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COMMERCE AND TRADE Selling and Other Trade Practices: Provide Relief from Liability for Sellers or Holders for Unintentional Errors Resulting from a Bona Fide Clerical or Typographical Error

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COMMERCE AND TRADE

Selling and Other Trade Practices: Provide Relief from Liability for Sellers or Holders for Unintentional Errors Resulting from a Bona Fide Clerical or Typographical Error

CODE SECTION:	O.C.G.A. § 10-1-15 (amended)
BILL NUMBER:	HB 1647
ACT NUMBER:	1030
GEORGIA LAWS:	1996 Ga. Laws 1506
SUMMARY:	The Act establishes that a seller or a holder under the Retail Installment and Home Solicitation Sales Act (RIHSSA) will not be liable if the seller or holder can show by clear and convincing evidence that a violation was not intentional and resulted from a bona fide clerical or typographical error. The Act also provides that only individual actions may be brought under the RIHSSA.
EFFECTIVE DATE:	April 18, 1996[1]

History

In 1967, the Georgia General Assembly enacted the Retail Installment and Home Solicitation Sales Act (RIHSSA), which established requirements and limitations on the practices of sellers and holders of installment contracts.[2] The RIHSSA contains specific provisions relating to criminal and civil penalties for violations of its provisions.[3] Absent from the law, however, were provisions relating to unintentional errors on the part of the seller. A seller could be subjected to complex litigation

1. The Act became effective upon approval by the Governor.

2. 1967 Ga. Laws 659, § 1, at 660-73 (formerly found at O.C.G.A. §§ 10-1-1 to -16 (1994)). A "seller" is defined as "a person regularly engaged in, and whose business consists to a substantial extent of, selling goods or services to a retail buyer." 1978 Ga. Laws 1455 (codified at O.C.G.A. § 10-1-2(a)(11) (1994)). A "holder" is "the retail seller of the goods or services under [a] 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 determination. 1967 Ga. Laws 659, § 2, at 662 (codified at O.C.G.A. § 10-1-2(a)(3) (1994)).

3. *See* 1967 Ga. Laws 659, § 10, at 672-73 (formerly found at O.C.G.A. § 10-1-15 (1994)).

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for "minor" typographical errors that could, unlike many other lending acts in the Georgia Code,[4] be brought in a class action.

As a reaction to judicial decisions in other districts[5] and cases pending in Georgia,[6] several large retail furniture stores[7] pressured the General Assembly to present this bill.[8] In the Alabama case *Whitson v. Voyager Guaranty Insurance Co.*,[9] plaintiffs brought suit for compensatory and punitive damages on behalf of themselves and all others similarly situated against Voyager Guaranty Insurance alleging Voyager "made certain misrepresentations concerning the purchase of credit property insurance in regard to consumer loan agreements."[10] The plaintiffs alleged, among other things, that Voyager "misrepresented that the purchase of insurance in an amount equal to the 'total of payments' of the loan was necessary, and that credit property insurance was actually sold in an amount that exceeded the replacement value of the insured property."[11] The filing of *Whitson* led furniture retailers in Georgia to lobby for this Act.[12]

The retailers were concerned with the growing trend under the RIHSSA of plaintiffs bringing in "all people who did business with the store" as plaintiffs in a class action.[13] Knowing that class actions suites had already been the primary cause of bankruptcy for several well-established companies, the credit

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4. *See* 1989 Ga. Laws 14, § 7 (codified at O.C.G.A. § 7-3-29(e) (1994) (The Industrial Loan Act)); 1985 Ga. Laws 698, § 3, at 699 (codified at O.C.G.A. § 10-1-36.1(a) (1994) (the Motor Vehicle Sales Finance Act)). Both of these lending acts have limitations against the use of class actions.

5. *See, e.g.*, Whitson v. Voyager Guar. Ins. Co., 669 So. 2d 198 (Ala. Civ. App. 1995).

6. *See, e.g.*, Wiggins Brielle v. Farmers' Furniture Co., No. 94-RCCV-1032 (Sup. Ct. of Richmond County, Ga., filed Nov. 9, 1994).

7. Four of the major proponents of this bill were Farmers' Furniture Company, Badcock Furniture Company, Haverty's Furniture Company, and Heilig-Meyers Furniture Company. Telephone Interview with Rep. Roy H. "Sonny" Watson, Jr., House District No. 139 (May 20, 1996) [hereinafter Watson Interview].

