954); Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Agency cannot be proved by declarations of alleged agent. Davis v. Metropolitan Life Ins. Co., 196 Ga. 304, 26 S.E.2d 618, 1943 Ga. LEXIS 350 (1943).

Declarations of a general agent made while in the employ of the defendant are admissible to prove agency. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

Fact of an agency may be established by proof of circumstances, apparent relations, the conduct of the parties, and the declarations of the alleged agent, though the declarations of the agent are inadmissible if standing alone; but the declarations become admissible as a part of the res gestae of the transaction and as such may be considered in establishing the fact of agency. Brewer v. Southeastern Fid. Ins. Co., 147 Ga. App. 562, 249 S.E.2d 668, 1978 Ga. App. LEXIS 2775 (1978).

Trial court did not err in precluding a creative designer, who was employed by a game promoter a supermarket hired, from testifying, in a breach of contract action brought by a vendor the designer hired, that the designer was an agent for the supermarket. Process Posters, Inc. v. Winn-Dixie Stores, Inc., 263 Ga. App. 246, 587 S.E.2d 211, 2003 Ga. App. LEXIS 1103 (2003).

Declarations admissible once agency established. — Once agency is established, declarations and admissions of the person whose agency is shown, within the scope of one's authority, are

admissible in evidence. Ross v. Durrence, 181 Ga. 52, 181 S.E. 581, 1935 Ga. LEXIS 20 (1935).

Assertion or denial of agency by stranger. — Bare assertion or denial of the existence of an agency relationship is a statement of fact when made by one of the purported parties to the relationship, but when made by an outsider, bare assertions are merely conclusions of law. Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765, 1976 Ga. App. LEXIS 2021 (1976).

Assertion or denial of agency relationship constitutes factual statement when made by purported party to relationship, but such statements, when made by outsiders, constitute mere conclusions of law. Stone v. First Nat'l Bank, 159 Ga. App. 812, 285 S.E.2d 207, 1981 Ga. App. LEXIS 2827 (1981).

Agency cannot be established by general reputation in the community as to such agency. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Conduct of principal and agent may be used to rebut the denial of the existence of agency and for the purpose of impeaching the testimony and contentions of the principal and agent as to the existence of the agency or the scope of the powers of the agent. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Only slight evidence needed of husband's agency. — While proof of the relationship of husband and wife, and that work was done and material furnished to improve real estate belonging to the wife, without more, is not sufficient evidence to establish the fact that she is an undisclosed principal and the husband merely her agent, so as to render her liable for contracts made by him with third persons, yet only slight evidence of the husband's agency is required under the law to charge the wife with being the principal. Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760, 1934 Ga. App. LEXIS 714 (1934).

Burden of proof. — If existence of agency is relied upon, burden of proof rests with party asserting relationship. Carter v. Kim, 157 Ga. App. 418, 277 S.E.2d 776, 1981 Ga. App. LEXIS 1851 (1981).

Breach of duty shown. — In a breach of contract suit brought by a taxpayer against the tax service hired to handle real property assessments regarding an office building, a trial court ruling in favor of the tax service for tax year 2002 was reversed since the taxpayer established that the tax service breached a duty to the taxpayer by failing to protect the taxpayer from an upward reassessment of the taxpayer's property, pursuant to O.C.G.A. § 48-5-299(c). However, because the taxpayer failed to show any damage or loss for tax year 2003, the trial court's ruling in favor of the tax service for that year was upheld. AT&T Corp. v. Property Tax Servs., 288 Ga. App. 679, 655 S.E.2d 295, 2007 Ga. App. LEXIS 1275 (2007).

Professional basketball player was not liable to inexperienced business people who invested and lost money by hosting sports event-related parties with two men claiming to act as the player's agents because, under O.C.G.A. § 10-6-1, the business people failed to show that the "agents" had express or implied authority to act on the player's behalf. The unrebutted evidence showed that the player had never met the business people prior to being deposed and had no knowledge of the transaction. J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330, 2008 U.S. Dist. LEXIS 15494 (N.D. Ga. 2008).

In a breach of contract suit involving an employment contract, the trial court properly entered a judgment in favor of the former employee after a bench trial as there was sufficient evidence to support the conclusion that even though the person who signed the employment contract was not authorized to execute the employment contract on behalf of the employer, the employer ratified the agreement by failing to ever object to the agreement. In addition, the employer paid the former employee at least two times directly. A & S Group, Inc. v. Murray, 291 Ga. App. 331, 661 S.E.2d 701, 2008 Ga. App. LEXIS 501 (2008).

No breach of duty shown. — Trial court properly granted summary judgment to a former employee in the

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2. Evidence (Cont'd)

former employer's suit asserting breach of contract and breach of the duty of loyalty as the record established that the former employee did not inform the former employer's customers of the resignation from employment, nor did the former employee solicit any business from the former employer's customers, until after the resignation took place. Hanson Staple Co. v. Eckelberry, 297 Ga. App. 356, 677 S.E.2d 321, 2009 Ga. App. LEXIS 245 (2009).

Evidence held insufficient. — In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because the only evidence showing any authority to act as an agent for the sellers was based on hearsay, and not on a writing, and no exception applied, two of the sellers were entitled to a directed verdict against the investor pursuant to O.C.G.A. § 13-5-30(4). Dunn v. Venture Bldg. Group, Inc., 283 Ga. App. 500, 642 S.E.2d 156, 2007 Ga. App. LEXIS 93 (2007).

Summary judgment for a neighbor in a negligence suit by landowners arising out of fire damage was proper because a corporation, not the neighbor, owned the land on which the fire was set, and the person performing the burn was employed by the corporation, not the neighbor. There was no showing of agency under O.C.G.A. § 10-6-1 or O.C.G.A. § 51-2-1(a) between the neighbor and the employee. Barrs v. Acree, 302 Ga. App. 521, 691 S.E.2d 575, 2010 Ga. App. LEXIS 170 (2010).

Unpublished decision: Securities broker-dealer firm could not have been held liable for its former employee's tortious conduct because the firm identified clear and unrefuted record evidence showing that the employee lacked authority to promote a stock within the firm and lacked authority to sell away. Owens v. Stifel Nicolaus & Co., 650 Fed. Appx. 764, 2016 U.S. App. LEXIS 9726 (11th Cir. 2016).

In a case in which the plaintiff was injured when a container of hot soup spilled onto the plaintiff's lap, and the plaintiff sued the defendant for the negligence of its owners, alleging the soup was improperly packaged, summary judgment was properly granted in favor of the defendant as there was insufficient evidence from which a jury could find it liable for negligence under the theory of agency because the plaintiff did not point to any evidence showing that the defendant held the other corporation out to be its agent or that the plaintiff relied on any such representation. Lowery v. Noodle Life, Inc., 363 Ga. App. 1, 869 S.E.2d 600, 2022 Ga. App. LEXIS 117 (2022).

Evidence held sufficient to establish agency relationship between freight forwarder and another common carrier. National Carloading Corp. v. Security Van Lines, 164 Ga. App. 850, 297 S.E.2d 740, 1982 Ga. App. LEXIS 3350 (1982).

3. Instructions

Giving charge under section held proper. — There being evidence sufficient to warrant the jury in finding that the alleged agent had express authority from the plaintiff to collect the note sued upon, and also that the latter had ratified partial collections thereon made by the former, the court did not err in giving the charge to the jury. National Bank v. Burt, 98 Ga. 380, 25 S.E. 502, 1896 Ga. LEXIS 45 (1896).

Correct charge as to execution of instrument. — While, when a person authorizes another to execute a written instrument for the person, in the person's presence, it is not necessary, in order to constitute the act of the person actually signing the instrument the act and deed of the person authorizing him to do so, that the person so authorizing should touch the pen, a charge by the court that when a person authorizes another in the person's presence to sign the instrument for the person and does touch the pen and make the person's mark, the act of the party making the signature is the act and deed of the person so authorizing, states a correct proposition of law. East Point Lumber Co. v. Chandler, 46 Ga. App. 361, 167 S.E. 787, 1933 Ga. App. LEXIS 70 (1933).

4. Questions of Law and Fact

Nonsuit may be granted when question of agency is one of law for the

court. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Agent's actual or apparent authority to terminate real estate contract was fact question. — In a back-up buyer's action against the buyer and sellers of real property, an issue of fact remained regarding whether the buyer's agent's delivery of a termination letter to the sellers constituted substantial compliance with the termination provisions of the buyer's contract, and whether the agent had actual or apparent authority to terminate the contract under O.C.G.A. § 10-6-1. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

Jury questions if evidence shows agency. — If there is any evidence tending to establish the agency, the questions should be submitted to a jury. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Questions regarding existence of agency and extent of agent's authority are generally for the trier of fact. Renfroe v. Warren-Hawkins Am. Legion Post No. 523, 157 Ga. App. 614, 278 S.E.2d 414, 1981 Ga. App. LEXIS 1935 (1981).

Issue of the relationship between an insurance agent and an insurance applicant must be reserved for jury determination, even though the insurance agent was not an agent of an insurer. Stewart v. Boykin, 165 Ga. App. 868, 303 S.E.2d 50, 1983 Ga. App. LEXIS 2046 (1983).

Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the patient's authorized agent acting on the patient's behalf to protect the well-being of the patient's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

Trial court erred in granting summary judgment to a surety because jury questions existed as to whether two subcontractors were the same company, whether an owner acted as an agent on behalf of one of those subcontractors when the owner procured the bonds, and whether the bonds were intentionally written fraudulently based on admissions made by counsel for the surety during the hearing. Choate Constr. Co. v. Auto-Owners Ins. Co., 318 Ga. App. 682, 736 S.E.2d 443, 2012 Ga. App. LEXIS 977 (2012).

Jury finding that dual agency existed supported by evidence. — Jury did not err by concluding that a representative of the plaintiff was a dual agent for the plaintiff and the defendant with regard to the purchase of a helicopter because there was some evidence to support that finding based on the plaintiff's testimony that the plaintiff exercised control over the representative and the representative went to the location to purchase the helicopter, obtained insurance, and otherwise performed other actions on behalf of the plaintiff. Eagle Jets, LLC v. Atlanta Jet, Inc., 321 Ga. App. 386, 740 S.E.2d 439, 2013 Ga. App. LEXIS 321 (2013).

No jury question if evidence shows agency beyond dispute. — If the evidence for both the plaintiff and the defendant showed beyond dispute that a certain individual was an agent of the defendant when the defendant assaulted the plaintiff, the court erred in giving charge that the jury should determine whether the defendant was an agent or an independent contractor. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

Summary judgment improper. — Complaint alleging that an agreement had been reached between the plaintiff's neighbor and a representative of an animal control facility for the safekeeping of

Procedure (Cont'd)
4. Questions of Law and Fact (Cont'd)

the plaintiff's dogs while the plaintiff was hospitalized, set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and the plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's neighbor, an authorized agent acting on the plaintiff's behalf, to protect the well-being of the plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

Trial court erred in granting summary judgment on its claims against the buyer and the contingent sellers because there was a genuine issue of material fact regarding whether the agent's delivery of the termination letter constituted substantial compliance with the termination provisions of the real estate sales contract. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

In a fire insurance dispute, issues of fact remained as to whether the agent was a dual agent such that the agent's knowledge that the insured would not be using the covered home as the insured's primary residence was imputable to the insurer. Lee v. Mercury Ins. Co., 343 Ga. App. 729, 808 S.E.2d 116, 2017 Ga. App. LEXIS 562 (2017), cert. denied, No. S18C0518, 2018 Ga. LEXIS 491 (Ga. Aug. 2, 2018).

Trial court erred by granting the independent contractor's motion for summary judgment on its breach of contract claim because questions of fact remained as to the extent of the festival organizer's liability for work performed by the contractor at the festival and whether the organizer agreed to settle the balance due on the contractor's invoices. IMF Entertainment, LLC v. Herc Rentals, Inc., 364 Ga. App. 882, 876 S.E.2d 734, 2022 Ga. App. LEXIS 365 (2022).

OPINIONS OF THE ATTORNEY GENERAL

Department of Administrative Services. — Department of Administrative Services is the state manager for administrative aspects of workers' compensation program and, as such, is an agent for each individual department or instrumentality in its relations with the State Board of Workers' Compensation. 1980 Op. Att'y Gen. No. 80-55.

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, §§ 1 et seq., 11 et seq.
Am. Jur. Proof of Facts.
Establishing Agency by the Circumstances in Real Estate Transactions, 45 POF3d 453.
C.J.S.
2A C.J.S., Agency, §§ 5, 35, 53.
ALR.
Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 A.L.R. 906.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission, 9 A.L.R. 1235.

One doing work under a cost plus contract as an independent contractor or a servant or an agent, 55 A.L.R. 291.

Regulations, rules, customs, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 A.L.R. 592.

Lessee as agent of lessor within contemplation of mechanic's lien laws, 79 A.L.R. 962; 163 A.L.R. 992.

Doctrine of ratification invoked to

charge one person with responsibility for the negligence of another not authorized to act for him, 85 A.L.R. 915.

Right of one who deals with another as principal to set up latter's apparent authority as agent, 95 A.L.R. 1319.

Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 96 A.L.R. 1233.

Liability of bank for losses incurred on loans or investments made on recommendation of its officers or employees, 113 A.L.R. 246.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 A.L.R. 893.

When agency for sale of goods deemed exclusive agency, in the absence of express provision in that regard, 126 A.L.R. 1233.

What amounts to ratification by owner of unauthorized employment by broker or agent of subagent to procure a sale or purchase of property, 136 A.L.R. 1418.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 A.L.R. 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 A.L.R. 1152.

Advertising agency as agent of advertising medium or of advertiser, 53 A.L.R. 1139.

Liability of partners or partnership for libel, 88 A.L.R.2d 474.

Continuation of agency beyond contract period as extending contract for like period, 6 A.L.R.3d 1352.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 A.L.R.3d 579.

Doctrine of apparent authority as applied to agent of municipality, 77 A.L.R.3d 925.

10-6-2. Formality necessary to create agency.

Where the exercise or performance of an agency is by written instrument, the agency shall also be created by written instrument; provided, however, unless a contrary intent is expressly set forth therein, any written instrument creating an agency regardless of the formality of its execution shall conclusively be deemed to authorize the execution of instruments with the formalities necessary or appropriate to accomplish the purposes for which the agency was granted. A corporation may create an agent in its usual mode of transacting business and without its corporate seal. Any deed or other instrument executed under seal pursuant to an agency created by an act not under seal, if not otherwise required to be under seal for its validity, shall be binding upon the principal and valid as if an unsealed instrument.

History.

Orig. Code 1863, § 2160; Code 1868, § 2156; Code 1873, § 2182; Code 1882, § 2182; Civil Code 1895, § 3002; Civil Code 1910, § 3574; Code 1933, § 4-105; Ga. L. 1991, p. 410, § 1; Ga. L. 1993, p. 457, § 1.

Law reviews.

For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — Some of the cases cited below were decided prior to the 1991 amendment, which added the last sentence.

Power to execute instrument under seal must be conferred by instrument under seal. Pollard & Co. v. Gibbs, 55 Ga. 45, 1875 Ga. LEXIS 323 (1875); McCalla v. American Freehold Land Mtg. Co., 90 Ga. 113, 15 S.E. 687, 1892 Ga. LEXIS 133 (1892); Overman v. Atkinson, 102 Ga. 750, 29 S.E. 758, 1897 Ga. LEXIS 683 (1897); Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087, 1907 Ga. App. LEXIS 138 (1907); Neely & Co. v. Stevens, 138 Ga. 305, 75 S.E. 159, 1912 Ga. LEXIS 287 (1912); Harris v. Woodard, 144 Ga. 211, 86 S.E. 1097, 1915 Ga. LEXIS 135 (1915).

Changing promissory note into sealed instrument. — Changing of an ordinary promissory note into a sealed instrument is the making of a sealed instrument, and the authority to make this radical change in the paper must be evidenced in the same way that authority to make a sealed instrument in the first instance would have to be shown. Thomason v. Wilson, 127 Ga. 141, 56 S.E. 302, 1906 Ga. LEXIS 775 (1906).

Section not limited to execution of instruments under seal. — There is nothing in this section which confines it to agencies created for the execution of instruments under seal. It lays down a broad and sweeping rule for the creation of all agencies. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48, 1927 Ga. LEXIS 408 (1927).

Authority to execute contract required to be in writing must be in writing. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960).

Agency created by writing. — If the law prescribes that the act can be executed by the principal only by writing, then the act creating the agency must be executed with the same formality; that is, the agency must be created by writing. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48, 1927 Ga. LEXIS 408 (1927); Terry v. Kean, 180 Ga. 627, 180 S.E. 135, 1935 Ga. LEXIS 512 (1935); Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Proper construction of this section is that agencies for the execution of agreements which are required to be made by principals to be in writing must be created by written authority; otherwise the purpose of the statute of frauds, which is to prevent frauds and perjuries, would be virtually done away with. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48, 1927 Ga. LEXIS 408 (1927); Terry v. Kean, 180 Ga. 627, 180 S.E. 135, 1935 Ga. LEXIS 512 (1935); Atlanta Biltmore Hotel Corp. v. Martell, 118 Ga. App. 172, 162 S.E.2d 815, 1968 Ga. App. LEXIS 1342 (1968). But see Hirsh & Co. v. Beverley, 125 Ga. 657, 54 S.E. 678, 1906 Ga. LEXIS 240 (1906) (authority to sell mules and apply proceeds); Wesley v. Boyd, 10 Ga. App. 9, 72 S.E. 514, 1911 Ga. App. LEXIS 606 (1911); McNamara v. Georgia Cotton Co., 10 Ga. App. 669, 73 S.E. 1092, 1912 Ga. App. LEXIS 640 (1912) (authority to purchase cotton); Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co., 128 Ga. App. 779, 197 S.E.2d 839, 1973 Ga. App. LEXIS 1615 (1973) (guaranty by agent authorized or principal estopped to deny authority).

Lease of land for seven years being required to be in writing, if the agent signs for the principal, the agent's authority must be in writing. Baxley Hdwe. Co. v. Morris, 165 Ga. 359, 140 S.E. 869, 1927 Ga. LEXIS 394 (1927) (commented on in 1 Ga. L. Rev. No. 3, p. 51 (1927)).

This section applies if a contract which is required to be in writing under the

statute of frauds is executed by another as a disclosed agent for the person intended to be bound, and in such case the authority of the principal to the agent to so sign must also be in writing. Spiegel v. Hays, 103 Ga. App. 293, 119 S.E.2d 123, 1961 Ga. App. LEXIS 930 (1961).

Oral agreements. — If the owner of personal property orally authorizes an agent to lease it to another for a period of three months and orally authorizes the agent to give to the sublessee an option to buy, the option price being more than $50.00, the option so given by the agent is not binding on the owner in the absence of facts sufficient to work an estoppel or show ratification of a completed sale; and, accordingly, if such authority rested in parol, and before the option was exercised by the third person, the owner notified the agent that the giving of such an option was without the owner's authority, repudiated the contract in the contract's entirety, and instructed the agent to retract the agent's proposal, and the agent proceeded to sell the property under the option as the agent's own, the agent was guilty of a conversion and was liable in trover for the property. Collier v. Wilson-Weesner-Wilkinson Co., 58 Ga. App. 44, 197 S.E. 516, 1938 Ga. App. LEXIS 181 (1938) (decided under former statute of frauds provision as to contracts for sale of goods, repealed by Ga. L. 1962, p. 156, which also enacted § 11-2-201).

Authority of attorney-in-fact to issue a guardianship bond could not be mere apparent authority, but was required to be shown by a writing, i.e., a power of attorney from the insurance company named in the bond. Continental Ins. Co. v. Gazaway, 216 Ga. App. 125, 453 S.E.2d 91, 1994 Ga. App. LEXIS 1433 (1994), cert. denied, No. S95C0742, 1995 Ga. LEXIS 562 (Ga. Apr. 14, 1995).

If agent must have written authority, the agent cannot be orally vested with apparent authority, any more than the agent can be orally vested with a real one. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Mere effort to ratify orally will not suffice. — Authority to execute a contract required by the statute of frauds to be in writing must also be in writing, and a mere effort to ratify orally will not suffice. Hubert Realty Co. v. Bland, 79 Ga. App. 321, 53 S.E.2d 691, 1949 Ga. App. LEXIS 645 (1949).

Principal may confer authority on agent merely by course of conduct holding out that person as an agent which induces others to rely on the statements of that agent. Ampex Credit Corp. v. Bateman, 554 F.2d 750, 1977 U.S. App. LEXIS 12721 (5th Cir. 1977).

Estoppel to deny agency. — While a written instrument may have been executed by an agent not having any authority in writing to do so or not having been ratified by an act of comparable dignity, the principal may nevertheless be estopped by the principal's acts from denying the authority of the principal's agent. Atlanta Biltmore Hotel Corp. v. Martell, 118 Ga. App. 172, 162 S.E.2d 815, 1968 Ga. App. LEXIS 1342 (1968).

Authority of an agent in a particular instance need not be proved by an express contract; it may be established by the principal's conduct and course of dealing, and if one holds out another as one's agent, and by one's course of dealing indicates that the agent has certain authority, and thus induces another to deal with one's agent as such, one is estopped to deny that the agent has any authority which, as reasonably deducible from the conduct of the parties, the agent apparently has. Atlanta Biltmore Hotel Corp. v. Martell, 118 Ga. App. 172, 162 S.E.2d 815, 1968 Ga. App. LEXIS 1342 (1968) (see notes to § 10-6-50).

Authority of an agent to lease the land of another must ordinarily be in writing, but the jury might find oral authority sufficient if the principal was estopped by the principal's later conduct from raising the issue. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Failure to ascertain if written authority exists deemed negligence. — One who enters into a 15-year-lease with an agent is charged with notice that the agent's authority to execute the lease is required by law to be in writing and is

General Consideration (Cont'd)

under a duty to inquire and ascertain whether such written authority exists and what the limits of the authority are, and such person is guilty of negligence in failing to make such an inquiry. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960); Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Failure to ascertain if authority exists bars recovery from agent. — One who enters into a 15-year lease with an agent without making due inquiry into the agent's authority is precluded from recovering damages from the agent either on the ground that the agent contractually misrepresented the fact that the agent had authority, either expressly or impliedly, or on the ground that the agent fraudulently misrepresented that the agent had authority to execute the lease as agent. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960).

Power of attorney held valid. — Regardless of wife's failure to follow instructions and have husband's signature of the power of attorney properly witnessed, the power of attorney itself was technically valid as regards acts which themselves required no greater formality. Wheeless v. Gelzer, 780 F. Supp. 1373, 1991 U.S. Dist. LEXIS 18594 (N.D. Ga. 1991).

Not applicable if statute of frauds does not apply. — Verbal authorization from a decedent was sufficient to create a valid agency relationship between the decedent and a brother and a wife, so as to allow them to withdraw money for the decedent from the accounts on a periodic basis; the equal dignity rule outlined in O.C.G.A. § 10-6-2 did not apply in this case because the instruments at issue were not subject to the statute of frauds. Rowland v. Rowland, No. 1:04-CV-2068-TWT, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Only principal proper party to raise issue. — Construction company's claim that a grocery store owner's representative who signed a contract which contained an agreement to arbitrate lacked the power to sign under the Equal Dignity Rule, pursuant to O.C.G.A. § 10-6-2, as the authority to sign the agreement and the agreement itself, had to be in writing under O.C.G.A. § 9-9-3, lacked merit, as the contract clearly provided that the representative was acting on behalf of the owner, and further, the company was not the proper party to dispute the agent's authority under O.C.G.A. § 10-6-2; rather, that statute was for the principal's use to dispute an agent's authority to act on the principal's behalf. Barron Reed Constr. v. 430, LLC, 275 Ga. App. 884, 622 S.E.2d 83, 2005 Ga. App. LEXIS 1131 (2005), cert. denied, No. S06C0441, 2006 Ga. LEXIS 232 (Ga. Mar. 27, 2006).

Real Estate Transactions

Authority to execute long-term lease in writing. — Contracts creating the relationship of landlord and tenant, for any time exceeding one year, must be in writing; and when executed by an agent, the authority of the agent to execute the contract must likewise be in writing. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48, 1927 Ga. LEXIS 408 (1927).

One seeking to hold the principal liable for the undertaking of an agent on a lease for over a year must show that the agent had written authority to act for the principal. Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897, 1979 Ga. LEXIS 1104 (1979).

When a new partner of a lessee signed an option to renew a lease, a guarantor's emailed explanation regarding the partner's authority did not satisfy the statute of frauds because the email was not a writing in equal dignity to that of the original lease; however, there was a genuine issue of material fact as to the partner's apparent agency. Sage Atlanta Props., Ltd. v. Hawxhurst, 349 Ga. App. 758, 824 S.E.2d 387, 2019 Ga. App. LEXIS 129 (2019).

Authority to execute mortgage must be in writing. Duke v. Culpepper, 72 Ga. 842, 1884 Ga. LEXIS 330 (1884).

Authority of an agent to execute a contract or memorandum for the sale of real

estate or for the lease thereof for a period longer than one year must be evidenced by writing. Terry v. Kean, 180 Ga. 627, 180 S.E. 135, 1935 Ga. LEXIS 512 (1935); Deal v. Dickson, 232 Ga. 885, 209 S.E.2d 214, 1974 Ga. LEXIS 1125 (1974); Turnipseed v. Jaje, 267 Ga. 320, 477 S.E.2d 101, 1996 Ga. LEXIS 876 (1996).

Third party seeking to compel a principal to deed real property alleged to have been acquired by written instrument with the agent must show written authority held by the agent empowering the agent to act. Dover v. Burns, 186 Ga. 19, 196 S.E. 785, 1938 Ga. LEXIS 545 (1938).

When the plaintiffs' rights in a suit for breach of contract to sell real estate must stand or fall on the contract set up by it and there was no evidence that the plaintiff-husband had authority in writing to execute the contract, nor that it was ratified in writing, nor that the defendant buyer had notice thereof and by the buyer's subsequent conduct was estopped to deny the validity of the same, the evidence demanded a verdict for the defendant. Hubert Realty Co. v. Bland, 79 Ga. App. 321, 53 S.E.2d 691, 1949 Ga. App. LEXIS 645 (1949).

Written authority to the agent must be shown to support the agent's sale or lease of the principal's lands. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

This section requires that the agent's power to sell land must be in writing, absent later ratification of the agent's acts or estoppel of the agent's principal to deny the agent's authority. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

A contract to sell land, as distinguished from authority to execute a deed to land, is not binding upon a principal if there is no written authority given the agent and the contract to sell is oral. Jones v. Sheppard, 231 Ga. 223, 200 S.E.2d 877, 1973 Ga. LEXIS 652 (1973).

Evidence held insufficient. — In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because the only evidence showing any authority to act as an agent for the sellers was based on hearsay, and not on a writing, and no exception applied, two of the sellers were entitled to a directed verdict against the investor pursuant to O.C.G.A. § 13-5-30(4). Dunn v. Venture Bldg. Group, Inc., 283 Ga. App. 500, 642 S.E.2d 156, 2007 Ga. App. LEXIS 93 (2007).

Authority of agent to execute option contract. — Because the statute of frauds requires that an option contract for the purchase of land be in writing, the authority of an agent to execute such a contract likewise must be in writing. Garrett v. S. Health Corp. of Ellijay, Inc., 320 Ga. App. 176, 739 S.E.2d 661, 2013 Ga. App. LEXIS 151 (2013).

Unauthorized conveyance of land cannot be ratified except by writing under seal. McCalla v. American Freehold Land Mtg. Co., 90 Ga. 113, 15 S.E. 687, 1892 Ga. LEXIS 133 (1892).

No witnesses needed for authority to sell mortgaged property. — Contract whereby mortgagor is authorized to convey mortgaged property by agreement between the mortgagor and the mortgagee is not a power of attorney to the mortgagor to sell land of which the title is in the mortgagee, but only the consent of the lienholder to the release of the lien in case a sale is made, and it is not required by the laws of Georgia to be executed before two witnesses under former Code 1882, § 2690. Woodward v. Jewell, 140 U.S. 247, 11 S. Ct. 784, 35 L. Ed. 478, 1891 U.S. LEXIS 2460 (1891).

Agent cannot execute contract containing provision requiring principal's execution. — A proposed lease agreement negotiated by various representatives of landlord and tenant through conversations and exchanged correspondence did not constitute a binding, written agreement in view of a clause in the agreement providing that the lease would become effective "only upon execution and delivery by Landlord and Tenant." 20/20 Vision Ctr., Inc. v. Hudgens, 256 Ga. 129, 345 S.E.2d 330, 1986 Ga. LEXIS 747 (1986).

Partnership to own real estate. — Partnership formed for the purpose of acquiring interest in tracts of land must

Real Estate Transactions (Cont'd)

be executed in writing. Shivers v. Sexton, 164 Ga. App. 490, 296 S.E.2d 749, 1982 Ga. App. LEXIS 2845 (1982).

Spouse of seller as promisor. — Fact that promisor was seller's husband did not negate the need for a written authorization to convey or promise to convey any interest in the seller's land. Since the promisor had no written authorization and the buyers never asked for one, an agency was not established as a matter of law. East Piedmont 120 Assocs. v. Sheppard, 209 Ga. App. 664, 434 S.E.2d 101, 1993 Ga. App. LEXIS 950 (1993), cert. denied, No. S93C1797, 1993 Ga. LEXIS 1103 (Ga. Nov. 19, 1993).

Corporate Agents

Common law changed. — Sentence of this section relative to corporations changes the common-law rule. Brandon v. Pritchett, 126 Ga. 286, 55 S.E. 241, 1906 Ga. LEXIS 375 (1906).

Corporations recognized as unique entities. — In codifying the "equal dignity" rule, the legislature apparently recognized that corporations are unique legal entities which must at all times act through corporate agents. Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc., 243 Ga. 114, 252 S.E.2d 604, 1979 Ga. LEXIS 824 (1979).

Legislature excepted the creation of corporate agents from the "equal dignity" rule and permitted corporations to create such agents in their usual mode of transacting business, i.e., shareholder action in the adoption of charters, bylaws, resolutions, and similar conduct vesting corporate agents with authority to act. Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc., 243 Ga. 114, 252 S.E.2d 604, 1979 Ga. LEXIS 824 (1979).

Creation of corporate agents is excepted from the "equal dignity" rule codified in O.C.G.A. § 10-6-2, which permits corporations to create such agents in their "usual mode of transacting business." Travel Centre, Ltd. v. Starr-Mathews Agency, Inc., 179 Ga. App. 406, 346 S.E.2d 840, 1986 Ga. App. LEXIS 1929 (1986).

No sealed authority needed to execute sealed instrument. — When empowered by corporate authority, corporate agents are not required to have sealed authorization to enable the agents to execute sealed instruments on behalf of the corporation. Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc., 243 Ga. 114, 252 S.E.2d 604, 1979 Ga. LEXIS 824 (1979); Dundon v. Forehand, 152 Ga. App. 749, 263 S.E.2d 687, 1979 Ga. App. LEXIS 3031 (1979).

No written authority needed for written settlement with debtor. — When a corporation claimed that one who had been the corporation's agent in certain transactions was indebted to it in a certain sum and sent another agent to close up its account with the agent, and the second agent took a note evidencing the amount of the indebtedness, it was competent for the agent thus authorized (there being a dispute between the agent and the debtor as to the actual amount of the debt, the debtor claiming that the debtor had evidence to show that a certain item of indebtedness should not be included in the note) to stipulate in writing, that if this evidence should be discovered, the debtor could use the evidence as against the note given; and it was not necessary to show that the authority to execute such a written agreement was itself in writing. Home Fertilizer & Chem. Co. v. Strickland, 145 Ga. 197, 88 S.E. 820, 1916 Ga. LEXIS 239 (1916).

No written authority needed to fill in blanks on insurance policy for insurer. — Under this section and the insurance laws, it is not essential to the validity of a policy of insurance, which was actually signed by the president and secretary of the company by which it purported to have been issued, that the person who, in behalf of the company, after the policy had been so signed and placed in one's hands, filled blanks therein so as to make it a complete contract, and who then delivered the contract to the insured, should have been clothed with

written authority either to fill such blanks or make the delivery. Smith v. Farmers Mut. Ins. Ass'n, 111 Ga. 737, 36 S.E. 957, 1900 Ga. LEXIS 706 (1900) (see O.C.G.A. §§ 33-24-1(1), 33-24-13, 32-24-18).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 11 et seq.
C.J.S.
2A C.J.S., Agency, § 39 et seq.
ALR.
Applicability to corporate officers and employees of statute requiring agent's authority to be in writing, 1 A.L.R. 1132.
Liability of bank for losses incurred on loans or investments made on recommendation of its officers or employees, 113 A.L.R. 246.
Recording laws as applied to power of attorney under which deed or mortgage is executed, 114 A.L.R. 660.
Construction and application of statute which enables real estate broker to recover commissions on oral contract with owner who has been served with written notice of the terms thereof, 148 A.L.R. 676.
Advertising agency as agent of advertising medium or of advertiser, 53 A.L.R.2d 1139.
Doctrine of apparent authority as applied to agent of municipality, 77 A.L.R.3d 925.

10-6-3. Eligibility standard for agent.

Any person who is of sound mind may be appointed an agent; so a principal shall be bound by the acts of his infant agent.

History.
Orig. Code 1863, § 2159; Code 1868, § 2155; Code 1873, § 2181; Code 1882, § 2181; Civil Code 1895, § 3001; Civil Code 1910, § 3573; Code 1933, § 4-102.

JUDICIAL DECISIONS

Insane persons are generally declared incompetent to be agents. Central of Ga. Ry. v. Hall, 124 Ga. 322, 52 S.E. 679, 1905 Ga. LEXIS 708 (1905).

Bank or lending institution may act as agent for another. Heard v. Decatur Fed. Sav. & Loan Ass'n, 157 Ga. App. 130, 276 S.E.2d 253, 1980 Ga. App. LEXIS 3229 (1980).

Attorney at law is agent of highest rank for client. Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.), 15 B.R. 232, 1981 Bankr. LEXIS 2579 (Bankr. N.D. Ga. 1981), rev'd, 25 B.R. 729, 1982 U.S. Dist. LEXIS 16133 (N.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 9 et seq.
C.J.S.
2A C.J.S., Agency, §§ 26, 29.
ALR.
Infant's appointment of agent, and acts of agent thereunder, as void or voidable, 31 A.L.R. 1001.

10-6-4. Conveyance authority of attorneys in fact.

(a) Personal representatives, guardians, conservators, and trustees

are authorized to sell and convey property by attorneys in fact in all cases where they may lawfully sell and convey in person.

(b) When a personal representative, guardian, conservator, or trustee exercising the authority conferred by subsection (a) of this Code section appoints an attorney in fact by a power of attorney to which Chapter 6B of this title is applicable under Code Section 10-6B-81, the exercise of fiduciary powers by such attorney in fact under such power of attorney shall be subject to Code Section 10-6B-40.

History.
Ga. L. 1855-56, p. 148, § 11; Code 1868, § 2154; Code 1873, § 2180; Code 1882, § 2180; Civil Code 1895, § 3000; Civil Code 1910, § 3572; Code 1933, § 4-104; Ga. L. 2006, p. 805, § 1/SB 534; Ga. L. 2020, p. 377, § 2-8/HB 865.

JUDICIAL DECISIONS

Written authority needed to sell land. — It would seem that since this section was enacted, if an executor or administrator desires to sell the land of the estate by an agent, the agency must be created in writing since that is the usual mode of appointing attorneys in fact. Scales v. Chambers, 113 Ga. 920, 39 S.E. 396, 1901 Ga. LEXIS 416 (1901).

Mere crier employed by administrator does not control sale but is simply the mouthpiece of the latter, and is in no sense the agent or attorney in fact of the administrator under this section, and cannot, over protest, complete the sale. Scales v. Chambers, 113 Ga. 920, 39 S.E. 396, 1901 Ga. LEXIS 416 (1901).

Power presumed properly exercised. — If a testator gave the testator's executors power to sell property, such power will be held to have been properly exercised, in the absence of proof to the contrary. Webster v. Black, 142 Ga. 806, 83 S.E. 941, 1914 Ga. LEXIS 553 (1914).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, §§ 17 et seq., 175 et seq.
C.J.S.
2A C.J.S., Agency, § 224 et seq.
ALR.
Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 A.L.R. 1055.
Disposition of all or residue of testator's property, without referring to power of appointment, as constituting sufficient manifestation of intention to exercise power, in absence of statute, 15 A.L.R.3d 346.
Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 A.L.R.3d 1191.

10-6-5. Agent authority; delegation.

Whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act; so an agent may not delegate his authority to another unless specially empowered to do so.

History.

Orig. Code 1863, § 2158; Code 1868, § 2153; Code 1873, § 2179; Code 1882, § 2179; Civil Code 1895, § 2999; Civil Code 1910, § 3571; Code 1933, § 4-103.

Law reviews.

For article, "The Georgia Power of Attorney Act," see 24 Ga. St. B. J. 20 (Dec. 2018).

JUDICIAL DECISIONS

Analysis

General Consideration
Delegation of Authority

General Consideration

Scope of authority. — There is conferred upon an agent no greater power than that possessed by the principal. Tippins v. Cobb County Parking Auth., 213 Ga. 685, 100 S.E.2d 893, 1957 Ga. LEXIS 487 (1957).

Agent for sale of personalty has authority only to sell. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

Agent may enter credit binding payee. — If payee of a note could make an entry of credit and that act would bind the payee, the payee could make it by an agent and be bound thereby. Green v. Juhan, 66 Ga. 531, 1881 Ga. LEXIS 52 (1881).

Waiver of prepayment of insurance premiums. — An insurance company by the company's proper officers may waive a condition requiring prepayment of the premium, and whatever the company might do itself it would be permitted to do by an agent. Penn Mut. Life Ins. Co. v. Blount, 33 Ga. App. 642, 127 S.E. 892, 1925 Ga. App. LEXIS 660 (1925).

Principal may be bound by agent's admission. — Admission made through an agent, during the existence and in pursuance of the agent's power, was no less evidence against the principal than if made by the principal in person, under former Civil Code 1910, §§ 3571 and 5779. William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269, 1918 Ga. App. LEXIS 377 (1918).

Wife may appoint husband her general agent. — A married woman may enter into any contract by an agent that the law will permit her to make in person, and she may appoint her husband as her general agent and in such case will be bound by an agreement made in her behalf by the husband acting within the scope of his authority, to the same extent as if the agreement were made by the wife by and for herself independently of such agent. Hutcheson v. May, 40 Ga. App. 746, 151 S.E. 657, 1930 Ga. App. LEXIS 683 (1930).

Husband may bind wife by contract to purchase execution against husband. — Where a married woman entered into a contract for the purpose of an execution against her husband and executed notes therefor, she could not repudiate the transaction upon the ground that the agreement was an undertaking by her to pay the debt of her husband, and the fact that in all negotiations prior to the final making of the contract the wife was represented by the husband, and that she did not in fact understand the true consideration of the agreement, would not operate to relieve her from liability, where the true intent and purpose was not to bind her for the debt of her husband, but to make a bona fide purchase of the execution and the husband in so representing his wife was acting within the scope of his authority as her agent. Hutcheson v. May, 40 Ga. App. 746, 151 S.E. 657, 1930 Ga. App. LEXIS 683 (1930).

After a husband, after conveying lands to another to secure a debt, made a second conveyance of the same lands to his wife to secure an additional debt and, while both of these conveyances were outstanding, entered upon the lands and manufactured lumber from timber standing thereon, the husband was not without an

General Consideration (Cont'd)

apparent interest in the lumber; and where a judgment creditor caused an execution against the husband to be levied upon such lumber as the husband's property, the wife, in order to obtain a release of the property and to protect her interest therein, could purchase the execution; and a contract made by her for that purpose, if free from fraud or undue influence, would be binding upon her. Hutcheson v. May, 40 Ga. App. 746, 151 S.E. 657, 1930 Ga. App. LEXIS 683 (1930).

Transfer of securities to agent. — The power of attorney conveyed by husband to wife expressly conveyed upon wife the authority to effect the transfer of securities from him to her. Wheeless v. Gelzer, 780 F. Supp. 1373, 1991 U.S. Dist. LEXIS 18594 (N.D. Ga. 1991).

When debtor files bankruptcy, control over property passes to court. — Possession of property of debtor by agent for debtor presents no question of jurisdiction over property by bankruptcy court, because upon filing of bankruptcy petition, control which debtor possessed over debtor's property in hands of debtor's agent passes to bankruptcy court and title thereto passes to bankruptcy court and the court's trustee. Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.), 15 B.R. 232, 1981 Bankr. LEXIS 2579 (Bankr. N.D. Ga. 1981), rev'd, 25 B.R. 729, 1982 U.S. Dist. LEXIS 16133 (N.D. Ga. 1982).

Delegation of Authority

Restriction states common law. — Inhibition against an agent delegating an agent's power as contained in this section is only declaratory of the common law and is but another form of expression for the maxim "delegata potestas non potest delegari." Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687, 64 S.E. 1074, 1909 Ga. LEXIS 388 (1909).

"Personal trusts" arise out of fiduciary relation. — "Personal trusts" referred to in this section are those arising out of a fiduciary relation, such as the relation between principal and agent and the like. Council v. Teal, 122 Ga. 61, 49 S.E. 806, 1905 Ga. LEXIS 114 (1905).

To contract to drill artesian well does not involve any personal trust, any more than to contract to dig a ditch or to erect a building, and in the absence of a stipulation to the contrary, the contractor may perform the contract obligations through agents, being accountable, of course, for the manner in which the agents prosecute the work. Council v. Teal, 122 Ga. 61, 49 S.E. 806, 1905 Ga. LEXIS 114 (1905).

Test as to whether contract involves relation of personal confidence is whether the party conferring the rights must necessarily have intended the rights to be exercised only by the individual upon whom the rights were actually conferred. Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919).

Parties may agree contract not personal in nature. — Even though the subject matter of a contract might of itself in a sense indicate that it was intended to be personal in the contract's nature, the parties thereto can nevertheless by the express terms of the agreement manifest a different purpose and intent. Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919).

Section strictly applied as to public officers. — No agent may delegate authority unless the agent is specially empowered to do so and, for reasons that are entirely obvious, this rule is usually given a very strict, if not a literal, application in the case of public officers. Deariso v. Mobley, 38 Ga. App. 313, 143 S.E. 915, 1928 Ga. App. LEXIS 206 (1928).

Defendant's claim that an investigator employed by the district attorney was bound by the ethical and legal standards that prohibited the district attorney from testifying before the grand jury was rejected as an agent could not delegate the agent's authority unless specifically empowered to do so and as the discretionary powers conferred upon public agents could not be delegated without authorization; further, an unlicensed individual could not practice law and a witness could not testify to hearsay other than in specified cases. Hall v. State, 273 Ga. App. 203, 614 S.E.2d 844, 2005 Ga. App. LEXIS 446 (2005).

Section prevents assignment of position. — Agreement between the

state and R, whereby R was appointed special tax investigator and was to receive commission on such back ad valorem taxes due the state as should be collected through R's efforts, could not have been assigned. Roberts v. Allen, 31 Ga. App. 660, 122 S.E. 86, 1924 Ga. App. LEXIS 119 (1924).

Assignability of choses in action. — Former Civil Code 1910, § 3571 is a recognized exception to the rule stated in former Civil Code 1910, §§ 3653 through 3655, namely, that all choses in action arising upon contract and involving property rights may be assigned. Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919).

Employment of workers. — This section has no application to the contractual relation existing between the parties to an agreement under the terms of which one of them obligates oneself to accomplish a given task, not alone or in person, but through workers in one's employ. Council v. Teal, 122 Ga. 61, 49 S.E. 806, 1905 Ga. LEXIS 114 (1905).

Insurance company agent may employ clerks. — Agent of an insurance company, fully authorized to make out and issue policies of insurance, has power to employ clerks in the ordinary business of the agency. Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687, 64 S.E. 1074, 1909 Ga. LEXIS 388 (1909).

Subagents for telegraph operators. — Rule laid down in the case of Central of Ga. Ry. v. Price, 106 Ga. 176, 32 S.E. 77, 71 Am. St. R. 246, 43 L.R.A. 402 (1898), deciding under this section that a conductor would have no authority to employ a subagent to act for the railroad company in caring for a passenger, would certainly apply equally to a telegraph operator in the service of such company. Western & Atl. R.R. v. Jackson, 21 Ga. App. 50, 93 S.E. 547, 1917 Ga. App. LEXIS 419 (1917).

Station agent may not delegate authority to employ servants to an inferior agent since it involves discretion and judgment. Mathis v. Western & Atl. R.R., 35 Ga. App. 672, 134 S.E. 793, 1926 Ga. App. LEXIS 1076 (1926) (railroad not liable for death of person employed by inferior agent).

Agent may not by indirection delegate authority to operate farms to another, unless specially empowered to do so, under this section. Hargrove v. Armour Fertilizer Works, 31 Ga. App. 465, 120 S.E. 800, 1923 Ga. App. LEXIS 986 (1923).

Authority to sell article. — An agent, whose authority is limited to the sale of an article, may not delegate this authority to another, without being empowered so to do. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

If authority exceeded, no title passes. — If an agent who is authorized to sell trucks but not authorized to delegate such authority to another undertakes to exceed one's authority by delivering a truck to an automobile dealer to sell, the agent was acting without authority and no title to the truck passed. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

Owner not estopped by having given possession to agent. — Purchaser of personal property from one who is not the true owner acquires no title against the true owner by reason of the bona fides of purchase, when one purchased from one who is an utter stranger to the title and who can convey no title, except when there may be some statute otherwise, or when the true owner, upon some principle of estoppel, would be precluded from asserting title. However, the mere permission by the owner for the agent to have possession of the truck would not be such an act as would estop the owner. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

Relationship of master and servant cannot be imposed upon person without consent, express or implied; hence, the defendant was free to select the defendant's own servant and was responsible for the acts of the defendant's servant within the scope of the defendant's employment, but the defendant was not responsible for the act of an assistant permitted without authority to act for the defendant. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

Liability of principal for acts of subagent. — If a servant, who is employed to do certain work for a master,

Delegation of Authority (Cont'd)

employs another person to assist the servant, the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the assistant or when the act of employment is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive it on the business of the owner, is personally expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master, engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953); Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961).

Family purpose doctrine. — Parent who keeps and maintains an automobile for the use, comfort, pleasure, and convenience of the family is responsible for injuries resulting from the negligence of a third person whom the family member permits to drive, if the family member remains in the automobile and retains control, authority, and direction over the automobile, and if the automobile is being used in furtherance of the purposes of a family car. This liability created by the family car doctrine is applicable notwithstanding the fact that the parent has expressly instructed the family member not to permit third persons to drive the car. Phillips v. Dixon, 236 Ga. 271, 223 S.E.2d 678, 1976 Ga. LEXIS 839 (1976).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 53 et seq.

C.J.S.

2A C.J.S., Agency, §§ 140 et seq., 255 et seq., 279 et seq.

ALR.

Authority of agent to assent to account stated, 2 A.L.R. 71.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission, 9 A.L.R. 1235.

Validity of factor's pledge of his principal's property, 14 A.L.R. 423.

Liability of undisclosed principal on sealed contract, 32 A.L.R. 162.

Death as revoking power of attorney to transfer corporate stock, 40 A.L.R. 1004.

Character as holder in due course of concern which takes paper from its dealers or agents, 61 A.L.R. 694.

Implied or ostensible authority of officer, agent, or employee to engage medical services, 71 A.L.R. 638.

Authority of claim agent as regards terms or condition of settlement, 87 A.L.R. 1277.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 A.L.R. 895.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 A.L.R. 389.

Authority of agent to endorse and transfer commercial paper, 37 A.L.R.2d 453.

Authority of agent to borrow money for principal, 55 A.L.R.2d 1215.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students, 23 A.L.R.5th 1.

10-6-6. Conditional power of attorney.

(a) As used in this Code section, the term "conditional power of attorney" means a written power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency, including, but not limited to, the subsequent incapacity of the principal.

(b) In a conditional power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of false swearing, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons.

(c) A power of attorney containing the designation described in subsection (b) of this Code section becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of false swearing that the specified event or contingency has occurred; and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

(d) This Code section shall apply to a power of attorney whether executed before, on, or after July 1, 1993, if the power of attorney contains the designation described in subsection (b) of this Code section.

(e) Subsections (b) and (c) of this Code section do not provide the exclusive method by which a power of attorney may be limited to take effect upon the occurrence of a specified event or contingency.

History.
Code 1981, § 10-6-6, enacted by Ga. L. 1993, p. 1052, § 1.

Law reviews.
For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 31 (1993).

10-6-7. Application.

This chapter shall not apply to powers of attorney to which Chapter 6B of this title is applicable.

History.
Code 1981, § 10-6-7, enacted by Ga. L. 2017, p. 435, § 3-1/HB 221.

ARTICLE 2
RELATIONS BETWEEN PRINCIPAL AND AGENT

Cross references.
Indemnification of corporate directors and officers, § 14-2-850 et seq.

RESEARCH REFERENCES

ALR.
Validity of factor's pledge of his principal's property, 14 A.L.R. 423.
Liability of third person for aiding agent or employee in breach of duty to principal or employer, 45 A.L.R. 1481.
Validity of contract negotiated by agent acting for both parties, 48 A.L.R. 917.
Liability of agent for acts or omissions of subagent, 61 A.L.R. 277.
Regulations, rules, custom, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 A.L.R. 592.
Right as between two principals of common agent who misappropriates funds of one of them in order to make good misappropriation of funds of other, 86 A.L.R. 537.
Ratification by customer of stockbroker's wrongful purchase or sale of securities on his account, or failure to comply with instructions, 87 A.L.R. 794.
Agent's liability to principal on account of money or property received on latter's account, as affected by his restoration of same to, or his application thereof for benefit of, third person, 98 A.L.R. 1429.
Right of one other than principal to repudiate transaction because of common agency unknown to principal, 147 A.L.R. 772.
Availability of equitable remedy of accounting between principal and agent, 3 A.L.R.2d 1310.
Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285.
Abstracter's duty and liability to employer respecting matters to be included in abstract, 28 A.L.R.2d 891.
Power of real-estate broker to execute contract of sale in behalf of principal, 43 A.L.R.2d 1014.
Duty of real-estate broker to disclose identity of purchaser or lessee, 2 A.L.R.3d 1119.

10-6-20. Rights under agency for illegal purpose.

No rights shall arise to either party out of an agency created for an illegal purpose.

History.
Orig. Code 1863, § 2169; Code 1868, § 2165; Code 1873, § 2191; Code 1882, § 2191; Civil Code 1895, § 3018; Civil Code 1910, § 3590; Code 1933, § 4-201.

JUDICIAL DECISIONS

Scope of agent's power. — There is conferred upon agent no greater power than that possessed by the principal. Tippins v. Cobb County Parking Auth., 213 Ga. 685, 100 S.E.2d 893, 1957 Ga. LEXIS 487 (1957).
There was no merit to a homeowner's argument that a restrictive covenant barring "For Sale" signs in a subdivision did not apply to the homeowner's real estate agent; under O.C.G.A. §§ 10-6-20 and 10-6-25, an agent could do no more than a principal. Godley Park Homeowners Ass'n v. Bowen, 286 Ga. App. 21, 649 S.E.2d 308, 2007 Ga. App. LEXIS 677 (2007).
Principal may recover future money deposited with agent for speculation, as the action is not one to

enforce an illegal contract, but to recover money in the hands of an agent belonging to the principal. Clark, Harrison & Co. v. Brown, 77 Ga. 606, 1886 Ga. LEXIS 374 (1886).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 202.

ALR.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 A.L.R. 906.

Right to recover money which the plaintiff placed in the hands of an agent, to be used for gambling purposes, 3 A.L.R. 1635.

Illegality of transaction or proposed transaction as affecting right of real estate broker to commission for promoting it, 85 A.L.R. 274.

10-6-21. Extent of agent's authority; liability for exceeding, violating, or disregarding instructions.

The agent shall act within the authority granted to him, reasonably interpreted; if he shall exceed or violate his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded.

History.

Orig. Code 1863, § 2162; Code 1868, § 2158; Code 1873, § 2184; Code 1882, § 2184; Civil Code 1895, § 3004; Civil Code 1910, § 3576; Code 1933, § 4-202.

Cross references.

Authority of attorney to act on behalf of client, § 15-19-5 et seq.

Law reviews.

For article, "Theories of Stockbroker and Brokerage Firm Liability," see 9 Ga. St. B. J. 12 (2004).

For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
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1. Generally
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General Consideration

Agent must follow principal's instructions. — When the directions to an agent are clear and well defined, it is the agent's duty to follow the directions faithfully, provided this may be lawfully done; although the agent is, in the absence of instructions, bound to follow the established usage or mode of dealing, yet no custom or usage will authorize a departure from positive instructions; the instructions of the principal make the law by which the agent is governed. J. Day & Co. v. Crawford, 13 Ga. 508, 1853 Ga. LEXIS 121 (1853); McLendon v. Wilson, Callaway & Co., 52 Ga. 41, 1874 Ga. LEXIS 234 (1874); Hatcher & Baldwin v. Comer & Co., 73 Ga. 418, 1884 Ga. LEXIS

General Consideration (Cont'd)

140 (1884); Central of Ga. Ry. v. Felton, 110 Ga. 597, 36 S.E. 93, 1900 Ga. LEXIS 595 (1900).

Specific instructions control general authority. — If specific instructions as to a particular matter have been given, the agent is charged with strict compliance with such instructions, no matter how broad the general powers as agent may otherwise have been. Lovejoy v. Lamar, 20 Ga. App. 499, 93 S.E. 153, 1917 Ga. App. LEXIS 953 (1917).

Power of attorney did not create fiduciary relationship. — Limited power of attorney given by insured to an insurance premium finance company authorizing the company to cancel policies and perform certain other duties related thereto did not create a fiduciary relationship between the insured and the company. Gill Plumbing Co. v. Imperial Premium Fin., Inc., 213 Ga. App. 754, 445 S.E.2d 840, 1994 Ga. App. LEXIS 702 (1994).

Violation or nonperformance breaches contract and fiduciary obligations. — Violation or nonperformance of instructions may be considered as a breach of two obligations — the consensual obligation set forth in the contract of agency itself and the fiduciary obligation of obedience to the principal's instructions raised by the agency relationship. Cutcliffe v. Chesnut, 122 Ga. App. 195, 176 S.E.2d 607, 1970 Ga. App. LEXIS 833 (1970).

Conversion. — If personal property has been by the property's owner delivered to an agent with power of attorney in the agent to sell the property and convey title, and a limitation on the terms of sale is placed on the agent, and the agent sells the property in violation of these terms, neither the agent nor a subagent, who sells the property for the agent is guilty of a conversion of the property; and since title and right to possession pass out of the owner, the owner cannot recover in trover. Noras v. McCord, 59 Ga. App. 311, 200 S.E. 513, 1938 Ga. App. LEXIS 495 (1938).

Rescission remedy for breach of contract obligations. — Rescission of an agency agreement is an available remedy to the principal for the agent's breach or nonperformance of contractual obligations imposed by that agreement whenever and to whatever extent it is authorized by the law of contracts. Cutcliffe v. Chesnut, 122 Ga. App. 195, 176 S.E.2d 607, 1970 Ga. App. LEXIS 833 (1970).

Agent liable if injury results. — If injury results to the principal from a failure of the agent to observe the principal's instructions, the agent is liable therefor to the principal. J. Day & Co. v. Crawford, 13 Ga. 508, 1853 Ga. LEXIS 121 (1853); Central Ga. Bank v. Cleveland Nat'l Bank, 59 Ga. 667, 1877 Ga. LEXIS 368 (1877); Cason v. Heath, 86 Ga. 438, 12 S.E. 678, 1890 Ga. LEXIS 275 (1890); Georgia Southern & Florida Ry. v. Jossey, 105 Ga. 271, 31 S.E. 179, 1898 Ga. LEXIS 499 (1898); Cave v. Lougee & Zimmer, 134 Ga. 135, 67 S.E. 667, 1910 Ga. LEXIS 134 (1910).

Agent liable regardless of degree of care. — If specific instructions are violated, the agent is responsible in damages for any loss which results from the violation regardless of the degree of care exercised. Cutcliffe v. Chesnut, 122 Ga. App. 195, 176 S.E.2d 607, 1970 Ga. App. LEXIS 833 (1970).

Intent to benefit principal. — Primary obligation of an agent or factor, whose authority is limited by instructions, is to adhere faithfully to those instructions; for if the agent unnecessarily exceeds the agent's commission or risks the agent's principal's effects without authority, the agent renders oneself responsible to the principal for the consequences of the agent's act; and if loss ensues, it furnishes no defense to the agent that the agent intended the benefit of the principal. Cutcliffe v. Chesnut, 122 Ga. App. 195, 176 S.E.2d 607, 1970 Ga. App. LEXIS 833 (1970).

Agent not liable if principal ratifies or fails to disapprove. — If an agent deviated from instructions, and forthwith informed the agent's principal, and the principal, with full knowledge of the facts, either ratifies the act, in terms, or fails, within a reasonable time, to disapprove, the agent is not liable for the deviation from the agent's instructions. Bray & Bro.

v. Gunn, 53 Ga. 144, 1874 Ga. LEXIS 424 (1874).

Agent not liable if no actual damage. — If an agent, such as a cotton factor, who has been instructed by the cotton factor's principal to sell cotton belonging to the latter immediately and for the best price obtainable, fails to sell the cotton and thereby violates the contract with the principal, no actual damage is suffered by the principal when the cotton has not decreased in value from the time when the agent in the due exercise of the agent's commission should have sold the cotton and the time when the principal learned of the agent's violation of the agreement to sell and should have affirmed or disapproved of the agent's conduct in failing to sell. Vinson v. Kinney & Co., 30 Ga. App. 731, 119 S.E. 217, 1923 Ga. App. LEXIS 654 (1923).

No liability if agents' act in accordance with general custom of trade. — If cotton factors sued customers for advances made on cotton consigned to the cotton factors for sale, the customers could not set off damages because of a sale of the cotton for a lower price than the cotton factors had instructed it sold for, when, in accordance with the general custom and usage of the trade at the place of sale, the cotton was sold after the customers had failed to comply with repeated notices from the factors to deposit with them more margins and when, in the opinion of the factors, the cotton was not a sufficient security for the balance due them. Leffler Co. v. Pearson & Son, 17 Ga. App. 57, 86 S.E. 256, 1915 Ga. App. LEXIS 257 (1915).

Questions of fact. — Questions of the existence and extent of an agent's authority are generally for the triers of fact. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295, 1980 Ga. App. LEXIS 1924 (1980); Am. Global Dev. Group v. Sasser & Weatherford, Inc., 249 Ga. App. 479, 548 S.E.2d 465, 2001 Ga. App. LEXIS 533 (2001).

Issues of material fact as to validity of agent's transfer of property. — Genuine issues of material fact existed as to the validity of a property transfer because there was evidence that the actions of the agent in transferring the property were in contravention of the principal's actions and intent and were attempts to benefit the agent's own position. Harris v. Peterson, 318 Ga. App. 382, 734 S.E.2d 93, 2012 Ga. App. LEXIS 918 (2012).

Abuse of power of attorney in dealing with farm quotas. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments because certain claims were not untimely since genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497, 2014 Ga. App. LEXIS 808 (2014).

Burden of proving specific instructions. — If the contention of the principal is not that the agent exceeded the scope of the agent's general authority, but that the agent violated specific instructions as to a particular matter, the burden is upon the principal to show that such instructions were given. Lovejoy v. Lamar, 20 Ga. App. 499, 93 S.E. 153, 1917 Ga. App. LEXIS 953 (1917).

Power Coupled with Interest

Agent may have interest. — That an agent is not prohibited from having an interest is evident from former Code 1933, §§ 4-202 and 3575. Pendley v. Jessee, 134 Ga. App. 138, 213 S.E.2d 496, 1975 Ga. App. LEXIS 1934 (1975).

Agent who advances purchase price has interest. — Agent to sell becomes an agent with an interest when the agent advances the amount of the purchase price of the goods sold. Southern Trading Corp. v. Benchley Bros., Inc., 34 Ga. App. 625, 130 S.E. 691, 1925 Ga. App. LEXIS 450 (1925).

Unreasonable instructions may be disregarded. — Ordinarily, an agent must be guided wholly by the wishes or directions expressed by a principal, but in cases of an agency coupled with an

Power Coupled with Interest (Cont'd)

interest, unreasonable instruction, detrimental to the agent's interests, may be disregarded. Gordon & Co. v. Cobb, 4 Ga. App. 49, 60 S.E. 821, 1908 Ga. App. LEXIS 194 (1908).

If an agency is coupled with an interest and the principal gives to the agent unreasonable instructions detrimental to the agent's interest, the agent may disregard the instructions and act for the agent, provided the agent acts in good faith, and the principal would be bound thereby. Southern Trading Corp. v. Benchley Bros., Inc., 34 Ga. App. 625, 130 S.E. 691, 1925 Ga. App. LEXIS 450 (1925).

Bonded messenger. — If an express company employed a messenger and required the messenger to give bond, which provided that the messenger should "well and truly perform all the duties required of me in any position . . ., and indemnify and save harmless the said company from all liability on account of my fault or neglect," as between the company and the messenger, the messenger's liability was that of an agent and depended on the messenger's diligence or negligence, and it was erroneous to charge the latter part of this section, as the power of this agent to act in this business was not coupled with any interest in the sense of this section. Southern Express Co. v. Frink, 67 Ga. 201, 1881 Ga. LEXIS 153 (1881).

When Principal Bound by Agent's Act

1. Generally

Knowledge that agent exceeded authority. — Principal is not bound by the acts of an agent when those acts are beyond the scope of the agent's authority and the person dealing with the agent knows thereof. Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935).

Illegal acts. — Unless a borrower shows affirmatively that one who loaned the borrower money at the highest legal rate assented to the exaction of a commission by the latter's agent, it cannot be said that the lender ever understood and agreed that the collateral agreement between the agent and the borrower should be considered and become a part of the contract of loan. The borrower has no right to assume that even a general agent has power to bind a principal by such an agreement; for, the same being illegal and prohibited by law, the borrower is put upon immediate notice that the agent is transcending the agent's general powers and going beyond the legal scope of the agency. Burnett v. Lewis, 40 Ga. App. 525, 150 S.E. 462, 1929 Ga. App. LEXIS 626 (1929).

Ratification. — Principal is not chargeable with knowledge as to acts of an agent beyond the scope of the latter's authority, nor in anywise bound thereby; but the principal must be shown by the party so alleging to have either tacitly or expressly assented to or ratified such acts on the part of the agent before they can be considered as having any binding effect. Burnett v. Lewis, 40 Ga. App. 525, 150 S.E. 462, 1929 Ga. App. LEXIS 626 (1929).

Estoppel to deny liability. — Purchaser of personal property from one who is not the true owner acquires no title against the true owner by reason of the bona fides of the purchase, when the purchaser purchased from one who is an utter stranger to the title and who can convey no title, except if there may be some statute otherwise, or if the true owner, upon some principle of estoppel, would be precluded from asserting title. However, the mere permission by the owner for the agent to have possession of the truck would not be such an act as would estop the owner. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

Although a principal is not bound by a sealed instrument signed by an agent without authority to execute the instrument under seal, yet, having allowed the opposite party to act upon the instrument in a way to be prejudiced and to one's detriment but to the benefit of the principal, the principal is estopped from denying the validity of the instrument, and the court erred in excluding the instrument from the evidence and in directing the verdict for the plaintiff. Ferguson v.

Carter, 208 Ga. 143, 65 S.E.2d 600, 1951 Ga. LEXIS 305 (1951).

Liability for tort of driver, injuring driver's guest. — If agent, servant, or employee of defendant, while driving automobile in and about defendant's business and in performance of the services for which the agent was hired or which the agent contracted to perform for the agent's principal or master, invites a third person to ride with the agent as a guest and such third person is injured by reason of the negligence of the driver, no right of action arises in favor of such third person against the owner of the automobile for a tort committed by the driver as the owner's agent, servant, or employee. Beard v. Oliver, 52 Ga. App. 229, 182 S.E. 921, 1935 Ga. App. LEXIS 118 (1935).

Examination of special agent's authority. — In the case of a special agency for a particular purpose, it is the duty of the one dealing with the agent to examine the agent's authority. Van Arsdale v. Joiner, 44 Ga. 173, 1871 Ga. LEXIS 345 (1871).

Broker is deemed special agent. — Under former Code 1882, §§ 2184, 2194, 2196, a broker was a special agent and derived the broker's power and authority to bind a principal from the instruction given to the agent by a principal. Clark & Nunnally v. Cumming & Co., 77 Ga. 64, 1886 Ga. LEXIS 287 (1886).

Power to borrow must be express. — It was held under former Civil Code 1895, §§ 3004 and 3021, which laid down the rule as to how the principal was bound by the acts of an agent, that authority to borrow money was among the most dangerous powers which a principal can confer upon an agent and must be created by express terms or be necessarily implied from the very nature actually created. Exchange Bank v. Thrower, 118 Ga. 433, 45 S.E. 316, 1903 Ga. LEXIS 580 (1903).

Agency to sell does not necessarily carry with it authority to collect. — Agent must act within the authority granted the agent, and persons dealing with any agent appointed for a particular purpose are bound to inquire as to the extent of the agent's authority. Miles v. Smith, 37 Ga. App. 619, 141 S.E. 314, 1928 Ga. App. LEXIS 530 (1928).

Power to make restricted endorsement does not authorize general endorsement in blank. Exchange Bank v. Thrower, 118 Ga. 433, 45 S.E. 316, 1903 Ga. LEXIS 580 (1903).

Agent's authority limited by policy ends with cancellation thereof. — If authority of an agent is limited by the terms of the group insurance policy and such policy is cancelled, such agent is without authority to continue such cancelled policy in force, unless such continuation is accepted and agreed to by the officers of the company empowered so to do or there has been an acceptance by the company of payments of premiums made for such purpose, and such agent is without authority to constitute the employer in group insurance policy the agent of the company to receive premiums for the employer. Lancaster v. Travelers Ins. Co., 54 Ga. App. 718, 189 S.E. 79, 1936 Ga. App. LEXIS 739 (1936).

2. Act of Subagent Appointed by Agent

Acts of unauthorized assistant. — Relationship of master and servant cannot be imposed upon a person without the person's consent, express or implied; hence, the defendant was free to select defendant's own servant and was responsible for the acts of the servant within the scope of employment, but the defendant was not responsible for the act of an assistant permitted without the defendant's authority to act for the defendant. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

Driver appointed by agent. — Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive it on the business of the owner, is himself expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

Ratification of act of employment. — If a servant, who is employed to do certain work for a master, employs another person to assist the servant, the master is liable for the negligence of the

When Principal Bound by Agent's Act (Cont'd)
2. Act of Subagent Appointed by Agent (Cont'd)

assistant only when the servant had authority, express or implied, to employ the assistant, or when the act of employment is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953); Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961).

Agent not authorized to delegate authority to sell. — Agent for the sale of personal property has only the authority to sell. If an agent, who is authorized to sell trucks but not authorized to delegate such authority to another, undertakes to exceed the agent's authority by delivering a truck to an automobile dealer to sell, the agent was acting without authority and no title to the truck passed. Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844, 1950 Ga. App. LEXIS 814 (1950).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 162 et seq., 213 et seq.

C.J.S.

2A C.J.S., Agency, §§ 295, 300.

ALR.

Liability on the contract of one who without authority assumes to contract for another, 60 A.L.R. 1348.

Contract for development and sale of land as creating a power coupled with interest or supporting an equitable lien, 65 A.L.R. 1080.

Implied or ostensible authority of officer, agent, or employee to engage medical services, 71 A.L.R. 638.

Power to mortgage as authorizing insertion of power of sale in mortgage, 72 A.L.R. 158.

Authority of claim agent as regards terms or condition of settlement, 87 A.L.R. 1277.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 A.L.R. 389.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or apparently authorized, to find a market, 105 A.L.R. 718.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 A.L.R. 665.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 A.L.R. 893.

Gross or net profits as the measure of liability of agent or employee who has engaged in transactions on his own account in violation of his duty to his principal, 126 A.L.R. 1357.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 A.L.R. 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 A.L.R. 1152.

Agent's disregard of principal's instructions where power coupled with an interest, 162 A.L.R. 1182.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 A.L.R.2d 598.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

Agent's authority to agree contemporaneously with sale to repurchase or resell or for return of personal property, 34 A.L.R.2d 510.

Authority of agent to endorse and transfer commercial paper, 37 A.L.R.2d 453.

Salesman's power to pledge employer's or principal's personal property, 49 A.L.R.2d 1271.

Advertising agency as agent of advertising medium or of advertiser, 53 A.L.R.2d 1139.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6.

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 A.L.R.2d 1328.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 A.L.R.2d 1237.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 A.L.R.3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 A.L.R.3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 A.L.R.3d 907.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

10-6-22. Required standard of care.

An agent for hire shall be bound to exercise, about the business of his principal, that ordinary care, skill, and diligence required of a bailee for hire. A voluntary agent, without hire or reward, shall be liable only for gross neglect.

History.

Orig. Code 1863, § 2163; Code 1868, § 2159; Code 1873, § 2185; Code 1882, § 2185; Civil Code 1895, § 3009; Civil Code 1910, § 3581; Code 1933, § 4-203.

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Duty of diligence, loyalty, and absolute good faith implied. — Law implies, as a part of the contract by which every agency arises, that the agent agrees to have and exercise towards the agent's principal diligence, loyalty, and absolute good faith. Render & Hammett v. Hartford Fire Ins. Co., 33 Ga. App. 716, 127 S.E. 902, 1925 Ga. App. LEXIS 702 (1925); Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645, 1970 Ga. App. LEXIS 843 (1970).

Partnership and all partners liable for breach. — If the agent is a partnership, the partnership and all its members may be held liable for a violation of the duty of diligence, loyalty, and absolute good faith by any member as for a breach of contract. Render & Hammett v. Hartford Fire Ins. Co., 33 Ga. App. 716, 127 S.E. 902, 1925 Ga. App. LEXIS 702 (1925).

Delay in notifying principal of service of process. — If the law authorizes service of process upon a principal by service upon the agent, it is the agent's duty, when service is so made, to exercise diligence to notify the principal, and in default thereof, the agent will be liable for such damage as the principal may sustain. Render & Hammett v. Hartford Fire Ins. Co., 33 Ga. App. 716, 127 S.E. 902, 1925 Ga. App. LEXIS 702 (1925).

Money stolen because of failure to exercise ordinary care. — Agent would be liable if money was stolen as a result of the agent's failure to perform some duty with respect to the agent's handling and custody which rested on the agent

independently of the instructions under which the agent was acting, if such failure on the agent's part, under the circumstances, amounted to a failure to exercise ordinary care. Cave v. Lougee & Zimmer, 134 Ga. 135, 67 S.E. 667, 1910 Ga. LEXIS 134 (1910).

One undertaking to procure insurance liable for fraud or negligence. — If one undertakes to procure insurance for another and is guilty of fraud or negligence in the undertaking, one is liable for loss or damage to the limit of the agreed policy. Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645, 1970 Ga. App. LEXIS 843 (1970).

A cause of action will lie for breach of contract to procure insurance on behalf of another, and, irrespective of contractual duty, an action in tort may be based upon a misrepresentation that insurance coverage has been effected when no policy or binder has been issued. Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645, 1970 Ga. App. LEXIS 843 (1970).

Creditor selling security must use ordinary diligence. — If a bill of sale is given to secure debt and on maturity of the debt the creditor elects to exercise the right given therein to take possession of the security and to sell the security at private sale as the agent of the debtors, the creditor is acting as agent for the debtors in thus dealing with the security and must exercise ordinary diligence, such as persons of common prudence use in relation to their own affairs, in handling such security, having due regard to the rights of the debtors therein. Goldin v. Federal Intermediate Credit Bank, 50 Ga. App. 790, 179 S.E. 291, 1935 Ga. App. LEXIS 283 (1935).

Gratuitous agent. — Voluntary agent without reward is only liable for gross neglect in and about the business of the principal. Armstrong, Cator & Co. v. Pease, 66 Ga. 70, 1880 Ga. LEXIS 15 (1880).

Gratuitous agent owes the principal the duty to exercise slight diligence. Summerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716, 1979 Ga. App. LEXIS 1898 (1979).

Rule requiring mutuality of promises inapplicable to voluntary agent. — Rule that when mutual promises furnish the only consideration for a contract the promises must be mutually binding was inapplicable if the case was made to substantially rest on the theory that there was no valuable consideration for the agreement, but that the defendant agreed with the plaintiff to render certain services as the agent of the latter, and that the defendant was liable for gross neglect as a voluntary agent. Barber v. Roland, 143 Ga. 432, 85 S.E. 321, 1915 Ga. LEXIS 475 (1915).

Benefit held sufficient consideration to require ordinary care. — If the jury is authorized to find that the defendant voluntarily solicited control of the plaintiff's money for the purpose of lending the money to defendant's own customers and that the defendant wanted the money for this purpose because of some benefit or advantage which would accrue personally to the defendant by reason of the agency, the evidence upon this question, though circumstantial, authorizes the inference that the contract of agency was supported by a consideration and bound the defendant to ordinary care about the business of the principal. Benton v. Roberts, 41 Ga. App. 189, 152 S.E. 141, 1930 Ga. App. LEXIS 488 (1930).

Proper appraisal of agent's conduct encompasses knowledge which the agent professes to possess. Summerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716, 1979 Ga. App. LEXIS 1898 (1979) (gratuitous agent).

Charge substantially in the language of section is sufficient. National Pencil Co. v. Pinkerton's Nat'l Detective Agency, 19 Ga. App. 429, 91 S.E. 432, 1917 Ga. App. LEXIS 136 (1917).

Evidence was sufficient to create an issue for jury determination as to whether real estate agent negligently represented seller by failing to inform the seller that documents executed at closing granted the agent a security interest.

Welch v. Holley, 191 Ga. App. 532, 382 S.E.2d 128, 1989 Ga. App. LEXIS 685 (1989).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 185 et seq.

C.J.S.

2A C.J.S., Agency, § 300 et seq.

ALR.

Liability of agent for shrinkage or shortage in commodity purchased for principal, 8 A.L.R. 1120.

Duty of factor, broker, or commission merchant with respect to care and protection of goods entrusted to him, 17 A.L.R. 538.

Liability of real estate agent or broker to employer because of unfit character of purchaser or tenant procured by him, 60 A.L.R. 1379.

Personal liability of agent in respect of funds received from third person and turned over to principal not entitled thereto, 82 A.L.R. 307.

Advertising agency as agent of advertising medium or of advertiser, 53 A.L.R.2d 1139.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 A.L.R.2d 342.

Real-estate broker's liability to principal for accepting note, check, or property, rather than cash, as earnest money, 59 A.L.R.2d 1455.

Right of principal to recover punitive damages for agent's or broker's breach of duty, 67 A.L.R.2d 952.

Liability of real-estate broker to principal for negligence in carrying out agency, 94 A.L.R.2d 468.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 A.L.R.3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 A.L.R.3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 A.L.R.3d 907.

Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, 72 A.L.R.3d 704; 60 A.L.R.5th 165.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured, 72 A.L.R.3d 735.

Liability of insurance agent or broker on ground of inadequacy of property insurance coverage procured, 72 A.L.R.3d 747.

Liability of insurance agent or broker for placing insurance with insolvent carrier, 42 A.L.R.5th 199.

10-6-23. Instructions from multiple principals.

Where several persons shall appoint an agent to do an act for their joint benefit, the instructions of one, not inconsistent with the general directions, shall protect the agent in his act.

History.

Orig. Code 1863, § 2167; Code 1868, § 2163; Code 1873, § 2189; Code 1882, § 2189; Civil Code 1895, § 3013; Civil Code 1910, § 3585; Code 1933, § 4-207.

Law reviews.

For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 189 et seq.
C.J.S.
2A C.J.S., Agency, §§ 31, 282 et seq.
ALR.
Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 A.L.R.3d 1165.

10-6-24. Sale or purchase to self prohibited.

Without the express consent of the principal after a full knowledge of all the facts, an agent employed to sell may not himself be the purchaser; and an agent to buy may not himself be the seller.

History.
Orig. Code 1863, § 2164; Code 1868, § 2160; Code 1873, § 2186; Code 1882, § 2186; Civil Code 1895, § 3010; Civil Code 1910, § 3582; Code 1933, § 4-204.
Law reviews.
For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

Principles set forth in section are generally applicable when the agent is acting or should be acting as such for the agent's principal in dealing with third persons. Smith v. Pennington, 192 Ga. 478, 15 S.E.2d 727, 1941 Ga. LEXIS 517 (1941).

Sale by agent to self. — As a general rule, one employed by an owner of property to sell the property as an agent is not authorized to sell the property to himself or herself alone or with others. Mayor of Macon v. Huff, 60 Ga. 133, 1878 Ga. LEXIS 398 (1878); Mitchell v. Gifford & Co., 133 Ga. 823, 67 S.E. 197, 1910 Ga. LEXIS 73 (1910); Peterson v. Appleby, 31 Ga. App. 286, 120 S.E. 651, 1923 Ga. App. LEXIS 891 (1923).

Transfer option to purchase by agent personally. — Plaintiffs, a firm of brokers with whom the defendant had listed real estate for sale, were not entitled to recover a commission from the defendant for services in procuring a prospective purchaser, who obtained from the defendant an option for the purchase of the property and transferred the option to one of the plaintiffs. Peterson v. Appleby, 31 Ga. App. 286, 120 S.E. 651, 1923 Ga. App. LEXIS 891 (1923).

Absence of principal's knowledge and consent. — Agent or attorney employed to sell property cannot directly or indirectly become the purchaser without the principal's knowledge and consent. Reeves v. Callaway, 140 Ga. 101, 78 S.E. 717, 1913 Ga. LEXIS 43 (1913).

Agent who has been engaged to sell real estate for the owner may not, either directly or indirectly, purchase the real estate personally, without the express consent of the principal after full knowledge of all the facts. Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109, 1948 Ga. LEXIS 497 (1948).

Agent employed to sell may not purchase the principal's property without the express consent of the latter after a full

disclosure of all the facts. Youngblood v. Mock, 143 Ga. App. 320, 238 S.E.2d 250, 1977 Ga. App. LEXIS 2303 (1977).

Sale voidable. — If an agent for the purpose of selling property of the principal purchases the property personally, either directly or through the instrumentality of a third person, the sale is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except the principal's own confirmation, after full knowledge of all the facts. Fraud on the part of the agent or injury to the principal is therefore unessential. Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109, 1948 Ga. LEXIS 497 (1948).

Subagents. — Subagent's duties and obligations to the principal are of the same nature and extent as those of the agent, and a sale of the principal's real estate by the subagent to the subagent, without express consent of the principal with full knowledge of all the facts, will likewise be set aside at the option of the principal. Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109, 1948 Ga. LEXIS 497 (1948).

Trustees. — Trustee could not buy at the trustee's own lawful sale. For a stronger reason, the trustee could not buy at a sale brought about by the trustee's own unlawful conduct. Bourquin v. Bourquin, 120 Ga. 115, 47 S.E. 639, 1904 Ga. LEXIS 457 (1904).

Sales under which agent assumes all losses and takes all profits. — Agent to sell is not, without the consent of the agent's principal, authorized to make sales in foreign markets under an arrangement whereby the agent should assume all risks and contingencies of loss and take all the profits, as this would amount to a sale by the agent to the agent, and one cannot lawfully do by indirection what one is positively forbidden to do. Atlantic Turpentine & Pine Tar Co. v. Rosin & Turpentine Export Co., 247 F. 618, 1918 U.S. Dist. LEXIS 1247 (D. Ga. 1918).

Good faith no defense. — It is no defense for an agent and the agent's associate to show that the agent acted in good faith in selling to the agent in association with another and that the transaction was in fact for the best interest of the principal; the law does not inquire in such a case whether there is any fraud, but gives the principal the absolute right to repudiate the transaction because the law will not allow an agent to take a position which is so inconsistent with the agent's duty to the agent's principal. Reeves v. Callaway, 140 Ga. 101, 78 S.E. 717, 1913 Ga. LEXIS 43 (1913); Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Agent must account for property purchased and proceeds. — When the principal executes, without reading them, written instruments which have been prepared by the agent in which the agent is named grantee, and the agent thereafter conveys to a third person a part of the property so conveyed to the agent and claims the rest of the property as purchaser under deeds executed by the principal, a court of equity will decree an implied trust upon the proceeds derived from the sale of the property to the third person and upon the property remaining in the agent and will enforce an accounting between the parties. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

First duty of an agent is that of loyalty to the trust; the agent must not be in relations which are antagonistic to that of the agent's principal; the agent's duty and interest must not be allowed to conflict; the agent cannot deal in the business within the scope of the agent's agency for the agent's own benefit, nor is the agent permitted to compromise the agent's responsibilities by attempting to serve two masters having a contrary interest, unless it be that such contracts of dual agency are known to each of the principals. Arthur v. Georgia Cotton Co., 22 Ga. App. 431, 96 S.E. 232, 1918 Ga. App. LEXIS 376 (1918); Clyde Chester Realty Co. v. Stansell, 151 Ga. App. 357, 259 S.E.2d 639, 1979 Ga. App. LEXIS 2595 (1979).

Agent cannot have any interest nor do any act adverse to the interest of

General Consideration (Cont'd)

the agent's principal or incompatible with the application of the agent's best skill, zeal, and diligence to the promotion of that interest. Franco v. Stein Steel & Supply Co., 227 Ga. 92, 179 S.E.2d 88, 1970 Ga. LEXIS 402 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137, 1971 U.S. LEXIS 1982 (1971); Clyde Chester Realty Co. v. Stansell, 151 Ga. App. 357, 259 S.E.2d 639, 1979 Ga. App. LEXIS 2595 (1979).

Antagonism between the agent and principal. — It is contrary to public policy for an agent, without the full knowledge and consent of a principal, to do any act or make any contract in carrying out the business of the agency, the effect of which will be to bring the personal interests of the agent in antagonism with those of the principal. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

No man can serve two masters. — Former Civil Code 1895, §§ 3010, 3011 and 3014 followed the rule that "no man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." Gann v. Zettler, 3 Ga. App. 589, 60 S.E. 283, 1908 Ga. App. LEXIS 380 (1908).

Personal and representative interests must not conflict. — Underlying thought is that an agent should not unite an agent's personal and representative characters in the same transaction; and equity will not permit an agent to be exposed to the temptation or brought into a situation where the agent's own personal interests conflict with the interests of the agent's principal and with the duties which the agent owes to the principal. Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109, 1948 Ga. LEXIS 497 (1948).

Principal can rely on agent's representations. — When the relation of principal and agent arises, the utmost fidelity is imposed upon the agent; the principal can in law rely upon the agent's statements and representations without the necessity of establishing their genuineness. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Right to presume papers tendered by agent will not give agent adverse interest. — Principal has a right to presume that all papers tendered to the principal are as represented by the agent and not contracts under which the agent can derive an interest in opposition to the principal's own. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Decisions requiring party to read unless prevented by fraud are inapplicable. — Cases holding to the effect that a party who can read must read and fraud which will relieve a party who can read must be such as prevents the party from reading have no application when a confidential and fiduciary relationship of principal and agent is involved. Youngblood v. Mock, 143 Ga. App. 320, 238 S.E.2d 250, 1977 Ga. App. LEXIS 2303 (1977) (action by principal against agent for breach of fiduciary duty).

Application

Agent making sale to corporation. — Conveyance by an agent authorized to sell, being made to a corporation of which the agent is president and a stockholder, may be treated as void by the principal. Whitley v. James, 121 Ga. 521, 49 S.E. 600, 1904 Ga. LEXIS 219 (1904); Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Partner of agent. — When realtor was acting as agent in the sale of property, neither the agent nor the agent's partner could become the purchaser of the property without the express consent of the plaintiffs after full knowledge of all the facts. Kellett v. Boynton, 87 Ga. App. 692, 75 S.E.2d 292, 1953 Ga. App. LEXIS 830 (1953).

Listing of property at fixed or minimum price. — Rule forbidding an agent or subagent from purchasing the principal's property, without the express consent and knowledge of the principal, is not made inapplicable because the property was listed for sale with the agency at a fixed or minimum price.

Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109, 1948 Ga. LEXIS 497 (1948).

Indirect purchase through father-in-law. — Testimony and documents relating to a sales contract wherein an agent's father-in-law was named as the purchaser was admissible to show the initiation by the agent of an undisclosed effort on the agent's part to earn a secret personal profit on the eventual resale of the property by first attempting to purchase the property indirectly through the agent's father-in-law. Johnson Realty, Inc. v. Hand, 189 Ga. App. 706, 377 S.E.2d 176, 1988 Ga. App. LEXIS 1507 (1988).

Mayor may not rent from city. — Mayor of a city while in office cannot contract with the city council to rent a city park. Mayor of Macon v. Huff, 60 Ga. 221, 1878 Ga. LEXIS 427 (1878).

Court-approved investment in stock of trustee-bank. — Money invested in the capital stock of a bank under order of court, when the bank was acting as trustee, was legal as this was in no sense such a case as provided against in this section, and the principal had full knowledge of all the facts, and the sale had the specific authority of judicial sanction. Haddock v. Planters' Bank, 66 Ga. 496, 1881 Ga. LEXIS 43 (1881).

Contractual power of sale in security deed authorizing purchase by grantee. — When a deed to secure a debt provides that the grantee may sell the property upon default and may bid and purchase at such sale, the power of sale is a power coupled with an interest and is absolute for the purposes therein mentioned, without any element of personal confidence in the grantee or limitation as to discretion. The power, being of such character by contract of the parties, is not inhibited by this section. Smith v. Bukofzer, 180 Ga. 209, 178 S.E. 641, 1935 Ga. LEXIS 221 (1935).

Scope of attorney-client relationship. — Relationship of attorney and client is fiduciary in character, but this does not extend beyond the subject matter for which the services of the lawyer have been retained. Jerry Lipps, Inc. v. Postell, 139 Ga. App. 595, 229 S.E.2d 78, 1976 Ga. App. LEXIS 1900 (1976) (no breach of duty by attorneys).

Insurance agent may not represent company and property owner. — Agent of a fire insurance company, authorized to contract for insurance in its behalf, cannot, without the company's consent, become in the agent's individual character the agent of a property owner who desires to obtain insurance in that company. Ramspeck v. Pattillo, 104 Ga. 772, 30 S.E. 962, 1898 Ga. LEXIS 425 (1898).

Real estate agent may not collect commissions from both parties. — Agent who secretly undertakes to represent both parties to a transaction is not permitted to recover commissions from either of them. This rule applies to real estate agents as well as others. Williams v. Moore-Gaunt Co., 3 Ga. App. 756, 60 S.E. 372, 1908 Ga. App. LEXIS 424 (1908).

Real estate agent may collect commissions from both parties if all have so agreed. — When it is clearly understood by all the parties that one who is paid commissions to sell cotton is also to charge commissions from the buyer, the transaction is not illegal. Talcott v. Chew, 27 F. 273, 1885 U.S. App. LEXIS 2419 (C.C.D. Ga. 1885).

OPINIONS OF THE ATTORNEY GENERAL

Real estate broker may not retain the amount received above the net listing, in excess of the broker's usual commission, unless the broker's contract with the seller so provides, and may not conceal from the seller the amount received from the purchaser. 1945-47 Ga. Op. Att'y Gen. 510.

RESEARCH REFERENCES

C.J.S.

2A C.J.S., Agency, § 286 et seq.

ALR.

Rights and remedies of principal where agent professes to sell principal's property without disclosing that he is the purchaser, 62 A.L.R. 63.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

Rights and obligations of real estate broker employed to sell property as affected by option to purchase for himself, 164 A.L.R. 1378.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

Liability of vendor's real estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 A.L.R.2d 342.

10-6-25. Personal profit off principal's property prohibited.

The agent shall not make a personal profit from his principal's property; for all such he is bound to account.

History.

Orig. Code 1863, § 2165; Code 1868, § 2161; Code 1873, § 2187; Code 1882, § 2187; Civil Code 1895, § 3011; Civil Code 1910, § 3583; Code 1933, § 4-205.

Law reviews.

For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965).

JUDICIAL DECISIONS

Principles set forth in this section are generally applicable when the agent is acting or should be acting as such for the agent's principal in dealing with third persons. Smith v. Pennington, 192 Ga. 478, 15 S.E.2d 727, 1941 Ga. LEXIS 517 (1941).

Public agents are included under this section. Mayor of Macon v. Huff, 60 Ga. 221, 1878 Ga. LEXIS 427 (1878).

Trustees can never be allowed to derive a personal advantage from the use of the trustee's principal's property. Rogers v. Dickey, 117 Ga. 819, 45 S.E. 71, 1903 Ga. LEXIS 349 (1903).

Duty of agent. — Arthur v. Georgia Cotton Co., 22 Ga. App. 431, 96 S.E. 232, 1918 Ga. App. LEXIS 376 (1918); Franco v. Stein Steel & Supply Co., 227 Ga. 92, 179 S.E.2d 88, 1970 Ga. LEXIS 402 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137, 1971 U.S. LEXIS 1982 (1971).

Loyalty to the principal is the primary obligation of the agent. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326, 1950 Ga. LEXIS 354 (1950).

Loyalty and good faith required of agent. — Relationship of principal and agent is confidential and fiduciary and demands of the agent loyalty and good faith to the principal. Kellett v. Boynton, 87 Ga. App. 692, 75 S.E.2d 292, 1953 Ga. App. LEXIS 830 (1953).

Agent cannot have any interest or do any act adverse to the interest of the agent's principal or which is incompatible with the application of the agent's skill and diligence to the promotion of that interest. Franco v. Stein Steel & Supply Co., 227 Ga. 92, 179 S.E.2d 88, 1970 Ga. LEXIS 402 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137, 1971 U.S. LEXIS 1982 (1971).

Antagonism between agent and principal. — Agent must not put oneself in relations which are antagonistic to that of the agent's principal; the agent's duty and interest must not be allowed to conflict; the agent can not deal in the

business within the scope of the agent's agency for the agent's own benefit. Arthur v. Georgia Cotton Co., 22 Ga. App. 431, 96 S.E. 232, 1918 Ga. App. LEXIS 376 (1918).

Personal benefit to agent. — Agent cannot engage in the business of the agent's principal for the agent's personal benefit and profit within the scope of the agency. Franco v. Stein Steel & Supply Co., 227 Ga. 92, 179 S.E.2d 88, 1970 Ga. LEXIS 402 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137, 1971 U.S. LEXIS 1982 (1971).

Relation of principal and agent is a fiduciary one, and the agent may not make a profit for the agent out of the relationship, or out of knowledge obtained from the relationship, to the injury of the principal. Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307, 1949 Ga. LEXIS 514 (1949).

If the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the defendant could not make advantage or profit for the defendant out of the relationship to the injury of the defendant's principal. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

Scope of agent's power. — There was no merit to a homeowner's argument that a restrictive covenant barring "For Sale" signs in a subdivision did not apply to the homeowner's real estate agent; under O.C.G.A. §§ 10-6-20 and 10-6-25, an agent could do no more than a principal. Godley Park Homeowners Ass'n v. Bowen, 286 Ga. App. 21, 649 S.E.2d 308, 2007 Ga. App. LEXIS 677 (2007).

Gift or purchase from principal closely scrutinized. — It is for the common security of mankind that gifts procured by agents, and purchases made by the agents, from the agent's principals, should be scrutinized with a close and vigilant suspicion. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

Breach of faith requirement is fraud in itself. — Relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to the agent's principal, and any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit, and also from claiming the agent's commissions. Peevy v. Wilkes, 48 Ga. App. 114, 172 S.E. 108, 1933 Ga. App. LEXIS 480 (1933); Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

Principal need not show actual or moral fraud. — Under former Civil Code 1910, §§ 3582, 3583 and 4628, an agent to buy and resell property for the agent's principals cannot lawfully make a secret profit from the transaction; nor is it necessary to the application of this rule that the principal must show actual or moral fraud. Ausley v. Cummings, 145 Ga. 750, 89 S.E. 1071, 1916 Ga. LEXIS 466 (1916).

Contract obtained by violation is void. — Contract, no matter how solemnly expressed, obtained by an agent from the agent's principal through a violation of the loyalty and good faith imposed by the confidential relation, is void and is not enforceable in law or in equity. Peevy v. Wilkes, 48 Ga. App. 114, 172 S.E. 108, 1933 Ga. App. LEXIS 480 (1933).

Agent is trustee as to any advantage obtained. — Relation of principal and agent is a fiduciary one, and the latter cannot make advantage and profit for oneself out of the relationship, or out of knowledge thus obtained, to the injury of one's principal; and the agency being established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the scope and by reason of such agency. Peevy v. Wilkes, 48 Ga. App. 114, 172 S.E. 108, 1933 Ga. App. LEXIS 480 (1933).

Relation of principal and agent is a fiduciary one, and if the agent obtains any advantage or profit out of the relationship to the injury of the principal, one becomes a trustee. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326, 1950 Ga. LEXIS 354 (1950).

Good faith no defense. — It is no defense for an agent and the agent's associate to show that the agent acted in good faith in selling to the agent in association with another and that the transaction was in fact for the best

interest of the principal; the law does not inquire in such a case whether there is any fraud, but gives the principal the absolute right to repudiate the transaction because it will not allow an agent to take a position which is so inconsistent with the agent's duty to the agent's principal. Reeves v. Callaway, 140 Ga. 101, 78 S.E. 717, 1913 Ga. LEXIS 43 (1913); Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793, 1936 Ga. LEXIS 375 (1936).

Principal may rely on agent's representations. — Because of their fiduciary relationship, a principal is justified in relying upon the representations of the principal's agent and in failing to read and know the contents of the various deeds signed by the principal. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

Numerous decisions to the effect that a party who can read, must read, and that fraud which will relieve a party who can read must be such as prevents one from reading, apply to situations where the parties are dealing with each other at arms length and have no application to a situation where the confidential and fiduciary relation of principal and agent is involved. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

Power of attorney. — When the clear and unambiguous purpose of the power of attorney is to serve and benefit only the grantor of the power, there is no authorization for the agent to use such powers on the agent's own behalf, i.e., to secure a personal loan for the agent. First Nat'l Bank v. Cooper, 252 Ga. 215, 312 S.E.2d 607, 1984 Ga. LEXIS 653 (1984).

Duty terminates upon termination of agency. — Principles of agency will not sustain grant of an injunction prohibiting competition after agency relationship is terminated. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290, 1982 Ga. LEXIS 928 (1982).

Agent taking over principal's position with company deemed disloyal. — Agent can do nothing more disloyal to the agent's principal than contacting the agent's principal's employer and taking over the latter's position with the company. Koch v. Cochran, 251 Ga. 559, 307 S.E.2d 918, 1983 Ga. LEXIS 907 (1983).

Breach of duty of loyalty by employee. — Trial court's finding that a former employee breached the duty of loyalty to a former employer was supported by some evidence because competition against the employer by the employer's employees was specifically prohibited by the terms of the employee manual, the employee agreed to abide by the employee manual, and the employee engaged in a rival business while employed by the employer. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532, 2011 Ga. App. LEXIS 849 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Real estate broker may not retain the amount received above the net listing, in excess of the broker's usual commission, unless the broker's contract with the seller so provides, and may not conceal from the seller the amount received from the purchaser. 1945-47 Ga. Op. Att'y Gen. 510.

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 221, 225.

C.J.S.

2A C.J.S., Agency, §§ 316, 317.

ALR.

Right of agent to offset his own claim against collection made for principal, 2 A.L.R. 132.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 A.L.R. 906.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 A.L.R. 464.

Duty of principal to discover and notify third persons of wrongful disposal of property by agent not assuming to act for principal, 35 A.L.R. 325.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

Salesman's power to pledge employer's or principal's personal property, 49 A.L.R.2d 1271.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 A.L.R.2d 342.

10-6-26. Dispute of principal's title.

An agent may not dispute his principal's title, except in such cases where legal proceedings, at the instance of others, shall have been commenced against him.

History.

Orig. Code 1863, § 2166; Code 1868, § 2162; Code 1873, § 2188; Code 1882, § 2188; Civil Code 1895, § 3012; Civil Code 1910, § 3584; Code 1933, § 4-206.

JUDICIAL DECISIONS

Agent cannot dispute principal's title. — One who undertakes to act as the agent of another cannot dispute the right or title of the agent's principal in and to the subject of the agency. Morgan v. Morgan, 160 Ga. 472, 128 S.E. 674, 1925 Ga. LEXIS 188 (1925).

Agent may not attack transfer to principal. — If there was an agreement between J and B that the latter should hold a certificate to secure a debt due B by J, and if J, for the purpose of securing such debt, delivered the certificate to B and the latter delivered the certificate to L for safekeeping, L could not defeat a recovery of the certificate by B on the ground that there was no written assignment of the certificate by J to B. Loveless v. Bridges, 136 Ga. 338, 71 S.E. 166, 1911 Ga. LEXIS 530 (1911).

Denial of authority to sign principal's name. — If a person signs the name of another to a note, purportedly as a joint obligor, one will be estopped to assert, in an action thereon by an innocent holder for value, that one did not have the authority to sign the name of such other party to the note. Williams v. Atlanta Nat'l Bank, 31 Ga. App. 212, 120 S.E. 658, 1923 Ga. App. LEXIS 856 (1923).

Denial that agent holds money as county agent by showing money was borrowed without authority. — If the authorities in charge of the finances of a county borrowed money for county purposes without authority of law, and the money thus unlawfully borrowed was received by the county treasurer as county funds and kept with the lawful money of the county, one was estopped from denying that one held this borrowed money by virtue of one's office as treasurer, and was liable for the same upon one's official bond. Mason v. Commissioners of Rds. & Revenues, 104 Ga. 35, 30 S.E. 513, 1898 Ga. LEXIS 278 (1898).

Agent's declarations are not admissible to disparage principal's title. — Declarations of an agent, who is in possession of realty merely to manage and care for the realty, are not admissible in evidence against the principal to disparage the principal's title. Sweeney v. Sweeney, 119 Ga. 76, 46 S.E. 76, 1903 Ga. LEXIS 39 (1903).

Principal's title may be defense to subagent. — While an agent cannot dispute one's principal's title except in certain instances, yet if one is in possession of cattle merely by virtue of an employment by an officer of the corporation, one would not because of these facts be estopped from defending upon the ground that the title was in the

company. Paschal v. Godley, 34 Ga. App. 321, 129 S.E. 565, 1925 Ga. App. LEXIS 250 (1925).

Agent may restore note to principal despite another's demand. — One in possession of a promissory note as agent for another is not cut off from restoring the note to one's principal though a demand upon one for the note has been made by another claimant. Wando Phosphate Co. v. Parker, 93 Ga. 414, 21 S.E. 53, 1893 Ga. LEXIS 449 (1893).

Dispute as to possession between principal and agent. — When dispute arises as to right of agent or principal to possession of property in hands of agent, title to that property must, of necessity, be decided. Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.), 15 B.R. 232, 1981 Bankr. LEXIS 2579 (Bankr. N.D. Ga. 1981), rev'd, 25 B.R. 729, 1982 U.S. Dist. LEXIS 16133 (N.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, §§ 14, 62, 139.
C.J.S.
2A C.J.S., Agency, § 265.
ALR.
Liability of one who signs commercial paper in blank to be used for his own benefit where it is wrongfully used by an agent or employee, 43 A.L.R. 198.

10-6-27. Principal's right of recovery.

A principal may follow his money deposited by an agent in the latter's name and recover the same wherever found, unless the rights of innocent third persons shall have intervened.

History.
Civil Code 1895, § 3005; Civil Code 1910, § 3577; Code 1933, § 4-208.
History of Code section.
This Code section is derived from the decision in Spain v. W.H. Beach & Son, 52 Ga. 494 (1874).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 247.
C.J.S.
2A C.J.S., Agency, § 300 et seq.
ALR.
Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 A.L.R. 1055.

Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary, as charging bank with notice of misappropriation, 57 A.L.R. 925; 64 A.L.R. 1404; 106 A.L.R. 836; 115 A.L.R. 648.

Deposit by trustee of funds of separate trusts in a single bank account, 117 A.L.R. 179.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 A.L.R. 361.

10-6-28. Effect of bank failure.

If the money of a principal shall be deposited by a private agent in the name of the principal in the hands of a bank of good credit and the

deposit is according to the common usage of the place, the agent shall not be responsible for any loss arising from the failure of the bank.

History.
Civil Code 1895, § 3008; Civil Code 1910, § 3580; Code 1933, § 4-209.
History of Code section.
This Code section is derived from the decision in Rogers v. Hopkins & Glenn, 70 Ga. 454 (1883).

JUDICIAL DECISIONS

Demand deposit by fiduciary not investment requiring court order. — Deposit in a bank by a fiduciary, such as a guardian, of trust funds in the fiduciary's custody and control, subject to the fiduciary's withdrawal on demand, does not constitute an investment of the funds which can be made only by an order of court. Gross v. Butler, 48 Ga. App. 750, 173 S.E. 866, 1934 Ga. App. LEXIS 182 (1934).

Guardian not insurer of safety of deposited funds. — Whatever duty may rest upon a guardian to invest the funds of a ward in securities such as the guardian may be legally authorized to invest the funds in, the guardian is not an insurer of the safety of the funds in the guardian's hands and is not liable for the funds' loss, when, in handling the funds, the guardian has acted in good faith and in the exercise of the care and diligence required of an ordinarily prudent person. Gross v. Butler, 48 Ga. App. 750, 173 S.E. 866, 1934 Ga. App. LEXIS 182 (1934).

Guardian not liable for bank failure when required care was exercised. — When the guardian has, in the guardian's fiduciary capacity, deposited the funds subject to withdrawal by the guardian at any time, in a bank of solvent reputation and which the guardian has no reason to believe is insolvent and the funds, through no fault of the guardian, are lost by the insolvency of the bank, the guardian has thereby exercised the care and diligence required of the guardian in the handling of the funds, and is not liable for their loss. Gross v. Butler, 48 Ga. App. 750, 173 S.E. 866, 1934 Ga. App. LEXIS 182 (1934).

Deposit must be in name of estate. — It is the duty of a trustee or administrator to deposit money belonging to the estate in the name of the particular estate. Gatewood v. Furlow, 19 Ga. App. 74, 90 S.E. 973, 1916 Ga. App. LEXIS 51 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 116 et seq.
C.J.S.
2A C.J.S., Agency, § 315 et seq.
ALR.
Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 A.L.R. 1381.

Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 A.L.R. 1055.

Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary, as charging bank with notice of misappropriation, 57 A.L.R. 925; 64 A.L.R. 1404; 106 A.L.R. 836; 115 A.L.R. 648.

Personal liability of agent in respect of funds received from third person and turned over to principal not entitled thereto, 82 A.L.R. 307.

Responsibility of attorney, broker, or other agent depositing his principal's money in his own name or account for loss resulting from the failure of depository or depreciation of currency, 96 A.L.R. 798.

Liability of attorney for loss of client's

money or personal property in his possession or entrusted to him, 26 A.L.R.2d 1340.

10-6-29. Mingling goods.

An agent, by willfully mingling his own goods with those of his principal, shall not create a tenancy in common; but, if incapable of separation, the whole shall belong to the principal.

History.
Orig. Code 1863, § 2171; Code 1868, § 2167; Code 1873, § 2193; Code 1882, § 2193; Civil Code 1895, § 3020; Civil Code 1910, § 3592; Code 1933, § 4-210.

JUDICIAL DECISIONS

Agent cannot create tenancy in common by mingling goods. — Special agent, by mingling the agent's own goods with those of the agent's principal, cannot create a tenancy in common. Hall v. Page, 4 Ga. 428, 1848 Ga. LEXIS 49 (1848).

Agent loses agent's property unless confusion was innocent. — By virtue of this section if one fraudulently, willfully, or wrongfully mixes or confuses one's goods with those of another and cannot distinguish one's own, one will lose the goods; but when one does so innocently or by mistake, if one can distinguish them or show their value or their proportion of value to the whole, one ought in equity to be allowed to do so. The question is for the jury. Claflin & Co. v. Continental Jersey Works, 85 Ga. 27, 11 S.E. 721, 1890 Ga. LEXIS 2 (1890).

Agent liable for all mingled funds absent proof as to each source. — When an administrator sold as a unit and for a lump sum four parcels of land, as to only two of which the administrator has obtained an order of court, the administrator in thus causing a confusion of funds brings upon oneself and one's security the burden of showing what proportion of the funds were derived from the sale of the other two parcels, in order to escape liability therefor; and, upon a failure to carry such burden the administrator was held liable for the entire sum. American Sur. Co. v. Pettie, 178 Ga. 26, 171 S.E. 916, 1933 Ga. LEXIS 6 (1933).

Agent must separate agent's own funds to claim the funds. — Factor with whom property has been deposited who, after having made advancements to the owner upon the property, sells a portion of the property during the owner's lifetime and applies the proceeds thereof upon the indebtedness and sells the remainder of the property after the death of the owner, must, when one is entitled to the proceeds of the property sold before the death of the owner, but, by reason of a claim of the widow and minor children of the owner to a year's support, is not entitled to the proceeds of the property sold after the death of the owner, before one can assert one's claim to the proceeds of the property to which one is entitled, separate and distinguish them from the proceeds of the property sold after the death of the owner. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204, 1933 Ga. App. LEXIS 584 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 195.

C.J.S.
2A C.J.S., Agency, § 315 et seq.

ALR.
Responsibility of attorney, broker, or other agent depositing his principal's money in his own name or account for loss

resulting from the failure of depository or depreciation of currency, 96 A.L.R. 798.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 A.L.R. 361.

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 A.L.R.2d 1340.

10-6-30. Proper accounting required.

It shall be the duty of agents, trustees, administrators, guardians, conservators, receivers, and all other fiduciaries to keep their accounts in a regular manner and to be always ready with them supported by proper vouchers; neglect of this duty shall be ground for charging them with interest on balances on hand and with costs.

History.

Civil Code 1895, § 3007; Civil Code 1910, § 3579; Code 1933, § 4-211; Ga. L. 2006, p. 805, § 2/SB 534.

History of Code section.

This Code section is derived from the decisions in Dowling v. Feeley, 72 Ga. 557 (1884), and Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92 (1886).

JUDICIAL DECISIONS

Proof of compliance with section. — Burden of proof is upon the agent to show compliance with this section. Dodge v. Hatchett, 118 Ga. 883, 45 S.E. 667, 1903 Ga. LEXIS 752 (1903).

While ordinarily one attacking a return of a guardian has the burden to impeach the correctness thereof, the burden of proof is upon the guardian to show compliance with this section. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Supporting claim with vouchers. — When a receiver is called upon for an accounting, the burden is upon the receiver to support the claim for expenditures by proper vouchers or to show some sufficient reason why the receiver cannot do so. Dodge v. Hatchett, 118 Ga. 883, 45 S.E. 667, 1903 Ga. LEXIS 752 (1903); Merritt v. George, 168 Ga. 497, 148 S.E. 334, 1929 Ga. LEXIS 175 (1929).

Proper accounting and payment over by agent is presumed. — There is a legal presumption, in the absence of proof to the contrary, that an agent has performed the agent's duty and paid over and accounted to the agent's principal for moneys collected by the agent in the agent's capacity as agent, and the burden is on the principal to show the contrary. Kelley v. Carolina Life Ins. Co., 48 Ga. App. 106, 171 S.E. 847, 1933 Ga. App. LEXIS 478 (1933).

Guardian making an annual return should lay the guardian's account before the probate court, plainly setting forth, with sufficient certainty, the guardian's charges against the ward. This account is the case the guardian should prove. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Vouchers are the guardian's evidence to support the guardian's account. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Vouchers entitled to no weight as evidence. — Vouchers are entitled to no weight as evidence on the score that the probate court allowed the vouchers. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Annual returns of a guardian, allowed by the probate court, are only prima facie evidence of the correctness thereof, and in an application for a settlement the returns may be attacked by the ward, the

burden being on the ward to impeach the returns. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Approval of returns is not final, conclusive judgment. — Approval of returns by the probate court, made when the ward was an infant and unable to question the legality and accuracy of such returns and of the expenditures charged against the estate, is not intended to mean a final, conclusive judgment, but only a conditional judgment contingent upon further needs. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

Returns may be attacked by ward upon reaching majority. — Purported vouchers or receipts are not alone sufficient to constitute conclusive evidence that such expenditures were made. Their approval by the court being prima facie only, an attack by the ward, upon discovering after reaching majority that such expenditures were not made and that there were not proper vouchers attached to the items of the returns including such expenditures, is not subject to dismissal. Pettigrew v. Williams, 65 Ga. App. 576, 16 S.E.2d 120, 1941 Ga. App. LEXIS 356 (1941).

OPINIONS OF THE ATTORNEY GENERAL

County administrator/county guardian may aggregate the funds of the estates the administrator administers in a single fiduciary account provided that accurate records are maintained separately identifying the monies and disbursements of each estate included in the aggregation. 1982 Op. Att'y Gen. No. U82-31.

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 195 et seq., 264 et seq.

Am. Jur. Pleading and Practice Forms.

24 Am. Jur. Pleading and Practice Forms, Trusts, § 248 et seq.

C.J.S.

2A C.J.S., Agency, § 311 et seq.

ALR.

Authority of agent to assent to account stated, 2 A.L.R. 71.

Right of agent to offset his own claim against collection made for principal, 2 A.L.R. 132.

Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 A.L.R. 1055.

Necessity of proof by trustee that charges or expenses for which he claims credit upon an accounting were proper disbursements, 13 A.L.R. 364.

Rate of interest chargeable against guardians, executors or administrators, and trustees, 37 A.L.R. 447; 55 A.L.R. 950; 112 A.L.R. 833; 156 A.L.R. 936.

Deposit by trustee of funds of separate trusts in a single bank account, 117 A.L.R. 179.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 A.L.R. 361.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

10-6-31. Commission and expenses.

An agent who shall have discharged his duty shall be entitled to his commission and all necessary expenses incurred about the business of his principal. If he shall have violated his engagement, he shall be entitled to no commission.

History.
Orig. Code 1863, § 2168; Code 1868, § 2164; Code 1873, § 2190; Code 1882, § 2190; Civil Code 1895, § 3014; Civil Code 1910, § 3586; Code 1933, § 4-212.

JUDICIAL DECISIONS

Agent impliedly agrees to exercise good faith. — Law implies as a part of the contract by which every agency arises that the agent agrees to have and exercise for and toward a principal loyalty and absolute good faith. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

Deception bars benefit to agent. — If the agent practices upon the principal any deception (whether intentional or not) whereby the principal is misled and damaged and the agent would reap any benefit, the transaction is fraudulent, and the courts will not allow the agent to take or retain the benefit. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

Agent must act in fiduciary manner for compensation. — Agent is entitled to compensation during the period of time in which the agent acts in a fiduciary manner; the agent forfeits compensation only during the period of time in which the agent fails to act in a fiduciary manner. E.H. Crump Co. v. Millar, 194 Ga. App. 687, 391 S.E.2d 775, 1990 Ga. App. LEXIS 291 (1990), cert. denied, No. S90C0828, 1990 Ga. LEXIS 689 (Ga. Apr. 12, 1990).

Breach of duty of loyalty. — Although the language of O.C.G.A. § 10-6-31 states that if an agent has violated the agent's engagement, the agent shall be entitled to no commission, this provision, by its very terms, can apply only in cases where an employee or agent breaches the duty of loyalty. Crippen v. Outback Steakhouse Int'l, L.P., 321 Ga. App. 167, 741 S.E.2d 280, 2013 Ga. App. LEXIS 333 (2013).

Agent's breach forfeits right to commissions. — Any breach of the agent's implied contract on the agent's part forfeits the agent's right to commissions. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

Agent's fault or lack thereof. — The law requires utmost good faith on the part of an agent with a principal when undertaking to carry out the contract of agency, and if the agent, through no fault of the principal, fails to perform the duties for which the agent has been employed, or when, through the agent's fault, by reason of fraud perpetrated by the agent, a contract which the agent has negotiated for a principal's benefit is unenforceable and is repudiated by the person with whom the agent has contracted, and thus the agent has failed to perform the duties of the agency, the agent is not entitled to compensation from the principal. Rood v. Anchors, 42 Ga. App. 76, 155 S.E. 65, 1930 Ga. App. LEXIS 237 (1930).

Agent retained right to compensation. — Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. Ben Farmer Realty, Inc. v. Owens, 286 Ga. App. 678, 649 S.E.2d 771, 2007 Ga. App. LEXIS 768 (2007), cert. denied, No. S07C1820, 2008 Ga. LEXIS 81 (Ga. Jan. 7, 2008).

Principal may recover agent's compensation upon discovering failure to perform. — When the principal has paid the agent for services rendered pursuant to the contract of agency and is in ignorance of the fact that the agent has failed in the performance of the agent's duties as agent, the principal has a right, upon a discovery of this fact, to recover the money thus paid to the agent as compensation. Rood v. Anchors, 42 Ga. App. 76, 155 S.E. 65, 1930 Ga. App. LEXIS 237 (1930).

Trial court incorrectly relied on the law firm's failure to show that the firm in-

curred a loss or that the former managing member of the law firm obtained a benefit from the former managing member's efforts to market the former managing member's own professional corporation while working for the law firm when it granted summary judgment to the former managing member on the law firm's claim that the former managing member breached the former managing member's fiduciary duty to the law firm through such conduct; and the law firm was entitled to recover compensation the firm paid to the former managing member during the time the former managing member breached the fiduciary duty. Helms & Greene, LLC v. Willis, 333 Ga. App. 396, 773 S.E.2d 491, 2015 Ga. App. LEXIS 422 (2015), cert. denied, No. S15C1833, 2015 Ga. LEXIS 728 (Ga. Oct. 5, 2015).

Indemnification of agent for expenses. — General rule is that, if one is employed or directed by another to do an act in the other's behalf, the law implies a promise of indemnity by the principal for expenditures incurred as a proximate consequence of the good faith execution of the agency. Dollar v. First Bank, 153 Ga. App. 789, 266 S.E.2d 566, 1980 Ga. App. LEXIS 1982 (1980).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 203 et seq.

C.J.S.

2A C.J.S., Agency, § 328 et seq.

ALR.

Right of agent to offset his own claim against collection made for principal, 2 A.L.R. 132.

Right of one selling on commission as affected by principal's refusal to fill order, 12 A.L.R. 150.

Rights and remedies upon cancellation of sales agency, 32 A.L.R. 210; 52 A.L.R. 546; 89 A.L.R. 252.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 A.L.R. 993.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

What change affecting corporation satisfies condition of contract providing compensation for effecting sale of corporate stock or a specified change in the corporate structure or organization, 101 A.L.R. 1222.

Employee's or agent's acceptance of bonus, gratuity, or other personal benefit from one with whom he deals on employer's or principal's account as affecting his right to recover wages, salary, or commissions, 102 A.L.R. 1115.

Principal's right to recover commissions paid by him or by third person to unfaithful agent, 134 A.L.R. 1346.

Real estate broker's right to recover damages in tort upon ground that he was wrongfully prevented from earning or collecting commissions, 146 A.L.R. 1417.

Right of agent or broker, employed to sell personalty on commission, to commissions on sales made or consummated by his principal or another agent, 12 A.L.R.2d 1360.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 A.L.R.2d 1410.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 A.L.R.2d 376.

Broker's right to commission on sales consummated after termination of employment, 27 A.L.R.2d 1348.

"Exclusive right to sell" and other terms in real estate broker's contract as excluding owner's right of sale, 88 A.L.R.2d 936.

Personal liability of servant or agent for advances or withdrawals in excess of commissions earned, bonus, or share of profits, 32 A.L.R.3d 802.

Right of mortgage broker to commission where principal violated conditions of agreement, 45 A.L.R.3d 1326.

Measure of damages recoverable by loan broker for breach of brokerage contract, 67 A.L.R.3d 1069.

Validity, construction, and effect of provision in exclusive listing agreement for payment of commission on termination by owner, 69 A.L.R.3d 1270.

10-6-32. Owner's right to sell property placed with broker; broker's right to commissions.

The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner.

History.

Civil Code 1895, § 3015; Civil Code 1910, § 3587; Code 1933, § 4-213.

History of Code section.

This Code section is derived from the decisions in Hyams v. Miller, 71 Ga. 608 (1883), Doonan v. Ives & Krouse, 73 Ga. 295 (1885), and Emery v. Atlanta Real Estate Exch., 88 Ga. 321, 14 S.E. 556 (1891).

Law reviews.

For comment discussing a broker's entitlement to a commission where buyer defaults in light of Ellsworth-Dabbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967), see 19 Mercer L. Rev. 460 (1968).

For article, "Compensation of the Georgia Real Estate Broker," see 6 Ga. L. Rev. 375 (1972).

For annual survey article discussing real property law, see 51 Mercer L. Rev. 441 (1999).

For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

JUDICIAL DECISIONS

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General Consideration

"Owner" defined. — "Owner," as used in this section, is construed to mean "owners," if the property belongs to joint owners. Stallworth v. Martin-Ozburn Realty Co., 17 Ga. App. 689, 87 S.E. 1094, 1916 Ga. App. LEXIS 858 (1916).

Owner's Right to Sell

Conferring the exclusive right to sell excludes sales by the owners themselves. Barrington v. Dunwody, 35 Ga. App. 517, 134 S.E. 130, 1926 Ga. App. LEXIS 964 (1926).

Owner may sell despite appointment of agent. — Under this section, if there is no express provision to the contrary, the appointment of a real estate agent to sell property does not deprive the owner of the right of selling the property personally without liability to account to the real estate agent for the commission. Humphries & Jackson v. Smith, 5 Ga. App. 340, 63 S.E. 248, 1908 Ga. App. LEXIS 116 (1908); Ford & Pruett v. Thomason, 11 Ga. App. 359, 75 S.E. 269, 1912 Ga. App. LEXIS 405 (1912); Floyd & Lee v. Boyd, 16 Ga. App. 43, 84 S.E. 494, 1915 Ga. App. LEXIS 497 (1915); City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929).

Owner's Right to Sell (Cont'd)

If a property owner has authorized a broker to procure a purchaser for the owner's property but has not given the owner an "exclusive agency" to do so, the owner remains free to sell the property personally or to sell it through another broker. Kraft Land Servs., Inc. v. Hart Co., 165 Ga. App. 358, 300 S.E.2d 186, 1983 Ga. App. LEXIS 1874 (1983).

Exclusive agent. — Though the owner appoints a real estate broker the owner's exclusive agent to sell designated property, in the absence of a contractual provision to the contrary, the owner may sell the owner's own property without incurring liability to the broker for commissions. Bradbury v. Morrison, 93 Ga. App. 704, 92 S.E.2d 607, 1956 Ga. App. LEXIS 838 (1956).

Effect of irrevocable appointment for fixed period. — Owner of real estate, by employing an agent to effect the sale thereof under a written contract under seal, does not preclude the owner from selling the property, provided the owner makes the sale in the utmost good faith, without any purpose to defraud the agent of the agent's right to commissions under the contract. The fact that the contract provides that the agency created thereby is irrevocable for the term of three months is not of itself sufficient to prevent the owner from personally selling the property within that time, if the owner does so to a person with whom the agent has had no prior negotiations relating to the sale or purchase of the property. Moore v. May, 10 Ga. App. 198, 73 S.E. 29, 1911 Ga. App. LEXIS 712 (1911).

Effect of agreement. — Provision of O.C.G.A. § 10-6-32 that the broker's commissions are earned when the broker procures a buyer ready, willing, and able to buy on terms stipulated by the owner did not apply when the agreement established that the owner was liable for payment of a commission if the property was sold during the term of the agreement, even if the sale was accomplished without the broker's involvement. OTI Shelf, Inc. v. Schair & Assocs., Inc., 238 Ga. App. 12, 517 S.E.2d 542, 1999 Ga. App. LEXIS 702 (1999).

Sale may be to broker's prospect if negotiations have ended. — If the first broker has been unable to sell the prospective purchaser and thereafter negotiations between the two have been entirely broken off, then the owner, or another broker, may thereafter sell without incurring liability to the first agent, even though the sale is made to the initial prospect. Cadranel v. Wildwood Constr. Co., 101 Ga. App. 630, 115 S.E.2d 415, 1960 Ga. App. LEXIS 965 (1960).

Owner's mere negotiations do not end agent's right to commissions. — Agent cannot be deprived of the agent's commission by negotiations between the owner and a prospective purchaser with whom the owner has not entered into a mutually binding and enforceable contract for the sale of the property. Hawks v. Moore, 27 Ga. App. 555, 109 S.E. 807, 1921 Ga. App. LEXIS 259 (1921).

Section contemplates binding contract of sale. — Provision of this section reserving to the owner the right of "selling" the property contemplates that the owner and the purchaser have entered into a mutually binding and enforceable contract before the broker produces a duly qualified purchaser. Hawks v. Moore, 27 Ga. App. 555, 109 S.E. 807, 1921 Ga. App. LEXIS 259 (1921).

Broker's Right to Compensation

"Able" defined. — Word "able," as used in this section, means financially able. Shaw v. Chiles, 9 Ga. App. 460, 71 S.E. 745, 1911 Ga. App. LEXIS 178 (1911); Howell Realty Co. v. Boggs, 127 Ga. App. 867, 195 S.E.2d 253, 1973 Ga. App. LEXIS 1674 (1973); Rucker v. Corbin, 188 Ga. App. 182, 372 S.E.2d 512, 1988 Ga. App. LEXIS 931 (1988).

Ability to buy, required in a purchaser obtained by a real estate broker as a condition to the broker's right to earn a commission for the broker's services, is the financial ability to meet the required terms of the sale; it does not mean solvency or ability to respond in damages for a breach of the contract. Stewart v. Sink,

29 Ga. App. 17, 114 S.E. 71, 1922 Ga. App. LEXIS 18 (1922); Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

Salesperson in employ of broker. — This section has no application when the plaintiff is a real estate salesperson in the employ of the defendant, a real estate broker, and the plaintiff's claim is based entirely upon the written contract of employment with the defendant. Howell Realty Co. v. Boggs, 127 Ga. App. 867, 195 S.E.2d 253, 1973 Ga. App. LEXIS 1674 (1973).

Broker employed to lease. — Provisions of this section apply if property is placed in the hands of a broker for the purpose of procuring a lease thereof. Meinhard v. Stillwell Realty Co., 47 Ga. App. 194, 169 S.E. 732, 1933 Ga. App. LEXIS 341 (1933).

If an agent is employed by a real estate renting agency to procure rental agreements between lessors and lessees for such renting agency, for a stipulated percentage of the commissions received by such agency for collecting the rents paid by the lessees under such leases, the agent is ordinarily entitled to such compensation if the agent brings the principal and third persons, who are through the agent's efforts willing to enter a lease as to certain property, into communication with the renting agency, and as a result the parties through the renting agency close the transaction by executing the lease, and the renting agency obtains the handling of the rentals accruing under the lease. Johnson v. Lipscomb-Weyman-Chapman Co., 46 Ga. App. 798, 169 S.E. 266, 1933 Ga. App. LEXIS 250 (1933).

Broker employed to purchase instead of sell. — By judicial decision, this section has been made applicable to brokers finding property for those principals desiring to purchase. Sharp-Boylston Co. v. Lundeen, 145 Ga. App. 672, 244 S.E.2d 622, 1978 Ga. App. LEXIS 2289 (1978), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Real estate agent employed to purchase land is as much entitled to be compensated, in accordance with the agent's contract as one employed to sell land in behalf of the owner. Hendrix v. Crosby, 76 Ga. App. 191, 45 S.E.2d 448, 1947 Ga. App. LEXIS 402 (1947); Pierce v. Deich, 81 Ga. App. 717, 59 S.E.2d 755, 1950 Ga. App. LEXIS 976 (1950).

This section presupposes the existence of an agency between the real estate broker and the property owner before the broker can collect a commission. Galloway v. McKinley, 73 Ga. App. 381, 36 S.E.2d 485, 1945 Ga. App. LEXIS 466 (1945).

Principal not liable to broker acting without authority. — While an owner of property is bound to pay an authorized broker for the broker's services in procuring a lease of property, if a broker without any authority whatever finds a prospective tenant and induces the tenant to make an offer to lease the property, the owner is not obligated to accept the offer and may accept a later offer, less favorable, from another broker without becoming liable to the broker procuring the first offer, even though the tenant is the same person presented by the first broker. Wilharbla Realty Co. v. Carrington, 62 Ga. App. 778, 9 S.E.2d 842, 1940 Ga. App. LEXIS 435 (1940).

Utmost good faith must be exercised between the principal and broker; but if there was no agreement or relationship between them with respect to the sale of the property or the procuring of a purchaser therefor, there can be no recovery on the part of the broker. Galloway v. McKinley, 73 Ga. App. 381, 36 S.E.2d 485, 1945 Ga. App. LEXIS 466 (1945).

Exclusive sales agency in consideration of broker's promise to list is valid. — Grant of an exclusive brokerage sale contract in consideration of the broker's promise to list, offer for sale, endeavor to sell, enlist the organization's best efforts to such end in the ordinary course of business, and advertise in such manner as is deemed advisable is not void as being nudum pactum. Efforts to find prospects, show the prospects the property, and relay purchase offers to the owners is a part performance under these terms. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601, 1971 Ga. App. LEXIS 918 (1971).

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Georgia law does not require real estate listings to be reduced to writing, and oral contracts are enforceable. Thomas v. Memory, 154 Ga. App. 756, 270 S.E.2d 24, 1980 Ga. App. LEXIS 2374 (1980).

Oral contracts enforceable. — Agreement employing the plaintiff to obtain a purchaser for certain real estate owned by the defendants, although oral, may be the basis for an action. Hunter v. Benamy, 101 Ga. App. 907, 115 S.E.2d 424, 1960 Ga. App. LEXIS 1039, aff'd, 216 Ga. 511, 117 S.E.2d 627, 1960 Ga. LEXIS 520 (1960).

Brokerage contract is not within statute of frauds. — Contract amounting to a brokerage contract for the sale of lands, containing no power on the part of the broker to execute a conveyance of the lands, is a contract for services and does not come within the statute of frauds as constituting a contract for the sale of lands. Cantrell v. Johnston, 74 Ga. App. 74, 38 S.E.2d 893, 1946 Ga. App. LEXIS 461 (1946).

Limitations on right to commissions must be embodied in contract. — If the owner of the property desires to limit the owner's liability for commissions in a manner other than that which is governed by the general rule, such as that commissions will be due only in the event of a consummated sale, provision for such limitation of liability must be embodied in the authority to sell. Hall v. Vandiver, 37 Ga. App. 656, 141 S.E. 332, 1928 Ga. App. LEXIS 556 (1928).

Contract may make right subject to acceptance of title. — Owner may stipulate in the contract of listment that the owner is not to be subject to the payment of brokerage commissions until the actual acceptance of title by the offeror. Kiser Real Estate Co. v. Shippen Hardwood Lumber Co., 34 Ga. App. 308, 129 S.E. 294, 1925 Ga. App. LEXIS 241 (1925).

Contract may make right subject to payment of purchase price. — Owner may, by the express terms of the owner's agreement with the broker, limit the owner's liability by specifically providing that the commissions shall become earned, due, and payable only as the purchase price shall be actually paid. Such a provision would not, however, affect the broker's rights to commissions in a case when, during the agency, the broker finds a purchaser, ready, able, and willing to buy, and who actually offers to buy on the terms stipulated, but when the owner personally refuses to consummate the trade. Hogan v. Gilbert, 27 Ga. App. 444, 108 S.E. 625, 1921 Ga. App. LEXIS 954 (1921).

Contract may require broker to procure contract of sale or only able purchaser. — Real estate broker may contract, as a condition precedent to earning a commission, to procure a contract of sale or the broker's undertaking may be simply to procure a purchaser ready, willing, and able to buy, and who offers to buy, upon the terms stipulated by the owner. Knowles v. Haas & Dodd, 70 Ga. App. 715, 29 S.E.2d 312, 1944 Ga. App. LEXIS 89 (1944).

Contract may require other service than procuring purchaser. — Sometimes, under the broker's employment, the broker's duty is not merely to procure a purchaser, but to perform some other agreed service within a reasonable time, or within a limited time. In such cases the general rule in this section as to what is required of the broker in order to be entitled to commissions is modified accordingly. Phinizy v. Bush, 129 Ga. 479, 59 S.E. 259, 1907 Ga. LEXIS 491 (1907).

This section has no application to a sales agency contract. Chastain v. Allison, 122 Ga. App. 811, 178 S.E.2d 752, 1970 Ga. App. LEXIS 1044 (1970).

If contract, statutory provisions not relevant. — If the plaintiff and the defendant entered into an express contract creating the relationship of exclusive sales agency, the provisions of this section are not applicable. Ragsdale v. Smith, 110 Ga. App. 485, 138 S.E.2d 916, 1964 Ga. App. LEXIS 675 (1964).

Broker's right to commissions may be limited to consummated sales. — It is possible for the owner, by the contract of employment, to appoint, not a broker, but

an exclusive sales agent, so that the latter will be entitled to commissions only upon consummated sales, and not upon mere executory contracts as contemplated by the provisions of this section. Roberts v. Prater & Forrester, 29 Ga. App. 245, 114 S.E. 645, 1922 Ga. App. LEXIS 204 (1922).

Mere reference to selling does not limit broker's right. — Mere fact that in a contract between an owner and a broker, listing property for sale, use is made of the words "to sell," does not change the status of the agent thus employed from that of a broker to a sales agent, so as to render inoperative the provision of this section, that the broker's commissions are earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy. Roberts v. Prater & Forrester, 29 Ga. App. 245, 114 S.E. 645, 1922 Ga. App. LEXIS 204 (1922); Wehunt v. Babb, 84 Ga. App. 536, 66 S.E.2d 405, 1951 Ga. App. LEXIS 720 (1951) ("negotiate the sale" used).

Broker as "procuring cause" of sale. — If a broker can show that the broker was the "procuring cause" of the sale, the broker is entitled to a commission even though the broker has no exclusive agency and even though someone else may actually have consummated the sale. Kraft Land Servs., Inc. v. Hart Co., 165 Ga. App. 358, 300 S.E.2d 186, 1983 Ga. App. LEXIS 1874 (1983).

In determining whether or not a real estate broker is the procuring cause of a sale if there is no exclusive contract to sell, the broker must show and prove that there were negotiations still pending between the broker and the prospective purchaser and that the owner was aware that negotiations were still pending at the time the broker consummated the sale. Kraft Land Servs., Inc. v. Hart Co., 165 Ga. App. 358, 300 S.E.2d 186, 1983 Ga. App. LEXIS 1874 (1983); Income Properties v. Glass, 195 Ga. App. 127, 392 S.E.2d 728, 1990 Ga. App. LEXIS 435 (1990), cert. denied, No. S90C1016, 1990 Ga. LEXIS 732 (Ga. May 9, 1990).

If an express contract governs the conditions under which a commission is to be paid, the common law "procuring cause" doctrine does not apply. B&R Realty, Inc. v. Carroll, 245 Ga. App. 44, 537 S.E.2d 183, 2000 Ga. App. LEXIS 902 (2000).

Effect of reference to "other terms acceptable to me". — Under provisions in a broker's contract for sale under the terms stipulated "or any other terms acceptable to me," an offer to buy for a lesser price procured and submitted to the defendants by the plaintiffs would constitute performance. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601, 1971 Ga. App. LEXIS 918 (1971).

Reference to named sales amount "net to him". — Agreement between owner and broker for sale of the owner's property for a named amount "net to him" does not import by implication a contract to allow the broker, as a fee, the excess of the purchase price above the sum so named. Norwood v. Robie, 102 Ga. App. 206, 115 S.E.2d 729, 1960 Ga. App. LEXIS 588 (1960).

Broker's action is on a contract, not contract of sale. — Action by the broker to recover the broker's commissions alleged to be due is not an action upon the contract of sale which the broker has procured between a principal, the owner of the land, and the customer, the purchaser, but is a suit upon the contract, either express or implied, between the broker and the principal to pay commissions for services performed by the broker in respect to selling or procuring a purchaser for the real estate. Knowles v. Haas & Dodd, 70 Ga. App. 715, 29 S.E.2d 312, 1944 Ga. App. LEXIS 89 (1944).

Realty company as agent for owner. — If a realty company, as agent for an owner in good faith procured a purchaser who offered in writing to buy certain real estate on the terms and conditions specified by the owner, and the owner accepted the purchaser's tender and executed the contract of sale, a verdict for the realtor for the usual and customary commission would have been authorized; and the realty company was not required to proceed against the purchaser for the company's commission under certain provisions of the sale the contract between the purchaser and owner, as the company did not sign the sales contract, was not a party to the contract, and therefore could

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not sue the purchaser by virtue of such contract. Cox v. Dolvin Realty Co., 56 Ga. App. 649, 193 S.E. 467, 1937 Ga. App. LEXIS 186 (1937).

Broker's contract may be part of contract of sale with third party. — If the right of action by the plaintiff broker is based upon an agreement to pay a commission contained in an alleged written contract for the sale of the defendant's property which is negotiated by the plaintiff with a third party, the liability of the defendant must be determined by the validity and effect of the written contract. Ragsdale v. Smith, 110 Ga. App. 485, 138 S.E.2d 916, 1964 Ga. App. LEXIS 675 (1964).

Contract of sale may place limitations on right to commissions. — General rule laid down by this section that a real estate broker's commission is earned when, during the agency, the broker finds a purchaser ready, able, etc., does not apply when an agreement to pay a definite amount as commission is included in a preliminary contract of sale between the owner and the proposed purchaser, by the terms of which a commission "for making the trade" is to be paid only in the event "it is closed"; a verdict in favor of the broker suing for such commission is not demanded when there is evidence that the would-be purchaser declined to complete the sale, upon the ground that the purchaser had been advised that the title to the real estate in question was defective. Nutting & Co. v. Kennedy, 16 Ga. App. 569, 85 S.E. 767, 1915 Ga. App. LEXIS 129 (1915).

Broker's contract irrevocable during agreed term. — If the owner of land gives to a broker, for a valuable consideration, a written option, for a named number of days, to sell the owner's land at a certain fixed price, the owner cannot lawfully withdraw the option during the life of the contract. The broker's commissions are earned if, during the life of the option, the broker finds a purchaser ready, able, and willing to buy, and who actually offers to buy, the land on the terms stipulated by the owner. Cobb v. Jolley, 30 Ga. App. 48, 116 S.E. 553, 1923 Ga. App. LEXIS 240 (1923).

If not agreed, term is reasonable time. — If no time limit is fixed in a contract authorizing an agent to sell real estate, then, under the law, the agent has a reasonable time within which to do so. Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813, 1946 Ga. App. LEXIS 402 (1946).

If the agent expends time and effort in endeavoring to effect a sale pursuant to the agent's employment by the owner to obtain a specified commission if a sale is made, the listing ripens into a contract by the agent's furnishing a consideration through the expenditure of the agent's physical and fiscal efforts to find a buyer. When the listing has ripened into such a contract and no time limit has been fixed, the listing's duration is for a reasonable time. Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869, 1962 Ga. App. LEXIS 701 (1962).

Owner's right to defeat agent's commission. — When the owner of real estate has authorized a broker to sell the real estate, without setting a time limit, the owner is bound to exercise good faith towards the agent and not captiously withdraw the property for the purpose of defeating the agent's commission about to be earned. Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813, 1946 Ga. App. LEXIS 402 (1946); Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869, 1962 Ga. App. LEXIS 701 (1962).

Right to commission during term of lease extended by extension of lease. — If a contract of lease contains an option to the lessee to purchase the property at a price and on terms as stated "at any time during the time this lease is in effect," with an agreement by the lessor-owner to pay to the broker a commission of 5 percent of the purchase price, "in the event this option is exercised," and when, before the expiration of the lease, the lessor and lessee extend it for an additional six months, within which time the option is exercised and a deed is made, the lessor will still be liable to the broker for the agreed commissions just as if the option had been exercised during the original term of the lease. Odell v.

Wessinger, 54 Ga. App. 838, 189 S.E. 367, 1936 Ga. App. LEXIS 774 (1936).

If negotiations are successful, broker entitled to commission. — Broker is entitled to a commission whenever negotiations conducted by the broker on behalf of the principal culminate in the purchase of the property by the principal or would have so culminated but for the principal's interference. Sharp-Boylston Co. v. Lundeen, 145 Ga. App. 672, 244 S.E.2d 622, 1978 Ga. App. LEXIS 2289 (1978), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Securing a binding contract of sale is a prerequisite to recovery. Barnes v. Whatley, 221 Ga. App. 110, 470 S.E.2d 498, 1996 Ga. App. LEXIS 375 (1996).

Consummation of sale entitles broker to commission. — Broker is entitled to commissions when the broker produces a purchaser who consummates the sale on terms satisfactory to the owner. Glassman v. Melrose Constr. Co., 100 Ga. App. 763, 112 S.E.2d 282, 1959 Ga. App. LEXIS 724 (1959).

Option obtained that is later exercised entitles broker to commission. — This section applies if the purchaser procured by the broker first buys an option to purchase, and subsequently, within the life of the option, exercises the purchaser's option by electing to purchase and gives timely and unconditional notice thereof to the other party. In such a case the broker's right to the broker's commissions does not ripen into a cause of action until the option has been actually exercised. Snead v. Wood, 24 Ga. App. 210, 100 S.E. 714, 1919 Ga. App. LEXIS 507 (1919); Odell v. Wessinger, 54 Ga. App. 838, 189 S.E. 367, 1936 Ga. App. LEXIS 774 (1936).

If a real estate sales person procures for a customer only an option to buy and the option is afterwards exercised and a contract of sale thereby results, the broker has consummated the contract and has earned a commission. Mendenhall v. Adair Realty & Loan Co., 67 Ga. App. 154, 19 S.E.2d 740, 1942 Ga. App. LEXIS 347 (1942).

Commission properly refused if contract of sale not affected. — If the essentials necessary for a contract of sale which would have effectuated the intention and agreements of the parties was lacking, the court correctly refused to order the payment of a commission. William L. Thomas Co. v. Kretsos, 115 Ga. App. 550, 155 S.E.2d 453, 1967 Ga. App. LEXIS 1168 (1967).

Contract of sale need not be carried out if enforceable. — Right of a broker to the broker's commission does not depend upon the carrying out of the contract of sale, but the broker is entitled to the commission when the broker has procured a purchaser and the seller has accepted the purchaser and entered into a binding and enforceable contract of sale. Davis v. Holbrook, 75 Ga. App. 417, 43 S.E.2d 791, 1947 Ga. App. LEXIS 554 (1947).

Final act of closing the sale is not a condition precedent to the broker's right to a commission, if the broker has secured a binding contract of sale. Northside Realty Assocs. v. MPI Corp., 245 Ga. 321, 265 S.E.2d 11, 1980 Ga. LEXIS 780 (1980).

When vendee sent vendor a written offer to purchase the property and to prorate the taxes for year due and the vendor accepted this offer and executed a written acceptance thereof and turned the same over to the broker, who notified the vendee of such acceptance, a valid contract arose between the parties for the sale of the property on the terms stated in the written offer, and the broker's commission was earned. Smith v. Knight, 75 Ga. App. 178, 42 S.E.2d 570, 1947 Ga. App. LEXIS 509 (1947).

Sale need not actually occur, in order for the broker to earn a commission, if the parties entered into a binding and enforceable agreement. Carroll v. Harry Norman, Inc., 198 Ga. App. 614, 402 S.E.2d 357, 1991 Ga. App. LEXIS 192 (1991).

Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller

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remained obligated to pay that amount, which was the proper measure of damages. Ben Farmer Realty, Inc. v. Owens, 286 Ga. App. 678, 649 S.E.2d 771, 2007 Ga. App. LEXIS 768 (2007), cert. denied, No. S07C1820, 2008 Ga. LEXIS 81 (Ga. Jan. 7, 2008).

Production of able purchaser during term earns commission. — In view of the testimony of the defendant that the plaintiff, a broker suing for commissions, told the defendant that the would-be purchaser was ready to take the property on the terms stated and that the defendant knew the would-be purchaser was able to pay for the property, which evidence was corroborated by the testimony of the plaintiff and the would-be purchaser, the verdict for the plaintiff cannot be set aside on appeal. Davis v. Davis & Joiner Realty, 23 Ga. App. 577, 99 S.E. 60, 1919 Ga. App. LEXIS 225 (1919).

If property is placed in the hands of a real estate broker for sale on a commission, the commission is earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner. Ray v. Hutchinson, 27 Ga. App. 448, 108 S.E. 815, 1921 Ga. App. LEXIS 956 (1921); Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813, 1946 Ga. App. LEXIS 402 (1946).

When a broker secures a purchaser for lands during the life of the broker's contract of employment who is ready, able, and willing to purchase on the terms stipulated by the owner, the broker has earned the broker's commission agreed upon. Cantrell v. Johnston, 74 Ga. App. 74, 38 S.E.2d 893, 1946 Ga. App. LEXIS 461 (1946).

If real estate brokers present a purchaser ready, willing, and able to complete the sale and close the transaction, unless the purchaser breaches a fiduciary duty, the brokers are entitled to the sales commission provided in the contract. Paredes v. Bud Bailey Corp., 160 Ga. App. 572, 287 S.E.2d 620, 1981 Ga. App. LEXIS 3103 (1981).

Commission without actual consummation of sale. — Real estate agent may earn commissions even when a sale is not actually consummated, but the agent must procure a purchaser who is ready, willing, etc., or else the agent is not entitled to a commission. Floyd & Lee v. Boyd, 16 Ga. App. 43, 84 S.E. 494, 1915 Ga. App. LEXIS 497 (1915); Rothberg v. Manhattan Coil Co., 84 Ga. App. 528, 66 S.E.2d 390, 1951 Ga. App. LEXIS 719 (1951) (commented on in 3 Mercer L. Rev. 348).

Commission without binding written contract. — In a suit for commission it is not essential to recovery that there shall have been executed a written contract of sale binding alike on the seller and the purchaser. Pierce v. Deich, 81 Ga. App. 717, 59 S.E.2d 755, 1950 Ga. App. LEXIS 976 (1950).

Commission when owner agrees to remove lien. — Real estate broker earns the broker's commission when during the agency the broker finds a purchaser ready, able, etc. This is true even though there may exist a lien upon the property, known to the broker, but which the owner in a contract with the purchaser, accepting the offer and binding the sale, agrees to remove. Martin v. Thrower, 28 Ga. App. 270, 110 S.E. 742, 1922 Ga. App. LEXIS 444 (1922).

Commission when purchaser's offer is contingent on obtaining loan. — Language in a contingency clause in a contract for the sale of real estate stating, "Purchaser agrees within seven days after the date of this contract to make application for such loan and to pursue and seek to obtain such loan diligently and in good faith. Purchaser agrees to accept a commitment and to execute and deliver all documents required to close the loan, if a commitment to make the loan is obtained by Purchaser or by Seller or Broker on behalf of Purchaser," are express promises sufficient to supply mutuality of obligation in exchange for the seller's holding open the offer to sell until the time specified for the closing, and this fulfills the agent's obligation to

furnish a ready, able, and willing buyer. Fourteen W. Realty, Inc. v. Screws, 147 Ga. App. 362, 248 S.E.2d 722, 1978 Ga. App. LEXIS 2690 (1978).

Trial court erred in granting a real estate broker's motion for summary judgment on the broker's counterclaim for real estate commissions because a potential buyer was unable to obtain the financing, which prevented sales from closing, and if the exception to the financing contingencies did not apply, then under Georgia law, the buyer's obligation as the non-performing party to pay the commissions never arose, for in those circumstances the commissions were never earned since the sales contracts were neither binding nor enforceable; the broker did not depose or otherwise obtain evidence from a bank as to why the bank denied the buyer's loan, and the broker did not seek the buyer's financial records to determine how much money the buyer had on hand for a closing or ask whether additional investors or sources would provide the buyer with the down payment money. Desmear Sys., Inc. v. Vines, 305 Ga. App. 730, 700 S.E.2d 711, 2010 Ga. App. LEXIS 804 (2010).

Owner need not be confronted with buyer. — Under this section, the commissions are earned when a purchaser is found and the owner is notified, though the prospective purchaser is not brought into the actual presence of the owner and no contract of sale binding alike on the seller and purchaser has been made. Wilmot & Cosby v. Silverman, 26 Ga. App. 196, 105 S.E. 654, 1921 Ga. App. LEXIS 61 (1921).

Broker need not have obtained offer if sale completed with fraudulent intent. — If the broker has failed to procure an offer to buy upon the terms stipulated and the owner has not relinquished the owner's right to sell the property personally, to authorize a recovery of commissions it must appear that the owner negotiated the sale directly to the customer procured by the broker with a fraudulent intent to deprive the broker of the broker's commission, in order for the broker to recover the broker's commission. Kuniansky v. Williams, 101 Ga. App. 678, 115 S.E.2d 204, 1960 Ga. App. LEXIS 977 (1960).

Showing broker was procuring cause of sale is gist of action. — Gist of an action by a broker to recover commissions is the showing that the plaintiff-broker was the procuring or efficient cause of the sale. Woodall v. McEachern, 113 Ga. App. 213, 147 S.E.2d 659, 1966 Ga. App. LEXIS 1022 (1966); Fields Realty & Ins. Co. v. Smith, 123 Ga. App. 342, 180 S.E.2d 909, 1971 Ga. App. LEXIS 1217 (1971).

Realty company is not entitled to any brokerage commission since the firm never had any direct contact with the party who bought the property and was not the procuring cause of the sale. King-Williams Realty & Mtg., Inc. v. State Farm Life Ins. Co., 142 Ga. App. 620, 236 S.E.2d 695, 1977 Ga. App. LEXIS 1424 (1977).

Broker must be shown to be cause of sale whether broker's claim is for breach of contract or in tort. — Whether the claim is in the nature of a breach of a contract between the seller and broker or a claim in tort based on a conspiracy to deprive the broker of a commission, it must appear that the broker's effort was a procuring or efficient cause of the sale. Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259, 1971 Ga. App. LEXIS 1155 (1971).

In the absence of alleging or proving that the plaintiff-broker was the procuring or efficient cause of the sale, there can be no contract breached in the first instance nor a conspiracy coupled with a wrong done in the second. Fields Realty & Ins. Co. v. Smith, 123 Ga. App. 342, 180 S.E.2d 909, 1971 Ga. App. LEXIS 1217 (1971).

Burden of proof on broker. — In a suit for commissions, the burden of showing all the requirements is on the broker. Carroll v. Harry Norman, Inc., 198 Ga. App. 614, 402 S.E.2d 357, 1991 Ga. App. LEXIS 192 (1991).

Summary judgment for a broker on the broker's suit for recovery of a real estate sales commission was reversed, when the broker did not carry the broker's burden of demonstrating that the purchaser failed to make a reasonable attempt to obtain the loan the purchaser was obliged to seek under the contractual terms, or that the purchaser qualified for such, or that the

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purchaser agreed to close with an optional loan. Carroll v. Harry Norman, Inc., 198 Ga. App. 614, 402 S.E.2d 357, 1991 Ga. App. LEXIS 192 (1991).

Broker must have sold or procured sale of property. — In order for a broker to earn commission on account of the sale of property, the broker must either have sold the property or been the procuring cause of the sale. Hendrix v. Crosby, 76 Ga. App. 191, 45 S.E.2d 448, 1947 Ga. App. LEXIS 402 (1947); Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948); Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259, 1971 Ga. App. LEXIS 1155 (1971); First Nat'l Bank & Trust Co. v. McNatt, 141 Ga. App. 6, 232 S.E.2d 356, 1977 Ga. App. LEXIS 1731 (1977); Booth v. Watson, 153 Ga. App. 672, 266 S.E.2d 326, 1980 Ga. App. LEXIS 1941 (1980).

Finding the prospect and attempting to make the sale are not sufficient, in law, to justify payment of commissions to an agent. The sale of the property is what gets results for the owner and for the agent. To earn a commission, one must be the procuring cause. One must, during the agency, find a purchaser ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner. Jordan v. Dolvin Realty Co., 54 Ga. App. 472, 188 S.E. 304, 1936 Ga. App. LEXIS 673 (1936).

Broker with whom property is listed for sale does not make out a case of procuring cause by merely showing that the broker first located the ultimate purchaser, if it further appears that without interference by the owner the broker was unsuccessful in bringing about an offer which could be consummated and that the sale was made after the broker had abandoned the broker's effort. Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259, 1971 Ga. App. LEXIS 1155 (1971).

Owner-negotiated sale. — In the absence of an agreement to the contrary, the owner is not deprived of the right to sell the property personally and consequently does not ordinarily become liable to the purchaser for commissions upon a sale negotiated by the owner. City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929).

Termination of broker's negotiations. — That commission which it has been agreed a broker will be paid to procure a purchaser is not recoverable from a principal who subsequently made an exchange proposed by the broker by virtue of this section upon the theory that the broker had furnished a purchaser ready, able, etc., when the broker had not been given an exclusive brokerage and there was nothing to indicate that the negotiations between the broker and the purchaser had not been terminated. Drew v. Cone, 19 Ga. App. 704, 91 S.E. 1068, 1917 Ga. App. LEXIS 315 (1917).

Brokers in whose hands property is placed for sale, in order to earn commissions on account of the sale of such property, must either have sold the property or been the procuring cause of the sale. If the purchaser who was spoken to by the brokers had abandoned all idea of the trade, and the brokers had no influence at all in bringing it about, the brokers would not be entitled to commissions, although the purchaser subsequently may have bought from the owner. Crutchfield v. Western Elec. Co., 66 Ga. App. 161, 17 S.E.2d 246, 1941 Ga. App. LEXIS 162 (1941).

When an owner lists property for sale with a broker and the broker procures a prospect, but the sale as contemplated is not consummated and the parties in good faith break off negotiations, the broker is not the procuring cause of the ultimate transaction between the same owner and buyer and is not entitled to a commission. Parrish v. Ragsdale Realty Co., 135 Ga. App. 491, 218 S.E.2d 164, 1975 Ga. App. LEXIS 1711 (1975).

No interference from owner. — If plaintiff brought suit to recover broker's commissions alleged to be due on the sale of a hotel lease and furnishings, but the plaintiff had not produced a customer who was ready, able, and willing to buy and who actually offered to buy on the terms stipulated by the defendant owner, at the time of the sale by the owner through another broker, the negotiations between

the plaintiff and the prospective buyer had come to an end, and the owner had not interfered with the efforts of the plaintiff to make a sale to the prospect, the jury was authorized to return a verdict in favor of the defendant. Thompson v. Weeks, 60 Ga. App. 560, 4 S.E.2d 415, 1939 Ga. App. LEXIS 85 (1939).

