

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Introduced**

## **Senate Bill 401**

BY SENATOR NELSON

[Introduced February 23, 2021; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §46A-1-102 of the Code of West Virginia, 1931, as amended; to  
2 amend and reenact §46A-2-122 of said code; to amend and reenact §46A-5-101, §46A-  
3 5-104, and §46A-5-106 of said code; and to amend and reenact §46A-6-106 of said code,  
4 all relating to the Consumer Credit and Protection Act; excluding checking, savings, and  
5 other depository accounts from the definition of “services”; excluding a party collecting on  
6 its own debt from the definition of “debt collector”; establishing an actual loss threshold of  
7 \$5,000 for the certification of a class action; limiting recovery of each individual within a  
8 class to the greater of \$1,000 per claim penalty or the total outstanding indebtedness;  
9 reducing the current statute of limitations from four years to one year; reducing stator  
10 penalties to \$1,000 per claim from \$1,000 per violation; limiting recoverable attorney’s fees  
11 to four times the award; updating the adjustment for inflation from September 2015 to  
12 September 2021; and prohibiting class actions under article 6 of the act.

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

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

### **§46A-1-102. General definitions.**

1 In addition to definitions appearing in subsequent articles, in this chapter:  
2 (1) “Actuarial method” means the method, defined by rules adopted by the commissioner,  
3 of allocating payments made on a debt between principal or amount financed and loan finance  
4 charge or sales finance charge pursuant to which a payment is applied first to the accumulated  
5 loan finance charge or sales finance charge and the balance is applied to the unpaid principal or  
6 unpaid amount financed.  
7 (2) “Agreement” means the bargain of the parties in fact as found in their language or by  
8 implication from other circumstances including course of dealing or usage of trade or course of  
9 performance. A “consumer credit agreement” is an agreement where credit is granted.  
10 (3) “Agricultural purpose” means a purpose related to the production, harvest, exhibition,  
11 marketing, transportation, processing or manufacture of agricultural products by a natural person

12 who cultivates, plants, propagates or nurtures the agricultural products. "Agricultural products"  
13 includes agricultural, horticultural, viticultural and dairy products, livestock, wildlife, poultry, bees,  
14 forest products, fish and shellfish, and any products thereof, including processed and  
15 manufactured products, and any and all products raised or produced on farms and any processed  
16 or manufactured products thereof.

17 (4) "Amount financed" means the total of the following items to the extent that payment is  
18 deferred:

19 (a) The cash price of the goods, services or interest in land, less the amount of any down  
20 payment whether made in cash or in property traded in;

21 (b) The amount actually paid or to be paid by the seller pursuant to an agreement with the  
22 buyer to discharge a security interest in or a lien on property traded in; and

23 (c) If not included in the cash price:

24 (i) Any applicable sales, use, privilege, excise or documentary stamp taxes;

25 (ii) Amounts actually paid or to be paid by the seller for registration, certificate of title or  
26 license fees; and

27 (iii) Additional charges permitted by this chapter.

28 (5) "Average daily balance" in a billing cycle for which a sales finance charge or loan  
29 finance charge is made is the sum of the amount unpaid each day during that cycle divided by  
30 the number of days in that cycle. The amount unpaid on a day is determined by adding to the  
31 balance, if any, unpaid as of the beginning of that day all purchases and other debits and  
32 deducting all payments and other credits made or received as of that day.

33 (6) The "cash price" of goods, services or an interest in land means the price at which the  
34 goods, services or interest in land are offered for sale by the seller to cash buyers in the ordinary  
35 course of business, and may include: (a) Applicable sales, use, privilege, and excise and  
36 documentary stamp taxes; (b) the cash price of accessories or related services such as delivery,  
37 installation, servicing, repairs, alterations and improvements; and (c) amounts actually paid or to

38 be paid by the seller for registration, certificate of title or license fees.

