# WEST VIRGINIA CODE CHAPTER 46a ARTICLE 2

WV Legislature

**§46A-2-101. Holders of negotiable instruments subject to claims and defenses.**

(1) The following limitations shall be applicable to negotiable instruments, other than a currently dated check, evidencing an obligation arising from a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, made on the date this chapter becomes operative or within a period of one year thereafter;

(a) Notwithstanding any term or agreement to the contrary or the provisions of section three hundred five, article three, chapter forty-six of this code, a holder in due course of any such negotiable instrument shall take and hold such instrument subject to all claims and defenses arising from that specific consumer credit sale or consumer lease which the buyer or lessee has against the seller or lessor but the holder's liability shall not exceed the amount owing to the holder at the time the holder receives notice of the claims or defenses, if such claims and defenses are asserted by the buyer or lessee by written notice given to the holder within a period of one hundred eighty days after the holder has delivered or mailed to the buyer or lessee a written notice of negotiation complying with the requirements of subdivision (b) of this subsection (1).

(b) The notice of negotiation from the holder to the buyer or lessee contemplated in subdivision (a) of this subsection (1) shall be in writing, identify the negotiable instrument, briefly describe the goods or services, state the name and address of the holder, state the initial deferred balance of such negotiable instrument payable by the buyer or lessee and the number, amount and due dates of installments, the amount currently payable by the buyer or lessee, and inform the buyer or lessee in a conspicuous manner that he has one hundred eighty days from a specified date (which date shall be the date the notice was delivered or mailed to the buyer or lessee) within which to notify the holder in writing of any claims and defenses he may have against the seller or lessor arising from that specific consumer credit sale or consumer lease; and that if written notification of any such claims and defenses is not given to the holder within such one hundred eighty day period, the holder will have the right to enforce the instrument free of any such claims and defenses the buyer or lessee may have against the seller or lessor. Such notice of negotiation, if given by mail, is given when it is mailed to the buyer's or lessee's last-known address by registered or certified mail, return receipt requested.

(c) In order to preserve all of his claims and defenses against a holder under subdivision (a) of this subsection (1), the buyer or lessee must, after receiving the written notice of negotiation provided for in subdivision (b) of this subsection (1), and before the expiration of a period of one hundred eighty days, notify such holder in writing as to any claims and defenses he has against the seller or lessor arising from that specific consumer credit sale or consumer lease. The notice by the buyer or lessee need not take any particular form and shall be sufficient if it indicates the claims and defenses which the buyer or lessee has against the seller or lessor in a manner sufficient to apprise the holder of the nature of such claims and defenses. Such notice, if given by mail, is given when it is mailed to the holder's last-known address by registered or certified mail, return receipt requested. All claims and defenses of the buyer or lessee against the seller or lessor arising out of a consumer credit

WV Legislature

sale or consumer lease shall be valid against the holder unless the notice of negotiation is given pursuant to this subsection (1).

(d) In a consumer credit sale or consumer lease when goods or services cannot be delivered or completed immediately after the sale or lease or when the rendition of future services constitutes a material part of the sale or lease agreement, the notice of negotiation contemplated in subdivision (a) of this subsection (1) shall not be given to the buyer or lessee until the seller or lessor has furnished a certificate to the buyer or lessee which indicates that delivery of such goods has been made or such services completed and such certificate has been duly executed by the buyer or lessee and, in the case of future services, until the buyer or lessee shall forward to the holder a written reaffirmation of the completion of such future services which are the subject of such sale or lease. Such reaffirmation shall not be made until execution by the buyer or lessee of the certificate of completion. Such reaffirmation shall be forwarded directly by United States mail to the holder by the buyer or lessee. If the seller or lessor directly or indirectly obtains such reaffirmation, it shall be void and have no force or legal effect. A completion certificate need not take any particular form, but shall indicate the names and addresses of the parties to the consumer credit sale or consumer lease, the goods delivered or the services completed and the date on which actual delivery was made or actual performance was completed.

(e) Whenever any such negotiable instrument, and an instrument, contract or other writing (other than a negotiable instrument) executed in connection with such negotiable instrument, are negotiated and assigned to the same person, either the notices contemplated and provided for in this subsection (1) or the notices contemplated and provided for in section one hundred two of this article need by given, and it shall not be necessary for notices to be given pursuant to both this subsection (1) and said section one hundred two.

(2) Notwithstanding any provisions of this section, a holder shall be subject to any claim or defense based upon lack or failure of consideration.

(3) Nothing contained in this section shall be construed as affecting any buyer's or lessee's right of action, claim or defense which is otherwise provided for in this code or at common law.

(4) Nothing contained in this section shall be construed in any manner as affecting any negotiation of any negotiable instrument made prior to the operative date of this chapter.

(5) With respect to a consumer credit sale or consumer lease made or entered into more than one year after the operative date of this chapter, other than a sale or lease primarily for an agricultural purpose, the seller or lessor may not take a negotiable instrument other than a currently dated check as evidence of the obligation of the buyer or lessee. The holder in due course of a negotiable instrument taken in violation of this subsection shall, notwithstanding the provisions of section three hundred five, article three, chapter forty-six of this code, be subject to all claims and defenses arising from that specific consumer credit sale or consumer lease which the buyer or lessee has against the seller or lessor.

WV Legislature

(6) For the purpose of determining the amount owing to a holder in due course of a negotiable instrument evidencing an obligation of a buyer or lessee arising from a consumer credit sale or consumer lease:

(a) Payments received after the consolidation of two or more consumer credit sales, other than pursuant to a revolving charge account, are deemed to have been first applied to the payment of the sales first made; if the sales consolidated arose from sales made on the same day, payments are deemed to have been first applied to the smaller or smallest sale or sales;

(b) Payments received upon a revolving charge account are deemed to have been first applied to the payment of sales finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(7) A claim or defense which a buyer or lessee may assert against a holder in due course of a negotiable instrument under the provisions of this section may be asserted only as a matter of defense to or setoff against a claim by the holder: Provided, That if a buyer or lessee shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the holder in due course of a negotiable instrument were such holder to assert such claim against the buyer or lessee, then such buyer or lessee shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation in whole or in part of the indebtedness evidenced by such negotiable instrument or the release in whole or in part of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack or failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a buyer or lessee at any time, subject to the provisions of this code relating to limitation of actions.

(8) Notwithstanding any provisions of this section, a holder shall not be subject to any claim or defense arising from or growing out of personal injury or death resulting therefrom or damage to property.

WV Legislature

**§46A-2-102. Assignee subject to claims and defenses.**

The following provisions shall be applicable to instruments, contracts or other writings, other than negotiable instruments, evidencing an obligation arising from a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose: (1) Notwithstanding any term or agreement to the contrary or the provisions of article two, chapter forty-six of this code or section two hundred six, article nine of said chapter forty-six, an assignee of any such instrument, contract or other writing shall take and hold such instrument, contract or other writing subject to all claims and defenses of the buyer or lessee against the seller or lessor arising from that specific consumer credit sale or consumer lease of goods or services but the total of all claims and defenses which may be asserted against the assignee under this subsection or subsection (3) or subsection (4) of this section shall not exceed the amount owing to the assignee at the time of such assignment except (i) as to any claim or defense founded in fraud: Provided, That as to any claim or defense founded in fraud arising on or after July 1, 1990 the total sought shall not exceed the amount of the original obligation under the instrument, contract or other writing and (ii) for any excess charges and penalties recoverable under section one hundred one, article five of this chapter.

