

ENROLLED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 542

(Senators D. Hall, Carmichael, M. Hall,
Gaunch, Trump, Blair and Nohe, *original sponsors*)

[Passed March 14, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of West Virginia, 1931, as amended; to amend and reenact §46A-3-112 and §46A-3-113 of said code; to amend and reenact §46A-5-101 and §46A-5-106 of said code; and to amend said code by adding thereto a new section, designated §46A-5-107, all relating to clarifying permitted and prohibited actions with regard to the prohibition on oppression and abuse in the course of debt collection; clarifying permitted and prohibited actions with regard to the prohibition of unreasonable publication; clarifying permitted and prohibited actions and communications with regard to the prohibition on the use of unfair or unconscionable means in the course of debt collection; increasing permitted delinquency charges; modifying damages and penalties for violations; modifying the limitation of actions brought under this chapter; adjusting time allowed after discovery to correct an error without liability in certain circumstances; adjusting damages for inflation; and specifying venue of an action or proceeding brought by a consumer.

Be it enacted by the Legislature of West Virginia:

That §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of West Virginia, as amended, be amended and reenacted; that §46A-3-112 and §46A-3-113 of said code be amended and reenacted; that §46A-5-101 and §46A-5-106 of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §46A-5-107, all to read as follows:

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-125. Oppression and abuse.

1 No debt collector shall unreasonably oppress or abuse any person in connection with the
2 collection of or attempt to collect any claim alleged to be due and owing by that person or another.
3 Without limiting the general application of the foregoing, the following conduct is deemed to violate
4 this section:

5 (a) The use of profane or obscene language or language that is intended to unreasonably
6 abuse the hearer or reader;

7 (b) Engaging any person in telephone conversation without disclosure of the caller's identity
8 and with the intent to annoy, harass or threaten any person at the called number;

9 (c) Causing expense to any person in the form of long distance telephone tolls, telegram fees
10 or other charges incurred by a medium of communication, by concealment of the true purpose of the
11 communication; and

12 (d) Calling any person more than thirty times per week or engaging any person in telephone
13 conversation more than ten times per week, or at unusual times or at times known to be
14 inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number. In
15 determining whether a debt collector's conduct violates this section, the debt collector's conduct will
16 be evaluated from the standpoint of a reasonable person. In the absence of knowledge of
17 circumstances to the contrary, a debt collector shall assume that the convenient time for

1 communicating with a consumer is after eight o'clock antemeridian and before nine o'clock
2 postmeridian, local time at the consumer's location.

3 **§46A-2-126. Unreasonable publication.**

4 No debt collector shall unreasonably publicize information relating to any alleged
5 indebtedness or consumer. For purposes of this section, a debt collector does not unreasonably
6 publicize information relating to any alleged indebtedness by identifying themselves to the debtor
7 by name, identifying the debt collector's employer by name, if expressly requested by the debtor, or
8 by providing a telephone number or other contact information to the debtor. Without limiting the
9 general application of the foregoing, the following conduct is deemed to violate this section:

10 (a) The communication to any employer or his agent before judgment has been rendered of
11 any information relating to an employee's indebtedness other than through proper legal action,
12 process or proceeding;

13 (b) The disclosure, publication or communication of information relating to a consumer's
14 indebtedness to any relative or family member of the consumer if such person is not residing with
15 the consumer, except through proper legal action or process or at the express and unsolicited request
16 of the relative or family member;

17 (c) The disclosure, publication or communication of any information relating to a consumer's
18 indebtedness to any other person other than a credit reporting agency, by publishing or posting any
19 list of consumers, commonly known as "deadbeat lists", except lists to prevent the fraudulent use
20 of credit accounts or credit cards, by advertising for sale any claim to enforce payment thereof, or
21 in any manner other than through proper legal action, process or proceeding; and

22 (d) The use of any form of communication to the consumer, which ordinarily may be seen
23 by any other persons, that displays or conveys any information about the alleged claim other than the

1 name, address and phone number of the debt collector.