Acquiescence in rescission of contract of sale. — Real estate agent is not entitled to commissions for the sale of land, when, prior to the completion of the sale, the parties disagree as to the terms of the sale and it is agreed between the parties that the transaction be considered at an end, if the agent acquiesces in such rescission of the contract of sale, even though the owner of the land subsequently places it in the hands of another agent who sells it on practically the same terms to the purchaser secured by the first agent, unless fraud or bad faith be shown. Girardeau & Saunders v. Gibson, 122 Ga. 313, 50 S.E. 91, 1905 Ga. LEXIS 191 (1905); F.L. Allison & Co. v. McMath Plantation Co., 29 Ga. App. 414, 115 S.E. 916, 1923 Ga. App. LEXIS 43 (1923).

Offer by proposed purchaser different from terms stipulated by owner. — By virtue of this section, an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the broker to the broker's commissions. Parker v. Stubbs, 139 Ga. 46, 76 S.E. 571, 1912 Ga. LEXIS 520 (1912); Howard v. Sills & Purvis, 154 Ga. 430, 114 S.E. 580, 1922 Ga. LEXIS 384 (1922); Atlanta Realty Co. v. Campion, 94 Ga. App. 136, 93 S.E.2d 781, 1956 Ga. App. LEXIS 486 (1956).

Generally, a broker's commission is earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy and who actually offers to buy, on the terms stipulated by the owner, and an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the broker to the broker's commission. Sikes v. Markham, 74 Ga. App. 874, 41 S.E.2d 828, 1947 Ga. App. LEXIS 722 (1947).

While in every action for broker's commissions proof of acceptance of an offer might not be required, if the action is predicated upon the broker's having procured a buyer ready, willing, and able to buy on terms stipulated by the owner, the proof of an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the plaintiff broker to the broker's commissions. Fourteen W. Realty Inc. v. Lane, 147 Ga. App. 171, 248 S.E.2d 233, 1978 Ga. App. LEXIS 2834 (1978).

In order for the agent to recover the agent's commission, the offer to buy must be in the exact terms stipulated and the offer must be accepted unequivocally and without variance of any sort. Barnett v. Eubanks, 105 Ga. App. 749, 125 S.E.2d 571, 1962 Ga. App. LEXIS 1026 (1962).

Offer by the proposed purchaser to buy on terms not stipulated by the owner, which is refused, will not entitle the agent to a commission. Even a slight variation will prevent the agent from recovering. Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869, 1962 Ga. App. LEXIS 701 (1962).

Proof of an offer by a proposed purchaser to buy on terms not stipulated by the seller will not entitle a broker to the broker's commissions. Clover Realty Co. v. Gouyd, 153 Ga. App. 64, 264 S.E.2d 547, 1980 Ga. App. LEXIS 1675 (1980).

Even a slight variation from the owner's terms will prevent the agent from recovering. Schaffer v. Padgett, 107 Ga. App. 861, 131 S.E.2d 796, 1963 Ga. App. LEXIS 1006 (1963); Bentley Group, Ltd. v. Paces Ferry Anesthesiology Assocs., 180 Ga. App. 818, 350 S.E.2d 826, 1986 Ga. App. LEXIS 2286 (1986).

Variance may authorize repudiation of contract. — If there was a clear variance between the contract effected by the plaintiff and that which the plaintiff was authorized to make, the owner has the right to repudiate the contract, as there was no acceptance on the terms stipulated by the owner. Huson v. Dawson Naval Stores & Lumber Co., 23 Ga. App. 353, 98 S.E. 186, 1919 Ga. App. LEXIS 118 (1919).

Agreement may authorize compensation when any terms are accepted by principal. — If the plaintiff's commission, under agreement

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with the defendant, was to be the difference between the terms acceptable to the defendant and the actual sale price of the business, the plaintiff would be entitled to recover the plaintiff's commission upon proof that the defendant, during the agency, accepted any one of the various sets of terms offered by the purchasers, secured by the plaintiff, who were ready, able, and willing to purchase. Ray v. Thomas McDonald Corp., 90 Ga. App. 872, 84 S.E.2d 705, 1954 Ga. App. LEXIS 839 (1954).

Broker must fully perform unless principal prevents performance. — If the compensation is to be paid by way of commissions, the whole service or duty must be performed before any right to commissions arises, unless the act of the principal has prevented the performance of it. Hyams v. Miller, 71 Ga. 608, 1883 Ga. LEXIS 233 (1883); Craigmiles v. Steyerman, 27 Ga. App. 14, 107 S.E. 386, 1921 Ga. App. LEXIS 650 (1921).

To entitle a sales agent to commissions when the sale has not been consummated, it must be made to appear that the agent has performed the whole duty or service required of the agent under the agent's contract, except insofar as the agent has been prevented by the conduct of the owner. Roberts v. Prater & Forrester, 29 Ga. App. 245, 114 S.E. 645, 1922 Ga. App. LEXIS 204 (1922).

Broker cannot recover when owner's offer is conditioned on option that prospect buys and exercises. — Real estate broker's commissions are not earned until the broker's principal, the owner, makes an unconditional offer to sell and the offer is accepted by a purchaser found by the broker; accordingly, if the offer of the owner is conditioned upon an outstanding option not being exercised and the purchaser found by the broker buys the option from its holder, has it transferred to the purchaser, and exercises it by buying the property, the broker cannot recover. Birchmore v. Upchurch, 78 Ga. App. 233, 50 S.E.2d 857, 1948 Ga. App. LEXIS 715 (1948).

No commission if customer's offer is unacceptable but customer is assigned contract with third party. — Real estate broker is not entitled to a commission from an owner of real estate for sale of the real estate to a customer of the broker who had made an unacceptable offer for the property and with whom the broker was still negotiating, where the sale was made to such customer by virtue of the assignment in good faith of a contract for the purchase of the property from one who was not a customer of the broker. Dolvin Realty Co. v. Jones, 63 Ga. App. 351, 11 S.E.2d 105, 1940 Ga. App. LEXIS 89 (1940).

Sale after full performance does not cut off broker's right. — If there is such compliance with a broker's contract as to entitle a plaintiff broker to a commission, the fact that the land was sold by the owners or by a third person would not cut off the broker's right to payment. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601, 1971 Ga. App. LEXIS 918 (1971).

Broker, if procuring cause, entitled to compensation although principal closes transaction. — If the agent is the procuring cause of the transaction, the agent is entitled to compensation for effecting the transaction, if the principal closes the transaction itself. Johnson v. Lipscomb-Weyman-Chapman Co., 46 Ga. App. 798, 169 S.E. 266, 1933 Ga. App. LEXIS 250 (1933).

If property placed in the hands of a broker for sale is subsequently sold by the owner, the broker is entitled to the commission, if the broker was the procuring cause of the sale, although the sale was actually consummated by the owner. Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948); Pierce v. Deich, 81 Ga. App. 717, 59 S.E.2d 755, 1950 Ga. App. LEXIS 976 (1950).

Sale by owner to purchaser procured by broker. — Under this section, when a broker procures a purchaser ready, able, etc., to buy, the principal cannot defeat the broker's right

to commission by completing the sale personally through another broker. Gresham v. Lee, 152 Ga. 829, 111 S.E. 404, 1922 Ga. LEXIS 291 (1922). See also Central of Ga. Ry. v. McKenzie, 125 Ga. 222, 53 S.E. 591, 1906 Ga. LEXIS 95 (1906).

Principal cannot, with knowledge of the negotiations between the purchaser and the agent, and while such negotiations are still pending, defeat the right of the agent to recover such commission by interfering with and the principal completing the sale of which the agent was the procuring cause. Gresham v. Connally, 114 Ga. 906, 41 S.E. 42, 1902 Ga. LEXIS 829 (1902); Case Threshing Mach. Co. v. Binns, 23 Ga. App. 46, 97 S.E. 443, 1918 Ga. App. LEXIS 29 (1918); Brown & Peeples v. Stokes, 25 Ga. App. 254, 103 S.E. 423, 1920 Ga. App. LEXIS 717 (1920); Washington v. Jordan, 28 Ga. App. 18, 109 S.E. 923, 1921 Ga. App. LEXIS 462 (1921); City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929); Bromberg v. Drake, 91 Ga. App. 118, 85 S.E.2d 160, 1954 Ga. App. LEXIS 876 (1954).

If the owner of property has listed it with a real estate broker to be sold, and the broker procures a prospective purchaser, and the owner, with knowledge of this fact intervenes or sells the property to the customer or prospective purchaser procured by the broker, an inference is authorized that the broker has earned a commission and can recover the commission from the owner. Mendenhall v. Adair Realty & Loan Co., 67 Ga. App. 154, 19 S.E.2d 740, 1942 Ga. App. LEXIS 347 (1942); Spence v. Walker, 92 Ga. App. 609, 89 S.E.2d 668, 1955 Ga. App. LEXIS 662 (1955).

Owner, or another broker, even though there is no exclusive agency provision in the agreement, cannot, with knowledge of negotiations between a prospect and another broker, interfere and by closing the sale defeat the right of the first agent to the agent's commissions. Cadranel v. Wildwood Constr. Co., 101 Ga. App. 630, 115 S.E.2d 415, 1960 Ga. App. LEXIS 965 (1960).

Sale at differing terms to purchaser procured by broker. — While even the slightest variation from the terms the owner fixed in the listing with the agent will prevent the recovery of commissions, such a departure does not in all cases prevent the agent from recovering commissions when a sale has been made by the owner to a buyer procured by the agent. The test to be applied is whether the agent was the procuring cause of the sale made to a buyer directly by the owner. Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869, 1962 Ga. App. LEXIS 701 (1962).

Sale at less than listed price to purchaser procured by broker. — Owner may sell the property, and if the owner does not use the broker's labor to help in the sale, the owner owes the broker nothing, but if a purchaser procured by the broker buys from the owner, even at a lower price than that given the broker, the owner would be liable for the broker's commission if the broker's effort was the procuring cause of the sale. Hendrix v. Crosby, 76 Ga. App. 191, 45 S.E.2d 448, 1947 Ga. App. LEXIS 402 (1947); Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948); Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259, 1971 Ga. App. LEXIS 1155 (1971); Booth v. Watson, 153 Ga. App. 672, 266 S.E.2d 326, 1980 Ga. App. LEXIS 1941 (1980).

If the broker is the procuring cause, the owner is liable for commissions even if the owner sells to the broker's prospect at a price less than that listed with the broker. Glassman v. Melrose Constr. Co., 100 Ga. App. 763, 112 S.E.2d 282, 1959 Ga. App. LEXIS 724 (1959).

Purchase at higher price than broker authorized to pay. — If the defendant used the plaintiff's labor in getting the price of the property substantially reduced and used the information furnished by the plaintiff in contacting the seller's agent, and the plaintiff's effort was the procuring cause of the sale and culminated in the defendant purchasing the property, defendant could not defeat the broker's right to the broker's commission by purchasing the property directly through the seller's agent, even though the buyer paid a slightly higher price for it than the

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buyer had authorized the broker to pay, but the broker would be entitled to the broker's commissions for purchasing the property. Hendrix v. Crosby, 76 Ga. App. 191, 45 S.E.2d 448, 1947 Ga. App. LEXIS 402 (1947).

Principal's knowledge of broker was procuring cause. — Rule that renders the owner liable to the agent when the agent was the procuring cause of a sale is subject to the further requirement that the owner have knowledge, at the time of entering into the contract of sale or of selling it without a contract, of the fact that the buyers were procured by the agent. Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869, 1962 Ga. App. LEXIS 701 (1962).

Knowledge that negotiations were still pending. — If the owner sells to a buyer who was initially approached by a broker, in determining whether or not the broker was the procuring cause of the sale when there is no exclusive contract to sell, it must be established that: (1) the negotiations were still pending between the broker and the prospective purchaser; and (2) the owner was aware that the negotiations were still pending at the time the owner consummated the sale. Booth v. Watson, 153 Ga. App. 672, 266 S.E.2d 326, 1980 Ga. App. LEXIS 1941 (1980); Gibbs v. Nixon, 154 Ga. App. 463, 268 S.E.2d 670, 1980 Ga. App. LEXIS 2229 (1980); Hodges-Ward Assocs. v. Ecclestone, 156 Ga. App. 59, 273 S.E.2d 872, 1980 Ga. App. LEXIS 2879 (1980).

Mere knowledge of proposed sale does not establish negotiations. — Mere knowledge by the prospective purchaser of the proposed sale as received by it from the broker is totally insufficient to establish negotiations in the purchase of the property. Gibbs v. Nixon, 154 Ga. App. 643, 268 S.E.2d 670 (1980).

Principal cannot defeat claim by pretended intervening sale to third person. — Since the utmost good faith must be exercised between the owner and the broker, the owner cannot defeat the broker's claim for commissions by resorting to any subterfuge, such as a pretended conveyance to a third person while still retaining control of the property, in order that the title may be acquired by the customer procured by the broker through such third person. City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929).

Bona fide intervening sale is good defense. — Bona fide intervening sale, if established, would amount to a complete defense to the broker's claim. City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929).

Unless principal repurchases and continues to use broker's services. — If the owner, after having made a bona fide sale of the property to a customer procured by the owner and not by the broker, continues to avail himself of the broker's services by encouraging the broker to continue negotiations for the sale of the property to the customer with whom the broker had been negotiating and afterwards accepts the broker's customer and sells the property to the broker's customer upon the terms originally prescribed by the owner, the owner, having in the meantime repurchased the property, cannot avoid liability to the broker for commissions upon the ground of a previous sale of the property by the owner. City Nat'l Bank & Trust Co. v. Orr, 42 Ga. App. 807, 157 S.E. 520, 1931 Ga. App. LEXIS 145 (1931).

Broker need not be sole cause to earn commission. — In determining whether a broker has earned the broker's commission for procuring a purchaser, it is not necessary that the broker's services shall have been the sole cause; but it is enough if the efforts of the broker, acting on the purchaser, are the efficient cause of the offer. Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948).

It need not appear that the broker's effort was the sole procuring cause, but it is enough if it appears that it was an efficient cause. Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259, 1971 Ga. App. LEXIS 1155 (1971).

If there were two brokers, question is whose efforts were primary, procuring cause. — When the services

of a broker, as well as those of another broker, have conjointly contributed to the successful termination of negotiations resulting in the transfer of real estate for an owner, the question which of the brokers is entitled to commissions from the owner for effecting such transfer depends upon whose efforts were the primary, proximate, and procuring cause of the transfer negotiated. Nestle Co. v. J.H. Ewing & Sons, 153 Ga. App. 328, 265 S.E.2d 61, 1980 Ga. App. LEXIS 1794 (1980), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Award may be based on quantum meruit even if broker not procuring cause. — Jury can award damages based on quantum meruit even if the jury determines that the plaintiffs were not the procuring cause of the transfer. Nestle Co. v. J.H. Ewing & Sons, 153 Ga. App. 328, 265 S.E.2d 61, 1980 Ga. App. LEXIS 1794 (1980), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Owner liable if real party in interest was procured by broker. — Lessor's liability to pay a broker's commission pursuant to an agreement in a lease containing an option of purchase would not be defeated by the fact that a deed was executed to the spouse of lessee at the lessee's instance, when the lessee was the real party at interest, or was jointly interested with the lessee's spouse, or by the fact that the deed recited a consideration of less than the contract amount, when the lessor, without the consent or knowledge of the broker, completed the transaction by accepting all of the consideration in cash instead of the agreed part cash and part time payments, and the total amount paid actually exceeded the contract price, and even if, as contended, the amount accepted by the lessor had been less than the agreed price, liability would not have been defeated. Odell v. Wessinger, 54 Ga. App. 838, 189 S.E. 367, 1936 Ga. App. LEXIS 774 (1936).

Principal refusing to effectuate sale liable to broker. — If the owner, without legal excuse, refuses to effectuate the sale, the owner becomes liable for the commissions pursuant to the provision of this section; and after such a refusal, it is generally not necessary that the proposed purchaser shall have made to the owner an actual tender of the purchase price. Hogan v. Gilbert, 27 Ga. App. 444, 108 S.E. 625, 1921 Ga. App. LEXIS 954 (1921).

Under contracts creating the ordinary relationship of principal and real estate broker and providing commissions for the latter, the principle of this section applies, and the broker has made a sale whenever, through the broker's influence, a person ready, able, and willing to buy on the terms proposed is brought to the principal, though, through the fault or disinclination of the principal, no actual sale is ever consummated. Humphries & Jackson v. Smith, 5 Ga. App. 340, 63 S.E. 248, 1908 Ga. App. LEXIS 116 (1908); Kesler v. Stults, 15 Ga. App. 735, 84 S.E. 201, 1915 Ga. App. LEXIS 49 (1915).

If an owner of land authorized a broker to sell the land at a stated price, agreeing to pay the broker a certain sum as commission for making the sale, and the latter procured an offer to be made for the purchase of the land at that price, on stated terms of payment, which offer was accepted by the owner, the broker was entitled to the broker's commission notwithstanding there was a failure to consummate the sale, if the cause of the failure was the refusal of the owner to proceed further with the transaction because the owner was dissatisfied with the terms of payment to which the owner had agreed; if this was the sole ground of objection assigned by the owner at the time of the refusal, other grounds of objection then known to the owner were waived, and would not avail the owner as a defense to an action for the commission. The question of estoppel becomes one for determination of the jury. Broyles v. Haas, 51 Ga. App. 374, 180 S.E. 517, 1935 Ga. App. LEXIS 702 (1935).

Interference of principal with consummation. — By virtue of this section, the agent would not be deprived of the agent's commissions if it is made to appear that the whole service or duty devolving upon the agent has been performed and that only the refusal or interference of the owner has prevented the consummation of the sale according to

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the terms authorized in the contract of listment. Roberts v. Prater & Forrester, 29 Ga. App. 245, 114 S.E. 645, 1922 Ga. App. LEXIS 204 (1922).

This section does not mean that a broker is entitled to the broker's commissions only when the transaction has been closed by a conveyance and payment of the purchase price. A contract for commissions on sales entitles the broker to the specified compensation whenever through the broker's influence a prospective purchaser has been brought to the principal, though by reason of some fault or disinclination of the latter the sale is never completed or is consummated on terms somewhat different from those originally proposed by the principal. Pierce v. Deich, 81 Ga. App. 717, 59 S.E.2d 755, 1950 Ga. App. LEXIS 976 (1950).

Contention that when a sale is not consummated, the seller is relieved of the seller's obligation to pay the commission, though a purchaser ready, able, and willing to buy was produced, is without merit when it appears that the failure to consummate the sale was the seller's fault. Hope v. DeForest Realty, Inc., 144 Ga. App. 269, 241 S.E.2d 49, 1977 Ga. App. LEXIS 2668 (1977).

Broker makes out a prima facie case that the broker was the procuring cause of the completed transaction when the broker shows that negotiations for the sale were set on foot through the broker's efforts, that the broker performed every service required by the employment which it was possible to perform, and that the failure on the broker's part to personally consummate the transaction was due to the interference of the defendant. Nestle Co. v. J.H. Ewing & Sons, 153 Ga. App. 328, 265 S.E.2d 61, 1980 Ga. App. LEXIS 1794 (1980), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Refusal of owner to carry out trade. — If a broker has a purchaser ready, willing, and able to buy and who offers to buy on terms stipulated by the owner and the owner refuses to carry out the trade, it is not generally necessary, in order for the broker or agent to recover the commissions, that the proposed purchaser should make to the proposed vendor an actual tender of the purchase price. Smith v. Tatum, 140 Ga. 719, 79 S.E. 775, 1913 Ga. LEXIS 234 (1913); Winter v. Flournoy Realty Co., 27 Ga. App. 87, 107 S.E. 398, 1921 Ga. App. LEXIS 703 (1921); Carter v. Ray, 70 Ga. App. 419, 28 S.E.2d 361, 1943 Ga. App. LEXIS 323 (1943).

Principal cannot defeat broker's right by having sale made to corporation instead of principal. — Fact that a corporation organized by the defendant for the purpose of purchasing certain property in deed bought the property did not affect the plaintiff's right to recover for the services performed by the plaintiff and accepted by the defendant, as the defendant could not form a corporation and purchase the property through it directly from the owner so as to defeat the plaintiff's right to compensation for the plaintiff's services. Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948).

Sale by stockholders does not make corporation liable. — Subsequent actual sale by the several stockholders of the defendant corporation of their individual holdings of corporate stock, being an individual and not a corporate act, could not form the basis of an action for commissions against the corporation. F.L. Allison & Co. v. McMath Plantation Co., 29 Ga. App. 414, 115 S.E. 916, 1923 Ga. App. LEXIS 43 (1923).

Broker's right to commissions does not depend on performance by purchaser. — Right of a real estate broker to the broker's commissions does not depend upon the carrying out and fully performing of the contract of sale by the purchaser. Payne v. Ponder, 139 Ga. 283, 77 S.E. 32, 1913 Ga. LEXIS 404 (1913).

When an agent employed to sell certain real estate for the owner at a stipulated price procures a purchaser who is accepted by the owner and a contract is entered into between them, the commission of such agent is earned, provided the agent acted in good faith towards the agent's principal in the transaction, al-

though the purchaser later defaults for no reason caused by the agent. Cox v. Dolvin Realty Co., 56 Ga. App. 649, 193 S.E. 467, 1937 Ga. App. LEXIS 186 (1937).

Purchaser's refusal to consummate contract does not prevent recovery by broker. — Agent will not be prevented from recovering commissions for obtaining a purchaser who is accepted in furtherance of which a binding contract is made, though the purchaser deliberately refuses to consummate the contract. Cox v. Dolvin Realty Co., 56 Ga. App. 649, 193 S.E. 467, 1937 Ga. App. LEXIS 186 (1937).

If the purchaser procured by the broker entered into a valid contract with the owner, whereby the purchaser became bound to buy upon the terms stipulated, and the owner became bound to sell, the broker had earned the broker's commission by virtue of such binding and completed contract, even though the purchaser, before the expiration of a reasonable time allowed to the owner to remove the lien, refused to carry out the contract to purchase. Davis v. Holbrook, 75 Ga. App. 417, 43 S.E.2d 791, 1947 Ga. App. LEXIS 554 (1947).

If the seller accepts the terms of the purchaser's offer by signing a sales contract, the seller has accepted the broker's procurement, and the seller cannot thereafter defeat the broker's right to a commission by refusing to close the transaction. Jones v. Trail Cities Realty, Inc., 160 Ga. App. 533, 287 S.E.2d 588, 1981 Ga. App. LEXIS 3086 (1981).

Purchaser's inability to make title for exchange prevents recovery by broker. — If an agent's customer agreed with the principal upon an exchange of lots and was unable to make title the agent did not earn any commission as the purchaser was not "ready, willing and able" to buy upon the terms agreed upon by the agent with the principal. Harris v. Warmack, 24 Ga. App. 600, 101 S.E. 713, 1919 Ga. App. LEXIS 959 (1919).

Vendee refusing to perform is liable for commission paid out by vendor. — When vendee refused to comply with the contract to purchase property and vendor paid the broker the commission, the vendor was then entitled to maintain an action against the vendee for damages for a breach of the contract in the amount of the commission so paid by the vendor. Smith v. Knight, 75 Ga. App. 178, 42 S.E.2d 570, 1947 Ga. App. LEXIS 509 (1947).

Unconsummated sale does not bar commission. — Fact that a sale is never actually consummated does not bar recovery of commissions unless the owner agreed that payment of commissions was contingent upon such, and unless the failure to consummate the sale is not the fault of the owner. Steinemann v. Vaughn & Co., 169 Ga. App. 573, 313 S.E.2d 701, 1983 Ga. App. LEXIS 3076 (1983).

Broker is not guarantor of purchaser's financial ability or performance. — If the plaintiff occupied the status of broker (as distinguished from a sales agent), and as such procured a purchaser ready, able, and willing to buy on terms agreeable to the seller, plaintiff would not, in the absence of a contractual undertaking, become a guarantor either of the financial ability of the purchaser or of the subsequent performance by the purchaser of the offer to buy, especially if the seller actually accepted the offer, and accordingly, the seller was not entitled to a recoupment in suit by broker for commissions on three cars of peanuts actually delivered and accepted by the purchaser, because, on account of a drop in the market price of the commodity, the fourth car in the order was countermanded and refused. Farmers Peanut Co. v. Zimmerman-Alderson Carr Co., 52 Ga. App. 265, 183 S.E. 115, 1935 Ga. App. LEXIS 135 (1935).

Agent must act in good faith. — Agent is not an insurer of the ability of the purchasers procured by the agent, if the purchasers are accepted as satisfactory by the principal and binding contracts of sale are made by the principal with such purchasers; but the agent is bound to act in good faith towards the principal. Williamson, Inman & Co. v. Thompson, 50 Ga. App. 564, 179 S.E. 289, 1935 Ga. App. LEXIS 222 (1935).

Agent's bad faith not waived by entering into contract or seeking to enforce it. — Neither entering into contract to sell nor futile attempts to enforce a contract would be such conduct

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as would waive the seller's right to defend against the agent's suit for commissions on the grounds of the agent's bad faith, if the enforcement of the contract involves a determination of whether the representation of the buyer's financial ability was true or not. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

Principal may recover compensation paid if broker obtains contract by fraud and then substitutes purchaser. — If, by the terms of the contract of agency, the agent, as a real estate broker, is to procure a purchaser of property belonging to the principal, and the agent by exceeding the agent's authority and misrepresenting the property perpetrates a fraud upon the purchaser and thereby obtains an unenforceable contract with the purchaser, and on account of the fraud the contract is rescinded by the purchaser, and the agent knowingly, and without the principal's knowledge, substitutes as purchaser one who the principal believes is an agent of the purchaser whom the agent had procured, the agent thereby fails to act in good faith with the principal, and the principal is entitled to recover from the agent compensation for the services which the principal had paid to the agent in ignorance of the fraud of the agent in obtaining the contract, and in ignorance of the purchaser's rescission of the contract. Rood v. Anchors, 42 Ga. App. 76, 155 S.E. 65, 1930 Ga. App. LEXIS 237 (1930).

Telling owner purchaser must pay commissions does not create dual agency barring recovery. — There was no such dual agency unknown to both principals as would defeat the right of the plaintiff to commission, when the defendant-owner was told that the purchaser of the property in question would have to pay the commissions. Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948).

Contract ambiguity. — Grant of summary judgment for the realty company was error since the contract was ambiguous as to whether the real estate commission was refundable once the property sale failed to close, and a question of material fact existed as to the parties' intent on that issue; the issue could not be resolved by application of the rules of contract construction, O.C.G.A. § 13-2-3, nor by parol evidence, O.C.G.A. § 13-2-2. Krogh v. Pargar, LLC, 277 Ga. App. 35, 625 S.E.2d 435, 2005 Ga. App. LEXIS 1321 (2005), cert. denied, No. S06C0788, 2006 Ga. LEXIS 337 (Ga. Apr. 25, 2006).

Practice and Procedure

1. Pleading

Ability of purchaser should be alleged. — Under this section, the ability to comply, that is that one is solvent and one's compliance can be compelled or the question of one's solvency has been waived, of the purchaser accepted by the principal and afterwards refusing to comply with the contract should be alleged. Harvil v. Wilson Bros., 11 Ga. App. 156, 74 S.E. 845, 1912 Ga. App. LEXIS 304 (1912); Wilson Bros. v. Verner, 12 Ga. App. 511, 77 S.E. 656, 1913 Ga. App. LEXIS 617 (1913).

Allegation of what occurred between purchasers and defendants. — Plaintiffs should allege the facts as to what occurred between the defendant and the prospective purchasers upon which the plaintiffs rely in support of the plaintiffs' claim for commissions. McMath Plantation Co. v. F.L. Allison & Co., 26 Ga. App. 744, 107 S.E. 420, 1921 Ga. App. LEXIS 622 (1921).

Alleging direction to sign contract does not make action one on written contract of sale. — Allegations that clients directed agent to sign a written contract and that client would send a check as earnest money are not necessary to the cause of action whereby a licensed real estate dealer sues for commissions and will not establish the action as a suit upon a written contract to purchase real estate. Pierce v. Deich, 81 Ga. App. 717, 59 S.E.2d 755, 1950 Ga. App. LEXIS 976 (1950).

Only one count need be sufficient. — In an action against the principal by the broker to recover commissions which

was brought in two counts, each for the same amount, one count alleging a contract by which the broker was to procure a contract of sale between the broker's principal and the purchaser and the other count alleging that the plaintiff earned the commission under a brokerage contract by obtaining a customer ready, willing, and able to purchase the property and who actually offered to purchase upon the terms stipulated by the owner, when the verdict found for the plaintiff is sustainable under the second count, it is immaterial that the evidence was insufficient to support a verdict under the first count by reason of the contract of sale necessary to support such verdict being for any reason invalid as by an insufficient description therein of the land purported to be sold. Knowles v. Haas & Dodd, 70 Ga. App. 715, 29 S.E.2d 312, 1944 Ga. App. LEXIS 89 (1944).

Plaintiff's allegations held sufficient. — See Payne v. Ponder, 139 Ga. 283, 77 S.E. 32, 1913 Ga. LEXIS 404 (1913); McKenzie v. Patterson, 27 Ga. App. 465, 109 S.E. 174, 1921 Ga. App. LEXIS 217 (1921).

Alleging contract for commission under this section from first payment and a first payment states a cause of action. Luckey v. Daniels, 25 Ga. App. 164, 102 S.E. 902, 1920 Ga. App. LEXIS 661 (1920).

If the plaintiff specifically alleges the existence and duration of the broker's agency, the property listed for sale, the terms of compensation for the performance of the broker's services, the terms of sale stipulated by the owner and the procurement by the broker of a purchaser ready, able, and willing to buy on such terms, and a refusal by the seller to pay the broker's commission in accordance with their contract, the plaintiff's pleading is not subject to dismissal. Norwood v. Robie, 102 Ga. App. 206, 115 S.E.2d 729, 1960 Ga. App. LEXIS 588 (1960).

Plaintiff's pleading is not subject to dismissal because the pleading seeks to recover on an oral agreement for the performance of services by the broker or because the pleading does not allege that the transaction has been closed by a conveyance and payment of the purchase price. Norwood v. Robie, 102 Ga. App. 206, 115 S.E.2d 729, 1960 Ga. App. LEXIS 588 (1960).

If a real estate sales contract provides that the broker is made a party thereto to enforce the broker's commission rights and that liability for the commission can be based on the "seller's inability, failure, or refusal to convey" an allegation that the seller "fails and refuses" to close the transaction is sufficient. Nussbaum v. Shaffer, 105 Ga. App. 430, 124 S.E.2d 658, 1962 Ga. App. LEXIS 945 (1962).

Plaintiff's allegations held insufficient. — By virtue of this section, if an action for a commission on a sale of land is based upon a contract authorizing the plaintiff to sell the land for the defendant for a fixed price per acre within a specified time, and it does not appear from the plaintiff's allegations that the plaintiff procured a purchaser ready, able, and willing to buy at the price stipulated, or that during the life of the contract there was such interference on the part of the defendant as to prevent a sale of the property, or any secret agreement, collusion, or mutual understanding between the defendant and the prospective buyer, while negotiations were pending, to delay the consummation of the trade until after the expiration of the contract, the allegations are insufficient, even though it is alleged that immediately after the expiration of the contract (time being of the essence) the defendant sold the property to one who had been negotiating with the plaintiff. Price v. Cocke, 23 Ga. App. 578, 99 S.E. 47, 1919 Ga. App. LEXIS 226 (1919).

In a suit to recover commissions alleged to be due under a broker's contract, if the plaintiff's pleading fails to show that the plaintiff produced a purchaser who was ready, able, and willing to buy the property placed in the plaintiff's hands for sale, on the terms prescribed by the owner, the court does not err in dismissing the pleading. Montgomery v. Lester, 25 Ga. App. 660, 104 S.E. 28, 1920 Ga. App. LEXIS 138 (1920).

Alleging efforts by a broker to sell property and that the broker interested certain persons and by the broker's efforts created a demand for the property, making it possible for the owner to sell to one

Practice and Procedure (Cont'd)
1. Pleading (Cont'd)

not alleged to have been interested by the broker, does not state a cause of action. Corker v. Simmons, 26 Ga. App. 515, 106 S.E. 558, 1921 Ga. App. LEXIS 506 (1921).

Allegation that the "plaintiff was the procuring cause of the sale" is a mere conclusion of the pleader when not sustained by the facts stated by the plaintiff and the court does not err in dismissing the plaintiff's pleading. Craigmiles v. Steyerman, 27 Ga. App. 14, 107 S.E. 386, 1921 Ga. App. LEXIS 650 (1921).

Cause of action for commissions earned is not alleged if it does not appear that a purchaser was procured who actually offered to buy on the terms stipulated by the owner. Frederick May & Co. v. B. Karpf, Inc., 80 Ga. App. 1, 54 S.E.2d 916, 1949 Ga. App. LEXIS 757 (1949).

Answer alleging defense of broker's bad faith. — Answer alleging that the plaintiff broker misrepresented the financial ability of the buyer, that is, that the buyer was ready, willing, and able to buy on the terms stipulated by the seller, thereby inducing the defendant to accept the buyer's offer and to enter into a contract which the buyer was unable to perform, set out a breach of the broker's duty of exercising the utmost good faith toward the principal, the seller, which was a defense to the broker's action for commissions. Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585, 1951 Ga. App. LEXIS 800 (1951).

2. Burden of Proof

Burden on broker of showing all requirements of section. — Under the general rule stated in this section, ordinarily the burden of showing all the requirements recited is on the broker in an action for commissions. Phinizy v. Bush, 129 Ga. 479, 59 S.E. 259, 1907 Ga. LEXIS 491 (1907).

Burden of proving defense of purchaser's inability. — If the customer procured by the broker is accepted by the principal, the burden will be upon the latter to show that such purchaser was not able to comply with the contract, if the purchaser relies on that defense. Phinizy v. Bush, 129 Ga. 479, 59 S.E. 259, 1907 Ga. LEXIS 491 (1907).

Proof of conspiracy. — In order to establish that a conspiracy existed to deprive the broker of a real estate broker's commission, a party must show that the commission was earned; that the broker, as the plaintiff-broker, has been the procuring or efficient cause of the ultimate sale; and that there has been a wrongful interference with the broker and the purchaser. Having shown that the broker was the procuring cause of the sale, the plaintiff broker must then demonstrate that the sellers actually knew that the purchaser may have been procured by the broker. Hodges-Ward Assocs. v. Ecclestone, 156 Ga. App. 59, 273 S.E.2d 872, 1980 Ga. App. LEXIS 2879 (1980).

3. Questions for Jury or Court

Whether broker has produced a purchaser during the term of the agency is an issue of fact. Ocean Lake & River Fish Co. v. Dotson, 70 Ga. App. 268, 28 S.E.2d 319, 1943 Ga. App. LEXIS 296 (1943).

Which broker's efforts were procuring cause. — If the services of a broker, as well as those of another broker, have conjointly contributed to the successful termination of negotiations resulting in the sale of real estate for an owner, it becomes a question of fact as to which broker was the proximate, predominating, and procuring cause of the sale. Gresham v. Lee, 152 Ga. 829, 111 S.E. 404, 1922 Ga. LEXIS 291 (1922); Nicholson v. Smith & Son, 29 Ga. App. 376, 115 S.E. 499, 1923 Ga. App. LEXIS 13 (1923); City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795, 1929 Ga. App. LEXIS 261 (1929).

Whether contract applied to property is for jury. — Issue whether contract as to commissions applied to goods accepted but not delivered was for jury, not court. Interstate Chem. Corp. v. Slade & Treadwell, 20 Ga. App. 776, 93 S.E. 422, 1917 Ga. App. LEXIS 1080 (1917).

Reasonable time. — If no time is specified for a real estate agent to procure a ready, willing, and able purchaser, under the agency contract what would be

a reasonable time is for the jury to determine under all the facts and circumstances of the case. Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813, 1946 Ga. App. LEXIS 402 (1946).

If a contract between the owner of real estate and the real estate agent for the sale of property specified no time limit, and the commitment to purchase property by the purchaser was obtained ten days after the contract was made, and the sale was made by the agent on the terms stated less than three months from the date of the owner's contract with the agent, the jury is authorized to find that the agent has earned a commission under the contract. Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813, 1946 Ga. App. LEXIS 402 (1946).

Whether broker made attempt to perform. — Under provisions in a broker's contract for sale under the terms stipulated "or any other terms acceptable to me," a bona fide attempt to procure an offer to buy for a lesser price is sufficient to constitute performance, and whether or not such performance has occurred is a jury question. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601, 1971 Ga. App. LEXIS 918 (1971).

If a promise as stated in a contract is "to list, offer for sale, and endeavor to sell" upon the terms stated in the contract or any other terms acceptable to the owner, and the plaintiff's affidavit shows that there were efforts to find prospects, show the prospects the property, and relay offers to the owner, it is a jury question whether or not there was such compliance with the contract as to entitle the plaintiff to commissions. Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601, 1971 Ga. App. LEXIS 918 (1971).

Whether a sales agent breaches a fiduciary duty to the seller by working in concert with the agent's spouse, the purchaser, in the negotiations and execution of the sales contract is a question of fact for the court. Paredes v. Bud Bailey Corp., 160 Ga. App. 572, 287 S.E.2d 620, 1981 Ga. App. LEXIS 3103 (1981).

Verdict for defendant required as matter of law. — If in a suit by a broker for commission it appears that the plaintiff never produced a customer who was ready, able, and willing to buy, and who actually offered to buy on the terms expressly stipulated by the defendant, the owner of the property in question, that prior to the sale of the property by the defendant personally to one who had been introduced to the defendant by the plaintiff's agent as its prospect, the negotiations between such prospect and the plaintiff had come to an end, and that the defendant had not at any time interfered with the efforts of the plaintiff to effect a sale during the agency, a verdict in favor of the defendant was demanded as a matter of law. Landrum v. Lipscomb-Ellis Co., 62 Ga. App. 649, 9 S.E.2d 205, 1940 Ga. App. LEXIS 392 (1940).

4. Instructions

Owner's right to sell. — Since there was an issue of fact as to whether a broker was employed to sell property or the broker's acts ratified, and it appeared that the owner sold the property personally, without the broker's aid, to a purchaser with whom the broker negotiated, the court should have charged pursuant to this section that placing the property in the hands of a broker did not prevent the owner from selling unless otherwise agreed. Folds v. Lifsey Co., 26 Ga. App. 297, 105 S.E. 854, 1921 Ga. App. LEXIS 109 (1921).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 79 et seq.

C.J.S.

2A C.J.S., Agency, § 332 et seq.

ALR.

Does ordinary broker's contract exclude right of sale by owner, 10 A.L.R. 814; 20 A.L.R. 1268.

Right of one selling on commission as affected by principal's refusal to fill order, 12 A.L.R. 150.

Duration of real estate broker's contract

which specifies no time, 24 A.L.R. 1537; 28 A.L.R. 893.

Broker's right to commission as affected by failure to consummate sale within time limited by terms of employment, 26 A.L.R. 784.

Rights and remedies upon cancelation of sales agency, 32 A.L.R. 209; 52 A.L.R. 546; 89 A.L.R. 252.

Broker's right to commission where owner sells property to customer of broker at less than stipulated price, 43 A.L.R. 1103; 46 A.L.R.2d 848.

Character and extent of right of broker who has exclusive contract, where sale is effected without his agency, 64 A.L.R. 395.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 A.L.R. 993.

Right of real estate broker to list competing properties of different owners, 71 A.L.R. 699.

Acceptance by principal of services of broker with knowledge that he acted also for the other party as affecting broker's right to compensation, 80 A.L.R. 1075.

Illegality of transaction or proposed transaction as affecting right of real estate broker to commission for promoting it, 85 A.L.R. 274.

Right of real estate broker against third person who prevented broker from earning commissions, or who received, or induced owner to pay to him or another, commission which the broker had earned, 97 A.L.R. 1273; 146 A.L.R. 1417.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

Principal's right to recover commissions paid by him or by third person to unfaithful agent or broker, 134 A.L.R. 1346.

Necessity of specially pleading revocation of authority as defense to action for broker's commission, 144 A.L.R. 694.

Real estate broker's right to commissions, under contract calling for net price or entitling broker to all above a specified price, where sale is not completed because of refusal or fault of owner, 144 A.L.R. 921.

Real estate broker's right to compensation as affected by death of person employing him, 146 A.L.R. 828.

Real estate broker's right to recover damages in tort upon ground that he was wrongfully prevented from earning or collecting commissions, 146 A.L.R. 1417.

Construction and application of statute which enables real estate broker to recover commissions on oral contract with owner who has been served with written notice of the terms thereof, 148 A.L.R. 676.

Failure, when refusing offer to purchase land, to state ground therefor as affecting right to assert such ground in defense of broker's action for compensation, 156 A.L.R. 602.

Right of real estate broker under listing contract providing for compensation if sale is made during listing period, where contract or incipient negotiations for sale with customer not produced by broker are not consummated within that period, 160 A.L.R. 1048.

Broker's right to compensation as affected by the fact that customer procured by him joined with another in the purchase of the property involved, 164 A.L.R. 949.

Rights and obligations of real estate broker employed to sell property as affected by option to purchase for himself, 164 A.L.R. 1378.

Right of real estate broker, employed to effect or consummate sale, to compensation where principal refuses or is unable to complete transaction, 169 A.L.R. 605.

Condemnation of property as affecting real estate broker's right to compensation, 170 A.L.R. 1422.

Relative rights and liabilities of vendor and his broker to down payment or earnest money forfeited by vendee for default under real estate contract, 9 A.L.R.2d 495.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 A.L.R.2d 504.

Statutory necessity and sufficiency of written statement as to amount of compensation in broker's contract to procure purchase, sale, or exchange of real estate, 9 A.L.R.2d 747.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 A.L.R.2d 1410.

Effect of statement of real estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor, so as to bar claim for commission, 17 A.L.R.2d 904.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 A.L.R.2d 376.

Broker's right to commission on sales consummated after termination of employment, 27 A.L.R.2d 1348.

Agreement between brokers as within statute requiring agreements for commissions for the sale of real estate to be in writing, 44 A.L.R.2d 741.

Conveyance of real property to mortgagee or lienholder as constituting "sale or exchange" rendering owner liable for commissions to broker having exclusive agency or exclusive right to sell, 46 A.L.R.2d 1116.

Broker's right to commission for selling part of property, 47 A.L.R.2d 680.

Broker's return of deposit to purchaser as waiver of right to demand commission from seller, 69 A.L.R.2d 1244.

Broker's right to commission on sale rejected by principal because of buyer's fraud or mispresentation, 79 A.L.R.2d 1055.

Broker's right to commission on renewal, extension, or renegotiation of lease, 79 A.L.R.2d 1063.

"Exclusive right to sell" and other terms in real estate broker's contract as excluding owner's right of sale, 88 A.L.R.2d 936.

Real estate broker's right to compensation as affected by failure or refusal of principal's spouse to join in contract of sale, 10 A.L.R.3d 665.

Validity, construction, and enforcement of business opportunities or "finder's fee" contract, 24 A.L.R.3d 1160.

Liability of purchaser of real estate for interference with contract between vendor and real estate broker, 29 A.L.R.3d 1229.

Liability of defaulting purchaser to owner's broker or auctioneer, 30 A.L.R.3d 1395.

Broker's right to commission from principal upon procuring third party taking an option, 32 A.L.R.3d 321.

Right of real estate broker to commission where listing contract is for sale of property and it is subsequently leased to one with whom broker had negotiated, 42 A.L.R.3d 1430.

Validity, construction, and effect of real estate brokers' multiple-listing agreement, 45 A.L.R.3d 190.

Right of mortgage broker to commission where principal violated conditions of agreement, 45 A.L.R.3d 1326.

Construction of provision in real estate broker's listing contract that broker shall receive commission on sale after expiration of listing period to one with whom broker has "negotiated" during listing period, 51 A.L.R.3d 1149.

Real estate broker's right to commission for procuring lessee, where lease terminates before contemplated term, 54 A.L.R.3d 1171.

Validity, construction, and effect of provision in exclusive listing agreement for payment of commission on termination by owner, 69 A.L.R.3d 1270.

Modern view as to right of real estate broker to recover commission from seller-principal where buyer defaults under valid contract of sale, 12 A.L.R.4th 1083.

What constitutes financial ability to perform within rule entitling broker to commission for producing ready, willing and able purchaser of real property, 87 A.L.R.4th 11.

10-6-33. Method for revocation of agency; damages for unreasonable revocation.

Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act or the death of either principal or agent revokes the power. If, however, the power is coupled with an interest in the agent himself, it is not

revocable at will. In all cases the agent may recover from the principal, for an unreasonable revocation, any damages he may have suffered by reason thereof.

History.
Orig. Code 1863, § 2161; Code 1868, § 2157; Code 1873, § 2183; Code 1882, § 2183; Ga. L. 1894, p. 44, § 1; Civil Code 1895, § 3003; Civil Code 1910, § 3575; Code 1933, § 4-214.

JUDICIAL DECISIONS

Analysis

General Consideration
Power Coupled with an Interest

General Consideration

Section not intended to be exhaustive. — This section, expressing but one exception to the general rule of revocability of an agency at will, was not intended to be exhaustive of the legal principles controlling revocation. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895); Wheeler v. Pan Am. Petro. Corp., 48 Ga. App. 378, 172 S.E. 826, 1934 Ga. App. LEXIS 80 (1934).

Revocable at will of principal. — Generally, an agency is revocable at the will of the principal. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895); Wheeler v. Pan Am. Petro. Corp., 48 Ga. App. 378, 172 S.E. 826, 1934 Ga. App. LEXIS 80 (1934); Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

If books were merely entrusted to a party as agent of a corporation for the purpose of selling the books with title remaining in the corporation, the corporation was empowered to revoke the agency at will and to take possession of the books by any lawful means. Parks v. Atlanta News Agency, Inc., 115 Ga. App. 842, 156 S.E.2d 137, 1967 Ga. App. LEXIS 1276 (1967).

Death. — Agency is ipso facto revoked by death. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895).

Agent is not barred from having interest. — That an agent was not prohibited from having an interest was evident from former Code 1933, §§ 4-202 and 4-214. Pendley v. Jessee, 134 Ga. App. 138, 213 S.E.2d 496, 1975 Ga. App. LEXIS 1934 (1975).

Paying consideration for power is not sufficient. — Power will not survive merely because the donee may have paid a valuable consideration for the power. Turman v. Winecoff, 138 Ga. 726, 75 S.E. 1131, 1912 Ga. LEXIS 670 (1912).

Voluntary agency to settle lawsuit held revocable. — If one, without consideration, entrusted an agent with a sum of money to settle a lawsuit between two others, one has the power of revocation until the settlement is complete, especially if the contract is in writing and it is therein expressly agreed that the terms of the settlement are to be satisfactory to the person in every way, and if not, then the money is to be restored to the person. Phillips v. Howell, 60 Ga. 411, 1878 Ga. LEXIS 486 (1878).

Attorney-client relationship does not come under this section; it is an erroneous legal theory to argue that retention of an attorney is nothing more than creation of an agency, so that under this section death of either the principal or agent revokes the power. Continental Ins. Co. v. Weekes, 140 Ga. App. 791, 232 S.E.2d 80, 1976 Ga. App. LEXIS 1634 (1976) (attorney-client relationship held not involved).

Power of sale in mortgage held revoked by mortgagor's death. — Power of sale given by mortgage under this section is revoked by the mortgagor's death before the note falls due. Lathrop & Co. v. Brown, 65 Ga. 312, 1880 Ga. LEXIS

185 (1880); Wilkins v. McGehee, 86 Ga. 764, 13 S.E. 84, 1891 Ga. LEXIS 60 (1891).

Power of sale in mortgage held irrevocable during mortgagor's lifetime. — Power of sale, such as one contained in a mortgage, is irrevocable during the lifetime of the principal when it is given for a valuable consideration, and forms a part of a contract made as security for a debt, and is conferred for the purpose of effectuating the security, even though not coupled with an interest in the thing itself, and this is undoubtedly so if there is an express stipulation that the power shall be irrevocable. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895).

Agency to sell land held not revocable until after reasonable time. — If agents are employed to sell land for a specified commission to be paid when a sale is made and they expend time and effort in endeavoring to effect a sale, the owner cannot, without lawful cause, revoke the contract of agency at one's mere option and before the expiration of a reasonable time for performance. If no time limit is fixed in the contract for the contract's performance, the agents are entitled to a reasonable time. Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

Consummation of sale by owner would not relieve the owner of liability for commission. — Fact that a sale was finally consummated by the owner to a purchaser procured by the agents would not relieve the owner of the owner's liability for the commission. Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

No power to collect additional compensation shown. — In a breach of contract and fraud action for unpaid commissions brought by an independent sales representative against a manufacturer, the trial court properly determined that the independent sales representative could not recover continuing commissions after the agreement expired based on the theory of irrevocable agency as the agreement expressly stated that no additional compensation would be paid for equipment leases. Irvin Int'l, Inc. v. Riverwood Int'l Corp., 299 Ga. App. 633, 683 S.E.2d 158, 2009 Ga. App. LEXIS 921 (2009).

Agency to collect note owned in part by agent held not revoked by payee's death. — If one lends money for oneself and as agent for others and takes a note so payable, the right and duty of the payee to collect the note for the principals for whom money was loaned is an agency coupled with an interest which is not terminated by the death of the payee of the note; the executrix has the right to proceed to collect the note. Scott v. Cain, 77 Ga. App. 826, 50 S.E.2d 99, 1948 Ga. App. LEXIS 653 (1948).

Termination by manufacturer of oral agreement for distributorship did not give rise to an action for wrongful termination, even though the distributorship was to be for an indefinite time. Loy's Office Supplies, Inc. v. Steelcase, Inc., 174 Ga. App. 701, 331 S.E.2d 75, 1985 Ga. App. LEXIS 1935 (1985).

Powers of remainderman to manage property until life tenant dies held irrevocable. — When A executed a deed to B, C, and D, for $1.00 and other valuable considerations, providing that the property was conveyed in trust and empowering the grantees to pay insurance, taxes, and maturing loans on the property conveyed, to collect the rents, to sell and reinvest, and to pay the net income to the grantor for life, and providing that at A's death title should vest absolutely in B, C, and D, such deed conveyed the property to grantees subject to a life estate in the grantor, and the powers conferred by the deed were irrevocable. Finn v. Dobbs, 188 Ga. 602, 4 S.E.2d 655, 1939 Ga. LEXIS 610 (1939).

Notice to remit proceeds revokes agency of bank to place proceeds to depositor's credit. — Notice by a depositor given to a bank before the bank has collected checks which have been deposited with the bank as agent to collect, notifying the bank that the proceeds of the checks after being collected are not to be deposited to the depositor's credit, but are to be remitted by the bank to the depositor, is notice to

General Consideration (Cont'd)

the bank of a revocation by the depositor of the bank's agency to place the proceeds derived from the collection of the checks to the depositor's credit in the bank. Macon Grocery Co. v. Citizens' Bank, 42 Ga. App. 74, 155 S.E. 57, 1930 Ga. App. LEXIS 236 (1930).

Filing suit to cancel power of attorney and deeds made thereunder revokes agency. — Power of attorney not coupled with an interest is revocable at will; and the mere filing of suit to cancel a power of attorney and two deeds made by the attorney in fact amounts to a revocation thereof with respect to any future action thereunder by the attorney in fact. Thompson v. Thompson, 190 Ga. 264, 9 S.E.2d 80, 1940 Ga. LEXIS 445 (1940).

Right to discharge at will shows employer-employee relationship. — Charge of the court to the jury to the effect that, if a used car lot owner retained the right to direct or control the time or manner of executing the work of a salesperson and had the right to discharge the salesperson and to terminate at any time the arrangement between them, the relationship would be that of employer and employee or that of master and servant, but that, if the dealer did not have these rights, then the relationship between the dealer and the salesperson would be another relationship, "such as the relationship of independent contractor and principal," was an accurate statement of the law. Hamilton v. Pulaski County, 86 Ga. App. 705, 72 S.E.2d 487, 1952 Ga. App. LEXIS 1036 (1952).

Power of attorney must be strictly construed and strictly pursued; the act done must be legally identical with that authorized to be done. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Action lies for wrongful revocation. — If the revocation of an agency is unreasonable and constitutes a breach of contract, whereby the agent sustains injury, the law affords the agent redress in an action for damages. Standard Oil Co. v. Gilbert & Co., 84 Ga. 714, 11 S.E. 491, 1890 Ga. LEXIS 330 (1890); Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895).

If no time limit is fixed for performance in a contract employing agents to sell land, the agents are entitled to a reasonable time, and if, before the expiration of such reasonable time, the owner, without lawful cause, revokes the contract, the owner is liable to the agents in damages for so doing. Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

Measure of damages would be determined by the contract of agency. Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

Burden of proving the revocation of an agency is generally upon the party asserting revocation. Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275, 1945 Ga. App. LEXIS 542 (1945).

Power Coupled with an Interest

"Coupled with an interest". — To be "coupled with an interest," the interest of the agent must lie in the subject matter of the agency and not merely in the contract of agency. Cutcliffe v. Chesnut, 126 Ga. App. 378, 190 S.E.2d 800, 1972 Ga. App. LEXIS 1156 (1972).

Interest of the agent that will prevent revocation at the will of the principal, referred to in this section, must lie in the subject matter of the agency and not merely in the profits which are to result from the exercise of the power. Lathrop & Co. v. Brown, 65 Ga. 312, 1880 Ga. LEXIS 185 (1880); Wilkins v. McGehee, 86 Ga. 764, 13 S.E. 84, 1891 Ga. LEXIS 60 (1891); Turman v. Winecoff, 138 Ga. 726, 75 S.E. 1131, 1912 Ga. LEXIS 670 (1912); Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919); Wheeler v. Pan Am. Petro. Corp., 48 Ga. App. 378, 172 S.E. 826, 1934 Ga. App. LEXIS 80 (1934).

Agency coupled with an interest is not revocable by death. Gurr v. Gurr, 198 Ga. 493, 32 S.E.2d 507, 1944 Ga. LEXIS 454 (1944).

Death ordinarily terminates an agency, but when the agency is coupled with an

interest, the rule does not apply. Scott v. Cain, 77 Ga. App. 826, 50 S.E.2d 99, 1948 Ga. App. LEXIS 653 (1948).

Exception to normal death rule. — To the rule that an agency is revoked by the death of the principal there is but one exception, and that exists when the power of the agent is coupled with an interest in the subject on which the power is to be exercised and not merely in that which is produced by the exercise of the agency. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895).

Agency coupled with an interest is not revocable at will. Gurr v. Gurr, 198 Ga. 493, 32 S.E.2d 507, 1944 Ga. LEXIS 454 (1944).

If the power is coupled with an interest in the agent personally, the power is not revocable at will. Wheeler v. Pan Am. Petro. Corp., 48 Ga. App. 378, 172 S.E. 826, 1934 Ga. App. LEXIS 80 (1934).

Mere recital that power is coupled with an interest would not of itself make it such an interest. Ray v. Hemphill, 97 Ga. 563, 25 S.E. 485, 1895 Ga. LEXIS 527 (1895).

Giving agent title to instrument makes agency irrevocable. — If the agent has title to the instrument itself, the agent has such an interest as will prevent termination of the agency. Scott v. Cain, 77 Ga. App. 826, 50 S.E.2d 99, 1948 Ga. App. LEXIS 653 (1948).

Power of attorney to sue under contingent-fee contract. — If an attorney is employed to sue for property under a special contract whereby the attorney's fee is payable out of the proceeds of the suit, such a contract is in the nature of a power with an interest, and such a power is irrevocable. Twiggs v. Chambers, 56 Ga. 279, 1876 Ga. LEXIS 264 (1876).

Right to control of security held not revoked by owner's death. — Agreement between a company, the holder of a security deed, which as such had the right to demand possession of property for the purpose of controlling the property until the net amount from the rents and profits was sufficient to satisfy the debt, which was in arrears, and the owner, whereby the company was given the immediate direction and control of the apartment house, creates a power coupled with an interest, and the agency is not terminated by the death of the owner. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347, 1937 Ga. LEXIS 637 (1937).

Factor's power of sale held not revoked by principal's death. — Factor's power of sale to reimburse the factor for advances the factor has made to the principal or expense in taking care of such property is coupled with an interest and is not revoked by the death of the principal. Willingham v. Rushing, 105 Ga. 72, 31 S.E. 130, 1898 Ga. LEXIS 452 (1898).

Work and expense of agent to lease held to prevent revocation at will. — Work and expense of an authorized agent in finding a tenant and securing a lease could be taken as sufficient to establish such an interest that will prevent revocation at the will of the principal in the contract of rental. Adair v. Smith, 23 Ga. App. 290, 98 S.E. 224, 1919 Ga. App. LEXIS 91 (1919) (agent had interest in contract of rental, not just contract of agency).

Distribution agency not made irrevocable by agent's efforts. — In the absence of some contractual provision to the contrary, an agency for a petroleum corporation to distribute the corporation's products in a certain territory for commissions would not be irrevocable as a power coupled with an interest merely because the agent expends time, efforts, and money to increase the business of the agency. Wheeler v. Pan Am. Petro. Corp., 48 Ga. App. 378, 172 S.E. 826, 1934 Ga. App. LEXIS 80 (1934).

OPINIONS OF THE ATTORNEY GENERAL

This section is not exhaustive of the exceptions to the general rule that an agency is revocable at will. 1976 Op. Att'y Gen. No. 76-18.

Power that is given for consideration as security is irrevocable. — Power which is given to an agent in exchange for valuable consideration is irrevocable should the power form a part of the contractual agreement as a security for the debt. 1976 Op. Att'y Gen. No. 76-18.

Power of wage collection given creditor is irrevocable during life-time of employee. — Power of attorney which authorizes the State Employees' Credit Union to collect the unpaid compensation due a state employee in the event of the employee's termination prior to the repayment of the employee's loan is irrevocable during the lifetime of the employee, although it does not constitute a power coupled with an interest within the meaning of this section. 1976 Op. Att'y Gen. No. 76-18.

Death of principal revokes power. — General rule is that all powers are revoked by the death of the principal. 1976 Op. Att'y Gen. No. 76-18.

Death of principal does not revoke powers which are coupled with an interest in the thing itself. 1976 Op. Att'y Gen. No. 76-18.

Without interest, power irrevocable during lifetime does not survive principal. — Although a power is irrevocable during the lifetime of the principal, the power does not survive the death of the principal if the power does not confer a power coupled with an interest. 1976 Op. Att'y Gen. No. 76-18.

Reciting interest insufficient. —Recital in the instrument that a power of collection is coupled with an interest is not sufficient to create the necessary interest. 1976 Op. Att'y Gen. No. 76-18.

Power to collect wages of terminated state employee may not be honored. — In the absence of a contractual relationship or authorizing legislation, a state agency may not properly honor a power of attorney authorizing collection by the State Employee's Credit Union of the unpaid wages due a terminated state employee in satisfaction of the unpaid balance on the employee's loan. 1976 Op. Att'y Gen. No. 76-18.

Payment may be to spouse or children if employee has died. —Should a terminated state employee die prior to the employee's loan's repayment, the unpaid compensation due the employee, not to exceed $2,500.00, may be paid to the employee's surviving spouse or minor children, as provided in former Code 1933, §§ 66-103 — 66-105. 1976 Op. Att'y Gen.No. 76-18.

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 32 et seq.

C.J.S.

2A C.J.S., Agency, § 100 et seq.

ALR.

Rights and remedies upon cancellation of sales agency, 32 A.L.R. 210; 52 A.L.R. 546; 89 A.L.R. 252.

Death or incompetency of principal as affecting existing power of attorney to confess judgment, 44 A.L.R. 1310.

What constitutes power coupled with interest within rule as to termination of agency, 64 A.L.R. 380; 28 A.L.R.2d 1243.

Payment to agent after death of principal, 67 A.L.R. 1419.

Power of attorney as authorizing gift or conveyance or transfer without a present consideration, 73 A.L.R. 884.

When attorney's power deemed coupled with an interest so as to prevent discharge or revocation, 97 A.L.R. 923.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

Grounds for discharge of servant or agent existing during lifetime of employer, but unknown to him, as available to his executor or administrator, 109 A.L.R. 474.

Construction, application, and effect of statutory provision that directors of corporation may remove officer, agent, or employee at pleasure, 111 A.L.R. 894.

Real estate broker's right to compensation as affected by death of person employing him, 146 A.L.R. 828.

Implied obligation of employee not to use trade secrets or confidential informa-

tion for his own benefit or that of third persons after leaving the employment, 165 A.L.R. 1453.

Agency conferred upon partners as affected by dissolution of the partnership, 170 A.L.R. 512.

What constitutes power coupled with interest within rule as to termination of agency, 28 A.L.R.2d 1243.

Termination by principal of distributorship contract containing no express provision for termination, 19 A.L.R.3d 196.

10-6-34. Effect of death or disability on pledge of stock with power of attorney.

Every creditor or other person advancing money upon the pledge of a certificate of stock or other scrip representing an ownership or interest in corporations in Georgia shall have such an irrevocable interest in such certificate of stock or other scrip as not to be affected by the death, insanity, or legal disability thereafter of the person in whose name such stock or other scrip stands upon the books of any corporation in Georgia; but such pledgee or holder of such stock or scrip assigned in blank, coupled with the power of attorney, shall have the same right after the death, insanity, or legal disability of the person in whose name the stock stands upon the books of the corporation as before the death, insanity, or legal disability of such person.

History.

Ga. L. 1894, p. 44, § 1; Civil Code 1895, § 3003; Civil Code 1910, § 3575; Code 1933, § 4-214.

Law reviews.

For note discussing revocation of proxy upon maker's incapacity, see 17 Ga. St. B. J. 88 (1980).

RESEARCH REFERENCES

ALR.

Death as revoking power of attorney to transfer corporate stock, 40 A.L.R. 1004.

10-6-35. Effect of death on power of attorney by member of armed forces, seaman, or person on war service.

(a) No agency created by a power of attorney in writing given by a principal who is at the time of execution or who, after executing the power of attorney, becomes either:

(1) A member of the armed forces of the United States;

(2) A person serving as a merchant seaman outside the limits of the United States; or

(3) A person outside the limits of the United States by permission, assignment, or direction of any department or official of the United States government in connection with any activity pertaining to or connected with the prosecution of any war in which the United States is then engaged

shall be revoked or terminated by the death of the principal as to the

agent or other person who, without actual knowledge or actual notice of the death of the principal, shall have acted or shall act, in good faith, under or in reliance upon such power of attorney or agency; and any action so taken, unless otherwise invalid or unenforceable, shall be binding on the heirs, devisees, legatees, or personal representatives of the principal, provided that it shall be made to appear by proof that the person or persons, firm, or corporation receiving any property by reason of the exercise of the power shall have paid value for the property and the attorney in fact or agent shall make bond for title to purchaser of the property without notice of the death of the principal.

(b) An affidavit, executed by the attorney in fact or agent setting forth that he has not or had not, at the time of doing any act pursuant to the power of attorney, received actual knowledge or actual notice of the revocation or termination of the power of attorney, by death or otherwise, or notice of any facts indicating the same, shall, in the absence of fraud, be conclusive proof of the nonrevocation or nontermination of the power at such time. If the exercise of the power requires execution and delivery of any instrument which is recordable under the laws of this state, such affidavit, when authenticated for record in the manner prescribed by law, shall likewise be recordable.

(c) No report or listing, either official or otherwise, of "missing" or "missing in action," as such words are used in military parlance, shall constitute or be interpreted as constituting actual knowledge or actual notice of the death of such principal or notice of any facts indicating the same or shall operate to revoke the agency.

(d) This Code section shall not be construed so as to alter or affect any provisions for revocation or termination contained in such power of attorney.

(e) This Code section shall apply to such powers of attorney executed prior to March 9, 1945.

(f) This Code section shall not apply to any last will and testament of the principal unless the power of disposal is in compliance with the last will of the principal.

History.

Code 1933, § 4-214, enacted by Ga. L. 1943, p. 354, § 1; Ga. L. 1945, p. 398, § 1; Ga. L. 2024, p. 1052, § 2(49)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, deleted "or" from the end of paragraph (a)(1).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1989, a semicolon was deleted from the end of paragraph (a)(3).

RESEARCH REFERENCES

ALR.
Rights and remedies upon cancellation of sales agency, 32 A.L.R. 210; 52 A.L.R. 546; 89 A.L.R. 252.
Soldiers' and seamen's wills, 137 A.L.R. 1310; 147 A.L.R. 1297; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

10-6-36. Effect of incompetency or incapacity of principal on power of attorney.

A written power of attorney, unless expressly providing otherwise, shall not be terminated by the incompetency or incapacity of the principal. The power to act as an attorney in fact for a principal who subsequently becomes incompetent or incapacitated shall remain in force until such time as a conservator or receiver shall be appointed for the principal or until some other judicial proceeding shall terminate the power.

History.
Code 1933, § 4-214.1, enacted by Ga. L. 1973, p. 493, § 1; Ga. L. 1999, p. 485, § 2; Ga. L. 2008, p. 715, § 1/SB 508.

Law reviews.
For note discussing revocation of proxy upon maker's incapacity, see 17 Ga. St. B. J. 88 (1980).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 32 et seq.
C.J.S.
2A C.J.S., Agency, § 135 et seq.

ALR.
Death or incompetency of principal as affecting existing power of attorney to confess judgment, 44 A.L.R. 1310.

10-6-37. Action for wrongful discharge of agent before termination of contract.

When the contract is for a year, and the principal wrongfully discharges the agent before the end of the year, the agent may either sue immediately for any special injury from the breach of the contract, or, treating the contract as rescinded, may sue for the value of the services rendered, or he may wait until the expiration of the year and sue for and recover his entire wages.

History.
Orig. Code 1863, § 2196; Code 1868, § 2191; Code 1873, § 2217; Code 1882, § 2217; Civil Code 1895, § 3016; Civil Code 1910, § 3588; Code 1933, § 4-215.

JUDICIAL DECISIONS

Section applies after discharged servant had entered upon duties. — This section applies after the servant had actually entered upon the performance of the duties undertaken and was discharged. Putney v. Swift, Murphy &

Co., 54 Ga. 266, 1875 Ga. LEXIS 149 (1875).

Section inapplicable if servant never permitted to serve. — This section is not applicable if A and B contract that A shall serve B as a clerk for four months at a specified rate per month and B refused, on application of A, to permit A to enter on the work. A has a right to recover, not A's four months' wages, but the damages which have come to A from B's breach of contract. Putney v. Swift, Murphy & Co., 54 Ga. 266, 1875 Ga. LEXIS 149 (1875).

Section inapplicable to permanent tenure. — This section does not deal with an employment when the employee has permanent tenure. City Council v. Hydrick, 126 Ga. App. 611, 191 S.E.2d 563, 1972 Ga. App. LEXIS 1234 (1972).

Action under section is ex contractu. — Employee's suit for damages on account of a breach of contract by discharge is an action ex contractu. Cason v. Tye, 9 Ga. App. 325, 71 S.E. 593, 1911 Ga. App. LEXIS 535 (1911).

Cognizable agency contracts must refer to legal rights and duties. — Contracts of agency, to be cognizable in law, must, like other agreements, have reference to the assumption of legal rights and duties, as opposed to engagements of a mere civic or social character, or of such other nature as to exclude monetary values. Huckeby v. Smith, 42 Ga. App. 719, 157 S.E. 234, 1931 Ga. App. LEXIS 119 (1931).

Cognizable agency contracts must have monetary value at law. — In order to constitute a valid contract, the intention of the parties must refer to legal relations, so that the courts may take cognizance of it, and it is generally said that the test of this quality of the contract is that the intention of the parties must relate to something which is of a monetary value in the eye of the law. Huckeby v. Smith, 42 Ga. App. 719, 157 S.E. 234, 1931 Ga. App. LEXIS 119 (1931).

Accrual of right of action when contract treated as continuing. — If the employee elects to treat the employment contract as continuing after wrongful discharge, the right of action as to the last installment of the employee's salary does not accrue until expiration of the stipulated term of employment. Rosenstock v. Congregation Agudath Achim, 118 Ga. App. 443, 164 S.E.2d 283, 1968 Ga. App. LEXIS 1424 (1968).

Employee has six years to bring action on written contract. — If the employment contract is in writing, the employee has six years after the expiration within which to bring an action. Rosenstock v. Congregation Agudath Achim, 118 Ga. App. 443, 164 S.E.2d 283, 1968 Ga. App. LEXIS 1424 (1968).

Action brought during term may include recovery to end. — Although an action for breach of a contract of employment is brought before the term of hiring has expired, the recovery may embrace all the damages down to the expiration of the term, if the trial is held after the whole of such damages become susceptible of definite proof — that is, after the term expired. Georgia, Fla. & Ala. Ry. v. Parsons, 12 Ga. App. 180, 76 S.E. 1063, 1913 Ga. App. LEXIS 486 (1913).

Quantum meruit available as remedy. — If there exists a written contract which is broken, one of the remedies for the breach is quantum meruit, that is, in treating the contract as rescinded. Gilbert v. Powell, 165 Ga. App. 504, 301 S.E.2d 683, 1983 Ga. App. LEXIS 1925 (1983).

Recovery properly limited to quantum meruit. — There being no allegation in the petition and nothing in the evidence to show that the term of service had expired and that the servant was suing to recover the servant's entire damages or that the servant was suing for any special injury for a breach of the contract, the court did not err in treating the plaintiff's case as one based upon quantum meruit and in charging the jury accordingly. Silverthorne v. Arkansas S.E. Ry., 142 Ga. 194, 82 S.E. 551, 1914 Ga. LEXIS 648 (1914).

Measure of damages. — When an offended party sues for the breach of a contract, the measure of the party's recovery is, prima facie, full payment at the contract rate, but the defendant may mitigate the damages by showing that the

plaintiff, by the exercise of ordinary care and diligence, could have rendered the next loss less than that amount. Mimms v. Betts Co., 9 Ga. App. 718, 72 S.E. 271, 1911 Ga. App. LEXIS 305 (1911); J.L. Betts Co. v. Mimms, 14 Ga. App. 786, 82 S.E. 474, 1914 Ga. App. LEXIS 450 (1914).

If there was a contract for the division of commissions between tax investigators and one investigator collected taxes but refused to pay plaintiff the plaintiff's share of the commission, it would appear that the principle controlling is analogous to that found in this section and that the plaintiff is entitled to the third of the remedies provided by this section. Roberts v. Allen, 31 Ga. App. 660, 122 S.E. 86, 1924 Ga. App. LEXIS 119 (1924).

If an employee is unlawfully discharged before the expiration of the term of employment and, before the expiration of the term, brings suit against the employer for damages sustained by reason of such discharge, the employee's measure of damages is the salary or advancements which the employee was entitled to receive under the terms of the contract for the remainder of the term, subject to reduction by proof at the trial. Fried v. Portis Bros. Hat Co., 41 Ga. App. 30, 152 S.E. 151, 1930 Ga. App. LEXIS 449 (1930).

Trial court properly granted partial summary judgment pursuant to O.C.G.A. § 9-11-56 to an employer on an employee's action alleging breach of an employment contract, holding that the employee could only recover wages payable up to the time of trial; O.C.G.A. § 10-6-37 provided that in all employment contracts for a definite duration, an employee could sue for the value of the services rendered, or could wait until the expiration of the year and sue for and recover the employee's entire wages. In this action the employee elected to affirm the contract and bring an immediate suit for damages based upon the company's alleged breach of the employment contract, and under this option, the employee only had the right to prove, and to recover for, all damages which may have accrued up to the date of the trial. Harvey v. J. H. Harvey Co., 276 Ga. 762, 582 S.E.2d 88, 2003 Ga. LEXIS 542 (2003).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 32 et seq.

Am. Jur. Trials.

Defending Wrongful Discharge Cases, 36 Am. Jur. Trials 419.

C.J.S.

3 C.J.S., Agency, §§ 99, 349.

ALR.

Right of agent to offset his own claim against collection made for principal, 2 A.L.R. 132.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 A.L.R. 906.

Rights and remedies upon cancellation of sales agency, 32 A.L.R. 210, 52 A.L.R. 546, 89 A.L.R. 252.

Character and extent of right of broker who has exclusive contract, where sale is effected without his agency, 64 A.L.R. 395.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 A.L.R. 993.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive right to promote or sell defendant's product or invention, 173 A.L.R. 1198.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules, 84 A.L.R.2d 1077.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 A.L.R.3d 9.

Elements and measure of damages in action by schoolteacher for wrongful discharge, 22 A.L.R.3d 1047.

In-house counsel's right to maintain action for wrongful discharge, 16 A.L.R.5th 239.

When statute of limitations commences to run as to cause of action for wrongful discharge, 19 A.L.R.5th 439.

Negligent discharge of employee, 53 A.L.R.5th 219.

10-6-38. Mitigation of damages for improper dismissal.

When an agent has been improperly dismissed before the expiration of his time, earnings which were realized or might have been realized by him up to the end of the term shall go in mitigation of damages.

History.

Civil Code 1895, § 3017; Civil Code 1910, § 3589; Code 1933, § 4-216.

History of Code section.

This Code section is derived from the decision in Ansley v. Jordan, 61 Ga. 483 (1878).

JUDICIAL DECISIONS

Damages for wrongful discharge subject to reduction. — If an employee is unlawfully discharged before the expiration of the term of employment and, before the expiration of the term, brings suit against the employer for damages sustained by reason of such discharge, the employee's measure of damages is the salary or advancements which the employee was entitled to receive under the terms of the contract for the remainder of the term, subject to reduction by proof at the trial. Fried v. Portis Bros. Hat Co., 41 Ga. App. 30, 152 S.E. 151, 1930 Ga. App. LEXIS 449 (1930).

Profits to agent from discharge. — Regular measure of damages is subject to diminution by any amount which the proof shows the agent profited, or in the exercise of reasonable diligence should have profited, by reason of the agent's release from the performance of the service. Realty Co. v. Ellis, 4 Ga. App. 402, 61 S.E. 832, 1908 Ga. App. LEXIS 314 (1908).

Probable commissions employee required to accept in lieu of salary. — Damages will not be diminished by probable commissions when contract was broken by refusal to let employee continue work unless the employee would accept commissions in lieu of salary. Americus Grocery Co. v. Roney, 129 Ga. 40, 58 S.E. 462, 1907 Ga. LEXIS 299 (1907).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 32 et seq.

C.J.S.

3 C.J.S., Agency, §§ 99, 349.

ALR.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 A.L.R. 906.

Rights and remedies upon cancellation of sales agency, 32 A.L.R. 210; 52 A.L.R. 546; 89 A.L.R. 252.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 A.L.R. 684.

Elements and measure of damages in action by schoolteacher for wrongful discharge, 22 A.L.R.3d 1047.

Pre-emption of wrongful discharge cause of action by civil rights laws, 21 A.L.R.5th 1.

10-6-39. Liability of principal for injuries by other agents.

Except as otherwise expressly provided, the principal shall not be

liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business.

History.
Orig. Code 1863, § 2180; Code 1868, § 2176; Code 1873, § 2202; Code 1882, § 2202; Civil Code 1895, § 3030; Civil Code 1910, § 3602; Code 1933, § 4-217.

Cross references.
Liability of employer for injury to employee by other employees, § 34-7-21.
Liability of railroad employer for injuries to employees, § 34-7-41.

JUDICIAL DECISIONS

Continuation of common-law rule. — At common law there could be no recovery against the principal for injuries sustained by an agent from the negligence or misconduct of other agents of the principal, engaged in the same business, and this rule was generally in force in this state by virtue of former Code 1873, § 2202. Crusselle v. Pugh, 67 Ga. 430, 1881 Ga. LEXIS 197 (1881); Barry v. McGhee, 100 Ga. 759, 28 S.E. 455, 1897 Ga. LEXIS 138 (1897); Kilgo v. Rome Soil Pipe Mfg. Co., 16 Ga. App. 737, 86 S.E. 82, 1915 Ga. App. LEXIS 212 (1915); Lamb v. Floyd, 148 Ga. 357, 96 S.E. 877, 1918 Ga. LEXIS 340 (1918).

Exception as to railroad employees. — Principal shall not be liable for injuries arising from the negligence or misconduct of another agent in the same business and declares an exception in case of railroads. Thompson v. Central R.R. & Banking Co., 54 Ga. 509, 1875 Ga. LEXIS 238 (1875).

Exception has been made to the general rule laid down in this section in the case of railroad employees. Robinson v. Huidekoper, 98 Ga. 306, 25 S.E. 440, 1896 Ga. LEXIS 34 (1896); Lamb v. Floyd, 148 Ga. 357, 96 S.E. 877, 1918 Ga. LEXIS 340 (1918).

RESEARCH REFERENCES

Am. Jur. 2d.
27 Am. Jur. 2d, Employment Relationship, § 323 et seq.

C.J.S.
30 C.J.S., Employer's Liability for Injuries to Employees, § 220 et seq.

ARTICLE 3

RIGHTS AND LIABILITIES OF PRINCIPAL TO THIRD PERSONS

Cross references.
Imputing of negligence of one person to another person, § 51-2-1.

Law reviews.
For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010).

JUDICIAL DECISIONS

Construction of article. — Whole of this article is to be taken together. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868); Byne

v. Hatcher, 75 Ga. 289, 1885 Ga. LEXIS 119 (1885).

Apparent authority vanishes in presence of knowledge of agent's powers. — Doctrine of apparent authority rests upon principle that if one of two innocent parties must suffer, the one must bear the burden who places another in a position to cause loss. It necessarily follows that the doctrine may not be invoked by one who knows or has good reason to know the limits and extent of an agent's authority. In such cases the rule is that any apparent authority that might otherwise exist vanishes in presence of person's actual or constructive knowledge of what agent is or is not empowered to do. Atlanta Limousine Airport Servs., Inc. v. Rinker, 160 Ga. App. 494, 287 S.E.2d 395, 1981 Ga. App. LEXIS 3158 (1981).

RESEARCH REFERENCES

ALR.

Liability for misconduct or negligence of messenger not directly related to the service, 18 A.L.R. 1416.

Liability of principal for amount of fraudulent excess collection by agent, 33 A.L.R. 90; 46 A.L.R. 1212.

Validity of contract negotiated by agent acting for both parties, 48 A.L.R. 917.

Regulations, rules, custom, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 A.L.R. 592.

Liability of infant for torts of his employee or agent, 103 A.L.R. 487.

"Vouching in" of one who is not liable over to defendant but is liable over to one whom the defendant has vouched in, 123 A.L.R. 1153.

Lessee as agent of lessor within contemplation of mechanic's lien laws, 163 A.L.R. 992.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 A.L.R.2d 196.

Owner's presence in motor vehicle operated by another as affecting owner's rights or liability, 50 A.L.R.2d 1281.

Shipowner's liability to longshoreman for injuries due to aspects of unseaworthiness brought about by acts of stevedore company or latter's servants, 77 A.L.R.2d 829.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533.

Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 A.L.R.3d 943.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 A.L.R.3d 1191.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws, 50 A.L.R.3d 172.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 A.L.R.4th 459.

Fact that passenger in negligently operated motor vehicle is owner as affecting passenger's liability to or rights against third person—modern cases, 37 A.L.R.4th 565.

10-6-50. Scope of authority; general and special agents.

The agent's authority shall be construed to include all necessary and usual means for effectually executing it. Private instructions or limitations not known to persons dealing with a general agent shall not affect

them. In special agencies for a particular purpose, persons dealing with the agent should examine his authority.

History.

Orig. Code 1863, § 2174; Code 1868, § 2170; Code 1873, § 2196; Code 1882, § 2196; Civil Code 1895, § 3023; Civil Code 1910, § 3595; Code 1933, § 4-301.

Law reviews.

For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957).

JUDICIAL DECISIONS

Analysis

General Consideration
Scope of Authority
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1. Generally
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General Consideration

"General agency" exists if there is a delegation of authority to do all acts in connection with a particular trade or business. Bacon v. Dannenberg Co., 24 Ga. App. 540, 101 S.E. 699, 1919 Ga. App. LEXIS 909 (1919); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

"General agent" may either be one clothed with power to do all the principal's business, of every character, or the general agent may be one empowered to do all acts connected with a particular business or employment. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868).

"General agent" is defined to be one who is employed to transact generally all the business of the principal in regard to which the agent is employed, or in other words to do all acts connected with a particular trade, business, or employment, or to transact all the business of the principal of a particular kind or in a particular place. Raines v. Graham, 85 Ga. App. 815, 70 S.E.2d 125, 1952 Ga. App. LEXIS 835 (1952).

"General agent" is one who is authorized to do all acts connected with a particular trade, business, or employment. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

"Special agent" is one appointed to do a single act or several specified acts. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868).

"Special agent" is authorized to do one or more specific acts in pursuance of particular instructions or within restrictions necessarily implied from the act to be done. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

"Special agent" is one to whom there is a delegation to do a single act. Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765, 1976 Ga. App. LEXIS 2021 (1976).

Attorney as "special agent." — Attorney is not a general agent for all purposes, but the attorney's authority is limited to the particular purpose for which the attorney was retained and the attorney's authority to do other things must be inquired into; as a special agent, the attorney has no inherent power to dispose of the client's property or legal right, but must obtain special authority. Addley v. Beizer, 205 Ga. App. 714, 423 S.E.2d 398, 1992 Ga. App. LEXIS 1397 (1992).

Third person may presume general agency continues until notice of revocation. — Whenever a general agency has been established for any purpose, all persons who have dealt with

General Consideration (Cont'd)

the agent have a right to assume that the agent's authority to deal with the third person in behalf of the agent's principal continues, until notice, express or implied, has been conveyed to the third person that the agency has been revoked. Bacon v. Dannenberg Co., 24 Ga. App. 540, 101 S.E. 699, 1919 Ga. App. LEXIS 909 (1919); Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

When acts of dual agent are avoidable. — If an agent attempts to act for two parties, the effect of the agent's acts may be avoided by the principal when such dual agency is without the principal's full knowledge and consent. Abercrombie v. Ford Motor Co., 81 Ga. App. 690, 59 S.E.2d 664, 1950 Ga. App. LEXIS 973, rev'd, 207 Ga. 464, 62 S.E.2d 209, 1950 Ga. LEXIS 636 (1950).

Agency cannot be proved by evidence of mere declarations of the alleged agent. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Agent's declarations are admissible with other evidence. — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Third person must prove authority for acts beyond those reasonably necessary. — Person dealing with a special agent takes the risk as to any extension of the agent's authority beyond that which is authorized, and the burden rests upon the special agent to show authority from the principal for any acts of the agent other than such usual and ordinary acts as are reasonably necessary to a due performance of the particular purpose of the agency. Wise v. Mohawk Rubber Co., 23 Ga. App. 255, 98 S.E. 100, 1919 Ga. App. LEXIS 65 (1919).

Authority to release must be proved. — Person relying on a release of the person's contract by an agent must prove authority in the agent to make the release. International Correspondence Sch. v. Wright, 47 Ga. App. 861, 171 S.E. 831, 1933 Ga. App. LEXIS 698 (1933).

Fact employees were acting within scope of employment must be proved. — Fact that one or more employees were acting within the scope of their employment was a fact to be proved on the trial by competent evidence, if the same was not admitted by the defendants in their answer, and could be proved either by showing specific authority or it might be inferred from all of the facts and circumstances of the case. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600, 1951 Ga. App. LEXIS 805 (1951).

Admission of agency in answer binds defendant. — If the plaintiff alleged that a certain individual was the agent of defendant company, and the answer admitted the agency, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant's contract, this admission was binding on the defendant, notwithstanding testimony admitted without objection that the individual bought an option on the property and transferred the option to the defendant. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Existence and extent of authority are questions of fact. — Questions of the existence and extent of an agent's authority are generally for the triers of fact. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295, 1980 Ga. App. LEXIS 1924 (1980).

Apparent authority. — Question of the scope and extent of an agency's apparent authority is to be decided from all the facts and circumstances in evidence. All questions of law must be decided by the court, and all questions of fact must be decided by the jury. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Extent of written authority is for court. — If an agent's authority is conferred and defined in writing, the

scope or extent of such authority must be determined from the terms of the writing and is to be determined and construed by the court. Findlay Brick Co. v. American Sewer Pipe Co., 18 Ga. App. 446, 89 S.E. 535, 1916 Ga. App. LEXIS 403 (1916).

Scope of Authority

1. Generally

Test of extent of authority. — Extent of an agent's authority is not determined by the title affixed to the agent's name, but, as between the agent's principal and third persons, the test is in the authority which the agent actually has or which the agent's principal expressly or impliedly represents the agent as having. Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

One may be called a special agent and yet be given the broadest powers. Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

Authority includes all necessary and usual means. — This section embodies a sound proposition taken from the common law, that is, that the agent's authority will be construed to include all necessary and usual means for effectuating authority. Strong v. West, 110 Ga. 382, 35 S.E. 693, 1900 Ga. LEXIS 447 (1900).

First sentence applies to both general and special agents. Callaway v. Barmore, 32 Ga. App. 665, 124 S.E. 382, 1924 Ga. App. LEXIS 587 (1924); Star Furn. Co. v. Dubberly, 46 Ga. App. 178, 167 S.E. 207, 1932 Ga. App. LEXIS 100 (1932).

Authority of special and general agents. — Provision of this section that "the agent's authority shall be construed to include all necessary and usual means for effectually executing it" has reference to both special and general agents. Prudential Ins. Co. of Am. v. Franklin, 51 Ga. App. 496, 180 S.E. 869, 1935 Ga. App. LEXIS 383 (1935).

While a general agent has broader powers than one selected to do a particular act, the authority in both cases must be construed to include all necessary and usual means for effectually executing the authority. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980, 1903 Ga. LEXIS 58 (1903); Hopkins & Co. v. Armour & Co., 8 Ga. App. 442, 69 S.E. 580, 1910 Ga. App. LEXIS 213 (1910).

Agent's authority once established shall be construed to include all necessary and usual means for effectively executing the agent's authority, and this rule applies when the agency is created for general as well as for special purposes. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

Agent may do everything essential to agent's duties. — Agent to conduct a given business for the agent's principal necessarily has authority to do everything which is essential to the performance of the agent's duties as agent. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

Agent may do everything usual or necessary. — Express authority to do an act includes as incidental thereto authority to do those things which are usual or necessary to accomplish effectually the act expressly authorized. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 S.E. 830, 1908 Ga. App. LEXIS 34 (1908).

Authority for an agent to do a thing generally includes authority to do everything usual and necessary for the accomplishment of the main objective. Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Agent may use all usual means, unless contrary clearly appears. — If an agency is created for the performance of an act beneficial to the principal, all the usual modes and means of accomplishing the objects of the agency are included in the agency's creation, unless the contrary clearly appears. Strong v. West, 110 Ga. 382, 35 S.E. 693, 1900 Ga. LEXIS 447 (1900); John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Fact that at the time of an accident a truck driver was on the driver's way to the

Scope of Authority (Cont'd)
1. Generally (Cont'd)

lumberyard to get lumber with which to fasten furniture more securely on the truck does not mean that the driver was deviating from the mission to haul furniture for the employer since if the driver was moving the furniture under the authority of the master in the first instance, the driver's authority would include all necessary and usual means for effectually accomplishing the task. Ellison v. Evans, 85 Ga. App. 292, 69 S.E.2d 94, 1952 Ga. App. LEXIS 719 (1952).

Rule applies to power of attorney. — General rule that an agent's authority shall be construed to include all necessary and usual means for executing the authority has application to the provisions of a power of attorney. Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345, 1937 Ga. LEXIS 636 (1937).

Authority does not extend beyond what is necessary or incidental to it. — Agent's authority does not extend beyond what is necessary or incidental to the authority given. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

Agent may only do what agent may reasonably infer principal desires. — Agent is authorized to do, and to do only, what it is reasonable for the agent to infer that the principal desires the agent to do in the light of the principal's manifestations and the facts as the agent knows or should know them at the time the agent acts. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

When authority to sell inferred. — Authority to sell the principal's property is inferred only when it is incidental to the transaction, usually accompanies the authority expressly conferred, or is reasonably necessary in accomplishing it. Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Authority to obtain execution of prepared contract does not include authority for other agreement. — Authority to a special agent to obtain the signature of a seller to a prepared written contract for the sale of a certain amount of cotton, without more, does not include within itself authority to make a parol agreement that the cotton shall not in fact be delivered, but that the parties shall settle on the basis of the difference between the agreed price and the market price at the time for delivery. Terry v. International Cotton Co., 138 Ga. 656, 75 S.E. 1044, 1912 Ga. LEXIS 647 (1912).

Power to purchase includes power to execute note. — Agent having authority to purchase fertilizer for a company, it will be presumed by virtue of this section that the agent had authority to execute in behalf of the company a note for the payment of the purchase price. Swift & Co. v. Dawson Paper Shell Pecan Co., 24 Ga. App. 625, 101 S.E. 754, 1919 Ga. App. LEXIS 973 (1919).

Power to make cash purchases does not include power to pledge credit. — Person having authority from another to use the other's name in making cash purchases for the latter has no authority, as the latter's agent, to make purchases and pledge the principal's credit for their payment. Morgan v. Georgia Paving & Constr. Co., 40 Ga. App. 335, 149 S.E. 426, 1929 Ga. App. LEXIS 153 (1929).

Authority to sign note does not warrant signing note for larger amount. — Under this section, if one person authorized another to sign one's name to a note for a certain amount and the latter, instead of so doing, signed a note for a larger amount, it is not an abuse of power by the agent but an act by the agent wholly unwarranted. King v. Sparks, 77 Ga. 285, 1 S.E. 266, 1887 Ga. LEXIS 104 (1887).

Factor not authorized to pledge or mortgage. — Factor for the sale of goods is a general agent for that purpose and cannot, as against the owner, pledge or

mortgage them to a third party to secure advances made on the agent's own account. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868).

Drawing bills of exchange. — According to the evidence the drawing of foreign bills of exchange by the defendants, as the factors and shipping agents of the plaintiff, was the necessary and usual means to enable the defendants, as such agents, to obtain the proceeds of plaintiff's cotton in sterling bills. Jones v. J.W. Lathrop & Co., 44 Ga. 398, 1871 Ga. LEXIS 393 (1871).

Cotton factor's agent may make terms for shipments. — Cotton factor's agent, who is authorized to solicit shipments of cotton to the agent's principal, is a general agent for that purpose, and is presumptively authorized to make terms upon which the cotton shall be shipped, received, stored, sold, and handled by the agent's principal. John Flannery Co. v. James, 13 Ga. App. 425, 79 S.E. 912, 1913 Ga. App. LEXIS 184 (1913).

Authority to sell includes authority to agree on price. — If one is appointed to sell a particular article to a particular person, this confers on the special agent authority to agree on the price; otherwise, the appointment is illusory, and not real. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980, 1903 Ga. LEXIS 58 (1903); Hopkins & Co. v. Armour & Co., 8 Ga. App. 442, 69 S.E. 580, 1910 Ga. App. LEXIS 213 (1910).

Authority to collect. — Agency to sell does not necessarily carry with it an agency to collect. Walton Guano Co. v. McCall, 111 Ga. 114, 36 S.E. 469, 1900 Ga. LEXIS 494 (1900).

Agency to sell does not necessarily or impliedly or incidentally carry with it the authority to collect. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

Credit manager does not have authority to accept order. — Acceptance of an order for goods by the credit manager of a corporation is not binding on the corporation when the credit manager neither has authority to make sales nor was held out by the corporation as having such authority, but the authority to sell was vested in another agent; and the deposit with a traveling sales person of a check as part payment on a proposed sale of goods, at the instance of the credit manager, which check was not accepted by the corporation but was returned to the drawee of the check, would not constitute part payment to the corporation. W. & J. Sloane Selling Agents, Inc. v. Tampa Chair & Table Co., 53 Ga. App. 609, 186 S.E. 761, 1936 Ga. App. LEXIS 339 (1936).

Collecting agency has authority to employ attorney to sue. — If one holding a promissory note against another with a claim on certain property as security sends the note and papers evidencing the claims to a collecting agency, a power is created in the latter to procure the services of an attorney, if necessary, to collect the note and enforce the security. Strong v. West, 110 Ga. 382, 35 S.E. 693, 1900 Ga. LEXIS 447 (1900).

A collecting agency empowered by a patron to collect a claim is authorized to employ an attorney to institute suit on the claim in behalf of the client; the patron becomes the attorney's client, and for the attorney's conduct the patron is as much responsible as if the patron had employed the attorney in the first instance instead of engaging the services of the collecting agency. Chamberlin Co. of Am. v. Mays, 96 Ga. App. 755, 101 S.E.2d 728, 1957 Ga. App. LEXIS 684 (1957).

If an Atlanta collecting agency was employed by the defendant to collect a debt, through the medium of a Detroit collecting agency empowered under the terms of a contract with the defendant to sue the claim, to engage the services of the Atlanta agency, and to transmit to the latter the authority conferred upon it, the Atlanta agency was vested with authority to retain a lawyer to handle the litigation necessary to collect the debt because the agency could not institute a suit on behalf of the defendant. Chamberlin Co. of Am. v. Mays, 96 Ga. App. 755, 101 S.E.2d 728, 1957 Ga. App. LEXIS 684 (1957).

Authority to collect does not authorize receiving anything except cash. — As a general rule, a special agent or attorney to collect a debt is not authorized to receive anything as a

Scope of Authority (Cont'd)
1. Generally (Cont'd)

payment thereon except actual cash. Walton Guano Co. v. McCall, 111 Ga. 114, 36 S.E. 469, 1900 Ga. LEXIS 494 (1900); Quillan & Bros. v. Wales Adding Mach. Co., 34 Ga. App. 135, 128 S.E. 698, 1925 Ga. App. LEXIS 73 (1925).

Authority to accept less than full amount. — Presumptively, an agent is hired to make contracts and not to cancel contracts, and a power to collect money under a contract will not raise a presumption of authority in the agent to vary the terms and accept less than the agreed price. International Correspondence Sch. v. Wright, 47 Ga. App. 861, 171 S.E. 831, 1933 Ga. App. LEXIS 698 (1933).

If there is no apparent limitation on an attorney's authority, an attorney at law who has had placed with the attorney an account for collection cannot accept from the debtor, in full accord and satisfaction, anything less than the full amount of the claim, and that in cash; nevertheless, authority to effectuate the collection gives to the attorney implied authority to do everything usual and immediately necessary to accomplish the main purpose of the agency, that of making the collection "in cash." John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Authority to endorse check received for full amount. — Attorney with whom has been placed an account for collection, with no limitation on the attorney's authority as to the manner of collection, on receipt from the debtor of a check in the full amount of the claim and payable to the order of the client, has, without any enabling or permissive authority from the client, authority to endorse the name of the client personally as attorney, in order effectually to liquidate the collection; nor is the rule modified should the attorney, in lieu of taking manual possession of the money, deposit the check either to the attorney's individual account or to the attorney's account as attorney. John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Action of attorneys with whom a claim was placed for collection in endorsing client's name on check in settlement thereof, by themselves as attorneys, and depositing the check to the attorney's credit, did not constitute the crime of forgery, as the attorneys had authority to so endorse the check; hence, the bank was within the bank's right and authority when the bank cashed or paid the check by deposit to the credit of the attorneys making the collection, and would not, under the facts, be liable to the client of the attorneys, to whom the attorneys may have defaulted in remittance of the proceeds arising from the collection. John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Authority to endorse check received if attorney has interest in collection. — Attorney having an interest in a collection in the nature of a commission for services in effectuating the collection has authority to endorse the name of the attorney's client to whom the check is made payable, individually as attorney, in order that the attorney may deduct the commission fees before remittance of the collection to the client. John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Authority to foreclose security deed includes authority to execute required quitclaim reconveyance. — If the holder of the legal title under a deed to secure debt executed a power of attorney empowering the holder's named attorney in fact to bring suit on papers comprising the deed and evidence of debt,

to cause the property to be sold under levy after judgment, and to bid in the property in the name of such holder of the legal title, this authority included, as a "necessary and usual means" of selling the property, the right to execute the quitclaim reconveyance to the debtor, record of which in the clerk's office is made under former Code 1933, §§ 39-202 and 67-1501, a prerequisite to a valid levy and sale of the property. Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345, 1937 Ga. LEXIS 636 (1937).

Power to take bond does not include power to agree to conditions. — Ordinary (now judge of the probate court) who was appointed by the Governor to take a bond had no authority to consent to any stipulations or conditions, and any such consent would be in excess of the power conferred upon the ordinary. Lewis v. Board of Comm'rs, 70 Ga. 486, 1883 Ga. LEXIS 363 (1883).

Authority to make minor repairs necessarily includes the authority to employ others to do the work. Oconee County v. Rowland, 107 Ga. App. 108, 129 S.E.2d 373, 1962 Ga. App. LEXIS 584 (1962).

Delivery person may obtain assistance of another in changing tire. — If a servant is employed to take and deliver goods of the master in its truck to customers in another city, and after their delivery to return the truck to the master's place of business, and while the servant is thus en route, a blowout of a heavy tire occurs, the servant, in the absence of contrary instructions, is authorized, so far as reasonably necessary, to obtain the assistance of another in the furnishing of needful light for the work of changing the tire, when the blowout occurs at night. McGhee v. Kingman & Everett, Inc., 49 Ga. App. 767, 176 S.E. 55, 1934 Ga. App. LEXIS 554 (1934).

Foreperson of construction gang has no authority to hire teams. — Foreperson of a construction gang is a special agent with limited powers and has no authority to hire teams for a definite term. Langston v. Postal Telegraph-Cable Co., 6 Ga. App. 833, 65 S.E. 1094, 1909 Ga. App. LEXIS 492 (1909).

Conditions which enter into validity of contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered, and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or endorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101, 1935 Ga. App. LEXIS 424 (1935).

Agent is without authority to continue cancelled policy. — If authority of agent is limited by terms of group insurance policy and such policy is cancelled, such agent is without authority to continue such cancelled policy in force, unless such continuation is accepted and agreed to by the officers of the company empowered so to do, or there has been an acceptance by the company of payments of premiums made for such purpose, and such agent is without authority to constitute the employer in group insurance policy the agent of the company to receive premiums for it. Lancaster v. Travelers Ins. Co., 54 Ga. App. 718, 189 S.E. 79, 1936 Ga. App. LEXIS 739 (1936).

2. Apparent Authority

Principal bound by agent's apparent authority. — Principal is bound when the agent lacks express authority but is possessed of apparent authority. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

"Apparent authority" defined. — "Apparent authority" is power which results from acts that appear to third persons to be authorized by the principal. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

"Apparent authority" is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's

Scope of Authority (Cont'd)
2. Apparent Authority (Cont'd)

manifestations to such third persons. Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Basis of apparent authority doctrine. — Doctrine of apparent authority is based upon the principle that when one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who, by that person's conduct created the circumstances which enabled the third party to perpetuate the wrong and cause the loss. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

Principal's conduct may establish agent's authority. — Authority of an agent in a particular instance may be established by the principal's conduct and course of dealing. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

Agent is presumed to have authority within apparent scope. — If a person imposes upon another the duties and responsibilities involving the management and control of a matter of business, the agent will be presumed to have authority to represent the agent's employer in any matter within the scope of the agent's apparent authority. Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

Principal is bound to the extent of the apparent authority the principal has conferred upon the agent, and not by the actual or express authority, when that differs from the apparent authority. Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

In the case of a general agency, the principal is bound by the acts of an agent within the apparent scope of the agent's authority. Bacon v. Dannenberg Co., 24 Ga. App. 540, 101 S.E. 699, 1919 Ga. App. LEXIS 909 (1919); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668, 1954 Ga. App. LEXIS 819 (1954).

General agent may bind the agent's principal with respect to all matters within the apparent scope of the agent's authority. Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 S.E. 1000, 1905 Ga. LEXIS 351 (1905).

Special agent. — If one holds another out as one's special agent, the principal is bound by the agent's apparent authority to do the particular thing thus authorized, as well as to do any and all things usual and necessary and to employ all usual and necessary means as may be reasonably required, in the due, proper, and ordinary performance of the particular purpose of the appointment. Wise v. Mohawk Rubber Co., 23 Ga. App. 255, 98 S.E. 100, 1919 Ga. App. LEXIS 65 (1919); Callaway v. Barmore, 32 Ga. App. 665, 124 S.E. 382, 1924 Ga. App. LEXIS 587 (1924); Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

If principal's words or conduct cause third person to believe principal consents. — Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on the principal's behalf by the person purporting to act for the principal. Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Estoppel against principal to deny authority. — Under the doctrine of apparent authority, an estoppel is worked against the principal to deny that there was authority, and the principal will not be permitted to prove that the agent's authority was, in fact, less extensive than that with which the agent was apparently clothed. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

Establishing authority of agent. — Authority of an agent in a particular instance may be established by the habits, conduct, and course of business of the principal. If one thus holds out to another that one's agent possesses certain authority and this induces or influences others in their dealings with the agent, the principal is estopped to deny that the

agent has the authority which, as reasonably deducible from the conduct of the principal, the agent apparently possesses. Germain Co. v. Bank of Camden County, 14 Ga. App. 88, 80 S.E. 302, 1913 Ga. App. LEXIS 421 (1913); Bacon v. Dannenberg Co., 24 Ga. App. 540, 101 S.E. 699, 1919 Ga. App. LEXIS 909 (1919); Atlanta Biltmore Hotel Corp. v. Martell, 118 Ga. App. 172, 162 S.E.2d 815, 1968 Ga. App. LEXIS 1342 (1968); Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975); Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Justified reliance required for estoppel. — In order for estoppel under the doctrine of apparent authority to occur it must appear that the third party dealt with the agent in reliance upon the authority which the principal has apparently conferred upon the agent, and it must appear that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent had authority to perform a particular act and deals with the agent upon that assumption. Interstate Fin. Corp. v. Appel, 134 Ga. App. 407, 215 S.E.2d 19, 1975 Ga. App. LEXIS 2025 (1975).

When an alleged principal, by acts or conduct, has knowingly caused or permitted another to appear as the principal's agent, the principal will be estopped to deny the agency, to the injury of third persons who have in good faith and in reasonable prudence dealt with the apparent agent on the faith of the relation. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295, 1980 Ga. App. LEXIS 1924 (1980).

An estoppel is worked against the principal to deny authority if it appears that the third party dealt with the agent in reliance upon the authority apparently conferred upon it by the principal. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

Authority of an agent in a particular instance need not be proved by express contract. Germain Co. v. Bank of Camden County, 14 Ga. App. 88, 80 S.E. 302, 1913 Ga. App. LEXIS 421 (1913); Atlanta Biltmore Hotel Corp. v. Martell, 118 Ga. App. 172, 162 S.E.2d 815, 1968 Ga. App. LEXIS 1342 (1968); Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Authority to sell does not include apparent authority to release debtor. — Agent or representative whose duties are merely to sell goods for a principal and collect therefor has no apparent authority under this section to release anyone from an obligation due to the principal. Morgan v. Weil Co., 31 Ga. App. 611, 121 S.E. 703, 1924 Ga. App. LEXIS 96 (1924).

Authority to collect and adjust apparently includes authority to release. — If an agent with authority from a principal to "adjust" and "collect" accounts is sent by the principal to collect an alleged indebtedness due the principal under a particular contract, which contract contemplates that the debtor might under some circumstances turn back to the creditor goods purchased from the creditor under the contract, one is a general agent for the purpose of adjusting and collecting the indebtedness, and it is apparently within the scope of one's authority to accept from purchasers of the debtor goods of the character bought by the debtor under the contract from the creditor, the agent's principal, and also to release the debtor from further liability under the contract, and also to accept payment in release of all liability under the contract of guaranty from the guarantor; and, although the agent may not have actually possessed such authority, a settlement by way of release, so made with one of the guarantors, without knowledge of such limitation, is binding upon the agent's principal. Rawleigh Co. v. Royal, 30 Ga. App. 706, 119 S.E. 339, 1923 Ga. App. LEXIS 635 (1923).

Authority to endorse check includes apparent authority to deposit proceeds. — If an attorney has authority to endorse a check payable to the attorney's client, the attorney has apparent authority to deposit the

Scope of Authority (Cont'd)
2. Apparent Authority (Cont'd)

proceeds thereof either in the attorney's individual account or the attorney's account as attorney. John Bean Mfg. Co. v. Citizens Bank, 60 Ga. App. 615, 4 S.E.2d 924, 1939 Ga. App. LEXIS 106 (1939), overruled, Tifton Bank & Trust Co. v. Knight's Furniture Co., 215 Ga. App. 471, 452 S.E.2d 219, 1994 Ga. App. LEXIS 1274 (1994).

Traveling salesperson apparently has authority to transmit instructions as to insuring goods. — Since it is a custom of wholesalers to effect insurance on goods shipped by the wholesalers, when requested or instructed so to do by their customers, an ordinary drummer or commercial traveler, who by the terms of employment is authorized to receive and transmit orders but not to close contracts, has apparent authority to receive and transmit instructions as to effecting insurance on goods ordered through the drummer or commercial traveler. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 S.E. 830, 1908 Ga. App. LEXIS 34 (1908).

Real estate sales person apparently has authority to guarantee purchaser's lease will be cancelled. — Person employed by a real estate broker to act for the person as a "real estate salesman," whose duties are to obtain listings of real estate for sale, "to make sales of real estate just in a general way," and who has "the privilege of making transactions generally," is a general agent for the broker to procure purchasers for real estate listed with the broker for sale; and it is within the scope of the apparent authority of the sales person as the agent of the broker, in negotiating sales of real estate, to bind the principal by an obligation to the purchaser made for the purpose of inducing the purchaser to buy the real estate, and as a part of the consideration moving to the contract for the purchase of the real estate, to guarantee to obtain for the purchaser a cancellation of a lease which the purchaser has as a tenant of the premises other than that which are the subject matter of the sale. J.J. Williamson & Sons v. Smith, 47 Ga. App. 495, 170 S.E. 709, 1933 Ga. App. LEXIS 705 (1933).

Although it was undisputed that the patient did not sign the arbitration agreement personally, the operator asserted that the patient's spouse was the patient's agent and, therefore, had the authority to bind the patient to the agreement by signing the spouse's name; in Georgia, an agency relationship was created whenever one person, expressly or by implication, authorized another to act for the person or subsequently ratified the acts of another in the person's behalf, O.C.G.A. § 10-6-1, and because the operator had not proven, by a preponderance of the evidence, that the patient expressly authorized the operator to act on the patient's behalf in signing the arbitration agreement, an agency relationship was created, if at all, by implication. Under Georgia law, the agent's authority shall be construed to include all necessary and usual means for effectually executing it. O.C.G.A. § 10-6-50, and even assuming that the version of events put forth by the operator's witnesses was true, the operator failed to meet the operator's burden of proving that the patient's spouse had actual or apparent authority to bind the patient by signing the arbitration agreement; accordingly, the arbitration agreement was not enforceable against the patient pursuant to 9 U.S.C. § 4, and the operator's motion to compel arbitration and stay discovery was denied. Gentry v. Beverly Enterprises-Georgia Inc., 714 F. Supp. 2d 1225, 2009 U.S. Dist. LEXIS 127194 (S.D. Ga. 2009).

Instructions or Limitations on Authority

1. Generally

Authority of attorney of record is fixed by contract and client's instructions. — Attorney of record is a party's agent in the prosecution of a legal action, and the attorney's authority is determined by the terms of the attorney's contract of employment and the instructions given by the client. Davis v. Davis, 245 Ga. 233, 264 S.E.2d 177, 1980 Ga. LEXIS 753 (1980).

Special agent, like broker, derives power from instructions. — Under

former Code 1873, §§ 2184 and 2196, a broker was a special agent and derived the broker's power and authority to bind the principal from the instruction given to the broker by the principal. Clark & Nunnally v. Cumming & Co., 77 Ga. 64, 1886 Ga. LEXIS 287 (1886).

Special agent cannot bind principal beyond known limitations. — One who deals with a special agent, knowing at the time the limits within which the agent, under the terms of the agent's appointment, has authority to bind the agent's principal, is bound to act with reference to this knowledge, and cannot hold the principal liable for loss occasioned by acts of the agent in excess of, or contrary to, the latter's authority in the premises. Littleton & Lamar v. Loan, Mercantile & Stock Ass'n, 97 Ga. 172, 25 S.E. 826, 1895 Ga. LEXIS 307 (1895); Quillan & Bros. v. Wales Adding Mach. Co., 34 Ga. App. 135, 128 S.E. 698, 1925 Ga. App. LEXIS 73 (1925).

In special agencies, the rule is that if the agent exceeds the special and limited authority conferred upon the agent, the principal is not bound by the agent's acts, but they are mere nullities, so far as the principal is concerned, unless the principal has held the agent out as possessing a more enlarged authority. Comer v. Foley, 98 Ga. 678, 25 S.E. 671, 1896 Ga. LEXIS 120 (1896); W. & J. Sloane Selling Agents, Inc. v. Tampa Chair & Table Co., 53 Ga. App. 609, 186 S.E. 761, 1936 Ga. App. LEXIS 339 (1936).

Principal is never bound when third person knows authority was exceeded. — A principal is not bound by the acts of an agent when those acts are beyond the scope of the agent's authority and the person dealing with the agent knows thereof. Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935).

If limitation on authority of agent is contained in an application for insurance, attached to and made part of the policy, and the agent was therefore not acting within the apparent scope of the agent's authority in waiving a breach of condition existing when the policy was issued, the insurer is not bound by the alleged waiver or by any estoppel. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101, 1935 Ga. App. LEXIS 424 (1935).

Unknown, private instructions cannot affect third persons. — Private instructions or limitations not known to persons dealing with an agent who assumes to act within the apparent scope of the agent's authority cannot affect the third parties. Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 S.E. 1000, 1905 Ga. LEXIS 351 (1905); Hopkins & Co. v. Armour & Co., 8 Ga. App. 442, 69 S.E. 580, 1910 Ga. App. LEXIS 213 (1910).

Unknown private instructions in case of general agent. — Private instructions or limitations not known to persons dealing with a general agent are not binding upon such persons. Bacon v. Dannenberg Co., 24 Ga. App. 540, 101 S.E. 699, 1919 Ga. App. LEXIS 909 (1919).

If it appears, without contradiction, that the agent had entire control of all the business affairs of the agent's sister, the landlord, including the management and control of the farm, the agent must be held to have been a general agent, and the agent's alleged agreement would be binding on the principal as landlord. This would be true despite any private instructions or limitations upon the agent's authority not known to the person dealing with the agent as a general agent. Nelson v. Fuqua, 46 Ga. App. 754, 169 S.E. 206, 1933 Ga. App. LEXIS 230 (1933).

If a clerk is left in charge of a mercantile establishment by the proprietors thereof in the proprietors' absence, with authority to conduct the business and to buy goods upon the credit of the proprietors, and with authority to conduct all the correspondence of the business, one is a general agent of the proprietors for the supervision of the establishment and the buying on their credit of goods of a mercantile character and suitable to the business conducted by the proprietors, and since one is such a general agent, limitations upon one's authority as to the amount and character of the purchases, which are unknown to persons dealing with the agent, do not affect them. Mason v. Rice, 47 Ga. App. 502, 170 S.E. 829, 1933 Ga. App. LEXIS 534 (1933).

Unknown private instructions in case of special agent not exceeding necessary and usual means. — Although the second sentence of this

Instructions or Limitations on Authority (Cont'd)
1. Generally (Cont'd)

section mentions only general agents, so long as a special agent does not go beyond the necessary and usual means for executing the special agent's agency, the special agent's powers with reference to the particular undertaking are in the nature of those of a general agent to the extent that private instructions or limitations not known to the persons dealing with the special agent cannot affect the other parties. Callaway v. Barmore, 32 Ga. App. 665, 124 S.E. 382, 1924 Ga. App. LEXIS 587 (1924); Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

Secret instructions in case of special agent to sell who fixes price. — When, without naming the terms of sale, the principal, in writing authorizes a special agent to sell personal property to a particular person, the authority of such special agent will be construed to include all necessary and usual means for effectually executing it, and such agent has authority to fix the price of the goods, and the purchaser is not bound to take notice of secret instructions given by the principal. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980, 1903 Ga. LEXIS 58 (1903).

Secret instructions do not alter general rule as to authority to use usual means. — Rule that whenever an agent is empowered to do a particular thing, the agent is also empowered to use all lawful means to accomplish the thing, would not be altered by any secret instructions given to the agent by the principal, unknown to a third person. John Flannery Co. v. James, 13 Ga. App. 425, 79 S.E. 912, 1913 Ga. App. LEXIS 184 (1913).

2. Inquiring as to Instructions

Third persons must inquire as to special agent's authority. — Persons dealing with an agent appointed for a particular purpose are bound to inquire as to the extent of the agent's authority. Baldwin Fertilizer Co. v. Thompson & McAlister, 106 Ga. 480, 32 S.E. 591, 1899 Ga. LEXIS 708 (1899); Harris Loan Co. v. Elliott & Hatch Book Typewriter Co., 110 Ga. 302, 34 S.E. 1003, 1900 Ga. LEXIS 382 (1900); Carter v. Pembroke Nat'l Bank, 11 Ga. App. 479, 75 S.E. 824, 1912 Ga. App. LEXIS 64 (1912); Germain Co. v. Bank of Camden County, 14 Ga. App. 88, 80 S.E. 302, 1913 Ga. App. LEXIS 421 (1913); Quillan & Bros. v. Wales Adding Mach. Co., 34 Ga. App. 135, 128 S.E. 698, 1925 Ga. App. LEXIS 73 (1925); Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960); Addley v. Beizer, 205 Ga. App. 714, 423 S.E.2d 398, 1992 Ga. App. LEXIS 1397 (1992); Continental Ins. Co. v. Gazaway, 216 Ga. App. 125, 453 S.E.2d 91, 1994 Ga. App. LEXIS 1433 (1994), cert. denied, No. S95C0742, 1995 Ga. LEXIS 562 (Ga. Apr. 14, 1995); Turnipseed v. Jaje, 267 Ga. 320, 477 S.E.2d 101, 1996 Ga. LEXIS 876 (1996).

Even though buyers had no actual knowledge of limitations on the agent's authority to make representations on the quality of the carpet, the buyers were charged with a duty to discover the extent of the agent's authority. Bruce v. Calhoun First Nat'l Bank, 134 Ga. App. 790, 216 S.E.2d 622, 1975 Ga. App. LEXIS 2171 (1975).

Third persons must take notice of special agent's instructions. — Every man deals with a special agent at the man's peril and is bound to take notice of the agent's instructions. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868).

Those who deal with a special agent are charged with notice of the extent of the latter's authority, and if such agent makes a settlement not within the scope of the agency, the settlement is not binding on the principal. Baldwin Fertilizer Co. v. Thompson & McAlister, 106 Ga. 480, 32 S.E. 591, 1899 Ga. LEXIS 708 (1899).

One entering into a 15-year lease contract executed by an agent in behalf of a purported principal is charged with notice that the agent's authority to execute the lease is required by law to be in writing and is under a duty to inquire and ascertain whether such written authority exists and what the limits of the authority

are, and such person is guilty of negligence in failing to make such an inquiry. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960); Union Camp Corp. v. Dyal, 460 F.2d 678, 1972 U.S. App. LEXIS 10518 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90, 1972 U.S. LEXIS 1323 (1972).

Third persons must take notice of special agent's instructions only if included in examined authority. — Even if a letter is treated as creating a special agency to sell particular goods to a particular person, the purchaser was only required to examine the authority and was not bound by private instructions not included in the writing. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980, 1903 Ga. LEXIS 58 (1903); Hopkins & Co. v. Armour & Co., 8 Ga. App. 442, 69 S.E. 580, 1910 Ga. App. LEXIS 213 (1910).

Failure to inquire bars recovery from agent for misrepresenting authority. — One who enters into a 15-year lease contract executed by an agent in behalf of a purported principal without making due inquiry into the agent's authority is precluded from recovering damages from the agent either on the ground that the agent contractually misrepresented the fact that the agent had authority, either expressly or impliedly, or on the ground that the agent fraudulently misrepresented that the agent had authority to execute the lease as agent. Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790, 1960 Ga. App. LEXIS 594 (1960).

Rule applies to guardian. — Since a guardian is in effect a special agent of the law to manage the estate of a person non sui juris, it is incumbent upon all persons dealing with the guardian/special agent to examine the agent's authority. Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803, 1934 Ga. LEXIS 443 (1934).

Railroad ticket agent. — Purchaser of railroad accommodations from a ticket agent was not required to communicate with the principal and verify the agent's actual authority. Bryant v. Atlantic C. L. R.R., 19 Ga. App. 536, 91 S.E. 1047, 1917 Ga. App. LEXIS 225 (1917).

Agents for indemnity company issuing unusual bond. — If a person dealing with agents, having a written power of attorney to execute bonds, has had experience in dealing with indemnity companies and knows that the bond is an unusual obligation for an indemnity company to write and is outside the ordinary range of the business of indemnity companies, and that the bond is not executed on the regular blank form used by the indemnity company, and is not executed in the office of indemnity company or in office of its authorized agents, but is executed in office of the person dealing with agents, this does not constitute knowledge of facts sufficient to put the person dealing with agents, as a prudent person, on inquiry as to the lack of the agents' authority to bind indemnity company. Independence Indem. Co. v. Industrial Realty Co., 46 Ga. App. 637, 168 S.E. 122, 1933 Ga. App. LEXIS 157, aff'd, 178 Ga. 45, 172 S.E. 38, 1933 Ga. LEXIS 12 (1933).

Principal may waive objection to want of authority. — Person who deals with a special agent must examine the special agent's authority and determine at the person's own risk whether the particular act to be done is within such authority, but this does not prevent the principal from waiving the principal's right to object to the agent's want of authority. Germain Co. v. Bank of Camden County, 14 Ga. App. 88, 80 S.E. 302, 1913 Ga. App. LEXIS 421 (1913).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, §§ 23 et seq., 188 et seq.
Am. Jur. Pleading and Practice Forms.
7 Am. Jur. Pleading and Practice Forms, Conspiracy, § 1.
C.J.S.
2A C.J.S., Agency, § 138 et seq.
ALR.
Authority of agent to assent to account stated, 2 A.L.R. 71.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or apparently authorized, to find a market, 8 A.L.R. 203; 105 A.L.R. 718.

Implied authority of servant or agent to bind employer for services of undertaker or other funeral expenses, 29 A.L.R. 457.

Liability of undisclosed principal on sealed contract, 32 A.L.R. 162.

Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A.L.R. 393.

Authority of claim agent as regards terms or condition of settlement, 87 A.L.R. 1277.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 A.L.R. 389.

Implied, apparent or ostensible, and presumed authority of bank cashier to surrender or waive some right of bank, 108 A.L.R. 713.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 A.L.R. 665.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 116 A.L.R. 457; 83 A.L.R.2d 1282.

Agent's disregard of principal's instructions where power coupled with an interest, 162 A.L.R. 1182.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 A.L.R.2d 406.

Authority of agent to make payment on behalf of principal, as regards statute of limitations, 31 A.L.R.2d 139.

Agent's authority to agree contemporaneously with sale to repurchase or resell or for return of personal property, 34 A.L.R.2d 510.

Power of real estate broker to execute contract of sale in behalf of principal, 43 A.L.R.2d 1014.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6.

Authority of agent to borrow money for principal, 55 A.L.R.2d 1215.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 A.L.R.2d 1237.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 A.L.R.2d 1389.

Doctrine of apparent authority as applied to agent of municipality, 77 A.L.R.3d 925.

10-6-51. Effect of acts within and outside scope of authority.

The principal shall be bound by all the acts of his agent within the scope of his authority; if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none.

History.

Orig. Code 1863, § 2172; Code 1868, § 2168; Code 1873, § 2194; Code 1882, § 2194; Civil Code 1895, § 3021; Civil Code 1910, § 3593; Code 1933, § 4-302.

Law reviews.

For note discussing governmental immunity from tort liability in Georgia, see 5 Ga. St. B. J. 494 (1969).

JUDICIAL DECISIONS

Analysis

General Consideration
When Principal Bound
1. Generally
2. Effect of Partial Ratification

General Consideration

Section amplifies § 10-6-56. — Former Code 1933, § 4-302 (see now O.C.G.A. § 10-6-51), providing that the principal shall be bound by all the acts of the principal's agent within the scope of the principal's authority, was a mere amplification of former Code 1933, § 4-307 (see now O.C.G.A. § 10-6-56), and the same was true of former Code 1933, § 4-315 (see now O.C.G.A. § 10-6-64), insofar as it referred to scope of authority. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

Authority to do things necessary to accomplish objective. — Agent's authority generally includes authority to do everything necessary for accomplishment of main objective. Maggioni v. L.P. Maggioni & Co., 159 Ga. App. 463, 283 S.E.2d 682, 1981 Ga. App. LEXIS 2647 (1981).

Sufficiency of allegations of agency to bind principal. — Since the plaintiff's pleading failed to show that the alleged agent of the defendant bank was a general agent, or that the agent was a special agent with authority to bind the bank, but showed that the sheriff had dealt with the person as an agent of the bank, the pleading failed to show that the person had any power or authority to enter into any contract binding the defendant in the manner alleged. First Joint Stock Land Bank v. Pitts, 48 Ga. App. 805, 173 S.E. 732, 1934 Ga. App. LEXIS 205 (1934).

One way of alleging agency so as to bind the principal for the acts of the agent is to allege that the act was committed by the agent as agent for the principal and within the scope of the agent's employment. Harris v. Barnes, 100 Ga. App. 412, 111 S.E.2d 147, 1959 Ga. App. LEXIS 633 (1959).

Allegations showing ratification. — Since the alleged acts of a finance company regarding an automobile sale contract included their acceptance of the benefits in the form of a note, conditional sale contract, payments on the note, and the insurance premium, this indicated a ratification of the agreement made by the president of the automobile dealership that assigned the contract to the finance company that credit life insurance would be procured, and showed such part performance on the part of the conditional buyer as to estop the finance company from attacking the agreement as oral and in conflict with any written provisions. In this situation, there appeared to be no conflict present, but rather an explanation of any ambiguity and a showing as to what constituted the entire contract. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101, 1961 Ga. LEXIS 454 (1961).

Admission of agency in answer binding on defendant. — Since the plaintiff alleged that a certain individual was the agent of defendant company, and the answer admitted it, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant's contract, this admission was binding on defendant notwithstanding testimony admitted without objection that the individual bought an option on the

General Consideration (Cont'd)

property and transferred the option to the defendant. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Agency cannot be proved by evidence of mere declarations of the alleged agent. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Agent's declarations are admissible with other evidence. — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, declarations of the alleged agent are admissible in evidence. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Acts of agents of defendant may be proved to prove waiver by defendant. — Act of fire insurance agents in waiving the necessity of filing proof of loss would be the act or conduct of the defendant, and accordingly the court did not err in admitting in evidence testimony of certain witnesses, over objection of the defendant, as to the acts and conduct of such agents, for the purpose of showing waiver of proof of loss. Concordia Fire Ins. Co. v. Hardman, 63 Ga. App. 320, 11 S.E.2d 79, 1940 Ga. App. LEXIS 84 (1940).

Whether acts within scope of employment question of fact to be proved. — Fact that one or more employees were acting within the scope of their employment was a fact to be proved on the trial by competent evidence, if the same was not admitted by the defendants in their answer, and could be proved either by showing specific authority or it might be inferred from all of the facts and circumstances of the case. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600, 1951 Ga. App. LEXIS 805 (1951).

Contract admissible if agent's authority or ratification by principal inferable. — Court did not err in admitting the contract in evidence since the jury was authorized to infer that the contract was signed by an agent held out by a partnership as having authority or ratified by the conduct of a partner during the existence of the partnership. Hardin v. Atlanta Gas Light Co., 71 Ga. App. 63, 30 S.E.2d 121, 1944 Ga. App. LEXIS 280 (1944).

When Principal Bound

1. Generally

Principal responsible for acts in line of duty. — What an agent does in the line of duty devolved upon the agent by the agent's superior will make the latter responsible, under this section and § 10-6-60. Maddox & Rucker v. Cunningham, 68 Ga. 431, 1882 Ga. LEXIS 24 (1882).

Principal is bound by the authorized acts of the principal's agent as effectively as if the principal had been present and personally committed the act. Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209, 1950 Ga. LEXIS 636 (1950).

Principal responsible for acts of one partner if partnership is agent. — If an owner of property employs a partnership as the owner's agent to sell the property, the owner will be bound by the acts and representations of each of the partners within the real or apparent scope of the agency, although the owner may have dealt with the partnership through one of the partners only. Lancaster v. Neal, 41 Ga. App. 721, 154 S.E. 386, 1930 Ga. App. LEXIS 1072 (1930).

If agency disclosed, principal is maker of authorized instrument. — If in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter, and not the agent, will be regarded as the maker of the instrument, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930).

Master's property is subject to lien for labor and materials furnished through servant. — Since the relationship of master and servant existed between an owner and builder, the master became liable for the acts of the servant as

the master's agent within the scope of the agent's employment and therefore was subject to a personal judgment, and the master's property was subject to liens for the labor and materials which had been furnished to the master through such servant and of which the master had received the benefit. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945).

Members of a union are chargeable with the act of the officers of the union in allowing a strike in another plant since the officers were clearly acting within the scope of their authority as defined by the union's constitution. Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209, 1950 Ga. LEXIS 636 (1950).

Principal bound without knowledge, if acts were authorized. — Authorized acts of the agent are binding upon the principal, although the principal has no knowledge thereof. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

Principal is bound when the agent lacks express authority but is possessed of apparent authority. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

Principal estopped from denying agent's apparent authority. — If agent has certain authority from principal by reason of principal's conduct and course of dealing as well as express agency contract, and thus induces another to deal with the principal's agent as such, the agent's principal is estopped to deny that the agent has such authority which, as reasonably appears or is deducible from the conduct of the parties (principal and agent), agent apparently has. Hutsell v. U.S. Life Title Ins. Co., 157 Ga. App. 845, 278 S.E.2d 730, 1981 Ga. App. LEXIS 2032 (1981).

Estoppel is worked against the principal to deny authority if it appears that the third party dealt with the agent in reliance upon the authority apparently conferred upon the agent by the principal. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

Principal bound even though agent is also agent for other party. — Insurer may not clothe an agent with apparent authority to enter into an insurance contract and then escape the usual effects of estoppel because the agent is also the agent of the insured party. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

Principal is responsible for the torts of the principal's agent when the agent is acting on behalf of the principal. DeDaviess v. U-Haul Co., 154 Ga. App. 124, 267 S.E.2d 633, 1980 Ga. App. LEXIS 2068 (1980).

Agent's absconding with an appearance bond fee did not affect the validity of the bond, and forfeiture was authorized when the principal failed to appear. First Joint Stock Land Bank v. Pitts, 48 Ga. App. 805, 173 S.E. 732, 1934 Ga. App. LEXIS 205 (1934).

Principal may be criminally liable for agent's act. — Under statutes positively forbidding certain acts irrespective of the motive or intent of the actor, a principal or master may be criminally liable for the principal's agent's or employee's act done within the scope of the agent's employment. Lunsford v. State, 72 Ga. App. 700, 34 S.E.2d 731, 1945 Ga. App. LEXIS 676 (1945).

Principal only bound by acts within scope of agent's authority. — Principal is only bound for the acts of the agent within the scope of the agent's authority. Baldwin Fertilizer Co. v. Thompson & McAlister, 106 Ga. 480, 32 S.E. 591, 1899 Ga. LEXIS 708 (1899).

General agent may bind the agent's principal by any act within the scope of the agent's authority; the agent may do all acts proper for the accomplishment of the end or such as are usual in matters of this kind, but the agent cannot bind the principal by an act outside of the object of the agent's appointment. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868).

Unpublished decision: Fact that the insured sent in a late payment after an agent allegedly told the insured that the insurer would provide retroactive coverage was of no issue; the late payment did not necessarily evidence a belief on the insured's part that the agent had the authority to provide retroactive coverage.

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1. Generally (Cont'd)

Even if the insured truly believed the agent had the authority to provide retroactive coverage, it was not a reasonable belief. Rutland v. State Farm Mut. Auto. Ins. Co., 392 Fed. Appx. 721, 2010 U.S. App. LEXIS 16744 (11th Cir. 2010).

Undisclosed principal. — Person cannot be held liable as an undisclosed principal unless the alleged agent who made the contract had actual authority as an agent to bind the principal. Morgan v. Georgia Paving & Constr. Co., 40 Ga. App. 335, 149 S.E. 426, 1929 Ga. App. LEXIS 153 (1929).

Principal not bound by acts outside scope. — Principal is not bound by the acts of the agent outside the scope of the agent's authority. First Joint Stock Land Bank v. Pitts, 48 Ga. App. 805, 173 S.E. 732, 1934 Ga. App. LEXIS 205 (1934).

Limitation on scope known to third person. — Principal is not bound by the acts of an agent when these acts are beyond the scope of the agent's authority and the person dealing has notice thereof, under former Code 1933, §§ 4-202, 4-301, 4-302 (see now O.C.G.A. §§ 10-6-21, 10-6-50, and 10-6-51). Cotton States Life Ins. Co. v. Scurry, 50 Ga. 48, 1873 Ga. LEXIS 201 (1873); Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935).

Limitation on power to procure attorney for collection. — Agent to procure a competent attorney to collect a note, though the note is without negotiable words, is clothed with power to make the contract for its collection, unless the agent's agency is restricted and that restriction is made known to the attorney at the time the contract for collection is made. Barclay v. Hopkins, 59 Ga. 562, 1877 Ga. LEXIS 335 (1877).

Waiver of breach of condition as to insurance policy. — If limitation on authority of agent is contained in an application for insurance, attached to and made part of the policy, and the agent was therefore not acting within the apparent scope of the agent's authority in waiving a breach of condition existing when the policy was issued, the insurer is not bound by the alleged waiver or by any estoppel. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101, 1935 Ga. App. LEXIS 424 (1935).

Act ratified by principal. — Act done by an agent in excess of the agent's authority does not bind the principal unless ratified by the latter. Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288, 1954 Ga. App. LEXIS 739 (1954).

Corporation clearly assented to a contract to sell the corporation's real property when the corporation properly executed a fourth amendment to the contract, although the original contract and amendments had not been properly signed. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

Despite the genuine issue of material fact as to whether the purchaser terminated the purchaser's contract, the purchaser's principal ratified the contract and the contract's prior amendments by signing the contracts; thus, because the principal clearly assented to the contract, any irregularities in the signatures were irrelevant. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

Duty to defend. — General liability insurers of a contractor were held to have a duty to defend the owner of a real estate project, because their agent had the actual or apparent authority to issue certificates of insurance to the owner, and to bind their obligations to the owner, under Georgia agency law. Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co., 337 F. Supp. 2d 1339, 2004 U.S. Dist. LEXIS 20097 (N.D. Ga. 2004).

Estoppel of principal to deny liability. — Notwithstanding knowledge by the principal of unauthorized acts of the principal's agent, the principal is not chargeable therewith unless the principal ratifies such acts or for other reasons is estopped to deny the principal's liability therefor. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

Receipt by principal of benefits of transaction. — If the principal has obtained the benefits of the transaction in which the draft was given by the agent,

the injured party may bring an action on the original transaction against the principal. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

If for some time an alleged agent of the defendant had purchased agricultural products for the defendant with drafts drawn upon the defendant, on which drafts the plaintiff bank advanced to the defendant's agent the cash, the defendant was bound by such acts of the defendant's agent and estopped to deny that such person was acting as the defendant's agent or set up that the defendant was not liable for the amount of plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

Act ratified by principal without intention. — By retaining money paid after knowledge that the money's source was the principal's credit, through an unauthorized assumption of authority by an agent, the principal ratifies the act irrespective of any intent to do so. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Principal's knowledge of all material facts. — Act of an insurance company in retaining the premiums without knowledge of the facts did not amount to a ratification of the unauthorized act of the agent in reinstating a lapsed policy. Independent Life & Accident Ins. Co. v. Pantone, 80 Ga. App. 426, 56 S.E.2d 153, 1949 Ga. App. LEXIS 851 (1949).

In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. City of Atlanta v. Smith, 84 Ga. App. 815, 67 S.E.2d 480, 1951 Ga. App. LEXIS 803 (1951).

When the fact of agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts. Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 118 Ga. App. 861, 165 S.E.2d 887, 1968 Ga. App. LEXIS 1549 (1968).

Ratification is effective only with full knowledge of all material facts, and a principal, in adopting the acts of a purported agent, is not obligated for the whole of a transaction when the acts of the purported agent are not fully disclosed. Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 118 Ga. App. 861, 165 S.E.2d 887, 1968 Ga. App. LEXIS 1549 (1968).

Principal must ratify or disaffirm promptly after learning of unauthorized act. — If an agent without authority enters into a contract on behalf of a principal, the principal, upon discovery of the circumstances, has a choice either to ratify or disaffirm the contract made in the principal's behalf, but the principal must act promptly and within a reasonable time. Once the choice has been made to ratify, the contract may no longer be disaffirmed. Southern Motors of Savannah, Inc. v. Krieger, 86 Ga. App. 574, 71 S.E.2d 884, 1952 Ga. App. LEXIS 1011 (1952).

Knowledge of agent does not give principal notice. — Knowledge of all the facts by the principal is essential to ratification. A principal is not put on notice of the unauthorized act of an agent by the mere knowledge of the agent of the acts the agent personally has done in excess of the agent's authority. Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288, 1954 Ga. App. LEXIS 739 (1954).

Third persons may presume general agency continues until notified of revocation. — Whenever a general agency has been established for any purpose, all persons who have dealt with the agent have a right to assume that the agent's authority to deal with them in behalf of the agent's principal continues until notice, express or implied, has been conveyed to them that the agency has been revoked. Arrington & Blount Ford, Inc. v. Jinks, 154 Ga. App. 785, 270 S.E.2d 27, 1980 Ga. App. LEXIS 2388 (1980).

Payment to agent does not relieve principal of liability to third person. — Since a travel agent was defendant's disclosed agent in making arrangements

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for hotel accommodations with the plaintiff, and the defendant paid the agent for the hotel charges but the agent failed to pay the plaintiff, the defendant was bound for the unpaid debt when it appeared that the plaintiff had not chosen to make the agent its debtor, dealing with the agent alone, and that the exclusive credit was given to the agent. Southeastern Foam Prods., Inc. v. Hilton Hotels Corp., 149 Ga. App. 372, 254 S.E.2d 494, 1979 Ga. App. LEXIS 1853 (1979).

Acts held within scope of authority. — Because a corporation was organized, not only to build a schoolhouse, but also to supervise and carry on a school, when the corporation appointed and held out to the world its superintendent as general agent, the corporation became liable for the contracts made by such agent within the scope of the corporation's business entrusted to the agent, including not only teaching, but also the making of such publications as would advance the interests of the academy entrusted to the agent. Georgia Military Academy v. Estill, 77 Ga. 409, 1886 Ga. LEXIS 335 (1886).

Under former Civil Code 1910, §§ 3593 and 3598, an agent authorized to sell mules in behalf of the agent's principal had authority to agree with a purchaser that if a mule which appeared to be sick did not recover, the seller will repay the purchase money. Turner Bros. v. Manley, 14 Ga. App. 215, 80 S.E. 680, 1914 Ga. App. LEXIS 178 (1914).

Under former Civil Code 1910, §§ 3593, 3595, and 3598, if a warehouse company placed an agent in charge of its warehouse for the purpose of dealing with the public and as such the agent had authority to receive, weigh, and give receipts for cotton, making a charge of 50¢ for 30 days, which other evidence showed included a charge for insurance, the agent's agreements within the scope of the agent's authority would bind the company. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804, 1916 Ga. LEXIS 53 (1916).

Bank will not be heard to plead that its vice-president exceeded the vice-president's authority as such officer in receiving a special deposit for the bank. Marietta Trust & Banking Co. v. Faw, 31 Ga. App. 507, 121 S.E. 244, 1924 Ga. App. LEXIS 10 (1924).

If the owner of an office building, through the operator of an elevator as the owner's agent, operates an elevator in the building, it is manifestly the duty of the operator, as such agent of the owner, to take on and let off persons using the elevator, and if the operator of an elevator refuses to permit a person in the elevator to leave the elevator, the agent is acting within the scope of the agent's employment as agent for the owner of the building. Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112, 1930 Ga. App. LEXIS 251 (1930).

Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although the conditions remain in the policy when delivered, and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or endorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy. National Fire Ins. Co. v. Thompson, 51 Ga. App. 625, 181 S.E. 101, 1935 Ga. App. LEXIS 424 (1935).

Lenders' title commitment provided that the closing documents had to be executed to the satisfaction of the title insurer's agents; that condition was fulfilled when the agents reviewed, approved, and accepted closing documents forged by an imposter and recorded the documents. As the insurer was bound by the authorized acts of the insurer's agents, the insurer was liable to the lenders. Keyingham Invs., LLC v. Fid. Nat'l Title Ins. Co., 298 Ga. App. 467, 680 S.E.2d 442, 2009 Ga. App. LEXIS 608 (2009), aff'd, 288 Ga. 312, 702 S.E.2d 851, 2010 Ga. LEXIS 768 (2010).

Trial court erred in granting a rental company summary judgment in a car owner's action alleging that the company breached a settlement agreement because the company was obligated to pay any settlement amounts negotiated by the company's agent, an independent third party administrator, and issues of fact

remained as to whether the company issued payment according to the terms of the settlement agreement, which were also disputed. Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661, 2012 Ga. App. LEXIS 338 (2012).

Authority to sell for cash. — In view of this section, a purchaser is charged with notice that an agent is only authorized to sell for cash; a sale on credit may be treated as void by the principal. Whitley v. James, 121 Ga. 521, 49 S.E. 600, 1904 Ga. LEXIS 219 (1904).

Acts held not within scope of authority. — Power to make restricted endorsement will not authorize a general endorsement in blank. Exchange Bank v. Thrower, 118 Ga. 433, 45 S.E. 316, 1903 Ga. LEXIS 580 (1903).

By virtue of this section, if less than the amount of an execution is received from one of joint defendants therein, under an agreement made or authorized by the plaintiff that the payment thus received shall relieve that defendant from further liability, the agreement will discharge the other defendants; but such an agreement by a sheriff, made without authority from the plaintiff, will not have that effect. Swicord v. Waxelbaum, 23 Ga. App. 297, 97 S.E. 891, 1919 Ga. App. LEXIS 92 (1919).

By virtue of this section, if an owner of cotton shipped it to factors and as an agent of another shipped cotton of the principal to the same factors, the owner could not, without special authority, authorize the factors to use money standing to the credit of the principal on the books of the factors to cover any deficit in the accounts or in the margins when the value of the owner's own cotton shipped to the factors became less than the advances of the latter. This is true, however general and broad the agent's power as agent may have been, unless the agent was expressly authorized by the principal to use the funds of the latter for the purpose indicated. Whiteley v. Garrett & Calhoun, Inc., 152 Ga. 437, 110 S.E. 209, 1921 Ga. LEXIS 118 (1921).

Motor vehicle activities not within scope of agent's authority. — Truck driver employed by the owner of the truck to deliver goods acts outside the scope of the driver's employment when the driver, for the driver's own pleasure and without the knowledge of the employer, invites another to ride on the truck, then the employer is not liable to the driver's guest for injury caused by negligence of the driver. Morris v. Fruit Co., 32 Ga. App. 788, 124 S.E. 807, 1924 Ga. App. LEXIS 665 (1924).

If one is employed by a master to drive a motor vehicle, the master is not liable for the negligence of another procured by the employee without authority as a substitute driver unless the master subsequent to the act ratifies the employment of the substitute. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953); Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961) (ratification shown).

Issues of fact as to agent's authority. — While a business seller claimed that an employee of a brokerage company was not the seller's agent and thus did not bind the seller to a new closing date under O.C.G.A. § 10-6-51, the employee was named as the seller's listing agent and the seller knew that the employee might have given the purchaser some sort of verbal extension to postpone the closing date; thus, issues of material fact remained as to the employee's actual or apparent authority. Santaniello v. Bennett, 296 Ga. App. 548, 675 S.E.2d 282, 2009 Ga. App. LEXIS 248 (2009).

Correct instruction as to signing for another who signs by mark. — While, when a person authorizes another to execute a written instrument for the person, in the person's presence, it is not necessary, in order to constitute the act of the person actually signing the instrument the act and deed of the person authorizing the person to do so, that the person so authorizing should touch the pen, a charge by the court that if a person authorizes another in the person's presence to sign the instrument for the person and does touch the pen and make the person's mark, the act of the party making the signature is the act and deed of the person so authorizing, states a correct proposition of law. East Point Lumber Co. v. Chandler, 46 Ga. App. 361,

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167 S.E. 787, 1933 Ga. App. LEXIS 70 (1933).

Untimely actions of attorney bound client. — Trial court erred by reversing the decision of the Georgia Department of Driver Services (Department) because the evidence supported the decision of the Department in denying, as untimely, the driver's request for an administrative license suspension, pursuant to O.C.G.A. § 40-5-67.1(g), since the actions of the driver's attorney in failing to mail a timely request for a hearing were imputed to the driver. Mikell v. Hortenstine, 334 Ga. App. 621, 780 S.E.2d 53, 2015 Ga. App. LEXIS 687 (2015).

Instructions as to master's liability held not erroneous. — If the judge charged the jury that if the person in charge of the defendant's car at the time of the injury was driving it "as the servant or agent of the defendant," the defendant would be responsible for any negligence of which the driver might be guilty, but the driver did not amplify this statement by adding that such alleged acts of negligence by the servant must have been done in the prosecution of or within the scope of the master's business, it was held that such a charge cannot be accounted as reversible error, for, while a master was bound by the acts of the servant only when the latter was acting within the scope of the servant's authority under former Code 1933, §§ 4-302, and 105-108 (see now O.C.G.A. §§ 10-6-51 and 51-2-2), still, since the charge limited the accountability of the master for the negligence of the servant to the servant's acts when done "as the servant or agent of the defendant," this should be taken as the equivalent of a statement that the acts must have been done within the scope of the master's business. Collier v. Schoenberg, 26 Ga. App. 496, 106 S.E. 581, 1921 Ga. App. LEXIS 499 (1921).

Charge of the court that "if in the prosecution of the master's business the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

2. Effect of Partial Ratification

Principal must ratify or repudiate in whole. — If, in cases when an agent exceeds the agent's authority, the principal must ratify or repudiate in whole, there can be no tenable grounds for argument that, when an agent does not exceed the agent's authority, the principal may ratify in part and repudiate in part the contract made on the principal's behalf. Savage v. Western Union Tel. Co., 198 Ga. 728, 32 S.E.2d 785, 1945 Ga. LEXIS 223 (1945).

Accepting portion of agent's collection ratifies collection in toto. — If an unauthorized agent collects the entire amount owing on a note and the principal accepts a portion of the proceeds and consents that the person making the collections may use the remainder for a short time, the principal will be held to have ratified the collection in toto. Roberts v. Bank of Eufaula, 20 Ga. App. 221, 92 S.E. 1015, 1917 Ga. App. LEXIS 824 (1917).

Retention of benefits ratifies whole transaction. — Bank cannot be heard to plead that the bank's vice-president exceeded the vice-president's authority as such officer in receiving a special deposit since the retention by the bank of the net proceeds of the transaction amounts to a ratification by the bank of the whole transaction. Marietta Trust & Banking Co. v. Faw, 31 Ga. App. 507, 121 S.E. 244, 1924 Ga. App. LEXIS 10 (1924).

Ratification of agent's agreements. — While an agent to rent has no implied power to bind the landlord to a provision that the tenant shall make repairs to be paid for out of the rents accruing, if the agent exceeds the agent's authority by such an agreement, the landlord cannot solemnly claim that rent shall be paid the landlord at the figure which the landlord's agent and the tenant agreed to upon the condition regarding improvements

without becoming bound to all of the terms and conditions upon which the landlord's agent and the tenant agreed, resulting in fixing the rent at that price; the landlord must, as a matter of law be held to have ratified the agreement in whole as made by the landlord's agent. Sikes v. Carter, 30 Ga. App. 539, 118 S.E. 430, 1923 Ga. App. LEXIS 524 (1923).

Partial payment of invoice. — Even though a company's sales vice president purchased advertising without authority, evidence that the company made a partial payment of the amount due several months after the advertisement was purchased, published, and invoiced reflected a ratification by the company as a matter of law. Thomas Register of Am. Mfrs. v. Proto Sys. Elec. Packaging, 221 Ga. App. 779, 471 S.E.2d 235, 1996 Ga. App. LEXIS 425 (1996), cert. denied, No. S96C1653, 1996 Ga. LEXIS 1049 (Ga. Oct. 4, 1996).

Agent's representations in consummating contract. — If one purporting to act as agent exceeds the agent's authority, the principal cannot ratify in part and repudiate in part, and therefore the principal cannot accept and retain the fruits of a contract so made by another in the principal's behalf without becoming bound by the representations of the person so purporting to act for the principal in consummating the agreement. Lancaster v. Neal, 41 Ga. App. 721, 154 S.E. 386, 1930 Ga. App. LEXIS 1072 (1930); Hawthorne Indus. v. Attaway Assocs., 153 Ga. App. 155, 264 S.E.2d 663, 1980 Ga. App. LEXIS 1720 (1980).

Partial acceptance of order does not bind principal if agent lacked authority to make sale. — Seller's partial acceptance of an order given the seller's traveling salesman, who was not authorized to do more than receive and transmit orders and was unauthorized to make unconditional sales, was held not to bind the seller to fill an unaccepted portion under this section. Dannenberg Co. v. Hughes, 30 Ga. App. 83, 116 S.E. 892, 1923 Ga. App. LEXIS 265 (1923).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 55 et seq.

C.J.S.

2A C.J.S., Agency, §§ 53 et seq., 65 et seq.

ALR.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Implied authority of servant or agent to bind employer for services of undertaker or other funeral expenses, 29 A.L.R. 457.

Validity of contract negotiated by agent acting for both parties, 48 A.L.R. 917.

Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 A.L.R. 711.

Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A.L.R. 393.

Liability of principal for overdraft drawn by agent and paid by bank, 58 A.L.R. 816.

Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 A.L.R. 915.

Authority of claim agent as regards terms or condition of settlement, 87 A.L.R. 1277.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 A.L.R. 895.

Acceptance by insurance agent of something other than money or insured's money obligation in payment of premium, 93 A.L.R. 654.

Acceptance by collection agent authorized to receive money only, of something else upon which he realized money, as binding principal, 94 A.L.R. 784.

Misrepresentations by one party's agent, who was not authorized in that regard, as ground of rescission by the other party, 95 A.L.R. 763.

Liability of infant for torts of his employee or agent, 103 A.L.R. 487.

Sole actor doctrine where officer or agent of corporation acting adversely to it

is its sole representative in the transaction, 111 A.L.R. 665.

Insurance company's responsibility for torts of agent causing physical injury to person or damage to property, 116 A.L.R. 1389.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 A.L.R. 893.

Liability of attorney or law firm for conduct of employee or member of firm in connection with investment of funds of client, 136 A.L.R. 1110.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 A.L.R. 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 A.L.R. 1152.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

Master's liability for injuries to nonemployee caused by servant's negligence in use of instrumentality different from that authorized, 166 A.L.R. 877.

Dealer's liability for negligent operation of car by prospective purchaser or one acting for him, 31 A.L.R.2d 1445.

Authority of officer or agent to bind corporation as guarantor or surety, 34 A.L.R.2d 290.

Implied or apparent authority of agent selling personal property to make warranties, 40 A.L.R.2d 285.

Salesman's power to pledge employer's or principal's personal property, 49 A.L.R.2d 1271.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 A.L.R.2d 10.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 A.L.R.2d 1389.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 A.L.R.3d 1135.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 A.L.R.3d 777.

Liability of one contracting for private police security service for acts of personnel supplied, 38 A.L.R.3d 1332.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843.

Insured's ratification, after loss, of policy procured without his authority, knowledge, or consent, 52 A.L.R.3d 235.

Imputation of servant's or agent's contributory negligence to master or principal, 53 A.L.R.3d 664.

Liability of travel agents for injuries on tour, 53 A.L.R.3d 1310.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 A.L.R.3d 6.

Doctrine of apparent authority as applied to agent of municipality, 77 A.L.R.3d 925.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 A.L.R.3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Liability of travel publication, travel agent, or similar party for personal injury or death of traveler, 2 A.L.R.5th 396.

10-6-52. Ratification.

A ratification by the principal shall relate back to the act ratified and shall take effect as if originally authorized. A ratification may be

express or implied from the acts or silence of the principal. A ratification once made may not be revoked.

History.

Orig. Code 1863, § 2170; Code 1868, § 2166; Code 1873, § 2192; Code 1882, § 2192; Civil Code 1895, § 3019; Civil Code 1910, § 3591; Code 1933, § 4-303.

Law reviews.

For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

For note, "The Great Escape: How One Plaintiff's Sidestep of a Mandatory Arbitration Clause Was Applied to a Class in Bickerstaff v. SunTrust Bank," see 68 Mercer L. Rev. 539 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

"Ratification" defined. — "Ratification" is the affirmance by a person of a prior act which did not bind the person but which was done or professedly done on the person's account, whereby the act, as to some or all persons, is given effect as if originally authorized by the person. Higgins v. D & F Elec. Co., 110 Ga. App. 790, 140 S.E.2d 99, 1964 Ga. App. LEXIS 764 (1964).

Principal may by ratification or by failure to repudiate acts of principal's alleged agent become bound. Klingbeil v. Renbaum, 146 Ga. App. 591, 246 S.E.2d 698, 1978 Ga. App. LEXIS 2469 (1978).

Act of one holding oneself out as agent in consummating a sale for one's principal may be ratified by the principal, even if the agent was unauthorized in the first place to make the sale, and such ratification may be implied from the acts or silence of the principal. If a principal is informed by the principal's agent of what the agent has done, unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

Chief executive officer terminated for cause based on ratification of chief financial officer's impropriety. — Chief executive officer of a housing authority was properly terminated for cause because the chief executive officer materially harmed the housing authority's business when the chief executive officer ratified the housing authority's chief financial officer's violation of federal rules the housing authority was required to comply with, when the proceeds of the sale of an asset were diverted to an improper purpose as: (1) the chief executive officer certified that the proceeds would be used only for a proper purpose; (2) the chief executive officer was notified of the diversion; and (3) the chief executive officer did not object or inform the housing authority's board of directors or the federal government of the diversion or seek the permission of either body for the diversion. Jones v. Hous. Auth. of Fulton County, 315 Ga. App. 15, 726 S.E.2d 484, 2012 Ga. App. LEXIS 303 (2012).

Corporation's president. — If the president of a corporation, merely by virtue of the president's office, has no power to bind the company by contract, the authority may be shown by ratification by the corporation of the contracts made by the corporation's president. Jack Fred Co. v. Lago, 96 Ga. App. 675, 101 S.E.2d 165, 1957 Ga. App. LEXIS 661 (1957).