39 (7) "Closing costs" with respect to a debt secured by an interest in land include:

40 (a) Fees or premiums for title examination, title insurance or similar purposes including  
41 surveys;

42 (b) Fees for preparation of a deed, deed of trust, mortgage, settlement statement or other  
43 documents;

44 (c) Escrows for future payments of taxes and insurance;

45 (d) Official fees and fees for notarizing deeds and other documents;

46 (e) Appraisal fees; and

47 (f) Credit reports.

48 (8) "Code" means the official Code of West Virginia, 1931, as amended.

49 (9) "Commercial facsimile transmission" means the electronic or telephonic transmission  
50 in the state to a facsimile device to encourage a person to purchase goods, realty or services.

51 (10) "Commissioner" means the commissioner of banking of West Virginia.

52 (11) "Conspicuous" A term or clause is conspicuous when it is so written that a reasonable  
53 person against whom it is to operate ought to have noticed it. Whether a term or clause is  
54 conspicuous or not is for decision by the court.

55 (12) "Consumer" means a natural person who incurs debt pursuant to a consumer credit  
56 sale or a consumer loan, or debt or other obligations pursuant to a consumer lease.

57 (13) (a) Except as provided in paragraph (b), "consumer credit sale" is a sale of goods,  
58 services or an interest in land in which:

59 (i) Credit is granted either by a seller who regularly engages as a seller in credit  
60 transactions of the same kind or pursuant to a seller credit card;

61 (ii) The buyer is a person other than an organization;

62 (iii) The goods, services or interest in land are purchased primarily for a personal, family,  
63 household or agricultural purpose;

64 (iv) Either the debt is payable in installments or a sales finance charge is made; and

65 (v) With respect to a sale of goods or services, the amount financed does not exceed  
66 \$45,000 or the sale is of a factory-built home as defined in §37-15-2 of this code.

67 (b) "Consumer credit sale" does not include a sale in which the seller allows the buyer to  
68 purchase goods or services pursuant to a lender credit card or similar arrangement.

69 (14) (a) "Consumer lease" means a lease of goods:

70 (i) Which a lessor regularly engaged in the business of leasing makes to a person, other  
71 than an organization, who takes under the lease primarily for a personal, family, household or  
72 agricultural purpose;

73 (ii) In which the total of payments under the lease, excluding payments for options to renew  
74 or buy, do not exceed \$45,000 or in which the lease is of a factory-built home as defined in §37-  
75 15-2 of this code; and

76 (iii) Which is for a term exceeding four months.

77 (b) "Consumer lease" does not include a lease made pursuant to a lender credit card or  
78 similar arrangement.

79 (15) "Consumer loan" is a loan made by a person regularly engaged in the business of  
80 making loans in which:

81 (a) The debtor is a person other than an organization;

82 (b) The debt is incurred primarily for a personal, family, household or agricultural purpose;

83 (c) Either the debt is payable in installments or a loan finance charge is made; and

84 (d) Either the principal does not exceed \$45,000 or the debt is secured by an interest in  
85 land or a factory-built home as defined in §37-15-2 of this code.

86 (16) "Cosigner" means a natural person who assumes liability for the obligation on a  
87 consumer credit sale or consumer loan without receiving goods, services or money in return for  
88 the obligation or, in the case of a revolving charge account or revolving loan account of a  
89 consumer, without receiving the contractual right to obtain extensions of credit under the account.

90 The term cosigner includes any person whose signature is requested as a condition to granting  
91 credit to a consumer or as a condition for forbearance on collection of a consumer's obligation  
92 that is in default. The term cosigner does not include a spouse whose signature is required to  
93 perfect a security interest. A person who meets the definition in this paragraph is a "cosigner"  
94 whether or not the person is designated as such on the credit obligation.

95 (17) "Credit" means the privilege granted by a creditor to a debtor to defer payment of debt  
96 or to incur debt and defer its payment.