2 Nothing in this chapter shall prohibit a creditor or debt collector from communicating with
3 any person other than the consumer for the purpose of acquiring or confirming the consumer's
4 location information provided they do so in a manner consistent with the provisions of 15 U. S. C.
5 § 1692b, as the same may be amended from time to time. For purposes of this section,
6 "communication" or "communicating" or any derivation of those terms shall not include the filing
7 of a complaint or other document, pleading or filing with any court.

8 **§46A-2-128. Unfair or unconscionable means.**

9 No debt collector may use unfair or unconscionable means to collect or attempt to collect any
10 claim. Without limiting the general application of the foregoing, the following conduct is deemed
11 to violate this section:

12 (a) The seeking or obtaining of any written statement or acknowledgment in any form that
13 specifies that a consumer's obligation is one incurred for necessities of life where the original
14 obligation was not in fact incurred for such necessities;

15 (b) The seeking or obtaining of any written statement or acknowledgment in any form
16 containing an affirmation of any obligation by a consumer who has been declared bankrupt except
17 where such affirmation is obtained pursuant to applicable bankruptcy law;

18 (c) The collection or the attempt to collect from the consumer all or any part of the debt
19 collector's fee or charge for services rendered: *Provided*, That attorney's fees, court costs and other
20 reasonable collection costs and charges necessary for the collection of any amount due upon
21 delinquent educational loans made by any institution of higher education within this state may be
22 recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection
23 costs may not exceed thirty-three and one-third percent of the amount due and owing to any such

1 institution: *Provided, however,* That nothing contained in this subsection shall be construed to limit
2 or prohibit any institution of higher education from paying additional attorney fees and collection
3 costs as long as such additional attorney fees and collection costs do not exceed an amount equal to
4 five percent of the amount of the debt actually recovered and such additional attorney fees and
5 collection costs are deducted or paid from the amount of the debt recovered for the institution or paid
6 from other funds available to the institution;

7 (d) The collection of or the attempt to collect any interest or other charge, fee or expense
8 incidental to the principal obligation unless such interest or incidental fee, charge or expense is
9 expressly authorized by the agreement creating or modifying the obligation and by statute or
10 regulation;

11 (e) Any communication with a consumer made more than seventy-two hours after the debt
12 collector receives written notice, either on paper or electronically, from the consumer or his or her
13 attorney that the consumer is represented by an attorney specifically with regard to the subject debt.
14 To be effective under this subsection, such notice must clearly state the attorney's name, address and
15 telephone number and be sent to the debt collector's registered agent, identified by the debt collector
16 at the office of the West Virginia Secretary of State or, if not registered with the West Virginia
17 Secretary of State, then to the debt collector's principal place of business. Communication with a
18 consumer is not prohibited under this subsection if the attorney fails to answer correspondence,
19 return phone calls or discuss the obligation in question, or if the attorney consents to direct
20 communication with the consumer. Regular account statements provided to the consumer and
21 notices required to be provided to the consumer pursuant to applicable law shall not constitute
22 prohibited communications under this section; and

23 (f) When the debt is beyond the statute of limitations for filing a legal action for collection,

1 failing to provide the following disclosure informing the consumer in its initial written
2 communication with such consumer that:

3 (1) When collecting on a debt that is not past the date for obsolescence provided for in
4 section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you
5 can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you
6 for it. If you do not pay the debt, (INSERT OWNER NAME) may report or continue to report it to
7 the credit reporting agencies as unpaid"; and

8 (2) When collecting on debt that is past the date for obsolescence provided for in section
9 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be
10 sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it
11 and (INSERT OWNER NAME) cannot report it to any credit reporting agencies."

12 **ARTICLE 3. FINANCE CHARGES AND RELATED PROVISIONS.**

13 **§46A-3-112. Delinquency charges on precomputed consumer credit sales or consumer loans.**

14 (1) With respect to a precomputed consumer credit sale or consumer loan, refinancing or
15 consolidation, the parties may contract for a delinquency charge on any installment not paid in full
16 within ten days after its scheduled due date in an amount not exceeding the greater of:

- 17 (a) Five percent of the unpaid amount of the installment, not to exceed \$30; or
- 18 (b) An amount equivalent to the deferral charge that would be permitted to defer the unpaid
19 amount of the installment for the period that it is delinquent.