Attorney purporting to represent party. — While as a general rule a party is not bound by the acts of an attorney who purports to represent the party, but without being employed so to do, and need

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not accept any benefits to the party as a result of such unauthorized appearance, the party may do so by ratifying the attorney's acts as in other cases of agency. Felker v. Johnson, 189 Ga. 797, 7 S.E.2d 668, 1940 Ga. LEXIS 377 (1940).

Class representative is a putative agent who keeps the case alive pending the decision on certification. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787, 2016 Ga. LEXIS 469, cert. denied, 580 U.S. 1020, 137 S. Ct. 571, 196 L. Ed. 2d 447, 2016 U.S. LEXIS 7351 (2016).

Substitute driver procured without authority. — If one is employed by a master to drive a motor vehicle, the master is not liable for the negligence of another procured by the employee without authority as a substitute driver unless the master subsequent to the act ratifies the employment of the substitute. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784, 1953 Ga. LEXIS 444 (1953); Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961) (ratification shown).

One committing forgery. — When one purports to act as the agent of another, even by forgery, the principal for whom the agent purports to act may ratify the act. Southern Fed. Sav. & Loan Ass'n v. Firemen's Benevolent Ass'n, 72 Ga. App. 663, 34 S.E.2d 674, 1945 Ga. App. LEXIS 666, 1945 Ga. App. LEXIS 667 (1945).

Ratification must be unconditional. — Promise afterwards made by a planter to a merchant to pay for oats if the planter's overseer will approve the bill is not an unconditional act and therefore cannot amount to a ratification of the act of overseer in buying the oats. Render v. Jones Mercantile Co., 33 Ga. App. 394, 126 S.E. 159, 1925 Ga. App. LEXIS 787 (1925).

Act must be such as principal could have authorized. — Principal cannot ratify that which the principal had no power to authorize. Harrison v. McHenry, 9 Ga. 164, 1850 Ga. LEXIS 132 (1850); Ozburn v. Woolworth, 106 Ga. 459, 32 S.E. 581, 1899 Ga. LEXIS 705 (1899).

Act must be done for person adopting it. — Act cannot be ratified unless done for and in behalf of the person adopting it and attempting to ratify it. Render v. Jones Mercantile Co., 33 Ga. App. 394, 126 S.E. 159, 1925 Ga. App. LEXIS 787 (1925).

Doctrine of ratification is not applicable against a person as to an act of one who did not assume to act in the person's name or under authority from that person. Smith v. Pope, 100 Ga. App. 369, 111 S.E.2d 155, 1959 Ga. App. LEXIS 620 (1959); Citizens & S. Realty Investors v. L.G. Balfour Co., 152 Ga. App. 852, 264 S.E.2d 304, 1980 Ga. App. LEXIS 1627 (1980).

Ratification of the act of one who volunteers to act as agent is valid. D. Goode & Son v. Rawlings, 44 Ga. 593, 1872 Ga. LEXIS 371 (1872).

Principal must have actual knowledge of unauthorized act. — Unauthorized act of an agent, done in the principal's behalf, cannot be ratified by the principal without actual knowledge of the act. Penn Mut. Life Ins. Co. v. Blount, 165 Ga. 193, 140 S.E. 496, 1927 Ga. LEXIS 351 (1927).

Principal's knowledge of all other material facts. — Ratification of an unauthorized act of an agent, to be binding on the principal, must be made with full knowledge, on the part of the principal, of all material facts relating to the act in question. Ludden & Bates Southern Music House v. McDonald, 117 Ga. 60, 43 S.E. 425, 1903 Ga. LEXIS 151 (1903); American Harrow Co. v. Dolvin, 119 Ga. 186, 45 S.E. 983, 1903 Ga. LEXIS 84 (1903).

Knowledge of all the facts is essential to a ratification. Penn Mut. Life Ins. Co. v. Blount, 33 Ga. App. 642, 127 S.E. 892, 1925 Ga. App. LEXIS 660 (1925).

Before a principal can be bound by a ratification of the act of an agent, the principal must at the time of ratification have full knowledge of all the material facts by which the principal is to be bound. Weather Bros. Transf. Co. v. Jarrell, 72 Ga. App. 317, 33 S.E.2d 805, 1945 Ga. App. LEXIS 575 (1945).

Act of an insurance company in retaining the premiums without knowledge of the facts did not amount to a ratification of the unauthorized act of the agent in reinstating a lapsed policy. Independent

Life & Accident Ins. Co. v. Pantone, 80 Ga. App. 426, 56 S.E.2d 153, 1949 Ga. App. LEXIS 851 (1949).

In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. City of Atlanta v. Smith, 84 Ga. App. 815, 67 S.E.2d 480, 1951 Ga. App. LEXIS 803 (1951).

Principal's knowledge of material facts necessary. — Agency may be established by the subsequent ratification and adoption of the act by the principal, but there must be some evidence of the principal's knowledge of the material facts. Shirley v. Couch, 177 Ga. App. 436, 339 S.E.2d 648, 1986 Ga. App. LEXIS 1472 (1986).

Knowledge at time ratification made. — Ratification involves knowledge of the facts on the part of the person ratifying at the time when the ratification is made. Dolvin v. American Harrow Co., 125 Ga. 699, 54 S.E. 706, 1906 Ga. LEXIS 1 (1906); Dolvin v. American Harrow Co., 131 Ga. 300, 62 S.E. 198, 1908 Ga. LEXIS 70 (1908).

Mere knowledge of alleged agent insufficient. — If agency is sought to be proved by ratification, it must appear that the principal had full knowledge of all material facts in connection with the transaction in question and such knowledge must have been acquired by the principal otherwise than by the mere knowledge of the agent, the ratification of whose acts is contended for. Kephart v. Gulf Ref. Co., 59 Ga. App. 432, 1 S.E.2d 221, 1939 Ga. App. LEXIS 53 (1939).

Sealed authority unnecessary to ratify instrument not under seal. — If an instrument is not a contract under seal, no writing under seal is required to ratify the actions taken in behalf of the principal. Hence, the authority of the agent to execute such a contract is not required to be given in writing and under seal. Klingbeil v. Renbaum, 146 Ga. App. 591, 246 S.E.2d 698, 1978 Ga. App. LEXIS 2469 (1978).

Ratification cures agent's mistake. — Contract made by an agent for the agent's principal is binding on the latter, though a mistake has been made therein by the agent, if such contract is ratified and acted on by the principal. Southern Ry. v. White, 108 Ga. 201, 33 S.E. 952, 1899 Ga. LEXIS 215 (1899).

Ratification, whether soon or late, is the equivalent of an original command and cures any defect in the execution of the agent's power. Whitley v. James, 121 Ga. 521, 49 S.E. 600, 1904 Ga. LEXIS 219 (1904).

Ratification once made may not be revoked. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

Burden of proving a ratification is on the party asserting ratification. Padgett v. Collins, 89 Ga. App. 769, 81 S.E.2d 309, 1954 Ga. App. LEXIS 577 (1954).

No manifestation of intent. — Even if an owner received some benefit under a settlement agreement, the owner's alleged actions did not manifest an intent to ratify the agreement as it never proffered a deed consistent with the agreement. Furthermore, even if the court were able to conclude that the owner's actions constituted ratification for purposes of a motion to dismiss, the owner was not obligated to do anything under the agreement as the owner was not a named party or a signatory to the contract. Rohrig Invs., LP v. Knuckle P'ship, LLLP (In re Rohrig Invs., LP), 584 B.R. 382, 2018 Bankr. LEXIS 1004 (Bankr. N.D. Ga. 2018).

Jury question. — Whether or not a ratification has resulted is usually a question of fact to be determined by the jury. Gray, Bedell & Hughes v. Bass, 42 Ga. 270, 1871 Ga. LEXIS 56 (1871); Charles P. Burr & Co. v. William H. Howard & Sons, 58 Ga. 564, 1877 Ga. LEXIS 170 (1877); Mendel v. Converse & Co., 30 Ga. App. 549, 118 S.E. 586, 1923 Ga. App. LEXIS 527 (1923); Thompson v. Neely & Wilcox, 32 Ga. App. 131, 123 S.E. 171, 1924 Ga. App. LEXIS 313 (1924).

Whether or not the facts and circumstances of the particular case show a ratification of the acts of one alleged to have been acting for the defendant principal is ordinarily a question for the jury. Burke County Bd. of Educ. v. Raley, 104 Ga. App.

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717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961).

Whether a ratification occurred is usually a question for a jury. Wielgorecki v. White, 133 Ga. App. 834, 212 S.E.2d 480, 1975 Ga. App. LEXIS 2307 (1975).

While director of municipal recreation authority, who made the purchases in question, had neither actual nor implied authority to act for the city, a fact issue existed as to whether the city appropriated the goods purchased to the city's own use after abolishing the authority, as one who accepts possession of goods and permits the goods to be used for one's benefit cannot defeat an action for the purchase price by denying that the person who purchased the goods had authority to act as one's agent. Got-It Hdwe. & Gifts, Inc. v. City of Ashburn, 155 Ga. App. 214, 270 S.E.2d 380, 1980 Ga. App. LEXIS 2533 (1980).

Pleading raising question of ratification makes case for jury. — If the question of ratification by the principal of unauthorized acts of the agent by the acceptance of the fruits of the agent's conduct arises, the plaintiff's pleading makes a case for submission to the jury. First Joint Stock Land Bank v. Pitts, 48 Ga. App. 805, 173 S.E. 732, 1934 Ga. App. LEXIS 205 (1934).

Relation Back of Ratification

Ratification relates back to the act ratified. Penn Mut. Life Ins. Co. v. Blount, 33 Ga. App. 642, 127 S.E. 892, 1925 Ga. App. LEXIS 660 (1925).

Ratification by a principal relates back to the act ratified and takes effect as if originally authorized. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Intervening equity. — As a general rule, ratification relates back to the act ratified, except when there is an intervening equity. Atlanta Buggy Co. v. Hess Spring & Axle Co., 124 Ga. 338, 52 S.E. 613, 1905 Ga. LEXIS 709 (1905); Bridwell v. Gate City Term. Co., 127 Ga. 520, 56 S.E. 624, 1907 Ga. LEXIS 418 (1907); Coursey v. Consolidated Naval Stores, 22 Ga. App. 538, 96 S.E. 397, 1918 Ga. App. LEXIS 591 (1918); Mendel v. Converse & Co., 30 Ga. App. 549, 118 S.E. 586, 1923 Ga. App. LEXIS 527 (1923).

Intervening rights of third persons. — Ratification generally relates back to the act ratified, but when a mortgage is executed by a debtor to a creditor without the creditor's knowledge and not delivered to the latter but to the clerk for registration, and after it is recorded, the creditor accepts and thus ratifies it, judgment liens obtained after the delivery to the clerk but before the ratification by the creditor take precedence over the mortgage. Evans v. Coleman, 101 Ga. 152, 28 S.E. 645, 1897 Ga. LEXIS 184 (1897).

Ratification does not so relate back as to affect the rights of other parties which have intervened and accrued between the time of the unauthorized act and that of the ratification. Graham v. Williams, 114 Ga. 716, 40 S.E. 790, 1902 Ga. LEXIS 774 (1902).

Ratification does not affect antagonistic rights of others acquired between the unauthorized act and its ratification. Dalton Buggy Co. v. Wood, Son & Bro., 7 Ga. App. 477, 67 S.E. 121, 1910 Ga. App. LEXIS 359 (1910).

Principal cannot ratify the acts of an agent so as to affect the intervening rights of third parties. Padgett v. Collins, 89 Ga. App. 769, 81 S.E.2d 309, 1954 Ga. App. LEXIS 577 (1954).

Implied Ratification

Ratification need not be by word or writing. — It is not essential that the principal should expressly ratify by word or writing; it may be done by implication or by the subsequent acts or conduct of the parties. Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459, 1907 Ga. App. LEXIS 547 (1907).

Implication from acts or silence of the principal. Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

Receipt of benefit. — Unauthorized contract made by an assumed agent, or by a real agent in excess of the agent's authority, becomes obligatory upon the principal if the latter receives the benefit

of the contract. Merchants' Bank v. Central Bank, 1 Ga. 418, 1846 Ga. LEXIS 92 (1846); Haney School Furn. Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 S.E. 761, 1901 Ga. LEXIS 233 (1901); Coursey v. Consolidated Naval Stores, 22 Ga. App. 538, 96 S.E. 397, 1918 Ga. App. LEXIS 591 (1918); Hixon v. Hinkle, 156 Ga. 341, 118 S.E. 874, 1923 Ga. LEXIS 249 (1923); Swearingen v. Virginia-Carolina Chem. Co., 19 Ga. App. 658, 91 S.E. 1050, 1917 Ga. App. LEXIS 292 (1917).

If the principal obtained the benefits of the transaction in which the draft was given by the agent, the injured party may bring an action on the original transaction against the principal. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

If for some time an alleged agent of the defendant purchased agricultural products for the defendant, with drafts drawn upon the defendant, on which drafts the plaintiff bank advanced to the defendant's agent the cash, the defendant was bound by such acts of the agent and estopped to deny that such person was acting as an agent or set up that the defendant was not liable for the amount of the plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. Rowland v. Farmers Bank, 52 Ga. App. 50, 182 S.E. 81, 1935 Ga. App. LEXIS 28 (1935).

Retaining possession of and using for any considerable period of time property received constitutes a ratification of an unauthorized contract for exchange. Southern Motors of Savannah, Inc. v. Krieger, 86 Ga. App. 574, 71 S.E.2d 884, 1952 Ga. App. LEXIS 1011 (1952).

If the alleged acts of a finance company regarding an automobile sale contract included their acceptance of the benefits in the form of a note, conditional-sale contract, payments on the note, and the insurance premium, this indicated a ratification of the agreement made by the president of the automobile dealership that assigned the contract to the finance company that credit life insurance would be procured, and showed such part performance on the part of the conditional buyer as to estop the finance company from attacking the agreement as oral and in conflict with any written provisions. In this situation, there appeared to be no conflict present, but rather an explanation of any ambiguity and a showing as to what constituted the entire contract. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101, 1961 Ga. LEXIS 454 (1961).

If a corporation, knowing all of the facts, accepts and uses the proceeds of an unauthorized contract executed in the corporation's behalf without authority, the corporation may be bound because of ratification. Western Am. Life Ins. Co. v. Hicks, 135 Ga. App. 90, 217 S.E.2d 323, 1975 Ga. App. LEXIS 1576 (1975).

In accepting the fruits of a contract for exchange of automobiles and using the new automobile for the principal's exclusive benefit for a period of almost six weeks of intensive driving, during which time the principal fails to notify the seller of the new car of any intention to disaffirm the contract on the principal's part, such acts of the principal constitute a ratification of the unauthorized act of exchange of the agent so as to render the principal liable for the payment of the purchase money. Southern Motors of Savannah, Inc. v. Krieger, 86 Ga. App. 574, 71 S.E.2d 884, 1952 Ga. App. LEXIS 1011 (1952).

Application in divorce action. — Plaintiff had full knowledge of his former wife's unauthorized withdrawal of funds from his "money market account" at the time he entered into his divorce settlement agreement with her. Plaintiff and his ex-wife also agreed in their property settlement agreement that "all personal property in the [ex-wife's] possession and control or in [her] name was to be and become [her] sole and separate property, free and clear of any claims of [plaintiff] whatsoever." Consequently, since plaintiff knowingly received the benefit of his former wife's withdrawal, he could not later make a claim against the bank that her withdrawal was unauthorized. Hyer v. Citizens & S. Nat'l Bank, 188 Ga. App. 452, 373 S.E.2d 391, 1988 Ga. App. LEXIS 1093 (1988).

Ratification of forged quitclaim deed between ex-spouses. — Ex-husband's action to quit title in certain

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property and to set aside a forged quitclaim deed transferring his interest in the property to the ex-wife was remanded for a jury to decide whether the ex-husband ratified the quitclaim deed in his divorce settlement agreement with his ex-wife because given the ambiguity in the settlement agreement arising from the phrase "liability on the property," a factual issue existed regarding the intention of the parties, which had to be determined in light of all the relevant evidence; to the extent that the ex-husband merely acknowledged that his ex-wife encumbered her share of the property, that acknowledgment would not evidence an election to treat the forged quitclaim deed as valid, and if the ex-husband believed that the property interest he was accepting from his ex-wife was encumbered, he could have wanted to clarify that he was not personally liable for the debt and to bargain for protection from any loss he could incur as the result of the debt. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583, 2010 Ga. LEXIS 647 (2010).

Intent when benefits retained. — Unauthorized act or transaction by an agent in excess of the agent's authority becomes binding and obligatory upon the principal if the latter, with knowledge of the facts, receives and retains the benefit thereof, since such acceptance of the benefit amounts to an implied ratification of such act, whether the principal intends thereby to ratify it or not. Kelley v. Carolina Life Ins. Co., 48 Ga. App. 106, 171 S.E. 847, 1933 Ga. App. LEXIS 478 (1933).

By retaining money paid after knowledge that its source was the principal's credit, through an unauthorized assumption of authority by an agent, the principal ratifies the act irrespective of any intent to do so. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Act done for principal who has knowledge of facts. — It is only when an act is done for and in behalf of another that it can be ratified by the latter's acceptance of the benefits accruing to the latter thereunder, and then only with knowledge of the facts. Morgan v. Georgia Paving & Constr. Co., 40 Ga. App. 335, 149 S.E. 426, 1929 Ga. App. LEXIS 153 (1929).

Ratification cannot be implied if the act assertedly ratified was not done in behalf of and for the benefit of the party assertedly ratifying the act. Regional Pacesetters, Inc. v. Halpern Enters., Inc., 165 Ga. App. 777, 300 S.E.2d 180, 1983 Ga. App. LEXIS 2016 (1983).

Principal's knowledge of facts required. — Given that there was no evidence that a parent had knowledge at any time of an arbitration agreement signed by the parent's adult child on the parent's behalf when the parent entered a nursing home, the parent's later grant to the child of a power of attorney did not ratify the child's earlier action of signing the arbitration agreement. McKean v. GGNSC Atlanta, LLC, 329 Ga. App. 507, 765 S.E.2d 681, 2014 Ga. App. LEXIS 725 (2014).

In a dispute between a warehouse and a staffing agency over the warehouse's failure to pay for temporary employees, genuine issues existed as to whether the warehouse knew of or ratified the employee's allegedly unauthorized act of executing an agreement on its behalf, making summary judgment error. Division Six Sports, Inc. v. Hire Dynamics, LLC, 348 Ga. App. 347, 822 S.E.2d 841, 2019 Ga. App. LEXIS 6 (2019).

Inference from failure to repudiate within reasonable time. — If one in the presence of the principal, sells goods of the latter, as the principal's agent, without objection, the tacit consent of the principal will be presumed and will bind the principal. N. Owsley & Son v. Woolhopter, 14 Ga. 124, 1853 Ga. LEXIS 201 (1853); Crockett v. Chattahoochee Brick Co., 95 Ga. 540, 21 S.E. 42, 1894 Ga. LEXIS 583 (1894).

Ratification will be inferred if the agent has notified the principal of the agent's act and the principal has not repudiated it. Unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. Whitley v. James, 121 Ga. 521, 49 S.E. 600, 1904 Ga. LEXIS 219 (1904); Brooke & Co. v.

Cunningham Bros., 19 Ga. App. 21, 90 S.E. 1037, 1916 Ga. App. LEXIS 13 (1916); Pilcher & Dillon v. Smith, 31 Ga. App. 606, 121 S.E. 701, 1924 Ga. App. LEXIS 93 (1924); Thompson v. Neely & Wilcox, 32 Ga. App. 131, 123 S.E. 171, 1924 Ga. App. LEXIS 313 (1924); Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332, 1951 Ga. LEXIS 341 (1951).

An unauthorized transaction by an agent may be validated by the principal's acquiescence therein for an unreasonable time, after knowledge of such act. Nations v. Russell, 68 Ga. App. 329, 22 S.E.2d 756, 1942 Ga. App. LEXIS 120 (1942).

If an agent without authority enters into a contract on behalf of a principal, the principal, upon discovery of the circumstances, has a choice either to ratify or disaffirm the contract made in the principal's behalf, but the principal must act promptly and within a reasonable time. Once the choice has been made to ratify, the contract may no longer be disaffirmed. Southern Motors of Savannah, Inc. v. Krieger, 86 Ga. App. 574, 71 S.E.2d 884, 1952 Ga. App. LEXIS 1011 (1952).

If a master (principal) has knowledge that the master's servant (agent) pursues a given course of conduct and the master takes no steps to prevent such conduct, the master is liable for the consequences. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295, 1980 Ga. App. LEXIS 1924 (1980).

What is unreasonable time is generally for jury. — If, after knowledge of what the agent has done, the principal makes no objection for an unreasonable time, a ratification results by operation of law. Generally, the question of what is an unreasonable period of time is one for the jury. Klingbeil v. Renbaum, 146 Ga. App. 591, 246 S.E.2d 698, 1978 Ga. App. LEXIS 2469 (1978).

Ratification of an agent's act is presumed from slight circumstances, and is as effective as if the act was originally authorized, and is not revocable. Napier v. Pool, 39 Ga. App. 187, 146 S.E. 783, 1929 Ga. App. LEXIS 246 (1929).

While ratification of an unauthorized act of an agent is not to be presumed, the acts of a principal are to be liberally construed in favor of an adoption of the acts of the agent, and when the unauthorized act of the agent is done in the execution of power conferred, but in excess or misuse thereof, a presumption of ratification readily arises from slight acts of confirmation, or from mere silence or acquiescence, or when the principal receives and holds the fruits of the agent's act. Kelley v. Carolina Life Ins. Co., 48 Ga. App. 106, 171 S.E. 847, 1933 Ga. App. LEXIS 478 (1933); Nations v. Russell, 68 Ga. App. 329, 22 S.E.2d 756, 1942 Ga. App. LEXIS 120 (1942).

Acts and conduct of the principal are construed liberally in favor of the agent. Slight circumstances and small matters will sometimes suffice to raise the presumption of ratification. Burke County Bd. of Educ. v. Raley, 104 Ga. App. 717, 123 S.E.2d 272, 1961 Ga. App. LEXIS 780 (1961).

Mere retention of employee does not ratify actions. — Mere retention of an employee after knowledge of the employee's wrongful act is not sufficient alone to amount to ratification by the employer of the act. Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321, 1974 Ga. App. LEXIS 1717 (1974).

Ratification of unauthorized acts by employer. — In a breach of contract suit involving an employment contract, the trial court properly entered a judgment in favor of the former employee after a bench trial as there was sufficient evidence to support the conclusion that even though the person who signed the employment contract was not authorized to execute the employment contract on behalf of the employer, the employer ratified the agreement by failing to never object to the agreement. In addition, the employer paid the former employee at least two times directly. A & S Group, Inc. v. Murray, 291 Ga. App. 331, 661 S.E.2d 701, 2008 Ga. App. LEXIS 501 (2008).

Unpublished decision: Principal was liable for breach of a written contract between the principal and a construction company because realty company employees who made additional work requests had authority to bind the principal, and the record supported a finding that the vice president, acting within actual au-

Implied Ratification (Cont'd)

thority, ratified, and authorized the actions of those employees who were acting as agents for the vice president. Circle Y Constr., Inc. v. WRH Realty Servs., 427 Fed. Appx. 772, 2011 U.S. App. LEXIS 10629 (11th Cir. 2011).

Retaining property to which principal is already entitled. — Principal already entitled to possession of property is not bound by an unauthorized agreement by which the principal is put in possession thereof, nor by retaining possession will the principal be charged with a ratification. Baldwin Fertilizer Co. v. Thompson & McAlister, 106 Ga. 480, 32 S.E. 591, 1899 Ga. LEXIS 708 (1899).

Corporation ratified past contracts that were allegedly forged. — Corporation clearly assented to a contract to sell the corporation's real property when the corporation properly executed a fourth amendment to the contract, although the original contract and amendments had not been properly signed. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 139 et seq.

C.J.S.

2A C.J.S., Agency, §§ 53 et seq., 65 et seq., 97.

ALR.

Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 A.L.R. 915.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 A.L.R. 893.

What amounts to ratification by owner of unauthorized employment by broker or agent of subagent to procure a sale or purchase of property, 136 A.L.R. 1418.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 A.L.R. 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 A.L.R. 1152.

Principal's liability for false arrest or imprisonment caused by agent or employee, 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 A.L.R.3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 A.L.R.3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 A.L.R.3d 907.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843.

Insured's ratification, after loss, of policy procured without his authority, knowledge, or consent, 52 A.L.R.3d 235.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 A.L.R.3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

10-6-53. Form of act.

The form in which the agent acts is immaterial; if the principal's name is disclosed and the agent professes to act for him, it will be held to be the act of the principal.

History.
Orig. Code 1863, § 2173; Code 1868, § 2169; Code 1873, § 2195; Code 1882, § 2195; Civil Code 1895, § 3022; Civil Code 1910, § 3594; Code 1933, § 4-304.

JUDICIAL DECISIONS

Disclosed principal liable when agent not dealt with alone. — When a travel agent was the defendant's disclosed agent in making arrangements for hotel accommodations with the plaintiff, the defendant paid the agent for the hotel charges, but the agent failed to pay the plaintiff, the defendant was bound for the unpaid debt since it did not appear that the plaintiff had chosen to make the agent its debtor, dealing with the agent alone, and that exclusive credit was given to the agent. Southeastern Foam Prods., Inc. v. Hilton Hotels Corp., 149 Ga. App. 372, 254 S.E.2d 494, 1979 Ga. App. LEXIS 1853 (1979).

Principal's name and agent's acting for principal must appear to bind principal. — Latitude is allowed as to the form in which an agent may contract, but in order to bind a principal the name of the principal must be disclosed, and the agent must profess to act for the principal. Moore v. Adams, 153 Ga. 709, 113 S.E. 383, 1922 Ga. LEXIS 157 (1922).

Disclosure of name must be in writing when required for principal to be bound. — This section does not purport to authorize an agent to contract for the agent's principal in a form which would be insufficient if the principal acted personally; if it is essential that the contracting party's name should appear in the writing when the party is contracting for the party, it is also necessary when the party contracts through an agent. Moore v. Adams, 153 Ga. 709, 113 S.E. 383, 1922 Ga. LEXIS 157 (1922).

Duly constituted agent is not responsible if agent has named principal. — It is a general rule — standing on strong foundations, and pervading every system of jurisprudence — that if an agent is duly constituted, and names the agent's principal, and contracts in the agent's name, the principal is responsible and not the agent. Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760, 1934 Ga. App. LEXIS 714 (1934).

Instrument specifying agency and naming principal is binding on principal. — If in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter, and not the agent, will be regarded as the maker of the instrument, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930); Dover v. Burns, 186 Ga. 19, 196 S.E. 785, 1938 Ga. LEXIS 545 (1938).

Instrument binding on principal in individual capacity. — Agent acting within the scope of the agent's authority may bind the agent's principal, although signing in the agent's individual capacity only, when it appears from the instrument that the principal and not the agent is intended to be bound. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

"Agent for" designated person in signature is merely descriptive. — Expression "agent for" a designated person following the name in a signature attached to a contract is merely descriptio personae, and its presence in the signature does not of itself necessarily render the contract the undertaking of the designated principal, acting by and through the signer as the principal's agent. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Evidence that contract is principal's. — Under former Code 1882, §§ 2195 and 2211, when two notes were given to the plaintiff for cotton seed for Green J. Jordan's plantation and signed,

"J. Spradley, Agent for Green J. Jordan," this was a contract of Jordan, the principal, and not the contract of Spradley, the agent; more especially, as the evidence in the record disclosed the fact that the agency was made known to the payee of the notes at the time the notes were given. Tiller v. Spradley, 39 Ga. 35, 1869 Ga. LEXIS 168 (1869).

Acts held those of principal, not agent. — Under former Code 1873, § 2195, a deed made by a trustee under former Code 1873, § 2563 and signed by the trustee as "trustee of M.R." did not bind the trustee individually as to the warranty. Shacklett v. Ransom, 54 Ga. 350, 1875 Ga. LEXIS 179 (1875).

Contract signed by a person who adds after the person's signature the words "general manager" is not the individual undertaking of the person signing, if the contract shows on the contract's face that the contract was made in behalf of another, or if, in a suit for the contract's breach, this fact appears by extrinsic evidence. Raleigh & Gaston R.R. v. Pullman Co., 122 Ga. 700, 50 S.E. 1008, 1905 Ga. LEXIS 304 (1905).

Executory contract between "F.C. Miller, administrator of the estate of E.P. Miller," and H, properly construed, was an agreement by F.C. Miller in the representative capacity. Miller v. Hines, 145 Ga. 616, 89 S.E. 689, 1916 Ga. LEXIS 422 (1916).

If the check of the wife is signed by the husband as agent for his wife, the latter being named, it is in effect and in fact a check drawn by the wife upon an account kept in the bank in the name of the husband as agent for the wife. McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930).

When two attorneys in fact were expressly authorized by power of attorney to execute a deed in the names of the principals "or otherwise," under the facts, the security deed would be construed to be a conveyance by them in behalf of themselves and as attorneys in fact for the other heirs at law. Cocke v. Bank of Dawson, 180 Ga. 714, 180 S.E. 711, 1935 Ga. LEXIS 537 (1935).

Noncompetition clause in parties' agreement did not bar members of a limited liability company that sold a childcare facility from opening another daycare center as the members were not parties to the agreement and were not bound thereby; further, a member's signature was as a disclosed agent. Primary Invs., LLC v. Wee Tender Care III, Inc., 323 Ga. App. 196, 746 S.E.2d 823, 2013 Ga. App. LEXIS 665 (2013), cert. denied, No. S13C1735, 2014 Ga. LEXIS 34 (Ga. Jan. 6, 2014).

Parent signed as agent for adult son, not in personal capacity. — Trial court erred in granting summary judgment to a medical center and denying it to a patient's parent because the parent signed the form on behalf of the adult son as an agent, not in a personal capacity; thus, the parent was not personally liable for any unpaid medical bills. Winterboer v. Floyd Healthcare Mgmt., 334 Ga. App. 97, 778 S.E.2d 354, 2015 Ga. App. LEXIS 579 (2015).

No evidence defendant "made" contract. — There was no evidence to support that the defendant "made" a contract with the plaintiff when the undisputed evidence was that the plaintiff executed the loan agreement with the mortgagee in 1998, that the defendant began servicing the plaintiff's loan in May 2005, and that the mortgagee assigned the note and security deed to the trustee on March 10, 2010. Phillips v. Ocwen Loan Servicing, LLC, 92 F. Supp. 3d 1255, 2015 U.S. Dist. LEXIS 31357 (N.D. Ga. 2015).

Contract held individual undertaking, not agency. — Under this section, a contract by one described as president of an association indicated an individual undertaking rather than an agency. Candler v. DeGive, 133 Ga. 486, 66 S.E. 244, 1909 Ga. LEXIS 253 (1909).

Disclosure of agency must be pled in action against principal. — In an action against a principal based on a contract allegedly entered into by an agent, when the plaintiff did not allege that the agent revealed that the agent was acting for the principal, the plaintiff's pleading was insufficient. Georgia Cas. & Sur. Co. v. Hardrick, 211 Ga. 709, 88 S.E.2d 394, 1955 Ga. LEXIS 437 (1955).

Admission of agency in answer binding on defendant. — When the plaintiff alleged that a certain individual

was the agent of defendant company, and the answer admitted it, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant's contract, this admission was binding on the defendant, notwithstanding testimony admitted without objection that the individual bought an option on the property and transferred the option to the defendant. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

When issue of who is bound is question of fact. — Omitting cases of contracts under seal, negotiable instruments, and those in which there is an express declaration in writing or an intention and agreement on the part of an agent to be individually bound, usually when the agent contracts in the agent's own name, but with the agent's principal known, the question as to whether the principal or agent is bound is one of fact. Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760, 1934 Ga. App. LEXIS 714 (1934).

Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the patient's authorized agent acting on the patient's behalf to protect the well-being of the patient's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

Parol evidence may show contract was in fact principal's contract. — Under former Civil Code 1895, §§ 3022 and 3039, it was competent to show by parol evidence that the contract nominally that of the agent was in fact that of the principal. Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. App. 212, 59 S.E. 713, 1907 Ga. App. LEXIS 598 (1907).

If it does not appear from the face of the contract whether it is the signer's individual undertaking or is that of the signer's principal acting through the agent as the principal's agent, it may, especially where the contract is not executed under seal, be shown extrinsically that the contract is that of the principal, executed for and in the principal's behalf by the principal's agent. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Where principal different from one indicated in signature. — Where the question as to who is the real contracting party is one of fact which can be extrinsically determined, it may be shown that the person signing a contract in one's own name, with descriptive terms of agency after one's signature, did so for and in behalf of another as the principal, by and through oneself as agent, although one's principal may be another and different person from the one indicated as the signer's principal in the descriptive terms attached to one's signature. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Agency cannot be proved by evidence of mere declarations of the alleged agent. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Agent's declarations admissible with other evidence. — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, declarations of the alleged agent are admissible in evidence. Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840, 1936 Ga. App. LEXIS 161 (1936).

Summary judgment improper. — Summary judgment for an engineer in a concrete company's suit for services and materials provided to a construction project was error because the evidence could have authorized a jury to have found that the engineer obtained the concrete

company's agreement to provide services and material to the construction project without disclosing that the concrete company was dealing with the engineer, not directly, but only as an agent of the developer for purposes of O.C.G.A. §§ 10-6-53 and 10-6-85; a jury could have found that the concrete company reasonably understood that the engineer was binding itself as well as the developer. Action Concrete, Inc. v. Focal Point Eng'g, Inc., 296 Ga. App. 567, 675 S.E.2d 303, 2009 Ga. App. LEXIS 274 (2009).

Trial court erred in granting an insurer summary judgment and in denying an attorney summary judgment on the insurer's breach of contract claim because the evidence showed no meeting of the minds identifying the attorney as a party to the contract upon which the insurer based the insurer's claim and, therefore, no enforceable contract existed between the insured and the attorney; the closing instructions formed a contract between the insured and a law firm. Villanueva v. First Am. Title Ins. Co., 313 Ga. App. 164, 721 S.E.2d 150, 2011 Ga. App. LEXIS 1082 (2011), cert. denied, No. S12C0502, 2012 Ga. LEXIS 607 (Ga. June 18, 2012), aff'd, 292 Ga. 630, 740 S.E.2d 108, 2013 Ga. LEXIS 268 (2013).

Complaint alleging that an agreement had been reached between plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized, set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to plaintiff's neighbor, authorized agent acting on plaintiff's behalf, to protect the well-being of plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 1 et seq., 66 et seq., 166 et seq., 273.

C.J.S.

2A C.J.S., Agency, § 411 et seq.

ALR.

Liability of undisclosed principal on sealed contract, 32 A.L.R. 162.

Liability of principal for overdraft drawn by agent and paid by bank, 58 A.L.R. 816.

Acceptance by collection agent authorized to receive money only, of something else upon which he realizes money, as binding principal, 94 A.L.R. 784.

Sufficiency of execution of instrument by agent or attorney in fact in name of principal without his own name appearing, 96 A.L.R. 1251.

Liability of corporation on contract of promoters, 123 A.L.R. 726.

Use of trade name in connection with contract executed by agent as sufficient disclosure of agency or principal to protect agent against personal liability, 150 A.L.R. 1303.

Imputation of servant's or agent's contributory negligence to master or principal, 53 A.L.R.3d 664.

10-6-54. Effect of undisclosed principal.

If an agent shall fail to disclose his principal, when discovered, the person dealing with the agent may go directly upon the principal under the contract, unless the principal shall have previously accounted and settled with the agent.

History.
Orig. Code 1863, § 2175; Code 1868, § 2171; Code 1873, § 2197; Code 1882, § 2197; Civil Code 1895, § 3024; Civil Code 1910, § 3596; Code 1933, § 4-305.

JUDICIAL DECISIONS

Analysis

General Consideration
Agent Liability
Principal Liability

General Consideration

Section codifies preexisting law. — This section is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. Van Dyke v. Van Dyke, 123 Ga. 686, 51 S.E. 582, 1905 Ga. LEXIS 578 (1905).

Section states general rule as to holding undisclosed principal. — General rule with reference to holding an undisclosed principal liable upon the contract of the principal's agent is stated in this section. Van Dyke v. Van Dyke, 123 Ga. 686, 51 S.E. 582, 1905 Ga. LEXIS 578 (1905).

Section does not apply to contract under seal. — Rule laid down in this section, that an undisclosed principal shall stand liable for the contract of the principal's agent, does not apply when the contract is under seal. Van Dyke v. Van Dyke, 123 Ga. 686, 51 S.E. 582, 1905 Ga. LEXIS 578 (1905); Gill v. Atlanta, B. & Atl. Ry., 24 Ga. App. 780, 102 S.E. 457, 1920 Ga. App. LEXIS 521 (1920).

Contract must purport to be principal's to bind the principal. — General rule is this: in order to bind a principal on a contract made by an agent, it must purport on the contract's face to be the contract of the principal, and the principal's name must be asserted in the contract. It is not enough that the agent be described as such in the instrument. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

Because the plaintiff contracted with the defendant individually, and not as anyone's agent, the fact that the defendant's employer made the downpayment was not conclusive as to which party entered into the agreement, and the plaintiff's claim against the defendant should not have been dismissed by the trial court sua sponte. Bump-Aire Corp. v. Rogers, 236 Ga. App. 422, 512 S.E.2d 326, 1999 Ga. App. LEXIS 197 (1999).

Person acting on person's own account cannot bind another, despite benefit. — Mere fact that a wife got the benefit of goods bought by her husband on his own credit would not, whether he was solvent or insolvent, make her liable in law to the seller for the price of such goods. Hightower v. Walker, 97 Ga. 748, 25 S.E. 386, 1895 Ga. LEXIS 571 (1895).

Trustees of a church are not, as such, liable for the price of lumber sold and delivered to the pastor on the pastor's individual account, when the pastor neither acted as their agent nor had authority to do so, although the lumber was, with the church's knowledge, used in improving the property of the church. Montgomery v. Walton, 111 Ga. 840, 36 S.E. 202, 1900 Ga. LEXIS 800 (1900).

Mere fact that a wife may be the owner of a tract of land upon which a house is erected out of materials furnished solely on the credit of her husband will not render her liable for the value of such materials on the theory that she was the concealed principal of her husband when there is no evidence that he was in any way acting as her agent when he purchased the materials. Blount & Morel v. Dugger, 115 Ga. 109, 41 S.E. 270, 1902 Ga. LEXIS 317 (1902); Cornelia Planing Mill Co. v. Wilcox, 129 Ga. 522, 59 S.E. 223, 1907 Ga. LEXIS 502 (1907).

Mere fact that the wife is the owner of cows which were fed upon provender furnished solely upon the credit of her hus-

General Consideration (Cont'd)

band was held insufficient to establish her as the concealed principal of her husband, when there was no evidence that he was in any way acting as her agent when the purchase was made. Moore v. Sims, 24 Ga. App. 296, 100 S.E. 647, 1919 Ga. App. LEXIS 582 (1919).

Undisclosed principal cannot deny liability for agent's act. — If a husband is acting as agent for his wife and she is simply the undisclosed principal, her liability cannot be questioned any more than if he had, with her assistance, concealed or misled the plaintiff as to the true ownership of the property. Porter v. Terrell, 2 Ga. App. 269, 58 S.E. 493, 1907 Ga. App. LEXIS 343 (1907).

Special contract. — If the agent delivers the property in the agent's own name and the agent's principal is undisclosed, the latter is bound by any special contract, so far as the terms thereof are legal and binding, which is made between the agent and the carrier; but if the company receives the goods as those of the principal and, without the knowledge or consent of the latter, the carrier attempts to make special contract with the agent, the principal is not bound thereby, unless the principal does some act from which the law infers a ratification. Wellborn v. Southern Ry., 6 Ga. App. 151, 64 S.E. 491, 1909 Ga. App. LEXIS 217 (1909).

Disclosure of agency must encompass principal's name to relieve agent from personal liability. Collins v. Brayson Supply Co., 157 Ga. App. 438, 278 S.E.2d 87, 1981 Ga. App. LEXIS 1860 (1981).

Contract liability of a principal and the principal's agent is not joint, and after election to proceed against one, the other cannot be held. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

Undisclosed principal. — If an employer is merely an agent and acts with the authority of an undisclosed principal, either may be held liable, but not jointly liable, and after election to proceed against one of them, the other is released from liability. Davis v. Menefee, 34 Ga. App. 813, 131 S.E. 527, 1926 Ga. App. LEXIS 56 (1926).

Party with whom an agent contracts without disclosing the agent's principal may treat the agent as the principal and elect to proceed against the agent as such in lieu of the principal, but the party may not proceed against the two jointly. Dinkler Mgt. Corp. v. Stein, 115 Ga. App. 586, 155 S.E.2d 442, 1967 Ga. App. LEXIS 1177 (1967).

Third party must elect whether to proceed against agent or principal. — One who is in fact merely an agent and acts with the authority of an undisclosed principal may, at the election of the opposite party, be held as the principal therein, but the contractual liability of such undisclosed agent and the agent's principal is not joint, and the injured party must elect against whom the party desires to proceed. Washburn Storage Co. v. Elliott, 93 Ga. App. 456, 92 S.E.2d 28, 1956 Ga. App. LEXIS 770 (1956).

Agent Liability

If an agent wishes to avoid personal liability, the duty is on the agent to disclose the agency and not on the party with whom the agent deals to discover the agency. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965); Dinkler Mgt. Corp. v. Stein, 115 Ga. App. 586, 155 S.E.2d 442, 1967 Ga. App. LEXIS 1177 (1967).

Agents may be held when principals' identities not disclosed. — If certain individuals composing a committee to represent the general citizenry, whose names and identities were not disclosed, purchased a monument to be erected as a memorial to the soldiers from a given county who died in the first World War and the contract of purchase and sale was duly executed by the seller in terms of the agreement, the members of the committee may be held liable as individuals in a suit by the seller on account for the price of the monument. Schneider Marble Co. v. Knight, 37 Ga. App. 646, 141 S.E. 420, 1928 Ga. App. LEXIS 552 (1928).

In a suit brought by a carpet and paint company for unpaid work invoices for an apartment complex, the trial court did not err by granting partial summary judg-

ment and holding the complex's property manager liable for the expenses because the company failed to disclose the company's agency relationship with the complex's owner. Carroll Mgmt. Group, LLC v. A Carpet & Paint, LLC, 334 Ga. App. 259, 779 S.E.2d 26, 2015 Ga. App. LEXIS 611 (2015), cert. denied, No. S16C0355, 2016 Ga. LEXIS 121 (Ga. Feb. 1, 2016).

Election to recover from agent. — One who deals with an agent who fails to disclose the agent's principal may recover from the agent, where the person so elects, or the person may proceed against the principal, when made known, should the person not elect to proceed against the agent. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965).

One who performs personal services at the request of the agent, who fails to disclose the principal for whom the request is made, may recover from the agent, where the person so elects, or the person may proceed against the principal, when made known, should the person not elect to proceed against the agent. Dinkler Mgt. Corp. v. Stein, 115 Ga. App. 586, 155 S.E.2d 442, 1967 Ga. App. LEXIS 1177 (1967).

If an agent buys in the agent's own name without disclosing the principal and the seller subsequently discovers that the purchase was in fact made for another, the seller may, at the seller's choice, look for payment either to the agent or the principal, even though the title has been made to the agent and the agent has been debited with the account. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

To avoid personal liability, the agent must disclose fact of agency and identity of principal, and one who deals with agent who fails to disclose the principal may at one's election recover from either agent or principal. Collins v. Brayson Supply Co., 157 Ga. App. 438, 278 S.E.2d 87, 1981 Ga. App. LEXIS 1860 (1981).

If the plaintiff did not take a default judgment against the undisclosed principal, no election was made as between the principal and agent, and the agent was subject to suit individually. Watson v. Sierra Contr. Corp., 226 Ga. App. 21, 485 S.E.2d 563, 1997 Ga. App. LEXIS 513 (1997).

Third person knowing of agency and making agent debtor cannot charge principal. — A wife cannot be held accountable unless her husband acted as her agent in the transaction, nor even then if the fact of agency was known to the seller and the seller extended credit to her agent, not to her. Fisher v. Darsey, 21 Ga. App. 583, 94 S.E. 839, 1918 Ga. App. LEXIS 415 (1918).

If at the time of the sale the seller knows not only that the person who is nominally dealing with the seller is not principal but agent, but also who the principal really is, and, notwithstanding all the knowledge, chooses to make the agent the seller's debtor, dealing with the seller and the seller alone, the seller must be taken to have abandoned the seller's recourse against the principal, and cannot afterwards, upon failure of the agent, turn round and charge the principal, having once made an election at the time when the seller had the power of choosing between the one and the other. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

No recovery from agent after discovering agency and looking to principal. — If the creditor, when the creditor ascertains that there is a principal who is liable, accepts the principal as the debtor and looks exclusively to the principal, the creditor cannot afterwards recover from the agent. Miller v. Watt & Walker, 70 Ga. 385, 1883 Ga. LEXIS 342 (1883).

Agent receiving property for undisclosed principal does not take title. — Ruling that when the original tenant, having reserved no rights against the subtenant in the transfer of a note to the landlord and having claimed no interest in the property delivered to the original tenant by the subtenant, the proceeds of which the original tenant paid to the landlord in satisfaction of the transferred note, title never vested in the original tenant, is not altered by the fact that the subtenant may not have known that the subtenant's note to the tenant had been transferred to the landlord; when it appears without dispute that the

Agent Liability (Cont'd)

original tenant did not accept the cotton as owner, but, even if under an assumed agency, received the cotton only for the landlord as principal, undisclosed both to the subtenant and the claimant. Watson v. Sudderth, 32 Ga. App. 383, 123 S.E. 143, 1924 Ga. App. LEXIS 413 (1924).

When extrinsic evidence admissible concerning agent being party to contract. — If it appears unambiguously in an integrated contract that the agent is a party or is not a party, extrinsic evidence is not admissible to show a contrary intent, except for the purpose of reforming the contract. If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that one is not a party except: (a) for the purpose of reforming the contract; or (b) to establish that one's name was signed as the business name of the principal and that it was so agreed by the parties. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

When wife retains property, only slight evidence of husband's agency required. — When the wife retains property and enjoys the property, only slight evidence of the husband's agency in contracting the debt for the property is required to charge her. Pinkston v. Cedar Hill Nursery & Orchard Co., 123 Ga. 302, 51 S.E. 387, 1905 Ga. LEXIS 448 (1905).

If principal and agent are improperly joined, one may be dismissed. — When the plaintiff, having a right to elect whether the plaintiff will sue the agent or the undisclosed principal, improperly joins both in the same action, the plaintiff may exercise the right of election, proceed against one, and dismiss as to the other. Lippincott & Co. v. Behre, 122 Ga. 543, 50 S.E. 467, 1905 Ga. LEXIS 255 (1905).

Unpublished decision: Realty company was liable to a construction company for breaching oral agreements because, to avoid personal liability, the realty company had the duty to disclose that the company was acting solely as the principal's agent in making the oral contracts. Circle Y Constr., Inc. v. WRH Realty Servs., 427 Fed. Appx. 772, 2011 U.S. App. LEXIS 10629 (11th Cir. 2011).

Principal Liability

Third party's right as to such principal does not depend upon diligence. — Right to proceed against the principal, is not dependent on the diligence of the plaintiff in discovering the fact of the concealed agency. Baldwin v. Garrett & Sons, 111 Ga. 876, 36 S.E. 966, 1900 Ga. LEXIS 875 (1900); Beacham v. Coe-Mortimer Co., 30 Ga. App. 456, 118 S.E. 441, 1923 Ga. App. LEXIS 503 (1923); Barrington v. Davis Jenkins & Sons, 44 Ga. App. 682, 162 S.E. 642, 1932 Ga. App. LEXIS 453 (1932).

Upon discovery, third person may go against principal. — When a person enters a demand for cars, without at that time disclosing an agency for another, but it appears that at the time of shipment, it was disclosed that the cars were intended solely for the use of another and the bill of lading was issued in the name of the true owner, the carrier might in such case go directly against the principal for demurrage charges, upon the agency being disclosed. Central of Ga. Ry. v. Rabun, 21 Ga. App. 402, 94 S.E. 598, 1917 Ga. App. LEXIS 607 (1917).

If an agent fails to disclose the agent's principal, a person dealing with the former may, when the fact is discovered, go against the principal under the contract. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Right to proceed against principal depends on special agent's authority. — Right of a third person to elect to proceed against principal is confined to the liability arising from the actual authority given the agent, when the authority given is a special and limited one, and no question of apparent authority or estoppel was involved. Piel v. Snow's Laundry & Dry Cleaning Co., 92 Ga. App. 411, 88 S.E.2d 628, 1955 Ga. App. LEXIS 599 (1955).

If no agency or if undisclosed principal has settled, one is not directly liable. — If there was in fact no agency, or if the agency existed, but the

undisclosed principal has previously accounted and settled with the agent, the plaintiff is authorized to go directly upon the principal. Price-Evans Foundry Co. v. Southern Bell Tel. & Tel. Co., 19 Ga. App. 264, 91 S.E. 283, 1917 Ga. App. LEXIS 90 (1917); Beacham v. Coe-Mortimer Co., 30 Ga. App. 456, 118 S.E. 441, 1923 Ga. App. LEXIS 503 (1923).

Question of fact as to relationship precludes summary judgment. — Question of fact remained as to whether the crematory was acting as the undisclosed agent of the funeral home in contracting with the widower for the cremation; therefore, summary judgment for the funeral home was reversed on the breach of contract claim as the record on appeal was unclear as to the exact nature of the relationship between the crematory and the funeral home such as whether the funeral home was a co-owner of the crematory along with several other funeral homes. Moore v. Lovein Funeral Home, Inc., 358 Ga. App. 10, 852 S.E.2d 876, 2020 Ga. App. LEXIS 686 (2020).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 251 et seq.

C.J.S.

3 C.J.S., Agency, § 520 et seq.

ALR.

Signing of contract by agent of undisclosed principal as satisfying statute of frauds, 23 A.L.R. 932; 138 A.L.R. 330.

Liability of undisclosed principal on sealed contract, 32 A.L.R. 162.

Sufficiency of execution of instrument by agent or attorney in fact in name of principal without his own name appearing, 96 A.L.R. 1251.

Concealment of fact that party to contract was acting for undisclosed principal as fraud which will toll statute of limitations, 114 A.L.R. 864.

Right to join agent and undisclosed principal in same action, 118 A.L.R. 701.

Action or judgment against agent as affecting right to maintain action against undisclosed principal, 119 A.L.R. 1316.

Exceptions to rule which permits suit by or against undisclosed principal, 130 A.L.R. 664.

Use of trade name in connection with contract executed by agent as sufficient disclosure of agency or principal to protect agent against personal liability, 150 A.L.R. 1303.

Principal's payment to or settlement with agent as affecting former's liability to third person with respect to contract negotiated by agent, 71 A.L.R.2d 911.

10-6-55. Effect of seller giving credit to agent.

If the credit shall be given to the agent by the choice of the seller, he may not afterward demand payment of the principal.

History.

Orig. Code 1863, § 2176; Code 1868, § 2172; Code 1873, § 2198; Code 1882, § 2198; Civil Code 1895, § 3025; Civil Code 1910, § 3597; Code 1933, § 4-306.

Cross references.

Responsibility of agent for credit given § 10-6-87.

JUDICIAL DECISIONS

Section not applicable when principal undisclosed. — Provision of this section does not apply so long as the principal is undisclosed. Beacham v.

Coe-Mortimer Co., 30 Ga. App. 456, 118 S.E. 441, 1923 Ga. App. LEXIS 503 (1923).

Generally, contract does not bind principal unless it purports to be principals. — General rule is this: in order to bind a principal, on a contract made by an agent, it must purport on the contract's face to be the contract of the principal, and the principal's name must be asserted in the contract. It is not enough that the agent be described as such in the instrument. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

Known principal cannot be held liable by third person dealing with agent. — Wife could not be held accountable under this section if the fact of agency was known to the seller, and the seller extended credit to her agent, not to her. Pinkston v. Cedar Hill Nursery & Orchard Co., 123 Ga. 302, 51 S.E. 387, 1905 Ga. LEXIS 448 (1905); Fisher v. Darsey, 21 Ga. App. 583, 94 S.E. 839, 1918 Ga. App. LEXIS 415 (1918).

When one with knowledge of the agent's authority to bind the agent's principal deals with the agent directly, and not with the principal, one cannot hold the principal liable. Morgan v. Georgia Paving & Constr. Co., 40 Ga. App. 335, 149 S.E. 426, 1929 Ga. App. LEXIS 153 (1929); Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

If an agent buys in the agent's own name, without disclosing the principal, and the seller subsequently discovers that the purchase was in fact made for another, the seller may, at the seller's choice, look for payment either to the agent or the principal, and that too, notwithstanding the title had been made to the agent, and the agent debited with the account. On the other hand, if at the time of the sale, the seller knows not only the person who is nominally dealing with the seller is not the principal but the agent, and also knows who the principal really is, and, notwithstanding all the knowledge, chooses to make the agent the seller's debtor, dealing with the agent and the agent alone, the seller must be taken to have abandoned the seller's recourse against the principal and cannot afterwards, upon failure of the agent, turn around and charge the principal, having once made the seller's election at the time when the seller had the power of choosing between the one and the other. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

Credit given exclusively to agent. — To constitute an election by the seller between a principal and agent, so that giving credit to the agent will prevent the seller from afterward demanding payment of the principal under this section, it should appear that the credit was given exclusively to the agent. Fontaine v. Eagle & Phenix Mfg. Co., 52 Ga. 31, 1874 Ga. LEXIS 231 (1874).

Principal is liable if agent not dealt with alone. — When a travel agent was defendant's disclosed agent in making arrangements for hotel accommodations with the plaintiff, the defendant paid the agent for the hotel charges, but the agent failed to pay the plaintiff, the defendant was bound for the unpaid debt since it did not appear that the plaintiff had chosen to make the agent its debtor, dealing with the agent alone, and that exclusive credit was given to the agent. Southeastern Foam Prods., Inc. v. Hilton Hotels Corp., 149 Ga. App. 372, 254 S.E.2d 494, 1979 Ga. App. LEXIS 1853 (1979).

When extrinsic evidence admissible concerning whether agent is party to contract. — If it appears unambiguously in an integrated contract that the agent is a party or is not a party, extrinsic evidence is not admissible to show a contrary intent, except for the purpose of reforming the contract. If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that the agent is not a party except: (a) for the purpose of reforming the contract; or (b) to establish that the agent's name was signed as the business name of the principal and that it was so agreed by the parties. Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51, 1978 Ga. LEXIS 1208 (1978).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 273.
C.J.S.
2A C.J.S., Agency, § 435.
ALR.
Principal's payment to or settlement with agent as affecting former's liability to third person with respect to contract negotiated by agent, 71 A.L.R.2d 911.

10-6-56. Effect of representations or concealment on principal.

The principal shall be bound by all representations made by his agent in the business of his agency and also by his willful concealment of material facts, although they are unknown to the principal and known only by the agent.

History.
Orig. Code 1863, § 2177; Code 1868, § 2173; Code 1873, § 2199; Code 1882, § 2199; Civil Code 1895, § 3026; Civil Code 1910, § 3598; Code 1933, § 4-307.

JUDICIAL DECISIONS

Amplification of statute. — Former Code 1933, § 4-302, providing that the principal shall be bound by all the acts of the principal's agent within the scope of the principal's authority, was a mere amplification of former Code 1933, § 4-307, and the same was true of former Code 1933, § 4-315, insofar as it referred to scope of authority. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

Principal bound by agent's fraudulent conduct in its business. — Under this section, a corporation is bound by the fraudulent conduct of the corporation's agents engaged in the corporation's business and on that line of the business where it puts such agent to work. All deceit, misrepresentations, and falsehoods occurring in the course of business, whereby anybody is cheated, are the responsibility of the corporation. Scofield Rolling Mill Co. v. State, 54 Ga. 635, 1875 Ga. LEXIS 286 (1875).

Chapter 11 debtor's claim that the statute of limitations on the debtor's claim seeking recovery of transfers under 11 U.S.C. § 547 was tolled until one of the debtor's members learned that another member was misappropriating funds the member received from a lender failed as a matter of law because the debtor was an LLC and the debtor was bound under O.C.G.A. § 10-6-56 by the fraudulent conduct of the debtor's agents who were engaged in business where the debtor put those agents to work. Citrus Tower Blvd. Imaging Ctr., LLC v. Key Equip. Fin., Inc. (In re Citrus Tower Blvd. Imaging Ctr., LLC), 520 B.R. 892, 2014 Bankr. LEXIS 4745 (Bankr. N.D. Ga. 2014).

Fraudulent conduct in obtaining contract principal accepts. — Principal who accepts a contract procured by fraudulent conduct of an agent, regardless of such agent's authority, is bound by such fraudulent conduct of the agent in procuring such contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

Representations by agent exceeding authority, if benefits are retained. — If one purporting to act as agent exceeds the agent's authority, the principal cannot ratify in part and repudiate in part, and therefore the principal cannot accept and retain the fruits of a contract so made by another in the principal's behalf without becoming bound by the representations of the person so purporting to act for the principal in consummating the agreement. Lancaster v. Neal, 41 Ga. App.

721, 154 S.E. 386, 1930 Ga. App. LEXIS 1072 (1930); Hawthorne Indus. v. Attaway Assocs., 153 Ga. App. 155, 264 S.E.2d 663, 1980 Ga. App. LEXIS 1720 (1980).

Representation of each partner when employing partnership. — When an owner of property employs a partnership as the owner's agent to sell the property, the owner will be bound by the acts and representations of each of the partners within the real or apparent scope of the agency, although the owner may have dealt with the partnership through one of the partners only. Lancaster v. Neal, 41 Ga. App. 721, 154 S.E. 386, 1930 Ga. App. LEXIS 1072 (1930).

Agent to sell may agree principal will repay purchase money. — Agent authorized to sell mules on behalf of a principal has authority to agree with a purchaser that if a mule which appears to be sick does not recover, the seller will repay the purchase money. Turner Bros. v. Manley, 14 Ga. App. 215, 80 S.E. 680, 1914 Ga. App. LEXIS 178 (1914).

Right to presume insurance companies dealing through agents follow usual rules. — Under former Code 1868, §§ 2168 and 2173, those who deal with agents of foreign insurance companies have a right to presume that the companies conform to the usual rules. City Fire Ins. Co. v. Carrugi, 41 Ga. 660, 1871 Ga. LEXIS 164 (1871).

Agent has duty to communicate material facts. — Since knowledge of an agent is imputed to the principal by law and only by the agent's performance of this duty can the principal acquire actual knowledge and govern or protect oneself, an agent is under a duty to communicate to the principal all pertinent and material facts concerning any transaction entered into on behalf of the principal. Dawes Mining Co. v. Callahan, 246 Ga. 531, 272 S.E.2d 267, 1980 Ga. LEXIS 1184 (1980).

Effect of dual representation by agent. — Rule set out in O.C.G.A. § 10-6-56 is not negated by the equally well-established rule that neither principal is civilly liable to the other for the tortious acts of the dual agent of both unless there is collusion or participation in that conduct by the principal. Although the principal may be relieved of liability in tort, equity will not allow the principal to be relieved of responsibility for misrepresentations of the dual agent upon which the other principal relied to the principal's detriment when the action is in contract. Home Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139, 1983 Ga. LEXIS 586 (1983).

One who issued and procured insurance held dual agent. — Acts of an individual in procuring liability insurance for a company, of which the individual was the chairman, and issuing liability insurance policies on behalf of an insurer of which the individual was the president, had been occurring and recurring for more than 30 years with the knowledge and consent of all parties, and made the individual a dual agent. The individual's misconduct in procuring a policy which did not cover certain acts of employees could not be imputed to either of the principals, who were not actually at fault. Edwards-Warren Tire Co. v. Cole, Sanford & Whitmire, 188 Ga. App. 395, 373 S.E.2d 83, 1988 Ga. App. LEXIS 1048 (1988).

Question of fraud is a jury question in action on agent's false and fraudulent representations to induce purchase of mules. Johnson v. Renfroe & McCrary, 73 Ga. 138, 1884 Ga. LEXIS 69 (1884).

Instruction as to agent's representations held not erroneous. — Charge of the court that "if in the prosecution of the master's business, the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 55 et seq., 148 et seq.

C.J.S.

2A C.J.S., Agency, §§ 408, 412.

ALR.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 A.L.R. 170; 150 A.L.R. 623.

Acceptance by collection agent authorized to receive money only, of something else upon which he realizes money, as binding principal, 94 A.L.R. 784.

Misrepresentations by one party's agent, who was not authorized in that regard, as ground of rescission by other party, 95 A.L.R. 763.

Liability of infant for torts of his employee or agent, 103 A.L.R. 487.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 A.L.R. 535.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 A.L.R. 665.

Insurance company's responsibility for torts of agent causing physical injury to person or damage to property, 116 A.L.R. 1389.

Responsibility of bank for fraud of officer or agent inducing customer or debtor of bank to enter into transaction with such officer or agent personally or with third person, 117 A.L.R. 389.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 A.L.R. 893.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

Implied or apparent authority of agent selling personal property to make warranties, 40 A.L.R.2d 285.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 A.L.R.2d 10.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations, 61 A.L.R.2d 1237.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 A.L.R.3d 1135.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 A.L.R.3d 777.

Insured's responsibility for false answers inserted by insurer's agent in application following correct answers by insured, or incorrect answers suggested by agent, 26 A.L.R.3d 6.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 A.L.R.3d 6.

10-6-57. Nonproduction of payment made or security by agent.

Where money is due on a written evidence of debt, payment to an agent of the creditor who fails to produce the obligation shall be at the risk of the debtor. Nonproduction of the security shall rebut the implication of authority arising from the agent's employment, and it must be otherwise established.

History.

Civil Code 1895, § 3006; Civil Code 1910, § 3578; Code 1933, § 4-308.

History of Code section.

This Code section is derived from the decisions in Howard v. Soule, 54 Ga. 52 (1875), and Bank of Univ. v. Tuck, 96 Ga. 456, 23 S.E. 467 (1895).

JUDICIAL DECISIONS

Payment to payee without notice of payee's lack of authority is valid defense. — If the maker pays an installment to the payee without notice that the payee had no authority to accept payment, in a suit by the transferee the maker can set up as a defense that the payment was made, even though the transferor has not remitted it to the transferee. Northside Bldg. & Inv. Co. v. Finance Co. of Am., 119 Ga. App. 131, 166 S.E.2d 608, 1969 Ga. App. LEXIS 1013 (1969).

Careless maker may have to pay twice. — Holder, notwithstanding the previous payment of a note by the maker to the original payee, may collect it again, unless one of three things appears: first, that the payee was the holder's general agent for the collection of such papers; or, second, had special authority to collect in the particular instance; or, third, that the money collected by the payee in fact reached the holder's hands. If the payee collected for the holder under the payee's authority, either general or special, or if the holder actually received the money collected by the payee upon the note, this should be an end to the matter. Otherwise, the law renders the careless maker liable to pay a second time. Bank of Univ. v. Tuck, 96 Ga. 456, 23 S.E. 467, 1895 Ga. LEXIS 110 (1895).

Maker may have to pay twice if note is not produced, unless payee is agent for holder or money reaches holder. — If the maker of a negotiable promissory note pays it to the original payee without requiring the production and surrender of the note, the maker is liable to pay it again to an innocent holder who acquired title to it in good faith and for value before maturity, unless the payee was the holder's general agent for the collection of the note and had special authority to collect it, or the money collected thereon in fact reached the hands of the holder of the note. Northside Bldg. & Inv. Co. v. Finance Co. of Am., 119 Ga. App. 131, 166 S.E.2d 608, 1969 Ga. App. LEXIS 1013 (1969).

Debtor should verify that agent possesses security. — If the debtor on a promissory note makes a payment thereon to one claiming to be an agent for collection, it is incumbent on the debtor to see that the agent is in possession of the security, for if the agent is not, the debtor will be liable to pay again, unless the person making the collection had authority to collect the sums due the principal or the money actually reached the owner. Walton Guano Co. v. McCall, 111 Ga. 114, 36 S.E. 469, 1900 Ga. LEXIS 494 (1900); Baker v. Armour Fertilizer Works, 18 Ga. App. 611, 90 S.E. 171, 1916 Ga. App. LEXIS 1138 (1916).

Ordinary prudence in requiring production of note protects maker. — General rule set out in this section will injure no one who exercises the ordinary degree of prudence in requiring the production of the note before one pays the note. Howard & Soule v. Rice, 54 Ga. 52, 1875 Ga. LEXIS 69 (1875).

Holder not in due course is subject to defense of payment in full. — One who acquires a promissory note, but is not a holder in due course, is subject to the defense of payment in full. Northside Bldg. & Inv. Co. v. Finance Co. of Am., 119 Ga. App. 131, 166 S.E.2d 608, 1969 Ga. App. LEXIS 1013 (1969).

One who is not a holder cannot utilize this section. — Plaintiff, who is not a holder in due course, cannot avail itself of the provisions of this section. Northside Bldg. & Inv. Co. v. Finance Co. of Am., 119 Ga. App. 131, 166 S.E.2d 608, 1969 Ga. App. LEXIS 1013 (1969).

Section is inapplicable if note to partnership is paid to partner. — This section has no application when payment on a note payable to a partnership is made

to one partner. Brady v. Phillips Mule Co., 27 Ga. App. 444, 108 S.E. 809, 1921 Ga. App. LEXIS 953 (1921).

Production of written evidence of debt implies agent has authority to collect. — If payment is made on a written evidence of debt to a person as agent for another, the production of the written evidence of debt raises an implication of the person's authority as agent to receive the payment. Futch v. F.S. Royster Guano Co., 51 Ga. App. 305, 180 S.E. 368, 1935 Ga. App. LEXIS 675 (1935).

If evidence of debt not produced, payor must prove such authority. — If payment on a written evidence of debt is made to a person as agent for another, the production of the written evidence of debt raises an implication of the person's authority to receive the payment as agent, but when it is not produced there is no such implication, and the burden is upon the person making the payment to establish such authority. Dibble v. Law, 141 Ga. 364, 80 S.E. 999, 1914 Ga. LEXIS 204 (1914); Sherrod v. Springfield Baptist Church, 21 Ga. App. 200, 93 S.E. 1009, 1917 Ga. App. LEXIS 523 (1917); Brady v. Phillips Mule Co., 27 Ga. App. 444, 108 S.E. 809, 1921 Ga. App. LEXIS 953 (1921).

Proof that payment reached owner. — In a suit upon a promissory note, if the debtor shows that the debtor paid a part of it to a supposed agent of the holder of the note, but fails to show that the supposed agent produced the note at the time of payment, or that the money so collected ever reached the owner of the note, or that the alleged agent had specific authority to collect the note, no valid defense of partial payment is shown. Lane v. Bank of Thomasville, 23 Ga. App. 275, 97 S.E. 884, 1919 Ga. App. LEXIS 83 (1919).

If a debtor makes a payment to a supposed agent of a note creditor, without requiring the production of the note at the time of payment, so as to create by such production an implication of the agent's authority, the burden is upon the debtor to show: (1) that the payment actually reached the hands of the creditor; or (2) that the payee was a general agent of the creditor for the collection of such paper; or (3) that the payee had special authority from the creditor to collect the particular payment. Prudential Ins. Co. of Am. v. Franklin, 51 Ga. App. 496, 180 S.E. 869, 1935 Ga. App. LEXIS 383 (1935).

Section does not limit proof of authority. — This section does not preclude the debtor from establishing express or implied authority to collect otherwise than by showing production of the evidence of debt, nor from showing the subsequent ratification of the act by the creditor as principal. Roberts v. Bank of Eufaula, 20 Ga. App. 221, 92 S.E. 1015, 1917 Ga. App. LEXIS 824 (1917).

Regardless of whether an implication of authority to collect a debt before maturity may arise if the creditor's agent has possession of an instrument which is evidence of the debt, the debtor who has made a payment before maturity is not precluded from otherwise establishing the authority of the agent receiving such payment. Commercial Credit Corp. v. Noles, 85 Ga. App. 392, 69 S.E.2d 309, 1952 Ga. App. LEXIS 742 (1952).

Authority may be shown by course of dealing. — One who has held another out as one's lawful agent is estopped to deny the agent's acts within the apparent scope of the agent's authority and about the agent's principal's business; such authority may be established by proof of a long course of dealing by such agent in a similar manner for the principal. Futch v. F.S. Royster Guano Co., 51 Ga. App. 305, 180 S.E. 368, 1935 Ga. App. LEXIS 675 (1935).

Customary collection of similar notes. — In a suit on a promissory note, if the debtor shows that the debtor has paid a part of the note to a duly authorized agent of the holder of the note, who has possession of the note, and who also had specific authority to collect the note, by customarily collecting such notes for the holder, a valid defense of partial payment is shown. Futch v. F.S. Royster Guano Co., 51 Ga. App. 305, 180 S.E. 368, 1935 Ga. App. LEXIS 675 (1935).

Declarations of the alleged agent are insufficient to establish agency and authority to collect. Baker v. Armour Fertilizer Works, 18 Ga. App. 611, 90 S.E. 171, 1916 Ga. App. LEXIS 1138 (1916).

Production, not just possession, must be shown. — Affidavit of a witness setting forth newly discovered evidence

did not furnish sufficient ground for the grant of a new trial since it merely stated that the alleged agent had the note "in his possession" but did not state that it was produced. Schaefer v. Schaefer, 46 Ga. App. 789, 169 S.E. 256, 1933 Ga. App. LEXIS 247 (1933).

RESEARCH REFERENCES

ALR.

Making paper payable to agent as charging drawer with loss due to agent's misappropriation, 8 A.L.R. 304.

Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 90 A.L.R. 467; 96 A.L.R. 1233.

Payment to payee, indorser, or guarantor of bill or note not in possession thereof, 103 A.L.R. 653.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or apparently authorized, to find a market, 105 A.L.R. 718.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 A.L.R. 578.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

Payment to broker or agent authorized to sell real property, as payment to principal, 30 A.L.R.2d 805.

10-6-58. Effect of notice to agent.

Notice to the agent of any matter connected with his agency shall be notice to the principal.

History.

Orig. Code 1863, § 2178; Code 1868, § 2174; Code 1873, § 2200; Code 1882, § 2200; Civil Code 1895, § 3027; Civil Code 1910, § 3599; Code 1933, § 4-309.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Evidence

General Consideration

Agent's notice of fact connected with agency is notice to principal. — Notice to an agent of a fact connected with the subject matter of the agency is notice to the agent's principal. Whitten v. Jenkins, 34 Ga. 297, 1866 Ga. LEXIS 89 (1866).

Notice to an agent in the business for which the agent is employed is notice to the principal. Wilensky v. Martin, 4 Ga. App. 187, 60 S.E. 1074, 1908 Ga. App. LEXIS 242 (1908).

When notice of a fact is communicated to a general agent, or to a special agent in absolute charge of a particular business, knowledge of all the facts suggested by the notice is imputable to the principal. Fireman's Fund Ins. Co. v. Davis, 42 Ga. App. 49, 155 S.E. 105, 1930 Ga. App. LEXIS 234 (1930).

Notice to an agent of any matter within the scope of the agency is notice to the principal. Hartford Accident & Indem. Co. v. Hartley, 275 F. Supp. 610, 1967 U.S. Dist. LEXIS 7638 (M.D. Ga. 1967), aff'd,

389 F.2d 91, 1968 U.S. App. LEXIS 8540 (5th Cir. 1968).

If agents, as attorneys of claimant, were making an investigation in the interest of their client, then the claimant is chargeable with whatever notice such agents had. Deveney, Hood & Co. v. Burton, 110 Ga. 56, 35 S.E. 268, 1900 Ga. LEXIS 324 (1900).

If an attorney for a mortgagee had knowledge of an adverse claim to the property which was subsequently bought at an execution sale by the attorney as agent for the attorney's spouse, if the notice of the claim was still in the mind of the attorney at the time of the execution sale, such knowledge would be imputable to the attorney's spouse, notwithstanding that the attorney acted in the dual capacity of attorney for the mortgagee and of agent for the spouse. Faircloth v. Taylor, 147 Ga. 787, 95 S.E. 689, 1918 Ga. LEXIS 145 (1918).

Knowledge of a dual agent is imputable to both principals. Carlton v. Moultrie Banking Co., 170 Ga. 185, 152 S.E. 215, 1930 Ga. LEXIS 419 (1930).

Agent who proves false to principal. — Rule of this section is modified when an agent proves false to the principal. Loftin v. Great S. Home Benevolent Ass'n, 9 Ga. App. 121, 70 S.E. 353, 1911 Ga. App. LEXIS 432 (1911); Hartford Accident & Indem. Co. v. Hartley, 275 F. Supp. 610, 1967 U.S. Dist. LEXIS 7638 (M.D. Ga. 1967), aff'd, 389 F.2d 91, 1968 U.S. App. LEXIS 8540 (5th Cir. 1968).

Conspiracy with other party keeps section from applying. — Rule of former Civil Code 1910, § 3599 does not apply if an agent conspires with the other party. In such a case, the principal is not bound thereby nor charged with knowledge of the facts thus acquired by the agent under former Civil Code 1910, § 3600. Terry v. International Cotton Co., 138 Ga. 656, 75 S.E. 1044, 1912 Ga. LEXIS 647 (1912).

Imputation imposes duty on agent to disclose material facts. — Since knowledge of an agent is imputed to the principal by law and only by agent's performance of this duty can principal acquire actual knowledge and govern or protect oneself, an agent is under a duty to communicate to the agent's principal all pertinent and material facts concerning any transaction entered into on behalf of the principal. Dawes Mining Co. v. Callahan, 246 Ga. 531, 272 S.E.2d 267, 1980 Ga. LEXIS 1184 (1980).

Proof of agency is indispensable for section to apply. — While notice to the agency is notice to the principal, proof of the agency is indispensable; and the fact that one as father or friend gives information or advice in reference to a land trade does not make such friend the agent in the sense of the rule stated in this section. McNamara v. McNamara, 62 Ga. 200, 1879 Ga. LEXIS 481 (1879).

Knowledge acquired during authorized duties is imputable. — Knowledge of an agent which is imputable to a principal is the knowledge which is acquired during the performance of authorized duties. Estes v. Standard Fire Ins. Co., 66 Ga. App. 775, 19 S.E.2d 35, 1942 Ga. App. LEXIS 303 (1942).

Subject matter of notice must be connected with agency. — In order that notice to an agent may operate as notice to the principal, the subject matter of the notice must be connected with the agency. Pursley v. Stahley, 122 Ga. 362, 50 S.E. 139, 1905 Ga. LEXIS 206 (1905); Central of Ga. Ry. v. Americus Constr. Co., 133 Ga. 392, 65 S.E. 855, 1909 Ga. LEXIS 222 (1909).

If the person receiving notice is not the agent of the adverse party, or when the notice is on a matter in no wise connected with the agency, no implication that the party has received such notice arises. Cloud v. Bagwell, 83 Ga. App. 769, 64 S.E.2d 921, 1951 Ga. App. LEXIS 958 (1951).

Application

Notice to person whose actions are accepted by principal. — When H, holding a deed as security for a debt, sold the land under a power of sale and had it struck off to H, approached B, a money lender, and told B that H had bought B a farm, and B, being satisfied with the transaction, let H have the money and took a deed to the land, executing a title bond to H, B was put upon inquiry and

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chargeable with knowledge of facts invalidating the sale, by the sudden and unexpected communication from H and also by reason of the fact that H acted as H's own agent within this section. Wright v. Harris, 221 F. 736, 1915 U.S. Dist. LEXIS 1620 (D. Ga.), aff'd, 228 F. 1021, 1915 U.S. App. LEXIS 2080 (5th Cir. 1915).

Notice to traveling salesperson for dealer. — If, after dissolution of a partnership, a former member of the firm, on being approached and offered goods for sale by a traveling salesperson for a dealer who, before the dissolution had sold goods to the firm, tells the salesperson that the member is no longer a member of the firm, this is notice of the dissolution to the dealer represented by the salesperson. Franklin Buggy Co. v. Carter, 21 Ga. App. 576, 94 S.E. 820, 1918 Ga. App. LEXIS 411 (1918).

Notice to agent is imputed to carrier. — General liability insurers of a contractor were held to have a duty to defend the owner of a real estate project because their agent had the actual or apparent authority to issue certificates of insurance to the owner, and to bind their obligations to the owner, under Georgia agency law. Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co., 337 F. Supp. 2d 1339, 2004 U.S. Dist. LEXIS 20097 (N.D. Ga. 2004).

Notice to agent for landlord dealing with tenant. — Notice of the defective condition of the property when given to the agent with whom the tenant dealt, under the instructions of the landlord, when the premises were rented and to whom the rents were paid is notice to the landlord. Wall Realty Co. v. Leslie, 54 Ga. App. 560, 188 S.E. 600, 1936 Ga. App. LEXIS 701 (1936).

Knowledge of employees of tourist camp operator failing to register guests. — It is not required that the owner or operator of a tourist camp be personally in actual charge of the register; if the owner's agents, servants, or employees are in charge thereof and fail to secure from the occupants of the cabins or rooms the registration and information required by Ga. L. 1945, p. 326, § 6, the owner or operator is responsible therefore under former Code 1933, §§ 4-309 and 4-311. Copeland v. Leathers, 206 Ga. 280, 56 S.E.2d 530, 1949 Ga. LEXIS 455 (1949).

Notice to a partner is notice to the partnership of which the partner is a member, and service upon the partner is service upon the firm. Render & Hammett v. Hartford Fire Ins. Co., 33 Ga. App. 716, 127 S.E. 902, 1925 Ga. App. LEXIS 702 (1925).

Notice to officer is notice to corporation. — Notice to an officer of a corporation, acting for it in connection with its business and within the scope of its agency, is notice to the principal. Holland v. McRae Oil & Fertilizer Co., 134 Ga. 678, 68 S.E. 555, 1910 Ga. LEXIS 321 (1910).

Ordinarily, a corporation is presumed to have notice of any material fact disclosed to any agent authorized to act in its behalf in the peculiar circumstances or with reference to the particular business or undertaking at hand. Wallis v. Heard, 16 Ga. App. 802, 86 S.E. 391, 1915 Ga. App. LEXIS 231 (1915).

Knowledge of the officers of a corporation is knowledge to that corporation, and the corporation is bound thereby. Stein Steel & Supply Co. v. Franco, 148 Ga. App. 186, 251 S.E.2d 74, 1978 Ga. App. LEXIS 3117 (1978).

Notice of a law firm's potential conflict of interest was directly imputable to a company as the company's president signed conflict letters while acting in connection with the company's business as well as the president's own. Accordingly, whether or not the company was a party to the original conflict letter, the company was charged with knowledge of the conflict of interest and of the law firm's role in the transactions at issue. Smith v. Morris, Manning & Martin, LLP, 293 Ga. App. 153, 666 S.E.2d 683, 2008 Ga. App. LEXIS 860 (2008), cert. denied, No. S08C2077, 2008 Ga. LEXIS 992 (Ga. Nov. 17, 2008).

Notice to president of bank. — Knowledge of a president of a bank that certain stock had not been fully paid up is imputable to the bank, if the president, acting for the bank and in the bank's

behalf, accepted a transfer of the stock to the bank, and the bank thereunder retained the stock. Fouche & Fouche v. Merchants Nat'l Bank, 110 Ga. 827, 36 S.E. 256, 1900 Ga. LEXIS 644 (1900).

Notice to cashier. — Cashier of a bank is held out as the bank's general agent for the management of the bank's notes and other securities. Therefore, the same rule applies as to notice as in the case of other agents. Bank of St. Marys v. Mumford & Tyson, 6 Ga. 44, 1849 Ga. LEXIS 7 (1849); Lessee of Veasey v. Graham, 17 Ga. 99, 1855 Ga. LEXIS 74 (1855).

Actual notice of a dissolution given by one partner to the cashier of a bank, which sues upon a note thereafter executed at the instance of such cashier as the bank's representative by the other alleged partner in the name of the partnership, and payable to the plaintiff, is sufficient notice to the bank. Bennett v. Watson, 31 Ga. App. 367, 120 S.E. 802, 1923 Ga. App. LEXIS 949 (1923).

Notice to real estate agent. — In an action involving a defect in a home's septic system, the home buyers' agent was not entitled to summary judgment on a Brokerage Relationship in Real Estate Transactions Act (BRETA), O.C.G.A. § 10-6A-1 et seq., claim because while notice to the buyers' agent was notice to the buyers under O.C.G.A. § 10-6-58, a disputed issue existed as to whether the buyers' agent actually disclosed the information regarding the second pumping of the septic tank to the buyers. Davis v. Silvers, 295 Ga. App. 103, 670 S.E.2d 805, 2008 Ga. App. LEXIS 1217 (2008).

Notice to officer entering into contract with corporation. — If a director or other officer of a corporation is dealing in the director's behalf or in conjunction with others in making a contract with the corporation, the director becomes an adverse party, and notice to the director is not notice to the corporation. Wallis v. Heard, 16 Ga. App. 802, 86 S.E. 391, 1915 Ga. App. LEXIS 231 (1915).

Agent acting on own behalf. — While it is true that notice to the agent of any matter connected with the agency is notice to the principal, a corporation is not charged with notice to the corporation's officer or agent while the officer or agent is acting in the officer's or agent's private capacity and for the officer's or agent's own benefit with third persons. Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935).

Notice or knowledge of failure of consideration of a negotiable promissory note which the director of a bank sells to it before the maturity of the paper is not imputable to the bank, when in the transaction the seller did not act for it at all, but exclusively for the seller, and the bank was represented by another of the bank's officials, who alone acted for it. English-American Loan & Trust Co. v. Hiers, 112 Ga. 823, 38 S.E. 103, 1901 Ga. LEXIS 102 (1901).

Banking corporation is not charged with notice of facts which became known to its president while the president is dealing in the president's private capacity and in the president's own behalf with third persons. Peoples Bank v. Exchange Bank, 116 Ga. 820, 43 S.E. 269, 1902 Ga. LEXIS 287 (1902); Alsabrooks v. Bank of Sparta, 22 Ga. App. 693, 97 S.E. 111, 1918 Ga. App. LEXIS 690 (1918).

Knowledge of insurance agent is imputable to company. — If an agent knew the status of the title to property insured at the time of issuance of the policy, such knowledge will be notice to the company. Atlas Assurance Co. v. Kettles, 144 Ga. 306, 87 S.E. 1, 1915 Ga. LEXIS 177 (1915).

In the absence of anything in the policy limiting the insurance agent's authority, the agent's knowledge that the insured had a hernia condition which was not disabling to any extent prior to the issuance of the policy was imputed to the company, and the insured would not be barred from a recovery for sickness caused by the aggravation of such hernia after the policy was issued merely because of its preexistence. American Life Ins. Co. v. Stone, 78 Ga. App. 98, 50 S.E.2d 231, 1948 Ga. App. LEXIS 689 (1948).

When an authorized agent of an insurance company has actual knowledge of the existence of a fact concerning the status of the potential policyholder or prospect, which fact would have the effect of voiding

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the policy, but the insurance company issues a policy which contains a provision that the policy is void upon the existence of such fact, the insurance company is deemed to have waived such provision. The knowledge of the agent is imputed to the principal. Fireman's Fund Ins. Co. v. Standridge, 103 Ga. App. 442, 119 S.E.2d 585, 1961 Ga. App. LEXIS 962 (1961).

Unless there is a limitation on the authority of the agent in the application itself sufficient to put the proposed insured on notice of the limitation on the authority of the agent, the general rule applies that the knowledge of the agent is the knowledge of the principal. Canal Ins. Co. v. Bryant, 166 Ga. App. 483, 304 S.E.2d 565, 1983 Ga. App. LEXIS 2217 (1983).

An insurance company had actual knowledge of an applicant's misrepresentation about prior cancellation of a policy because its own agency had secured the policy; the "agent" for purposes of application of this section was the insurance agency, not merely the individuals working for the agency. Graphic Arts Mut. Ins. Co. v. Pritchett, 220 Ga. App. 430, 469 S.E.2d 199.

Where authority of insurance agent has been circumscribed by policy. — Knowledge of local agents as to the fact that premium was not paid by the insureds before the loss was not imputable to the company, where the policy had been delivered at the time of the payments to the agents and the more comprehensive authority of the local agents had been reduced and circumscribed by the terms of the policy. Estes v. Standard Fire Ins. Co., 66 Ga. App. 775, 19 S.E.2d 35, 1942 Ga. App. LEXIS 303 (1942).

Employer is not insurer's agent in selecting insurer, policy, and coverage for employees. — In selecting a group insurer, in selecting a policy, and in selecting coverages to be afforded by the insurer, for contributing employees, employers act not as agents of the insurer but for their employees or for themselves. Dawes Mining Co. v. Callahan, 246 Ga. 531, 272 S.E.2d 267, 1980 Ga. LEXIS 1184 (1980).

Employer's knowledge is imputed to insurer as agent for making policy effective. — When an employer obtains a group insurance policy covering the employer's employees, the employee acts as agent of the insurance company for every purpose necessary to make effective the group policy, and the insurance company has imputed knowledge of facts which the employer knows. Dawes Mining Co. v. Callahan, 246 Ga. 531, 272 S.E.2d 267, 1980 Ga. LEXIS 1184 (1980).

Notice imputed to principal is actual, not constructive, notice. — Actual notice to an agent of any matter connected with the agency is also actual notice to the agent's principal and is not merely constructive notice to the latter. Prater v. Cox, 64 Ga. 706, 1880 Ga. LEXIS 396 (1880), overruled, Rodgers v. Elder, 108 Ga. 22, 33 S.E. 662, 1899 Ga. LEXIS 177 (1899); Hillyer v. Brogden, 67 Ga. 24, 1881 Ga. LEXIS 122 (1881); Deveney, Hood & Co. v. Burton, 110 Ga. 56, 35 S.E. 268, 1900 Ga. LEXIS 324 (1900); Union Sav. Bank & Trust Co. v. Ellis, 110 Ga. 494, 35 S.E. 780, 1900 Ga. LEXIS 566 (1900).

Actual notice to an agent can be imputed to the principal, but, even then, though the principal's information rests only on the implication that the agent has imparted the agent's knowledge, it is impliedly actual knowledge. Wiley v. Rome Ins. Co., 12 Ga. App. 186, 76 S.E. 1067, 1913 Ga. App. LEXIS 488 (1913).

Actual notice to the agent is imputed actual notice to the principal. Mumford v. Sears, Roebuck & Co., 44 Ga. App. 623, 162 S.E. 661, 1931 Ga. App. LEXIS 788 (1931).

Actual notice to an agent of any matter connected with the agent's agency is also actual notice to the agent's principal and is not merely constructive notice to the latter. Copeland v. Leathers, 206 Ga. 280, 56 S.E.2d 530, 1949 Ga. LEXIS 455 (1949).

Expression, "constructive notice," used in Atlas Assurance Co. v. Kettles, 144 Ga. 306, 87 S.E. 1 (1915), was not used in its strict sense, but as meaning that

knowledge of the agent at the time of the issuance of the policy would be imputed to the agent's principal. Liverpool & London & Globe Ins. Co. v. Hughes, 145 Ga. 716, 89 S.E. 817, 1916 Ga. LEXIS 456 (1916).

Agent must have been acting in course of employment. — If the officer or agent at the time of the alleged knowledge or notice was not acting for the corporation or in pursuance of the corporation's business and in the course of the agent's employment and duties, it is not bound or affected. Georgia Power Co. v. Kinard, 47 Ga. App. 483, 170 S.E. 688, 1933 Ga. App. LEXIS 528 (1933).

No imputed knowledge shown. — Superior court did not err in granting a purchaser summary judgment in an administrator's action alleging that the purchaser aided and abetted an executor's breach of fiduciary duties when it bought properties from the executor because, assuming that an individual acted as agent for a purchaser in filing an affidavit seeking a dispossessory warrant prior to the purchase of properties, such evidence did not show that any knowledge by the individual and a second purchaser of the executor's alleged fraud, which they concealed for their own benefit, could be imputed to the purchaser; for similar reasons, the purchaser could not have ratified the alleged tortious conduct of the individual and the second purchaser. Witcher v. JSD Props., LLC, 286 Ga. 717, 690 S.E.2d 855, 2010 Ga. LEXIS 232 (2010).

Evidence

How principal proves no notice to agent. — Under former Civil Code 1895, §§ 3027 and 5160, if it was sought to charge a principal with notice, the principal was only required to offer the agent to whom the opposite party claimed the party gave the notice. The principal need not undertake to prove a negative by producing all of the principal's agents in order to show that each did not receive the notice. Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678, 1904 Ga. LEXIS 232 (1904).

Effect of proving want of notice to agent. — Proof that there was want of notice of a judgment against the principal on the part of an agent is not proof of want of such notice on the part of the principal. Eason v. Vandiver, 108 Ga. 109, 33 S.E. 873, 1899 Ga. LEXIS 195 (1899).

Jury questions were presented, in pleading alleging sickness resulting from the aggravation of a preexisting hernia, as to whether the disability was a sickness within the meaning of the insurance policy and as to whether the company had waived the defense that the hernia existed before the policy was written or was estopped from defending on that ground since it appeared that the company had knowledge of such hernia through the company's agent taking the application for the insurance. American Life Ins. Co. v. Stone, 78 Ga. App. 98, 50 S.E.2d 231, 1948 Ga. App. LEXIS 689 (1948).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 224 et seq.

C.J.S.

2A C.J.S., Agency, §§ 473 et seq., 483 et seq.

ALR.

Imputation of attorney's knowledge of facts to his client, 4 A.L.R. 1592; 38 A.L.R. 820.

Notice to salesman as chargeable to principal, 43 A.L.R. 745.

Knowledge of agent as imputable to principal in respect of transaction subsequent to agency, or transaction with which agent had no connection, 73 A.L.R. 420.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 A.L.R. 535.

Imputation of knowledge of agent acting for both parties to transaction, 4 A.L.R.3d 224.

10-6-59. Conspiracy with third parties.

Where an agent shall conspire with the other party, his principal

shall not be bound thereby nor charged with knowledge of facts thus acquired by his agent.

History.
Civil Code 1895, § 3028; Civil Code 1910, § 3600; Code 1933, § 4-310.
History of Code section.
This Code section is derived from the decision in Freeman v. Mutual Building & Loan Ass'n, 90 Ga. 190, 15 S.E. 758 (1892).

JUDICIAL DECISIONS

When agent acts for the agent, reason for O.C.G.A. § 10-6-58 ceases. — When the agent departs from the scope of the agency and begins to act for the agent and not for the principal, when the agent's private interest is allowed to outweigh the agent's duty as a representative, and when to communicate the information would prevent the accomplishment of the agent's fraudulent scheme, the agent becomes an opposite party, not an agent. The reason for the rule enunciated in former Code 1933, § 4-309 then ceases. Pursley v. Stahley, 122 Ga. 362, 50 S.E. 139, 1905 Ga. LEXIS 206 (1905).

Former Code 1933, § 4-309 was modified when an agent proves false to the agent's principal. Hartford Accident & Indem. Co. v. Hartley, 275 F. Supp. 610, 1967 U.S. Dist. LEXIS 7638 (M.D. Ga. 1967), aff'd, 389 F.2d 91, 1968 U.S. App. LEXIS 8540 (5th Cir. 1968).

When agent is false. — Rule enunciated in former Civil Code 1910, § 3599 was modified when an agent proves false to the agent's principal and at the instance of a third party aids in the communication of false reports as to the insurability of an applicant for the purpose of benefiting the applicant and of defrauding the agent's principal. Loftin v. Great S. Home Benevolent Ass'n, 9 Ga. App. 121, 70 S.E. 353, 1911 Ga. App. LEXIS 432 (1911).

Rule of former Civil Code 1910, § 3599 did not apply when an agent conspired with the other party. In such a case the principal was not bound thereby nor charged with knowledge of the facts thus acquired by the agent. Terry v. International Cotton Co., 138 Ga. 656, 75 S.E. 1044, 1912 Ga. LEXIS 647 (1912).

When notice to agent will not be imputed to principal. — Notice to the agent will not be imputed to the principal: (1) when it is such as it is the agent's duty not to disclose; (2) when the agent's relations to the subject matter, or the agent's previous conduct, render it uncertain that the agent will not disclose it; and (3) when the person claiming the benefit of the notice, or those whom the agent represents, colluded with the agent to cheat or defraud the principal. Faircloth v. Taylor, 147 Ga. 787, 95 S.E. 689, 1918 Ga. LEXIS 145 (1918).

A could read and write, but was inexperienced in business. B had been A's attorney, and A owed B $50. At B's request, and to enable B to raise the money, A agreed to give a note therefor. The agent fraudulently made a note for $500, instead of $50, and procured A to sign it. The note was made payable to X, who had money to lend and who was a client of B. The money was advanced on the note to B, but none was paid over by X to A. It was held that the lender was not charged with notice of the agent's fraud. Pursley v. Stahley, 122 Ga. 362, 50 S.E. 139, 1905 Ga. LEXIS 206 (1905).

Notice to the agent will not be imputed to the principal when the person claiming the benefit of the notice colluded with the agent to cheat or defraud the principal. Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935).

When an agent ceases to act for the agent's principal and begins to act in the agent's own best interest or conspire with

another to the detriment of the agent's principal, the agent's knowledge is no longer imputed to the agent's principal. Hartford Accident & Indem. Co. v. Hartley, 275 F. Supp. 610, 1967 U.S. Dist. LEXIS 7638 (M.D. Ga. 1967), aff'd, 389 F.2d 91, 1968 U.S. App. LEXIS 8540 (5th Cir. 1968).

Conspiracy with agent not proved. — Defense set up by the defendant insurer, that the plaintiff conspired with the agent of the insurance company to obtain the policies, was not supported by any evidence. Guaranty Life Ins. Co. v. Brown, 92 Ga. App. 847, 90 S.E.2d 97, 1955 Ga. App. LEXIS 729 (1955).

RESEARCH REFERENCES

C.J.S.

2A C.J.S., Agency, § 479 et seq.

ALR.

Imputation of attorney's knowledge of facts to his client, 4 A.L.R. 1592; 38 A.L.R. 820.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Notice to salesman as chargeable to principal, 43 A.L.R. 745.

Imputing to principal knowledge of agent having adverse interest or acting antagonistically to principal, 104 A.L.R. 1246.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 A.L.R. 535.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Imputation of knowledge of agent acting for both parties to transaction, 4 A.L.R.3d 224.

10-6-60. Effect of neglect or fraud by agent.

The principal shall be bound for the care, diligence, and fidelity of his agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business.

History.

Orig. Code 1863, § 2179; Code 1868, § 2175; Code 1873, § 2201; Code 1882, § 2201; Civil Code 1895, § 3029; Civil Code 1910, § 3601; Code 1933, § 4-311.

JUDICIAL DECISIONS

Analysis

General Consideration
Specific Examples

General Consideration

O.C.G.A. § 10-6-60 must be construed in pari materia with O.C.G.A. § 10-6-61; the distinction is that under § 10-6-60 the principal is liable for fraud or neglect of the principal's agent "in the transaction of the principal's business." The "assent" of the principal which under O.C.G.A. § 10-6-61 binds the principal to the willful trespass is deemed to exist implicitly where the act was "in the transaction of the principal's business." There is no conflict in these two statutes. Sasser v. Mixon Contracting, Inc., 181 Ga. App. 710, 353 S.E.2d 525, 1987 Ga. App. LEXIS 1546 (1987).

Common law. — This section, which lays down the general rule, also follows the common law. Robinson v. Huidekoper,

General Consideration (Cont'd)

98 Ga. 306, 25 S.E. 440, 1896 Ga. LEXIS 34 (1896).

Gratuitous bailments. — Former Code 1882, §§ 2201 and 2961 did not vary the rule in respect to gratuitous bailments inasmuch as the degree of diligence touching such bailments is no higher under these sections than at common law. Merchants Nat'l Bank v. Guilmartin, 88 Ga. 797, 15 S.E. 831, 1892 Ga. LEXIS 104 (1892).

Principal is responsible for the torts of the agent when the agent is acting on behalf of the principal. DeDaviess v. U-Haul Co., 154 Ga. App. 124, 267 S.E.2d 633, 1980 Ga. App. LEXIS 2068 (1980).

Agent's acts in line of duty. — What an agent did in the line of duty devolved upon the agent by the superior will make the superior responsible under former Code 1873, §§ 2194 and 2201. Maddox & Rucker v. Cunningham, 68 Ga. 431, 1882 Ga. LEXIS 24 (1882).

In determining the liability of the master for the negligent or willful acts of a servant, the test of liability is not whether the act was done during the existence of the employment, but whether it was done within the scope of the actual transaction of the master's business for accomplishing the ends of the servant's employment. McGhee v. Kingman & Everett, Inc., 49 Ga. App. 767, 176 S.E. 55, 1934 Ga. App. LEXIS 554 (1934).

In order to hold an automobile dealer liable for injuries inflicted by an automobile while being operated by a salesperson, the relation of master and servant must exist and the servant must, at the time, have been acting within the scope of the servant's employment in performing an act for the master's benefit. Nichols v. G.L. Hight Motor Co., 63 Ga. App. 155, 10 S.E.2d 439, 1940 Ga. App. LEXIS 27 (1940) (nonsuit granted dealer reversed), commented on in3 Ga. B.J. 63 (1940).

No matter how much authority a general agent may have, it is not to be presumed that the agent has authority to commit a tort, and in order to hold the defendant corporation liable for the act of the corporation's officer, such tort must have been committed during the prosecution of the business of the corporation as a part thereof or by authority of the corporation or be ratified by the corporation or assented to. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Principal responsible if principal accepts contract procured by agent. — Principal who accepts a contract procured by fraudulent conduct of an agent, regardless of such agent's authority, is bound by such fraudulent conduct of the agent in procuring such contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

When command or assent need not be shown. — Principal may be liable for the willful tort of the principal's agent, done in the prosecution and within the scope of the principal's business, although it is not expressly shown that the principal either commanded the commission of the willful act or assented to the act. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

If the tort of the agent is committed in the prosecution and within the scope of the principal's business, it is done with the implied command or assent of the principal, and in such case it is unnecessary to make proof of an express command or assent. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

General rule applies to either agent or servant. — Whether tort-feasor was an agent or a servant makes no difference in applying the doctrine of respondeat superior; if the servant's or agent's wrongful acts were in the prosecution of the defendant's business and within the scope of the employment, then the defendant is liable for such tortious conduct of the servant or agent, as the case may be. Prince v. Brickell, 87 Ga. App. 697, 75 S.E.2d 288, 1953 Ga. App. LEXIS 831 (1953).

To end general employer's liability, new employment must clearly appear. — To show that the general employee or agent of one person has become the employee of another, with the

effect of ending the general employer's responsibility for the acts of the agent, the new relation of the parties must clearly appear. Fleming v. E.I. Du Pont De Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529, 1954 Ga. App. LEXIS 593 (1954).

Agent's nonfeasance. — If the appellant's agent for any reason fails to perform the agent's duty, the fault is chargeable to the principal and inures to the benefit of the opposite party. Broussard v. Brandenberg, 8 Ga. App. 795, 70 S.E. 159, 1911 Ga. App. LEXIS 150 (1911).

Agent's misfeasance. — While an agent is personally liable to those injured by the agent's misfeasance, the agent is not ordinarily liable for mere nonfeasance, under former Code 1933, §§ 4-311 and 4-409. Kimbrough v. Boswell, 119 Ga. 201, 45 S.E. 977, 1903 Ga. LEXIS 86 (1903).

Liability when duty is owed by principal. — Agent is not liable to third persons for the failure of the principal to discharge affirmative duties which the principal may owe. Verddier v. Neal Blun Co., 128 Ga. App. 321, 196 S.E.2d 469, 1973 Ga. App. LEXIS 1471 (1973).

Only fraud preventing reading what is signed will relieve party. — Only fraud which would relieve a party from an obligation which the party has signed, when that party can read and write and is not otherwise under any disability, is that fraud which prevents the party from reading what the party signed. Wall v. Federal Land Bank, 156 Ga. App. 368, 274 S.E.2d 753, 1980 Ga. App. LEXIS 2985 (1980).

Blind reliance unjustified. — No actionable fraud was demonstrated because as a matter of law the defendant's blind reliance upon any representation about the principal without any attempt whatsoever at direct contact with the principal was unjustified. B & W Pipeline, Inc. v. Newton County Bank, 181 Ga. App. 684, 353 S.E.2d 829, 1987 Ga. App. LEXIS 1529 (1987).

Alleging principal by principal's agent committed wrongful act sufficiently pleads agency. — One of the ways of pleading that agency existed so as to make alleged principal responsible for the wrongful acts of the agent is to allege by a simple direct statement that the defendant principal by the principal's agent committed the wrongful act. Garver v. Smith, 90 Ga. App. 892, 84 S.E.2d 693, 1954 Ga. App. LEXIS 843 (1954).

Connection of act with employment must be alleged. — Principal or master being responsible for the negligent acts of the agent or servant only when done by command or within the scope of the employment, it is necessary, in an action seeking to charge one for the acts of another upon the theory that the latter was agent for the former, that the plaintiff's pleading should disclose, either expressly or by necessary implication, not only the existence of the agency, but also the connection of the act with the employment. Bates v. Southern Ry., 52 Ga. App. 576, 183 S.E. 819, 1936 Ga. App. LEXIS 184 (1936).

Agent's false parol representations may be shown. — Statements and representations in parol made by an agent of one of the parties to a contract, which are offered for the purpose of showing that they were falsely and fraudulently made for the purpose of procuring the execution of the contract and that therefore no valid contract is in existence, are not subject to the objection that they are matters in parol in contradiction to the terms of a written instrument. Edge v. Alertox, Inc., 47 Ga. App. 598, 171 S.E. 181, 1933 Ga. App. LEXIS 573 (1933).

Error not to vacate nonsuit. — Since there was evidence that defendant's explosives sales agent, in advising and instructing a county engineer as to the method of detonation and the quantities of explosives necessary to blast rock from the county's quarry, was acting in the scope of the agent's employment and in the prosecution of the defendant's business, and was not subject to the county's control in the performance of the agent's duties connected with the sales of explosives, and that, as a result of the negligence of the defendant's agent in instructing the county engineer to use a large quantity of explosives, to be detonated in a short time, a blast was performed in the county's quarry

General Consideration (Cont'd)

according to the instructions given, thereby causing the damage to the plaintiff's house as alleged, the court erred in refusing to vacate judgment on nonsuit and reinstate the plaintiffs' case. Fleming v. E.I. Du Pont De Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529, 1954 Ga. App. LEXIS 593 (1954).

Instruction based on section proper when agent's act was unintentional. — If a trespass committed by an agent for the agent's principal is not denied, but is claimed to have been unintentional, it is proper to instruct the jury, on this issue, that "the principal is bound for the care, diligence, and fidelity of his agent in his business". Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S.E. 326, 1908 Ga. App. LEXIS 370 (1908).

Specific Examples

Independent contractor. — Principle of law that a master or employer is liable for a tort committed by the master's or employer's servant or employee about the master's business or within the course of the employee's employment is not applicable in a case where the relation between the parties is that of principal or employer and independent contractor. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135, 1936 Ga. App. LEXIS 135 (1936).

Conductor of train is alter ego of carrier. — Conductor of the train is the alter ego of the carrier with respect to the care of passengers on a railroad train and the duty of making contracts for passage, between points on the conductor's run, with persons who are permitted to board the train without tickets. Williamson v. Central of Ga. Ry., 127 Ga. 125, 56 S.E. 119, 1906 Ga. LEXIS 769 (1906).

Operator of tourist camp is liable for nonregistration of guests by employees. — It was not required that the owner or operator of a tourist camp be personally in actual charge of the register; if the owner's agents, servants, or employees were in charge thereof, and fail to secure from the occupants of the cabins or rooms the registration and information required by Ga. L. 1945, p. 326, § 6, the owner or operator was responsible therefor under former Code 1933, §§ 4-309 and 4-311. Copeland v. Leathers, 206 Ga. 280, 56 S.E.2d 530, 1949 Ga. LEXIS 455 (1949).

Seller of explosives is liable for agent's negligence in instructing use. — If a company by the company's agent gives instructions for the use of the company's explosive products, the company is liable for the company's negligence in giving such instructions, in connection with the sale of the company's products. Fleming v. E.I. Du Pont De Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529, 1954 Ga. App. LEXIS 593 (1954).

Bank officer cannot release debtors short of payment of debt. — Despite this section, a bank officer, with or without apparent authority, cannot compromise the institution the officer represents by promising proposed debtors of the bank that the debtors will be granted a release from the debtors' obligations short of payment of the debt. Wall v. Federal Land Bank, 156 Ga. App. 368, 274 S.E.2d 753, 1980 Ga. App. LEXIS 2985 (1980).

Special trust in bank or officers does not allow reliance on oral communications. — Even if a party places special trust and confidence in a bank or the bank's officers, this does not create a confidential or fiduciary relationship which would entitle the party seeking to avoid an obligation to the bank by alleging reliance upon oral communications between the bank officers and that party which might otherwise vitiate the transaction. Wall v. Federal Land Bank, 156 Ga. App. 368, 274 S.E.2d 753, 1980 Ga. App. LEXIS 2985 (1980).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 235 et seq.

C.J.S.
2A C.J.S., Agency, § 445 et seq.

ALR.

Liability for misconduct or negligence of messenger not directly related to the service, 18 A.L.R. 1416.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Liability of bank in respect to funds of third persons misappropriated by bank officer or employee and used to cover his own overdraft or defalcation, 48 A.L.R. 464.

Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 A.L.R. 711.

Waiver of fraud by principal's performance of contract with third person, or by payment of commissions to broker with knowledge of fraud, 69 A.L.R. 1082.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 A.L.R. 895.

Liability of infant for torts of his employee or agent, 103 A.L.R. 487.

Responsibility of bank for fraud of officer or agent inducing customer or debtor of bank to enter into transaction with such officer or agent personally or with third person, 117 A.L.R. 389.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

Fraud or misrepresentation by insured's agent after loss as within provision avoiding policy for fraud or attempted fraud of insured, 24 A.L.R.2d 1220.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 A.L.R.2d 1050.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 A.L.R.2d 10.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on floor, 61 A.L.R.2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on floor, 61 A.L.R.2d 110.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on stairway, 61 A.L.R.2d 174.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on steps, 61 A.L.R.2d 205.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 A.L.R.2d 1389.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 A.L.R.3d 1135.

Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 A.L.R.3d 1055.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 A.L.R.3d 6.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 A.L.R.3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 A.L.R.4th 57.

10-6-61. Effect of willful trespass by agent.

The principal shall not be liable for the willful trespass of his agent unless done by his command or assented to by him.

History.
Orig. Code 1863, § 2181; Code 1868, § 2177; Code 1873, § 2203; Code 1882, § 2203; Civil Code 1895, § 3031; Civil Code 1910, § 3603; Code 1933, § 4-312.

Law reviews.
For note discussing the doctrine of respondeat superior, see 2 Ga. St. B. J. 478 (1966).

JUDICIAL DECISIONS

Analysis

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General Consideration

Meaning of "trespass". — In its broader sense, a "trespass" comprehends any misfeasance, transgression, or offense which damages another person's health, reputation, or property. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Any abuse of, or damage done to, the personal property of another, unlawfully, is a "trespass" for which damages may be recovered. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Summary judgment for a lender in an owner's suit claiming that the lender trespassed on the owner's property was proper because the security deed provided that the lender was allowed to take action to preserve the lender's interest in the property in the event of a default on the payments, and the owners admitted the owners were in default of those payments; further, both of the owners admitted that the owners had no evidence that the lender authorized anyone to remove the personal property from the home. Tacon v. Equity One, Inc., 280 Ga. App. 183, 633 S.E.2d 599, 2006 Ga. App. LEXIS 786 (2006).

Former Code 1933, §§ 4-312 and 105-108 (see now O.C.G.A. §§ 10-6-61 and 51-2-2) should be construed together, so as to harmonize the statutes and allow both to remain of force, in the cases to which the statutes were applicable. Western & Atl. R.R. v. Turner, 72 Ga. 292, 1884 Ga. LEXIS 258 (1884); Toole Furn. Co. v. Ellis, 5 Ga. App. 271, 63 S.E. 55, 1908 Ga. App. LEXIS 91 (1908); Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 1911 Ga. LEXIS 71 (1911); Southeastern Fair Ass'n v. Wong Jung, 24 Ga. App. 707, 102 S.E. 32, 1920 Ga. App. LEXIS 475 (1920), aff'd, 151 Ga. 85, 105 S.E. 847, 1921 Ga. LEXIS 157 (1921).

Former Code 1933, §§ 4-312 and 105-108, being in pari materia, must be construed together. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

Former Code 1933, § 4-312 was in pari materia with former Code 1933, § 105-108, and must be construed therewith and the two sections harmonized. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

O.C.G.A. § 10-6-61 must be construed in pari materia with § 51-2-2 and, so construed, means that the principal may be liable if trespass was committed by the principal's implied command or implied assent; and if committed within scope of agency, implication will arise as a matter of law. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393, 1981 Ga. App. LEXIS 2432 (1981).

O.C.G.A. § 10-6-61 must be construed in pari materia with O.C.G.A. § 10-6-60; the distinction is that under O.C.G.A. § 10-6-60 the

principal is liable for fraud or neglect of the principal's agent "in the transaction of the principal's business." The "assent" of the principal which under § 10-6-61 binds the principal to the willful trespass is deemed to exist implicitly if the act was "in the transaction of the principal's business." There is no conflict in these two statutes. Sasser v. Mixon Contracting, Inc., 181 Ga. App. 710, 353 S.E.2d 525, 1987 Ga. App. LEXIS 1546 (1987).

Master liable for servant's willful torts if done in prosecution of master's business. — While former Code 1933, § 4-312 declared that "the principal is not liable for the willful trespass of his agent, unless done by his command or asserted to by him," § 51-2-2 makes a person liable "for torts committed by his servant, by his command or in the prosecution and within the scope of his business, whether the same is by negligence or voluntary." Thus, a master is deemed to have impliedly "assented" to and becomes liable for the willful torts of the master's servant only when the torts are committed "in the prosecution and within the scope of his business," and notwithstanding that, under common law and earlier decisions, an employer was not liable for the malicious and intentional torts of an employee, although committed while forwarding the employer's business; the rule is that a master is liable for the willful torts of the master's servant, committed in the course of the servant's employment, just as though the master had personally committed the torts. Gomez v. Great Atl. & Pac. Tea Co., 48 Ga. App. 398, 172 S.E. 750, 1934 Ga. App. LEXIS 87 (1934).

Master is not liable for act done wholly for servant's purpose. — If the servant acts not in the prosecution of the master's business or within the scope of such business, the master cannot be held liable, no matter how wanton or willful the conduct of the servant, so that if the servant, wholly for a purpose of the servant's own, disregarding the object for which the servant is employed, and not intending by the servant's act to execute it, does an injury to another not within the scope of the servant's employment, the master is not liable. But if the act is done in the execution of the authority given the servant by the servant's master and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done is occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. Gomez v. Great Atl. & Pac. Tea Co., 48 Ga. App. 398, 172 S.E. 750, 1934 Ga. App. LEXIS 87 (1934).

Principal is liable for agent's willful trespass if principal commands or assents to trespass. — While a principal is not, as a general rule, liable for the willful trespass of the principal's agent, yet, if the trespass is committed by the principal's command, or if it is assented to by the principal, the principal is liable under this section. Byne v. Hatcher, 75 Ga. 289, 1885 Ga. LEXIS 119 (1885); Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S.E. 326, 1908 Ga. App. LEXIS 370 (1908).

Principal's command or assent is implied as matter of law. — Former Code 1933, § 105-108 was not contrary to former Code 1933, § 4-312, because former Code 1933, § 4-312 properly construed did not mean the principal was not liable for the willful trespass of the principal's agent unless done by the principal's express command or assent, but the principal may be liable if the trespass was committed by the principal's implied command or implied assent, and if committed within the scope of the agency, the implication will arise as a matter of law. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935); Conney v. Atlantic Greyhound Corp., 81 Ga. App. 324, 58 S.E.2d 559, 1950 Ga. App. LEXIS 888 (1950).

If the tort of the agent is committed in the prosecution and within the scope of the principal's business, it is done with the implied command or assent of the principal, and in such case it is unnecessary to make proof of an express command or assent. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

If an agent commits a trespass in the prosecution of the corporation's business, it is by implication of law committed by command of the principal or with the

General Consideration (Cont'd)

principal's consent. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Since the determinative question in a case of a principal's liability is whether the act of the agent is done in the prosecution and within the scope of the principal's business, either command or assent can be implied. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432, 1964 Ga. App. LEXIS 730 (1964).

If an agent commits a trespass in the prosecution of the principal's business, it is by implication of law committed by command of the principal or with the principal's consent. Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321, 1974 Ga. App. LEXIS 1717 (1974).

Same rules apply to agent and servant. — There should not be made any distinction between the relationships of principal and agent and that of master and servant, so as to make different rules of liability apply, according to the nature of the relationship. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

Whether tort-feasor was an agent or a servant makes no difference in applying the doctrine of respondeat superior; if the tort-feasor's wrongful acts were in the prosecution of the defendant's business and within the scope of the employment, then the defendant is liable for such tortious conduct of the defendant's servant or agent, as the case may be. Prince v. Brickell, 87 Ga. App. 697, 75 S.E.2d 288, 1953 Ga. App. LEXIS 831 (1953).

Evidence

Jury charge on ratification. — It was not error for the court, in giving in charge to the jury the language of this section, to add, after the words "by his command or assented to by him," the words "or ratifies it." Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S.E. 326, 1908 Ga. App. LEXIS 370 (1908).

Command or assent need not be expressly shown. — Principal may be liable for the willful tort of the principal's agent, done in the prosecution and within the scope of the principal's business, although it is not expressly shown that the principal either commanded the commission of the willful act or assented to the act. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671, 1935 Ga. LEXIS 49 (1935).

Application

Fact tort-feasor is director or officer does not make corporation liable. — Mere fact that one who commits a tort is a director in a corporation does not, without more, render the corporation liable therefor. Strickland v. Bank of Cartersville, 141 Ga. 565, 81 S.E. 886, 1914 Ga. LEXIS 57 (1914).

Mere fact that one who commits a tort is a director and officer of a corporation does not, without more, render the corporation liable. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Corporation liable when tort-feasor acted in prosecution of corporation's business or with corporation's authority or act was ratified. — No matter how much authority a general agent may have, it is not to be presumed that the agent has authority to commit a tort, and, in order to hold the defendant corporation liable for the act of the corporation's officer, such tort must have been committed during the prosecution of the business of the corporation as a part thereof or by authority of the corporation or be ratified by the corporation or assented to. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Liability of corporation when acts in themselves violate duty owed by corporation. — Corporation is not liable for the malicious acts of the corporation's agent or officer unless the acts are authorized, or were within the scope of the agent's duties, or were in themselves a violation of a duty owed by the corporation to the party injured, or such acts were ratified by the corporation. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Liability of corporation for slander. — Corporation may only be liable for slander expressly ordered or directed, and

in slander situations only for those words spoken by the corporation's command. Church of God, Inc. v. Shaw, 194 Ga. App. 694, 391 S.E.2d 666, 1990 Ga. App. LEXIS 292 (1990), cert. denied, No. S90C0806, 1990 Ga. LEXIS 770 (Ga. Apr. 5, 1990).

No liability if principal neither owes duty nor negligently fails to prevent servant's act. — Neither a carrier nor one who furnishes to a carrier terminal facilities for taking on passengers, owing a duty to one who is a passenger, violates that duty through any act of a servant towards the passenger, when servant committing the act has not been intrusted with the performance of any duty owing by master to passenger and when master is not negligent in failing to anticipate, or to prevent, the performance of the act of the servant. Massengale v. Atlanta, B. & C.R.R., 46 Ga. App. 484, 168 S.E. 111, 1933 Ga. App. LEXIS 112 (1933).

Principal is liable in a proper case for malicious prosecution, if the prosecution is conducted by the agent in furtherance of the business of the principal and within the scope of the agent's authority. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Principal is liable for malicious prosecution only if agent acted within scope of employment or at principal's command. — If it is alleged in a suit for damages for malicious prosecution that the prosecution was instituted by the agent of the defendant, it must be proved that the agent was at that time acting within the scope of the agent's employment or at the direction or command of the agent's principal. The plaintiff having failed to prove the plaintiff's case as laid in the plaintiff's pleading the court did not commit error in granting a nonsuit. Glass v. Brittain Bros. Co., 21 Ga. App. 634, 94 S.E. 814, 1918 Ga. App. LEXIS 445 (1918).

In order for a bank to be held liable for a malicious prosecution instigated by a false statement made by the bank's agent or the bank's executive vice-president, it must appear that the bank authorized such malicious prosecution and that the prosecution was done by the officer and agent, acting within the scope of the officer's or agent's employment or at the discretion or command of the bank. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Authority to agent must affirmatively appear. — Bank is not liable for a malicious prosecution in which the bank's vice-president participated, encouraged and aided, and purported to act for the corporation, since it does not affirmatively appear that the bank authorized the vice-president to engage in such prosecution or aid and abet therein or that the bank assented thereto or ratified the prosecution. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Banking corporation is not liable for damages resulting from a false statement maliciously and willfully made by the bank's executive vice-president, thereby inducing another to institute without probable cause and maliciously a criminal prosecution against another, even when in making such false statement the officer of the corporation was acting in the officer's capacity as such officer and for the corporation, and within the scope of the officer's agency with the corporation, unless it affirmatively appears that such officer had authority from the corporation to make such false statement. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86, 1953 Ga. App. LEXIS 1004 (1953).

Liability of principal for malicious arrest by agent. — Principal is not liable for a malicious arrest by an agent, which was beyond the scope of the agent's authority and neither authorized or ratified by the principal. Fire Ass'n v. Fleming, 78 Ga. 733, 3 S.E. 420, 1887 Ga. LEXIS 62 (1887).

Liability of principal for assault and battery by agent. — If the agent of a corporation engaged in the business of selling certain commercial products manufactured by the corporation committed an unprovoked assault and battery upon the plaintiff, inflicting upon the plaintiff severe personal injuries, the plaintiff could not maintain a suit for damages against the corporation on this account, although it knew that the agent was a person of violent temper and in fact

Application (Cont'd)

had employed the agent because it knew that the agent was a man prone to make unprovoked attacks upon others; it not appearing that the corporation authorized the assault or that the corporation assented to the tort complained of. Murphey v. New S. Brewery & Ice Co., 145 Ga. 561, 89 S.E. 704, 1916 Ga. LEXIS 401 (1916).

It appearing from the plaintiff's pleading that the alleged injury arose from an assault by a person alleged to be the manager of the defendant corporation; that the plaintiff approached the office of the corporation, not for the purpose of transacting any sort of business, but from mere idle curiosity, to hear a conversation between the manager and a third person; that the assault did not arise from the business of the corporation or in connection with the assailant's duties as manager, but arose from a merely personal altercation; and that the assailant left the corporation's place of business and struck the plaintiff on steps, which, though alleged to have been used jointly by the corporation and by a hotel company as an entrance, are not alleged to have been a part of the defendant's premises, the pleading does not show liability on the part of the corporation. Daniel v. Excelsior Auto Co., 31 Ga. App. 621, 121 S.E. 692, 1924 Ga. App. LEXIS 102 (1924).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 215.

C.J.S.

2A C.J.S., Agency, § 445 et seq.

ALR.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Liability of infant for torts of his employee or agent, 103 A.L.R. 487.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 A.L.R.2d 1282.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Principal's liability for punitive damages for false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

10-6-62. Rights under contract; undisclosed principal.

The principal shall have advantage of his agent's contracts in the same manner as he shall be bound by them, so far as they come within the scope of his agency. If, however, the agency shall have been concealed, the party dealing with him may set up any defense against the principal which he has against the agent.

History.

Orig. Code 1863, § 2182; Code 1868, § 2178; Code 1873, § 2204; Code 1882, § 2204; Civil Code 1895, § 3032; Civil Code 1910, § 3604; Code 1933, § 4-313.

JUDICIAL DECISIONS

Undisclosed principal is entitled to benefits of agent's contracts and acts. — Governing principle is that an undisclosed principal, as the ultimate party in interest, is entitled, against third persons, to all advantages and benefits of acts and contracts of the principal's agent. United States Fid. & Guar. Co. v. Coastal Serv., Inc., 103 Ga. App. 133, 118 S.E.2d 710, 1961 Ga. App. LEXIS 884 (1961).

Injury to other party by substitution. — If an agent makes a contract for the agent's principal but conceals the fact that the agent is an agent, the principal may claim the benefits of the contract so far as the principal can do so without injury to the other party by the substitution of the principal for the agent. Planters Gin & Whse. Co. v. Pitts Banking Co., 24 Ga. App. 731, 102 S.E. 183, 1920 Ga. App. LEXIS 492 (1920).

Undisclosed principal may sue upon simple contract made in agent's name. — If a simple contract, oral or written was made with an agent in the agent's own name, and the principal was undisclosed, the latter may claim its fruits and sue upon it under former Code 1873, §§ 2197 and 2204, even though the agent also might sue. Spain v. W.H. Beach & Son, 52 Ga. 494, 1874 Ga. LEXIS 331 (1874); Atlanta & W. Point R.R. v. Texas Grate Co., 81 Ga. 602, 9 S.E. 600, 1888 Ga. LEXIS 287 (1888).

Suit on contract disclosing agency but not principal's name. — Principal may sue for breach of a written contract entered into by the principal's agent, if the instrument disclosed on the instrument's face that the agent was contracting as such and fails to disclose the name of the principal. Washington Mfg. Co. v. Callaway, 144 Ga. 89, 86 S.E. 225, 1915 Ga. LEXIS 60 (1915).

Undisclosed principal may recover damages for delay in delivery of telegram sent by agent. — If an agent sends a telegram for an undisclosed principal, the principal may maintain an action in the principal's own name for damages resulting from unreasonable delay in the telegram's transmission or delivery. Ruan v. Gunn, 77 Ga. 53, 1886 Ga. LEXIS 282 (1886); Rosser, Armistead & Co. v. Darden, 82 Ga. 219, 7 S.E. 919, 1888 Ga. LEXIS 394 (1888); Dodd Grocery Co. v. Postal Telegraph-Cable Co., 112 Ga. 685, 37 S.E. 981, 1901 Ga. LEXIS 56 (1901); Propeller Tow-Boat Co. v. Western Union Tel. Co., 124 Ga. 478, 52 S.E. 766, 1905 Ga. LEXIS 754 (1905); Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 S.E. 699, 1907 Ga. LEXIS 328 (1907).

Undisclosed principal's rights are subject to claims against agent. — Rights of an undisclosed principal are subject to claims acquired in good faith against the agent. Standard Brick & Tile Co. v. Posey, 56 Ga. App. 686, 193 S.E. 613, 1937 Ga. App. LEXIS 205 (1937).

Defenses. — If the agency has been concealed, the party dealing with the agent may set up any defense against the principal which the party has against the agent. United States Fid. & Guar. Co. v. Coastal Serv., Inc., 103 Ga. App. 133, 118 S.E.2d 710, 1961 Ga. App. LEXIS 884 (1961).

Third person who contracts in ignorance of the existence of a principal can set up against the principal, who sues upon the contract, any defenses and equities which the third person could have set up against the agent, had the agent's been in reality the principal suing on the principal's own behalf. Standard Brick & Tile Co. v. Posey, 56 Ga. App. 686, 193 S.E. 613, 1937 Ga. App. LEXIS 205 (1937).

Third person must have no notice of agency for application of defenses. — In a suit by principal, in order for third person to avail oneself of any equities, defenses, setoffs, or counterclaims one has against agent only, one must be innocent of any knowledge of facts and circumstances which would put a reasonably prudent person on inquiry that one is dealing with an agent; and, although the agent acts in the agent's own name, if the third person knows or has reason to believe that the third person is dealing with one who is agent of another, the third person cannot successfully set up such a defense or setoff. Standard Brick & Tile Co. v. Posey, 56 Ga. App. 686,

193 S.E. 613, 1937 Ga. App. LEXIS 205 (1937).

If principal gives indicia of authority to sell, principal cannot follow property. — If one gives to another such evidence of the right of selling the goods of the former as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of the property, one loses the right of following it; a sale to a fair purchaser divests the first title, and the authority to sell, whether real or apparent, is good against the party who gave it, though the confidence of the principal is abused by the possessor of such indicia. Rosser, Armistead & Co. v. Darden, 82 Ga. 219, 7 S.E. 919, 1888 Ga. LEXIS 394 (1888).

Payment to a principal will discharge an obligation assumed by another to the agent of such principal. Trust Co. v. Mobley, 40 Ga. App. 468, 150 S.E. 169, 1929 Ga. App. LEXIS 589 (1929).

Payment to third person nominal payee must remit to. — If a mere nominal payee is bound on receiving money to pay it over to a third person, the debtor may be relieved by making payment directly to such third person. Trust Co. v. Mobley, 40 Ga. App. 468, 150 S.E. 169, 1929 Ga. App. LEXIS 589 (1929).

Sale of intoxicating liquors to an agent may be alleged as a sale to the principal. Kemp v. State, 120 Ga. 157, 47 S.E. 548, 1904 Ga. LEXIS 475 (1904).

Proof of undisclosed principal by parol evidence. — If fact of agency is concealed, it is necessary ordinarily to prove by parol evidence the existence of the undisclosed principal. United States Fid. & Guar. Co. v. Coastal Serv., Inc., 103 Ga. App. 133, 118 S.E.2d 710, 1961 Ga. App. LEXIS 884 (1961).

Although parol evidence is inadmissible to add to, take from, or vary a written contract, parol evidence may be used in cases involving undisclosed principals in ordinary contracts which are not under seal; if the rule were otherwise, this section, which provides that the principal shall have advantage of its agent's contracts in the same manner as the principal shall be bound by them, could not be applied in all cases. United States Fid. & Guar. Co. v. Coastal Serv., Inc., 103 Ga. App. 133, 118 S.E.2d 710, 1961 Ga. App. LEXIS 884 (1961).

If there was nothing in the record to show that the contract for the purchase of a car was under seal, the testimony of the agent that the agent was acting for an undisclosed principal was properly admitted; thus, the fact that the agency was not disclosed at the time of the contract would not prevent the principal from enforcing the contract in the principal's own name. United States Fid. & Guar. Co. v. Coastal Serv., Inc., 103 Ga. App. 133, 118 S.E.2d 710, 1961 Ga. App. LEXIS 884 (1961).

When issue of who is bound is question of fact. — Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's authorized agent acting on the plaintiff's behalf to protect the well-being of the plaintiff's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

Summary judgment improper. — Complaint alleging that an agreement had been reached between plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's neighbor, the plaintiff's authorized agent acting on the plaintiff's

behalf, to protect the well-being of the plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742, 2012 Ga. App. LEXIS 706 (2012), rev'd, 294 Ga. 112, 751 S.E.2d 351, 2013 Ga. LEXIS 951 (2013), vacated in part, 328 Ga. App. 473, 763 S.E.2d 488, 2014 Ga. App. LEXIS 337 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 290 et seq., 298 et seq.

C.J.S.

2A C.J.S., Agency, § 487 et seq. 3 C.J.S., Agency, § 502 et seq.

ALR.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Liability of undisclosed principal on sealed contract, 32 A.L.R. 162.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract, 53 A.L.R. 414.

Concealment of fact that party to contract was acting for undisclosed principal as fraud which will toll statute of limitations, 114 A.L.R. 864.

Right to join agent and undisclosed principal in same action, 118 A.L.R. 701.

Exceptions to rule which permits suit by or against undisclosed principal, 130 A.L.R. 664.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Agency: Anti-assignment clause in contract as precluding enforcement by undisclosed principal, 75 A.L.R.3d 1184.

Rights to expirations as between insurer and insurance agent or broker, 88 A.L.R.3d 1142.

10-6-63. Recovery of illegal or mistaken payments.

The principal may recover back money paid illegally or by mistake of his agent or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or willful misconduct.

History.

Orig. Code 1863, § 2183; Code 1868, § 2179; Code 1873, § 2205; Code 1882, § 2205; Civil Code 1895, § 3033; Civil Code 1910, § 3605; Code 1933, § 4-314.

JUDICIAL DECISIONS

Section introduces no new rule. — It authorizes a principal to recover back goods wrongfully transferred by the principal's agent, when the transferee had notice, but it does not change the rules regulating the rights of principals against parties dealing with special agents, or with general agents, who act beyond the scope of their agency. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868); Hawthorne v. Pope, 48 Ga. App. 239, 172 S.E. 574, 1934 Ga. App. LEXIS 24 (1934).

Knowledge of conversion. — This section applies in all cases when the third person knew and participated in the illegal or unauthorized act of conversion. First Nat'l Bank v. Charles Nelson & Co., 38 Ga. 391, 1868 Ga. LEXIS 104 (1868); Hawthorne v. Pope, 48 Ga. App. 239, 172 S.E. 574, 1934 Ga. App. LEXIS 24 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 302 et seq., 308 et seq.

C.J.S.

2A C.J.S., Agency, § 357.

ALR.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Notice to salesman as chargeable to principal, 43 A.L.R. 745.

Necessity and sufficiency of notice of termination of authority of agent to purchase goods for mercantile business to charge one who has previously dealt with him, 43 A.L.R. 1219.

Agent's liability to principal on account of money or property received on latter's account, as affected by his restoration of same to, or his application thereof for benefit of, third person, 98 A.L.R. 1429.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 A.L.R. 578.

Drawing of check on bank account of principal or employer payable to accused's creditor as constituting embezzlement, 88 A.L.R.2d 688.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

10-6-64. [Reserved] Agent may be witness; credibility; admissibility of agent's declarations.

History.

Orig. Code 1863, § 2184; Code 1868, § 2180; Code 1873, § 2206; Code 1882, § 2206; Civil Code 1895, § 3034; Civil Code 1910, § 3606; Code 1933, § 4-315; repealed by Ga. L. 2011, p. 99, § 17/HB 24, effective January 1, 2013.

Editor's notes.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

ARTICLE 4

RIGHTS AND LIABILITIES OF AGENT AS TO THIRD PERSONS

10-6-80. Agent authority in legal actions; parol authority; effect of repudiation.

Any act authorized or required to be done under this Code by any person in the prosecution of his legal remedies may be done by his agent; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency shall be created by parol. In all such cases, if the principal shall repudiate the act of the agent, the agent, together with his sureties, shall be personally bound.

History.

Orig. Code 1863, § 2185; Code 1868, § 2181; Code 1873, § 2207; Code 1882, § 2207; Civil Code 1895, § 3035; Civil Code 1910, § 3607; Code 1933, § 4-402.

JUDICIAL DECISIONS

Right to repudiate distinguishes § 10-6-80 from § 9-13-123. — If the agent had no authority to make an affidavit, former Code 1882, § 2207 allowed the principal to repudiate the action of the agent, and in that event the agent and the agent's securities become liable; and this is the difference between this section and former Code 1882, § 3670, which said an affidavit of illegality with respect to an execution may be filed by an attorney in fact or an executor, administrator, or other trustee. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83, 1891 Ga. LEXIS 58 (1891).

"Parol" means a verbal creation of the agency. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83, 1891 Ga. LEXIS 58 (1891).

When verbal appointment authorized. — Under this section, any person, in the prosecution of the person's legal remedies may appoint verbally an agent to act for the person therein, unless it is apparent that the agent cannot make the affidavit required by law, i.e., cannot conscientiously depose to the same facts to which the principal could, or where the Code provides elsewhere that the appointment shall be in writing. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83, 1891 Ga. LEXIS 58 (1891).

Agent may verify application for ne exeat. — Under this section, an agent may verify the application for a ne exeat, provided the agent can, of the agent's own knowledge, state the facts as positively and distinctly as is required of the complainant personally. Orme v. McPherson, 36 Ga. 571, 1867 Ga. LEXIS 95 (1867).

Execution of forthcoming bond. — Under this section, an agent interposing a claim in behalf of the agent's principal may execute the forthcoming bond required by statute whether the agency is created in writing or by parol. This section supplies the legislative authority which was wanting when the case of Gilmer v. Allen, 9 Ga. 208 (1850), was decided. Head v. Woods, 92 Ga. 548, 17 S.E. 928, 1893 Ga. LEXIS 175 (1893); United States Fid. & Guar. Co. v. Murphy, 4 Ga. App. 13, 60 S.E. 831, 1908 Ga. App. LEXIS 184 (1908).

Affidavit of illegality of execution without written appointment. — Under this section, an agent may make an affidavit of illegality when an execution has been issued and levied, and it is not necessary that the agency should be created in writing. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83, 1891 Ga. LEXIS 58 (1891).

Agent cannot interpose claim upon pauper's affidavit. — Claim can be interposed under former Code 1887, § 3733 upon an affidavit in forma pauperis made by the claimant personally, but not under former Code 1882, § 2202 upon a like affidavit made by the claimant's agent. Hadden v. Larned, 83 Ga. 636, 10 S.E. 278, 1889 Ga. LEXIS 126 (1889).

Agent cannot enter appeal when not authorized in writing. — Agent created by parol under former Code 1882, § 2207 cannot enter an appeal because former Code 1882, § 3615 expressly required that if an agent enters an appeal, the agent must be authorized in writing and the writing filed in the court in which the case is pending. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83, 1891 Ga. LEXIS 58 (1891).

Action in agent's own name not authorized. — If the claim of right to a private way is founded upon an uninterrupted use of the way for more than seven years by the owners of a certain plantation, their agents, servants, and tenants, the right is not in the agents or servants themselves, but in the owners who alone are the persons injured by an unlawful obstruction of the way, as against agents and servants, in violation of the right. While their agent, by virtue of former Code 1882, § 2207, may commence and carry on a proceeding in their names to remove such obstruction, under former Code 1882, §§ 738, 739, and 740, the agent cannot institute and carry on a proceeding for that purpose in the agent's own name, either individually or as an

agent. Cunningham v. Elliott, 92 Ga. 159, 18 S.E. 365, 1893 Ga. LEXIS 33 (1893).

Local special agent without authority to bind surety company by renewal certificate. — Power of a local agent to bind the agent's surety company by a renewal certificate, contrary to the express terms of the indemnity bond itself, was not within the real or the apparent authority of the local special agent. National Sur. Co. v. Moore, 42 Ga. App. 582, 157 S.E. 108, 1930 Ga. App. LEXIS 6 (1930).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 2, 64 et seq., 83 et seq., 157 et seq., 186 et seq.

C.J.S.

2A C.J.S., Agency, § 4.

ALR.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

10-6-81. Recovery for mistaken payment to principal.

If money shall be paid to an agent by mistake and he in good faith shall pay it over to his principal, he shall not thereafter be personally liable therefor. In all other cases he shall be liable for its repayment. If money shall be paid by an agent by mistake, he may recover it in his own name.

History.

Orig. Code 1863, § 2186; Code 1868, § 2182; Code 1873, § 2208; Code 1882, § 2208; Civil Code 1895, § 3036; Civil Code 1910, § 3608; Code 1933, § 4-403.

JUDICIAL DECISIONS

Remedy for mistaken payment reaching principal is action against principal. — If money is paid to an agent as the result of a mistake and the agent in turn pays the money in good faith to the agent's principal, the correct remedy of the payor is an action against the principal and not the agent. John L. Burns, Inc. v. Gulf Oil Corp., 268 F. Supp. 222, 1967 U.S. Dist. LEXIS 11448 (N.D. Ga. 1967).

Question in suit against agent is whether agent has possession of money. — In a suit against an agent to recover money voluntarily paid to the agent by mistake in fact, the controlling question in determining the agent's individual liability to repay the money is whether the agent still has the money in the agent's possession at the time of the suit or whether the agent had, before the suit was brought and before the agent had any notice of the mistake, paid over to the agent's principal the money received by mistake. Rogers v. Durrence, 10 Ga. App. 657, 73 S.E. 1083, 1912 Ga. App. LEXIS 636 (1912).

Agent not liable if subagents have paid it to principal. — When there was testimony tending to show that the amount paid by a purchaser was paid in consequence of a mistake of fact, in that the plaintiff understood that the plaintiff was buying land, and it appears that the defendants acted in good faith, and the amount voluntarily paid to and received by their subagents or employees was in good faith paid over by the latter to the principal, before any notice of the alleged mistake was brought home to them, there was no personal liability on the part of the defendants. Pratt v. Foster, 18 Ga. App. 765, 90 S.E. 654, 1916 Ga. App. LEXIS 1253 (1916).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, §§ 302 et seq., 308 et seq.
C.J.S.
2A C.J.S., Agency, § 358.
ALR.
Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market, 8 A.L.R. 203; 105 A.L.R. 718.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Personal liability of agent in respect of funds received from third person and turned over to principal not entitled thereto, 82 A.L.R. 307.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 A.L.R. 649.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 A.L.R. 578.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

10-6-82. Agent's right of action on principal's contracts.

Generally, an agent shall have no right of action on contracts made for his principal. The following are exceptions:

(1) A factor contracting on his own credit;

(2) Where promissory notes or other evidences of debt are made payable to an agent of a corporation;

(3) In all cases where the contract is made with the agent in his individual name, though his agency be known;

(4) Auctioneers may sue in their own names for goods sold by them;

(5) In cases of agency coupled with an interest in the agent, known to the party contracting with him.

In all these cases, payment to the principal before notice of the agent's claim is a good defense.

History.
Orig. Code 1863, § 2187; Code 1868, § 2183; Code 1873, § 2209; Code 1882, § 2209; Civil Code 1895, § 3037; Civil Code 1910, § 3609; Code 1933, § 4-404.

JUDICIAL DECISIONS

"Agency coupled with an interest in the agent" is similar to "a power coupled with an interest." The latter is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised and by its exercise, is extinguished. The power

ceases when the interest commences and, therefore, cannot, in accurate law language, be said to be "coupled" with it. United States Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336, 1958 U.S. Dist. LEXIS 4460 (M.D. Ga.), aff'd, U. S. Epperson Underwriting Co. v. Jessup, 260 F.2d 355, 1958 U.S. App. LEXIS 3090 (5th Cir. 1958).

Suit on principal's contract. — Nothing is better settled than that an agent has no right of action on contracts made for the agent's principal except in specific instances. Henry Darling, Inc. v. Harvey-Given Co., 40 Ga. App. 771, 151 S.E. 518, 1930 Ga. App. LEXIS 691 (1930).

Agent is not liable for the agent's principal's contract when the agency is disclosed, and an agent has no right to sue on a contract made by the agent for the principal. R.C. Craig, Ltd. v. Ships of Sea, Inc., 345 F. Supp. 1066, 1972 U.S. Dist. LEXIS 12788 (S.D. Ga. 1972).

Merely instructing agent to sue. — Instruction by principal to agent to institute litigation in the agent's name is not one of the exceptions of this section to the general rule. Rowland v. Gregg & Son, 122 Ga. 819, 50 S.E. 949, 1905 Ga. LEXIS 340 (1905).

Generally, an agent has no authority to enforce in the agent's own name the rights of the agent's principal. To this rule there are certain exceptions. But for an agent to be merely instructed by a principal to institute litigation in the agent's own name is not one of them. A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc., 170 Ga. 30, 152 S.E. 49, 1930 Ga. LEXIS 392 (1930).

If a person has a legal right, it does not follow that the person may delegate to another the power to litigate in the name of such other in respect to it. A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc., 170 Ga. 30, 152 S.E. 49, 1930 Ga. LEXIS 392 (1930).

Mere direction by an owner of property to another that the latter should file a claim in one's own name would not make such proceeding lawful. A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc., 170 Ga. 30, 152 S.E. 49, 1930 Ga. LEXIS 392 (1930).

Agent may not sue in agent's name for illegal levy upon principal's property. — Plaintiff agent cannot maintain an action in the plaintiff's own name for actual damages to the principal's automobile, or for the malicious abuse of process, or for any interference with the plaintiff's right of possession of the automobile resulting from an illegal levy. Andrew v. George Muse Clothing Co., 44 Ga. App. 291, 161 S.E. 296, 1931 Ga. App. LEXIS 678 (1931).

General rule requires action on contract in name of party with legal interest. — While an agent has a right of action in the agent's own name on a contract made with the agent in the agent's individual name, though the agent's agency is known, and, in cases of agency coupled with an interest in the agent, known to the party contracting with the agent, the agent may, in the agent's own name, maintain an action on the contract, as a general rule an action on a contract must be brought in the name of the party in whom the legal interest in the contract is vested. Whitfield v. Boykin, 48 Ga. App. 141, 172 S.E. 82, 1933 Ga. App. LEXIS 499 (1933).

Either corporation or agent may sue on note payable to agent. — Promissory note, payable to the order of an agent of a corporation (the principal as well as the agent being specified by name) is, in legal effect, payable to the corporation, and while the agent can maintain an action thereon by virtue of this section, so can the principal. Martin v. Lamb & Co., 77 Ga. 252, 3 S.E. 10, 1887 Ga. LEXIS 100 (1887); Young v. Murray, 3 Ga. App. 204, 59 S.E. 717, 1907 Ga. App. LEXIS 595 (1907).

Contract for rent made in agent's name. — If one rents land from the agent of the owner, the contract being made with the agent in the agent's individual name, the latter may maintain an action on such contract, though the fact of the agent's agency was known by the renter; and, accordingly, the payment of such rent may be enforced by a distress warrant sued out by the agent in the agent's own name. Spence v. Wilson, 102 Ga. 762, 29 S.E. 713, 1897 Ga. LEXIS 686 (1897).

If a rent contract is made with A, "trustee," as landlord, A may foreclose a lien in A's own name for money furnished the tenant by A, as landlord, with which to

make the crop upon the rented premises, though the land and such money belong to another person whom A represented in the transaction. Fargason v. Ford, 119 Ga. 343, 46 S.E. 431, 1904 Ga. LEXIS 830 (1904).

An executor, administrator, guardian, or trustee can sue out a distress warrant in an individual capacity under paragraph (3) of this section, and terms indicating a representative capacity, if used, may be treated and disregarded as surplusage. Dean v. Donalson, 2 Ga. App. 462, 58 S.E. 679, 1907 Ga. App. LEXIS 424 (1907).

Agent may sue carrier when contract of shipment does not disclose agency. — Person who having in charge as agent the goods of another makes with a common carrier a contract to ship such goods in which the agency is not disclosed may maintain by virtue of this section an action in the person's own name for a breach of such contract. Carter v. Southern Ry., 111 Ga. 38, 36 S.E. 308, 1900 Ga. LEXIS 479 (1900).

Broker with option to buy for clients may sue for breach. — Agreement to give a real estate agent the option of purchasing land for the agent's clients gives the agent individually a right of action for breach of the contract. Pearson v. Horne, 139 Ga. 453, 77 S.E. 387, 1913 Ga. LEXIS 464 (1913).

Agent buying in own name may sue for breach of warranty. — When one buys personally in one's own name that person may maintain an action in one's own name for a breach of a warranty in regard to the quality of the goods, although one may have been the agent of another in making the purchase. King v. Dobbs, 30 Ga. App. 441, 118 S.E. 428, 1923 Ga. App. LEXIS 497 (1923).

Agent's action upon contract in agent's name generally subject to defenses against principal. — If an agent sues in the agent's own name upon a contract so made for the benefit of the agent's principal, the action will be subject to any defenses which the defendant could lawfully assert against the principal if the action had been brought in the name of the latter. Hollingsworth v. Georgia Fruit Growers, Inc., 185 Ga. 873, 196 S.E. 766, 1938 Ga. LEXIS 818 (1938).

Rule that an agent's action in the agent's own name upon a contract made for the benefit of the agent's principal is subject to any defenses which the defendant could assert against the principal can have no application if the instrument sued on is a sealed instrument and the principal does not appear to be a party thereto. Hollingsworth v. Georgia Fruit Growers, Inc., 185 Ga. 873, 196 S.E. 766, 1938 Ga. LEXIS 818 (1938).

Agent may sue in own name on whole contract if agent has interest. — While it was the settled rule at common law that an agent who made a contract for an agent's principal could not sue upon the contract in the agent's own name, yet the rule had exceptions. One of these was, that if the agent had an interest, as for commissions, etc., the agent might sue on the whole contract in the agent's own name. Stevens v. Hunt, 61 Ga. App. 265, 6 S.E.2d 591, 1939 Ga. App. LEXIS 274 (1939).

Suit for agent's commission. — There is an exception to the rule that generally an agent cannot maintain an action on a contract which the agent has made on behalf of the agent's principal when the agency is coupled with an interest in the agent, such as commissions. Sheriff v. Moore, 105 Ga. App. 833, 125 S.E.2d 729, 1962 Ga. App. LEXIS 1055 (1962) (action by insurance agents for insurance premium); Pendley v. Jessee, 134 Ga. App. 138, 213 S.E.2d 496, 1975 Ga. App. LEXIS 1934 (1975) (owners acting as real estate brokers for other owners).

Exception authorizing suit must be alleged if agency appears. — If the plaintiff's pleading discloses agency on the part of the plaintiff, the plaintiff cannot maintain the action without alleging that the plaintiff was a factor and contracted on the plaintiff's own credit, or that the contract was made in the plaintiff's individual name, or that the plaintiff's agency was coupled with an interest in the agent known to the party contracting with the plaintiff, unless it appears that the action is founded on a promissory note or other evidence of debt payable to the plaintiff as agent of a corporation or joint stock company, or upon the sale of goods

made by the plaintiff as an auctioneer. Richmond & Danville R.R. v. Bedell & Bowers ex rel. Orr & Hunter, 88 Ga. 591, 15 S.E. 676, 1892 Ga. LEXIS 72 (1892); Burg v. Malone, 22 Ga. App. 175, 95 S.E. 739, 1918 Ga. App. LEXIS 223 (1918).

If agent contracted in own name, principal's name may be inserted by amendment. — When a suit for rent is instituted by the party with whom the actual contract of tenancy was made, it is permissible for the plaintiff to amend plaintiff's pleading by setting out the name of the true owner for whose use the suit is brought. The rule would be otherwise, and such an amendment is not permissible, if the plaintiff acts not in the plaintiff's own behalf as landlord, but merely as an agent of the true owner. Clark v. Long, 25 Ga. App. 807, 105 S.E. 654, 1920 Ga. App. LEXIS 223 (1920).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 311 et seq.

Am. Jur. Pleading and Practice Forms.

2C Am. Jur. Pleading and Practice Forms, Auctions and Auctioneers, § 1.

C.J.S.

2A C.J.S., Agency, § 404 et seq. 3 C.J.S., Agency, § 501 et seq.

ALR.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 A.L.R. 464.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 A.L.R. 387.

Validity of contract negotiated by agent acting for both parties, 48 A.L.R. 917.

Contract for development and sale of land as creating a power coupled with interest or supporting an equitable lien, 65 A.L.R. 1080.

When attorney's power deemed coupled with an interest so as to prevent discharge or revocation, 97 A.L.R. 923.

Statute of limitations: action by one secondarily liable on negotiable instrument against others secondarily liable, or against principal, as an action on such instrument, or an action on an implied promise, or a similar action, 143 A.L.R. 1062.

Agent's disregard of principal's instructions where power coupled with an interest, 162 A.L.R. 1182.

10-6-83. Right of action by agent for interference with possession of principal's property.

An agent having possession, actual or constructive, of the property of his principal shall have a right of action for any interference with that possession by third persons.

History.

Orig. Code 1863, § 2188; Code 1868, § 2184; Code 1873, § 2210; Code 1882, § 2210; Civil Code 1895, § 3038; Civil Code 1910, § 3610; Code 1933, § 4-405.

JUDICIAL DECISIONS

History of section. — Provisions of this section appeared for the first time in the statute law of this state in the Code of 1863. It has been embodied in the same language in every Code since adopted. Mitchell v. Georgia & Ala. Ry., 111 Ga. 760, 36 S.E. 971, 1900 Ga. LEXIS 714 (1900).

Section applies only to agent with property interest. — Word "agent" as used in this section is to be construed as meaning an agent who has a property,

either general or special, in the personalty in the agent's possession. Mitchell v. Georgia & Ala. Ry., 111 Ga. 760, 36 S.E. 971, 1900 Ga. LEXIS 714 (1900).

This section has been construed as referring only to an agent who has a property either general or special in the personalty in the agent's possession. Central of Ga. Ry. v. George P. Greene & Co., 41 Ga. App. 794, 154 S.E. 809, 1930 Ga. App. LEXIS 1101 (1930).

Section does not contravene requirement that possession must be in plaintiff's own right. — While at common law and under former Civil Code 1895, § 3886, mere possession of a chattel will give a right of action for any interference therewith, such possession must be in the plaintiff's own right, and not as agent of another. This rule was not contravened by former Civil Code 1895, § 3038. Mitchell v. Georgia & Ala. Ry., 111 Ga. 760, 36 S.E. 971, 1900 Ga. LEXIS 714 (1900).

Agent's possession will support principal's possessory warrant. — Possession of personalty by an agent is actual, not constructive, possession by the principal and will support a possessory warrant by the latter against one who wrongfully and fraudulently takes possession thereof. Hillyer v. Brogden, 67 Ga. 24, 1881 Ga. LEXIS 122 (1881).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 226.
C.J.S.
3 C.J.S., Agency, § 501 et seq.
ALR.
Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A.L.R. 393.

10-6-84. Enforcement of contract after authority exceeded.

When the agent shall exceed his authority so that the principal is not bound, the agent may not enforce the contract in his own name against the person with whom he deals unless the contract shall have been fully executed upon the part of the agent or the credit was originally given to the agent.

History.
Orig. Code 1863, § 2192; Code 1868, § 2188; Code 1873, § 2214; Code 1882, § 2214; Civil Code 1895, § 3042; Civil Code 1910, § 3614; Code 1933, § 4-408.

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 71 et seq.
C.J.S.
2A C.J.S., Agency, § 174 et seq.
ALR.
Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Duty of principal to discover and notify third persons of wrongful disposal of property by agent not assuming to act for principal, 35 A.L.R. 325.

Liability on the contract of one who without authority assumes to contract for another, 42 A.L.R. 1310; 60 A.L.R. 1348.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 A.L.R. 665.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

10-6-85. Liability for exceeding authority.

All agents, by an express undertaking to that effect, may render themselves individually liable. Every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he shall be responsible; for the negligence of his underservant, employed by him in behalf of his principal, he shall not be responsible.

History.
Orig. Code 1863, § 2191; Code 1868, § 2187; Code 1873, § 2213; Code 1882, § 2213; Civil Code 1895, § 3041; Civil Code 1910, § 3613; Code 1933, § 4-409.

Cross references.
Imputing of negligence of one person to another person generally, § 51-2-1.

Law reviews.
For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Agent's Individual Liability
1. Generally
2. Upon Contract
3. For Tort
4. As to Underservant

General Consideration

Existence and extent of agency are questions of fact. — Questions of the existence and extent of an agent's authority are generally for the triers of fact. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295, 1980 Ga. App. LEXIS 1924 (1980).