8. HB 1647, as introduced, 1996 Ga. Gen. Assem.

9. 669 So. 2d 198 (Ala. Civ. App. 1995).

10. *Id.* at 199.

11. *Id.*

12. Telephone Interview with Ronald Payne, C.E.O. of Farmers' Furniture Company (May 23, 1996) [hereinafter Payne Interview].

13. Telephone Interview with Buddy Pulliam, Independent Consultant (May 22, 1996) [hereinafter Pulliam Interview]. Mr. Pulliam is a lobbyist who worked extensively on the bill and is credited as a major proponent of the legislation by Representative Watson. *See* Watson Interview, *supra* note 7.

industry feared class actions under the RIHSSA "could bring consumer credit to its knees" if left unchecked.[14] The credit industry felt the need for "a steady, predictable credit environment."[15]

HB 1647

Unintentional Bona Fide Clerical or Typographical Error

When drafted and presented to the House Committee on Industry, the bill originally provided that a seller or holder would not be held liable if the seller or holder could show by a preponderance of the evidence that the violation was unintentional and the result of a bona fide clerical or typographical error.[16] Under the suggestion of Senator Egan, the Senate Finance and Public Utilities Committee changed the standard of proof from preponderance of the evidence to clear and convincing.[17] The motivation behind the change was fairness to the consumer.[18] While it is important that sellers and holders not be liable for these types of errors, it is also important that the seller or holder have a high burden of proof so as not to abuse this provision.[19] While the addition was seen as a way for the seller or purchaser to avoid liability, the heightened standard was added to "level the playing field" for the consumer.[20]

Individual Actions Only

The original version of the bill contained a clause mandating that actions be asserted individually rather than as class actions.[21] Claiming it would be unfair to plaintiffs, Representative Barnes successfully lobbied to have this section

14. Payne Interview, *supra* note 12. Skinner Furniture, a company with significant operations in Alabama, and Lorchs Jewelers, a Birmingham, Alabama company that had been in business for over 100 years, have both recently gone out of business in part because of the strains placed upon them by class actions in Alabama. *Id.*

15. *Id.*

16. HB 1647, as introduced, 1996 Ga. Gen. Assem.

17. HB 1647 (SCS), 1996 Ga. Gen. Assem.; Telephone Interview with Sen. Michael J. Egan, Senate District No. 40 (June 19, 1996); *see* O.C.G.A. § 10-1-15(e) (Supp. 1996); Pulliam Interview, *supra* note 13.

18. Watson Interview, *supra* note 7; Pulliam Interview, *supra* note 13.

19. Watson Interview, *supra* note 7.

20. Pulliam Interview, *supra* note 13.

21. *See* HB 1647, as introduced, 1996 Ga. Gen. Assem.

omitted from the House version of the bill.[22] Representative Barnes' opposition to the provision was based on the size of the typical plaintiff's claim under the RIHSSA.[23] Since the amount of the average claim ranges from $50 to $200, an individual would probably not bring an action because the court costs and the expenses of bringing a suit would outweigh the amount recovered.[24] Thus, sellers and holders could potentially commit egregious violations of the RIHSSA without fear of a lawsuit.[25] The bill passed the House of Representatives without the clause dispensing of class actions.[26] However, a similar clause restricting suits to individual actions was added back into the Act by the Senate Finance and Public Utilities Committee[27] at the urging of the lobbyists supporting the bill.[28]

J. Parker Gilbert

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22. *See* HB 1647 (HFA), 1996 Ga. Gen. Assem.; Payne Interview, *supra* note 12.

23. Telephone Interview with Rep. Roy E. Barnes, House District No. 33 (June 18, 1996) [hereinafter Barnes Interview].

24. *Id.*

25. *Id.*

26. The bill passed the House of Representatives on March 14, 1996. Final Composite Status Sheet, Mar. 18, 1996.

27. HB 1647 (SCS), 1996 Ga. Gen. Assem.

28. Representative Barnes noted that the amendment came when he had stepped out of the room. Barnes Interview, *supra* note 23. Because the clause was added in his absence, he sent a letter to the Governor urging him to veto the bill. *Id.* The bill passed the Senate on March 18, 1996 and was signed into law on April 18, 1996 by Governor Zell Miller. Final Composite Status Sheet, Mar. 18, 1996.

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