

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 563

BY SENATOR TRUMP

[Originating in the Committee on the Judiciary;

reported on March 27, 2017]

1 A BILL to amend and reenact §46A-2-105, §46A-2-122 and §46A-2-128 of the Code of West
2 Virginia, 1931, as amended; to amend said code by adding thereto a new section,
3 designated §46A-2-140; to amend and reenact §46A-5-101 and §46A-5-102 of said code;
4 to amend said code by adding thereto a new section, designated §46A-5-108; and to
5 amend and reenact §46A-8-101 of said code, all relating to the Consumer Credit and
6 Protection Act; modifying requirements for contracts allowing for balloon payments;
7 establishing that agreements allowing for balloon payments shall contain certain language
8 in form and substance substantially similar to existing requirements; modifying and
9 clarifying definitions; excluding attorneys from the definition of “debt collector” under
10 certain circumstances; changing the time period where direct contact with a consumer
11 must cease after receipt of notice of representation from seventy-two hours to three
12 business days; establishing means of notice to a debt collector of a consumer’s
13 representation by legal counsel; requiring notice of representation to a debt collector be
14 sent by certified mail, return receipt requested; establishing that contents of a pleading do
15 not provide the basis for a claim of a violation of the Consumer Credit and Protection Act
16 under certain circumstances; establishing exceptions for when a pleading may form the
17 basis of a claim under the Consumer Credit Protection Act; providing for statutes of
18 limitation in foreclosure matters; providing that counterclaims are subject to the
19 appropriate statute of limitations; adopting a right to cure under articles two, three, four
20 and five of this chapter; establishing procedures and remedies for the right to cure;
21 addressing awards of attorney fees in certain circumstances involving the right to cure;
22 and providing for applicability and effective dates of these amendments to the Consumer
23 Credit Protection Act.

Be it enacted by the Legislature of West Virginia:

1 That §46A-2-105, §46A-2-122 and §46A-2-128 of the Code of West Virginia, 1931, as
2 amended, be amended and reenacted; that said code be amended by adding thereto a new

3 section, designated §46A-2-140; that §46A-5-101 and §46A-5-102 of said code be amended and
4 reenacted; that said code be amended by adding thereto a new section, designated §46A-5-108;
5 and that §46A-8-101 of said code be amended and reenacted, all to read as follows:

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-105. Balloon payments.

1 (1) With respect to a consumer credit sale or a consumer loan in which the initial total
2 amount payable is less than \$1,500, other than one primarily for an agricultural purpose or one
3 pursuant to a revolving charge account or revolving loan account, if any scheduled payment is
4 more than twice as large as the average of earlier scheduled payments, the consumer has the
5 right to refinance the amount of that payment, hereinafter in this section referred to as a balloon
6 payment, at the time it is due without penalty.

7 (2) With respect to a consumer credit sale or consumer loan whenever any scheduled
8 payment is at least twice as large as the smallest of all earlier scheduled payments other than
9 any down payment, any writing purporting to contain the agreement of the parties shall contain
10 ~~the following language in form and substance substantially similar to the following: typewritten or~~
11 ~~printed in a conspicuous manner.~~ THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF
12 EQUAL AMOUNTS: Followed, if there is only one installment which is at least twice as large as
13 the smallest of all earlier scheduled payments other than any down payment, by: AN
14 INSTALLMENT OF \$..... WILL BE DUE ON

15 or, if there is more than one such installment, by: LARGER INSTALLMENTS WILL BE
16 DUE AS FOLLOWS:

17 (The amount of every such installment and its due date shall be inserted).

18 (3) The provisions of this section shall not apply to the extent that the payment schedule
19 is adjusted to the seasonal or irregular income of the consumer.

20 (4) Notwithstanding the foregoing provisions of this section, the commissioner may, by
21 rules and regulations, if necessary to further protect consumers, otherwise regulate or control

22 agreements to be entered into in a consumer credit sale or consumer loan transaction which
23 provide for a balloon payment or prohibit parties from entering into any agreement in a consumer
24 credit sale or consumer loan transaction which provides for a balloon payment.

