

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 563

BY SENATOR TRUMP

[Introduced March 8, 2017; Referred
to the Committee on the Judiciary]

1 A BILL to repeal §46A-5-106 and §46A-5-107 of the Code of West Virginia, 1931, as amended;
 2 to amend and reenact §46A-2-105, §46A-2-115, §46A-2-122 and §46A-2-128 of said
 3 code; to amend said code by adding thereto two new sections, designated §46A-2-140
 4 and §46A-2-141; and to amend and reenact §46A-5-101 and §46A-5-102 of said code, all
 5 relating to the Consumer Credit and Protection Act; modifying requirements for contracts
 6 allowing for balloon payments; establishing that reasonable charges meet certain
 7 requirements to be recoverable; modifying and adding definitions; excepting the collection
 8 of default charges from unconscionable conduct; establishing means of notice to debt
 9 collector of a consumer's representation by legal counsel; limiting monetary penalties for
 10 violations of statute; enforcing arbitration agreements; establishing that contents of a
 11 pleading not provide the basis for a claim of a violation of the Consumer Credit and
 12 Protection Act; prohibiting the consumer from bringing a class action under the Consumer
 13 Credit and Protection Act; establishing the Attorney General and county prosecuting
 14 attorney may bring a class action under the Consumer Credit and Protection Act;
 15 modifying the statute of limitations from four years to one year; and removing fee shifting
 16 provisions.

Be it enacted by the Legislature of West Virginia:

1 That §46A-5-106 and §46A-5-107 of the Code of West Virginia, 1931, as amended, be
 2 repealed; that §46A-2-105, §46A-2-115, §46A-2-122 and §46A-2-128 of said code be amended
 3 and reenacted; that said code be amended by adding thereto two sections, designated §46A-2-
 4 140 and §46A-2-141; and that §46A-5-101 and §46A-5-102 of said code be amended and
 5 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-2-115. 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 recovery of reasonable charges and expenses, including

4 ~~attorney fees, expenses and court costs,~~ as a result of default by the consumer: ~~other than those~~
5 ~~authorized by this chapter~~ Provided, That such charges and expenses are: (1) Actually incurred
6 by or on behalf of the holder of the consumer credit sale obligation or the consumer loan; and (2)
7 are actually incurred after the last day allowed for cure of the consumer's default pursuant to
8 section one hundred six of this article.

9 (b) With respect to this subsection:

10 (1) The phrase "consumer loan" shall mean a consumer loan secured by real property:

11 (A) Originated by a bank or savings and loan association, or an affiliate, not solicited by
12 an unaffiliated broker;

13 (B) Held by a federal home loan bank, the federal National Mortgage Association, the
14 federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the
15 West Virginia Housing Development Fund; or

16 (C) Insured or guaranteed by the Farmers Home Administration, the Veteran's
17 Administration or the Department of Housing and Urban Development.

18 (2) Except as provided in subdivision (3) of this subsection, the agreements that evidence
19 a consumer loan may permit the recovery of the following charges:

20 (A) Costs of publication;

21 (B) An appraisal fee;

22 (C) All costs incidental to a title examination including professional fees, expenses incident
23 to travel, and copies of real estate and tax records;

24 (D) Expenses incidental to notice made to lienholders and other parties and entities having
25 an interest in the real property to be sold;

26 (E) Certified mailing costs; and

27 (F) All fees and expenses, including attorney fees and expenses, incurred by a trustee,
28 creditor or debt collector incident to a pending trustee's sale of the real property securing the
29 consumer loan.

30 (3) For purposes of the charges expressly authorized by this subsection, no charge may
31 be assessed and collected from a consumer unless:

32 (A) Each charge is reasonable in its amount;

33 (B) Each charge is actually incurred by or on behalf of the holder of the consumer loan;

34 (C) Each charge is actually incurred after the last day allowed for cure of the consumer's
35 default pursuant to section one hundred six, of this article and before the consumer reinstates the
36 consumer loan or otherwise cures the default;

37 (D) The holder of the consumer loan and the consumer have agreed to cancel any pending
38 trustee's sale or other foreclosure on the real property securing the consumer loan; and

39 (E) In the case of an appraisal fee, no appraisal fee has been charged to the consumer
40 within the preceding six months.

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

48 (d) At least once every twelve months, the holder or servicer of each consumer loan
49 secured by real property against which the creditor assesses any default charge, and: (1) Not
50 serviced by the originating lender or its affiliate or their successors by merger; (2) not held by a
51 federal home loan bank, the federal National Mortgage Association, the federal Home Loan
52 Mortgage Corporation, the Government National Mortgage Association, the West Virginia
53 Housing Development Fund; or (3) not insured or guaranteed by the Farmers Home
54 Administration, the Veteran's Administration, Department of Housing and Urban Development,

55 shall transmit to the consumer an accounting of every default charge assessed within the previous
56 twelve months, including the date, amount and nature of the cost.

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

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

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

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

10 (c) "Creditor" means any person who offers or extends credit creating a debt or to whom
11 a debt is owed, but such term does not include any person to the extent that the person receives

12 an assignment or transfer of a debt in default solely for the purpose of facilitating collection of
13 such debt for another.

