Ohio Legislative Service Commission

Bill Analysis

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Sub. S.B. 196

129th General Assembly
(As Reported by S. Insurance, Commerce and Labor)

Sens. Wagoner, Gillmor, Seitz, Bacon

BILL SUMMARY

- Expands the definition of "business opportunity plan" to include a plan purchase with an initial payment up to $100,000, as opposed to $50,000 under current law.
- Expands the definition of "initial payment" to include more initial payment situations and promissory note situations and excludes from the definition goods or services purchased for resale or lease.
- Makes changes to the cancellation provisions of the Ohio Business Opportunity Plan Law and allows cancellation for up to 12 months if certain continuing law provisions are not fulfilled.
- Changes certain exemptions from the Ohio Business Opportunity Plan Law.
- Adjusts the remedies available to purchasers when a seller violates business opportunity plan law.
- Limits the timeframe within which an action for recovery may be brought under the Ohio Business Opportunity Plan Law.
- Renders any choice of law provision that deprives a purchaser who is an Ohio resident of the benefit of the Ohio Business Opportunity Plan Law void and unenforceable.
- Declares that the Ohio Business Opportunity Plan Law represents a fundamental public policy for Ohio.
- Voids any provision of a business opportunity plan contract that restricts the jurisdiction or venue of a claim otherwise enforceable under the Business Opportunity Plan Law to a forum outside of Ohio.

CONTENT AND OPERATION

Changes to definitions

Business opportunity plan

The bill changes the definition of "business opportunity plan." A business opportunity plan is an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under certain conditions.[1] Under current law, the purchaser must make an initial payment greater than $500, but less than $50,000 to the seller or an affiliated person to begin or maintain the plan. The bill raises the upper threshold for the initial payment to $100,000.[2]

Initial payment

The bill makes changes to the definition of "initial payment." Under current law, the definition includes the total sale price of a business opportunity plan when the total sale price is split into a down payment followed by specific monthly payments. Under the bill, this element of the definition remains essentially the same, except the bill refers to the total sale price being split into "one or more installments" as opposed to being split into a down payment followed by monthly payments. This change expands the definition of "initial payment" to include those situations where a business opportunity plan does not specify a down payment, and instead specifies installments that may be on a monthly, or other, basis.

Under current law, the definition of "initial payment" includes the amount of a promissory note signed by the purchaser prior to or during the first six months after commencing operation of the business opportunity plan. The bill expands this element of the definition to include those promissory notes given or received by an affiliated person of either the purchaser or seller of the business opportunity plan for the purchase of the plan.

Finally, the bill excludes purchases, at bona fide wholesale prices, of reasonable quantities of goods or services for resale or lease from the definition of "initial payment." As such, purchases of goods or services that were *not* for resale or lease would likely still be included under the definition. For example, initial purchases of production equipment would likely still be included in the definition.[3]

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[1] R.C. 1334.01(D).

[2] R.C. 1334.01(D)(2).

[3] R.C. 1334.01(G).

Cancellation

The bill adds a provision to the Ohio Business Opportunity Plan Law[4] that allows a purchaser of a business opportunity plan to cancel an agreement selling or leasing to the purchaser a business opportunity plan. Under continuing law, a purchaser has the right to cancel an agreement until midnight of the fifth business day after the day on which the purchaser signs the agreement. The bill only allows this cancellation if the seller complies with certain continuing law provisions. The bill also allows a purchaser to cancel an agreement any time within 12 months after the day on which the purchaser signs the agreement if the seller has failed to comply with the continuing law provisions. The applicable continuing law provisions with which a seller must comply to limit the cancellation period to five days include all of the following:

(1) The agreement must contain a notice of the purchaser's right to cancel the agreement in at least ten-point boldface type, in the following form and in close proximity to the space reserved in the agreement for the signature of the purchaser:

You, the purchaser, may cancel this transaction at any time prior to midnight of the fifth business day after the date you sign this agreement. See the attached notice of cancellation for an explanation of this right.

(2) A completed form, in duplicate, captioned "Notice of Cancellation," must be attached to the agreement signed by the purchaser and be easily detachable and must contain in ten-point boldface type, the following statement:

Notice of cancellation

..... (Enter date of transaction)

You may cancel this transaction, without penalty or obligation, within five business days from the above date. If you cancel, any payments made by you under the agreement, and any negotiable instrument executed by you will be returned within ten business days following the seller's receipt of your cancellation notice, and any security interest arising out of the transaction will be cancelled. If you cancel, you must make available to the seller at your business address all goods delivered to you under this agreement; or you may if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of them without further obligation. If you fail to make the goods available to the seller, or if you agree to return them to the seller and fail to do so, then you remain liable for the performance of all obligations under this agreement. To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business) not later than midnight of (enter date).

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[4] R.C. Chapter 1334.

I hereby cancel this transaction.

.....	**.....**
(Date)	**(Purchaser's signature)**

(3) Before furnishing copies of the notice of cancellation to the purchaser, the seller must complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the agreement, and the date of the last day on which the purchaser may cancel.

