

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

Senate Bill 5

BY SENATORS RUCKER, TRUMP, TAKUBO, MARONEY, AND

SWOPE

[Originating in the Committee on the Judiciary;

reported on February 25, 2021]

1 A BILL to amend and reenact §46A-5-104 and §46A-5-108 of the Code of West Virginia, 1931,
2 as amended; to amend said code by adding thereto a new section, designated §46A-5-
3 109; to amend and reenact §46A-6-106 of said code; and to amend and reenact §46A-8-
4 101 of said code, all relating generally to the West Virginia Consumer Credit and
5 Protection Act and claims arising thereunder; providing criteria for the court to evaluate
6 reasonable attorney's fees and expense awards to the consumer in an action under the
7 act; providing a unified mechanism for pre-suit notices of violation and offers to cure;
8 providing that a cure offer is not admissible at trial of an action under the act, except that
9 a timely delivered cure offer may be presented in a proceeding before the court, after entry
10 of judgment, to determine attorney's fees, if any; providing that either party in a private
11 action under the act may serve upon the other an offer to settle or for judgment to be
12 entered, establishing a process therefor, and providing that if the offer is rejected, the
13 circumstances under which parties may or may not recover attorney's fees; providing for
14 the award of attorney's fees and expenses in actions under the act upon a judicial
15 determination that a claim or defense presented in the case is frivolous; and providing for
16 an effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES.

§46A-5-104. Attorney's 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's fees, court costs and fees, to the consumer. On a~~
4 ~~finding by the court that a claim brought under this chapter applying to illegal, fraudulent or~~
5 ~~unconscionable conduct or any prohibited debt collection practice was brought in bad faith and~~
6 ~~for the purposes of harassment, the court may award to the defendant reasonable attorney's fees.~~

7 (a) Except as provided in §46A-5-108 and §46A-5-109 of this code, in any cause of action
8 brought under this chapter, the court may award reasonable attorney's fees and expenses to the
9 consumer upon examination of the following factors:

10 (1) The time and labor required;

11 (2) The novelty and difficulty of the questions;

12 (3) The skill requisite to perform the legal service properly;

13 (4) Preclusion of other employment by the attorney due to acceptance of the case;

14 (5) The customary fee;

15 (6) Whether the fee is fixed or contingent;

16 (7) Time limitations imposed by the client or the circumstances;

17 (8) The amount involved and the amount of the judgment and any nonmonetary relief
18 obtained;

19 (9) The experience, reputation, and ability of the attorneys;

20 (10) The undesirability of the case;

21 (11) The nature and length of the professional relationship with the client; and

22 (12) Awards in similar cases.

23 (b) Upon a finding by the court that a claim brought under this chapter was brought in bad
24 faith and for the purposes of harassment, the court may award reasonable attorney's fees and
25 expenses to the defendant under an analysis of the factors set forth in subsection (a) of this
26 section.

§46A-5-108. Right to cure.

1 (a) ~~No~~ An action may not be brought pursuant to this article and §46A-2-1 *et seq.*, §46A-
2 3-1 *et seq.*, §46A-4-1 *et seq.*, and §46A-6-1 *et seq.* of this code until 45 days after the consumer
3 has informed the creditor, ~~or~~ debt collector, seller, or lessor in writing and by certified mail, return
4 receipt requested, to the creditor's, ~~or~~ debt collector's, seller's, or lessor's registered agent
5 identified by the creditor, ~~or~~ debt collector, seller, or lessor at the Office of the West Virginia

