

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

Senate Bill 614

BY SENATORS GAUNCH AND ASHLEY

[Originating in the Committee on the Judiciary;

reported on February 27, 2016]

1 A BILL 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 ~~(3)~~ (4) Transactions under public utility or common carrier tariffs if a subdivision or agency
13 of this state or of the United States regulates the charges for the services involved, the charges
14 for delayed payment, and any discount allowed for early payment; or

15 ~~(4)~~ (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 ~~agreement with respect to~~ agreements that
3 evidence a consumer credit sale or a consumer loan may not provide for charges as a result of
4 default by the consumer other than those authorized by this chapter.

5 ~~(b) A consumer loan secured by real property: (1) Originated by a bank or savings and~~
6 ~~loan association, or an affiliate, and not solicited by an unaffiliated broker; (2) 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 (3) insured or guaranteed by the farmers home administration, the~~
10 ~~veteran's administration, department of housing and urban development, which includes in the~~
11 ~~loan agreement a reinstatement period beginning with the trustee notice of foreclosure and ending~~
12 ~~prior to foreclosure sale, may, in addition to those authorized by this chapter, permit the recovery~~
13 ~~of the following actual reasonable reinstatement period expenses paid or owed to third parties: (i)~~
14 ~~Publication costs paid to the publisher of the notice; (ii) appraisal fee when required by the~~
15 ~~circumstances or by a regulatory authority and only after the loan has been referred to a trustee~~
16 ~~for foreclosure; (iii) title check and lienholder notification fee not to exceed \$200, as adjusted from~~
17 ~~time to time by the increase in the consumer price index for all consumers published by the United~~
18 ~~States Department of Labor; and (iv) certified mailing costs. (b) With respect to this subsection:~~

19 (1) The phrase "consumer loan" shall mean a consumer loan secured by real property: (A)
20 Originated by a bank or savings and loan association, or an affiliate, not solicited by an unaffiliated

21 broker; (B) held by a federal home loan bank, the federal National Mortgage Association, the
22 federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the
23 West Virginia Housing Development Fund; or (C) insured or guaranteed by the Farmers Home
24 Administration, the Veteran's Administration or the Department of Housing and Urban
25 Development.

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

33 (3) For purposes of the charges expressly authorized by this subsection, no charge may
34 be assessed and collected from a consumer unless: (A) Each charge is reasonable in its amount;
35 (B) each charge is actually incurred by or on behalf of the holder of the consumer loan; (C) each
36 charge is actually incurred after the last day allowed for cure of the consumer's default pursuant
37 to section one hundred six, of this article and before the consumer reinstates the consumer loan
38 or otherwise cures the default; (D) the holder of the consumer loan and the consumer have agreed
39 to cancel any pending trustee's sale or other foreclosure on the real property securing the
40 consumer loan; and (E) in the case of an appraisal fee, no appraisal fee has been charged to the
41 consumer within the preceding six months.

42 (c) All amounts paid to a creditor arising out of any consumer credit sale or consumer loan
43 shall be credited upon receipt against payments due: *Provided*, That amounts received and
44 applied during a cure period will not result in a duty to provide a new notice of right to cure:
45 ~~provided further that~~ *Provided, however, That* partial amounts received during the reinstatement
46 period set forth in ~~subsection~~ subdivision (3) subsection (b) of this section do not create an

47 automatic duty to reinstate and may be returned by the creditor. Default charges shall be
48 accounted for separately; ~~these~~ Those recoverable charges set forth in said subsection arising
49 during ~~such a reinstatement~~ the period described therein may be added to principal.

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

59 ~~For purposes of this~~ This subsection ~~the notice requirement~~ does not apply to delinquency
60 charges permitted under sections one hundred twelve and one hundred thirteen, article three of
61 this chapter; credit line over-the-limit fees; deferral charges permitted under section one hundred
62 fourteen, article three of this chapter; collateral protection insurance permitted under section one
63 hundred nine-a, article three of this chapter; and, advances to pay taxes.

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

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

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

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

3 ~~(a)~~(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 ~~(b)~~(2) Any term or part of the agreement or transaction to have been unconscionable at
7 the time it was made, 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)~~(b) If it is claimed or appears to the court that the agreement or transaction or any term
11 or 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)~~(c) For the purpose of this section, a charge or practice expressly permitted by this
14 chapter is not unconscionable.