(2) For the purpose of determining the amount owing to an assignee of any such instrument, contract or other writing evidencing an obligation of a buyer or lessee arising from a consumer credit sale or consumer lease:

(a) Payments received after the consolidation of two or more consumer credit sales, other than pursuant to a revolving charge account, are deemed to have been first applied to the payment of the sales first made; if the sales consolidated arose from sales made on the same day, payments are deemed to have been first applied to the smaller or smallest sale or sales;

(b) Payments received upon a revolving charge account are deemed to have been first applied to the payment of sales finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(3) A claim or defense which a buyer or lessee may assert against an assignee of such instrument, contract or other writing under the provisions of this section may be asserted only as a matter of defense to or setoff against a claim by the assignee: Provided, That if a buyer or lessee shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the assignee were such assignee to assert such claim against the buyer or lessee, then such buyer or lessee shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation, in whole or in part, of the indebtedness evidenced by such instrument, contract or other writing or the release, in whole or in part, of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack or failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a buyer

WV Legislature

or lessee at any time, subject to the provisions of this code relating to limitation of actions.

(4) Notwithstanding any provisions of this section, an assignee shall be subject to any claim or defense based upon lack or failure of consideration.

(5) Nothing contained in this section shall be construed as affecting any buyer's or lessee's right of action, claim or defense which is otherwise provided for in this code or at common law.

(6) Nothing contained in this section shall be construed in any manner as affecting any assignment of any such instrument, contract or other writing, made prior to the operative date of this chapter.

(7) Notwithstanding any provisions of this section, an assignee shall not be subject to any claim or defense arising from or growing out of personal injury or death resulting therefrom or damage to property.

WV Legislature

**§46A-2-103. Lender subject to claims and defenses arising from sales.**

(a) The following provisions shall be applicable to claims and defenses of borrowers, arising from consumer sales, with respect to consumer loans:

A lender, other than the issuer of a lender credit card or a lender of a student loan made on or after July 1, 1992, in accordance with the federal higher education act of 1965, as amended, who, with respect to a particular transaction, makes a consumer loan for the purpose of enabling a borrower to buy goods or services, other than primarily for an agricultural purpose, is subject to all claims and defenses of the borrower against the seller arising from that specific sale of goods or services if the lender participates in or is connected with the sales transaction. A lender is considered to be connected with such sales transaction if:

(i) The lender and the seller have arranged for a commission or brokerage or referral fee for the extension of credit by the lender;

(ii) The lender is a person related to the seller unless the relationship is remote or is not a factor in the transaction;

(iii) The seller guarantees the loan or otherwise assumes the risk of loss by the lender upon the loan other than a risk of loss arising solely from the seller's failure to perfect a lien securing the loan;

(iv) The lender directly supplies the seller with documents used by the borrower to evidence the transaction or the seller directly supplies the lender with documents used by the borrower to evidence the transaction;

(v) The loan is conditioned upon the borrower's purchase of the goods or services from the particular seller, but the lender's payment of proceeds of the loan to the seller does not in itself establish that the loan was so conditioned;

(vi) The seller in such sale has specifically recommended such lender by name to the borrower and the lender has made ten or more loans to borrowers within a period of twelve months within which period the loan in question was made, the proceeds of which other ten or more loans were used in consumer credit sales with the seller or a person related to the seller, if in connection with such other ten or more loans, the seller also specifically recommended such lender by name to the borrowers involved; or

(vii) The lender was the issuer of a credit card other than a lender credit card which may be used by the borrower in the sales transaction as a result of a prior agreement between the issuer and the seller.

(b) The total of all claims and defenses which a borrower is permitted to assert against a lender under the provisions of this section shall not exceed that portion of the loan used for that sale, except (1) as to any claim or defense founded in fraud: Provided, That as to any



WV Legislature

claim or defense founded in fraud arising on or after July 1, 1990, the total sought shall not exceed the original amount of the sale and (2) for any excess charges and penalties recoverable under section one hundred one, article five of this chapter.

(c) An agreement may not limit or waive the claims and defenses of a borrower under this section.

(d) "Lender credit card" as used in this section means an arrangement or loan agreement, other than a seller credit card, pursuant to which a lender gives a debtor the privilege of using the credit card in transactions which entitles the user thereof to purchase goods or services from at least one hundred persons not related to the issuer of the lender credit card, out of which debt arises:

(1) By the lender's honoring a draft or similar order for the payment of money drawn or accepted by the consumer;

(2) By the lender's payment or agreement to pay the consumer's obligation; or

(3) By the lender's purchase from the obligee of the consumer's obligations.

(e) A claim or defense which a borrower may assert against a lender under the provisions of this section may be asserted only as a defense to or setoff against a claim by the lender: Provided, That if a borrower shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the lender were such lender to assert such claim against the borrower, then the borrower shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation, in whole or in part, of the indebtedness evidenced by a negotiable instrument or other instrument or the release, in whole or in part, of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack or failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a borrower at any time, subject to the provisions of this code relating to limitation of actions.

(f) Nothing contained in this section shall be construed in any manner as affecting any loan made prior to the operative date of this chapter.

(g) Notwithstanding any provisions of this section, a lender shall not be subject to any claim or defense arising from or growing out of personal injury or death resulting therefrom or damage to property.

(h) Nothing contained in this section shall be construed as affecting any buyer's or lessee's right of action, claim or defense which is otherwise provided for in this code or at common law.

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**§46A-2-103a. Lessor subject to claims and defenses arising from leases.**

(a) The following provisions shall be applicable to claims and defenses of lessees arising from finance leases which are consumer leases or arising from sale and lease back agreements which include consumer leases:

(1) A lessor, other than the issuer of a credit card who, with respect to a particular transaction, makes a consumer lease for the purpose of enabling a lessee to lease goods or services, other than primarily for an agricultural purpose, is subject to all claims and defenses of the lessee against the supplier arising from that specific lease of goods or services if the lessor participates in or is connected with the lease transaction. A lessor is considered to be connected with the lease transaction if:

(A) The lessor and the supplier have arranged for a commission or brokerage or referral fee for the agreement to lease by the lessor;

(B) The lessor is a person related to the supplier unless the relationship is remote or is not a factor in the transaction;

(C) The supplier guarantees the payments or otherwise assumes the risk of loss by the lessor upon the lease other than a risk of loss arising solely from the lessor's failure to perfect a lien if necessary;

(D) The lessor directly supplies the supplier with documents used by the lessee to evidence the transaction, or the supplier directly supplies the lessor with documents used by the lessee to evidence the transaction;

(E) The lease is conditioned upon the lessee's lease of the goods or services from the particular supplier, but the lessor's payment of proceeds of the lease to the supplier does not in itself establish that the lease was so conditioned;

(F) The supplier in such sale has specifically recommended such lessor by name to the lessee, and the lessor has made ten or more leases to lessees within a period of twelve months, within which period the lease in question was made, for goods or services supplied by the supplier or a person related to the supplier, if in connection with such other ten or more leases, the supplier also specifically recommended such lessor by name to the lessees involved; or

(G) The supplier was the issuer of a credit card other than a lender credit card which may be used by the lessee in the transaction as a result of a prior agreement between the issuer and the supplier.

(b) The total of all claims and defenses which a lessee is permitted to assert against a lessor under the provisions of this section shall not exceed the sums due to the lessor for that lease, except (1) As to any claim or defense founded in fraud: Provided, That as to any claim or defense founded in fraud, the total sought shall not exceed the total sum due or payable

WV Legislature

under the lease, and (2) for any excess charges and penalties recoverable under section one hundred one, article five of this chapter.

(c) An agreement may not limit or waive the claims and defenses of a lessee under this section.

(d) "Lender credit card" as used in this section means an arrangement or loan agreement, other than a seller credit card, pursuant to which a lender gives a debtor the privilege of using the credit card in transactions which entitle the user thereof to purchase goods or services from at least one hundred persons not related to the issuer of the lender credit card, out of which debt arises:

(1) By the lender's honoring a draft or similar order for the payment of money drawn or accepted by the consumer;

(2) By the lender's payment or agreement to pay the consumer's obligation; or

(3) By the lender's purchase from the obligee of the consumer's obligations.

(e) A claim or defense which a lessee may assert against a lessor under the provisions of this section may be asserted only as a defense to or setoff against a claim by the lessor: Provided, That if a lessee shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or set off against a claim which is asserted by the lessor, then the lessee shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation, in whole or in part, of the obligation evidenced by the lease agreement or the release, in whole or in part, of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack or failure of consideration, or in a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a lessee at any time, subject to the provisions of this code relating to limitation of actions.

