

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 315

(By Senator Mullins)

[Originating in the Committee on the Judiciary;
reported February 10, 2015.]

A BILL to amend and reenact §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, all relating to civil actions filed under the Consumer Protection Act; providing statement of legislative intent that courts be guided by federal court and agency interpretations of similar federal statutes; clarifying who may bring private cause of action; establishing requirement of out-of-pocket loss proximately caused by alleged violation in actions for damages; and providing right to demand a jury trial.

Be it enacted by the Legislature of West Virginia:

That §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 6. GENERAL CONSUMER PROTECTION.

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

1 (1) The Legislature hereby declares that the purpose of
2 this article is to complement the body of federal law
3 governing unfair competition and unfair, deceptive and
4 fraudulent acts or practices in order to protect the public and
5 foster fair and honest competition. It is the intent of the
6 Legislature that, in construing this article, the courts be
7 guided by the policies of the Federal Trade Commission and
8 interpretations given by the Federal Trade Commission and
9 the federal courts to Section 5(a)(1) of the Federal Trade
10 Commission Act (15 U. S. C. §45(a)(1)), as from time to time
11 amended, and to the various other federal statutes dealing
12 with the same or similar matters. To this end, this article
13 shall be liberally construed so that its beneficial purposes
14 may be served.

15 (2) It is, however, the further intent of the Legislature that
16 this article ~~shall~~ not be construed to prohibit acts or practices
17 which are reasonable in relation to the development and
18 preservation of business or which are not injurious to the
19 public interest, nor ~~shall~~ does this article ~~be construed to~~
20 repeal by implication the provisions of articles eleven,
21 eleven-a and eleven-b, chapter forty-seven of this code.

§46A-6-102. Definitions.

1 When used in this article, the following words, terms and
2 phrases, and any variations thereof required by the context,
3 shall have the meaning ascribed to them in this article except
4 where the context indicates a different meaning:

5 (1) “Advertisement” means the publication, dissemination
6 or circulation of any matter, oral or written, including
7 labeling, which tends to induce, directly or indirectly, any
8 person to enter into any obligation, sign any contract or
9 acquire any title or interest in any goods or services and
10 includes every word device to disguise any form of business

11 solicitation by using such terms as “renewal”, “invoice”,
12 “bill”, “statement” or “reminder” to create an impression of
13 existing obligation when there is none or other language to
14 mislead any person in relation to any sought-after
15 commercial transaction.

16 (2) “Consumer” means a natural person to whom a sale
17 or lease is made in a consumer transaction and a “consumer
18 transaction” means a sale or lease to a natural person or
19 persons for a personal, family, household or agricultural
20 purpose.

21 (3) “Cure offer” means a written offer of one or more
22 things of value, including, but not limited to, the payment of
23 money, that is made by a merchant or seller and that is
24 delivered by certified mail to a ~~consumer~~ person claiming to
25 have suffered a loss as a result of a ~~consumer~~ transaction or
26 to the attorney for such person.

27 (4) “Merchantable” means, in addition to the qualities
28 prescribed in section three hundred fourteen, article two,

29 chapter forty-six of this code, that the goods conform in all
30 material respects to applicable state and federal statutes and
31 regulations establishing standards of quality and safety of
32 goods and, in the case of goods with mechanical, electrical or
33 thermal components, that the goods are in good working
34 order and will operate properly in normal usage for a
35 reasonable period of time.

36 (5) "Sale" includes any sale, offer for sale or attempt to
37 sell any goods for cash or credit or any services or offer for
38 services for cash or credit.

39 (6) "Trade" or "commerce" means the advertising,
40 offering for sale, sale or distribution of any goods or services
41 and shall include any trade or commerce, directly or
42 indirectly, affecting the people of this state.

43 (7) "Unfair methods of competition and unfair or
44 deceptive acts or practices" means and includes, but is not
45 limited to, any one or more of the following:

46 (A) Passing off goods or services as those of another;

47 (B) Causing likelihood of confusion or of
48 misunderstanding as to the source, sponsorship, approval or
49 certification of goods or services;

50 (C) Causing likelihood of confusion or of
51 misunderstanding as to affiliation, connection or association
52 with or certification by another;

53 (D) Using deceptive representations or designations of
54 geographic origin in connection with goods or services;

55 (E) Representing that goods or services have sponsorship,
56 approval, characteristics, ingredients, uses, benefits or
57 quantities that they do not have or that a person has a
58 sponsorship, approval, status, affiliation or connection that he
59 does not have;

60 (F) Representing that goods are original or new if they
61 are deteriorated, altered, reconditioned, reclaimed, used or
62 secondhand;

63 (G) Representing that goods or services are of a particular
64 standard, quality or grade, or that goods are of a particular
65 style or model if they are of another;

66 (H) Disparaging the goods, services or business of
67 another by false or misleading representation of fact;

68 (I) Advertising goods or services with intent not to sell
69 them as advertised;

70 (J) Advertising goods or services with intent not to
71 supply reasonably expectable public demand, unless the
72 advertisement discloses a limitation of quantity;

73 (K) Making false or misleading statements of fact
74 concerning the reasons for, existence of or amounts of price
75 reductions;