Summary judgment improper. — Because the question of authorization could not be decided on summary judgment since a jury question existed as to whether the resolution of the county board of education authorized the county school superintendent to enter into a contract with the plaintiff on the board's behalf, the trial judge erred in entering summary judgment for the superintendent in the superintendent's individual capacity. Knight v. Troup County Bd. of Educ., 144 Ga. App. 634, 242 S.E.2d 263, 1978 Ga. App. LEXIS 1718 (1978).

Agent's Individual Liability

1. Generally

This section states the law of Georgia as to the individual liability of agents in three instances: (1) by "express undertaking; (2) by exceeding the scope of his authority; and (3) for his own tortious acts"; and then the section states when the agent is not liable: "for the negligence of his underservant, employed by him in behalf of his principal, he is not responsible." Pan-American Petro. Co. v. Williams, 174 Ga. 875, 164 S.E. 759, 1932 Ga. LEXIS 161 (1932).

This section neither changes nor adds to old law. — This section does not change or add to the old law as to the liability of an agent. Reid v. Humber, 49 Ga. 207, 1873 Ga. LEXIS 336 (1873).

2. Upon Contract

Agent may bind agent by express undertaking. — Even though one

employing another to perform services is acting in the capacity of agent and for the sole benefit of the agent's principal, the agent may nevertheless by express undertaking bind oneself personally. Willingham, Wright & Covington v. Glover, 28 Ga. App. 394, 111 S.E. 206, 1922 Ga. App. LEXIS 542 (1922); Davis v. Menefee, 34 Ga. App. 813, 131 S.E. 527, 1926 Ga. App. LEXIS 56 (1926).

A county warden who offered a certain amount to the plaintiff to return a convict rendered the warden individually liable. King v. Lewis, 32 Ga. App. 110, 122 S.E. 633, 1924 Ga. App. LEXIS 301 (1924).

If agent acts within authority, only express agreement binds agent. — Agent who, acting within the scope of the agent's authority, enters into contractual relations for a principal whom the agent discloses does not bind the agent, in the absence of an express agreement to do so. Echols v. Howard, 17 Ga. App. 49, 86 S.E. 91, 1915 Ga. App. LEXIS 253 (1915).

Agent acting within the scope of the agent's authority is liable only on the agent's own express undertaking. Allstate Ins. Co. v. Reynolds, 138 Ga. App. 582, 227 S.E.2d 77, 1976 Ga. App. LEXIS 2242 (1976).

Failure of agent to disclose agency. — To avoid individual liability, it is the agent's duty to disclose the agent's agency, and failing to do so, even if acting within the agent's authority, the party with whom the agent deals may proceed against the agent. Maslia v. Kilgore, 119 Ga. App. 769, 168 S.E.2d 857, 1969 Ga. App. LEXIS 1241 (1969).

If an agent does not disclose to the other party with whom the agent is dealing that the agent is acting on behalf of a principal, the agent is personally liable and responsible. Hodges-Ward Assocs. v. Ecclestone, 156 Ga. App. 59, 273 S.E.2d 872, 1980 Ga. App. LEXIS 2879 (1980).

If an agent wishes to avoid personal liability, the duty is on the agent to disclose the agency, and not on the party with whom the agent deals to discover it. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965); Hodges-Ward Assocs. v. Ecclestone, 156 Ga. App. 59, 273 S.E.2d 872, 1980 Ga. App. LEXIS 2879 (1980).

If agent lacks or exceeds authority, only agent is liable. — If in point of fact one employing another to perform services has acted without or beyond the authority of an alleged principal, the agent alone becomes personally liable. Willingham, Wright & Covington v. Glover, 28 Ga. App. 394, 111 S.E. 206, 1922 Ga. App. LEXIS 542 (1922); Davis v. Menefee, 34 Ga. App. 813, 131 S.E. 527, 1926 Ga. App. LEXIS 56 (1926).

Agent must pay damages if agent knows of want of authority. — If one has knowledge of agent's want of authority and, without intending any wrong or by making false representations as to the agent's authority, executes a contract as the agent of another, the agent is personally liable to the person with whom the agent is dealing, and the third party, not learning the facts, has the right to repudiate the contract and hold the assumed agent immediately responsible for damages. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Agent's bona fide belief of authority. — If an assumed agent bona fide believes the agent has authority, but in fact has none, and injury results to a third person who has honestly relied on the correctness of the agent's position as agent in making a contract in behalf of the agent's apparent principal, the agent will be personally liable for such injury. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

If one has no authority and acts bona fide, still one does a wrong to the other party, and if that wrong produces injury to the latter, owing to one's confidence in the truth of an express or implied assertion of authority by the purported agent, it is perfectly just that one who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Breaching implied warranty of authority. — If an agent executes, without authority from the agent's

Agent's Individual Liability (Cont'd)
2. Upon Contract (Cont'd)

principal, a bond in the name of the agent's principal as surety, and fails to disclose the agent's lack of authority to the other parties to the instrument, and the other parties have no knowledge of such lack of authority, and no ratification by the principal appears, and the principal is without knowledge of the agent's failure to comply with the specific requirements of a written power of attorney, which furnishes the agent's sole authority to bind the principal, and, on account of the implied representation as to the agent's authority to bind the principal in the manner attempted, a beneficiary in the instrument suffers injury, the injured person may recover damages from the agent individually. Peeples v. Perry, 18 Ga. App. 369, 89 S.E. 461, 1916 Ga. App. LEXIS 359 (1916).

Doctrine of the liability of a purported agent for the breach of an agent's implied warranty of authority proceeds upon a plain principle of justice, for every person so acting for another, by a natural, if not a necessary implication, holds oneself out as having competent authority to do the act, and one thereby draws the other party into a reciprocal engagement. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

If one assumes, as the agent of a named corporation, to contract with a real estate broker to procure a purchaser for certain corporate realty at a stated price, and the broker, within the time specified, finds a purchaser who is ready, willing, and able to purchase the realty in the terms of the contract and who actually offers to so purchase, the broker may, when the purported agent was without authority to contract for the corporation, maintain an action against the purported agent individually for the breach of the implied warranty of authority. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Other party's ignorance of agent's want of authority. — To give a party a right of action against a professed agent, the party must have been ignorant of the want of authority on the part of the latter and have acted upon the faith of the representations, express or implied, that the professed agent had the authority assumed; hence, if the party complaining is fully cognizant of all the facts touching the agent's authority, the latter will not be liable. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Section embodies only general rule of agency. — Provision of this section that "every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals," embodies only a general rule of agency. Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936).

Section does not authorize action against agent on unauthorized instrument. — This section creates no authority for an action ex contractu against the agent on the unauthorized instrument itself, save perhaps, for peculiar reasons, in cases of executors, administrators, and guardians. Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936).

Contract not purporting to bind agent personally. — An action ex contractu on the instrument itself ordinarily will not lie against the agent individually on a contract made by the agent in the name of the principal, unless it contains apt words binding the agent personally. While the instrument is not the contract of the principal, because the principal did not authorize or ratify the acts of the alleged agent, neither is it the contract of the alleged agent, because in seeking to bind the principal the agent used no language binding the agent, and therefore the law cannot create an undertaking which was not made by the parties themselves. Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936).

Language not binding agent of corporation personally. — If a replevy bond, given in a laborer's lien foreclosure, was signed by a corporate officer with the name of the corporation followed by the word "by" and the officer's own name as secretary, the instrument as thus executed contained no language which as a matter of contract or as a matter of law

would bind the corporate officer personally. Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936).

Agent for principal with no legal status. — One who assumes to act as agent for a nonexistent principal or one having no legal status renders that one individually liable in contracts so made. Don Swann Sales Corp. v. Echols, 160 Ga. App. 539, 287 S.E.2d 577, 1981 Ga. App. LEXIS 3089 (1981).

If the evidence supports a finding that the purported corporation is not a valid corporate entity, there is no doubt that the agent is bound by the agent's purchases on an open account. Don Swann Sales Corp. v. Echols, 160 Ga. App. 539, 287 S.E.2d 577, 1981 Ga. App. LEXIS 3089 (1981).

Measure of damages against agent acting without authority. — The damages to be recovered against a purported agent for acting without authority must, in general, be compensation for the loss which the other party has naturally and proximately sustained by reason of the lack of authority. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

In the case of a contract, the measure of damages to be recovered against a purported agent for acting without authority will usually be compensation for the loss sustained by not obtaining a then binding contract. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Measure of damages against a purported agent for acting without authority is what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had the authority the defendant professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made. Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106, 1952 Ga. App. LEXIS 619 (1952).

Summary judgment improper. — Summary judgment for an engineer in a concrete company's suit for services and materials provided to a construction project was error because the evidence could have authorized a jury to have found that the engineer obtained the concrete company's agreement to provide services and material to the construction project without disclosing that the concrete company was dealing with the engineer, not directly, but only as an agent of the developer for purposes of O.C.G.A. §§ 10-6-53 and 10-6-85; a jury could have found that the concrete company reasonably understood that the engineer was binding itself as well as the developer. Action Concrete, Inc. v. Focal Point Eng'g, Inc., 296 Ga. App. 567, 675 S.E.2d 303, 2009 Ga. App. LEXIS 274 (2009).

3. For Tort

"Misfeasance" and "nonfeasance" defined. — "Misfeasance" is a positive wrong, and means the improper doing of an act which the agent might lawfully do. It may also involve to some extent the idea of not doing, as if an agent engaged in the performance of an undertaking does not do something which it is the agent's duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932).

"Nonfeasance" on the part of an agent is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which the agent has agreed with the principal to do. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932).

"Nonfeasance" is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which the agent has agreed with the principal to do. "Misfeasance" means the improper doing of an act which the agent might lawfully do, or, in other words, the performing of the agent's duty to the principal in such a manner as to infringe upon the rights and privileges of third persons. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

"Misfeasance" may involve, to some extent, the idea of not doing, as when an agent engaged in the performance of the

Agent's Individual Liability (Cont'd)
3. For Tort (Cont'd)

agent's undertaking does not do something which it is the agent's duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires; this is not the doing of that which is imposed upon the agent merely by virtue of the agent's relation, but of that which is imposed upon the agent by law as a responsible individual in common with all other members of society, and is the same not doing which constitutes actionable negligence in any relation. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Agent is personally responsible for own tortious act. Wadley v. Dooly, 138 Ga. 275, 75 S.E. 153, 1912 Ga. LEXIS 281 (1912).

Actions not constituting tort. — O.C.G.A. § 10-6-85 did not apply in an action against a law firm for wrongfully and intentionally foreclosing on property since the firm was acting for a company that had legal title to the property under a deed to secure debt which was in default, and there was no impropriety in the notice, advertisement, or sale at foreclosure. McCarter v. Bankers Trust Co., 247 Ga. App. 129, 543 S.E.2d 755, 2000 Ga. App. LEXIS 1433 (2000).

Agent personally responsible for conversion. — When A delivered to the defendant, a warehouseman, a certain bale of cotton and received a warehouse receipt, which A transferred in writing to the plaintiff, who has since retained its possession, and subsequently the defendant, without legal authority, delivered the cotton to one B, knowing that the latter did not own it, the alleged conduct of the defendant amounted to a conversion, and B was liable for B's tortious act, though done in the capacity of agent. Trippe v. Bell & Co., 139 Ga. 782, 78 S.E. 126, 1913 Ga. LEXIS 602 (1913).

Trover lies against an agent, even though the agent does not purport to act individually, but wholly for another. Godwin v. Mitchell, 60 Ga. App. 713, 4 S.E.2d 678, 1939 Ga. App. LEXIS 149 (1939); Kelley v. Sheehan, 61 Ga. App. 714, 7 S.E.2d 298, 1940 Ga. App. LEXIS 232 (1940); Teper v. Weiss, 115 Ga. App. 621, 155 S.E.2d 730, 1967 Ga. App. LEXIS 1189 (1967).

Fact that the defendant held possession of the property in the defendant's representative capacity (as administrator of the estate) would afford the defendant no protection from a trover suit. Godwin v. Mitchell, 60 Ga. App. 713, 4 S.E.2d 678, 1939 Ga. App. LEXIS 149 (1939).

Agent's liability is measured by duty to third persons agent has assumed. — Agent's liability must be judged, not merely by a breach of the agent's contract to the principal, but by the extent of the duty and responsibility to third persons which the agent assumed coextensively with the contract. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Agent's intervention into the relations between the principal and the others by the agent's assumption of the duty to the principal creates a duty to the others to use care either to perform the service or to see that no harm results from the agent's failure to do so. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Agent is liable if acts create unreasonable risk of harm to others. — Agent is subject to liability if, by the agent's acts, the agent creates an unreasonable risk of harm to the interests of others protected against negligent invasion. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155, 1941 Ga. App. LEXIS 306 (1941).

Failure to take reasonable care in performing agency. — When a servant enters upon the performance of a contract with a principal and in so doing fails to take reasonable care in the commission of some act which the servant should do in the performance of the servant's duty under the contract, and thereby a third person is injured, the servant is responsible therefor to the same extent as if the servant had committed the wrong in the servant's own behalf; the servant's liability in such case is not based on the ground of the servant's agency, but on the

ground that the servant is a wrongdoer and, as such, is responsible for any injury the servant may cause. Risby v. Sharp-Boylston Co., 62 Ga. App. 101, 7 S.E.2d 917, 1940 Ga. App. LEXIS 605 (1940).

If an agent fails to use reasonable care or diligence in the performance of the agent's duty, the agent will be personally responsible to a third person who is injured by such misfeasance; the agent's liability, in such cases, is not based upon the ground of the agent's agency, but upon the ground that the agent is a wrongdoer. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

If a landowner gives an agent sole authority to manage property, including renting and repairing, and if it is specifically alleged that the agent agreed to and did in fact assume such authority for the landowner, the agent may be held individually liable for a violation of this duty, not as an agent, but as an independent tort-feasor whose breach of duty owed to a third person is the actionable negligence. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305, 1954 Ga. App. LEXIS 804 (1954).

Agent liable whether wrongful act is misfeasance or nonfeasance. — If a servant has undertaken for the principal the performance of a duty owed a third person, the servant is personally liable to such third person when the servant's wrongful act in the course of the servant's employment is the direct and proximate cause of injury to the third person, whether the wrongful act is one of misfeasance or nonfeasance. It is not the servant's contract with the principal which exposes the servant to, or protects the servant from, liability to third persons, but the servant's common-law obligation to use that which the servant controls so as not to injure another. Southern Ry. v. Smith, 55 Ga. App. 689, 191 S.E. 181, 1937 Ga. App. LEXIS 463 (1937); Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155, 1941 Ga. App. LEXIS 306 (1941).

Performance of duty to principal is no defense. — In an action for damages founded on tort, it is no defense that the injury was caused while the defendant was acting in performance of a duty as agent of a firm of which the plaintiff was a member, if negligence of the defendant amounting to misfeasance produced the injury. Owens v. Nichols, 139 Ga. 475, 77 S.E. 635, 1913 Ga. LEXIS 475 (1913).

Officer or agent of corporation is personally liable for torts. — An officer or agent of a corporation is liable in damages for injuries suffered by third persons because of the officer's or agent's torts, regardless of whether the officer or agent acted on the officer's or agent's own account or on behalf of the corporation, and regardless of whether or not the corporation is also liable. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932).

Misfeasance of corporate agent. — The rule which makes officers or agents of a corporation liable for their torts to third persons who suffer injury thereby refers to misfeasance or positive wrong. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932).

Agent is not ordinarily liable for nonfeasance. — Under former Civil Code 1895 §§ 3029 and 3041, while an agent was personally liable to those injured by the agent's misfeasance, the agent was not ordinarily liable for mere nonfeasance. Kimbrough v. Boswell, 119 Ga. 201, 45 S.E. 977, 1903 Ga. LEXIS 86 (1903).

Agent is not ordinarily liable to third persons for nonfeasance; an agent is, however, liable to third persons for misfeasance. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932); Chambers v. Self, 53 Ga. App. 437, 186 S.E. 203, 1936 Ga. App. LEXIS 147 (1936); Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Liability when duty to principal required performance. — Before an agent becomes liable for an act of omission alleged to have constituted negligence with resultant injury, it must appear that such agent had agreed to perform such act for the agent's principal, or had assumed to perform the act. Risby v. Sharp-Boylston Co., 62 Ga. App. 101, 7

Agent's Individual Liability (Cont'd)
3. For Tort (Cont'd)

S.E.2d 917, 1940 Ga. App. LEXIS 605 (1940).

Agent in complete charge of business is liable for nonperformance. — Nonperformance by an agent left in complete charge of the business in the absence of the owner entails liability, as do specific acts of negligence. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591, 1957 Ga. App. LEXIS 687 (1957).

Liability for failing to keep premises safe. — Agent who undertakes the sole and complete control and management of the principal's premises is liable to third persons, to whom a duty is owing on the part of the owner, for injuries resulting from the owner's negligence in failing to make or keep the premises in a safe condition. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305, 1954 Ga. App. LEXIS 804 (1954).

Agent with custody of property that may harm others. — Agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of the agent's custody, by the agent's failure to use care to take such reasonable precautions as the agent is authorized to take. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Failure to make repairs. — After the defendant had by contract assumed the duty of maintaining and repairing a building, which duty in the first instance devolved upon the owner, and actually entered upon such duty by repairing a part of the building, then the defendant's failure to repair another part of the building, resulting in injury to the plaintiff, rendered the defendant liable, not because the defendant had breached the defendant's contract with the defendant's principal, but because, by assuming the total duty of repair and maintenance, the defendant had caused the owner to rely upon the defendant and prevented the job from being done by others, and had therefore breached a duty owing to the public generally and the plaintiff in particular of maintaining the premises in a reasonably safe condition. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853, 1954 Ga. App. LEXIS 624 (1954).

Employee canning food products not liable unless employee knows of defective condition. — Employee aiding in canning food products that are then in a dangerously defective condition is liable to the person injured if such agent knows of that condition; the agent would not be liable unless the agent knew of the defect. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155, 1941 Ga. App. LEXIS 306 (1941).

Retail clerk. — Agent or clerk in a retail store who merely passes out the articles and receives the price for the principal is not liable for defects in the article sold unless the clerk has actual knowledge of the defect, or unless the clerk assumes the responsibility which the law places upon retailers and distributers of food, or unless the clerk owes some particular duty to the purchaser. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155, 1941 Ga. App. LEXIS 306 (1941).

4. As to Underservant

Agent is not liable for subagent's negligence. — When an agent has authority to employ a subagent to do the work of the principal, the agent is not liable for the negligence of the subagent in the performance of the work, if due care has been used in the subagent's selection. Morris v. Warlick, 118 Ga. 421, 45 S.E. 407, 1903 Ga. LEXIS 576 (1903); Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347, 1937 Ga. LEXIS 637 (1937).

Failure to use due care in selecting or failing to remove subagent. — Agent is liable for the negligence of the subagent if due care has not been used in the subagent's selection, and the same principle should be applied to negligence in failing to displace a subagent or an underservant when the agent appears to have had a duty and responsibility as to

such matter. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347, 1937 Ga. LEXIS 637 (1937). But see Pan-American Petro. Corp. v. Williams, 45 Ga. App. 490, 165 S.E. 473, 1932 Ga. App. LEXIS 576 (1932).

Negligence of an underservant in respect to the inspection of bottles and the soft drink was not attributable to an agent of the bottling company in charge of business's operation, who served as the company's executive and administrative head; the only negligence of which such agent could have been guilty under the circumstances would have been an original act of negligence in selecting or retaining an incompetent employee. Schutle v. Pyle, 95 Ga. App. 229, 97 S.E.2d 558, 1957 Ga. App. LEXIS 760 (1957).

Employment by agent should be explicitly alleged. — If the plaintiff means to charge that an underservant was employed by an agent and that the agent was liable for the torts of the underservant because the agent had not exercised good faith and reasonable care in the selection of a suitable and proper subagent, the allegations of employment should be explicit and not inferential. Pan-American Petro. Co. v. Williams, 174 Ga. 875, 164 S.E. 759, 1932 Ga. LEXIS 161 (1932).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 273 et seq.

C.J.S.

2A C.J.S., Agency, §§ 262 et seq., 295.

ALR.

Liability for misconduct or negligence of messenger not directly related to the service, 18 A.L.R. 1416.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Duty of principal to discover and notify third persons of wrongful disposal of property by agent not assuming to act for principal, 35 A.L.R. 325.

Personal liability of agent to third person for injuries or damages due to condition of principal's premises, 49 A.L.R. 521.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract, 53 A.L.R. 414.

Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A.L.R. 393.

Liability of agent for acts or omissions of subagent, 61 A.L.R. 277.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 A.L.R. 665.

Right to bring separate actions against master and servant, or principal and agent, to recover for negligence of servant or agent, where master's or principal's only responsibility is derivative, 135 A.L.R. 271.

Liability of master or principal for servant's or agent's libel or slander of one other than servant or agent or former servant or agent, 150 A.L.R. 1338.

Agent's disregard of principal's instructions where power coupled with an interest, 162 A.L.R. 1182.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 A.L.R.2d 406.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

Tenant's capacity to sue independent contractor, as third-party beneficiary, for breach of contract between landlord and such contractor for repair or remodeling work, 46 A.L.R.2d 1210.

Salesman's power to pledge employer's or principal's personal property, 49 A.L.R.2d 1271.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 A.L.R.2d 342.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations, 61 A.L.R.2d 1237.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 A.L.R.2d 1237.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 A.L.R.2d 1282.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R.2d 533.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Products liability: Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 A.L.R.3d 943.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 A.L.R.3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 A.L.R.3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 A.L.R.3d 907.

Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 A.L.R.3d 1055.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 A.L.R.5th 550.

Liability of insurance agent or broker on ground of inadequacy of liability-insurance coverage procured, 60 A.L.R.5th 165.

10-6-86. Liability of person signing instrument as agent or fiduciary.

An instrument signed by one as agent, trustee, conservator, guardian, administrator, executor, or the like, without more, shall be the individual undertaking of the maker, except as otherwise provided by Code Sections 11-3-402, 13-5-30, 29-2-21, 29-3-21, 29-4-22, 29-5-22, 53-8-14, and 53-12-308, such words being generally words of description.

History.

Civil Code 1895, § 2998; Civil Code 1910, § 3570; Code 1933, § 4-401; Ga. L. 1997, p. 143, § 10; Ga. L. 2020, p. 377, § 2-9/HB 865.

History of Code section.

This Code section is derived from the decision in Crusselle v. Chastain, 76 Ga. 840 (1886).

JUDICIAL DECISIONS

Analysis

General Consideration
Pleadings and Evidence

General Consideration

This section lays down the general rule. Wadley v. Oertel, 140 Ga. 326, 78 S.E. 912, 1913 Ga. LEXIS 120 (1913).

Rule was not changed by NIL. — Statutory rule in this section, first in the Code of 1895, was not altered but was given substantial effect with respect to negotiable instruments by the former Negotiable Instruments Law (see now O.C.G.A. § 11-3-403). Hill v. Daniel, 52 Ga. App. 427, 183 S.E. 662, 1936 Ga. App. LEXIS 656 (1936).

Deposit without instrument. — This section is not applicable when an administrator of an estate deposits funds of the estate (which were lost by failure of the bank), but when there was no instrument executed by the agent. Gatewood v. Furlow, 19 Ga. App. 74, 90 S.E. 973, 1916 Ga. App. LEXIS 51 (1916).

Checks drawn by spouse. — Instrument signed by one as agent, without more, is the individual undertaking of the maker, such words being generally words of description. So checks drawn by the husband and signed by him with the word "agent" added to his name, without more, were the individual checks of the husband, and did not put the payee upon notice that they were drawn on funds which did not belong to the husband, but which belonged to the wife. McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930).

One adding "trustee" after name is individually liable. — Addition of the word "trustee" after the name of the signer of a note, without more, is mere descriptio personae, and the debt is that of the maker individually. Crusselle v. Chastain, 76 Ga. 840, 1886 Ga. LEXIS 145 (1886); McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930).

Adding "President" after name. — One signing, "J. L. DeGive, President" was apparently individually liable. Candler v. DeGive, 133 Ga. 486, 66 S.E. 244, 1909 Ga. LEXIS 253 (1909).

Adding "Treas." or "V.P." after name. — Abbreviations and letters, "Treas.," and "V.P.," following the names respectively of two endorsers on a promissory note, are mere words of description, and the obligation incurred by such endorsers is personal. Morris v. Reed, 14 Ga. App. 729, 82 S.E. 314, 1914 Ga. App. LEXIS 435 (1914).

Adding "adm'r" after name. — It is clear that if "F" had signed an instrument as "TMF, adm'r" it would have been F's individual undertaking. Gatewood v. Furlow, 19 Ga. App. 74, 90 S.E. 973, 1916 Ga. App. LEXIS 51 (1916).

Adding "with Power of Attorney" after name. — When endorsed on a note and mortgage were several names, the last of which was "H. A. Burge with Power of Attorney" and the power of attorney is not included in the record, at most this could only indicate an ordinary individual endorsement. Hastey v. Roberts, 149 Ga. 479, 100 S.E. 569, 1919 Ga. LEXIS 277 (1919).

Adding "administrator" after name. — Certiorari bond payable on the bond's face to a named individual, followed by the word "administrator" which fails within itself to furnish the means whereby the actual principal for whose benefit the bond is executed can be ascertained with absolute and legal certainty, amounts to nothing more than an undertaking in favor of the named individual, and the word "administrator" is to be taken merely as descriptio personae under this section. Metropolitan Life Ins. Co. v. Monroe, 26 Ga. App. 332, 106 S.E. 209, 1921 Ga. App. LEXIS 139 (1921).

Adding "agent" after name. — If an agent signs a note with the agent's own name alone and adds to the agent's signature the word "agent," and if there is nothing in the note to indicate who is the principal, the agent will be personally liable, just as if the word agent was not added. Harp v. First Nat'l Bank, 173 Ga. 768, 161 S.E. 355, 1931 Ga. LEXIS 397 (1931).

Checks drawn by husband. — Two checks drawn by the plaintiff's husband and signed by him with the word "agent" added to his signature, without more, were the individual checks of the husband, and did not put the payee upon notice that the checks were drawn on funds which did not belong to the

General Consideration (Cont'd)

husband, nor did such signature to these checks impose upon the payee the duty of inquiring whether the checks were drawn on the funds of the drawer or upon someone else. McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834, 1930 Ga. LEXIS 443 (1930).

Action on note signed as administrator is action against individual. — Action against "A, administrator," on a promissory note containing the words "I promise to pay," and signed "B Estate, A, administrator (L.S.)," is an action against A as an individual. Glisson v. Weil & Co., 117 Ga. 842, 45 S.E. 221, 1903 Ga. LEXIS 362 (1903).

Action by or against one adding "administrator" or "executor" to name is action by or against individual. — Action by one with the word "administrator" or "executor" added to one's name, especially on a contract made by that one, will ordinarily be treated as being one's individual action; and likewise when the action is against that one. Wadley v. Oertel, 140 Ga. 326, 78 S.E. 912, 1913 Ga. LEXIS 120 (1913).

Execution against one "as agent for" another is against former alone. — Execution against SJW as agent for Mrs. MW is against SJW alone, the words, "as agent for," etc., being merely descriptio personae. Wynn v. Irvine's Ga. Music House, 109 Ga. 287, 34 S.E. 582, 1899 Ga. LEXIS 635 (1899).

Bond payable to city recorder individually is not city contract. — Bond made payable to the city recorder who tried the case in which the defendant was convicted, or to the recorder's successors in office, if given to the obligee in the obligee's personal capacity only, would not be a valid contract with the city. Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249, 1955 Ga. App. LEXIS 727 (1955) (bond construed as payable to obligee in official capacity).

Application with "Agt." after name is individual application. — When an application to establish and lay out a public road is signed by a named person with the letters "Agt." after the person's name, without more, such instrument is the person's individual application for such road. Commissioners of Decatur County v. Curry, 154 Ga. 378, 114 S.E. 341, 1922 Ga. LEXIS 369 (1922).

Stock issued with "guardian" after name is individually owned. — Legal title to bank stock purchased by and issued to W, "guardian," was prima facie in W individually and on W's death descended to W's personal representative; and W's successor in the trust had no right, under the facts of this case, to recover from the bank money paid for the stock. Williams v. Farmers State Bank, 22 Ga. App. 656, 97 S.E. 249, 1918 Ga. App. LEXIS 664 (1918).

Only principal is bound if agency specified and principal name in contract. — When in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter and not the agent is liable, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. Rawlings v. Robson, 70 Ga. 595, 1883 Ga. LEXIS 379 (1883); Bank of Univ. v. Hamilton, 78 Ga. 312, 1886 Ga. LEXIS 237 (1886); Wadley v. Oertel, 140 Ga. 326, 78 S.E. 912, 1913 Ga. LEXIS 120 (1913); Ocilla S.R.R. v. Morton, 13 Ga. App. 504, 79 S.E. 480, 1913 Ga. App. LEXIS 241 (1913); Harp v. First Nat'l Bank, 173 Ga. 768, 161 S.E. 355, 1931 Ga. LEXIS 397 (1931).

Trial court properly granted summary judgment to the relative after the home healthcare agency sued the relative for a balance due on a contract the relative signed to have nursing services provided to the relative's father. The relative clearly signed in a representative capacity the contract that the home healthcare agency drafted and provided for the relative to sign, the principal, the relative's father, was clearly named in the document as such, and it was evident that the contract was substantially in the name of the principal; accordingly, there was no issue for the jury to decide because the contract obligated the father, not the relative, to pay. Associated Servs. of Accountable

Prof'ls, Ltd. v. Workman, 265 Ga. App. 348, 593 S.E.2d 882, 2004 Ga. App. LEXIS 115 (2004).

Agent not personally liable for stock assessment. — When the trustee of a person non compos mentis, who succeeded to the trust upon the death of the original trustee, entered stock on the books of the bank in the name of "Billups Phinizy, Trustee Marion Daniel Phinizy," the words "Trustee Marion Daniel Phinizy" were not merely descriptio personae, and therefore the trustee was not personally liable for the stock assessment. Gormley v. Phinizy, 46 Ga. App. 431, 167 S.E. 757, 1933 Ga. App. LEXIS 86 (1933).

Principal must be party to sealed instrument to be liable thereon. — When a contract is made by an agent under seal, no one but a party to the instrument is liable to be sued thereon; and, therefore, if made by an agent or attorney, it must be in the name of the principal in order that the agent may be a party because otherwise the agent is not bound by it. Harp v. First Nat'l Bank, 173 Ga. 768, 161 S.E. 355, 1931 Ga. LEXIS 397 (1931).

Context may show agent signed in representative capacity. — Executory contract between "FCM, administrator of the estate of EPM" and H, was an agreement by FCM in FCM's representative capacity, under former Civil Code 1910, §§ 3570 and 3594. Miller v. Hines, 145 Ga. 616, 89 S.E. 689, 1916 Ga. LEXIS 422 (1916).

When two attorneys in fact were expressly authorized by power of attorney to execute a security deed in the names of the principals "or otherwise" and the security deed executed refers to the heirs of an estate (the principals) the security deed would be construed to be a conveyance by them in behalf of themselves and as attorneys in fact for the other heirs at law. Cocke v. Bank of Dawson, 180 Ga. 714, 180 S.E. 711, 1935 Ga. LEXIS 537 (1935).

Deeds in which the named grantor was decedent's estate and which were signed in the name of the estate and of the two executors were deeds by the executors of the estate in their official capacity, and purported to convey properties belonging to the estate, and were not the personal deeds of the individuals designated as executors. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214, 1958 Ga. LEXIS 438 (1958).

While it is the general rule that a signature with the added word "administrator" or "executor" will ordinarily be treated as that of one in one's individual capacity, the added word being generally merely descriptio personae, this is not an inflexible rule when the context makes it clear that it is signed in a representative capacity, although the added words are not "as administrator" or "as executor." Fisher v. Pair, 69 Ga. App. 492, 26 S.E.2d 187, 1943 Ga. App. LEXIS 124 (1943); Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977).

Words added to signature may take case out of section. — When the evidence discloses that the advertising contract was signed as follows: "Ann Zior, Sec.-Tres. authorized agent for Ejax Oil Stabilizer," the addition of the name of the purported principal to the agent's signature is prima facie sufficient to take the case beyond the purview of this section. Radio Station WTMP v. Zior, 102 Ga. App. 38, 115 S.E.2d 627, 1960 Ga. App. LEXIS 549 (1960).

Pleadings and Evidence

Between immediate parties parol evidence may show only principal bound. — As between the immediate parties, it may be shown by parol evidence that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent and that it was given and accepted as such. Ocilla S.R.R. v. Morton, 13 Ga. App. 504, 79 S.E. 480, 1913 Ga. App. LEXIS 241 (1913).

When a promissory note was made payable to the order of a named person, followed merely by the word "trustee," and such payee in like manner endorsed the note and delivered the note to a third person, in a suit on the note by the endorsee against the maker and the endorser, although under the rule of descriptio personae the manner of the endorser's

Pleadings and Evidence (Cont'd)

signature indicated prima facie that the endorser signed as an individual and that the endorser's obligation as endorser was the endorser's individual undertaking, the endorser was nevertheless entitled to show by parol that the endorser in fact acted in the transaction merely as the trustee or agent of the plaintiff endorsee, and that the endorser's endorsement of the note, though in blank, was, under this agreement with the endorsee, made solely for the transfer of title as the true rightful owner. Kaiser v. Simmons, 52 Ga. App. 355, 183 S.E. 343, 1936 Ga. App. LEXIS 627 (1936) (see § 10-6-87 and notes thereto).

Only slight evidence of trust required. — Prima facie, a judgment in favor of EJD, executor of MG, is EJD's individual property under this section, but this presumption may be removed by slight evidence tending to show that EJD holds the same in trust for the estate. Dozier v. McWhorter, 117 Ga. 786, 45 S.E. 61, 1903 Ga. LEXIS 336 (1903).

Pleading may be amended to delete "agent". — Pleading alleging that the contract, the breach of which is the wrong complained of, was made by the defendant as agent, without more, is amendable by striking the word "agent" therefrom. Such contract is the individual undertaking of the maker under this section. Hearn v. Gower, 1 Ga. App. 265, 57 S.E. 916, 1907 Ga. App. LEXIS 209 (1907).

Mortgage held inadmissible when signer's authority not shown. — When a mortgage on realty was signed "Trustees North Ga. Col. School (Seal). H. A. Burge, Cor. Sect. (Seal)," it was erroneous to admit the mortgage in evidence on the trial of a claim to the property, over timely objection that "there was no evidence shown where H. A. Burge had any authority to sign any mortgage," the evidence failing to disclose any such authority. Hastey v. Roberts, 149 Ga. 479, 100 S.E. 569, 1919 Ga. LEXIS 277 (1919).

If one undertakes obligation in fictitious or trade name, such obligation is one's own individually. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66, 1981 Ga. App. LEXIS 1845 (1981).

Action against "X, administratrix of estate of Y, deceased," is suit against X individually, the additional words being merely descriptio personae. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66, 1981 Ga. App. LEXIS 1845 (1981).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, §§ 167 et seq., 192 et seq., 302 et seq.

C.J.S.

2A C.J.S., Agency, § 249 et seq.

ALR.

Personal liability of broker for breach of contract by his principal, 6 A.L.R. 641.

Regulations, rules, custom, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 A.L.R. 592.

Right to join agent and undisclosed principal in same action, 118 A.L.R. 701.

Exceptions to rule which permits suit by or against undisclosed principal, 130 A.L.R. 664.

10-6-87. Assignment of credit.

Where the agency is known and the credit is not expressly given to the agent, he shall not be personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances in each case.

History.

Orig. Code 1863, § 2189; Code 1868, § 2185; Code 1873, § 2211; Code 1882,

§ 2211; Civil Code 1895, § 3039; Civil Code 1910, § 3611; Code 1933, § 4-406.

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Agency
Questions of Fact
Jury Instructions

General Consideration

Liability of agent if agency not disclosed. — It is only when an agent is either expressly or impliedly dealing or acting for and in behalf of the agent's principal that a contract made by the agent with a third person having knowledge of this relationship is the contract of the principal and is not the personal contract of the agent. Harris v. Southeastern Printers Supply Co., 59 Ga. App. 729, 2 S.E.2d 184, 1939 Ga. App. LEXIS 398 (1939).

When the plaintiff, through a member of the firm, made an oral agreement with the defendant to install and repair a printing press on what is designated as "a time and material basis," and the defendant did not at any time during the negotiations for the contract or during the progress of the work disclose to the plaintiff's agent that the defendant was the agent of anyone or that the agent was contracting for the services, or that the agent accepted the services, as the agent for another, and, notwithstanding the fact that the plaintiff may have known beforehand that the defendant was "connected with" or was an officer in or agent for a corporation which was the owner of the printing press which was being repaired under the contract, the inference is authorized that the contract was with the defendant in the defendant's individual capacity. Harris v. Southeastern Printers Supply Co., 59 Ga. App. 729, 2 S.E.2d 184, 1939 Ga. App. LEXIS 398 (1939).

Agent who makes a contract without disclosing that the agent is acting as an agent or without identifying the agent's principal will become individually liable on the contract. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966).

Only principal is bound if agent names principal. — Under former Code 1868, §§ 2169 and 2185, it was a general rule — standing on strong foundations, and pervading every system of jurisprudence — that when an agent was duly constituted, and named the agent's principal, and contracts in the agent's name, the principal was responsible, and not the agent. Tiller v. Spradley, 39 Ga. 35, 1869 Ga. LEXIS 168 (1869); Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760, 1934 Ga. App. LEXIS 714 (1934).

When an agent in making a contract discloses to the other contracting party that the agent is acting for a named principal, the principal is responsible and not the agent. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966); Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977).

When the owner of land employs a general agent to manage and operate the owner's farm, such agency being fully disclosed to the persons contracting with the agent to cultivate the land as croppers, no liability arises in favor of persons cultivating the land, as against the agent, by reason of the operation of the farm, and even though the agent may have authority from the agent's employer to make all contracts with croppers, superintend the operations of the farm, sell the products of the farm, and make all settlements with the croppers and tenants thereon, and may actually perform such duties, with the consent of a cropper on the premises, the agent's possession of crops grown on the premises is as agent for the agent's

General Consideration (Cont'd)

employer, and not in the agent's own right, and the agent is not subject to the process of garnishment instituted by a creditor of such cropper. Johnson v. Varnum, 43 Ga. App. 737, 159 S.E. 908, 1931 Ga. App. LEXIS 533 (1931).

Principal liable if other party knew of agency. — If the sheriff knew that the bidder purchased as the agent of others, and recognized and treated the bidder as such, the sheriff's right of action would not be against the agent but against the principal. Cureton v. Wright, 73 Ga. 8, 1884 Ga. LEXIS 3 (1884).

A person who has obtained a diversion of a shipment of goods during transportation by a carrier is not liable for a resulting additional freight charge when, in ordering the diversion, the person was acting as agent for another and the carrier must have known of this fact. B & O R.R. v. Johnson-Battle Lumber Co., 37 Ga. App. 729, 141 S.E. 678, 1928 Ga. App. LEXIS 585 (1928).

Agent has duty to disclose principal to avoid liability. — If the agent would avoid personal liability, the duty is on the agent to disclose the agent's principal, and the agent is individually liable if the agent fails to disclose the agent's agency and the identity of the agent's principal. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966).

When an agent wishes to avoid personal liability, the duty is on the agent to disclose the agent's agency, and not on the party with whom the agent deals to discover it. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965); Whitlock v. PKW Supply Co., 154 Ga. App. 573, 269 S.E.2d 36, 1980 Ga. App. LEXIS 2291 (1980).

Agent has burden of proving agency and other party's knowledge thereof. — If a person would relieve themselves from personal liability on the ground of agency, the person ordinarily has the burden of proving the fact of agency as well as knowledge thereof by the opposite party. Citizens Nat'l Bank v. Jennings, 35 Ga. App. 553, 134 S.E. 114, 1926 Ga. App. LEXIS 976 (1926); B & O R.R. v. Johnson-Battle Lumber Co., 37 Ga. App. 729, 141 S.E. 678, 1928 Ga. App. LEXIS 585 (1928).

To relieve oneself of personal liability the agent ordinarily has the burden of proving by direct or circumstantial evidence the fact of agency as well as knowledge thereof by the opposite party. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966); Yarbrough & Co. v. Travis Pruitt & Assocs., 130 Ga. App. 49, 202 S.E.2d 227, 1973 Ga. App. LEXIS 1219 (1973).

Use of a tradename is not necessarily a sufficient disclosure of the identity of the principal and the fact of agency so as to protect the agent against personal liability. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965).

Agent may expressly or impliedly bind himself. — An agent who makes a contract with the express or implied understanding with the other party that the agent is binding oneself individually will become individually liable on the contract. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966).

Personal liability of agent in addition to principal's liability. — If an agent acts for a disclosed principal, within the scope of the agent's authority, the actions are those of the principal, who is alone liable unless the agent has assumed personal liability also. Candler v. Clover Realty Co., 125 Ga. App. 278, 187 S.E.2d 318, 1972 Ga. App. LEXIS 1298 (1972).

When agency is known. — When the agency is known but the credit is expressly given to the agent, the agent is personally responsible. Verhey v. Cook, 142 Ga. App. 280, 235 S.E.2d 678, 1977 Ga. App. LEXIS 1576 (1977).

Agent may expressly contract on the agent's own credit and be bound, even though the agent's principal is known. Brown & Huseby, Inc. v. Chrietzberg, 242 Ga. 232, 248 S.E.2d 631, 1978 Ga. LEXIS 1153 (1978).

Recording agency contract held not to give notice or relieve agent. — In an action by a seller on an open account for

goods sold against a defendant who alleges the defendant was acting as an agent, recording of the agency contract in the office of the clerk of the superior court was held not to give proper notice of the agency contract to the seller, and when the seller had no actual knowledge of the contents of the agency contract, the defendant agent is personally liable. Babb v. Kersh, 92 Ga. App. 346, 88 S.E.2d 432, 1955 Ga. App. LEXIS 589 (1955).

Applicability in attorney-client relationship. — Attorney could not be held solely liable to a court reporting service for $851.10, representing court reporting fees owed, as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. §§ 9-11-14(a) and 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. Free v. Lankford & Assocs., Inc., 284 Ga. App. 328, 643 S.E.2d 771, 2007 Ga. App. LEXIS 236 (2007), cert. denied, No. S07C1114, 2007 Ga. LEXIS 560 (Ga. July 12, 2007).

Proof of Agency

Agency may be proved by contract or extrinsic evidence. — Contract signed by a person who adds after the person's signature the words "general manager" is not the individual undertaking of the person signing, if the contract shows on its face that it was made in behalf of another, or if, in an action for its breach, this fact appears by extrinsic evidence. Raleigh & Gaston R.R. v. Pullman Co., 122 Ga. 700, 50 S.E. 1008, 1905 Ga. LEXIS 304 (1905).

If it does not appear from the face of the contract whether it is the signer's individual undertaking or is that of the signer's principal acting through the signer as the principal's agent, it may, especially when the contract is not executed under seal, be shown extrinsically that the contract is that of the principal, executed for and in the principal's behalf by the principal's agent. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Parol evidence. — Under former Civil Code 1895, §§ 3022 and 3039, when a contract was signed by a person individually, parol evidence was admissible for the purpose of showing that the person was acting as agent for another. Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. App. 212, 59 S.E. 713, 1907 Ga. App. LEXIS 598 (1907).

Proof when actual principal is not one indicated after agent's signature. — When the question as to who is the real contracting party is one of fact which can be extrinsically determined, it may be shown that the person signing a contract in the person's own name, with descriptive terms of agency after the person's signature, did so for and on behalf of another as the person's principal, by and through the person as agent, although the person's principal may be another and different person from the one indicated as the signer's principal in the descriptive terms attached to the signer's signature. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Contract reciting it was not signed on another's behalf. — When a contract recites that it represents the entire agreement between the parties, it cannot be shown by extrinsic parol evidence that one of the signatories did not sign, as recited therein, on the signatory's own behalf, but signed as an agent of another. Haas v. Koskey, 138 Ga. App. 448, 226 S.E.2d 279, 1976 Ga. App. LEXIS 2188 (1976).

Introduction of extrinsic evidence when fact of agency not in contract. — If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that the agent is not a party except: (a) for the purpose of reforming the contract; or (b) to establish that the agent's name was signed as the business name of the principal and that it was so agreed by the parties. Haas v. Koskey, 138 Ga. App. 448, 226 S.E.2d 279, 1976 Ga. App. LEXIS 2188 (1976).

"Agent for" after signature does not alone bind principal. — Expression "agent for" a designated person, following

Proof of Agency (Cont'd)

the name in a signature attached to a contract, is merely descriptio personae, and its presence in the signature does not of itself necessarily render the contract the undertaking of the designated principal, acting by and through the signer as the principal's agent. Dorsey v. Rankin, 43 Ga. App. 12, 157 S.E. 876, 1931 Ga. App. LEXIS 161 (1931).

Use of trade name does not necessarily relieve agent. — Use of a trade name is not necessarily a sufficient disclosure of the identity of the principal and the fact of agency so as to protect the agent against personal liability. Whitlock v. PKW Supply Co., 154 Ga. App. 573, 269 S.E.2d 36, 1980 Ga. App. LEXIS 2291 (1980).

Employer was not representing the disclosed principal when the employer hired an employee, the employer contracted with the employee personally and not as an agent, and the language of a letter of understanding supported the position that the employer was acting individually in asking the employee to work for the corporation. Wojcik v. Lewis, 204 Ga. App. 301, 419 S.E.2d 135, 1992 Ga. App. LEXIS 848 (1992).

Questions of Fact

Disclosure or knowledge of agency is question of fact. — Whether or not the fact of the agency and the identity of the principal were disclosed or known to the other contracting party is a question of fact which may be shown by direct or circumstantial evidence. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966).

Trier of fact should determine whether the agency was disclosed. Yarbrough & Co. v. Travis Pruitt & Assocs., 130 Ga. App. 49, 202 S.E.2d 227, 1973 Ga. App. LEXIS 1219 (1973).

Parties' intention as to who will be bound. — Intention of the parties as to who will be bound when the principal is disclosed is usually a question of fact for a jury. Whitlock v. PKW Supply Co., 154 Ga. App. 573, 269 S.E.2d 36, 1980 Ga. App. LEXIS 2291 (1980).

Question whether the plaintiff received certain foreign bills of exchange drawn by the defendants, payable to the plaintiff's order, from the defendants on their credit as the drawers thereof or on the credit of the proceeds of the plaintiff's own cotton shipped and sold by the defendants as the plaintiff's agents was a question to be decided by the jury under the evidence in the case. Jones v. J.W. Lathrop & Co., 44 Ga. 398, 1871 Ga. LEXIS 393 (1871).

Contract may, depending upon the facts and circumstances, be impliedly one with the agent in the agent's individual capacity. What was the understanding of both parties is a question of fact to be decided by the jury under the circumstances of each case. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334, 1966 Ga. App. LEXIS 982 (1966); Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977).

Negotiable instruments after negotiation. — This section does not control when a negotiable paper, complete on its face, appears to have been negotiated in the fair and usual course of trade; nor, on such a paper as this, is the question to whom credit was given one of fact to be decided by the jury. Bedell v. Scarlett, 75 Ga. 56, 1885 Ga. LEXIS 69 (1885).

Sealed instruments or agreements to be individually bound. — Omitting cases of contracts under seal, negotiable instruments, and those when there is an express declaration in writing of an intention and agreement on the part of an agent to be individually bound, usually when the agent contracts in the agent's own name, but with the agent's principal known, the question as to whether the principal or the agent individually is bound is one of fact. Phinizy v. Bush, 129 Ga. 479, 59 S.E. 259, 1907 Ga. LEXIS 491 (1907).

Allegations not raising issue of who is bound. — When the plaintiff's pleading showed on its face that the agency of the president was known and that credit was extended to the principal, and there being no allegation that credit was expressly extended to the agent, there was no issue which required submission to the jury. Bank of Univ. v. Hamilton, 78 Ga. 312, 1886 Ga. LEXIS 237 (1886).

When agency was shown, there was no issue which required submission to the

jury in the absence of allegations that credit was expressly extended to the agent, or that the authority assumed by the agents was unauthorized. Ross v. Grinalds, 86 Ga. App. 180, 71 S.E.2d 294, 1952 Ga. App. LEXIS 909 (1952).

Jury Instructions

Instruction on section should use "expressly" or refer to parties' understanding. — In charging this section, the court neither used the word "expressly" nor any equivalent language, nor did the court refer in clear terms to the understanding of both parties. The amplification which was requested orally would have supplied the omission and ought to have been incorporated into the charge. Fleming v. Hill, 62 Ga. 751, 1879 Ga. LEXIS 613 (1879).

Instruction substantially giving benefit of section. — Failure to charge this section without request was not error when accommodation endorsers in an action on a renewal note were given substantially the benefit of this contention in a charge to the jury that, should the jury find from the evidence that the endorsers signed the note sued on as officers of a corporation and not as individuals, they should find in favor of them, even though no such representative capacity appears on the face of the note. Franklin v. Sea Island Bank, 111 Ga. App. 182, 141 S.E.2d 121, 1965 Ga. App. LEXIS 913 (1965).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 213 et seq.
C.J.S.
3 C.J.S., Agency, § 557 et seq.
ALR.
Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 A.L.R. 97; 99 A.L.R. 408; 96 A.L.R.2d 208.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 A.L.R.2d 208.

Attorney's personal liability for expenses incurred in relation to services for client, 66 A.L.R.4th 256.

10-6-88. Liability on public contract.

Public agents contracting in behalf of the public shall not be individually liable on such contracts.

History.
Orig. Code 1863, § 2190; Code 1868, § 2186; Code 1873, § 2212; Code 1882, § 2212; Civil Code 1895, § 3040; Civil Code 1910, § 3612; Code 1933, § 4-407.

JUDICIAL DECISIONS

Public officials are not personally liable on authorized contracts. — Public officials are not liable personally on contracts entered into by the officials within the scope of the officials' authority. Wilson v. Strange, 235 Ga. 156, 219 S.E.2d 88, 1975 Ga. LEXIS 810 (1975).

Justices of the inferior court. — Justices of the inferior court contracting in behalf of the public are not individually liable for the payment of such contracts. Ghent v. Adams, 2 Ga. 214, 1847 Ga. LEXIS 29 (1847).

Commissioners contracting for river improvement. — Commissioners contracting for improvement on Coosa River are not individually liable for obligations assumed in that character. Tucker v. Shorter, 17 Ga. 620, 1855 Ga. LEXIS 161 (1855).

Sheriffs. — When an action is against the defendant as sheriff, to recover on a

contract made by the sheriff solely in the sheriff's capacity as sheriff and not in the sheriff's individual capacity, the plaintiff's pleading sets out no liability against the sheriff in the sheriff's individual capacity. Bowden v. Eubanks, 57 Ga. App. 414, 195 S.E. 582, 1938 Ga. App. LEXIS 617 (1938).

Members of county board of education. — Membership on a county board of education is a public office, and board members cannot be sued in their official capacity for breach of contract made on behalf of or in the name of the board. Knight v. Troup County Bd. of Educ., 144 Ga. App. 634, 242 S.E.2d 263, 1978 Ga. App. LEXIS 1718 (1978).

County school superintendents. — When a county school superintendent's actions were authorized by the county board of education, the superintendent is immune from any individual liability on a contract made on behalf of or in the name of the board. Knight v. Troup County Bd. of Educ., 144 Ga. App. 634, 242 S.E.2d 263, 1978 Ga. App. LEXIS 1718 (1978).

Contract showing intent to assume personal liability. — Officials are not personally liable on contracts entered into by the officials within the scope of their official authority, unless the contract shows that the officials clearly intended to assume a personal liability. Bowden v. Eubanks, 57 Ga. App. 414, 195 S.E. 582, 1938 Ga. App. LEXIS 617 (1938).

Public agent may stipulate to be personally responsible. Aven v. Beckom, 11 Ga. 1, 1852 Ga. LEXIS 1 (1852).

Reason for rule. — There is a manifest distinction between contracts made with private agents and agents acting on behalf of the public as it regards their personal responsibility. The reason for the distinction is that it is not to be presumed either that the public agent means to bind oneself personally in acting as a functionary of the public or that the party dealing with the public agent in the agent's public character means to rely on the agent's individual responsibility. If individuals acting for the public are to be held individually liable upon their official contracts, few would be willing to accept any public trust or office. Ghent v. Adams, 2 Ga. 214, 1847 Ga. LEXIS 29 (1847); Aven v. Beckom, 11 Ga. 1, 1852 Ga. LEXIS 1 (1852).

Other provisions are applicable to public agents. — That public agents fall within former Code 1873, § 2186, which prohibited an agent from buying if employed to sell or selling if employed to buy, and former Code 1882, § 2187, which prohibited an agent from making a profit out of the principal's property, appeared clearly from former Code 1873, § 2212; upon the principle "inclusio unius, exclusio alterius," it applies to all agents in common. Mayor of Macon v. Huff, 60 Ga. 221, 1878 Ga. LEXIS 427 (1878).

Existence of oral contract held question of fact. — When the plaintiff contends that an oral contract existed between the plaintiff and the county school superintendent, acting either on behalf of the county board of education or individually, but the only evidence as to the oral contract is the contradicting testimony of the plaintiff and the superintendent, a question of fact exists which must be resolved by the jury. Knight v. Troup County Bd. of Educ., 144 Ga. App. 634, 242 S.E.2d 263, 1978 Ga. App. LEXIS 1718 (1978).

RESEARCH REFERENCES

Am. Jur. 2d.

63C Am. Jur. 2d, Public Officers and Employees, § 342 et seq.

C.J.S.

73A C.J.S., Supp., Public Contracts, § 10.

ALR.

Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 A.L.R. 1055.

10-6-89. Contract for nonexisting principal void; right of action against purported agent.

The contract of any person or corporation who purports as agent of a nonexisting principal to bind such nonexisting principal only shall be void. Any other party to such contract who is misled thereby to his injury shall have a right of action for damages against such purported agent individually.

History.
Code 1933, § 4-410, enacted by Ga. L. 1955, p. 346, § 1.

JUDICIAL DECISIONS

Section codifies case law. — Rule holding an agent individually responsible when the agent acts for a nonexistent principal was derived from the case law and subsequently included in the statutes. West v. FDIC, 149 Ga. App. 342, 254 S.E.2d 392, 1979 Ga. App. LEXIS 3111, aff'd, 244 Ga. 396, 260 S.E.2d 89, 1979 Ga. LEXIS 1250 (1979).

Nonexistent legal entity can have no agent. Dixie Drive It Yourself Sys. v. Lewis, 78 Ga. App. 236, 50 S.E.2d 843, 1948 Ga. App. LEXIS 716 (1948).

Corporation acting under a trade name is not a nonexistent principal as a matter of law. West v. FDIC, 149 Ga. App. 342, 254 S.E.2d 392, 1979 Ga. App. LEXIS 3111, aff'd, 244 Ga. 396, 260 S.E.2d 89, 1979 Ga. LEXIS 1250 (1979).

Unauthorized foreign corporation. — Fact that a foreign corporation was unauthorized within the meaning of the Georgia Business Corporation Code (see now O.C.G.A. § 14-2-1501 et seq.) would not mean that the corporate agent was acting for a nonexistent principal. Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977).

If one contracts as agent when in fact one has no principal, one will be personally liable. Dixie Drive It Yourself Sys. v. Lewis, 78 Ga. App. 236, 50 S.E.2d 843, 1948 Ga. App. LEXIS 716 (1948).

One who assumes to act as agent for a nonexistent principal or one having no legal status renders oneself individually liable in contracts so made. Brown-Wright Hotel Supply Corp. v. Bagen, 112 Ga. App. 300, 145 S.E.2d 294, 1965 Ga. App. LEXIS 678 (1965); Don Swann Sales Corp. v. Echols, 160 Ga. App. 539, 287 S.E.2d 577, 1981 Ga. App. LEXIS 3089 (1981).

If there was a nonexistent principal within the meaning of this section, the contract is void and the agent is rendered individually liable. Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278, 1977 Ga. App. LEXIS 2290 (1977).

When the evidence supports a finding that the purported corporation is not a valid corporate entity, there is no doubt that the agent is bound by the agent's purchases on an open account. Don Swann Sales Corp. v. Echols, 160 Ga. App. 539, 287 S.E.2d 577, 1981 Ga. App. LEXIS 3089 (1981).

Purported agent liable unless other party agrees to look to somebody else. — One who professes to contract as agent for another, when one's purported principal is actually nonexistent, may be held personally liable on the contract, unless the other contracting party agrees to look to some other person for performance. Hagan v. Asa G. Candler, Inc., 189 Ga. 250, 5 S.E.2d 739, 1939 Ga. LEXIS 683 (1939); Dixie Drive It Yourself Sys. v. Lewis, 78 Ga. App. 236, 50 S.E.2d 843, 1948 Ga. App. LEXIS 716 (1948).

Other party's knowledge of principal's nonexistence. — One who professes to contract as agent is personally liable on the contract if, unknown to the other party, one's purported principal is actually nonexistent; however, the agent is not liable when the third person has knowledge of the nonexistence of the

principal or when there is an agreement or understanding to the contrary. Hagan v. Asa G. Candler, Inc., 59 Ga. App. 587, 1 S.E.2d 693, 1939 Ga. App. LEXIS 367, aff'd, 189 Ga. 250, 5 S.E.2d 739, 1939 Ga. LEXIS 683 (1939).

Contract for rental of two automobiles, signed "Hapeville High School, John G. Lewis, Principal," when both parties knew that the high school had no legal entity, was the individual undertaking of the principal. Dixie Drive It Yourself Sys. v. Lewis, 78 Ga. App. 236, 50 S.E.2d 843, 1948 Ga. App. LEXIS 716 (1948).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am. Jur. 2d, Agency, § 277.
C.J.S.
2A C.J.S., Agency, § 395.
ALR.
Liability on the contract of one who without authority assumes to contract for another, 42 A.L.R. 1310; 60 A.L.R. 1348.

Personal liability of one who assumes to contract as agent for a principal who is fictitious or nonexistent, 126 A.L.R. 114.

ARTICLE 5

AGENTS RECEIVING MONEYS FOR THIRD PERSONS

Cross references.
Duties and liabilities of banks and trust companies receiving money for transmission, § 7-1-354.

RESEARCH REFERENCES

ALR.
Check on bank as payment of debts held by bank for collection, 18 A.L.R. 537; 65 A.L.R. 1151.

Liability of principal for amount of fraudulent excess collection by agent, 46 A.L.R. 1212.

10-6-100. Bond to be posted by agent in business of receiving cash for payment to third persons; exceptions.

Any person, corporation, partnership, association, or any other entity which engages in the business of receiving cash from patrons as payment of obligations owed by such patrons to third parties, with the understanding that such person, corporation, partnership, association, or other entity will act as agent of the patron in making payment directly to the third party must, as a condition to engaging in such a business, post a bond as security in the amount of $50,000.00 with the clerk of the superior court in the county in which its principal place of business is located; provided, however, that no such bonding requirement need be met by any person, corporation, partnership, association, or other entity who or which handles or administers fewer than 20 payments per month; provided, further, that no such bonding requirement need be met by any person, corporation, partnership, association, or other entity who or which has received written authorization from a third party to act as agent for the third party. Written authorization to the agent from one or more third parties does not relieve the agent from posting the security bond as required by this Code section if the agent

is receiving 20 or more cash payments owed to one or more other third parties from whom no written authorization has been received.

History.
Code 1933, § 84-6901, enacted by Ga. L. 1976, p. 558, § 1.

RESEARCH REFERENCES

ALR.
Check on bank as payment of debts held by bank for collection, 18 A.L.R. 537; 65 A.L.R. 1151.

Liability of principal for amount of fraudulent excess collection by agent, 46 A.L.R. 1212.

10-6-101. Right to restitution from bond; agent's civil liability or criminal responsibility to patron not affected.

Failure of any such agent to pay over moneys in accordance with lawful instructions or agreement shall entitle the third party to whom payment should have been made to restitution of moneys entrusted and not so paid over from such posted bond to the extent of the amount thereof; provided, however, that no payment on bond made in accordance with this article shall relieve any agent of any civil liability to the patron for sums misappropriated or not properly paid over or of any criminal liability for fraud, theft, conversion, breach of fiduciary duty, or other offense.

History.
Code 1933, § 84-6902, enacted by Ga. L. 1976, p. 558, § 2.

RESEARCH REFERENCES

C.J.S.
2A C.J.S., Agency, § 373 et seq.

ALR.
Check on bank as payment of debts held by bank for collection, 18 A.L.R. 537; 65 A.L.R. 1151.

Liability of principal for amount of fraudulent excess collection by agent, 46 A.L.R. 1212.

Embezzlement by independent collector or collection agency working on commission or percentage, 56 A.L.R.2d 1156.

Liability of collection agency for failure to pursue claim, 76 A.L.R.2d 1155.

Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 A.L.R.3d 880.

10-6-102. Penalties for failure to post bond.

Any person who fails to post a bond as required under this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $300.00 nor more than $3,000.00, or by imprisonment for not more than six months, or both.

History.
Code 1933, § 84-9994, enacted by Ga. L. 1976, p. 558, § 3.

ARTICLE 6

OVERSEERS

10-6-120. Overseer's duties and powers.

In the absence of the employer, the overseer stands in his place. It shall be his duty to see to the sustenance and protection of his employer's property; and to discharge the duty, he shall be justified in repelling aggressors and trespassers to the same extent as the employer.

History.
Orig. Code 1863, § 2193; Code 1868, § 2189; Code 1873, § 2215; Code 1882, § 2215; Civil Code 1895, § 3043; Civil Code 1910, § 3615; Code 1933, § 4-501.

JUDICIAL DECISIONS

Section does not make overseer purchasing agent. — This section is not to be construed as conferring upon an overseer implied legal authority to act as a purchasing agent so as to bind the overseer's employer. Render v. Hill Bros., 30 Ga. App. 239, 117 S.E. 258, 1923 Ga. App. LEXIS 367 (1923).

Overseer's statement as to fence admissible to prove adverse possession. — By virtue of former Code 1868, §§ 2189 and 3721, the statement of the overseer of defendant, who was in possession on the land and managing the defendant's property for the defendant as the defendant's agent, as to the reason why a fence was located in a peculiar manner, was admissible to prove the adverse possession of the defendant. Doe v. Roe, 46 Ga. 593, 1872 Ga. LEXIS 128 (1872).

RESEARCH REFERENCES

ALR.
Right to eject customer from store, 33 A.L.R. 421.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6.

10-6-121. Parol contract between employer and overseer.

Contracts between employers and overseers may be by parol, though they may extend beyond a year from the time of the contract.

History.
Orig. Code 1863, § 2195; Code 1868, § 2190; Code 1873, § 2216; Code 1882, § 2216; Civil Code 1895, § 3044; Civil Code 1910, § 3616; Code 1933, § 4-502.

Cross references.
Statute of frauds, § 13-5-30 et seq.

RESEARCH REFERENCES

ALR.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, or oral employment contract for more than one year but specifically made terminable upon death of either party, 88 A.L.R.2d 701.

ARTICLE 7

FINANCIAL POWER OF ATTORNEY

10-6-140 through 10-6-142. [Reserved]

History.

Ga. L. 1995, p. 1171, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 1999, p. 485, §§ 3, 4; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 579, § 3/SB 131; repealed by Ga. L. 2017, p. 435, § 1-1/HB 221, effective July 1, 2017.

Cross references.

Uniform power of attorney, § 10-6B-1 et seq.

Editor's notes.

Ga. L. 2017, p. 435, § 1-1/HB 221 repealed and reserved this article, effective July 1, 2017.

CHAPTER 6A

BROKERAGE RELATIONSHIPS IN REAL ESTATE TRANSACTIONS

Sec.	
10-6A-1.	Short title.
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10-6A-9.	Duration of relationships between brokers and clients; conflict between duties owed to clients and customers.
10-6A-10.	Duties of brokers to prospective clients; limitations on brokerage agreements; exceptions.
10-6A-11.	Creation of relationship not determined by payment or promise of compensation.
10-6A-12.	Broker acting as dual agent.
10-6A-13.	Exclusive representation; company policies; actual knowledge; confidentiality.
10-6A-14.	Ministerial acts explained; required actions of transaction brokers; false information.
10-6A-15.	Affiliation with common source information company.
10-6A-16.	Regulation.

Cross references.
Real Estate Brokers and Salespersons, § 43-40-1 et seq.

Administrative rules and regulations.
Licensure and Brokerage, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Real Estate Commission, Rule 520-1-.01.

Law reviews.
For note on 1993 enactment of this chapter, see 10 Ga. St. U.L. Rev. 23 (1993).

RESEARCH REFERENCES

Am. Jur. 2d.
12 Am. Jur. 2d, Brokers, §§ 55 et seq., 101 et seq.

Am. Jur. Proof of Facts.
Diminished Property Value Due to Environmental Contamination, 33 POF3d 163.

C.J.S.
12 C.J.S., Brokers, §§ 1 et seq., 104 et seq.

10-6A-1. Short title.

This chapter shall be known and may be cited as the "Brokerage Relationships in Real Estate Transactions Act."

History.
Code 1981, § 10-6A-1, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1;

Ga. L. 2024, p. 1052, § 2(50)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "known and" for "known as and" in this Code section.

Law reviews.

For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).

JUDICIAL DECISIONS

Propriety of summary judgment. — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. Ikola v. Schoene, 264 Ga. App. 338, 590 S.E.2d 750, 2003 Ga. App. LEXIS 1477 (2003).

Client's summary judgment motion was properly denied; the absence of a written agreement between a real estate broker and a client did not preclude the broker from seeking to recover compensation under the remedies found outside the scope of the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., including those at common law. Killearn Partners, Inc. v. Southeast Props., 279 Ga. 144, 611 S.E.2d 26, 2005 Ga. LEXIS 222 (2005).

Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. Ben Farmer Realty, Inc. v. Owens, 286 Ga. App. 678, 649 S.E.2d 771, 2007 Ga. App. LEXIS 768 (2007), cert. denied, No. S07C1820, 2008 Ga. LEXIS 81 (Ga. Jan. 7, 2008).

Scope. — Silence in the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., as to when or under what circumstances a real estate agent may assert a claim for payment owed in exchange for services rendered or whether a written agreement must exist before an agent may claim such payment demonstrates that the Georgia legislature did not intend for the Act to regulate real estate commissions or remuneration payments; rather, the Act is concerned primarily with the question of whether and under what circumstances a client or a customer relationship arises and what duties are owed within the context of each. Killearn Partners, Inc. v. Southeast Props., 279 Ga. 144, 611 S.E.2d 26, 2005 Ga. LEXIS 222 (2005).

Act is not exclusive remedy, common law claims remain. — Nothing in the text of the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., provides for the act to be the exclusive remedy; therefore, even in the absence of a written brokerage engagement as defined under the act, a broker may nevertheless recover for the value of the broker's services under common law theories of quantum meruit or as the procuring cause. Killearn Partners, Inc. v. Southeast Props., Inc., 266 Ga. App. 508, 597 S.E.2d 578, 2004 Ga. App. LEXIS 425 (2004), aff'd, 279 Ga. 144, 611 S.E.2d 26, 2005 Ga. LEXIS 222 (2005), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Remedies outside of act's scope not foreclosed. — Nothing in the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., indicates that the Georgia General Assembly intended to foreclose the

availability of remedies outside the Act's scope, including those available under statute and at common law. Killearn Partners, Inc. v. Southeast Props., 279 Ga. 144, 611 S.E.2d 26, 2005 Ga. LEXIS 222 (2005).

10-6A-2. Legislative findings; chapter as basis for private rights of actions and defenses.

(a) The General Assembly finds, determines, and declares that application of the common law of agency to the relationships between real estate brokers and persons who are sellers, buyers, landlords and tenants of rights and interests in real property has resulted in misunderstandings and consequences that have been contrary to the best interests of the public; the General Assembly further finds, determines, and declares that the real estate brokerage industry has a significant impact upon the economy of the State of Georgia and that it is in the best interests of the public to provide codification of the relationships between real estate brokers and consumers of brokerage services in order to prevent detrimental misunderstandings and misinterpretations of such relationships by both consumers and real estate brokers and thus promote and provide stability in the real estate market. The provisions of this chapter are enacted to govern the relationships between sellers, landlords, buyers, tenants, and real estate brokers and their affiliated licensees to the extent not governed by specific written agreements between and among the parties.

(b) The General Assembly further finds, determines, and declares that the provisions of this chapter are not intended to prescribe or affect the contractual relationships as between real estate brokers and the broker's affiliated licensees.

(c) The provisions of this chapter may serve as a basis for private rights of action and defenses by sellers, buyers, landlords, tenants, and real estate brokers.

History.

Code 1981, § 10-6A-2, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1993, "General Assembly" was substituted for "general assembly" at the first instance of the term in subsection (a).

JUDICIAL DECISIONS

No breach of duties. — Trial court did not err in dismissing the buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the

agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777, 2011 Ga. App. LEXIS 733 (2011).

10-6A-3. Definitions.

As used in this chapter, the term:

(1) "Agency" means every relationship in which a real estate broker acts for or represents another as a client by the latter's written authority in a real property transaction.

(2) "Broker" means any individual or entity issued a broker's real estate license by the Georgia Real Estate Commission pursuant to Chapter 40 of Title 43. The term "broker" includes the broker's affiliated licensees except where the context would otherwise indicate.

(3) "Brokerage" means the business or occupation of a real estate broker.

(4) "Brokerage engagement" means a written contract wherein the seller, buyer, landlord, or tenant becomes the client of the broker and promises to pay the broker a valuable consideration or agrees that the broker may receive a valuable consideration from another in consideration of the broker producing a seller, buyer, tenant, or landlord ready, able, and willing to sell, buy, or rent the property or performing other brokerage services.

(5) "Brokerage relationship" means the agency and nonagency relationships which may be formed between the broker and the broker's clients and customers, as described in this chapter.

(6) "Client" means a person who is being represented by a real estate broker in an agency capacity pursuant to a brokerage engagement.

(7) "Common source information companies" means any person, firm, or corporation that is a source, compiler, or supplier of information regarding real estate for sale or lease and other data and includes but is not limited to multiple listing services.

(8) "Customer" means a person who is not being represented by a real estate broker in an agency capacity pursuant to a brokerage engagement but for whom a broker may perform ministerial acts in a real estate transaction pursuant to either a verbal or written agreement.

(9) "Designated agent" means one or more licensees affiliated with a broker who are assigned by the broker to represent solely one client to the exclusion of all other clients in the same transaction and to the exclusion of all other licensees affiliated with the broker.

(10) "Dual agent" means a broker who simultaneously has a client relationship with both seller and buyer or both landlord and tenant in the same real estate transaction.

(11) "Material facts" means those facts that a party does not know, could not reasonably discover, and would reasonably want to know.

(12) "Ministerial acts" means those acts described in Code Section 10-6A-14 and such other acts which do not require the exercise of the broker's or the broker's affiliated licensee's professional judgment or skill.

(12.1) "Option to enter into a brokerage engagement" means a written contract wherein a broker pays valuable consideration or agrees that a seller, buyer, landlord, or tenant may receive a valuable consideration from another in consideration of such seller, buyer, landlord, or tenant granting such broker an exclusive right to enter into a brokerage engagement with such seller, buyer, landlord, or tenant during the term of the written contract.

(13) "Timely" means a reasonable time under the particular circumstances.

(14) "Transaction broker" means a broker who has not entered into a client relationship with any of the parties to a particular real estate transaction and who performs only ministerial acts on behalf of one or more of the parties, but who is paid valuable consideration by one or more parties to the transaction pursuant to a verbal or written agreement for performing brokerage services.

History.

Code 1981, § 10-6A-3, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2002, p. 415, § 10; Ga. L. 2023, p. 255, § 3/SB 90, effective January 1, 2024.

Amendments.

The 2023 amendment, effective January 1, 2024, added paragraph (12.1).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1993, the subsection (a) designation was deleted from the beginning, as there is no subsection (b).

Law reviews.

For annual survey of real property law, see 68 Mercer L. Rev. 231 (2016).

JUDICIAL DECISIONS

Written agreement required. — Trial court erred in denying the appellants' motion for summary judgment in a negligence action because a written agreement was explicitly required under the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., the listing agreement terminated without either party entering into an extension or another written agreement and, therefore, appellee's status, as a matter of law, was no longer

that of a client to whom appellants owed any duty. Starks v. Carver, 360 Ga. App. 366, 861 S.E.2d 193, 2021 Ga. App. LEXIS 353 (2021).

Business brokers. — O.C.G.A. § 10-6A-4(a), regarding a broker's legal relationship to customers or clients, which is in derogation of common law and must therefore be limited in strict accordance with its language, applies only to real estate brokers, not to business brokers, under O.C.G.A. § 10-6A-3. Bienert v. Dickerson, 276 Ga. App. 621, 624 S.E.2d 245, 2005 Ga. App. LEXIS 1335 (2005).

Reasonable care exercised by real estate broker. — Trial court erred in denying motions for directed verdict and judgment notwithstanding the verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property when the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in locating a property owner and checking on the status of desired property pursuant to § 10-6A-3. Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892, 2008 Ga. App. LEXIS 654 (2008).

Brokerage agreement. — Real estate broker was not entitled to recover a commission from buyers who elected not to close because the required brokerage agreement under O.C.G.A. § 10-6A-3(4) had the pertinent commission paragraph stricken and, thus, did not advise the buyers that any commission had to be paid under O.C.G.A. § 10-6A-10(3); although the broker sought to rely on, inter alia, an FMLS listing indicating the commission, that particular document was unsigned and indicated no assent to any contractual terms. Pargar, LLC v. Jackson, 294 Ga. App. 882, 670 S.E.2d 547, 2008 Ga. App. LEXIS 1353 (2008).

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777, 2011 Ga. App. LEXIS 733 (2011).

10-6A-4. Broker's legal relationship to customers or clients.

(a) A broker who performs brokerage services for a client or customer shall owe the client or customer only the duties and obligations set forth in this chapter, unless the parties expressly agree otherwise in a writing signed by the parties. A broker shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party but shall only be responsible for exercising reasonable care in the discharge of its specified duties as provided in this chapter and, in the case of a client, as specified in the brokerage engagement.

(b) Whenever a broker with an existing brokerage relationship with either a customer or a client enters into a new brokerage relationship

with the customer or client, the broker shall timely disclose that fact and the new brokerage relationship to all brokers, customers, or clients involved in the contemplated real estate transaction.

History.
Code 1981, § 10-6A-4, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.

JUDICIAL DECISIONS

Home buyer's breach of contract claim against realtor. — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion as to the homebuyer's fraudulent concealment claim. Ikola v. Schoene, 264 Ga. App. 338, 590 S.E.2d 750, 2003 Ga. App. LEXIS 1477 (2003).

Real estate broker owes no fiduciary duty to a client. Instead, the broker is only responsible for exercising reasonable care in the discharge of the broker's specified duties. Resnick v. Meybohm Realty, Inc., 269 Ga. App. 486, 604 S.E.2d 536, 2004 Ga. App. LEXIS 983 (2004), cert. denied, No. S05C0166, 2005 Ga. LEXIS 76 (Ga. Jan. 10, 2005).

Potential buyer did not have a viable common law cause of action for fraud and deceit against a real estate broker and a real estate agent because, as set forth in O.C.G.A. § 10-6A-4(a), no confidential or fiduciary relationship was created between the buyer and the broker and the agent as a matter of law. Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892, 2008 Ga. App. LEXIS 654 (2008).

Trial court erred in denying motions for directed verdict and judgment notwithstanding the verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property since the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in locating a property owner and checking on the status of desired property pursuant to § 10-6A-3. Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892, 2008 Ga. App. LEXIS 654 (2008).

Issue as to whether broker exercised reasonable care. — Trial court erred in granting the brokerage firm's motion for summary judgment because the undisputed facts showed that the seller rejected the offer because the firm failed to timely submit an updated proof of funds and a material issue existed as to whether the failure to do so was due to the broker's failure to exercise reasonable care in timely disclosing to the buyer the final deadline for submission of the proof of funds. RZI Properties, LLC v. Southern REO Associates, LLC, 336 Ga. App. 336, 782 S.E.2d 731, 2016 Ga. App. LEXIS 83 (2016).

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a

broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777, 2011 Ga. App. LEXIS 733 (2011).

Business brokers. — O.C.G.A. § 10-6A-4(a), regarding a broker's legal relationship to the customers or the clients, which is in derogation of common law and must therefore be limited in strict accordance with its language, applies only to real estate brokers, not to business brokers, under O.C.G.A. § 10-6A-3. Bienert v. Dickerson, 276 Ga. App. 621, 624 S.E.2d 245, 2005 Ga. App. LEXIS 1335 (2005).

RESEARCH REFERENCES

C.J.S.
12 C.J.S., Brokers, § 83.

10-6A-5. Duties and responsibilities of broker engaged by seller.

(a) A broker engaged by a seller shall:

(1) Perform the terms of the brokerage engagement made with the seller;

(2) Promote the interests of the seller by:

(A) Seeking a sale at the price and terms stated in the brokerage engagement or at a price and terms acceptable to the seller; provided, however, that the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract of sale, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the seller, even when the property is subject to a contract of sale;

(C) Disclosing to the seller material facts which the broker has actual knowledge concerning the transaction;

(D) Advising the seller to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the seller has or may have an interest;

(3) Exercise reasonable skill and care in performing the duties set forth in this subsection and such other duties, if any, as may be agreed to by the parties in the brokerage engagement;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker dur-

ing the course of the engagement which is made confidential by an express request or instruction from the seller unless the seller permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a seller shall timely disclose the following to all parties with whom the broker is working:

(1) All adverse material facts pertaining to the physical condition of the property and improvements located on such property including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer; and

(2) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions. Nothing in this subsection shall be deemed to create any duty on the part of a broker to discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood. Brokers shall not knowingly give prospective buyers false information; provided, however, that a broker shall not be liable to a buyer for providing false information to the buyer if the broker did not have actual knowledge that the information was false and discloses to the buyer the source of the information. Nothing in this subsection shall limit any obligation of a seller under any applicable law to disclose to prospective buyers all adverse material facts actually known by the seller pertaining to the physical condition of the property nor shall it limit the obligation of prospective buyers to inspect and to familiarize themselves with potentially adverse conditions related to the physical condition of the property, any improvements located on the property, and the neighborhood in which the property is located. No cause of action shall arise on behalf of any

person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a seller in a real estate transaction may provide assistance to the buyer by performing ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the seller nor shall performing such ministerial acts for the buyer be construed to form a brokerage engagement with the buyer.

(d) A broker engaged by a seller does not breach any duty or obligation by showing alternative properties to prospective buyers.

History.

Code 1981, § 10-6A-5, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2024, p. 1052, § 2(51)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subparagraph (a)(2)(A).

JUDICIAL DECISIONS

Seller disclosure form provided by agent. — Form disclosure statement provided by a real estate agent to the buyer plainly stating that the representations the statement contained were solely those of the seller was insufficient to form the basis for a claim of fraud because the statement was simply relaying information to the buyer without actual knowledge of the alleged falsity. ReMax North Atlanta v. Clark, 244 Ga. App. 890, 537 S.E.2d 138, 2000 Ga. App. LEXIS 886 (2000).

Buyer's claim against seller's agents barred because buyer did not exercise diligence. — Buyer's claim under Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., against the sellers' real estate agent and the employer failed because the buyer did not exercise diligence in determining the boundaries of the property; the buyer could have easily ascertained the actual property lines, and the buyer was unable to recover from the agents based upon any alleged failure to disclose information. Peacock v. Kiser, 272 Ga. App. 83, 611 S.E.2d 747, 2005 Ga. App. LEXIS 221 (2005).

No fraud shown by agent. — Trial court erred in denying a real estate agent's motion for summary judgment in an action against the agent by the home purchasers, alleging that the agent committed fraud by failing to disclose the defective nature of the home's septic system as there was no evidence that the broker had actual knowledge of any defect in the septic system, nor that the agent had breached the obligations under O.C.G.A. § 10-6A-5(b)(1); even if the septic system was defective, the agent could not be held liable. Dasher v. Davis, 274 Ga. App. 788, 618 S.E.2d 728, 2005 Ga. App. LEXIS 833 (2005), cert. denied, No. S05C2042, 2006 Ga. LEXIS 59 (Ga. Jan. 17, 2006).

Because a purchaser failed to act diligently, the purchaser was unable to recover from real estate agents or a broker

based upon any alleged failure on the agents part to disclose information about property the purchaser bought from sellers under the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq. Shaw v. Robertson, 307 Ga. App. 337, 705 S.E.2d 210, 2010 Ga. App. LEXIS 1077 (2010), cert. denied, No. S11C0636, 2011 Ga. LEXIS 375 (Ga. Apr. 26, 2011).

Plaintiff's Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., claim failed as the plaintiff was told of the structural defects, and the defects were discoverable by a reasonably diligent inspection. Atlanta Partners Realty, LLC v. Wohlgemuth, 365 Ga. App. 386, 878 S.E.2d 615, 2022 Ga. App. LEXIS 448 (2022).

No breach of duties. — Trial court did not err in dismissing the buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777, 2011 Ga. App. LEXIS 733 (2011).

Section imposes no special duties regarding pets. — O.C.G.A. §§ 10-6A-5, 10-6A-14, 43-40-15(a), and 43-40-25(b)(25) and related Code sections fail to impose any duties regarding pets other than the general duty to exercise reasonable skill and care in performing all duties; thus, a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed. Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848, 2004 Ga. App. LEXIS 925 (2004), cert. denied, No. S04C1918, 2004 Ga. LEXIS 904 (Ga. Oct. 12, 2004).

Independent contractor. — Because the home buyers failed to show that a realty company knew of the drainage and flooding issues associated with their property, but instead claimed that the company was liable for negligence or negligent misrepresentation for failure to oversee the sales transaction and failure to oversee the listing agent because the company did not comply with the requirements of O.C.G.A. § 43-40-18 and Ga. Comp. R. & Regs. 520-1-.10(4), the realty company was not liable for the acts of the listing agent as the listing agent was an independent contractor, and the homebuyers failed to present any evidence that the realty company assumed the right to control the time, manner, or method of the work. Walker v. Johnson, 278 Ga. App. 806, 630 S.E.2d 70, 2006 Ga. App. LEXIS 353 (2006), overruled in part, Kleber v. City of Atlanta, 291 Ga. App. 146, 661 S.E.2d 195, 2008 Ga. App. LEXIS 396 (2008).

Disclosure of material information. — In an action involving a defect in a home's septic system, the home buyers' agent was not entitled to summary judgment on a Brokerage Relationship in Real Estate Transactions Act (BRETA), O.C.G.A. § 10-6A-1 et seq., claim because while notice to the buyers' agent was notice to the buyers under O.C.G.A. § 10-6-58, a disputed issue existed as to whether the buyers' agent actually disclosed the information as required by O.C.G.A. § 10-6A-5(b)(1) regarding the second pumping of the septic tank to the buyers. Davis v. Silvers, 295 Ga. App. 103, 670 S.E.2d 805, 2008 Ga. App. LEXIS 1217 (2008).

10-6A-6. Duties of broker engaged by landlord.

(a) A broker engaged by a landlord shall:

(1) Perform the terms of the brokerage engagement made with the landlord;

(2) Promote the interests of the landlord by:

(A) Seeking a tenant at the price and terms stated in the brokerage engagement or at a price and terms acceptable to the landlord; provided, however, that the broker shall not be obligated to seek additional offers to lease the property while the property is subject to a lease, or letter of intent to lease, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the landlord, even when the property is subject to a lease or a letter of intent to lease;

(C) Disclosing to the landlord adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the landlord to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the landlord has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties in the brokerage agreement;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the landlord unless the landlord permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a landlord shall timely disclose to prospective tenants with whom the broker is working:

(1) All adverse material facts pertaining to the physical condition of the property and improvements located on the property including, but not limited to, material defects in the property, environmental

contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the tenant; and

(2) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the tenant upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions. Nothing in this subsection shall be deemed to create any duty on the part of a broker to discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood. Brokers shall not knowingly give prospective tenants false information; provided, however, that a broker shall not be liable to a tenant for providing false information to the tenant if the broker did not have actual knowledge that the information was false and discloses to the tenant the source of the information. Nothing in this subsection shall limit any obligation of the landlord under any applicable law to disclose to prospective tenants all adverse material facts actually known by the landlord pertaining to the physical condition of the property nor shall it limit the obligation of prospective tenants to inspect and to familiarize themselves with potentially adverse conditions in the physical condition of the property, any improvements located on the property, and the surrounding neighborhood. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a landlord in a real estate transaction may provide assistance to the tenant by performing such ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the landlord nor shall performing such ministerial acts for the tenant be construed to form a brokerage engagement with the tenant.

(d) A broker engaged by a landlord does not breach any duty or obligation by showing alternative properties to prospective tenants.

History.
Code 1981, § 10-6A-6, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2024, p. 1052, § 2(52)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subparagraph (a)(2)(A).

10-6A-7. Duties of broker engaged by buyer.

(a) A broker engaged by a buyer shall:

(1) Perform the terms of the brokerage engagement made with the buyer;

(2) Promote the interests of the buyer by:

(A) Seeking a property at a price and terms acceptable to the buyer; provided, however, that the broker shall not be obligated to seek other properties for the buyer while the buyer is a party to a contract to purchase property, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the buyer, even when the buyer is a party to a contract to purchase property;

(C) Disclosing to the buyer adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the buyer to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the buyer has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the buyer unless the buyer permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures

between a broker and any of the broker's affiliated licensees assisting the broker in representing the buyer shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a buyer shall timely disclose to a prospective seller with whom the broker is working as a customer and who is selling property which will be financed either by a loan assumption or by the seller's providing a part or all of the financing all material adverse facts actually known by the broker concerning the buyer's financial ability to perform the terms of the sale and, in the case of a residential transaction, the buyer's intent to occupy the property as a principal residence. Brokers shall not knowingly give prospective sellers false information; provided, however, that a broker shall not be liable to a seller for providing false information to the seller if the broker did not have actual knowledge that the information was false and discloses to the seller the source of the information. Nothing in this subsection shall limit the obligation of the prospective buyer under any applicable law to disclose to the prospective seller all adverse material facts actually known by the buyer concerning the buyer's financial ability to perform the terms of the sale and, in the case of a residential transaction, the buyer's intent to occupy the property as a principal residence. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a buyer in a real estate transaction may provide assistance to the seller by performing ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the buyer nor shall performing such ministerial acts for the seller be construed to form a brokerage engagement with the seller.

(d) A broker engaged by a buyer does not breach any duty or obligation by showing properties in which the buyer is interested to other prospective buyers.

History.

Code 1981, § 10-6A-7, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2024, p. 1052, § 2(53)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subparagraph (a)(2)(A).

JUDICIAL DECISIONS

Propriety of summary judgment. — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. Ikola v. Schoene, 264 Ga. App. 338, 590 S.E.2d 750, 2003 Ga. App. LEXIS 1477 (2003).

Breach of duty not shown. — Trial court properly dismissed a homebuyer's claim that the buyer's real estate agent breached the agent's duties under a brokerage agreement by suppressing an inspection report which showed problems with a house the buyer purchased, and by falsely stating that other offers had been made on the house. Even though there was a gas leak in the house that ignited, there was no evidence that the agent knew about the leak or that the agent lied to the buyer about other offers the seller received. Resnick v. Meybohm Realty, Inc., 269 Ga. App. 486, 604 S.E.2d 536, 2004 Ga. App. LEXIS 983 (2004), cert. denied, No. S05C0166, 2005 Ga. LEXIS 76 (Ga. Jan. 10, 2005).

10-6A-8. Duties of broker engaged by tenant.

(a) A broker engaged by a tenant shall:

(1) Perform the terms of the brokerage engagement made with the tenant;

(2) Promote the interests of the tenant by:

(A) Seeking a property to lease at a price and terms acceptable to the tenant; provided, however, that the broker shall not be obligated to seek other properties for the tenant while the tenant is a party to a lease or a letter of intent to lease unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the tenant, even when the tenant is a party to a lease or a letter of intent to lease;

(C) Disclosing to the tenant adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the tenant to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the tenant has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the tenant unless the tenant permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a tenant shall timely disclose to a prospective landlord with whom the broker is working all adverse material facts actually known by the broker concerning the tenant's financial ability to perform the terms of the lease or letter of intent to lease or intent to occupy the property. Brokers shall not knowingly give prospective landlords false information; provided, however, that a broker shall not be liable to a landlord for providing false information to the landlord if the broker did not have actual knowledge that the information was false and the broker discloses to the landlord the source of the information. Nothing in this subsection shall limit any obligation of the prospective tenant under any applicable law to disclose to a prospective landlord all adverse material facts actually known by the tenant concerning the tenant's financial ability to perform the terms of the lease or letter of intent to lease or intent to occupy the property. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a tenant in a real estate transaction may provide assistance to the landlord by performing such ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the tenant nor shall performing such ministerial acts for the landlord be construed to form a brokerage engagement with the landlord.

(d) A broker engaged by a tenant does not breach any duty or obligation by showing properties in which the tenant is interested to other prospective tenants.

History.

Code 1981, § 10-6A-8, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2024, p. 1052, § 2(54)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted

"however, that" for "however," in subparagraph (a)(2)(A).

10-6A-9. Duration of relationships between brokers and clients; conflict between duties owed to clients and customers.

(a) The relationships set forth in Code Sections 10-6A-4 through 10-6A-8, Code Section 10-6A-12, Code Section 10-6A-13, and an option to enter into a brokerage engagement shall commence at the time that the client engages the broker or executes an option to enter into a brokerage engagement, and shall continue until:

(1) Completion of performance of the engagement; or

(2) If paragraph (1) of this subsection is not applicable, then the earlier of:

(A) Any date of expiration agreed upon by the parties in the brokerage engagement, the option to enter into a brokerage engagement, or in any amendments thereto;

(B) Any authorized termination of the relationship; or

(C) If no expiration is provided and no authorized termination has occurred, then one year after initiation of the brokerage engagement or one year after the date the option to enter into a brokerage engagement was executed.

(b) Except as otherwise agreed in writing and as provided in subsection (a) of this Code section, a broker owes no further duties to the client after termination, withdrawal, expiration, or completion of performance of the engagement, except:

(1) To account for all moneys and property relating to the engagement; and

(2) To keep confidential all information received during the course of the engagement which was made confidential by request or instructions from the client, unless:

(A) The client permits the disclosure by subsequent word or conduct;

(B) Such disclosure is required by law; or

(C) The information becomes public from a source other than the broker.

(c) Notwithstanding any other provision to the contrary contained in this chapter, in the event a conflict arises between a broker's duty to keep the confidence of a client and the duty not to give customers false information, the broker's duty not to give false information to custom-

ers shall prevail and shall govern the broker's actions. No cause of action shall arise on behalf of any person against a broker or the broker's affiliated licensees for revealing information in compliance with this subsection.

History.

Code 1981, § 10-6A-9, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2023, p. 255, § 4/SB 90, effective January 1, 2024.

Amendments.

The 2023 amendment, effective January 1, 2024, in subsection (a), substituted the present provisions of the introductory paragraph for the former provisions, which read: "The relationships set forth in Code Sections 10-6A-4 through 10-6A-8 and Code Sections 10-6A-12 and 10-6A-13 shall commence at the time that the client engages the broker, and shall continue until:", inserted ", the option to enter into a brokerage engagement," in subparagraph (a)(2)(A), and, in subparagraph (a)(2)(C), inserted "authorized", "brokerage", and "or one year after the date the option to enter into a brokerage engagement was executed".

RESEARCH REFERENCES

C.J.S.

12 C.J.S., Brokers, § 92.

10-6A-10. Duties of brokers to prospective clients; limitations on brokerage agreements; exceptions.

(a) All brokerage engagements must:

(1) Advise the prospective client of the types of agency relationships available through the broker;

(2) Advise such prospective client of any brokerage relationships held by such broker with other parties which would conflict with any interests of the prospective client actually known to the broker but excluding the fact that the broker may be representing other sellers and landlords in selling or leasing property or that the broker may be representing other buyers and tenants in buying or leasing other property;

(3) Advise such prospective client as to the broker's compensation and whether the broker will share such compensation with other brokers who may represent other parties to the transaction in an agency capacity; and

(4) Advise the prospective client of the broker's obligations to keep information confidential under this chapter.

(b) A brokerage engagement or an option to enter into a brokerage engagement shall not:

(1) Purport to be a covenant running with the land or to be binding on future owners of interests in the subject property, except

for rights solely applicable to commercial real estate as set forth in Code Section 44-14-602;

(2) Allow for assignment of the right to provide service without notice and agreement of the owner of the subject property, except for such rights of assignment for commercial real estate as set forth in Code Section 44-14-602 or as part of the sale or merger of a brokerage firm; or

(3) Purport to create a recordable lien, encumbrance, or other real property security interest. Any such lien, encumbrance, or other real property security interest, if recorded, shall be void and unenforceable and no release or voiding of such lien, encumbrance, or other real property security interest shall be required; provided, however, that this subsection shall not be applicable to lien rights solely applicable to commercial real estate as set forth in Code Section 44-14-602.

(c) This Code section shall not apply to:

(1) A home warranty, building warranty, or other similar product that covers the cost of maintenance of a home's or other building's system or systems for a prescribed period of time from the date such home or building is sold;

(2) An insurance contract;

(3) An option to purchase, a put requirement to purchase, a right of first offer, or a right of refusal;

(4) A declaration created in the formation of a common interest community or an amendment thereto;

(5) A maintenance or repair agreement entered into by a homeowners' or property owners' association in a common interest community;

(6) A loan or a commitment to make or receive a loan secured by real estate;

(7) A security agreement under the Uniform Commercial Code relating to the sale or rental of personal property or fixtures;

(8) Water, sewer, electrical, telephone, cable, or other regulated utility service providers; or

(9) A property management agreement by which the owner of the real property shall contract with a party to provide management services for the maintenance, ownership, operation, or lease of real property, provided that the real estate that is the subject of the property management agreement is either for commercial real estate as defined by Code Section 44-14-601 or is for residential one-to four-family real estate that is otherwise not occupied by the owner or

owner's family members as their principal place of residence and place of abode as of the date of inception of such property management agreement.

(d) This Code section shall not be construed to impair the rights granted by Code Sections 44-14-361, 44-14-361.1, 44-14-602, and 9-12-80.

(e) This Code section shall not be construed to create any statutory lien right or statutory right to create a cloud on title that is not otherwise created elsewhere in the Official Code of Georgia Annotated.

History.
Code 1981, § 10-6A-10, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2023, p. 255, § 5/SB 90, effective January 1, 2024.

Amendments.
The 2023 amendment, effective January 1, 2024, designated the existing provisions of this Code section as subsection (a) and added subsections (b) through (e).

JUDICIAL DECISIONS

Brokerage agreement failed to advise of commission. — Real estate broker was not entitled to recover a commission from buyers who elected not to close because the required brokerage agreement under O.C.G.A. § 10-6A-3(4) had the pertinent commission paragraph stricken and, thus, did not advise the buyers that any commission had to be paid under O.C.G.A. § 10-6A-10(3); although the broker sought to rely on, inter alia, an FMLS listing indicating the commission, that particular document was unsigned and indicated no assent to any contractual terms. Pargar, LLC v. Jackson, 294 Ga. App. 882, 670 S.E.2d 547, 2008 Ga. App. LEXIS 1353 (2008).

10-6A-11. Creation of relationship not determined by payment or promise of compensation.

The payment or promise of payment of compensation to a broker by a seller, landlord, buyer, or tenant shall not determine whether a brokerage relationship has been created between any broker and a seller, landlord, buyer, or tenant.

History.
Code 1981, § 10-6A-11, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.

10-6A-12. Broker acting as dual agent.

(a) A broker may act as a dual agent only with the written consent of all clients. Such written consent shall contain the following:

(1) A description of the transactions or types of transactions in which the broker will serve as a dual agent;

(2) A statement that, in serving as a dual agent, the broker represents two clients whose interests are or at times could be different or even adverse;

(3) A statement that a dual agent will disclose all adverse material facts relevant to the transaction and actually known to the dual agent to all parties in the transaction except for information made confidential by request or instructions from another client which is not allowed to be disclosed by this Code section or required to be disclosed by this Code section;

(4) A statement that the broker or the broker's affiliated licensees will timely disclose to each client in a real estate transaction the nature of any material relationship the broker and the broker's affiliated licensees have with the other clients in the transaction other than that incidental to the transaction. For the purposes of this Code section, a material relationship shall mean any actually known personal, familial, or business relationship between the broker or the broker's affiliated licensees and a client which would impair the ability of the broker or affiliated licensees to exercise fair and independent judgment relative to another client;

(5) A statement that the client does not have to consent to the dual agency; and

(6) A statement that the consent of the client has been given voluntarily and that the engagement has been read and understood.

(b) Upon the client signing a written consent meeting the requirements of this Code section, the consent of the client to dual agency shall conclusively be deemed to have been given and informed.

(c) No cause of action shall arise on behalf of any person against a dual agent for making disclosures allowed or required by this chapter and the dual agent does not terminate any agency by making such allowed or required disclosures.

(d) In the case of dual agency, each client and broker and their respective licensees possess only actual knowledge and information. There shall be no imputation of knowledge or information among or between the clients, brokers, or their affiliated licensees.

(e) In any transaction, a broker may without liability withdraw from representing a client who has not consented to a disclosed dual agency at any time prior to the existence of the dual agency. Such withdrawal shall not prejudice the ability of the broker to continue to represent the other client in the transaction, nor limit the broker from representing the client in other transactions not involving a dual agency. When such withdrawal as contemplated in this subsection occurs, the broker may receive a referral fee for referring a client to a broker employed by a different real estate brokerage firm.

(f) Every broker shall develop and enforce an office brokerage relationship policy among affiliated licensees which either specifically

permits or rejects the practice of disclosed dual agency, which office brokerage relationship policy shall be disclosed pursuant to Code Section 10-6A-10 and paragraph (1) of subsection (a) of this Code section.

History. Code 1981, § 10-6A-12, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.

RESEARCH REFERENCES

C.J.S.
12 C.J.S., Brokers, § 125.

10-6A-13. Exclusive representation; company policies; actual knowledge; confidentiality.

(a) A broker may assign directly or through the adoption of a company policy different licensees affiliated with the broker as designated agents to exclusively represent different clients in the same transaction. In addition, the broker may delegate such assignment responsibility to other management level personnel acting under a company policy. Any company policy adopted to fulfill the requirements of this subsection shall contain provisions reasonably calculated to ensure each client is represented in accordance with the requirements of this chapter. A designated agent of a seller, landlord, buyer, or tenant shall owe his or her client the duties set forth in Code Section 10-6A-5, 10-6A-6, 10-6A-7, or 10-6A-8 of this chapter, respectively.

(b) If a broker appoints different designated agents in accordance with subsection (a) of this Code section, neither the broker, the broker's licensees, nor the real estate brokerage firm shall be deemed to be dual agents.

(c) When designated agents are appointed in accordance with subsection (a) of this Code section, the broker, the clients, and the designated agents shall be considered to possess only actual knowledge and information; there shall be no imputation of knowledge or information between and among the broker, the designated agents, and the clients. Designated agents shall not disclose, except to the designated agent's broker, information made confidential by request or instruction of the client whom the designated agent is representing, except information allowed to be disclosed by this Code section or required to be disclosed by this chapter. Unless required to be disclosed by law, the broker of a designated agent shall not reveal confidential information it receives from either the designated agent or the client with whom the designated agent is working. For the purposes of this Code section, confidential information shall be deemed to be any information the disclosure of which has not been consented to by the client that could harm the negotiating position of the client.

(d) The designation of one or more of a broker's affiliated licensees as designated agents shall not permit the disclosure by the broker or any of the broker's affiliated licensees of any information made confidential by an express request or instruction by a party prior to the creation of the designated agency. The broker and the broker's affiliated licensees shall continue to maintain such confidential information unless the party from whom the confidential information was obtained permits such disclosure by subsequent word or conduct, or such disclosure is required by law. No liability shall be created as a result of a broker and the broker's affiliated licensee's compliance with this subsection.

History.
Code 1981, § 10-6A-13, enacted by Ga. L. 2000, p. 929, § 1.
Editor's notes.
Ga. L. 2000, p. 929, § 1, effective July 1, 2000, renumbered former Code Section 10-6A-13 as present Code Section 10-6A-15.

RESEARCH REFERENCES

C.J.S.
12 C.J.S., Brokers, §§ 111, 118.

10-6A-14. Ministerial acts explained; required actions of transaction brokers; false information.

(a) A broker acting as a transaction broker may provide assistance to buyers, sellers, tenants, and landlords by performing ministerial acts. Examples of ministerial acts which can be performed by the transaction broker on behalf of any of the parties in a real estate transaction include without limitation the following:

(1) Identifying property for sale, lease, or exchange;

(2) Providing real estate statistics and information on property;

(3) Providing preprinted real estate form contracts, leases, and related exhibits and addenda;

(4) Acting as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;

(5) Locating architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and

(6) Identifying schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.

(b) A broker acting as a transaction broker shall do the following:

(1) Timely present all offers to and from the parties involving the sale, lease, and exchange of property;

(2) Timely account for all money and property received by the broker on behalf of a party in a real estate transaction; and

(3) Timely disclose the following to all buyers and tenants with whom the broker is working:

(A) All adverse material facts pertaining to the physical condition of the property and improvements located thereon including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer; and

(B) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; crime statistics; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions.

(c) Transaction brokers shall not knowingly give any party in a real estate transaction false information; provided, however, that a broker shall not be liable to a party for providing false information to the party if broker did not have actual knowledge that the information was false and discloses to the party the source of the information. Nothing in this subsection shall limit any obligation of a seller under any applicable law to disclose to prospective buyers all adverse material facts actually known by the seller pertaining to the physical condition of the property nor shall it limit the obligation of prospective buyers to inspect and to familiarize themselves with potentially adverse conditions related to the physical condition of the property, any improvements located thereon, and the neighborhood in which the property is located. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

History.
Code 1981, § 10-6A-14, enacted by Ga. L. 2000, p. 929, § 1; Ga. L. 2017, p. 774, § 10/HB 323.
Editor's notes.
Ga. L. 2000, p. 929, § 1, effective July 1, 2000, renumbered former Code Section 10-6A-14 as present Code Section 10-6A-16.

JUDICIAL DECISIONS

Section imposes no special duties regarding pets. — O.C.G.A. §§ 10-6A-5, 10-6A-14, 43-40-15(a), and 43-40-25(b)(25), and related Code sections fail to impose any duties regarding pets other than the general duty to exercise reasonable skill and care in performing all duties; thus, a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed. Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848, 2004 Ga. App. LEXIS 925 (2004), cert. denied, No. S04C1918, 2004 Ga. LEXIS 904 (Ga. Oct. 12, 2004).

Disclosure of water and mold damage. — In a purchaser's suit asserting fraud, rescission, breach of contract, and negligence with regard to the purchase of a townhome, the trial court properly granted summary judgment to the listing real estate agent, a listing broker, a listing brokerage, and a seller on all claims as the evidence established conclusively that a mold report that identified the water issues was disclosed to the purchaser's real estate agent (who the purchaser did not sue). However, the court found an exception to the general rule of caveat emptor with regard to the purchaser's claim asserting negligent repair against the seller and found the grant of summary judgment on that claim only was in error since the seller had superior knowledge of the water issues, failed to repair the water issues as advised by an engineer, and covered up the defects with sheetrock. Asuamah v. Haley, 293 Ga. App. 112, 666 S.E.2d 426, 2004 Ga. App. LEXIS 925 (2008).

10-6A-15. Affiliation with common source information company.

Except as may be provided in a written agreement between the parties, a broker shall not be deemed to have an agency relationship with a common source information company. No broker shall be deemed to be a subagent of any client of another broker solely by reason of membership or other affiliation by such brokers in a common source information company, including but not limited to multiple listing services.

History.
Code 1981, § 10-6A-13, enacted by Ga. L. 1993, p. 376, § 1; Code 1981, § 10-16A-15, as redesignated by Ga. L. 2000, p. 929, § 1.

10-6A-16. Regulation.

Nothing contained in this chapter shall limit the Georgia Real Estate Commission in its regulation of brokers and the broker's affiliated licensees pursuant to Chapter 40 of Title 43 and the substantive rules and regulations adopted by the commission pursuant thereto.

History.
Code 1981, § 10-6A-14, enacted by Ga. L. 1993, p. 376, § 1; Code 1981, § 10-6A-16, as redesignated by Ga. L. 2000, p. 929, § 1.

CHAPTER 6B

GEORGIA POWER OF ATTORNEY

Article 1

General Provisions

Sec.

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ARTICLE 1

GENERAL PROVISIONS

Law reviews.
For article, "The Georgia Power of Attorney Act," see 24 Ga. St. B. J. 20 (Dec. 2018).

10-6B-1. Short title.

This chapter shall be known and may be cited as the "Georgia Power of Attorney Act."

History.
Code 1981, § 10-6B-1, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 1/HB 897.

JUDICIAL DECISIONS

Attorney client privilege extended to wills not probated. — Trial court did not clearly abuse the court's discretion in concluding that the principal's will was privileged, and, therefore, granting the agent's motion for an order protecting it from production because the privilege afforded to communications between an attorney and a client extended to wills that have not been submitted to probate. Bethune v. Bethune, 363 Ga. App. 273, 870 S.E.2d 827, 2022 Ga. App. LEXIS 145 (2022).

10-6B-2. Definitions.

As used in this chapter, the term:

(1) "Agent" means a person granted authority to act in the place of an individual, whether denominated by such term, attorney-in-fact, or otherwise. Such term shall include a coagent, successor agent, and a person to which authority is delegated.

(2) "Durable" means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3.1) "Gift" means a transfer of property for less than adequate consideration in money or money's worth that is not a renunciation within the meaning of Code Section 53-1-20.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) Is:

(i) Missing;

(ii) Detained, including incarcerated in a penal system; or

(iii) Outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to a person to act in the place of an individual, whether or not such term is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. Such term shall include a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. Such term shall not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to a person to act in the place of such individual.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein and shall include digital assets and electronic communications, as such terms are defined in Code Section 53-13-2.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record, to execute or adopt a tangible symbol.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held

directly, indirectly, or in any other manner. Such term shall not include commodity futures contracts and call or put options on stocks or stock indexes.

History.
Code 1981, § 10-6B-2, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 2/HB 897; Ga. L. 2018, p. 1089, § 2/SB 301.

Law reviews.
For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 204 (2018).

10-6B-3. Applicability.

This chapter shall apply to all powers of attorney except:

(1) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) A power to make health care decisions, including, but not limited to, mental health care decisions;

(3) Any delegation of voting, management, or similar rights related to the governance or administration of an entity or business, including, but not limited to, delegation of voting or management rights;

(4) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose;

(5) A power created by a person other than an individual;

(6) A power that grants authority with respect to a single transaction or series of related transactions involving real estate;

(7) A power given to a transfer agent to facilitate a specific transfer or disposition of one or more identified stocks, bonds, or other financial instruments;

(8) A power authorizing a financial institution or broker-dealer, or an employee of the financial institution or broker-dealer, to act as agent for the account owner in executing trades or transfers of cash, securities, commodities, or other financial assets in the regular course of business;

(9) Powers of attorney provided for under Titles 19 and 33; and

(10) As set forth in Code Section 10-6B-81.

History.
Code 1981, § 10-6B-3, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 3/HB 897; Ga. L. 2020, p. 377, § 2-10/HB 865; Ga. L. 2022, p. 611, §

2-1/HB 752; Ga. L. 2024, p. 1052, § 2(55)/SB 448, effective July 1, 2024.

Amendments.

The 2022 amendment, effective July 1, 2022, added ", including but limited to, mental health care decisions" at the end of paragraph (2).

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "including, but not limited" for "including but limited" in paragraph (2).

Law reviews.

For article, "HB 752: Psychiatric Advance Directive Act," see 39 Ga. St. U.L. Rev. 191 (2022).

10-6B-4. Power of attorney is durable.

A power of attorney created under this chapter shall be durable unless it expressly provides that it is terminated by the incapacity of the principal.

History.

Code 1981, § 10-6B-4, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-5. Execution of power of attorney.

(a) A power of attorney shall be:

(1) Signed by the principal or by another individual in such principal's presence at the principal's express direction;

(2) Attested in the presence of the principal by a competent witness who is not also named as an agent in the power of attorney being attested; and

(3) Attested as set forth in Code Section 44-2-15, in the presence of the principal, by an individual who is not a witness for purposes of paragraph (2) of this subsection and who is not also named as an agent in the power of attorney being attested.

(b) The individuals provided for in paragraphs (2) and (3) of subsection (a) of this Code section shall not be required to attest to the signature of any person other than the principal or the individual signing at the principal's express direction.

History.

Code 1981, § 10-6B-5, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 4/HB 897; Ga. L. 2018, p. 1112, § 10/SB 365.

Editor's notes.

For application of this statute in 2020 and 2021, see Executive Orders 04.09.20.01, 06.30.21.02, 07.22.21.02, 08.19.21.02, and 09.20.21.02.

10-6B-6. Validity of power of attorney; effect of copy.

(a) A power of attorney executed in this state on or after July 1, 2017, shall be valid if its execution complies with Code Section 10-6B-5.

(b) A power of attorney executed other than in this state shall be

valid in this state if, when the power of attorney was executed, the execution complied with:

(1) The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Code Section 10-6B-7; or

(2) The requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, in effect on February 1, 2018.

(c) Except as otherwise provided by law other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney shall have the same effect as the original; provided, however, that when recording a power of attorney in connection with a conveyance involving real property, a power of attorney shall be in a form that complies with Part 1 of Article 1 of Chapter 2 of Title 44.

History.
Code 1981, § 10-6B-6, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 5/HB 897.

10-6B-7. Controlling law.

The meaning and effect of a power of attorney shall be determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

History.
Code 1981, § 10-6B-7, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-8. Nomination of conservator; relationship of agent to court-appointed fiduciary; finding of incapacity.

(a) In a power of attorney, a principal may nominate a conservator of the principal's estate for consideration by the court if protective proceedings for the principal's estate are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

(b) Unless expressly provided otherwise by the power of attorney or ordered otherwise by the court appointing the conservator, if, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, then the appointment of a conservator or other fiduciary shall terminate all or part of the power of attorney that relates to the matters within the scope of the conservatorship or management by another fiduciary. If such power of attorney does not wholly terminate, the agent shall be accountable to the conservator or other fiduciary as well as to the principal.

(c) If the court orders the power of attorney shall not terminate, the court may impose upon the power of attorney or agent such terms and conditions as it determines are in the best interest of the principal.

(d) A finding by a court that a principal is incapacitated for purposes of this chapter shall neither constitute a determination of nor create a presumption regarding such principal's need for a guardian or conservator under Title 29.

History. Code 1981, § 10-6B-8, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 6/HB 897.

10-6B-9. When power of attorney effective.

(a) A power of attorney shall be effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney shall become effective upon a certification in a writing or other record by:

(1) A physician or licensed psychologist determining that the principal has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(2) An attorney at law, a judge, or an appropriate governmental official determining that the principal is missing, detained, including incarcerated in a penal system, or is outside the United States and unable to return.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, in effect on February 1, 2018, and applicable regulations in effect on February 1, 2018, to obtain access to the principal's health care information and communicate with the principal's health care provider.

History. Code 1981, § 10-6B-9, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 22/HB 897.

10-6B-10. Termination of power of attorney and agent's authority; third-party reliance; filing notice of revocation with clerk.

(a) A power of attorney shall terminate when:

(1) The principal dies;

(2) The principal becomes incapacitated, if the power of attorney specifically provides that it is not durable;

(3) The principal revokes the power of attorney;

(4) The principal revokes the agent's authority or the agent resigns, becomes incapacitated, or dies and the power of attorney does not provide for another agent to act under such power of attorney;

(5) The power of attorney provides that it terminates; or

(6) The purpose of the power of attorney is accomplished.

(b) An agent's authority shall terminate when:

(1) The agent resigns, becomes incapacitated, or dies;

(2) The principal revokes the agent's authority;

(3) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) The power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b) of this Code section, notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney shall not be effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, shall bind the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable shall not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, shall bind the principal and the principal's successors in interest.

(f) The execution of a power of attorney shall not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney shall be revoked or that all other powers of attorney are revoked.

(g) Nothing in this Code section shall prevent a principal who notifies an agent of the revocation of the agent's authority or power of attorney by certified mail or statutory overnight delivery from filing such notification and evidence of its receipt by the agent with the clerk of superior court in the county of the principal's domicile for the purposes of establishing such agent had knowledge of the principal's revocation.

History.
Code 1981, § 10-6B-10, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 7/HB 897.

Law reviews.
For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

10-6B-11. Designation of coagents; role of successor agent; notification of violation.

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, coagents shall exercise their authority independently.

(b)(1) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is no longer qualified to serve, has declined to serve, or dies. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent shall:

(A) Have the same authority as that granted to the original agent; and

(B) Not act until all predecessor agents have resigned, become incapacitated, are no longer qualified to serve, have declined to serve, or died.

(2) An agent who has been incapacitated for more than six months shall not resume acting as an agent pursuant to the power of attorney that created the agency during which the agent became incapacitated.

(c) Except as otherwise provided in the power of attorney and subsection (d) of this Code section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, shall not be liable for the actions of the other agent.

(d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection shall be liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

History.
Code 1981, § 10-6B-11, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 8/HB 897.

10-6B-12. Compensation.

Unless the power of attorney otherwise provides, an agent shall not be entitled to compensation for services rendered. An agent shall be entitled to reasonable reimbursement of expenses incurred in performing the acts required by the principal under the power of attorney.

History.
Code 1981, § 10-6B-12, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-13. Agent's acceptance of appointment.

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

History.
Code 1981, § 10-6B-13, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-14. Duties of agents.

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted:

(1) Appointment shall act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) Appointment shall act in good faith;

(3) Appointment shall act only within the scope of authority granted in the power of attorney; and

(4) Delegation of fiduciary powers under paragraph (7) of subsection (a) of Code Section 10-6B-40, shall have the same duties and liabilities as the principal with respect to such fiduciary powers.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) Act loyally for the principal's benefit;

(2) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving such plan is consistent with the principal's best interest based on all relevant factors, including:

(A) The value and nature of the principal's property;

(B) The principal's foreseeable obligations and need for maintenance;

(C) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) Eligibility for a benefit, a program, or assistance under a law or regulation.

(c) An agent that acts in good faith shall not be liable to any beneficiary of the principal's estate plan for failure to preserve such plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal shall not be liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent shall not be liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal shall not be liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent shall not be required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

History.
Code 1981, § 10-6B-14, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 9/HB 897.

JUDICIAL DECISIONS

Attorney client privilege extended to wills not probated. — Trial court did not clearly abuse the court's discretion in concluding that the principal's will was privileged, and, therefore, granting the agent's motion for an order protecting it from production because the privilege afforded to communications between an attorney and a client extended to wills that have not been submitted to probate. Bethune v. Bethune, 363 Ga. App. 273, 870 S.E.2d 827, 2022 Ga. App. LEXIS 145 (2022).

10-6B-15. Waivers of agent liability.

A provision in a power of attorney relieving an agent of liability for breach of duty shall be binding on the principal and the principal's successors in interest except to the extent the provision:

(1) Relieves the agent of liability for breach of duty committed in bad faith, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

History.
Code 1981, § 10-6B-15, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-16. Petition for construction of power of attorney or role of agent; reimbursement for fees and expenses.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) The principal or the agent;

(2) A guardian, conservator, personal representative, or other fiduciary acting for the principal or for the principal's estate;

(3) A person authorized to make health care decisions for the principal;

(4) The principal's spouse, parent, or descendant;

(5) An individual who would qualify as a presumptive heir of the principal;

(6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) A governmental agency having authority to protect the welfare of the principal;

(8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) A person asked to accept the power of attorney.

(b) If a petition under this Code section was in the best interest of the principal and the agent admitted to a violation of this chapter or a court found that such agent violated this chapter, a court may order the principal to reimburse the persons, other than a governmental agency, who made such petition for part or all of the reasonable attorney's fees and expenses of litigation incurred by such persons, provided that such fees and expenses were not imposed on the agent, were related to the agent's violation of this chapter, and were reasonable in the context of the agent's misconduct and the general circumstances of the principal.

(c) Upon motion by the principal, the court shall dismiss a petition filed under this Code section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

History.

Code 1981, § 10-6B-16, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 10/HB 897.

Law reviews.

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 69 Mercer L. Rev. 341 (2017).

For article with annual survey on wills, trusts, guardianships, and fiduciary administration, see 73 Mercer L. Rev. 281 (2021).

JUDICIAL DECISIONS

Attorney client privilege extended to wills not probated. — Trial court did not clearly abuse the court's discretion in concluding that the principal's will was privileged, and, therefore, granting the agent's motion for an order protecting it from production because the privilege afforded to communications between an attorney and a client extended to wills that have not been submitted to probate. Bethune v. Bethune, 363 Ga. App. 273, 870 S.E.2d 827, 2022 Ga. App. LEXIS 145 (2022).

10-6B-17. Agent's liability to principal.

An agent that violates this chapter shall be liable to the principal or the principal's successors in interest for the amount required to:

(1) Restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

History.
Code 1981, § 10-6B-17, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-18. Resignation of agent.

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) To the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(2) If there is no person described in paragraph (1) of this Code section, to:

(A) The principal's caregiver; or

(B) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare.

History.
Code 1981, § 10-6B-18, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-19. Acceptance of and reliance upon attested power of attorney; request for additional information.

(a) As used in this Code section, the term "attested power of attorney" means a power of attorney that was purportedly attested as set forth in Code Section 44-2-15.

(b) A person that in good faith accepts an attested power of attorney

without actual knowledge that the signature is not genuine may rely upon the presumption under Code Section 10-6B-5 that the signature is genuine.

(c) A person that in good faith accepts an attested power of attorney without actual knowledge that such power of attorney is void, invalid, or terminated; that the purported agent's authority is void, invalid, or terminated; or that the agent is exceeding or improperly exercising the agent's authority may rely upon such power of attorney as if it were genuine, valid, and still in effect; the agent's authority were genuine, valid, and still in effect; and the agent had not exceeded and had properly exercised the authority.

(d) A person that is asked to accept an attested power of attorney may request, and rely upon, without further investigation:

(1) An agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or such power of attorney;

(2) An English translation of such power of attorney if it contains, in whole or in part, language other than English; and

(3) An opinion of an attorney as to any matter of law concerning such power of attorney if the person making the request provides in a writing or other record the reason for the request.

(e) An English translation or an opinion of an attorney requested under this Code section shall be provided at the principal's expense unless the request is made more than seven business days after an attested power of attorney is presented for acceptance.

(f) For purposes of this Code section, a person that conducts activities through employees shall be without actual knowledge of a fact relating to an attested power of attorney, a principal, or an agent if the employee conducting the transaction involving such power of attorney is without actual knowledge of the fact.

History. Code 1981, § 10-6B-19, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 11/HB 897.

10-6B-20. Liability for refusal to accept power of attorney.

(a) As used in this Code section, the term:

(1) "Attested statutory form power of attorney" means a statutory form power of attorney that was purportedly attested as set forth in Code Section 44-2-15.

(2) "Statutory form power of attorney" means a power of attorney:

(A) Substantially in the form set forth in Code Section 10-6B-70;

(B) That meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, in effect on February 1, 2018; or

(C) That substantially reflects the language in the form set forth in Code Section 10-6B-70.

(b) For purposes of:

(1) Subparagraph (a)(2)(C) of this Code section, a power of attorney shall be deemed to substantially reflect the language in the form set forth in Code Section 10-6B-70 if it:

(A) Grants or withholds authority for each of the descriptive terms for the subjects described in Code Sections 10-6B-43 through 10-6B-56, either by reference to the descriptive terms or citation to the specific Code sections;

(B) Grants or withholds authority for each of the powers described in subsection (a) of Code Section 10-6B-40, either by reference to the powers or citation to such subsection; and

(C) Contains a provision substantially similar to the following: "Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person has actual knowledge it has terminated or is invalid."; and

(2) Subparagraphs (1)(A) and (1)(B) of this subsection, a power of attorney shall be deemed to satisfy the requirement to grant authority with respect to a subject described in Code Sections 10-6B-43 through 10-6B-56 and a power described in subsection (a) of Code Section 10-6B-40, so long as it grants some authority with respect to such subject or power and regardless of whether it modifies the authority granted with respect to such subject or power under Code Sections 10-6B-43 through 10-6B-56 and subsection (a) of Code Section 10-6B-40.

(c) Except as otherwise provided in subsection (d) of this Code section:

(1) A person shall either accept an attested statutory form power of attorney or request a certification, a translation, or an opinion of an attorney under subsection (d) of Code Section 10-6B-19 no later than seven business days after presentation of such power of attorney for acceptance;

(2) If a person requests a certification, a translation, or an opinion of an attorney under subsection (d) of Code Section 10-6B-19, the person shall accept the attested statutory form power of attorney no later than five business days after receipt of the certification, translation, or opinion of an attorney; and

(3) A person shall not require an additional or different form of the attested statutory form power of attorney for authority granted in the document presented.

(d) A person shall not be required to accept an attested statutory form power of attorney if:

(1) The person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) The person has actual knowledge of the termination of the agent's authority or of such power of attorney before exercise of such power of attorney;

(4) A request for a certification, a translation, or an opinion of an attorney under subsection (d) of Code Section 10-6B-19 is refused;

(5) The person in good faith believes that such power of attorney is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of an attorney under subsection (d) of Code Section 10-6B-19 has been requested or provided; or

(6) The person makes, or has actual knowledge that another person has made, a report to protective services as such term is defined in Code Section 30-5-1 stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(e) A person that refuses to accept an attested statutory form power of attorney in violation of this Code section shall be subject to:

(1) A court order mandating acceptance of such power of attorney; and

(2) Liability for reasonable attorney's fees and expenses of litigation incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of such power of attorney.

(f) For purposes of this Code section, a person that conducts activities through employees shall be without actual knowledge of a fact relating to an attested statutory form power of attorney, a principal, or an agent if the employee conducting the transaction involving such power of attorney is without actual knowledge of the fact.

History. Code 1981, § 10-6B-20, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 12/HB 897.

Law reviews.
For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

10-6B-21. Principles of law and equity.

Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.

History.
Code 1981, § 10-6B-21, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-22. Laws applicable to financial institutions and entities.

(a) This chapter shall not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this chapter.

(b) This chapter shall not supersede the Bank Secrecy Act of 1970, 31 U.S.C. Section 5311, in effect on February 1, 2018, and the corresponding regulations thereto, in effect on February 1, 2018.

History.
Code 1981, § 10-6B-22, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 22/HB 897.

10-6B-23. Rights and remedies under other law.

The remedies under this chapter shall not be exclusive and shall not abrogate any right or remedy under the laws of this state other than this chapter.

History.
Code 1981, § 10-6B-23, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

ARTICLE 2

AUTHORITY OF AGENT

Law reviews.
For annual survey on wills, trusts, guardianships, and fiduciary administration, see 69 Mercer L. Rev. 341 (2017).

For article, "The Georgia Power of Attorney Act," see 24 Ga. St. B. J. 20 (Dec. 2018).

RESEARCH REFERENCES

Am. Jur. 2d.
3 Am Jur. 2d, Agency, § 17 et seq.

10-6B-40. Agent authority that requires specific grant; granting of general authority; prohibited authorizations; petitions for authority.

(a)(1) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(A) Create, fund, amend, revoke, or terminate an inter vivos trust, other than a trust created pursuant to 42 U.S.C. Section 1396p(d)(4)(B) as provided under subsection (d) of Code Section 53-12-20;

(B) Make a gift;

(C) Create or change rights of survivorship;

(D) Create or change a beneficiary designation;

(E) Authorize another person to exercise authority granted under the power of attorney;

(F) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

(G) Exercise fiduciary powers, other than those associated with an ownership interest as provided under paragraph (14) of Code Section 10-6B-48, that the principal has authority to delegate;

(H) Exercise authority over the content of electronic communications, as such term is defined in Code Section 53-13-2, sent or received by the principal; or

(I) Renounce an interest in property, including a power of appointment.

(2) A failure to grant authority under subparagraphs (1)(A) through (1)(D) of this subsection shall not prevent an agent from accessing information, depositing money, or withdrawing money, pursuant to the agent's other authority and in accordance with the agent's duties to the principal, from a revocable trust or an account or other banking arrangement with a bank or other financial institution.

(b) Notwithstanding a grant of authority:

(1) To do an act described in subsection (a) of this Code section, unless the power of attorney otherwise provides, an agent that is not

an ancestor, spouse, or descendant of the principal, shall not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise; and

(2) To exercise a fiduciary power described in subparagraph (a)(1)(G) of this Code section, an agent may only exercise those fiduciary powers of the principal that are expressly and clearly identified in the power of attorney. In identifying such fiduciary powers, the principal shall specify the persons for which the principal acts as a fiduciary. If such persons are not individuals, the principal shall specify only the estate, trust, or other legal or commercial entity for which the principal acts as a fiduciary. With respect to such an entity, the principal shall not be required to specify additional persons such as beneficiaries, members, partners, or other similar persons.

(c) Subject to subsections (a), (b), (d), and (e) of this Code section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Code Sections 10-6B-43 through 10-6B-55.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift shall be subject to Code Section 10-6B-56.

(e) Subject to subsections (a), (b), and (d) of this Code section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority shall control.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney shall have the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

(h) A power of attorney shall not authorize an agent to:

(1) Execute or revoke any will or codicil for the principal;

(2) Make an affidavit as to the personal knowledge of the principal; or

(3) Vote in any public election on behalf of the principal.

(i) An agent under a power of attorney that does not expressly grant the agent the authority to do an act described in paragraph (1) of

subsection (a) of this Code section or Code Sections 10-6B-43 through 10-6B-55 may petition the court for authority to do such act that is reasonable under the circumstances.

History.

Code 1981, § 10-6B-40, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 13/HB 897; Ga. L. 2018, p. 1089, § 3/SB 301; Ga. L. 2019, p. 1056, § 10/SB 52; Ga. L. 2020, p. 377, § 2-11/HB 865.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2018, the amendment of paragraph (a)(1)(H) (former paragraph (a)(8)) of this Code section by Ga. L. 2018, p. 520, § 13/HB 897, was treated as impliedly repealed and superseded by Ga. L. 2018, p. 1089, § 3/SB 301, due to irreconcilable conflict.

Law reviews.

For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 204 (2018).

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

For article with annual survey on wills, trusts, guardianships, and fiduciary administration, see 73 Mercer L. Rev. 281 (2021).

JUDICIAL DECISIONS

Authority to convey property. — Trial court properly granted plaintiff summary judgment on the issue of defendant's authority to convey the decedent's property to herself because the record contained no indication that defendant was related to the decedent and the power of attorney contained no language expressly granting defendant the authority to create in herself an interest in the decedent's property. Lawson v. Weidman Two Cases, 370 Ga. App. 35, 895 S.E.2d 314, 2023 Ga. App. LEXIS 543 (2023).

10-6B-41. References to general authority in powers of attorney; modifications.

(a) An agent shall have authority described in this article if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Code Sections 10-6B-43 through 10-6B-56 or cites the Code section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject stated in Code Sections 10-6B-43 through 10-6B-56 or a citation to a specific Code section in Code Sections 10-6B-43 through 10-6B-56 shall incorporate the entire Code section as if it were set out in full in the power of attorney.

(c) A principal may modify authority incorporated by reference.

History.

Code 1981, § 10-6B-41, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-42. Construction of authority of agent generally.

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Code Sections 10-6B-43 through 10-6B-56 or that grants to an agent authority to do all acts that a principal could do pursuant to subsection (c) of Code Section 10-6B-40, a principal shall authorize the agent, with respect to that subject, to:

(1) Demand, receive, and obtain by litigation or otherwise, money or any other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) Execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) Seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) Engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(7) Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a law or regulation;

(8) Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

(9) Except as otherwise provided under federal privacy laws, access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means;

(10) Exercise all authority over digital assets for which an express grant by the principal is not required; and

(11) Do any lawful act with respect to the subject and all property related to the subject.

History. Code 1981, § 10-6B-42, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 14/HB 897.

10-6B-43. Real property.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property shall authorize the agent to:

(1) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) Pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) Insuring against liability or casualty or other loss;

(B) Obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with such taxes or assessments; and

(D) Purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) Selling or otherwise disposing of them;

(B) Exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) Exercising any voting rights in person or by proxy;

(8) Change the form of title of an interest in or right incident to real property; and

(9) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

History.
Code 1981, § 10-6B-43, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-44. Tangible personal property.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property shall authorize the agent to:

(1) Demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) Release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

(5) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) Insuring against liability or casualty or other loss;

(B) Obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with such taxes or assessments;

(D) Moving the property from place to place;

(E) Storing the property for hire or on a gratuitous bailment; and

(F) Using and making repairs, alterations, or improvements to the property; and

(6) Change the form of title of an interest in tangible personal property.

History.
Code 1981, § 10-6B-44, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-45. Stocks and bonds.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds shall authorize the agent to:

(1) Buy, sell, and exchange stocks and bonds;

(2) Establish, continue, modify, or terminate an account with respect to stocks and bonds;

(3) Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(4) Receive certificates and other evidences of ownership with respect to stocks and bonds; and

(5) Exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

History.
Code 1981, § 10-6B-45, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-46. Commodities and options.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options shall authorize the agent to:

(1) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(2) Establish, continue, modify, and terminate option accounts.

History.
Code 1981, § 10-6B-46, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-47. Banks and other financial institutions.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions shall authorize the agent to:

(1) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) Enter a safe deposit box or vault and withdraw or add to the contents;

(7) Borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(8) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) Receive for the principal and act upon a sight draft, warehouse receipt, or other document of title, whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) Apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

History. Code 1981, § 10-6B-47, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 1112, § 10/SB 365.

10-6B-48. Operation of entity or business.

Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business shall authorize the agent to:

(1) Operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) Enforce the terms of an ownership agreement;

(4) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(5) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) With respect to an entity or business owned solely by the principal:

(A) Continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) Determine:

(i) The location of its operation;

(ii) The nature and extent of its business;

(iii) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) The amount and types of insurance carried; and

(v) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) Put additional capital into an entity or business in which the principal has an interest;

(9) Join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) Sell or liquidate all or part of an entity or business;

(11) Establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments;

(13) Pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney; and

(14) Exercise the principal's fiduciary powers associated with an ownership interest.

History. Code 1981, § 10-6B-48, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 15/HB 897.

10-6B-49. Insurance and annuities.

Unless the power of attorney otherwise provides, language in a power

of attorney granting general authority with respect to insurance and annuities shall authorize the agent to:

(1) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

(3) Pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) Apply for and receive a loan secured by a contract of insurance or annuity;

(5) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) Exercise an election;

(7) Exercise investment powers available under a contract of insurance or annuity;

(8) Change the manner of paying premiums on a contract of insurance or annuity;

(9) Change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this Code section;

(10) Apply for and procure a benefit or assistance under a law or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) Collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) Select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) Pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of such tax or assessment.

History.
Code 1981, § 10-6B-49, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-50. Estates, trusts, and other beneficial interests.

(a) As used in this Code section, the term "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests shall authorize the agent to:

(1) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) Demand or obtain money or any other thing of value to which the principal is, may become, or claims to be entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) Exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) Conserve, invest, disburse, or use anything received for an authorized purpose;

(7) Create, amend, and revoke a revocable trust so long as the terms of the trust only authorize distributions that would be allowable under the power of attorney if the principal held the trust assets outright and provide for the distribution of all trust assets to the principal's estate upon the principal's death;

(8) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor or as described in paragraph (7) of this Code section; and

(9) With respect to a bona fide dispute, consent to a reduction in or

modification of a share in or payment from an estate, trust, or other beneficial interest.

History. Code 1981, § 10-6B-50, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 16/HB 897; Ga. L. 2018, p. 1112, § 10/SB 365.

10-6B-51. Claims and litigation.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation shall authorize the agent to:

(1) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or any other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) Submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or any other thing of value;

(8) Pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) Receive money or any other thing of value paid in settlement of or as proceeds of a claim or litigation.

History.
Code 1981, § 10-6B-51, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-52. Personal and family maintenance.

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance shall authorize the agent to:

(1) Perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(A) The principal's minor children;

(B) The principal's adult children who are pursuing a postsecondary school education and are under 25 years of age;

(C) The principal's parents or the parents of the principal's spouse, if the principal had established a pattern of such payments or indicated a clear intent to make such payments;

(D) The principal's minor descendants who are not also the principal's children, if the principal had established a pattern of such payments or indicated a clear intent to make such payments;

(E) The principal's adult descendants who are under 25 years of age, not the principal's children, and pursuing a postsecondary school education, if the principal had established a pattern of such payments or indicated a clear intent to make such payments; and

(F) Any other individuals legally entitled to be supported by the principal;

(2) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) Provide living quarters for the individuals described in paragraph (1) of this subsection by:

(A) Purchase, lease, or other contract; or

(B) Paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for individuals described in paragraph (1) of this subsection to enable such individuals to maintain their customary standard of living;

(5) Pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (1) of this subsection;

(6) Act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, in effect on February 1, 2018, and applicable regulations in effect on February 1, 2018, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the laws of this state to consent to health care on behalf of the principal;

(7) Continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (1) of this subsection;

(8) Maintain credit and debit accounts for the convenience of the individuals described in paragraph (1) of this subsection and open new accounts; and

(9) Continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance shall be neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this chapter.

History.
Code 1981, § 10-6B-52, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, §§ 17, 22/HB 897; Ga. L. 2020, p. 377, § 2-12/HB 865.

10-6B-53. Benefits from governmental programs or civil or military service.

(a) As used in this Code section, the term "benefits from governmental programs or civil or military service" means any benefit, program, or

assistance provided under a law or regulation, including Social Security, medicare, and Medicaid.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service shall authorize the agent to:

(1) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or political subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in paragraph (1) of subsection (a) of Code Section 10-6B-52, and for shipment of their household effects;

(2) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for such purpose;

(3) Enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

(4) Prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which such principal may be entitled under a law or regulation;

(5) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a law or regulation; and

(6) Receive the financial proceeds of a claim described in paragraph (4) of this subsection and conserve, invest, disburse, or use for a lawful purpose anything so received.

History.
Code 1981, § 10-6B-53, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-54. Retirement plans.

(a) As used in this Code section, the term "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which such principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) An individual retirement account under Internal Revenue

Code Section 408, 26 U.S.C. Section 408, in effect on February 1, 2018;

(2) A Roth individual retirement account under Internal Revenue Code Section 408A, 26 U.S.C. Section 408A, in effect on February 1, 2018;

(3) A deemed individual retirement account under Internal Revenue Code Section 408(q), 26 U.S.C. Section 408(q), in effect on February 1, 2018;

(4) An annuity or mutual fund custodial account under Internal Revenue Code Section 403(b), 26 U.S.C. Section 403(b), in effect on February 1, 2018;

(5) A pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code Section 401(a), 26 U.S.C. Section 401(a), in effect on February 1, 2018;

(6) A plan under Internal Revenue Code Section 457(b), 26 U.S.C. Section 457(b), in effect on February 1, 2018; and

(7) A nonqualified deferred compensation plan under Internal Revenue Code Section 409A, 26 U.S.C. Section 409A, in effect on February 1, 2018.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans shall authorize the agent to:

(1) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) Establish a retirement plan in the principal's name;

(4) Make contributions to a retirement plan;

(5) Exercise investment powers available under a retirement plan; and

(6) Borrow from, sell assets to, or purchase assets from a retirement plan.

History. Code 1981, § 10-6B-54, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 22/HB 897.

10-6B-55. Taxes.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes shall authorize the agent to:

(1) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, in effect on February 1, 2018, closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

(2) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) Exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) Act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

History. Code 1981, § 10-6B-55, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 22/HB 897.

10-6B-56. Gifts.

(a) As used in this Code section, the term:

(1) "For the benefit of" means a gift to a trust, an account under the Uniform Transfers to Minors Act, a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529, in effect on February 1, 2018, or an ABLE account as defined under Internal Revenue Code Section 529A, 26 U.S.C. Section 529A, in effect on February 1, 2018.

(2) "Gift splitting" means the election to have a gift treated as made one-half by the transferor and one-half by the spouse pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, in effect on February 1, 2018.

(3) "Section 2503(b) amount" means the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), in effect on February 1, 2018, indexed for future years under the provisions in effect on February 1, 2018.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts shall authorize the agent only to:

(1) Make outright to, or for the benefit of, a person, a gift of any of

the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in the following amounts, without regard to whether the federal gift tax exclusion applies to the gift;

(A) If the principal is not married or is legally separated at the time of the gift, in an amount per donee not to exceed the Section 2503(b) amount; or

(B) If the principal is married and not legally separated at the time of the gift, in an amount per donee not to exceed twice the Section 2503(b) amount; and

(2) Consent to gift splitting if the principal has a spouse for purposes of gift splitting.

(c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

(1) The value and nature of the principal's property;

(2) The principal's foreseeable obligations and need for maintenance;

(3) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(4) Eligibility for a benefit, a program, or assistance under a law or regulation; and

(5) The principal's personal history of making or joining in making gifts.

History.
Code 1981, § 10-6B-56, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 18/HB 897.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2018, "a" was deleted following "means a", a comma was deleted following "Section 529, in effect on February 1," and a comma was added following "2018" in paragraph (a)(1).

ARTICLE 3

STATUTORY FORMS

10-6B-70. Form power of attorney.

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this chapter.

State of Georgia

County of _____

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in O.C.G.A. Chapter 6B of Title 10.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise in the Special Instructions, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is not entitled to any compensation unless you state otherwise in the Special Instructions. Your agent shall be entitled to reimbursement of reasonable expenses incurred in performing the acts required by you in your power of attorney.

This form provides for designation of one agent. If you wish to name more than one agent, you may name a successor agent or name a coagent in the Special Instructions. Coagents will not be required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney shall be durable unless you state otherwise in the Special Instructions.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I _____ (Name of principal) name the following person as my agent:

Name of agent: _____

Agent's address: _____

Agent's telephone number: _____

Agent's email address: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent: _____

Successor agent's address: _____

Successor agent's telephone number: _____

Successor agent's email address: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of second successor agent: _____

Second successor agent's address: _____

Second successor agent's telephone number: _____

Second successor agent's email address: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in O.C.G.A. Chapter 6B of Title 10:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects, you may initial 'all preceding subjects' instead of initialing each subject.)

( ) Real property
( ) Tangible personal property
( ) Stocks and bonds
( ) Commodities and options

( ) Banks and other financial institutions
( ) Operation of entity or business
( ) Insurance and annuities
( ) Estates, trusts, and other beneficial interests
( ) Claims and litigation
( ) Personal and family maintenance
( ) Benefits from governmental programs or civil or military service
( ) Retirement plans
( ) Taxes
( ) All preceding subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent SHALL NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. You should give your agent specific instructions in the Special Instructions when you authorize your agent to make gifts.)

( ) Create, fund, amend, revoke, or terminate an inter vivos trust
( ) Make a gift, subject to the limitations of O.C.G.A. § 10-6B-56 and any Special Instructions in this power of attorney
( ) Create or change rights of survivorship
( ) Create or change a beneficiary designation
( ) Authorize another person to exercise the authority granted under this power of attorney
( ) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
( ) Exercise authority over the content of electronic communications sent or received by the principal
( ) Exercise fiduciary powers that the principal has authority to delegate and that are expressly and clearly identified (including the persons for which the principal acts as a fiduciary) in the Special Instructions
( ) Renounce an interest in property, including a power of appointment

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant SHALL NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines (you may add lines or place your special instructions in a separate document and attach it to the power of attorney):

_____
_____
_____
_____
_____
_____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF CONSERVATOR (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:

_____

Nominee's address: _____

Nominee's telephone number: _____

Nominee's email address: _____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person has actual knowledge it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

_____ _____
Your signature Date

_____
Your name printed

_____

_____
Your address

_____
Your telephone number

_____
Your email address
This document was signed in my presence on _____,
(Date)
by _____.
(Name of principal)
_____.
(Witness's name printed)
_____
Witness's telephone number
_____
Witness's address
_____
Witness's email address
State of Georgia
County of _____
This document was signed in my presence on _____, by
(Date)
_____
(Name of principal)
_____ (Seal)
Signature of notary
My commission expires: _____
This document prepared by: _____.

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;

(2) Act in good faith;

(3) Do nothing beyond the authority granted in this power of attorney; and

(4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

_____ by _____ as Agent.
(Principal's name) (Your signature)

Unless the Special Instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;

(2) Avoid conflicts that would impair your ability to act in the principal's best interest;

(3) Act with care, competence, and diligence;

(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and

(6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) Death of the principal;

(2) The principal's revocation of your authority or the power of attorney;

(3) The occurrence of a termination event stated in the power of attorney;

(4) The purpose of the power of attorney is fully accomplished; or

(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in O.C.G.A. Chapter 6B of Title 10. If you violate O.C.G.A. Chapter 6B of Title 10 or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

History.

Code 1981, § 10-6B-70, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 19/HB 897; Ga. L. 2024, p. 1052, § 2(56)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" throughout the form.

Law reviews.

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 69 Mercer L. Rev. 341 (2017).

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

10-6B-71. Optional form for agent certification of facts.

The following optional form may be used by an agent to certify facts concerning a power of attorney.

"AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of Georgia

County of _____

I, _____ (name of agent), certify under penalty of perjury that _____ (name of principal) granted me authority as an agent or successor agent in a power of attorney dated _____.

I further certify that to my knowledge:

(1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;

(2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) If I were named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____

_____

_____

_____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

Agent's signature Date

Agent's name printed

Agent's address

Agent's telephone number

Agent's email address

This document was signed in my presence on _____, by
(Date)

(Name of agent)

(Seal)

Signature of notary

My commission expires: _____

This document prepared by: _____.

History.
Code 1981, § 10-6B-71, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 20/HB 897; Ga. L. 2024, p. 1052, § 2(57)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in this Code section.

ARTICLE 4

OTHER STATUTORY PROVISIONS

10-6B-80. Construction with federal Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but shall not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of

any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History.
Code 1981, § 10-6B-80, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221.

10-6B-81. Application of Chapter 6B.

(a) Code Section 10-6B-19 shall apply retroactively to powers of attorney created before July 1, 2018. The remainder of this chapter shall not apply to a power of attorney executed before July 1, 2017.

(b) When Code Section 10-6B-3 applies to a power of attorney, Chapter 6 of this title shall not apply to such power of attorney.

(c) When, other than Code Section 10-6B-19, this chapter does not apply to a power of attorney:

(1) It shall not affect the application of Chapter 6 of this title; and

(2) The former provisions of Article 7 of Chapter 6 of this title, as such existed on June 30, 2017, shall remain applicable.

History.
Code 1981, § 10-6B-81, enacted by Ga. L. 2017, p. 435, § 2-1/HB 221; Ga. L. 2018, p. 520, § 21/HB 897.

CHAPTER 7

SURETYSHIP

Article 1

Contract of Suretyship

Sec.

10-7-1. Contract of suretyship or guaranty defined; liability of surety generally.
10-7-2. Nature of obligation of surety.
10-7-3. Suretyship not extended by implication.
10-7-4. Form of contract immaterial.

Article 2

Relative Rights of Creditor and Surety

10-7-20. Effect of release of or compounding with surety.
10-7-21. Novation; effect.
10-7-22. Discharge of surety by increase of risk.
10-7-23. Refusal to deliver evidence of debt and securities on tender of amount of debt as discharging surety.
10-7-24. Refusal to sue principal after notice by surety as discharge.
10-7-25. Extending liability.
10-7-26. Promise to pay in ignorance of discharge.
10-7-27. Provisions of Uniform Commercial Code to control.
10-7-28. Process sued out and judgment entered against surety as such.
10-7-29. Judgment against principal and surety at same time.
10-7-30. Bad faith refusal of corporate surety to perform suretyship contract.
10-7-31. Rights of certain parties claiming protection under a payment bond or security deposit; notice of commencement of work.

Article 3

Rights of Surety Against Principal, Cosureties, and Third Persons

Sec.

10-7-40. Attachment against principal.
10-7-41. Right of surety or endorser to recover amount paid, interest, and costs.
10-7-42. Effect of judgment against surety.
10-7-43. Recovery of usury paid by surety.
10-7-44. Foreclosure of mortgage or enforcement of security given by principal.
10-7-45. Proof of suretyship by parol.
10-7-46. Proof of suretyship after judgment.
10-7-47. Control of execution and judgment by surety; subrogation to plaintiff's rights.
10-7-48. Control of execution and judgment by surety when sued separately.
10-7-49. Payment pending action; judgment for plaintiff for use of surety.
10-7-50. Compelling contribution from cosureties after paying more than equal share; effect of cosurety's insolvency.
10-7-51. Interest on sum recovered as contribution.
10-7-52. Duty to account for indemnification from principal; compelling transfer of security from principal.
10-7-53. Controlling action on debt and judgments therein against cosureties.
10-7-54. Endorser's right to control judgment on debt and execution thereon.
10-7-55. Protection of bona fide purchasers when surety controls judgment.
10-7-56. Subrogation to rights of creditor; priority of claim.

Sec.
10-7-57. Substitution in place of creditor as to securities held by creditor.

Cross references.

Powers of banks to act as sureties and guarantors, § 7-1-290.

Sureties on bonds, § 17-6-30 et seq.

Law reviews.

For article analyzing problems and obligations of parties in personal suretyship, see 5 Mercer L. Rev. 289 (1954).

For article discussing Georgia commercial law in 1976 to 1977, see 29 Mercer L. Rev. 41 (1977).

JUDICIAL DECISIONS

Compensated sureties. — Prior to 1981, this chapter was not intended to govern compensated sureties, which meant that the surety law for compensated sureties had to be found in the common law of this state. Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316, 1978 Ga. LEXIS 1021 (1978) (excluding § 10-7-30, enacted in 1973, from holding and holding § 10-7-22 states common law applicable to compensated sureties).

Corporations writing surety bonds for profit. — Compensated corporate sureties engaged in writing surety bonds for a profit were, prior to 1981, not such sureties within the meaning of this chapter as to generally enjoy the protection afforded by all of its sections. Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, 1978 Ga. App. LEXIS 1824, aff'd, 241 Ga. 460, 246 S.E.2d 316, 1978 Ga. LEXIS 1021 (1978).

Uncompensated sureties. — Persons who guaranteed payment of a note solely as an accommodation to another and not for any profit flowing to themselves were uncompensated sureties entitled as members of a favored class to the protections of this chapter. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483, 1979 Ga. LEXIS 1271 (1979).

In 1981, distinction between sureties and guarantors was abolished. — Georgia L. 1981, p. 870 amends O.C.G.A. § 10-7-1 so as to abolish the distinction between sureties and guarantors. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599, 1981 Ga. LEXIS 727 (1981).

RESEARCH REFERENCES

Am. Jur. Trials.

Handling Fidelity Bond Claims, 47 Am. Jur. Trials 411.

ARTICLE 1

CONTRACT OF SURETYSHIP

Law reviews.

For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B. J. 12 (2009).

For comment, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Comment: Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia," see 65 Mercer L. Rev. 1167 (2014).

RESEARCH REFERENCES

ALR.

Right of surety to avoid contract for fraud on principal, 3 A.L.R. 868.

Failure to pay premium on indemnity bond as terminating same, 45 A.L.R. 617.

Misrepresentations by principal obligor to surety or guarantor as affecting obligee, 71 A.L.R. 1278.

Right of sureties on bond to take advantage of noncompliance with statutory requirement as to approval of bond, 77 A.L.R. 1479.

Liability of surety company as distinguished from that of gratuitous surety, 94 A.L.R. 876.

Liability of surety on appeal or supersedeas bond as affected by death of principal before decision on appeal, 94 A.L.R. 971.

Liability of sureties on official bonds for profits realized by principal from use or investment of public funds, 104 A.L.R. 1402.

Liability of sureties as affected by actual, constructive, or asserted transfer of property or funds by fiduciary acting in one capacity to himself acting in another capacity, 111 A.L.R. 267.

Rights and liabilities of parties to bond given as condition of issuance of new corporation stock certificate, investment trust certificate, or other security in place of one lost or stolen, 112 A.L.R. 900.

Equality among claimants under indemnity or surety bond which is insufficient to pay all claimants in full, 128 A.L.R. 1096.

10-7-1. Contract of suretyship or guaranty defined; liability of surety generally.

The contract of suretyship or guaranty is one whereby a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit or indulgence or other benefit given to his principal, the principal in either instance remaining bound therefor. Sureties, including those formerly called guarantors, are jointly and severally liable with their principal unless the contract provides otherwise. There shall be no distinction between contracts of suretyship and guaranty.

History.

Orig. Code 1863, § 2125; Code 1868, § 2120; Code 1873, § 2148; Code 1882, § 2148; Civil Code 1895, § 2966; Civil Code 1910, § 3538; Code 1933, § 103-101; Ga. L. 1981, p. 870, § 1.

Cross references.

Transfer warranties, § 11-3-416.

Loan guaranties not state debt, § 20-3-269.

Law reviews.

For article contrasting guaranty with suretyship in Georgia, see 2 Ga. B. J. 25 (1939).

For article, "The Distinction Between Guaranty and Suretyship in Georgia," see 9 Ga. B. J. 273 (1947).

For comment discussing distinction between guaranty and suretyship, in light of McCallum v. Griffin, 289 F.2d 135 (5th Cir. 1961), see 24 Ga. B. J. 273 (1961).

For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For survey article citing developments in Georgia contracts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981).

For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991).

For comment, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Comment: Confirming the Enforceability of the Guaranty Agreement

After Non-Judicial Foreclosure in Georgia," see 65 Mercer L. Rev. 1167 (2014).

