WEST VIRGINIA CODE CHAPTER 46A ARTICLE 6

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

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

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

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§46A-6-102. Definitions.

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

(1) "Advertisement" means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract or acquire any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement" or "reminder" to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought-after commercial transaction.

(2) "Consumer" means a natural person to whom a sale or lease is made in a consumer transaction and a "consumer transaction" means a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.

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

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

(5) "Sale" includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.

(6) "Trade" or "commerce" means the advertising, offering for sale, sale or distribution of any goods or services and shall include any trade or commerce, directly or indirectly, affecting the people of this state.

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

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

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

(C) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or

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association with or certification by another;

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

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

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

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

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

(I) Advertising goods or services with intent not to sell them as advertised;

(J) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(K) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;

(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

(N) Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods or the extension of consumer credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading or deceptive or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive;

(O) Representing that any person has won a prize, one of a group of prizes or any other thing of value if receipt of the prize or thing of value is contingent upon any payment of a service charge, mailing charge, handling charge or any other similar charge by the person or upon

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mandatory attendance by the person at a promotion or sales presentation at the seller's place of business or any other location: Provided, That a person may be offered one item or the choice of several items conditioned on the person listening to a sales promotion or entering a consumer transaction if the true retail value and an accurate description of the item or items are clearly and conspicuously disclosed along with the person's obligations upon accepting the item or items; such description and disclosure shall be typewritten or printed in at least eight point regular type, in upper or lower case, where appropriate; or

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

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

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§46A-6-103. Rules and regulations.

The Attorney General of the State of West Virginia may make rules and regulations interpreting and defining the provisions of section one hundred two of this article. Such rules and regulations shall conform as nearly as practicable with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the "Federal Trade Commission Act," as from time to time amended.

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§46A-6-104. Unlawful acts or practices.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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§46A-6-105. Exempted transactions.

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

(b) This article does not apply to time, savings, or demand deposit accounts provided by a bank as defined in §31A-1-2 of this code.

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§46A-6-106. Private causes of action.

(a) Subject to subsection (b) of this section, any person who purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit court of the county in which the seller or lessor resides or has his or her principal place of business or is doing business, or as provided for in §46A-1-1 and §46A-1-2 of this code, to recover actual damages or $200, whichever is greater. The court may, in its discretion, provide such equitable relief it considers necessary or proper. Any party to an action for damages under this subsection has the right to demand a jury trial.

(b) An award of damages in an action pursuant to subsection (a) of this section may not be made without proof that the person seeking damages suffered an actual out-of-pocket loss that was proximately caused by a violation of this article. If a person seeking to recover damages for a violation of this article alleges that an affirmative misrepresentation is the basis for his or her claim then he or she must prove that the deceptive act or practice caused him or her to enter into the transaction that resulted in his or her damages. If a person seeking to recover damages for a violation of this article alleges that the concealment or omission of information is the basis for his or her claim, then he or she must prove that the person's loss was proximately caused by the concealment or omission.

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

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§46A-6-107. Disclaimer of warranties and remedies prohibited.

(a) Except as otherwise provided in subsection (b) of this section, with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant may:

(1) Exclude, modify, or otherwise attempt to limit any warranty, express, or implied, including the warranties of merchantability and fitness for a particular purpose; or

(2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express, or implied.

(b) A consumer who purchases a used manufactured home may waive the warranties of merchantability and fitness for a particular purpose, or waive a warranty as to a particular defect or malfunction which the merchant has identified and disclosed in writing to the consumer, if the used manufactured home is not being sold for human habitation: Provided, That notice be posted on the front door of the used manufactured home that it is not being sold for human habitation: Provided, however, That the waiver is not effective unless the waiver:

(1) Is in writing;

(2) Is conspicuous and is in plain language;

(3) Identifies with particularity the disclosed defect or malfunction, if any, in the used manufactured home for which the warranty is to be waived;

(4) Describes any additional defects or malfunctions, if any, disclosed to the merchant by a previous owner of the used manufactured home or discoverable by the merchant after an inspection of the used manufactured home;

(5) States that the warranty being waived applies only to the disclosed defect or malfunction, if any, to the extent the merchant intends to waive a warranty as to a specific defect;

(6) Acknowledges that the used manufactured home will not be used for human habitation: Provided, That the consumer shall sign or initial such provision in order to evidence the consumer's acknowledgment thereof; and

(7) Is signed by both the consumer and the merchant before the sales contract is executed.

For purposes of this subsection, "used manufactured home" means a manufactured home, as defined in §21-9-2 of this code, that is more than four years old from its date of production and has previously been occupied, used, or sold for purposes other than resale.

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§46A-6-107a. Used motor vehicles sold "as is".

(a) Notwithstanding the provisions of §46A-6-107 of this code, a used motor vehicle may be sold "as is" if:

(1) The vehicle is inoperable and a total loss;

(2) The vehicle has been custom built or modified for show purposes or racing; or

(3) The vehicle is the following:

(A) Sold for less than $4,000;

(B) Driven more than 100,000 miles at the time sold; or

(C) Seven years of age or older as calculated from January 1 of the designated model year of the vehicle.

(b) A buyer who purchases a vehicle "as is" that meets the criteria set out in the provisions of §46A-6-107a(a)(3) of this code shall have the right to cancel the sale by the end of the dealer's third business day following the sale. To cancel the sale, the "as is" vehicle must have a significant mechanical issue or issues that can be reasonably expected to have existed at the time of the sale. Cancellation shall become effective when the buyer returns the "as is" vehicle to the point of sale by the end of the dealer's third business day following the sale.