97 (18) "Earnings" means compensation paid or payable to an individual or for his or her  
98 account for personal services rendered or to be rendered by him or her, whether denominated as  
99 wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a  
100 pension, retirement or disability program.

101 (19) "Facsimile device" means a machine that receives and copies reproductions or  
102 facsimiles of documents or photographs that have been transmitted electronically or  
103 telephonically over telecommunications lines.

104 (20) "Federal Consumer Credit Protection Act" means the "Consumer Credit Protection  
105 Act" (Public Law 90-321; 82 Stat. 146), as amended, and includes regulations issued pursuant to  
106 that act.

107 (21) "Goods" includes goods not in existence at the time the transaction is entered into  
108 and gift and merchandise certificates, but excludes money, chattel paper, documents of title and  
109 instruments.

110 (22) "Home solicitation sale" means a consumer credit sale in excess of \$25 in which the  
111 buyer receives a solicitation of the sale at a place other than the seller's business establishment  
112 at a fixed location and the buyer's agreement or offer to purchase is there given to the seller or a  
113 person acting for the seller. The term does not include a sale made pursuant to a preexisting  
114 open-end credit account with the seller in existence for at least three months prior to the  
115 transaction, a sale made pursuant to prior negotiations between the parties at the seller's

116 business establishment at a fixed location, a sale of motor vehicles, mobile homes or farm  
117 equipment or a sale which may be rescinded under the federal Truth in Lending Act (being Title I  
118 of the federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if  
119 credit were extended by the seller is a home solicitation sale although the goods or services are  
120 paid for, in whole or in part, by a consumer loan in which the creditor is subject to claims and  
121 defenses arising from the sale.

122 (23) Except as otherwise provided, "lender" includes an assignee of the lender's right to  
123 payment but use of the term does not in itself impose on an assignee any obligation of the lender.

124 (24) "Lender credit card or similar arrangement" means an arrangement or loan  
125 agreement, other than a seller credit card, pursuant to which a lender gives a debtor the privilege  
126 of using a credit card, letter of credit or other credit confirmation or identification in transactions  
127 out of which debt arises:

128 (a) By the lender's honoring a draft or similar order for the payment of money drawn or  
129 accepted by the consumer;

130 (b) By the lender's payment or agreement to pay the consumer's obligations; or

131 (c) By the lender's purchase from the obligee of the consumer's obligations.

132 (25) "Loan" includes:

133 (a) The creation of debt by the lender's payment of or agreement to pay money to the  
134 consumer or to a third party for the account of the consumer other than debts created pursuant  
135 to a seller credit card;

136 (b) The creation of debt by a credit to an account with the lender upon which the consumer  
137 is entitled to draw immediately;

138 (c) The creation of debt pursuant to a lender credit card or similar arrangement; and

139 (d) The forbearance of debt arising from a loan.

140 (26) (a) "Loan finance charge" means the sum of: (i) All charges payable directly or  
141 indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the

142 extension of credit, including any of the following types of charges which are applicable: Interest  
143 or any amount payable under a point, discount or other system of charges, however denominated,  
144 premium or other charge for any guarantee or insurance protecting the lender against the  
145 consumer's default or other credit loss; and (ii) charges incurred for investigating the collateral or  
146 credit worthiness of the consumer or for commissions or brokerage for obtaining the credit,  
147 irrespective of the person to whom the charges are paid or payable, unless the lender had no  
148 notice of the charges when the loan was made. The term does not include charges as a result of  
149 default, additional charges, delinquency charges or deferral charges.

150 (b) If a lender makes a loan to a consumer by purchasing or satisfying obligations of the  
151 consumer pursuant to a lender credit card or similar arrangement, and the purchase or  
152 satisfaction is made at less than the face amount of the obligation, the discount is not part of the  
153 loan finance charge.