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General Consideration

Editor's notes. — Prior to 1981, this section was but a codification of the common law. McIntyre v. Moore, 105 Ga. 112, 31 S.E. 144 (1898); Musgrove v. Luther Publishing Co., 5 Ga. App. 279, 63 S.E. 52 (1908). The language used in it in defining the obligation of a surety was almost exactly the language of the English textbooks. Phillips v. Solomon, 42 Ga. 192, 519 (1871). However, Ga. L. 1981, p. 870, § 1, amends this section to abolish the distinction between contracts of suretyship and guaranty. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). The distinction formerly expressly made by this section was that a contract of suretyship "differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor." Many cases applied this distinction. See, for example, Wright v. Shorter, 56 Ga. 72 (1876); Manry v. Waxelbaum Co., 108 Ga. 14, 33 S.E. 701 (1899); Fields v. Willis, 123 Ga. 272, 51 S.E. 280 (1905), later appeal, 132 Ga. 242, 63 S.E. 828 (1909); Maril v. Boswell, 12 Ga. App. 41, 76 S.E. 773 (1912); Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347 (1923); Etheridge v. Rawleigh Co., 29 Ga. App. 698, 116 S.E. 903 (1923); Brock Candy Co. v. Craton, 33 Ga. App. 690, 127 S.E. 619 (1925), later appeal, 37 Ga. App. 728, 141 S.E. 916 (1928); Wilson Bros. v. Heard, 46 Ga. App. 497, 167 S.E. 913 (1933); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); Singleton v. Farmers & Merchants Bank, 55 Ga. App. 776, 191 S.E. 478 (1937); Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585 (1939); W.T. Rawleigh Co. v. Burkhalter, 59 Ga. App. 514, 1 S.E.2d 609 (1939); Cartwright v. Farmers Bank, 74 Ga. App. 847, 41 S.E.2d 818 (1947); National Bank v. Wright, 77 Ga. App. 272, 48 S.E.2d 306 (1948); Bearden v. Ebcap Supply Co., 108 Ga. App. 375, 133 S.E.2d 62 (1963); Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393 (N.D. Ga. 1967); Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978); Jackson v. First Bank, 150 Ga. App. 182, 256 S.E.2d 923 (1979); Griswold v. Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7 (1980); Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). However, this was only one of the tests to distinguish a contract of suretyship from a contract of guaranty. Schlittler & Johnson v. Deering Harvester Co., 3 Ga. App. 83, 3 Ga. App. 86, 59 S.E. 342, 1907 Ga. App. LEXIS 558 (1907); McKibben v. Luther Williams Banking Co., 32 Ga. App. 419, 123 S.E. 726, 1924 Ga. App. LEXIS 435 (1924), overruled, Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 247 S.E.2d 567, 1978 Ga. App. LEXIS 2549 (1978); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937).

The test formerly laid down in this section was not decisive. As with other

contracts, the whole matter was governed by the intention of the parties. For instance, in the usual indemnity contracts, the parties generally intended that the indemnitor should be surety, although the indemnitor received an independent consideration. And again, sometimes a contract would be construed to be one of guaranty although the guarantor received no consideration other than the benefit flowing to the guarantor's principal. Baggs v. Funderburke, 11 Ga. App. 173, 74 S.E. 937 (1912); Rawleigh Co. v. Salter, 31 Ga. App. 329, 120 S.E. 679 (1923); McKibben v. Luther Williams Banking Co., 32 Ga. App. 419, 123 S.E. 726 (1924); Whitley v. Powell, 47 Ga. App. 105, 169 S.E. 766 (1933); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); General Finance Corp. v. Welborn, 98 Ga. App. 280, 105 S.E.2d 386 (1958); McCallum v. Griffin, 289 F.2d 135 (5th Cir. 1961), commented on in 24 Ga. B.J. 273 (1961); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Scarboro v. Universal C.I.T. Credit Corp., 364 F.2d 10 (5th Cir. 1966); Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975). The fundamental distinction between a contract of guaranty and one of suretyship was said to be that in a contract of suretyship the person obligating himself to pay the debt of another was primarily, and not merely secondarily, liable for its payment. Watkins Medical Co. v. Marbach, 20 Ga. App. 691, 93 S.E. 270 (1917); Hartsfield Co. v. Robertson, 48 Ga. App. 735, 173 S.E. 201 (1934); Hartsfield Co. v. Hamil, 180 Ga. 615, 180 S.E. 128 (1935); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941); Erbelding v. Noland Co., 83 Ga. App. 464, 64 S.E.2d 218 (1951); Nichols v. Miller, 91 Ga. App. 99, 84 S.E.2d 841 (1954); Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72 (1954); Continental Cas. Co. v. White, 160 F. Supp. 611 (M.D. Ga. 1957); General Fin. Corp. v. Welborn, 98 Ga. App. 280, 105 S.E.2d 386 (1958); McCallum v. Griffin, 289 F.2d 135 (5th Cir. 1961), commented on in 24 Ga. B.J. 273 (1961); Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); Rankin v. Smith, 113 Ga. App. 204, 147 S.E.2d 649 (1966); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492 (1975); Oliver v. Citizens DeKalb Bank, 150 Ga. App. 437, 258 S.E.2d 204 (1979). While a surety rendered himself primarily responsible with the principal debtor and on the same undertaking, a guarantor became collaterally responsible by virtue of the guarantor's own separate and independent obligation, whereby, without joining in the principal's undertaking, the guarantor yet vouched for the principal's solvency by guaranteeing that the principal would be able to perform as the principal had agreed. Rawleigh Co. v. Salter, 31 Ga. App. 329, 120 S.E. 679 (1923); Hartsfield Co. v. Robertson, 48 Ga. App. 735, 173 S.E. 201 (1934); Hartsfield Co. v. Hamil, 180 Ga. 615, 180 S.E. 128 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603 (1936), aff'd, 184 Ga. 644, 192 S.E. 298 (1937); Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941); W.T. Rawleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574 (1944); Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Griswold v. Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7 (1980). Hence, it was held that waiver of presentment, protest, and notice of nonpayment of any note or other evidence of indebtedness accepted by a promisee from the principal was evidence of suretyship, as it indicated assumption of a primary, rather than secondary, obligation to pay the debt. The 1981 amendment also inserted the provision that "sureties, including those formerly called guarantors, are jointly and severally liable with their principals unless the contract provides otherwise."

General Consideration (Cont'd)

Many of the cases cited below construed or applied this Code section as it existed prior to the 1981 amendment.

Section reasonably construed. — This section must be given a reasonable and not an unreasonable construction. Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347, 1923 Ga. App. LEXIS 157 (1923).

Distinction between suretyship and guaranty has been eliminated. Johns v. Leaseway of Ga., Inc., 166 Ga. App. 472, 304 S.E.2d 555, 1983 Ga. App. LEXIS 2213 (1983); Daprano v. Sherwin-Williams Co., 166 Ga. App. 811, 305 S.E.2d 655, 1983 Ga. App. LEXIS 2340 (1983).

"Indemnity contract" is defined as an agreement between two parties, whereby the one party, the indemnitor, either agrees to indemnify and save harmless the other party, the indemnitee, from loss or damage, or binds the indemnitor to do some particular act or thing, or to protect the indemnitee against liability to, or the claim of, a third party. "Indemnity" means reimbursement, restitution, or compensation. National Bank v. Wright, 77 Ga. App. 272, 48 S.E.2d 306, 1948 Ga. App. LEXIS 531 (1948).

In a contract of indemnity the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person, or against loss resulting from such liability. The contract of the indemnitor is an original undertaking. National Bank v. Wright, 77 Ga. App. 272, 48 S.E.2d 306, 1948 Ga. App. LEXIS 531 (1948).

Trial court properly awarded damages jointly and severally against an individual representing an electrical contractor because the individual was charged with knowledge of the signature provision, whether read or not, and no violation of the statute of frauds existed because the signature provision was an assumption of the obligations under the contract or indemnity provision, not a guaranty; thus, the individual was a principal under the contract, not a guarantor. Progressive Elec. Servs. v. Task Force Construction, Inc., 327 Ga. App. 608, 760 S.E.2d 621, 2014 Ga. App. LEXIS 389 (2014).

Contracts of surety and indemnity compared. — Difference between a contract of surety and a contract of indemnity lies in the character of the promisee. In suretyship, the promise runs to an obligee or creditor, present or prospective. In indemnity, the promise runs to an obligor or debtor, present or prospective. In suretyship, the promisee has or is about to extend credit to a third person, the principal, and the promise is made to protect the promisee creditor in case the principal fails to perform. In indemnity, the promisee owes or is about to assume an obligation to a third person, the creditor, and the promisor agrees to save the promisee harmless from a loss as a result of assuming that obligation. Rankin v. Smith, 113 Ga. App. 204, 147 S.E.2d 649, 1966 Ga. App. LEXIS 1019 (1966).

Suretyship and fidelity insurance distinguished. — There is a well-recognized difference between a contract of suretyship and one of fidelity insurance. John Church Co. v. Aetna Indem. Co., 13 Ga. App. 826, 80 S.E. 1093, 1913 Ga. App. LEXIS 372 (1913).

Insurance law not applicable to suretyship contract. — Insurance law was not applicable in a case involving liability under a suretyship contract; thus, O.C.G.A. § 33-24-7 did not apply to excuse a surety from liability based on fraud of the principal. American Mfg. Mut. Ins. Co. v. Tison Hog Mkt., Inc., 182 F.3d 1284, 1999 U.S. App. LEXIS 18167 (11th Cir. 1999), cert. denied, 531 U.S. 819, 121 S. Ct. 59, 148 L. Ed. 2d 26, 2000 U.S. LEXIS 5097 (2000), cert. denied, 531 U.S. 819, 121 S. Ct. 59, 148 L. Ed. 2d 26, 2000 U.S. LEXIS 5098 (2000).

Difference between guarantee of loan and guarantee of negotiable instrument. — There is a difference between an undertaking which guarantees a loan and one which guarantees the payment of a negotiable instrument; the former covers the debt; the latter the evidence thereof. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694, 1935 Ga. App. LEXIS 476 (1935).

Principal and surety are joint and several obligors. — If an obligation,

joint in form, is executed by one party as principal and another as surety, they were to be deemed joint and several obligors since by former Code 1933, § 107-102 the obligation of the surety was an accessory to that of the principal. Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765, 1932 Ga. App. LEXIS 665 (1932).

Liability of principal is essence of suretyship. — Very essence of a contract of suretyship is that there should be someone liable as principal. This necessarily contemplates that when a note is given to purchase a store and goods, there must be at least two parties who signed the note and are liable for the payment thereof, the principal and the surety. Where only one person signed the note sued on, that person must necessarily be the principal. Jordan v. Douglas Grocery Co., 27 Ga. App. 296, 108 S.E. 139, 1921 Ga. App. LEXIS 844 (1921); Saxon v. National City Bank, 169 Ga. 784, 151 S.E. 501, 1930 Ga. LEXIS 32 (1930); Boles v. Hartsfield Co., 50 Ga. App. 442, 178 S.E. 416, 1935 Ga. App. LEXIS 354 (1935); Meeks v. Withers, 181 Ga. 787, 184 S.E. 604, 1936 Ga. LEXIS 433 (1936); Magid v. Beaver, 56 Ga. App. 286, 192 S.E. 532, 1937 Ga. App. LEXIS 334 (1937), rev'd, 185 Ga. 669, 196 S.E. 422, 1938 Ga. LEXIS 511 (1938).

Nature of liability established by guaranty terms. — Generally, a guarantor or surety is primarily liable along with the guarantor's principal to pay the debt; however, the true nature of the guarantor's liability is established by the terms of the guaranty, which may render the guarantor only secondarily liable on the principal's inability to pay, or otherwise condition or limit liability in any number of ways. Holland v. Holland Heating & Air Conditioning, 208 Ga. App. 794, 432 S.E.2d 238, 1993 Ga. App. LEXIS 688 (1993), cert. denied, No. S93C1471, 1993 Ga. LEXIS 917 (Ga. Oct. 5, 1993).

Verdict for principal extinguishes surety's liability. — Verdict in favor of the principal, on the principal's defense of failure of consideration, extinguishes ipso facto the obligation of the sureties. Schlittler & Johnson v. Deering Harvester Co., 3 Ga. App. 83, 3 Ga. App. 86, 59 S.E. 342, 1907 Ga. App. LEXIS 558 (1907).

Illegality of consideration to principal is defense to surety. — If a note was executed by one as principal and by another as surety and the consideration therefor was illegal and immoral, but this fact was unknown to the surety at the time of the execution and delivery of the note, the surety may nevertheless defend a suit thereon by showing that the note was in fact executed by the principal for such a consideration. William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269, 1918 Ga. App. LEXIS 377 (1918).

Duress of principal. — If the principal signed the obligation sought to be enforced under such duress as would release the principal from liability thereon, the duress of the principal is an available defense for the surety, if the principal signed without knowledge of the defense. Patterson v. Gibson, 81 Ga. 802, 10 S.E. 9, 1888 Ga. LEXIS 350 (1888).

If purported principal not bound, promissor is principal and not surety. — It is essential that there be a principal, and if a person undertakes that another will pay or perform, there not being any legal liability on the part of such person to pay or perform, the promissor is the principal and not a surety. Saxon v. National City Bank, 169 Ga. 784, 151 S.E. 501, 1930 Ga. LEXIS 32 (1930).

Contract of suretyship does not depend on form. — Under this section, a contract, whatever the contract's form, by which one obligates oneself to pay the debt of another in consideration of credit or indulgence or other benefit given to one's principal, the principal remaining bound for the debt, is a contract of suretyship. Buck v. Bank of Ga., 104 Ga. 660, 30 S.E. 872, 1898 Ga. LEXIS 392 (1898).

Form of the contract is immaterial, provided the fact of suretyship exists, and one may assume that relation even by an instrument separate and distinct from that of one's principal and also subsequent in time. Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492, 1975 Ga. App. LEXIS 2313 (1975).

No written instrument between creditor and surety required. — Fact that written instrument may not have been executed between the creditor and the alleged surety does not preclude the existence of a suretyship. Griswold v.

General Consideration (Cont'd)

Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7, 1980 Ga. App. LEXIS 2856 (1980).

Whether one is principal or surety determined by facts. — Whether one signs a note with another as joint principal maker or as surety merely is a question to be determined by the facts and not by the opinion that either party to the contract may entertain. Williams v. Peoples Bank, 9 Ga. App. 714, 72 S.E. 177, 1911 Ga. App. LEXIS 304 (1911).

Facts, not statements, control. — Real character of the instrument must be determined by the facts, not by the statement of the payee that the defendant did sign as principal and not as surety nor by the defendant's statement that the defendant understood the plaintiff signed as principal and not as surety. McDaniel v. Akridge, 5 Ga. App. 208, 62 S.E. 1010, 1908 Ga. App. LEXIS 67 (1908).

Purchase subject to lien does not create suretyship. — Implied promise of suretyship with the incident rights of a surety to discharge does not arise when a purchase is made merely subject to the outstanding lien of a mortgage. Nelson v. National Life & Accident Ins. Co., 51 Ga. App. 684, 181 S.E. 202, 1935 Ga. App. LEXIS 443 (1935).

Retiring partner as surety. — When a partnership is dissolved by the retirement of one of the partners and the continuing partner agrees to assume the debts of the firm, the retiring partner becomes a surety for the copartner. Stapler v. Anderson, 177 Ga. 434, 170 S.E. 498, 1933 Ga. LEXIS 195 (1933).

Drawer of bill of exchange as surety. — Contract of one who draws a domestic bill of exchange is that if the drawee does not accept, the drawer will pay, and if the drawee does not pay after acceptance, the drawer will. After acceptance, the contract of the drawer is one of suretyship. Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347, 1923 Ga. App. LEXIS 157 (1923).

Endorser held principal, not surety. — When four people owning equal undivided interests in property situated in Alabama executed in that state an instrument in writing purporting to convey such property, in trust for themselves, to a named corporation of that state as trustee, and providing for the appointment of a board of advisors to govern the estate, consisting of one representative for each of the four undivided shares and one representative of the trustee, each such member of the board to have one vote accordingly, but under the terms of the agreement the grantors reserved unto themselves or their assigns as beneficiaries the power to remove their representatives and fill vacancies, and the further power to remove the trustee through such representatives, and when the designated trustee was a bank, and before the execution of such instrument had loaned money to the grantors as individuals, and after its execution advanced additional money to itself as trustee for the benefit of the estate, and finally as trustee signed a note payable to itself for the entire indebtedness, in view of the control reserved to the beneficiaries by the trust agreement, the entity created, if any, was in the nature of a partnership, with the trustee as its agent, and endorsement by the beneficiaries of the note amounted to a ratification of the trustee's action, rendering the endorsers liable as principals, so that endorsement by one of the beneficiaries did not create the relation of surety within the meaning of the law of this state. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Set-off not guaranty. — Setoff provision was not a guaranty nor created an obligation for the appellant to answer for the appellant's son's debt. Yates v. Trust Co. Bank, 212 Ga. App. 438, 442 S.E.2d 293, 1994 Ga. App. LEXIS 299 (1994).

Persons who sign on the back of a note made by one party to another, or order, are liable as sureties or joint promisors, and the mere limitation in the term "endorser" written after the name of such a signer would not change the real status, if as a matter of fact the endorsement was to add strength to the paper and not to negotiate title. Burkhalter v. Conley, 24 Ga. App. 256, 100 S.E. 725, 1919 Ga. App.

LEXIS 533 (1919) (judgment of superior court judge).

When two people sign a note apparently as joint principals and there is nothing in the face of the note to indicate that one is principal and the other is surety, the law presumes that both are principals. This presumption is rebuttable, of course, but the burden is on those asserting suretyship to establish suretyship. United States v. Frost, 149 F. Supp. 386, 1957 U.S. Dist. LEXIS 3868 (D. Ga. 1957).

Cosurety may become such without knowledge of other sureties. — If an apparent accommodation endorser knew other apparent makers were sureties and intended to become surety for principal maker, the endorser and the other sureties were cosureties, though they signed at different times and the others had no knowledge or expectation that the endorser would become surety. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923).

Cosureties who had set forth in different instruments their separate promises to pay the debt of their principal were not joint contractors or obligors, and one cosurety was not a necessary party in a creditor's action against the other cosurety to recover a debt. Floyd Davis Sales, Inc. v. Central Mtg. Corp., 197 Ga. App. 532, 398 S.E.2d 820, 1990 Ga. App. LEXIS 1405 (1990).

Suretyship is not valid as to creditor until creditor assents. — When the grantee of property under a mortgage assumes and agrees with the mortgagor to pay the mortgage, the grantee becomes, as to the mortgagor with whom the grantee thus contracts, the principal debtor, with the result that the mortgagor thereafter occupies the position of surety; but the mortgagee is not bound by such an agreement unless one personally assents to such express assumption. Nelson v. National Life & Accident Ins. Co., 51 Ga. App. 684, 181 S.E. 202, 1935 Ga. App. LEXIS 443 (1935).

When B conveys lands to C in consideration of the assumption by C of the obligation due to A, the relationship between B and C is that of principal and surety, but so far as A is concerned, such relationship between B and C is not effective as to A unless A assents to and accepts the relationship. Federal Land Bank v. Conger, 55 Ga. App. 11, 189 S.E. 567, 1936 Ga. App. LEXIS 419 (1936).

Waiver of confirmation of foreclosure sale. — When a buyer of foreclosed properties bought the properties for less than the amounts owed, but the buyer's efforts at confirmation of the sales failed, the buyer was nevertheless entitled to pursue the guarantors of the notes on the properties for the deficiency because the guarantors had waived "any and all rights or defenses based on suretyship," and the confirmation defense under O.C.G.A. § 44-14-161(a) was based on suretyship. York v. RES-GA LJY, LLC, 336 Ga. App. 253, 784 S.E.2d 96, 2016 Ga. App. LEXIS 155 (2016), aff'd, 300 Ga. 869, 799 S.E.2d 235, 2017 Ga. LEXIS 229 (2017).

Effect of death of guarantor. — Death of a guarantor and knowledge or notice of such death to the guarantee revokes the guaranty as to future transactions, when the guaranty is a continuing one based on a divisible consideration, if the contract of guaranty itself does not express a contrary intention. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694, 1935 Ga. App. LEXIS 476 (1935).

Surety is liable for judgment against principal without being party. — When a surety is bound under a materialman's bond to pay a claim against the principal, the surety is liable for a judgment rendered against the defendant principal even though the surety was not a party in the prior case. Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121, 1976 Ga. App. LEXIS 2161 (1976).

Surety is not obligated to furnish additional collateral. — Contract being one of suretyship only, accessory to that of the principal and limited to the principal's obligation to pay the principal's debt, a bank had no legal right to demand of the surety additional collateral provided for in the instrument, and it was therefore unnecessary for it to do so as a condition precedent to declaring the note due. Chandler v. Bank of Waynesboro, 29 Ga.

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App. 5, 113 S.E. 25, 1922 Ga. App. LEXIS 5 (1922).

Surety or guarantor may consent in advance to conduct which would otherwise result in surety's discharge. Bobbitt v. Firestone Tire & Rubber Co., 158 Ga. App. 580, 281 S.E.2d 324, 1981 Ga. App. LEXIS 2319 (1981).

Agent guarantying payment jointly and severally liable on account. — Authorized agent is generally not personally liable on contracts which the agent enters into on behalf of the disclosed principal, but an agent may become a party to a contract either by the term of the agreement or by implication based on the surrounding facts and circumstances. One guarantying payment is jointly and severally liable on an account, notwithstanding the fact that one is acting as an agent for a disclosed principal. TBS, Inc. v. Sanyo Elec., Inc., 33 B.R. 996, 1983 U.S. Dist. LEXIS 13171 (N.D. Ga. 1983), aff'd, 742 F.2d 1465, 1984 U.S. App. LEXIS 19223 (11th Cir. 1984).

Corporation was not a surety on a note since the corporation's name did not appear on the face of the note and the debt was paid by the corporation to protect a co-maker's credit and not to protect any interest or right of the corporation. Levinson v. American Thermex, Inc., 196 Ga. App. 291, 396 S.E.2d 252, 1990 Ga. App. LEXIS 852 (1990).

Co-debtor was not a surety of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties that one was signing as the principal debtor and the other was signing as a surety. Johnson v. AgSouth Farm Credit, 267 Ga. App. 567, 600 S.E.2d 664, 2004 Ga. App. LEXIS 713 (2004).

Knowledge of endorser's signing as accommodation party. — Even assuming that a creditor was aware that the president of a corporation co-signed a note as a guarantor to accommodate the corporation, knowledge that the president signed as an accommodation party to guarantee the note would not relieve the president of the joint and several liability the president assumed under the terms of the note. Hassell v. First Nat'l Bank, 218 Ga. App. 231, 461 S.E.2d 245, 1995 Ga. App. LEXIS 696 (1995), cert. denied, No. S95C1878, 1995 Ga. LEXIS 1199 (Ga. Nov. 9, 1995).

When a tenant which terminated the tenant's lease early and agreed to pay the landlord the difference between the tenant's rental obligation and rent the landlord was able to obtain from a third party the tenant said this agreement was a guaranty from which the tenant had been discharged, the landlord was entitled to partial summary judgment on the landlord's breach of contract claim in the landlord's suit to enforce the agreement, because the agreement was not a guaranty subject to the discharge provisions of O.C.G.A. § 10-7-20 et seq., as the tenant did not agree to be answerable for the debt of another but, instead, agreed to continue the tenant's rental obligation to the landlord, subject to any credit the tenant might be entitled to for rent the landlord received from a third party. Equifax, Inc. v. 1600 Peachtree, L.L.C., 268 Ga. App. 186, 601 S.E.2d 519, 2004 Ga. App. LEXIS 875 (2004), cert. denied, No. S04C1871, 2004 Ga. LEXIS 866 (Ga. Sept. 27, 2004), cert. denied, No. S04C1855, 2004 Ga. LEXIS 870 (Ga. Sept. 27, 2004).

Contract of idemnity and not guaranty. — Document signed by individual owners of a masonry business in support of the business's application for a performance bond on a construction project was a contract of indemnity and not a guaranty, and the document did not fall within the statute of frauds, O.C.G.A. § 13-5-30(2); summary judgment for the bond issuer should have been granted.

Auto-Owners Ins. Co. v. CW Masonry, Inc., 350 Ga. App. 401, 829 S.E.2d 443, 2019 Ga. App. LEXIS 308 (2019).

Consideration for Obligation

Consideration for a guarantor's signature is the extension of credit to guarantor's principal. Griswold v. Whetsell, 157 Ga. App. 800, 278 S.E.2d 753, 1981 Ga. App. LEXIS 2015 (1981); Beard v. McDowell, 174 Ga. App. 793, 331 S.E.2d 104, 1985 Ga. App. LEXIS 1958 (1985).

"Benefit" means more than nominal benefit. — Word "benefit," as used in this section, means some real and substantial, and not a mere nominal, benefit. Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347, 1923 Ga. App. LEXIS 157 (1923).

Benefit to guarantor need not be direct. — If there is a consideration for the promise of the guarantor, it is immaterial whether or not the guarantor personally gets any immediate and direct benefit therefrom. Musgrove v. Luther Publishing Co., 5 Ga. App. 279, 63 S.E. 52, 1908 Ga. App. LEXIS 93 (1908).

Generally, consideration to guarantor is new or independent. — As a general proposition, a contract of guaranty must be expected to be founded on some new or independent consideration flowing directly to the guarantor. Etheridge v. Rawleigh Co., 29 Ga. App. 698, 116 S.E. 903, 1923 Ga. App. LEXIS 171 (1923).

Contract of guaranty exists if one lends one's credit for the benefit of another, but under an obligation which is separate and distinct from that of the principal debtor, by which one renders oneself secondarily or collaterally liable on account of any inability of the principal to perform one's own contract, and is supported either as an original undertaking to guarantee satisfaction for benefits to be subsequently extended to the principal or is based upon an independent consideration flowing directly to the guarantor. Except as indicated, a contract of guaranty must be expected to be founded on some new or independent consideration flowing directly to the guarantor. Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585, 1939 Ga. LEXIS 493 (1939).

Contract of guaranty, whether entered into on the same or another instrument as that of the original obligation, whether executed at the same or a different time, and whether or not purporting to be the separate obligation of the signer, must, to be enforceable, show a consideration flowing directly to the guarantor. This is because it is a separate contract, and any contract, to be enforceable, must have a consideration. Bearden v. Ebcap Supply Co., 108 Ga. App. 375, 133 S.E.2d 62, 1963 Ga. App. LEXIS 650 (1963).

Obligation of a surety may be for a previously existing obligation if there is a consideration for the execution of the instrument. Nichols v. Miller, 91 Ga. App. 99, 84 S.E.2d 841, 1954 Ga. App. LEXIS 869 (1954).

Consideration for preexisting debt is insufficient. — Whether the obligation of a person in executing a note in payment of a preexisting indebtedness of another, when the latter is not released, constitutes a contract of suretyship, the consideration for the latter's obligation will not suffice as a consideration for the contract of suretyship, but the contract must be supported by a new and distinct consideration. McCrary v. Berry, 51 Ga. App. 947, 181 S.E. 814, 1935 Ga. App. LEXIS 503 (1935).

Promise without detriment to creditor or benefit to debtor is nudum pactum. — Promise to pay the preexisting debt of another, without any detriment or inconvenience to the creditor or any benefit secured to the debtor in consequence of the undertaking, is a mere nudum pactum. Jackson v. First Bank, 150 Ga. App. 182, 256 S.E.2d 923, 1979 Ga. App. LEXIS 2177 (1979).

Benefit to principal binds surety. — Benefit given to or obtained by the maker or principal on the maker's transfer of the note with a surety's endorsement supplies a consideration sufficient to bind the surety. Jordan v. First Nat'l Bank, 19 Ga. App. 118, 91 S.E. 287, 1917 Ga. App. LEXIS 6 (1917).

Proof of want of consideration. — Surety cannot defeat liability by proving merely that the surety received no monetary consideration, but in order to sustain a defense of want of consideration,

Consideration for Obligation (Cont'd)

the surety would have to show that the principal did not receive any consideration or benefit from the paper sued on. Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347, 1923 Ga. App. LEXIS 157 (1923); Jackson v. First Bank, 150 Ga. App. 182, 256 S.E.2d 923, 1979 Ga. App. LEXIS 2177 (1979).

Consideration to surety individually not needed. — It is not necessary that there should be a consideration to the surety individually for the suretyship in order to bind the surety; it is sufficient if there is a valid consideration out of which the suretyship grew. Walls v. Muscogee Bank & Trust Co., 44 Ga. App. 361, 161 S.E. 663, 1931 Ga. App. LEXIS 727 (1931).

Only consideration flowing to principal is required. — Contract of suretyship is when, in consideration of the benefit extended to the principal debtor, one lends one's credit by joining in the principal debtor's obligation, so as to render oneself directly and primarily responsible with the principal on the same contract, and without any reference to the solvency of the principal; in such a case, the promise of each being one and the same, one consideration, the one flowing to the principal debtor, is all that is required, although there may be additional consideration flowing to the surety. Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585, 1939 Ga. LEXIS 493 (1939).

Confidentiality provision void and consideration adequate. — Trial court properly granted summary judgment to a payee under the terms of a settlement agreement to recover funds owed for a preexisting debt, despite the fact that a confidentiality provision contained therein was void for public policy reasons, as the consideration supporting the payment provision was separate and apart from the confidentiality provision. Thus, the obligation to pay the payee remained enforceable, and the guarantor under the settlement agreement remained obligated to pay the payee the debt owed. Unami v. Roshan, 290 Ga. App. 317, 659 S.E.2d 724, 2008 Ga. App. LEXIS 310 (2008).

Indulgence to principal, such as extension of time, suffices. — Extension of time by a creditor to a principal debtor is a sufficient consideration to support the accommodation endorsement of a note renewing the original note. Hollinshead v. Virginia Nat'l Bank, 104 Ga. 250, 30 S.E. 728, 1898 Ga. LEXIS 317 (1898).

When the appellant obligates oneself as a surety, it is not necessary that the appellant receive a separate consideration from the transaction in order for the appellant's promise to be binding on the appellant. It is enough that the maker received a consideration, even though that consideration may have amounted to nothing more than an extension of time resulting from the refinancing of preexisting indebtedness. Oliver v. Citizens DeKalb Bank, 150 Ga. App. 437, 258 S.E.2d 204, 1979 Ga. App. LEXIS 2342 (1979).

Words "value received" are always subject to explanation. Baggs v. Funderburke, 11 Ga. App. 173, 74 S.E. 937, 1912 Ga. App. LEXIS 314 (1912).

Words "value received" have been held not to show conclusively that there was consideration. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831, 1966 Ga. LEXIS 525 (1966).

Mere recitation "for value received" in the instrument is not controlling. Southern Land & Dev. Co. v. Silvers, 499 F.2d 967, 1974 U.S. App. LEXIS 7694 (6th Cir. 1974).

Implied promise may be a sufficient consideration for an express promise whereby one party obligates oneself to pay the debt of another in consideration of indulgence to one's principal, the latter remaining bound therefor. Loewenherz v. Weil, 33 Ga. App. 760, 127 S.E. 883, 1925 Ga. App. LEXIS 715 (1925).

Past consideration is insufficient for guaranty or suretyship. — Guarantor's promise cannot be founded on a past consideration or one flowing to the debtor only, such as a previous extension of credit to the principal debtor plus an agreement to postpone the time of

collection of the principal's debt, and the fact that the purported guarantor is a married woman who owns all of the stock of the corporate debtor does not allow the court to pierce the corporate veil and to consider the benefit as one flowing directly to the owner. Bearden v. Ebcap Supply Co., 108 Ga. App. 375, 133 S.E.2d 62, 1963 Ga. App. LEXIS 650 (1963).

Past consideration, one which has already served its purpose in a former transaction, will support neither a contract of guaranty nor a contract of suretyship. Jackson v. First Bank, 150 Ga. App. 182, 256 S.E.2d 923, 1979 Ga. App. LEXIS 2177 (1979).

Contract of guaranty executed after the original obligation must be founded on some new type of consideration, independent of that flowing to the principal and flowing directly to the guarantor; past consideration which has already served its purpose in a former transaction will not support a contract of guaranty. Gwinnett Com. Bank v. Flake, 151 Ga. App. 578, 260 S.E.2d 523, 1979 Ga. App. LEXIS 2650 (1979).

Forbearance to sue would be insufficient unless requested for becoming surety. — Mere forbearance by the plaintiff to prosecute a judgment, without even so much as a request therefor, would not have afforded a consideration for the promise of the defendants to be liable as sureties. But undoubtedly, if they sought and also obtained an agreement for the grant of it, the execution of the notes signed by them as sureties in consideration thereof would be binding upon them. Broughton v. Joseph Lazarus Co., 13 Ga. App. 153, 78 S.E. 1024, 1913 Ga. App. LEXIS 80 (1913); Watkins Medical Co. v. Marbach, 20 Ga. App. 691, 93 S.E. 270, 1917 Ga. App. LEXIS 1032 (1917); Loewenherz v. Weil, 33 Ga. App. 760, 127 S.E. 883, 1925 Ga. App. LEXIS 715 (1925).

If the principal received the proceeds of the subject loans, there was adequate consideration for the contracts of suretyship. Delta Diversified, Inc. v. Citizens & S. Nat'l Bank, 171 Ga. App. 625, 320 S.E.2d 767, 1984 Ga. App. LEXIS 2303 (1984).

Consideration found. — In return for parties' personal and unconditional guaranty of a debt, the federal government guaranteed a loan of the principal, a corporation of which the guarantors were 10 percent stockholders. Because this in essence financed the guarantors' business, there was thereby conferred a direct benefit on the principal and an indirect benefit on the guarantors. United States v. Blue Dolphin Assocs., 620 F. Supp. 463, 1985 U.S. Dist. LEXIS 14708 (S.D. Ga. 1985).

Under O.C.G.A. § 10-7-1, the mere lack of any personal consideration flowing directly to one guarantor constituted no legal defense to their liability on the guaranty because while the one guarantor did not execute a guaranty in connection with the initial loan, the record established that the one guarantor executed a guaranty on the same date the loan was renewed. MJL Props. v. Cmty. & S. Bank, 330 Ga. App. 524, 768 S.E.2d 111, 2015 Ga. App. LEXIS 2 (2015).

Procedure

When action against surety barred by statute of limitations. — Right of action upon an unsealed contract of surety is barred by the statute of limitations upon the expiration of six years after the date of the maturity of the obligation, not six years after the date of the execution of the agreement, since no right of action accrues until the maturity date of the obligation. Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313, 1964 Ga. App. LEXIS 949 (1964) (commented on in) 1 Ga. St. B.J. 523 (1965).

Action may be brought against surety by one beneficially interested in contract. — Subcontractor's bond to a main contractor to build a hospital, conditioned in part to pay all persons having contracts directly with the subcontractor for labor and materials, gave a materialman who furnished marble directly to the subcontractor such a beneficial interest in the bond as to authorize an action against the surety thereon, for the use of the materialman, for the subcontractor's failure to pay the materialman for the marble. Fidelity & Deposit Co. v. Pittman ex rel. Georgia

Procedure (Cont'd)

Marble Co., 52 Ga. App. 394, 183 S.E. 572, 1936 Ga. App. LEXIS 647 (1936).

Principal and surety may be joined in one action. — Surety binds oneself to perform if the principal does not, without regard to one's ability to do so. The surety's contract is equally absolute with that of the principal. They may be sued in the same action, and judgment may be entered up against both. Hartsfield Co. v. Robertson, 48 Ga. App. 735, 173 S.E. 201, 1934 Ga. App. LEXIS 178 (1934); Hartsfield Co. v. Hamil, 180 Ga. 615, 180 S.E. 128, 1935 Ga. LEXIS 507 (1935); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379, 1935 Ga. App. LEXIS 658 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937); Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941); W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574, 1944 Ga. App. LEXIS 249 (1944); Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492, 1975 Ga. App. LEXIS 2313 (1975).

Liability of the principal and surety being joint and several, they may be joined in same action. Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585, 1939 Ga. LEXIS 493 (1939).

"Contract of suretyship" is when one lends one's credit by joining in the principal debtor's obligation, so as to render oneself directly and primarily responsible with the debtor, and on the same contract, and without reference to the solvency of the principal. In such a case, the promise of each being one and the same, and their liability being joint and several, they may be joined in the same action. Erbelding v. Noland Co., 83 Ga. App. 464, 64 S.E.2d 218, 1951 Ga. App. LEXIS 888 (1951).

Surety may be sued alone. — If note was a joint and severable obligation, suit was properly brought against the surety alone who resided in the county in which the suit was instituted. Griffin v. Blackshear Bank, 66 Ga. App. 821, 19 S.E.2d 325, 1942 Ga. App. LEXIS 309 (1942).

Surety may be sued first. — Surety is an original debtor, and a surety's contract is equally absolute with that of a surety's principal; they may be sued in the same action, or the surety may even be sued first. Woodward v. La Porte, 181 Ga. 731, 184 S.E. 280, 1936 Ga. LEXIS 417 (1936).

Guarantor and principal may not be sued jointly. — Contract of the guarantor is separate and distinct from the contract of the debtor, and they cannot be sued jointly; the two contracts are several, not joint, and the liability on each is several and those who contracted the account are not liable at all on the guaranty, and one who made the guaranty is not liable at all on the account. Shepard v. Moultrie Banking Co., 48 Ga. App. 194, 172 S.E. 587, 1934 Ga. App. LEXIS 12 (1934).

Improper joinder does not bar subsequent action against guarantor. — Fact that a joint action was brought against the principal and the other named parties as sureties or guarantors and a judgment by default obtained against all of them except the defendant, who successfully contended that the defendant was a guarantor and could not be sued in such action, will not estop the plaintiff from bringing an action against the defendant as such guarantor. W.T. Rawleigh Co. v. Burkhalter, 59 Ga. App. 514, 1 S.E.2d 609, 1939 Ga. App. LEXIS 341 (1939).

To recover against guarantor, inability of principal to perform must be shown. — Before an action can be maintained against a guarantor, it must be shown that the principal is unable to perform. The surety says to the creditor: "If your debtor will not pay, I will pay." The guarantor says to the creditor: "Proceed first against the principal, and, if he should not be able to pay, then you may proceed against me." It has been said that there is no instance in the books of a guarantor contracting jointly with a principal. Hartsfield Co. v. Hamil, 180 Ga. 615, 180 S.E. 128, 1935 Ga. LEXIS 507 (1935).

A guarantor does not contract that the principal will pay, but simply that the principal is able to do so, warranting nothing but the solvency of the principal, and

before an action can be maintained against a guarantor, it must be shown that the principal is unable to perform. Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379, 1935 Ga. App. LEXIS 658 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937).

Ordinarily, a guarantor cannot be sued to judgment on a contract of guaranty in the absence of a prior judgment against the principal and a nulla bona return, unless it is alleged and proved that the principal debtor is insolvent or that the debtor cannot be made to respond to a judgment that may be obtained against the debtor by the plaintiff. Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941).

When the contract, properly construed, is one of guaranty, before an action may be maintained on such contract, it must appear that the principal debtor is insolvent or is unable to respond to any judgment which the creditor may obtain against it. Erbelding v. Noland Co., 83 Ga. App. 464, 64 S.E.2d 218, 1951 Ga. App. LEXIS 888 (1951).

Guarantor is only secondarily liable on the principal's obligation, and in order to recover against a guarantor without first suing and seeking to enforce a judgment against the principal, the obligee must first show that the principal is insolvent or cannot be made to respond to a judgment against the obligee. Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72, 1954 Ga. App. LEXIS 875 (1954).

Guarantor, unlike a surety, is not liable until it appears that the debt is uncollectible from the primary debtor. Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393, 1967 U.S. Dist. LEXIS 7477 (N.D. Ga. 1967).

When guarantor's liability under contract is direct and primary. — When under an agreement the defendant is primarily liable to the plaintiff, not secondarily so due to the defendant's having agreed to pay a certain amount for the principal debtor promptly on demand at maturity. The defendant's liability under the contract is direct and primary and, upon the defendant's failure to pay as provided therein, the defendant is subject to suit thereon, without it being shown that the principal debtor was insolvent, or unable to respond to any judgment that the plaintiff may obtain against the principal debtor. Under these circumstances, it is immaterial whether the instrument in question be denominated a contract of suretyship or one of guaranty. Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941).

Amount admitted by guarantor's principal not conclusive. — Guarantor is not conclusively bound by a judgment or the amount admitted due by the guarantor's principal, and such amount is only prima facie evidence of liability to the creditor; while a default judgment against a guarantor as to liability based on the guarantor's failure to answer the complaint was proper, the trial court erred in granting judgment against the guarantor without proof of damages, and the case was remanded for further proceedings regarding the damages owed by the guarantor. McCorvey Grading & Pipeline, Inc. v. Blalock Oil Co., 268 Ga. App. 795, 602 S.E.2d 842, 2004 Ga. App. LEXIS 1020 (2004).

Case remanded when findings so deficient as to preclude review. — When there may have been forbearance sufficient to constitute consideration for the guaranty as a material issue, but the findings of the trial court are so deficient as to preclude review, the appeal will be remanded with direction that the judgment be vacated and a new one entered with appropriate findings of fact and conclusions of law, after which the losing party shall be free to enter another appeal. Hickok v. Starka Indus., Inc., 151 Ga. App. 668, 261 S.E.2d 418, 1979 Ga. App. LEXIS 2740 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Contract of guaranty is a collateral "obligation" which is just as enforceable

as any other contract. 1971 Op. Att'y Gen. No. 71-69.

Notes for education are "obligations".—Notes guaranteed by the Georgia Higher Education Assistance Corporation and the United States government were "obligations" within the meaning of Ga. L. 1965, p. 217, § 5(2). 1971 Op. Att'y Gen. No. 71-69.

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 1 et seq.

C.J.S.

72 C.J.S., Principal and Surety, § 12.

ALR.

Liability of surety or guarantor for partnership in respect of transactions or defaults subsequent to change in personnel of the partnership, 45 A.L.R. 1426.

Liability of grantee assuming mortgage debt, to grantor, 76 A.L.R. 1191; 97 A.L.R. 1076.

Duration of continuing guaranty, 81 A.L.R. 790.

Liabilities of sureties on bond of guardian, executor, administrator, or trustee for defalcation or deficit occurring before bond was given, 82 A.L.R. 585.

Guaranty of "collection and payment" as independent guaranty of payment or only of payment through collection, 84 A.L.R. 289.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 A.L.R. 651.

Penalty as limit of liability on bond which protects several persons, and their relative rights as affected thereby, 89 A.L.R. 1071.

Lessee as surety for rent after assignment, and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 A.L.R. 1238.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 A.L.R. 1236; 58 A.L.R.5th 325.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 107 A.L.R. 1171.

Consideration for assumption of obligation as guarantor, surety, endorser, or indemnitor, after execution and delivery of principal contract, as predicable upon an antecedent promise to assume or furnish such obligation, 167 A.L.R. 1174.

Parol evidence rule as applied to written guaranty, 33 A.L.R.2d 960.

Who may enforce guaranty, 41 A.L.R.2d 1213.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

Necessity of creditor giving guarantor notice of acceptance of guaranty, 6 A.L.R.3d 355.

Conflict of laws: what law governs validity and construction of written guaranty, 72 A.L.R.3d 1180.

10-7-2. Nature of obligation of surety.

The obligation of the surety is accessory to that of his principal; and, if the latter from any cause becomes extinct, the former shall cease of course, even though it is in judgment. If, however, the original contract of the principal was invalid from a disability to contract and this disability was known to the surety, he shall still be bound.

History.

Orig. Code 1863, § 2126; Code 1868, § 2121; Code 1873, § 2149; Code 1882, § 2149; Civil Code 1895, § 2967; Civil Code 1910, § 3539; Code 1933, § 103-102.

JUDICIAL DECISIONS

Analysis

General Consideration
Surety's Obligation
Discharge of Surety
Disability of Principal

General Consideration

This section is but an affirmance of the common law upon this subject. Phillips v. Solomon, 42 Ga. 192, 1871 Ga. LEXIS 35 (1871); Schwitzerlet-Seigler Co. v. Citizens & S. Bank, 155 Ga. 740, 118 S.E. 365, 1923 Ga. LEXIS 161 (1923).

Judgment against surety does not preclude setting up defense. — If, for any cause, the surety failed to set up a defense and judgment went against the surety, the surety would not be precluded by that judgment, from showing this fact and protecting the surety, at least to this extent. Norris v. Pollard, 75 Ga. 358, 1885 Ga. LEXIS 133 (1885).

Surety on bond for tax commissioner not liable for excess funds from tax sale. — Trial court did not err in granting a surety summary judgment in a lienholder's action under O.C.G.A. § 15-13-3 to recover excess funds from a tax sale because as the surety on the bond for the tax commissioner, the surety had no liability when the tax commissioner had none, O.C.G.A. § 10-7-2, and the tax commissioner was not liable. Brina Bay Holdings, LLC v. Echols, 314 Ga. App. 242, 723 S.E.2d 533, 2012 Ga. App. LEXIS 169 (2012), overruled in part, DLT List, LLC v. M7VEN Supportive Hous. & Dev. Group, 335 Ga. App. 318, 779 S.E.2d 436, 2015 Ga. App. LEXIS 769 (2015).

Surety's Obligation

Surety's liability governed by intent of parties as expressed in instrument. — Ordinarily, as a matter of construction, liability of surety on bond which is plain and unambiguous is governed, like any other contract, by intention of parties as expressed in the instrument. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Surety's obligation is predicated on bond. — While the obligation of a surety is accessory to that of the surety's principal, still regardless of the underlying cause, the liability of the surety is predicated on the bond and not on a tort. Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525, 1970 Ga. App. LEXIS 1390 (1970).

Principal and surety are joint and several obligors. — When an obligation, joint in form, is executed by one party as principal and another as surety, they are to be deemed joint and several obligors, since by this section the obligation of the surety is accessory to that of the principal. Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765, 1932 Ga. App. LEXIS 665 (1932).

Accommodation endorsers. — An obligation in the form "we promise to pay," but signed by one party as maker and endorsed by another as an accommodation endorser, is a joint and several obligation, since the endorser is a mere surety. Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765, 1932 Ga. App. LEXIS 665 (1932).

Balance owed by principal determines amount owed by surety. — By virtue of this section, the balance due by a principal on a contract of suretyship must determine the amount due by the surety thereon. Gartrell v. Johns, 15 Ga. App. 671, 84 S.E. 175, 1915 Ga. App. LEXIS 33 (1915).

Surety is liable for no greater amount than is found to be due from the principal; the surety's liability cannot be extended beyond that of the principal. This follows from the very nature of the contract. Norris v. Pollard, 75 Ga. 358, 1885 Ga. LEXIS 133 (1885).

Surety not liable when principal not liable. — Trial court properly dismissed the counterclaim filed by the

Surety's Obligation (Cont'd)

Georgia Department of Corrections (GDOC) against a roofing company's surety because it was found that the roofing company was not liable to the GDOC; thus, the surety was not liable to the GDOC. State Dep't of Corr. v. Developers Sur. & Indem. Co., 324 Ga. App. 371, 750 S.E.2d 697, 2013 Ga. App. LEXIS 847 (2013), aff'd, 295 Ga. 741, 763 S.E.2d 868, 2014 Ga. LEXIS 732 (2014).

Surety's promise is presumed to continue to amount agreed until revocation. — When an absolute promise is made to become responsible for a certain amount with no limitation as to time and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will be presumed that the promise was to continue until revoked, and the promisor will be held liable to the extent of one's guaranty, notwithstanding the principal may have, during the existence of the contract, contracted debts to an amount equal to or greater than the sum named in the guaranty. Manry v. Waxelbaum Co., 108 Ga. 14, 33 S.E. 701, 1899 Ga. LEXIS 176 (1899); Brock Candy Co. v. Craton, 33 Ga. App. 690, 127 S.E. 619, 1925 Ga. App. LEXIS 685 (1925).

Extension of credit beyond limit does not release surety. — Extension of credit to the principal in excess of the sum named in the contract of suretyship will not release the surety, the limit thus named being merely as to the surety's liability and not as to the credit to be extended. Brock Candy Co. v. Craton, 33 Ga. App. 690, 127 S.E. 619, 1925 Ga. App. LEXIS 685 (1925).

Obligations may be determined in light of surrounding circumstances. — Although, standing alone, a letter signed by the defendants is ambiguous, the intention of the parties may be ascertained by viewing the circumstances under which the letter was written, and under such circumstances it constituted a continuing guaranty of loans as they were made after the receipt of the letter. Roberson v. Liberty Nat'l Bank & Trust Co., 88 Ga. App. 271, 76 S.E.2d 522, 1953 Ga. App. LEXIS 1063 (1953).

Want of due care by a payee bank is no defense to the willful misconduct of the principal for the faithful performance of whose duties the surety obligated itself. American Sur. Co. v. Citizens' Bank, 48 Ga. App. 448, 172 S.E. 801, 1934 Ga. App. LEXIS 100 (1934), aff'd, 180 Ga. 827, 180 S.E. 635, 1935 Ga. LEXIS 571 (1935).

Accommodation party held liable without endorsement. — If one signs as maker a note payable to oneself and another signs the note as surety only, the maker's endorsement converts the note into a negotiable instrument, and the transfer of the note binds the surety, notwithstanding the absence of an endorsement by the surety. Jordan v. First Nat'l Bank, 19 Ga. App. 118, 91 S.E. 287, 1917 Ga. App. LEXIS 6 (1917).

Surety on fiduciary's bond only liable as to official acts. — Surety on the bond of an administrator or executor is liable only for acts of nonfeasance or misfeasance on the part of such representative in respect to one's official acts. Watson v. Watson, 61 Ga. App. 825, 7 S.E.2d 614, 1940 Ga. App. LEXIS 278 (1940).

Alleging executor's fraud in employing puffer does not state cause of action. — Petition against executor and executor's bond to recover an amount in excess of actual value the plaintiff was required to pay for lands sold by an executor at public outcry by reason of fraudulent conduct of an executor in securing a puffer to bid with the understanding that such person would not have to comply with one's bid did not set out a cause of action against the defendants. Watson v. Watson, 61 Ga. App. 825, 7 S.E.2d 614, 1940 Ga. App. LEXIS 278 (1940).

Guarantor is not conclusively bound by judgment or amount admitted due by one's principal as such amount is only prima-facie evidence of liability to the creditor. But, when such evidence has been introduced, it does establish prima facie the liability of the guarantor then the burden shifts to the guarantor to rebut the correctness of the amount. Peterson v. Midas Realty Corp., 160 Ga. App. 333, 287 S.E.2d 61, 1981 Ga. App. LEXIS 3061 (1981).

Surety or guarantor may assert all but personal defenses principal would have to contract. Peterson v. Midas Realty Corp., 160 Ga. App. 333, 287 S.E.2d 61, 1981 Ga. App. LEXIS 3061 (1981).

Discharge of Surety

Generally, discharge of the principal debtor also discharges the surety. Hendricks v. Davis, 196 Ga. App. 286, 395 S.E.2d 632, 1990 Ga. App. LEXIS 902 (1990), cert. denied, No. S90C1451, 1990 Ga. LEXIS 571 (Ga. Sept. 4, 1990).

Section does not include discharge of principal by operation of law. — This section does nothing more than to announce the general law applicable to principal and surety and does not include that class of cases when the principal debtor is discharged by operation of law; the more especially when that law which discharges the principal debtor expressly declares that it shall not operate to discharge the surety. Phillips v. Solomon, 42 Ga. 192, 1871 Ga. LEXIS 35 (1871).

Discharge under bankruptcy law. — By the words "from any cause" as used in this section is meant any cause dependent on the act or negligence of the creditor and not such a cause as the discharge of the principal under the bankruptcy law, Title 11, U.S.C., which is beyond the control of the creditor, and by force of the laws of the land. Phillips v. Solomon, 42 Ga. 192, 1871 Ga. LEXIS 35 (1871).

Discharge of principal by party's act discharges surety. — If the principal is discharged from liability by the act of the party procuring the contract, or by the party seeking to enforce the contract, and this was done without the knowledge of the surety, the surety will also be discharged, under this section. Langston v. Aderhold, 60 Ga. 376, 1878 Ga. LEXIS 475 (1878); Richardson v. Allen, 74 Ga. 719, 1885 Ga. LEXIS 388 (1885); Patterson v. Gibson, 81 Ga. 802, 10 S.E. 9, 1888 Ga. LEXIS 350 (1888).

If the maker of notes with sureties thereon executes a deed of assignment for the benefit of one's creditors, with a provision therein that the acceptance of any benefits thereunder by one's creditors will be a full satisfaction of the claims of the creditors against such maker, the acceptance, by the payee of such notes, of benefits under the assignment terminates the liability of the maker of such notes and would likewise discharge the sureties thereon, if done without their knowledge and consent. Schwitzerlet-Seigler Co. v. Citizens & S. Bank, 155 Ga. 740, 118 S.E. 365, 1923 Ga. LEXIS 161 (1923).

Sureties not discharged when creditor reserves rights. — When the creditor reserves all rights against the sureties, or it appears from the whole transaction that the sureties should remain bound, the sureties would not be discharged. Schwitzerlet-Seigler Co. v. Citizens & S. Bank, 155 Ga. 740, 118 S.E. 365, 1923 Ga. LEXIS 161 (1923).

Knowledge of continued liability on assigned notes. — When the holder of the notes accepted benefits under the assignment with the knowledge of the sureties and under an express understanding with the sureties that their liability on the notes was to continue, the sureties were not discharged from liability on the notes, although the acceptance of such benefits was a full satisfaction of the notes so far as the maker was concerned. Schwitzerlet-Seigler Co. v. Citizens & S. Bank, 155 Ga. 740, 118 S.E. 365, 1923 Ga. LEXIS 161 (1923).

Debt does not become extinct merely because the debt has become barred by limitation. Franklin v. Mobley, 202 Ga. 212, 42 S.E.2d 755, 1947 Ga. LEXIS 417 (1947).

Verdict for principal discharges surety. — Verdict of the jury in favor of the principal, discharging the principal from liability, extinguished ipso facto the obligation of the sureties. Schlittler & Johnson v. Deering Harvester Co., 3 Ga. App. 83, 3 Ga. App. 86, 59 S.E. 342, 1907 Ga. App. LEXIS 558 (1907); Marietta Fertilizer Co. v. Gary, 22 Ga. App. 604, 96 S.E. 711, 1918 Ga. App. LEXIS 620 (1918).

Verdict against surety only in joint action discharges surety and principal. — If the principal and the principal's surety on a promissory note, which is joint and several on its face, are sued in the same action and verdict and

Discharge of Surety (Cont'd)

judgment are taken against the surety only, both the principal and the surety are discharged. Fricks v. Rome Mercantile Co., 49 Ga. App. 431, 175 S.E. 807, 1934 Ga. App. LEXIS 430 (1934).

Effect of dismissal without prejudice from case. — Dismissal without prejudice of a principal from a case sub judice is not equivalent to the extinction of the principal's obligation so as to render relevant the provisions of O.C.G.A. § 10-7-2. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309, 1985 Ga. App. LEXIS 2226 (1985).

Disability of Principal

Duress is, or, rather, it imposes, a disability. Patterson v. Gibson, 81 Ga. 802, 10 S.E. 9, 1888 Ga. LEXIS 350 (1888).

Duress of principal unknown to surety is good defense. — Bond executed under the duress of the principal is void as to the surety also if the surety acted without knowledge of the duress; and knowledge of the fact of imprisonment does not necessarily involve knowledge of its want of legality. Patterson v. Gibson, 81 Ga. 802, 10 S.E. 9, 1888 Ga. LEXIS 350 (1888).

Disability known to surety is no defense to surety. — Any disability of the principal in a bond or recognizance which is known to the bail will not prevent the bail from being bound by their undertaking, they being instrumental in causing the principal to be discharged from arrest, and delivered into their friendly custody. Weldon v. Colquitt, 62 Ga. 449, 1879 Ga. LEXIS 553 (1879).

General rule is inapplicable if surety knew surety had no remedy against principal. — Whatever discharges the principal also discharges the surety; but this rule does not apply when the principal binds oneself knowing the principal has no remedy over against the principal. Patterson v. Gibson, 81 Ga. 802, 10 S.E. 9, 1888 Ga. LEXIS 350 (1888).

Supreme Court has jurisdiction of claim Constitution prevents enforcement against principal. — Supreme Court and not the Court of Appeals has jurisdiction when surety seeks to be held free of liability on grounds of constitutional provisions which made the obligation unenforceable against the school system as principal. Franklin v. Mobley, 202 Ga. 212, 42 S.E.2d 755, 1947 Ga. LEXIS 417 (1947).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, §§ 1 et seq., 10 et seq.

C.J.S.

72 C.J.S., Principal and Surety, § 19 et seq.

ALR.

Agreement by principal to pay compound or additional interest, as releasing surety, 2 A.L.R. 1569.

Right of surety to avoid contract for fraud on principal, 3 A.L.R. 868.

Right to judgment against surety where action fails against principal, 5 A.L.R. 594.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Right of obligee in surety bond to fill blank as to amount, 37 A.L.R. 1395; 48 A.L.R. 741.

Taking of demand note in renewal as releasing surety or endorser, 48 A.L.R. 1222.

Ignorance or mistake as to character of instrument signed as affecting liability of surety or guarantor, 66 A.L.R. 312.

Right to contribution or indemnity of executor, administrator, guardian, testamentary trustee, or sureties against a cofiduciary or sureties, in respect of losses or defaults for which the fiduciaries are answerable, 66 A.L.R. 1147.

Liability of grantee assuming mortgage debt, to grantor, 76 A.L.R. 1191; 97 A.L.R. 1076.

Liability of guarantor of obligations to bank as affected by limitation of amount

which bank may legally loan, 92 A.L.R. 341.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 A.L.R. 1236; 58 A.L.R.5th 325.

Acceptance of construction work as releasing contractors or sureties on bond conditioned for performance of construction contract or guaranteeing completed work, 109 A.L.R. 625.

Liability of sureties on bond of tax collector for illegal or unauthorized acts of latter toward individual taxpayer, 127 A.L.R. 857.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

Duty of construction contractor to indemnity contractee held liable for injury to third person, in absence of express contract for indemnity, 97 A.L.R.2d 616.

Liability of surety on infant's contract or obligation, where contract is disaffirmed by infant, 44 A.L.R.3d 1417.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 A.L.R.3d 567.

10-7-3. Suretyship not extended by implication.

The contract of suretyship is one of strict law; and the surety's liability will not be extended by implication or interpretation.

History.

Orig. Code 1863, § 2127; Code 1868, § 2122; Code 1873, § 2150; Code 1882, § 2150; Civil Code 1895, § 2968; Civil Code 1910, § 3540; Code 1933, § 103-103.

Law reviews.

For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B. J. 12 (2009).

For annual survey on business associations, see 70 Mercer L. Rev. 19 (2018).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

Strict construction of contract of suretyship or guaranty. — When a person promises to become a sponsor for the debt of another, the person's promise is to be strictly construed. Musgrove v. Luther Publishing Co., 5 Ga. App. 279, 63 S.E. 52, 1908 Ga. App. LEXIS 93 (1908).

This section calls for a strict construction of a contract of suretyship. American Sur. Co. v. Small Quarries Co., 157 Ga. 33, 120 S.E. 617, 1923 Ga. LEXIS 358 (1923); Hannah v. Lovelace-Young Lumber Co., 159 Ga. 856, 127 S.E. 225, 1925 Ga. LEXIS 69 (1925).

Courts of this state have construed bonds given by contractors on public works strictly. Durden v. American Sur. Co., 40 Ga. App. 705, 151 S.E. 408, 1930 Ga. App. LEXIS 653 (1930).

Whether the contract is one of guaranty or suretyship, the rule of stricti juris is applicable. LeCraw v. Atlanta Arts Alliance, Inc., 126 Ga. App. 656, 191 S.E.2d 572, 1972 Ga. App. LEXIS 1245 (1972) (decided prior to 1981 amendment to O.C.G.A. § 10-7-1, abolishing distinction between contracts of suretyship and guaranty).

Georgia Court of Appeals held that a guaranty contract cannot be extended by

General Consideration (Cont'd)

implication or interpretation and must be strictly construed. Apex Bank v. Thompson, 349 Ga. App. 285, 826 S.E.2d 162, 2019 Ga. App. LEXIS 155 (2019).

Failure to show waiver of confirmation process on part of guarantors. — As to the foreclosure deficiency judgment, the trial court erred by denying the guarantors of the mortgage summary judgment because the loan documents failed to include an adequate waiver of the confirmation process required by O.C.G.A. § 44-14-161. Apex Bank v. Thompson, 349 Ga. App. 285, 826 S.E.2d 162, 2019 Ga. App. LEXIS 155 (2019).

Construction same at law or in equity. — Undertaking of a surety being one stricti juris, the surety cannot, either at law or in equity, be bound farther or otherwise than the surety is by the very terms of the contract. Kenney v. Armour Fertilizer Works, 33 Ga. App. 126, 126 S.E. 284, 1924 Ga. App. LEXIS 765 (1924), rev'd, 161 Ga. 477, 131 S.E. 281, 1926 Ga. LEXIS 287 (1926); Mayor of Savannah v. Glens Falls Ins. Co., 104 Ga. App. 879, 123 S.E.2d 293, 1961 Ga. App. LEXIS 832 (1961), overruled, Brock Constr. Co. v. Houston General Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, 1978 Ga. App. LEXIS 1824 (1978); Johns v. Leaseway of Ga., Inc., 166 Ga. App. 472, 304 S.E.2d 555, 1983 Ga. App. LEXIS 2213 (1983); Stone v. Palm Pool Prods., Ltd., 198 Ga. App. 751, 403 S.E.2d 69, 1991 Ga. App. LEXIS 303 (1991).

Section inapplicable where surety's obligation is manifest. — This section is inapplicable to an action upon an injunction bond if the surety's obligation is made manifest and full by a reference in the bond to certain portions of the injunction proceedings. Richardson v. Allen, 74 Ga. 719, 1885 Ga. LEXIS 388 (1885).

Liability cannot be extended by implication. — If the contract is unambiguous and subject to only one construction, the liability of any surety (whether compensated or not) is not to be extended beyond the terms of the contract by implication or interpretation. Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316, 1978 Ga. LEXIS 1021 (1978) (decided prior to 1981 amendment to O.C.G.A. § 10-7-1, abolishing distinction between contracts of suretyship and guaranty).

Surety's liability on a bond given to dissolve a garnishment is one of strict law and cannot be extended by implication. Roney v. McCall, 128 Ga. 249, 57 S.E. 503, 1907 Ga. LEXIS 76 (1907).

Guarantee agreement executed between lessor and lessee three days prior to a lease agreement could not apply to the lease agreement as it would have effectively extended the lessee's liability by implication. Avec Corp. v. Schmidt, 207 Ga. App. 374, 427 S.E.2d 850, 1993 Ga. App. LEXIS 190 (1993).

Any unconsented to change discharges surety. — Contract of suretyship is one of strict law by virtue of this section, and any change of the nature or terms of the contract without the consent of the surety discharges the surety. Camp v. Howell, 37 Ga. 312, 1867 Ga. LEXIS 163 (1867).

Liability of a surety cannot be extended beyond the actual terms of the surety's engagement and will be extinguished by any act or omission which alters the terms of the contract, unless it is done with the surety's consent. Washington Loan & Banking Co. v. Holliday, 26 Ga. App. 792, 107 S.E. 370, 1921 Ga. App. LEXIS 642 (1921).

Undertaking of a surety being stricti juris, one cannot, in law or equity, be bound further than the very terms of one's contract; and if the principal and obligee change the terms of the contract without consent, the surety is discharged. LeCraw v. Atlanta Arts Alliance, Inc., 126 Ga. App. 656, 191 S.E.2d 572, 1972 Ga. App. LEXIS 1245 (1972).

Appearance at specified term of court complies with bond. — When the condition in a criminal recognizance was that a principal should appear at a particular term of court, but it contained no provision as to appearing from term to term, or other like provision, the appearance of the principal at the specified term was a compliance with the condition, and the principal's failure to

appear at a subsequent term to which the case was continued would not subject the sureties to a forfeiture. Colquitt v. Smith, 65 Ga. 341, 1880 Ga. LEXIS 193 (1880).

Undertaking of the sureties on a criminal bond is stricti juris by virtue of this section, and when the bond obligates the principal to be present at a specified term of court, but contains no provision for the surety's appearance from term to term, or other like provision, the appearance of the principal at the term specified in the bond would be a compliance with the condition thereof. Roberts v. State, 32 Ga. App. 339, 123 S.E. 151, 1924 Ga. App. LEXIS 381 (1924).

Official bond does not apply to funds received after term of office. — Under former Civil Code 1910, §§ 291 and 3540 (see now O.C.G.A. §§10-7-3 and 45-4-24) official bond of the former treasurer of the county did not impose upon the treasurer's sureties any obligation with reference to the county funds received by the treasurer after the treasurer's term of office from the treasurer's successor. Fannin County v. Daves, 23 Ga. App. 220, 98 S.E. 104, 1919 Ga. App. LEXIS 46 (1919).

Recovery is limited to penalty in bond. — When, pursuant to former Civil Code 1910, §§ 5185, 5186, and 5187, a bond was executed with a penalty value of $20.00, as far as the surety was concerned, the only recovery which could have been had on the bond was the named penalty of $20.00. Gullatt v. Blankenship, 42 Ga. App. 139, 155 S.E. 353, 1930 Ga. App. LEXIS 262 (1930).

Rule of strict construction in surety's favor applies only to gratuitous sureties. — Rule of "strict law" embodied in O.C.G.A. § 10-7-3 which provides an absolute rule of strict construction of surety contract in favor of the surety applies only to uncompensated sureties (sureties acting gratuitously), not to compensated sureties (sureties engaged in writing surety bonds for profit). Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Contracts of compensated sureties construed strongly against surety. — Unlike gratuitous sureties, compensated sureties are not favorites of the law; on the contrary, the contract of a surety company, acting for compensation, and of any other surety for hire, is construed most strongly against the surety and in favor of an indemnity which the obligee has reasonable grounds to expect. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Application

Sheriff's surety is not liable for injuries by fellow prisoners allowed by jailer. — Action against surety on bond of a sheriff for injuries sustained by a prisoner confined, for violation of a municipal ordinance, in a county jail where the prisoner was "kangarooed" by other prisoners confined therein, the jailer knowingly allowing the injuries to be inflicted, was properly nonsuited. Tate v. National Sur. Corp., 58 Ga. App. 874, 200 S.E. 314, 1938 Ga. App. LEXIS 162 (1938).

Defendant was not a compensated surety and thus was entitled to the application of the extremely protective rule of strictissimi juris set forth in the statute; while the defendant had ownership interests in the businesses who were the unnamed principal debtors and may have eventually derived some benefit from their success, the consideration for the defendant signing the guarantees did not flow to the defendant, but instead to the businesses. Workman v. Sysco Food Servs., 236 Ga. App. 784, 513 S.E.2d 523, 1999 Ga. App. LEXIS 333 (1999).

Contract held not to extend to all debts of principal. — Other than the general statement that the plaintiff would not lease trucks to a company without a guaranty or suretyship agreement, there was no evidence that would alter the clear and unambiguous language of the agreement that the defendant would guarantee the obligation of the company arising from a weekly lease agreement of the same date as the suretyship agreement, nor was any evidence produced of the referenced lease agreement or that the company owed the plaintiff anything under the agreement,

Application (Cont'd)

the plaintiff failed to prove that the defendant was obligated to pay any sums under the suretyship agreement; and the trial court's factual finding that the purpose of obtaining the defendant's guarantee was to have the defendant be responsible for all the debts of the company and its judgment for the plaintiff were clearly erroneous. Johns v. Leaseway of Ga., Inc., 166 Ga. App. 472, 304 S.E.2d 555, 1983 Ga. App. LEXIS 2213 (1983).

Addition of coguarantor held not to alter contract. — When the contract contemplates more than one guarantor to be jointly and severally liable and the addition of other guaranties, the terms of the contract as to the original guarantor, would not be altered by adding a coguarantor, as the guarantor remains jointly and severally liable, nor would there be any increase in the risk to the guarantor if a coguarantor were added. Daprano v. Sherwin-Williams Co., 166 Ga. App. 811, 305 S.E.2d 655, 1983 Ga. App. LEXIS 2340 (1983).

Incorporation of credit application sufficiently identified principal debtor. — Guaranty agreement that was included at the bottom of the same page as a credit application identified the principal debtor by referring to "the above applicant;" when read in conjunction with the incorporated application, with the word "applicant" bearing its usual meaning, the guaranty agreement identified the principal debtor sufficiently to satisfy the statute of frauds. House Hasson Hardware Co., Inc. v. Lawson's Home Ctr., Inc., 332 Ga. App. 295, 772 S.E.2d 389, 2015 Ga. App. LEXIS 288 (2015).

Debt unenforceable. — Writing which left blank both the name of the principal debtor and the name of the person individually guaranteeing the indebtedness was unenforceable. Sysco Food Servs. v. Coleman, 227 Ga. App. 460, 489 S.E.2d 568, 1997 Ga. App. LEXIS 935 (1997).

Directed verdict error when fact of suretyship does not appear on face of contract. — It was error to grant a motion for directed verdict when the fact of suretyship did not appear on the face of a contract, and since the question is an evidentiary one, the fact finder should hear all the facts in order to determine the parties' intention. Growth Properties of Fla., Ltd. v. Wallace, 168 Ga. App. 893, 310 S.E.2d 715, 1983 Ga. App. LEXIS 2948 (1983).

Explicit, limited contract terms governed. — Trial court did not err in finding that the guaranties had expired when under the explicit terms in each guaranty, the guarantors' obligations were to end on the 42nd month of the lease in the event that no default existed, which was indeed the case. Roswell Festival, L.L.L.P. v. Athens Int'l, Inc., 259 Ga. App. 445, 576 S.E.2d 908, 2003 Ga. App. LEXIS 146 (2003).

Insufficient identification of guarantor. — Lessor was not entitled to recover on an equipment lease guaranty because the guaranty was unenforceable since it omitted essential elements, including the guarantor's identity, and the lease could not supply the missing elements since this required consideration of parol evidence, which was inadmissible for a contract required by the statute of frauds to be in writing. Dabbs v. Key Equip. Fin., Inc., 303 Ga. App. 570, 694 S.E.2d 161, 2010 Ga. App. LEXIS 379 (2010).

Lease holdover. — Lease guarantor was liable for increased holdover rent since the lease specifically reserved the holdover rent and the guaranty obligated the guarantor; since there was no change in the terms of the lease, the landlord's act of allowing the tenant to remain as a holdover was not a novation of the lease, and the guarantor's reliance on O.C.G.A. § 10-7-3 to refute the landlord's claim under the guaranty was misplaced because the guarantor's liability was established by the terms of the guaranty. Hood v. Peck, 269 Ga. App. 249, 603 S.E.2d 756, 2004 Ga. App. LEXIS 1129 (2004).

Expired performance bond. — Because the performance bond, on which the plaintiff's sole claim against an insurer was based, expired before the plaintiff asserted the claims, the insurer's motion for summary judgment was

granted; the surety's liability could not be extended by implication or interpretation. Snapping Shoals Elec. Mbrshp. Corp. v. RLI Ins. Corp., No. 1:05-cv-1714-GET, 2005 U.S. Dist. LEXIS 36776 (N.D. Ga. Dec. 14, 2005), aff'd, 216 Fed. Appx. 829, 2007 U.S. App. LEXIS 2492 (11th Cir. 2007).

Guarantor personally liable on promissory note. — Trial court did not err by finding a guarantor personally liable on a promissory note because the trial court correctly found that the language of the promissory note, the unconditional guaranty, and the modification to the promissory note were unambiguous, and since the documents' provisions were clear, the trial court's proper role was to apply the terms as written; in the guaranty, the guarantor expressly waived all notices or defenses to which the guarantor could be entitled under the guaranty, to the extent permitted by law, and because the guarantor failed to assert any defense based upon an alleged incompetency to enter into a contract at the time the guarantor executed the guaranty, and because the guarantor failed to show that the guaranty's broad waiver of defenses was prohibited by statute or public policy, the guarantor was bound thereby. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336, 2011 Ga. App. LEXIS 281 (2011).

Corporate officers not individually liable. — Plain language of the document, although poorly drafted, established that the document was a promissory note made between two lenders and a corporation, and the officers signed the document in the officers' representative capacity on behalf of the corporation. A provision that the officers personally guaranteed the debt could not be implied pursuant to O.C.G.A. § 10-7-3. Elwell v. Keefe, 312 Ga. App. 393, 718 S.E.2d 587, 2011 Ga. App. LEXIS 964 (2011).

Acts not covered by bond. — Trial court erred in granting a purchaser summary judgment and in denying an insurer summary judgment in the purchaser's action to recover against a bond the insurer issued to a mortgage lender under the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000 et seq., because the acts that gave rise to the judgment the purchaser obtained against the lender occurred before the bond was in effect, and the lender's failure to pay the judgment was not an act that authorized recovery against the bond; the bond did not contain a specific covenant extending liability to acts prior to the bond's execution. Hartford Fire Ins. Co. v. iFreedom Hartford Fire Ins. Co. v. iFreedom Direct Corp., 312 Ga. App. 262, 718 S.E.2d 103, 2011 Ga. App. LEXIS 934 (2011), cert. denied, No. S12C0408, 2012 Ga. LEXIS 246 (Ga. Feb. 27, 2012).

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74 Am. Jur. 2d, Suretyship, §§ 16 et seq., 39 et seq.

C.J.S.

72 C.J.S., Principal and Surety, §§ 33 et seq., 46 et seq.

ALR.

Agreement by principal to pay compound or additional interest as releasing surety, 2 A.L.R. 1569.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 A.L.R. 1262.

Right of obligee in guaranty or surety bond to fill blank as to amount, 48 A.L.R. 741.

Liability of guarantor of or surety for bank deposit as affected by reorganization, merger, or consolidation of bank, 78 A.L.R. 381.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency, 81 A.L.R. 10.

Duration of continuing guaranty, 81 A.L.R. 790.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 A.L.R. 651.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Liability of sureties as affected by actual, constructive, or asserted transfer of property or funds by fiduciary acting in one capacity to himself acting in another capacity, 111 A.L.R. 267.

Labor and materials furnished to subcontractor as within coverage of bond of principal contractor under nonpublic building or construction contract, 128 A.L.R. 938.

Guaranty of payment at maturity as covering expense of collection, 4 A.L.R.2d 138.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 A.L.R.2d 734.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 A.L.R.3d 582.

10-7-4. Form of contract immaterial.

The form of the contract is immaterial, provided the fact of suretyship exists.

History.

Orig. Code 1863, § 2128; Code 1868, § 2123; Code 1873, § 2151; Code 1882, § 2151; Civil Code 1895, § 2969; Civil Code 1910, § 3541; Code 1933, § 103-104.

Editor's notes.

In Massell v. Prudential Ins. Co. of America, 57 Ga. App. 460, 196 S.E. 115 (1938), it was held that this section, under which an accommodation endorser was considered merely a surety, must yield to the former Negotiable Instruments Law, Ga. L. 1924, p. 126, which has in turn been superseded by the commercial paper provisions of the Uniform Commercial Code, O.C.G.A. §§ 11-3-101 through 11-3-805. The UCC provides that a signature in an ambiguous capacity is an endorsement (O.C.G.A. § 11-3-402); that an accommodation party is liable in the capacity in which he has signed, even though the taker knows of the accommodation, where the instrument has been taken for value before it is due (O.C.G.A. § 11-3-415(2)); that oral proof of the accommodation is not admissible against a holder in due course who has no notice of the accommodation to give the accommodation party the benefit of discharges dependent on his character as such, but in other cases is admissible (§ 11-3-415(3)); and that an accommodation party paying the instrument has a right of recourse against the accommodated party (§ 11-3-415(5)), and spells out the liability of makers, drawers, acceptors, endorsers, and guarantors (O.C.G.A. §§ 11-3-413, 11-3-414, and 11-3-416) and how the liability of parties to commercial paper is discharged (§§ 11-3-601 through 11-3-606).

Many cases involving negotiable instruments were decided under this section before the UCC became effective. See, for example, Freeman v. Cherry, 46 Ga. 14 (1872); Camp v. Simmons, 62 Ga. 73 (1878), later appeals, 64 Ga. 726, 65 Ga. 674 (1880), 71 Ga. 54 (1883); Patillo v. Mayer & Glauber, 70 Ga. 715 (1883); Hall v. Capital Bank, 71 Ga. 715 (1883); Parmelee v. Williams, 72 Ga. 42 (1883); Hull v. Myers, 90 Ga. 674, 16 S.E. 653 (1893); Baggs v. Funderburke, 11 Ga. App. 173, 74 S.E. 937 (1912); Bank of LaFayette v. Wardlaw, 20 Ga. App. 741, 93 S.E. 236 (1917); Washington Loan & Banking Co. v. Holliday, 26 Ga. App. 792, 107 S.E. 370, cert. denied, 26 Ga. App. 801 (1921); Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866 (1923); McKibben v. Fourth Nat'l Bank, 32 Ga. App. 222, 122 S.E. 891 (1924); Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765 (1932); Hamby v. Crisp, 48 Ga. App. 418, 172 S.E. 842 (1934).

Law reviews.

For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B. J. 12 (2009).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided before the UCC became effective on January 1, 1964, are included in the annotations for this Code section and must be considered in light of the UCC provisions referred to above.

Form of contract makes no difference. — Form of the contract can make no difference, if the fact of suretyship is made to appear from the evidence and that fact was known to all the parties. Norris v. Pollard, 75 Ga. 358, 1885 Ga. LEXIS 133 (1885); Buck v. Bank of Ga., 104 Ga. 660, 30 S.E. 872, 1898 Ga. LEXIS 392 (1898).

Mere language of the contract does not determine the contract's legal character. Courts may disregard formal expressions to ascertain the real intent of the parties. Schlittler & Johnson v. Deering Harvester Co., 3 Ga. App. 83, 3 Ga. App. 86, 59 S.E. 342, 1907 Ga. App. LEXIS 558 (1907).

Form is immaterial if the fact of suretyship exists. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Formal expressions may be disregarded. — No particular or formal phrase is required to create a contract of surety. Courts may disregard formal expressions to ascertain the real intent of the parties, and the form of the contract is immaterial. W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574, 1944 Ga. App. LEXIS 249 (1944); United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976).

Suretyship may be created by separate instrument. — While a surety is usually bound with the surety's principal by the same instrument, that is not always true, and one may assume that the relation of suretyship exists even by an instrument separate and distinct from that of the surety's principal and also subsequent in time. McKibben v. Fourth Nat'l Bank, 32 Ga. App. 222, 122 S.E. 891, 1924 Ga. App. LEXIS 343 (1924), overruled, Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 247 S.E.2d 567, 1978 Ga. App. LEXIS 2549 (1978); Griswold v. Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7, 1980 Ga. App. LEXIS 2856 (1980).

Written instrument is not required. — Fact that written instrument may not have been executed between the creditor and an alleged surety does not preclude existence of a suretyship. Griswold v. Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7, 1980 Ga. App. LEXIS 2856 (1980).

Suretyship may be shown although not on face of instrument. — When the evidence offered tended to show that B signed the note purely for the accommodation of S to enable the latter to borrow the money from the bank, that B did not receive a cent of the money, that B had no interest in the loan and that B therefore obligated B to pay S's debt in consideration of the credit extended to S by the bank while S remained bound for the debt, under the provision of this section, B was only a surety for S. Buck v. Bank of Ga., 104 Ga. 660, 30 S.E. 872, 1898 Ga. LEXIS 392 (1898).

Although the fact of suretyship does not appear on the face of a note, the defendants are clearly entitled to show that the defendants were only sureties by virtue of this section. Duggan v. Monk, 5 Ga. App. 206, 62 S.E. 1017, 1908 Ga. App. LEXIS 66 (1908).

If a negotiable promissory note purports to have been given "for value received," and suit is brought thereon by the payee, the maker may plead and prove by parol that the note was executed without consideration as between the parties, and for the sole purpose of enabling the payee to endorse the note to a third person as collateral security for a debt which the payee desired to contract and which the payee promised to pay without assistance from the maker of the note. Such a note is a mere accommodation paper and, while in the hands of the person to be accommodated, is without consideration and binds nobody, but it would be otherwise if the note were in the hands of an endorsee who received the note for value. Rheney v.

Anderson, 22 Ga. App. 417, 96 S.E. 217, 1918 Ga. App. LEXIS 373 (1918).

One who signs a note with another apparently as a joint principal may in an action by the payee plead and prove that one had no interest in the paper and was only surety for the accommodation of the other and principal signer, and that the plaintiff took the note with knowledge of such facts. Cheshire v. Hightower, 33 Ga. App. 793, 127 S.E. 891, 1925 Ga. App. LEXIS 724 (1925).

One who signs a note ostensibly as a coprincipal may in fact be a surety, and this may be established by parol. Campbell v. Rybert, 46 Ga. App. 461, 167 S.E. 924, 1933 Ga. App. LEXIS 101 (1933).

Creditor's reliance on surety's credit does not alter rule. — Fact that the payee of the note might have been induced to make the loan on the faith of the surety's credit, rather than upon that of the principal debtor, would not alter the rule. Cheshire v. Hightower, 33 Ga. App. 793, 127 S.E. 891, 1925 Ga. App. LEXIS 724 (1925).

Surety usually bound with principal by same instrument, executed at same time, and on same consideration; the surety is an original promisor and debtor from the beginning. Griswold v. Whetsell, 157 Ga. App. 800, 278 S.E.2d 753, 1981 Ga. App. LEXIS 2015 (1981).

Surety or guarantor may consent in advance to conduct which would otherwise result in surety's discharge. Griswold v. Whetsell, 157 Ga. App. 800, 278 S.E.2d 753, 1981 Ga. App. LEXIS 2015 (1981).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 9 et seq.

C.J.S.

72 C.J.S., Principal and Surety, §§ 29, 30, 31.

ALR.

Right of accommodation party to bill or note to revoke his signature, 22 A.L.R. 1348.

Ignorance or mistake as to character of instrument signed as affecting liability of surety or guarantor, 66 A.L.R. 312.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 A.L.R.2d 246.

ARTICLE 2

RELATIVE RIGHTS OF CREDITOR AND SURETY

Cross references.

Discharge of liability of party on negotiable instrument by act or agreement which would discharge simple contract to pay money, § 11-3-601.

Law reviews.

For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B. J. 12 (2009).

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Failure of a cosurety to disclose the true nature and purport of the note at the time of endorsement is insufficient to release an accommodation endorser who did not read the note but seeks to avoid liability on the ground that the endorsement was obtained by fraud and deceit. Hollinshead v. Virginia Nat'l Bank, 104 Ga. 250, 30 S.E. 728, 1898 Ga. LEXIS 317 (1898).

RESEARCH REFERENCES

ALR.

Right of surety to avoid contract for fraud on principal, 3 A.L.R. 868.

Failure to pay premium on indemnity bond as terminating same, 45 A.L.R. 617.

Duty of employer to notify surety that employee was dilatory, slow, or negligent in settling account, 60 A.L.R. 160.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency, 81 A.L.R. 10.

Right of construction contractor who does not comply strictly with contract as against guarantor or surety for payment, 81 A.L.R. 1211.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 A.L.R. 1014.

Right of surety on fidelity bond to allowance or refund where obligee makes recovery from principal or other sources, 126 A.L.R. 946.

Joinder in one action of sureties on different bonds relating to same matter, 137 A.L.R. 1044.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 A.L.R.2d 1122.

Application of payments as between debts for which a surety or guaranty is bound and those for which he is not, 57 A.L.R.2d 855.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 A.L.R.2d 899.

Creditor's duty of disclosure to surety or guarantor after inception of suretyship or guaranty, 63 A.L.R.4th 678.

Computation of net "loss" for which fidelity insurer is liable, 5 A.L.R.5th 132.

10-7-20. Effect of release of or compounding with surety.

The creditor may release or compound with the surety without releasing the principal, but the release of or compounding with one surety shall discharge a cosurety.

History.

Orig. Code 1863, § 2129; Code 1868, § 2124; Code 1873, § 2152; Code 1882, § 2152; Civil Code 1895, § 2970; Civil Code 1910, § 3542; Code 1933, § 103-201.

Cross references.

Effect of commercial paper article of Uniform Commercial Code, § 10-7-27.

JUDICIAL DECISIONS

"Compound" defined. — To "compound" is to compromise or make a composition whereby a creditor discharges the creditor's debtor on payment of a smaller sum than that actually owing. Williams-Thompson Co. v. Williams, 10 Ga. App. 251, 73 S.E. 409, 1912 Ga. App. LEXIS 446 (1912) (no compounding shown).

Foreign statute denying release conflicts with policy of this state. — Tennessee statute providing that the release of a cosurety or coobligor does not release the other surety or obligor when the parties, other than those not released, stipulate that such other surety or obligor ws not released, was contrary to the public policy of this state as expressed by former Code 1933, §§ 20-910 and 103-201 (see now O.C.G.A. §§ 10-7-20 and 13-4-80), and will not be enforced. Kent v. Hair, 60 Ga. App. 652, 4 S.E.2d 703, 1939 Ga. App. LEXIS 130 (1939).

Section only applies to release without consent of cosureties. — When the novation of a contract by the release of one surety and the substitution of another was done with the consent of the sureties, derived from the provisions of the contract of suretyship, the provision

of this section for the discharge of cosureties by the release of a surety must be construed, in pari materia with former Code 1933, § 103-202 (see now O.C.G.A. § 10-7-21), so as to apply only when such release is done without the consent of such cosurety or co-sureties. Overcash v. First Nat'l Bank, 115 Ga. App. 499, 155 S.E.2d 32, 1967 Ga. App. LEXIS 1144 (1967).

Unenforceable attempt to release surety does not release cosurety. — Release of or compounding with one surety discharges a cosurety under this section, but an attempt to release one of the sureties does not have this effect when the attempted release is unenforceable for lack of consideration. Williams-Thompson Co. v. Williams, 10 Ga. App. 251, 73 S.E. 409, 1912 Ga. App. LEXIS 446 (1912).

Individually liable guarantors not cosureties. — Nonsettling guarantors of promissory notes who were individually, not jointly, liable were not cosureties under O.C.G.A. § 10-7-20; thus, they were not discharged by plaintiff's acceptance from other guarantors of less than the total sum owed under the notes. Any novation by virtue of the settlement agreement would not operate to release the nonsettling guarantors from their individual limited liabilities. Marret v. Scott, 212 Ga. App. 427, 441 S.E.2d 902, 1994 Ga. App. LEXIS 286 (1994).

Guarantor who admitted forging co-guarantor's signature estopped from pleading discharge. — Husband/guarantor was equitably estopped from arguing that a licensor's discharge of his co-guarantor and wife discharged him pursuant to O.C.G.A. §§ 10-7-20 and 10-7-21 because he signed an affidavit that he had forged his wife's signature on the guaranty without her knowledge, and the affidavit resulted in the wife's dismissal from the licensor's suit. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166, 2010 Ga. App. LEXIS 922 (2010), cert. denied, No. S11C0654, 2011 Ga. LEXIS 423 (Ga. May 16, 2011).

Guarantor bound by contract. — As there was some evidence to support a determination that a guarantor did not intend that contractual guaranty obligations were contingent upon another individual signing the guaranty as a co-surety, the failure of such signature was not a change in the contract terms or a release that discharged the guarantor from liability. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230, 2013 Ga. App. LEXIS 604 (2013).

Guarantor discharged. — In a foreclosure action, the property owner was discharged as a guarantor when the lender compromised with and released the owner's co-guarantors. Pollard v. Queensborough Nat'l Bank & Trust Co., 356 Ga. App. 223, 844 S.E.2d 894, 2020 Ga. App. LEXIS 349 (2020), cert. denied, No. S21C0012, 2021 Ga. LEXIS 342 (Ga. Apr. 19, 2021).

Waiver of defense by terms of guaranty documents. — Even if a corporation president was released from the president's personal guarantee of a corporate loan, O.C.G.A. § 10-7-20 did not apply to release the co-guarantors from liability when, by virtue of the terms of their guarantee documents, the guarantors had expressly waived any defense the guarantors might have which was related to the guarantors claim under § 10-7-20. Baby Days, Inc. v. Bank of Adairsville, 218 Ga. App. 752, 463 S.E.2d 171, 1995 Ga. App. LEXIS 875 (1995), cert. denied, No. S96C0260, 1996 Ga. LEXIS 269 (Ga. Jan. 26, 1996).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, §§ 55 et seq., 79 et seq.

C.J.S.

72 C.J.S., Principal and Surety, § 149 et seq.

ALR.

Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 A.L.R. 1605.

Incapacity of principal to contract as

affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 A.L.R. 477.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety, 77 A.L.R. 229.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

10-7-21. Novation; effect.

Any change in the nature or terms of a contract is called a "novation"; such novation, without the consent of the surety, discharges him.

History.

Orig. Code 1863, § 2130; Code 1868, § 2125; Code 1873, § 2153; Code 1882, § 2153; Civil Code 1895, § 2971; Civil Code 1910, § 3543; Code 1933, § 103-202.

Editor's notes.

It was held in some cases, prior to 1981, that this section did not apply to compensated sureties, as they were treated as guarantors under O.C.G.A. § 10-7-1 as it then read. See, for example, Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978), overruling Little Rock Furn. Co. v. Jones & Co., 13 Ga. App. 502, 79 S.E. 375 (1913), and Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S.E. 56 (1917). Other cases stated that this section did apply to contracts of guaranty. See, for example, Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975); Gilbert v. Cobb Exch. Bank, 140 Ga. App. 514, 231 S.E.2d 508 (1976); Ricks v. United States, 434 F. Supp. 1262 (S.D. Ga. 1976). Then in 1981, Ga. L. 1981, p. 870, § 1, amended O.C.G.A. § 10-7-1 to abolish the distinction between contracts of suretyship and guaranty. See the Editor's note to O.C.G.A. § 10-7-1.

Law reviews.

For article, "Georgia Law Needs Clarification: Does it Take Willful or Wanton Misconduct to Defeat a Contractual 'Exculpatory' Clause, or Will Gross Negligence Suffice," see 19 Ga. St. B. J. 10 (Feb. 2014).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Section strictly construed. — Georgia courts have given this section strict enforcement. Oellerich v. First Fed. Sav. & Loan Ass'n, 552 F.2d 1109, 1977 U.S. App. LEXIS 13220 (5th Cir. 1977).

Liability of a surety cannot be extended beyond the actual terms of surety's engagement and will be extinguished by any act or omission which alters the terms of the contract, unless it is done with the surety's consent.

General Consideration (Cont'd)

Washington Loan & Banking Co. v. Holliday, 26 Ga. App. 792, 107 S.E. 370, 1921 Ga. App. LEXIS 642 (1921).

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Novation discharges surety. — Contract of suretyship was one of strict law under former Code 1863, § 2127 (see now O.C.G.A. § 10-7-3), and any change of the nature or terms of the contract, without the consent of the surety, discharges the surety. Camp v. Howell, 37 Ga. 312, 1867 Ga. LEXIS 163 (1867).

Change in the nature or terms of the contract is a novation, and such a novation, without the consent of the surety discharges the surety from liability. Smith v. Georgia Battery Co., 46 Ga. App. 840, 169 S.E. 381, 1933 Ga. App. LEXIS 266 (1933) (change in terms of bond after surety signed).

Any change in the terms of the contract is considered a novation and discharges the surety in the absence of the latter's consent. The surety is also discharged by any act of the creditor which injures the surety or increases the surety's risk. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Any novation without the consent of the surety, or increase in risk, discharges the surety. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651, 1975 Ga. App. LEXIS 2210 (1975).

Tenant and landlord changed the terms of lease without the consent of the guarantor on the lease, therefore the guarantor was discharged from its obligations; the amendments, which removed the landlord's obligation to provide additional access to the property and waived the landlord's liability for leasing portions of the property to competing businesses, were material changes to the lease. SuperValu, Inc. v. KR Douglasville, LLC, 272 Ga. App. 710, 613 S.E.2d 154, 2005 Ga. App. LEXIS 290 (2005), cert. denied, No. S05C1326, 2005 Ga. LEXIS 602 (Ga. Sept. 19, 2005).

In a suit to recover on a note, the trial court properly denied a creditor's motion for summary judgment, and granted summary judgment to the guarantor of the note, releasing the guarantor from the guaranty the guarantor entered into with the creditor's debtor, as the execution of an escrow agreement between the creditor and the debtor, which materially changed the debtor's obligations thereunder without the guarantor's consent, amounted to a novation, releasing the guarantor from any obligation under the note. Thomas-Sears v. Morris, 278 Ga. App. 152, 628 S.E.2d 241, 2006 Ga. App. LEXIS 272 (2006).

Change must be material. — Any material alteration in the original contract, without the knowledge or consent of the guarantor thereof, will relieve the guarantor from the guaranty. H.C. Whitmer Co. v. Sheffield, 51 Ga. App. 623, 181 S.E. 119, 1935 Ga. App. LEXIS 423 (1935).

Surety will not be discharged from the contract unless the change or alteration in the contract is material. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Changes in lease agreed on in advance by guarantor. — Increased holdover rent was reserved in a commercial lease, and since there was no change in the terms of the lease, the landlord's act of allowing the corporation to remain as a tenant holding over was not a novation; in any event, the guaranty gave the landlord the authority to change the amount, time, or manner of payment of rent and to amend, modify, change or supplement the lease, and thus, the guarantor consented in advance to changes in the lease. Hood v. Peck, 269 Ga. App. 249, 603 S.E.2d 756, 2004 Ga. App. LEXIS 1129 (2004).

Guarantors remained responsible under lease. — In a dispute to recover amounts due under a lease and two guaranties, under the plain terms of the guaranties, the guarantors were liable for rent under the lease renewal as there was no novation because the guarantors explicitly agreed that the guaranties would continue in full force and effect during any renewals of the lease and that the guaranties would not be affected by

any modification, changes, alteration, or revisions to the lease. Sage Atlanta Props. v. Diner Group of Ga., 360 Ga. App. 817, 861 S.E.2d 638, 2021 Ga. App. LEXIS 398 (2021).

One who consents to a novation is not discharged as a surety. If notes are accepted by a creditor as security and are signed by the surety, the notes are not "without the consent of the surety" as contemplated by this section. Mauldin v. Lowe's of Macon, Inc., 146 Ga. App. 539, 246 S.E.2d 726, 1978 Ga. App. LEXIS 2448 (1978).

Liability extinguished when changes without consent. — If a party makes a contract in such a manner as is authorized by law, the party has a right to object to being bound by any other, and this elementary general rule has particular application to material changes in contractual obligations of sureties when made without their consent, and their liability is thereby extinguished. Hamby v. Crisp, 48 Ga. App. 418, 172 S.E. 842, 1934 Ga. App. LEXIS 91 (1934).

Individually liable guarantors not released by novation. — Nonsettling guarantors of promissory notes who were individually, not jointly, liable were not cosureties under O.C.G.A. § 10-7-21; thus, they were not discharged by plaintiff's acceptance from other guarantors of less than the total sum owed under the notes. Any novation by virtue of the settlement agreement would not operate to release the nonsettling guarantors from their individual limited liabilities. Marret v. Scott, 212 Ga. App. 427, 441 S.E.2d 902, 1994 Ga. App. LEXIS 286 (1994).

No evidence of novation to discharge surety. — Given that the broad language of a guaranty obligated the guarantor to the bank, absolutely and unconditionally guaranteeing the payment and performance of each and every debt that the debtor would owe, and because no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation, the guarantor remained obligated under the guaranty to the bank. Fielbon Dev. Co. v. Colony Bank, 290 Ga. App. 847, 660 S.E.2d 801, 2008 Ga. App. LEXIS 376 (2008).

Trial court did not err in ruling that a promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; at the time the guarantor executed the note modification on behalf of the debtor, the guarantor was already personally obligated to pay the creditors, pursuant to the guaranty, the original principal amount plus the accrued interest. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336, 2011 Ga. App. LEXIS 281 (2011).

Change which benefits surety. — Rule enunciated in this section will not be altered by the fact that the change in the contract, which was made without the knowledge or consent of the surety, nevertheless inured to the benefit of the principal and the surety. If the change is made without the knowledge or consent of the surety, the surety's complete reply is non haec in foedera veni. Little Rock Furn. Co. v. Jones & Co., 13 Ga. App. 502, 79 S.E. 375, 1913 Ga. App. LEXIS 239 (1913), overruled, Brock Constr. Co. v. Houston General Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, 1978 Ga. App. LEXIS 1824 (1978); Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S.E. 56, 1917 Ga. App. LEXIS 440 (1917).

Any change in the terms of a contract by which a new and materially different contract is created constitutes a novation and, when made without the consent of the surety, operates to discharge the latter; this is true even though such newly created contract is more favorable to the surety than the contract as originally executed. Paulk v. Williams, 28 Ga. App. 183, 110 S.E. 632, 1922 Ga. App. LEXIS 370 (1922).

Surety who has not consented to a change in a bond is entitled to claim a discharge, regardless of how the change affected the surety, and even if the change inured to the surety's benefit. Smith v.

Novation (Cont'd)

Georgia Battery Co., 46 Ga. App. 840, 169 S.E. 381, 1933 Ga. App. LEXIS 266 (1933).

Change which does not injure surety. — If there is a change in the nature of the contract and it is made without the knowledge or consent of the surety, a release will result, regardless of injury. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Surety is discharged from the terms of the contract, even though the surety is not injured by the contract change. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Any change, whether to the surety's benefit or detriment, is a novation which discharges the surety. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483, 1979 Ga. LEXIS 1271 (1979).

Release of parties to instrument secured discharges surety. — By virtue of this section, when a surety or accommodation endorser signs a note, the consideration of which is that the note shall be held by the bank when it is negotiated as collateral security for another note or draft due the bank, and the bank, without the knowledge and consent of the surety, changes the contract by releasing the acceptor and endorser of that other note or draft, the security or accommodation endorser of the collateral note is discharged. Stallings v. Bank of Americus, 59 Ga. 701, 1877 Ga. LEXIS 372 (1877).

Change in terms of payment to creditor discharges surety. — Change by the obligee and principal in the terms of payments to the contractor from that provided in the building contract operates to discharge the surety. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Claim for interest not novation. — Creditor's claim for interest in an action against the debtor and personal guarantor on an open account agreement did not result in a novation of the agreement. Charles S. Martin Distrib. Co. v. Berhardt Furn. Co., 213 Ga. App. 481, 445 S.E.2d 297, 1994 Ga. App. LEXIS 608 (1994).

Increase in rate of interest. — Giving of a new note for a usurious increase in interest, and part payment thereof, in consideration of 12 months delay to sue, discharges the surety on the original note. Camp v. Howell, 37 Ga. 312, 1867 Ga. LEXIS 163 (1867).

Under former Civil Code 1885, §§ 2968 and 2971, if, after a promissory note payable to a named payee or bearer has been signed by one as surety, the principal, before it comes into the hands of one who thereafter receives it as bearer in the course of negotiation before due, so alters it as to increase the rate of interest agreed to be paid from 8 to 12 percent, such note is by such alteration rendered void as to such surety; and this is true even though, at the time it comes into the hands of such bearer, one has no notice of the alteration by the principal. Hill v. O'Niell, 101 Ga. 832, 28 S.E. 996, 29 S.E. 996, 1897 Ga. LEXIS 341 (1897).

Comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest since the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. Bank of Terrell v. Webb, 177 Ga. App. 715, 341 S.E.2d 258, 1986 Ga. App. LEXIS 1526 (1986).

Change in payment terms, costs, and expenses resulted in novation. — New agreement was a novation under O.C.G.A. § 10-7-21 as the agreement changed the payment terms of the original contract by adding the requirement of late charges on unpaid balances, and costs and expenses of collection, including attorney fees; therefore, the novation discharged the guarantor. Builder Marts of Am., Inc. v. Gilbert, 257 Ga. App. 763, 572 S.E.2d 88, 2002 Ga. App. LEXIS 1281 (2002).

There is no novation if there is no new consideration. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226, 1981 Ga. App. LEXIS 2800 (1981).

Novation not found. — Guarantor argued that a bank's settlements with two other guarantors constituted a novation

under O.C.G.A. § 10-7-21; however, a novation required a new agreement, and there was no new contract between the bank and the borrower and no new contract between the bank and the borrower. Additionally, the guarantor consented to the settlements in advance in the guaranty agreement. Wooden v. Synovus Bank, 323 Ga. App. 794, 748 S.E.2d 275, 2013 Ga. App. LEXIS 750 (2013).

Consent

Implied consent makes change immaterial. — Any change or alteration made in an instrument after the instrument's execution which is impliedly authorized by the signers thereof, and which merely expresses what would otherwise be supplied by intendment, is immaterial, and will not discharge one signing as surety. Watkins Medical Co. v. Harrison, 33 Ga. App. 585, 126 S.E. 909, 1925 Ga. App. LEXIS 615 (1925).

Surety may consent in advance to a course of conduct which would otherwise result in the surety's discharge. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651, 1975 Ga. App. LEXIS 2210 (1975).

Surety is not discharged by any act of the creditor or obligee to which the surety consents. Consent may be given in advance as at the time the contract of suretyship is entered into. Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc., 155 Ga. App. 257, 270 S.E.2d 696, 1980 Ga. App. LEXIS 2549 (1980).

Guarantor may consent in advance to conduct which would otherwise result in statutory discharge. Regan v. United States Small Bus. Admin., 926 F.2d 1078, 1991 U.S. App. LEXIS 4091 (11th Cir. 1991).

If the language of a guaranty specifically contemplated an increase in the obligor's debt and the creation of new obligations, and included waivers of any "legal or equitable discharge" and of any defense based upon an increase in risk, the protections of O.C.G.A. §§ 10-7-21 and 10-7-22 were waived. Underwood v. NationsBanc Real Estate Serv., Inc., 221 Ga. App. 351, 471 S.E.2d 291, 1996 Ga. App. LEXIS 482 (1996).

By assenting in advance to a waiver of all legal and equitable defenses, the guarantor was foreclosed from asserting that the guarantor was discharged under O.C.G.A. § 10-7-21 or O.C.G.A. § 10-7-22. Ramirez v. Golden, 223 Ga. App. 610, 478 S.E.2d 430, 1996 Ga. App. LEXIS 1241 (1996).

Alleged guarantor was not discharged from the obligations of a personal guarantee under O.C.G.A. §§ 10-7-21 and 10-7-22 because, although a subsequent agreement changed the terms of the original guaranty by granting an extension of time regarding the terms of purchase from a company and acted as a novation, the alleged guarantor consented to those changes. Staten v. Beaulieu Group, LLC, 278 Ga. App. 179, 628 S.E.2d 614, 2006 Ga. App. LEXIS 278 (2006).

Disregard of condition of surety's consent makes section apply. — If a surety authorizes the substitution of the new bill on a condition useless to the surety and the condition is disregarded, the surety may claim the principle announced in this section. Central Ga. Bank v. Cleveland Nat'l Bank, 59 Ga. 667, 1877 Ga. LEXIS 368 (1877).

Unconsented increase in risk is an independent ground for discharge of a surety. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483, 1979 Ga. LEXIS 1271 (1979).

Application

Rules apply to negotiable instruments. — Agreement (novation) which would discharge the surety or guarantor of a simple contract for the payment of money will also discharge one who is a guarantor or surety on a negotiable instrument. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274, 1978 Ga. App. LEXIS 2720 (1978).

Official bonds. — When, after the execution of the public printer's performance bond, the legislature by resolution authorized the treasurer (now director of the Office of Treasury and Fiscal Services) to advance to the printer a sum in part payment for the public printing of the session then pending, this was such a novation of the contract as discharged the sureties if done without

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the surety's consent. Walsh v. Colquitt, 64 Ga. 740, 1880 Ga. LEXIS 402 (1880).

Taking of a promissory note for an antecedent liability does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694, 1935 Ga. App. LEXIS 476 (1935).

Mutual intention to treat former contract as no longer binding must be shown. — To do away with the stipulations in a contract, the circumstances must show a mutual intention of the parties to treat the stipulations as no longer binding and must be such as, in law, to make practically a new agreement. Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 723, 1942 U.S. Dist. LEXIS 3262 (D. Ga.), modified, 131 F.2d 674, 1942 U.S. App. LEXIS 2918 (5th Cir. 1942).

Promissory note evidence of settlement of accounts. — Under the facts, the taking of a demand promissory note for a preexisting liability which was covered by the guaranty did not constitute a payment of the debt and thereby release the guarantor. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694, 1935 Ga. App. LEXIS 476 (1935).

Generally, the execution of a promissory note is prima facie evidence of the full settlement of all accounts up to the date of the note. A compromise, or mutual accord and satisfaction, is binding on both parties. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776, 1939 Ga. App. LEXIS 377 (1939).

Accord and satisfaction is effected by each party relinquishing claim. — When each of two persons relinquishes a claim against the other, or each discontinues an action against the other, a mutual accord and satisfaction is effected, regardless of the respective amounts involved; and this bars any further recourse on the part of either as to such claims. Any rights of the parties must now be based upon the new agreement. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776, 1939 Ga. App. LEXIS 377 (1939).

New note for less than old is presumptive evidence of settlement. — New note for a less sum than the old note, given in renewal thereof, is presumptive evidence that all differences between the parties were adjusted and settled when such new note was given. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776, 1939 Ga. App. LEXIS 377 (1939).

Other agreement must be clearly shown. — It must be upon clear and satisfactory evidence that both parties agreed and intended that the settlement, made when the new note was given, was not final and that any defense which could have been made to the old note might still be made to the new one. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776, 1939 Ga. App. LEXIS 377 (1939).

New note given for old with different terms is novation. — When a note was given by principal and security during the Civil War which, at the close of the war, was scaled to a gold standard, a new note given by a principal alone for the amount thus scaled, and accepted by the payee in the discharge of the first note, was a novation of the original contract under former Code 1868, §§ 2125 and 2828. Hamilton v. Willingham, 45 Ga. 500, 1872 Ga. LEXIS 267 (1872).

Substituting absolute deed for mortgage. — Absolute deed conveying land as security for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied and surrendered up because of the execution of such deed, the transaction operates as a novation and amounts to a merger. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783, 1945 Ga. App. LEXIS 405 (1945).

Changing the date from which a promissory note draws interest by erasing the words "from date" and substituting therefor the words "from maturity" is a material alteration creating a new contract and constitutes a novation. Paulk v. Williams, 28 Ga. App. 183, 110 S.E. 632, 1922 Ga. App. LEXIS 370 (1922).

Renewing note at same rate. — By virtue of this section, the mere renewal of a note at the same rate of interest is not a novation. Partridge v. Williams' Sons, 72 Ga. 807, 1884 Ga. LEXIS 324 (1884).

New note to ward and security deed conveying same property conveyed to guardian. — If a guardian holding a note secured by a deed received, for the benefit of two minor wards, payment from the debtor of a sum equal to the share of one of the wards, and settled with such ward at majority, and thereafter the debtor executed a new note and security deed to the other ward at majority, the new note representing the ward's share of the original indebtedness and the security deed conveying the same property as the original deed to the guardian, it was held that the new note and security deed did not amount to a novation. Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783, 1936 Ga. LEXIS 474 (1936).

Failure to enter into contract not relied upon by surety. — Fact that no contract was ultimately entered into between the grantor and grantee in the security deed executed contemporaneously with notes endorsed by a surety does not constitute a fraud upon the surety so as to relieve the surety of liability on the notes; nor does such fact constitute a novation of the notes so as to relieve the surety of the surety's liability thereon, for if it does not appear that the surety relied upon the existence of such contract as an inducement to sign as surety, there can be no fraud, nor can the failure to enter into the contract, which was cancellable at any time solely by the grantee in the security deed (the payee in the notes), constitute a novation of the notes. Southern Cotton Oil Co. v. Hammond, 92 Ga. App. 11, 87 S.E.2d 426, 1955 Ga. App. LEXIS 506 (1955).

Surety will not be released by fraudulent renewal note disaffirmed by creditor. — While under former Civil Code 1910, §§ 3543 and 3544 a surety will be discharged by a novation changing the nature or terms of the surety's contract without the surety's consent, and therefore the acceptance by a payee bank, without the agreement or consent of the surety, of a new note in renewal or payment of the original note signed by the surety will discharge the surety from liability, such an acceptance by the payee bank, when induced by the actual fraud of the maker in presenting the renewal instrument with the signature of the surety forged thereon, and without knowledge or reasonable ground to suspect, on the part of the bank, that the signature was in fact a forgery, will not release the surety, if it appeared that upon discovery of the fraud of the maker the bank promptly disaffirmed the bank's previous acceptance of the renewal note by regaining possession of the original note and suing thereon. Biddy v. People's Bank, 29 Ga. App. 580, 116 S.E. 222, 1923 Ga. App. LEXIS 128 (1923).

Guarantor who admitted forging co-guarantor's signature estopped from pleading discharge. — Husband/guarantor was equitably estopped from arguing that a licensor's discharge of his co-guarantor and wife discharged him pursuant to O.C.G.A. §§ 10-7-20 and 10-7-21 because he signed an affidavit that he had forged his wife's signature on the guaranty without her knowledge, and the affidavit resulted in the wife's dismissal from the licensor's suit. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166, 2010 Ga. App. LEXIS 922 (2010), cert. denied, No. S11C0654, 2011 Ga. LEXIS 423 (Ga. May 16, 2011).

Guarantor bound by contract. — As there was some evidence to support a determination that a guarantor did not intend that contractual guaranty obligations were contingent upon another individual signing the guaranty as a co-surety, the failure of such signature was not a change in the contract terms or a release that discharged the guarantor from liability. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230, 2013 Ga. App. LEXIS 604 (2013).

Substituting note for account. — By virtue of this section, a guarantor is not released by reason of the mere fact that an account which the guarantor guaranteed has been reduced to a note, when it appears the account was for goods furnished "in pursuance of the contract of guaranty" and it appears that the note

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represents the same amount and stands in lieu of the account. Kalmon v. Scarboro, 11 Ga. App. 547, 75 S.E. 846, 1912 Ga. App. LEXIS 101 (1912).

Substitution of a promissory note for an original account indebtedness, with the inclusion in the note of an extended time for payment, a higher face amount reflecting accrued interest, and a provision authorizing the recovery of attorney fees in the event of collection by an attorney, did not result in either a novation of the contract nor an increased risk and did not discharge the guarantors of the prior guaranty agreement from liability. Columbia Nitrogen Corp. v. Mason, 171 Ga. App. 685, 320 S.E.2d 838, 1984 Ga. App. LEXIS 2316 (1984).

Contract simply giving creditor additional security. — Since a second contract simply gave the seller additional security for the payment of the debt, was not inconsistent with the first contract, and did not increase the risk of the surety, the second contract was not a novation of the first within the meaning of former Code 1933, § 103-202 (see now O.C.G.A. § 10-7-21) and did not release the surety under the provisions of either § 103-202 or former Code 1933, § 103-203. W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574, 1944 Ga. App. LEXIS 249 (1944).

Failure of creditor to record lien. — Since the defendant signed the note as surety, and this fact was known to the plaintiffs when the plaintiffs accepted the note, the failure of the plaintiffs to record the retention of title contract within the time required by law did not discharge the surety. La Boon v. Wright & Locklin, 42 Ga. App. 275, 155 S.E. 770, 1930 Ga. App. LEXIS 335 (1930).

Grantor whose debt is assumed is surety if creditor assents to assumption. — When A, the mortgagor, was originally bound as principal to B, the mortgagee, and C, the grantee, assumed the debt to B, as between A and C, the latter assumed the position of principal debtor and the former was changed to a mere surety. The consideration for C's assumption of the debt was the property conveyed by A to C. This change of position would not affect B, the mortgagee, if B did not assent to the change. Stapler v. Anderson, 177 Ga. 434, 170 S.E. 498, 1933 Ga. LEXIS 195 (1933).

New obligation from grantee to creditor is recognition of suretyship. — When a grantee in a sales agreement, as part of the consideration thereof, assumes and agrees to pay an outstanding indebtedness against the property conveyed, the grantee takes upon the grantee the burden of the debt secured by the deed, and, as between the grantee and the grantor, the grantee becomes the principal and the latter merely a surety for payment of the debt. While the holder of the security deed is not bound by such an agreement unless the holder consents to it, when, with knowledge of such an agreement, the holder enters into an independent stipulation on the holder's own account with the grantee whereby the holder obtains a new obligation running directly to the holder on the footing that the grantee becomes the principal, then, in the absence of special conditions, the holder is held to have recognized and become bound by the relation of principal and surety existing between the maker of the surety deed and the grantee. Zellner v. Hall, 210 Ga. 504, 80 S.E.2d 787, 1954 Ga. LEXIS 347 (1954).

Extension of mortgage without consent of grantor discharges grantor. — A purchased land subject to a mortgage which A assumed, and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A. It was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Grant must consent to extension when suretyship was not created by mutual agreement of all parties. — In the absence of a mutual agreement of the grantor, the grantee, and the holder of the encumbrance to that effect, the relation of

principal and surety did not exist between the grantee and grantor, and the latter was not discharged from liability by an agreement between the other parties to extend the time of payment. Alsobrook v. Taylor, 181 Ga. 10, 181 S.E. 182, 1935 Ga. LEXIS 8 (1935).

Reduction in interest rate does not release grantor who remains principal. — Change in the rate of interest called for by contract from eight to six percent at the time of the sale of the premises to the grantees, when the grantor remained bound to the holder as principal debtor, would not operate to relieve the grantor from responsibility on the grantor's note and deed to secure debt. Zellner v. Hall, 211 Ga. 572, 87 S.E.2d 395, 1955 Ga. LEXIS 394 (1955).

Creditor's agreement to allow delay in payment is not an additional consideration as the debtor's promise to pay debt already due creates no additional obligation. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226, 1981 Ga. App. LEXIS 2800 (1981).

Payment of late charges or reinstatement fees authorized by original contract does not furnish new consideration. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226, 1981 Ga. App. LEXIS 2800 (1981).

Promise to pay usury does not discharge surety. — Mere promise to pay usury is void, and the surety is not thereby discharged. Lewis, Leonard & Co. v. Brown, 89 Ga. 115, 14 S.E. 881, 1892 Ga. LEXIS 280 (1892).

Parol contract does not release surety when statute of frauds applies. — When a written contract which must, under the statute of frauds, be in writing has been signed by a surety for one of the contracting parties, the surety will not be released from liability by reason of the making of a subsequent parol contract between the principals which does not become binding by reason of complete performance or otherwise. Willis v. Fields, 132 Ga. 242, 63 S.E. 828, 1909 Ga. LEXIS 72 (1909).

Parol evidence inadmissible to show novation under statute of frauds. — Contract which by law is required to be in writing cannot be changed by parol evidence so as to substitute therefor, by novation, a contract which is also required by law to be in writing. Evidence of a parol agreement is inadmissible to establish the novation of a contract by law required to be in writing. Ver Nooy v. Pitner, 17 Ga. App. 229, 86 S.E. 456, 1915 Ga. App. LEXIS 314 (1915).

When section should be charged. — When Civil Code 1895, §§ 2968, 2971, and 2972 (see now O.C.G.A. §§ 10-7-3, 10-7-21, and 10-7-22), defining a contract of suretyship and the rights of a surety, were pertinent to the issues involved, the statutes should have been given in a charge to the jury on timely written request, or even without request. Haigler v. Adams, 5 Ga. App. 637, 63 S.E. 715, 1909 Ga. App. LEXIS 93 (1909).

Instruction proper. — As there was evidence to support a charge on waiver of a guarantor's right to be discharged by an increase of risk or a novation, and it was not an improper statement of the law, there was no cause to grant the guarantor's motion for a new trial. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230, 2013 Ga. App. LEXIS 604 (2013).

If the arrangement for the use of a pledged savings account did not deviate from the terms of the subject note as agreed to by plaintiffs, no issue concerning the discharge defenses remained for jury determination, warranting summary judgment. Cohen v. Northside Bank & Trust Co., 207 Ga. App. 536, 428 S.E.2d 354, 1993 Ga. App. LEXIS 260 (1993).

Extension

Extension of time for payment. — A creditor of a partnership who has notice of the dissolution and of the agreement by the continuing partner to assume the debts of the firm is bound to accord to the retiring partner all the rights of a surety. Hence, if, without the latter's knowledge or consent, the creditor, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing

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partner. Grigg v. Empire State Chem. Co., 17 Ga. App. 385, 87 S.E. 149, 1915 Ga. App. LEXIS 441 (1915).

When the creditor had, for a consideration, extended the time of payment of the note signed by the surety, and in addition thereto had calculated, and undertook to and did collect, usurious interest from the principal, and by reason of such payment did indulge the principal debtor and extend the payment of the note, all of which, according to the evidence, was without the knowledge or consent of the surety, the surety was discharged by virtue of this section. Pickett v. Brooke, 24 Ga. App. 651, 101 S.E. 814, 1920 Ga. App. LEXIS 429 (1920).

If after the maturity of a note the debtor pays to the creditor a sum of money representing advance interest upon the principal at the rate of 8 percent per annum for a definite period of time, in consideration of a promise by the creditor to extend the time of payment of the principal, this agreement, although not in writing, constitutes a valid contract between the parties, and, when made without the consent of the surety upon the note, operates to release and discharge the latter by virtue of this section. Lewis v. Citizens' & S. Bank, 31 Ga. App. 597, 121 S.E. 524, 1924 Ga. App. LEXIS 83 (1924), aff'd, Citizens' & Southern Bank v. Lewis, 159 Ga. 551, 126 S.E. 392, 1925 Ga. LEXIS 17 (1925).

If a valid and binding extension is granted to the principal debtor without the consent of the surety, the latter is discharged. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Period of extension must be fixed by agreement. — In order to discharge a surety by an extension of time to the principal, not only must there be an agreement for the extension, but the proof must show that the indulgence was extended for a definite period fixed by the agreement. Bunn v. Commercial Bank, 98 Ga. 647, 26 S.E. 63, 1896 Ga. LEXIS 114 (1896); Ver Nooy v. Pitner, 17 Ga. App. 229, 86 S.E. 456, 1915 Ga. App. LEXIS 314 (1915).

If a signer of a note was in fact a surety only and the payee, under a valid agreement with the principal and without the consent of the surety, extends the time of maturity as fixed by the obligation, a release of the surety will result, but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. Duckett v. Martin, 23 Ga. App. 630, 99 S.E. 151, 1919 Ga. App. LEXIS 245 (1919); Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406, 1935 Ga. App. LEXIS 188 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937).

Taking demand note is not extension of time. — Taking of a demand note was not such an extension of time as would release a guarantor because a demand note is instantly due and the moment delivered can be sued upon. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694, 1935 Ga. App. LEXIS 476 (1935).

Creditor may rescind extension obtained by fraud. — Under former Code 1882, §§ 2153 and 2154, if the maker of a note induced the payee to extend the time of payment, by fraudulent representations, upon the discovery of such fraud, the creditor can rescind the agreement, but if the creditor failed so to do and retained the benefits of the transaction, this will operate to discharge a surety or accommodation endorser. Burnlap v. Robertson, 75 Ga. 689, 1885 Ga. LEXIS 206 (1885).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, §§ 5, 35.

C.J.S.

72 C.J.S., Principal and Surety, § 95 et seq.

ALR.

Consenting to continuance or extension of time in action as releasing surety, 7 A.L.R. 376.

Extension of time or other modification of original contract as releasing indemnitor of surety or guarantor, 43 A.L.R. 1368.

Liability of surety or guarantor for partnership in respect of transactions or defaults subsequent to change in personnel of the partnership, 45 A.L.R. 1426.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law, 48 A.L.R. 715; 65 A.L.R. 1425; 108 A.L.R. 1088; 2 A.L.R.2d 260.

Taking of demand note in renewal as releasing surety or endorser, 48 A.L.R. 1222.

Acceptance of interest in advance as consideration for, or evidence of, an extension of time which will release a guarantor, surety, or endorser, 59 A.L.R. 988.

Liability of grantee assuming mortgage debt to grantor, 76 A.L.R. 1191; 97 A.L.R. 1076.

Liability of guarantor of or surety for bank deposit as affected by reorganization, merger, or consolidation of bank, 78 A.L.R. 381.

Creditor's knowledge of, or consent to, assumption by third person of debtor's obligation as release of original debtor or extinguishment of original debt essential to novation, 87 A.L.R. 281.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 A.L.R. 651.

Lessee as surety for rent after assignment, and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 A.L.R. 1238.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Rule as to discharge of surety by subsequent modification of obligation without his consent as applicable to surety on bond for discharge of lien, 102 A.L.R. 764.

Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of its use for purpose other than intended, as ratification of, or estoppel to assert, the diversion, 105 A.L.R. 437.

Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 A.L.R. 964.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 A.L.R. 1014.

Necessity of proof of original obligor's consent to, or ratification of, third person's assumption of obligation, in order to effect a novation, 124 A.L.R. 1498.

Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 A.L.R. 10.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Surety's liability as affected by the addition, without surety's knowledge or consent, of the personal obligation of a third person, 144 A.L.R. 1266.

Creditor's acceptance of obligation of third person as constituting novation, 61 A.L.R.2d 755.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 A.L.R.2d 734.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 A.L.R.3d 582.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 A.L.R.3d 567.

10-7-22. Discharge of surety by increase of risk.

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to prosecute with vigor his legal remedies, unless for a consideration, shall not release the surety.

History.
Orig. Code 1863, § 2131; Code 1868, § 2126; Code 1873, § 2154; Code 1882, § 2154; Civil Code 1895, § 2972; Civil Code 1910, § 3544; Code 1933, § 103-203.

Cross references.
Refusal to sue principal after notice by surety as discharge, § 10-7-24.

Law reviews.
For article, "Georgia Law Needs Clarification: Does it Take Willful or Wanton Misconduct to Defeat a Contractual 'Exculpatory' Clause, or Will Gross Negligence Suffice," see 19 Ga. St. B. J. 10 (Feb. 2014).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316 (1978), this section was held not to apply to compensated sureties. However, Ga. L. 1981, p. 870, § 1, amended § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). See the Editor's note under §§ 10-7-1 and 10-7-24.

Section codifies general rule. — This section is a codification of the general rule. Timmons v. Butler, Stevens & Co., 138 Ga. 69, 74 S.E. 784, 1912 Ga. LEXIS 192 (1912); Johnson v. Longley, 142 Ga. 814, 83 S.E. 952, 1914 Ga. LEXIS 560 (1914).

Section is of judicial origin, being merely the adoption and incorporation into the Code by legislative approval of the principles previously asserted in Brown v. Executors of Riggins, 3 Ga. 405 (1847), and Jones v. Whitehead, 4 Ga. 397 (1848). Cloud v. Scarborough, 3 Ga. App. 7, 59 S.E. 202, 1907 Ga. App. LEXIS 536 (1907).

Common law. — Rule stated in this section is a correct statement of the common law applicable to compensated sureties. Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316, 1978 Ga. LEXIS 1021 (1978); Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599, 1981 Ga. LEXIS 727 (1981).

While O.C.G.A. § 10-7-22 does not apply to compensated sureties, the rule stated therein is a correct statement of common law applicable to compensated sureties. West Cash & Carry Bldg. Materials of Savannah, Inc. v. Liberty Mtg. Corp., 160 Ga. App. 323, 287 S.E.2d 320, 1981 Ga. App. LEXIS 3056 (1981).

Uniform Commercial Code provides for discharge of parties on instruments. — Former Code 1933, § 103-203 was superseded by former Code 1933, § 14-902. Former § 14-902 was, in turn, repealed by Ga. L. 1962, p. 156. The law governing discharge of sureties and other parties on instruments is currently

governed by the Uniform Commercial Code provisions. Christian v. Atlanta Army Depot Fed. Credit Union, 151 Ga. App. 403, 260 S.E.2d 533, 1979 Ga. App. LEXIS 2547 (1979).

Law governing the discharge of parties from liability on instruments may be found in present O.C.G.A. § 11-3-601. Westwood Place, Ltd. v. Green, 153 Ga. App. 595, 266 S.E.2d 242, 1980 Ga. App. LEXIS 1917, aff'd in part and rev'd in part, 246 Ga. 287, 271 S.E.2d 194, 1980 Ga. LEXIS 1083 (1980).

Not applicable to liability of debtor to guarantor. — O.C.G.A. §§ 10-7-22 and 11-3-606 address liability of a guarantor to a creditor, not the liability of a debtor to the debtor's guarantor, and did not apply to the release of a guarantor's principal from liability on a note. Fabian v. Dykes, 214 Ga. App. 792, 449 S.E.2d 305, 1994 Ga. App. LEXIS 1059 (1994).

Holder of collateral may not split debt. — When a debtor to secure a debt deposits more than one piece of property, whether personal or real, as security in gross for an entire debt, the amount of which is definitely fixed in the contract, it is not within the power of the holder of such collateral, whether the holder is the original creditor or a transferee, to split the debt so as to make it the liability of two persons instead of one, and to be paid in full as to a portion of the original amount with a provision that it shall still retain vigor as to the other debtor. Loftis v. Clay, 164 Ga. 845, 139 S.E. 668, 1927 Ga. LEXIS 288 (1927).

Contract of guaranty not broken by shipments not confirmed by guarantor. — Contract guaranteeing a trade account, which says that "this guarantee does not limit the amount of credit extended the said party, but my liability hereunder is not to exceed $2000.00 at any one time," and "no shipments are to be made except on orders confirmed by me," means that the guarantor will not be liable for any shipment not confirmed by the guarantor, nor for more than $2000.00 at any one time, but that the vendor may extend credit in addition to the amounts guaranteed, and consequently the contract was not broken by the vendor shipping some goods to the vendee without the confirmation of the guarantor. Brown Shoe Co. v. Moore, 53 Ga. App. 159, 184 S.E. 923, 1936 Ga. App. LEXIS 29 (1936).

Both principal and surety discharged by verdict against surety only. — When the principal and the principal's surety on a promissory note, which is joint and several on its face, are sued in the same action, and verdict and judgment are taken against the surety only, both the principal and the surety are discharged. Fricks v. Rome Mercantile Co., 49 Ga. App. 431, 175 S.E. 807, 1934 Ga. App. LEXIS 430 (1934).

Guarantor consented to the additional risk. — Sole shareholder of the corporation consented to the additional risk created by the extension of credit beyond $15,000, when the personal guaranty language provided that the guarantor's liability under the guaranty was to be "UNLIMITED", and that the guaranty remained in full force and effect until the guarantor gave written notice to the seller to make no further advances on the security of the guaranty. Builders Dev. Corp. v. Hughes Supply, Inc., 242 Ga. App. 244, 529 S.E.2d 388, 2000 Ga. App. LEXIS 143 (2000).

Risk of guarantor not increased. — Trial court did not err in granting a payee's motion for summary judgment in the payee's action against a maker and a guarantor to collect on a promissory note and to enforce a guaranty because the payee established that there was no issue of material fact as to the defense that its actions in promising to refinance the loan or to extend a line of credit increased the guarantor's risk under the guaranty; a lender's failure to lend additional sums to a principal did not discharge a guarantor from liability for the amount that was actually advanced by the lender. Ga. Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 700 S.E.2d 662, 2010 Ga. App. LEXIS 788 (2010).

Instruction proper. — As there was evidence to support a charge on waiver of a guarantor's right to be discharged by an increase of risk or a novation, and it was not an improper statement of the law, there was no cause to grant the

General Consideration (Cont'd)

guarantor's motion for a new trial. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230, 2013 Ga. App. LEXIS 604 (2013).

Waiver of defense clear. — Trial court properly held a guarantor liable on a promissory note because the construction of the guaranty was a matter of law for the court and the language employed by the parties in the guaranty was plain, unambiguous, and capable of only one reasonable interpretation and the discharge of the surety by increase of risk under O.C.G.A. § 10-7-22 was a legal defense which the plain language of the guaranty waived. Hanna v. First Citizens Bank & Trust Co., Inc., 323 Ga. App. 321, 744 S.E.2d 894, 2013 Ga. App. LEXIS 546 (2013), cert. denied, No. S13C1742, 2013 Ga. LEXIS 986 (Ga. Nov. 18, 2013).

Unpublished decision: After a restaurant operator stopped making rent payments and the plaintiff sued the defendant for rent payments, re-letting costs, accrued interest, and attorneys' fees under a guaranty agreement, it was not error to hold that the defendant waived its defenses to liability pursuant to the terms of the guaranty agreement. ND Props. v. BLRG Rest. Grp., Inc., 649 Fed. Appx. 861, 2016 U.S. App. LEXIS 8691 (11th Cir. 2016).

Acts Discharging Surety

1. In General

"Creditor" whose acts relieve is opposite party. — Acts of "the creditor," the opposite party, are those that relieve. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133, 1907 Ga. App. LEXIS 206 (1907).

Acts enumerated are disjunctive. — This section lays down three acts on the part of a creditor which will release a surety: (1) injury to the surety; (2) increasing the risk to the surety; and (3) exposing the surety to greater liability; any one of these three acts will discharge a surety. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

Injury necessarily involves something in past. — Distinction between the first ground of discharge under this section and the other two is apparent because the injury naturally refers to something in the past from which the injury resulted. Cloud v. Scarborough, 3 Ga. App. 7, 59 S.E. 202, 1907 Ga. App. LEXIS 536 (1907).

Acts of creditor causing injury or increased risk. — Any breach of a contract between a principal debtor and the creditor, made at the time of the making of a loan to the principal debtor, which results in loss or increase of risk to sureties discharges the sureties. Seaboard Loan Corp. v. McCall, 61 Ga. App. 752, 7 S.E.2d 318, 1940 Ga. App. LEXIS 252 (1940).

Surety is discharged by any act of the creditor which injures the surety or increases the surety's risk. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Any novation without the consent of the surety, or increase in risk, discharges the surety. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651, 1975 Ga. App. LEXIS 2210 (1975).

Unconsented increase in risk is an independent ground for discharge of a surety. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483, 1979 Ga. LEXIS 1271 (1979).

Consent by guarantor in advance to changes. — Landlord's failure to pursue the landlord's legal remedies as soon as the law allowed and the landlord's refusal to accept the tenant's insufficient rent payments after bringing an eviction action did not affect a guarantor's liability under a lease guaranty; in any event, the guaranty gave the landlord the authority to change the amount, time, or manner of payment of rent and to amend, modify, change, or supplement the lease, and thus, the guarantor consented in advance to changes in the lease. Hood v. Peck, 269 Ga. App. 249, 603 S.E.2d 756, 2004 Ga. App. LEXIS 1129 (2004).

Alleged guarantor was not discharged from the obligations of a personal guarantee under O.C.G.A. §§ 10-7-21 and 10-7-22 because, although a subsequent agreement changed the terms of the original guaranty by granting an

extension of time regarding the terms of purchase from a company and acted as a novation, the alleged guarantor consented to those changes and, thus, an additional risk. Staten v. Beaulieu Group, LLC, 278 Ga. App. 179, 628 S.E.2d 614, 2006 Ga. App. LEXIS 278 (2006).

Trial court did not err in ruling that a promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; given the unambiguous language of the guaranty, no issue of fact existed as to whether the guarantor was discharged by any increased risk or a purported novation because the guarantor voluntarily and explicitly agreed in advance to the modification of the original note. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336, 2011 Ga. App. LEXIS 281 (2011).

Exposure to greater liability. — Surety may be discharged when the creditor has so acted as to increase the surety's risk or expose the surety to greater liability than that for which the surety contracted. Parker v. Fidelity Bank, 151 Ga. App. 733, 261 S.E.2d 465, 1979 Ga. App. LEXIS 2773 (1979).

Change must be material. — Surety will not be discharged from the contract unless the change or alteration in the contract is material. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Compensated surety is discharged only if the change is material and causes some injury, loss, or prejudice to it. Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, 1978 Ga. App. LEXIS 1824, aff'd, 241 Ga. 460, 246 S.E.2d 316, 1978 Ga. LEXIS 1021 (1978).

Loss need not be shown. — In a contract of suretyship, it is not essential, in order to prove a release, that the surety allege or prove a loss. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

Surety is discharged from the terms of the contract even though the surety is not injured by the contract change. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Some acts discharge in whole and some in part only. — While the language of this section is broad, yet there is a distinction between certain things which will operate to discharge a surety in whole and others which will only discharge a surety in part. Johnson v. Longley, 142 Ga. 814, 83 S.E. 952, 1914 Ga. LEXIS 560 (1914).

Collateral injury discharges pro tanto. — If a surety suffers injury arising collaterally and not affecting the contract itself, the discharge is only to the extent of the loss or injury, and, if that is not as great as the liability of the surety, then pro tanto. Armour Fertilizer Works v. Kenney, 161 Ga. 477, 131 S.E. 281, 1926 Ga. LEXIS 287 (1926); Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Discharge pro tanto despite increased risk. — If the plaintiff sought to recover against the surety on a replevy bond and if, after the bond was executed and the plaintiff obtained a verdict and judgment in the plaintiff's favor establishing a lien upon the cotton (subject of the replevy bond and plaintiff's previous suit in trover), the plaintiff took possession of the cotton, the surety was not discharged from the entire indebtedness but was discharged only in the amount of the value of the cotton, even though this act of the plaintiff may have increased the risk of the surety. Trice v. Cabero, 41 Ga. App. 816, 155 S.E. 54, 1930 Ga. App. LEXIS 1106 (1930).

Act of creditor affecting contract itself. — Principle regarding a release pro tanto has no relevancy when the act of the creditor affected the contract itself. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Accommodation party must show payee knew payee was surety. — Promissory note signed by two persons as apparent principal makers, reciting, "We

Acts Discharging Surety (Cont'd)
1. In General (Cont'd)

promise to pay," etc., when there is nothing to indicate that they are not principal makers, is prima facie a joint note; however, it may be shown by parol, in an action by the payee, that one of the persons so signing the note as an apparent maker was in truth a surety for the other signer, rather than a coprincipal, and when the one thus claiming suretyship claims a discharge or release by reason of some act increasing one's risk as surety, one must go further and show that the payee knew one was a surety at the time of the act in question. Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406, 1935 Ga. App. LEXIS 188 (1935).

Act damaging surety's heirs held not to increase surety's risk. — Although the plaintiff creditor, through the plaintiff's agent, may have induced the other heirs at law of the intestate surety to purchase the share of the principal debtor, also an heir at law, in the estate of the intestate, and pay the plaintiff therefor, the agent's actions could not have operated to increase the risk of the surety on the note, although it may have resulted in damage to the other heirs at law who had purchased such share. Stephens v. Stone, 46 Ga. App. 293, 167 S.E. 545, 1932 Ga. App. LEXIS 129 (1932).

Act or omission authorized by law does not discharge surety. — Neither the omission by the creditor of some act not specially enjoined by law nor the commission of some act expressly authorized by law which tends to increase the risk of the security will operate as a discharge. Stewart v. Barrow, 55 Ga. 664, 1876 Ga. LEXIS 452 (1876).

Consent may be given in advance to act which otherwise would discharge surety. — Surety or guarantor may consent in advance to a course of conduct which would otherwise result in the surety's discharge. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651, 1975 Ga. App. LEXIS 2210 (1975).

When the language of a guaranty specifically contemplated an increase in the obligor's debt and the creation of new obligations, and included waivers of any "legal or equitable discharge" and of any defense based upon an increase in risk, the protections of O.C.G.A. §§ 10-7-21 and 10-7-22 were waived. Underwood v. NationsBanc Real Estate Serv., Inc., 221 Ga. App. 351, 471 S.E.2d 291, 1996 Ga. App. LEXIS 482 (1996).

By assenting in advance to a waiver of all legal and equitable defenses, the guarantor was foreclosed from asserting that the guarantor was discharged under O.C.G.A. § 10-7-21 or O.C.G.A. § 10-7-22. Ramirez v. Golden, 223 Ga. App. 610, 478 S.E.2d 430, 1996 Ga. App. LEXIS 1241 (1996).

Contract giving additional security does not discharge surety. — When a second contract simply gave the seller additional security for the payment of the debt, was not inconsistent with the first contract, and did not increase the risk of the surety, the second contract was not a novation of the first within the meaning of former Code 1933, § 103-202 and did not release the surety under either § 103-202 or former Code 1933, § 103-203. W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574, 1944 Ga. App. LEXIS 249 (1944).

Extension of additional credit. — Lender's extension of additional credit to the principal obligor did not affect the guarantor's liability under the guaranty since the amount sought by the lender from the guarantor did not exceed the limit in the note secured by the guaranty. Evans v. Merrill Lynch Bus. Fin. Servs., Inc., 213 Ga. App. 808, 446 S.E.2d 215, 1994 Ga. App. LEXIS 755 (1994), cert. denied, No. S94C1690, 1994 Ga. LEXIS 1123 (Ga. Oct. 17, 1994).

Creditor's nonaction will not discharge surety unless collateral lost, consideration paid, or notice given. — Mere nonaction by the creditor will not release the surety, unless such nonaction made unproductive some collateral surety or was based upon a consideration paid by the principal debtor to the creditor, or the creditor was notified under former Code 1933, § 103-205 to collect the debt. Lumsden v. Leonard, 55 Ga. 374, 1876 Ga. LEXIS 411 (1876); Jordan v. F & M Bank, 5 Ga. App. 244, 62

S.E. 1024, 1908 Ga. App. LEXIS 81 (1908); Chapman v. Miller, 40 Ga. App. 138, 149 S.E. 70, 1929 Ga. App. LEXIS 48 (1929).

Some positive act must be done by the creditor, either before or after judgment, which injures the surety in some way; mere failure or negligence on the part of the creditor will not relieve the surety; the exceptions to this general rule will be found to be where the creditor omits to do something by which some collateral security in the creditor's hands is made unproductive or when the creditor is notified under former Civil Code 1910, § 3546 (see now O.C.G.A. § 10-7-24) to proceed and the creditor fails or refuses. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

Creditor's loan extensions. — Because creditor bank's loan extensions increased guarantor's risk of exposure to greater liability due to the marked diminution of the resale value of collateralled stock, guarantor's obligation was accordingly discharged under O.C.G.A. § 10-7-22. Cantrell v. First Tenn. Nat'l Bank Ass'n, 207 Ga. App. 458, 428 S.E.2d 368, 1993 Ga. App. LEXIS 237 (1993).

Surety not discharged by failure to apply judicial sale proceeds to senior execution. — That the plaintiff in the senior execution, after obtaining in the justice's court a judgment on the first bond, did not seek to have the proceeds of the sale of the property under the junior execution applied to the senior execution or object to the application of such proceeds to the junior execution would not afford a sufficient reason for discharging the surety on the trial of an appeal entered to the judgment rendered against the surety and the surety's principal in the magistrate's court. Reese v. Worsham & Co., 110 Ga. 449, 35 S.E. 680, 1900 Ga. LEXIS 458 (1900).

Failure of creditor to prosecute claim against surety's estate. — Since the plaintiff creditor failed to apprise the heirs at law of the deceased surety of the fact that the plaintiff held an unpaid note, and to prosecute the claim against the then unrepresented estate, even though the plaintiff may have known that pending such delay the personal property of the intestate had been turned over to the principal debtor and was being wasted by the debtor, the plaintiff's actions amounted to mere inaction on the plaintiff's part and were not such a positive act causing injury to the surety as would operate as a release. Stephens v. Stone, 46 Ga. App. 293, 167 S.E. 545, 1932 Ga. App. LEXIS 129 (1932).

No provision of law requires that a surety be notified of the principal debtor's default. Barnett v. Leasing Int'l, Inc., 151 Ga. App. 715, 261 S.E.2d 452, 1979 Ga. App. LEXIS 2764 (1979).

Failing to give notice of default will not discharge surety. — When a contract for a future sale of goods is signed by the prospective vendor as creditor and the prospective purchaser as principal debtor and by sureties for such purchaser, whereby the obligation of continuing suretyship is imposed upon the sureties, guaranteeing payment for goods which the contract provides shall be furnished from time to time by the prospective vendor to the prospective purchaser, and the contract provides for weekly settlements for the goods furnished under the contract, but does not require that notice of any default in weekly payments shall be given by the creditor to the sureties, the securities are not released from liability to the creditor, or confined to the first weekly default, although such sureties are given no notice by the creditor of the original default and are unaware thereof. Georgian Co. v. Jones, 154 Ga. 762, 115 S.E. 490, 1923 Ga. LEXIS 384 (1923).

Failure to keep the collateral security insured amounts to an increase in risk which will discharge the surety to the extent that the surety is injured thereby. Evans v. American Nat'l Bank & Trust Co., 116 Ga. App. 468, 157 S.E.2d 816, 1967 Ga. App. LEXIS 854 (1967).

Failure of the bank, knowing the purchaser's insolvency, either to obtain insurance at the purchaser's expense or to notify the surety of the cancellation materially increased the risk and, to the extent of the insurance involved, discharged the surety from liability. Evans v. American

Acts Discharging Surety (Cont'd)
1. In General (Cont'd)

Nat'l Bank & Trust Co., 116 Ga. App. 468, 157 S.E.2d 816, 1967 Ga. App. LEXIS 854 (1967).

Breach of agreement to procure life insurance discharges damaged surety. — Even if an agreement by the creditor to procure insurance on the life of the maker of a note was an agreement subsequent to the making and endorsing of the note and could be classified as a collateral agreement so as to bring the agreement without the rule that a surety is discharged by a breach thereof, the principle that a surety would be discharged to the extent of actual damage would apply, and in such case the damage would be sufficient to discharge the obligation. Seaboard Loan Corp. v. McCall, 61 Ga. App. 752, 7 S.E.2d 318, 1940 Ga. App. LEXIS 252 (1940).

Allowing life insurance not made condition of contract to lapse. — When life insurance policy was allowed to lapse and the guarantor by not being informed in no manner increased the guarantor's risk, neither guarantor nor the makers having made the fact of life insurance a condition of the contract, the surety may not be discharged. Parker v. Fidelity Bank, 151 Ga. App. 733, 261 S.E.2d 465, 1979 Ga. App. LEXIS 2773 (1979).

Change in terms of payment to contractor discharges surety. — Change by the obligee and principal in the terms of payments to the contractor from that provided in the building contract operates to discharge the surety. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297, 1970 U.S. Dist. LEXIS 13292 (S.D. Ga. 1970).

Contractor's failure to pay subcontractor does not discharge subcontractor's surety. — Main contractor's breach of the contractor's contract with the subcontractor to pay the subcontractor for materials used in construction of the hospital was not such an increase of the risk of the surety on the subcontractor's bond, which was conditioned in part to pay all persons having contracts directly with the subcontractor for materials, as to discharge the surety. Fidelity & Deposit Co. v. Pittman ex rel. Georgia Marble Co., 52 Ga. App. 394, 183 S.E. 572, 1936 Ga. App. LEXIS 647 (1936).

Principal's misrepresentations increasing risk are defense to surety. — Misrepresentations as to the shape and quality of the land by principal, inducing surety to sign a note and materially increasing the risk, constitute a good defense. Satterfield v. Spier, 114 Ga. 127, 39 S.E. 930, 1901 Ga. LEXIS 603 (1901).

If a false representation of an existing fact to the effect that a person had signed as surety to a contract induced another to sign as surety, such misrepresentation increased the risk and exposed to greater liability the person who signed by reason of such false representation, and it is not necessary to prove loss to avoid the contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

Allegation to the effect that a surety was induced to sign by a false representation that a surety whose name appeared as such had already signed the contract of suretyship is not an effort to vary the terms of a written contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113, 1948 Ga. App. LEXIS 668 (1948).

Substitution of a promissory note for an original account indebtedness, with the inclusion in the note of an extended time for payment, a higher face amount reflecting accrued interest, and a provision authorizing the recovery of attorney fees in the event of collection by an attorney, did not result in either a novation of the contract nor an increased risk and did not discharge the guarantors of the prior guaranty agreement from liability. Columbia Nitrogen Corp. v. Mason, 171 Ga. App. 685, 320 S.E.2d 838, 1984 Ga. App. LEXIS 2316 (1984).

Foreclosure of mortgage. — Creditor had every right under the creditor's first and second preferred ship mortgages to bring an in rem foreclosure action against a fishing vessel, the subject of the loan proceeds. When it did so, there was no ground for discharge under O.C.G.A. § 10-7-22, even though the act allegedly

increased the guarantors' risk. United States v. Blue Dolphin Assocs., 620 F. Supp. 463, 1985 U.S. Dist. LEXIS 14708 (S.D. Ga. 1985).

Increased rate of interest. — Comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest, since the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. Bank of Terrell v. Webb, 177 Ga. App. 715, 341 S.E.2d 258, 1986 Ga. App. LEXIS 1526 (1986).

No discharge of debt due to bad faith or fraud. — See Delta Diversified, Inc. v. Citizens & S. Nat'l Bank, 171 Ga. App. 625, 320 S.E.2d 767, 1984 Ga. App. LEXIS 2303 (1984).

When the arrangement for the use of a pledged savings account did not deviate from the terms of the subject note as agreed to by the plaintiffs, no issue concerning the discharge defenses remained for jury determination, warranting summary judgment. Cohen v. Northside Bank & Trust Co., 207 Ga. App. 536, 428 S.E.2d 354, 1993 Ga. App. LEXIS 260 (1993).

No evidence of increased risk meant no discharge of surety. — Given that the broad language of a guaranty obligated the guarantor to the bank, absolutely and unconditionally guaranteeing the payment and performance of each and every debt that the debtor would owe, and because no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation, the guarantor remained obligated under the guaranty to the bank. Fielbon Dev. Co. v. Colony Bank, 290 Ga. App. 847, 660 S.E.2d 801, 2008 Ga. App. LEXIS 376 (2008).

Guarantor argued that a bank's settlements with two other guarantors increased the guarantor's risk, discharging the guarantor under O.C.G.A. § 10-7-22; however, the language of the guaranty unconditionally obligated the guarantor individually to pay the entire amount of the borrower's indebtedness, and the language permitted the bank to enter into settlements with the others. Wooden v. Synovus Bank, 323 Ga. App. 794, 748 S.E.2d 275, 2013 Ga. App. LEXIS 750 (2013).

No material breach as surety not exposed to greater liability. — Creditor did not commit a material breach of a guaranty by not providing monthly billings to the surety as the surety was not exposed to greater liability under O.C.G.A. § 10-7-22 as the guaranty capped the surety's liability at $30,000. General Steel, Inc. v. Delta Bldg. Sys., 297 Ga. App. 136, 676 S.E.2d 451, 2009 Ga. App. LEXIS 392 (2009).

2. Loss of Collateral

Loss of collateral discharges surety to extent of injury. — When a creditor has control of liens, securities, or any other means whereby a creditor might satisfy the debt and parts with them, or by the creditor's negligence allows them to become lost or depreciated in value, thus cutting off the surety from the surety's right to be subrogated to such liens, etc., the surety is discharged to the extent of the surety's injury by the loss of such liens. Stewart v. Barrow, 55 Ga. 664, 1876 Ga. LEXIS 452 (1876); Poullain v. Brown, 80 Ga. 27, 5 S.E. 107, 1887 Ga. LEXIS 315 (1887); Lewis v. Armstrong, 80 Ga. 402, 7 S.E. 114, 1888 Ga. LEXIS 149 (1888).

Failure to record lien in time. — Failure of a creditor to preserve a lien which the creditor had on property of the principal debtor discharges a surety. For instance, where a creditor failed to record a mortgage within the time prescribed, it was held to operate as a discharge of the surety. Stevens v. Zachary, 27 Ga. 427, 1859 Ga. LEXIS 92 (1859); Atlanta Nat'l Bank v. Douglass, 51 Ga. 205, 1874 Ga. LEXIS 89 (1874); Bledsoe v. Ivey, 27 Ga. App. 235, 107 S.E. 615, 1921 Ga. App. LEXIS 793 (1921); Seymour v. Bank of Thomasville, 157 Ga. 99, 121 S.E. 578, 1923 Ga. LEXIS 371 (1923).

When the defendant has signed the note as surety, and this fact was known to the plaintiffs when plaintiffs accepted the note, the failure of the plaintiffs to record the retention of title contract within the time required by law did not discharge the surety. La Boon v. Wright & Locklin, 42

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2. Loss of Collateral (Cont'd)

Ga. App. 275, 155 S.E. 770, 1930 Ga. App. LEXIS 335 (1930).

Filing claim in bankruptcy on judgment without reserving lien. — Under former Code 1873, §§ 2153 and 2154 (see now O.C.G.A. §§ 10-7-21 and 10-7-22), proof of debt in the bankruptcy court by the judgment creditor against the principal without an express reservation of the lien of the judgment will discharge the lien of the judgment, and the accommodation endorser or surety is discharged, but only to the extent of the injury received. Jones v. Hawkins, 60 Ga. 52, 1878 Ga. LEXIS 370 (1878) (no damage shown and surety counsel for principal in bankruptcy proceedings).

Having execution returned without levy. — If, when the execution is issued, it becomes a valid lien on property of the principal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy by procurement of the creditor, and the surety is thereby injured, the surety is discharged pro tanto. This is in accord with justice and common sense and is within the spirit, if not the very letter, of this section. Griffeth v. Moss & Co., 94 Ga. 199, 21 S.E. 463, 1894 Ga. LEXIS 45 (1894).

Failing to enter judgment after verdict. — When a plaintiff, at a given term of the court, took a verdict against a principal and sureties but failed for several terms to enter a judgment thereon, the sureties were discharged. Hayes v. Little, 52 Ga. 555, 1874 Ga. LEXIS 346 (1874); Hall v. Pratt, 103 Ga. 255, 29 S.E. 764, 1898 Ga. LEXIS 104 (1898).

Releasing notes taken as collateral. — When, in a suit on a note against two defendants as apparent joint makers, one of the defendants had signed the note as surety only, which fact was known to the plaintiff, the note sued on was a balance of a larger note, at the time of making the original note there was delivered to the plaintiff bank by the principal, as collateral security, described notes aggregating an amount in excess of the amount of the note sued on, and the plaintiff bank released the collateral notes to the principal without the knowledge or consent of the defendant surety, who did not know that the plaintiff bank had released the collateral notes when the defendant signed the renewal note sued on, by reason of these facts the defendant surety has been injured and the defendant's risk increased so that the defendant is discharged from all liability on the note sued on. Kennedy v. Farmers' & Merchants' Bank, 47 Ga. App. 104, 169 S.E. 769, 1933 Ga. App. LEXIS 304 (1933).

Failing to enter judgment after default. — An accommodation endorser of a promissory note, sued jointly with the maker thereof, was not discharged merely because the plaintiff, after an entry of "default" had been made upon the judge's docket, permitted one or more terms to elapse before entering up a final judgment in the case. Hall v. Pratt, 103 Ga. 255, 29 S.E. 764, 1898 Ga. LEXIS 104 (1898).

Failing to issue execution. — In the absence of notice to proceed, the surety is not discharged by failure to issue execution on a judgment obtained against the principal. Crawford v. Gaulden, 33 Ga. 173, 1862 Ga. LEXIS 10 (1862); Hall v. Langford, 18 Ga. App. 73, 88 S.E. 918, 1916 Ga. App. LEXIS 128 (1916).

Failing to docket execution in time. — Omission to enter execution on general docket in ten days did not effect discharge of surety. Williams v. Kennedy, 134 Ga. 339, 67 S.E. 821, 1910 Ga. LEXIS 192 (1910).

