

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 2891

2015 Carryover

(BY DELEGATE WALTERS, A. EVANS AND STORCH)

[Introduced January 13, 2016; referred to the
Committee on Banking and Insurance then the
Judiciary.]

1 A BILL to amend and reenact §46A-2-121, §46A-2-122, §46A-2-125, §46A-2-126, and
 2 §46A-2-128 of the Code of West Virginia, 1931, as amended; to amend and reenact
 3 §46A-5-101 and §46A-5-106 of said code; and to amend said code by adding thereto a
 4 new section, designated §46A-5-107, all relating to unconscionability, defining creditor,
 5 debt collector and person, engaging any person in a telephone conversation, failure to
 6 disclose a caller's identity, convenient time for communicating with a consumer,
 7 unreasonable publication by disclosure of caller's identity, affirmation of an obligation
 8 pursuant to bankruptcy law, means of giving notice of a consumer's representation by an
 9 attorney, a ringing phone not answered by the consumer does not constitute a prohibited
 10 communication, damages and penalties for violation, no action may be brought more than
 11 four years after the violation or excess charge occurred, time allowed after discovery to
 12 correct an error without liability, adjustment of damages for inflation and venue of an action
 13 or proceeding brought by a consumer.

Be it enacted by the Legislature of West Virginia:

1 That §46A-2-121, §46A-2-122, §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of
 2 West Virginia, as amended, be amended and reenacted; that §46A-5-101 and §46A-5-106 of said
 3 code be amended and reenacted; and that said code be amended by adding thereto a new
 4 section, designated §46A-5-107, all to read as follows:

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-121. Unconscionability; inducement by unconscionable conduct.

1 (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer
 2 lease or consumer loan, if the court as a matter of law finds:

3 (a) The agreement or transaction ~~to have been unconscionable~~ at the time it was made ~~or~~
 4 ~~to have been induced by unconscionable conduct the court may refuse to enforce the agreement,~~

5 ~~or~~ and

6 (b) Any term or part of the agreement or transaction to have been unconscionable at the
7 time it was made, then the court may refuse to enforce the agreement, or may enforce the
8 remainder of the agreement without the unconscionable term or part, or may so limit the
9 application of any unconscionable term or part as to avoid any unconscionable result.

10 (2) If it is claimed or appears to the court that the agreement or transaction or any term or
11 part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to
12 present evidence as to its setting, purpose and effect to aid the court in making the determination.

13 (3) For the purpose of this section, a charge or practice expressly permitted by this chapter
14 is not unconscionable.

§46A-2-122. Definitions.

1 For the purposes of this section and sections one hundred twenty-three, one hundred
2 twenty-four, one hundred twenty-five, one hundred twenty-six, one hundred twenty-seven, one
3 hundred twenty-eight, one hundred twenty-nine, and one hundred twenty-nine-a of this article,
4 the following terms shall have the following meanings:

5 (a) "Consumer" means any natural person obligated or allegedly obligated to pay any debt.

6 (b) "Claim" or "debt" means any obligation or alleged obligation of a consumer to pay
7 money arising out of a transaction in which the money, property, insurance or service which is the
8 subject of the transaction is primarily for personal, family or household purposes, whether or not
9 such obligation has been reduced to judgment.

10 (c) "Creditor" means any person who offers or extends credit creating a debt or to whom
11 a debt is owed, including a lender, as such term is defined in W.Va. Code §46A-1-102(23), but
12 such term does not include any person to the extent that such person receives an assignment or
13 transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

14 ~~(e)~~ (d) "Debt collection" means any action, conduct or practice of soliciting claims for
15 collection or in the collection of claims owed or due or alleged to be owed or due by a consumer.