(f) Nothing contained in this section shall be construed in any manner as affecting any transaction entered into prior to the operative date of this chapter.

(g) Notwithstanding any provisions of this section, a lessor shall not be subject to any claim or defense arising from or growing out of personal injury or death resulting therefrom, or damage to property.

(h) Nothing contained in this section shall be construed as affecting any lessee's right of action, claim or defense which is otherwise provided in this code or at common law.

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**§46A-2-104. Notice to cosigners.**

(a) No person shall be held liable as cosigner, or be charged with personal liability for payment in a consumer credit sale, consumer lease or consumer loan unless that person, in addition to and before signing any instrument evidencing the transaction, signs and receives a separate notice which clearly explains his liability in the event of default by the consumer and also receives a copy of any disclosure required by the "Federal Consumer Credit Protection Act."

(b) Such notice shall be sufficient in a consumer credit sale or consumer loan if it appears under the conspicuous caption "NOTICE TO COSIGNER" and contains substantially the following language:

"You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay it if you have to, and that you want to accept this responsibility."

"You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount."

"The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record."

"This notice is not the contract that makes you liable for the debt."

The caption shall be typewritten or printed in at least twelve point bold upper case type. The body of the notice shall be typewritten or printed in at least eight point regular type, in upper or lower case, where appropriate.

(c) Such notice shall be sufficient in a consumer lease transaction if it appears under the conspicuous caption "NOTICE TO COSIGNER" and contains substantially the following language:

"You are being asked to guarantee this lease. Think carefully before you do. If the lessee doesn't pay, you will have to. Be sure you can afford to pay it if you have to, and that you want to accept this responsibility."

"You may have to pay up to the full amount if the lessee does not pay. You may also have to pay late fees or collection costs, which increase this amount."

"The creditor can collect this debt from you without first trying to collect from the lessee. The creditor can use the same collection methods against you that can be used against the lessee, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record."

WVLegislature

"This notice is not the contract which makes you liable for the debt."

The caption shall be typewritten or printed in at least twelve point bold upper case type. The body of the notice shall be typewritten or printed in at least eight point regular type, in upper or lower case, where appropriate.

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**§46A-2-105. Balloon payments.**

(1) With respect to a consumer credit sale or a consumer loan in which the initial total amount payable is less than $1,500, other than one primarily for an agricultural purpose or one pursuant to a revolving charge account or revolving loan account, if any scheduled payment is more than twice as large as the average of earlier scheduled payments, the consumer has the right to refinance the amount of that payment, hereinafter in this section referred to as a balloon payment, at the time it is due without penalty.

(2) With respect to a consumer credit sale or consumer loan whenever any scheduled payment is at least twice as large as the smallest of all earlier scheduled payments other than any down payment, any writing purporting to contain the agreement of the parties shall contain language in form and substance substantially similar to the following: THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS: Followed, if there is only one installment which is at least twice as large as the smallest of all earlier scheduled payments other than any down payment, by: AN INSTALLMENT OF $..... WILL BE DUE ON .....

or, if there is more than one such installment, by: LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS:

(The amount of every such installment and its due date shall be inserted).

(3) The provisions of this section shall not apply to the extent that the payment schedule is adjusted to the seasonal or irregular income of the consumer.

(4) Notwithstanding the foregoing provisions of this section, the commissioner may, by rules and regulations, if necessary to further protect consumers, otherwise regulate or control agreements to be entered into in a consumer credit sale or consumer loan transaction which provide for a balloon payment or prohibit parties from entering into any agreement in a consumer credit sale or consumer loan transaction which provides for a balloon payment.

WV Legislature

**§46A-2-106. Notice of consumer's right to cure default; cure; acceleration.**

After a consumer has been in default on any installment obligation or any other secured obligation for five days for failure to make a scheduled payment or otherwise perform pursuant to such a consumer credit sale, consumer lease or consumer loan other than with respect to a covenant to provide insurance for or otherwise to protect and preserve the property covered by a security interest, the creditor may give him or her notice of such fact in the manner provided for herein. Actual delivery of such notice to a consumer or delivery or mailing of same to the last known address of the consumer is sufficient for the purpose of this section. If given by mail, notice is given when it is deposited in a mailbox properly addressed and postage prepaid. Notice shall be in writing and shall conspicuously state the name, address and telephone number of the creditor to whom payment or other performance is owed, a brief description of the transaction, the consumer's right to cure such default and the amount of payment and other required performance and date by which it must be paid or accomplished in order to cure the default. A copy of the notice required by this section shall be: (i) Delivered or mailed to the last known address of any cosigner of the obligation in the manner set forth in this section unless the cosigner has waived in writing his or her right to receive copies of the notice: Provided, That a waiver of notice contained in the consumer credit sales agreement or consumer loan agreement does not constitute effective waiver of notice of the cosigner's right to receive notice of the consumer's default for purposes of this section; (ii) retained by the creditor; (iii) certified in the manner prescribed by this section by an officer or other authorized representative of such creditor; and (iv) notarized by a person licensed as a notary under the laws of the State of West Virginia or any other state or territory of the United States. The certification required by this section shall substantially conform to the following language:

"I, _____ (name of person certifying),

the _____ (title of person certifying)

of _____ (creditor's name), hereby certify that the notice of the consumer's right to cure default on which this certification appears (or to which this certification is attached) was on this _____ day of _____, 19_____, mailed to the person(s) whose name(s) appear herein (therein) at the address(es) set forth herein (therein).

_____"

(Signature)

Failure to send notice to a cosigner as required by this section does not, in and of itself, give rise to a cause of action against the creditor.

Except as hereinafter provided in this section, after a default on any installment obligation or any other secured obligation other than with respect to a covenant to provide insurance

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for or otherwise to protect and preserve the property covered by a security interest or lease, a creditor may not accelerate maturity of the unpaid balance of any such installment obligation or any other such secured obligation, commence any action or demand or take possession of collateral on account of default until ten days after notice has been given to the consumer of his or her right to cure such default. Until such period expires, the consumer shall have the right to cure any default by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges and by tendering any other performance necessary to cure such default. Any such cure shall restore a consumer to all his or her rights under the agreement the same as if there had been no default. A consumer who has been in default three or more times on the same obligation and who has been given notice of such fact three or more times shall not have the right to cure a default under this section even though previous defaults have been cured and his or her creditor's right to proceed against him or her and his or her collateral shall not be impaired or limited in any way by this section. There shall be no acceleration of the maturity of all or part of any amount owing in such a consumer credit sale, consumer lease or consumer loan, except where nonperformance specified in the agreement as constituting default has occurred.

WV Legislature

## §46A-2-107. Security in sales or leases.

(1) With respect to a consumer credit sale, a seller or issuer of a seller credit card may take a security interest in the property sold. In addition, a seller or issuer of a seller credit card may take a security interest in goods upon which services are performed or in which goods sold are installed or to which they are annexed, or in land to which the goods are affixed or which is maintained, repaired or improved as a result of the sale of the goods or services, if in the case of a security interest in land the debt secured is $1,500 or more, or, in the case of a security interest in goods the debt secured is $300 or more. The seller or issuer of a seller credit card may also take a security interest in any property of the buyer to secure the debt arising from a consumer credit sale primarily for an agricultural purpose. Except as provided with respect to cross-collateral in connection with consolidated debts, a seller or issuer of a seller credit card may not otherwise take a security interest in property of the buyer to secure the debt arising from a consumer credit sale.

(2) With respect to a consumer lease other than a lease primarily for an agricultural purpose, a lessor may not take a security interest in property of the lessee to secure the debt arising from the lease.

(3) A security interest taken in violation of this section is void.

(4) "Security interest" as used in this section means a security interest arising by agreement of the parties and does not include a lien arising by operation of law. Any such agreement must contain a description of the security interest retained and must contain a clear identification of each particular item of collateral, including if appropriate, the name of the manufacturer of such item and its make, model and serial number. If the item is a used or rebuilt sample or demonstrator, such fact shall also be stated in the security agreement.