20 (2) A delinquency charge under subdivision (a), subsection (1) of this section may be
21 collected only once on an installment however long it remains in default. No delinquency charge may
22 be collected with respect to a deferred installment unless the installment is not paid in full within ten
23 days after its deferred due date. A delinquency charge may be collected at the time it accrues or at

1 any time thereafter.

2 (3) No delinquency charge may be collected on an installment which is paid in full within
3 ten days after its scheduled or deferred installment due date, even though an earlier maturing
4 installment or a delinquency or deferral charge on an earlier installment may not have been paid in
5 full. For purposes of this subsection, payments shall be applied first to current installments, then to
6 delinquent installments and then to delinquency and other charges.

7 (4) If two installments, or parts thereof, of a precomputed consumer credit sale or consumer
8 loan are in default for ten days or more, the creditor may elect to convert such sale or loan from a
9 precomputed sale or loan to one in which the sales finance charge or loan finance charge is based
10 on unpaid balances. In such event, the creditor shall make a rebate pursuant to the provisions on
11 rebate upon prepayment, refinancing or consolidation as of the maturity date of any installment then
12 delinquent and thereafter may make a sales finance charge or loan finance charge as authorized by
13 the appropriate provisions on sales finance charges or loan finance charges for consumer credit sales
14 or consumer loans. The amount of the rebate may not be reduced by the amount of any permitted
15 minimum charge. If the creditor proceeds under this subsection, any delinquency or deferral charges
16 made with respect to installments due at or after the maturity date of the delinquent installments shall
17 be rebated and no further delinquency or deferral charges shall be made.

18 (5) The commissioner shall prescribe by rule the method or procedure for the calculation of
19 delinquency charges consistent with the other provisions of this chapter where the precomputed
20 consumer credit sale or consumer loan is payable in unequal or irregular installments.

21 **§46A-3-113. Delinquency charges on nonprecomputed consumer credit sales or consumer**
22 **loans repayable in installments.**

23 (1) In addition to the continuation of the sales finance charge or loan finance charge on a

1 delinquent installment with respect to a nonprecomputed consumer credit sale or consumer loan,
2 refinancing or consolidation, repayable in installments, the parties may contract for a delinquency
3 charge on any installment not paid in full within ten days after its scheduled due date of five percent
4 of the unpaid amount of the installment, not to exceed \$30.

5 (2) A delinquency charge under subsection (1) of this section may be collected only once on
6 an installment however long it remains in default. A delinquency charge may be collected at the time
7 it accrues or at any time thereafter.

8 (3) No delinquency charge may be collected on an installment which is paid in full within
9 ten days after its scheduled or deferred installment due date, even though an earlier maturing
10 installment or a delinquency or deferral charge on an earlier installment may not have been paid in
11 full. For purposes of this subsection, payments shall be applied first to current installments, then to
12 delinquent installments and then to delinquency and other charges.

13 **ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES.**

14 **§46A-5-101. Effect of violations on rights of parties; limitation of actions.**

15 (1) If a creditor or debt collector has violated the provisions of this chapter applying to
16 collection of excess charges, security in sales and leases, disclosure with respect to consumer leases,
17 receipts, statements of account and evidences of payment, limitations on default charges, assignment
18 of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any
19 prohibited debt collection practice, or restrictions on interest in land as security, assignment of
20 earnings to regulated consumer lender, security agreement on household goods for benefit of
21 regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in
22 bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and (b) a right in
23 an action to recover from the person violating this chapter a penalty of \$1,000 per violation:

1 *Provided*, That the aggregate amount of the penalty awarded shall not exceed the greater of \$175,000
2 or the total alleged outstanding indebtedness: *Provided, however*, That in a class action the
3 aggregate limits on the amount of the penalty set forth above shall be applied severally to each
4 named plaintiff and each class member such that no named plaintiff nor any class member may
5 recover in excess of the greater of \$175,000 or the total alleged outstanding indebtedness. With
6 respect to violations arising from consumer credit sales, consumer leases, or consumer loans, or from
7 sales as defined in article six of this chapter, no action pursuant to this subsection may be brought
8 more than four years after the violations occurred. This limitations period shall apply to all actions
9 filed on or after September 1, 2015.