16 ~~(d)~~ "Debt collector" means ~~any person or organization engaging directly or indirectly in~~
17 ~~debt collection. The term includes any person or organization who sells or offers to sell forms~~
18 ~~which are, or are represented to be, a collection system, device or scheme, and are intended or~~
19 ~~calculated to be used to collect claims.~~

20 (e) "Debt collector" means any person who uses any instrumentality of interstate
21 commerce or the mails in any business the principal purpose of which is the collection of any
22 debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or
23 asserted to be owed or due another. Notwithstanding the exclusion provided by clause (6) of the
24 this paragraph, the term includes any mortgage or other loan servicer, and any creditor who, in
25 the process of collecting his or its own debts, uses any name other than his or its own which would
26 indicate that a third person is collecting or attempting to collect such debts. "Debt collector" does
27 not include --

28 (1) Any officer or employee of a creditor while, in the name of the creditor, collecting debts
29 for such creditor;

30 (2) Any person while acting as a debt collector for another person, both of whom are
31 related by common ownership or affiliated by corporate control, if the person acting as a debt
32 collector does so only for persons to whom it is so related or affiliated and if the principal business
33 of such person is not the collection of debts;

34 (3) Any officer or employee of the United States or any state to the extent that collecting
35 or attempting to collect any debt is in the performance of such officer's or employee's official
36 duties;

37 (4) Any person while serving or attempting to serve legal process on any other person in

38 connection with the judicial enforcement of any debt;

39 (5) A nonprofit organization which, at the request of consumers, performs bona fide
40 consumer credit counseling and assists consumers in the liquidation of their debts by receiving
41 payments from such consumers and distributing such amounts to creditors; and

42 (6) Any person collecting or attempting to collect any debt owed or due or asserted to be
43 owed or due another to the extent such activity: (i) Is incidental to a bona fide fiduciary obligation
44 or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person,
45 including any affiliate of such person; or (iii) concerns a debt obtained by such person as a
46 secured party in a commercial credit transaction involving the creditor.

47 (f) "Person" shall have the meaning set forth in W.Va. Code §46A-1-102(31).

§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) ~~The placement of telephone calls~~ Engaging any person in telephone conversation
8 without disclosure of the caller's identity and with the intent to annoy, harass or threaten any
9 person at the called number;

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

13 (d) ~~Causing a telephone to ring or~~ Engaging any person in telephone conversation

14 repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent
15 to annoy, abuse, oppress or threaten any person at the called number. In the absence of
16 knowledge of circumstances to the contrary, a debt collector shall assume that the convenient
17 time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock
18 postmeridian, local time at the consumer's location.

§46A-2-126. Unreasonable publication.

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

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

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

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

19 and

20 (d) The use of any form of communication to the consumer, which ordinarily may be seen
21 by any other persons, that displays or conveys any information about the alleged claim other than
22 the name, address and phone number of the debt collector.

23 Nothing in this chapter prohibits a creditor or debt collector from communicating with any
24 person other than the consumer for the purpose of acquiring or confirming the consumer's place
25 of abode and telephone numbers. For purposes of this chapter, "communication" or
26 "communicating" or any derivation of those terms does not include the filing of a complaint or
27 other document, pleading or filing with any court.

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

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

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

7 (b) The seeking or obtaining of any written statement or acknowledgment in any form
8 containing an affirmation of any obligation by a consumer who has been declared bankrupt,
9 ~~without clearly disclosing the nature and consequences of such affirmation and the fact that the~~
10 ~~consumer is not legally obligated to make such affirmation~~ except where such affirmation is
11 obtained pursuant to applicable bankruptcy law;

12 (c) The collection or the attempt to collect from the consumer all or any part of the debt
13 collector's fee or charge for services rendered: *Provided*, That attorney's fees, court costs and
14 other reasonable collection costs and charges necessary for the collection of any amount due