WV Legislature

## §46A-2-108. Cross-collateral.

In addition to contracting for a security interest pursuant to the provisions on security in sales or leases, a seller or issuer of a seller credit card in a consumer credit sale may secure the debt arising from the sale by contracting for a security interest in other property if as a result of a prior sale the seller or issuer of a seller credit card has an existing security interest in the other property and such debts are consolidated. The seller or issuer of a seller credit card may also contract for a security interest in the property sold in the subsequent sale as security for the previous debt if such debts are consolidated.

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## §46A-2-109. Debt secured by cross-collateral.

(1) If debts arising from two or more consumer credit sales, other than sales primarily for an agricultural purpose or pursuant to a revolving charge account, are secured by cross-collateral and consolidated into one debt payable on a single schedule of payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of the cross- collateral and the consolidation are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made. To the extent debts are paid according to this section, security interests in items of property terminate as the debts originally incurred with respect to each item are paid.

(2) Payments received by the seller upon a revolving charge account are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of sales finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

(3) If the debts consolidated arose from two or more sales made on the same day, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of the smallest debt.

WV Legislature

## §46A-2-110. Referral sales or leases.

With respect to a consumer credit sale or consumer lease, the seller or lessor may not give or offer to give a rebate or discount or otherwise pay or offer to pay value to the buyer or lessee as an inducement for a sale or lease in consideration of his giving to the seller or lessor the names of prospective purchasers or lessees, or otherwise aiding the seller or lessor in making a sale or lease to another person, if the earning of the rebate, discount or other value is contingent upon the occurrence of an event subsequent to the time the buyer or lessee agrees to buy or lease. If a buyer or lessee is induced by a violation of this section to enter into a consumer credit sale or consumer lease, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his option, may rescind the agreement or retain the goods delivered and the benefit of any services performed, without any obligation to pay for them.

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## §46A-2-111. Consumer leases; information to be furnished.

With respect to a consumer lease the lessor shall give to the lessee the following information:

(1) Brief description or identification of the goods;

(2) Amount of any payment required at the inception of the lease;

(3) Amount paid or payable for official fees, registration, title privilege, certificate of title or license fees or taxes;

(4) Amount of other charges not included in the periodic payment and a brief description of the charges;

(5) Brief description of insurance to be provided or paid for by the lessor, including the types and amounts of the coverages;

(6) Number of periodic payments, the amount of each payment, the due date of the first payment, the due dates of subsequent payments or interval between payments, and the total amount payable by the lessee;

(7) Statement of the conditions under which the lessee may terminate the lease prior to the end of the term; and

(8) Statement of the liabilities the lease imposes upon the lessee at the end of the term.

WV Legislature

## §46A-2-112. Restriction on liability in consumer lease.

The obligation of a lessee upon expiration of a consumer lease, other than one primarily for an agricultural purpose, may not exceed twice the average payment allocable to a monthly period under the lease. This limitation does not apply to charges for damages to the leased property or for other default.

WV Legislature

## §46A-2-113. Notice of assignment.

A consumer is authorized to pay the original creditor until he receives notification of assignment of rights to payment pursuant to a consumer credit sale, consumer lease or a consumer loan and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the consumer, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the consumer may pay the original creditor.

WV Legislature

**§46A-2-114. Receipts; statements of account; evidence of payment.**

(1) The creditor shall deliver or mail to the consumer, without request, a written receipt for each payment by coin or currency on an obligation pursuant to a consumer credit sale, consumer lease or consumer loan. A periodic statement showing a payment received complies with this subsection.

(2) Upon written request of a consumer, the person to whom an obligation is owed pursuant to a consumer credit sale, consumer lease or consumer loan, other than one pursuant to a revolving charge account or revolving loan account, shall provide a written statement of the dates and amounts of payments made within the past twelve months and the total amount unpaid. The requested statement shall be provided without charge once during each year of the term of the sale, lease or loan. If additional statements are requested the creditor may charge not in excess of $3 for each additional statement.

(3) After a consumer has fulfilled all obligations with respect to a consumer credit sale, consumer lease or consumer loan, other than one pursuant to a revolving charge account or revolving loan account, the person to whom the obligation was owed shall, upon the request of the consumer, deliver or mail to the consumer written evidence acknowledging payment in full of all obligations with respect to the transaction.

WV Legislature

**§46A-2-115. Limitation on default charges.**

(a) Except for reasonable expenses, including costs and fees authorized by statute incurred in realizing on a security interest, the agreements that evidence a consumer credit sale or a consumer loan may not provide for charges as a result of default by the consumer other than those authorized by this chapter.

(b) With respect to this subsection:

(1) The phrase "consumer loan" shall mean a consumer loan secured by real property: (A) Originated by a bank or savings and loan association, or an affiliate, not solicited by an unaffiliated broker; (B) held by a federal home loan bank, the federal National Mortgage Association, the federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the West Virginia Housing Development Fund; or (C) insured or guaranteed by the Farmers Home Administration, the Veterans Administration or the Department of Housing and Urban Development.

(2) Except as provided in subdivision (3) of this subsection, the agreements that evidence a consumer loan may permit the recovery of the following charges: (A) Costs of publication; (B) an appraisal fee; (C) all costs incidental to a title examination including professional fees, expenses incident to travel and copies of real estate and tax records; (D) expenses incidental to notice made to lienholders and other parties and entities having an interest in the real property to be sold; (E) certified mailing costs; and (F) all fees and expenses incurred by a trustee incident to a pending trustee's sale of the real property securing the consumer loan.

(3) For purposes of the charges expressly authorized by this subsection, no charge may be assessed and collected from a consumer unless: (A) Each charge is reasonable in its amount; (B) each charge is actually incurred by or on behalf of the holder of the consumer loan; (C) each charge is actually incurred after the last day allowed for cure of the consumer's default pursuant to section one hundred six of this article and before the consumer reinstates the consumer loan or otherwise cures the default; (D) the holder of the consumer loan and the consumer have agreed to cancel any pending trustee's sale or other foreclosure on the real property securing the consumer loan; and (E) in the case of an appraisal fee, no appraisal fee has been charged to the consumer within the preceding six months.

(c) All payments made to a creditor in accordance with the terms of any consumer credit sale or consumer loan shall be credited upon receipt against payments due: Provided, That amounts received and applied during a cure period will not result in a duty to provide a new notice of right to cure: Provided, however, That partial amounts received during the period set forth in subdivision (3) subsection (b) of this section do not create an automatic duty to reinstate and may be returned by the creditor. Default charges shall be accounted for separately. Those recoverable charges set forth in said subsection arising during the period described therein may be added to principal.

(d) At least once every twelve months, the holder or servicer of each consumer loan secured

WV Legislature

by real property against which the creditor assesses any default charge, and: (1) Not serviced by the originating lender or its affiliate or their successors by merger; (2) not held by a federal home loan bank, the federal National Mortgage Association, the federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the West Virginia Housing Development Fund; or (3) not insured or guaranteed by the Farmers Home Administration, the Veterans Administration, Department of Housing and Urban Development, shall transmit to the consumer an accounting of every default charge assessed within the previous twelve months, including the date, amount and nature of the cost.

This subsection does not apply to delinquency charges permitted under sections one hundred twelve and one hundred thirteen, article three of this chapter; credit line over-the-limit fees; deferral charges permitted under section one hundred fourteen of said article; collateral protection insurance permitted under section one hundred nine-a of said article; and advances to pay taxes.

(e) A provision in violation of this section is unenforceable. The amendments to this section by acts of the Legislature in the regular session of 2003 are a clarification of existing law and shall be retroactively applied to all agreements in effect on the date of passage of the amendments, except where controversies arising under those agreements are pending prior to the date of passage of the amendments.

(f) Nothing in this section limits the expenses incidental to a trustee’s sale of real property that are recoverable pursuant to section seven, article one, chapter thirty-eight of this code.