154 (27) "Merchandise certificate" or "gift certificate" means a writing issued by a seller or  
155 issuer of a seller credit card, not redeemable in cash and usable in its face amount in lieu of cash  
156 in exchange for goods or services.

157 (28) "Official fees" means:

158 (a) Fees and charges prescribed by law which actually are or will be paid to public officials  
159 for determining the existence of or for perfecting, releasing, terminating or satisfying a security  
160 interest related to a consumer credit sale or consumer loan; or

161 (b) Premiums payable for insurance or fees escrowed in a special account for the purpose  
162 of funding self-insurance or its equivalent in lieu of perfecting a security interest otherwise required  
163 by the creditor in connection with the sale, lease or loan, if such premium or fee does not exceed  
164 the fees and charges described in paragraph (a) of this subdivision which would otherwise be  
165 payable.

166 (29) "Organization" means a corporation, government or governmental subdivision or  
167 agency, trust, estate, partnership, cooperative or association.



168 (30) "Payable in installments" means that payment is required or permitted by agreement  
169 to be made in: (a) Two or more periodic payments, excluding a down payment, with respect to a  
170 debt arising from a consumer credit sale pursuant to which a sales finance charge is made; (b)  
171 four or more periodic payments, excluding a down payment, with respect to a debt arising from a  
172 consumer credit sale pursuant to which no sales finance charge is made; or (c) two or more  
173 periodic payments with respect to a debt arising from a consumer loan. If any periodic payment  
174 other than the down payment under an agreement requiring or permitting two or more periodic  
175 payments is more than twice the amount of any other periodic payment, excluding the down  
176 payment, the consumer credit sale or consumer loan is "payable in installments".

177 (31) "Person" or "party" includes a natural person or an individual, and an organization.

178 (32) "Person related to" with respect to an individual means: (a) The spouse of the  
179 individual; (b) a brother, brother-in-law, sister or sister-in-law of the individual; (c) an ancestor or  
180 lineal descendant of the individual or his or her spouse; and (d) any other relative, by blood or  
181 marriage, of the individual or his or her spouse who shares the same home with the individual.  
182 "Person related to" with respect to an organization means: (a) A person directly or indirectly  
183 controlling, controlled by or under common control with the organization; (b) an officer or director  
184 of the organization or a person performing similar functions with respect to the organization or to  
185 a person related to the organization; (c) the spouse of a person related to the organization; and  
186 (d) a relative by blood or marriage of a person related to the organization who shares the same  
187 home with him or her.

188 (33) "Precomputed loan". A loan, refinancing or consolidation is "precomputed" if:

189 (A) The debt is expressed as a sum comprising the principal and the amount of the loan  
190 finance charge computed in advance; or

191 (B) The loan is expressed in terms of the principal amount; the loan installment payments  
192 are a scheduled, fixed amount including principal and interest and assume payment on the  
193 installment due date; and interest payments will not vary or result in an adjustment during the

194 term of the loan or at its final payment as a result of the actual installment payment dates.

195 (34) "Precomputed sale". A sale, refinancing or consolidation is "precomputed" if:

196 (A) The debt is expressed as a sum comprising the amount financed and the amount of  
197 the sales finance charge computed in advance; or

198 (B) The debt is expressed in terms of the principal amount; the debt installment payments  
199 are a scheduled, fixed amount including principal and interest and assume payment on the  
200 installment due date; and interest payments will not vary or result in an adjustment during the  
201 term of the debt or at its final payment as a result of the actual installment payment dates.

202 (35) "Presumed" or "presumption" means that the trier of fact must find the existence of  
203 the fact presumed unless and until evidence is introduced which would support a finding of its  
204 nonexistence.

205 (36) "Principal" of a loan means the total of:

206 (a) The net amount paid to, receivable by or paid or payable for the account of the debtor;

207 (b) The amount of any discount excluded from the loan finance charge; and

208 (c) To the extent that payment is deferred:

209 (i) Amounts actually paid or to be paid by the lender for registration, certificate of title or  
210 license fees if not included in paragraph (a) of this subdivision; and

211 (ii) Additional charges permitted by this chapter.