76 (L) Engaging in any other conduct which similarly
77 creates a likelihood of confusion or of misunderstanding;

78 (M) The act, use or employment by any person of any
79 deception, fraud, false pretense, false promise or
80 misrepresentation, or the concealment, suppression or
81 omission of any material fact with intent that others rely upon
82 such concealment, suppression or omission, in connection
83 with the sale or advertisement of any goods or services,

84 whether or not any person has in fact been misled, deceived
85 or damaged thereby;

86 (N) Advertising, printing, displaying, publishing,
87 distributing or broadcasting, or causing to be advertised,
88 printed, displayed, published, distributed or broadcast in any
89 manner, any statement or representation with regard to the
90 sale of goods or the extension of consumer credit including
91 the rates, terms or conditions for the sale of such goods or the
92 extension of such credit, which is false, misleading or
93 deceptive or which omits to state material information which
94 is necessary to make the statements therein not false,
95 misleading or deceptive;

96 (O) Representing that any person has won a prize, one of
97 a group of prizes or any other thing of value if receipt of the
98 prize or thing of value is contingent upon any payment of a
99 service charge, mailing charge, handling charge or any other
100 similar charge by the person or upon mandatory attendance
101 by the person at a promotion or sales presentation at the

102 seller's place of business or any other location: *Provided*,
103 That a person may be offered one item or the choice of
104 several items conditioned on the person listening to a sales
105 promotion or entering a consumer transaction if the true retail
106 value and an accurate description of the item or items are
107 clearly and conspicuously disclosed along with the person's
108 obligations upon accepting the item or items; such
109 description and disclosure shall be typewritten or printed in
110 at least eight point regular type, in upper or lower case,
111 where appropriate; or

112 (P) Violating any provision or requirement of article six-b
113 of this chapter.

114 (8) "Warranty" means express and implied warranties
115 described and defined in sections three hundred thirteen,
116 three hundred fourteen and three hundred fifteen, article two,
117 chapter forty-six of this code and expressions or actions of a
118 merchant which assure the consumer that the goods have
119 described qualities or will perform in a described manner.

§46A-6-105. Exempted transactions.

1 ~~Nothing in~~ This article ~~shall~~ does not apply to acts done
2 by the publisher, owner, agent or employee of a newspaper,
3 periodical or radio or television station in the publication or
4 dissemination of an advertisement, when the owner, agent or
5 employee did not have knowledge of the false, misleading or
6 deceptive character of the advertisement, did not prepare the
7 advertisement and did not have a direct financial interest in
8 the sale or distribution of the advertised goods or services.

§46A-6-106. Private causes of action.

1 (a) Subject to subsections (b) and (c) of this section, any
2 person who purchases or leases goods or services and thereby
3 suffers ~~any~~ an ascertainable loss of money or property, real
4 or personal, as a result of the use or employment by another
5 person of a method, act or practice prohibited or declared to
6 be unlawful by the provisions of this article may bring an
7 action in the circuit court of the county in which the seller or
8 lessor resides or has his or her principal place of business or

9 is doing business, or as provided for in sections one and two,
10 article one, chapter fifty-six of this code, to recover actual
11 damages or \$200, whichever is greater. The court may, in its
12 discretion, provide such equitable relief it ~~deems~~ considers
13 necessary or proper.

14 (b) No award of damages in an action covered by this
15 subsection may be made without proof that the person
16 seeking damages suffered an actual out-of-pocket loss that
17 was proximately caused by a violation of this article. Any
18 party to an action for damages under subsection (a) of this
19 section has the right to demand a jury trial.

20 ~~(b)~~ (c) Notwithstanding the provisions of ~~subsection~~
21 subsections (a) and (b) of this section, no action may be
22 brought pursuant to the provisions of this section until the
23 ~~consumer~~ person has informed the seller or lessor in writing
24 and by certified mail of the alleged violation and provided
25 the seller or lessor twenty days from receipt of the notice of
26 violation to make a cure offer: *Provided*, That the ~~consumer~~

27 person shall have ten days from receipt of the cure offer to
28 accept the cure offer or it is deemed refused and withdrawn.

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

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

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

41 ~~(f)~~ (g) Any permanent injunction, judgment or order of
42 the court under section one hundred eight, article seven of
43 this chapter for a violation of section one hundred four of this
44 article ~~shall be~~ is prima facie evidence in an action brought

45 pursuant to the provisions of this section that the respondent
46 used or employed a method, act or practice declared unlawful
47 by section one hundred four of this article.

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

55 ~~(h)~~ (i) No cure offer ~~shall be~~ is admissible in any
56 proceeding initiated pursuant to the provisions of this article
57 unless the cure offer is delivered by a seller or lessor to the
58 person claiming loss or to any attorney representing such
59 person prior to the filing of the seller or lessee's initial
60 responsive pleading in such proceeding. If the cure offer is
61 timely delivered by the seller or lessor, then the seller or
62 lessee may introduce the cure offer into evidence at trial.

63 The seller or lessor ~~shall not be~~ is not liable for ~~such the~~
64 person's attorney's fees and court costs incurred following
65 delivery of the cure offer unless the actual damages found to
66 have been sustained and awarded, without consideration of
67 attorney's fees and court costs, exceed the value of the cure
68 offer.