WV Legislature

**§46A-2-116. Assignment of earnings.**

(1) The maximum part of the aggregate disposable earnings of an individual for any workweek which may be subjected to any one or more assignments of earnings for the payment of a debt or debts arising from one or more consumer credit sales, consumer leases, or consumer loans, or one or more sales as defined in §46A-6-102 of this code, may not exceed 25 percent of his or her disposable earnings for that week.

(2) As used in this section:

(a) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld; and

(b) "Assignment of earnings" includes all forms of assignments, deductions, transfers, or sales of earnings to another, either as payment or as security, and whether stated to be revocable or nonrevocable, and includes any deductions authorized under the provisions of §21-5-3 of this code, except deductions for union, labor organization, or club dues or fees, pension plans, payroll savings plans, charities, stock purchase plans, and any form of insurance offered by an employer.

(3) Any assignment of earnings and any deduction under §21-5-3 of this code shall be revocable by the employee at will at any time, notwithstanding any provision to the contrary.

(4) The priority of multiple assignments of earnings shall be according to the date and time of each such assignment.

WV Legislature

## §46A-2-117. Authorization to confess judgment prohibited.

A consumer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale, consumer lease or a consumer loan. An authorization in violation of this section is void. The provisions of this section shall not be construed as in any way impliedly authorizing a confession of judgment in any other type of transaction.

WV Legislature

**§46A-2-118. No garnishment before judgment.**

Prior to entry of judgment in an action against the debtor for debt arising from a consumer credit sale, consumer lease or a consumer loan, the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings. The provisions of this section shall not be construed as in any way impliedly authorizing garnishment before judgment in any other type of transaction.

WV Legislature

**§46A-2-119. Restrictions on deficiency judgments.**

(1) This section applies to a deficiency on a consumer credit sale of goods or services and on a consumer loan in which the lender is subject to claims and defenses arising from sales.

(2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest and the balance owed for the goods repossessed or surrendered was at the time of such repossession or surrender $1,000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of the goods, and the seller's duty to dispose of the collateral is governed by the provisions on disposition of collateral of the "Uniform Commercial Code."

(3) If the seller repossesses or voluntarily accepts a surrender of goods which were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the balance owed on such debt was at the time of such repossession or surrender $1,000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale, and the seller's duty to dispose of the collateral is governed by the provisions on disposition of collateral of the "Uniform Commercial Code."

(4) If the lender takes possession or voluntarily accepts a surrender of goods in which he has a security interest to secure a debt arising from a consumer loan in which the lender may be subject to claims and defenses arising from sales and the balance owed on the net proceeds of the loan paid to or for the benefit of the borrower was at the time of such repossession or surrender $1,000 or less, the borrower is not personally liable to the lender for the unpaid balance of the debt arising from the loan and the lender's duty to dispose of the collateral is governed by the provisions on disposition of collateral of the "Uniform Commercial Code."

(5) For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to revolving charge accounts or revolving loan accounts, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of debt secured by various security interests.

(6) The consumer may be liable in damages to the creditor if the consumer has wrongfully damaged the collateral or if after default and demand, the consumer has wrongfully failed to make the collateral available to the creditor.

(7) If the creditor elects to bring an action against the consumer for a debt arising from a consumer credit sale of goods or services or from a consumer loan in which the lender is subject to claims and defenses arising from sales, when under this section he would not be entitled to a deficiency judgment if he took possession of the collateral, and obtains judgment:

(a) He may not take possession of the collateral, and

WV Legislature

(b) The collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

WV Legislature

## §46A-2-119a. Secured transaction; use of price guide value in calculating deficiency or surplus.

****Clerk's NOTE: This section was amended to bring it into conformity with the newly enacted article nine, chapter forty-six, which will take effect July 1, 2001.****

(a) This section applies to the following transactions:

(1) Transactions in which a purchase money security interest is taken in collateral which is being purchased primarily for a personal, family, household or agricultural purpose;

(2) Transactions in which a security interest is taken in collateral which was used primarily for a personal, family, household or agricultural purpose prior to the giving the security interest; or

(3) Transactions in which a security interest is taken in collateral for a debt that was incurred primarily for a personal, family, household or agricultural purpose.

(b) This section takes effect on July 1, 2002, and is applicable notwithstanding the provisions of:

(1) Section six hundred ten, article nine, chapter forty-six of this code, providing that disposition may only be by certain public or private sale, lease or license procedures;

(2) Section six hundred ten, article nine, chapter forty-six of this code, requiring that those procedures be commercially reasonable;

(3) Section six hundred fifteen, article nine, chapter forty-six of this code, providing for the application of the proceeds;

(4) Section six hundred twenty, article nine, chapter forty-six of this code, requiring disposition by sale, lease or license in certain circumstances; and

(5) Section six hundred two, article nine, chapter forty-six of this code, providing that these sections may not be waived or varied by agreement.

(c) For purposes of this section, the term "debtor" shall be deemed to refer collectively to each person who is indebted to a secured creditor in connection with a consumer lease or consumer loan, whether the person's obligation arises as a comaker, endorser or guarantor of the lease or loan.

(d) After a default by the debtor and after the secured creditor takes or receives possession of collateral or makes collateral unusable as provided in section six hundred nine, article nine, chapter forty-six of this code, the secured creditor may send a written proposal to the debtor setting forth a value for the secured creditor's collateral which value, less any expenses of taking and holding the collateral, shall be credited against the debtor's

WV Legislature

obligation to the secured creditor. The written proposal must explain that:

(1) The proposal becomes effective only if the debtor agrees to it in writing but the debtor is not required to agree to the written proposal;

(2) If the debtor does not agree to the proposal in writing, then the goods which are the subject of the written proposal will be disposed of in a "commercially reasonable" manner by the secured creditor in accordance with applicable law, and the amount received from the disposition of the collateral, less the expenses of taking and holding the collateral, preparing the collateral of the sale or lease, and selling the collateral, will be the amount credited against the debtor's obligation to the secured creditor when calculating the deficiency owed by the debtor to the secured creditor or the surplus owed by the secured creditor to the debtor;

(3) If the debtor agrees to the written proposal, then the debtor will thereby release and waive any claims against the secured creditor that the disposition of the collateral was not commercially reasonable or was otherwise improper; and

(4) The written proposal may set forth a date and time by which the debtor's written agreement must be received by secured creditor in order for the agreement to become effective.

(5) The following form, when reproduced on a single sheet of paper with no other statements or agreements and accurately completed, meets the requirements of this section even if it contains typographical or other minor errors that are not misleading:

[*Name and address of secured party*]

[*Date*]

TO: [*Name and address of debtor*]

OFFER TO CREDIT PRICE GUIDE VALUE

We have possession of your [*describe collateral*] ("property") (or we have made it unusable by you), because you broke the terms of our agreement.

By law, we may sell, lease or license this property in any commercially reasonable manner. If we choose to sell the property at a public sale we will give you notice of the date, time and place of the sale and you may attend the sale and bring bidders if you want. If we choose to sell the property at a private sale we will give you notice of the date after which the sale will take place. From the money we are paid from the sale of the property, we may subtract our expenses in getting the property from you, storing it, preparing and selling, leasing or licensing it. The sale money left over after these expenses are subtracted will then be subtracted from what you owe us. If we receive less money than you owe, you will still owe us the difference. If we receive more money than you owe, you will get the extra money back

WV Legislature

(unless we are required to pay it to someone else).

Instead of selling, leasing or licensing this property, we are now offering to subtract the amount of $ [*enter amount*] from what you owe us. We have calculated this amount by adding the retail value of the property of $ [*insert retail value*] and the [*insert other value pursuant to § 46A-2-119a(5)*] value of the property of $ [*enter amount*] and dividing that total by 2 ("value amount"). These values were obtained from _____, a price guide in general use as of the date we got possession of or rendered the property unusable by you. From the value amount we have subtracted our expenses of $ [*enter amount*] in taking back the property from you, and our expenses of $ [*enter amount*] for storing the property through the date below by which you must respond to this offer.