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

10 (c) "Debt collection" means any action, conduct or practice of soliciting claims for collection
11 or in the collection of claims owed or due or alleged to be owed or due by a consumer.

12 (d) "Debt collector" means any person or organization engaging directly or indirectly in
13 debt collection. The term includes any person or organization who sells or offers to sell forms
14 which are, or are represented to be, a collection system, device or scheme, and are intended or
15 calculated to be used to collect claims. The term excludes attorneys representing creditors
16 provided the attorneys are licensed in West Virginia or otherwise authorized to practice law in the
17 State of West Virginia and handling claims and collections in their own name as an employee,
18 partner, member, shareholder or owner of a law firm and not operating a collection agency under
19 the management of a person who is not a licensed attorney.

§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 except
9 where such affirmation is obtained pursuant to applicable bankruptcy law;

10 (c) The collection or the attempt to collect from the consumer all or any part of the debt
11 collector's fee or charge for services rendered: *Provided*, That attorney's fees, court costs and
12 other reasonable collection costs and charges necessary for the collection of any amount due
13 upon delinquent educational loans made by any institution of higher education within this state
14 may be recovered when the terms of the obligation so provide. Recovery of attorney's fees and
15 collection costs may not exceed thirty-three and one-third percent of the amount due and owing
16 to any such institution: *Provided, however*, That nothing contained in this subsection shall be
17 construed to limit or prohibit any institution of higher education from paying additional attorney
18 fees and collection costs as long as such additional attorney fees and collection costs do not
19 exceed an amount equal to five percent of the amount of the debt actually recovered and such
20 additional attorney fees and collection costs are deducted or paid from the amount of the debt
21 recovered for the institution or paid from other funds available to the institution;

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

26 (e) Any communication with a consumer made more than three business days ~~seventy-~~
27 ~~two hours~~ after the debt collector receives written notice, ~~either on paper or electronically~~, from
28 the consumer or his or her attorney that the consumer is represented by an attorney specifically
29 with regard to the subject debt. To be effective under this subsection, such notice must clearly

30 state the attorney's name, address and telephone number and be sent by certified mail, return
31 receipt requested, to the debt collector's registered agent, identified by the debt collector at the
32 office of the West Virginia Secretary of State or, if not registered with the West Virginia Secretary
33 of State, then to the debt collector's principal place of business. Communication with a consumer
34 is not prohibited under this subsection if the attorney fails to answer correspondence, return phone
35 calls or discuss the obligation in question, or if the attorney consents to direct communication with
36 the consumer. Regular account statements provided to the consumer and notices required to be
37 provided to the consumer pursuant to applicable law shall not constitute prohibited
38 communications under this section; 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~~ all 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."

§46A-2-140. Pleadings not to be the basis of a cause of action.

1 Nothing contained in or omitted from a pleading filed in a court of this state shall be the
2 basis of a cause of action under this chapter, nor shall the act of filing a civil action be the basis
3 of a cause of action under this chapter unless the pleading or the filing of the civil action constitutes
4 a material violation of sections 124(f), 127(d), 128(c), or 128(d) of this article: *Provided, That*

5 demand in a pleading to award costs authorized by the applicable rules of civil procedure shall
6 not be the basis of a cause of action under this chapter. For purposes of this section, a pleading
7 shall have the same definition as provided in the Rules of Civil Procedure applicable in the court
8 where the action is filed. Further, nothing contained in this section is intended to abrogate or
9 abolish common law causes of action for malicious prosecution, abuse of process, harassment
10 or frivolity, but in no case shall the contents of pleadings in a civil action nor the institution of a
11 civil action in any court be the basis for a claim of a violation of the West Virginia Consumer Credit
12 and Protection Act except as set forth above.