212 (37) "Regulated consumer lender" means a person authorized to make or take  
213 assignments of regulated consumer loans.

214 (38) "Regulated consumer loan" means a consumer loan, including a loan made pursuant  
215 to a revolving loan account, in which the rate of the loan finance charge exceeds eighteen percent  
216 per year as determined according to the actuarial method, except where the loan qualifies for  
217 federal law preemption from state interest rate limitations, including federal law bank parity  
218 provisions, or where the lender is specifically permitted by state law other than article four of this  
219 chapter to make the loan at that rate without a requirement the lender hold a regulated consumer

220 lender license.

221 (39) "Revolving charge account" means an agreement between a seller and a buyer by  
222 which: (a) The buyer may purchase goods or services on credit or a seller credit card; (b) the  
223 balances of amounts financed and the sales finance and other appropriate charges are debited  
224 to an account; (c) a sales finance charge if made is not precomputed but is computed periodically  
225 on the balances of the account from time to time; and (d) there is the privilege of paying the  
226 balances in installments.

227 (40) "Revolving loan account" means an arrangement between a lender and a consumer  
228 including, but not limited to, a lender credit card or similar arrangement, pursuant to which: (a)  
229 The lender may permit the consumer to obtain loans from time to time; (b) the unpaid balances  
230 of principal and the loan finance and other appropriate charges are debited to an account; (c) a  
231 loan finance charge if made is not precomputed but is computed periodically on the outstanding  
232 unpaid balances of the principal of the consumer's account from time to time; and (d) there is the  
233 privilege of paying the balances in installments.

234 (41) "Sale of goods" includes any agreement in the form of a bailment or lease of goods if  
235 the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or  
236 in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee  
237 will become, or for no other or a nominal consideration has the option to become, the owner of  
238 the goods upon full compliance with his or her obligations under the agreement.

239 (42) "Sale of an interest in land" includes a lease in which the lessee has an option to  
240 purchase the interest and all or a substantial part of the rental or other payments previously made  
241 by him or her are applied to the purchase price.

242 (43) "Sale of services" means furnishing or agreeing to furnish services and includes  
243 making arrangements to have services furnished by another.

244 (44) "Sales finance charge" means the sum of: (a) All charges payable directly or indirectly  
245 by the buyer and imposed directly or indirectly by the seller or issuer of a seller credit card as an

246 incident to the extension of credit, including any of the following types of charges which are  
247 applicable: Time-price differential, however denominated, including service, carrying or other  
248 charge, premium or other charge for any guarantee or insurance protecting the seller against the  
249 buyer's default or other credit loss; and (b) charges incurred for investigating the collateral or  
250 credit worthiness of the buyer or for commissions or brokerage for obtaining the credit,  
251 irrespective of the person to whom the charges are paid or payable; unless the seller had no  
252 notice of the charges when the credit was granted. The term does not include charges as a result  
253 of default, additional charges, delinquency charges or deferral charges. If the seller or issuer of a  
254 seller credit card purchases or satisfies obligations of the consumer and the purchase or  
255 satisfaction is made at less than the face amount of the obligation, the discount is not part of the  
256 sales finance charge.

257 (45) Except as otherwise provided, "seller" includes an assignee of the seller's right to  
258 payment but use of the term does not in itself impose on an assignee any obligation of the seller.

259 (46) "Seller credit card" means an arrangement pursuant to which a person gives to a  
260 buyer or lessee the privilege of using a credit card, letter of credit, or other credit confirmation or  
261 identification primarily for the purpose of purchasing or leasing goods or services from that person,  
262 that person and any other person or persons, a person related to that person, or others licensed  
263 or franchised or permitted to do business under his or her business name or trade name or  
264 designation or on his or her behalf.