You do not have to accept this offer. To agree to our offer, you must sign this notice at the bottom no sooner than one day after the date on which you received this offer and deliver it or have it delivered to us before [*enter date by which the secured party determines the offer must be accepted*] . If you agree to this offer, you are giving up any right to hold us liable for the way that we sell, lease or otherwise dispose of the property and account for the proceeds.

You can get the property back at any time before you accept this offer or we sell, lease or license the property by paying us the full amount you owe (not just the past due payments), including our expenses so far. To learn the exact amount you must pay, you may call us at [*telephone number*] . If you want us to explain to you in writing how we calculated the amount that you owe us, you may call us at [*telephone number*] or write us at [*secured party's address*] and request a written explanation.

[We are sending this notice to the following other people who owe money under our agreement. They will also have to agree to our offer or we will sell the property as we normally do.

[*Names of all other debtors and obligors, if any*]]

I accept the offer:

Signed _____

Date of signature _____

[End of Form]

(e) (1) The value of the collateral set forth in the written proposal shall be determined from any price guide used generally by persons who are not purchasers or lessees of that type of collateral and who insure, lend money for the purchase of, lease or otherwise deal in goods of the same type as the collateral when it would be to the advantage of the user for the price guide to have higher values.

WV Legislature

(2) The value of the collateral set forth in the written proposal shall be determined as of the date the secured party took possession of the collateral, received possession of the collateral or rendered the collateral unusable.

(3) For a motor vehicle, as that term is defined by section one, article one, chapter seventeen-a of this code, the value of the motor vehicle collateral shall be calculated by adding together the retail value and the trade-in value for the motor vehicle and dividing that sum by two.

(4) For a manufactured home, mobile home or house trailer, as those terms are defined in section one, article six, chapter seventeen-a of this code, which at the time of default was located on a lot owned by the debtor, an obligor or a person related to the debtor, the value of the manufactured home, mobile home or house trailer collateral shall be calculated by adding together the retail value and the wholesale value designated for the manufactured home that is moved for resale, mobile home or house trailer and dividing that sum by two.

(5) For a manufactured home, mobile home or house trailer, as those terms are defined in section one, article six, chapter seventeen-a of this code, which at the time of default was located on a lot owned by a person or organization in the business of renting or leasing lots or on a lot owned by a person who is not the debtor, an obligor or a person related to the debtor or obligor, the value of the manufactured home, mobile home or house trailer collateral shall be calculated by adding together the retail value and the wholesale value designated for collateral that is offered for sale without moving the collateral from its current location, and dividing that sum by two.

(6) For other personal property, the value of the collateral shall be calculated by adding together the used retail value and the highest listed wholesale value for the property and dividing that sum by two.

(f) If the debtor agrees in writing to the written proposal within the time period prescribed by the secured creditor, then:

(1) The collateral value as calculated in subsection (e) above, less any expenses of taking and holding the collateral, shall be applied to the indebtedness as provided in section six hundred fifteen, article nine, chapter forty-six of this code;

(2) Any expenses incurred by the secured creditor in the actual sale or lease of the collateral or preparing the collateral for sale or lease may not be charged to the debtor but must be born by the secured creditor; and

(3) The secured creditor is not required to dispose of the collateral in a commercially reasonable manner and is not liable for any failure to comply with any law of this state relating to the disposition of the collateral or application of the proceeds.

(g) The written agreement of the debtor is not valid unless it is signed by the debtor on or

WV Legislature

after the next calendar day after it is received by the debtor or the second calendar day after it was sent to the debtor.

(h) If the debtor is more than one person, then the secured creditor must send the proposal described in subsection (d) of this section to all such persons. If any one of the persons indebted to a secured creditor on a consumer lease or consumer loan does not agree in writing to the proposal or does not respond timely to the proposal, then the secured creditor must proceed with a sale or other disposition of its collateral as provided in article nine, chapter forty-six of this code.

(i) If a person other than the debtor has a recorded ownership interest in property securing the debtor's obligation to a secured creditor and such other person is not also indebted to the secured creditor on such obligation, then the secured creditor must send a copy of the proposal described in subsection (d) of this section to such other person but is not required to obtain such other person's consent or agreement to the proposal in order to effect the proposal.

(j) Upon receipt of the debtor's executed acceptance of a written proposal described in subsection (d) of this section, title to the collateral described in the proposal shall be deemed to pass to the secured creditor unless such collateral is a vehicle, manufactured home, mobile home or house trailer.

(k) Upon presentation of the debtor's executed acceptance of a written proposal described in subsection (d) of this section to the department of motor vehicles and a certificate of title to the debtor's vehicle, manufactured home, mobile home or house trailer described in the written proposal, the department of motor vehicles shall issue a new certificate of title to the vehicle, manufactured home, mobile home or house trailer in the name of the secured creditor as the owner thereof.

(l) Nothing in this section may be construed to create, directly or indirectly, or impose a duty on the secured creditor to make a written offer or give notice under this section. A secured creditor's failure to make a written proposal shall not subject the secured creditor to any liability to the debtor or any other person.

(m) The provisions of this section may not be waived or varied.

WV Legislature

**§46A-2-120. Extortionate extensions of credit.**

(1) If the court finds as a matter of fact that it was the understanding of the creditor and the consumer at the time an extension of credit was made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person, the repayment of the extension of credit is unenforceable through civil judicial process against the consumer.

(2) If a court finds as a matter of fact that an extension of credit was made at a rate in excess of that permitted for such transaction by the provisions of this chapter and that the creditor then had a reputation for the use or threat of use of violence or other criminal means to cause harm to the person, reputation or property of any person to collect extensions of credit or to punish the nonrepayment thereof, there is prima facie evidence that the extension of credit was unenforceable under subsection (1).

WV Legislature

**§46A-2-121. Unconscionability; inducement by unconscionable conduct.**

(a) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:

(1) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct such as affirmative misrepresentations, active deceit or concealment of a material fact, the court may refuse to enforce the agreement; or

(2) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

(c) For the purpose of this section, a charge or practice expressly permitted by this chapter is not unconscionable.

WV Legislature

## §46A-2-122. Definitions.

For the purposes of this section and sections one hundred twenty-three, one hundred twenty-four, one hundred twenty-five, one hundred twenty-six, one hundred twenty-seven, one hundred twenty-eight, one hundred twenty-nine and one hundred twenty-nine-a of this article, the following terms shall have the following meanings:

(a) "Consumer" means any natural person obligated or allegedly obligated to pay any debt and includes any duly appointed personal representative of the estate of a natural person obligated or allegedly obligated to pay any debt.

(b) "Claim" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

(c) "Debt collection" means any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer.

(d) "Debt collector" means any person or organization engaging directly or indirectly in debt collection. The term includes any person or organization who sells or offers to sell forms which are, or are represented to be, a collection system, device or scheme, and are intended or calculated to be used to collect claims. The term excludes attorneys representing creditors provided the attorneys are licensed in West Virginia or otherwise authorized to practice law in the state of West Virginia and handling claims and collections in their own name as an employee, partner, member, shareholder or owner of a law firm and not operating a collection agency under the management of a person who is not a licensed attorney.

WV Legislature

**§46A-2-123. Practice of law by debt collectors.**

Unless a licensed attorney in this state, no debt collector shall engage in conduct deemed the practice of law. Without limiting the general application of the foregoing, the following conduct is deemed the practice of law:

(a) The performance of legal services, furnishing of legal advice or false representation, direct or by implication, that any person is an attorney;

(b) Any communication with consumers in the name of an attorney or upon stationery or other written matter bearing an attorney's name; and

(c) Any demand for or payment of money constituting a share of compensation for services performed or to be performed by an attorney in collecting a claim.