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 (b) a right in an action to recover from the person violating this chapter a penalty
10 of \$1,000 per violation: *Provided*, That the aggregate amount of the penalty awarded shall not
11 exceed the greater of \$175,000 or the total alleged outstanding indebtedness: *Provided, however*,
12 That in a class action the aggregate limits on the amount of the penalty set forth above shall be
13 applied severally to each named plaintiff and each class member such that no named plaintiff nor
14 any class member may recover in excess of the greater of \$175,000 or the total alleged
15 outstanding indebtedness. With respect to violations arising from consumer credit sales,
16 consumer leases or consumer loans, or from sales as defined in article six of this chapter, no

17 action pursuant to this subsection may be brought more than four years after the violations
18 occurred: Provided further, That no action pursuant to this subsection to set aside a foreclosure
19 sale of any real estate securing a consumer loan may be brought more than one year after the
20 foreclosure sale is final. ~~This limitations period shall apply to all actions filed on or after September~~
21 ~~1, 2015.~~

22 (2) If a creditor has violated the provisions of this chapter respecting authority to make
23 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the
24 principal or the loan finance charge. If he has paid any part of the principal or of the finance
25 charge, he has a right to recover in an action the payment from the person violating this chapter
26 or from an assignee of that person's rights who undertakes direct collection of payments or
27 enforcement of rights arising from the debt. With respect to violations arising from regulated
28 consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection
29 may be brought more than four years after the violation occurred. With respect to violations of the
30 provisions of this chapter respecting the authority to make arising from other regulated consumer
31 loans, no action pursuant to this subsection may be brought more than four years after the
32 violation occurred: ~~This limitations period shall apply to all actions filed on or after September 1,~~
33 ~~2015:~~ Provided, That no action pursuant to this subsection to set aside a foreclosure sale of any
34 real estate securing a consumer loan may be brought more than one year after the foreclosure
35 sale is final.

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

43 (4) If a creditor or debt collector has contracted for or received a charge in excess of that
44 allowed by this chapter, the consumer may, in addition to recovering such excess charge, also
45 recover from the creditor or the person liable in an action a penalty of \$1,000 per violation:
46 *Provided*, That the aggregate amount of the penalty awarded shall not exceed the greater of
47 \$175,000 or the total alleged outstanding indebtedness: *Provided, however*, That in a class action
48 the aggregate limits on the amount of the penalty set forth above shall be applied severally to
49 each named plaintiff and each class member such that no named plaintiff nor any class member
50 may recover in excess of the greater of \$175,000 or the total alleged outstanding indebtedness:
51 *Provided further*, That no action pursuant to this subsection to set aside a foreclosure sale of any
52 real estate securing a consumer loan may be brought more than one year after said foreclosure
53 sale is final. This limitations period shall apply to all actions filed on or after September 1, 2015.

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

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

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

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

46A-5-102. Assertion of rights.

1 Rights granted by this chapter may be asserted as a ~~defense~~, claim for setoff or
2 ~~counterclaim~~ defense to an action against a consumer without regard to any limitation of actions.
3 Any counterclaim is subject to the appropriate limitation of actions set forth in this chapter.

§46A-5-108. Right to cure.

1 (a) No action may be brought pursuant to this article and articles two, three and four of
2 this chapter until the consumer has informed the creditor or debt collector in writing and by certified
3 mail, return receipt requested, to the creditor's or debt collector's registered agent identified by
4 the creditor or debt collector at the office of the West Virginia Secretary of State or, if not registered
5 with the West Virginia Secretary of State, then to the creditor's or debt collector's principal place
6 of business, of the alleged violation and the factual basis for the violation and provide the creditor
7 or debt collector forty-five days from receipt by the agent or at the principal place of business
8 referenced above of the notice of violation but twenty days in the case a cause of action has
9 already been filed to make a cure offer, which shall be provided to the consumer's counsel or, if
10 unrepresented, to the consumer by certified mail, return receipt requested: *Provided*, That the
11 consumer shall have twenty days from receipt of the cure offer to accept the cure offer or it is
12 deemed refused and withdrawn. When a claim under the provisions set forth in section one
13 hundred one is presented as a counterclaim, cross-claim or third party claim, the notice of right to
14 cure shall be served with the counterclaim, cross claim or third party claim in any manner
15 permitted by the Rules of Civil Procedure.