265 (47) "Services" includes: (a) Work, labor and other personal services; (b) privileges with  
266 respect to transportation, use of vehicles, hotel and restaurant accommodations, education,  
267 entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery  
268 accommodations, and the like; and (c) insurance: Provided, That "services" does not include any  
269 time, savings or demand deposit accounts.

270 (48) "Supervised financial organization" means any organization, corporation or person,  
271 other than an insurance company or other organization primarily engaged in an insurance

272 business, which is required under state law to register or obtain a license from the commissioner  
273 of banking before conducting business in this state; or which is authorized under federal law to  
274 make consumer loans without a license from the state commissioner of banking, provided such  
275 loans are subject to supervision and examination by an official or agency of the United States.

## **ARTICLE 2. CONSUMER CREDIT PROTECTION.**

### **§46A-2-122. Definitions.**

1 For the purposes of this section and §46A-2-123, §46A-2-124, §46A-2-125, §46A-2-126,  
2 §46A-2-127, §46A-2-128, §46A-2-129, and §46A-2-129a of this code, the following terms shall  
3 have the following meanings:

4 (a) "Consumer" means any natural person obligated or allegedly obligated to pay any debt.

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

9 (c) "Debt collection" means any action, conduct or practice of soliciting claims for collection  
10 or in the collection of claims owed or due or alleged to be owed or due by a consumer.

11 (d) "Debt collector" means any person or organization engaging directly or indirectly in  
12 debt collection on behalf of another person or organization. The term includes any person or  
13 organization who sells or offers to sell forms which are, or are represented to be, a collection  
14 system, device or scheme, and are intended or calculated to be used to collect claims. The term  
15 excludes attorneys representing creditors provided the attorneys are licensed in West Virginia or  
16 otherwise authorized to practice law in the State of West Virginia and handling claims and  
17 collections in their own name as an employee, partner, member, shareholder or owner of a law  
18 firm and not operating a collection agency under the management of a person who is not a  
19 licensed attorney.

**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: (a) Actual  
9 damages; and (b) a right in an action to recover from the person violating this chapter a penalty  
10 of \$1,000 per violation: ~~Provided, That the aggregate amount of the penalty awarded shall not~~  
11 ~~exceed the greater of \$175,000 or the total alleged outstanding indebtedness, whichever is~~  
12 ~~greater: Provided, however That no consumer class action can be certified unless the consumer~~  
13 ~~class representative has suffered an ascertainable loss of money or property, real or personal, of~~  
14 ~~at least \$5,000, as a result of the violation of this article and in such a class action the aggregate~~  
15 ~~limits on the amount of the penalty set forth above shall be applied severally to each named~~  
16 ~~plaintiff and each class member such that no named plaintiff nor any class member may recover~~  
17 ~~in excess of the greater of \$175,000 \$1,000 or the total alleged outstanding indebtedness,~~  
18 ~~whichever is greater. With respect to violations arising from consumer credit sales, consumer~~  
19 ~~leases or consumer loans, or from sales as defined in article six of this chapter, no action pursuant~~  
20 ~~to this subsection may be brought more than ~~four years~~ one year after the violations occurred:~~  
21 ~~Provided, further however, That no action pursuant to this subsection to set aside a foreclosure~~  
22 ~~sale of any real estate securing a consumer loan may be brought more than one year after the~~  
23 ~~foreclosure sale is final.~~

24 (2) If a creditor has violated the provisions of this chapter respecting authority to make

25 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the  
26 principal or the loan finance charge. If he has paid any part of the principal or of the finance  
27 charge, he has a right to recover in an action the payment from the person violating this chapter  
28 or from an assignee of that person's rights who undertakes direct collection of payments or  
29 enforcement of rights arising from the debt. With respect to violations arising from regulated  
30 consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection  
31 may be brought more than four years one year after the violation occurred. With respect to  
32 violations of the provisions of this chapter respecting the authority to make arising from other  
33 regulated consumer loans, no action pursuant to this subsection may be brought more than four  
34 years after the violation occurred: *Provided*, That no action pursuant to this subsection to set aside  
35 a foreclosure sale of any real estate securing a consumer loan may be brought more than one  
36 year after the foreclosure sale is final.