WV Legislature

**§46A-2-124. Threats or coercion.**

No debt collector shall collect or attempt to collect any money alleged to be due and owing by means of any threat, coercion or attempt to coerce. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The use, or express or implicit threat of use, of violence or other criminal means, to cause harm to the person, reputation or property of any person;

(b) The accusation or threat to accuse any person of fraud, any crime, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule or contempt of society;

(c) False accusations made to another person, including any credit reporting agency, that a consumer is willfully refusing to pay a just debt, or the threat to so make false accusations;

(d) The threat to sell or assign to another the obligation of the consumer with an attending representation or implication that the result of such sale or assignment would be that the consumer would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;

(e) The threat that nonpayment of an alleged claim will result in the:

(1) Arrest of any person; or

(2) Garnishment of any wages of any person or the taking of other action requiring judicial sanction, without informing the consumer that there must be in effect a judicial order permitting such garnishment or such other action before it can be taken; and

(f) The threat to take any action prohibited by this chapter or other law regulating the debt collector's conduct.

WV Legislature

## §46A-2-125. Oppression and abuse.

No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The use of profane or obscene language or language that is intended to unreasonably abuse the hearer or reader;

(b) Engaging any person in telephone conversation without disclosure of the caller's identity and with the intent to annoy, harass or threaten any person at the called number;

(c) Causing expense to any person in the form of long distance telephone tolls, telegram fees or other charges incurred by a medium of communication, by concealment of the true purpose of the communication; and

(d) Calling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number. In determining whether a debt collector's conduct violates this section, the debt collector's conduct will be evaluated from the standpoint of a reasonable person. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after eight o'clock antemeridian and before nine o'clock postmeridian, local time at the consumer's location.

WV Legislature

**§46A-2-126. Unreasonable publication.**

No debt collector shall unreasonably publicize information relating to any alleged indebtedness or consumer. For purposes of this section, a debt collector does not unreasonably publicize information relating to any alleged indebtedness by identifying themselves to the debtor by name, identifying the debt collector's employer by name, if expressly requested by the debtor, or by providing a telephone number or other contact information to the debtor. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The communication to any employer or his agent before judgment has been rendered of any information relating to an employee's indebtedness other than through proper legal action, process or proceeding;

(b) The disclosure, publication or communication of information relating to a consumer's indebtedness to any relative or family member of the consumer if such person is not residing with the consumer, except through proper legal action or process or at the express and unsolicited request of the relative or family member;

(c) The disclosure, publication or communication of any information relating to a consumer's indebtedness to any other person other than a credit reporting agency, by publishing or posting any list of consumers, commonly known as "deadbeat lists", except lists to prevent the fraudulent use of credit accounts or credit cards, by advertising for sale any claim to enforce payment thereof, or in any manner other than through proper legal action, process or proceeding; and

(d) The use of any form of communication to the consumer, which ordinarily may be seen by any other persons, that displays or conveys any information about the alleged claim other than the name, address and phone number of the debt collector.

Nothing in this chapter shall prohibit a creditor or debt collector from communicating with any person other than the consumer for the purpose of acquiring or confirming the consumer's location information provided they do so in a manner consistent with the provisions of 15 U. S. C. § 1692b, as the same may be amended from time to time. For purposes of this section, "communication" or "communicating" or any derivation of those terms shall not include the filing of a complaint or other document, pleading or filing with any court.

WV Legislature

**§46A-2-127. Fraudulent, deceptive or misleading representations.**

No debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The use of any business, company or organization name while engaged in the collection of claims, other than the true name of the debt collector's business, company or organization;

(b) Any false representation that the debt collector has in his possession information or something of value for the consumer that is made to solicit or discover information about the consumer;

(c) The failure to clearly disclose the name and full business address of the person to whom the claim has been assigned for collection, or to whom the claim is owed, at the time of making any demand for money;

(d) Any false representation or implication of the character, extent or amount of a claim against a consumer, or of its status in any legal proceeding;

(e) Any false representation or false implication that any debt collector is vouched for, bonded by, affiliated with or an instrumentality, agent or official of this state or any agency of the federal, state or local government;

(f) The use or distribution or sale of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by a court, an official or any other legally constituted or authorized authority, or which creates a false impression about its source, authorization or approval;

(g) Any representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation; and

(h) Any false representation or false impression about the status or true nature of or the services rendered by the debt collector or his business.

WVLegislature

## §46A-2-128. Unfair or unconscionable means.

No debt collector may use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

(a) The seeking or obtaining of any written statement or acknowledgment in any form that specifies that a consumer's obligation is one incurred for necessaries of life where the original obligation was not in fact incurred for such necessaries;

(b) The seeking or obtaining of any written statement or acknowledgment in any form containing an affirmation of any obligation by a consumer who has been declared bankrupt except where such affirmation is obtained pursuant to applicable bankruptcy law;

(c) The collection or the attempt to collect from the consumer all or any part of the debt collector's fee or charge for services rendered: Provided, That attorney's fees, court costs and other reasonable collection costs and charges necessary for the collection of any amount due upon delinquent educational loans made by any institution of higher education within this state may be recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection costs may not exceed thirty-three and one-third percent of the amount due and owing to any such institution: Provided, however, That nothing contained in this subsection shall be construed to limit or prohibit any institution of higher education from paying additional attorney fees and collection costs as long as such additional attorney fees and collection costs do not exceed an amount equal to five percent of the amount of the debt actually recovered and such additional attorney fees and collection costs are deducted or paid from the amount of the debt recovered for the institution or paid from other funds available to the institution;

(d) The collection of or the attempt to collect any interest or other charge, fee or expense incidental to the principal obligation unless such interest or incidental fee, charge or expense is expressly authorized by the agreement creating or modifying the obligation and by statute or regulation;

(e) Any communication with a consumer made more than three business days after the debt collector receives written notice from the consumer or his or her attorney that the consumer is represented by an attorney specifically with regard to the subject debt. To be effective under this subsection, such notice must clearly state the attorney's name, address and telephone number and be sent by certified mail, return receipt requested, to the debt collector's registered agent, identified by the debt collector at the office of the West Virginia Secretary of State or, if not registered with the West Virginia Secretary of State, then to the debt collector's principal place of business. Communication with a consumer is not prohibited under this subsection if the attorney fails to answer correspondence, return phone calls or discuss the obligation in question, or if the attorney consents to direct communication with the consumer. Regular account statements provided to the consumer

WV Legislature

and notices required to be provided to the consumer pursuant to applicable law shall not constitute prohibited communications under this section; and

(f) When the debt is beyond the statute of limitations for filing a legal action for collection, failing to provide the following disclosure informing the consumer in all written communication with such consumer that:

(1) When collecting on a debt that is not past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it. If you do not pay the debt, (INSERT OWNER NAME) may report or continue to report it to the credit reporting agencies as unpaid"; and

(2) When collecting on debt that is past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it and (INSERT OWNER NAME) cannot report it to any credit reporting agencies."

WV Legislature

## §46A-2-129. Postal violations.

No debt collector shall use, distribute, sell or prepare for use any written communication which violates or fails to conform to United States postal laws and regulations.

WV Legislature

**§46A-2-129a. Deceptive or oppressive telephone calls.**

No debt collector shall place a telephone call or otherwise communicate by telephone with a consumer or third party, at any place, including a place of employment, falsely stating that the call is "urgent" or an "emergency".

WV Legislature

**§46A-2-130. Limitation on garnishment.**

(1) For the purposes of the provisions in this chapter relating to garnishment:

(a) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld; and

(b) "Garnishment" means any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of a debt.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit sale or consumer loan may not exceed the lesser of:

(a) Twenty percent of his or her disposable earnings for that week, or

(b) The amount by which his or her disposable earnings for that week exceed fifty times the federal minimum hourly wage prescribed by section 6(a) (1) of the "Fair Labor Standards Act of 1938," U.S.C. Title 19, Sec. 206(a)(1), in effect at the time the earnings are payable.

(c) In the case of earnings for a pay period other than a week, the commissioner shall prescribe by rule a multiple of the federal minimum hourly wage equivalent in effect to that set forth in subdivision (b), subsection (2) of this section.