14 ~~(e)~~ (d) "Debt collection" means any action, conduct or practice of soliciting claims for
15 collection or in the collection of claims owed or due or alleged to be owed or due by a consumer.

16 ~~(d)~~ (e) "Debt collector" means ~~any person or organization engaging directly or indirectly in~~
17 ~~debt collection. The term includes any person or organization who sells or offers to sell forms~~
18 ~~which are, or are represented to be, a collection system, device or scheme, and are intended or~~
19 ~~calculated to be used to collect claims~~ any person who uses any instrumentality of interstate
20 commerce or the mails in any business the principal purpose of which is the collection of any
21 debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or
22 asserted to be owed or due another. Notwithstanding the exclusion provided by subdivision (6) of
23 this subsection, the term includes any creditor who, in the process of collecting the creditor's own
24 debts, uses any name other than the creditor's own which would indicate that a third person is
25 collecting or attempting to collect such debts. The term "debt collector" does not include:

26 (1) Any officer or employee of a creditor while, in the name of the creditor, collecting debts
27 for such creditor;

28 (2) Any person while acting as a debt collector for another person, both of whom are
29 related by common ownership or affiliated by corporate control, if the person acting as a debt
30 collector does so only for persons to whom the debt collector is so related or affiliated and if the
31 principal business of such person is not the collection of debts;

32 (3) Any officer or employee of the United States or any state to the extent that collecting
33 or attempting to collect any debt is in the performance of the officer's or employee's official duties;

34 (4) Any person while serving or attempting to serve legal process on any other person in
35 connection with the judicial enforcement of any debt;

36 (5) Any nonprofit organization which, at the request of consumers, performs bona fide
 37 consumer credit counseling and assists consumers in the liquidation of their debts by receiving
 38 payments from such consumers and distributing such amounts to creditors;

39 (6) An attorney representing a creditor; and

40 (7) Any person collecting or attempting to collect any debt owed or due or asserted to be
 41 owed or due another to the extent such activity: (i) Is incidental to a bona fide fiduciary obligation
 42 or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii)
 43 concerns a debt which was not in default at the time it was obtained by such person; or (iv)
 44 concerns a debt obtained by such person as a secured party in a commercial credit transaction
 45 involving the creditor.

§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 except for those charges and expenses authorized
 12 by section one hundred fifteen of this article: *Provided*, That attorney's fees, court costs and other
 13 reasonable collection costs and charges necessary for the collection of any amount due upon
 14 delinquent educational loans made by any institution of higher education within this state may be
 15 recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection

16 costs may not exceed thirty-three and one-third percent of the amount due and owing to any such
17 institution: *Provided, however,* That nothing contained in this subsection shall be construed to
18 limit or prohibit any institution of higher education from paying additional attorney fees and
19 collection costs as long as such additional attorney fees and collection costs do not exceed an
20 amount equal to five percent of the amount of the debt actually recovered and such additional
21 attorney fees and collection costs are deducted or paid from the amount of the debt recovered for
22 the institution or paid from other funds available to the institution;

23 (d) The collection of or the attempt to collect any interest or other charge, fee or expense
24 incidental to the principal obligation unless such interest or incidental fee, charge or expense is
25 expressly authorized either: (1) By the agreement creating or modifying the obligation, and or (2)
26 by a statute or regulation;

27 (e) Any communication with a consumer made more than seventy-two hours after the debt
28 collector receives written notice, ~~either on paper or electronically,~~ from the consumer or his or her
29 attorney that the consumer is represented by an attorney specifically with regard to the subject
30 debt. To be effective under this subsection, such notice must clearly state the attorney's name,
31 address and telephone number and be sent by certified mail, return receipt requested, to the debt
32 collector's registered agent, identified by the debt collector at the office of the West Virginia
33 Secretary of State or, if not registered with the West Virginia Secretary of State, then to the debt
34 collector's principal place of business. Communication with a consumer is not prohibited under
35 this subsection if the attorney fails to answer correspondence, return phone calls or discuss the
36 obligation in question, or if the attorney consents to direct communication with the consumer.
37 Regular account statements provided to the consumer and notices required to be provided to the
38 consumer pursuant to applicable law shall not constitute prohibited communications under this
39 section; ~~and~~

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

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

48 (2) When collecting on debt that is past the date for obsolescence provided for in section
 49 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be
 50 sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it
 51 and (INSERT OWNER NAME) cannot report it to any credit reporting agencies"; and

52 (g) Initiating a lawsuit or an arbitration to collect a consumer debt if the applicable statute
 53 of limitations has expired.

§46A-2-140. Arbitration agreements to be enforced.

1 Where the contract documents of the parties provide for binding arbitration, upon demand
 2 by one of the parties in a civil case, the matter shall be referred to arbitration in accordance with
 3 the parties' agreement and the Revised Uniform Arbitration Act set forth in article ten, chapter
 4 fifty-five of this code.

§46A-2-141. Pleadings not to be the basis of a cause of action.