10 (2) If a creditor has violated the provisions of this chapter respecting authority to make
11 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the
12 principal or the loan finance charge. If he has paid any part of the principal or of the finance charge,
13 he has a right to recover in an action the payment from the person violating this chapter or from an
14 assignee of that person's rights who undertakes direct collection of payments or enforcement of rights
15 arising from the debt. With respect to violations arising from regulated consumer loans made
16 pursuant to revolving loan accounts, no action pursuant to this subsection may be brought more than
17 four years after the violation occurred. With respect to violations arising from other regulated
18 consumer loans, no action pursuant to this subsection may be brought more than four years after the
19 violation occurred. This limitations period shall apply to all actions filed on or after September 1,
20 2015.

21 (3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter and
22 if he has paid an excess charge, he has a right to a refund. A refund may be made by reducing the
23 consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in

1 excess of the lawful obligation under the agreement, the consumer may recover in an action the
2 excess amount from the person who made the excess charge or from an assignee of that person's
3 rights who undertakes direct collection of payments from or enforcement of rights against the
4 consumer arising from the debt.

5 (4) If a creditor or debt collector has contracted for or received a charge in excess of that
6 allowed by this chapter, the consumer may, in addition to recovering such excess charge, also
7 recover from the creditor or the person liable in an action a penalty of \$1,000 per violation:
8 *Provided*, That the aggregate amount of the penalty awarded shall not exceed the greater of \$175,000
9 or the total alleged outstanding indebtedness: *Provided, however*, That in a class action the
10 aggregate limits on the amount of the penalty set forth above shall be applied severally to each
11 named plaintiff and each class member such that no named plaintiff nor any class member may
12 recover in excess of the greater of \$175,000 or the total alleged outstanding indebtedness. With
13 respect to excess charges arising from consumer credit sales, consumer leases, or consumer loans,
14 no action pursuant to this subsection may be brought more than four years after the time the excess
15 charge was made.. This limitations period shall apply to all actions filed on or after September 1,
16 2015.

17 (5) Except as otherwise provided, a violation of this chapter does not impair rights on a debt.

18 (6) If an employer discharges an employee in violation of the provisions prohibiting
19 discharge, the employee may within ninety days bring a civil action for recovery of wages lost as a
20 result of the violation and for an order requiring the reinstatement of the employee. Damages
21 recoverable shall not exceed lost wages for six weeks.

22 (7) A creditor or debt collector has no liability for a penalty under subsection (1) or (4) of this
23 section if, after discovering an error and prior to the institution of an action under this section or the

1 receipt of written notice of the error, the creditor notifies the person concerned of the error and
2 corrects the error: (a) Within fifteen days if the error affects no more than two persons; or (b) within
3 sixty days if the error affects more than two persons. If the violation consists of a prohibited
4 agreement, giving the consumer a corrected copy of the writing containing the error is sufficient
5 notification and correction. If the violation consists of an excess charge, correction shall be made by
6 an adjustment or refund.

7 (8) If the creditor or debt collector establishes by a preponderance of evidence that a violation
8 is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of
9 procedures reasonably adapted to avoid any such violation or error, no liability is imposed under
10 subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

11 **§46A-5-106. Adjustment of damages for inflation.**

12 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable
13 conduct or any prohibited debt collection practice, the court may adjust the damages awarded
14 pursuant to section one hundred one of this article to account for inflation from 12:01 a.m. on
15 September 1, 2015, to the time of the award of damages in an amount equal to the consumer price
16 index. Consumer price index means the last consumer price index for all consumers published by
17 the United States Department of Labor.

18 **§46A-5-107. Venue.**

19 Any civil action or other proceeding brought by a consumer to recover actual damages or a
20 penalty, or both, from creditor or a debt collector, founded upon illegal, fraudulent or unconscionable
21 conduct, or prohibited debt collection practice, or both, shall be brought either in the circuit court
22 of the county in which the plaintiff has his or her legal residence at the time of the civil action, the
23 circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the

1 circuit court of the county in which the creditor or debt collector has its principal place of business
2 or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her
3 legal residence. With respect to causes of action arising under this chapter, the venue provisions of
4 this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia
5 statute or rule.