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

44 (4) If a creditor or debt collector has contracted for or received a charge in excess of that  
45 allowed by this chapter, the consumer may, in addition to recovering such excess charge, also  
46 recover from the creditor or the person liable in an action a penalty of \$1,000 per violation:  
47 *Provided*, That the aggregate amount of the penalty awarded shall not exceed the greater of  
48 \$175,000 action or the total alleged outstanding indebtedness, whichever is greater: *Provided*,  
49 *however*, That in a class action the aggregate limits on the amount of the penalty set forth above  
50 shall be applied severally to each named plaintiff and each class member such that no named

51 plaintiff nor any class member may recover in excess of the ~~greater of \$175,000 or the total~~  
52 alleged outstanding indebtedness: *Provided* further, That no action pursuant to this subsection to  
53 set aside a foreclosure sale of any real estate securing a consumer loan may be brought more  
54 than one year after said foreclosure sale is final.

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

57 (6) If an employer discharges an employee in violation of the provisions prohibiting  
58 discharge, the employee may within 90 days bring a civil action for recovery of wages lost as a  
59 result of the violation and for an order requiring the reinstatement of the employee. Damages  
60 recoverable shall not exceed lost wages for six weeks.

61 (7) A creditor or debt collector has no liability for a penalty under subsection (1) or (4) of  
62 this section if, after discovering an error and prior to the institution of an action under this section  
63 or the receipt of written notice of the error, the creditor notifies the person concerned of the error  
64 and corrects the error: (a) Within 15 days if the error affects no more than two persons; or (b)  
65 within 60 days if the error affects more than two persons. If the violation consists of a prohibited  
66 agreement, giving the consumer a corrected copy of the writing containing the error is sufficient  
67 notification and correction. If the violation consists of an excess charge, correction shall be made  
68 by an adjustment or refund.

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

**§46A-5-104. Attorney fees.**

1 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable  
2 conduct or any prohibited debt collection practice, the court may award all or a portion of the costs  
3 of litigation, including reasonable attorney fees, court costs and fees, to the consumer: *Provided,*



4 That such award may not exceed four times, exclusive of court costs, of the statutory penalty  
5 awarded or the total alleged outstanding indebtedness cancelled, whichever is greater. On a  
6 finding by the court that a claim brought under this chapter applying to illegal, fraudulent or  
7 unconscionable conduct or any prohibited debt collection practice was brought in bad faith and  
8 for the purposes of harassment, the court may award to the defendant reasonable attorney fees.

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

1 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable  
2 conduct or any prohibited debt collection practice, the court may adjust the damages awarded  
3 pursuant to section one hundred one of this article to account for inflation from 12:01 a.m. on  
4 September 1, ~~2015~~2021, to the time of the award of damages in an amount equal to the consumer  
5 price index. Consumer price index means the last consumer price index for all consumers  
6 published by the United States Department of Labor.

**§46A-6-106. Adjustment of damages for inflation.**

1 (a) Subject to subsections (b) and (c) of this section, any person who purchases or leases  
2 goods or services and thereby suffers an ascertainable loss of money or property, real or  
3 personal, as a result of the use or employment by another person of a method, act or practice  
4 prohibited or declared to be unlawful by the provisions of this article may bring an action in the  
5 circuit court of the county in which the seller or lessor resides or has his or her principal place of  
6 business or is doing business, or as provided for in sections one and two, article one, chapter  
7 fifty-six of this code, to recover actual damages or \$200, whichever is greater. The court may, in  
8 its discretion, provide such equitable relief it considers necessary or proper. Any party to an action  
9 for damages under this subsection has the right to demand a jury trial: Provided, That because  
10 this article precludes any action, counterclaim, cross-claim or third party claim until the person  
11 has made a cure offer, actions hereunder may not be subject to class certification.

