

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 542

(By Senators D. Hall, Carmichael, M. Hall,
Gaunch, Trump, Blair and Nohe)

[Originating in the Committee on
the Judiciary;
reported March 2, 2015.]

A BILL 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:

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

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

13 (d) ~~Causing a telephone to ring or~~ Calling any person more than thirty times per week or
14 engaging any person in telephone conversation repeatedly or continuously more than ten times per
15 week, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress
16 or threaten any person at the called number. In determining whether a debt collector's conduct

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1 violates this section, the debt collector's conduct will be evaluated from the standpoint of a
2 reasonable person. In the absence of knowledge of circumstances to the contrary, a debt collector
3 shall assume that the convenient time for communicating with a consumer is after eight o'clock
4 antemeridian and before nine o'clock postmeridian, local time at the consumer's location.

5 **§46A-2-126. Unreasonable publication.**

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

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

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

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

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1 in any manner other than through proper legal action, process or proceeding; and

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

5 Nothing in this chapter shall prohibit a creditor or debt collector from communicating with
6 any person other than the consumer for the purpose of acquiring or confirming the consumer's
7 location information provided they do so in a manner consistent with the provisions of 15 U. S. C.
8 § 1692b, as the same may be amended from time to time. For purposes of this section,
9 “communication” or “communicating” or any derivation of those terms shall not include the filing
10 of a complaint or other document, pleading or filing with any court.

11 **§46A-2-128. Unfair or unconscionable means.**

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

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

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

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

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

17 (e) Any communication with a consumer ~~whenever it appears~~ made more than seventy-two
18 hours after the debt collector receives written notice, either on paper or electronically, from the
19 consumer or his or her attorney that the consumer is represented by an attorney specifically with
20 regard to the subject debt. To be effective under this subsection, such notice must clearly state and
21 the attorney's name, and address are known, or could be easily ascertained, and telephone number
22 and be sent to the debt collector's registered agent, identified by the debt collector at the office of

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1 the West Virginia Secretary of State or, if not registered with the West Virginia Secretary of State,
2 then to the debt collector's principal place of business. Communication with a consumer is not
3 prohibited under this subsection if ~~unless~~ the attorney fails to answer correspondence, return phone
4 calls or discuss the obligation in question, or ~~unless~~ if the attorney consents to direct communication
5 with the consumer. Regular account statements provided to the consumer and notices required to
6 be provided to the consumer pursuant to applicable law shall not constitute prohibited
7 communications under this section; and

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

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

16 (2) When collecting on debt that is past the date for obsolescence provided for in section
17 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be
18 sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it
19 and (INSERT OWNER NAME) cannot report it to any credit reporting agencies."

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

21 **§46A-3-112. Delinquency charges on precomputed consumer credit sales or consumer loans.**

22 (1) With respect to a precomputed consumer credit sale or consumer loan, refinancing or

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1 consolidation, the parties may contract for a delinquency charge on any installment not paid in full
2 within ten days after its scheduled due date in an amount not exceeding the greater of:

3 (a) Five percent of the unpaid amount of the installment, not to exceed ~~fifteen dollars~~ \$30;

4 or

5 (b) An amount equivalent to the deferral charge that would be permitted to defer the unpaid
6 amount of the installment for the period that it is delinquent.

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

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

17 (4) If two installments, or parts thereof, of a precomputed consumer credit sale or consumer
18 loan are in default for ten days or more, the creditor may elect to convert such sale or loan from a
19 precomputed sale or loan to one in which the sales finance charge or loan finance charge is based
20 on unpaid balances. In such event, the creditor shall make a rebate pursuant to the provisions on
21 rebate upon prepayment, refinancing or consolidation as of the maturity date of any installment then
22 delinquent and thereafter may make a sales finance charge or loan finance charge as authorized by

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1 the appropriate provisions on sales finance charges or loan finance charges for consumer credit sales
2 or consumer loans. The amount of the rebate may not be reduced by the amount of any permitted
3 minimum charge. If the creditor proceeds under this subsection, any delinquency or deferral charges
4 made with respect to installments due at or after the maturity date of the delinquent installments shall
5 be rebated and no further delinquency or deferral charges shall be made.

