

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 5

BY SENATORS RUCKER, TRUMP, TAKUBO, MARONEY, AND

SWOPE

[Introduced February 10, 2021; referred

to the Committee on the Judiciary]

1 A BILL to amend and reenact §46A-5-104 and §46A-5-108 of the Code of West Virginia, 1931,
2 as amended; and to amend said code by adding thereto a new section, designated §46A-
3 5-109, all relating to claims arising out of the West Virginia Consumer Credit and
4 Protection Act.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES

§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 which shall not exceed 25 percent of any award
4 granted, court costs and fees, to the consumer. On a finding by the court that a claim brought
5 under this chapter ~~applying to illegal, fraudulent or unconscionable conduct or any prohibited debt~~
6 ~~collection practice~~ was brought in bad faith and for the purposes of harassment, the court may
7 award to the defendant reasonable attorney fees.

§46A-5-108. Right to cure.

1 (a) No action may be brought pursuant to this ~~article and articles two, three and four of~~
2 ~~this~~ chapter until the consumer has informed the creditor or debt collector in writing and by certified
3 mail, return receipt requested, to the creditor's or debt collector's registered agent identified by
4 the creditor or debt collector at the office of the West Virginia Secretary of State or, if not registered
5 with the West Virginia Secretary of State, then to the creditor's or debt collector's principal place
6 of business, of the alleged violation and the factual basis for the violation and provide the creditor
7 or debt collector 45 days from receipt by the agent or at the principal place of business referenced
8 above of the notice of violation but 20 days in the case a cause of action has already been filed
9 to make a cure offer, which shall be provided to the consumer's counsel or, if unrepresented, to
10 the consumer by certified mail, return receipt requested: *Provided*, That the consumer shall have
11 20 days from receipt of the cure offer to accept the cure offer or it is deemed refused and

12 withdrawn. When a claim under the provisions set forth in section one hundred one is presented
13 as a counterclaim, cross-claim or third party claim, the notice of right to cure shall be served with
14 the counterclaim, cross claim or third party claim in any manner permitted by the Rules of Civil
15 Procedure.

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

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

21 (d) Nothing in this section prevents a consumer that has accepted a cure offer from
22 bringing a civil action against a creditor or debt collector for failing to timely effect the cure offer.

23 (e) Where an action is brought under this ~~article or article two, three or four of this chapter~~,
24 it is a complete defense that a cure offer was made, accepted and the agreed upon cure was
25 performed. If the finder of fact determines that the cure offer was accepted and the agreed upon
26 cure performed, the creditor or debt collector is entitled to reasonable attorney fees and costs
27 attendant to defending the action.

28 (f) No cure offer is admissible in any proceeding initiated pursuant to the provisions of this
29 article unless the cure offer is delivered by a creditor or debt collector to the person claiming loss
30 or to any attorney representing such person prior to the filing of the creditor or debt collector's
31 initial responsive pleading in such proceeding. If the cure offer is timely delivered by the creditor
32 or debt collector, then the creditor or debt collector may introduce the cure offer into evidence at
33 trial. The creditor or debt collector is not liable for the consumer's attorney's fees and court costs
34 incurred following delivery of the cure offer unless the actual damages, civil penalties and any
35 other monetary or equitable relief provided for under this ~~article and articles two, three and four~~
36 ~~of this~~ chapter are found to have been sustained and awarded, without consideration of attorney
37 fees and court costs, to exceed the value of the cure offer.

§46A-5-109. Offers of Judgment; Damages for Frivolous Claims or Defenses.

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

6 (1) Be in writing and state that it is being made pursuant to this section;
7 (2) Identify the party or parties making the proposal and the party or parties to whom the
8 proposal is being made;

9 (3) Identify generally the claim or claims the proposal is attempting to resolve;
10 (4) State with particularity any relevant conditions;

11 (5) State the total amount of the proposal;

12 (6) State with particularity the amount proposed to settle a claim for punitive damages, if
13 any;

14 (7) State whether the proposal includes attorney's fees or other expenses and whether
15 attorney's fees or other expenses are part of the legal claim; and

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

18 (b) (1) If a defendant makes an offer of judgment which is rejected by the plaintiff, the
19 defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation
20 incurred by the defendant or on the defendant's behalf from the date of the offer of judgment
21 through the entry of judgment if the final judgment is one of no liability or the final judgment
22 obtained by the plaintiff is less than 75 percent of such offer of judgment.

23 (2) If a plaintiff makes an offer of judgment which is rejected by the defendant and the
24 plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of judgment,
25 the plaintiff shall be entitled to recover reasonable attorney's fees, not exceeding 25 percent of

26 the award granted, and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf
27 from the date of the offer of judgment through the entry of judgment.

28 (c) Any offer made under this section shall remain open for 14 days unless sooner
29 withdrawn by a writing served on the offeree prior to acceptance by the offeree. A counteroffer
30 shall be deemed a rejection but may serve as an offer under §46A-5-109(a) if it is specifically
31 denominated as an offer under this section. Acceptance or rejection of the offer by the offeree
32 must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted
33 within 10 days shall be deemed rejected. The fact that an offer is made but not accepted does
34 not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to
35 enforce a settlement or to determine reasonable attorney's fees and costs under this section.

36 (d) (1) The court shall order the payment of reasonable attorney's fees and expenses of
37 litigation upon receipt of proof that the judgment is one to which the provisions of either §46A-5-
38 109(b)(1) or §46A-5-109(b)(2) apply: *Provided*, That if an appeal is taken from such judgment,
39 the court shall order payment of such reasonable attorney's fees and expenses of litigation only
40 upon remittitur affirming such judgment.

41 (2) If a party is entitled to reasonable costs and attorney fees pursuant to the provisions
42 of this section, the court may determine that an offer was not made in good faith in an order setting
43 forth the basis for such a determination. In such case, the court may disallow an award of
44 attorney's fees and costs.

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

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

52 (A) A claim, defense, or other position that lacks substantial justification or that is not made
53 in good faith or that is made with malice or a wrongful purpose;
54 (B) A claim, defense, or other position with respect to which there existed such a complete
55 absence of any justiciable issue of law or fact that it could not be reasonably believed that a court
56 would accept the asserted claim, defense, or other position; and
57 (C) A claim, defense, or other position that was interposed for delay or harassment;
58 (2) Damages awarded may include reasonable and necessary attorney's fees and
59 expenses of litigation.

NOTE: The purpose of this bill is to encourage the efficient settlement of legal claims.

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