12 (b) No award of damages in an action pursuant to subsection (a) may be made without  
13 proof that the person seeking damages suffered an actual out-of-pocket loss that was proximately

14 caused by a violation of this article. If a person seeking to recover damages for a violation of this  
15 article alleges that an affirmative misrepresentation is the basis for his or her claim then he or she  
16 must prove that the deceptive act or practice caused him or her to enter into the transaction that  
17 resulted in his or her damages. If a person seeking to recover damages for a violation of this  
18 article alleges that the concealment or omission of information is the basis for his or her claim,  
19 then he or she must prove that the person's loss was proximately caused by the concealment or  
20 omission.

21 (c) Notwithstanding the provisions of subsections (a) and (b) of this section, no action,  
22 counterclaim, cross-claim or third-party claim may be brought pursuant to the provisions of this  
23 section until the person has informed the seller or lessor in writing and by certified mail, return  
24 receipt requested, of the alleged violation and provided the seller or lessor 20 days from receipt  
25 of the notice of violation but 10 days in the case a cause of action has already been filed to make  
26 a cure offer: *Provided*, That the person shall have 10 days from receipt of the cure offer to accept  
27 the cure offer or it is deemed refused and withdrawn.

28 (d) If a cure offer is accepted, the seller or lessor has 10 days to begin effectuating the  
29 agreed upon cure and the cure must be completed within a reasonable time.

30 (e) Any applicable statute of limitations is tolled for the 20-day period set forth in subsection  
31 (c) of this section or for the period the effectuation of the cure offer is being performed, whichever  
32 is longer.

33 (f) Nothing in this section prevents a person that has accepted a cure offer from bringing  
34 a civil action against a seller or lessor for failing to timely effect the cure offer.

35 (g) Any permanent injunction, judgment or order of the court under section one hundred  
36 eight, article seven of this chapter for a violation of section one hundred four of this article is prima  
37 facie evidence in an action brought pursuant to the provisions of this section that the respondent  
38 used or employed a method, act or practice declared unlawful by section one hundred four of this  
39 article.

40 (h) Where an action is brought pursuant to the provisions of this section, it is a complete  
41 defense that a cure offer was made, accepted and the agreed upon cure was performed. If the  
42 finder of fact determines that the cure offer was accepted and the agreed upon cure performed,  
43 the seller or lessor is entitled to reasonable attorney's fees and costs attendant to defending the  
44 action.

45 (i) No cure offer is admissible in any proceeding initiated pursuant to the provisions of this  
46 article unless the cure offer is delivered by a seller or lessor to the person claiming loss or to any  
47 attorney representing such person prior to the filing of the seller or lessee's initial responsive  
48 pleading in such proceeding. If the cure offer is timely delivered by the seller or lessor, then the  
49 seller or lessee may introduce the cure offer into evidence at trial. The seller or lessor is not liable  
50 for the person's attorney's fees and court costs incurred following delivery of the cure offer unless  
51 the actual damages found to have been sustained and awarded, without consideration of  
52 attorney's fees and court costs, exceed the value of the cure offer.

NOTE: The purpose of this bill is to amend the West Virginia Consumer Credit and Protection Act to exclude depository accounts from the definition of services; to remove a party collecting on its own debt from the definition of a debt collector; to establish a loss threshold of \$5,000 for the certification of a class action; to limit recovery to members of a class to the greater of \$1,000 per claim or the total outstanding indebtedness; to reduce the current statute of limitations from four years to one year; to reduce statutory penalties to \$1,000 per claim; to limit attorney's fees to four times the award; to update the adjustment for inflation to September of 2021; and to prohibit class actions under Article 6 of the Act.

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