Failing to proceed against collateral. — Right of a payee of a note to resort to the sureties thereon is not lost because of the payee's failure to sell personal property held as collateral immediately on the maturity of the note. Timmons v. Butler, Stevens & Co., 138 Ga. 69, 74 S.E. 784, 1912 Ga. LEXIS 192 (1912).

Mere failure of the payee of a note, who is the holder thereof, to institute suit to recover on the note against one of the sureties thereon, before the expiration of the period of limitation in which suit must be brought against this surety, does not amount to a release by the payee of the obligation to him of a cosurety on the note

whose obligation is not barred by the statute of limitations, when the payee's act in refraining from instituting the suit as indicated was not procured by or consented or agreed to by the latter surety. Scott v. Gaulding, 187 Ga. 751, 2 S.E.2d 69, 1939 Ga. LEXIS 454 (1939).

When no agreement to condition the surety's obligation upon the creditor's enforcement of security is found, the courts have not conditioned the creditor's right of recovery from the surety on the creditor's first using any security the creditor may have to satisfy or reduce the creditor's claim. Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828, 1977 Ga. LEXIS 1010 (1977).

Mere failure of a creditor to proceed against collateral will not operate to discharge a surety. Pippin v. Brigadier Indus. Corp., 150 Ga. App. 401, 258 S.E.2d 18, 1979 Ga. App. LEXIS 2331 (1979).

Accepting payment from principal voidable in bankruptcy. — By virtue of this section, the mere fact that the holder of a note in good faith accepts payment thereof from the maker at a time when the maker is insolvent, so that such payment is voidable in the event of the maker's bankruptcy and is thereafter actually voided by the trustee or voluntarily surrendered to the trustee by the holder, will not discharge the note or release a surety thereon. Higdon v. Bell, 25 Ga. App. 54, 102 S.E. 546, 1920 Ga. App. LEXIS 592 (1920) (See 11 U.S.C. § 547(b)).

Dismissing levy discharges surety. — If the fi. fa. was levied upon the property of the principal defendant and the levy dismissed by the creditor, whereby injury resulted to the surety, it is just that such act inure to the surety's discharge. Brown v. Executors of Riggins, 3 Ga. 405, 1847 Ga. LEXIS 120 (1847); Rawson v. Gregory, 59 Ga. 733, 1877 Ga. LEXIS 382 (1877).

Dismissal of levy on realty. — The dismissal of a levy on the real property of the principal cannot hurt or discharge the surety, for the lien of the judgment on the property being realty cannot be removed, and the lien of the judgment is one to which the surety becomes entitled the moment the surety pays the debt. Wyley v. Stanford, 22 Ga. 385, 1857 Ga. LEXIS 165 (1857); Manry v. Shepperd, 57 Ga. 68, 1876 Ga. LEXIS 24 (1876).

Placing property out of reach discharges surety pro tanto. — Removal of principal's property outside the county and beyond reach of judgment by the plaintiffs in fi. fa. discharges the surety to the extent of the property removed. Dasher v. Brannen & Bro., 29 Ga. App. 253, 116 S.E. 206, 1922 Ga. App. LEXIS 212 (1922).

Enforcement against joint debtors. — Joint debtors have a right of contribution which may be enforced like that of cosureties, and if the creditor so acted as to place the property of one of the joint debtors beyond the reach of the other, the creditor would be responsible to the latter for the injury done by such wrongful diversion; and this injury may be set up in a claim case, as a discharge, at least to the extent of the damage done, as well as by an action for damages. Green v. Mann, 76 Ga. 246, 1886 Ga. LEXIS 9 (1886).

Removal by principal when creditor receives no consideration. — Removal of personal property from one county in the state to another by the principal judgment debtor will not discharge the surety, though permitted by the plaintiff without action on the plaintiff's part and without the surety's consent, and though the property would be sufficient to satisfy the fi. fa., no consideration being paid to the plaintiff-creditor by the principal debtor. Lumsden v. Leonard, 55 Ga. 374, 1876 Ga. LEXIS 411 (1876).

Delivery of property awarded to trustee does not discharge sureties. — When in an equity cause between the remaindermen and the trustee certain property was awarded to the latter and it was not sought to hold the trustee responsible therefor, the delivery of such property to the trustee did not work a discharge to the sureties, and an allegation to that effect was properly stricken. Haddock v. Perham, 70 Ga. 572, 1883 Ga. LEXIS 374 (1883).

When a creditor transferred possession of some collateral to a codebtor, and express language of a guaranty agreement prevented the surety from subrogation until the creditor received full pay-

Acts Discharging Surety (Cont'd)
2. Loss of Collateral (Cont'd)

ment of all liabilities, the surety could not be discharged on the claim that the surety's rights to subrogation had been impaired. In re Broomfield, 35 B.R. 459, 1983 Bankr. LEXIS 5383 (Bankr. N.D. Ga. 1983).

3. Forbearance to Sue and Dismissal of Suit

Failure to sue does not discharge surety. — A mere failure to sue on a bond, required by the court to stay the collection of a judgment, as soon as the law allows or the negligence of the obligee to prosecute with vigor the obligee's legal remedies, unless for a consideration, will not release the surety. Harris v. Woodard, 142 Ga. 297, 82 S.E. 902, 1914 Ga. LEXIS 747 (1914).

Forbearance towards principal. — When indulgence was granted to the acceptors in consideration of the payment of 18 percent interest and the acceptors became insolvent, the security was thereby released. Parmelee v. Williams, 72 Ga. 42, 1883 Ga. LEXIS 10 (1883).

If the consequence of forbearance is injury to the surety, the surety is discharged. Brown v. Executors of Riggins, 3 Ga. 405, 1847 Ga. LEXIS 120 (1847).

Mere forbearance towards the principal does not discharge the surety. Hall v. Langford, 18 Ga. App. 73, 88 S.E. 918, 1916 Ga. App. LEXIS 128 (1916); McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917); Hearn v. Durrence, 33 Ga. App. 296, 125 S.E. 794, 1924 Ga. App. LEXIS 846 (1924).

Failure to sue for consideration releases the surety. Camp v. Howell, 37 Ga. 312, 1867 Ga. LEXIS 163 (1867) (new note for usurious portion of interest given and paid in part).

When subsequent to the sale by a borrower of the property securing its loan evidenced by a note and the assumption of the indebtedness by the purchaser, which assumption was consented to by the holder of the note, the latter grants a six-month extension to the purchaser with the knowledge, consent, or ratification of either of the signers of the note in consideration of the purchaser paying (apparently after maturity) $500.00 on the note and thereafter 6 percent calculated upon the original amount of the note rather than 8 percent as specified in the note, on the balance, the alleged contract between the holder and the subsequent purchaser, not being supported by a consideration, would not be binding on the holder, and the signers, who, it is alleged had become sureties under the agreement, would not be released. Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937).

Extension of time for definite period. — If the defendant is in fact a surety only and the payee, under a valid agreement with the principal and without the consent of the surety, extends the time of maturity as fixed by the obligation, a release of the defendant will result; but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. Duckett v. Martin, 23 Ga. App. 630, 99 S.E. 151, 1919 Ga. App. LEXIS 245 (1919); Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406, 1935 Ga. App. LEXIS 188 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603, 1936 Ga. App. LEXIS 439 (1936), aff'd, 184 Ga. 644, 192 S.E. 298, 1937 Ga. LEXIS 595 (1937).

Surety's reliance on promise to proceed against principal. — Mere promise by the holder of a promissory note, made to a surety thereon without consideration, to the effect that the creditor would proceed forthwith against the principal debtor, standing alone, would be a nudum pactum and would have no effect upon the obligation of the surety. If, however, the surety is induced by such an assurance to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss, and the surety will be discharged to that extent. Johnson v. Longley, 142 Ga. 814, 83 S.E. 952, 1914 Ga. LEXIS 560 (1914).

Agreeing to increase in interest, with note for increase. — When the

holder of a promissory note on which the interest was 7 percent, without the assent of the surety, agreed with the principal to wait 12 months in consideration of the promise of 16 percent interest and for the 9 percent usurious interest took a new note with security, a portion of which usurious note was paid, and the time was given accordingly, the surety to the original note was discharged. Camp v. Howell, 37 Ga. 312, 1867 Ga. LEXIS 163 (1867).

Debtor's promise to pay required interest during forbearance is not consideration. — Promise by the principal debtor to pay interest upon the debt during the time of forbearance forms no consideration for such forbearance when the debtor is already bound to pay such interest. Harrell v. Kutz & Co., 22 Ga. App. 235, 95 S.E. 717, 1918 Ga. App. LEXIS 264 (1918).

Extension of time by mortgagee. — When the mortgagee has in fact assented to an assumption by the grantee to pay the mortgage and thus has recognized the relation of principal and surety between such a mortgagor and the grantee, a new agreement made by the mortgagee with the grantee who purchased the property and assumed the debt, extending the time of payment of the debt, if valid and made on a sufficient consideration, will discharge the original mortgagor from personal liability, unless the extension agreement is made with the consent of the mortgagor; but such an implied promise of suretyship with the incident rights of a surety to discharge does not arise when a purchase is made merely subject to the outstanding lien of a mortgage. Nelson v. National Life & Accident Ins. Co., 51 Ga. App. 684, 181 S.E. 202, 1935 Ga. App. LEXIS 443 (1935).

When A purchased land subject to a mortgage which A assumed and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A, it was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352, 1936 Ga. LEXIS 339 (1936).

Whene B conveys lands to C in consideration of the assumption by C of the obligation due to A, the relationship between B and C is that of principal and surety, but so far as A is concerned, such relationship between B and C is not effective as to A unless A assents to and accepts it; but after such assent by A, an extension of time of payment granted to C without the knowledge or consent of B releases B from B's obligation to A. Federal Land Bank v. Conger, 55 Ga. App. 11, 189 S.E. 567, 1936 Ga. App. LEXIS 419 (1936).

Extension of time not shown. — When whether or not the defendant was a principal, endorser, or surety, there was no showing that the plaintiff entered an agreement with the principal, without the consent of the alleged surety, to extend the time of maturity as fixed by the obligation so as to release the surety, no issue of fact was created and the trial court did not err in granting a partial summary judgment in that there was no discharge of defendant's liability by any novation or increase of the risk. Barnett v. Leasing Int'l, Inc., 151 Ga. App. 715, 261 S.E.2d 452, 1979 Ga. App. LEXIS 2764 (1979).

Surety to pay judgment not discharged although judgment becomes dormant. — If a principal and surety executed a bond required by the court to stay the collection of a judgment, conditioned to pay that judgment in a certain contingency, in a suit brought thereon, seven years after the happening of such contingency, it is no defense to the surety that the judgment may have become dormant in the meantime. Harris v. Woodard, 142 Ga. 297, 82 S.E. 902, 1914 Ga. LEXIS 747 (1914).

If no relationship of principal and surety exists between B and C, the voluntary assumption by C of the debt owed by B to A does not make C the principal so far as A is concerned, nor does an extension of time granted to C release B from B's liability to A. Federal Land Bank v. Conger, 55 Ga. App. 11, 189 S.E. 567, 1936 Ga. App. LEXIS 419 (1936).

Consideration for forbearance or notice to sue must be alleged. — Defense that the plaintiff was guilty of laches, in that the plaintiff did not bring

Acts Discharging Surety (Cont'd)
3. Forbearance to Sue and Dismissal of Suit (Cont'd)

suit earlier and thereby increased the risk of the surety, was properly stricken because there was no allegation that there was a consideration for the postponement nor an averment that the security had given a written notice to sue. Baumgartner v. McKinnon, 10 Ga. App. 219, 73 S.E. 519, 1912 Ga. App. LEXIS 439 (1912).

Surety not released by failure to prove debt in bankruptcy. — As this section provides nonaction or failure to sue will not release a surety, the failure or refusal of the creditor to prove the creditor's debt in bankruptcy against the principal debtor will not discharge the surety. Jordan v. F & M Bank, 5 Ga. App. 244, 62 S.E. 1024, 1908 Ga. App. LEXIS 81 (1908); Higdon v. Bell, 25 Ga. App. 54, 102 S.E. 546, 1920 Ga. App. LEXIS 592 (1920).

Surety on appeal bond is discharged by dismissal of suit. — Risk of a surety on an appeal bond is increased and the surety is therefore discharged when the suit is dismissed by the creditor or by the court at the creditor's instance. Armstrong v. Lewis, 61 Ga. 680, 1878 Ga. LEXIS 210 (1878).

Dismissal of suit as to cosurety discharges other. — Dismissal as to one surety of a suit already brought, for a consideration paid by the surety, and not bringing any further action against the surety, constituted such conduct as released the other surety on the administrator's bond. Wilkinson v. Conley, 133 Ga. 518, 66 S.E. 372, 1909 Ga. LEXIS 263 (1909).

Surety is not discharged by dismissal as to principal. — When a joint action is brought against the principal and the surety on a joint and several promissory note, and the plaintiff, by amendment, voluntarily dismisses the plaintiff's action against the principal, the surety is not thereby ipso facto discharged from liability. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

When a joint action is brought against a principal and a surety and the plaintiff by amendment voluntarily dismisses the plaintiff's action against the principal, the surety is not thereby ipso facto discharged from liability. Griffin v. H.C. Whitmer Co., 57 Ga. App. 203, 194 S.E. 895, 1938 Ga. App. LEXIS 530 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Effect of failure to give notice of principal's default. — Unless the creditor or trustee grants an indulgence based upon a consideration paid by a warehouseman or unless the bond specifies that immediate notice of any known breach by the warehouseman be given, failure of the Commissioner of Agriculture as trustee for the obligees to give such notice will not release the surety. 1967 Op. Att'y Gen. No. 67-423.

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, §§ 5, 35.

C.J.S.

72 C.J.S., Principal and Surety, §§ 107, 113.

ALR.

Agreement by principal to pay compound or additional interest, as releasing surety, 2 A.L.R. 1569.

Consenting to continuance or extension of time in action as releasing surety, 7 A.L.R. 376.

Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 A.L.R. 1605.

Acceptance of interest in advance as consideration for, or evidence of, an extension of time which will release a guarantor, surety, or endorser, 59 A.L.R. 988.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 A.L.R. 651.

Lessee as surety for rent after assignment, and effect of lessor's dealings (other

than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 A.L.R. 1238.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 A.L.R. 1236.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of its use for purpose other than intended, as ratification, or estoppel to assert, the diversion, 105 A.L.R. 437.

Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 A.L.R. 964.

Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 A.L.R. 10.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 A.L.R.2d 260.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

Extension of net credit in excess of specified amount as discharging or releasing guarantor, 57 A.L.R.2d 1209.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 A.L.R.2d 734.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 A.L.R.3d 567.

10-7-23. Refusal to deliver evidence of debt and securities on tender of amount of debt as discharging surety.

The surety may tender to the creditor the amount of his debt and demand that the evidence of and the securities for the same be delivered up to him to be enforced against his principal or cosureties; and a failure of the creditor to comply, when within his power, shall operate to discharge the surety.

History.

Orig. Code 1863, § 2132; Code 1868, § 2127; Code 1873, § 2155; Code 1882, § 2155; Civil Code 1895, § 2973; Civil Code 1910, § 3545; Code 1933, § 103-204.

Law reviews.

For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

JUDICIAL DECISIONS

Only person making tender is discharged. — This section provides only for the discharge of the person whose tender was refused. Hall v. First Nat'l Bank, 145 Ga. App. 267, 243 S.E.2d 569, 1978 Ga. App. LEXIS 1944 (1978).

Burden upon surety to prove tender and demand. — When, to an action by the former state superintendent of banks, the surety pleaded that the surety was discharged by a refusal of a tender and demand allowable under this section, the burden was upon the surety to prove that the tender and demand had been made either to the superintendent of banks or to one duly authorized by the surety, as provided by statute, to make collections for the bank. Bennett v. Simmons, 30 Ga. App. 529, 118 S.E. 493, 1923 Ga. App. LEXIS 522 (1923).

Transfer of security proper. — Summary judgment for a bank was properly entered after the bank demanded that a guarantor pay off an outstanding

business debt, and upon demand of the guarantor, transferred the security for the loan, a mortgage on the homeowners' home, to the guarantor; under O.C.G.A. § 10-7-23, upon demand, the bank was required to transfer the securities to the guarantor paying off the debt or it would lose the ability to enforce the debt against the guarantor. Phillips v. First Bank of Ga., 257 Ga. App. 342, 571 S.E.2d 410, 2002 Ga. App. LEXIS 1155 (2002).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 132 et seq.

C.J.S.

72 C.J.S., Principal and Surety, §§ 106, 112.

ALR.

Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 A.L.R. 1605.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, 57 A.L.R.2d 855.

10-7-24. Refusal to sue principal after notice by surety as discharge.

Any surety, guarantor, or endorser, at any time after the debt on which he or she is liable becomes due, may give notice in writing to the creditor, his or her agent, or any person having possession or control of the obligation, to proceed to collect the debt from the principal or any one of the several principals liable therefor; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged. To comply with the requirements of this Code section, the notice must specifically state that the creditor loses his or her rights to pursue the surety, guarantor, or endorser, as well as any cosureties, coguarantors, or endorsers, if the creditor does not commence legal action within three months after receiving the notice. Further, any notice which does not state the county in which the principal resides shall not be considered to be in compliance with the requirements of this Code section.

History.

Laws 1826, Cobb's 1851 Digest, p. 595.; Laws 1831, Cobb's 1851 Digest, p. 596.; Ga. L. 1859, p. 54, § 1; Code 1863, § 2133; Ga. L. 1866, p. 23, § 1; Code 1868, § 2128; Code 1873, § 2156; Code 1882, § 2156; Civil Code 1895, § 2974; Civil Code 1910, § 3546; Code 1933, § 103-205; Ga. L. 1994, p. 746, § 1.

Law reviews.

For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For article, "A Georgia Practitioner's Guide to Construction Performance Bond Claims," see 60 Mercer L. Rev. 509 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Notice
Suit by Creditor
Waiver and Estoppel

General Consideration

Editor's notes. — In Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981), it was held that this Code section applied to compensated sureties. However, Ga. L. 1981, p. 870, § 1, amends O.C.G.A. § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. See the Editor's note to § 10-7-1.

Section is in derogation of common law and strictly construed. — This section was made in derogation of the common-law rule upon this subject and introduced a new principle of commercial law. It operates as a restriction upon the rights of the holder and should be strictly construed. Howard v. Brown, 3 Ga. 523, 1847 Ga. LEXIS 133 (1847).

The discharge under this section is statutory, and a strict compliance with the requirements of this section by one claiming benefit under the statute is mandatory. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330, 1957 Ga. App. LEXIS 893 (1957).

Section affects remedy only. — This section does not affect either the nature, obligation, construction, or validity of the contract, but goes only to the remedy. Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460, 1920 Ga. LEXIS 140 (1920); Overstreet v. W.T. Rawleigh Co., 75 Ga. App. 483, 43 S.E.2d 774, 1947 Ga. App. LEXIS 566 (1947).

Section is like limitation of actions. — This section operates as the extinguishment of a remedy, and not of a right, and is therefore in the nature of a limitation of actions. Vanzant, Jones & Co. v. Arnold, Hamilton & Johnson, 31 Ga. 210, 1860 Ga. LEXIS 316 (1860); Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460, 1920 Ga. LEXIS 140 (1920); Overstreet v. W.T. Rawleigh Co., 75 Ga. App. 483, 43 S.E.2d 774, 1947 Ga. App. LEXIS 566 (1947); Hearn v. Citizens & S. Nat'l Bank, 154 Ga. App. 686, 269 S.E.2d 486, 1980 Ga. App. LEXIS 2342 (1980).

Any conflict between this section and the UCC would be controlled by the UCC as the later expression of the legislature. Gunter v. True, 203 Ga. App. 330, 416 S.E.2d 768, 1992 Ga. App. LEXIS 406 (1992), cert. denied, No. S92C0807, 1992 Ga. LEXIS 449 (Ga. June 4, 1992).

Compensated as well as uncompensated sureties are governed by the provisions of O.C.G.A. § 10-7-24. Morrison Assurance Co. v. Preston Carroll Co., 254 Ga. 608, 331 S.E.2d 520, 1985 Ga. LEXIS 752 (1985), cert. denied, 474 U.S. 1060, 106 S. Ct. 805, 88 L. Ed. 2d 781, 1986 U.S. LEXIS 2382 (1986).

Purpose of section. — Object of this section was for the benefit and protection of securities. Bank of St. Marys v. Mumford & Tyson, 6 Ga. 44, 1849 Ga. LEXIS 7 (1849).

Essential purpose of O.C.G.A. § 10-7-24 is to accord sureties a mechanism to compel creditors to sue the principal debtor upon accrual of the creditor's cause of action. A.J. Kellos Constr. Co. v. Balboa Ins. Co., 661 F.2d 402, 1981 U.S. App. LEXIS 15993 (5th Cir. 1981).

Statutory bonds. — This section has no reference to statutory bonds, such as a forthcoming bond, taken in the progress of a judicial proceeding. Hobbs v. Taylor, 11 Ga. App. 579, 75 S.E. 906, 1912 Ga. App. LEXIS 107 (1912).

Guaranty agreements under UCC. — O.C.G.A. § 10-7-24 does not apply to guaranty agreements governed by the UCC. Gunter v. True, 203 Ga. App. 330, 416 S.E.2d 768, 1992 Ga. App. LEXIS 406 (1992), cert. denied, No. S92C0807, 1992 Ga. LEXIS 449 (Ga. June 4, 1992).

Section applicable to guarantor. — A guarantor has the same right as a surety by written notice to compel the

General Consideration (Cont'd)

institution of a suit against the principal under this section. Fields v. Willis, 123 Ga. 272, 51 S.E. 280, 1905 Ga. LEXIS 440 (1905).

Contracts executed in another state. — This section is applicable to a case when the contract sued on in Georgia was executed in another state. J.R. Watkins Co. v. Seawright, 168 Ga. 750, 149 S.E. 45, 1929 Ga. LEXIS 230 (1929).

Nonresident principal. — Fact that the residence of the principal was in another state, and was so stated in the notice, would not, under the terms of this section or the statutes from which it is condensed, preclude the sureties from the benefit thereof, the principal being in fact within the jurisdiction of the court. Fricks v. J.R. Watkins Co., 88 Ga. App. 276, 76 S.E.2d 518, 1953 Ga. App. LEXIS 1065, rev'd, 210 Ga. 83, 78 S.E.2d 2, 1953 Ga. LEXIS 481 (1953).

Discharge of an endorser for which provision is made in this section is not applicable when the principal in the promissory note resides outside this state. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330, 1957 Ga. App. LEXIS 893 (1957).

When it appears that the corporate maker of a note is a foreign corporation, an endorser of the note is not discharged if the creditor, on request, neglects to proceed against the principal, in the absence of an offer of indemnity to the holder against the consequences, risk, delay, or expenses. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330, 1957 Ga. App. LEXIS 893 (1957).

Failure to show waiver of confirmation process on part of guarantors. — As to foreclosure deficiency judgment, the trial court erred by denying the guarantors of the mortgage summary judgment because the loan documents failed to include an adequate waiver of the confirmation process required by O.C.G.A. § 44-14-161. Apex Bank v. Thompson, 349 Ga. App. 285, 826 S.E.2d 162, 2019 Ga. App. LEXIS 155 (2019).

Surety claim brought in bad faith. — Trial court properly awarded the surety company a bad faith attorney fee award and struck the counterclaim because the purchaser's bad faith counterclaim against the surety company as a corporate surety was not only brought under an inapplicable statute, namely O.C.G.A. § 13-6-11, but failed to meet the basic pleading requirements under § 13-6-11. Hicks v. Gabor, 354 Ga. App. 714, 841 S.E.2d 42, 2020 Ga. App. LEXIS 183 (2020).

Notice

Notice may be given at any time. — This section provides that the surety, "at any time" after the debt on which the surety is liable becomes due, may give the notice. Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460, 1920 Ga. LEXIS 140 (1920).

Notice after suit against surety. — When a surety has been sued separately from a principal, it is not too late to give the notice. Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460, 1920 Ga. LEXIS 140 (1920); Overstreet v. W.T. Rawleigh Co., 75 Ga. App. 483, 43 S.E.2d 774, 1947 Ga. App. LEXIS 566 (1947).

Notice must be written. — Notice to the creditor by a surety to proceed against the principal debtor, required by this section, is written notice, an oral request will not suffice. Timmons v. Butler, Stevens & Co., 138 Ga. 69, 74 S.E. 784, 1912 Ga. LEXIS 192 (1912); Johnson v. Longley, 142 Ga. 814, 83 S.E. 952, 1914 Ga. LEXIS 560 (1914).

If it is not claimed that either of the endorsers gave notice in writing to the creditor to proceed to collect the debt out of the principal, the creditor was not barred from bringing suit to recover several years later. Chapman v. Miller, 40 Ga. App. 138, 149 S.E. 70, 1929 Ga. App. LEXIS 48 (1929).

Oral notice is not a sufficient compliance with this section. Gettis v. Gormley, 49 Ga. App. 339, 175 S.E. 393, 1934 Ga. App. LEXIS 395 (1934).

Creditor may waive requirement by filing suit and then discharge surety by dismissing it. — If oral notice is given by a surety on a note to the creditor to sue on the note, and the creditor agrees to sue and in pursuance to such notice and agreement does actually

enter suit, the creditor thereby treats such notice as sufficient and waives the requirements of this section, and the surety acquires a right and interest in the suit; and when such suit is dismissed without the permission of the surety, the creditor must bring another suit within three months from the date of the original notice and executed agreement to sue, and failure to do so will discharge the surety. Gettis v. Gormley, 49 Ga. App. 339, 175 S.E. 393, 1934 Ga. App. LEXIS 395 (1934).

Reliance on assurance of suit will discharge surety to extent of loss. — A parol notice or request to the creditor by a surety upon a promissory note to bring suit will not operate as a compliance with this section; if, however, the surety is assured by the holder of the note that suit will be brought at the next term of court, and because of such assurance the surety foregoes means of indemnity or protection, and the suit is not brought, the surety will be discharged to the extent of the loss. Longley v. Johnson, 22 Ga. App. 96, 95 S.E. 315, 1918 Ga. App. LEXIS 168 (1918).

Evidence of oral notice. — If it does not appear that the endorser parted with the means of protecting himself in consequence of any assurances made to him by the creditor and the record discloses nothing that would estop the creditor or relieve the endorser from the necessity of complying with the strict provisions of this section, the court does not err in excluding parol testimony to the effect that the endorser made an oral demand on the officers of the creditor to sue on the note while the principal was solvent and that demand was followed by a promise on the part of the creditor to do so and it failed to do so. Smith v. Morris Fertilizer Co., 18 Ga. App. 217, 89 S.E. 174, 1916 Ga. App. LEXIS 244 (1916).

Notice need not indicate benefit of section will be claimed. — To entitle a security or endorser to the benefit of the provisions of this section for the endorser's relief, it is only necessary for the endorser to notify the holder to sue the note. It is not necessary that the endorser should, in addition, notify the holder that unless the endorser did proceed to collect the note that the endorser would claim the benefit of this section. Denson v. Miller, 33 Ga. 275, 1862 Ga. LEXIS 25 (1862).

Notice must be positive demand to sue. — It must be a positive demand to sue, and so understood by the parties at the time, in order to discharge the surety. If it appeared that it was a request of a favor, and so considered by the parties at the time, then the surety was not discharged by reason of a failure to sue in three months. Bethune v. Dozier, 10 Ga. 235, 1851 Ga. LEXIS 95 (1851).

"Lose no time in suing" is a command to sue. Howard v. Brown, 3 Ga. 523, 1847 Ga. LEXIS 133 (1847).

Letters properly excluded which contain no command. — When two letters were written by the surety, one being mailed before the maturity of the debt and containing merely the expression of a desire on the part of the surety that the plaintiff would collect when the obligation became due and the other suggesting the advisability of bringing suit and expressing doubt whether the money could be made later, but containing no command, there was no notice given as required by this section, and the letters were rightly excluded. Smith v. Morris Fertilizer Co., 18 Ga. App. 217, 89 S.E. 174, 1916 Ga. App. LEXIS 244 (1916).

Notice must state county of principal's residence. — No notice shall be considered a compliance with the requirements of this section which does not state the county of the principal's residence. Smith v. Morris Fertilizer Co., 18 Ga. App. 217, 89 S.E. 174, 1916 Ga. App. LEXIS 244 (1916).

A notice which states that the principal's residence is "Waycross, Ga.," but which does not state the county of the principal's residence, is not the notice required by this section. Seckinger v. Exchange Bank, 38 Ga. App. 667, 145 S.E. 94, 1928 Ga. App. LEXIS 382 (1928).

Written notice that does not state the county of the principal's residence is not a sufficient compliance with this section. Gettis v. Gormley, 49 Ga. App. 339, 175 S.E. 393, 1934 Ga. App. LEXIS 395 (1934).

If the maker resides in this state, in order for the notice for which provision is made in this section to be effective, such notice must state the county in which the

Notice (Cont'd)

principal resides. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330, 1957 Ga. App. LEXIS 893 (1957).

Notice to a creditor to proceed is ineffective unless the notice states the county in which the principal resides; this requirement is mandatory under the statute. Motz v. Landmark First Nat'l Bank, 154 Ga. App. 858, 270 S.E.2d 81, 1980 Ga. App. LEXIS 2418 (1980).

Actual notice is required. Constructive notice, if there is any arising by virtue of an Act of the legislature incorporating a city, that the city is in a particular county, will not suffice as a compliance with this section. Seckinger v. Exchange Bank, 38 Ga. App. 667, 145 S.E. 94, 1928 Ga. App. LEXIS 382 (1928).

When city and county have same name. — It is not a compliance with the section to say "of Macon, Georgia," there being in the state both a County of Macon and a City of Macon, and the notice not indicating that the county was meant rather than the city. Ware v. City Bank, 59 Ga. 840, 1877 Ga. LEXIS 415 (1877).

Receipt of notice by creditor does not cure defect as to county. — A notice to sue, given by a surety under this section in order to afford a defense to a subsequent action brought against the surety by the creditor, must state the county of the residence of the principal debtor since, under the mandate of the statute, "no notice shall be considered a compliance with the requirements of this section which does not state the county of the principal's residence"; a notice fatally defective in this respect, but received by the creditor with the remark "all right," could amount to nothing more than a mere promise by the creditor, without consideration, to proceed against the principal debtor, which would have no effect upon the obligation of the surety. Bowen v. Mobley, 40 Ga. App. 833, 151 S.E. 667, 1930 Ga. App. LEXIS 722 (1930).

Notice by one surety is sufficient. — Notice by one surety is as effectual as if all the sureties were to unite in the notice; a notice by one surety is as available to the creditor as a notice from all. Jones v. Whitehead, 4 Ga. 397, 1848 Ga. LEXIS 46 (1848).

Notice is properly given to creditor holding note. — When a promissory note to which there is a surety is held by a creditor of the owner as a collateral security, such creditor is the proper person to be notified by the surety to sue the maker. McCrary v. King, 27 Ga. 26, 1859 Ga. LEXIS 3 (1859).

Notice to agent, such as cashier of bank. — Since notice to sue the principal maker of a note by the surety was directed to the cashier of the bank which was the holder of the note, it was sufficient notice to the bank, especially as it appeared that the bank acted upon such notice. Bank of St. Marys v. Mumford & Tyson, 6 Ga. 44, 1849 Ga. LEXIS 7 (1849).

Wrongly designating person giving notice is not grounds for excluding notice. — Fact that the person giving the written notice to sue under this section was designated as "endorser," when, under both the pleading and the evidence, the person was a technical "surety," was not cause for excluding such notice as evidence in the case. Milam v. Lewis, 47 Ga. App. 376, 170 S.E. 404, 1933 Ga. App. LEXIS 410 (1933).

Nature of surety's request may be question for jury. — If it is doubtful whether the surety intended to request the creditor to sue the principal as a matter of law, it is proper to submit it to the jury to find from the facts how the parties understood the matter. Bethune v. Dozier, 10 Ga. 235, 1851 Ga. LEXIS 95 (1851).

Suit by Creditor

Surety is entitled under the law to have the creditor sue the principal debtor, if the debtor can be found, as such was the purpose of the General Assembly in the enactment of this section. W.T. Rawleigh Co. v. Overstreet, 84 Ga. App. 21, 65 S.E.2d 50, 1951 Ga. App. LEXIS 620 (1951).

After proper notice, failure to sue principal within state discharges surety. — Under this section, the surety is required only to give the creditor: (a) notice to proceed to collect the debt from the principal; and (b) to state the county

in which the principal resides; thereafter, if the principal is within the jurisdiction of the state, and if the creditor fails to commence an action within three months after such notice, the surety will be discharged. Fricks v. J.R. Watkins Co., 88 Ga. App. 276, 76 S.E.2d 518, 1953 Ga. App. LEXIS 1065, rev'd, 210 Ga. 83, 78 S.E.2d 2, 1953 Ga. LEXIS 481 (1953).

Failure of creditor to commence action. — To the extent O.C.G.A. § 10-7-24 provides for the discharge of a guarantor based on the failure of the creditor to commence an action against the principal it is inconsistent with O.C.G.A. § 11-3-416(1). Gunter v. True, 203 Ga. App. 330, 416 S.E.2d 768, 1992 Ga. App. LEXIS 406 (1992), cert. denied, No. S92C0807, 1992 Ga. LEXIS 449 (Ga. June 4, 1992).

Filing of petition without service does not operate to commence suit and no suit is pending until the suit has been served. Southeastern Fid. Ins. Co. v. Tesler, 159 Ga. App. 60, 282 S.E.2d 703, 1981 Ga. App. LEXIS 2487 (1981).

Suing in wrong county does not comply with notice. — Bringing of a suit by a creditor against a principal in a county other than the principal's residence is the equivalent of no suit at all when process was not served on the principal and hence cannot be urged as a compliance upon service of notice provided for in this section. Overstreet v. W.T. Rawleigh Co., 75 Ga. App. 483, 43 S.E.2d 774, 1947 Ga. App. LEXIS 566 (1947); Southeastern Fid. Ins. Co. v. Tesler, 159 Ga. App. 60, 282 S.E.2d 703, 1981 Ga. App. LEXIS 2487 (1981).

Suit on obligation on which sureties were not liable. — Suit by a creditor against the principal debtor on the second of two obligations for which sureties were liable on only the first obligation will not suffice as a suit within three months since this section refers to the obligation on which the sureties sought to be held liable became obligated to pay the creditor. W.T. Rawleigh Co. v. Overstreet, 84 Ga. App. 21, 65 S.E.2d 50, 1951 Ga. App. LEXIS 620 (1951).

New suit is unnecessary if one is pending when notice received. — If a creditor brings suit against the sureties on a contract, and the sureties give the statutory notice to the creditor to proceed to collect the debt out of the principal, and if upon the trial the creditor admits the creditor's failure to sue the principal within three months after receiving such notice, but shows that the creditor did file suit against the principal in the county of the residence of the principal after the debt was due, but before the creditor received the notice from the sureties and before the creditor brought suit against the sureties, the filing of another suit is unnecessary. J.R. Watkins Co. v. Seawright, 168 Ga. 750, 149 S.E. 45, 1929 Ga. LEXIS 230 (1929).

Creditor has full three months to sue so surety risks principal's removal. — If notice was given to the holder to sue the maker, but before the expiration of the three months allowed by this section, the maker removed out of the state, so that no suit could be instituted against the maker, the holder has the whole three months allowed by this section within which to sue, and the removal of the maker was at the risk of the endorser and not of the holder. Howard v. Brown, 3 Ga. 523, 1847 Ga. LEXIS 133 (1847).

No duty to sue principal when third party not surety. — Creditor is not required to proceed against the principal in order to preserve the creditor's rights to hold a third party liable when the third party is neither a surety, guarantor, nor an endorser, but has agreed to a primary obligation to pay for goods. Ely & Walker v. Dux-Mixture Hdwe. Co., 582 F. Supp. 285, 1982 U.S. Dist. LEXIS 17649 (N.D. Ga. 1982), aff'd, 732 F.2d 821, 1984 U.S. App. LEXIS 22771 (11th Cir. 1984).

Obtaining default judgment. — Creditor who obtained a default judgment against the principal (maker of notes) fulfilled the creditor's duty under O.C.G.A. § 10-7-24. United States v. Blue Dolphin Assocs., 620 F. Supp. 463, 1985 U.S. Dist. LEXIS 14708 (S.D. Ga. 1985).

Waiver and Estoppel

Surety may waive benefit of section. — Right created by the legislature, as embodied in this section, was established solely for the benefit of

Waiver and Estoppel (Cont'd)

one who has become surety for another, and such surety may therefore waive it without injuring others and without affecting the public interest. J.R. Watkins Co. v. Fricks, 210 Ga. 83, 78 S.E.2d 2, 1953 Ga. LEXIS 481 (1953).

Provision agreeing creditor may extend time estops surety from giving notice. — If, for value received, the surety consents that the creditor "may grant any extension on the note that he deems proper," the surety cannot, by giving the notice contemplated in this section, revoke the surety's consent allowing the extension of time and be discharged from liability on the note merely because of a failure on the part of the creditor to commence an action against the principal debtor within the period of three months. Armour Fertilizer Works v. Bond, 139 Ga. 246, 77 S.E. 22, 1913 Ga. LEXIS 395 (1913).

If the surety has in the surety's contract consented that the creditor may, within the creditor's discretion, extend the period of time within which the principal's indebtedness is due, the surety will be estopped to give notice under this section after the date the debt is due and claim the benefit of the shorter three-month "statute of limitation" within which the creditor must thereafter bring suit against the principal. Hearn v. Citizens & S. Nat'l Bank, 154 Ga. App. 686, 269 S.E.2d 486, 1980 Ga. App. LEXIS 2342 (1980).

Surety waives notice by requesting indulgence to principal. — If the surety gives notice and then asks the creditor for indulgence, the surety waives the notice, provided the surety's request was made before the expiration of three months after the notice, and provided it was a request for indulgence to the surety's principal, not to the surety. Bailey v. New, 29 Ga. 214, 1859 Ga. LEXIS 311 (1859).

Request after three-month period. — Request for indulgence made after the expiration of three months after the notice will not have the effect of a waiver of notice. Bailey v. New, 29 Ga. 214, 1859 Ga. LEXIS 311 (1859).

Provision allowing suit against sureties first does not waive section. — When relationship of principal and surety exists, the creditor for whose protection the sureties become such may proceed against the sureties without first exhausting its remedies against the principal as a matter of law, with or without a provision to that effect in the contract. Therefore, the creditor acquires nothing by such a provision, and the sureties surrender nothing. Overstreet v. W.T. Rawleigh Co., 75 Ga. App. 483, 43 S.E.2d 774, 1947 Ga. App. LEXIS 566 (1947).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 28 et seq.

C.J.S.

72 C.J.S., Principal and Surety, § 147 et seq.

ALR.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Language or purport of notice to proceed against principal, noncompliance with which will relieve surety, 30 A.L.R. 1285.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 A.L.R. 477.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 A.L.R. 1262.

Failure to present claim against estate of deceased principal as releasing surety, 50 A.L.R. 1214.

Insolvency of obligee as extending time allowed by fidelity bond for discovery of default, 56 A.L.R. 1263.

Waiver by surety agreement of benefit of rule which releases surety in event of obligee's failure to comply with surety's demand that he proceed against principal, 89 A.L.R. 570.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Pledgor of property to secure another's obligation as within benefit of rule that requires obligee to comply with surety's demand to proceed against principal, 151 A.L.R. 928.

Applicability to compensated surety or bonding company of statute discharging surety where creditor fails to bring suit against principal after notice, 42 A.L.R.2d 1159.

10-7-25. Extending liability.

The creditor shall pursue his remedy against the surety within the time prescribed by law; and no payment or promise by the principal or by a cosurety shall extend the obligation of the surety or the remedy of the creditor against him.

History.
Orig. Code 1863, § 2135; Code 1868, § 2130; Code 1873, § 2157; Code 1882, § 2157; Civil Code 1895, § 2975; Civil Code 1910, § 3547; Code 1933, § 103-206.

JUDICIAL DECISIONS

Entering payment on note does not extend statute of limitations against surety. — Payment and entry on a note by the principal did not prevent the bar of the statute of limitations from attaching in favor of the surety's security under former Code 1873, §§ 2157 and 2938. McBride v. Hunter, 64 Ga. 655, 1880 Ga. LEXIS 385 (1880).

Credits on note do not extend statute of limitations whether made by principal or cosurety. — Whether the credits on the notes were made by the principal or the maker thereof, or by the present plaintiff as surety, these payments or credits did not extend or revive the original liability, did not create new promises that were binding upon any of the other sureties who were not parties to such payments, and did not constitute new points for the running of the statute of limitations insofar as the rights of other sureties not parties to such payments were concerned. This principle falls within the spirit, if not the letter, of this section. McLin v. Harvey, 8 Ga. App. 360, 69 S.E. 123, 1910 Ga. App. LEXIS 162 (1910).

Waiver of contractual limitations on time to sue. — When surety company led bank to believe that claim under bond sued on would be paid by surety company, without suit, if the bank would by legal proceedings force exhaustion of administrator's bond before calling upon cashier's bond, and thus determine the amount due by the surety company on the cashier's bond on account of embezzlement of bank's cashier, the surety company could not take advantage of the provision in the policy requiring that action thereunder be brought within a stated time. American Sur. Co. v. Peoples Bank, 55 Ga. App. 28, 189 S.E. 414, 1936 Ga. App. LEXIS 422 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Suretyship, § 18 et seq.
C.J.S.
72 C.J.S., Principal and Surety, § 180 et seq.

ALR.
Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 A.L.R. 1605.

Incapacity of principal to contract as

affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 A.L.R. 477.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 A.L.R. 1262.

Extension of time or other modification of original contract as releasing indemnitor of surety or guarantor, 43 A.L.R. 1368.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 A.L.R. 85.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, 57 A.L.R.2d 855.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 A.L.R.2d 734.

10-7-26. Promise to pay in ignorance of discharge.

If by an act of the creditor the surety is discharged and in ignorance of the fact of the discharge the surety promises to pay, the promise shall not be binding.

History.

Orig. Code 1863, § 2136; Code 1868, § 2131; Code 1873, § 2158; Code 1882, § 2158; Civil Code 1895, § 2976; Civil Code 1910, § 3548; Code 1933, § 103-207.

JUDICIAL DECISIONS

This section applies when there is discharge. Langston v. Aderhold, 60 Ga. 376, 1878 Ga. LEXIS 475 (1878).

New promise by surety not binding if discharge not known. — If an endorser being discharged for want of notice of nonpayment promises to pay, making the promise in ignorance of the endorser's legal rights, the endorser will not be bound. Langston v. Aderhold, 60 Ga. 376, 1878 Ga. LEXIS 475 (1878).

A new promise to pay the obligation, made by a surety in ignorance of the fact that the surety has been released and discharged, is not binding. Crandall v. Shepard, 166 Ga. 889, 144 S.E. 772, 1928 Ga. LEXIS 428 (1928).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 43.

10-7-27. Provisions of Uniform Commercial Code to control.

Code Sections 10-7-20 through 10-7-26 shall be superseded to the extent of any conflict by the provisions of Article 3 of Title 11, the "Uniform Commercial Code — Negotiable Instruments," relating to the discharge of any party to a negotiable instrument.

History.

Ga. L. 1997, p. 143, § 10.

Cross references.

Discharge of party to commercial paper, § 11-3-601 et seq.

JUDICIAL DECISIONS

Current law on discharge of parties to instruments. — Law governing discharge of sureties and other parties on instruments is currently governed by the Uniform Commercial Code provisions cited in Ga. L. 1962, pp. 156, 276 (see now O.C.G.A. § 11-3-601). Christian v. Atlanta Army Depot Fed. Credit Union, 151 Ga. App. 403, 260 S.E.2d 533, 1979 Ga. App. LEXIS 2547 (1979).

Security for negotiable instruments. — Some decisions of the Court of Appeals have applied the law to contracts of surety or guaranty securing obligations evidenced by instruments which were almost certainly negotiable instruments without reference to the Uniform Commercial Code. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274, 1978 Ga. App. LEXIS 2720 (1978).

Construction with UCC. — Commercial paper chapter of the Uniform Commercial Code controls in cases based on negotiable instruments. The law providing for the discharge of a surety or guarantor of a simple contract for the payment of money applies equally to a surety or guarantor of negotiable instruments. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274, 1978 Ga. App. LEXIS 2720 (1978).

10-7-28. Process sued out and judgment entered against surety as such.

When the fact of suretyship appears on the face of the contract, the creditor shall sue out process against the surety and enter up judgment against him as such.

History.

Laws 1845, Cobb's 1851 Digest, p. 598.; Laws 1850, Cobb's 1851 Digest, p. 600.; Code 1863, § 2137; Code 1868, § 2132; Code 1873, § 2159; Code 1882, § 2159; Civil Code 1895, § 2977; Civil Code 1910, § 3549; Code 1933, § 103-208.

JUDICIAL DECISIONS

Judgment may be amended to describe surety as such. — Judgment is not void by reason of failing to describe the security as security, but is amendable. Saffold v. Wade, 56 Ga. 174, 1876 Ga. LEXIS 233 (1876).

RESEARCH REFERENCES

ALR.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 A.L.R. 81.

Right to bring action against guarantor before right to bring action against principal has arisen, 145 A.L.R. 935.

10-7-29. Judgment against principal and surety at same time.

It shall be lawful to enter judgment against principal and sureties at the same time, as in cases of appeal, in all cases in law or equitable proceedings when a bond has been given by the losing party conditioned

to pay the eventual condemnation money in the action; and it shall not be necessary to bring an action upon the bond.

History.

Ga. L. 1893, p. 131, § 1; Civil Code 1895, § 2978; Civil Code 1910, § 3550; Code 1933, § 103-209; Ga. L. 1982, p. 3, § 10.

Cross references.

Discharge of parties to commercial paper, § 11-3-601 et seq.

JUDICIAL DECISIONS

Prior to section, suit against sureties was required. — Prior to the adoption of this section, in order to obtain judgment against sureties on bonds of losing parties in equitable proceedings, conditioned to pay the eventual condemnation money, it was necessary to bring suit on the bond. Offerman & W. R.R. v. Waycross Air-Line R.R., 112 Ga. 610, 37 S.E. 871, 1901 Ga. LEXIS 21 (1901); Miller v. A.M. Watson & Co., 135 Ga. 408, 69 S.E. 555, 1910 Ga. LEXIS 557 (1910).

Purpose of this section was to make the judgment so entered against the surety binding to the same extent as a judgment against the surety if rendered in a separate suit on the bond; in other words, that such a judgment should be a substitute for a judgment which might theretofore have been rendered in a separate suit on the bond. Miller v. A.M. Watson & Co., 135 Ga. 408, 69 S.E. 555, 1910 Ga. LEXIS 557 (1910).

Judgment may now be entered against surety without suit. — Under this section, upon the entering of judgment against the principal, it is lawful to sign up judgment against the surety on the condemnation money bond at the same time without the necessity for bringing suit thereon. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969).

Eventual condemnation money bond. — Prior to Ga. L. 1893, p. 131, § 1, now embraced in this section, it was necessary to bring an independent suit on all bonds given in an equitable proceeding; and since the passage of the Act, judgment can be entered up against the principal and the principal's sureties at the same time in an equitable proceeding only in a case where a bond has been made by the losing party, conditioned to pay the eventual condemnation money in the action. Jordan v. J.A. Callaway & Co., 138 Ga. 209, 75 S.E. 101, 1912 Ga. LEXIS 261 (1912); United States Fid. & Guar. Co. v. Tucker, 165 Ga. 283, 140 S.E. 866, 1927 Ga. LEXIS 371 (1927).

"Eventual condemnation money" is that which is recovered in the identical case in which the appeal is taken; it is the amount fixed and settled by the judgment or decree of the court in the case. Harrell v. Kutz & Co., 22 Ga. App. 235, 95 S.E. 717, 1918 Ga. App. LEXIS 264 (1918).

If the bond given by the defendants is for the payment of the judgments which may be rendered in the case, it will be treated as a bond for the eventual condemnation money under this section. Harrell v. Kutz & Co., 22 Ga. App. 235, 95 S.E. 717, 1918 Ga. App. LEXIS 264 (1918).

Under this section, while judgment against the sureties on a bond to dissolve an injunction and receivership cannot be entered in the main case, when the bond is conditioned otherwise than for the eventual condemnation money, yet, when the obligation of the bond was conditioned to pay unto the plaintiff whatever sum may be shown to be due the plaintiff under the contract and the liability was not limited to an amount other than that which might be ultimately fixed and settled by the judgment or decree in the case, a summary judgment in the same case against the sureties on the bond was permissible, and an affidavit of illegality, based on the contention that one of the sureties had not had a day in court could not properly be sustained. Smith v. Newsome, 26 Ga. App. 743, 107 S.E. 269, 1921 Ga. App. LEXIS 621 (1921).

An "eventual condemnation money bond" is one wherein makers agree to pay to the payee therein any judgment which the payee may recover against the principal in the suit in which such bond is given. United States Fid. & Guar. Co. v. Tucker, 165 Ga. 283, 140 S.E. 866, 1927 Ga. LEXIS 371 (1927).

Under this section, a bond must be an eventual condemnation money bond in order that judgment may be entered thereon in the particular case in which it was given, that is, without an independent suit. Vickers v. Jones, 200 Ga. 338, 37 S.E.2d 205, 1946 Ga. LEXIS 395 (1946).

Bond must secure independent liability for which judgment may be taken. — Since a "condemnation money bond" is given merely as security, necessarily there must be some independent liability that is thus secured, and it must be one for which judgment may be taken against the principal in the identical case, even if the bond had not been given. Vickers v. Jones, 200 Ga. 338, 37 S.E.2d 205, 1946 Ga. LEXIS 395 (1946).

Recovery on bond creating only liability must be by independent suit. — If a bond itself creates the only liability, it is not an eventual condemnation money bond, and a recovery thereon can be had only in an independent suit. Vickers v. Jones, 200 Ga. 338, 37 S.E.2d 205, 1946 Ga. LEXIS 395 (1946).

Injunction bond is not an eventual condemnation money bond within the meaning of this section, and a recovery thereon may be had only in an independent suit. Vickers v. Jones, 200 Ga. 338, 37 S.E.2d 205, 1946 Ga. LEXIS 395 (1946).

Bond of indemnity. — See United States Fid. & Guar. Co. v. Tucker, 165 Ga. 283, 140 S.E. 866, 1927 Ga. LEXIS 371 (1927).

Judgment may be entered if bond so provides. — Judge of the superior court did not err in entering up judgment against the plaintiff and the plaintiff's surety upon a bond for the amount of the judgment obtained in the municipal court, which bond was voluntarily given in order to obtain a restraining order upon presentation of the petition for injunction for sanction by the judge and which provided that judgment might be entered thereon as in case of appeal, should the plaintiff fail in the plaintiff's equitable cause for injunction. American Liberty Fire Ins. Co. v. McGlothin, 165 Ga. 173, 140 S.E. 354, 1927 Ga. LEXIS 338 (1927).

Sureties on a condemnation money bond must remain silent witnesses to the conflict between the parties to the suit, standing ready to fulfill at the end of the litigation the obligation the sureties have undertaken. Ford v. Herbermann, 125 Ga. App. 87, 186 S.E.2d 501, 1971 Ga. App. LEXIS 743 (1971).

Bail or security takes the fortunes of the principal and is bound equally with the principal by the judgment in the main action. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969).

Consent of principal, not surety. — Where, under former provisions therefor, a tenant arrested an eviction proceeding by giving bond with a surety to the landlord, conditioned for the payment of such sum with costs as may be recovered against the defendant tenant on the trial of the case, the surety took the fortunes of the principal and was bound by whatever judgment was rendered against the principal, even though the surety did not appear and plead and the judgment was by consent of the principal and not of the surety. Ford v. Eskridge, 53 Ga. App. 466, 186 S.E. 204, 1936 Ga. App. LEXIS 281 (1936).

Liability of sureties is absolutely fixed by the judgment against their principal, and the sureties must stand or fall by the result of the surety's defense, such being the express undertaking in the bond. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969); Ford v. Herbermann, 125 Ga. App. 87, 186 S.E.2d 501, 1971 Ga. App. LEXIS 743 (1971).

Notice or hearing not required. — There is no requirement in this section that the surety be named as a party or be served, or otherwise notified and given an opportunity to be heard. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969).

Under the construction the courts have placed on this section, a surety takes the

fortunes of the surety's principal; upon judgment being entered against the principal, it is lawful to enter judgment against the surety at the same time without the necessity of bringing suit. In such instance, the surety cannot complain of lack of notice or opportunity of being heard prior to that judgment. Houston Gen. Ins. Co. v. Stein Steel & Supply Co., 134 Ga. App. 624, 215 S.E.2d 511, 1975 Ga. App. LEXIS 2106 (1975).

Surety cannot attack judgment for causes principal could have raised. — If a judgment has been rendered against a surety by a court of competent jurisdiction, the surety is absolutely bound by the judgment, and will not be heard to impeach or attack the judgment in any way for causes which were or could have been a matter of defense by the principal. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969); Ford v. Herbermann, 125 Ga. App. 87, 186 S.E.2d 501, 1971 Ga. App. LEXIS 743 (1971).

Motion to set aside. — In a motion to set aside, a surety may make no complaint relative to the merits of the judgment which could have been raised by the surety's principal, but must stand or fall by the result of the principal's defense. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969).

Affidavit of illegality. — Bail can no more go behind the judgment or attack the judgment by affidavit of illegality after the judgment is duly entered against both the bail and the principal than can the principal. O'Leary v. Smith, 119 Ga. App. 762, 168 S.E.2d 886, 1969 Ga. App. LEXIS 1238 (1969).

Finding in main case must fix liability according to terms of bond. — Even if in a particular case judgment could be entered upon the bond under this section, it is a prerequisite that there be a finding fixing the surety's liability according to the condition in the surety's bond. Jordan v. J.A. Callaway & Co., 138 Ga. 209, 75 S.E. 101, 1912 Ga. LEXIS 261 (1912) (bond to dissolve injunction and receivership).

When, as a condition for the grant of an interlocutory injunction against interfering with the possession of land, the plaintiff was required to file a bond to indemnify the defendant for such rentals as the jury on the final trial of the case should find to be due by the plaintiff to the defendant according to such interest as the defendant might be found to have in the land, under the terms of the bond, no recovery could be had thereon without a determination in the cause itself as to the interest of the defendant and the amount of rentals due the defendant by the plaintiff if the defendant had an interest; this is true irrespective of whether or not, in the event of determination of these questions favorably to the defendant, the defendant could summarily enter in the same case a judgment on the bond against the principal and the surety as in cases of appeal, or would have to resort to an independent action. Fender v. Hendley, 196 Ga. 512, 26 S.E.2d 887, 1943 Ga. LEXIS 373 (1943).

Intervening surety is concluded by prior judgment. — Surety on the eventual condemnation money bond given by the defendant in the distress warrant proceeding was concluded by the prior judgment, even though the surety had been allowed to intervene in the distress warrant proceeding. Price v. Carlton, 121 Ga. 12, 48 S.E. 721, 1904 Ga. LEXIS 2 (1904).

Binding judgment may be entered after dismissal set aside. — Under former provisions as to eviction proceedings, after an order of reinstatement of such a proceeding against a tenant, because its dismissal at the same term of court was for want of prosecution, being presumptively proper and reciting that it was entered "for sufficient cause shown," the surety on the bond of the defendant became bound for such eventual condemnation money as might be determined under the evidence at the trial; the surety was not entitled to set aside the final judgment rendered against the surety and the defendant principal on the bond upon the grounds that the order of dismissal terminated the surety's liability as surety and that the order of reinstatement was entered by the consent only of the defendant and without notice to the surety. Ford v. Eskridge, 53 Ga. App. 466, 186 S.E. 204, 1936 Ga. App. LEXIS 281 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 109 et seq.

ALR.

Right to judgment against surety where action fails against principal, 5 A.L.R. 594.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 A.L.R. 81.

Right of surety on bond given to prevent, or secure the release of, attachment, to attack attachment proceedings after recovery by plaintiff of judgment in attachment action, 89 A.L.R. 266.

Right to join principal debtor and guarantor as parties defendant, 53 A.L.R.2d 522.

Conclusiveness and effect, upon surety, of default or consent judgment against principal, 59 A.L.R.2d 752.

10-7-30. Bad faith refusal of corporate surety to perform suretyship contract.

(a) For the purposes of this Code section, the term "obligee" shall include any obligee or beneficiary pursuant to the terms of the contract of suretyship.

(b) In the event of the refusal of a corporate surety to commence the remedy of a default covered by, to make payment to an obligee under, or otherwise to commence performance in accordance with the terms of a contract of suretyship within 60 days after receipt from the obligee of a notice of default or demand for payment, and upon a finding that such refusal was in bad faith, the surety shall be liable to pay such obligee, in addition to the loss, not more than 25 percent of the liability of the surety for the loss and all reasonable attorney's fees for the prosecution of the case against the surety. The amount of such reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment rendered in such action; provided, however, that such attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of such services, based on the time spent and legal and factual issues involved, in accordance with prevailing fees in the locality where the action is pending; provided, further, that the trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of such attorney in the action against the surety.

History.

Ga. L. 1973, p. 825, § 1; Ga. L. 1980, p. 1159, § 1; Ga. L. 1982, p. 3, § 10.

Editor's notes.

In Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316 (1978), it was held that this chapter, with the exception of this section, was not intended to govern compensated sureties. However, Ga. L. 1981, p. 870, § 1, amends O.C.G.A. § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). See the Editor's note to O.C.G.A. § 10-7-1.

Law reviews.

For article, "A Georgia Practitioner's Guide to Construction Performance Bond Claims," see 60 Mercer L. Rev. 509 (2010).

JUDICIAL DECISIONS

O.C.G.A. § 33-4-6 is virtually identical to O.C.G.A. § 10-7-30, except that the statute deals with the liability of insurance companies on their insurance contracts rather than the liability of corporate sureties on their suretyship contracts. Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co., 166 Ga. App. 509, 304 S.E.2d 471, 1983 Ga. App. LEXIS 2225 (1983).

Strict construction. — This section, being in derogation of the common law, must be strictly construed. Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121, 1976 Ga. App. LEXIS 2161 (1976).

Section refers to payment to obligee, not claimant. — This section, which provides damages and attorney fees for default by a corporate surety, refers to the payment to the obligee of the penalty and not to a claimant. Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121, 1976 Ga. App. LEXIS 2161 (1976).

Continued failure to pay the claim after the suit was filed may not be counted as part of the 60-day deadline set forth in subsection (b) of O.C.G.A. § 10-7-30. Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co., 166 Ga. App. 509, 304 S.E.2d 471, 1983 Ga. App. LEXIS 2225 (1983).

Estoppel. — Indemnitors were estopped from contending that the insurer's failure to pay the owner's claim prior to trial constituted a breach of fiduciary duty on the insurer's part, when the reason the insurer defended the owner's claim instead of paying the claim prior to trial was because the president of one of the indemnitors denied any liability in the matter and resisted efforts to settle. M-Pax, Inc. v. Dependable Ins. Co., 176 Ga. App. 93, 335 S.E.2d 591, 1985 Ga. App. LEXIS 2265 (1985).

Unavailable remedies. — The 60-day performance period provided by subsection (b) of O.C.G.A. § 10-7-30 began to run on the date that the surety received the obligee's demand letter and not on the date that the surety was "aware of" the obligee's claim on the bond, and this period was not waived by the surety's denying, prior to 60 days, any obligation on the bond. Consulting Eng'rs Group, Inc. v. Pace Constr., 613 F. Supp. 1192, 1985 U.S. Dist. LEXIS 17504 (N.D. Ga. 1985).

Plaintiff may not recover a bad faith penalty or attorneys' fees pursuant to O.C.G.A. § 10-7-30 in a suit brought under the Miller Act. United States v. All Am. Bldg. Sys., 847 F. Supp. 69, 1994 U.S. Dist. LEXIS 3840 (S.D. Tex. 1994).

No award for additional attorney's fees on appeal. — Since the trial court did not err in striking the bad-faith penalty and attorney fees awarded to the plaintiff, its motion for an award of additional attorney fees on appeal will be perforce, denied, both because of this holding and because the Court of Appeals is not empowered by statute or otherwise to grant such relief. Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co., 166 Ga. App. 509, 304 S.E.2d 471, 1983 Ga. App. LEXIS 2225 (1983).

Withdrawal of first notice of default. — When a contractor's letter to the subcontractor specified that no claim was being made against the performance bond "at this time," the prior notice of default was clearly intended to be

withdrawn, and since the subcontractor was not again declared in default until less than 60 days before suit was filed, and since no demand for payment was made against the surety until that same date, it follows that the surety cannot be held liable for a bad-faith penalty and attorney fees. Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co., 166 Ga. App. 509, 304 S.E.2d 471, 1983 Ga. App. LEXIS 2225 (1983).

Jurisdiction. — Subcontractor's action against surety for breach of payment bond contract, bad faith, and attorney fees was within the superior court's subject matter jurisdiction. Harry S. Peterson Co. v. National Union Fire Ins. Co., 209 Ga. App. 585, 434 S.E.2d 778, 1993 Ga. App. LEXIS 945 (1993).

RESEARCH REFERENCES

ALR.

Act or default of employee covered by fidelity bond or insurance, 62 A.L.R. 411; 77 A.L.R. 861; 98 A.L.R. 1264.

Conclusiveness and effect, upon surety, of default or consent judgment against principal, 59 A.L.R.2d 752.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 A.L.R.3d 515.

10-7-31. Rights of certain parties claiming protection under a payment bond or security deposit; notice of commencement of work.

(a) Where a payment bond or security deposit is provided pursuant to a contract for the construction of an improvement to property other than a public work, every person entitled to claim the protection of the payment bond or security deposit who has not been paid in full for labor or material furnished in the prosecution of the work referred to in such bond or security deposit after the last of the labor was done or performed by him or her or the material or equipment or machinery was furnished or supplied by him or her for which such claim is made, or when he or she has completed his or her subcontract for which such claim is made, shall have the right to bring an action on such payment bond or security deposit in accordance with the terms thereof for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due him or her; provided, however, that any person having no contractual relationship express or implied with the contractor furnishing such payment bond or security deposit on a project where the contractor has complied with the Notice of Commencement requirements in accordance with subsection (b) of this Code section shall not have the right to bring an action on such payment bond or security deposit in accordance with the terms thereof unless such person gave to the contractor within 30 days from the filing of the Notice of Commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, a written Notice to Contractor setting forth:

(1) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;

(2) The name and address of each person at whose instance the labor, material, machinery, or equipment are being furnished;

(3) The name and location of the project set forth in the Notice of Commencement; and

(4) A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.

(b) Where a payment bond or security deposit is provided pursuant to a contract for the construction of an improvement to property other than a public work, the contractor furnishing the payment bond or security deposit shall post on the project site and file with the clerk of the superior court of the county in which the project is located a Notice of Commencement no later than 15 days after the contractor physically commences work on the project and give a copy of the Notice of Commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to give a copy of the Notice of Commencement within ten calendar days of receipt of the written request from the subcontractor, materialman, or person shall render the notice to contractor requirement of subsection (a) of this Code section inapplicable to the subcontractor, materialman, or person making the request. The Notice of Commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the project being constructed and the legal description of the property upon which the improvements are being made;

(3) The name and address of the true owner of the property;

(4) The name and address of the person other than the owner at whose instance the improvements are being made, if not the true owner of the property;

(5) The name and the address of the surety for the performance and payment bonds, if any;

(6) The name and address of the construction lender, if any; and

(7) The name and address of the holder of the security deposit provided, if any.

(c) The failure to file a Notice of Commencement under subsection (b) of this Code section shall render the Notice to Contractor requirements of subsection (a) of this Code section inapplicable.

(d) The clerk of the superior court shall file the Notice of Commencement provided for in this Code section within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices of lien specified in subsection (a) of Code Section 44-14-361.3. Each such Notice of Commencement shall be indexed under the name of the true owner and the contractor as contained in the Notice of Commencement.

History.

Code 1981, § 10-7-31, enacted by Ga. L. 1994, p. 870, § 1.

Law reviews.

For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

JUDICIAL DECISIONS

Judgment on the pleadings reversed. — Construing the pleadings in a light most favorable to showing a question of fact in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in the supplier's action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that the supplier's "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and the contractor's surety were not entitled to judgment on the pleadings. Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc., 279 Ga. App. 894, 633 S.E.2d 59, 2006 Ga. App. LEXIS 731 (2006).

Payment bond not substitute collateral. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the trial court erred by declaring that the payment bond obtained and recorded by the general contractor served as substituted collateral for the construction project and in discharging the materialmen's lien filed by the provider; O.C.G.A. § 10-7-31 was silent on the issue of how or whether the bond affected materialmen's liens, and, under O.C.G.A. § 44-14-364(a), the bond did not satisfy the essential requirements of a lien release bond since the bond was obtained before the provider filed its lien claim and there was nothing indicating that the bond was issued with good security approved by the clerk. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

Notice adequate. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of commencement stated that the notice was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that the notice was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5 as the indexing requirements of both statutes were substantially identical. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App.

377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

Notice to contractor deficient. — Trial court did not err in granting a general contractor and its surety summary judgment in a supplier's action to recover under a payment bond and a lien discharge bond for monies a subcontractor owed it for materials it supplied to a construction project because the supplier's notice to contractor failed to comply with O.C.G.A. §§ 10-7-31(a) and 44-14-361.5(c) because the notice wholly omitted required information; although the supplier's notice to contractor set forth the subcontractor's name, it failed to provide any address for the subcontractor as required under §§ 10-7-31(a)(2) and 44-14-361.5(c)(2), and although the notice set forth the name of the project, it failed to state the location of the construction project pursuant to §§ 10-7-31(a)(3) and 44-14-361.5(c)(3). Consol. Pipe & Supply Co. v. Genoa Constr. Servs., 302 Ga. App. 255, 690 S.E.2d 894, 2010 Ga. App. LEXIS 104 (2010).

Notice did not limit the future claims of supplier. — Although the materials provider, in seeking payment under a payment bond, incorrectly stated in the notice to contractor that the contract price for its provision of materials was $20,000, it was not limited to recovery of that amount. O.C.G.A. § 10-7-31(a)(4), dictating the contents of a notice to contractor, did not limit the future claims of a notifying supplier. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

ARTICLE 3

RIGHTS OF SURETY AGAINST PRINCIPAL, COSURETIES, AND THIRD PERSONS

RESEARCH REFERENCES

ALR.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Duty of bank to sureties or endorsers as to application of general deposit by principal, 70 A.L.R. 339.

Right of surety or one secondarily liable to bring an action before payment of obligation to set aside fraudulent conveyances by principal, 71 A.L.R. 354.

Right of sureties on bond to take advantage of noncompliance with statutory requirement as to approval of bond, 77 A.L.R. 1479.

Liability of surety on subcontractor's bond to principal contractor for public improvement or to his surety, in respect of claims for labor or materials furnished to subcontractor, 117 A.L.R. 662.

Right of principal, cosureties, or coguarantors to benefit of discount at which obligation is purchased or discharged by a surety or guarantor, 118 A.L.R. 416.

Right of surety on bond of trustee, executor, administrator, or guardian to terminate liability as regards future defaults of principal, 118 A.L.R. 1261; 150 A.L.R. 485.

Right of surety on fidelity bond to allowance or refund where obligee makes recovery from principal or other sources, 126 A.L.R. 946.

Basis upon which surety paying part of creditor's claim may participate in dividends from insolvent estate of principal, where other part of claim is paid by proceeds of collateral security or by prior dividends, 138 A.L.R. 517.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 A.L.R.2d 1122.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 A.L.R.2d 899.

Computation of net "loss" for which fidelity insurer is liable, 5 A.L.R.5th 132.

10-7-40. Attachment against principal.

A surety or endorser is entitled to the process of attachment against his principal before payment of the debt under the same circumstances as any other creditor.

History.
Orig. Code 1863, § 2138; Code 1868, § 2133; Code 1873, § 2160; Code 1882, § 2160; Civil Code 1895, § 2979; Civil Code 1910, § 3551; Code 1933, § 103-301.

JUDICIAL DECISIONS

Independent remedies provided surety. — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

Basis of liability. — Liability between principals is not based on underlying notes but on inducement to action. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Action in equity after debt falls due. — Paying party may proceed in equity against other principal at any time after debt falls due even if the other principal has not yet been served. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Call for contribution. — One who discharges a note can call on one's joint debtor for contribution. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Basis for contribution. — Right to call on a joint debtor for contribution arises upon implied contract of joint debtor to bear the debtor's share of debt. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Contribution in proportion to benefits received. — Usually joint debtors are equally liable, but, upon highest equitable principles, if there is an inequality of benefits the debtors contribute not equally but in proportion to respective benefits accruing to each joint debtor from proceeds. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Recovery on implied promise of accommodated party. — Accommodation party can recover on implied promise of accommodated party to indemnify the accomodating party. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Suretyship, §§ 58, 143.
C.J.S.
72 C.J.S., Principal and Surety, §§ 184 et seq., 200.

10-7-41. Right of surety or endorser to recover amount paid, interest, and costs.

Payment by a surety or endorser of a debt past due shall entitle him to proceed immediately against his principal for the sum paid, with interest thereon, and all legal costs to which he may have been subjected by the default of his principal.

History.
Orig. Code 1863, § 2139; Code 1868, § 2134; Code 1873, § 2161; Code 1882, § 2161; Civil Code 1895, § 2980; Civil Code 1910, § 3552; Code 1933, § 103-302.

Cross references.
Obligation of indorser, § 11-3-415.

JUDICIAL DECISIONS

Independent remedies provided surety. — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

Subrogation not applicable to rights. — Subrogation by which a guarantor takes rights of a creditor is not the same thing as a guarantor's right to recoup payment of a debt from the debtor's principal under O.C.G.A. § 10-7-41. Fabian v. Dykes, 214 Ga. App. 792, 449 S.E.2d 305, 1994 Ga. App. LEXIS 1059 (1994).

Voluntary payment entitles surety to proceed against principal. — Voluntary payment by a surety of a past due debt entitles the surety to proceed immediately against the principal for the amount paid in the principal's behalf. Shattles v. Baker, 18 Ga. App. 300, 89 S.E. 373, 1916 Ga. App. LEXIS 309 (1916).

Recovery upon note or upon other obligation. — If one who signs a note ostensibly as a coprincipal is in fact a surety, one may, after paying the amount due by the principal, recover the amount in a suit against the principal, either in a suit upon the note after a transfer or upon an obligation of the defendant arising otherwise. Campbell v. Rybert, 46 Ga. App. 461, 167 S.E. 924, 1933 Ga. App. LEXIS 101 (1933).

Effect of release of principal. — Even though the creditor released the principal from liability on a note, the guarantor who paid the note on the principal's behalf and who was not a party to the release had an independent legal right to collect from the principal under O.C.G.A. § 10-7-41. Fabian v. Dykes, 214 Ga. App. 792, 449 S.E.2d 305, 1994 Ga. App. LEXIS 1059 (1994).

Right is not affected by paying fraudulent renewal note. — When the surety has paid the debt, the surety is entitled to reimbursement. The fact that the payment was accomplished by paying a fraudulent renewal note would not affect the right to recover on the original note. Frye v. Sims, 144 Ga. 74, 86 S.E. 249, 1915 Ga. LEXIS 54 (1915).

Written assignment of note to surety is unnecessary. — When a negotiable promissory note, endorsed in blank and discounted at a bank, is paid to the bank at maturity by a surety thereon, title to the note passes to the surety by mere delivery and no written assignment by the bank is necessary. Electric City Brick Co. v. Hagler, 168 Ga. 836, 149 S.E. 126, 1929 Ga. LEXIS 255 (1929).

Dispute as to date debt was paid with stock and amount paid. — Guarantor's were not entitled to summary judgment on indemnification claim since the guarantor failed to establish when the stock used to satisfy the debt, in part, was actually transferred to the creditor or when the creditor exercised control over it. Lahaina Acquisitions, Inc. v. GCA Strategic Inv. Fund Ltd., 261 Ga. App. 800, 584 S.E.2d 51, 2003 Ga. App. LEXIS 773 (2003).

Recovery of stipulated attorney's fees. — Attorney's fees stipulated in note may be recovered by surety. Youmans v. Puder, 13 Ga. App. 785, 80 S.E. 34, 1913 Ga. App. LEXIS 359 (1913).

Surety or endorser is subrogated to payee's rights to extent of payment. — When the plaintiff was a surety or endorser, the plaintiff is to be subrogated to the rights of the payee in the notes in controversy to the extent of payment. Electric City Brick Co. v. Hagler, 168 Ga.

836, 149 S.E. 126, 1929 Ga. LEXIS 255 (1929).

Spouse is not entitled to be subrogated. — Spouse of the grantor in the security deed paying debt secured by another deed was not entitled to be subrogated to the grantee's rights. Hiers v. Exum, 158 Ga. 19, 122 S.E. 784, 1924 Ga. LEXIS 72 (1924).

Waiver. — Guaranty executed by a guarantor contained a very broad waiver clause which plainly and unambiguously waived any claims the guarantor might have had against the debtor and extended to claims arising in equity, or under contract, statute, or common law, and which obviously included a claim under O.C.G.A. § 10-7-41; the trial court erred by denying summary judgment to the debtor and other defendants, and erred in granting summary judgment in favor of the guarantor. Brookside Cmtys., LLC v. Lake Dow N. Corp., 268 Ga. App. 785, 603 S.E.2d 31, 2004 Ga. App. LEXIS 933 (2004).

Relationship to bankruptcy law. — Although the court found that the debtor owed a specific amount to the creditor at the time the bankruptcy case was filed and as scheduled, affirmative defenses of recoupment and setoff were preserved, and the party objecting to the creditor's claim could assert those defenses to reduce the creditor's claims if the defenses were permitted under state law (here, Georgia). Whether called setoff or recoupment, it was undisputed that the debtor paid an amount to the bank to satisfy the creditor's primary obligation to that bank, and it was also undisputed that the obligation of the debtor to the creditor arose when the debtor borrowed money that originated from the bank; thus, under any theory the debtor would get the benefit of the amount the debtor paid on the bank's debt, reducing the creditor's claim accordingly. In re Bay Circle Props., LLC, No. 15-58440-WLH, 2020 Bankr. LEXIS 917 (Bankr. N.D. Ga. Apr. 3, 2020).

Setoff allowed. — Equity holders were not entitled to disallow the scheduled claims of an affiliate of a bankruptcy debtor because bankruptcy rules allowed the affiliate to amend its bankruptcy schedules at any time until the case was closed, judicial estoppel did not bar an amendment based on a change in circumstances, and the affiliate was entitled to setoff of the amount it paid to the creditor post-petition to reduce the debtor's claim under state law since the bankruptcy law opened up the possibility for others to raise the defense to minimize recovery from the estate. In re Bay Circle Props., LLC, No. 15-58440-WLH, 2020 Bankr. LEXIS 733 (Bankr. N.D. Ga. Mar. 21, 2020), modified, No. 15-58440-WLH, 2020 Bankr. LEXIS 917 (Bankr. N.D. Ga. Apr. 3, 2020).

RESEARCH REFERENCES

ALR.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 A.L.R. 838; 43 A.L.R. 589.

Liability of grantee assuming mortgage debt, to grantor, 76 A.L.R. 1191; 97 A.L.R. 1076.

Right of surety to recover against principal for expenses incurred in defeating a claim by the obligee, 124 A.L.R. 1175.

Right of building contractor's surety who completes contract, to money earned by contractor but unpaid before default, 134 A.L.R. 738; 164 A.L.R. 613.

Construction and application of contractual provision regarding payment by surety of claim as evidence of principal's liability to surety ("conclusive evidence" clause), 144 A.L.R. 521.

What constitutes action on bond, executed under law of United States, so as to be within Federal District Court's jurisdiction under 28 USCS § 1352, 105 A.L.R. Fed. 716.

10-7-42. Effect of judgment against surety.

If the payment was made after judgment and the principal had notice of the pendency of the action against the surety, the amount of such

judgment shall be conclusive against the principal as to the amount for which the surety was bound. If the payment was not made after judgment, the principal may dispute the validity of the payment as to the amount or as to the authority of the person to whom it was paid.

History.
Orig. Code 1863, § 2140; Code 1868, § 2135; Code 1873, § 2162; Code 1882, § 2162; Civil Code 1895, § 2981; Civil Code 1910, § 3553; Code 1933, § 103-303.

JUDICIAL DECISIONS

Independent remedies provided surety. — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

Joint or separate actions on joint and several note. — The holder of a joint and several note may sue the obligors jointly or severally or sue any one of the signers alone. On such an obligation, one may sue the principal and surety jointly, or at one's option one may sue either the principal or the surety alone under former Civil Code 1910, §§ 3553 and 3559. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917); Johnson v. Georgia Fertilizer & Oil Co., 21 Ga. App. 530, 94 S.E. 850, 1918 Ga. App. LEXIS 389 (1918); Cone v. American Sur. Co., 29 Ga. App. 676, 116 S.E. 648, 1923 Ga. App. LEXIS 160 (1923); Bank of Madison v. Bell, 30 Ga. App. 458, 118 S.E. 438, 118 S.E. 439, 1923 Ga. App. LEXIS 504 (1923); McKibben v. Fourth Nat'l Bank, 32 Ga. App. 222, 122 S.E. 891, 1924 Ga. App. LEXIS 343 (1924), overruled, Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 247 S.E.2d 567, 1978 Ga. App. LEXIS 2549 (1978); Hicks v. Bank of Wrightsville, 57 Ga. App. 233, 194 S.E. 892, 1938 Ga. App. LEXIS 541 (1938).

How surety may defeat liability. — A surety cannot defeat liability by proving merely that the surety received no monetary consideration; the surety would have to show that the surety's principal did not receive any consideration or benefit from the paper sued on. Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881, 1981 Ga. App. LEXIS 2259 (1981).

Dormant judgment against surety alone revivable although principal not notified. — When a scire facias proceeding is brought to revive a dormant judgment rendered against a surety on a joint and several note and the defendant objects to the revival of such judgment on the ground that the defendant's liability had been increased and that the defendant had been discharged from liability thereon because no judgment was rendered against the principal on the note, although no service of the suit was had on the principal, it was error for the judge to refuse to revive the judgment for that reason. Hicks v. Bank of Wrightsville, 57 Ga. App. 233, 194 S.E. 892, 1938 Ga. App. LEXIS 541 (1938).

Sufficiency of allegations in action against endorser. — In view of former Civil Code 1910, §§ 3541, 3553, and 3559, the plaintiff's pleading in an action against an endorser alleging that the plaintiff was the owner and holder of the notes sued on in due course, bona fide and for value, states a cause of action and is not subject to dismissal for failure to allege the defendant's relationship to the notes and to the other parties to the notes. Meldrim v. Peoples Bank, 28 Ga. App. 294, 111 S.E. 76, 1922 Ga. App. LEXIS 458 (1922).

Effect of surety's payment of the judgment. — Amount of the indemnity owed by an insurer to a surety was not affected by the outcome of the appeal as when the judgment was paid by the surety and when the principal had notice of the action against the surety, the surety's payment of the judgment was conclusive of the amount and the surety could

recover such sum from the principal under O.C.G.A. § 10-7-42. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319, 2003 Ga. App. LEXIS 1255 (2003), rev'd, No. S04G0322, 2004 Ga. LEXIS 1038 (Ga. Nov. 22, 2004), aff'd in part and rev'd in part, 278 Ga. 800, 606 S.E.2d 855, 2004 Ga. LEXIS 1078 (2004), vacated in part, 273 Ga. App. 91, 614 S.E.2d 477, 2005 Ga. App. LEXIS 417 (2005).

When the surety on a principal's appeal bond paid the judgment that had been entered and substituted itself for the principal's opponents, the surety's payment of the judgment was not conclusive of the principal's liability to the surety because the principal was still engaged in contesting the extent of the principal's liability, and the judgment was not final because the judgment was still on appeal, so the second sentence of O.C.G.A. § 10-7-42 was applicable to these facts, rather than the first sentence, which applied to situations in which a judgment had reached a state of finality. Sec. Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co., 278 Ga. 800, 606 S.E.2d 855, 2004 Ga. LEXIS 1078 (2004).

RESEARCH REFERENCES

ALR.

Construction and application of contractual provision regarding payment by surety of claim as evidence of principal's liability to surety ("conclusive evidence" clause), 144 A.L.R. 521.

Judgment obtained by third person against indemnitee as conclusive against the latter, irrespective of its conclusiveness against indemnitor, in indemnitee's action against indemnitor for amount paid in satisfaction of judgment, 24 A.L.R.2d 329.

What constitutes action on bond, executed under law of United States, so as to be within Federal District Court's jurisdiction under 28 USCS § 1352, 105 A.L.R. Fed. 716.

10-7-43. Recovery of usury paid by surety.

If the contract was originally usurious and the surety in making payment includes the usury, he shall recover the same from the principal unless previous to the payment he had notice of the intention of the principal to resist usury.

History.

Orig. Code 1863, § 2141; Code 1868, § 2136; Code 1873, § 2163; Code 1882, § 2163; Civil Code 1895, § 2982; Civil Code 1910, § 3554; Code 1933, § 103-304.

JUDICIAL DECISIONS

Surety may recover usury surety pays. — Usury paid by a surety on a contract originally usurious may be recovered back by the surety. Whitehead v. Peck, 1 Ga. 140, 1846 Ga. LEXIS 49 (1846).

Knowledge that contract was usurious. — If the surety knew the contract to be usurious when the surety paid the debt, the surety cannot recover it back out of the surety's principal. Jones v. Joyner, 8 Ga. 562, 1850 Ga. LEXIS 98 (1850).

Knowledge that principal intended to resist usury. — A surety cannot recover usury paid by the surety if, previous to the payment, the surety had knowledge of the intention of the principal to resist the usury. Lay v. Seago, 47 Ga. 82, 1872 Ga. LEXIS 306 (1872).

Failure of surety to plead known usury. — If the surety had notice of the

usury and might have pleaded it, but did not, the surety is estopped to recover it of the principal. Hargraves v. Lewis, 3 Ga. 162, 1847 Ga. LEXIS 91 (1847).

Principal reimbursing surety cannot recover usury paid voluntarily from creditor. — When a surety who is indemnified by a mortgage voluntarily pays a usurious note and is subsequently reimbursed by the surety's principal in property, the latter cannot recover of the creditor the excess of interest in an action for money had and received. Whitehead v. Peck, 1 Ga. 140, 1846 Ga. LEXIS 49 (1846).

RESEARCH REFERENCES

C.J.S.
72 C.J.S., Principal and Surety, § 183.

10-7-44. Foreclosure of mortgage or enforcement of security given by principal.

If the principal executes any mortgage or gives other security to the surety or endorser to indemnify him against loss by reason of his suretyship, the surety or endorser may proceed to foreclose such mortgage or enforce such other lien or security as soon as judgment shall be rendered against him on his contract.

History.
Orig. Code 1863, § 2142; Code 1868, § 2137; Code 1873, § 2164; Code 1882, § 2164; Civil Code 1895, § 2983; Civil Code 1910, § 3555; Code 1933, § 103-305.

JUDICIAL DECISIONS

Section prescribes general rule. — This section prescribes a rule which was intended to be general, and the section comprehends all cases of the class mentioned. Importers & Traders Bank v. McGhees & Co., 88 Ga. 702, 16 S.E. 27, 1892 Ga. LEXIS 87 (1892).

Remedy in absence of contractual stipulation. — This section simply provides a remedy for the endorser or surety in the absence of any stipulations in the contract between the principal and the surety on the subject. Jones v. Norton, 9 Ga. App. 333, 71 S.E. 687, 1911 Ga. App. LEXIS 540 (1911).

Section authorizes surety to foreclose. — Mortgage given to indemnify a surety may, under this section, be foreclosed by the surety when judgment is rendered against the surety on the contract. Conley v. State, 85 Ga. 348, 11 S.E. 659, 1890 Ga. LEXIS 53 (1890).

Judgment against surety required prior to foreclosure. — Under this section, no foreclosure can be had ordinarily until after judgment against the mortgagee. Importers & Traders Bank v. McGhees & Co., 88 Ga. 702, 16 S.E. 27, 1892 Ga. LEXIS 87 (1892); Jones v. Norton, 136 Ga. 835, 72 S.E. 337, 1911 Ga. LEXIS 245 (1911).

Payment by surety required prior to foreclosure. — By clear implication, this section negatives any right of foreclosure until the surety or endorser has paid something on the debt or judgment has been rendered against the surety on the surety's contract. Importers & Traders Bank v. McGhees & Co., 88 Ga. 702, 16 S.E. 27, 1892 Ga. LEXIS 87 (1892).

Foreclosure in manner stipulated in mortgage. — This section recognizes the right of the principal to give to the principal's surety or endorser a mortgage or other security to secure and protect the surety on the surety's endorsement or suretyship, and, if it is legal for such a mortgage to be given, it can be provided in

the mortgage that it may be foreclosed or enforced in such way as the parties may stipulate, without reference to the statutory right referred to. Jones v. Norton, 9 Ga. App. 333, 71 S.E. 687, 1911 Ga. App. LEXIS 540 (1911).

Surety giving creditor note may foreclose mortgage. — When the security to a promissory note was indemnified by a mortgage executed by the principal, and after the note became due, the security voluntarily gave the security's own note to the creditor, which was accepted by the security in full payment of the joint debt, and the joint note was given up to the security, the security was allowed to foreclose the security's mortgage against the principal and collect from the security what was actually due on the note in the hands of the original creditor. Mims v. McDowell, 4 Ga. 182, 1848 Ga. LEXIS 22 (1848).

Defense by principal debtor. — Principal debtor may make any defense to the note which the debtor could have made against the original creditor. Mims v. McDowell, 4 Ga. 182, 1848 Ga. LEXIS 22 (1848).

Creditor cannot enforce mortgage without judgment. — Creditor, prior to obtaining judgment, cannot proceed in the creditor's own behalf to enforce the mortgage, even though the principal debtor and the endorser both are insolvent, the rights of the creditor depending, not upon the law of trust, but upon the law of subrogation. Importers & Traders Bank v. McGhees & Co., 88 Ga. 702, 16 S.E. 27, 1892 Ga. LEXIS 87 (1892); Burnett v. Gainesville Nat'l Bank, 28 Ga. App. 255, 110 S.E. 753, 1922 Ga. App. LEXIS 434 (1922).

Security deed cannot be enforced in absence of judgment. — In the absence of any judgment against the surety upon the indebtedness represented by a note, there was no right in the surety to enforce any lien against the property arising out of a deed to secure a debt to the surety from the principal, and therefore no right existed in the surety to which the creditor could be subrogated. Burnett v. Gainesville Nat'l Bank, 28 Ga. App. 255, 110 S.E. 753, 1922 Ga. App. LEXIS 434 (1922).

Assets cannot be impounded awaiting judgment. — Creditor cannot, prior to obtaining judgment according to this section on the creditor's debt, maintain a bill or petition to impound the mortgaged assets to await the recovery of such judgment. Up to the rendition of judgment, the right to preserve the security is one personal to the endorser, and to which the creditor is not subrogated. Importers & Traders Bank v. McGhees & Co., 88 Ga. 702, 16 S.E. 27, 1892 Ga. LEXIS 87 (1892).

Deed of trust as voluntary assignment. — Since a deed of trust to two of 16 accommodation endorsers was a voluntary assignment for the benefit of creditors and was not a mortgage or mere security under former Code 1882, § 2164, a compliance with the essential requirements of former Civil Code 1895, § 2700 et seq. was necessary to the security's validity. Johnson v. Brewer, 134 Ga. 828, 68 S.E. 590, 1910 Ga. LEXIS 364 (1910).

RESEARCH REFERENCES

ALR.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 A.L.R. 1262.

10-7-45. Proof of suretyship by parol.

If the fact of suretyship does not appear on the face of the contract, it may be proved by parol, either before or after judgment (the creditor not being delayed in his remedy by such collateral issue between the principal and his surety), if before judgment the surety shall give notice to the principal of his intention to make such proof.

History.
Laws 1826, Cobb's 1851 Digest, p. 593.; Code 1863, § 2143; Code 1868, § 2138; Code 1873, § 2165; Code 1882, § 2165; Civil Code 1895, § 2984; Civil Code 1910, § 3556; Code 1933, § 103-306.

JUDICIAL DECISIONS

Analysis

General Consideration
Proof
Application
Notice

General Consideration

Purpose of section. — This section was enacted for the purpose of protecting the securities on bonds, notes, or other contracts. Bank of St. Marys v. Mumford & Tyson, 6 Ga. 44, 1849 Ga. LEXIS 7 (1849).

Basis for section. — Rule laid down in this section rests primarily upon the reason that when there is in fact a contract of suretyship and this is made to appear, the relative rights of the makers' interests can be fixed and the surety given the surety's right of subrogation generally without affecting the rights of the holder of the note. Hill v. Driskell, 15 Ga. App. 458, 83 S.E. 859, 1914 Ga. App. LEXIS 294 (1914).

"Delay", as used in this section, is such as arises from fault or negligence of the surety. Whitley v. Hudson, 114 Ga. 668, 40 S.E. 838, 1902 Ga. LEXIS 755 (1902).

Section only applies when surety seeks to enforce rights against principal. — This section applies only when the defendant seeks to establish the defendant as a surety, not by way of a defense to an action against the defendant on the contract, but for the purpose of enforcing the defendant's rights as a surety against the defendant's principal. Brown v. Merchants Trading Co., 26 Ga. App. 331, 106 S.E. 208, 1921 Ga. App. LEXIS 137 (1921).

Statutes and cases barring a cosigner from introducing parol evidence that the cosigner signed the note as a surety are applicable only when the defense of suretyship is asserted by one who is primarily obligated on the note in an action brought by the payee or the cosigner's assign to collect on the note. That prohibition does not apply when the note was paid from the proceeds of a life insurance policy the cosigner had assigned to the creditor, the creditor assigned the note and security deed to the creditor's estate, and the maker then sued the creditor and the cosigner's executor to cancel the security deed. Aultman v. United Bank, 259 Ga. 237, 378 S.E.2d 302, 1989 Ga. LEXIS 180 (1989).

Right to control judgment. — Law allows sureties to make "special defense," i.e., to show that they are sureties for the purpose of acquiring the right to control the judgment under Laws 1826, Cobb's 1851 Digest, p. 593 (see now O.C.G.A. § 9-13-77), and to do this even after judgment. Brown v. Harris, 20 Ga. 403, 1856 Ga. LEXIS 71 (1856).

Proof

This section allows proof of suretyship by parol. Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393, 1967 U.S. Dist. LEXIS 7477 (N.D. Ga. 1967).

Use of parol evidence. — If the fact of suretyship does not appear on the face of a note, it may be proved by parol; and the relative position of the makers' names is immaterial, if one is surety of the other. Trammell v. Swift Fertilizer Works, 121 Ga. 778, 49 S.E. 739, 1905 Ga. LEXIS 70 (1905).

When a written contract for the sale of personalty is executed by two persons ostensibly as purchasers, it may be shown by parol that one of such persons executed the contract, not as a principal obligor, but as a surety only. Nunnally v. J.B. Colt Co., 34 Ga. App. 247, 129 S.E. 119, 1925 Ga.

App. LEXIS 202 (1925); West v. Nottingham, 71 Ga. App. 282, 30 S.E.2d 651, 1944 Ga. App. LEXIS 335 (1944).

One who signs a note ostensibly as a coprincipal may in fact be a surety, and this may be established by parol. Campbell v. Rybert, 46 Ga. App. 461, 167 S.E. 924, 1933 Ga. App. LEXIS 101 (1933); Levinson v. American Thermex, Inc., 196 Ga. App. 291, 396 S.E.2d 252, 1990 Ga. App. LEXIS 852 (1990).

One who signs a note with another apparently as a joint principal may, in an action by the payee, plead and prove that the payee had no interest in the paper and was only surety for the accommodation of the other and principal signer, and that the plaintiff took the note with knowledge of such facts. Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406, 1935 Ga. App. LEXIS 188 (1935).

Even though the notes did not show that defendant signed as surety and not as principal, the defendant could establish by parol evidence that the defendant signed the notes as surety and not as principal. Wofford v. Waldrip, 80 Ga. App. 562, 56 S.E.2d 816, 1949 Ga. App. LEXIS 879 (1949).

Although the contract recites that the contract is made for "value received" and is prima facie a contract of guaranty, parol evidence is admissible to show that there was no independent consideration flowing to those signing as guarantors and the contract is one of suretyship. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831, 1966 Ga. LEXIS 525 (1966); Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492, 1975 Ga. App. LEXIS 2313 (1975). (As to abolishment of distinction between contracts of suretyship and guaranty, see O.C.G.A. § 10-7-1 and the Editor's note thereto).

Burden is on surety to prove relationship and knowledge of creditor. — When a married woman signs a note ostensibly as a maker jointly with her husband when in fact she is a surety only, before she can establish the fact of her suretyship as against the payee of the note, it must be made to appear, despite her apparent relationship as principal, that the payee, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. Bennett v. Danforth, 36 Ga. App. 466, 137 S.E. 285, 1927 Ga. App. LEXIS 109 (1927).

When the wife signs the note as an apparent principal, the burden is on her to prove that she signed as surety only, and that the payee of the note, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. Lovelady v. Moss, 50 Ga. App. 652, 179 S.E. 168, 1935 Ga. App. LEXIS 260 (1935).

In an action by the payee against all the makers as joint principals it may be shown by parol evidence that some of the makers are sureties for others, the burden being on those setting up suretyship to establish it; and when they claim to be discharged by some act increasing their risk as sureties, they must further show that the payee knew they were sureties at the time of the occurrence of such act. Northcutt v. Crowe, 116 Ga. App. 715, 158 S.E.2d 318, 1967 Ga. App. LEXIS 935 (1967).

Establishment of suretyship requires proof payee knew signer of note was obligating signer to pay another's debt. — In order to establish as a fact that the ostensible maker of a promissory note executed the note as surety only and not as a principal, it must be shown that the payee contracted with the principal as a surety; and if the payee did not at the time know that the person signing the note was obligating oneself for the payment of the debt of another, it is not established that the payee contracted with the obligor as a surety. Northcutt v. Crowe, 116 Ga. App. 715, 158 S.E.2d 318, 1967 Ga. App. LEXIS 935 (1967).

Prayer for relief. — Surety's pleading must contain an appropriate prayer for independent affirmative relief. Morrison v. Citizens & S. Bank, 19 Ga. App. 434, 91 S.E. 509, 1917 Ga. App. LEXIS 138 (1917).

Nature of transaction is jury question. — Whether a note and deed to secure debt or mortgage were made by the wife as a part of a transaction to secure a debt of her husband or for the purpose of paying the debts of her husband is for the jury, and it may be shown by parol that the wife signed the note as surety. Almond v. Mount Vernon Bank, 53 Ga. App. 565,

Proof (Cont'd)

186 S.E. 581, 1936 Ga. App. LEXIS 318 (1936).

New trial proper when surety denied right to prove alleged suretyship. — If a party defendant to an action upon a contract by the defendant's answer alleges that the defendant signed the paper as a security and is by an erroneous ruling denied the right to establish before judgment the fact thus set up, the defendant is entitled to a new trial, and granting the new trial will not violate that portion of this section which declares that in such a case the creditor is not to be "delayed in his remedy." Whitley v. Hudson, 114 Ga. 668, 40 S.E. 838, 1902 Ga. LEXIS 755 (1902); Ryle v. Farmers' & Merchants' Bank, 33 Ga. App. 459, 127 S.E. 233, 1925 Ga. App. LEXIS 531 (1925) (ruling held harmless under circumstances).

Suretyship shown in contract as pled need not appear in judgment. — When the fact of suretyship sufficiently appears upon the face of the contract as pled, it is probably unnecessary for the defendant's protection for the fact to be made to appear in the judgment. Loewenherz v. Weil, 33 Ga. App. 760, 127 S.E. 883, 1925 Ga. App. LEXIS 715 (1925).

Application

Self estoppel by party. — When the written assignment of the note signed by the payee recites that, for value received, the payee transferred and assigned the note with full recourse on oneself, the payee was estopped from testifying that as a matter of fact the payee was an accommodation endorser only. This section is clearly not applicable to such facts. Phillips v. Bridges, 20 Ga. App. 489, 93 S.E. 115, 1917 Ga. App. LEXIS 944 (1917).

Presumption that signers of note are principals may be rebutted. — When two or more persons sign a note apparently as joint principals, and there is nothing in the instrument indicating that some of the makers are principals and others sureties, the presumption of law is that all are joint principals. This presumption, however, may be rebutted, and in an action by the payee against all the makers as joint principals it may be shown by parol evidence that some of the makers are sureties for others, the burden being on those setting up suretyship to establish it. Hill v. Driskell, 15 Ga. App. 458, 83 S.E. 859, 1914 Ga. App. LEXIS 294 (1914); Duckett v. Martin, 23 Ga. App. 630, 99 S.E. 151, 1919 Ga. App. LEXIS 245 (1919); Bank of Lumpkin County v. Justus, 150 Ga. 286, 103 S.E. 794, 1920 Ga. LEXIS 144 (1920); Seymour v. Bank of Thomasville, 157 Ga. 99, 121 S.E. 578, 1923 Ga. LEXIS 371 (1923); Northcutt v. Crowe, 116 Ga. App. 715, 158 S.E.2d 318, 1967 Ga. App. LEXIS 935 (1967).

Judgment is not void if plaintiff consents to proof of suretyship without notice. — Judgment against one signer of a note as principal and another as surety is not absolutely void and subject to collateral attack, although no pleading alleging suretyship was filed or any notice of intention to make proof thereof was given to the principal, when by consent of the plaintiff's attorney one of the signers was permitted to show that the signer was only security on the note. Freeman v. Bank of LaFayette, 20 Ga. App. 334, 93 S.E. 34, 1917 Ga. App. LEXIS 888 (1917).

Co-debtor was not a surety of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties that one was signing as the principal debtor and the other was signing as a surety. Johnson v. AgSouth Farm Credit, 267 Ga. App. 567, 600 S.E.2d 664, 2004 Ga. App. LEXIS 713 (2004).

Notice

Notice of intention to prove suretyship must have been given principal. — Surety's pleading setting up the fact of suretyship and praying that the

judgment be molded accordingly must also show that previous notice had been given the principal of the surety's intention to make such proof. Johnson v. Georgia Fertilizer & Oil Co., 21 Ga. App. 530, 94 S.E. 850, 1918 Ga. App. LEXIS 389 (1918).

Notice when suretyship appears on face of contract. — This section requires notice of an intention to prove suretyship only when the fact of suretyship does not appear upon the face of the contract. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923).

Notice when suretyship is raised as defense. — Prior to 1979, a female defendant whose name appeared as a principal on the face of the contract sued on could plead in defense that she was in fact a surety only and that, being a married woman at the time she entered into the contract, the contract of suretyship was void; and it was not necessary to the validity of such defense that it appear that notice was given to the alleged principal, as required by this section, of her intention to make such defense. Brown v. Merchants Trading Co., 26 Ga. App. 331, 106 S.E. 208, 1921 Ga. App. LEXIS 137 (1921) (decided under former Code 1933, § 53-503, repealed in 1979).

An apparent maker of a note is not limited by the provisions of this section to relief over against a principal after payment of the debt, nor in a suit by the payee, when the apparent maker pleads that the maker is surety only and alleges grounds of discharge of liability to the payee, have the provisions of this section prescribing notice to the principal any application to such defense. Seymour v. Bank of Thomasville, 157 Ga. 99, 121 S.E. 578, 1923 Ga. LEXIS 371 (1923).

Creditor has no interest in notice. — It is obvious from the language of this section that the statute's provision as to notice applies solely to a collateral issue between the principal and the principal surety in which the creditor has no interest, and it is therefore no concern of the principal whether the surety, in a case covered by this section, gives notice to the principal of the surety's intention to make proof of suretyship. Bank of Lumpkin County v. Justus, 150 Ga. 286, 103 S.E. 794, 1920 Ga. LEXIS 144 (1920).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Suretyship, § 136.
C.J.S.
72 C.J.S., Principal and Surety, §§ 193, 194.

10-7-46. Proof of suretyship after judgment.

If judgment has been rendered without such proof of suretyship, the surety shall give at least ten days' notice to his principal of his intention to apply at the next term of the court where the judgment was entered to make such proof and to have the fact of his suretyship entered of record, together with an order for the control of such judgment and execution thereon against the principal, on payment of the same by him.

History.
Laws 1850, Cobb's 1851 Digest, p. 599.; Code 1863, § 2144; Code 1868, § 2139; Code 1873, § 2166; Code 1882, § 2166; Civil Code 1895, § 2985; Civil Code 1910, § 3557; Code 1933, § 103-307.

JUDICIAL DECISIONS

Surety making part payment may have fact put in record for contribution. — Surety without paying in full the joint debt, but upon paying, either before or after judgment, a portion only thereof, may maintain against a cosurety, for the purpose of compelling contribution, the statutory proceeding for having such fact entered of record; and when such a proceeding is instituted after judgment it is not essential for the petitioner to show that the execution issued thereon has been assigned to the petitioner. Cooper v. Chamblee, 114 Ga. 116, 39 S.E. 917, 1901 Ga. LEXIS 597 (1901).

Surety must follow section if not named as surety in execution. — If one defendant to a fi. fa., not named as security therein but claiming to be such, seeks to control it against a codefendant who is set forth as a security, to force contribution, one must proceed to obtain the legal control thereof former Code 1873, §§ 2166 and 2170 (see now O.C.G.A. §§ 10-7-46 and 10-7-53). Burke v. Lee, 59 Ga. 165, 1877 Ga. LEXIS 222 (1877).

Right to control execution lost if O.C.G.A. §§ 10-7-45 and 10-7-46 not followed. — If one of joint judgment debtors has paid off the judgment, claiming to have been only a surety of the other, but without taking such steps as are required former Civil Code 1895, §§ 2984 and 2985 (see now O.C.G.A. §§ 10-7-45 and 10-7-46) to have one's true relation defined on the record, one is not entitled, in a contest exclusively between oneself and others who are judgment creditors of the alleged principal, arising on a rule for the distribution of money realized from the sale of property of the latter under another execution, to control the execution so paid by the one for the purpose of competing with other creditors claiming the money. Patterson v. Clark, 101 Ga. 214, 28 S.E. 623, 1897 Ga. LEXIS 197 (1897).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Suretyship, § 170 et seq.

C.J.S.
72 C.J.S., Principal and Surety, § 13.

10-7-47. Control of execution and judgment by surety; subrogation to plaintiff's rights.

Any surety on the original contract, or on stay of execution, or on appeal, or in any other way, or the representative of a deceased surety, who shall have paid off or discharged the judgment or execution in whole or in part and shall have the fact of such payment by him entered on such execution by the plaintiff or his attorney or the collecting officer, shall have the control of such execution and the judgment upon which it is founded, to the same extent as if he were the original plaintiff therein, and be subrogated to all the rights of such plaintiff, for the purpose of reimbursing himself from his principal.

History.
Laws 1810, Cobb's 1851 Digest, p. 592.; Laws 1826, Cobb's 1851 Digest, p. 594.; Laws 1831, Cobb's 1851 Digest, p. 595.; Laws 1845, Cobb's 1851 Digest, p. 598.; Code 1863, § 2145; Code 1868, § 2140; Code 1873, § 2167; Code 1882, § 2167; Civil Code 1895, § 2986; Civil Code 1910, § 3558; Code 1933, § 103-308.

JUDICIAL DECISIONS

Benefits of this section are for an actual surety who becomes such on the authority of the principal. Therefore, one who is not a surety would not be entitled to control a judgment or fi. fa. merely because the surety had agreed with the creditor to become such. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923).

Applicability to involuntary payments. — The language, "who shall have paid off or discharged the judgment," as employed in this section, applies to an involuntary as well as a voluntary payment. Ezzard v. Bell, 100 Ga. 150, 28 S.E. 28, 1897 Ga. LEXIS 17 (1897).

Levy on and sale of surety's property. — A surety whose property, under an execution against the surety's principal and the surety, has been levied upon and sold in satisfaction of the sum due the judgment creditor, "pays off and discharges" the debt of the principal, within the meaning of this section. Ezzard v. Bell, 100 Ga. 150, 28 S.E. 28, 1897 Ga. LEXIS 17 (1897).

Applicability to partner paying joint judgment. — Former Civil Code 1910, § 5971 (see now O.C.G.A. § 9-13-78), taken in connection with former Civil Code 1910, § 3558 (see now O.C.G.A. § 10-7-47) gave a partner paying off a judgment binding on the partner and a copartner the right to enforce it to its full amount against the partnership assets. Higdon v. Williamson, 10 Ga. App. 376, 73 S.E. 528, 1912 Ga. App. LEXIS 519 (1912).

No legal right to subrogation unless surety or compelled to protect interest. — Legal right of subrogation arising out of the payment of the debt of another extends only in favor of a surety for the payment of the debt or in favor of one who is compelled to pay the debt to protect one's own right or interest, and there is no right of subrogation when, at the time of the payment of the debt, the plaintiff had no claim against or lien upon the property in question. Hiers v. Exum, 158 Ga. 19, 122 S.E. 784, 1924 Ga. LEXIS 72 (1924).

Lien takes effect from date of judgment. — When a surety takes control of the execution against the surety's principal, the lien of the judgment against the surety's principal in the surety's hands takes effect from the date of that judgment. Bailey v. Mizell, 4 Ga. 123, 1848 Ga. LEXIS 12 (1848).

Payment after principal's death entitles surety to proceed against principal's property. — After a judgment was rendered against an intestate in the intestate's lifetime, as principal, and the principal's surety, which judgment was paid by the surety since the death of the intestate, such payment, under the statutes of this state, had relation to the date of the judgment so as to enable the surety to remunerate the surety out of the property of the surety's principal. Ray v. Dennis, 5 Ga. 357, 1848 Ga. LEXIS 102 (1848).

Payment must be entered on execution. — If entry of payment was not made on the execution, the surety would not be able to enforce the contribution against a cosurety provided by former Civil Code 1895, § 2989 (see now O.C.G.A. § 10-7-53). Cureton v. Cureton, 120 Ga. 559, 48 S.E. 162, 1904 Ga. LEXIS 640 (1904).

Entry may be made by justice of peace. — A justice of the peace is a collecting officer as to debts sued in the justice's court and may make, upon an execution issued from the justice's court against joint defendants, the entry of payment by one of the justices which is required by this section. Higdon v. Williamson, 10 Ga. App. 376, 73 S.E. 528, 1912 Ga. App. LEXIS 519 (1912).

Entry may be made by attorney for plaintiff. — When there was no entry on the fi. fa. showing its payment by the endorser, pending a claim case arising under a levy made for the benefit of such endorser, the attorney for the plaintiff in fi. fa. could make the entry. Thomason v. Wade, 72 Ga. 160, 1883 Ga. LEXIS 44 (1883).

Surety making payment is protected against fraudulent conveyance. — Surety on bail bond who pays judgment in trover is entitled to the protection afforded creditors as against a

conveyance by the debtor to avoid payment of the judgment. Banks v. McCandless, 119 Ga. 793, 47 S.E. 332, 1904 Ga. LEXIS 362 (1904).

Surety's right limited to reimbursement for actual payment. — If a surety bought a judgment at a discount or, after levy of it upon the surety's property, obtained control of it by compromise at a price less than the amount apparently due on it, the surety would be entitled to enforce it against the principal for only the amount necessary for reimbursement, after receiving which the execution would be paid off and discharged. Stanford v. Connery, 84 Ga. 731, 11 S.E. 507, 1890 Ga. LEXIS 335 (1890).

Part payment gives surety no right of control without tender of amount due. — That a security has paid a part of the amount due on a fi. fa. does not give the security the right to control the same so as to reimburse the security. The security's rights are secondary to those of the holder of the fi. fa., and in order to control it without the consent of the latter, the security must comply with the requirements of former Code 1873, § 2155 (see now O.C.G.A. § 10-7-23) as to tender. Cherry v. Singleton, 66 Ga. 206, 1880 Ga. LEXIS 50 (1880).

Transferee from surety cannot enforce execution against surety's property. — Under former Code 1882, §§ 2167, 2168 and 2169, when a surety paid off a fi. fa. against a principal and the surety personally and takes a transfer thereof, the debt was extinguished as to the surety and the surety became the creditor of the principal; and if the surety thereafter transfers the fi. fa. to another, the surety's transferee had no right to enforce it against the surety's property, but only against the property held by the principal. Jennings v. National Bank, 74 Ga. 782, 1885 Ga. LEXIS 398 (1885).

Surety was not entitled to capias against principal. — When the principal and sureties in a promissory note were sued and judgment and fi. fa. went against them jointly, the sureties paid off the fi. fa., and the sheriff made an entry to that effect on the fi. fa., the sureties had no right to return the fi. fa. and take out a ca. sa. and arrest the principal. Elam v. Rawson, 21 Ga. 139, 1857 Ga. LEXIS 19 (1857).

OPINIONS OF THE ATTORNEY GENERAL

Surety's right limited to actual expenses. — Surety who completes a contract when the surety's principal defaults is entitled to moneys due to the principal only to the extent of the actual expenses of the surety. 1954-56 Ga. Op. Att'y Gen. 662.

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 119 et seq.

Am. Jur. Pleading and Practice Forms.

23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

ALR.

Payment of entire claim of third person as condition of subrogation, 9 A.L.R. 1596; 32 A.L.R. 568; 46 A.L.R. 857; 53 A.L.R. 304; 91 A.L.R. 855.

Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default, 45 A.L.R. 379; 134 A.L.R. 738; 164 A.L.R. 613.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 A.L.R. 551.

Right of surety on supersedeas or appeal bond to subrogation, 77 A.L.R. 452.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 A.L.R. 81.

Right of subrogation of fiduciary's surety to claim of the estate against third

person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 A.L.R. 997.

Surety's right to be subrogated to obligee's right against third person as affected by equities in favor of latter which are insufficient to prevent his liability to obligee, 137 A.L.R. 700.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 A.L.R. 421.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 166 A.L.R. 870.

Rights and remedies of property insurer as against third-person tortfeasor who has settled with insured, 92 A.L.R.2d 102.

10-7-48. Control of execution and judgment by surety when sued separately.

If the surety is sued separately from his principal, on payment by him of the judgment against him, he shall be entitled to control the judgment and execution against his principal in the same manner as if the judgment and execution were joint; and, if he does not appear as surety in the judgment against him, he may give notice and make the proof and obtain the control in the same manner as provided in cases of joint judgments.

History.

Laws 1850, Cobb's 1851 Digest, p. 600.; Code 1863, § 2146; Code 1868, § 2141; Code 1873, § 2168; Code 1882, § 2168; Civil Code 1895, § 2987; Civil Code 1910, § 3559; Code 1933, § 103-309.

Cross references.

Proving suretyship, §§ 10-7-45 and 10-7-46.

JUDICIAL DECISIONS

Independent remedies provided surety. — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

Separate action against surety. — Surety may be sued separately from the surety's principal under this section. Amos v. Continental Trust Co., 22 Ga. App. 348, 95 S.E. 1025, 1918 Ga. App. LEXIS 333 (1918); Stanfield v. McConnon & Co., 25 Ga. App. 226, 102 S.E. 908, 1920 Ga. App. LEXIS 698 (1920); Wesley v. Lewis Bros., 33 Ga. App. 783, 127 S.E. 660, 1925 Ga. App. LEXIS 718 (1925).

Principal and surety are joint and several obligors, although obligation is joint in form. — If an obligation, joint in form, is executed by one party as principal and another as surety, they are to be deemed joint and several obligors, since by former Civil Code 1910, § 3539 the obligation of the surety is accessory to that of the principal. Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765, 1932 Ga. App. LEXIS 665 (1932).

Obligation on which one party is maker and another is accommodation endorser. — An obligation in the form "we promise to pay" but signed by one party as maker and endorsed by another as an accommodation endorser is a joint and several obligation, since the endorser is a mere surety. Smith v. Moore, 45 Ga. App. 708, 165 S.E. 765, 1932 Ga. App. LEXIS 665 (1932).

Holder of a joint and several note may sue the obligors jointly or severally or sue any one of the signers. On such an obligation the holder may sue either the principal or the surety by virtue of former Civil Code 1910, §§ 3553 and

3559. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917); Johnson v. Georgia Fertilizer & Oil Co., 21 Ga. App. 530, 94 S.E. 850, 1918 Ga. App. LEXIS 389 (1918); Cone v. American Sur. Co., 29 Ga. App. 676, 116 S.E. 648, 1923 Ga. App. LEXIS 160 (1923); Bank of Madison v. Bell, 30 Ga. App. 458, 118 S.E. 438, 118 S.E. 439, 1923 Ga. App. LEXIS 504 (1923); McKibben v. Fourth Nat'l Bank, 32 Ga. App. 222, 122 S.E. 891, 1924 Ga. App. LEXIS 343 (1924), overruled, Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 247 S.E.2d 567, 1978 Ga. App. LEXIS 2549 (1978); Burson v. Shields, 160 Ga. 723, 129 S.E. 22, 1925 Ga. LEXIS 244 (1925).

The holder of a joint and several note may sue the principal and surety jointly, or at the holder's option the holder may sue either the principal or surety alone. Hicks v. Bank of Wrightsville, 57 Ga. App. 233, 194 S.E. 892, 1938 Ga. App. LEXIS 541 (1938).

Judgment against surety is valid without serving principal. — As a surety may be sued separately from a principal, the fact that service was not perfected upon the principal debtor to whom the goods were furnished would not affect the validity of the judgment properly obtained against the surety. Wesley v. Lewis Bros., 33 Ga. App. 783, 127 S.E. 660, 1925 Ga. App. LEXIS 718 (1925).

Judgment may be revived although no service or judgment had against principal. — When a proceeding is brought to revive a dormant judgment rendered against a surety on a joint and several note and the defendant objects to the revival of such judgment on the ground that the defendant's liability had been increased and that the defendant had been discharged from liability thereon because no judgment was rendered against the principal on the note, although no service of the suit was had on the principal, it was error for the judge to refuse to revive the judgment for that reason. Hicks v. Bank of Wrightsville, 57 Ga. App. 233, 194 S.E. 892, 1938 Ga. App. LEXIS 541 (1938).

Execution may be issued against surety alone on joint judgment. — Insofar as an affidavit of illegality asserts the defense that the execution did not follow the judgment, since it was issued against the surety alone, while the suit and the judgment were against another as principal and the surety only as security, and that the execution is therefore void, because the defendant was thereby deprived of the defendant's right to control the execution against the principal, the affidavit of illegality is without merit. Assuming that the better practice would have been — if this ground was sustained by the record in the proceeding — to have issued a single fi. fa. against both the principal and the surety, describing them respectively as such, the fact that a separate fi. fa. was issued against the surety without describing the surety as such would not deprive the surety of the rights accorded the surety by former Civil Code 1910, §§ 3556 through 3559 (see now O.C.G.A. §§ 10-7-45 though 10-7-48), against the surety's principal, or render the execution void. Fowler v. King, 29 Ga. App. 500, 116 S.E. 54, 1923 Ga. App. LEXIS 95 (1923).

Pleading against endorser need not allege relationship to notes. — In view of former Civil Code 1910, §§ 3541, 3553, and 3559 (see now O.C.G.A. §§ 10-7-4, 10-7-42, and 10-7-48), relative to sureties, the plaintiff's pleading in an action against an endorser alleging that the plaintiff was the owner and holder of the notes sued on in due course, bona fide and for value, states a cause of action and is not subject to dismissal for failure to allege the defendant's relationship to the notes and to the other parties to the notes. Meldrim v. Peoples Bank, 28 Ga. App. 294, 111 S.E. 76, 1922 Ga. App. LEXIS 458 (1922).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 119 et seq.

ALR.

Right of surety or his privies to require creditor to resort to security given by

principal before enforcing security given by surety, 37 A.L.R. 1262.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 A.L.R. 81.

10-7-49. Payment pending action; judgment for plaintiff for use of surety.

If the surety pays off the debt pending the action against the principal and himself or against the principal alone, such payment shall operate only to cause the action to proceed for the benefit of such surety; and the judgment may be entered in the name of the original plaintiff for the use of such surety.

History.

Ga. L. 1857, p. 111, § 1; Code 1863, § 2147; Code 1868, § 2142; Code 1873, § 2169; Code 1882, § 2169; Civil Code 1895, § 2988; Civil Code 1910, § 3560; Code 1933, § 103-310.

JUDICIAL DECISIONS

Independent remedies provided surety. — Former Civil Code 1910, §§ 3551, 3553, 3559 and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. McMillan v. Heard Nat'l Bank, 19 Ga. App. 148, 91 S.E. 235, 1917 Ga. App. LEXIS 36 (1917).

RESEARCH REFERENCES

ALR.

Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default, 45 A.L.R. 379; 134 A.L.R. 738; 164 A.L.R. 613.

10-7-50. Compelling contribution from cosureties after paying more than equal share; effect of cosurety's insolvency.

Where several are sureties for the same principal for the same sum of money, either by one or by distinct instruments, and one pays more than an equal share of the sum, he may compel contribution from his cosureties. If one of the cosureties is insolvent, the deficiency in his share must be borne equally by the solvent sureties.

History.

Laws 1840, Cobb's 1851 Digest, p. 597.; Code 1863, § 2151; Code 1868, § 2146; Code 1873, § 2173; Code 1882, § 2173; Civil Code 1895, § 2992; Civil Code 1910, § 3564; Code 1933, § 103-401.

JUDICIAL DECISIONS

Codification of common law. — This section is but a codification of the principle of contribution of the common law and is not of statutory origin. Bigby v. Douglas, 123 Ga. 635, 51 S.E. 606, 1905 Ga. LEXIS 562 (1905).

Modification of common law. — Only amendment or modification of the

common-law rule governing the amount which each of the cosureties must contribute to the one who has paid more than one's equal share of the indebtedness is found in the last sentence of this section. Higdon v. Bell, 25 Ga. App. 54, 102 S.E. 546, 1920 Ga. App. LEXIS 592 (1920).

Construction with federal provisions. — As adequate protection pursuant to 11 U.S.C. §§ 361 and 363, the court provided a junior creditor a replacement lien on claims for contribution and subrogation by the debtor against other related debtors after the property on which the junior creditor had a lien was sold. In re Bay Circle Props., No. Administered, 577 B.R. 587, 2017 Bankr. LEXIS 3870 (Bankr. N.D. Ga. 2017).

In an adversary proceeding in bankruptcy that sought determinations regarding a contribution claim and an adequate protection lien, the parties liable for contribution under Georgia law included only the debtors, as guarantors under a settlement agreement, but not primary obligors and pledgors; applying a presumption of solvency and both a balance sheet test and a cash flow test, an entity that had paid claims against it and was paying debts when due was solvent. Good Gateway, LLC v. NRCT, LLC (In re Bay Circle Props., LLC), 635 B.R. 784, 2022 Bankr. LEXIS 233 (Bankr. E.D. Mo. 2022).

Doctrine of contribution is limited to cosureties. — Doctrine of contribution, as applied to sureties, is limited to cosureties. Snow v. Brown, 100 Ga. 117, 28 S.E. 77, 1897 Ga. LEXIS 10 (1897).

No right of contribution between successive sureties. — A surety upon a guardian's bond, after obtaining the surety's discharge, although liable to the ward for any past default of the guardian, is not liable to a surety of the guardian upon a second bond who has answered for that default in consequence of the surety's own statutory liability upon the second bond. This liability of the second surety is primary, as between the second surety and the first surety, and the second surety has no right of contribution from the first surety. Tittle v. Bennett, 94 Ga. 405, 21 S.E. 62, 1894 Ga. LEXIS 94 (1894); Snow v. Brown, 100 Ga. 117, 28 S.E. 77, 1897 Ga. LEXIS 10 (1897).

Cosurety is entitled to binding contract requiring contribution. — Parol agreement of one surety was not sufficient to bind a cosurety as the surety was entitled to a valid, binding contract on which the surety could require contribution. English v. Bank of Ga., 76 Ga. 537, 1886 Ga. LEXIS 60 (1886).

Sureties paying debt may sue jointly for contribution on instrument. — Three of four sureties, who have paid the debt of their principal, may jointly sue their cosurety for contribution founding their action upon the obligation containing the contract of suretyship. Train v. Emerson, 141 Ga. 95, 80 S.E. 554, 1913 Ga. LEXIS 333 (1913).

Sureties may sue jointly on implied promise. — Two or more sureties who have paid the debt of their insolvent principal may jointly sue a cosurety for contribution, even when their action is based upon their right to contribution predicated upon the implied promise springing from the payment of the debt alone and is not based upon notes paid off and transferred to them, when the plaintiff sureties jointly paid the debt, although it was paid by their individual funds. Durden v. Youmans, 37 Ga. App. 182, 139 S.E. 91, 1927 Ga. App. LEXIS 570 (1927).

Action by surety against cosurety on original indebtedness is for contribution. — There is no authority which allows a cosurety to convert the cosurety's action for contribution into something else merely by finding the cosurety's action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and the plaintiff is bound by the substantive rules pertaining to contribution. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

It is not some independent right but the right to contribution which is being enforced, and it is suit on the original evidence of indebtedness by way of subrogation to the creditor's remedy which is allowed to the surety merely as a form of action in aid of the right to contribution from cosureties. Todd v. Windsor, 118 Ga.

App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Trial court erred in failing to award appellant partner prejudgment interest under O.C.G.A. § 10-7-51, as the judgment was for contribution under O.C.G.A. § 10-7-50 and the law of the case by appellee partner for sums appellant partner paid in excess of that paid by appellee partner since both were equally bound on the same instruments. Murphy v. McCaughey, 262 Ga. App. 570, 586 S.E.2d 16, 2003 Ga. App. LEXIS 829 (2003), cert. denied, No. S03C1809, 2003 Ga. LEXIS 1024 (Ga. Nov. 17, 2003).

Judgment must be limited to proportion due from each cosurety. — Since the substantive right and liability being enforced is that of contribution between co-obligors, each is liable only for an equal proportionate share of the debt. This liability is several and not joint, and a joint obligor who has paid the joint obligation is entitled to judgment against each of the co-obligors only for the proportion for which each is liable — judgment should not be entered against any one of them or against all of them jointly for the aggregate amount due from them. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

When co-obligors have received unequal benefits from the common obligation, the portion of the contribution that each must bear is according to the benefit that each has received, and the presumption that each co-obligor benefited in an equal degree is subject to rebuttal by proof that there was an inequality of benefits received. Steele v. Grot, 232 Ga. App. 847, 503 S.E.2d 92, 1998 Ga. App. LEXIS 854 (1998).

Joint and several judgment for aggregate amount due surety is not authorized. — There is no authority for the proposition that a surety or other co-obligor, however the surety may have found the surety's action for contribution, may obtain a joint and several judgment against the surety's several cosureties for the aggregate amount due the surety. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

In case of insolvency of one surety, solvent sureties bear burden equally. — Rule in equity in case of insolvency of a surety is that the solvent sureties bear equally the burden of payment. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Insolvency of co-obligors. — In a lienholder's action for contribution, a co-obligor failed to rebut the presumption that all co-obligors were solvent because evidence of bankruptcy was not dispositive. Good Gateway, LLC v. NRCT, LLC (In re Bay Circle Props., LLC), No. 15-58440-WLH, No. 19-5284, 2022 Bankr. LEXIS 257 (Bankr. N.D. Ga. Jan. 31, 2022).

Time for bringing action depends on basis therefor. — Under this section, the surety entitled to contribution may sue the cosureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class) or upon the implied contract raised by law in favor of one surety against the cosureties for contribution (in which instance the period of limitation would be that of an implied promise). Bigby v. Douglas, 123 Ga. 635, 51 S.E. 606, 1905 Ga. LEXIS 562 (1905); Reed v. Liberty Nat'l Bank & Trust Co., 44 Ga. App. 544, 162 S.E. 154, 1932 Ga. App. LEXIS 371 (1932). (See also O.C.G.A. §§ 9-3-23 to 9-3-25).

Sureties founding their action for contribution upon the obligation containing the contract of suretyship will have the same time within which to bring the action as the creditor would have on the same instrument. Train v. Emerson, 141 Ga. 95, 80 S.E. 554, 1913 Ga. LEXIS 333 (1913).

Accommodation party is not surety now without express agreement. — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see now O.C.G.A. §§ 11-3-101 through 11-3-805), an accommodation party is no longer a surety for the party accommodated as a legal consequence of the accommodation undertaking. The rule

now is that the fact of suretyship must be written in the endorsement or there must be an express agreement that the accommodation party is signing as surety. Bell v. Kleinberg, 102 Ga. App. 623, 117 S.E.2d 262, 1960 Ga. App. LEXIS 696 (1960).

Accommodation party who is not surety may only sue on implied promise. — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see O.C.G.A. §§ 11-3-101 through 11-3-805), the ruling in Hull v. Myers, 90 Ga. 674, 16 S.E. 653 (1893), to the effect that an action by an accommodation party against another party could be brought on the instrument as well as on the basis of an implied contract to reimburse, has not been the law. Bell v. Kleinberg, 102 Ga. App. 623, 117 S.E.2d 262, 1960 Ga. App. LEXIS 696 (1960) (four-year statute of limitations as to implied contracts applies and Reed v. Liberty Nat'l Bank & Trust Co., 44 Ga. App. 544, 162 S.E. 154, will not be followed).

Signatures on separate agreements held not consequential. — Fact that corporate officers were not signatories to the same guaranty agreement but rather signed separate agreements, each of which contained language providing that the agreement inured only to the benefit of a bank and the undersigned, was of no consequence. Because both parties were sureties for the obligations of the corporation, and one of the parties paid the corporate obligation to the bank, that party was entitled to contribution from the other party. Dever v. Lee, 188 Ga. App. 483, 373 S.E.2d 224, 1988 Ga. App. LEXIS 1108 (1988).

Statute of limitations. — Four-year statute of limitations is applicable to claims for the right of contribution filed by one co-maker of a debt against another pursuant to O.C.G.A. § 10-7-50; thus, because a plaintiff filed a claim for contribution some four years and 10 months after the plaintiff paid the debt for which the plaintiff sought contribution from the defendants, the claim was time-barred. Gray v. Currie, No. 1:04-CV-3211-TWT, 2005 U.S. Dist. LEXIS 31407 (N.D. Ga. Nov. 21, 2005).

Interest award reversed. — Award of interest for a client against an attorney from the date that the client satisfied an underlying judgment against the client, the client's son, and the attorney had no legal basis and was reversed; it had been established that the client, the client's son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a co-surety's payment of a joint obligation, it applied to contribution actions arising from joint instruments executed by the sureties, not to joint tortfeasors. The issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribution from a joint defendant and the statute did not purport to control an award of interest; O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from the date of entry. Gerschick v. Pounds, 281 Ga. App. 531, 636 S.E.2d 663, 2006 Ga. App. LEXIS 940 (2006), cert. denied, No. S07C0191, 2007 Ga. LEXIS 95 (Ga. Jan. 8, 2007).

RESEARCH REFERENCES

Am. Jur. 2d.

74 Am. Jur. 2d, Suretyship, § 147 et seq.

C.J.S.

72 C.J.S., Principal and Surety, § 226 et seq.

ALR.

Exhaustion of remedies against, or insolvency of, principal as condition of enforcing contribution between coguarantors or cosureties, 29 A.L.R. 273.

Right to contribution or indemnity of executor, administrator, guardian, testamentary trustee, or sureties against a cofiduciary or sureties, in respect of losses or defaults for which the fiduciaries are answerable, 66 A.L.R. 1147.

Right of surety or guarantor who pays judgment to preservation thereof as against his cosureties or coguarantors, 71 A.L.R. 300.

Rights and liabilities as between sure-

ties on successive bonds given by executor, administrator, trustee, or guardian, 76 A.L.R. 904.

Transmission of fund from ancillary to domiciliary jurisdiction, or liability of sureties on bond given in the latter jurisdiction, as affecting liability of sureties on bond given in the former jurisdiction, 78 A.L.R. 575.

Joinder in one action of sureties on different bonds relating to same matter, 106 A.L.R. 90; 137 A.L.R. 1044.

Rights and liabilities as between sureties on successive bonds given in course of litigation, 117 A.L.R. 583.

Right of one cojudgment debtor who pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 A.L.R. 495.

Right of surety on recognizance or bail bond to indemnity or contribution, 170 A.L.R. 1161.

Limitation by surety of amount of his liability as affecting liability to contribution, 172 A.L.R. 1447.

Apportionment of liability between automobile liability insurers one or more of whose policies provide against any liability if there is other insurance, 46 A.L.R.2d 1163.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 A.L.R.3d 680.

10-7-51. Interest on sum recovered as contribution.

The sum recovered as contribution shall bear interest from the time the original obligation was paid by the surety and shall be deemed and held a liquidated demand.

History.

Orig. Code 1863, § 2152; Code 1868, § 2147; Code 1873, § 2174; Code 1882, § 2174; Civil Code 1895, § 2993; Civil Code 1910, § 3565; Code 1933, § 103-402.

JUDICIAL DECISIONS

Partner entitled to interest on contribution award. — Trial court erred in failing to award appellant partner prejudgment interest under O.C.G.A. § 10-7-51 as the judgment was for contribution under O.C.G.A. § 10-7-50 and the law of the case by appellee partner for sums appellant partner paid in excess of that paid by appellee partner since both were equally bound on the same instruments. Murphy v. McCaughey, 262 Ga. App. 570, 586 S.E.2d 16, 2003 Ga. App. LEXIS 829 (2003), cert. denied, No. S03C1809, 2003 Ga. LEXIS 1024 (Ga. Nov. 17, 2003).

Interest award reversed. — Award of interest for a client against an attorney from the date that the client satisfied an underlying judgment against the client, the client's son, and the attorney had no legal basis and was reversed; it had been established that the client, the son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a co-surety's payment of a joint obligation, it applied to contribution actions arising from joint instruments executed by the sureties, not to joint tortfeasors; the issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribution from a joint defendant and it did not purport to control an award of interest and O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from the date of entry. Gerschick v. Pounds, 281 Ga. App. 531, 636 S.E.2d 663, 2006 Ga. App. LEXIS 940 (2006), cert. denied, No. S07C0191, 2007 Ga. LEXIS 95 (Ga. Jan. 8, 2007).

RESEARCH REFERENCES

C.J.S.
72 C.J.S., Principal and Surety, § 225 et seq.

ALR.
Rights of one entitled to contribution to recover interest, 27 A.L.R.2d 1268.

10-7-52. Duty to account for indemnification from principal; compelling transfer of security from principal.

A surety suing for contribution must first account for all money or other things received from the principal to indemnify him against loss; and, if he has paid the entire debt, he may compel his cosurety to transfer to him any mortgage or other security taken from the principal for the protection of such cosurety, by relieving him of all liability for contribution.

History.
Orig. Code 1863, § 2153; Code 1868, § 2148; Code 1873, § 2175; Code 1882, § 2175; Civil Code 1895, § 2994; Civil Code 1910, § 3566; Code 1933, § 103-403.

RESEARCH REFERENCES

ALR.
Rights and liabilities as between sureties on successive bonds given by executor, administrator, trustee, or guardian, 76 A.L.R. 904.

Right of surety to share in benefit of security or indemnity taken by another surety on or before becoming such, 95 A.L.R. 305.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 107 A.L.R. 1171.

10-7-53. Controlling action on debt and judgments therein against cosureties.

Code Sections 10-7-40 through 10-7-49 shall apply to cases where there is more than one surety, so as to enable a surety discharging a joint debt, in whole or in part, either pending the action or after joint or several judgments, to control the same against his cosureties for the purpose of compelling them to contribute their respective shares of the amount so paid by him.

History.
Laws 1840, Cobb's 1851 Digest, p. 597.; Laws 1850, Cobb's 1851 Digest, p. 599.; Ga. L. 1857, p. 111, § 3; Code 1863, § 2148; Code 1868, § 2143; Code 1873, § 2170; Code 1882, § 2170; Civil Code 1895, § 2989; Civil Code 1910, § 3561; Code 1933, § 103-311.

JUDICIAL DECISIONS

Entry of payment must be endorsed on execution. — Surety who did not have any entry of payment endorsed on the fi. fa. as required by former Civil Code 1895, § 2986 was not equitably subrogated to the rights of the plaintiff in the judgment so as to enforce contribution against a cosurety. Cureton v. Cureton, 120 Ga. 559, 48 S.E. 162, 1904 Ga. LEXIS 640 (1904).

RESEARCH REFERENCES

Am. Jur. 2d.
74 Am. Jur. 2d, Suretyship, § 147.
C.J.S.
72 C.J.S., Principal and Surety, § 225 et seq.
ALR.
Right of surety or guarantor who pays judgment to preservation thereof as against his cosureties or coguarantors, 71 A.L.R. 300.

Joinder in one action of sureties on different bonds relating to same matter, 106 A.L.R. 90; 137 A.L.R. 1044.

Limitation by surety of amount of his liability as affecting liability to contribution, 172 A.L.R. 1447.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 A.L.R.3d 680.

10-7-54. Endorser's right to control judgment on debt and execution thereon.

Every endorser who shall pay off and discharge the debt on which he is endorser, either pending the action or after judgment, whether the judgment against the principal and the endorsers is joint or several, shall be entitled to control the judgment and execution founded thereon against the principal and all prior endorsers, in the same manner, upon the same proof, and under the same circumstances as provided in this article in the case of sureties; and, if such endorser shall collect the same from a prior endorser, the latter shall have the same control of the judgment or judgments against the principal or any endorser prior to him.

History.
Laws 1839, Cobb's 1851 Digest, p. 596.; Laws 1845, Cobb's 1851 Digest, p. 598.; Laws 1850, Cobb's 1851 Digest, p. 600.; Ga. L. 1855-56, p. 227, § 1; Code 1863, § 2149; Code 1868, § 2144; Code 1873, § 2171; Code 1882, § 2171; Civil Code 1895, § 2990; Civil Code 1910, § 3562; Code 1933, § 103-312.
Cross references.
Obligation of indorser, § 11-3-415..

JUDICIAL DECISIONS

Right of control formerly limited to bankable instruments. — Neither Laws 1839, Cobb's 1851 Digest, p. 596, nor Georgia Laws 1845, Cobb's 1851 Digest, p. 598 (from which this section was derived), passed for the relief of endorsers, gave the control of executions to endorsers who had paid off the same against prior endorsers except such executions as had been issued on judgments founded on bankable instruments. Evans v. Rogers, 1 Ga. 463, 1846 Ga. LEXIS 95 (1846).

Right of control limited to payment after judgment. — Under Georgia Laws 1839, 1845, and 1850, Cobb's 1851 Digest, pp. 596, 598, and 600, when pending suit against a principal and endorser jointly, the endorser paid the note, this payment was a bar to the further prosecution of the suit, even though the further prosecution of the suit might be at the instance, and for the benefit of, the endorser. Griffin v. Hampton, 21 Ga. 198, 1857 Ga. LEXIS 35 (1857).

"Shall pay off or discharge" defined. — When the codifiers used the expression "shall pay off and discharge" in this section, they intended that those words should have the same significance as "compelled to pay." Ezzard v. Bell, 100 Ga. 150, 28 S.E. 28, 1897 Ga. LEXIS 17 (1897).

Section applies to involuntary payment as well as voluntary. Stiles v. Eastman, 1 Ga. 205, 1846 Ga. LEXIS 56 (1846); Ezzard v. Bell, 100 Ga. 150, 28 S.E. 28, 1897 Ga. LEXIS 17 (1897).

A voluntary payment is compulsory within legal contemplation, and there is no reason why a compulsory payment should not likewise fall within the spirit of this section. Ezzard v. Bell, 100 Ga. 150, 28 S.E. 28, 1897 Ga. LEXIS 17 (1897).

Plaintiff's attorney may enter payment on execution after levy. — Under this section, it having been discovered that there was no entry on the fi. fa. showing its payment by the endorser, pending a claim case arising under a levy made for the benefit of such endorser, the attorney for the plaintiff in fi. fa. could then make the entry. Thomason v. Wade, 72 Ga. 160, 1883 Ga. LEXIS 44 (1883).

Surety cannot control execution if cosureties do not consent to relationship. — If an accommodation endorser agreed with the creditor to become surety for all signers of the note, but those signing did not have notice of nor accept such relation, the accommodation endorser could not control the fi. fa. under this section, merely by reason of the accommodation endorser's agreement with the creditor. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866, 1923 Ga. App. LEXIS 147 (1923).

10-7-55. Protection of bona fide purchasers when surety controls judgment.

When the surety does not appear to be such in the judgment and execution, the lien of such judgment, when controlled by the surety, shall not interfere with bona fide purchasers without notice from the principal, whose rights were vested before the order giving control to the surety was granted.

History.

Laws 1845, Cobb's 1851 Digest, p. 598; Code 1863, § 2150; Code 1868, § 2145; Code 1873, § 2172; Code 1882, § 2172; Civil Code 1895, § 2991; Civil Code 1910, § 3563; Code 1933, § 103-313.

10-7-56. Subrogation to rights of creditor; priority of claim.

A surety who has paid the debt of his principal shall be subrogated, both at law and in equity, to all the rights of the creditor and, in a controversy with other creditors, shall rank in dignity the same as the creditor whose claim he paid.

History.

Ga. L. 1857, p. 111, § 4; Code 1863, § 2155; Code 1868, § 2150; Code 1873, § 2176; Code 1882, § 2176; Civil Code 1895, § 2995; Civil Code 1910, § 3567; Code 1933, § 103-501.

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

"Subrogation" defined. — "Subrogation" is the substitution of another person in the place of the creditor whose obligation is paid, so that the person in whose favor it is exercised succeeds to all the rights of the creditor; it is of equitable origin, being founded upon the dictates of refined justice, its basis is the doing of complete, essential, and perfect justice between the parties, and its object is the prevention of injustice. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Construction by courts. — Courts incline to extend rather than restrict the principle of subrogation. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Effect of UCC. — Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation. Argonaut Ins. Co. v. C & S Bank, 140 Ga. App. 807, 232 S.E.2d 135, 1976 Ga. App. LEXIS 1639 (1976); Pembroke State Bank v. Balboa Ins. Co., 144 Ga. App. 609, 241 S.E.2d 483, 1978 Ga. App. LEXIS 1706 (1978).

Surety need not file under UCC to preserve surety's priority. — A surety is "secured" by the surety's right of subrogation, which relates back to the issuance of the bond, to defeat intervening creditors. The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation, and a surety is not required to file under the UCC to preserve the surety's priority under the equitable right of subrogation. Pembroke State Bank v. Balboa Ins. Co., 144 Ga. App. 609, 241 S.E.2d 483, 1978 Ga. App. LEXIS 1706 (1978).

Cumulative remedy. — Only a cumulative remedy is afforded by this section as the doctrine of subrogation existed by general law prior to its adoption in the statutes. Curan v. Colbert, 3 Ga. 239, 1847 Ga. LEXIS 103 (1847).

Section not applicable to rights under § 10-7-41. — Subrogation under O.C.G.A. § 10-7-56 is not the same thing as a guarantor's right to recoup payment of a debt from the guarantor's principal under O.C.G.A. § 10-7-41. Fabian v. Dykes, 214 Ga. App. 792, 449 S.E.2d 305, 1994 Ga. App. LEXIS 1059 (1994).

Legal and equitable right. — Regardless of its origin in equity, subrogation under former Code 1933, §§ 103-501 and 103-502 was now a legal as well as an equitable right. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Former Code 1882, §§ 2176 and 2177 made subrogation a legal as well as an equitable right. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

What former Code 1882, §§ 2176 and 2177 did was to break down the exclusiveness of equity and carry the right of subrogation into law, so as to make equity and law concurrent and coequal with respect to this subject matter. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Whether right is legal or equitable is now immaterial. — Whether former Civil Code 1910, §§ 3567 and 3568 serve to convert the right of substitution from an equitable to a legal right was quite immaterial since enforcement of equitable and legal rights was permitted in the same action in a court having jurisdiction to administer both. Train v. Emerson, 141 Ga. 95, 80 S.E. 554, 1913 Ga. LEXIS 333 (1913); Durden v. Youmans, 37 Ga. App. 182, 139 S.E. 91, 1927 Ga. App. LEXIS 570 (1927).

Section reaffirms subrogation founded upon equity, not contract. — Subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. The doctrine was not limited or abrogated by this section, but positively reaffirmed. Argonaut Ins. Co. v. C & S Bank, 140 Ga. App. 807, 232 S.E.2d 135, 1976 Ga. App. LEXIS 1639 (1976).

Legal subrogation arises as a matter of equity without any agreement to that effect. Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790, 1983 Ga. App. LEXIS 2420 (1983).

Origins of legal subrogation. — Doctrine of subrogation is not founded on contract but has its origin in a sense of

General Consideration (Cont'd)

natural justice. The equitable principle of the surety's subrogation was incorporated into the 1863 Code as former Code 1863, §§ 2155 and 2156. Since the 1863 Code, this action is for the enforcement of a legal, as contradistinguished from an equitable, right. Fender v. Fender, 30 Ga. App. 319, 117 S.E. 676, 1923 Ga. App. LEXIS 430 (1923).

Conventional subrogation. — There is a well-recognized distinction between the right to sue on a claim of legal subrogation, which is of an equitable nature, and the right to sue on conventional subrogation, based on an agreement of the parties. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

There are known to the law two kinds of subrogation, legal and conventional. Legal subrogation arises by operation of law, when one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that one is in equity entitled to the security or obligation held by the creditor whom one has paid. Conventional subrogation depends upon a lawful contract, and occurs when one having no interest in or relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights of the creditor so paid. Erwin v. Brooke, 159 Ga. 683, 126 S.E. 777, 1925 Ga. LEXIS 39 (1925).

Subrogation is of two kinds. One is legal subrogation, which takes place as a matter of equity, without any agreement to that effect made with the person paying the debt. The other is conventional subrogation, which is applied when an agreement is made with the person paying the debt that one shall be subrogated to the rights and remedies of the original creditor. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Conventional subrogation depends upon contract and upon payment of the debt of another who then is entitled to the securities and rights of the creditor so paid. Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790, 1983 Ga. App. LEXIS 2420 (1983).

Conventional subrogation can take effect only by agreement, and has been said to be synonymous with assignment. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Conventional subrogation agreement need not be written. — Conventional subrogation agreement is not required to be in writing. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Standing to sue. — *Unpublished decision:* Insurer expressly limited the insurer's subrogation rights in a settlement agreement to any other person or entity who received either directly or indirectly any of the funds or property belonging to an injured child's estate. The child's co-counsel did not receive any of the misappropriated funds; thus, because the insurer's subrogation rights did not reach co-counsel, the insurer did not have standing to sue co-counsel. Hartford Fire Ins. Co. v. Schneider, 267 Fed. Appx. 912, 2008 U.S. App. LEXIS 5039 (11th Cir. 2008).

Subrogation under section does not depend on judicial proceeding. — Former Code 1882, §§ 2176 and 2177 intended to effect the substitution of the surety by their own vigor and not leave it to be done by any court or any judicial proceedings. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

As soon as the debt is paid by the surety, the surety is subrogated by virtue of this section to all the rights of the creditor by vigor of the law, and not dependent upon any judicial proceedings. Sherling v. Long, 122 Ga. 797, 50 S.E. 935, 1905 Ga. LEXIS 331 (1905); Fender v. Fender, 30 Ga. App. 319, 117 S.E. 676, 1923 Ga. App. LEXIS 430 (1923).

Payment of debt is necessary. — Subrogation inures only to a surety who has paid the debt of the surety's principal. Jessee v. First Nat'l Bank, 154 Ga. App. 209, 267 S.E.2d 803, 1980 Ga. App. LEXIS 3240 (1980).

When note maker brought an action to cancel a security deed after the creditor assigned the note and security deed to the cosigner's estate when the note was paid

from the cosigner's life insurance policy, the trial judge correctly refused to cancel the security deed which the creditor transferred to the cosigner's estate. Aultman v. United Bank, 259 Ga. 237, 378 S.E.2d 302, 1989 Ga. LEXIS 180 (1989).

Full amount of debt must be tendered. — When less than the total amount of the debt is tendered, subrogation is not permitted; the reason for this rule is that if the surety upon making a partial payment became entitled to subrogation pro tanto and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Jessee v. First Nat'l Bank, 154 Ga. App. 209, 267 S.E.2d 803, 1980 Ga. App. LEXIS 3240 (1980).

Writing "paid" on instrument does not extinguish surety's rights. — Under former Civil Code 1910, §§ 3567 and 3568, the fact that when a note was paid by the surety and it, with the mortgage securing it, was surrendered by the creditor to the surety, the word "Paid," dated and signed, was written across the face of the note and the mortgage, amounts to nothing more than a receipt for the money by the creditor to the surety, and does not operate legally to extinguish the rights of the surety against the principal or against other creditors of the principal contending for the mortgaged property, unless it is made to appear that it was the intent that such payment by the surety should operate to satisfy and extinguish the instruments; especially would this be true when it does not appear that the contending creditor had knowledge of such entry. Dabney v. Brigman Motors Co., 32 Ga. App. 652, 124 S.E. 370, 1924 Ga. App. LEXIS 580 (1924).

Surety making payment to state acquires its security, not remedies. — Right of subrogation does not apply to the remedies which the state has against a citizen, but as to the security which the state has. That security passes to the surety who pays off a debt to the state. Irby v. Livingston, 81 Ga. 281, 6 S.E. 591, 1888 Ga. LEXIS 108 (1888).

Surety acquires no greater rights than state had. — Lien which the state had under the Motor Fuel Tax Law of 1937 (now repealed and replaced by present O.C.G.A. § 48-9-1 et seq.) upon the property of a distributor for excise taxes collected by the distributor on the sale or use of motor fuel or kerosene did not have priority over the lien of a judgment creditor, when the rights of such creditor attached prior to the time the state revenue commissioner filed notice of the state's lien in the office of the clerk of the superior court; and when a surety upon such distributor's bond to the state became subrogated to the rights of the state by payment of such taxes to the state, the surety took the position of the state and acquired no greater rights with respect thereto than the state had at the time the surety became subrogated. Royal Indem. Co. v. Mayor of Savannah, 209 Ga. 383, 73 S.E.2d 205, 1952 Ga. LEXIS 529 (1952).

Surety in a state project. — Surety on a public contract, after assisting the contractor in completing the project, stood in the place of the contractor and was subrogated to the contractor's right of action for breach of contract against the Georgia Department of Corrections; under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c), the state waived sovereign immunity for contracts. State Dep't of Corr. v. Developers Sur. & Indem. Co., 295 Ga. 741, 763 S.E.2d 868, 2014 Ga. LEXIS 732 (2014).

Section gives surety title to instrument paid off. — This section clothes the surety with the legal title to the security which the surety pays off. By legal subrogation, the paper becomes the surety's property, and the creditor has no right to withhold it from the surety's possession. Dabney v. Brigman Motors Co., 32 Ga. App. 652, 124 S.E. 370, 1924 Ga. App. LEXIS 580 (1924).

Section permits surety to sue on original obligation. — Since the adoption of former Civil Code 1910, §§ 3567 and 3568 (see now O.C.G.A.

General Consideration (Cont'd)

§§ 10-7-56 and 10-7-57), not only can a surety paying the debt of the surety's principal maintain a suit in equity against the surety's principal upon the implied promise of indemnification, but, being legally subrogated to the rights of the creditor, the surety may sue on the original indebtedness. Fender v. Fender, 30 Ga. App. 319, 117 S.E. 676, 1923 Ga. App. LEXIS 430 (1923); Dabney v. Brigman Motors Co., 32 Ga. App. 652, 124 S.E. 370, 1924 Ga. App. LEXIS 580 (1924).

Surety entitled to contribution may sue the cosureties upon the written evidence of indebtedness or upon the implied contract raised by law in favor of one surety against the cosureties for contribution. Reed v. Liberty Nat'l Bank & Trust Co., 44 Ga. App. 544, 162 S.E. 154, 1932 Ga. App. LEXIS 371 (1932).

Application

Accommodation party is not surety now without express agreement. — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see now O.C.G.A. § 11-3-101 et seq.), an accommodation party is no longer a surety for the party accommodated as a legal consequence of the accommodation undertaking. The rule now is that the fact of suretyship must be written in the endorsement or there must be an express agreement that the accommodation party is signing as surety. Bell v. Kleinberg, 102 Ga. App. 623, 117 S.E.2d 262, 1960 Ga. App. LEXIS 696 (1960).

Accommodation party who is not surety may now only sue on implied promise. — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see now O.C.G.A. § 11-3-101 et seq.), the ruling in Hull v. Myers, 90 Ga. 674, 16 S.E. 653 (1893), to the effect that an action by an accommodation party against another party could be brought on the instrument as well as on the basis of an implied contract to reimburse, has not been the law. Bell v. Kleinberg, 102 Ga. App. 623, 117 S.E.2d 262, 1960 Ga. App. LEXIS 696 (1960) (four-year statute of limitations as to implied contracts applies and will not be followed).

Surety paying debt may collect from principal. — When person making a payment of the debt of another pays an indebtedness for which one is surety, and is therefore under a contractual obligation to pay it, one is entitled, by subrogation to the rights of the creditor, to collect from the debtor the amount of the payment thus made. Hartley v. Hartley, 50 Ga. App. 848, 179 S.E. 245, 1935 Ga. App. LEXIS 293 (1935).

Surety may recover from cosurety. — Surety who has paid the debt of the surety's principal is subrogated, both at law and in equity, to all the rights of the creditor and is entitled to recover from the cosurety (when there are only two sureties) half of the amount paid by the surety, with interest thereon and attorney's fees, provided the debt paid by the surety was past due and the statutory notice of suit was given. Reed v. Liberty Nat'l Bank & Trust Co., 44 Ga. App. 544, 162 S.E. 154, 1932 Ga. App. LEXIS 371 (1932).

When several persons who are directors of a banking corporation borrow money which is used for the benefit of the bank and obligate themselves to repay it, all of the obligors are equally bound to bear the common burden, and when all of the obligors except one make a payment on the obligation, which payment represents their aggregate pro rata shares, and when all of the obligors execute a promissory note for the unpaid amount of the debt which represents the proportionate share of the obligor who did not pay, which is then paid in full by all the obligors except the one who had not paid and is transferred to them by the creditor, although no suit has been filed upon it, they are sureties and are subrogated to the rights of the creditor and are entitled to recover the amount of the note against the principal, who is the obligor who had not paid. Holton v. Smith, 44 Ga. App. 832, 163 S.E. 516, 1932 Ga. App. LEXIS 546 (1932).

