

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 315**

4 (By Senator Mullins)

5 _____
6 [Originating in the Committee on the Judiciary;

7 reported February 10, 2015.]

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10 A BILL to amend and reenact §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code
11 of West Virginia, 1931, as amended, all relating to civil actions filed under the Consumer
12 Protection Act; providing statement of legislative intent that courts be guided by federal court
13 and agency interpretations of similar federal statutes; clarifying who may bring private cause
14 of action; establishing requirement of out-of-pocket loss proximately caused by alleged
15 violation in actions for damages; and providing right to demand a jury trial.

16 *Be it enacted by the Legislature of West Virginia:*

17 That §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia,
18 1931, as amended, be amended and reenacted, all to read as follows:

19 **ARTICLE 6. GENERAL CONSUMER PROTECTION.**

20 **§46A-6-101. Legislative declarations; statutory construction.**

21 (1) The Legislature hereby declares that the purpose of this article is to complement the body
22 of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices
23 in order to protect the public and foster fair and honest competition. It is the intent of the Legislature

1 that, in construing this article, the courts be guided by the policies of the Federal Trade Commission
2 and interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1)
3 of the Federal Trade Commission Act (15 U. S. C. § 45(a)(1)), as from time to time amended, and
4 to the various other federal statutes dealing with the same or similar matters. To this end, this article
5 shall be liberally construed so that its beneficial purposes may be served.

6 (2) It is, however, the further intent of the Legislature that this article ~~shall~~ not be construed
7 to prohibit acts or practices which are reasonable in relation to the development and preservation of
8 business or which are not injurious to the public interest, nor ~~shall~~ does this article ~~be construed to~~
9 repeal by implication the provisions of articles eleven, eleven-a and eleven-b, chapter forty-seven
10 of this code.

11 **§46A-6-102. Definitions.**

12 When used in this article, the following words, terms and phrases, and any variations thereof
13 required by the context, shall have the meaning ascribed to them in this article except where the
14 context indicates a different meaning:

15 (1) “Advertisement” means the publication, dissemination or circulation of any matter, oral
16 or written, including labeling, which tends to induce, directly or indirectly, any person to enter into
17 any obligation, sign any contract or acquire any title or interest in any goods or services and includes
18 every word device to disguise any form of business solicitation by using such terms as “renewal”,
19 “invoice”, “bill”, “statement” or “reminder” to create an impression of existing obligation when there
20 is none or other language to mislead any person in relation to any sought-after commercial transaction.

21 (2) “Consumer” means a natural person to whom a sale or lease is made in a consumer
22 transaction and a “consumer transaction” means a sale or lease to a natural person or persons for a
23 personal, family, household or agricultural purpose.

1 (3) “Cure offer” means a written offer of one or more things of value, including, but not
2 limited to, the payment of money, that is made by a merchant or seller and that is delivered by
3 certified mail to a ~~consumer~~ person claiming to have suffered a loss as a result of a ~~consumer~~
4 transaction or to the attorney for such person.

5 (4) “Merchantable” means, in addition to the qualities prescribed in section three hundred
6 fourteen, article two, chapter forty-six of this code, that the goods conform in all material respects
7 to applicable state and federal statutes and regulations establishing standards of quality and safety
8 of goods and, in the case of goods with mechanical, electrical or thermal components, that the goods
9 are in good working order and will operate properly in normal usage for a reasonable period of time.

10 (5) “Sale” includes any sale, offer for sale or attempt to sell any goods for cash or credit or
11 any services or offer for services for cash or credit.

12 (6) “Trade” or “commerce” means the advertising, offering for sale, sale or distribution of
13 any goods or services and shall include any trade or commerce, directly or indirectly, affecting the
14 people of this state.

15 (7) “Unfair methods of competition and unfair or deceptive acts or practices” means and
16 includes, but is not limited to, any one or more of the following:

17 (A) Passing off goods or services as those of another;

18 (B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship,
19 approval or certification of goods or services;

20 (C) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or
21 association with or certification by another;

22 (D) Using deceptive representations or designations of geographic origin in connection with

1 goods or services;

2 (E) Representing that goods or services have sponsorship, approval, characteristics,
3 ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship,
4 approval, status, affiliation or connection that he does not have;

5 (F) Representing that goods are original or new if they are deteriorated, altered,
6 reconditioned, reclaimed, used or secondhand;

7 (G) Representing that goods or services are of a particular standard, quality or grade, or that
8 goods are of a particular style or model if they are of another;

9 (H) Disparaging the goods, services or business of another by false or misleading
10 representation of fact;

11 (I) Advertising goods or services with intent not to sell them as advertised;

12 (J) Advertising goods or services with intent not to supply reasonably expectable public
13 demand, unless the advertisement discloses a limitation of quantity;

14 (K) Making false or misleading statements of fact concerning the reasons for, existence of
15 or amounts of price reductions;

16 (L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

17 (M) The act, use or employment by any person of any deception, fraud, false pretense, false
18 promise or misrepresentation, or the concealment, suppression or omission of any material fact with
19 intent that others rely upon such concealment, suppression or omission, in connection with the sale
20 or advertisement of any goods or services, whether or not any person has in fact been misled,
21 deceived or damaged thereby;