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

9 **§46A-3-113. Delinquency charges on nonprecomputed consumer credit sales or consumer**
10 **loans repayable in installments.**

11 (1) In addition to the continuation of the sales finance charge or loan finance charge on a
12 delinquent installment with respect to a nonprecomputed consumer credit sale or consumer loan,
13 refinancing or consolidation, repayable in installments, the parties may contract for a delinquency
14 charge on any installment not paid in full within ten days after its scheduled due date of five percent
15 of the unpaid amount of the installment, not to exceed ~~fifteen dollars~~ \$30.

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

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

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1 delinquent installments and then to delinquency and other charges.

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

3 **§46A-5-101. Effect of violations on rights of parties; limitation of actions.**

4 (1) If a creditor or debt collector has violated the provisions of this chapter applying to
5 collection of excess charges, security in sales and leases, disclosure with respect to consumer leases,
6 receipts, statements of account and evidences of payment, limitations on default charges, assignment
7 of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any
8 prohibited debt collection practice, or restrictions on interest in land as security, assignment of
9 earnings to regulated consumer lender, security agreement on household goods for benefit of
10 regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in
11 bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and in addition a
12 right in an action to recover from the person violating this chapter a penalty in an amount determined
13 by the court not less than one hundred dollars nor more than one thousand dollars (b) a right in an
14 action to recover from the person violating this chapter a penalty of \$1,000 per violation: *Provided,*
15 That the aggregate amount of the penalty awarded shall not exceed the greater of \$175,000 or the
16 total alleged outstanding indebtedness: *Provided, however,* That in a class action the aggregate
17 limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff
18 and each class member such that no named plaintiff nor any class member may recover in excess of
19 the greater of \$175,000 or the total alleged outstanding indebtedness. With respect to violations
20 arising from consumer credit sales, consumer leases, or consumer loans ~~made pursuant to revolving~~
21 ~~charge accounts or revolving loan accounts,~~ or from sales as defined in article six of this chapter, no
22 action pursuant to this subsection may be brought more than four years after the violations occurred.

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1 ~~With respect to violations arising from other consumer credit sales or consumer loans, no action~~
2 ~~pursuant to this subsection may be brought more than one year after the due date of the last~~
3 ~~scheduled payment of the agreement.~~ This limitations period shall apply to all actions filed on or
4 after September 1, 2015.

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

17 (3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter and
18 if he has paid an excess charge, he has a right to a refund. A refund may be made by reducing the
19 consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in
20 excess of the lawful obligation under the agreement, the consumer may recover in an action the
21 excess amount from the person who made the excess charge or from an assignee of that person's
22 rights who undertakes direct collection of payments from or enforcement of rights against the

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1 consumer arising from the debt.

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

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

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

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

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

13 **§46A-5-106. Adjustment of damages for inflation.**

14 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable
15 conduct or any prohibited debt collection practice, the court may adjust the damages awarded
16 pursuant to section one hundred one of this article to account for inflation from ~~the time that the~~
17 ~~West Virginia consumer credit and protection act became operative, specifically 12:01 a.m. on~~
18 September 1, ~~1974~~ 2015, to the time of the award of damages in an amount equal to the consumer
19 price index. Consumer price index means the last consumer price index for all consumers published
20 by the United States Department of Labor.

21 **§46A-5-107. Venue.**

22 Any civil action or other proceeding brought by a consumer to recover actual damages or a

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1 penalty, or both, from a debt collector or a creditor, founded upon illegal, fraudulent or
2 unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the
3 circuit court of the county in which the plaintiff has his or her legal residence at the time of the civil
4 action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia,
5 or in the circuit court of the county in which the debt collector or a creditor has its principal place
6 of business or, if the debt collector or creditor is an individual, in the circuit court of the county of
7 his or her legal residence. With respect to causes of action arising under this chapter, the venue
8 provisions of this section shall be exclusive of and shall supersede the venue provisions of any other
9 West Virginia statute or rule.

(NOTE: The purpose of this bill is to modify provisions of the West Virginia Consumer Credit and Protection Act relating to collection of indebtedness.

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, underlining has been omitted.)