

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 614**

BY SENATORS GAUNCH AND ASHLEY, *original sponsor*

[Passed March 10, 2016; in effect 90 days from  
passage]

1 AN ACT to amend and reenact §46A-1-105 of the Code of West Virginia, 1931, as amended; and  
2 to amend and reenact §46A-2-115 and §46A-2-121 of said code, all relating to the  
3 Consumer Credit and Protection Act; excluding obligation to make required payments to  
4 property owners' or homeowners' association from provisions of the Consumer Credit and  
5 Protection Act; clarifying conduct for unconscionable inducement; and providing limits on  
6 charges a secured lender may recover from a consumer borrower upon default.

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

1 That §46A-1-105 of the Code of West Virginia, 1931, as amended, be amended and  
2 reenacted; and that §46A-2-115 and §46A-2-121 of said code be amended and reenacted; all to  
3 read as follows:

**ARTICLE 1. SHORT TITLE, DEFINITIONS AND GENERAL PROVISIONS.**

**§46A-1-105. Exclusions.**

1 (a) This chapter does not apply to:

2 (1) Extensions of credit to government or governmental agencies or instrumentalities;

3 (2) The sale of insurance by an insurer, except as otherwise provided in this chapter;

4 (3) The obligation of a property owner, lot owner or homeowner in a planned community

5 containing no more than twelve units which is not subject to any development rights or a planned

6 community that provides in its declaration that the annual average common expense liability of all

7 units restricted to residential purposes, exclusive of optional user fees and any insurance

8 premiums paid by the association, may not exceed \$300 as adjusted pursuant to section one

9 hundred fourteen, chapter one, article thirty-six-b of this code, or the efforts of property owners'

10 associations or homeowners' associations to collect the same to pay dues, assessments, costs

11 or fees of any kind to a property owners' association or homeowners' association;

12 (4) Transactions under public utility or common carrier tariffs if a subdivision or agency of

13 this state or of the United States regulates the charges for the services involved, the charges for

14 delayed payment, and any discount allowed for early payment; or

15 (5) Licensed pawnbrokers.

16 (b) Mortgage lender and broker licensees are excluded from the provisions of this chapter  
17 to the extent those provisions directly conflict with any section of article seventeen, chapter thirty-  
18 one of this code.

**ARTICLE 2. CONSUMER CREDIT PROTECTION.**

**§46A-2-115. Limitation on default charges.**

1 (a) Except for reasonable expenses, including costs and fees authorized by statute  
2 incurred in realizing on a security interest, the agreements that evidence a consumer credit sale  
3 or a consumer loan may not provide for charges as a result of default by the consumer other than  
4 those authorized by this chapter. (b) With respect to this subsection: (1) The phrase “consumer  
5 loan” shall mean a consumer loan secured by real property: (A) Originated by a bank or savings  
6 and loan association, or an affiliate, not solicited by an unaffiliated broker; (B) held by a federal  
7 home loan bank, the federal National Mortgage Association, the federal Home Loan Mortgage  
8 Corporation, the Government National Mortgage Association, the West Virginia Housing  
9 Development Fund; or (C) insured or guaranteed by the Farmers Home Administration, the  
10 Veteran's Administration or the Department of Housing and Urban Development.

11 (2) Except as provided in subdivision (3) of this subsection, the agreements that evidence  
12 a consumer loan may permit the recovery of the following charges: (A) Costs of publication; (B)  
13 an appraisal fee; (C) all costs incidental to a title examination including professional fees,  
14 expenses incidental to travel, and copies of real estate and tax records; (D) expenses incidental to  
15 notice made to lienholders and other parties and entities having an interest in the real property to  
16 be sold; (E) certified mailing costs; and (F) all fees and expenses incurred by a trustee incident to  
17 a pending trustee's sale of the real property securing the consumer loan.

18 (3) For purposes of the charges expressly authorized by this subsection, no charge may  
19 be assessed and collected from a consumer unless: (A) Each charge is reasonable in its amount;  
20 (B) each charge is actually incurred by or on behalf of the holder of the consumer loan; (C) each

21 charge is actually incurred after the last day allowed for cure of the consumer's default pursuant  
22 to section one hundred six, of this article and before the consumer reinstates the consumer loan  
23 or otherwise cures the default; (D) the holder of the consumer loan and the consumer have agreed  
24 to cancel any pending trustee's sale or other foreclosure on the real property securing the  
25 consumer loan; and (E) in the case of an appraisal fee, no appraisal fee has been charged to the  
26 consumer within the preceding six months.

27 (c) All amounts paid to a creditor arising out of any consumer credit sale or consumer loan  
28 shall be credited upon receipt against payments due: *Provided*, That amounts received and  
29 applied during a cure period will not result in a duty to provide a new notice of right to cure;  
30 *Provided, however*, That partial amounts received during the period set forth in subdivision (3)  
31 subsection (b) of this section do not create an automatic duty to reinstate and may be returned  
32 by the creditor. Default charges shall be accounted for separately. Those recoverable charges  
33 set forth in said subsection arising during the period described therein may be added to principal.

34 (d) At least once every twelve months, the holder or servicer of each consumer loan  
35 secured by real property against which the creditor assesses any default charge, and: (1) Not  
36 serviced by the originating lender or its affiliate or their successors by merger; (2) not held by a  
37 federal home loan bank, the federal National Mortgage Association, the federal Home Loan  
38 Mortgage Corporation, the Government National Mortgage Association, the West Virginia  
39 Housing Development Fund; or (3) not insured or guaranteed by the Farmers Home  
40 Administration, the Veteran's Administration, Department of Housing and Urban Development,  
41 shall transmit to the consumer an accounting of every default charge assessed within the previous  
42 twelve months, including the date, amount and nature of the cost.

43 This subsection does not apply to delinquency charges permitted under sections one  
44 hundred twelve and one hundred thirteen, article three of this chapter; credit line over-the-limit  
45 fees; deferral charges permitted under section one hundred fourteen, article three of this chapter;  
46 collateral protection insurance permitted under section one hundred nine-a, article three of this

47 chapter; and advances to pay taxes.

48 (e) A provision in violation of this section is unenforceable. The amendments to this section  
49 by acts of the Legislature in the regular session of 2003 are a clarification of existing law and shall  
50 be retroactively applied to all agreements in effect on the date of passage of the amendments,  
51 except where controversies arising under those agreements are pending prior to the date of  
52 passage of the amendments.

53 (f) Nothing in this section limits the expenses incidental to a trustee's sale of real property  
54 that are recoverable pursuant to section seven, article one, chapter thirty-eight of this code.

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

1 (a) 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 (1) The agreement or transaction to have been unconscionable at the time it was made,  
4 or to have been induced by unconscionable conduct such as affirmative misrepresentations,  
5 active deceit or concealment of a material fact, the court may refuse to enforce the agreement; or

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

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