(c) For the purposes of this section, a used motor vehicle is a "total loss" only if:

(1) There is material damage to the vehicle's frame, unitized structure, or suspension system; and

(2) The projected cost of repairing the damage exceeds the market value of the vehicle at the time of the incident causing it to be declared a total loss.

(d) If a used motor vehicle is sold "as is" pursuant to this section, a merchant shall satisfy the following disclaimer requirements:

(1) A disclaimer must appear on the front page of the contract of sale;

(2) The disclaimer shall read as follows:

"AS IS"

THIS VEHICLE IS SOLD "AS IS". THIS MEANS THAT YOU WILL LOSE YOUR IMPLIED WARRANTIES. YOU WILL HAVE TO PAY FOR ANY REPAIRS NEEDED AFTER THE SALE. IF WE HAVE MADE ANY PROMISES TO YOU, THE LAW SAYS WE MUST KEEP OUR PROMISES EVEN IF WE SELL "AS IS". TO PROTECT YOURSELF, ASK US TO PUT ALL

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PROMISES IN WRITING. YOU MAY HAVE THE RIGHT TO CANCEL THIS SALE BY THE END OF THE DEALER'S THIRD BUSINESS DAY FOLLOWING THE SALE IF THE VEHICLE HAS SIGNIFICANT MECHANICAL ISSUE THAT CAN BE REASONABLY EXPECTED TO HAVE EXISTED AT THE TIME OF THE SALE.

(3) The text of the disclaimer must be printed in 12-point boldfaced type, except the heading, which must be in 16-point extra boldfaced type;

(4) The entire disclaimer must be boxed;

(5) The consumer shall sign and date within the box containing the disclaimer prior to the sale;

(6) The merchant shall describe in writing any defects or malfunctions, if any, disclosed to the merchant by a previous owner of the used motor vehicle or discoverable by the merchant after an inspection of the used motor vehicle; and

(7) The merchant shall provide the consumer a copy of a nationally recognized vehicle history report for the used motor vehicle.

(e) An "as is" sale of a used motor vehicle waives implied warranties, but does not waive any express warranties, either oral or written, upon which the consumer relied in entering into the transaction.

(f) The provisions of this section do not apply to motor vehicles sold as surplus by a state agency.

(g) The provisions of this section only apply to sales directly to consumers.

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§46A-6-108. Breach of warranty; privity abolished.

(a) Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

(b) Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or intended to become the subject of a consumer transaction, no manufacturer may fail to honor a manufacturer's warranty if the consumer has complied with applicable warranty registration provisions but the merchant from whom such goods were purchased has not complied with or registered the warranty, and in such case the manufacturer shall honor the warranty.

(c) When a merchant or manufacturer has failed to honor a warranty which is valid under the laws of this state and which the manufacturer is bound to honor, if the goods have been replaced or repaired by the merchant or a repairperson, as the case may be, such merchant, repairperson or consumer, in addition to any other remedy provided by law, shall have a cause of action against the manufacturer for the reasonable cost of such replacement or repair.

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§46A-6-109. The use of plain language in consumer transactions.

(a) Every written agreement entered into by a consumer after April 1, one thousand nine hundred eighty-two, for the purchase or lease of goods or services in consumer transactions, whether for the rental of space to be occupied for residential purposes or for the sale of goods or services for personal, family, household or agricultural purposes, must: (1) Be written in a clear and coherent manner, using words with common and everyday meanings; (2) use type of an easily readable size and ink which adequately contrasts with the paper; and (3) be appropriately organized and captioned by its various sections to be easily understood.

(b) A violation of the provisions of this section shall not render any agreement void or voidable: Provided, That if a consumer at the time of entering into a consumer transaction or anytime thereafter, requests of the other party thereto that the agreement evidencing the consumer transaction be changed or written in a manner to conform with this section, and that request is refused, then a consumer shall have a cause of action to require a consumer agreement not in conformity with the provisions of this section to be reformed. This section shall not be construed to prohibit the use of words or phrases specifically required or specifically permitted by state or federal law, rule or regulation. This section shall not be construed to preclude a consumer from asserting a claim or defense which would have been available to the consumer if this provision were not in effect. A consumer may not waive the rights provided by this section, and any attempted waiver shall be void.

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§46A-6-110. Solicitation or cashing of postdated checks; penalties.

(a) No person may:

(1) Solicit or accept a postdated check with the intent of presenting it for payment prior to the date listed on the check; or

(2) Represent in any manner that postdating a check will prevent its payment from the account of the maker of the check prior to the date listed on the check; and either (A) present the check or cause the check to be presented for payment before the date on the check either intentionally, or (B) in the case of a payee that is an organization, present the check or cause the check to be presented without reasonable procedures to prevent such presentment.

(b) When a check is presented for payment from the account of the maker before the date of the check, no payee who knowingly accepted a postdated check may refuse, upon request of the maker of the postdated check, to immediately return the funds to the maker of the postdated check, to pay the fees and other costs incurred by the maker as a result of the early presentment of the check.

(c) If a person has violated the provisions of subsection (a) or (b) of this section, the maker has a cause of action to recover from that person the amount of the check, any fees or costs incurred and, in addition, a civil penalty, in an amount determined by the court, of not less than one hundred nor more than $1,000.

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