6 Secretary of State or, if not registered with the West Virginia Secretary of State, then to the
7 creditor's, ~~or~~ debt collector's, seller's, or lessor's principal place of business, of the alleged
8 violation and the factual basis for the violation. ~~and provide~~ Upon receiving the notice of alleged
9 violation, the creditor, ~~or~~ debt collector, seller, or lessor 45 days from receipt by the agent or at
10 the principal place of business referenced ~~above~~ in this subsection of the notice of violation but
11 20 days in the case a cause of action has already been filed to make a cure offer, which shall be
12 provided to the consumer's counsel or, if unrepresented, to the consumer by certified mail, return
13 receipt requested: *Provided*, That the consumer ~~shall have~~ has 20 days from receipt of the cure
14 offer to accept the cure offer or it is deemed refused and withdrawn. When a claim under the
15 provisions set forth in §46A-1-101 of this code is presented as a counterclaim, cross-claim, or
16 third-party claim, the notice of right to cure shall be served with the counterclaim, cross-claim, or
17 third-party claim in any manner permitted by the Rules of Civil Procedure.

18 (b) If a cure offer is accepted, the creditor, ~~or~~ debt collector, seller, or lessor has 20 days
19 to begin effectuating the agreed upon cure and the cure must be completed within a reasonable
20 time.

21 (c) Any applicable statute of limitations is tolled for the 45-day period set forth in subsection
22 (a) of this section or for the period the effectuation of the cure offer is being performed, whichever
23 is longer.

24 (d) Nothing in this section prevents a consumer that has accepted a cure offer from
25 bringing a civil action against a creditor, ~~or~~ debt collector, seller, or lessor for failing to timely effect
26 the cure offer.

27 (e) Where an action is brought under this article or §46A-2-1 *et seq.*, §46A-3-1 *et seq.*,
28 §46A-4-1 *et seq.*, and §46A-6-1 *et seq.* of this code, it is a complete defense that a cure offer was
29 made, accepted, and the agreed upon cure was performed. If the ~~finder of fact~~ court determines
30 that the cure offer was accepted and the agreed upon cure performed, the creditor, ~~or~~ debt

31 collector, seller, or lessor is entitled to reasonable attorney's fees and costs attendant to defending
32 the action.

33 (f) ~~No~~ A cure offer is not admissible in any proceeding initiated pursuant to the provisions
34 of this article, ~~unless the cure offer is delivered by a creditor or debt collector to the person~~
35 ~~claiming loss or to any attorney representing such person prior to the filing of the creditor or debt~~
36 ~~collector's initial responsive pleading in such proceeding. If~~ except that if the cure offer is timely
37 delivered by the creditor, ~~or~~ debt collector, seller, or lessor, then the ~~creditor or debt collector may~~
38 ~~introduce the cure offer~~ may be introduced ~~into evidence at trial in a proceeding before the court~~
39 to determine an award of attorney's fees and expenses, if any, following entry of a judgment. The
40 creditor, ~~or~~ debt collector, seller, or lessor is not liable for the consumer's attorney's fees and court
41 costs incurred following delivery of the cure offer unless the actual damages, civil penalties, and
42 any other monetary or equitable relief provided for under this article and §46A-2-1 *et seq.*, §46A-
43 3-1 *et seq.*, §46A-4-1 *et seq.*, and §46A-6-1 *et seq.* of this code are found to have been sustained
44 and awarded, without consideration of attorney's fees and court costs, exceed the value of the
45 cure offer.

§46A-5-109. Offers to settle or of judgment; damages for frivolous claims or defenses.

1 (a) In a private cause of action under this chapter, at any time more than 30 days after the
2 service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a
3 counteroffer) before trial, either party may serve upon the other party, but shall not file with the
4 court, a written offer to settle a claim under this chapter for the money specified in the offer and
5 to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.

6 An offer must:

7 (1) Be in writing and state that it is being made pursuant to this section;

8 (2) Identify the party or parties making the proposal and the party or parties to whom the
9 proposal is being made;

10 (3) Identify with specificity the claim or claims the proposal is attempting to resolve;

11 (4) State with particularity any relevant conditions;

12 (5) State the total amount of the proposal and, if it includes attorney's fees and expenses,
13 specify the amount offered for the fees and expenses provided that counsel for the plaintiff has
14 provided an estimate of fees and costs to counsel for the defendant upon request;

15 (6) Include a certificate of service and be served by certified mail, return receipt requested,
16 postage prepaid or by overnight delivery using a nationally recognized carrier.