1 (N) Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to
2 be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement
3 or representation with regard to the sale of goods or the extension of consumer credit including the
4 rates, terms or conditions for the sale of such goods or the extension of such credit, which is false,
5 misleading or deceptive or which omits to state material information which is necessary to make the
6 statements therein not false, misleading or deceptive;

7 (O) Representing that any person has won a prize, one of a group of prizes or any other thing
8 of value if receipt of the prize or thing of value is contingent upon any payment of a service charge,
9 mailing charge, handling charge or any other similar charge by the person or upon mandatory
10 attendance by the person at a promotion or sales presentation at the seller's place of business or any
11 other location: *Provided*, That a person may be offered one item or the choice of several items
12 conditioned on the person listening to a sales promotion or entering a consumer transaction if the
13 true retail value and an accurate description of the item or items are clearly and conspicuously
14 disclosed along with the person's obligations upon accepting the item or items; such description and
15 disclosure shall be typewritten or printed in at least eight point regular type, in upper or lower case,
16 where appropriate; or

17 (P) Violating any provision or requirement of article six-b of this chapter.

18 (8) "Warranty" means express and implied warranties described and defined in sections three
19 hundred thirteen, three hundred fourteen and three hundred fifteen, article two, chapter forty-six of
20 this code and expressions or actions of a merchant which assure the consumer that the goods have
21 described qualities or will perform in a described manner.

22 **46A-6-105. Exempted transactions.**

1 ~~Nothing in~~ This article ~~shall~~ does not apply to acts done by the publisher, owner, agent or
2 employee of a newspaper, periodical or radio or television station in the publication or dissemination
3 of an advertisement, when the owner, agent or employee did not have knowledge of the false,
4 misleading or deceptive character of the advertisement, did not prepare the advertisement and did
5 not have a direct financial interest in the sale or distribution of the advertised goods or services.

6 **§46A-6-106. Private causes of action.**

7 (a) Subject to subsections (b) and (c) of this section, any person who purchases or leases
8 goods or services and thereby suffers ~~any~~ an ascertainable loss of money or property, real or
9 personal, as a result of the use or employment by another person of a method, act or practice
10 prohibited or declared to be unlawful by the provisions of this article may bring an action in the
11 circuit court of the county in which the seller or lessor resides or has his or her principal place of
12 business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six
13 of this code, to recover actual damages or \$200, whichever is greater. The court may, in its
14 discretion, provide such equitable relief it ~~deems~~ considers necessary or proper.

15 **(b) No award of damages in an action covered by this subsection may be made without proof**
16 **that the person seeking damages suffered an actual out-of-pocket loss that was proximately caused**
17 **by a violation of this article. Any party to an action for damages under subsection (a) of this section**
18 **has the right to demand a jury trial.**

19 **(c)** Notwithstanding the provisions of ~~subsection~~ subsections (a) and (b) of this section,
20 no action may be brought pursuant to the provisions of this section until the ~~consumer~~ person has
21 informed the seller or lessor in writing and by certified mail of the alleged violation and provided
22 the seller or lessor twenty days from receipt of the notice of violation to make a cure offer: *Provided,*
23 That the ~~consumer~~ person shall have ten days from receipt of the cure offer to accept the cure offer

1 or it is deemed refused and withdrawn.

2 ~~(e)~~ (d) If a cure offer is accepted, the seller or lessor ~~shall have~~ has ten days to begin
3 effectuating the agreed upon cure and ~~such~~ the cure must be completed within a reasonable time.

4 ~~(d)~~ (e) Any applicable statute of limitations ~~shall be~~ is tolled for the twenty-day period set
5 forth in subsection ~~(b)~~ (c) of this section or for the period ~~of time~~ the effectuation of the cure offer
6 is being performed, whichever is longer.

7 ~~(e)~~ (f) Nothing in this section ~~shall be construed to prevent~~ prevents a ~~consumer~~ person that
8 has accepted a cure offer from bringing a civil action against a seller or lessor for failing to timely
9 effect ~~such~~ the cure offer.

10 ~~(f)~~ (g) Any permanent injunction, judgment or order of the court under section one hundred
11 eight, article seven of this chapter for a violation of section one hundred four of this article ~~shall be~~
12 is prima facie evidence in an action brought pursuant to the provisions of this section that the
13 respondent used or employed a method, act or practice declared unlawful by section one hundred
14 four of this article.

15 ~~(g)~~ (h) Where an action is brought pursuant to the provisions of this section, it ~~shall be~~ is a
16 complete defense that a cure offer was made, accepted and the agreed upon cure was performed. If
17 the finder of fact determines that the cure offer was accepted and the agreed upon cure performed,
18 the seller or lessor ~~shall be~~ is entitled to reasonable attorney's fees and costs attendant to defending
19 the action.

20 ~~(h)~~ (i) No cure offer ~~shall be~~ is admissible in any proceeding initiated pursuant to the
21 provisions of this article unless the cure offer is delivered by a seller or lessor to the person claiming
22 loss or to any attorney representing such person prior to the filing of the seller or lessee's initial

1 responsive pleading in such proceeding. If the cure offer is timely delivered by the seller or lessor,
2 then the seller or lessee may introduce the cure offer into evidence at trial. The seller or lessor ~~shall~~
3 ~~not be~~ is not liable for ~~such~~ the person's attorney's fees and court costs incurred following delivery
4 of the cure offer unless the actual damages found to have been sustained and awarded, without
5 consideration of attorney's fees and court costs, exceed the value of the cure offer.