16 (b) If a cure offer is accepted, the creditor or debt collector has twenty days to begin
17 effectuating the agreed upon cure and the cure must be completed within a reasonable time.

18 (c) Any applicable statute of limitations is tolled for the 45-day period set forth in subsection
19 (a) of this section or for the period the effectuation of the cure offer is being performed, whichever
20 is longer.

21 (d) Nothing in this section prevents a consumer that has accepted a cure offer from
22 bringing a civil action against a creditor or debt collector for failing to timely effect the cure offer.

23 (e) Where an action is brought under this article or article two, three or four of this chapter,
24 it is a complete defense that a cure offer was made, accepted and the agreed upon cure was
25 performed. If the finder of fact determines that the cure offer was accepted and the agreed upon
26 cure performed, the creditor or debt collector is entitled to reasonable attorney fees and costs
27 attendant to defending the action.

28 (f) No cure offer is admissible in any proceeding initiated pursuant to the provisions of this
29 article unless the cure offer is delivered by a creditor or debt collector to the person claiming loss
30 or to any attorney representing such person prior to the filing of the creditor or debt collector's
31 initial responsive pleading in such proceeding. If the cure offer is timely delivered by the creditor
32 or debt collector, then the creditor or debt collector may introduce the cure offer into evidence at
33 trial. The creditor or debt collector is not liable for the consumer's attorney's fees and court costs
34 incurred following delivery of the cure offer unless the actual damages, civil penalties and any
35 other monetary or equitable relief provided for under this article and articles two, three and four
36 of this chapter are found to have been sustained and awarded, without consideration of attorney
37 fees and court costs, to exceed the value of the cure offer.

ARTICLE 8. OPERATIVE DATE AND PROVISIONS FOR TRANSITION.

§46A-8-101. Time of becoming operative; provisions for transition; enforceability of prior transactions; applicability and effective dates of amendments.

1 ~~(4)~~(a) Except as otherwise provided in this section, this chapter shall become operative at
2 12:01 a.m. on September 1, 1974.

3 ~~(2)~~(b) Notwithstanding the provisions of subsection ~~(4)~~ (a) of this section, in order to allow
4 sufficient time to prepare for the implementation and operation of this chapter and to act on
5 applications for licenses to make regulated consumer loans under this chapter as amended, the
6 provisions of article four of this chapter, relating to regulated consumer lenders, and the provisions
7 of article seven of this chapter, relating to their administration, shall, to the extent necessary,
8 become operative for such purposes at 12:01 a.m. on September 1, 1996.

9 ~~(3)~~(c) Transactions entered into before this chapter becomes operative and the rights,
10 duties and interests flowing from them thereafter may be terminated, completed, consummated
11 or enforced as required or permitted by any statute, rule of law or other law amended, repealed
12 or modified by this chapter as though the repeal, amendment or modification had not occurred,
13 but this chapter applies to:

14 ~~(a)~~(1) Refinancings and consolidations made after this chapter becomes operative of
15 consumer credit sales, consumer leases and consumer loans whenever made;

16 ~~(b)~~(2) Consumer credit sales or consumer loans made after this chapter becomes
17 operative pursuant to revolving charge accounts or revolving loan accounts entered into, arranged
18 or contracted for before this chapter becomes operative; and

19 ~~(c)~~(3) All consumer credit transactions made before this chapter becomes operative
20 insofar as this chapter limits the remedies of creditors.

21 (d) Applicability. — The amendments made during the 2017 regular session of the
22 Legislature to section one hundred five, article two of this chapter shall apply to consumer credit
23 sales or consumer loans entered into on after the effective date of those amendments. The
24 amendments made during the 2017 regular session of the Legislature to sections one hundred
25 twenty-eight and one hundred forty, article two of this chapter, shall apply to all causes of accruing
26 on or after the effective date of those amendments. The amendments made during the 2017
27 regular session of the Legislature to section one hundred twenty-two, article two and sections one
28 hundred one and one hundred eight, article five of this chapter shall apply to all causes of action
29 filed on or after the effective date of those amendments.