WEST VIRGINIA CODE CHAPTER 46A ARTICLE 5

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§46A-5-101. Effect of violations on rights of parties; limitation of actions.

(1) If a creditor or debt collector has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and (b) a right in an action to recover from the person violating this chapter a penalty of $1,000 per violation: Provided, That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: Provided, however, That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness. With respect to violations arising from consumer credit sales, consumer leases or consumer loans, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred: Provided further, That no action pursuant to this subsection to set aside a foreclosure sale of any real estate securing a consumer loan may be brought more than one year after the foreclosure sale is final.

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

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

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enforcement of rights against the consumer arising from the debt.

(4) If a creditor or debt collector has contracted for or received a charge in excess of that allowed by this chapter, the consumer may, in addition to recovering such excess charge, also recover from the creditor or the person liable in an action a penalty of $1,000 per violation: Provided, That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: Provided, however, That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness: Provided further, That no action pursuant to this subsection to set aside a foreclosure sale of any real estate securing a consumer loan may be brought more than one year after said foreclosure sale is final.

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

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

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

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

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§46A-5-102. Assertion of rights.

Rights granted by this chapter may be asserted as a claim for setoff or defense to an action against a consumer without regard to any limitation of actions. Any counterclaim is subject to the appropriate limitation of actions set forth in this chapter.

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§46A-5-103. Willful violations.

(1) A regulated consumer lender who willfully makes charges in excess of those permitted by the provisions of article four of this chapter, pertaining to regulated consumer lenders, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500, or imprisoned not more than one year, or both fined and imprisoned.

(2) A person who willfully engages in the business of making regulated consumer loans without a license in violation of the provisions of article four of this chapter applying to authority to make regulated consumer loans shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $5,000, or imprisoned not more than one year, or both fined and imprisoned.

(3) A person who willfully engages in the business of making consumer credit sales or consumer loans, or of taking assignments of rights against consumers arising therefrom and undertakes direct collection of payments or enforcement of these rights, without complying with the provisions of section one hundred fifteen, article seven of this chapter, concerning notification, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $100.

(4) Any person who willfully violates any of the provisions of sections one hundred twenty-three through one hundred twenty-eight, inclusive, article two of this chapter, by committing any of the specifically described and enumerated acts contained therein, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned in the county jail not more than one year, or both fined and imprisoned.

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§46A-5-104. Attorney's fees.

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

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

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

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

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

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

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

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

(10) The undesirability of the case;

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

(12) Awards in similar cases.

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

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§46A-5-105. Willful violations.

If a creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, in addition to the remedy provided in section one hundred one of this article, the court may cancel the debt when the debt is not secured by a security interest.

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

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

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§46A-5-107. Venue.

Any civil action or other proceeding brought by a consumer to recover actual damages or a penalty, or both, from creditor or a debt collector, founded upon illegal, fraudulent or unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the circuit court of the county in which the plaintiff has his or her legal residence at the time of the civil action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the circuit court of the county in which the creditor or debt collector has its principal place of business or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her legal residence. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

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§46A-5-108. Right to cure.

(a) An action may not be brought pursuant to this article and §46A-2-1 *et seq*., §46A-3-1 *et seq*., §46A-4-1 *et seq*., and §46A-6-1 *et seq*. of this code until 45 days after the consumer has informed the creditor, debt collector, seller, or lessor in writing and by certified mail, return receipt requested, to the creditor's, debt collector's, seller's, or lessor's registered agent identified by the creditor, debt collector, seller, or lessor at the Office of the West Virginia Secretary of State or, if not registered with the West Virginia Secretary of State, then to the creditor's, debt collector's, seller's, or lessor's principal place of business, of the alleged violation and the factual basis for the violation. Upon receiving the notice of alleged violation, the creditor, debt collector, seller, or lessor 45 days from receipt by the agent or at the principal place of business referenced in this subsection of the notice of violation but 20 days in the case a cause of action has already been filed to make a cure offer, which shall be provided to the consumer's counsel or, if unrepresented, to the consumer by certified mail, return receipt requested: *Provided*, That the consumer has 20 days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn. When a claim under the provisions set forth in §46A-1-101 of this code is presented as a counterclaim, cross-claim, or third-party claim, the notice of right to cure shall be served with the counterclaim, cross-claim, or third-party claim in any manner permitted by the Rules of Civil Procedure.

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

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

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

(e) Where an action is brought under this article or §46A-2-1 *et seq*., §46A-3-1 *et seq*., §46A-4-1 *et seq*., and §46A-6-1 *et seq*. of this code, it is a complete defense that a cure offer was made, accepted, and the agreed upon cure was performed. If the court determines that the cure offer was accepted and the agreed upon cure performed, the creditor, debt collector, seller, or lessor is entitled to reasonable attorney's fees and costs attendant to defending the action.

(f) A cure offer is not admissible in any proceeding initiated pursuant to the provisions of this article, except that if the cure offer is timely delivered by the creditor, debt collector, seller, or lessor, then the cure offer may be introduced in a proceeding before the court to determine an award of attorney's fees and expenses, if any, following entry of a judgment. The creditor, debt collector, seller, or lessor is not liable for the consumer's attorney's fees and court costs incurred following delivery of the cure offer unless the actual damages, civil

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penalties, and any other monetary or equitable relief provided for under this article and §46A-2-1 *et seq.*, §46A-3-1 *et seq.*, §46A-4-1 *et seq.*, and §46A-6-1 *et seq*. of this code are found to have been sustained and awarded, without consideration of attorney's fees and court costs, exceed the value of the cure offer.

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

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

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

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

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

(4) State with particularity any relevant conditions;

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

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

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

(c) Any offer made under this section shall remain open for 14 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. A counteroffer shall be

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considered a rejection but may serve as an offer under subsection (a) of this section if it is denominated as an offer and meets the requirements of subsection (a) of this section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 14 days shall be considered rejected. The fact that an offer is made but not accepted does not preclude no more than two amended offers. If an offer is made or amended under this section, all prior offers made by that party, including any cure offer made under §46A-5-108 of this code, are null and void. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and expenses under this section.

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

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

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

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

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

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

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

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