15 upon delinquent educational loans made by any institution of higher education within this state
16 may be recovered when the terms of the obligation so provide. Recovery of attorney's fees and
17 collection costs may not exceed thirty-three and one-third percent of the amount due and owing
18 to any such institution: *Provided, however,* That nothing contained in this subsection shall be
19 construed to limit or prohibit any institution of higher education from paying additional attorney
20 fees and collection costs as long as such additional attorney fees and collection costs do not
21 exceed an amount equal to five percent of the amount of the debt actually recovered and such
22 additional attorney fees and collection costs are deducted or paid from the amount of the debt
23 recovered for the institution or paid from other funds available to the institution;

24 (d) The collection of or the attempt to collect any interest or other charge, fee or expense
25 incidental to the principal obligation unless such interest or incidental fee, charge or expense is
26 expressly authorized by the agreement creating or modifying the obligation and not otherwise
27 prohibited by statute or regulation;

28 (e) Any communication with a consumer ~~whenever it appears~~ made more than
29 seventy-two hours after the debt collector (or creditor) receives written notice, either on paper or
30 electronically, from the consumer or his or her attorney, that the consumer is represented by an
31 attorney specifically with regard to the subject debt. To be effective under this subsection, such
32 notice must clearly state ~~and the attorney's name, and address~~ and telephone number. are known,
33 ~~or could be easily ascertained,~~ Communication with a consumer is not prohibited under this
34 subsection if unless the attorney fails to answer correspondence, return phone calls or discuss
35 the obligation in question, or if unless the attorney consents to direct communication with the
36 consumer. Regular account statements provided to the consumer and notices required to be
37 provided to the consumer pursuant to applicable law do not constitute prohibited communications;
38 and

39 (f) When the debt is beyond the statute of limitations for filing a legal action for collection,
40 failing to provide the following disclosure informing the consumer in its initial written
41 communication with such consumer that:

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

47 (2) When collecting on debt that is past the date for obsolescence provided for in Section
48 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be
49 sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it
50 and (INSERT OWNER NAME) cannot report it to any credit reporting agencies.

ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES.

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

1 (1) If a creditor or debt collector has violated the provisions of this chapter applying to
2 ~~collection of excess charges~~, security in sales and leases, disclosure with respect to consumer
3 leases, receipts, statements of account and evidences of payment, limitations on default charges,
4 assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable
5 conduct, any prohibited debt collection practice, or restrictions on interest in land as security,
6 assignment of earnings to regulated consumer lender, security agreement on household goods
7 for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of a
8 loan discharged in bankruptcy, the consumer has a cause of action to recover: (a) Actual
9 damages; and ~~in addition a right in an action to recover from the person violating this chapter a~~
10 ~~penalty in an amount determined by the court not less than one hundred dollars nor more than~~

11 ~~one thousand dollars.~~ (b) (1) In the case of an action by an individual, such additional damages
12 as the court may allow, but such additional damages awarded under this article shall not exceed
13 \$1,000 per consumer credit sale, consumer lease or consumer loan, not per violation; or (2) in
14 the case of a class action: (i) Such amount for each named plaintiff as could be recovered under
15 subparagraph (a); and (ii) such amount as the court may allow for all other class members, without
16 regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 percent of the
17 net worth of the creditor or debt collector, as applicable. With respect to violations arising from
18 consumer credit sales or consumer loans ~~made pursuant to revolving charge accounts or~~
19 ~~revolving loan accounts, or from sales as defined in article six of this chapter,~~ no action pursuant
20 to this subsection may be brought more than four years after the violations occurred. ~~With respect~~
21 ~~to violations arising from other consumer credit sales or consumer loans, no action pursuant to~~
22 ~~this subsection may be brought more than one year after the due date of the last scheduled~~
23 ~~payment of the agreement.~~

24 (2) If a creditor has violated the provisions of this chapter respecting authority to make
25 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the
26 principal or the loan finance charge. If he or she has paid any part of the principal or of the finance
27 charge, he or she has a right to recover in an action the payment from the person violating this
28 chapter or from an assignee of that person's rights who undertakes direct collection of payments
29 or enforcement of rights arising from the debt. With respect to violations arising from regulated
30 consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection
31 may be brought more than four years after the violation occurred. With respect to violations arising
32 from other regulated consumer loans, no action pursuant to this subsection may be brought more
33 than one year after the due date of the last scheduled payment of the agreement pursuant to
34 which the charge was paid.

