

SB315

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WEST VIRGINIA LEGISLATURE
EIGHTY-SECOND LEGISLATURE

OFFICE WEST VIRGINIA
SECRETARY OF STATE

REGULAR SESSION, 2015



ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 315

(SENATOR MULLINS, *ORIGINAL SPONSOR*)

[PASSED MARCH 14, 2015; IN EFFECT NINETY DAYS FROM PASSAGE.]

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[Passed March 14, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, all relating to civil actions filed under the Consumer Protection Act; providing statement of legislative intent that courts be guided by federal court and agency interpretations of similar federal statutes; clarifying who may bring private cause of action; establishing requirement of out-of-pocket loss proximately caused by alleged violation in actions for damages; and providing right to demand a jury trial.

Be it enacted by the Legislature of West Virginia:

That §46A-6-101, §46A-6-102, §46A-6-105 and §46A-6-106 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 6. GENERAL CONSUMER PROTECTION.

§46A-6-101. Legislative declarations; statutory construction.

1 (1) The Legislature hereby declares that the purpose of
2 this article is to complement the body of federal law
3 governing unfair competition and unfair, deceptive and
4 fraudulent acts or practices in order to protect the public and
5 foster fair and honest competition. It is the intent of the
6 Legislature that, in construing this article, the courts be
7 guided by the policies of the Federal Trade Commission and
8 interpretations given by the Federal Trade Commission and
9 the federal courts to Section 5(a)(1) of the Federal Trade
10 Commission Act (15 U. S. C. § 45(a)(1)), as from time to
11 time amended, and to the various other federal statutes
12 dealing with the same or similar matters. To this end, this
13 article shall be liberally construed so that its beneficial
14 purposes may be served.

15 (2) It is, however, the further intent of the Legislature
16 that this article not be construed to prohibit acts or practices
17 which are reasonable in relation to the development and
18 preservation of business or which are not injurious to the
19 public interest, nor does this article repeal by implication the
20 provisions of articles eleven, eleven-a and eleven-b, chapter
21 forty-seven of this code.

§46A-6-102. Definitions.

1 When used in this article, the following words, terms and
2 phrases, and any variations thereof required by the context,
3 shall have the meaning ascribed to them in this article except
4 where the context indicates a different meaning:

5 (1) "Advertisement" means the publication, dissemination
6 or circulation of any matter, oral or written, including
7 labeling, which tends to induce, directly or indirectly, any
8 person to enter into any obligation, sign any contract or
9 acquire any title or interest in any goods or services and
10 includes every word device to disguise any form of business

11 solicitation by using such terms as “renewal”, “invoice”,
12 “bill”, “statement” or “reminder” to create an impression of
13 existing obligation when there is none or other language to
14 mislead any person in relation to any sought-after commercial
15 transaction.

16 (2) “Consumer” means a natural person to whom a sale
17 or lease is made in a consumer transaction and a “consumer
18 transaction” means a sale or lease to a natural person or
19 persons for a personal, family, household or agricultural
20 purpose.

21 (3) “Cure offer” means a written offer of one or more
22 things of value, including, but not limited to, the payment of
23 money, that is made by a merchant or seller and that is
24 delivered by certified mail to a person claiming to have
25 suffered a loss as a result of a transaction or to the attorney
26 for such person.

27 (4) “Merchantable” means, in addition to the qualities
28 prescribed in section three hundred fourteen, article two,
29 chapter forty-six of this code, that the goods conform in all
30 material respects to applicable state and federal statutes and
31 regulations establishing standards of quality and safety of
32 goods and, in the case of goods with mechanical, electrical or
33 thermal components, that the goods are in good working
34 order and will operate properly in normal usage for a
35 reasonable period of time.

36 (5) “Sale” includes any sale, offer for sale or attempt to
37 sell any goods for cash or credit or any services or offer for
38 services for cash or credit.