Joint action for contribution on original obligation is proper. — Three of four sureties, who have paid the debt of their principal, may jointly sue their cosurety for contribution, founding their

action upon the obligation containing the contract of suretyship, and will have the same time within which to bring suit as the creditor would have had on the same instrument. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892); Train v. Emerson, 141 Ga. 95, 80 S.E. 554, 1913 Ga. LEXIS 333 (1913).

If payment is by several, separate action is improper. — When accommodation endorsers have paid off more than their pro rata share of a note, one of the endorsers subrogated under this section cannot sue severally on the note for that one's pro rata share of the contribution to which the surety and the coowners of the note are entitled. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Separate action proper for amount paid and not on original indebtedness. — When, of several endorsers for accommodation, some pay off the whole debt, though each of these has no several right of action upon the note for contribution against a coendorser who has paid nothing, yet each may sue severally for contribution to the extent of each one's own share thereof in an action for money paid for the defendant's use, payment to the creditor having been made, not out of a joint fund, but out of individual assets contributed by each paying endorser from one's own resources. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Action is for contribution only, even if founded upon original indebtedness. — There is no authority which allows a cosurety to convert one's action for contribution into something else merely by founding one's action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and the plaintiff is bound by the substantive rules pertaining to contribution. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Although a surety, after payment of the principal's debt, was subrogated to the rights and remedies of the creditor and entitled to found the surety's action for contribution directly on the original evidence of indebtedness, it does not follow that the surety is entitled to enforce these obligations against the cosureties in exactly the same manner and in the same amounts as could the creditor. The surety is bound by the substantive rules of contribution, while the creditor is not. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Section does not allow surety to escape part of deficiency if cosurety is insolvent. — Former Code 1933, §§ 103-501 and 103-502 have never been construed to allow a cosurety to escape paying part of the deficiency in the share of an insolvent cosurety. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Section does not apply to successive sureties. — Exception to the general rule, laid down in this section, exists when in a legal proceeding there are successive sureties. In such a case the last surety is regarded as the primary one, and if the surety pays the debt of the surety's principal, the surety has no right of subrogation against the preceding sureties. This is true whether the dispute is between successive sureties in the legal proceeding itself or between the surety given in the legal proceeding and the surety in the original transaction upon which the legal proceeding is based. National Surety Co. v. White, 21 Ga. App. 471, 94 S.E. 589, 1917 Ga. App. LEXIS 645 (1917).

Section does not give subrogation when creditor has received mortgaged property in part payment. — Rights of subrogation given the surety by this section cannot be enjoyed when the creditor, who by the same contract has personal security and a mortgage upon personal property, has after maturity of the debt received the mortgaged property by contract with the principal debtor, in part payment at more than its full value at the time the creditor received it. Marshall v. Dixon, 82 Ga. 435, 9 S.E. 167, 1889 Ga. LEXIS 395 (1889).

Joint obligor is not like a surety subrogated to the rights of the creditor, but the obligor may enforce contribution on the implied contract on the obligor's

Application (Cont'd)

part to share the common burden. Sherling v. Long, 122 Ga. 797, 50 S.E. 935, 1905 Ga. LEXIS 331 (1905).

Surety is not bound to pay and be subrogated. — Surety may pay up the debt and be subrogated to the rights of the creditor against the surety's principal, but the surety is not bound to do this. Curan v. Colbert, 3 Ga. 239, 1847 Ga. LEXIS 103 (1847).

Surety may renounce right by surety's actions. — Although a surety, if the surety so elects, may, under former Code 1882, §§ 2176 and 2177, have the right to be subrogated to the creditor's status, yet a foreclosure by the surety of the mortgage given to indemnify the surety was a renunciation of that right. Flannagan v. Forrest, 94 Ga. 685, 21 S.E. 712, 1894 Ga. LEXIS 270 (1894).

Spouse of grantor in security deed paying another debt is not subrogated. — Under former Civil Code 1910, §§ 3558, 3567 and 3568, because the wife of the grantor in a security deed paid a debt secured by another deed, the spouse was not entitled to be subrogated to the grantee's rights. Hiers v. Exum, 158 Ga. 19, 122 S.E. 784, 1924 Ga. LEXIS 72 (1924).

Venue. — Creditor holding a promissory note may sue the maker and sureties thereon in the county of the residence of either, and a surety paying the note succeeds to this right, and may bring action upon the note either in the county of the residence of the maker or in that of the residence of a cosurety, at the surety's option, as the surety is subrogated in law and equity to all the rights of the creditor. Anderson v. Armistead, 18 Ga. App. 387, 89 S.E. 525, 1916 Ga. App. LEXIS 364 (1916).

In action on conventional subrogation, subrogee need not prove superior equity. — In this state an action based on conventional subrogation, clearly established by an agreement reduced to writing or otherwise shown, in which no equitable relief is prayed, is a legal action and is not controlled by principles of equity; and a conventional subrogee does not have the burden of showing the superior equity in itself as plaintiff to authorize a recovery. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Subrogation rights inchoate until principal unable to pay. — Contractor's surety has subrogation rights with respect to any funds earned and paid to the contractor and still in the contractor's hands. Until the surety is called upon to perform the surety's obligation under a payment or performance bond, however, the right of subrogation is an inchoate one, which becomes choate only upon the maturing and performance of the obligation to pay, which occurs only when the principal finds itself unable to pay and calls upon the surety to pay in accordance with the terms of the bond. Cotton States Mut. Ins. Co. v. Citizens & S. Nat'l Bank, 168 Ga. App. 83, 308 S.E.2d 199, 1983 Ga. App. LEXIS 3374 (1983).

Obtaining rights under negotiable promissory notes. — Fidelity bond insurer who paid insured's claim for loss based on the employee's improper receipt of a personal loan would not obtain subrogation rights under negotiable promissory notes bank received from an employee at the time of loan until the notes were negotiated to the insurer. Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790, 1983 Ga. App. LEXIS 2420 (1983).

Applicability in bankruptcy proceedings. — Assignment of a creditor's security interest to a co-debtor who paid the debt of a principal did not amount to inequitable conduct justifying subordination of the co-debtor's secured claim in bankruptcy proceedings, because the co-debtor had a clear right, under both state and federal law, to succeed to the creditor's position. Even in the absence of the assignment, the co-debtor would have been subrogated to the rights of the creditor. Estes v. Cranshaw (In re N & D Properties, Inc.), 54 B.R. 590, 1985 U.S. Dist. LEXIS 15440 (N.D. Ga. 1985), modified, In re N & D Properties, Inc., 799 F.2d 726, 1986 U.S. App. LEXIS 30924 (11th Cir. 1986).

Genuine issues of material fact existed as to whether equitable subrogation applied. — In a declaratory judgment action brought by a

senior lienholder against a junior lienholder of certain real property, a trial court erred by granting summary judgment to the senior lienholder based on equitable subrogation as, although the senior lienholder met the prima facie requirements for equitable subrogation, material issues of fact existed as to whether equitable subrogation applied to the case. Secured Equity Fin., LLC v. Washington Mut. Bank, F. A., 293 Ga. App. 50, 666 S.E.2d 554, 2008 Ga. App. LEXIS 717 (2008), cert. denied, No. S08C2028, 2008 Ga. LEXIS 968 (Ga. Nov. 3, 2008).

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74 Am. Jur. 2d, Suretyship, §§ 119, 171.

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Right of surety on warehouseman's bond to be subrogated to rights of owner of property stored as against third person, 4 A.L.R. 518.

Payment of entire claim of third person as condition of subrogation, 9 A.L.R. 1596, 32 A.L.R. 568; 46 A.L.R. 857; 53 A.L.R. 304; 91 A.L.R. 855.

Right of surety who discharges obligation due to government, to be subrogated to rights of latter against third persons, 24 A.L.R. 1523.

Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default, 45 A.L.R. 379; 134 A.L.R. 738; 164 A.L.R. 613.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 A.L.R. 551.

Right as between surety on contractor's bond and assignee of money to become due on contract, 76 A.L.R. 917.

Right of surety on supersedeas or appeal bond to subrogation, 77 A.L.R. 452.

Right of a third person who has paid corporation's indebtedness to be subrogated to creditors' right to enforce stockholders' statutory liability, 78 A.L.R. 611.

Right of surety on fidelity bond to be subrogated to obligee's right as against third person who caused or contributed to loss or failed in his duty to discover it, 95 A.L.R. 269.

Right of subrogation of fiduciary's surety to claim of the estate against third person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 A.L.R. 997.

Surety's right to be subrogated to obligee's right against third person as affected by equities in favor of latter which are insufficient to prevent his liability to obligee, 137 A.L.R. 700.

Right of one cojudgment debtor who pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 A.L.R. 495.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 A.L.R. 421.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 166 A.L.R. 870.

Right of indemnitee's insurer defending action against indemnitee, to recover costs and attorneys' fees from indemnitor, 77 A.L.R.2d 1143.

10-7-57. Substitution in place of creditor as to securities held by creditor.

A surety who has paid the debt of his principal shall also be entitled to be substituted in place of the creditor as to all securities held by him for the payment of the debt.

History.
Orig. Code 1863, § 2156; Code 1868, § 2151; Code 1873, § 2177; Code 1882, § 2177; Civil Code 1895, § 2996; Civil Code 1910, § 3568; Code 1933, § 103-502.

JUDICIAL DECISIONS

Section reaffirms equitable doctrine of subrogation. — Subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. The doctrine was not limited or abrogated by this section, but positively reaffirmed. Argonaut Ins. Co. v. C & S Bank, 140 Ga. App. 807, 232 S.E.2d 135, 1976 Ga. App. LEXIS 1639 (1976).

Effect of UCC. — Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation. Argonaut Ins. Co. v. C & S Bank, 140 Ga. App. 807, 232 S.E.2d 135, 1976 Ga. App. LEXIS 1639 (1976); Pembroke State Bank v. Balboa Ins. Co., 144 Ga. App. 609, 241 S.E.2d 483, 1978 Ga. App. LEXIS 1706 (1978).

Subrogation defined. — "Subrogation" is the substitution of another person in the place of the creditor whose obligation is paid so that the person in whose favor it is exercised succeeds to all the rights of the creditor; it is of equitable origin, being founded upon the dictates of refined justice, its basis is the doing of complete, essential, and perfect justice between the parties, and its object is the prevention of injustice. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Subrogation is legal as well as equitable right. — Former Code 1882, §§ 2176 and 2177 made subrogation a legal as well as equitable right. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

What former Code 1882, §§ 2176 and 2177 did was to break down the exclusiveness of equity and carry the right of subrogation into law, so as to make equity and law concurrent and coequal with respect to this subject matter. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Regardless of its origin in equity, subrogation under former Code 1933, §§ 103-501 and 103-502 was now a legal as well as an equitable right. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Subrogation rights inchoate until principal unable to pay. — Contractor's surety has subrogation rights with respect to any funds earned and paid to the contractor and still in the contractor's hands. Until the surety is called upon to perform the surety's obligation under a payment or performance bond, however, the right of subrogation is an inchoate one, which becomes choate only upon the maturing and performance of the obligation to pay, which occurs only when the principal finds itself unable to pay and calls upon the surety to pay in accordance with the terms of the bond. Cotton States Mut. Ins. Co. v. Citizens & S. Nat'l Bank, 168 Ga. App. 83, 308 S.E.2d 199, 1983 Ga. App. LEXIS 3374 (1983).

Construction by courts. — Courts incline to extend rather than restrict the principle of subrogation. First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402, 1944 Ga. App. LEXIS 293 (1944).

Contract of suretyship alone does not give surety interest in security. — Surety has not, by virtue of the contract of suretyship alone, any right, title, or interest in property which the surety's principal has pledged to a creditor as security for a debt. Conley v. Kelley, 43 Ga. App. 822, 160 S.E. 532, 1931 Ga. App. LEXIS 574 (1931).

Subrogation of surety. — As soon as a debt is paid, the surety paying the debt is subrogated to the creditor's rights and to any and all remedies for the enforcement thereof for the surety's own reimbursement and is substituted in place of the creditor to all securities held by the latter for the payment of the debt. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Payment of debt is necessary. — Since the note maker brought action to cancel security deed after the creditor

assigned the note and security deed to the cosigner's estate when the note was paid from the cosigner's life insurance policy, the trial judge correctly refused to cancel the security deed which the creditor transferred to the cosigner's estate. Aultman v. United Bank, 259 Ga. 237, 378 S.E.2d 302, 1989 Ga. LEXIS 180 (1989).

Subrogation requires full payment. — Pro tanto assignment or subrogation will not be made upon payment of part of the debt. All of the debt must be paid before there is any subrogation. Erwin v. Brooke, 159 Ga. 683, 126 S.E. 777, 1925 Ga. LEXIS 39 (1925).

When less than the total amount of the debt is tendered, subrogation is not permitted. Jessee v. First Nat'l Bank, 154 Ga. App. 209, 267 S.E.2d 803, 1980 Ga. App. LEXIS 3240 (1980).

Party paying is surety. — To be substituted under this section for the creditor, it is necessary only that the payment of the debt should be made by a surety, it matters not whether the surety is a maker, endorser, drawer, acceptor, or what not. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Right extends to original security on which surety is bound. — "All securities" as used in this section will include the identical security, the judgment, promissory note, bill, bond, or other contractual instrument, upon which the surety and the cosureties are bound with and for the principal debtor. Though there was a conflict on the question, the better opinion was that the primary and original security, as well as all others, was embraced in the equitable right of subrogation as it existed prior to the Code, irrespective of any statute. Hull v. Myers, 90 Ga. 674, 16 S.E. 653, 1892 Ga. LEXIS 233 (1892).

Co-debtor was not a surety of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties that one was signing as the principal debtor and the other was signing as a surety. Johnson v. AgSouth Farm Credit, 267 Ga. App. 567, 600 S.E.2d 664, 2004 Ga. App. LEXIS 713 (2004).

Surety acquires state's security, not remedies. — Right of subrogation does not apply to the remedies which the state has against a citizen, but as to the security which the state has. That security passes to the surety who pays off a debt to the state. Irby v. Livingston, 81 Ga. 281, 6 S.E. 591, 1888 Ga. LEXIS 108 (1888).

Section does not allow surety to escape part of deficiency if cosurety is insolvent. — Former Code 1933, §§ 103-501 and 103-502 have never been construed to allow a cosurety to escape paying part of the deficiency in the share of an insolvent cosurety. Todd v. Windsor, 118 Ga. App. 805, 165 S.E.2d 438, 1968 Ga. App. LEXIS 1528 (1968).

Filing under UCC not necessary to preserve surety's priority. — Surety is "secured" by the surety's right of subrogation, which relates back to the issuance of the bond, to defeat intervening creditors. The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation, and a surety is not required to file under the UCC to preserve the surety's priority under the equitable right of subrogation. Pembroke State Bank v. Balboa Ins. Co., 144 Ga. App. 609, 241 S.E.2d 483, 1978 Ga. App. LEXIS 1706 (1978).

Sureties are discharged if creditor takes mortgaged property. — When a creditor on a promissory note signed by three persons, two of whom were sureties, having as further security for the debt a mortgage upon personal property, takes charge of such personalty, such property being sufficient in value to discharge the debt, and fails to appropriate it to a payment of the note, the sureties will be discharged from liability thereon. Barrett v. Bass Bros. & Co., 105 Ga. 421, 31 S.E. 435, 1898 Ga. LEXIS 528 (1898).

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74 Am. Jur. 2d, Suretyship, § 119.

Am. Jur. Pleading and Practice Forms.

23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

C.J.S.

72 C.J.S., Principal and Surety, § 181 et seq.

ALR.

Payment of entire claim of third person as condition of subrogation, 9 A.L.R. 1596; 32 A.L.R. 568; 46 A.L.R. 857; 53 A.L.R. 304; 91 A.L.R. 855.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 A.L.R. 551.

Right as between surety on contractor's bond and assignee of money to become due on contract, 76 A.L.R. 917.

Right of subrogation of fiduciary's surety to claim of the estate against third person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 A.L.R. 997.

Surety's right to be subrogated to obligee's right against third person as affected by equities in favor of latter which are insufficient to prevent his liability to obligee, 137 A.L.R. 700.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 A.L.R. 421.

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ECONOMIC DEVELOPMENT COUNCIL

Sec.
10-8-1 through 10-8-5. [Repealed].

10-8-1 through 10-8-5. [Reserved]

History.
Ga. L. 1976, p. 1098, §§ 1-4; Ga. L. 1977, p. 865, § 1; and Ga. L. 1978, p. 1434, §§ 1-2; repealed by Ga. L. 1987, p. 325, § 1, effective July 1, 1987.

Editor's notes.
Ga. L. 2009, p. 8, § 10 effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, designated this chapter as reserved.

CHAPTER 9

GEO. L. SMITH II GEORGIA WORLD CONGRESS CENTER

Article 1

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JUDICIAL DECISIONS

Main purpose of the General Assembly in passing this chapter was to construct and operate a World Congress Center. Greer v. State, 233 Ga. 667, 212 S.E.2d 836, 1975 Ga. LEXIS 1415 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

ARTICLE 1

GENERAL PROVISIONS

10-9-1. Short title.

This chapter shall be known and may be cited as the "Geo. L. Smith II Georgia World Congress Center Act."

History. Ga. L. 1974, p. 174, § 1; Code 1981, § 10-9-1, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 2017, p. 774, § 10/HB 323.

10-9-2. Re-creation of "Geo. L. Smith II Georgia World Congress Center Authority."

There is re-created the "Geo. L. Smith II Georgia World Congress Center Authority" as a body corporate and politic, which shall be an instrumentality of the State of Georgia and a public corporation.

History.
Code 1981, § 10-9-2, enacted by Ga. L. 1982, p. 1122, § 1.

10-9-3. Definitions.

As used in this chapter, the term:

(1) "Authority" means the Geo. L. Smith II Georgia World Congress Center Authority.

(2) "Cost" with respect to the terms "cost of the project" or "cost of the facilities" includes but is not limited to the following:

(A) All costs of the purchase, lease, or any other form of acquisition by agreement, eminent domain, or otherwise or improvement, construction, reconstruction, repair, or maintenance of the project or any facility or component of either;

(B) All costs of real or personal property required for the purposes of such project and of all facilities related thereto, including land and any rights or undivided interest therein, easements, franchises, water rights, fees, permits, approvals, licenses, and certificates and the security of such franchises, permits, approvals, licenses, and certificates and the preparation of any application therefor;

(C) All machinery, equipment, furnishings, and fixtures required for such project or facilities;

(D) Financing charges and interest prior to and during construction and during such additional period as the authority may reasonably determine to be necessary for the placing of such project or facilities in operation;

(E) Costs of engineering, architectural, and legal services;

(F) Fees paid to fiscal agents for financial and other advice or supervision;

(G) Cost of plans and specifications and all expenses necessary or incidental to the construction, purchase, or acquisition of the completed project or facilities or to determine the feasibility or practicability of the project or facilities;

(H) Fees paid pursuant to the "Georgia Allocation System" established by Article 8 of Chapter 82 of Title 36;

(I) Fees for letters of credit, bond insurance, debt service or debt service reserve insurance, surety bonds, or similar credit enhancement instruments;

(J) Costs of the payment or performance of any obligation of the authority with respect to any lease to or by the authority of or with respect to the project or any facilities or any component thereof;

(K) Administrative expenses and such other expenses as may be necessary or incidental to the financing authorized in this chapter;

(L) The repayment of any loans made for the advance payment of any part of such cost, including the interest thereon; and

(M) A fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, and such other reserves as may be reasonably required by the authority with respect to the financing and operation of its projects or facilities and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds may be authorized.

Any obligation or expense incurred for any of the purposes set forth in subparagraphs (A) through (M) of this paragraph shall be regarded as part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds or notes issued under this chapter.

(3) "Project" means a comprehensive international trade and convention center consisting of a complex of facilities suitable for multipurpose use for housing trade shows, conventions, and cultural, political, musical, educational, entertainment, athletic, or other events; for displaying exhibits of Georgia's counties, municipalities, industries, and attractions; and for promoting the agricultural, historical, natural, and recreational resources of the State of Georgia, including all facilities necessary or convenient to such purposes, regardless of whether such facilities are contiguous, including, by way of illustration and not limitation, the following facilities: exhibit halls; auditoriums; theaters and amphitheaters; stadiums or coliseums and related athletic fields, courts or other surfaces, and clubhouses and gymnasiums; restaurants and other facilities for the purveying of foods, beverages, publications, souvenirs, novelties, and goods and services of all kinds, whether operated or purveyed directly or indirectly through concessionaires, licensees or lessees, or other-

wise; parking facilities and parking areas in connection therewith; facilities deemed necessary or convenient within the structure of any facility, including any stadium or coliseum facility; meeting room facilities, including meeting rooms providing for simultaneous translation capabilities for several languages; museum facilities; facilities used for plazas, parks, pavilions, and pedestrian ways; related lands, buildings, structures, fixtures, equipment, and personalty appurtenant or convenient to the foregoing; and extension, addition, and improvement of such facilities. The project shall be located in the City of Atlanta and shall be known as the "Geo. L. Smith II Georgia World Congress Center," except that any facility included within the project may be otherwise designated by the authority. As used in this chapter, the project described by the term "Geo. L. Smith II Georgia World Congress Center" shall include the same project formerly known as and referred to as the "Georgia World Congress Center" and the authority may be referred to as the "Georgia World Congress Center Authority."

History.

Ga. L. 1974, p. 174, § 3; Code 1981, § 10-9-2; Code 1981, § 10-9-3, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1988, p. 556, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 1195, §§ 1, 2; Ga. L. 1994, p. 421, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, the correct spelling of "concessionaires" was substituted in the first sentence of paragraph (3).

10-9-4. Purpose of authority; powers generally.

(a) Without limiting the generality of any provision of this chapter, the general purpose of the authority is declared to be that of acquiring, constructing, equipping, maintaining, and operating the project, in whole or in part, directly or under contract with the Department of Economic Development or others, and engaging in such other activities as it deems appropriate to promote trade shows, conventions, and political, musical, educational, entertainment, recreational, athletic, or other events and related tourism within the state so as to promote the use of the project and the use of the industrial, agricultural, educational, historical, cultural, recreational, commercial, and natural resources of the State of Georgia by those using the project or visiting the state or who may use the project or visit the state.

(b) The authority shall have the following powers:

(1) To bring actions, complain, and implead in any judicial, administrative, arbitration, or other action or proceeding and, to the extent permitted by law, to have actions brought against it, to be impleaded, and to defend in such proceedings;

(2) To have a seal and alter the same at its pleasure;

(3) To make and alter bylaws, rules, and regulations, not inconsistent with law, for the administration and regulation of its business and affairs;

(4) To elect, appoint, or hire officers, employees, and other agents of the authority, including experts and fiscal agents, define their duties, fix their compensation, and establish a flexible employee benefit plan for authority employees which may include those flexible employee benefits described in Code Section 45-18-52;

(5) To acquire, by purchase, gift, lease, or otherwise and to own, hold, improve, and use and to sell, convey, exchange, transfer, lease, sublease, and dispose of real and personal property of every kind and character, or any interest therein, for its corporate purposes;

(6) To make all contracts and to execute all instruments necessary or convenient to its purposes;

(7) To accept loans or grants of money or materials or property of any kind from the United States of America or any agency or instrumentality thereof; the State of Georgia, its departments, agencies, or authorities; or any county or municipality of this state, upon the terms and conditions as may be imposed thereon to the extent the terms and conditions are not inconsistent with the limitation and laws of this state and are otherwise within the power of the authority;

(8) To exercise the power of eminent domain and acquire by condemnation, in accordance with the provisions of any and all existing laws applicable to the condemnation of property for public use, real property or rights of easement therein or franchises necessary or convenient for its corporate purposes;

(9) To borrow money for any of its corporate purposes and to provide for the payment of same, as may be permitted under the Constitution and the laws of the State of Georgia;

(10) To issue revenue bonds as is more fully provided for in this chapter;

(11) To contract with the state and its departments or any county, municipal corporation, political subdivision, public corporation, or public authority with respect to activities, services, or facilities the contracting parties are authorized by law to undertake or provide;

(12) To exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and the laws of the State of Georgia; and

(13) To do all things necessary or convenient to carry out the powers expressly given in this chapter.

(c) Said authority shall comply with all applicable state budgetary processes and procedures as relate to compensation of employees of the authority.

(d) The authority shall have the power to borrow money and to issue revenue bonds regardless of whether the interest payable by the authority incident to such loans or revenue bonds or income derived by the holders of the evidence of such indebtedness or revenue bonds is, for purposes of federal or state taxation, includable in the taxable income of the recipients of such payments or is otherwise not exempt from the imposition of such taxation on the recipient.

(e) The authority shall have the power to sell or dispense, upon obtaining a license from the Department of Revenue, or to permit others to sell or dispense, upon obtaining a license from the Department of Revenue, alcoholic beverages for consumption on the premises but only upon and within the territorial limits of property of or under the management and control of the authority. The authority shall not have the power to sell or dispense alcoholic beverages in unbroken packages for the purpose of permitting such unbroken packages to be carried off the premises. The authority shall determine and regulate by resolution, as it may amend from time to time, the conditions under which such sales or dispensing of alcoholic beverages for consumption on the premises shall be made or shall be permitted, including the hours and days during which the sale or dispensing of alcoholic beverages shall be made or shall be permitted.

History.

Ga. L. 1972, p. 245, § 2; Ga. L. 1974, p. 174, § 4; Code 1981, § 10-9-4, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1988, p. 556, § 2; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 1641, § 4; Ga. L. 1989, p. 1195, § 3; Ga. L. 1992, p. 2097, § 1; Ga. L. 2004, p. 690, § 3; Ga. L. 2014, p. 129, § 1/HB 246.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1992, a comma was inserted following "others" and "and" was inserted following "conventions," in subsection (a).

Law reviews.

For annual survey on administrative law, see 66 Mercer L. Rev. 1 (2014).

JUDICIAL DECISIONS

Nature of functions performed. — Functions performed by the World Congress Center Authority are primarily, if not exclusively, executive. Greer v. State, 233 Ga. 667, 212 S.E.2d 836, 1975 Ga. LEXIS 1415 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

10-9-4.1. Adoption and enforcement of ordinances relating to property, affairs, and administration of authority; penalties.

(a) In addition to and not in derogation of its other powers under this

chapter, the authority is empowered to exercise such of the police powers of the state as may be necessary to maintain peace and order.

(b) The authority shall have legislative power to adopt reasonable ordinances relating to the property, affairs, and administration of the authority for which no provision has been made by general law and which are not inconsistent with the general laws and Constitution of the State of Georgia and the laws and Constitution of the United States. The officers of the Georgia World Congress Center Police, including the Security Guard Division thereof, and law enforcement officers acting within the jurisdiction of the authority under paragraph (3) of subsection (d) of Code Section 10-9-15, and subject to the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," shall be authorized to serve and execute warrants and to make arrests for violation of ordinances adopted by the authority. For the purposes of exercising the powers and responsibilities of such officers as peace officers under paragraph (8) of Code Section 35-8-2, including their duties and responsibilities with respect to matters occurring within the limits of the facilities of the authority or requests by another law enforcement agency to provide aid and assistance, such officers shall have the same authority, powers, privileges, and immunities regarding enforcement of laws as law enforcement officers employed by the state. Prosecutions for violations of the ordinances of the authority shall be in the magistrate court sitting in the county in which such violation occurs as provided in Article 4 of Chapter 10 of Title 15. The authority may provide that ordinance violations may be tried upon citations with or without a prosecuting attorney as well as upon accusations in the manner prescribed in Code Section 15-10-63.

(c) The maximum punishment for violation of such an ordinance shall be stated in the ordinance and shall not exceed a fine of $500.00 or imprisonment for 60 days, or both.

(d) Nothing in this Code section shall prevent prosecution of any act which is a violation of an ordinance of the authority under any law applicable to such act.

History.
Code 1981, § 10-9-4.1, enacted by Ga. L. 1996, p. 916, § 1.

10-9-5. Transfer of duties of Department of Economic Development; actions to be performed by authority under contract with and on behalf of department; costs; ratification of past actions.

The authority is authorized and directed to contract with the Department of Economic Development to exercise on behalf of the department such future responsibility in connection with the acquisition, construc-

tion, operation, management, and maintenance of the project as is now or may be vested in the department; and the Department of Economic Development is authorized by such contract to delegate to the authority all of its responsibilities and powers with respect to the project and to transfer to the authority any and all contracts, plans, documents, or other papers of said department relating to the project, together with any and all funds heretofore or hereafter appropriated to it for the acquisition, construction, operation, management, or maintenance of the project or for all other purposes related to the project, other than appropriations made specifically for debt service purposes, as compensation to the authority under such contract. Under contract with the Department of Economic Development, as authorized in this Code section, the authority on behalf of the Department of Economic Development shall plan, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage the project, as hereinabove defined, on property owned by or leased by the State of Georgia in the City of Atlanta, Georgia, the cost of any such project to be paid in full or in part from the proceeds of general obligation bonds issued by the State of Georgia as the General Assembly may authorize or from such proceeds and other funds as may be available for such purposes, including any grant from the United States of America or any agency or instrumentality thereof. All actions of the authority and the Department of Economic Development, or their predecessors, heretofore taken in connection with such contractual relationship, are ratified and confirmed and shall not be affected by any provision of this chapter. Nothing in this Code section shall affect the powers or duties of the Georgia State Financing and Investment Commission or of the State Properties Commission. Nothing in this Code section nor anything in any contract between the authority and the Department of Economic Development shall prevent the Department of Economic Development from contracting with the Georgia Building Authority for the provision of a parking facility or for any other exercise of its powers necessary or convenient to the department.

History.

Ga. L. 1974, p. 174, § 5; Code 1981, § 10-9-5, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 224, § 3; Ga. L. 1989, p. 1641, § 5; Ga. L. 2004, p. 690, § 4; Ga. L. 2024, p. 1052, § 2(58)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "as authorized in this Code section," for "as herein authorized," in the second sentence and substituted "Nothing in this Code section" for "Nothing herein" at the beginning of the next to last sentence.

10-9-6. Appointment and terms of members of board of governors; vacancies; travel expenses and per diem.

(a) The board of governors of the authority shall consist of 15 members. Each member shall serve for a term of four years, with the beginning and ending dates of terms to be specified by the Governor except that the four additional positions added in 1999 shall be appointed for initial terms ending July 1, 2002, but their successors shall be appointed for four-year terms. All members of the board shall be appointed by the Governor of the State of Georgia and shall serve until the appointment and qualification of a successor. Said members shall be appointed from the general public; and no person holding any other office of profit or trust under the state shall be appointed to membership.

(b) All successors shall be appointed in the same manner as original appointments. Vacancies in office shall be filled in the same manner as original appointments. An appointment to fill a vacancy shall be for the unexpired term. No vacancy on the board shall impair the right of the quorum of the remaining members then in office to exercise all rights and perform all duties of the board.

(c) The members of the board of governors shall be entitled to and shall be reimbursed for their actual travel expenses necessarily incurred in the performance of their duties and, for each day actually spent in performance of their duties, shall receive the same per diem as do members of the General Assembly.

(d) The members of the authority in office on November 1, 1982, shall continue in office as members of the board of governors for the remainder of the terms for which they were appointed and until their successors are appointed and qualified pursuant to this Code section.

History.

Ga. L. 1972, p. 245, § 1; Ga. L. 1974, p. 174, § 2; Ga. L. 1975, p. 435, § 1; Ga. L. 1980, p. 1176, § 1; Code 1981, § 10-9-3; Code 1981, § 10-9-6, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1991, p. 1686, § 1; Ga. L. 1992, p. 6, § 10; Ga. L. 1999, p. 1040, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1991, "four-year" was substituted for "four year" in the second sentence of subsection (a).

JUDICIAL DECISIONS

Legislators may not constitutionally be authority members. — Legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions in violation of Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III). Greer v. State, 233 Ga. 667, 212

S.E.2d 836, 1975 Ga. LEXIS 1415 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

Former invalid provisions did not make rest of chapter unconstitutional. — Former provisions of this section relating to legislative membership on the governing board held to be unconstitutional and stricken therefrom did not render the entire chapter unconstitutional. Greer v. State, 233 Ga. 667, 212 S.E.2d 836, 1975 Ga. LEXIS 1415 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

OPINIONS OF THE ATTORNEY GENERAL

Former provisions were unconstitutional. — Former provisions of this section were invalid to the extent that membership on the authority created thereby included officers of the legislative branch of state government, violating Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III). 1974 Op. Att'y Gen. No. 74-109 (rendered under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

10-9-7. Management of business and affairs of authority; bylaws, rules, and regulations; quorum; delegation of authority to committees.

(a) The management of the business and affairs of the authority shall be vested in the board of governors, subject to the provisions of this chapter and to the provisions of bylaws adopted by the board of governors as authorized by this chapter.

(b) The board of governors shall have the power to make the bylaws, rules, and regulations for the government of the authority and the operation, management, and maintenance of the project as it may determine appropriate.

(c) A majority of the number of members of the board then in office shall constitute a quorum for the transaction of business. The vote of a majority of the members of the board present at the time of the vote, if a quorum is present at such time, shall be the act of the board unless the vote of a greater number is required by law or by the bylaws of the board of governors.

(d) If the bylaws of the authority so provide, the board of governors, by resolution adopted by a majority of the full board of governors, may designate from among its members an executive committee and one or more other committees, each consisting of two or more members of the board and each of which, to the extent provided in such resolution or the bylaws of the authority, shall have and may exercise such authority as the board of governors may delegate to it. Unless otherwise provided in the bylaws of the authority, any such committee shall act by a majority of its members. The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of governors or any member thereof of any responsibility imposed by law.

History.
Code 1981, § 10-9-7, enacted by Ga. L. 1982, p. 1122, § 1.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 1985, "full board of governors" was substituted for "full board of directors" in the first sentence of subsection (d).

10-9-8. Meetings of board; notice; removal of members from board.

(a) Meetings of the board of governors, regular or special, shall be held at the time and place fixed by or under the bylaws or, if not so fixed, by the board. Regular meetings of the board may be held with or without notice as prescribed in the bylaws. Special meetings of the board shall be held upon such notice as is prescribed in the bylaws. Unless otherwise prescribed in the bylaws, written notice of the time and place of special meetings of the board shall be given to each member either by personal delivery or by mail, telegram, or cablegram at least two days before the meeting. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. Meetings of the board may be called by the chairman of the board or by any other person or persons authorized by the bylaws.

(b) Upon receipt of a resolution by a majority of the number of members of the board authorized by this chapter which so certifies and requests, adopted after notice to the defaulting member, the Governor of the state may by executive order remove from membership a member of the board who has failed to attend three consecutive meetings of the board. The action of the Governor shall be final and nonreviewable.

History.
Code 1981, § 10-9-8, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1984, p. 22, § 10.

10-9-9. Officers of board; terms; authority; compensation.

(a) The board of governors shall elect or appoint such officers as may be provided in the bylaws and may delegate to such officers, who need not be members of the board, such authority and responsibility as the board may determine appropriate.

(b) Each officer and employee of the authority shall serve at the pleasure of the authority and shall hold office for the term for which he is elected or appointed and until his successor has been elected or appointed and has qualified or until his earlier resignation, removal from office, or death.

(c) All officers and agents of the authority shall have such authority and perform such duties in the management of the authority as may be

provided in the bylaws or as may be determined by action of the board not inconsistent with law or with the bylaws.

(d) The board of governors shall have authority to fix the compensation of its officers and employees, except that officers or employees who are also members of the board shall serve without additional compensation for such service.

(e) The authority shall be authorized to obtain conviction data with respect to its officers and employees or prospective officers and employees. For such purpose, the authority may submit to the Georgia Crime Information Center two complete sets of fingerprints of the officer or employee or the applicant for appointment or employment, the required records search fees, and such other information as may be required. Upon receipt thereof, the Georgia Crime Information Center shall promptly transmit one set of fingerprints to the Federal Bureau of Investigation for a search of bureau records and an appropriate report and shall retain the other set and promptly conduct a search of its own records and records to which it has access. The Georgia Crime Information Center shall notify the authority in writing of any derogatory finding, including, but not limited to, any conviction data regarding the fingerprint records check or if there is no such finding. All conviction data received by the authority shall be used by it for the exclusive purpose of making employment decisions, shall not be a public record, shall be privileged, and shall not be disclosed to any other person or agency except to any person or agency which otherwise has a legal right to inspect the employment file. All such records shall be maintained by the authority pursuant to laws regarding such records and the rules and regulations of the Federal Bureau of Investigation and the Georgia Crime Information Center, as applicable. As used in this subsection, the term "conviction data" means a record of a finding or verdict of guilty or plea of guilty or plea of nolo contendere with regard to any crime, regardless of whether an appeal of the conviction has been sought.

History.

Code 1981, § 10-9-9, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1991, p. 1093, § 1; Ga. L. 2024, p. 1052, § 2(59)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "subsection, the term" for "subsection," in subsection (e).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1991, a comma was deleted following "qualified" in subsection (b) and "bureau" was substituted for "Bureau" in the third sentence of subsection (e).

10-9-10. Exemption of authority from taxation.

It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and are public

purposes and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this chapter. The authority shall be required to pay no taxes or assessments upon any property acquired or under its jurisdiction, control, possession, or supervision or upon its activities in the development, construction, operation, or maintenance of any of the projects or facilities erected, maintained, or acquired by it or any fees, rentals, or other charges for the use of such facilities or other income received by the authority and shall not be subject to regulation of its activities in the acquisition, development, construction, operation, or maintenance of any of the projects or facilities acquired, developed, constructed, operated, or maintained by it by any county or municipal corporation of this state. The exemption from taxation provided for in this Code section shall include an exemption from sales and use tax on tangible personal property purchased by the authority for use exclusively by the authority. The revenue bonds or other evidence of indebtedness issued by the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within this state by the state or its municipalities or political subdivisions.

History.
Ga. L. 1974, p. 174, § 6; Code 1981, § 10-9-6; Code 1981, § 10-9-10, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1989, p. 1195, § 4; Ga. L. 2007, p. 309, § 13/HB 219.

Law reviews.
For annual survey on local government law, see 71 Mercer L. Rev. 189 (2019).

10-9-11. Venue and jurisdiction of actions under chapter.

Any action against the authority to protect or enforce any rights under the provisions of this chapter shall be brought in the Superior Court of Fulton County, Georgia, and such court shall have exclusive, original jurisdiction of such actions.

History.
Ga. L. 1974, p. 174, § 8; Code 1981, § 10-9-13; Code 1981, § 10-9-11, enacted by Ga. L. 1982, p. 1122, § 1.

10-9-12. Acceptance of grants, contributions, and gifts of money, property, or services.

The authority, in addition to the moneys received from the collection of revenues, rents, and earnings derived under the provisions of this chapter or from the Department of Economic Development, shall have authority to accept from any entity or agency of the United States, of this state, or of any county, municipality, political subdivision, or public authority and from any private individual or entity, grants, contributions, or gifts of either money or property, real or personal, tangible or intangible, or services or other things of value, in the furtherance of the purposes and powers of the authority. Incident to the acceptance of any

such grant, contribution, or gift, the authority may accept and bind itself to express terms and conditions imposed incident to the grant, contribution, or gift governing the use and application of the money or property or the use of disposition of any property acquired therewith, provided that such term or condition is expressly accepted by the authority, is consistent with the purposes and powers of the authority under this chapter, and is not inconsistent with the Constitution or laws of this state. Any such term or condition may require the authority to hold any money or property in trust separate from other money or property of the authority and any such money or property so held shall not be subject to any claims against or liability of the authority not arising from the use or application of the money or property so held or the operation of the property so held or acquired therewith.

History.
Ga. L. 1974, p. 174, § 9; Code 1981, § 10-9-8; Code 1981, § 10-9-12, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1989, p. 1641, § 6; Ga. L. 1994, p. 421, § 2; Ga. L. 2004, p. 690, § 5.

10-9-13. Moneys received considered trust funds; exception.

All moneys received pursuant to the authority of this chapter, whether as grants, contributions, or gifts or as revenues, rents, and earnings, shall be deemed to be trust funds to be held and applied solely as provided in this chapter, except that grants, contributions, or gifts, the terms or conditions of which require that the proceeds thereof be held separately in trust, shall be held in the manner and applied solely for the purposes specified.

History.
Ga. L. 1974, p. 174, § 10; Code 1981, § 10-9-9; Code 1981, § 10-9-13, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1994, p. 421, § 3.

10-9-14. Authority to fix charges for use; use of earnings; terms and conditions for use of project; contract required; penalty for violation of commercial activity prohibition.

(a) The board of governors of the authority is authorized to fix rentals, fees, prices, and other charges which any tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall pay to the authority for the use of the project or the facilities or part thereof or combination thereof, and for the goods and services provided by the authority in connection with such use, as the authority may deem necessary or appropriate to provide in connection with such use, and to charge and collect the same, and to establish and to perform and pay any obligations established under such other terms, conditions, and considerations as the authority and any such tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall determine

necessary or appropriate. Such rentals, fees, prices, and other charges shall be so fixed and adjusted in respect to the aggregate thereof from the project or facilities or any part thereof so as to be reasonably expected to provide a fund sufficient with other revenues of such project and funds available to the authority, if any, to pay the cost of acquiring, constructing, equipping, maintaining, repairing, and operating the project or facilities, including the payment of debt service with respect to any revenue bonds issued under Article 3 of this chapter or other indebtedness and the payment or performance of contractual obligations incurred or undertaken by the authority and the establishment of reserves for debt service for such revenue bonds or for extraordinary repairs and insurance, unless such cost shall be otherwise provided for, which costs shall be deemed to include the expenses incurred by the authority on account of the project for water, light, sewer, and other services furnished by other facilities at such project.

(b) The authority may establish the terms and conditions upon which any lessee, sublessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall be authorized to use the project as the authority may determine necessary or appropriate. The authority may by contract require any such person or entity to indemnify and hold harmless the authority and its officers, agents, or employees from the claims for personal injury or property damage or loss of such person or others employed by or admitted to the project or any of its facilities by such person arising out of or in connection with such use of the project from any cause, including negligence of the authority, its officers, agents, or employees, notwithstanding any other provision of law, including but not limited to subsection (b) of Code Section 13-8-2.

(c) A contract between the authority and any tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor and any consent otherwise granted by the authority for the use of or conduct of any activity within any project of or under the control and management of the authority shall not be exercisable or enforceable against the authority without the consent of the authority by any person except the person named in such contract. No such contract or consent shall be assignable or transferable to any other person without the consent of the authority.

(d) The authority shall have the power to adopt reasonable rules and regulations governing the use during an event period of sidewalks and public streets immediately adjacent to any project of or under the control and management of the authority so as to ensure the safe and orderly operation of the project and such areas, to prevent disruption of and interference with the conduct of such event, and to prevent public solicitation or public distribution of literature which is competitive with the activities of the person to whom the authority has granted the right to conduct such event.

(e) No person shall be authorized to engage publicly in any commercial activity or sale of goods or services, the public solicitation of commercial activity or the sale of goods or services, or begging, panhandling, or other public solicitation of funds for any purpose or the public distribution of literature within the boundaries of any project of or under the control and management of the authority without the prior express written consent of the authority and then only in accordance with the consent so given.

(f) No person shall be authorized to engage during any event period in any public commercial activity or the sale of goods or services, the public solicitation of commercial activity or sale of goods or services, or begging, panhandling, or other public solicitation of funds for any purpose, or the public distribution of literature upon or within sidewalks or public streets adjacent to any project of or under the control and management of the authority without the prior written consent of the authority and then only in accordance with the consent so given.

(g) Any person who shall violate the provisions of subsection (e) or (f) of this Code section shall be guilty of a misdemeanor.

(h) As used in this Code section, "event period" means the period on any day on which an event has been scheduled by or under contract with the authority within any project of or under the management and control of the authority beginning two hours prior to the scheduled start of such event on that day and ending one hour after the closing of such event on that day.

(i) The provisions of this Code section are cumulative and shall not be in derogation of the rights and powers of the authority to control access to and use of any project of or under the control and management of the authority or applicable civil or criminal remedies or penalties otherwise provided by law.

History.

Ga. L. 1974, p. 174, § 11; Code 1981, § 10-9-10; Code 1981, § 10-9-14, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1988, p. 556, § 3; Ga. L. 1989, p. 1195, § 5; Ga. L. 1991, p. 1093, § 2.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, the correct spelling of "concessionaire" was substituted in the first sentence of subsection (b).

Pursuant to Code Section 28-9-5, in 1991, "transferable" was substituted for "transferrable" near the end of subsection (c) and "to" was inserted preceding "conduct" near the end of subsection (d).

OPINIONS OF THE ATTORNEY GENERAL

Constitutionality. — O.C.G.A. § 10-9-14, and in particular subsections (d), (e) and (f), empowering the authority to regulate activities on the sidewalks and streets immediately adjacent to the World Congress Center's projects during an event period do not violate the City of Atlanta's home rule power under Ga.

Const. 1983, Art. IX, Sec. II, Para. III(c) and O.C.G.A. § 36-35-3(a). 1994 Op. Att'y Gen. No. U94-4.

RESEARCH REFERENCES

ALR.

Laws regulating begging, panhandling, or similar activity by poor or homeless persons, 7 A.L.R.5th 455.

10-9-14.1. Bylaws, resolutions, regulations, or ordinances governing use of facilities; exclusion of persons; grants for particular uses.

(a) Notwithstanding any designation or name of a facility of the authority, the facilities of the authority owned by it or under its control and management, including without limitation facilities named as or used for plazas, parks, pavilions, and vehicular and pedestrian ways, shall not be open or accessible to the public or be generally available for public or other use except (1) as may be determined or designated by the authority by bylaw, resolution, regulation, or ordinance as may be adopted by and amended from time to time by the authority either governing all facilities of the authority or governing a specific facility and then only for the purposes, at the times, and in the manner provided in such bylaw, resolution, regulation, or ordinance governing such facilities or facility and (2) as may be permitted by the authority to lessees, sublessees, licensees, sublicensees, exhibitors, concessionaires, franchisees, or vendors operating under a grant from the authority authorized by or entered into in accordance with bylaw, resolution, regulation, or ordinance of the authority and then only in accordance with the terms of that grant.

(b) The authority may exclude from the facilities of the authority any person whose access to or use of the facility is not authorized or permitted in accordance with such grant, bylaw, resolution, regulation, or ordinance and remove any person present on such facilities whose presence or activities during such presence are not in accordance with such grant, bylaw, resolution, regulation, or ordinance. In addition, the authority may exclude or remove any person from a facility of the authority or conditionally limit access of a person to a facility of the authority where the authority in good faith determines that the person's activities pose an actual or imminent threat of harm, that the person's activities do or are intended to disrupt or interfere with the activities or functions authorized or permitted within such facility, that the person's activities do or are likely to violate the security of persons authorized or permitted to use the facility, or that the person's activities constitute a hazard to the safe or orderly operation of the facilities of the authority or to the safety of the authority's facilities or the occupants thereof.

(c) Any bylaw, resolution, regulation, or ordinance adopted by the authority authorizing or permitting public or other use and access to any facility by the public or by persons other than the authority shall permit the authority from time to time directly to conduct activities within such facility or for other purposes which may be exclusive of access to and use of the facility by the public or by others otherwise authorized or permitted. Any bylaw, resolution, regulation, or ordinance adopted by the authority authorizing or permitting public or other use and access to any facility by persons other than the authority shall also permit the authority by lease, license, concession, franchise, or vending rights agreement, as the authority determines appropriate, to grant to others the right to use designated facilities of the authority to conduct activities thereon or for other purposes which shall be exclusive of the rights of others, including the public, to the extent set forth in the grant. During the period of such direct use or of the term of such grant and at such times preceding or following such period as the authority determines appropriate, notwithstanding any bylaw, resolution, regulation, or ordinance permitting public or other use and access to a facility, the authority may close the facility for which direct use or grant is made to access by the public or others and exclude and remove from the facility of the authority for which such direct use or grant is made any person not authorized by the authority or by the authority's grantee to obtain access thereto. To the extent necessary to effectuate the purposes of such direct use or grant, the authority may temporarily close to vehicular and pedestrian access public streets and sidewalks within such facilities or limit vehicular and pedestrian traffic thereon and, after agreement with municipalities having jurisdiction, temporarily close to vehicular and pedestrian traffic public streets and sidewalks adjacent to such facilities or limit vehicular and pedestrian traffic thereon.

(d) The provisions of this Code section are in addition to and not in derogation of the other provisions of this chapter, including Code Section 10-9-14.

History.
Code 1981, § 10-9-14.1, enacted by Ga. L. 1996, p. 916, § 2.

10-9-15. Power of authority with regard to ensuring maximum use of project; rules and regulations for operation and use; security guards.

(a) The authority shall operate the project so as to ensure maximum use of the project. In connection with and incident to its operation of the project, the authority may engage in such activities as it deems appropriate to promote trade shows, conventions, and tourism within the state so as to promote the use of the project and the use of the

industrial, agricultural, educational, historical, cultural, recreational, and natural resources of the State of Georgia by those using or visiting the project.

(b) The authority shall have the power to lease and make contracts with political subdivisions and agencies of this state with respect to the use of the project and the goods and services of the authority provided in connection with such use or the activities which the authority is otherwise authorized to undertake.

(c) It shall be the duty of the board of governors of the authority to prescribe rules and regulations for the operation and governing the use of the project constructed under the provisions of this chapter, including rules and regulations to ensure maximum use of the project.

(d)(1) The authority shall be authorized to establish the Georgia World Congress Center Police to keep watch over and protect the Geo. L. Smith II Georgia World Congress Center and such other properties or projects of the authority or as may be under the management and control of the authority. The police officers of the Georgia World Congress Center Police shall be subject to Chapter 8 of Title 35. Subject to rules and regulations of the authority, any person employed as a police officer of the Georgia World Congress Center Police who is accepted as a candidate for or who has obtained certification under Chapter 8 of Title 35 shall have powers to possess and carry firearms and to exercise such other powers and duties as are possessed by a police officer or other peace officer employed by the county or the municipality in which the properties of or under the control and management of the authority are located, and without limitation of the foregoing, shall have the powers of protecting and preserving the properties or projects of or under the management and control of the authority and, within such properties and projects and within the boundaries of any public street or sidewalk adjacent to any such property or projects or which area is otherwise subject to regulation by the authority, have the powers of protecting persons, of enforcing law and order, of controlling pedestrian and vehicular traffic, and of prevention, detection, and investigation of offenses committed thereon.

(2) The authority shall be authorized to establish the Security Guard Division of the Georgia World Congress Center Police and to employ and assign security guards to the division. Security guards so assigned shall not be subject to Chapter 8 of Title 35. Subject to rules and regulations of the authority, security guards shall have the powers of protecting and preserving the properties in projects of or under the management and control of the authority and within such properties or projects and within the boundaries of any public street or sidewalk adjacent to any such property or projects, or which is

otherwise subject to regulation by the authority, have the powers of protecting persons, enforcing law and order, controlling pedestrian and vehicular traffic, and of the prevention, detection, and investigation of offenses committed thereon and for those purposes shall be authorized to exercise such powers as are authorized by law for security guards employed by the Georgia Building Authority and subsection (f) of Code Section 50-9-9.

(3) The authority may contract for the provision of security services to the property or areas subject to control of the authority:

(A) With any state, county, or municipal government, agency, or authority police or security force;

(B) Subject to regulations of such police or security force, with the members of such force; and

(C) With any private person authorized and licensed to provide such services.

(4) Under such terms and conditions as may be established by agreement with such agencies, the Board of Public Safety through the Georgia Police Academy or the Georgia Peace Officer Standards and Training Council may provide such limited or specialized training to police officers or security guards employed by the authority as may be appropriate to the responsibilities and powers vested in such police officers or security guards. Nothing in this Code section shall limit the duty of the Georgia Peace Officer Standards and Training Council or the Georgia Police Academy to provide training necessary for certification under Chapter 8 of Title 35.

(5) Law enforcement officers employed by the state or the county or municipality in which properties, projects, or facilities of or under the control or management of the authority are located may with respect to the police officers and security guards provided for under this subsection, exercise:

(A) Concurrent law enforcement jurisdiction over protecting and preserving such properties, projects, or facilities; and

(B) The power to enforce law and order and in the event of conflict shall have jurisdiction over such authority police officers and security guards on law enforcement matters and investigation of offenses committed on such properties, projects, or facilities.

History.

Ga. L. 1972, p. 245, § 2; Ga. L. 1974, p. 174, §§ 4, 12; Ga. L. 1980, p. 1043, § 1; Code 1981, §§ 10-9-4, 10-9-11; Code 1981, § 10-9-15, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1983, p. 3, § 8; Ga. L. 1985, p. 149, § 10; Ga. L. 1991, p. 1093, § 3; Ga. L. 1993, p. 91, § 10.

Code Commission notes.

Pursuant to Code Section 28-9-5, in

1991, a comma was inserted following "detection" in paragraph (d)(2), "authority" was substituted for "Authority" in subparagraph (d)(5)(B) and a comma was inserted following "projects" at the end of subparagraph (d)(5)(B).

Pursuant to Code Section 28-9-5, in 1992, "terms" was substituted for "term" in the first sentence of paragraph (d)(4).

JUDICIAL DECISIONS

Decision not to rent space to promoter's competitor constitutional. — Authority's decision not to rent space to a promoter for a proposed fall home show but to rent instead to a competitor to hold its own fall home show did not violate Ga. Const. 1983, Art. III, Sec. VI, Para. V. Exposition Enters., Inc. v. George L. Smith II Ga. World Congress Ctr. Auth., 177 Ga. App. 211, 338 S.E.2d 726, 1985 Ga. App. LEXIS 2560 (1985).

10-9-16. Duties of Attorney General.

The Attorney General shall provide legal services for the authority and in connection therewith the provisions of Chapter 15 of Title 45, relating to the Attorney General, shall apply.

History.

Ga. L. 1973, p. 666, § 3; Ga. L. 1974, p. 174, § 13; Code 1981, § 10-9-12; Code 1981, § 10-9-16, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1983, p. 3, § 8.

10-9-16.1. Authority to contract with local entities with regard to local trade and convention center; provision of goods and services; costs, liabilities, and expenses.

(a) The authority is authorized to contract with any county, municipality, public corporation, or public authority, or combination of the foregoing (any such county, municipality, corporation, authority, or combination being hereinafter referred to as the "local entity"), to exercise on behalf of the local entity such responsibility in connection with the planning, design, acquisition, construction, operation, management, and maintenance of a local trade and convention center of such local entity, as is now or may be hereafter vested in the local entity, and to provide to the local entity goods or services of the authority in connection with the planning, design, acquisition, construction, operation, management, and maintenance of any local trade and convention center of the local entity, all as the parties may by contract determine appropriate. Any such local entity is authorized by such contract to delegate to the authority all or any of its responsibilities and powers with respect to the planning, design, acquisition, construction, operation, management, and maintenance of a local trade and convention center and to obtain from the authority such goods or services of the authority in connection with the planning, design, acquisition, construction, operation, management, and maintenance of a local trade

and convention center as the parties may by contract determine appropriate.

(b) Any such contract shall provide that the local entity shall reimburse the authority for all of the costs, liabilities, and expenses of the authority incurred by the authority in exercising such powers or providing such goods or services. The authority shall not directly or indirectly be liable for any liability, cost, or expense incurred by such local entity in the acquisition, construction, operation, management, or maintenance of a local trade and convention center. No funds derived by the authority from or in connection with the operation of the Geo. L. Smith II Georgia World Congress Center shall be used to pay any liability, cost, or expense incurred in connection with such contract, except pursuant to contract providing for reimbursement of the authority by the local entity therefor.

(c) As used in this Code section, "local trade and convention center" means a trade and convention center owned or operated by a local entity for the purpose of housing trade shows, conventions, cultural, political, musical, educational, entertainment, recreational, athletic, and other events, for displaying exhibits of counties, municipalities, industries, and attractions, or for promoting agricultural, historic, natural, and recreational resources of the state, which includes one or more facilities suitable for such purposes, including, but not limited to, exhibition halls, meeting halls, auditoriums, theaters, stadiums, facilities for purveying of foods, beverages, and other goods and services, parking facilities and parking areas in connection therewith, and related buildings or facilities usual and convenient to such purposes and activities.

History.
Code 1981, § 10-9-16.1, enacted by Ga. L. 1988, p. 673, § 1; Ga. L. 1989, p. 14, § 10.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1988, "Geo. L. Smith, II" was inserted preceding "Georgia World Congress Center" in subsection (b).

10-9-16.2. Disposition of real property not required by authority; excepted property.

(a) This Code section does not apply to any real property:

(1) Held by the authority for management under Code Section 10-9-5 or contract with the Department of Economic Development pursuant to such Code section;

(2) Held by the authority as lessee under lease from the Department of Economic Development;

(3) Acquired by the authority with the proceeds of revenue bonds issued under Article 3 of this chapter; or

(4) Acquired with the proceeds of appropriations or bonds issued by the state assigned to the authority for management.

(b) If the authority determines, in its sole discretion, that any real property held by it is no longer required for the purposes for which it was originally acquired or that the furtherance of the purposes of the authority would be served thereby, the authority may sell, lease, or otherwise convey, on such terms and conditions and with or without consideration as the authority determines appropriate, such real property to any county or municipality in which such property is located or to an authority created by such county or municipality, for the authorized public purposes of such entity, including, by way of illustration and not limitation, the public purposes set forth in Chapter 42, 44, 61, or 64 of Title 36, relating to local government.

History. Code 1981, § 10-9-16.2, enacted by Ga. L. 1994, p. 421, § 4; Ga. L. 2004, p. 690, § 6.

10-9-17. Powers declared supplemental and additional.

The foregoing Code sections of this chapter shall be deemed to provide an additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by the Constitution and laws of the State of Georgia and shall not be regarded as in derogation of any powers now existing.

History. Ga. L. 1974, p. 174, § 14; Code 1981, § 10-9-15; Code 1981, § 10-9-17, enacted by Ga. L. 1982, p. 1122, § 1.

10-9-18. Liberal construction of chapter.

This chapter, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof.

History. Ga. L. 1974, p. 174, § 15; Code 1981, § 10-9-16; Code 1981, § 10-9-18, enacted by Ga. L. 1982, p. 1122, § 1.

10-9-19. Accounts and audits.

The accounts of the authority created in this chapter shall be kept as separate and distinct accounts and shall be audited by the Department of Audits and Accounts of the state.

History. Ga. L. 1974, p. 174, § 16; Code 1981, § 10-9-14; Code 1981, § 10-9-19, enacted by Ga. L. 1982, p. 1122, § 1.

ARTICLE 2

OVERVIEW COMMITTEE

10-9-20. Geo. L. Smith II Georgia World Congress Center Authority Overview Committee created; composition; officers; duties.

There is created as a joint committee of the General Assembly the Geo. L. Smith II Georgia World Congress Center Authority Overview Committee to be composed of five members of the House of Representatives appointed by the Speaker of the House, one of whom shall be a member of the minority party, five members of the Senate appointed by the Senate Committee on Assignments, one of whom shall be a member of the minority party, the chairperson of the House Committee on Economic Development and Tourism or his or her designee, and the chairperson of the Senate Committee on Economic Development and Tourism or his or her designee. The members of the committee shall serve two-year terms concurrent with their terms as members of the General Assembly. The chairperson of the committee shall be appointed by the Senate Committee on Assignments from the membership of the committee, and the vice chairperson of the committee shall be appointed by the Speaker of the House from the membership of the committee. The chairperson and vice chairperson shall serve terms of two years concurrent with their terms as members of the General Assembly. Vacancies in an appointed member's position or in the offices of chairperson or vice chairperson of the committee shall be filled for the unexpired term in the same manner as the original appointment. The committee shall periodically inquire into and review the operations of the Geo. L. Smith II Georgia World Congress Center Authority, as well as periodically review and evaluate the success with which the authority is accomplishing its statutory duties and functions as provided in this chapter.

History.

Ga. L. 1978, p. 1929, § 1; Code 1981, § 10-9-30; Code 1981, § 10-9-20, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 2003, p. 386, § 1; Ga. L. 2009, p. 303, § 5/HB 117; Ga. L. 2024, p. 922, § 2-1/SB 341, effective May 6, 2024.

Amendments.

The 2024 amendment, effective May 6, 2024, substituted "Senate Committee on Economic Development and Tourism" for "Senate Economic Development Committee" near the end of the first sentence.

Editor's notes.

Ga. L. 2009, p. 303, § 20/HB 117, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

10-9-21. Cooperation of other state agencies; staff members and independent consultants.

The state auditor, the Attorney General, and all other agencies of state government, upon request by the committee, shall assist the committee in the discharge of its duties set forth in this article. The committee may employ not more than two staff members and may secure the services of independent accountants, engineers, and consultants.

History. Ga. L. 1978, p. 1929, § 2; Code 1981, § 10-9-31; Code 1981, § 10-9-21, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 149, § 10.

10-9-22. Authority to cooperate with committee; enforcement actions; annual committee reports.

The Geo. L. Smith II Georgia World Congress Center Authority shall cooperate with the committee, its authorized personnel, the Attorney General, the state auditor, the state accounting officer, and other state agencies in order that the charges of the committee, set forth in this article, may be timely and efficiently discharged. The authority shall submit to the committee such reports and data as the committee shall reasonably require of the authority in order that the committee may adequately perform its functions. The Attorney General is authorized to bring appropriate legal actions to enforce any laws specifically or generally relating to the Geo. L. Smith II Georgia World Congress Center Authority. The committee shall, on or before the first day of January of each year, and at such other times as it deems necessary, submit to the General Assembly a report of its findings and recommendations based upon the review of the Geo. L. Smith II Georgia World Congress Center Authority, as set forth in this chapter.

History. Ga. L. 1978, p. 1929, § 3; Code 1981, § 10-9-32; Code 1981, § 10-9-22, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 2005, p. 694, § 20/HB 293.

10-9-23. Criteria for evaluating authority.

In the discharge of its duties, the committee shall evaluate the performance of the Geo. L. Smith II Georgia World Congress Center Authority consistent with the following criteria:

(1) Prudent, legal, and accountable expenditure of public funds;

(2) Efficient operation; and

(3) Performance of its statutory responsibilities.

History. Ga. L. 1978, p. 1929, § 4; Code 1981, § 10-9-33; Code 1981, § 10-9-23, enacted by Ga. L. 1982, p. 1122, § 1.

10-9-24. Expenditure of funds; expenses of committee members.

(a) The committee is authorized to expend state funds available to the committee for the discharge of its duties. Said funds may be used for the purposes of compensating staff personnel, paying for services of independent accountants, engineers, and consultants, and paying all other necessary expenses incurred by the committee in performing its duties.

(b) The members of the committee shall receive the same compensation, per diem, expenses, and allowances for their service on the committee as is authorized by law for members of interim legislative study committees.

(c) The funds necessary for the purposes of the committee shall come from the funds appropriated to and available to the legislative branch of government.

History. Ga. L. 1978, p. 1929, § 5; Code 1981, § 10-9-34; Code 1981, § 10-9-24, enacted by Ga. L. 1982, p. 1122, § 1.

ARTICLE 3

REVENUE BONDS

10-9-40. Issuance of bonds authorized; purpose.

The authority shall have the power and is authorized at one time or from time to time to provide by one or more authorizing resolutions for the issuance of revenue bonds, but the authority shall not have the power to incur indebtedness under this article in excess of the principal sum of $500 million but excluding from such limit bonds issued for the purpose of refunding bonds which have been previously issued. The authority shall have the power to issue such revenue bonds and to use the proceeds thereof for the purpose of paying all or part of the costs of the project to the extent but only to the extent the costs are incurred for the following facilities: multipurpose stadiums or coliseums and related athletic fields, courts, or surfaces, and clubhouses and gymnasiums; facilities for the purveying of goods and services within such stadiums or coliseums; parking facilities and parking areas in connection therewith; facilities deemed necessary or convenient within the structure of such stadiums or coliseums; and related lands, buildings, structures, fixtures, equipment, and personalty appurtenant or convenient to such facilities and the extension, addition, or improvement of such facilities, which facilities are to be operated as part of the project, as such facilities shall be designated in the resolution of the board of governors of the authority authorizing the issuance of such bonds.

History.
Code 1981, § 10-9-40, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 2017, p. 20, § 1/HB 264; Ga. L. 2019, p. 453, § 1/HB 221.

10-9-41. Terms and conditions of bonds; form.

(a) The revenue bonds of each issue shall be dated, shall bear interest, shall be payable in such medium of payment as to both principal and interest as may be determined by the authority, and may be made redeemable before maturity, at the option of the authority, at such price or prices and under such terms and conditions as may be fixed by the authority in the resolution providing for the issuance of revenue bonds.

(b) The authority shall determine the form of the revenue bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the revenue bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or outside the state.

History.
Code 1981, § 10-9-41, enacted by Ga. L. 1988, p. 556, § 4.

10-9-42. Signatures; seal.

In case any officer whose signature or facsimile signature appears on any revenue bonds ceases to be an officer before the delivery of the revenue bonds, the signature or facsimile signature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until the delivery. All such revenue bonds shall be signed by or bear the facsimile signature of the chairman or vice chairman of the board of governors of the authority, and the official seal of the authority shall be affixed thereto and attested by or bear the facsimile signature of the secretary or assistant secretary of the authority; and any bond may be signed, sealed, and attested on behalf of the authority by any such persons as at the actual time of the execution of the revenue bonds shall be duly authorized or hold the proper office, although at the date of the issuance of the revenue bonds such person may not have been so authorized or shall not have held such office. The facsimile signature of any officer of the authority may be imprinted in lieu of manual signature if the authority so directs.

History.
Code 1981, § 10-9-42, enacted by Ga. L. 1988, p. 556, § 4.

10-9-43. Tax exemption.

The revenue bonds and the interest payable thereon shall be exempt from all taxation within the state imposed by the state or any county, municipal corporation, or other political subdivision of the state.

History.
Code 1981, § 10-9-43, enacted by Ga. L. 1988, p. 556, § 4.

10-9-44. Sale of bonds; interest rate.

The authority may sell the revenue bonds in such manner at public or private sale and for such price, rate of interest, and other terms as it may determine to be in the best interest of the authority. The rate of interest may be a fixed or variable rate, but if the rate is a variable rate, a maximum per annum rate of interest shall be specified in the authorizing resolution and in the validation proceeding.

History.
Code 1981, § 10-9-44, enacted by Ga. L. 1988, p. 556, § 4.

10-9-45. Use of proceeds; issuance of additional bonds in case of deficit; use of surplus.

The proceeds of the revenue bonds shall be used solely for the payment of the costs of the project incurred with respect to the facilities designated by the resolution authorizing the issuance of such revenue bonds. The resolution authorizing the issuance of revenue bonds may provide that the proceeds thereof shall be disbursed upon requisition or order of the chairman of the authority or other designated officer of the authority or by the Georgia State Financing and Investment Commission acting on behalf of the authority under contract with the authority under such restrictions, if any, as the resolution authorizing the issuance of the revenue bonds or the trust indenture may provide. If the proceeds of the revenue bonds, by error of calculation or otherwise, shall be less than the cost of the facility or combined facilities, unless otherwise provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, additional revenue bonds may in like manner be issued to provide the amount of the deficit which, unless otherwise provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the revenue bonds first issued for the same purpose. If the proceeds of the revenue bonds of any issue shall exceed the amount required for the purpose for which such revenue bonds are issued, the surplus shall be used for one or more of the following purposes:

(1) Payment into the fund provided in Code Section 10-9-51 for the payment of principal and interest of such revenue bonds; or

(2) For the purchase of such revenue bonds in the open market.

History.
Code 1981, § 10-9-45, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 6.

10-9-46. Interim revenue receipts, certificates, or bonds.

Prior to the preparation of definitive revenue bonds, the authority may, under like restrictions, issue interim revenue receipts, interim revenue certificates, or temporary revenue bonds exchangeable for definitive revenue bonds upon the issuance of the latter.

History.
Code 1981, § 10-9-46, enacted by Ga. L. 1988, p. 556, § 4.

10-9-47. Replacement of mutilated, destroyed, or lost bonds.

The authority may also provide for the replacement of any revenue bond which becomes mutilated or is destroyed or lost upon receipt of such indemnification as it may deem appropriate.

History.
Code 1981, § 10-9-47, enacted by Ga. L. 1988, p. 556, § 4.

10-9-48. Proceedings and conditions for issuance; resolution.

The revenue bonds may be issued without any other proceedings or the happening of any other conditions or things than those proceedings, conditions, and things which are specified or required by this article and Article 1 of this chapter. In the discretion of the authority, revenue bonds of a single issue may be issued for the purpose of paying the cost of any one or more, including a combination of, facilities described in Code Section 10-9-40 and in the resolution authorizing the issuance of such bonds. Any resolution providing for the issuance of revenue bonds under this article shall become effective immediately upon its passage and need not be published or posted, and any such resolution may be passed at any regular, special, or adjourned meeting of the board of governors of the authority.

History.
Code 1981, § 10-9-48, enacted by Ga. L. 1988, p. 556, § 4.

10-9-49. Lease of facilities; terms and conditions; contracts with public entities.

(a)(1) Subject to the requirements of paragraph (2) of this subsection, the authority shall operate and manage the facilities financed by the issuance of revenue bonds as authorized by this article. The authority may, incident to such operation and management, lease the facilities to persons, firms, private corporations, authorities, counties, municipal corporations, public corporations, public authorities, or other political subdivisions of this state under leases covering all or such separately identified portions of the facilities as the authority may determine appropriate and upon and for such terms, conditions, and considerations and for such rentals, fees, prices, and other charges as the authority shall determine appropriate. The authority shall fix the rentals, fees, prices, and other charges payable to the authority under such leases so that the aggregate amount of such rentals, fees, prices, or other charges derived by the authority thereunder, together with other revenues and earnings of the authority from the facilities designated by the resolution authorizing the issuance of the revenue bonds, and together with revenues, earnings, and funds otherwise available to the authority for such purposes, are at least sufficient to pay the principal, interest, premiums, discounts, fees, costs, or expenses payable by the authority on or with respect to all of the revenue bonds and other obligations issued by the authority for the purpose of financing such facilities as such principal, interest, premiums, discounts, fees, costs, or expenses shall become due, together with the costs of the maintenance, repair, and operation of the facilities, including reserves established for such purposes, and the payment and performance of contractual obligations of the authority. The obligation of any lessee to the authority under any such lease may be secured in such manner as the authority shall determine appropriate. Any such lease may provide that the authority may be subrogated to and may at its election upon such terms as may be set forth in such lease enforce all contracts or rights of action of such lessee relating to or arising out of the operation of the facilities covered by such lease. Any such lease shall contain such other terms, conditions, and considerations as the authority may determine appropriate.

(2) Any lease provided for in paragraph (1) of this subsection which lease is for a term in excess of ten years must, as a condition precedent to its effectiveness, be approved by the Fiscal Affairs Subcommittees of the Senate and House of Representatives meeting jointly as one committee; and such approval shall require the affirmative votes of at least 11 members of such subcommittees sitting jointly.

(b) As used in this article, "lease" includes a lease or sublease and may, in the discretion of the authority, be in form and substance an estate for years, usufruct, license, concession, or any other right or privilege to use or occupy or conduct any activity within the facilities. The term "lessee" includes lessee or sublessee, tenant, licensee, concessionaire, or other person contracting for such estate, interest, right, or privilege.

(c) In the exercise of its powers under this chapter, including the powers under this article, the authority may contract with any public entity which shall include the state or with any other public agency, public corporation, or public authority, for joint services, for the provision of services, or for the joint or separate use of facilities which the contracting parties are authorized by law to undertake or provide.

(d) Pursuant to any such contract, in connection with any facility authorized under this article or any project authorized under this chapter, the authority may undertake such facility or provide such services or facilities or projects of the authority, in whole or in part, to or for the benefit of the public entity contracting with the authority with respect to those activities, services, or facilities or projects which the contracting public entity is authorized by the Constitution or laws of this state to provide, including, but not limited to, those set forth in Article IX, Section III, Paragraph I of the Constitution and Chapters 42, 44, 61, and 64 of Title 36 and Article 3 of Chapter 13 of Title 48, and any such contracting public entity is authorized to undertake to pay the authority for such activities, services, or facilities or projects such amounts and on such terms as the parties may determine.

(e) The state and each institution, department, or other agency thereof or each county, municipality, school district, or other political subdivision of this state and each public agency, public corporation, or public authority is authorized to contract with the authority in connection with any activity, service, or facility which such public entity is otherwise authorized to provide to obtain the performance of such activity or provision of such services or facilities through the authority.

(f) In connection with its operations, the authority may similarly obtain from, and each public entity may provide, such activities, services, or facilities which the authority is authorized to provide.

(g) Except as provided by Article VII, Section IV, Paragraph IV of the Constitution, any such contract authorized by this Code section or the revenues derived therefrom may be designated as security for revenue bonds issued under this article.

History. Code 1981, § 10-9-49, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 7.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, the correct spelling of "concessionaire" was substituted in the second sentence of subsection (b) and commas were inserted following "activities" and "services" in subsection (d).

10-9-50. Enforceability against authority; limitation on state liability.

(a)(1) Revenue bonds issued under the authority of this article shall not be deemed to constitute a debt of the state or a pledge of the faith and credit of the state. The bonds shall be enforceable against the authority only to the extent of, and only against funds derived from, the rents, revenues, earnings, and funds derived from the facilities designated by the resolution authorizing the issuance of such revenue bonds or which are otherwise available to the authority for such purposes which are so designated, including but not limited to rents, revenues, earnings, and funds which are:

(A) Payable to the authority by the lessee or lessees and received by the authority from the lessee or lessees under the lease or leases by the authority of the facilities acquired or improved by the proceeds of such revenue bonds described in the resolutions authorizing the issuance of such revenue bonds;

(B) Payable to the authority under such contracts as may be entered into in accordance with Code Section 10-9-49, relating to the facilities acquired or improved by the proceeds of the revenue bonds or the use thereof or services provided through such facilities, which are designated as security for the revenue bonds;

(C) Payable to the authority under such other contracts or agreements relating to the facilities acquired or improved by the proceeds of the revenue bonds as may be designated as security for such bonds; and

(D) As may otherwise be designated as security for such bonds either: (i) derived from or in connection with the facilities acquired or improved by the proceeds of the revenue bonds or the use or operation thereof or the services provided through such facilities; or (ii) otherwise available to the authority for such purposes.

The bonds shall be payable solely from the rents, revenues, earnings, and funds described in this paragraph, except that the bonds may, in addition and in the discretion of the authority, be paid in part by the authority from any other source of funds lawfully available to the authority for that purpose. The authority shall not be obligated in any way, however, to make any payments from any such other source of funds.

(2) The issuance of the revenue bonds shall not directly or indirectly or contingently obligate the state to continue or to levy or pledge any form of taxation whatsoever therefor or to continue or make any appropriation for the payment thereof. Revenue bonds issued under the authority of this article shall not be payable from or a charge upon any funds other than those pledged to the payment thereof nor shall the authority be otherwise directly or indirectly subject to any pecuniary liability thereon. Except as provided in this article, a holder or holders of any such revenue bonds, directly or through any trustee or receiver, shall not have the right to enforce payment thereof against the authority or any property of or any right of action of or against the authority nor shall any such revenue bonds constitute a charge, lien, or encumbrance, legal or equitable, upon any property of or any right of action of or against the authority.

(b) Notice of the limitations of this Code section shall be set forth on the face of the revenue bonds which shall further provide that the obligations of the authority thereunder are limited by the provisions of this article.

History. Code 1981, § 10-9-50, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 8; Ga. L. 2017, p. 774, § 10/HB 323.

10-9-51. Security; provisions in resolution or trust indenture for protection of bondholder rights and remedies; sinking fund.

(a) Subject to the limitations set forth in this chapter, the authority shall be authorized to provide, directly or through lessees of the project, such security for revenue bonds issued by it as it may determine appropriate.

(b)(1) Without limitation of the provisions of subsection (a) of this Code section, in the discretion of the authority, any issue of revenue bonds may be secured by a trust indenture by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside the state. The trust indenture may pledge or assign rents, revenues, earnings, and funds derived from the facilities designated by the resolution authorizing the issuance of such revenue bonds or which may be otherwise available to the authority for such purposes, including but not limited to rents, revenues, earnings, and funds which are:

(A) Payable to the authority by the lessee or lessees and received by the authority from the lessee or lessees under the lease or leases by the authority of the facilities acquired or improved by the proceeds of such revenue bonds described in the resolutions authorizing the issuance of such revenue bonds;

(B) Payable to the authority under such contracts as may be entered into in accordance with Code Section 10-9-49, relating to the facilities acquired or improved by the proceeds of the revenue bonds or the use thereof or services provided through such facilities, which are designated as security for the revenue bonds;

(C) Payable to the authority under such other contracts or agreements relating to the facilities acquired or improved by the proceeds of the revenue bonds as may be designated as security for such bonds; and

(D) As may otherwise be designated as security for such bonds either: (i) derived from or in connection with the facilities acquired or improved by the proceeds of the revenue bonds or the use or operation thereof or the services provided through such facilities; or (ii) otherwise available to the authority for such purposes.

(2) Either the resolution providing for the issuance of the revenue bonds or the trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the authority in relation to the acquisition of property; the construction of the project; the maintenance, operation, repair, and insurance of the project; and the custody, safeguarding, manner of disbursements, and application of all moneys and may also provide that any facility shall be constructed and paid for under the supervision and approval of consulting engineers or architects employed or designated by the authority. The resolution or the trust indenture may also require that the security given by contractors and by any depository of the proceeds of the bonds or revenues or other moneys be satisfactory to such purchasers and may also contain provisions concerning the conditions, if any, upon which additional revenue bonds may be issued. The indenture may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action of bondholders as is customary in trust indentures securing revenue bonds and debentures of corporations.

(c) The resolution or trust indenture may provide that the rents, revenues, earnings, and funds which are designated as security for the revenue bonds shall be set aside into a sinking fund, which sinking fund shall be pledged to and charged with the payment of:

(1) The interest upon the revenue bonds as the interest falls due;

(2) The principal of the bonds as the same falls due;

(3) The necessary charges of paying agents for paying principal and interest;

(4) Any premium upon bonds retired by call or purchase as provided in this article; and

(5) Any fees, costs, or expenses payable under the revenue bonds or trust indentures.

(d) The use and disposition of the sinking fund shall be subject to such regulations as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, but, except as may otherwise be provided in the resolution or trust indenture, such sinking fund shall be a fund for the benefit of all revenue bonds without distinction or priority of one over another. Subject to the resolution authorizing the issuance of the revenue bonds or in the trust indenture, surplus moneys in the sinking fund may be applied to the purchase or redemption of such revenue bonds; and any such bonds so purchased or redeemed shall immediately be canceled and shall not again be issued.

History. Code 1981, § 10-9-51, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 9; Ga. L. 2017, p. 774, § 10/HB 323.

10-9-52. Enforcement of rights by bondholder, receiver, or indenture trustee.

Any holder of revenue bonds or interest coupons thereon issued under this article, any receiver for such holders, or any indenture trustee, if there is any, except to the extent the rights given in this article may be restricted by resolution passed before the issuance of the revenue bonds or by the trust indenture, may either at law or in equity, by action, mandamus, or other proceedings, protect and enforce any and all rights under the laws of the state or granted under this article or under such resolution or trust indenture and may enforce and compel performance of all duties required by this article or by such resolution or trust indenture to be performed by the authority or any officer thereof. In the event of default upon the principal and interest or other obligations of any revenue bond issue, any such holder, receiver, or indenture trustee shall be subrogated to each and every right of collecting rentals, revenues, earnings, or funds by the authority which the authority may possess under contracts designated as security therefor, and, in the pursuit of its remedies as subrogee, may proceed either at law or in equity by action, mandamus, or other proceedings to collect any sums by such proceeding due and owing to the authority and pledged or partially pledged to the benefit of the revenue bond issue. No individual, receiver, or indenture trustee thereof shall have the right to compel any exercise of the taxing power of the state to pay any such revenue bond or the interest thereon or otherwise to enforce the payment thereof against the state or the authority or any property of the state or authority, nor shall any such bond constitute a charge, lien, or encumbrance, legal or equitable, upon the property of the state or

authority except the rents, revenues, earnings, and funds designated as security for the revenue bonds. In addition to the foregoing, the resolution or trust indenture may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders subject to the limitations otherwise stated in this article. All expenses incurred in carrying out the trust indenture may be treated as a part of the cost of the project affected by the indenture.

History.
Code 1981, § 10-9-52, enacted by Ga. L. 1988, p. 556, § 4.

10-9-53. Payment of sale proceeds to trustee.

The authority may, in the resolution providing for the issuance of revenue bonds or in the trust indenture, provide for the payment of the proceeds of the sale of the bonds to any officer or person who shall act as trustee or any agency, bank, or trust company or to the Georgia State Financing and Investment Commission acting under contract with the authority, which officer, person, bank, trust company, or agency shall act as trustee of such funds and shall hold and apply the same to the purposes set forth in or through this article, subject to such regulations as this article and Article 1 of this chapter, or as the resolution or trust indenture, may provide.

History.
Code 1981, § 10-9-53, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 10; Ga. L. 2017, p. 774, § 10/HB 323.

10-9-54. Use of services of Georgia State Financing and Investment Commission; professional services for projects.

The authority shall be authorized to utilize the financial advisory and construction related services of the Georgia State Financing and Investment Commission with respect to the issuance of revenue bonds and the investment and disposition of the proceeds thereof and the acquisition, design, planning, and construction of the facilities designated in the resolution authorizing the issuance of the revenue bonds. The reimbursement by the authority of the commission for services provided by the commission shall be considered as part of the costs of the project. Chapter 22 of Title 50 shall be applicable to the selection of persons to provide professional services for any project or any portion thereof constructed in whole or in part with any proceeds from the sale of revenue bonds authorized by this article.

History.
Code 1981, § 10-9-54, enacted by Ga. L. 1988, p. 556, § 4.

10-9-55. Refunding bonds.

The authority is authorized to provide by resolution for the issuance of revenue refunding bonds of the authority for the purpose of refunding any revenue bonds issued under this article and then outstanding, together with accrued interest thereon. The issuance of such revenue refunding bonds, and maturities and all other details thereof, the rights of the holders thereof, and the duties of the authority in respect to the same shall be governed by this article insofar as the same may be applicable.

History.
Code 1981, § 10-9-55, enacted by Ga. L. 1988, p. 556, § 4.

10-9-56. Bonds made securities for investment and deposit purposes.

The revenue bonds authorized by this article are made securities in which all public officers and bodies of this state and all municipalities and all political subdivisions of this state; all insurance companies and associations and other persons carrying on an insurance business; all banks, bankers, trust companies, savings banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, financial institutions, and other persons carrying on a banking business; all administrators, guardians, executors, trustees, and other fiduciaries; and all other persons who are authorized to invest in bonds or other obligations of the state may properly and legally invest funds including capital in their control or belonging to them. The revenue bonds are also made securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and political subdivisions of this state for any purpose for which the deposit of the bonds or other obligations of this state may be authorized.

History.
Code 1981, § 10-9-56, enacted by Ga. L. 1988, p. 556, § 4.

10-9-57. Validation of bonds; applicability of "Revenue Bond Law."

(a) Revenue bonds of the authority shall be confirmed and validated in accordance with the procedures of Article 3 of Chapter 82 of Title 36, the "Revenue Bond Law." The revenue bonds and any security therefor when validated and the judgment of validation shall be final and conclusive with respect to such revenue bonds and any security therefor and against the authority issuing the same and any person, firm, corporation, county, municipality, authority, subdivision, instrumental-

ity, or other agency contracting with the authority and any and all other persons who were or could have become parties to the proceedings.

(b) Revenue bonds issued by the authority shall not be subject to the limitations of term or interest set forth in the "Revenue Bond Law" or any other law.

(c) Notwithstanding the provisions of the "Revenue Bond Law," in its resolution authorizing the issuance of revenue bonds, the authority, in its discretion, in lieu of specifying the rate or rates of interest which the revenue bonds are to bear, may state that the bonds when issued will bear interest at a rate or rates which may be fixed or variable, not exceeding a maximum per annum rate of interest specified in the resolution. The petition, complaint, notice to the district attorney, and notice to the public required to be filed or published under the "Revenue Bond Law" shall conform to the resolution authorizing the issuance of the revenue bonds.

History.
Code 1981, § 10-9-57, enacted by Ga. L. 1988, p. 556, § 4.

10-9-58. Legislative findings; state covenants.

It is found, determined, and declared that the carrying out of the purposes of the authority as defined in this article is in all respects for the benefit of the people of this state and that the purposes are public purposes; that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this article; and that the activities authorized in this article will develop and promote trade, commerce, industry, and employment opportunities to the public good and the general welfare and promote the general welfare of the state. The state covenants with the holders of the revenue bonds that the authority shall be required to pay no taxes or assessments of the state or its municipalities or political subdivisions upon any of the property acquired or leased by it, or under its jurisdiction, control, possession, or supervision or upon its activities in the acquisition, construction, operation, or maintenance of the facilities erected or acquired by it, including the purchase of tangible personal property for such purposes, or any fees, rentals, or other charges, for the use of such facilities, or any other income received by the authority. Further, the state covenants that the revenue bonds of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within this state by the state or its municipalities or political subdivisions. Any exemption from taxation provided by this Code section shall not include exemption from sales and use taxes on sales made by the authority in transactions or to persons not otherwise exempt therefrom.

History.
Code 1981, § 10-9-58, enacted by Ga. L. 1988, p. 556, § 4.

10-9-59. Inapplicability of "Georgia Uniform Securities Act of 2008."

Revenue bonds issued under the authority of this article shall not be a security within the meaning of, and shall not otherwise be subject to any of the provisions of, Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008."

History.
Code 1981, § 10-9-59, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 2008, p. 381, § 10/SB 358.

10-9-60. Jurisdiction over actions.

Any action to protect or enforce any rights under this article shall be brought in the Superior Court of Fulton County, Georgia, and any action pertaining to validation of any revenue bonds issued under this article shall likewise be brought in such court which shall have exclusive, original jurisdiction of such actions.

History.
Code 1981, § 10-9-60, enacted by Ga. L. 1988, p. 556, § 4.

10-9-61. Cumulative nature of authority powers; power to pledge or assign rents, revenues, earnings, and funds as security for indebtedness.

(a) The powers granted to the authority under this article are cumulative and not in derogation of the powers otherwise granted to the authority under this chapter.

(b) Without limitation of the foregoing, the authority shall have the power to pledge or assign as security for the payment of, and to apply in the payment of, any indebtedness incurred by the authority under paragraph (9) of subsection (b) of Code Section 10-9-4 any rents, revenues, earnings, and funds derived from or in connection with the facilities undertaken under this article or any project under this chapter or otherwise available to the authority for such purposes, as the authority may determine necessary or appropriate, subject to such limitations or priorities as may be established incident to the issuance of revenue bonds under this article.

History.
Code 1981, § 10-9-61, enacted by Ga. L. 1989, p. 1195, § 11.

CHAPTER 10

SEED-CAPITAL FUND

Article 1

General Provisions

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Law reviews.
For note on 1989 enactment of this chapter, see 6 Ga. St. U.L. Rev. 155 (1989).

ARTICLE 1

GENERAL PROVISIONS

Editor's notes.
Ga. L. 2013, p. 243, § 1/HB 318, not codified by the General Assembly, designated Code Sections 10-10-1 through 10-10-7 of Chapter 10 as Article 1, effective April 29, 2013.

10-10-1. Definitions.

As used in this article, the term:

(1) "Board" means the Board of Regents of the University System of Georgia.

(2) "Center" means the Advanced Technology Development Center created by the board and acknowledged and empowered to administer the fund by Article III, Section IX, Paragraph VI(g) of the Constitution of Georgia.

(3) "Enterprise" means a corporation, partnership, limited liabil-

ity company, or other legal entity that has its principal place of business in this state and that is engaged in an entrepreneurial business, including, but not limited to, tenants of incubators. For the purposes of this article, an enterprise shall not be considered to be engaged in an entrepreneurial business unless it is engaged in innovative work in the areas of technology, bioscience, manufacturing, marketing, agriculture, or information related ventures that will increase the state's share of domestic or international markets. An enterprise engaged primarily in business of a mercantile nature shall not be considered engaged in an entrepreneurial business. An enterprise shall be required to be young, as determined by the center.

(4) "Equity contribution" means:

(A) Moneys from the fund used to make direct investments by the state in qualified securities of enterprises; and

(B) The capital of an investment entity contributed by the fund, as created in Code Section 10-10-3, and contributed by other investors, which capital shall be used by the investment entity to make investments in qualified securities of one or more enterprises as provided by this article and to pay the expenses of the investment entity but shall not include any current or accumulated income of the investment entity.

(5) "Fund" means the Seed-Capital Fund created in Code Section 10-10-3.

(6) "Incubator" means a facility that leases small units of space to tenants and which maintains or provides access to business development services for use by the tenants or member firms.

(7) "Investment entity" means a limited partnership, a limited liability company, or other legal entity, including, without limitation, any such entity as to which the state is the sole limited liability owner, providing limited liability to its owners that is formed to receive, in part, an investment by the fund or an equity return of investment from a fund loan and for which a general partner or manager manages the equity contributions by making investments in qualified securities of one or more enterprises or, in the case of an investment entity as to which the state is the sole limited liability owner, in another investment entity, as permitted by this article and by paying the expenses of the investment entity.

(8) "Loan" means an advance of money from the fund to an enterprise or an investment entity on such terms as the center shall set, including, but not limited to, an absolute promise to repay the principal amount of the loan made by the recipient enterprise, and any return on investment that the center may require as a term or

condition of the loan, which may include, but not be limited to, simple or compound interest or any form of equity participation.

(9) "Qualified security" means any note, stock, treasury stock bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, preorganization certificate or subscription, transferable share, investment contract, certificate of deposit for a security, certificate of interest or participation in a patent or application therefor or in royalty or other payments under such a patent or application, or, in general, any interest or instrument commonly known as a security or any certificate for, receipt for, guarantee of, or option, warrant, or right to subscribe to or purchase any of the foregoing of an enterprise.

(10) "State" means the State of Georgia.

History.
Code 1981, § 10-10-1, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 1/HB 1305; Ga. L. 2013, p. 243, § 2/HB 318.

Law reviews.
For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 47 (2013).

10-10-2. Creation of Seed-Capital Fund.

There is created the Seed-Capital Fund to be managed by the center under the authority of the board.

History.
Code 1981, § 10-10-2, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1.

Editor's notes.
Ga. L. 2004, p. 431, § 1, effective May 13, 2004, reenacted this Code section without change.

10-10-3. Administration of fund; equity contributions; disbursements.

(a) The fund is created as a separate fund maintained by the board or a body designated by the board and shall be expended only as provided in this article. Pending their use as equity contributions or as loans, the moneys in the fund may be invested and reinvested in accordance with the investment policies authorized by the board or its designee. The entire cost of administration of the fund, including expenses of the center incurred in connection with the creation, operation, management, liquidation, and investment of fund moneys in enterprises, directly or through investment entities, may be paid from the assets of the fund. All moneys appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(b) The fund shall consist of all moneys authorized by law for deposit in the fund, including, but not limited to, gifts, grants, private donations, and funds by government entities authorized to provide funding for the purposes authorized for use of the fund and any payments or returns on investments made by the center.

(c) In return for equity contributions by the fund, at the discretion of the center, the state shall receive either direct ownership of qualified securities of an enterprise or a limited liability ownership in an investment entity either directly or indirectly through an investment entity as to which the state is the sole limited liability owner as permitted in subsection (c) of Code Section 10-10-4 with rights accruing from investments in qualified securities by the investment entity. With respect to loans made from the fund, the state shall receive repayment of the loan in accordance with its terms, with cash proceeds or other assets from such repayments being deposited in or held through the fund. Additional returns to the state shall be secured through the establishment and growth of innovative enterprises that create new, value added products, processes, and services and encourage growth and diversification in the economy of the state.

(d) Disbursements from the fund shall be made upon the instruction of the center director in accordance with the policies of the board.

(e) The center, subject to the approval of the board or its designee, shall be authorized to contract and have contracts and other legal documents prepared to carry out the provisions of this article.

(f) The board shall have the authority to issue policies governing the management and operation of the fund as needed.

History.
Code 1981, § 10-10-3, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 2/HB 1305; Ga. L. 2013, p. 243, § 3/HB 318.

10-10-4. Investing of funds with investment entities.

(a) The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make equity contributions through the direct purchase of qualified securities of enterprises, subject to the center assuring itself that the following conditions will be satisfied:

(1) At least $3.00 of equity contributions has been committed in writing to the enterprise by persons other than the state for every $1.00 of equity contributions committed by the state from the fund to the enterprise;

(2) The center shall manage the investments of equity contribu-

tions in the qualified securities of enterprises so that the state shall not hold voting control of an enterprise;

(3) The total amount of equity contributions by the state made to an enterprise that originate from the fund, either directly or indirectly through an investment entity as permitted by subsections (b) and (c) of this Code section, and that are invested in qualified securities of an enterprise should ordinarily be no more than $1 million. Total equity contributions from the fund to an enterprise, directly or indirectly through an investment entity, may be greater than $1 million if, in the judgment of the center, the enterprise is in severe financial difficulty and an investment of a greater amount is necessary to preserve the initial investment in qualified securities;

(4) The amount of investment, directly or indirectly through an investment entity, by the fund in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the enterprise's total qualified securities outstanding at the time such qualified securities are purchased by the fund, after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise. An investment of an equity contribution from the fund may exceed 49 percent of the enterprise's total qualified securities outstanding if:

(A) In the case of direct investment, in the center's judgment, such greater investment is prudent; or

(B) In the case of indirect investment in the investment entity's judgment exercised in accordance with paragraph (5) of subsection (b) of this Code section, such greater investment is prudent;

(5) The center shall invest equity contributions in qualified securities of enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and

(D) Such other information as the center shall request; and

(6) Approval of an equity contribution may be made after the center finds, based upon the application submitted by the enterprise

and such additional investigation as the staff of the center shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The fund's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the fund will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the state by the enterprise for adequate reporting of financial data to the center, which shall include a requirement for an annual report or, if required by the center, an annual audit of the financial and operational records of the enterprise, and for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to protect the investment or financial commitment of the investment entity, including in the discretion of the entity and without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise.

(b) The center, subject to the approval of the board or its designee, may authorize transfers directly from the fund or indirectly, as described in subsection (c) of this Code section, from an investment entity as to which the state is the sole limited liability owner, to make equity contributions to one or more investment entities whose structures, purposes, and operations are consistent with the criteria specified in this chapter. Investment entities to which the state, directly or indirectly, makes an equity contribution shall not expend any of the funds invested by the state unless and until the center has assured itself that the following conditions will be satisfied by such investment entity:

(1) Either:

(A) At least $3.00 of equity contributions has been committed in writing to the investment entity by persons other than the

state for every $1.00 of equity contributions committed by the state from the fund or from an investment entity which the state is the sole limited liability owner of; or

(B) At least $1.00 of equity contributions has been committed in writing to the investment entity by persons other than the state for every $1.00 of equity contributions committed by the state from the fund or from an investment entity which the state is the sole limited liability owner of; provided, however, that no investment is to be made from such investment entity in qualified securities unless, in total, at least $3.00 of investment from sources other than the state, which may include funds from sources other than the investment entity and funds invested by the investment entity in the enterprise that are other than from equity contributions made by the state from the fund or from an investment entity which the state is the sole limited liability owner of, has been committed to such enterprise for every $1.00 of the state's portion of the amount invested in the qualified securities of such enterprise;

(2) The total amount of equity contributions by the state made to an investment entity that originate from the fund and that are ultimately invested by an investment entity in qualified securities of an enterprise, when added to any amounts invested by the fund directly in the enterprise's qualified securities, should ordinarily be no more than $1 million. In addition, the amount of investment by an investment entity in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the total qualified securities at the time such qualified securities are purchased by the investment entity, after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise; provided, however, that the investment in qualified securities of the enterprise by the investment entity can exceed 49 percent if, in the investment entity's judgment exercised in accordance with paragraph (5) of this subsection, such greater investment is prudent; and provided, further, that an amount greater than $1 million of funds attributable to equity contributions by the state from the fund may be invested by the investment entity in qualified securities of an enterprise if the enterprise is in severe financial difficulty and, in the judgment of the investment entity, an investment of such greater amount is necessary to preserve the initial investment in qualified securities;

(3) The investment entity shall make authorized investments in enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements

and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and

(D) Such other information as the investment entity shall request;

(4) Approval of an investment may be made after the investment entity finds, based upon the application submitted by the enterprise and such additional investigation as the staff of the investment entity shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The investment entity's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the investment entity will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the investment entity by the enterprise for adequate reporting of financial data to the investment entity, which shall include a requirement for an annual report or, if required by the investment entity, an annual audit of the financial and operational records of the enterprise and, for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to protect the investment or financial commitment of the investment entity, including in the discretion of the entity and without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise;

(5) The governing agreement of the investment entity provides that the care and judgment that management of the investment entity must exercise in the performance of its obligations shall be the judgment and care under the circumstances then prevailing and that persons of ordinary prudence, discretion, and intelligence exercise in the management of risk capital intended for investment at the early stages of organization and growth of a business that is:

(A) Expected to create, retain, or extend employment opportunities and economic growth in Georgia; and

(B) All other material matters being equal, developing technological advances that could be expected to result in the greatest increase in employment opportunity and economic growth in Georgia; and

(6) The governing agreement of the investment entity provides for distributions made by the investment entity to its partners or members that are proportionate to the capital committed or otherwise reflective of the ownership interests purchased by the partners or members.

(c) The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make equity contributions to one or more investment entities as to which the state is the sole limited liability owner. Any such investment entities as to which the state is the sole limited liability owner shall be assigned for administrative purposes to the center within the meaning of Code Section 50-4-3. Such investment entities may make investments in other investment entities, which make equity contributions pursuant to subsection (b) of this Code section. Such investment entities may also make equity contributions through direct purchases of qualified securities of enterprises, subject to the center and the investment entity assuring themselves that the following conditions will be satisfied:

(1) At least $3.00 of equity contributions has been committed in writing to the enterprise by persons other than the state for every $1.00 of equity contributions committed by the state directly or indirectly from the fund to the enterprise;

(2) The center shall manage the investments of equity contributions in the qualified securities of enterprises so that the state shall not hold voting control of an enterprise;

(3) The total amount of equity contributions by the state made to an enterprise that originates from the fund, either directly or indirectly through an investment entity as permitted by subsection (b) of this Code section and this subsection, and that are invested in qualified securities of an enterprise should ordinarily be no more

than $1 million. Total equity contributions from the fund to an enterprise, directly or indirectly through an investment entity, may be greater than $1 million if, in the judgment of the center, the enterprise is in severe financial difficulty and an investment of a greater amount is necessary to preserve the initial investment in qualified securities;

(4) The amount of investment, directly or indirectly through an investment entity, by the fund in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the enterprise's total qualified securities outstanding at the time such qualified securities are purchased by the fund after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise. An investment of an equity contribution from the fund may exceed 49 percent of the enterprise's total qualified securities outstanding if:

(A) In the case of direct investment, in the center's judgment, such greater investment is prudent; or

(B) In the case of indirect investment, in the investment entity's judgment exercised in accordance with paragraph (5) of subsection (b) of this Code section, such greater investment is prudent;

(5) The investment entity shall be authorized to make equity contributions in qualified securities of enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and

(D) Such other information as the center shall request; and

(6) Approval of an equity contribution may be made after the investment entity finds, based upon the application submitted by the enterprise and such additional investigation as the staff of the center shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The fund's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the fund will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the state by the enterprise for adequate reporting of financial data to the center, which shall include a requirement for an annual report or, if required by the center, an annual audit of the financial and operational records of the enterprise, and for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to protect the investment or financial commitment of the investment entity, including in the discretion of the entity and, without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise.

History.

Code 1981, § 10-10-4, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, §§ 3-6/HB 1305; Ga. L. 2008, p. 938, § 2/HB 1196.

Editor's notes.

Ga. L. 2008, p. 938, § 3, not codified by the General Assembly, provided that the amendment to this Code section shall be applicable to investments made on or after July 1, 2008.

10-10-5. Transfer of funds for making loans.

The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make unsecured or secured loans. With respect to such loans, the center, acting on behalf of the state and the fund, shall have the authority to sell loans, mortgages, security interests, and other obligations held by the state through the fund at public or private sale; to negotiate modifications or alterations in loans, mortgages, security interests, and other obligations held by the fund; to foreclose on any security interest in default or commence any action to protect or enforce any right conferred upon it by any law, mortgage, security agreement, deed of trust, deed to secure debt, contract, or other agreement; to bid for and purchase property which was the subject of such loan, mortgage, security interest, or other obligation held by the fund at any foreclosure or at any other sale; to acquire or take

possession of such property; and to exercise any and all rights as provided by law or contract for the benefit or protection of the fund.

History.
Code 1981, § 10-10-5, enacted by Ga. L. 2004, p. 431, § 1.
Editor's notes.
Ga. L. 2004, p. 431, § 1, effective May 13, 2004, redesignated former Code Section 10-10-5 as present Code Section 10-10-6.

10-10-6. Distribution to be deposited in the fund.

All distributions made by an investment entity allocable to the state's limited partner interest or membership interest therein; all cash proceeds with respect to any loan, whether interest, the repayment of principal, or other amounts; or proceeds of the sale or transfer of qualified securities held directly by the fund shall be deposited in the fund for future investment in other investment entities, in other qualified securities of enterprises, for making loans as provided in this article, or to pay the cost of administration of the fund as provided in this article.

History.
Code 1981, § 10-10-5, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-6, as redesignated by Ga. L. 2004, p. 431, § 1; Ga. L. 2013, p. 243, § 4/HB 318.
Editor's notes.
Ga. L. 2004, p. 431, § 1, effective May 13, 2004, redesignated former Code Section 10-10-6 as present Code Section 10-10-7.

10-10-7. Publishing of annual report by center.

The center, on behalf of the board, shall publish in print or electronically an annual report which shall be made available to the Governor, the General Assembly, the Department of Economic Development or any successor agency, the chairperson of the House Committee on Economic Development and Tourism, the chairperson of the Senate Economic Development Committee, and the board setting forth in detail the operations and transactions conducted by it pursuant to this chapter. The annual report shall specifically account for the ways in which the needs, mission, and programs of the center described in this chapter have been carried out. The center shall distribute its annual report by such means that will make it widely available to those innovative enterprises of special importance to the Georgia economy. The center shall not be required to distribute copies of the annual report to the members of the General Assembly but shall notify the members of the availability of the annual report in the manner which it deems to be most effective and efficient.

History.
Code 1981, § 10-10-6, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-7, as redesignated by Ga. L. 2004, p. 431, § 1; Ga. L. 2005, p. 1036, § 3/SB 49; Ga. L. 2009, p.

303, § 5/HB 117; Ga. L. 2010, p. 838, § 10/SB 388.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2004, "Economic Development" was substituted for "Industry, Trade, and Tourism".

Editor's notes.

Ga. L. 2009, p. 303, § 20/HB 117, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

ARTICLE 2

INVEST GEORGIA FUND

Law reviews.

For article on the 2013 enactment of this article, see 30 Ga. St. U.L. Rev. 47 (2013).

10-10-10. Creation; purpose.

Pursuant to the authority granted in Article III, Section IX, Paragraph VI(g) of the Constitution, there is hereby created the Invest Georgia Fund as a distinct component of the Seed-Capital Fund. The General Assembly declares that its purpose in creating the Invest Georgia Fund and enacting this legislation is to increase the amount of private investment capital available in this state for Georgia based business enterprises in the seed, early, or growth stages of business development and which require funding, as well as for established Georgia based business enterprises developing new methods or technologies, including the promotion of research and development purposes, thereby increasing employment, creating additional wealth, and otherwise benefiting the economic welfare of the people of this state. Accordingly, it is the intention of the General Assembly that the Invest Georgia Fund make investments in support of Georgia based business enterprises in accordance with the investment policy authorized and required under this article and focus its investment policy principally on venture capital funds and private equity organizations that invest in Georgia based business enterprises.

History.

Code 1981, § 10-10-10, enacted by Ga. L. 2013, p. 243, § 5/HB 318; Ga. L. 2024, p. 1052, § 2(60)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, corrected a spelling error in this Code section.

10-10-11. Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person who, directly or indirectly, beneficially owns,

controls, or holds power to vote any outstanding voting securities or other voting ownership interests of a venture capital firm; or

(B) A person whose outstanding voting securities or other voting ownership interests are directly or indirectly beneficially owned, controlled, or held with power to vote by a venture capital firm.

(2) "Board" means the Invest Georgia Board created under Code Section 10-10-12.

(3) "Center" means the Advanced Technology Development Center.

(4) "Contributed capital" means the amount of money contributed to the Invest Georgia Fund by any authorized method.

(5) "Designated capital" means the amount of money committed and invested by the Invest Georgia Fund into individual early stage venture capital funds or growth stage venture capital funds.

(6) "Early stage venture capital fund" means:

(A) A fund that has at least one principal employed to direct the investment of the designated capital;

(B) A fund whose principals have at least five years of experience in the venture capital, angel capital, or private equity sector by investing primarily in Georgia domiciled companies or a fund whose managers have been based, as defined by having an office, in the State of Georgia;

(C) At the discretion of the fund administrator and the board, one or more early stage venture capital funds that are first-time Georgia based funds, so long as the fund managers have at least five years of experience in venture capital or angel capital investing in Georgia based business enterprises; and

(D) A fund which has as its primary investment strategy the achievement of transformational economic development outcomes through focused investments of capital in seed or early stage businesses with high growth potential. The fund principals must have demonstrated the ability to lead investment rounds, advise and mentor entrepreneurs, and facilitate follow-on investments. A minimum of 10 percent of the committed capital of the fund must be committed by the institutional investors, fund principals, or other accredited investors.

(7) "Fund administrator" means a state appointed investment advisory firm consisting of experienced investment professionals that will actively pursue investment opportunities for the State of Geor-

gia. The investment advisory firm will evaluate and select Georgia based venture capital funds, in conjunction with the Invest Georgia Board, through a rigorous due diligence process.

(8) "Growth stage venture capital fund" means:

(A) A fund having its principal office and a majority of its employees in Georgia that has at least two principals employed to direct the investment of the designated capital;

(B) A fund whose principals have at least five years of experience in the venture capital, angel capital, or private equity sector by investing primarily in Georgia domiciled companies or a fund whose principals have been based, as defined by having an office in the State of Georgia; and

(C) A fund which has as its primary investment strategy the achievement of transformational economic development outcomes through focused investments of capital in growth stage businesses with high return potential. The fund principals must have demonstrated the ability to lead investment rounds, advise and mentor entrepreneurs, and facilitate follow-on investments. A minimum of 50 percent of the committed capital of the fund must be committed by the institutional investors, fund principals, or other accredited investors.

(9) "Invest Georgia Fund" means the fund created under the provisions of Code Section 10-10-15 to hold the money collected for the purposes of this article.

(10) "Qualified distribution" means any distribution or payment by the Invest Georgia Fund in connection with any of the following:

(A) Costs and expenses of forming, syndicating, and organizing the Invest Georgia Fund, including fees paid for professional services, and the costs of financing and insuring the obligations of the Invest Georgia Fund, provided such payments are not made to a participating investor;

(B) An annual management fee in accordance with a fund's partnership agreement, and consistent with such fund's other private investors, to offset the costs and expenses of managing and operating the Invest Georgia Fund; or

(C) Reasonable and necessary fees in accordance with industry custom for ongoing professional services, including, but not limited to, legal and accounting services related to the operation of the Invest Georgia Fund, but not including any lobbying or governmental relations.

(11) "Qualified early stage business" or "seed" business means a

business that, at the time of the first investment in the business by a venture capital firm:

(A) Has its headquarters located in the State of Georgia;

(B) Has its principal business operations located in the State of Georgia and intends to maintain its principal business operations in this state after receiving an investment from the venture capital firm. In order to discourage the business from relocating outside Georgia within three years from the date of an initial investment, the investment in the business shall be subject to redemption by the venture capital firm within one year from the time the business relocates its principal business operations outside this state, unless the business maintains a significant presence in Georgia as determined by relative number of employees or relative assets remaining in Georgia following the relocation;

(C) Has 20 or fewer employees;

(D) Has a current gross annual revenue run rate of less than $1 million;

(E) Has not obtained during its existence more than $2 million in aggregate cash proceeds from the issuance of its equity or debt investments, not including commercial loans from chartered banks or savings and loan institutions; and

(F) Does not engage substantially in:

(i) Retail sales;

(ii) Real estate development or construction;

(iii) Entertainment, amusement, recreation, or athletic or fitness activity for which an admission is charged;

(iv) The business of insurance, banking, lending, financial, brokerage, or investment activities;

(v) Natural resource extraction, including, but not limited to, oil, gas, or biomass; or

(vi) The provision of professional services by accountants, attorneys, or physicians.

A business classified as a qualified early stage business at the time of the first qualified investment in such business shall remain classified as a qualified early stage business and may receive continuing qualified investments from venture capital firms participating in the Invest Georgia Fund. Continuing investments shall constitute qualified investments even though the business may not meet

the definition of a qualified early stage business at the time of such continuing investments.

(12) "Qualified growth stage business" means a business that, at the time of the first investment in the business by a venture capital firm:

(A) Has its headquarters located in the State of Georgia;

(B) Is a corporation, limited liability company, or a general or limited partnership located in this state;

(C) Has its principal business operations located in the State of Georgia and intends to maintain its principal business operations in this state after receiving an investment from the venture capital firm. In order to discourage the business from relocating outside Georgia within three years from the date of initial investment, the investment in the business shall be subject to redemption by the venture capital firm within one year from the time the business relocates its principal business operations outside this state, unless the business maintains a significant presence in Georgia as determined by relative number of employees or relative assets remaining in Georgia following the relocation;

(D) Has 100 or fewer employees;

(E) Has a current gross annual revenue run rate of more than $1 million; and

(F) Does not engage substantially in:

(i) Retail sales;

(ii) Real estate development or construction;

(iii) Entertainment, amusement, recreation, or athletic or fitness activity for which an admission is charged;

(iv) The business of insurance, banking, lending, financial, brokerage, or investment activities;

(v) Natural resource extraction, including, but not limited to, oil, gas, or biomass; or

(vi) The provision of professional services by accountants, attorneys, or physicians.

A business classified as a qualified growth stage business at the time of the first qualified investment in such business shall remain classified as a qualified growth stage business and may receive continuing qualified investments from venture capital firms participating in the Invest Georgia Fund. Continuing investments shall

constitute qualified investments even though the business may not meet the definition of a qualified growth stage business at the time of such continuing investments.

(13) "Qualified investment" means the investment of money by the Invest Georgia Fund in each early stage venture capital fund or growth stage venture capital fund selected by the fund administrator.

History.
Code 1981, § 10-10-11, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-12. Invest Georgia Board; creation; membership; powers.

(a) There is hereby created the Invest Georgia Board, which shall exercise the powers and perform the duties prescribed by this article. The exercise by the board of its powers and duties is hereby declared to be an essential state governmental function. The board shall be subject to all laws generally applicable to state agencies and public officials, to the extent those laws do not conflict with the provisions of this article.

(b) The board shall consist of three members appointed by the Governor, one member appointed by the Lieutenant Governor, and one member appointed by the Speaker of the House of Representatives. Each appointed member shall be a resident of Georgia and shall have experience in at least one of the following areas:

(1) Early stage, angel, or venture capital investing;

(2) Growth stage venture capital investing;

(3) Fund of funds management; or

(4) Entrepreneurship.

No member of the board shall be an affiliate of any venture capital fund that is selected to perform services for the board or of an insurance company.

(c) The commissioner of economic development and a member of the One Georgia Authority or their designees shall serve as nonvoting members of the board.

(d) Initial appointees to the board shall serve staggered terms, with all of the initial terms beginning within 30 days of April 29, 2013. The terms of one member appointed by the Governor and the members appointed by the Lieutenant Governor and the Speaker of the House of Representatives shall expire on December 31, 2016. The terms of the other two initial appointments by the Governor shall expire on December 31, 2018. Thereafter, terms of office for all appointees shall be for four years, with each term ending on the same day of the same month

as did the term that it succeeds. A vacancy on the board shall be filled in the same manner as the original appointment, except that a person appointed to fill a vacancy shall be appointed to the remainder of the unexpired term. Any appointed member of the board shall be eligible for reappointment.

(e) A member of the board may be removed by such member's appointing official for misfeasance, willful neglect of duty, or other cause, after notice and a public hearing, unless the notice and hearing are waived in writing by such member.

(f) Members of the board shall serve without compensation. The Governor shall designate a member of the board to serve as chairperson. A majority of the voting members of the board shall constitute a quorum, and the affirmative vote of a majority of the voting members present shall be necessary for any action taken by the board. A vacancy in the membership of the board shall not impair the right of a quorum to exercise all rights and perform all duties of the board.

(g) The board shall have the power:

(1) To have a seal and alter the same at its pleasure;

(2) To acquire by purchase, lease, or otherwise, including acquisition of land from the state government, and to hold, lease, and dispose of real and personal property of every kind and character for its corporate purpose and to enter into any contracts, leases, or other charges for the use of property or services of the board and collect and use the same as necessary to operate the board; and to accomplish any of the purposes of this article and make any purchases or sales necessary for such purposes;

(3) To acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper, real property, or rights or easements therein, or franchises necessary or convenient for its corporate purpose, and to use the same so long as its corporate existence shall continue, and to lease or make contracts with respect to the use of such property, or dispose of the same in any manner it deems to be to the best advantage of the board;

(4) To appoint, select, and employ officers, agents, and employees, including real estate, environmental, engineering, architectural, and construction experts, fiscal agents, and attorneys, and to fix their respective compensations;

(5) To make contracts and leases and to execute all instruments necessary or convenient. Any and all persons, firms, and corporations and any and all political subdivisions, departments, institutions, authorities, or agencies of the state and federal government are authorized to enter into contracts, leases, or agreements with the

board upon such terms and for such purposes as they deem advisable; and, without limiting the generality of the foregoing, authority is specifically granted to municipal corporations, counties, political subdivisions, and to the board relative to entering into contracts, lease agreements, or other undertakings authorized between the board and private corporations, both inside and outside this state, and between the board and public bodies, including counties and cities outside this state and the federal government;

(6) To accept loans and grants of money or materials or property of any kind from the United States of America or any agency or instrumentality thereof upon such terms and conditions as the United States of America or such agency or instrumentality may require;

(7) To accept loans and grants of money or materials or property of any kind from the State of Georgia or any authority, agency, or instrumentality or political subdivision thereof upon such terms and conditions as the State of Georgia or such authority, agency, or instrumentality or political subdivision may require;

(8) To exercise any power usually possessed by private corporations performing similar functions, provided that no such power is in conflict with the Constitution or general laws of this state; and

(9) To do all things necessary or convenient to carry out the powers expressly given in this article.

(h) The center shall provide the board with office space and such technical assistance as the board requires, and the board shall be attached to the center for administrative purposes. The center shall also consult with the board in connection with the administration of the Invest Georgia Fund created under this article.

History.
Code 1981, § 10-10-12, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2013, "beginning within 30 days of April 29, 2013" was substituted for "beginning within 30 days of the effective date of this Code section" in the first sentence of subsection (d).

10-10-13. Responsibilities of board.

The board's primary responsibilities shall include:

(1) Establishing an investment policy for the selection of a fund administrator;

(2) Selecting a fund administrator to administer the provisions of this article;

(3) Giving final approval to allocations of designated capital to the venture capital funds selected by the fund administrator;

(4) Executing and overseeing the contracts of the fund administrator in order to assure compliance with this article; and

(5) Establishing a policy with respect to use of capital and profits returned to the state pursuant to the provisions of Code Section 10-10-19.

History.
Code 1981, § 10-10-13, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-14. Fund administrator; investments.

(a) The fund administrator shall be selected by the board through a transparent open bid process and shall be responsible for administering the Invest Georgia Fund and for making all venture capital fund selections in accordance with the investment policies developed by the board or contained in this article.

(b) The fund administrator shall be responsible for selecting a group of Georgia based venture capital funds in two categories, seed or early stage venture capital funds and growth stage venture capital funds.

(c) The early stage venture capital funds shall invest primarily in early or seed stage businesses and shall be selected using a transparent open bid process pursuant to guidelines developed by the board. The fund administrator shall ensure that a diverse cross section of industry sectors is represented by the selected funds, including technology, health care, life sciences, agribusiness, logistics, energy, and advanced manufacturing.

(d) The growth stage venture capital funds shall be selected using a transparent open bid process pursuant to guidelines developed by the board. The fund administrator shall ensure that a diverse cross section of industry sectors is represented by the selected funds, including technology, health care, life sciences, agribusiness, logistics, energy, and advanced manufacturing.

(e) In the selection of the early stage venture capital funds and the growth stage venture capital funds, the fund administrator shall consider the following factors:

(1) The management structure of the venture capital fund, including:

(A) The investment experience of the principals;

(B) The applicant's reputation in the venture capital firm industry and the applicant's ability to attract coinvestment capital and syndicate investments in qualified businesses in Georgia;

(C) The knowledge, experience, and capabilities of the appli-

cant in subject areas relevant to venture stage businesses in Georgia; and

(D) The tenure and turnover history of principals and senior investment professionals of the venture capital fund;

(2) The venture capital fund's investment strategy, including:

(A) The applicant's record of performance in investing in early and growth stage businesses;

(B) The applicant's history of attracting coinvestment capital and syndicate investments;

(C) The soundness of the applicant's investment strategy and the compatibility of that strategy with business opportunities in Georgia; and

(D) The applicant's history of job creation through investment;

(3) The venture capital fund's commitment to making investments that, to the fullest extent possible:

(A) Create employment opportunities in Georgia;

(B) Lead to the growth of the Georgia economy and qualified businesses in Georgia;

(C) Complement the research and development projects of Georgia academic institutions; and

(D) Foster the development of technologies and industries that present opportunities for the growth of qualified businesses in Georgia; and

(4) The venture capital fund's commitment to Georgia, including:

(A) The applicant's presence in Georgia through permanent local offices or affiliation with local investment firms;

(B) The local presence of senior investment professionals;

(C) The applicant's history of investing in early and growth stage businesses in Georgia;

(D) The applicant's ability to identify investment opportunities through working relationships with Georgia research and development institutions and Georgia based businesses; and

(E) The applicant's commitment to investing an amount that matches or exceeds the amount of the applicant's designated capital received under this article in Georgia based qualified early stage businesses and qualified growth stage businesses.

(f) A venture capital fund shall file an application with the board in the form required by the fund administrator. The board shall begin

accepting applications no later than 60 days after the initial appointments.

History.
Code 1981, § 10-10-14, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-15. Expenditure of funds; capitalization; cost of administration.

(a) The Invest Georgia Fund is created as a separate fund maintained by the board, and moneys shall be expended only as provided in this article.

(b) The Invest Georgia Fund shall be capitalized through grants from the Seed-Capital Fund, designated appropriations to the center, and private contributions to the board.

(c) The capital raised shall be periodically distributed to the venture capital funds selected by the fund administrator pursuant to Code Section 10-10-14.

(d) All moneys appropriated to or otherwise paid into the Invest Georgia Fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(e) The entire cost of administration of the Invest Georgia Fund, including expenses of the center incurred in connection with the creation, operation, management, liquidation, and investment of fund moneys may be paid from the assets of the Invest Georgia Fund.

History.
Code 1981, § 10-10-15, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-16. Five-year funding period.

The Invest Georgia Fund may be funded over a five-year period through guidelines developed by the board. In the first year of the Invest Georgia Fund, the state may provide $10 million to the Invest Georgia Fund; in the second year, $15 million; in the third year, $15 million; in the fourth year, $25 million; and in the fifth year, $35 million.

History.
Code 1981, § 10-10-16, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-17. Allocation of designated capital.

(a) As soon as practicable after the board receives contributed

capital, the board and each selected venture capital fund that has been allocated designated capital shall enter into a contract under which the allocated amount of designated capital shall be committed by the board to the selected venture capital funds for investment pursuant to this article.

(b) The board shall allocate designated capital as follows:

(1) Early stage venture capital funds: 40 percent of the total contributed capital in the Invest Georgia Fund shall be allocated among the early stage venture capital funds, in accordance with the following eligibility conditions and requirements:

(A) Each early stage venture capital fund shall be eligible for a minimum of $10 million, up to a maximum of $15 million allocation over a five-year period or in accordance with the early stage venture capital fund's partnership agreement and concurrent with the contributions of the early stage venture capital fund's other investors;

(B) Each early stage venture capital fund shall be required to obtain other independent investors. A minimum of 10 percent of the committed capital of the early stage venture capital fund shall be committed by independent institutional investors, early stage venture capital fund principals, or other accredited investors; and

(C) Each early stage venture capital fund shall be required to commit, via a side letter or otherwise, to invest in Georgia based qualified early stage businesses and qualified growth stage businesses an amount that matches or exceeds the amount of the early stage venture capital fund's designated capital received under this article;

(2) Growth stage venture capital funds: 60 percent of the total contributed capital in the Invest Georgia Fund shall be allocated among the growth stage venture capital funds, in accordance with the following eligibility conditions and requirements:

(A) Each growth stage venture capital fund shall be eligible for an allocation of a minimum of $10 million designated capital over a five-year period or in accordance with the growth stage venture capital fund's partnership agreement and concurrent with the contributions of the growth stage venture capital fund's other investors;

(B) Each growth stage venture capital fund shall be required to obtain other independent investors. A minimum of 50 percent of the committed capital of the growth stage venture capital fund shall be committed by independent institutional investors, growth stage venture capital fund principals, or other accredited investors; and

(C) Each growth stage venture capital fund shall be required to commit, via a side letter or otherwise, to invest in Georgia based qualified early stage businesses and qualified growth stage businesses an amount that matches or exceeds the amount of the growth stage venture capital fund's designated capital received under this article.

History.
Code 1981, § 10-10-17, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-18. Reports.

(a) Not later than December 31 of each year, each venture capital fund shall report to the board:

(1) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(2) All qualified investments made during the preceding calendar year, including the number of employees of each business at the time the qualified investment was made and as of December 31 of that year;

(3) For any qualified investment in which the venture capital fund no longer has a position as of the end of the calendar year, the number of employees of the business as of the date the investment was terminated; and

(4) Any other information the board requires to ascertain the impact of this article on the economy of Georgia.

(b) Not later than 180 days after the end of its fiscal year, each venture capital fund shall provide to the board an audited financial statement that includes the opinion of an independent certified public accountant.

(c) Not later than 60 days after the sale or other disposition of a qualified investment, the selling venture capital fund shall provide to the board a report on the amount of the interest sold or disposed of and the consideration received for the sale or disposition.

History.
Code 1981, § 10-10-18, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-19. Retention of designated capital and investment returns.

Designated capital and investment returns resulting from the qualified investments made under this article shall be retained and used to

make additional qualified investments in venture capital funds selected by the fund administrator; provided, however, that the Invest Georgia Fund shall receive any and all returns representing the principal portion of designated capital and shall receive 80 percent of investment returns in excess of designated capital from each respective venture capital fund with the remaining 20 percent of investment returns in excess of designated capital retained by each respective venture capital fund in accordance with such venture capital fund's partnership agreement.

History.
Code 1981, § 10-10-19, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

10-10-20. Report on implementation of article.

(a)(1) On or before January 1, 2015, and January 1 of each subsequent year, the fund administrator, through the board, shall submit a report on the implementation of this article to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, and the chairpersons of the Senate Finance Committee and the House Committee on Ways and Means.

(2) The center shall also publish the report on the center's website in a publicly available format.

(3) The report published on the website shall not include any proprietary or confidential information.

(b) The report shall include:

(1) With respect to each venture capital fund or private equity organization that has received an allocation of designated capital:

(A) The name and address of the venture capital fund or private equity organization;

(B) The names of the individuals making qualified investments under this article;

(C) The amount of designated capital received during the previous year;

(D) The cumulative amount of designated capital received;

(E) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(F) The names and locations of qualified businesses receiving designated capital and the amount of each qualified investment;

(G) The annual performance of each qualified investment,

including the qualified investment's fair market value as calculated according to generally accepted accounting principles; and

(H) The amount of any qualified distribution or nonqualified distribution taken during the prior year, including any management fee;

(2) With respect to the Invest Georgia Fund:

(A) The amount of designated capital received during the previous year;

(B) The cumulative amount of designated capital received;

(C) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(D) The names and locations of qualified businesses receiving designated capital and the amount of each qualified investment; and

(E) The annual performance of each qualified investment, including the qualified investment's fair market value as calculated according to generally accepted accounting principles; and

(3) With respect to the qualified businesses in which venture capital funds have invested:

(A) The classification of the qualified businesses according to the industrial sector and the size of the business;

(B) The total number of jobs created in Georgia by the investment and the average wages paid for the jobs; and

(C) The total number of jobs retained in Georgia as a result of the investment and the average wages paid for the jobs.

History.
Code 1981, § 10-10-20, enacted by Ga. L. 2013, p. 243, § 5/HB 318.

CHAPTER 11

BUSINESS RECORDS

Sec.		Sec.	
10-11-1.	Definitions.	10-11-3.	Retention of reproductions of original business records.
10-11-2.	Time period for retention of business records.		

10-11-1. Definitions.

As used in this chapter, the term:

(1) "Business record" means letters, words, sounds, or numbers, or the equivalent of letters, words, sounds, or numbers, recorded in the operation of a business by handwriting, typewriting, printing, photostat, photograph, magnetic impulse, mechanical or electronic recording, or another form of data compilation.

(2) "Reproduction" means a counterpart of an original business record created by production from the same impression on the same matrix as the original; photograph, including an enlargement or miniature; mechanical or electronic rerecording; chemical reproduction; or another technique that accurately reproduces the original.

History.
Code 1981, § 10-11-1, enacted by Ga. L. 1991, p. 1638, § 1.

10-11-2. Time period for retention of business records.

Unless a specific period is designated by law for their preservation, business records which persons pursuant to the laws of this state are required to keep or preserve may be destroyed after the expiration of three years from the making of such records without constituting an offense under such laws. This Code section does not apply to minute books of corporations or to records of sales or other transactions involving weapons or poisons capable of use in the commission of crimes.

History.
Code 1981, § 10-11-2, enacted by Ga. L. 1991, p. 1638, § 1.

10-11-3. Retention of reproductions of original business records.

If, in the regular course of business, a person makes reproductions of original business records, the preservation of such reproductions constitutes compliance with any laws of this state requiring that business records be kept or preserved.

History.
Code 1981, § 10-11-3, enacted by Ga. L. 1991, p. 1638, § 1.

CHAPTER 12

ELECTRONIC TRANSACTIONS

Sec.	
10-12-1.	Short title.
10-12-2.	Definitions.
10-12-3.	Applicability to electronic records and signatures relating to a transaction.
10-12-4.	Applicability to electronic records and signatures created on or after July 1, 2009.
10-12-5.	Chapter does not create requirement for electronic transactions; determination as to whether parties intend to conduct electronic transactions.
10-12-6.	Construction and applicability.
10-12-7.	Legal effect of electronic records or signatures.
10-12-8.	Ability to retain, store, and print electronic records; requirements for posting and display of records; variation by agreement.
10-12-9.	Attributing electronic record or signature to particular person; effect.
10-12-10.	Rules applicable when change or error in electronic record occurs.
10-12-11.	Satisfaction of notarization, acknowledgement, verification or oath requirement.
10-12-12.	Retention of electronic records.
10-12-13.	Record or signature evidence not to be excluded solely on the basis of electronic format.
10-12-14.	Rules for automated transactions.
10-12-15.	Sending and receipt of electronic records.
10-12-16.	Transferable records.
10-12-17.	Agency creation and retention of electronic records; conversion of written records to electronic records.
10-12-18.	Each government agency to determine extent of electronic record utilization; specifications for use.
10-12-19.	Standards.
10-12-20.	Chapter modifies, limits, and supersedes Electronic Signatures in Global and National Commerce Act.

Cross references.

Filing documents by electronic means, § 15-10-53.

Disclosure of information relating to electronic signature, § 50-18-72.

Editor's notes.

Ga. L. 2009, p. 698, § 1, effective July 1, 2009, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 10-12-1 through 10-12-5, relating to electronic records and signatures, and was based on Code 1981, §§ 10-12-1—10-12-5, enacted by Ga. L. 1997, p. 1052, § 1; Ga. L. 1998, p. 232, §§ 1-3; Ga. L. 1999, p. 323, § 1; Ga. L. 2001, p. 983, §§ 1, 2; Ga. L. 2006, p. 72, § 10/SB 465; Ga. L. 2007, p. 133, § 4/HB 24.

For application of this chapter in 2020 and 2021, see Executive Orders 06.11.20.01, 06.29.20.02, 07.15.20.01, 07.31.20.02, 08.15.20.01, 08.31.20.02, 06.30.21.02, 07.22.21.02, 08.19.21.02, and 09.20.21.02.

RESEARCH REFERENCES

ALR.
Construction and Application of Uniform Electronic Transactions Act, 4 A.L.R.7th 2.

10-12-1. Short title.

This chapter shall be known and may be cited as the "Uniform Electronic Transactions Act."

History.
Code 1981, § 10-12-1, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

Cross references.
Electronic records, signatures and filing documents, § 44-2-35 et seq.

10-12-2. Definitions.

As used in this chapter, the term:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures, given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances, in whole or in part, without review or action by an individual.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) "Information" means data, text, images, sounds, codes, computer programs, software, data bases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(16) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

History.
Code 1981, § 10-12-2, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-3. Applicability to electronic records and signatures relating to a transaction.

(a) Except as otherwise provided in subsection (b) of this Code section, this chapter shall apply to electronic records and electronic signatures relating to a transaction.

(b) This chapter shall not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) Title 11 other than Code Section 11-1-306, Article 2, and Article 2A; or

(3) The Uniform Computer Information Transactions Act.

(c) This chapter shall apply to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection (b) of this Code section to the extent it is governed by a law other than those specified in subsection (b) of this Code section.

(d) A transaction subject to this chapter shall also be subject to other applicable substantive law.

(e) A governmental agency which is a party to a transaction subject to this chapter shall also be further subject to the records retention requirements for state and local government records established by state law.

History.
Code 1981, § 10-12-3, enacted by Ga. L. 2009, p. 698, § 1/HB 126; Ga. L. 2015, p. 996, § 3C-4/SB 65.

Editor's notes.
Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: "(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

10-12-4. Applicability to electronic records and signatures created on or after July 1, 2009.

This chapter shall apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2009.

History.
Code 1981, § 10-12-4, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-5. Chapter does not create requirement for electronic transactions; determination as to whether parties intend to conduct electronic transactions.

(a) This chapter shall not require a record or signature to be created,

generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter shall apply only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection shall not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of this chapter's provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, shall not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences shall be determined by this chapter and other applicable laws.

History.
Code 1981, § 10-12-5, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-6. Construction and applicability.

This chapter shall be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable laws;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

History.
Code 1981, § 10-12-6, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-7. Legal effect of electronic records or signatures.

(a) A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record shall satisfy the law.

(d) If a law requires a signature, an electronic signature shall satisfy the law.

History.
Code 1981, § 10-12-7, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-8. Ability to retain, store, and print electronic records; requirements for posting and display of records; variation by agreement.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement shall be satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record to be posted or displayed in a certain manner; to be sent, communicated, or transmitted by a specified method; or to contain information that is formatted in a certain manner, the following rules shall apply:

(1) The record shall be posted or displayed in the manner specified in the other law;

(2) Except as otherwise provided in paragraph (2) of subsection (d) of this Code section, the record shall be sent, communicated, or transmitted by the method specified in the other law; and

(3) The record shall contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record shall not be enforceable against the recipient.

(d) The requirements of this Code section shall not be varied by agreement, but:

(1) To the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) of this Code section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this chapter to send, communicate, or transmit a record by first-class mail, postage prepaid, or by regular United States mail may be varied by agreement to the extent permitted by the other law.

History.
Code 1981, § 10-12-8, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-9. Attributing electronic record or signature to particular person; effect.

(a) An electronic record or electronic signature shall be attributable to a person if such record or signature was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this Code section shall be determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

History.
Code 1981, § 10-12-9, enacted by Ga. L. 2009, p. 698, § 1/HB 126.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2009, "whom" was substituted for "which" in the second sentence of subsection (a).

10-12-10. Rules applicable when change or error in electronic record occurs.

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules shall apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record;

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) Promptly notifies the other person of the error and that the

individual did not intend to be bound by the electronic record received by the other person;

(B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) Has not used or received any benefit or value from the consideration, if any, received from the other person;

(3) If neither paragraph (1) nor paragraph (2) of this Code section applies, the change or error shall have the effect provided by other law, including the law of mistake, and the parties' contract, if any; and

(4) Paragraphs (2) and (3) of this Code section shall not be varied by agreement.

History.
Code 1981, § 10-12-10, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-11. Satisfaction of notarization, acknowledgement, verification or oath requirement.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, such requirement shall be satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

History.
Code 1981, § 10-12-11, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-12. Retention of electronic records.

(a) If a law requires that a record be retained, such requirement shall be satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for the retention period required by law.

(b) A requirement to retain a record in accordance with subsection (a)

of this Code section shall not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this Code section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this Code section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this Code section.

(f) A record retained as an electronic record in accordance with subsection (a) of this Code section shall satisfy a law requiring a person to retain a record for evidentiary, audit, or like purposes unless a law enacted after July 1, 2009, specifically prohibits the use of an electronic record for the specified purpose.

(g) This Code section shall not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

(h) This Code section shall not preclude the Georgia Technology Authority from specifying additional technology requirements in accordance with Code Section 50-25-4.

History.
Code 1981, § 10-12-12, enacted by Ga. L. 2009, p. 698, § 1/HB 126.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2009, "July 1, 2009," was substituted for "the effective date of this chapter" in subsection (f).

10-12-13. Record or signature evidence not to be excluded solely on the basis of electronic format.

In a proceeding, evidence of a record or signature shall not be excluded solely because it is in electronic form.

History.
Code 1981, § 10-12-13, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-14. Rules for automated transactions.

In an automated transaction, the following rules shall apply:

(1) A contract may be formed by the interaction of electronic

agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements;

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance; and

(3) The terms of the contract are determined by the substantive law applicable to the contract.

History.
Code 1981, § 10-12-14, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-15. Sending and receipt of electronic records.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when:

(1) It is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) It is in a form capable of being processed by that system; and

(3) It enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this Code section shall apply even if the information processing system is located in a different place than the electronic record is deemed to be received under subsection (d) of this Code section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is

deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules shall apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) of this Code section even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this Code section shall establish that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this Code section, or purportedly received under subsection (b) of this Code section, was not actually sent or received, the legal effect of the sending or receipt shall be determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection shall not be varied by agreement.

History.
Code 1981, § 10-12-15, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

Law reviews.
For annual survey on commercial transportation, see 73 Mercer L. Rev. 47 (2021).

10-12-16. Transferable records.

(a) As used in this Code section, the term "transferable record" means an electronic record that:

(1) Would be a note under Article 3 of Title 11 or a document under Article 7 of Title 11 if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this Code section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the transferable record was issued; or

(B) If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Code Section 11-1-201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Title 11, including, if the applicable statutory requirements under subsection (a) of Code Section 11-3-302 or Code Section 11-7-501 or 11-9-308 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record shall have the same rights and defenses as an equivalent obligor under equivalent records or writings under Title 11.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

History.
Code 1981, § 10-12-16, enacted by Ga. L. 2009, p. 698, § 1/HB 126; Ga. L. 2024, p. 1052, § 2(61)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "section, the term" for "section," in the introductory language of subsection (a).

10-12-17. Agency creation and retention of electronic records; conversion of written records to electronic records.

Each governmental agency of this state shall determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records.

History.
Code 1981, § 10-12-17, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-18. Each government agency to determine extent of electronic record utilization; specifications for use.

(a) Except as otherwise provided in subsection (f) of Code Section 10-12-12, each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a) of this Code section, the governmental agency, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records shall be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature shall be affixed to the electronic record, and the identity of, or criteria that shall be met by, any third party used by a person filing a document to facilitate the process;

(3) Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in subsection (f) of Code Section 10-12-12, this chapter shall not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

History.
Code 1981, § 10-12-18, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-19. Standards.

Any governmental agency of this state which adopts standards pursuant to Code Section 10-12-18 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

History.
Code 1981, § 10-12-19, enacted by Ga. L. 2009, p. 698, § 1/HB 126.

10-12-20. Chapter modifies, limits, and supersedes Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History.
Code 1981, § 10-12-20, enacted by Ga. L. 2009, p. 698, § 1/HB 126.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2009, a misspelling of "Commerce" was corrected and a minor punctuation change was made in this Code section.

CHAPTER 13

TOBACCO PRODUCT MANUFACTURERS

Sec.		Sec.	
10-13-1.	Legislative findings; Master Settlement Agreement.	10-13-4.	Copies of Master Settlement Agreement available to the public.
10-13-2.	Definitions.		
10-13-3.	Deposits into escrow accounts; violations.		

Administrative rules and regulations. Rules Governing Escrow Payments from Non-Participating Tobacco Product Manufacturers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Consumer Interest Section, Rule 60-1-1-.01 et seq.

10-13-1. Legislative findings; Master Settlement Agreement.

(a) Cigarette smoking presents serious public health concerns to the state and to the citizens of the state. The Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.

(b) Cigarette smoking also presents serious financial concerns for the state. Under certain health-care programs, the state may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.

(c) Under these programs, the state pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

(d) It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts.

(e) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the state. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present, and certain future claims against them as described therein, to pay substantial sums to the state (tied in part to their volume of sales); to fund a national foundation devoted to the interests

of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

(f) It would be contrary to the policy of the state if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the state to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

History.
Code 1981, § 10-13-1, enacted by Ga. L. 1999, p. 725, § 1.

JUDICIAL DECISIONS

Misinterpretation of Attorney General's power under O.C.G.A. § 10-13A-4(b). — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the ability to have the manufacturer cure any certification deficiencies. Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811, 2008 Ga. App. LEXIS 1289 (2008).

RESEARCH REFERENCES

ALR.
Validity, construction, application, and effect of master settlement agreement (MSA) between tobacco companies and various states, and state statutes implementing agreement; use and distribution of MSA proceeds, 25 A.L.R.6th 435.

10-13-2. Definitions.

As used in this chapter, the term:

(1) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an equity interest, or the equivalent thereof of 10 percent or more, and the term "person" means an individual, partnership, committee,

association, corporation, or any other organization or group of persons.

(3) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

(4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (B) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (C) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (A) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(5) "Importer" means any person in the United States to whom nonfederal excise tax-paid cigarettes manufactured in a foreign country are shipped or consigned, any person who removes cigarettes for sale or consumption in the United States from a customs bonded manufacturing warehouse, or any person who smuggles or otherwise unlawfully brings cigarettes into the United States.

(6) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(7) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least $1 billion where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with subparagraph (B) of paragraph (2) of Code Section 10-13-3. The principal balance in the qualified escrow fund must always be maintained so that both the face value and the cost basis of the account are each equal to or greater than the accumulated principal deposits.

(8) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

(9) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.

(10) "Tobacco product manufacturer" means an entity that after April 28, 1999, directly (and not exclusively through any affiliate):

(A) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within subparagraphs (A) through (C) of this paragraph.

(11) "Units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, on packs required to bear a tax stamp pursuant to Code Section 48-11-3 and on "roll-your-own" tobacco on which excise tax is due either by tax stamp or pursuant to an alternate method of taxation. "Units sold" does not include cigarettes the purchase or use of which the state is prohibited from taxing under the Constitution or statutes of the United States. The state revenue commissioner and the Attorney General may promulgate such regulations as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

History.

Code 1981, § 10-13-2, enacted by Ga. L. 1999, p. 725, § 1; Ga. L. 2016, p. 528, § 1/HB 899; Ga. L. 2017, p. 774, § 10/HB 323.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, "$1 billion" was substituted for "$1,000,000,000.00" in paragraph (6) (now paragraph (7)).

JUDICIAL DECISIONS

Misinterpretation of Attorney's General power under O.C.G.A. § 10-13A-4(b). — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the ability to have the manufacturer cure any certification deficiencies. Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811, 2008 Ga. App. LEXIS 1289 (2008).

10-13-3. Deposits into escrow accounts; violations.

Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the date of enactment of this chapter shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2)(A) Place into a qualified escrow fund on a quarterly basis, no later than 30 days after the end of each calendar quarter in which sales are made, the following amounts (as such amounts are adjusted for inflation):

(i) 1999: $0.0094241 per unit sold after the date of enactment of this chapter;

(ii) 2000: $0.0104712 per unit sold;

(iii) For each of 2001 and 2002: $0.0136125 per unit sold;

(iv) For each of 2003 through 2006: $0.0167539 per unit sold; and

(v) For each of 2007 and each year thereafter: $0.0188482 per unit sold.

(B) A tobacco product manufacturer that places funds into escrow pursuant to subparagraph (A) of this paragraph shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(i) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this division: (I) in the order in which they were placed into escrow; and (II) only

to the extent and at the time necessary to make payments required under such judgment or settlement;

(ii) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including, after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(iii) To the extent not released from escrow under division (i) or (ii) of this subparagraph, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(C) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this paragraph shall quarterly and annually certify to the Attorney General that it is in compliance with this paragraph. The Attorney General may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this paragraph. Any tobacco product manufacturer that fails in any calendar quarter or year to place into escrow the funds required under this paragraph shall:

(i) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this paragraph. The court, upon a finding of a violation of this paragraph, may impose a civil penalty (to be paid to the general fund of the state) in an amount not to exceed 5 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100 percent of the original amount improperly withheld from escrow;

(ii) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this Code section. The court, upon a finding of a knowing violation of this paragraph, may impose a civil penalty (to be paid to the general fund of the state) in an amount not to exceed 15 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300 percent of the original amount improperly withheld from escrow; and

(iii) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state (whether

directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

(D) An importer shall be jointly and severally liable for escrow deposits due from a nonparticipating manufacturer with respect to any nonparticipating manufacturer cigarettes that it imported and which were then sold in this state.

Each failure to make a quarterly or annual deposit required under this Code section shall constitute a separate violation.

History.

Code 1981, § 10-13-3, enacted by Ga. L. 1999, p. 725, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2004, p. 340, § 1; Ga. L. 2016, p. 528, § 2/HB 899.

Editor's notes.

Ga. L. 2004, p. 340, § 2/SB 395, not codified by the General Assembly, provides: "If this Act, or any portion of the amendment to division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 made by this Act, is held by a court of competent jurisdiction to be unconstitutional, then such division (ii) shall be deemed to be repealed in its entirety. If subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this Act shall be deemed repealed, and division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall be restored as if no such amendments had been made. Neither any holding of unconstitutionality nor the repeal of division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall affect, impair, or invalidate any other portion of Code Section 10-13-3, or the application of such Code section to any other person or circumstance, and such remaining portions of Code Section 10-13-3 shall at all times continue in force and effect." As of May 2024, no such decision has been issued.

Ga. L. 2004, p. 340, § 3, not codified by the General Assembly, provides that the amendment to division (2)(B)(ii) shall govern all requests for the release of escrow moneys made on or after May 7, 2004.

JUDICIAL DECISIONS

Sovereign immunity. — Tobacco producer's claim that the attorney general was required to release escrow funds to the producer because the producer paid more into escrow than the producer was required to under Georgia law was properly dismissed because the producer was barred by state sovereign immunity. S&M Brands, Inc. v. Georgia ex rel. Carr, 925 F.3d 1198, 2019 U.S. App. LEXIS 15870 (11th Cir. 2019).

No Equal Protection violation shown. — All provisions of a revised escrow agreement that the tobacco producer challenged under the Equal Protection clause were provisions with respect to which participating manufacturer's and nonparticipating manufacturers were not similarly situated, so the producer had not plausibly alleged an Equal Protection violation. S&M Brands, Inc. v. Georgia ex rel. Carr, 925 F.3d 1198, 2019 U.S. App. LEXIS 15870 (11th Cir. 2019).

10-13-4. Copies of Master Settlement Agreement available to the public.

The "Master Settlement Agreement" referred to in subsection (e) of Code Section 10-13-1 and other provisions of this chapter has been transmitted by the Attorney General to the Secretary of State and shall

be maintained as a permanent record in the office of the Secretary of State, together with the enrolled Act by which this chapter is enacted. The Master Settlement Agreement shall not be published with the Act, but the Secretary of State shall, upon request and payment of copying costs, make a copy or certified copy of such document available to any member of the public.

History.
Code 1981, § 10-13-4, enacted by Ga. L. 1999, p. 725, § 1.

CHAPTER 13A

MASTER SETTLEMENT AGREEMENT ENHANCEMENTS

Sec.
10-13A-1. Legislative findings.
10-13A-2. Definitions.
10-13A-3. Certification of compliance with Master Settlement Agreement; requirements; retention of documentation of sales.
10-13A-4. Availability of directory; inclusion and maintenance requirements; provision of email by distributor.
10-13A-5. Prohibition against affixing tax stamp to manufacturer or brand not included in directory.
10-13A-6. Agents of nonresident or foreign nonparticipating manufacturer or importer; directory updating; refunds upon removal from directory.
10-13A-7. Bond from nonparticipating manufacturers; escrow.
10-13A-8. Documentation to be supplied by distributor; cooperation between commissioner and Attorney General; promulgation of regulations.
10-13A-9. Suspension of dealer's or distributor's license; other available remedies; falsification of information.
10-13A-10. Review of Attorney General's decision on removal from directory; certification of full compliance required; recovery of costs; conflicts with the Master Settlement Agreement.

Cross references.

Cigar and cigarette taxes, § 48-11-1 et seq.

Administrative rules and regulations.

Rules Governing Escrow Payments from Non-Participating Tobacco Product Manufacturers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Consumer Interest Section, Rule 60-1-1-.01 et seq.

Law reviews.

For note on the 2003 enactment of this chapter, see 20 Ga. St. U.L. Rev. 51 (2003).

10-13A-1. Legislative findings.

The General Assembly finds that violations of Chapter 13 of this title threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health. The General Assembly finds that enacting procedural enhancements will aid the enforcement of such chapter and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health.

History.

Code 1981, § 10-13A-1, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2016, p. 528, § 3/HB 899.

RESEARCH REFERENCES

ALR.

Validity, construction, application, and effect of master settlement agreement (MSA) between tobacco companies and various states, and state statutes implementing agreement; use and distribution of MSA proceeds, 25 A.L.R.6th 435.

10-13A-2. Definitions.

As used in this chapter, the term:

(1) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol," "lights," "kings," and "100s," and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to or identifiable with a previously known brand of cigarettes.

(2) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (B) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (C) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (A) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(3) "Commissioner" means the state revenue commissioner.

(4) "Dealer" means cigarette and loose and smokeless dealers as defined in paragraphs (7) and (17) of Code Section 48-11-1.

(5) "Directory" means the directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of Code Section 10-13A-3 and all brand families that are listed in such certifications developed by the Attorney General pursuant to Code Section 10-13A-4, or in the case of reference to another state's directory, the directory compiled under the similar law of the other state.

(6) "Distributor" means any person who:

(A) Maintains a warehouse, warehouse personnel, and salespersons who regularly contact and call on dealers; and

(B) Is engaged in the business of:

(i) Manufacturing cigarettes in this state, importing cigarettes into this state, or purchasing cigarettes from other manufacturers or distributors; and

(ii) Selling the cigarettes to dealers in this state for resale but is not in the business of selling the cigarettes directly to the ultimate consumer of the cigarettes.

(7) "Importer" means any person in the United States to whom nonfederal excise tax-paid cigarettes manufactured in a foreign country are shipped or consigned, any person who removes cigarettes for sale or consumption in the United States from a customs bonded manufacturing warehouse, or any person who smuggles or otherwise unlawfully brings cigarettes into the United States.

(8) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(9) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

(10) "Package" means any pack or other container on which a state stamp could be applied consistent with and as required by Code Section 48-11-3 that contains one or more individual cigarettes for sale. Nothing in this paragraph shall alter any other applicable requirements with respect to the minimum number of cigarettes that may be contained in a pack or other container of cigarettes. References to package do not include a container of multiple packages.

(11) "Participating manufacturer" has the meaning given that term in subsection II(jj) of the Master Settlement Agreement and all amendments thereto.

(12) "Person" means any natural person, trustee, company, partnership, corporation, or other legal entity.

(13) "Purchase" means any acquisition in any manner or by any means for any consideration. The term includes transporting or receiving product in connection with a purchase.

(14) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at

least $1 billion where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with subparagraph (B) of paragraph (2) of Code Section 10-13-3. The principal balance in the qualified escrow fund must always be maintained so that both the face value and the cost basis of the account are each equal to or greater than the accumulated principal deposits.

(15) "Sale or sell" means any transfer, exchange, or barter in any manner or by any means for any consideration. Sale or sell includes distributing or shipping product in connection with a sale. References to sale "in" or "into" a state refers to the state of the destination point of the product in the sale, without regard to where title was transferred. References to sale "from" the state refers to the sale of cigarettes that are located in the state to the destination in question without regard to where title was transferred.

(16) "Stamping agent" means any person that is authorized to affix stamps to packages or other containers of cigarettes under Code Section 48-11-3 or any person that is required to pay the excise tax under the alternate method of taxation, if so prescribed pursuant to Code Section 48-11-3 on "roll-your-own" tobacco.

(17) "Tobacco product manufacturer" means an entity that after April 28, 1999:

(A) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

The term tobacco product manufacturer shall not include an affiliate

of a tobacco product manufacturer unless such affiliate itself falls within subparagraphs (A) through (C) of this paragraph.

(18) "Units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question on cigarette packs required to bear a tax stamp pursuant to Code Section 48-11-3 and on "roll-your-own" tobacco on which excise tax is due either by tax stamp or pursuant to an alternate method of taxation. "Units sold" does not include cigarettes the purchase or use of which the state is prohibited from taxing under the Constitution or statutes of the United States. The state revenue commissioner and the Attorney General may promulgate such regulations as are necessary to ascertain the amount of state excise tax paid on cigarettes of such tobacco product manufacturer for each year.

History. Code 1981, § 10-13A-2, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2004, p. 631, § 10; Ga. L. 2016, p. 528, § 3/HB 899.

10-13A-3. Certification of compliance with Master Settlement Agreement; requirements; retention of documentation of sales.

(a) Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver in the manner prescribed by the Attorney General a certification to the commissioner and Attorney General, no later than the thirtieth day of April each year, certifying that, as of the date of such certification, such tobacco product manufacturer either is a participating manufacturer or is in full compliance with Chapter 13 of this title, including all annual deposits required by paragraph (2) of Code Section 10-13-3.