If the seller fails to comply with those continuing law provisions, the 12-month cancellation created by the bill will apply. The bill repeals the current law provision that allows the purchaser, until the seller has complied with the continuing law provisions discussed immediately above, to cancel the agreement by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of the purchaser's intention to cancel. The current law provision describing when the five-day period within which the purchaser may cancel the agreement begins to run is also repealed.[5]

Exemptions

Under continuing law, specified persons or transactions are exempt from the Ohio Business Opportunity Plan Law. Continuing law exempts a seller who has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than $5 million or a net worth, according to its most recent audited financial statement, of not less than $1 million and the seller is at least 80% owned by a corporation that has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than $5 million. The bill increases the requirement in that exemption, in both instances, from $5 million to $15 million.[6]

The bill removes the exemption for the sale or lease of goods or services to a purchaser who has previously been engaged, for at least one year, in the business of selling or distributing the goods or services that are the subject to the business opportunity plan, and earned from that business a gross income of at least $25,000 in one year.[7]

Current law exempts the following two types of transactions from the majority of the Ohio Business Opportunity Plan Law:

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[5] R.C. 1334.05 and 1334.06.

[6] R.C. 1334.12(L).

[7] R.C. 1334.12(M).

(1) Any transaction that fully complies with the trade regulation rule of the Federal Trade Commission, "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. 436.1 *et seq.*;

(2) Any transaction in which the prospective purchaser, at least ten business days before the execution of an agreement selling or leasing a business opportunity plan, receives a document containing truthful, accurate, and complete disclosures that fully complies with the requirements of the "Uniform Franchise Offering Circular" adopted by the Midwest Securities Commissioners Association on September 2, 1975, and the "Guidelines for Preparation of the Uniform Franchise Offering Circular and Related Documents" adopted by the association on July 20, 1977.

The bill instead exempts any transaction that complies (as opposed to fully complies) in all material respects with the same trade regulation as described in (1) above, but adds that the compliance must be with that trade regulation as amended from time to time, that is in effect on the date of the transaction. Additionally, the bill repeals the exemption described in (2) above, and instead exempts any transaction that complies in all material respects with the trade regulation rule of the Federal Trade Commission, "Disclosure Requirements and Prohibitions Concerning Business Opportunities," 16 C.F.R. 437.1 *et seq.*, as may be amended from time to time, that is in effect on the date of the transaction.[8]

Remedies for violations of business Ohio Business Opportunity Plan Law

Under current law, a purchaser of a business opportunity plan has a cause of action and may seek damages if the seller violates the Ohio Business Opportunity Plan Law. The purchaser may seek, in an individual action, to have the transaction rescinded and, if the purchaser is found to have been damaged, three times the amount of actual damages or $10,000, whichever is greater. In the alternative, the purchaser, in a class action civil suit, may recover damages or other appropriate relief under Civil Rule 23.[9]

The remedies under the bill for such violations are largely the same, but include a few key differences. First, to have a business opportunity plan agreement rescinded the purchaser must submit a written notice to the seller of this intent within one year of the date of the agreement. Second, the purchaser is unable to recover the fair-market value, at the time of delivery, of any goods sold to the purchaser that are not returned to

[8] R.C. 1334.13.

[9] R.C. 1334.09.

the seller.[10] Third, the bill stipulates that the purchaser may be awarded *up to* three times the amount of actual damages incurred, as opposed to just three times the amount of damages.[11] Fourth, the purchaser may take action both in an individual action and in a class action.[12]

The bill requires that, if a business opportunity plan agreement is rescinded, the purchaser must make available to the seller the goods received in accordance with the plan upon receipt by the purchaser of the amounts paid for the plan.[13]

The bill stipulates that a purchaser of a business opportunity plan is not entitled to unjust enrichment by exercising the rights described above. [14]

Limitations for recovery

Under continuing law, no action under the Ohio Business Opportunity Plan Law may be brought to recover for a transaction more than five years after the occurrence of the violation. The bill further limits when such an action may be brought. Under the bill, the action may also be brought no more than five years after the date on which the parties executed the agreement selling or leasing the business opportunity plan and requires the time limitation to run from whichever occurred earlier, the occurrence of the violation or the date on which the parties executed the agreement.[15]

Choice of law and public interest

The bill states that the General Assembly declares that the offer and sale of business opportunity plans is a matter affected with a public interest. The General Assembly further declares that it is the intent of this chapter to protect prospective purchasers of business opportunity plans by requiring that sellers provide the purchasers with the information necessary to make an intelligent decision about the business opportunity plan being offered, and that the Ohio Business Opportunity Plan Law represents a fundamental public policy for Ohio.

The bill states that any waiver by a purchaser of any venue and any choice of law provision that deprives a purchaser who is an Ohio resident of the benefit of the Ohio

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[10] R.C. 1334.09(A)(1)(a).

[11] R.C. 1334.09(A)(1)(b).

[12] R.C. 1334.09(A).

[13] R.C. 1334.09(C).

[14] R.C. 1334.09(C).

[15] R.C. 1344.10(C).

Business Opportunity Plan Law is contrary to public policy and is void and unenforceable.[16]

Voidance of change of venue clauses

The bill voids any provision of a business opportunity plan contract that restricts the jurisdiction or venue of a claim otherwise enforceable under the Ohio Business Opportunity Plan Law to a forum outside of Ohio. Similarly, the bill voids any provision that requires the application of the laws of another state to such a claim.[17]

HISTORY

ACTION	DATE
Introduced	07-07-11
Reported, S. Insurance, Commerce & Labor	12-08-11

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[16] R.C. 1334.15.

[17] R.C. 1334.06(E) and 1334.15(B).