17 (b) If a defendant makes an offer under this section which is rejected by the plaintiff, the
18 plaintiff is not entitled to recover attorney's fees or expenses from the date of the offer through
19 the entry of judgment if the final judgment is one of no liability or if the final judgment obtained by
20 the plaintiff, exclusive of attorney's fees and expenses, but inclusive of actual damages, civil
21 penalties, and any other monetary or equitable relief provided for under this chapter, is less than
22 75 percent of the offer: *Provided*, That if the amount of attorney's fees and expenses were not
23 separately specified in an offer of settlement or judgment, the court may consider any award of
24 attorney's fees and costs earned through the date of the offer in determining whether the total
25 award exceeds 75 percent of the offer. If the judgment entered does not exceed 75 percent of
26 the offer, the defendant may petition the court for reasonable fees and expenses incurred from
27 the date of the offer to the entry of final judgment. Upon petition, the court may award reasonable
28 fees and expenses if it finds that the plaintiff acted without substantial justification or without good
29 faith in rejecting the defendant's offer. If attorney's fees and expenses were specified in the offer,
30 the court may consider whether the defendant's offer concerning plaintiff's attorney's fees and
31 expenses was made in bad faith when determining either party's petition for fees and expenses.

32 (c) Any offer made under this section shall remain open for 14 days unless sooner
33 withdrawn by a writing served on the offeree prior to acceptance by the offeree. A counteroffer
34 shall be considered a rejection but may serve as an offer under subsection (a) of this section if it
35 is denominated as an offer and meets the requirements of subsection (a) of this section.
36 Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror.

37 An offer that is neither withdrawn nor accepted within 14 days shall be considered rejected. The
38 fact that an offer is made but not accepted does not preclude no more than two amended offers.
39 If an offer is made or amended under this section, all prior offers made by that party, including
40 any cure offer made under §46A-5-108 of this code, are null and void. Evidence of an offer is not
41 admissible except in proceedings to enforce a settlement or to determine reasonable attorney's
42 fees and expenses under this section.

43 (d) If an appeal is taken from the judgment, the court shall order payment of reasonable
44 attorney's fees and expenses of litigation only upon order affirming the judgment, or in which the
45 person or entity seeking attorney's fees and expenses otherwise substantially prevail on appeal.

46 (e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered,
47 the moving party may request that the court determine whether the opposing party presented a
48 frivolous claim or defense. In that event, the court shall hold a separate bifurcated hearing in which
49 the court shall make a determination of whether the frivolous claims or defenses were asserted
50 and to award damages, if any, against the party presenting the frivolous claims or defenses. Under
51 this subsection:

52 (1) Frivolous claims shall include, but are not limited to, the following:

53 (A) A claim, defense, or other position that lacks substantial justification or that is not made
54 in good faith or that is made with malice or a wrongful purpose;

55 (B) A claim, defense, or other position with respect to which there existed such a complete
56 absence of any justiciable issue of law or fact that it could not be reasonably believed that a court
57 would accept the asserted claim, defense, or other position; and/or

58 (C) A claim, defense, or other position that was interposed for delay or harassment;

59 (2) Damages awarded may include reasonable attorney's fees and expenses of litigation.

ARTICLE 6. GENERAL CONSUMER PROTECTION.

§46A-6-106. Private causes of action.

1 (a) Subject to ~~subsections~~ subsection (b) and ~~(c)~~ of this section, any person who
2 purchases or leases goods or services and thereby suffers an ascertainable loss of money or

3 property, real or personal, as a result of the use or employment by another person of a method,
4 act, or practice prohibited or declared to be unlawful by the provisions of this article may bring an
5 action in the circuit court of the county in which the seller or lessor resides or has his or her
6 principal place of business or is doing business, or as provided for in §46A-1-1 and §46A-1-2 of
7 this code, to recover actual damages or \$200, whichever is greater. The court may, in its
8 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.

