

1 **Senate Bill No. 315**

2 (By Senator Mullins)

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4 [Introduced January 27, 2015; referred to the Committee on the Judiciary.]
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9 A BILL to amend and reenact §46A-6-101, §46A-6-105 and §46A-6-106 of the Code of West
10 Virginia, 1931, as amended, all relating to civil actions filed under the Consumer Protection
11 Act.

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

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

15 **ARTICLE 6. GENERAL CONSUMER PROTECTION.**

16 **§46A-6-101. Legislative declarations; statutory construction.**

17 (†) (a) The Legislature hereby declares that the purpose of this article is to complement the
18 body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or
19 practices in order to protect the public and foster fair and honest competition. It is the intent of the
20 Legislature that, in construing this article, the courts be guided by the interpretation given by the
21 federal courts to the various federal statutes dealing with the same or similar matters. To this end,
22 this article shall be liberally construed so that its beneficial purposes may be served.

1 **(b) It is the intent of the Legislature that in construing this article, courts are guided by the**
2 **policies of the Federal Trade Commission and interpretations given by the Federal Trade**
3 **Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15**
4 **U.S.C. § 45(a)(1)), as from time to time amended.**

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

10 **(d) The amendments made to this section during the 2015 Regular Session of the Legislature**
11 **apply to all cases pending on or filed on or after the effective date of the amendments.**

12 **§46A-6-105. Exempted transactions.**

13 **(a) This article does not apply to actions or transactions otherwise permitted or regulated by**
14 **the Federal Trade Commission or any other regulatory body or officer acting under statutory**
15 **authority of this state or the United States.**

16 ~~(b) Nothing in~~ This article ~~shall~~ **does not** apply to acts done by the publisher, owner, agent
17 or employee of a newspaper, periodical or radio or television station in the publication or
18 dissemination of an advertisement, when the owner, agent or employee did not have knowledge of
19 the false, misleading or deceptive character of the advertisement, did not prepare the advertisement
20 and did not have a direct financial interest in the sale or distribution of the advertised goods or
21 services.

22 **(c) The amendments made to this section during the 2015 Regular Session of the Legislature**

1 apply to all cases pending on or filed on or after the effective date of the amendments.

2 **§46A-6-106. Actions by consumers.**

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

12 (b) Civil actions pursuant to subsection (a) of this section for violations of this article may
13 be brought only by natural persons who purchase or lease goods, services or real estate for personal,
14 family or household purposes. No action may be brought under this section to recover damages for
15 personal injury or death. If a person seeking to recover damages for a violation of this article alleges
16 that an affirmative misrepresentation is the basis for his or her claim then he or she must prove that
17 the deceptive act or practice caused him or her to enter into the transaction that resulted in his or her
18 damages. If a person seeking to recover damages for a violation of this article alleges that the
19 concealment or omission of information is the basis for his or her claim, then he or she must prove
20 that the person's loss was proximately caused by the concealment or omission. No award of
21 damages in an action covered by this subdivision may be made without proof that the person seeking
22 damages suffered an actual out-of-pocket loss. The term "out-of-pocket loss" means an amount of

1 money equal to the difference between the amount paid by the consumer for the good or service and
2 the actual market value of the good or service that the consumer actually received. Any party to an
3 action for damages under subsection (a) of this section has the right to demand a jury trial.

4 ~~(b)~~ (c) Notwithstanding the provisions of ~~subsection~~ subsections (a) and (b) of this section,
5 no action may be brought pursuant to the provisions of this section until the consumer has informed
6 the seller or lessor in writing and by certified mail of the alleged violation and provided the seller
7 or lessor twenty days from receipt of the notice of violation to make a cure offer: *Provided*, That the
8 consumer shall have ten days from receipt of the cure offer to accept the cure offer or it is deemed
9 refused and withdrawn.

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

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

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

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

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

6 ~~(h)~~ (I) No cure offer ~~shall be~~ is admissible in any proceeding initiated pursuant to the
7 provisions of this article unless the cure offer is delivered by a seller or lessor to the person claiming
8 loss or to any attorney representing such person prior to the filing of the seller or lessee's initial
9 responsive pleading in such proceeding. If the cure offer is timely delivered by the seller or lessor,
10 then the seller or lessee may introduce the cure offer into evidence at trial. The seller or lessor ~~shall~~
11 ~~not be~~ is not liable for ~~such~~ the person's attorney's fees and court costs incurred following delivery
12 of the cure offer unless the actual damages found to have been sustained and awarded, without
13 consideration of attorney's fees and court costs, exceed the value of the cure offer.

14 (j) The amendments made to this section during the 2015 Regular Session of the Legislature
15 apply to all cases pending on or filed on or after the effective date of the amendments.

NOTE: The purpose of this bill is to modify provisions relating to civil actions filed under the Consumer Protection Act.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.