39 (6) “Trade” or “commerce” means the advertising,
40 offering for sale, sale or distribution of any goods or services

41 and shall include any trade or commerce, directly or
42 indirectly, affecting the people of this state.

43 (7) "Unfair methods of competition and unfair or
44 deceptive acts or practices" means and includes, but is not
45 limited to, any one or more of the following:

46 (A) Passing off goods or services as those of another;

47 (B) Causing likelihood of confusion or of
48 misunderstanding as to the source, sponsorship, approval or
49 certification of goods or services;

50 (C) Causing likelihood of confusion or of
51 misunderstanding as to affiliation, connection or association
52 with or certification by another;

53 (D) Using deceptive representations or designations of
54 geographic origin in connection with goods or services;

55 (E) Representing that goods or services have sponsorship,
56 approval, characteristics, ingredients, uses, benefits or
57 quantities that they do not have or that a person has a
58 sponsorship, approval, status, affiliation or connection that he
59 does not have;

60 (F) Representing that goods are original or new if they
61 are deteriorated, altered, reconditioned, reclaimed, used or
62 secondhand;

63 (G) Representing that goods or services are of a particular
64 standard, quality or grade, or that goods are of a particular
65 style or model if they are of another;

66 (H) Disparaging the goods, services or business of
67 another by false or misleading representation of fact;

- 68 (I) Advertising goods or services with intent not to sell
69 them as advertised;
- 70 (J) Advertising goods or services with intent not to supply
71 reasonably expectable public demand, unless the
72 advertisement discloses a limitation of quantity;
- 73 (K) Making false or misleading statements of fact
74 concerning the reasons for, existence of or amounts of price
75 reductions;
- 76 (L) Engaging in any other conduct which similarly
77 creates a likelihood of confusion or of misunderstanding;
- 78 (M) The act, use or employment by any person of any
79 deception, fraud, false pretense, false promise or
80 misrepresentation, or the concealment, suppression or
81 omission of any material fact with intent that others rely upon
82 such concealment, suppression or omission, in connection
83 with the sale or advertisement of any goods or services,
84 whether or not any person has in fact been misled, deceived
85 or damaged thereby;
- 86 (N) Advertising, printing, displaying, publishing,
87 distributing or broadcasting, or causing to be advertised,
88 printed, displayed, published, distributed or broadcast in any
89 manner, any statement or representation with regard to the
90 sale of goods or the extension of consumer credit including
91 the rates, terms or conditions for the sale of such goods or the
92 extension of such credit, which is false, misleading or
93 deceptive or which omits to state material information which
94 is necessary to make the statements therein not false,
95 misleading or deceptive;
- 96 (O) Representing that any person has won a prize, one of
97 a group of prizes or any other thing of value if receipt of the

98 prize or thing of value is contingent upon any payment of a
99 service charge, mailing charge, handling charge or any other
100 similar charge by the person or upon mandatory attendance
101 by the person at a promotion or sales presentation at the
102 seller's place of business or any other location: *Provided*,
103 That a person may be offered one item or the choice of
104 several items conditioned on the person listening to a sales
105 promotion or entering a consumer transaction if the true retail
106 value and an accurate description of the item or items are
107 clearly and conspicuously disclosed along with the person's
108 obligations upon accepting the item or items; such description
109 and disclosure shall be typewritten or printed in at least eight
110 point regular type, in upper or lower case, where appropriate;
111 or

112 (P) Violating any provision or requirement of article six-b
113 of this chapter.

114 (8) "Warranty" means express and implied warranties
115 described and defined in sections three hundred thirteen,
116 three hundred fourteen and three hundred fifteen, article two,
117 chapter forty-six of this code and expressions or actions of a
118 merchant which assure the consumer that the goods have
119 described qualities or will perform in a described manner.

46A-6-105. Exempted transactions.

1 This article does not apply to acts done by the publisher,
2 owner, agent or employee of a newspaper, periodical or radio
3 or television station in the publication or dissemination of an
4 advertisement, when the owner, agent or employee did not
5 have knowledge of the false, misleading or deceptive
6 character of the advertisement, did not prepare the
7 advertisement and did not have a direct financial interest in
8 the sale or distribution of the advertised goods or services.