10 (b) ~~No~~ An award of damages in an action pursuant to subsection (a) of this section may
11 not be made without proof that the person seeking damages suffered an actual out-of-pocket loss
12 that was proximately caused by a violation of this article. If a person seeking to recover damages
13 for a violation of this article alleges that an affirmative misrepresentation is the basis for his or her
14 claim then he or she must prove that the deceptive act or practice caused him or her to enter into
15 the transaction that resulted in his or her damages. If a person seeking to recover damages for a
16 violation of this article alleges that the concealment or omission of information is the basis for his
17 or her claim, then he or she must prove that the person's loss was proximately caused by the
18 concealment or omission.

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

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

28 ~~(e) Any applicable statute of limitations is tolled for the twenty day period set forth in~~
29 ~~subsection (e) of this section or for the period the effectuation of the cure offer is being performed,~~
30 ~~whichever is longer.~~

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

33 ~~(g) (c)~~ Any permanent injunction, judgment, or order of the court under §46A-7-108 of this
34 code for a violation of §46A-6-104 of this code is prima facie evidence in an action brought
35 pursuant to the provisions of this section that the respondent used or employed a method, act, or
36 practice declared unlawful by §46A-6-104 of this code.

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

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

ARTICLE 8. OPERATIVE DATE AND PROVISIONS FOR TRANSITION.

§46A-8-101. Time of becoming operative; provisions for transition; enforceability of prior transactions; applicability and effective dates of amendments.

1 (a) Except as otherwise provided in this section, this chapter became operative at 12:01
2 a.m. on September 1, 1974.

3 (b) Notwithstanding the provisions of subsection (a) of this section, in order to allow
4 sufficient time to prepare for the implementation and operation of this chapter and to act on
5 applications for licenses to make regulated consumer loans under this chapter, as amended, the
6 provisions of §46A-4-1 *et seq.* of this code relating to regulated consumer lenders, and the
7 provisions of §46A-7-4 of this code relating to their administration, shall, to the extent necessary,
8 became operative for such purposes at 12:01 a.m. on September 1, 1996.

9 (c) Transactions entered into before this chapter becomes operative and the rights,
10 duties, and interests flowing from them thereafter may be terminated, completed, consummated,
11 or enforced as required or permitted by any statute, rule of law, or other law amended, repealed,
12 or modified by this chapter as though the repeal, amendment, or modification had not occurred,
13 but this chapter applies to:

14 (1) Refinancings and consolidations made after this chapter becomes operative of
15 consumer credit sales, consumer leases, and consumer loans whenever made;

16 (2) Consumer credit sales or consumer loans made after this chapter becomes operative
17 pursuant to revolving charge accounts or revolving loan accounts entered into, arranged, or
18 contracted for before this chapter becomes operative; and

19 (3) All consumer credit transactions made before this chapter becomes operative insofar
20 as this chapter limits the remedies of creditors.

21 (d) *Applicability.* —

22 (1) The amendments made during the regular session of the Legislature, 2017, to §46A-
23 2-105 of this code shall apply to consumer credit sales or consumer loans entered into on after
24 the effective date of those amendments. The amendments made during the regular session of
25 the Legislature, 2017, to §46A-2-128 and §46A-2-140 of this code, shall apply to all causes of
26 accruing on or after the effective date of those amendments. The amendments made during the
27 regular session of the Legislature, 2017, to §46A-2-122 and §46A-5-108 of this code shall apply
28 to all causes of action filed on or after the effective date of those amendments.

29 (2) The amendments made during the regular session of the Legislature, 2021, to §46A-
30 5-104, §46A-5-108, §46A-5-109, and §46A-6-106 of this code shall apply to all causes of action
31 filed on or after the effective date of those amendments.