35 (3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter,
36 and if he or she has paid an excess charge he or she has a right to a refund. A refund may be
37 made by reducing the consumer's obligation by the amount of the excess charge. If the consumer
38 has paid an amount in excess of the lawful obligation under the agreement, the consumer may
39 recover in an action the excess amount from the person who made the excess charge or from an
40 assignee of that person's rights who undertakes direct collection of payments from or enforcement
41 of rights against the consumer arising from the debt.

42 (4) If a creditor has contracted for or received a charge in excess of that allowed by this
43 chapter, the consumer may, in addition to recovering such excess charge, also recover from the
44 creditor or the person liable in an action ~~a penalty in an amount determined by the court not less~~
45 ~~than one hundred dollars nor more than one thousand dollars.~~ (a) Actual damages; and (b) (1) In
46 the case of an action by an individual, such additional damages as the court may allow, but such
47 additional damages awarded under this article shall not exceed \$1,000 per consumer credit sale,
48 consumer lease or consumer loan, not per violation; or (2) in the case of a class action: (i) Such
49 amount for each named plaintiff as could be recovered under subparagraph (a); and (ii) such
50 amount as the court may allow for all other class members, without regard to a minimum individual
51 recovery, not to exceed the lesser of \$500,000 or one percent of the net worth of the creditor or
52 the person liable, as applicable. With respect to excess charges arising from consumer credit
53 sales or consumer loans ~~made pursuant to revolving charge accounts or revolving loan accounts,~~
54 no action pursuant to this subsection may be brought more than four years after the time the
55 excess charge was made. ~~With respect to excess charges arising from other consumer credit~~
56 ~~sales or consumer loans no action pursuant to this subsection may be brought more than one~~
57 ~~year after the due date of the last scheduled payment of the agreement pursuant to which the~~
58 ~~charge was made.~~

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

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

65 (7) A creditor has no liability for a penalty under subsection (1) or subsection (4) of this
66 section if within ~~fifteen~~ forty-five days after discovering an error, and prior to the institution of an
67 action under this section or the receipt of written notice of the error, the creditor notifies the person
68 concerned of the error and corrects the error: (a) Within fifteen days if the error affects no more
69 than two consumers; or (b) within sixty days if the error affects more than two consumers. If the
70 violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing
71 containing the error is sufficient notification and correction. If the violation consists of an excess
72 charge, correction shall be made by an adjustment or refund.

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

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

1 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable
2 conduct or any prohibited debt collection practice, the court may adjust the damages awarded
3 pursuant to section one hundred one of this article to account for inflation from ~~the time that the~~
4 ~~West Virginia consumer credit and protection act became operative, specifically 12:01 a.m. on~~
5 ~~the first day of September, one thousand nine hundred seventy-four,~~ September 1, 2015 to the

6 time of the award of damages in an amount equal to the consumer price index. Consumer price
7 index means the last consumer price index for all consumers published by the United States
8 department of labor.

§46A-5-107. Venue.

1 Any civil action or other proceeding brought by a consumer to recover actual damages or
2 a penalty, or both, from a debt collector or a creditor, founded upon illegal, fraudulent or
3 unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in
4 the circuit court of the county in which the plaintiff has his or her legal residence at the time of the
5 civil action, or in the circuit court of the county in which the debt collector or a creditor has its
6 principal place of business or, if the debt collector or creditor is an individual, in the circuit court
7 of the county of his or her legal residence.

NOTE: The purpose of this bill is to reform provisions of the West Virginia Consumer Credit and Protection Act relating to collection of indebtedness, and to make the act more consistent with the federal Fair Debt Collection Practices Act.

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

§46A-5-107 is new; therefore, it has been completely underscored.