§46A-6-106. Private causes of action.

1 (a) Subject to subsections (b) and (c) of this section, any
2 person who purchases or leases goods or services and thereby
3 suffers an ascertainable loss of money or property, real or
4 personal, as a result of the use or employment by another
5 person of a method, act or practice prohibited or declared to
6 be unlawful by the provisions of this article may bring an
7 action in the circuit court of the county in which the seller or
8 lessor resides or has his or her principal place of business or
9 is doing business, or as provided for in sections one and two,
10 article one, chapter fifty-six of this code, to recover actual
11 damages or \$200, whichever is greater. The court may, in its
12 discretion, provide such equitable relief it considers
13 necessary or proper. Any party to an action for damages
14 under this subsection has the right to demand a jury trial.

15 (b) No award of damages in an action pursuant to
16 subsection (a) may be made without proof that the person
17 seeking damages suffered an actual out-of-pocket loss that
18 was proximately caused by a violation of this article. If a
19 person seeking to recover damages for a violation of this
20 article alleges that an affirmative misrepresentation is the
21 basis for his or her claim then he or she must prove that the
22 deceptive act or practice caused him or her to enter into the
23 transaction that resulted in his or her damages. If a person
24 seeking to recover damages for a violation of this article
25 alleges that the concealment or omission of information is the
26 basis for his or her claim, then he or she must prove that the
27 person's loss was proximately caused by the concealment or
28 omission.

29 (c) Notwithstanding the provisions of subsections (a) and
30 (b) of this section, no action, counterclaim, cross-claim or
31 third-party claim may be brought pursuant to the provisions
32 of this section until the person has informed the seller or

33 lessor in writing and by certified mail, return receipt
34 requested, of the alleged violation and provided the seller or
35 lessor twenty days from receipt of the notice of violation but
36 ten days in the case a cause of action has already been filed
37 to make a cure offer: *Provided*, That the person shall have
38 ten days from receipt of the cure offer to accept the cure offer
39 or it is deemed refused and withdrawn.

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

43 (e) Any applicable statute of limitations is tolled for the
44 twenty-day period set forth in subsection (c) of this section or
45 for the period the effectuation of the cure offer is being
46 performed, whichever is longer.

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

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

57 (h) Where an action is brought pursuant to the provisions
58 of this section, it is a complete defense that a cure offer was
59 made, accepted and the agreed upon cure was performed. If
60 the finder of fact determines that the cure offer was accepted
61 and the agreed upon cure performed, the seller or lessor is
62 entitled to reasonable attorney's fees and costs attendant to
63 defending the action.

64 (i) No cure offer is admissible in any proceeding initiated
65 pursuant to the provisions of this article unless the cure offer
66 is delivered by a seller or lessor to the person claiming loss or
67 to any attorney representing such person prior to the filing of
68 the seller or lessee's initial responsive pleading in such
69 proceeding. If the cure offer is timely delivered by the seller
70 or lessor, then the seller or lessee may introduce the cure
71 offer into evidence at trial. The seller or lessor is not liable
72 for the person's attorney's fees and court costs incurred
73 following delivery of the cure offer unless the actual damages
74 found to have been sustained and awarded, without
75 consideration of attorney's fees and court costs, exceed the
76 value of the cure offer.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Mark Bennett
.....
Chairman Senate Committee

John B. McCall
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Mark A. Burnett
.....
Clerk of the Senate

Steph J. Harrison
.....
Clerk of the House of Delegates

Phillip P. White
.....
President of the Senate

Robert C. Pease
.....
Speaker of the House of Delegates

The within *is approved* this the *2nd*
Day of *April*, 2015.

Earl Ray Tomblin
.....
Governor

PRESENTED TO THE GOVERNOR

MAR 20 2015

Time 4:05 pm