1 Nothing contained in a pleading filed in a court of this state shall be the basis of a cause
 2 of action under this chapter, nor shall the act of filing a civil action be the basis of a cause of action
 3 under this chapter. The Legislature intends by this section to honor and respect the exclusive
 4 authority of the judiciary to regulate, through its power and authority to promulgate and enforce
 5 the West Virginia Rules of Civil Procedure, pleadings and civil actions and the institution thereof.
 6 Further, nothing contained in this section is intended to abrogate or abolish common law causes

7 of action for abuse of process, harassment, or frivolity, but only to clarify that neither contents of
 8 pleadings in a civil action nor the institution of a civil action in any court may be the basis for a
 9 claim of a violation of the West Virginia Consumer Credit and Protection Act.

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 from the person
 9 violating this chapter: (a) Actual damages; and (b) ~~a right in an action to recover from the person~~
 10 ~~violating this chapter~~ a penalty of up to \$1,000 per violation civil action: *Provided,* That the
 11 aggregate amount of the ~~penalty~~ all penalties awarded to the consumer in connection with a
 12 particular consumer claim or debt shall not exceed the ~~greater of \$175,000~~ lesser of \$50,000 or
 13 the total ~~alleged~~ outstanding indebtedness at the time the civil action is commenced. *Provided,*
 14 ~~however,~~ That in a class action the aggregate limits on the amount of the penalty set forth above
 15 shall be applied severally to each named plaintiff and each class member such that no named
 16 plaintiff nor any class member may recover in excess of the ~~greater of \$175,000~~ or the total
 17 ~~alleged outstanding indebtedness~~ With respect to violations arising from consumer credit sales,
 18 consumer leases, or consumer loans, or from sales as defined in article six of this chapter, no
 19 action pursuant to this subsection may be brought more than ~~four~~ one years after the violations
 20 occurred. This limitations period shall apply to all actions filed on or after September 1, 2015 2017.

21 (2) If a creditor has violated the provisions of this chapter respecting authority to make
22 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the
23 principal or the loan finance charge. If ~~he~~ the consumer has paid any part of the principal or of the
24 finance charge, ~~he~~ the consumer has a right to recover in an action the payment from the person
25 violating this chapter ~~or from an assignee of that person's rights who undertakes direct collection~~
26 ~~of payments or enforcement of rights arising from the debt.~~ With respect to violations arising from
27 regulated consumer loans made pursuant to revolving loan accounts, no action pursuant to this
28 subsection may be brought more than ~~four years~~ one year after the violation occurred. With
29 respect to violations arising from other regulated consumer loans, no action pursuant to this
30 subsection may be brought more than ~~four years~~ one year after the violation occurred. This
31 limitations period shall apply to all actions filed on or after September 1, ~~2015~~ 2017.

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

39 (4) If a creditor or debt collector has contracted for or received a charge in excess of that
40 allowed by this chapter, the consumer may, in addition to recovering such excess charge, also
41 recover from ~~the creditor or the person~~ violating this chapter ~~liable in an action~~ a penalty of up to
42 \$1,000 per violation civil action: *Provided,* That the aggregate amount of ~~the penalty~~ all penalties
43 awarded to the consumer in connection with a particular claim or debt shall not exceed the ~~greater~~
44 ~~of \$175,000~~ lesser of \$50,000 or the total ~~alleged~~ outstanding indebtedness at the time the civil
45 action is commenced. *Provided, however,* That in a class action the aggregate limits on the
46 amount of the penalty set forth above shall be applied severally to each named plaintiff and each

47 ~~class member such that no named plaintiff nor any class member may recover in excess of the~~
48 ~~greater of \$175,000 or the total alleged outstanding indebtedness~~ With respect to excess charges
49 arising from consumer credit sales, consumer leases, or consumer loans, no action pursuant to
50 this subsection may be brought more than ~~four years~~ one year after the time the excess charge
51 was made. This limitations period shall apply to all actions filed on or after September 1, ~~2015~~
52 2017.

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

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

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

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

71 (9) A consumer or other person bringing an action under this chapter may not bring an
72 action on behalf of a class. The limitation in this subsection is a substantive limitation to a
73 statutorily created cause of action.

74 (10) Notwithstanding the prohibition on class actions contained in subsection (9), the office
75 of the Attorney General or county prosecuting attorney shall have the right and authority to bring
76 action in a representative capacity on behalf of any named person or persons. In any such
77 representative action brought by the office of the Attorney General or a county prosecuting
78 attorney, the court shall not award minimum damages or treble damages, but recovery shall be
79 limited to actual damages suffered by the person or persons, plus reasonable attorney's fees and
80 costs.

§46A-5-102. Assertion of rights.

1 Rights granted by this chapter may be asserted as a defense, setoff or counterclaim to an
2 action against a consumer, ~~without regard to any~~ but only to the extent that an affirmative claim
3 based upon those rights is not barred by the applicable limitation of actions.

NOTE: The purpose of this bill is to amend the requirements for contracts that allow for balloon payments, require proof of mailing of notices to debtors that consumers are represented by legal counsel and prohibit class action lawsuits under this chapter.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.