(b) Every tobacco product manufacturer shall also certify that:

(1) Such manufacturer or its importer holds a valid permit under 26 U.S.C. Section 5713; and

(2) Such manufacturer is in compliance with all reporting and registration requirements of 15 U.S.C. Sections 376 and 376a.

(c) In addition, participating manufacturer shall include in its certification a list of its brand families. A participating manufacturer shall update such list 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and commissioner. A participating manufacturer may not include a brand family in its certification unless the participating manufacturer affirms that the brand family is to be

deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement.

(d) A nonparticipating manufacturer shall include in its certification a list of all of its brand families and the number of units sold for each brand family that were sold in this state during the preceding calendar year and a list of all of its brand families that have been sold in this state at any time during the current calendar year. Such lists must indicate any brand family sold in this state during the preceding calendar year that is no longer being sold in this state as of the date of such certification, and identification by name and address of any other manufacturer of such brand families in the preceding or current calendar year. The nonparticipating manufacturer shall update such list 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and commissioner. A nonparticipating manufacturer may not include a brand family in its certification unless such nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of Chapter 13 of this title. Such certification must also certify:

(1) That such nonparticipating manufacturer is registered to do business in this state and has appointed a resident agent for service of process and provided notice thereof as required by Code Section 10-13A-6;

(2) That such nonparticipating manufacturer has established and continues to maintain a qualified escrow fund as required by Code Section 10-13-3 and has executed a qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund;

(3) That such nonparticipating manufacturer is in full compliance with Chapter 13 of this title, this chapter, Chapter 11 of Title 48, and any regulations promulgated pursuant to such chapters;

(4) The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund required pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such chapter; the account number of such qualified escrow fund and any subaccount number for this state; the amount such nonparticipating manufacturer placed in such fund for cigarettes sold in this state during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the Attorney General to confirm the foregoing; and the amount and date

of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such chapter;

(5) That such nonparticipating manufacturer consents to be sued in the courts of the State of Georgia for purposes of the state:

(A) Enforcing this chapter, Chapter 13 of this title, Title 48, and any regulations promulgated pursuant to these provisions; or

(B) Bringing a released claim as defined in paragraph (8) of Code Section 10-13-2;

(6) That such nonparticipating manufacturer has posted the appropriate bond required under Code Section 10-13A-7 and the information needed to establish the existence of such bond; and

(7) In the case of a nonparticipating manufacturer located outside of the United States, the nonparticipating manufacturer shall provide a declaration from each of its importers into the United States of any of its brand families to be sold in this state. The declaration shall be on a form prescribed by the Attorney General and shall state the following:

(A) The importer accepts joint and several liability with the nonparticipating manufacturer for all obligations to place funds into a qualified escrow fund and for payment of all civil penalties and all reasonable costs and expenses of investigation and prosecution, including attorney's fees;

(B) The importer consents to personal jurisdiction in Georgia for the purposes of claims by the state for any obligation to place funds into a qualified escrow fund and for payment of all civil penalties and all reasonable costs and expenses of investigation and prosecution, including attorney's fees; and

(C) The importer has appointed a registered agent for service of process in Georgia according to the same requirements as established in Code Section 10-13A-6 for any nonresident or foreign nonparticipating manufacturer.

Certification in accordance with this subsection shall be deemed to be in compliance with subparagraph (C) of paragraph (2) of Code Section 10-13-3.

(e) Nothing in this Code section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the Master Settlement Agreement or for purposes of Chapter 13 of this title.

(f) Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

History.
Code 1981, § 10-13A-3, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2016, p. 528, § 3/HB 899.

JUDICIAL DECISIONS

Misinterpretation of Attorney General's power under O.C.G.A. § 10-13A-4(b). — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the ability to have the manufacturer cure any certification deficiencies. Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811, 2008 Ga. App. LEXIS 1289 (2008).

10-13A-4. Availability of directory; inclusion and maintenance requirements; provision of email by distributor.

(a) The Attorney General shall develop and make available for public inspection on its website a directory, as defined in paragraph (5) of Code Section 10-13A-2.

(b) The Attorney General shall not include or retain in such directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Attorney General determines is not in compliance with Code Section 10-13A-3, unless the Attorney General has determined that such violation has been cured to the satisfaction of the Attorney General.

(c) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the Attorney General concludes, in the case of a nonparticipating manufacturer, that:

(1) Any escrow payment required pursuant to Chapter 13 of this title for any period for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General; or

(2) Any outstanding final judgment, including interest thereon, for a violation of Chapter 13 of this title has not been fully satisfied for such brand family or such manufacturer.

(d) The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove tobacco product

manufacturers or brand families to keep the directory in conformity with the requirements of this chapter.

(e) Every distributor shall provide and update as necessary an email address to the Attorney General for the purpose of receiving any notifications as may be required by this chapter.

History.
Code 1981, § 10-13A-4, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2016, p. 528, § 3/HB 899; Ga. L. 2024, p. 1052, § 2(62)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in subsection (e).

Law reviews.
For annual survey on administrative law, see 61 Mercer L. Rev. 1 (2009).

JUDICIAL DECISIONS

Misinterpretation of Attorney General's power under O.C.G.A. § 10-13A-4(b). — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the ability to have the manufacturer cure any certification deficiencies. Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811, 2008 Ga. App. LEXIS 1289 (2008).

10-13A-5. Prohibition against affixing tax stamp to manufacturer or brand not included in directory.

It shall be unlawful for any person to affix a tax stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or to sell, offer for sale, or possess with intent to sell, or import for personal use, in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

History.
Code 1981, § 10-13A-5, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2016, p. 528, § 3/HB 899.

10-13A-6. Agents of nonresident or foreign nonparticipating manufacturer or importer; directory updating; refunds upon removal from directory.

(a) Any nonresident or foreign nonparticipating manufacturer or importer that has not registered to do business in this state as a foreign corporation or business entity shall, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state as required by Code Section 48-11-5 to act as agent for the service

of process on whom all process and any action or proceeding against it concerning or arising out of the enforcement of Chapter 13 of this title or this chapter may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of such agent to the satisfaction of the commissioner and Attorney General.

(b) The nonparticipating manufacturer or importer shall provide notice to the commissioner and Attorney General 30 calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the agent and the nonparticipating manufacturer or importer shall notify the commissioner and Attorney General of said termination within five calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

(c) Any nonparticipating manufacturer or importer whose cigarettes are sold in this state who has not appointed and engaged an agent as required in this Code section shall be deemed to have appointed the Secretary of State as such agent and may be proceeded against in courts of this state by service of process upon the Secretary of State; provided, however, that the appointment of the Secretary of State as such agent shall not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer or importer included or retained in the directory.

(d) The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this chapter. The Attorney General shall post in the directory and transmit by email or other practicable means to each notice of any removal from the directory of a tobacco product manufacturer or brand family at least 30 days prior to removal from the directory of such tobacco product manufacturer or brand family. Unless otherwise provided by agreement between the wholesaler and a tobacco product manufacturer, the wholesaler shall be entitled to a refund from a tobacco product manufacturer for any money paid by the wholesaler to the tobacco product manufacturer for any cigarettes of the tobacco product manufacturer in the possession of the wholesaler on the effective date of removal from the directory, or as subsequently received from a retail dealer as provided in this chapter, of products of that tobacco product manufacturer or brand family of cigarettes. Unless otherwise provided by agreement between a retail dealer and the

wholesaler or a tobacco product manufacturer, a retail dealer shall be entitled to a refund from the wholesaler or a tobacco product manufacturer for any money paid by the retail dealer to the wholesaler or such tobacco product manufacturer for any cigarettes of the tobacco product manufacturer still in the possession of the retail dealer on the effective date of removal from the directory of that tobacco product manufacturer or brand family.

History.

Code 1981, § 10-13A-6, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2016, p. 528, § 3/HB 899; Ga. L. 2024, p. 1052, § 2(63)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in subsection (d).

10-13A-7. Bond from nonparticipating manufacturers; escrow.

(a) All nonparticipating manufacturers shall post a bond for the benefit of the state which is subject to execution under subsection (c) of this Code section. The bond shall be posted by a corporate surety located within the United States. The bond shall be posted and evidence of such posting shall be provided to the Attorney General with the nonparticipating manufacturer's quarterly and annual certifications as a condition of the nonparticipating manufacturer and its brand families being included or remaining in the directory for the following quarter or year.

(b) The amount of the bond shall be the greater of:

(1) Fifty thousand dollars; or

(2) The highest amount of escrow owed in Georgia by the nonparticipating manufacturer or its predecessor in the last 12 quarters.

(c) If a nonparticipating manufacturer that posted a bond has failed to make, or have made on its behalf by an entity with joint and several liability, escrow deposits equal to the full amount owed for a quarter within 15 days following the due date for the quarter under Code Section 10-13-3, the state may execute upon the bond, first to recover delinquent escrow, which amount shall be deposited into a qualified escrow account under Code Section 10-13-3, and then to recover civil penalties and costs authorized under such Code section. Escrow obligations above the amount collected on the bond remain due from that nonparticipating manufacturer and from the importers that sold its cigarettes during that calendar quarter and at any time prior to the removal of the nonparticipating manufacturer and brand from the directory.

History.
Code 1981, § 10-13A-7, enacted by Ga. L. 2016, p. 528, § 3/HB 899.
Editor's notes.
Ga. L. 2016, p. 528, § 1/HB 899, effective July 1, 2016, redesignated former Code Section 10-13A-7 as present Code Section 10-13A-8.
Administrative rules and regulations.
Rules Governing Escrow Payments from Non-Participating Tobacco Product Manufacturers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Consumer Interest Section, Rule 60-1-1-.01 et seq.

10-13A-8. Documentation to be supplied by distributor; cooperation between commissioner and Attorney General; promulgation of regulations.

(a) Not later than ten calendar days after the end of each calendar month, and more frequently if so directed by the Attorney General, each distributor shall submit such information as the Attorney General requires to facilitate compliance with this chapter, including, but not limited to, a list by brand family of the total number of cigarettes, or, in the case of "roll-your-own," the equivalent count, for which the distributor affixed tax stamps during the previous calendar month or otherwise paid the tax due for such cigarettes. The distributor shall also certify that the information provided to the Attorney General is complete and accurate. The distributor shall maintain and make available to the Attorney General all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Attorney General for a period of five years.

(b) Notwithstanding any law to the contrary, the commissioner and the Attorney General are authorized to disclose to each other any information received under this chapter, Chapter 13 of this title, and Title 48 for the purposes of determining compliance with and enforcing the provisions of this chapter, Chapter 13 of this title, and Title 48. The commissioner and Attorney General may also share such information with other federal, state, or local courts or agencies for purposes of enforcing the provisions of this chapter, Chapter 13 of this title, or the corresponding laws of other states. The commissioner and Attorney General may also disclose information provided under this Code section, Chapter 13 of this title, and Title 48 that may otherwise be confidential:

(1) In discharge of the duty to enforce or defend the provisions of this part or Chapter 13 of this title;

(2) In the course of any litigation, arbitration, or proceeding related to this part, Chapter 13 of this title, the Master Settlement Agreement, or the NPM Adjustment Settlement Agreement; or

(3) In complying with provisions in the NPM Adjustment Settlement Agreement.

Despite this disclosure, the information shall maintain its confidential status.

(c) Any tobacco sales data provided by another state, a tobacco product manufacturer, or other person or entity to a data clearinghouse pursuant to the NPM Adjustment Settlement Agreement that is also provided to the Attorney General or commissioner pursuant to that agreement shall be treated as confidential tax information as defined in Title 48. This subsection only applies to information received by the Attorney General or commissioner solely as a result of the NPM Adjustment Settlement Agreement.

(d) The Attorney General may require at any time from the nonparticipating manufacturer proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with Chapter 13 of this title of the amount of money in such fund, exclusive of interest, the amount and date of each deposit to such fund, and the amount and date of each withdrawal from such fund.

(e) In addition to the information required to be submitted pursuant to this chapter, the Attorney General may require a distributor, stamping agent, or tobacco product manufacturer to submit any additional information or documentation, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this chapter.

(f) To promote compliance with this chapter, the Attorney General may promulgate regulations. The Attorney General may also require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the quarterly or annual escrow deposit.

History.

Code 1981, § 10-13A-7, enacted by Ga. L. 2003, p. 829, § 1; Code 1981, § 10-13A-8, as redesignated by Ga. L. 2016, p. 528, § 3/HB 899; Ga. L. 2017, p. 774, § 10/HB 323.

Editor's notes.

Ga. L. 2016, p. 528, § 3/HB 899, effective July 1, 2016, redesignated former Code Section 10-13A-8 as present Code Section 10-13A-9.

10-13A-9. Suspension of dealer's or distributor's license; other available remedies; falsification of information.

(a) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent has violated Code Section 10-13A-5 or any regulation adopted pursuant to this chapter, the commissioner may revoke or suspend the dealer or distributor's license of the stamping agent in the manner provided by

Code Section 48-11-6. Each tax stamp affixed and each sale or offer to sell cigarettes in violation of Code Section 10-13A-5 or the rules and regulations adopted pursuant to this chapter shall constitute a separate violation. For each violation, the commissioner may also impose a civil penalty in an amount not to exceed the greater of 500 percent of the retail value of the cigarettes or $5,000.00 upon a determination of a violation of Code Section 10-13A-5 or any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner provided in subsection (c) of Code Section 48-11-24.

(b) A license may also be subject to termination, suspension, or other available remedy found in Code Section 48-11-14, if:

(1) A distributor fails to provide a report required under Code Section 10-13A-8; or

(2) A distributor files an incomplete or inaccurate report required under Code Section 10-13A-8.

(c) Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of Code Section 10-13A-5 or other provisions of this chapter or Chapter 13 of this title shall be deemed contraband under Code Section 48-11-9 and such cigarettes shall be subject to seizure and forfeiture as provided in such Code section.

(d) The Attorney General, on behalf of the commissioner, may seek an injunction to restrain a threatened or actual violation of Code Section 10-13A-5 or of subsection (a) or (e) of Code Section 10-13A-8 by a distributor or stamping agent and to compel the distributor to comply with said Code section or either such subsection. In any action brought pursuant to this Code section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

(e) It shall be unlawful for a person to sell or distribute cigarettes or to acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in this state in violation of Code Section 10-13A-5. Any person who violates this subsection shall be guilty of a misdemeanor.

(f) A violation of Code Section 10-13A-5 shall constitute an unfair and deceptive act or practice under Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975."

(g) It is unlawful for any person to knowingly submit any false information required pursuant to Chapter 13 of this title or this chapter. A violation of this subsection is a felony. Knowing submission of false information shall also be grounds for removal of a tobacco product manufacturer or brand from the directory.

History.

Code 1981, § 10-13A-8, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2015, p. 693, § 3-8/HB 233; Code 1981, § 10-13A-9, as redesignated by Ga. L. 2016, p. 528, § 3/HB 899.

Editor's notes.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Ga. L. 2016, p. 528, § 3/HB 899, effective July 1, 2016, redesignated former Code Section 10-13A-9 as present Code Section 10-13A-10.

Law reviews.

For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

10-13A-10. Review of Attorney General's decision on removal from directory; certification of full compliance required; recovery of costs; conflicts with the Master Settlement Agreement.

(a) A determination of the Attorney General to not include or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed by Article 1 of Chapter 13 of Title 50, known as the "Georgia Administrative Procedure Act."

(b) No person shall be issued a license or granted a renewal of a license under Chapter 11 of Title 48 to act as a distributor unless such person has certified in writing that such person will comply fully with this chapter.

(c) The Attorney General may promulgate rules and regulations necessary to effect the purposes of this chapter.

(d) In any action brought by the state to enforce this chapter, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

(e) If a court of competent jurisdiction finds that the provisions of this chapter and of Chapter 13 of this title conflict and cannot be harmonized, then such provisions of Chapter 13 of this title shall control. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this chapter causes Chapter 13 of this title to no longer constitute a qualifying or model statute, as those terms are defined in the Master Settlement Agreement, then that portion of this chapter shall not be valid. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter is for any reason held to be invalid, unlawful, or unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter or any part thereof.

History.

Code 1981, § 10-13A-9, enacted by Ga. L. 2003, p. 829, § 1; Code 1981, § 10-13A-10, as redesignated by Ga. L. 2016, p. 528, § 3/HB 899.

CHAPTER 13B

OPIOID LITIGATION

Sec.
10-13B-1. Legislative findings.
10-13B-2. Definitions.
10-13B-3. Bar to litigation by state-wide opioid settlement; exception; effective date.

Effective date.
This chapter became effective May 2, 2022.

10-13B-1. Legislative findings.

The General Assembly finds that:

(1) There is an opioid epidemic occurring in the United States, and the State of Georgia has been greatly impacted;

(2) State-wide coordination surrounding and managing opioid addiction and related disorders is critical to the health and safety of all Georgians;

(3) Funding is needed in the state for, among other things, prevention and treatment of opioid addiction and related disorders; providing resources to law enforcement agencies to address the opioid crisis; increasing the number of professionals who provide treatment for opioid addiction; educating medical professionals regarding the safe and effective prescribing of, and then tapering off of, opioids; and treatment and prevention of opioid use disorder in incarcerated populations;

(4) It is imperative that the state receive the full amount of any opioid settlement, and in order to do so, the state must be able to release claims for all state and local public bodies and instrumentalities in the state; and

(5) While local governments generally have the authority to pursue and litigate claims against businesses and individuals to protect their own interests, in certain limited circumstances involving particular industries, the interests of the state as a whole are best served by having a unified settlement structure that benefits both the state and its local governments and brings full and complete closure to the claims that were asserted or could have been asserted and maximizes the state and local governments' potential recovery to address this extraordinary crisis.

History.
Code 1981, § 10-13B-1, enacted by Ga. L. 2022, p. 178, § 1/SB 500.

10-13B-2. Definitions.

As used in this chapter, the term:

(1) "Governmental entity" means:

(A) This state and each of its departments, agencies, divisions, boards, commissions, authorities, and instrumentalities; and

(B) A political subdivision or creation of this state, including a county, municipality, special district, county and independent school systems, community service board, authority, any county or state officeholder, and any other public officeholder or public entity that has asserted or could assert a claim for damages as a result of the manufacture, marketing, sale, dispensing, or distribution of opioids.

(2) "Released claim" means a claim by a governmental entity that has been or could have been released under a state-wide opioid settlement agreement.

(3) "Released entity" means an entity against which a claim has been released under a state-wide opioid settlement agreement.

(4) "State-wide opioid settlement agreement" means any settlement agreement and related documents that:

(A) Are entered into by this state through the Attorney General with opioid manufacturers, distributors, retailers, labelers, marketers, pharmacies, or other entities concerning the use or prescription of opioid products;

(B) Relate to illegal or tortious conduct in the manufacturing, marketing, promotion, sale, distribution, or dispensing of opioids;

(C) Are entered into by the State on or after March 31, 2021;

(D) Provide a mechanism which permits governmental entities to join into such settlement agreement; and

(E) Are the subject of a memorandum of understanding or similar agreement entered into by both the Attorney General and at least 65 percent of the governmental entities which have active and pending litigation against one or more released entities identified in the settlement agreement as of the date when governmental entities are first permitted to join such settlement agreement.

History.
Code 1981, § 10-13B-2, enacted by Ga. L. 2022, p. 178, § 1/SB 500.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2022, the subsection (a) designation was deleted as there was no subsection (b).

10-13B-3. Bar to litigation by state-wide opioid settlement; exception; effective date.

(a) Entry into a state-wide opioid settlement agreement shall serve to bar any and all past, present, or future claims on behalf of any governmental entity seeking to recover against any business or person that is a released entity under the terms of the relevant settlement. Such bar shall apply to any and all released claims or suits by any governmental entity created by or pursuant to an Act of the General Assembly, the Constitution, or any department, agency, or authority thereof, for damages, abatement, injunctive, or any other relief. No such claim barred by this Code section shall be brought, threatened, asserted or pursued in any way in any court, and any such claim shall be dismissed by the court in which the claim is brought.

(b) The bar provided for in subsection (a) of this Code section shall not apply to a bellwether claim of any governmental entity, provided that such claim:

(1) Is brought in the proceedings titled *In re: National Prescription Opiate Litigation*, Case No.: MDL 2804 as bellwether claims that are to be tried in a bellwether trial;

(2) Is selected by the court in *In re: National Prescription Opiate Litigation*, Case No.: MDL 2804 as a bellwether claim to be tried in a bellwether trial; and

(3) Is brought against defendants selected as bellwether defendants in a bellwether trial.

(c) The bar provided for in subsection (a) of this Code section shall become active and effective upon the filing of a consent order by the state that attests to and evidences that a state-wide opioid settlement agreement has been reached, and that the parameters of this chapter have been met.

History.
Code 1981, § 10-13B-3, enacted by Ga. L. 2022, p. 178, § 1/SB 500; Ga. L. 2024, p. 1052, § 2(64)/SB 448, effective July 1, 2024.
Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (a).

JUDICIAL DECISIONS

Preemption provision of Settlement Act. — In an action concerning whether a state entity can continue asserting claims against opioid manufacturers and distributors after the State of Georgia entered into a settlement with the pharmaceutical companies, the Supreme Court of Georgia held that a hospital authority did not have the legal authority to challenge the constitutionality of the Settlement Act, O.C.G.A. § 10-13B-1 et seq. Hospital Authority of Wayne County v. Amerisourcebergen Drug Corp., 317 Ga. 182, 891 S.E.2d 786, 2023 Ga. LEXIS 175 (2023).

CHAPTER 14

CEMETERY AND FUNERAL SERVICES

Sec.
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Cross references.

Authority of administrator to issue cease and desist orders or impose civil penalty, judicial relief, and receivers, § 10-1-397.3.

Disposition of dead bodies, § 31-21-1 et seq.

Limitations upon right to choose funeral services for insured, entry into contracts by life insurers, and receiving of

compensation from undertakers, § 33-1-10 et seq.

Regulation of funeral directors, embalmers, and funeral establishments, and contracts for preneed funeral services, § 43-18-1 et seq.

Protection of American Indian human remains and burial objects, § 44-12-260 et seq.

Administrative rules and regulations.

Rules of General Applicability, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Chapter Rule 590-3-1-.01 et seq.

Preneed Sales Agents, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Rule 590-3-2-.01 et. seq.

Preneed Dealers, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Rule 590-3-4-.01 et. seq.

Merchandise Dealers, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Rule 590-3-5-.01 et. seq.

Mausoleum Preconstruction, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Rule 590-3-6-.01 et. seq.

Administrative Hearings, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Rule 590-3-7-.01 et seq.

RESEARCH REFERENCES

ALR.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lots, 32 A.L.R. 1406; 47 A.L.R. 70.

Cemetery property and cemetery lots as subject to assessment for public improvement, in absence of express exemption, 71 A.L.R. 322.

Rights and remedies of holder of lien on cemetery property, 90 A.L.R. 444.

Right to take property under eminent domain as affected by fact that property is already devoted to cemetery purposes, 109 A.L.R. 1502.

Right to exclude from privilege of burial in cemetery, 110 A.L.R. 388.

Validity of public prohibition or regulation of location of cemetery, 50 A.L.R.2d 905.

Cemetery or burial ground as nuisance, 50 A.L.R.2d 1324.

To whom does title to burial lot pass on testator's death, in absence of specific provision in his will, 26 A.L.R.3d 1425.

Liability of cemetery in connection with conducting or supervising burial services, 42 A.L.R.4th 1059.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

Construction and effect of contracts or insurance policies providing preneed coverage of burial expense or services, 67 A.L.R.4th 36.

Validity, construction, and application of statutes or ordinances regulating perpetual-care trust funds of cemeteries and mausoleums, 54 A.L.R.5th 681.

10-14-1. Short title.

This chapter shall be known and may be cited as the "Georgia Cemetery and Funeral Services Act of 2000."

History.

Code 1981, § 44-3-130, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-1, as redesignated by Ga. L. 2000, p.

882, § 1; Ga. L. 2024, p. 1052, § 2(65)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, deleted "as" following "known" in this Code section.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2000, "chapter" was substituted for "article".

JUDICIAL DECISIONS

Insurance coverage for breach of perpetual care. — When an insurer sought a declaratory judgment defining the insurer's rights and responsibilities under an insurance policy issued to an insured cemetery that was sued for desecrating a grave, the insurer was not obligated to indemnify the insured for any damages awarded on a breach of contract claim alleging a breach of a perpetual care contract regarding the grave because the insured had no duty to care for the grave absent the contract, and the policy excluded coverage for any personal injury for which the insured had assumed liability in a contract. Nationwide Mut. Fire Ins. Co. v. Somers, 264 Ga. App. 421, 591 S.E.2d 430, 2003 Ga. App. LEXIS 1496 (2003).

Private rule prohibiting use of concrete vaults violated statute. — Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in its cemeteries because the rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., because it was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858, 2010 Ga. App. LEXIS 1126 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Deposits and additional fees. — The Georgia Cemetery and Funeral Services Act, O.C.G.A. § 10 14 1 et seq., requires a cemetery to make deposits to a perpetual care trust fund based on a percentage of the sales price of any burial right, cemetery lot, grave space, niche, mausoleum, columbarium, urn, or crypt sold by a cemetery and prohibits a cemetery from charging an additional fee or add-on to the customer. 2017 Op. Att'y Gen. No. U2017-4.

RESEARCH REFERENCES

Am. Jur. 2d.

14 Am. Jur. 2d, Cemeteries, §§ 8, 9.

C.J.S.

14 C.J.S., Cemeteries, § 1 et seq.

10-14-2. Legislative findings and intent.

(a) The legislature recognizes that purchasers of preneed burial rights, funeral or burial merchandise, or funeral services or burial services may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional distress. Therefore, it is necessary in the interest of the public welfare

to regulate preneed dealers, licensees, registrants, and cemetery companies in this state. However, restrictions shall be imposed only to the extent necessary to protect the public from significant or discernible harm or damage and not in a manner which will unreasonably affect the competitive market.

(b) Subject to certain interests of society, the legislature finds that every competent adult has the right to control the decisions relating to his or her own funeral arrangements. Accordingly, unless otherwise stated in this chapter, it is the legislature's express intent that nothing contained in this chapter should be construed or interpreted in any manner as to subject preneed contract purchasers to federal income taxation under the grantor trust rules contained in Sections 671 et seq. of the Internal Revenue Code of 1986, as amended.

(c) Nothing herein is intended to prohibit or restrict the sale or purchase of life insurance as a funding vehicle for preneed contracts under this chapter, nor to change the state of the law prior to July 1, 2000, with respect to prohibiting or restricting the sale or purchase of life insurance as a funding vehicle for preneed contracts under this chapter.

History.
Code 1981, § 10-14-2, enacted by Ga. L. 2000, p. 882, § 1.

Cross references.
Solicitation during final illness, § 10-1-393.7.

JUDICIAL DECISIONS

Constitutional challenges. — Nonprofit cemetery association was unable to sustain an equal protection challenge to the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., on the basis that the Act regulated only private cemeteries; the association, which conceded that the Act's purpose was to protect consumers and the public welfare, health, and safety, did not argue that the regulation of the private cemeteries alone would not meet the purposes intended in the Act, but rather argued that it would have been better and more efficient if the Georgia General Assembly had regulated all cemeteries rather than only those privately owned, which was not a decision for the court to make. Ga. Cemetery Ass'n v. Cox, 403 F. Supp. 2d 1206, 2003 U.S. Dist. LEXIS 26825 (N.D. Ga.), aff'd, 353 F.3d 1319, 2003 U.S. App. LEXIS 25861 (11th Cir. 2003).

10-14-3. Definitions.

As used in this chapter, the term:

(1) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an

equity interest, or the equivalent thereof, of 10 percent or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(2) "Boards" mean the State Board of Cemeterians as described and authorized in Chapter 8B of Title 43 and the State Board of Funeral Service as described and authorized in Chapter 18 of Title 43.

(3) "Burial merchandise," "funeral merchandise," or "merchandise" means any personal property offered or sold by any person for use in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(4) "Burial right" means the right to use a grave space, mausoleum, or columbarium for the interment, entombment, or inurnment of human remains.

(5) "Burial service" means any service other than a funeral service offered or provided by any person in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(6) "Care and maintenance" means the perpetual process of keeping a cemetery and its lots, graves, grounds, landscaping, roads, paths, parking lots, fences, mausoleums, columbaria, vaults, crypts, utilities, and other improvements, structures, and embellishments in a well cared for and dignified condition, so that the cemetery does not become a nuisance or place of reproach and desolation in the community. As specified in the rules of the Secretary of State, care and maintenance may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. Care and maintenance may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. Care and maintenance may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. Care and maintenance does not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.

(7) "Casket" means a container which is designed for the encasement and viewing of a dead human body.

(8) "Cemetery" means a place dedicated to and used, or intended

to be used, for permanent interment of human remains. A cemetery may contain land or earth interments; a mausoleum, a vault, or crypt interments; a columbarium or other structure or place used or intended to be used for the inurnment of cremated human remains; or any combination of one or more of such structures or places. Such term shall not include governmentally owned cemeteries, fraternal cemeteries, cemeteries owned and operated by churches, synagogues, or communities or family burial plots.

(9) "Cemetery company" means any entity that owns or controls cemetery lands or property.

(10) "Columbarium" means a structure or building which is substantially exposed above the ground and which is intended to be used for the inurnment of cremated human remains.

(11) "Common business enterprise" means a group of two or more business entities that share common ownership in excess of 50 percent.

(12) "Cremation" includes any mechanical, chemical, thermal, or other professionally accepted process whereby a deceased human being is reduced to ashes. Cremation also includes any other mechanical, chemical, thermal, or other professionally accepted process whereby human remains are pulverized, burned, recremated, or otherwise further reduced in size or quantity.

(13) "Crypt" means a chamber of sufficient size to inter the remains of a deceased human being.

(14) "Entombment" means the disposition of a dead human body in a mausoleum, including without limitation a crypt, private mausoleum, or any other permanent aboveground structure not used for inurnment, but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(15) "Final disposition" means the final disposal of a deceased human being whether by interment, entombment, inurnment, burial at sea, cremation, or any other means and includes, but is not limited to, any other disposition of remains for which a segregated charge is imposed.

(16) "Funeral director" means any person licensed in this state to practice funeral directing pursuant to the provisions of Chapter 18 of Title 43.

(16.1) "Funeral director in full and continuous charge" means a funeral director who is approved by the State Board of Funeral Service to assume full responsibility for the operations of a particular funeral establishment and who shall ensure that said establishment

complies with this chapter and with all rules promulgated pursuant thereto as provided in Chapter 18 of Title 43.

(17) "Funeral service" means any service relating to the transportation, embalming, cremation, and interment of a deceased human being, as further described in Code Section 43-18-1.

(18) "Grave space" or "lot" means a space of ground in a cemetery intended to be used for the interment in the ground of human remains.

(19) "Human remains" means the bodies of deceased human beings and includes the bodies in any stage of decomposition and the cremated remains.

(20) "Interment" means the burial of human remains but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(21) "Inurnment" means the disposition of the cremated remains of a deceased human being in any fashion, including without limitation in a columbarium niche, cremorial, cremation bench, cremation rock, urn, or other container but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(22) "Mausoleum" means a structure or building which is substantially exposed above the ground and which is used, or intended to be used, for the entombment of human remains.

(23) "Mausoleum section" means any construction unit of a mausoleum which is acceptable to the Secretary of State and which a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(24) "Monument" means any product used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted.

(25) "Niche" means a space used, or intended to be used, for the interment of the cremated remains of one or more deceased human beings.

(26) "Nonperpetual care" means any cemetery which does not offer perpetual care as defined in this Code section.

(27) "Outer burial container" or "vault" means an enclosure into which a casket is placed and includes, but is not limited to, containers made of concrete, steel, fiberglass, copper or other metals, polypropylene, sectional concrete enclosures, and crypts.

(28) "Perpetual care" means the care and maintenance and the

reasonable administration of the cemetery grounds and buildings at the present time and in the future.

(29) "Person" or "entity" means an individual, a corporation, a limited liability company, a general or limited partnership, an association, a joint-stock company, a trust, or any type of incorporated or unincorporated organization.

(30) "Preneed contract" means any arrangement or method, of which the provider of burial or funeral merchandise or services has actual knowledge, whereby any person agrees to furnish burial or funeral merchandise or services in the future.

(31) "Preneed dealer" means every person, other than a salesperson registered under this chapter, who engages, either for all or part of his or her time, directly or indirectly, as agent, broker, or principal in the retail business of offering, selling, or otherwise dealing in funeral services or burial services or funeral or burial merchandise which is not attached to realty or delivered to the purchaser at the time of sale.

(32) "Preneed interment service" or "preneed service" means any service which is not performed at the time of sale and which is offered or provided by any person in connection with the interment of human remains, except those services offered regarding mausoleums and the normal and customary installation charges on burial or funeral merchandise.

(32.1) "Principal" means a sum set aside or escrowed exclusive of income or interest or other return thereon.

(33) "Sale" or "sell" means and shall include every contract of sale or disposition of burial rights, grave spaces, burial services, funeral services, or burial or funeral merchandise for value. The term "offer to sell," "offer for sale," or "offer" shall include any attempt or offer to dispose of, or solicitation of an offer to buy, grave spaces, burial rights, burial or funeral services, or burial or funeral merchandise for value. This definition shall not include wholesalers of burial or funeral merchandise.

(34) "Salesperson" or "sales agent" means an individual employed or appointed or authorized by a cemetery, cemetery company, or preneed dealer to sell grave spaces, burial rights, burial or funeral merchandise, burial or funeral services, or any other right or thing of value in connection with the final disposition of human remains. The owner of a cemetery, the executive officers, and general partners of a cemetery company shall not be deemed to be salespersons within the meaning of this definition unless they are paid a commission for the sale of said property, lots, rights, burial or funeral merchandise, or burial or funeral services.

(35) "Secretary of State" means the Secretary of State of the State of Georgia.

(36) "Solicitation" means any communication in the context of an offer or sale of grave spaces, burial or funeral merchandise, or burial or funeral services which directly or implicitly requests a response from the recipient.

History.

Code 1981, § 44-3-131, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, § 1; Code 1981, § 10-14-3, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, §§ 1, 2/HB 910; Ga. L. 2007, p. 47, § 10/SB 103; Ga. L. 2007, p. 398, § 1/HB 391; Ga. L. 2008, p. 324, § 10/SB 455; Ga. L. 2012, p. 625, §§ 1, 6/HB 933; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2024, p. 1052, § 2(66)/SB 448, effective July 1, 2024.

Amendments.

The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "aboveground" for "above-ground" in paragraph (14).

JUDICIAL DECISIONS

Constitutional challenges. — O.C.G.A. § 10-14-3(8) of the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., did not violate the Establishment Clause because the Act's purpose to protect consumer and public welfare, health, and safety was clearly secular; the principal effect of the Act did not advance or inhibit religion, and the statute did not foster an excessive government entanglement with religion. Ga. Cemetery Ass'n v. Cox, 403 F. Supp. 2d 1206, 2003 U.S. Dist. LEXIS 26825 (N.D. Ga.), aff'd, 353 F.3d 1319, 2003 U.S. App. LEXIS 25861 (11th Cir. 2003).

10-14-3.1. Authority of boards.

As provided in this Code section, the boards may have all administrative powers and other powers necessary to carry out the provisions of this chapter, including the authority to promulgate rules and regulations, and the Secretary of State may delegate to the boards all such duties otherwise entrusted to the Secretary of State; provided, however, that the Secretary of State shall have sole authority over matters relating to the regulation of funds, trust funds, and escrow accounts and accounting and investigations concerning such matters but may delegate authority to the appropriate board for the review of such investigations and the determination as to disciplinary matters, necessary sanctions, and the enforcement of such decisions and sanctions. The State Board of Funeral Service shall have authority to promulgate rules and regulations and may be delegated the authority to make disciplinary and sanctioning decisions relating to funeral services or funeral merchandise. The State Board of Cemeterians shall have authority to promulgate rules and regulations and may be delegated the authority to make disciplinary and sanctioning decisions relating to burial services or burial merchandise. The Secretary of State may

delegate to each board according to such duties and responsibilities of the boards.

History.
Code 1981, § 10-14-3.1, enacted by Ga. L. 2006, p. 1087, § 2A/HB 910; Ga. L. 2012, p. 625, § 7/HB 933; Ga. L. 2021, p. 382, § 1/HB 354.

10-14-4. Registration of cemetery owners, preneed dealers, and burial or funeral merchandise dealers; exemptions; nonperpetual care cemeteries.

(a)(1) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any cemetery burial rights, mausoleum interment rights, columbarium inurnment rights, grave spaces, or other physical locations for the final disposition of human remains in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner pursuant to this Code section.

(2) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or sell burial or funeral merchandise or burial services in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner under this Code section, a funeral director under Chapter 18 of Title 43, or a burial or funeral merchandise dealer under this Code section.

(3) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any preneed burial or funeral merchandise or preneed burial services in this state unless such person is registered as a preneed dealer or preneed sales agent pursuant to this Code section.

(4) It shall be unlawful for any person to offer for sale or to sell any funeral services in this state unless such person is licensed as a funeral director under the provisions of Chapter 18 of Title 43.

(b)(1) Every person desiring to be a registered cemetery owner shall file with the Secretary of State a separate registration application for each cemetery owned in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name, mailing address, and telephone number of the applicant, which for the purposes of this Code section shall be the legal owner of the land upon which the cemetery is located;

(B) The location and, if different from the information submitted for subparagraph (A) of this paragraph, the mailing address and telephone number of the cemetery;

(C) The location of all records of the applicant which relate to the cemetery;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A copy of cemetery rules and regulations, a certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation, and any amendments to such documents or any substantially equivalent documents. Any such document once filed with the Secretary of State pursuant to this chapter shall be deemed to be on file and incorporated into any subsequent renewal or filing of such cemetery registration; provided, however, that each applicant and registrant is under a continuing duty to update such filing and to notify the Secretary of State regarding any changes or amendments to the articles of incorporation, bylaws, cemetery rules and regulations, or substantially equivalent documents, and provided, further, that any applicant or registrant shall furnish to the Secretary of State additional copies of any such document upon request;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the cemetery or could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the cemetery;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Evidence satisfactory to the Secretary of State that the applicant owns for the cemetery unencumbered fee simple title to contiguous land in the minimum acreage required by this chapter or by rules issued by the Secretary of State in accordance with this chapter, properly zoned for use as a cemetery, and dedicated for such use, and a copy of a plat of survey thereto, provided that nothing herein shall prohibit the encumbrance of the undeveloped portion of cemetery property for the purpose of securing debt incurred for the purpose of developing or improving such property;

(L) Evidence satisfactory to the Secretary of State that the applicant has recorded, in the public land records of the county in which the land described in subparagraph (K) of this paragraph is located, a notice that contains the following language:

"NOTICE

The property described herein shall not be sold, conveyed, leased, mortgaged, or encumbered except as provided by the prior written approval of the Secretary of State, as provided in the Georgia Cemetery and Funeral Services Act of 2000."

Such notice shall have been clearly printed in boldface type of not less than ten points and may be included on the face of the deed of conveyance to the applicant or may be contained in a separate recorded instrument that contains a legal description of the property.

(M) The name, address, location, and telephone number of the perpetual care trust account depository or depositories, the names of the accounts, and the account numbers;

(N) The name, address, and telephone number of each trustee;

(O) A copy of a perpetual care trust fund agreement executed by the applicant and accepted by the trustee, and evidence satisfactory to the Secretary of State of the deposit into such account of the amount of the initial required deposit, the trust agreement being conditioned only upon issuance of a certificate of registration;

(P) Such other information and documents as the Secretary of State may require by rule; and

(Q) A filing fee of $100.00.

(2) Every person desiring to be a registered preneed dealer, other than a person already licensed by the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian, shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to preneed sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority, if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's preneed business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) A list of each individual employed, appointed, or authorized

by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) The name, address, location, and telephone number of the preneed trust or escrow account depository or depositories, the names of the accounts, and the account numbers;

(L) An executed copy of the trust or escrow agreement required by Code Section 10-14-7 or 10-14-7.1;

(M) The name, address, and telephone number of the trust or escrow agent;

(N) Such other information and documents as the Secretary of State may require by rule; and

(O) A filing fee of $250.00.

The provisions of this paragraph notwithstanding, a person licensed by the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian shall not be required to separately register as a preneed dealer provided that the requirements of subparagraphs (A) through (N) of this paragraph are satisfied.

(3) Every person desiring to be a registered burial or funeral merchandise dealer shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to funeral or burial merchandise sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a

corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's funeral or burial merchandise business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any burial or funeral merchandise on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Such other information and documents as the Secretary of State may require by rule;

(L) A filing fee of $100.00; and

(M) A bond, if required by the rules and regulations of the Secretary of State.

(c) The Secretary of State may approve an application only after he or she has conducted an investigation of the applicant and determined that such applicant is qualified by character, experience, and financial responsibility to conduct the business for which the applicant is seeking registration in a legal and proper manner. A registration application filed under this Code section shall become effective upon the issuing of a certificate of registration by the Secretary of State or at such earlier time as the Secretary of State determines.

(d) Every registration under this subsection shall expire on the first day of August of each year. The registration must be renewed with the Secretary of State each year by the submission of a renewal application containing the information required in an application for initial registration to the extent that such information had not been included in an application or renewal application previously filed together with a sworn statement that all information not provided remains accurate. The filing fee for renewal of registration shall be $50.00 for each cemetery of cemetery owners, $100.00 for preneed dealers, and $50.00 for burial or funeral merchandise dealers.

(e) The Secretary of State, by rule, may provide for exceptions from registration for cemeteries when the Secretary of State determines that the public interest does not require registration, provided that such cemeteries are in existence on or before July 1, 2000, consist of less than 25 acres, and are operated by nonprofit entities.

(f) Notwithstanding any provision to the contrary contained in this Code section, the following shall be exempt from registration as a burial or funeral merchandise dealer:

(1) Any registered cemetery owner;

(2) The owner of any cemetery exempt from registration with respect to sales of burial or funeral merchandise sold for use at such cemetery;

(3) Any licensed funeral director;

(4) Any person providing interment and disinterment services exclusively at cemeteries exempt from registration;

(5) Any monument manufacturer or dealer which does not install monuments in cemeteries required to be registered by this Code section;

(6) Any person who does not offer for sale or sell burial or funeral services or merchandise to the general public; and

(7) Any registered preneed dealer.

In addition, the Secretary of State, by rule, may provide for other exceptions from registration.

(g)(1) Any cemetery in operation on August 1, 1986 which offers perpetual care for some designated sections of its property but does not offer perpetual care to other designated sections shall be considered a perpetual care cemetery for purposes of this chapter. No cemetery formed or created on or after July 1, 2000, may fail to offer perpetual care for any part of such cemetery.

(2) Any nonperpetual care cemetery which was registered with the Secretary of State prior to August 1, 1986, may continue to be

operated as such after that date and a renewal of such registration shall not be required.

(3) Any nonperpetual care cemetery which is shown to be of historical significance and is operated solely for historical nonprofit purposes shall be exempt from registration.

(4) Except as specifically authorized under paragraphs (2) and (3) of this subsection, from and after August 1, 1986, it shall be unlawful for any person to operate or establish a nonperpetual care cemetery.

History.

Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-4, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 8/HB 933; Ga. L. 2017, p. 774, § 10/HB 323.

Cross references.

Abandonment and forfeiture of cemetery lots, § 44-5-211.

OPINIONS OF THE ATTORNEY GENERAL

Insurance Code restrictions apply. — Restrictions imposed by former Code 1933, § 56-1005 upon domestic insurers in making investments applied to the investment of the assets of perpetual care trust funds. 1974 Op. Att'y Gen. No. 74-51.

Initial deposit is capital. — For the purpose of determining what investments are permissible, the initial trust deposit required of a cemetery offering perpetual care should be considered minimum capital, and the balance of the corpus of the trust fund should be considered a reserve. 1974 Op. Att'y Gen. No. 74-51.

Corpus of a perpetual care trust fund is generally a reserve to provide for the payment of future liabilities. 1974 Op. Att'y Gen. No. 74-51.

Family burial plot. — Absent some local regulation to the contrary, a citizen could start a family burial plot on the citizen's own property; in the event of any death, however, all public health formalities would have to be complied with. 1975 Op. Att'y Gen. No. U75-9.

RESEARCH REFERENCES

Am. Jur. 2d.

14 Am. Jur. 2d, Cemeteries, §§ 8, 9, 22.

C.J.S.

14 C.J.S., Cemeteries, §§ 1 et seq, 17 et seq.

ALR.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 A.L.R. 834; 42 A.L.R. 1226; 118 A.L.R. 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot, 32 A.L.R. 1406; 47 A.L.R. 70.

Duty as regards use of proceeds of sales of cemetery lots for care, maintenance, or improvement of cemetery, 124 A.L.R. 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 A.L.R.2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 A.L.R.3d 637.

10-14-5. Registration of preneed sales agents; retention of employee applications by registered cemeteries.

(a) All individuals who offer preneed contracts to the public, or who execute preneed contracts on behalf of any entity required to be registered as a preneed dealer, and all individuals who offer, sell, or sign contracts for the preneed sale of burial rights shall be registered with the Secretary of State as preneed sales agents, pursuant to this Code section, unless such individuals are exempted under this chapter or individually own a controlling interest in a preneed dealer registered under this chapter. For purposes of this chapter, any person licensed by or registered with the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian shall be deemed a registered preneed dealer, and regulated pursuant to the rules governing same, by virtue thereof.

(b) All preneed sales agents must be employed by a registered preneed dealer.

(c) A preneed dealer shall be liable for the activities of all preneed sales agents who are employed by the preneed dealer or who perform any type of preneed related activity on behalf of the preneed dealer. If a preneed sales agent violates any provision of this chapter, such preneed sales agent and each preneed dealer who employs such preneed sales agent shall be subject to the penalties and remedies set out in Code Sections 10-14-11, 10-14-19, 10-14-20, and 10-14-21.

(d) A preneed sales agent may be authorized to sell, offer, and execute preneed contracts on behalf of all entities owned or operated by the agent's sponsoring preneed dealer.

(e) If the application for his or her registration is sent by certified mail or statutory overnight delivery, return receipt requested, an individual may begin functioning as a preneed sales agent as soon as a completed application for registration, as set forth in subsection (g) of this Code section, is submitted to the Secretary of State, provided that, if any such sales agent fails to meet the qualifications set forth in this chapter, the preneed dealer shall immediately upon notification by the Secretary of State cause such agent to cease any sales activity on its behalf.

(f) The qualifications for a preneed sales agent are as follows:

(1) The applicant must be at least 18 years of age;

(2) The applicant must not be subject to any order of the Secretary of State that restricts his or her ability to be registered as a preneed sales agent; and

(3) The applicant must not have been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, have been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or have been convicted of a felony.

(g) An application for registration as a preneed sales agent shall be submitted to the Secretary of State with an application fee of $100.00 by the preneed dealer on a form that has been designated by the Secretary of State and shall contain, at a minimum, the following:

(1) The name, address, social security number, and date of birth of the applicant and such other information as the Secretary of State may reasonably require of the applicant;

(2) The name, address, and license number of the sponsoring preneed dealer;

(3) A representation, signed by the applicant, that the applicant meets the requirements set forth in subsection (f) of this Code section;

(4) A representation, signed by the preneed dealer, that the applicant is authorized to offer, sell, and sign preneed contracts on behalf of the preneed dealer and that the preneed dealer has informed the applicant of the requirements and prohibitions of this chapter relating to preneed sales, the provisions of the preneed dealer's preneed contract, and the nature of the merchandise, services, or burial rights sold by the preneed dealer;

(5) A statement indicating whether the applicant has any type of working relationship with any other preneed dealer or insurance company; and

(6) A signed agreement by the applicant consenting to an investigation of his or her background with regard to the matters set forth in this Code section, including, without limitation, his or her criminal history.

(h) An individual may be registered as a preneed sales agent on behalf of more than one preneed dealer, provided that the individual has received the written consent of all such preneed dealers.

(i) A preneed dealer who has registered a preneed sales agent shall notify the Secretary of State within three business days of a change in such individual's status as a preneed sales agent with such preneed dealer or upon the occurrence of any other event which would disqualify the individual as a preneed sales agent.

(j) Upon receipt and review of an application that complies with all of the requirements of this Code section, the Secretary of State shall

register the applicant. The Secretary of State shall by rule provide for annual renewal of registration and a renewal fee of $50.00.

(k) Each cemetery registered under this chapter shall maintain in its files for a period of five years a properly completed and executed application for employment in a form prescribed by the Secretary of State for each employee, officer, independent contractor, or other agent directly or indirectly involved in cemetery or preneed sales or any person occupying a similar status or performing similar functions. If a request is made, said forms shall be made available for inspection by authorized representatives of the Secretary of State.

History.
Code 1981, § 44-3-132, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, § 2; Code 1981, § 10-14-5, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 9/HB 933; Ga. L. 2017, p. 774, § 10/HB 323.

10-14-5.1. Relationship between life insurance and funeral establishment.

Any individual engaged in the sale of life insurance shall not use the name of any funeral establishment or any price list which identifies the funeral establishment or any reference to a funeral establishment or crematory in connection with the sale of life insurance without the express written authorization of the funeral establishment. When a preneed funeral contract is funded by a life insurance policy, the funeral establishment shall be designated as the assignee of the death benefit payable under the policy in accordance with the terms of the preneed contract.

History.
Code 1981, § 10-14-5.1, enacted by Ga. L. 2012, p. 625, § 10/HB 933.

10-14-6. Perpetual care trust funds.

(a) As used in this Code section, the term "income" means:

(1) The net income, including the collected dividends, interest, net realized gains, and other income of the trust reduced by any expenses, including, but not limited to, taxes on income, fees, commissions, and costs; or

(2) Four percent of the net fair market value of the trust assets, averaged over the lesser of the three preceding years or the period during which the trust has been in existence.

(b)(1) Each cemetery or cemetery company required to be registered by this chapter shall establish and maintain an irrevocable trust fund for each cemetery owned.

(2) For trust funds established on or after July 1, 2000, the initial deposit to said irrevocable trust fund shall be the sum of $10,000.00 and the deposit of said sum shall be made before selling or contracting to sell any burial right. No such initial deposit shall be required with respect to any cemetery for which there is an existing perpetual care account on July 1, 2000. The trust fund shall apply to sales or contracts for sale of lots, grave spaces, niches, mausoleums, columbaria, urns, or crypts in which perpetual care has been promised or guaranteed.

(3) The initial corpus of the trust fund and all subsequent required deposits shall be deposited in a state bank, state savings and loan institution, savings bank, national bank, or federal savings and loan institution, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other depository or trustee which is approved by the Secretary of State or which meets the standards contained in the rules and regulations promulgated by the Secretary of State.

(4) Each perpetual care trust fund established on or after July 1, 2000, shall be named "The _____ Cemetery _____ Perpetual Care Trust Fund" with the first blank being filled by the name of the cemetery and the second blank being filled by the month and year of the establishment of such trust fund. If a cemetery has a perpetual care trust fund existing on July 1, 2000, and the perpetual care trust fund agreement permits, the cemetery may make additional deposits to such a trust fund on the condition that the entire corpus of the trust fund, any income earned by the trust fund, and any subsequent deposits to the trust fund are thereafter governed by the provisions of this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, except for the amount of the initial deposit to the trust fund. If a cemetery owner or company elects to establish a new perpetual care trust fund subject to the provisions of this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, any perpetual care trust fund which existed on July 1, 2000, is subject to the provisions of law in effect on the date of its establishment, and deposits for sales transacted on or after July 1, 2000, shall be deposited in the trust fund established on or after July 1, 2000. If a cemetery existing on July 1, 2000, has an existing perpetual care trust fund which complies with provisions of law in effect on the date of its establishment, a new trust fund created in compliance with this chapter shall not require an initial deposit.

(c) Whenever any burial right, cemetery lot, grave space, niche, mausoleum, columbarium, urn, or crypt wherein perpetual care or

endowment care is promised or contracted for or guaranteed is sold by any cemetery, the cemetery shall make deposits to the trust fund that equal 15 percent of the sales price of the burial right or 7.5 percent of the total sales price of any mausoleums, niches, columbaria, urns, or crypts, provided that the minimum deposit for each burial right shall be $50.00; provided, further, that on July 1, 2003, and every three years thereafter, the amount of said minimum deposit shall be adjusted by the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustment to the amount of said minimum deposit by rule. Deposits to the trust fund shall be made not later than 30 days following the last day of the month in which payment therefor is made, or, in the case of a free space, the month in which the space is given. In the event any sale is made on an installment basis, not less than a pro rata share of the principal portion of each payment made and allocated to the lot, grave, space, niche, mausoleum, columbarium, urn, or crypt shall be allocated to the required trust fund deposit, provided that all deposits to the trust fund shall be completed within six years from the date of the signing of the perpetual care contract. The manner of any such allocation shall be clearly reflected on the books of the registrant.

(d) The initial $10,000.00 corpus of the perpetual care trust fund shall not be counted as part of the required periodic deposits and shall be considered to be corpus or principal.

(e)(1) The income earned by the trust fund shall be retained by the trust fund. At such time as either:

(A) The cemetery owner is not licensed and has not been licensed for 90 or more consecutive days to sell burial rights;

(B) The cemetery is under the management of a receiver; or

(C) Less than 50 percent of available lots are unsold,

95 percent of the income from the trust fund shall be paid to the owner or receiver exclusively for covering the costs of care and maintenance of the cemetery, including reasonable administrative expenses incurred in connection therewith. The income of the trust fund shall be paid to the owner or receiver at intervals agreed upon by the recipient and the trustee, but in no case shall the income be paid more often than monthly.

(2) Subject to the limitations set forth in paragraph (1) of this subsection, a cemetery owner or receiver may request a trustee to distribute income following the unitrust distribution method provisions outlined in Code Section 53-12-362. The cemetery owner or receiver may select the unitrust distribution method by delivering

written instructions to the trustee no later than 60 days prior to when the conversion shall take place. Such notification shall also be provided to the Secretary of State. The unitrust distribution method and the distribution rate selected shall remain in effect unless the cemetery or cemetery company notifies the trustee and the Secretary of State of its desire to effect a change.

(3) Disbursements from the trust in accordance with this subsection shall be made on a monthly, quarterly, semiannual, or annual basis, as agreed upon by the cemetery or cemetery company and the trustee.

(4) The Secretary of State may limit or prohibit any distribution based on the unitrust distribution method provisions in situations where investment returns and distribution practices have not resulted in sufficient protection of the perpetual care trust fund's trust principal based upon a three to five-year analysis.

(f) There shall be no withdrawals from the trust fund except pursuant to the provisions of this chapter or by court order.

(g)(1) The assets of a trust fund shall be invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees regarding the making and depositing of investments with trust moneys pursuant to former Code Sections 53-8-1 through 53-8-4 as such existed on December 31, 1997, if applicable; Code Section 53-8-1; or Code Section 53-12-340. Subject to said terms, conditions, limitations, and restrictions, the trustee of the perpetual care trust fund shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said fund are invested, including proceeds of investments.

(2) Any state bank, national bank, or other financial institution authorized to act in a fiduciary capacity in this state, which presently or in the future serves as a fiduciary or cofiduciary of the trust fund of a perpetual care cemetery, may invest part or all of such trust fund held by it for investment in interests or participation in one or more common trust funds established by that state bank, national bank, or other financial institution for collective investment, if such investment is not expressly prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of cofiduciaries the trust institution procures the consent of its cofiduciary or cofiduciaries to such investment, and notwithstanding the fact that such common trust funds are not invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees in the making and disposing of their investments.

(3) Notwithstanding any other provision of this subsection, the Secretary of State shall establish rules and regulations for investments of a trust fund established on or after July 1, 2000, or otherwise governed by this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, as necessary to preserve the corpus and income of such a fund and for determining what restrictions are necessary for such purpose.

(4) At any time, in the event that the perpetual care trust fund contains an amount less than the amount required by this Code section, the cemetery owner shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the perpetual care trust fund an amount equal to such shortfall. In the event that the Secretary of State and the cemetery owner disagree regarding the amount of such shortfall, no penalty shall be imposed upon the cemetery owner for any failure to comply with this paragraph unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(h) Moneys of the perpetual care trust fund shall not be invested in or loaned to any business venture controlled by the cemetery owner, a person who owns a controlling interest of a cemetery owner that is not a natural person, or an affiliate of any of these persons or entities.

(i) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the perpetual care trust fund.

(j) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the trust account as required by this chapter or of fraud, theft, or misconduct by the owners of the cemetery or the officers or directors of a cemetery company which has wasted or depleted such funds, the cemetery owners or the officers or directors of a cemetery company may be held jointly and severally liable for any deficiencies in the trust account as required in this chapter.

History.

Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-6, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2010, p. 579, § 4/SB 131; Ga. L. 2011, p. 752, § 10/HB 142; Ga. L. 2017, p. 543, § 1/SB 147.

Cross references.

Abandonment and forfeiture of cemetery lots, § 44-5-211.

OPINIONS OF THE ATTORNEY GENERAL

Insurance Code restrictions apply. — Restrictions imposed by former Code 1933, § 56-1005 upon domestic insurers in making investments apply to the investment of the assets of perpetual care trust funds. 1974 Op. Att'y Gen. No. 74-51.

Initial deposit is capital. — For the purpose of determining what investments are permissible, the initial trust deposit required of a cemetery offering perpetual care should be considered minimum capital, and the balance of the corpus of the trust fund should be considered a reserve. 1974 Op. Att'y Gen. No. 74-51.

Corpus of a perpetual care trust fund is generally a reserve to provide for the payment of future liabilities. 1974 Op. Att'y Gen. No. 74-51.

Family burial plot. — Absent some local regulation to the contrary a citizen could start a family burial plot on the citizen's own property; in the event of any death, however, all public health formalities would have to be complied with. 1975 Op. Att'y Gen. No. U75-9.

Construction of subsection (c). — The plain language of O.C.G.A. § 10 14 6(c) requires a cemetery to "make deposits to the trust that equal" a specified percentage of the "sales price" of the item or items sold, but the statute does not directly address whether a cemetery can then charge a customer an "additional add-on" equal to the amount of the deposit to a perpetual care trust fund. Nevertheless, § 10 14 6(c) does not stand alone, as it is a part of the Act "whose key components were enacted contemporaneously." Construed together with other provisions of the Act, it does not appear that the legislature intended for customers to be charged an "additional add-on" equal to the amount of the deposit to a perpetual care trust fund, and a cemetery is, therefore, prohibited from doing so. 2017 Op. Att'y Gen. No. U2017-4.

RESEARCH REFERENCES

Am. Jur. 2d.

14 Am. Jur. 2d, Cemeteries, §§ 8, 9, 22.

C.J.S.

14 C.J.S., Cemeteries, §§ 1 et seq., 17 et seq.

ALR.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 A.L.R. 834; 42 A.L.R. 1226; 118 A.L.R. 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot, 32 A.L.R. 1406; 47 A.L.R. 70.

Duty as regards use of proceeds of sales of cemetery lots, for care, maintenance, or improvement of cemetery, 124 A.L.R. 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 A.L.R.2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 A.L.R.3d 637.

Construction and application of Federal Credit Union Act of 1934 (FCUA) (12 U.S.C.A. §§ 1751 to 1795k), 89 A.L.R. Fed. 2d 357.

10-14-7. Preneed escrow accounts or trust funds.

(a)(1) Each preneed dealer which sells burial or funeral merchandise on a preneed basis or preneed burial or funeral services, other than preneed funeral services described in Code Section 10-14-7.1, shall establish and maintain a trust fund or a preneed escrow account.

(2) With respect to each monument and outer burial container, bench, coping, and other burial and funeral merchandise items except for caskets, and except as otherwise provided in paragraph (3) of this subsection, the amount to be deposited to said trust or escrow account shall be not less than 35 percent of the sales price of such monument or outer burial container; in no event shall the amount deposited be less than 120 percent of the wholesale price of such

items. For caskets, the amount to be deposited to said trust or escrow account shall be not less than 100 percent of the sales price of such merchandise; in no event shall the amount deposited be less than 110 percent of the wholesale price of such merchandise. If the contract of sale shall include grave spaces or items not deemed to be burial or funeral merchandise, the portion of the sales price attributable to the sale of the burial or funeral merchandise shall be determined, and it shall only be as to such portion of the total contract as constitutes burial or funeral merchandise that the deposit described in this paragraph shall be required. In the event that the sale of burial or funeral merchandise is under an installment contract, the required trust deposit shall be a pro rata part of the principal portion of each installment payment, such deposit only being required as payments are made by the purchaser for such burial or funeral merchandise. In the event the installment contract is discounted or sold to a third party, the seller shall be required to deposit an amount equal to the undeposited portion of the required deposit of the sales price of such burial or funeral merchandise at such time as if the contract were paid in full.

(3) With respect to a monument, outer burial container, bench, coping, and other burial and funeral merchandise items except for caskets, the itemized sales price of which does not include the installation of such item, 100 percent of the installation cost shall be deposited in the trust or escrow account.

(4) With respect to cash advance items and the sale of preneed funeral services, the amount to be deposited to said trust or escrow account shall be 100 percent of the sales price of such funeral services or the full amount of a cash advance item. The time and manner of deposit shall be the same as that specified for deposit of burial or funeral merchandise sale funds to the escrow account.

(5) With respect to preneed burial services, the amount to be deposited to said trust or escrow account shall be not less than 35 percent of the sales price of such burial services; in no event shall the amount deposited be less than 120 percent of the wholesale price of such burial services. The time and manner of deposit shall be the same as that specified for deposit of burial or funeral merchandise sale funds to the escrow account.

(b) The deposit specified in paragraphs (2), (3), (4), and (5) of subsection (a) of this Code section shall be made not later than 30 days following the last day of the month in which any payment is received.

(c) A preneed escrow account governed by the provisions of this Code section shall be established and maintained in a state bank, state savings and loan institution, savings bank, national bank, federal

savings and loan association, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other organization approved by the Secretary of State which is located and doing business in this state.

(d)(1) If the account is maintained with a trustee, the assets of the trust fund shall be invested and reinvested by the trustee subject to all the terms, conditions, limitations, and restrictions imposed by Georgia law upon executors and trustees regarding the making and depositing of investments with trust moneys pursuant to Code Sections 53-8-1 through 53-8-4 of the "Pre 1998 Probate Code," if applicable, or Code Sections 53-8-1 and 53-12-340 of the "Revised Probate Code of 1998," if applicable, or Chapter 12 of Title 53, "The Revised Georgia Trust Code of 2010." Subject to said terms, conditions, limitations, and restrictions, the trustee of the preneed accounts shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said account are invested, including proceeds of investments.

(2) Any state bank, national bank, or other financial institution authorized to act in a fiduciary capacity in this state, which presently or in the future serves as a fiduciary or cofiduciary of the trust fund of a preneed dealer, may invest part or all of such trust fund held by it for investment in interests or participation in one or more common trust funds established by that state bank, national bank, or other financial institution for collective investment, if such investment is not expressly prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of cofiduciaries, the trust institution procures the consent of its cofiduciary or cofiduciaries to such investment, and notwithstanding the fact that such common trust funds are not invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees in the making and disposing of their investments.

(e)(1) For burial or funeral merchandise, funds shall be released from the trust or escrow account when the burial or funeral merchandise is delivered or, if the burial or funeral merchandise is not yet delivered, within the time required by law after a purchaser requests a refund. The preneed dealer is considered to have delivered burial or funeral merchandise when the burial or funeral merchandise is:

(A) Actually delivered to the purchaser at the time of need;

(B) Actually delivered to the purchaser at the purchaser's request;

(C) In the case of a monument, when the monument is attached to realty;

(D) In the case of a monument, when the preneed dealer has the monument manufactured for the purchaser and placed into storage with a responsible third party bonded and insured for the wholesale value thereof and evidenced by a receipt specifically identifying the monument, the specific preneed contract, the location of the monument, and identify and address of the bonding and insuring parties; or

(E) At such other times as prescribed by the rule or order of the Secretary of State.

Notwithstanding the foregoing, outer burial containers may not be delivered prior to need.

(2) Deposits made from funds received in payment of preneed services shall remain in the trust or escrow account until such services are performed, at which time said funds may be released to the preneed dealer. The trustee may require certification by the preneed dealer of delivery of merchandise or performance of services before release of funds.

(3) The funds on deposit under the terms of this subsection regarded as escrow funds may not be pledged, hypothecated, transferred, or in any manner encumbered by the escrow agent nor may said funds be offset or taken for the debts of the preneed dealer until such time as the merchandise has been delivered or the services performed, but after delivery of the burial or funeral merchandise concerned.

(f) At any time, in the event that the preneed trust or escrow account contains an amount less than the amount required by this Code section, the preneed dealer shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the preneed account an amount equal to such shortfall. In the event that the Secretary of State and the preneed dealer disagree regarding the amount of such shortfall, no penalty shall be imposed upon the preneed dealer for any failure to comply with this provision unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(g) In the case of release of trusted or escrowed funds to a purchaser at the purchaser's request pursuant to subsection (e) of this Code section, a sum not less than the lesser of 10 percent of the trusted or escrowed amount or one-half of the interest earned or return upon such funds as of the date of release, as provided by the Secretary of State by rule or regulation, may be retained by the preneed dealer as an administrative fee for reimbursement of the preneed dealer for costs.

(h) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the preneed trust or escrow account.

(i) Trust funds shall not be invested in or loaned to any business venture controlled by the preneed dealer, a person who owns a controlling interest of a cemetery owner that is not a natural person, or an affiliate of any of these persons or entities.

(j) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the preneed trust or escrow account as required by this chapter or of fraud, theft, or other misconduct by the preneed dealer or the officers or directors of the preneed dealer which has wasted or depleted such funds, the preneed dealer or the officers or directors of the preneed dealer may be held jointly and severally liable for any deficiencies in the preneed trust or escrow account.

History.

Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-7, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 3/HB 910; Ga. L. 2012, p. 625, § 11/HB 933.

Cross references.

Forfeiture of abandoned cemetery lots, § 44-5-211.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2012, "Section" was substituted for "section" in paragraph (a)(1) and "paragraphs (2), (3), (4), and (5)" was substituted for "paragraphs (2), (3), and (4), and (5)" in subsection (b).

RESEARCH REFERENCES

Am. Jur. 2d.

14 Am. Jur. 2d, Cemeteries, §§ 8, 9, 22.

C.J.S.

14 C.J.S., Cemeteries, §§ 1 et seq., 17 et seq.

ALR.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 A.L.R. 834; 42 A.L.R. 1226; 118 A.L.R. 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot, 32 A.L.R. 1406; 47 A.L.R. 70.

Duty as regards use of proceeds of sales of cemetery lots, for care, maintenance, or improvement of cemetery, 124 A.L.R. 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 A.L.R.2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 A.L.R.3d 637.

Construction and application of Federal Credit Union Act of 1934 (FCUA) (12 U.S.C.A. §§ 1751 to 1795k), 89 A.L.R. Fed. 2d 357.

10-14-7.1. Trust funds or escrow accounts for preneed funeral services.

(a) Notwithstanding any provision to the contrary contained in

Chapter 1 of Title 7, the "Financial Institutions Code of Georgia," or in any other provision of law, a preneed dealer registered or deemed registered pursuant to Code Section 10-14-5 who provides funeral services shall provide for funds to be deposited in an escrow account pursuant to Code Section 10-14-7 or with a depository institution in accordance with this Code section and placed in an individual trust fund account that is:

(1) Titled in the name of a funeral establishment;

(2) Established for the purpose of providing preneed funeral services;

(3) Payable upon the death of the purchaser in favor of a funeral establishment for purposes of providing funeral services; and

(4) Refundable to the purchaser's designee or the estate of the deceased, such that 100 percent of the trust funds following a deduction of any amounts paid or owing as taxes and a 3 percent charge for administrative costs shall be returned to the designee or estate where funeral services are not provided by the funeral establishment.

(b)(1) One hundred percent of funds to be held in trust shall be deposited in the trust account. The deposit of such funds shall be made not later than 30 days following the last day of the month in which any payment is received. Trust fund accounts shall be established and maintained in a state bank, state savings and loan institution, savings bank, national bank, federal savings and loan association, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other organization approved by the Secretary of State which is located and doing business in this state.

(2)(A) If the account is maintained with a trustee, the assets of the trust account shall be invested and reinvested by the trustee subject to all the terms, conditions, limitations, and restrictions imposed by Georgia law upon executors and trustees regarding the making and depositing of investments with trust moneys and subject to the limitations and restrictions imposed pursuant to this Code section.

(B) Subject to said terms, conditions, limitations, and restrictions, the trustee of a preneed account shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said account are invested, including proceeds of investments. A personal representative shall be authorized to invest funds in:

(i) Interest-bearing deposits in any chartered state or national bank or trust company or savings and loan association located in this state to the extent the deposits are insured by the Federal Deposit Insurance Corporation or comparable insurance; and

(ii) Direct and general obligations of the United States government, obligations unconditionally guaranteed by the United States government, and obligations of the agencies of the United States government enumerated in Code Section 53-8-3.

(C) In making investments pursuant to subparagraph (b)(2)(B) of this Code section and in acquiring and retaining those investments and managing the property of the estate, the personal representative shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

(3) In the event that the sale of burial or funeral merchandise is under an installment contract, the required trust deposit shall be a pro rata part of the principal portion of each installment payment, such deposit only being required as payments are made by the purchaser for such burial or funeral merchandise.

(c) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the preneed trust or escrow account.

(d) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the trust account as required by this Code section or of fraud, theft, or misconduct by a funeral establishment or a funeral director or his or her employee, representative, or agent which has wasted or depleted such funds, the funeral establishment owners, funeral director, or employee, representative, or agent of a funeral director or establishment may be held jointly and severally liable for any deficiencies in the trust account.

(e) Any other provision of law notwithstanding, a trust fund account established and maintained under this Code section and the moneys contained therein shall not be deemed an asset or income for purposes of recapture of income or funds owed or for any other purpose.

(f) Nothing contained herein shall preclude a licensed funeral director in full and continuous charge from maintaining an escrow account with aggregate escrow funds for 100 percent of any preneed contract

amount for purposes of passing through funds within 60 days to a trust fund account or payment of a policy of insurance for preneed services.

History.
Code 1981, § 10-14-7.1, enacted by Ga. L. 2012, p. 625, § 12/HB 933.

RESEARCH REFERENCES

ALR.
Construction and application of Federal Credit Union Act of 1934 (FCUA) (12 U.S.C.A. §§ 1751 to 1795k), 89 A.L.R. Fed. 2d 357.

10-14-8. Prohibition of certain persons from employment; notice and hearing; emergency orders.

(a) The Secretary of State, by order, may prohibit a person who is an employee, officer, independent contractor, or other agent directly involved in the sale of burial rights, burial or funeral merchandise, or burial or funeral services from employment or other association with a registrant under this chapter if the Secretary of State finds that such is in the public interest and that said person:

(1) Has willfully made or caused to be made, in any documents filed with the Secretary of State under this chapter, or in any hearings conducted by the Secretary of State, any statement which, at the time and in the light of the circumstances under which it was made, was false or misleading with respect to any material fact, or has willfully omitted to state in any application any material fact which is required to be stated therein or necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

(2) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor law or any regulation or order promulgated or issued under this chapter or any predecessor law;

(3) Has been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, has been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or has been convicted of a felony;

(4) Has engaged in any unethical or dishonest practices in the funeral or cemetery business; or

(5) Is permanently or temporarily enjoined, suspended, or barred by any court of competent jurisdiction or by any state or other jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the funeral or cemetery business.

(b) Where the Secretary of State finds that there are grounds for the prohibition from employment provided in this Code section, he or she may issue an order prohibiting an employee, officer, independent contractor, or other agent directly or indirectly involved in cemetery or preneed sales or any person occupying a similar status or performing similar functions from employment with a registered cemetery or preneed dealer. Such an order shall not be effective until notice and opportunity for hearing are provided in accordance with Code Section 10-14-23 and until the Secretary of State shall issue a written order in accordance with Code Section 10-14-23; but the Secretary of State may, if he or she finds that the public safety or welfare requires emergency action, immediately issue an order prohibiting such person from such employment. Such an order of immediate prohibition will expire automatically if the Secretary of State fails to afford notice and opportunity for hearing pursuant to Code Section 10-14-23.

History.

Code 1981, § 44-3-133, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, § 3; Code 1981, § 10-14-8, as redesignated by Ga. L. 2000, p. 882, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1985, in the first sentence of subsection (b) "provided in this Code section" was substituted for "herein provided".

Pursuant to Code Section 28-9-5, in 1986, "of State" was inserted following "Secretary" throughout subsection (b).

OPINIONS OF THE ATTORNEY GENERAL

Understanding "amount to be placed in trust" and "itemization". — The "amount to be placed in trust" is to be listed separately on the written contract, and it is, therefore, not a part of the "itemization" of the fees and charges to the customer for the sale of any burial rights, burial or funeral merchandise, or burial or funeral services. 2017 Op. Att'y Gen. No. U2017-4.

10-14-9. Amendment of registration applications; audit of registrant records; transfer of ownership in cemeteries or preneed dealers.

(a) A registration application may be amended by filing with the Secretary of State an amended application signed by the persons required to sign the original application under Code Section 10-14-4 or 10-14-5.

(b) Every applicant registered pursuant to Code Section 10-14-4 or 10-14-5 shall agree to deliver in Georgia, on demand of the Secretary of State, all records and documents concerning funds, accounts, transactions, and activities of said applicant or said applicant shall agree to pay the expenses incurred in sending an auditor approved by the Secretary of State to wherever such records and documents are located for the purpose of conducting an audit pursuant to the provisions of this chapter.

(c) When any cemetery or preneed dealer registered under Code Section 10-14-4 is sold or the ownership is otherwise transferred, or a controlling interest is sold or transferred, the vendor or the transferor of such cemetery, preneed dealer, or interest shall remain liable for any funds that should have been deposited prior to the date of such sale or transfer in the perpetual care trust fund or the preneed escrow account, or both.

(1) Prior to such sale or transfer, the vendor or transferor shall notify the Secretary of State of the proposed transfer and submit to the Secretary of State any document or record the Secretary of State may require in order to demonstrate that said vendor or transferor is not indebted to the perpetual care trust fund or the preneed escrow account, or both. After the transfer of ownership or control and the presentation of proof of currency of the perpetual care trust fund or the preneed escrow account, or both, by the vendor or transferor, the Secretary of State may require the presentation of proof of the continued current status of the perpetual care trust fund or the preneed escrow account, or both, by the vendee or transferee. The Secretary of State is authorized to recover from such vendor, transferor, vendee, or transferee, for the benefit of the perpetual care trust fund or the preneed escrow account, or both, all sums which the vendor, transferor, vendee, or transferee has not properly accounted for and paid into the trust fund.

(2) When the vendee or transferee has complied with the provisions of this subsection, he or she shall submit to the Secretary of State an application for registration and appropriate fees pursuant to Code Section 10-14-4. The Secretary of State shall then issue a certificate of registration to said vendee or transferee.

History.
Code 1981, § 44-3-135, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, §§ 7, 8; Ga. L. 1987, p. 3, § 44; Ga. L. 1992, p. 2397, § 1; Code 1981, § 10-14-9, as redesignated by Ga. L. 2000, p. 882, § 1.

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Cemeteries, § 11.

10-14-10. Minimum acreage for cemeteries; exceptions.

(a) Except as otherwise provided in subsections (b) and (c) of this Code section, every cemetery initially registered according to the provisions of this chapter on or after July 1, 1998, shall consist of not less than ten acres of land.

(b) The following cemeteries shall not be subject to the requirement of subsection (a) of this Code section:

(1) All cemeteries registered according to this chapter prior to August 1, 1986; or

(2) Cemeteries initially registered on or after August 1, 1986, but before July 1, 1998, which shall consist of not less than 25 acres of land, except for cemeteries subject to a provision of previous law, which allowed cemeteries consisting of not less than ten acres of land dedicated solely for burial purposes and located in counties having a population of less than 10,000 according to the United States decennial census of 1990 or any future such census.

(c) The Secretary of State may provide by rule or regulation for a smaller minimum size for a cemetery which consists solely of one or more columbaria.

History.
Code 1981, § 44-3-135, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, §§ 7, 8; Ga. L. 1987, p. 3, § 44; Ga. L. 1992, p. 2397, § 1; Code 1981, § 10-14-10, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 4/HB 910.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 2000, "chapter" was substituted for "article" in paragraph (b)(1).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Cemeteries, § 11.

10-14-11. Stop orders suspending, revoking, or denying the effectiveness of registration; late penalty fees.

(a) The Secretary of State may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration and shall give notice of such issuance pursuant to Code Section 10-14-23 if he or she finds that the order is in the public interest and that:

(1) The registration as of its effective date, or as of any earlier date in the case of an order denying effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(2) The applicant has failed to file financial reports required by subsection (h) of Code Section 10-14-12;

(3) The applicant has failed to pay the filing fees required by Code Section 10-4-4;

(4) The person or entity registered or sought to be registered or

the individual owner, corporate owner, or person who owns a controlling interest of the corporate owner has been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, has been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or has been convicted of a felony;

(5) The trustee for the perpetual care trust fund or the escrow agent for the preneed escrow account has failed to file financial reports required by subsection (i) of Code Section 10-14-6 or subsection (g) of Code Section 10-14-29;

(6) The person or entity registered or seeking to be registered has become insolvent or has filed a voluntary petition for protection from creditors; or

(7) Any provision of this chapter or any rule, order, or condition lawfully imposed under this chapter has been willfully violated by:

(A) The person filing the registration application;

(B) The registrant's individual owner, corporate owner, or person who owns a controlling interest of the corporate owner; or

(C) The trustee or escrow agent of a trust fund or escrow account established and maintained pursuant to the provisions of this chapter.

(b) The Secretary of State may deny registration or refuse to grant renewal of registration if he or she finds that such refusal or denial is in the public interest and that:

(1) The registration application does not contain a current list of preneed sales agents and accompanying information as required by Code Section 10-14-4;

(2) The applicant has not paid filing fees or renewal fees as required by Code Section 10-14-4; or

(3) The applicant has not filed the financial reports required by Code Section 10-14-4 or subsection (g) of Code Section 10-14-12.

(c) In addition to the actions authorized in subsections (a) and (b) of this Code section, the Secretary of State shall be authorized to impose a penalty fee not to exceed $500.00 for the late filing of an application for a renewal registration or late filing of financial reports required by this chapter, or both. However, the penalty fee or fees imposed for the late filing of an application for renewal of registration or financial reports may be waived by the Secretary of State upon a showing to the Secretary of State that such late filing was due to circumstances beyond

the control of the applicant or registrant despite the exercise by the applicant or registrant of due diligence in the timely filing of the application or report.

(d) The Secretary of State may by order summarily postpone or suspend the effectiveness of the registration or refuse to register any applicant pending final determination of any proceeding under this Code section. Upon the entry of the order, the Secretary of State shall promptly notify the applicant or registrant of the order and the reasons for the order and that, within 15 days after the receipt of a written request, the matter will be heard. If no hearing is requested and none is ordered by the Secretary of State, the order will remain in effect until it is modified or vacated by the Secretary of State. If a hearing is requested or ordered, the Secretary of State, after notice of an opportunity for hearing to the persons affected, may modify or vacate the order or extend it until final determination.

(e) The Secretary of State may vacate or modify a stop order if he or she finds that the conditions which prompted its entry have changed or that it is otherwise in the public interest to do so.

(f) No stop order issued under any part of this Code section, except the first sentence of subsection (d) of this Code section, shall become effective until and unless the Secretary of State has complied with the provisions of Code Section 10-14-23.

History.
Code 1981, § 44-3-136, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Code 1981, § 10-14-11, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2017, p. 543, § 2/SB 147; Ga. L. 2017, p. 774, § 10/HB 323; Ga. L. 2024, p. 1052, § 2(67)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "subsection (g)" for "subsection (h)" in paragraph (b)(3).

RESEARCH REFERENCES

C.J.S.
14 C.J.S., Cemeteries, § 11.

10-14-12. Separate accounts and records; owner acting as trustee; removal of trustee or escrow agent; financial reports.

(a) Each registrant under paragraph (1) or (2) of subsection (b), or both, of Code Section 10-14-4 shall establish and maintain a separate and distinct account for the perpetual care trust fund for each cemetery and for the preneed escrow account. There shall be no commingling, codeposits, or transfers of funds between the accounts, except pursuant

to court order and with the knowledge and consent of the Secretary of State.

(b) Each registrant shall keep and maintain separate books, records, accounts, and documents regarding the transaction of its business. The books, records, accounts, and documents related to the keeping of funds pursuant to the provisions of this chapter and the rules and regulations promulgated under this chapter shall be kept and maintained by the registrant separately from the other books, records, accounts, and documents related to the transaction of business.

(c) A cemetery owner or an officer or director of a cemetery company may be a trustee of the perpetual care trust fund of a cemetery which the individual or cemetery company owns upon approval of the Secretary of State.

(d) The Secretary of State shall have the authority to prescribe or approve the form of the perpetual care trust agreement and shall have the authority to approve or disapprove any amendments to said trust agreement as of July 1, 1983.

(e) The Secretary of State shall have the authority to prescribe or approve the form of the preneed escrow account agreement and shall have the authority to approve or disapprove any amendments to said escrow account agreement as of July 1, 1983.

(f) A trustee or escrow agent of a registrant may be removed pursuant to the provisions of Code Section 10-14-19 or by other means provided by the laws of this state.

(g) Each perpetual care cemetery and preneed dealer shall file a report concerning the perpetual care trust and the preneed escrow account annually with the Secretary of State, provided that, after notice and a hearing, the Secretary of State may order more frequent reports in the event any such report is not filed in a timely manner or if the report filed contains errors and deficiencies. The report shall be on a form prescribed by the Secretary of State.

History.

Code 1981, § 44-3-137, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1992, p. 6, § 44; Code 1981, § 10-14-12, as redesignated by Ga. L. 2000, p. 882, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2000, "at" was deleted preceding "annually with the Secretary of State" in subsection (g).

10-14-13. Venue for civil or criminal actions.

For the purposes of venue for any civil or criminal action under this chapter, any violation of this chapter or of any rule, regulation, or order promulgated under this chapter shall be considered to have been committed in any county in which any act was performed in furtherance

of the transaction which violated this chapter, in the county of any violator's principal place of business in this state, in the county of the cemetery's or preneed dealer's or burial or funeral merchandise dealer's location or residence in this state, and in any county in which any violator had control or possession of any proceeds of said violation or of any books, records, documents, or other material or objects which were used in furtherance of said violation.

History.
Code 1981, § 44-3-138, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-13, as redesignated by Ga. L. 2000, p. 882, § 1.

10-14-14. Administration of chapter; rules and regulations.

(a) The administration of the provisions of this chapter shall be vested in the Secretary of State.

(b) The Secretary of State shall keep a record of all proceedings related to his or her duties under this chapter and shall keep records in which shall be entered the names of all cemeteries, preneed dealers, preneed sales agents, and burial or funeral merchandise dealers to whom certificates of registration are issued, which records shall be open at all times for public inspection.

(c) The Secretary of State shall have the authority to administer oaths in, and to prescribe forms for, all matters arising under this chapter.

(d) The Secretary of State shall have authority to employ examiners, clerks and stenographers, and other employees as the administration of this law may require. The Secretary of State shall also have authority to appoint and employ investigators who shall have, in any case in which there is a reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(e) The Secretary of State shall have the power to make such rules and regulations from time to time as he or she may deem necessary and proper for the enforcement of this chapter including, without limitation, rules regarding the solicitation of burial or funeral rights, merchandise, or services. The Secretary of State shall regulate such solicitation to protect the public from solicitation which is intimidating, overreaching, vexatious, fraudulent, or misleading; which utilizes undue influence; or which takes undue advantage of a person's ignorance or emotional vulnerability. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50.

History.
Code 1981, § 44-3-139, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981,

§ 10-14-14, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 5/HB 910.

10-14-15. Investigations by Secretary of State; subpoenas; hearings.

(a) The Secretary of State, at his or her discretion:

(1) May make such public or private investigations or examinations inside or outside this state as he or she deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order under this chapter or to aid in the enforcement of this chapter or in the prescribing of rules and regulations under this chapter; and

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Secretary of State determines, as to all the facts and circumstances concerning the matter to be investigated.

(b) For the purpose of conducting any investigation as provided in this Code section, the Secretary of State shall have the power to administer oaths, to call any party to testify under oath at such investigations, to require the attendance of witnesses and the production of books, records, and papers, and to take the depositions of witnesses; and, for such purposes, the Secretary of State is authorized to issue a subpoena for any witness or a subpoena for the production of documentary evidence to compel the production of any books, records, or papers. Said subpoenas may be served by certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Secretary of State or shall be directed for service to the sheriff of the county where such witness resides or is found or where such person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Secretary of State in the same manner that other expenses of the Secretary of State are paid.

(c) In case of refusal to obey a subpoena issued under any Code section of this chapter to any person, a superior court of appropriate jurisdiction, upon application by the Secretary of State, may issue to the person an order requiring him or her to appear before the court to show cause why he or she should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

(d) The Secretary of State is authorized to hold investigative hearings with respect to any matter under this chapter. A hearing as

provided for in this Code section may be conducted by any person designated by the Secretary of State for that purpose. A transcript of the testimony and evidence resulting from such hearing may, but need not, be transcribed by the Secretary of State. A report of the investigative hearing shall be included in the investigative report prepared for the Secretary of State. Any recommendations of the designated representative of the Secretary of State shall be advisory only and shall not have the effect of an order of the Secretary of State.

(e) The Secretary of State shall have the authority to inspect and review or cause to be reviewed the books of each registrant under this chapter. Said inspection or review may be conducted by the Secretary of State as frequently as the Secretary of State may deem appropriate.

History.
Code 1981, § 44-3-140, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Ga. L. 1986, p. 1468, § 9; Ga. L. 1987, p. 3, § 44; Code 1981, § 10-14-15, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.

10-14-16. Cemetery rules and regulations; schedule of charges.

(a) The owner of every cemetery may make, adopt, and enforce rules and regulations for the use, care, control, management, restriction, and protection of such cemetery and of all parts and subdivisions thereof; for restricting, limiting, and regulating the use of all property within such cemetery; for regulating and preventing the introduction and care of plants or shrubs within such grounds; for regulating the conduct of persons and preventing improper assemblages therein; and for all other purposes deemed necessary by the owner of the cemetery for the proper conduct of the business of the cemetery and the protection of safeguarding the premises and the principles, plans, and ideas on which the cemetery was organized. From time to time, the owner may amend, add to, revise, change, modify, or abolish such rules and regulations. Such rules and regulations shall be plainly printed or typewritten, posted conspicuously, and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery; provided, however, that no cemetery to which the provisions of this chapter are applicable shall have the power to adopt any rule or regulation in conflict with any of the provisions of this chapter or in derogation of the contract rights of lot owners or owners of burial rights. Upon request, the registrant shall provide a copy of said rules and regulations to any person who requests it.

(b) The owner of every cemetery shall have the further right to establish reasonable rules and regulations regarding the type material, design, composition, finish, and specifications of any and all merchandise to be used or installed in the cemetery. Subject to the provisions of this Code section and rules of the Secretary of State, reasonable rules

may further be adopted regarding the installing by the cemetery or others of all merchandise to be installed in the cemetery. Such rules and regulations shall be posted conspicuously and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery. Upon request, the registrant shall provide a copy of said rules and regulations to any person requesting it. No cemetery owner shall have the right to prevent the use of any merchandise purchased by a lot owner or owner of a burial right, his or her representative, his or her agent, or his or her heirs or assigns from any source, provided the merchandise meets all rules and regulations.

(c) All registrants shall have a full and complete schedule of all charges for grave lots, burial rights, burial or funeral merchandise, and burial or funeral services provided by the registrant plainly printed or typewritten, posted conspicuously, and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery. Upon request, the registrant shall provide a copy of said schedule of charges to any person requesting it.

History.

Code 1981, § 44-3-141, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981, § 10-14-16, as redesignated by Ga. L. 2000, p. 882, § 1.

Cross references.

Abandoned cemetery lots, § 44-5-211.

JUDICIAL DECISIONS

Statute of limitations. — Violations of former O.C.G.A. § 44-3-141 (see now O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see now O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. Reeves v. Edge, 225 Ga. App. 615, 484 S.E.2d 498, 1997 Ga. App. LEXIS 203 (1997), cert. denied, No. S97C1120, 1997 Ga. LEXIS 795 (Ga. Sept. 4, 1997) (decided under former O.C.G.A. § 44-3-141).

Unreasonable rule on vaults. — Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in the company's cemeteries because the rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., and the rule was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858, 2010 Ga. App. LEXIS 1126 (2010).

10-14-17. Prohibited acts; fees.

(a) It shall be unlawful for any person:

(1) To sell or offer to sell any burial rights, burial or funeral services, or burial or funeral merchandise by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such

person shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

(2) To sell or offer to sell any, burial rights, burial or funeral services, or burial or funeral merchandise in violation of any provision of this chapter or rule, regulation, or order promulgated or issued by the Secretary of State under any provision of this chapter;

(3) Except as otherwise provided in paragraph (4) of this subsection, in connection with the sale of preneed merchandise or services requiring funds to be deposited into a preneed escrow account, to fail to refund, within three business days of the request of the purchaser or the purchaser's heirs or assigns, the sales prices plus applicable interest as determined according to rules promulgated by the Secretary of State, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the merchandise or services are intended to be used.

Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(4) In connection with the sale of monuments or vaults, to fail to refund within three business days of the request of the purchaser or the purchaser's heirs or assigns the full sales price, without interest, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the monument or vault is intended to be used.

Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(5) To misappropriate, convert, illegally withhold, or fail to account for any trust funds, escrow funds, or other funds established or maintained pursuant to this chapter;

(6) Knowingly to cause to be made, in any document filed with the Secretary of State or in any proceeding under this chapter, any statement which is, at the time it is made and in the light of the circumstances under which it is made, false or misleading in any material respect;

(7) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of funeral services if such person is not a licensed funeral director;

(7.1) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of burial rights or burial merchandise if such person is not registered pursuant to the provisions of this chapter; or

(8) To sell any grave space which has not been platted and pinned.

(b) It shall be unlawful for any person in connection with the ownership, offer, sale, or purchase of any burial rights, burial or funeral services, or burial or funeral merchandise, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud; or

(2) To engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller.

(c) In connection with the sale or installation of merchandise, it shall be unlawful for a cemetery company to:

(1) Impose any condition upon the installation of merchandise obtained from a third party, other than to require installation by a registrant under this chapter or as may be otherwise permitted by the rules and regulations of the Secretary of State;

(2) Charge a fee for the installation of merchandise purchased or obtained from and to be installed by a person or firm other than the cemetery company or its agents, provided that the cemetery owner may charge a fee not to exceed $125.00 to reimburse the cemetery owner for its reasonable costs incurred in assisting in the siting of a monument on the lot on which it is to be installed, supervision and inspection of the installation to ensure compliance with the rules and regulations of the cemetery, and any administrative functions associated with the installation; provided, further, any such fee is properly disclosed and published as required by this chapter and charged regardless of whether the installer is or is not the cemetery owner or affiliated therewith;

(3) Refuse to mark the place on the grave where the merchandise is to be installed and inspect the installation when completed to ensure compliance with cemetery rules and regulations;

(4) Require any person or firm that installs, places, or sets merchandise to pay any fee other than any fee charged pursuant to paragraph (2) of this subsection;

(5) Tie the purchase of any grave space or burial right to the purchase of merchandise from or through the seller or any other designated person or corporation;

(6) Refuse to provide care or maintenance for any portion of a grave site on which a monument has been placed, provided that installation has been in accordance with lawful rules and regulations of the cemetery;

(7) Attempt to waive liability with respect to damage caused by cemetery employees or agents to merchandise after installation, where merchandise or installation service is not purchased from the cemetery company providing grave space or from or through any other person or corporation designated by the person authorized to sell grave space or the cemetery company providing grave space; provided, however, that no cemetery company may be held liable for the improper installation of merchandise where merchandise is not installed by the cemetery company or its agents; or

(8) After the promulgation of rules and regulations relating to the subject matter of this subsection by the Secretary of State, to require any person who installs, places, or sets merchandise to obtain any form of insurance, bond, or surety or make any form of pledge, deposit, or monetary guarantee as a condition of entry or access to cemetery property or the installation of merchandise thereon, other than as may be in accordance with said rules and regulations.

(d) Other than fees for the processing and for the sale of burial rights, burial or funeral merchandise, and burial or funeral services, no other fee may be directly or indirectly charged, contracted for, or received by a cemetery company as a condition for a customer to use any burial right, burial or funeral merchandise, or burial or funeral service, except for:

(1) Charges paid for opening and closing a grave and vault installation;

(2) Charges paid for transferring burial rights from one purchaser to another; however, no such fee may exceed $75.00 and such fee must have been disclosed in writing to the owner at the time of the initial purchase of the burial right from the cemetery;

(3) Charges for sales, documentary, excise, and other taxes actually and necessarily paid to a public official, which charges must be supported in fact;

(4) Charges for credit life and credit disability insurance, but only as requested by the purchaser, and the premiums for which do not exceed the applicable premium chargeable in accordance with the rates filed with the Insurance Commissioner; or

(5) Charges for interest on unpaid balances in accordance with applicable law.

Nothing herein shall prohibit a cemetery company from charging a

reasonable fee for services it provides in connection with a lawful disinterment, provided such charges do not exceed the greater of the cemetery company's normal and customary charges for interment or the actual costs incurred by the cemetery directly attributable to such disinterment. Nothing herein shall prohibit a cemetery from charging a reasonable fee for actual costs it incurs due to the commencement of a funeral service at a time other than previously agreed by the cemetery company, the funeral establishment, and the owner of the burial rights, or his or her heirs and assigns, provided such charges are calculated in a manner which is disclosed and published as required by this chapter and that such charges are directly attributable to extra costs incurred by the cemetery company due to such late commencement.

(e) In connection with the sale of burial rights, burial or funeral merchandise, or burial or funeral services, it shall be unlawful for any person to fail to comply with the provisions of Article 1 of Chapter 1 of this title, "The Georgia Retail Installment and Home Solicitation Sales Act" or Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975." For the purposes of this subsection, burial rights, burial or funeral services, and burial or funeral merchandise shall constitute goods as that term is used in said article and said part.

(f) In connection with the installation of a monument:

(1) It shall be unlawful for any person installing said monument to fail to comply with the lawful rules and regulations of the cemetery regarding monument installation, provided that said rules and regulations are provided in writing to the installer prior to the installation. In the event such installation is not in conformity with said rules and regulations, the installer shall be liable to the cemetery for the actual cost of correcting such installation so it will be in conformity, provided that:

(A) The cemetery has notified the installer by certified mail, return receipt requested, of the reasons for the nonconformity not later than one year after the date of the installation; and

(B) The installer, provided it is registered under this chapter, shall have had not less than 30 days from its receipt of such notice to correct such nonconformity; and

(2) An installer of a monument shall be liable to the cemetery, to its customers, and to third persons for damages to their respective property and for other damages arising due to the negligence or intentional act of such installer, which liability may not be waived by contract.

(g) No program offering free burial rights may be conditioned on any requirement to purchase additional burial rights, burial or funeral merchandise, or burial or funeral services.

(h) The contract rights of any purchaser of preneed merchandise shall be freely transferable without fee except as provided in this chapter.

(i) It shall be unlawful for any owner or operator of a perpetual care cemetery to fail to provide care and maintenance for the cemetery.

(j) The fees set forth in this Code section shall be annually adjusted to the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustments to the amount of said fees by rule.

History.
Code 1981, § 44-3-142, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-17, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 6/HB 910; Ga. L. 2012, p. 625, § 13/HB 933; Ga. L. 2017, p. 774, § 10/HB 323.

JUDICIAL DECISIONS

Statute of limitations. — Violations of former O.C.G.A. § 44-3-141 (see now O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see now O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. Reeves v. Edge, 225 Ga. App. 615, 484 S.E.2d 498, 1997 Ga. App. LEXIS 203 (1997), cert. denied, No. S97C1120, 1997 Ga. LEXIS 795 (Ga. Sept. 4, 1997) (decided under former § 44-3-142).

Constitutional challenges. — Refund provisions of the Georgia Cemetery and Funeral Services Act of 2000, specifically O.C.G.A. § 10-14-17(a)(3) and (4), did not violate the equal protection rights of a nonprofit cemetery association because the purpose of the provisions, to protect consumers from fraud in preneed purchasing, has a legitimate governmental purpose. Ga. Cemetery Ass'n v. Cox, 403 F. Supp. 2d 1206, 2003 U.S. Dist. LEXIS 26825 (N.D. Ga.), aff'd, 353 F.3d 1319, 2003 U.S. App. LEXIS 25861 (11th Cir. 2003).

10-14-18. Duties of registrants; requirements of written contracts.

(a) A registrant offering to provide burial rights, burial or funeral merchandise, or burial or funeral services to the public shall:

(1) Provide by telephone, upon request, accurate information regarding the retail prices of burial or funeral merchandise and services offered for sale by the registrant;

(2) Fully disclose all regularly offered services and merchandise prior to the selection of burial rights, burial or funeral services, or burial or funeral merchandise. The full disclosure required shall identify the prices of all burial rights, burial or funeral services, and burial or funeral merchandise provided by the registrant;

(3) Not make any false or misleading statements of the legal requirement as to the necessity of a casket or outer burial container;

(4) Provide a good faith estimate of all fees and costs the customer will incur to use any burial rights, merchandise, or services purchased;

(5) Provide to the customer a current copy of the rules and regulations of the registrant;

(6) Provide the registrant's policy on cancellation and refunds to each customer;

(7) Provide refunds if burial or funeral merchandise is not delivered as represented; and

(8) Provide the customer, upon the purchase of any burial right or burial or funeral merchandise or service, a written contract, the form of which has been filed with the Secretary of State.

(b) In a manner established by rule of the Secretary of State, the written contract shall provide on the signature page of the contract, clearly and conspicuously in boldface ten-point type or larger, the following:

(1) The words "purchase price" together with the sum of all items set out in the contract in accordance with subsection (d) of this Code section;

(2) The amount to be placed in trust;

(3) Either:

(A) A statement that no further expenses will be incurred at the time of need; or

(B) A statement that additional expenses will be incurred at the time of need, the registrant's current price for each such expense, and a statement that such prices may be expected to increase in the future; and

(4) The telephone number designated by the Secretary of State for questions and complaints.

(c) The written contract shall be completed prior to the signing of the contract by the customer and a copy of the contract shall be provided to the customer. As used in this subsection, the term "signing" includes any manual, facsimile, conformed, or electronic signature, and the term "electronic signature" means an electronic symbol or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(d) The written contract shall provide an itemization of the amounts charged for all burial rights, burial or funeral services, burial or funeral merchandise, cash advances, and fees and other charges, which item-

ization shall be clearly and conspicuously segregated from everything else on the written contract.

(e) The written contract shall contain a description of the burial or funeral merchandise covered by the contract to include, when applicable, size, materials from which the burial or funeral merchandise is made, and other relevant specifications as may be required by the Secretary of State.

(f) The written contract shall disclose the location at which funeral services are to be provided and the space number of each lot or grave space.

History. Code 1981, § 10-14-18, enacted by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 2/HB 933; Ga. L. 2017, p. 774, § 10/HB 323.

10-14-19. Enforcement of chapter; civil penalties.

(a) Whenever it may appear to the Secretary of State that any person has engaged in, or is engaging in, or is about to engage in any act or practice or transaction which is prohibited by this chapter or by any rule, regulation, or order of the Secretary of State promulgated or issued pursuant to any Code section of this chapter or which is declared to be unlawful under this chapter, the Secretary of State may, at his or her discretion, act under any or all of the following paragraphs:

(1) Issue an order, if he or she deems it to be appropriate in the public interest or for the protection of consumers, prohibiting such person from continuing such act, practice, or transaction, subject to the right of such person to a hearing as provided in Code Section 10-14-23;

(2) Apply to any superior court of competent jurisdiction in this state for an injunction restraining such person and such person's agents, employees, partners, officers, and directors from continuing such act, practice, or transaction or engaging therein or doing any acts in furtherance thereof, and for appointment of a receiver or an auditor and such other and further relief as the facts may warrant; or

(3) Transmit such evidence as may be available concerning such act, practice, or transaction to any district attorney or to the Attorney General, who may, at his or her individual discretion, institute the necessary criminal proceedings.

(b) In any proceedings for an injunction, the Secretary of State may apply for and be entitled to have issued the court's subpoena requiring the appearance forthwith of any defendant and its agents, employees, partners, officers, or directors, and the production of such documents, books, and records as may appear necessary for the hearing upon the

petition for an injunction. Upon proof of any of the offenses described in this Code section, the court may grant such injunction and appoint a receiver or an auditor and issue such other orders for the protection of the public as the facts may warrant.

(c) In any criminal proceeding, either the district attorney or the Attorney General, or both, may apply for and be entitled to have issued the court's subpoena requiring the appearance forthwith of any defendant or its agents, employees, partners, officers, or directors and the production of such documents, books, and records as may appear necessary for the prosecution of such criminal proceedings.

(d) In any civil proceeding brought under this Code section, if the Secretary of State shall establish that a perpetual care trust fund or preneed escrow account has not been established and maintained as required, the assets of the cemetery, cemetery company, or preneed dealer may be seized and sold by the state under orders of the court to the extent necessary to provide said perpetual care trust fund or preneed escrow account and set up the same. In addition, where the registration has been revoked, the whole company property may be ordered sold after the perpetual care trust fund and preneed escrow account have been established so that the purchaser of the cemetery may continue to operate the same and maintain it under the terms of this chapter.

(e) The Secretary of State shall have the authority to petition a court of competent jurisdiction to remove a trustee or escrow agent for violation of the provisions of this chapter, the rules and regulations promulgated under this chapter, or for other unlawful acts and practices.

(f) In addition to any other penalties that may be imposed, any person willfully violating any provisions of Code Section 10-14-17 or 10-14-18 or of Code Section 10-14-11 or any rule, regulation, or order of the Secretary of State made pursuant to Code Section 10-14-17, 10-14-18, or 10-14-11 shall be subject to a civil penalty not to exceed $10,000.00 for a single violation and not exceeding $100,000.00 for multiple violations in a single proceeding or a series of related proceedings. The Secretary of State shall be authorized in his or her discretion to decline to impose a penalty or to impose any lesser penalty that he or she may deem to be sufficient and appropriate in any particular case. The amount of such penalty may be collected by the Secretary of State in the same manner that money judgments are now enforced in the superior courts of this state, except that the order or finding of the Secretary of State as to such penalty may be appealed according to the provisions of Code Section 10-14-22.

History.
Code 1981, § 44-3-143, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-19, as redesignated by Ga. L. 2000, p. 882, § 1.

JUDICIAL DECISIONS

Priority of liens. — Purchase-money security deed executed prior to the effective date of former O.C.G.A. § 44-3-143 (see now O.C.G.A. § 10-14-19) had priority over the statutory lien pertaining to the preneed escrow account but not as to the lien on the perpetual care trust fund. Connolly v. State, 199 Ga. App. 887, 406 S.E.2d 222, 1991 Ga. App. LEXIS 712 (1991) (decided under former § 44-3-143).

10-14-20. Criminal penalties.

(a) Except as otherwise provided in subsection (b) of this Code section, any person who shall willfully violate any provision of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both.

(b) Any person who shall willfully violate Code Section 10-14-17, Code Section 10-14-18, or any provision of this chapter regarding the establishment, maintenance, or reporting of any trust, reserve, or escrow funds mandated by this chapter shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $10,000.00 or imprisonment for not less than one and not more than five years, or both.

(c) Nothing in this chapter shall limit any statutory or common-law right of the state to punish any person for violation of any provision of any law.

History.
Code 1981, § 44-3-144, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-20, as redesignated by Ga. L. 2000, p. 882, § 1.

10-14-21. Purchaser's remedy for violations.

(a) Any person who violates any provision of subsection (a) of Code Section 10-14-17 shall be liable to the person buying such burial lot, burial right, burial merchandise, or burial service; and such buyer may bring action in any court of competent jurisdiction to recover the consideration paid in cash for the burial lot, burial right, burial merchandise, or burial service together with interest at the legal rate from the date of such payment, and reasonable attorney's fees and costs.

(b) In addition to the remedy set forth in subsection (a) of this Code section, a purchaser may apply to a court of competent jurisdiction in

this state for an order authorizing the recovery of the preneed escrow deposit if a registrant fails to deliver burial merchandise or perform preneed burial services in accordance with the terms of the preneed sales contract.

(c) No person may bring action under this Code section more than two years from the date of the scheduled completion of the contract for sale or from the date of the sale if there is no contract for sale.

(d) Every cause of action under this chapter survives the death of any person who might have been a plaintiff or defendant.

(e) Nothing in this chapter shall limit any statutory or common-law right of any person in any court for any act involving the sale of a burial lot, burial right, burial merchandise, or burial services.

History.
Code 1981, § 44-3-145, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-21, as redesignated by Ga. L. 2000, p. 882, § 1.

JUDICIAL DECISIONS

Statute of limitations. — Violations of former O.C.G.A. § 44-3-141 (see now O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see now O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. Reeves v. Edge, 225 Ga. App. 615, 484 S.E.2d 498, 1997 Ga. App. LEXIS 203 (1997), cert. denied, No. S97C1120, 1997 Ga. LEXIS 795 (Ga. Sept. 4, 1997) (decided under former § 44-3-145).

10-14-22. Judicial appeal of orders issued by Secretary of State.

(a)(1) An appeal may be taken from any order of the Secretary of State resulting from a hearing held in accordance with the provisions of Code Section 10-14-23 by any person adversely affected thereby to the Superior Court of Fulton County, Georgia, by serving on the Secretary of State, within 20 days after the date of entry of such order, a copy of the petition for review filed in the Superior Court of Fulton County and signed by the petitioner, stating:

(A) The order from which the appeal is taken;

(B) The ground upon which a reversal or modification of such order is sought; and

(C) A demand for a certified transcript of the record of such order.

(2) The proceedings on the petition for review shall be governed by Chapter 3 of Title 5 except as provided in this Code section.

(b) Upon receipt of such petition for review, the Secretary of State shall, within ten days thereafter, make, certify, and deliver to the clerk

of the Superior Court of Fulton County a transcript of the record of the order from which the appeal is taken, provided that the petitioner shall pay the reasonable costs of such transcript. Said petition for review and transcript of the record shall constitute petitioner's complaint. Said complaint shall thereupon be entered on the trial calendar of the court in accordance with the court's normal procedures.

(c) If the order of the Secretary of State shall be reversed, the court shall by its mandate specifically direct the Secretary of State as to his or her further action in the matter, including the making and entering of any order or orders in connection therewith and the conditions, limitations, or restrictions to be contained therein.

History.

Code 1981, § 44-3-146, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-22, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2022, p. 767, § 2-4/HB 916.

Amendments.

The 2022 amendment, effective July 1, 2023, redesignated subsection (a) as paragraph (a)(1); substituted "copy of the petition for review filed in the Superior Court of Fulton County and signed by the petitioner" for "written notice of appeal signed by the appellant" in the introductory language of paragraph (a)(1); added paragraph (a)(2); and rewrote subsection (b), which read: "Upon receipt of such notice of appeal, the Secretary of State shall, within ten days thereafter, make, certify, and deliver to the appellant a transcript of the record of the order from which the appeal is taken, provided that the appellant shall pay the reasonable costs of such transcript. The appellant shall, within five days after receipt of such transcript, file such transcript and a copy of the notice of appeal with the clerk of the court. Said notice of appeal and transcript of the record shall constitute appellant's complaint. Said complaint shall thereupon be entered on the trial calendar of the court in accordance with the court's normal procedures." See Editor's note for applicability.

Editor's notes.

Ga. L. 2022, p. 767, § 3-1/HB 916, not codified by the General Assembly, makes this Code section applicable to petitions for review filed in superior or state court on or after July 1, 2023.

10-14-23. Administrative appeal of orders issued by Secretary of State.

(a) Where the Secretary of State has issued any order forbidding the sale of burial lots, burial rights, burial merchandise, or burial services under any provision of this chapter, he or she shall promptly send to the cemetery owner, cemetery company, burial or funeral merchandise dealer, or preneed dealer and to the persons who have filed such application for registration a notice of opportunity for hearing. Before entering an order refusing to register any person or entity and after the entering of any order for revocation or suspension, the Secretary of State shall promptly send to such person or entity a notice of opportunity for hearing. Hearings shall be conducted by the Secretary of State pursuant to this Code section.

(b) Notices of opportunity for hearing shall be served by investigators appointed by the Secretary of State or sent by certified mail or

statutory overnight delivery, return receipt requested, to the addressee's business mailing address, and such notice shall state:

(1) The order which has issued or which is proposed to be issued;

(2) The ground for issuing such order or proposed order; and

(3) That the person to whom such notice is sent will be afforded a hearing upon request if such request is made within ten days after receipt of the notice.

(c) Whenever a person requests a hearing in accordance with the provisions of this Code section, there shall immediately be set a date, time, and place for such hearing, and the person requesting such hearing shall forthwith be notified thereof. The date set for such hearing shall be within 15 days, but not earlier than five days after the request for hearing has been made, unless otherwise agreed to by the issuer of the notice and the person requesting such hearing.

(d) For the purpose of conducting any hearing as provided in this Code section, the Secretary of State shall have the power to administer oaths, to call any party to testify under oath at such hearings, to require the attendance of witnesses and the production of books, records, and papers, and to take the depositions of witnesses; and for such purposes the Secretary of State is authorized, at the request of the person requesting such hearing or upon the official's own initiative, to issue a subpoena for any witnesses or a subpoena for the production of documentary evidence to compel the production of any books, records, or papers. Said subpoenas may be served by certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Secretary of State or shall be directed for service to the sheriff of the county where such witness resides or is found or where such person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Secretary of State in the same manner that other expenses of the Secretary of State are paid.

(e) At any hearing conducted under this Code section, a party or an affected person may appear in his or her own behalf or may be represented by an attorney. A stenographic record of the testimony and other evidence submitted shall be taken unless the Secretary of State and the person requesting such hearing shall agree that such a stenographic record of the testimony shall not be taken. A transcript of the proceeding shall be made available to a party upon the payment of reasonable costs. The Secretary of State shall pass upon the admissibility of such evidence, but a party may at any time make objections to such rulings thereon; and, if the Secretary of State refuses to admit evidence, the party offering the same shall make a proffer thereof and such proffer shall be made a part of the record of such hearing.

(f) If the Secretary of State does not receive a request for a hearing within the prescribed time, he or she may permit an order previously entered to remain in effect or he or she may enter a proposed order. If a hearing is requested and conducted as provided in this Code section, the Secretary of State shall issue a written order which shall set forth his or her findings with respect to the matters involved and enter an order in accordance with the Secretary's findings.

History.
Code 1981, § 44-3-147, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1992, p. 6, § 44; Code 1981, § 10-14-23, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.

10-14-24. Effect of consent to service of process.

When consent to service of process is required under this chapter, such consent to service of process shall be in the form prescribed by the Secretary of State, shall be irrevocable, and shall provide that actions brought by the State of Georgia arising out of or founded upon the sale of burial lots, burial rights, burial services, or burial merchandise in violation of this chapter may be commenced in any court of competent jurisdiction with proper venue within this state by the service of process or pleadings upon the Secretary of State against the person executing such consent. Notwithstanding any provision in any other law to the contrary, service of any such process or pleadings in any such action against a person who has filed a consent to service with the Secretary of State shall, if made on the Secretary of State, be by duplicate copies, one of which shall be filed in the office of the Secretary of State and the other shall immediately be forwarded by the Secretary of State by certified mail or statutory overnight delivery to the person against whom such process or pleadings are directed at such person's latest address on file in the office of the Secretary of State.

History.
Code 1981, § 44-3-148, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-24, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.

10-14-25. Waiver of rights or defenses in cemetery purchase agreements void.

Any condition, stipulation, or provision binding any person acquiring any burial lot, burial right, burial merchandise, or burial services to waive:

(1) Compliance with any provision of this chapter or of the rules and regulations promulgated under this chapter;

(2) Any rights provided by this chapter or by the rules and regulations promulgated under this chapter; or

(3) Any defenses arising under this chapter or under the rules and regulations promulgated under this chapter

shall be void.

History.
Code 1981, § 44-3-149, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981, § 10-14-25, as redesignated by Ga. L. 2000, p. 882, § 1.

10-14-26. Secretary of State immune from liability.

For any action taken or any proceeding had under the provisions of this chapter or under color of the law, the Secretary of State shall be immune from liability and action to the same extent that any judge of any court of general jurisdiction in this state would be immune.

History.
Code 1981, § 44-3-150, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-26, as redesignated by Ga. L. 2000, p. 882, § 1.

10-14-27. [Reserved] Evidence in civil or criminal actions under chapter.

History.
Code 1981, § 44-3-151, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-27, as redesignated by Ga. L. 2000, p. 882, § 1; repealed by Ga. L. 2011, p. 99, § 18/HB 24, effective January 1, 2013.

Editor's notes.
Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

10-14-28. Actions pending under prior law.

(a) Prior law exclusively governs all actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before July 1, 2000, except that no civil action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and, in any event, no later than July 1, 2000.

(b) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect. They shall be deemed to have been filed, entered, or imposed under this chapter but are governed by prior law.

(c) Judicial review of all administrative orders as to which review proceedings have not been instituted by July 1, 2000, are governed by Code Section 10-14-22, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and, in any event, no later than August 1, 2000.

History.
Code 1981, § 44-3-152, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-28, as redesignated by Ga. L. 2000, p. 882, § 1.

10-14-29. Construction of mausoleums and columbariums; preconstruction trust funds.

(a) A cemetery company shall start construction of that section of a mausoleum or columbarium in which sales, contracts for sales, reservations for sales, or agreements for sales are being made within four years after the date of the first such sale or 50 percent of the mausoleum or columbarium has been sold and the purchase price has been received, whichever occurs first. The construction shall be completed within five years after the date of the first sale made. If the units have not been completely constructed at the earlier of time of need or the time specified in this subsection, all moneys paid shall be refunded upon request, plus interest earned thereon for that portion of the moneys deposited in the preneed escrow account and an amount equal to the interest that would have been earned on that portion of the moneys that were not so deposited.

(b) A cemetery company that plans to offer for sale space in a section of a mausoleum or columbarium prior to construction shall establish a preconstruction trust fund by written instrument. The preconstruction trust fund shall be administered by a corporate trustee approved by the Secretary of State and not affiliated with the cemetery company and operated in conformity with applicable provisions of Code Section 10-14-7. The preconstruction trust fund shall be separate from any other trust funds that may be required by this chapter.

(c) Before a sale, contract for sale, reservation for sale, or agreement for sale in a mausoleum section or columbarium may be made, the cemetery company shall compute the amount to be deposited to the preconstruction trust fund. The total amount to be deposited in the fund for each unit of the project shall be computed by dividing the cost of the project plus 10 percent of the cost, as computed by a licensed contractor, engineer, or architect, by the number of crypts or niches in the mausoleum or columbarium. When payments are received in installments, the percentage of the installment payment placed in trust must be identical to the percentage which the payment received bears to the total cost of the contract, including other burial or funeral merchandise and services purchased. Preconstruction trust fund payments shall be made within 30 days after the end of the month in which payment is received.

(d) When the cemetery company delivers a completed crypt, mausoleum, columbarium, or niche acceptable to the purchaser in lieu of the crypt or niche purchased prior to construction, all sums deposited to the

preconstruction trust fund for that purchaser shall be paid to the cemetery company.

(e) Upon completion of the mausoleum section or columbarium, the cemetery company shall certify completion to the trustee and shall be entitled to withdraw all funds deposited to the account of such mausoleum section or columbarium.

(f) If the mausoleum section or columbarium is not completed within the time limits set out in this Code section, the trustee shall contract for and cause the project to be completed and pay therefor from the trust funds deposited to the project's account, paying any balance, less cost and expenses, to the cemetery company. The cemetery company shall be liable for any difference between the amount necessary to complete construction and the amount of trust funds.

(g) On or before January 31 of each year, the trustee shall file with the Secretary of State in the form prescribed by the Secretary of State, a full and true statement as to the activities of any trust established pursuant to this Code section for the preceding calendar year.

History.
Code 1981, § 10-14-29, enacted by Ga. L. 2000, p. 882, § 1.

10-14-30. Adoption of minimum standards by Secretary of State.

The Secretary of State, by rule, may adopt minimum standards for interment of human remains, including, without limitation, standards for depth of burial, composition of vaults, caskets, and other containers, siting and marking of burial lots, and minimum standards for construction of mausoleums and columbaria. In addition, the Secretary of State may, by rule, provide for the minimum standards for or prohibition of aboveground burial containers.

History.
Code 1981, § 10-14-30, enacted by Ga. L. 2000, p. 882, § 1.

CHAPTER 15

BUSINESS ADMINISTRATION

Sec.		Sec.	
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10-15-4.	Prohibited activities involving magnetic strip or stripe on payment card.		

Law reviews.
For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 81 (2002).

10-15-1. Definitions.

As used in this chapter, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Business" means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. The term includes a financial institution organized, chartered, or holding a license or authorization certificate under the laws of this state, any other state, the United States, or any other country, or the parent or the subsidiary of any such financial institution. The term also includes an entity that destroys records. However, for purposes of this chapter, the term shall not include any bank or financial institution that is subject to the privacy and security provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801, et seq., as amended, and as it existed on January 31, 2002, nor shall it include any hospital or health care institution licensed under Title 31 which is subject to the privacy and security provisions of the federal Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, nor any other entity which is governed by federal law, provided that the federal law governing the business requires the business to discard a record containing personal information in the same manner as Code Section 10-15-2.

(3) "Cardholder" means any person or organization named on the face of a payment card to whom or for whose benefit the payment card is issued.

(4) "Customer" means an individual who provides personal infor-

mation to a business for the purpose of purchasing or leasing a product or obtaining a service from the business.

(5) "Discard" means to throw away, get rid of, or eliminate.

(6) "Dispose" means the sale or transfer of a record for value to a company or business engaged in the business of record destruction.

(7) "Merchant" means any person or governmental entity which receives from a cardholder a payment card or information from a payment card as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from a person or governmental entity.

(8) "Payment card" means a credit card, charge card, debit card, or any other card that is issued to a cardholder and that allows the cardholder to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

(9) "Personal information" means:

(A) Personally identifiable data about a customer's medical condition, if the data are not generally considered to be public knowledge;

(B) Personally identifiable data which contain a customer's account or identification number, account balance, balance owing, credit balance, or credit limit, if the data relate to a customer's account or transaction with a business;

(C) Personally identifiable data provided by a customer to a business upon opening an account or applying for a loan or credit; or

(D) Personally identifiable data about a customer's federal, state, or local income tax return.

(10)(A) "Personally identifiable" means capable of being associated with a particular customer through one or more identifiers, including, but not limited to, a customer's fingerprint, photograph, or computerized image, social security number, passport number, driver identification number, personal identification card number, date of birth, medical information, or disability information.

(B) A customer's name, address, and telephone number shall not be considered personally identifiable data unless one or more of them are used in conjunction with one or more of the identifiers listed in subparagraph (A) of this paragraph.

(11) "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

(12) "Reencoder" means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card.

(13) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.

History.
Code 1981, § 10-15-1, enacted by Ga. L. 2002, p. 551, § 8; Ga. L. 2003, p. 339, § 1; Ga. L. 2015, p. 1088, § 11/SB 148.

Cross references.
Identity fraud, § 16-9-120 et seq.

10-15-2. Disposal of business records containing personal information.

A business may not discard a record containing personal information unless it:

(1) Shreds the customer's record before discarding the record;

(2) Erases the personal information contained in the customer's record before discarding the record;

(3) Modifies the customer's record to make the personal information unreadable before discarding the record; or

(4) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the customer's record for the period between the record's disposal and the record's destruction.

History.
Code 1981, § 10-15-2, enacted by Ga. L. 2002, p. 551, § 8; Ga. L. 2015, p. 1088, § 11/SB 148.

Law reviews.
For article, "The Growing Threat of Identity Theft and Its Implications for Employers," see 11 Ga. St. B. J. 27 (2006).

10-15-3. Handling of receipts for credit card transactions.

(a) A merchant who accepts a payment card for the transaction of business shall not print more than five digits of the payment card's account number or print the payment card's expiration date on a receipt provided to the cardholder. This subsection applies only to receipts described in subsection (b) of this Code section and does not apply to a transaction in which the sole means of recording the payment card's account number or expiration date is by handwriting or by an imprint or copy of the payment card.

(b)(1) Effective July 1, 2004, subsection (a) of this Code section applies to receipts that are electronically transferred by a payment

card processor and printed using a cash register or other machine or device that is first used on or after July 1, 2004.

(2) Effective July 1, 2006, subsection (a) of this Code section applies to all receipts that are electronically transferred by a payment card processor and printed, including those printed using a cash register or other machine or device that is first used before July 1, 2004.

History.
Code 1981, § 10-15-4, enacted by Ga. L. 2002, p. 551, § 8; Ga. L. 2003, p. 339, § 2; Code 1981, § 10-15-3, as redesignated by Ga. L. 2003, p. 140, § 10; Ga. L. 2015, p. 1088, § 11/SB 148.
Code Commission notes.
The amendment of this Code section by Ga. L. 2003, p. 140, § 10, irreconcilably conflicted with and was treated as superseded by Ga. L. 2003, p. 339, § 2. See County of Butts v. Strahan, 151 Ga. 417 (1921).

10-15-4. Prohibited activities involving magnetic strip or stripe on payment card.

(a) No person shall use a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(b) No person shall use a reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

History.
Code 1981, § 10-15-4, enacted by Ga. L. 2003, p. 339, § 2; Ga. L. 2015, p. 1088, § 11/SB 148.
Code Commission notes.
The amendment of this former Code section by Ga. L. 2003, p. 140, § 10, irreconcilably conflicted with and was treated as superseded by Ga. L. 2003, p. 339, § 2. See County of Butts v. Strahan, 151 Ga. 417 (1921).
Editor's notes.
Ga. L. 2003, p. 339, § 2, provided for the repeal of former Code Section 10-15-4, effective July 1, 2003. For present comparable provisions, see Code Section 10-15-6.

10-15-5. Enforcement; investigation of violations.

(a) The Attorney General shall be authorized to enforce the provisions of this chapter.

(b) The Attorney General shall have the authority to investigate alleged violations of this chapter, including all investigative powers available under the "Fair Business Practices Act of 1975," Code Section 10-1-390, et seq., including, but not limited to, the power to issue

investigative demands and subpoenas as provided in Code Sections 10-1-403 and 10-1-404.

(c) Nothing contained in this Code section precludes law enforcement or prosecutorial agencies from investigating violations of Code Section 10-15-4.

History. Code 1981, § 10-15-5, enacted by Ga. L. 2003, p. 339, § 2; Ga. L. 2015, p. 1088, § 11/SB 148.

10-15-6. Hearings and penalties for violations; appeal of decision; entry of judgment.

(a) If the Attorney General determines, after notice and hearing, that a business has violated Code Section 10-15-2, the Attorney General may issue an administrative order imposing a penalty of not more than $500.00 for each customer's record that contains personal information that is wrongfully disposed of or discarded; provided, however, that in no event shall the total fine levied by the Attorney General exceed $10,000.00. It shall be an affirmative defense to the wrongful disposing of or discarding of a customer's record that contains personal information if the business can show that it used due diligence in its attempt to properly dispose of or discard such records.

(b) If the Attorney General determines, after notice and hearing, that a business has violated Code Section 10-15-3, the Attorney General may issue an administrative order imposing a penalty of not more than $250.00 for the first violation of Code Section 10-15-3, and a penalty of $1,000.00 for a second or subsequent violation of Code Section 10-15-3.

(c) The hearing and any administrative review in connection with alleged violations of Code Section 10-15-2 or 10-15-3 shall be conducted in accordance with the procedure for contested cases pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the Attorney General shall have the right of judicial review in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(d) The Attorney General may file in the superior court of the county in which the person under an order resides, or if the person is a corporation, in the superior court of the county in which the corporation under an order maintains its principal place of business, a certified copy of or the final order of the Attorney General, whether or not the order was appealed. Thereafter the court shall render a judgment in accordance with the order and notify the parties. The judgment shall have the same effect as a judgment rendered by the court.

History.
Code 1981, § 10-15-6, enacted by Ga. L. 2003, p. 339, § 2; Ga. L. 2005, p. 60, § 10/HB 95; Ga. L. 2015, p. 1088, § 11/SB 148; Ga. L. 2024, p. 1052, § 2(68)/SB 448, effective July 1, 2024.

Amendments.
The 2024 amendment, effective July 1, 2024, part of an Act to revise, modernize, and correct the Code, substituted "however, that" for "however," in subsection (a).

10-15-7. Criminal penalties; authority to prosecute.

(a) A violation of Code Section 10-15-4 shall be punishable by imprisonment for not less than one nor more than three years or a fine not to exceed $10,000.00, or both. Any person who commits a violation for the second or any subsequent offense shall be punished by imprisonment for not less than three nor more than ten years or a fine not to exceed $50,000.00, or both.

(b) Any person found guilty of a violation of this chapter may be ordered by the court to make restitution to any consumer victim or any business victim of the fraud.

(c) Each violation of this chapter shall constitute a separate offense.

(d) The Attorney General and prosecuting attorneys shall have the authority to conduct the prosecution for a violation of Code Section 10-15-4.

(e) Upon a violation of this chapter, the court may issue any order necessary to correct a public record that contains false information resulting from the actions which resulted in the violation.

History.
Code 1981, § 10-15-7, enacted by Ga. L. 2003, p. 339, § 2; Ga. L. 2015, p. 1088, § 11/SB 148.

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Motor vehicle lemon law, §10-1-782.

DEFINED TERMS —Cont'd
Collateral costs.
Assistive technology warranties, §10-1-871.
Motorized wheelchair warranties, §10-1-891.
Collective mark.
Uniform deceptive trade practices act, §10-1-371.
Columbarium.
Cemetery and funeral services act, §10-14-3.
Commerce.
Fair business practices act of 1975, §10-1-392.
Commercial financing transactions.
Unfair or deceptive trade practices, commercial financing transactions, §10-1-393.18.
Commercial loans.
Unfair or deceptive trade practices, commercial financing transactions, §10-1-393.18.
Commercial open-end credit plans.
Unfair or deceptive trade practices, commercial financing transactions, §10-1-393.18.
Commercial recording or audiovisual work.
True origin of digital goods act, §10-1-931.
Commissioners.
Electric vehicle charging stations, §10-1-220.
Commodities, §10-5A-1.
Commodity contract, §10-5A-1.
Commodity exchange act, §10-5A-1.
Commodity futures trading commission, §10-5A-1.
Commodity futures trading commission rule, §10-5A-1.
Commodity merchant, §10-5A-1.
Commodity option, §10-5A-1.
Common business enterprise.
Cemetery and funeral services act, §10-14-3.
Common source information companies.
Real estate brokerage relationships, §10-6A-3.
Community of interest.
Recreational vehicle dealers, §10-1-679.
Company.
Business opportunity sales, §10-1-410.

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Compressed natural gas.
Weights and measures, §10-2-19.
Computer program.
Electronic transactions, §10-12-2.
Conditional power of attorney, §10-6-6.
Consignment.
Art, §10-1-521.
Conspicuously.
Promotional giveaways or contests, §10-1-393.
Consumer.
Assistive technology warranties, §10-1-871.
Credit report security freezes, §10-1-913.
Fair business practices act of 1975, §10-1-392.
Farm tractor warranty act, §10-1-811.
Motorized wheelchair warranties, §10-1-891.
Motor vehicle lemon law, §10-1-782.
Online automatic renewal transparency, §10-1-439.7.
Consumer acts or practices.
Fair business practices act of 1975, §10-1-392.
Consumer credit report.
Credit report security freezes, §10-1-913.
Consumer credit reporting agency.
Credit report security freezes, §10-1-913.
Consumer data.
Motor vehicle franchise practices act, §10-1-622.
Consumer products.
Online marketplaces, §10-1-940.
Consumer report.
Consumer reports for employment purposes, unfair or deceptive trade practices, §10-1-393.14.
Fair business practices act of 1975, §10-1-392.
Consumer reporting agency.
Consumer reports for employment purposes, unfair or deceptive trade practices, §10-1-393.14.
Fair business practices act of 1975, §10-1-392.
Consumer transaction.
Fair business practices act of 1975, §10-1-392.
Continuous service.
Online automatic renewal transparency, §10-1-439.7.

DEFINED TERMS —Cont'd
Contract.
Buying services act of 1975, §10-1-591.
Electronic transactions, §10-12-2.
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Retail installment and home solicitation sales act, §10-1-2.
Contract of suretyship or guaranty, §10-7-1.
Contributed capital.
Invest Georgia fund, §10-10-11.
Control, controlling or controlled by.
Telemarketing deception, fraud or abuse, §10-5B-2.
Convenience warehouse, §10-4-191.
Cooperatives.
Consignment of art, §10-1-521.
Copper property.
Secondary metals recyclers, §10-1-350.
Copper wire.
Secondary metals recyclers, §10-1-350.
Corporate authorized reseller.
Organized retail crime prevention, §10-1-310.
Corporate filings.
Unfair or deceptive trade practices, §10-1-393.16.
Corporate issuer.
Organized retail crime prevention, §10-1-310.
Corporate issuer agent.
Organized retail crime prevention, §10-1-310.
Correct.
Weights and measures, §10-2-1.
Costs.
Geo. L. Smith II Georgia World Congress Center Act, §10-9-3.
Covered communication.
Telemarketing, §10-1-393.
Credit union.
Securities, §10-5-2.
Cremation.
Cemetery and funeral services act, §10-14-3.
Crime.
Secondary metals recyclers, §10-1-359.3.
Crypt.
Cemetery and funeral services act, §10-14-3.
Customer.
Disposal of business records containing personal information, §10-15-1.

DEFINED TERMS —Cont'd
Customer —Cont'd
Online third-party delivery transparency, §10-1-439.17.
Real estate brokerage relationships, §10-6A-3.
Rights in works of fine art, §10-1-510.
Data collector.
Identity theft, §10-1-911.
Data management system.
Motor vehicle franchise practices act, §10-1-622.
Day.
Motor vehicle lemon law, §10-1-782.
Dealer.
Motor vehicle franchise practices act, §10-1-622.
Retail petroleum products dealers, §10-1-720.
Tobacco master settlement agreement enhancements, §10-13A-2.
Dealership.
Motor vehicle franchise practices act, §10-1-622.
Dealership facilities.
Motor vehicle franchise practices act, §10-1-622.
Deceit.
Securities, §10-5-2.
Defraud.
Securities, §10-5-2.
Deliverer.
Secondary metals recyclers, §10-1-350.
Demand letter.
Bad faith assertions of patent infringement, §10-1-770.
Demonstrator.
Assistive technology warranties, §10-1-871.
Motorized wheelchair warranties, §10-1-891.
Department.
Electric vehicle charging stations, §10-1-220.
Depository institution.
Securities, §10-5-2.
Designated agent.
Real estate brokerage relationships, §10-6A-3.
Designated capital.
Invest Georgia fund, §10-10-11.
Designated family member.
Retail petroleum products dealers, §10-1-720.
Designated successor.
Motor vehicle franchise practices act, §10-1-622.

DEFINED TERMS —Cont'd
Digital network.
Electric vehicle charging stations, §10-1-220.
Directory.
Tobacco master settlement agreement enhancements, §10-13A-2.
Disabled persons.
Unfair or deceptive trade practices, §10-1-850.
Disaster related violation.
Unfair or deceptive trade practices, §10-1-438.
Discard.
Disposal of business records containing personal information, §10-15-1.
Disclose a financial record.
Firearms industry nondiscrimination, §10-1-439.1.
Dispose.
Disposal of business records containing personal information, §10-15-1.
Distributor.
Marine manufacturers, §10-1-676.
Motion picture fair competition act, §10-1-292.
Motor vehicle franchise practices act, §10-1-622.
Tobacco master settlement agreement enhancements, §10-13A-2.
Documentary material.
Fair business practices act of 1975, §10-1-392.
Door-to-door sale, §10-1-21.
Dual agent.
Real estate brokerage relationships, §10-6A-3.
Duly licensed attorney at law.
False advertising, false solicitation in media of legal services, §10-1-424.1.
False advertising, misleading statements concerning legal services, §10-1-427.
Duplicate.
Rights in works of fine art, §10-1-510.
Durable.
Powers of attorney, §10-6B-2.
Early stage venture capital fund.
Invest Georgia fund, §10-10-11.
Early termination cost.
Assistive technology warranties, §10-1-871.

DEFINED TERMS —Cont'd
Early termination cost —Cont'd
Motorized wheelchair warranties, §10-1-891.
Early termination savings.
Assistive technology warranties, §10-1-871.
Motorized wheelchair warranties, §10-1-891.
Elder person.
Unfair or deceptive trade practices, §10-1-850.
Electric vehicle.
Electric vehicle charging stations, §10-1-220.
Electric vehicle charging providers.
Electric vehicle charging stations, §10-1-220.
Electric vehicle charging stations, §10-1-220.
Electronic.
Electronic transactions, §10-12-2.
Powers of attorney, §10-6B-2.
Electronic agent.
Electronic transactions, §10-12-2.
Electronic dissemination.
True origin of digital goods act, §10-1-931.
Electronic record.
Electronic transactions, §10-12-2.
Telemarketing, §10-1-393.
Electronic signature.
Cemetery contracts, §10-14-18.
Electronic transactions, §10-12-2.
Eligible adult.
Financial protections for elderly and disabled adults, securities regulation, §10-5-100.
Email.
Self-service storage facility act, §10-4-211.
Employment purposes.
Consumer reports for employment purposes, unfair or deceptive trade practices, §10-1-393.14.
Enrollee.
Unfair or deceptive practices, §10-1-393.
Enterprise.
Seed capital fund, §10-10-1.
Entity.
Cemetery and funeral services act, §10-14-3.
Entombment.
Cemetery and funeral services act, §10-14-3.

DEFINED TERMS —Cont'd
Entrant's fee.
Beauty pageants, §10-1-830.
Equity contribution.
Seed capital fund, §10-10-1.
Estate, trust or other beneficial interest.
Powers of attorney, specification of authority of agents, §10-6B-50.
Examination.
Fair business practices act of 1975, §10-1-392.
Executive officer.
Telemarketing deception, fraud or abuse, §10-5B-2.
Exhibit.
Motion picture fair competition act, §10-1-292.
Exhibition.
Motion picture fair competition act, §10-1-292.
Exhibitor.
Motion picture fair competition act, §10-1-292.
Express warranty.
Motor vehicle lemon law, §10-1-782.
Farm tractor.
Farm tractor warranty act, §10-1-811.
Federal covered investment adviser.
Securities, §10-5-2.
Federal covered security.
Securities, §10-5-2.
Ferrous metals.
Secondary metals recyclers, §10-1-350.
File.
Fair business practices act of 1975, §10-1-392.
Filing.
Securities, §10-5-2.
Final disposition.
Cemetery and funeral services act, §10-14-3.
Finance charge.
Motor vehicle sales finance act, §10-1-31.
Financial exploitation.
Financial protections for elderly and disabled adults, securities regulation, §10-5-100.
Financial institutions.
Commodities and commodity contracts and options, §10-5A-1.
Firearms industry nondiscrimination, §10-1-439.1.
Financial services.
Firearms industry nondiscrimination, §10-1-439.1.

DEFINED TERMS —Cont'd
Fine art.
Rights in works of fine art, §10-1-510.
Fine art multiple.
Limited edition art reproductions, §10-1-430.
Fine print.
Rights in works of fine art, §10-1-510.
Firearms code.
Firearms industry nondiscrimination, §10-1-439.1.
Firearms retailer.
Firearms industry nondiscrimination, §10-1-439.1.
Flea market.
Vendors' recordkeeping, §10-1-360.
Food.
Fair business practices act of 1975, §10-1-392.
Food service establishment.
Online third-party delivery transparency, §10-1-439.17.
Forged or counterfeited trademark, service mark or copyrighted or registered design, §10-1-454.
For the benefit of.
Powers of attorney, specification of authority of agents, §10-6B-56.
Franchise.
Marine manufacturers, §10-1-676.
Motor vehicle franchise practices act, §10-1-622.
Recreational vehicle dealers, §10-1-679.
Retail petroleum products dealers, §10-1-720.
Franchise agreement.
Retail petroleum products dealers, §10-1-720.
Franchisor.
Motor vehicle franchise practices act, §10-1-622.
Fraud.
Securities, §10-5-2.
Fuel alcohol.
Gasoline marketing practices act, §10-1-232.
Fully operational and available for use.
Requirements for health spas, §10-1-393.2.
Fund administrator.
Invest Georgia fund, §10-10-11.
Funeral director.
Cemetery and funeral services act, §10-14-3.

DEFINED TERMS —Cont'd
Funeral director in full and continuous charge.
Cemetery and funeral services act, §10-14-3.
Funeral merchandise.
Cemetery and funeral services act, §10-14-3.
Funeral service.
Cemetery and funeral services act, §10-14-3.
Gasohol.
Gasoline marketing practices act, §10-1-232.
Gasoline.
Gasoline marketing practices act, §10-1-232.
Sale of petroleum products, §10-1-140.
Gasoline dealer.
Gasoline marketing practices act, §10-1-232.
General use gift card.
Unfair or deceptive practices, §10-1-393.
Gift.
Powers of attorney, §10-6B-2.
Gift certificate.
Unfair or deceptive practices, §10-1-393.
Gift splitting.
Powers of attorney, specification of authority of agents, §10-6B-56.
Going-out-of-business sale.
Fair business practices act of 1975, §10-1-392.
Good faith.
Motor vehicle franchise practices act, §10-1-622.
Powers of attorney, §10-6B-2.
Goods.
Retail installment and home solicitation sales act, §10-1-2.
Governmental agency.
Electronic transactions, §10-12-2.
Governmental entity.
Bar on opioid litigation by state governmental entities, §10-13B-2.
Grain.
Georgia state warehouse act, §10-4-2.
Grantor.
Recreational vehicle dealers, §10-1-679.
Grave space.
Cemetery and funeral services act, §10-14-3.

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Growth stage venture capital fund.
Invest Georgia fund, §10-10-11.
Guaranteed.
Securities, §10-5-2.
Health benefit plans.
Unfair or deceptive practices, §10-1-393.
Health spa.
Fair business practices act of 1975, §10-1-392.
Heavy equipment.
Multiline heavy equipment dealer act, §10-1-731.
High-volume third-party sellers.
Online marketplaces, §10-1-940.
Holders.
Motor vehicle sales finance act, §10-1-31.
Retail installment and home solicitation sales act, §10-1-2.
Home solicitation sale, §10-1-2.
Human remains.
Cemetery and funeral services act, §10-14-3.
Importer.
Tobacco master settlement agreement enhancements, §10-13A-2.
Tobacco products manufacturers, §10-13-2.
Improper means.
Trade secrets act of 1990, §10-1-761.
Incapacity.
Powers of attorney, §10-6B-2.
Incidental costs.
Motor vehicle lemon law, §10-1-782.
Income.
Perpetual care cemeteries trust fund, §10-14-6.
In conjunction with and in immediate proximity to.
Promotional giveaways or contests, §10-1-393.
Incubator.
Seed capital fund, §10-10-1.
Indoor swap meet.
Flea market vendors' recordkeeping, §10-1-360.
Induce.
Motor vehicle subleasing, §10-1-39.
Industrial design.
Rights in work of fine art, §10-1-510.
Informal dispute settlement mechanism.
Motor vehicle lemon law, §10-1-782.

DEFINED TERMS —Cont'd
Information.
Electronic transactions, §10-12-2.
Information broker.
Identity theft, §10-1-911.
Information processing system.
Electronic transactions, §10-12-2.
Initial payment.
Business opportunity sales, §10-1-410.
Institutional investor.
Securities, §10-5-2.
Instrument conveying real estate.
Unfair or deceptive trade practices, solicitation for services to obtain copy of instrument conveying real estate, §10-1-393.15.
Insurance company.
Securities, §10-5-2.
Insured.
Securities, §10-5-2.
Insurer.
Unfair or deceptive practices, §10-1-393.
Intentional violation.
Fair business practices act of 1975, §10-1-392.
Interment.
Cemetery and funeral services act, §10-14-3.
International banking institution.
Securities, §10-5-2.
In this state.
Telemarketing services, identification of caller, §10-1-393.13.
Inurnment.
Cemetery and funeral services act, §10-14-3.
Invest Georgia fund, §10-10-11.
Investment adviser.
Securities, §10-5-2.
Investment adviser registration depository.
Securities, §10-5-2.
Investment adviser representative.
Securities, §10-5-2.
Investment entity.
Seed capital fund, §10-10-1.
Invitation to bid.
Motion picture fair competition act, §10-1-292.
Issuer.
Securities, §10-5-2.
Jobber.
Gasoline marketing practices act, §10-1-232.

DEFINED TERMS —Cont'd
Kerosene.
Sale of petroleum products, §10-1-140.
Kosher food disclosure statement.
Fair business practices act of 1975, §10-1-392.
Last known address.
Self-service storage facility act, §10-4-211.
Law enforcement officer.
Secondary metals recyclers, §10-1-350.
Lease.
Geo. L. Smith II Georgia World Congress Center Act, §10-9-49.
Lease-purchase agreement, §10-1-681.
Legal services.
False advertising, false solicitation in media of legal services, §10-1-424.1.
False advertising, misleading statements concerning legal services, §10-1-427.
Lemon law rights period.
Motor vehicle lemon law, §10-1-782.
Lessee.
Lease-purchase agreement act, §10-1-681.
Motor vehicle lemon law, §10-1-782.
Motor vehicle subleasing, §10-1-39.
Lessee cost.
Motor vehicle lemon law, §10-1-782.
Lessor.
Lease-purchase agreement act, §10-1-681.
Motor vehicle lemon law, §10-1-782.
Motor vehicle subleasing, §10-1-39.
License agreement.
Motion picture fair competition act, §10-1-292.
Limited agent.
Real estate brokerage relationships, §10-6A-3.
Limited edition.
Limited edition art reproductions, §10-1-430.
Line-make.
Motor vehicle franchise practices act, §10-1-622.
Liquefied petroleum gas, §10-1-262.
Loan.
Georgia museum property act, §10-1-529.2.
Seed capital fund, §10-10-1.
Local.
Unfair or deceptive practices and consumer transactions, §10-1-393.

DEFINED TERMS —Cont'd
Local area.
Unfair or deceptive practices and consumer transactions, §10-1-393.
Local telephone directory.
Unfair or deceptive practices and consumer transactions unlawful, §10-1-393.
Local telephone number.
Unfair or deceptive practices and consumer transactions unlawful, §10-1-393.
Local trade and convention center.
Geo. L. Smith II Georgia World Congress Act, §10-9-16.1.
Lubricating oils.
Sale of petroleum products, §10-1-140.
Major life activities.
Unfair or deceptive trade practices.
Elderly or disabled persons, §10-1-850.
Manufacturers.
Assistive technology warranties, §10-1-871.
Farm tractor warranty act, §10-1-811.
Marine manufacturers, §10-1-676.
Motorized wheelchair warranties, §10-1-891.
Motor vehicle franchise practices act, §10-1-622.
Motor vehicle lemon law, §10-1-782.
Manufacturer sales representative.
Marine manufacturers, §10-1-676.
Manufacturer's express warranty.
Farm tractor warranty, §10-1-811.
Marine dealer, §10-1-676.
Marine membership.
Fair business practices act of 1975, §10-1-392.
Marine membership facility.
Fair business practices act of 1975, §10-1-392.
Marine product, §10-1-676.
Mark.
Uniform deceptive trade practices act, §10-1-371.
Marketing agreement.
Gasoline marketing practices act, §10-1-232.
Master.
Limited edition art reproductions, §10-1-430.
Master settlement agreement.
Tobacco master settlement agreement enhancements, §10-13A-2.

DEFINED TERMS —Cont'd
Master settlement agreement —Cont'd
Tobacco products manufacturers, §10-13-2.
Mausoleum.
Cemetery and funeral services act, §10-14-3.
Mausoleum section.
Cemetery and funeral services act, §10-14-3.
Measure, §10-2-1.
Media.
False advertising.
False solicitation in media of legal services, §10-1-424.1.
Misleading statements concerning legal services, §10-1-427.
Members.
Buying services act of 1975, §10-1-591.
Merchants.
Disposal of business records containing personal information, §10-15-1.
Prohibited use of credit card information by merchant, §10-1-393.3.
Ministerial acts.
Real estate brokerage relationships, §10-6A-3.
Misappropriation.
Trade secrets act of 1990, §10-1-761.
Misleading statements.
False advertising, misleading statements concerning legal services, §10-1-427.
Monument.
Cemetery and funeral services act, §10-14-3.
Motor fuel.
Signs advertising retail motor fuel, §10-1-164.
Motorized wheelchair dealers, §10-1-891.
Motorized wheelchair lessors, §10-1-891.
Motorized wheelchairs, §10-1-891.
Motor vehicle.
Motor vehicle franchise practices act, §10-1-622.
Motor vehicle sales finance act, §10-1-31.
Retail installment and home solicitation sales act, §10-1-2.

DEFINED TERMS —Cont'd
Motor vehicle dealers.
Unfair or deceptive trade practices, commercial financing transactions, §10-1-393.18.
Motor vehicle lease contract.
Motor vehicle subleasing, §10-1-39.
Multilevel distribution company.
Business opportunity sales, §10-1-410.
Multiline dealer.
Multiline heavy equipment dealer act, §10-1-731.
Museum.
Georgia museum property act, §10-1-529.2.
Natural disaster.
Unfair or deceptive trade practices, §10-1-438.
New motor vehicle.
Motor vehicle franchise practices act, §10-1-622.
Motor vehicle lemon law, §10-1-782.
New motor vehicle dealer.
Motor vehicle lemon law, §10-1-782.
Niche.
Cemetery and funeral services act, §10-14-3.
Nonconformity.
Assistive technology warranties, §10-1-871.
Farm tractor warranty act, §10-1-811.
Motorized wheelchair warranties, §10-1-891.
Motor vehicle lemon law, §10-1-782.
Nonferrous metals.
Secondary metals recyclers, §10-1-350.
Nonissuer distribution.
Securities, §10-5-2.
Nonissuer transaction.
Securities, §10-5-2.
Nonlocal business.
Unfair or deceptive practices and consumer transactions, §10-1-393.
Nonparticipating manufacturer.
Tobacco master settlement agreement enhancements, §10-13A-2.
Nonperpetual care.
Cemetery and funeral services act, §10-14-3.
Nonregistered vendor.
Flea market vendors' recordkeeping, §10-1-360.
Normal business hours.
Credit report security freezes, §10-1-913.

DEFINED TERMS —Cont'd
Notice.
Identity theft, §10-1-911.
Promotional giveaways or contests, §10-1-393.
Novation, §10-7-21.
Obligee.
Fair business practices act of 1975, §10-1-392.
Suretyship, §10-7-30.
Obligor.
Fair business practices act of 1975, §10-1-392.
Occupant.
Self-service storage facility act, §10-4-211.
Offer terms.
Online automatic renewal transparency, §10-1-439.7.
Offer to purchase.
Securities, §10-5-2.
Office.
Fair business practices act of 1975, §10-1-392.
Office supplier.
Fair business practices act of 1975, §10-1-392.
Office supply transactions.
Fair business practices act of 1975, §10-1-392.
Official fees.
Motor vehicle sales finance act, §10-1-31.
Retail installment and home solicitation sales act, §10-1-2.
Online marketplaces, §10-1-940.
Operator.
Beauty pageants, §10-1-830.
Carry-over tobacco, §10-4-141.
Option to enter into brokerage engagement.
Real estate brokerage relationships, §10-6A-3.
Outer burial container.
Cemetery and funeral services act, §10-14-3.
Owners.
Motor vehicle franchise practices act, §10-1-622.
Self-service storage facility act, §10-4-211.
Package.
Tobacco master settlement agreement enhancements, §10-13A-2.
Weights and measures, §10-2-1.

DEFINED TERMS —Cont'd
Paint, §10-1-120.
Panel.
Motor vehicle lemon law, §10-1-782.
Participant.
Business opportunity sales, §10-1-410.
Promotional giveaways or contests, §10-1-393.
Participating manufacturer.
Tobacco master settlement agreement enhancements, §10-13A-2.
Patient.
Unfair or deceptive practices, §10-1-393.
Payment card.
Disposal of business records containing personal information, §10-15-1.
Firearms industry nondiscrimination, §10-1-439.1.
Performing group.
Vocal or instrumental performances or productions by cover band.
Advertisement without authorization of recording group, §10-1-393.17.
Periods.
Lease-purchase agreement act, §10-1-681.
Perpetual care.
Cemetery and funeral services act, §10-14-3.
Person.
Below cost sales act, §10-1-251.
Business opportunity sales, §10-1-410.
Cemetery and funeral services act, §10-14-3.
Commodities and commodity contracts and options, §10-5A-1.
Consignment of art, §10-1-521.
Convenience warehouse act of 1975, §10-4-191.
Credit report security freezes, §10-1-913.
Electronic transactions, §10-12-2.
Fair business practices act of 1975, §10-1-392.
False advertising, misleading statements concerning legal services, §10-1-427.
Firearms industry nondiscrimination, §10-1-439.1.
Georgia state warehouse act, §10-4-2.
Identity theft, §10-1-911.
Limited edition art reproductions, §10-1-430.
DEFINED TERMS —Cont'd
Person —Cont'd
Motion picture fair competition act, §10-1-292.
Motor vehicle franchise practices act, §10-1-622.
Motor vehicle lemon law, §10-1-782.
Motor vehicle sales finance act, §10-1-31.
Multiline heavy equipment dealer act, §10-1-731.
Powers of attorney, §10-6B-2.
Recreational vehicle dealers, §10-1-679.
Registration and use of trademarks and service marks, §10-1-440.
Retail installment and home solicitation sales act, §10-1-2.
Rights in works of fine art, §10-1-510.
Sale of antifreeze, §10-1-200.
Sale of petroleum products, §10-1-162.
Secondary metals recyclers, §10-1-350.
Securities, §10-5-2.
Telemarketing deception, fraud or abuse, §10-5B-2.
Tobacco master settlement agreement enhancements, §10-13A-2.
Trade secrets act of 1990, §10-1-761.
True origin of digital goods act, §10-1-931.
Uniform deceptive trade practices act, §10-1-371.
Weights and measures, §10-2-1.
Personal identification card.
Secondary metals recyclers, §10-1-350.
Personal information.
Disposal of business records containing personal information, §10-15-1.
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