(3) No court may make, execute or enforce an order or process in violation of this section. Any time after a consumer's earnings have been executed upon pursuant to article five-a or article five-b, chapter thirty-eight of this code by a creditor resulting from a consumer credit sale, consumer lease or consumer loan, such consumer may petition any court having jurisdiction of such matter or the circuit court of the county wherein he or she resides to reduce or temporarily or permanently remove such execution upon his or her earnings on the grounds that such execution causes or will cause undue hardship to him or her or his or her family. When such fact is proved to the satisfaction of such court, it may reduce or temporarily or permanently remove such execution.

(4) No garnishment governed by the provisions of this section will be given priority over a voluntary assignment of wages to fulfill a support obligation, a garnishment to collect arrearages in support payments, or a notice of withholding from wages of amounts payable as support, notwithstanding the fact that the garnishment in question or the judgment upon which it is based may have preceded the support-related assignment, garnishment, or notice of withholding in point of time or filing.

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## §46A-2-131. No discharge or reprisal because of garnishment.

No employer shall discharge or take any other form of reprisal against an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a consumer credit sale, consumer lease or consumer loan.

WV Legislature

## §46A-2-132. Home solicitation; buyer's right to cancel; notice.

In addition to any other right to revoke an offer, a buyer shall have the right to cancel a home solicitation sale until midnight of the third business day after the day on which he has signed an agreement or offer to purchase. Cancellation shall become effective when the buyer gives written notice of his intention to cancel to the seller at the address stated in the agreement or offer to purchase. Notice of such cancellation, if given by mail, is given when it is deposited in a mailbox properly addressed and postage prepaid. Such notice of cancellation given by the buyer need not take any particular form and shall be sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home solicitation sale. Notwithstanding any above-mentioned provision, a buyer may not cancel a home solicitation sale where he has requested and the seller has provided goods or services without delay because of a bona fide emergency and either the seller has in good faith made a substantial beginning of performance of the agreement before the buyer has given notice of cancellation, or in the case of goods, such goods cannot be returned to the seller in substantially as good condition as when they were received by the buyer.

WV Legislature

## §46A-2-133. Form of agreement or offer to purchase; statement of buyer's rights.

In every home solicitation sale in this state, except where a buyer has requested a seller to provide goods or services without delay because of an emergency, the seller shall present to the buyer a written agreement or offer to purchase which designates as the date of the transaction the day on which the buyer has signed it and which contains a statement of the buyer's rights as hereinafter provided for. No such written agreement or offer to purchase shall be effective until after it has been signed by the buyer and he has written the date of such signature in his own handwriting. The statement must appear under the conspicuous caption:"BUYER'S RIGHT TO CANCEL" and read as follows:"If this agreement was solicited at a place other than the seller's business establishment at a fixed location and you decide you do not want these goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: (Name and mailing address of seller)." Until the seller has fully complied with this section, the buyer may cancel the home solicitation sale, by notifying the seller of his intention to cancel in any manner. Any written agreement or offer to purchase which contains the form and content of notice of cancellation required by the federal trade commission and which provides information substantially similar to that required by this section shall be deemed to comply fully with this section.

WV Legislature

**§46A-2-134. Restoration of down payment.**

Within ten days after a home solicitation sale has been cancelled or an offer to purchase has been revoked, the seller shall tender to the buyer any payment made by the buyer to him and any note or other evidence of indebtedness taken in the transaction. A provision permitting the seller to keep all or part of any payment, note or other evidence of indebtedness is in violation of this section and unenforceable. If any down payment included goods traded in, the seller shall return the goods in substantially as good a condition as when he received them. If a seller has failed to tender goods as required by this section, the buyer may elect to recover an amount equal to the trade-in allowance on such goods as stated in the agreement. Until a seller has complied with all the obligations imposed by this section, a buyer may keep any goods delivered to him by the seller and he is hereby given a lien on such goods for the purpose of making any recovery to which he is entitled by this section.

WV Legislature

**§46A-2-135. Buyer's duty; seller's right; no compensation for certain services.**

Within a reasonable time after a home solicitation sale has been cancelled or an offer to purchase has been revoked, the seller may demand and receive any goods delivered by him to the buyer as the result of the home solicitation sale. The buyer shall not be obligated to tender such goods to the seller at any place other than the buyer's residence. If the seller fails to demand possession of goods within such reasonable time, such goods shall become the buyer's property without any obligation to pay for them. For the purposes of this section, twenty days shall be presumed to be a reasonable time. The buyer shall take reasonable care of such goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk. Where the seller has performed any service pursuant to a home solicitation sale prior to its cancellation or prior to giving the statement required in section one hundred thirty-three of this article, he shall not be entitled to any compensation for such performance.

WV Legislature

**§46A-2-136. Personal property exemptions.**

Any consumer residing in this state may set apart and hold personal property to be exempt from execution or other judicial process resulting from consumer credit transactions or consumer leases, except for the purchase money due on such property, in such amounts as follows: Children's books, pictures, toys and other such personal property of children; all medical health equipment used for health purposes by the consumer, his or her spouse and any dependent of such consumer; and personal property set apart and held as exempt pursuant to section one, article eight, chapter thirty-eight of this code. When a consumer claims personal property as exempt under the provisions of this section, he or she shall deliver a list containing all the personal property owned or claimed by him or her and all items of such property he or she claims as exempt hereunder, with the value of each separate item listed according to his or her best knowledge, to the officer holding the execution or other such process. Such list shall be sworn to by affidavit. If the value of the property named in such list exceeds the amounts specified in this section, the consumer shall state at the foot thereof what part of such property he or she claims as exempt. If such value does not exceed the amounts specified in this section, the claim of exemption shall be held to extend to the whole thereof without stating more and, if no appraisement is demanded, the property so claimed shall be set aside as exempt. Where the consumer owning exempt property is absent or incapable of acting or neglects or declines to act hereunder, the claim of exemption may be made, the list delivered and the affidavit made by his or her spouse or by or on behalf of a dependent of the consumer, with the same effect as if the owner had done so. Upon receipt of such a list, the officer to whom it is given shall immediately exhibit such list to the creditor or his or her agent or attorney. The rights granted and procedures provided in article eight, chapter thirty-eight of this code shall apply to any proceeding under this section, except that the provisions of section three of such article shall not apply.

WV Legislature

**§46A-2-137. Service of process on certain nonresidents.**

Any nonresident person, except a nonresident corporation authorized to do business in this state pursuant to the provisions of chapter thirty-one of this code, who takes or holds any negotiable instrument, nonnegotiable instrument, or contract or other writing, arising from a consumer credit sale or consumer lease which is subject to the provisions of this article, other than a sale or lease primarily for an agricultural purpose, or who is a lender subject to the provisions of section one hundred three of this article, shall be conclusively presumed to have appointed the Secretary of State as his attorney-in-fact with authority to accept service of notice and process in any action or proceeding brought against him arising out of such consumer credit sale, consumer lease or consumer loan. A person shall be considered a nonresident hereunder if he is a nonresident at the time such service of notice and process is sought. No act of such person appointing the Secretary of State shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the Secretary of State with the original notice or process, together with the fee required by section two, article one, chapter fifty-nine of this code, the Secretary of State shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, by a means which may include electronic issuance and acceptance of electronic return receipts, to such person at his address, which address shall be stated in such process or notice: Provided, That after receiving verification from the United States postal service that acceptance of process or notice has been signed, the Secretary of State shall notify the clerk's office of the court from which the process or notice was issued by a means which may include electronic notification. If the process or notice was refused or undeliverable by the United States postal service the Secretary of State shall return refused or undeliverable mail to the clerk's office of the court from which the process or notice was issued. But no process or notice shall be served on the Secretary of State or accepted fewer than ten days before the return date thereof. The court may order such continuances as may be reasonable to afford each defendant opportunity to defend the action or proceeding.The provisions for service of process or notice herein are cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action from having process or notice in such action served in any other mode and manner provided by law.

WVLegislature

**§46A-2-138. Buyer's right to cancel certain subscriptions and other obligations.**

(a) When a buyer has become indebted or paid cash on a contract for future deliveries of a correspondence course, on any contract entered into after the effective date of this section for truck driver, modeling or any other occupational or business course with a private proprietary school, or a multiple magazine subscriptions contract, other than for single subscriptions direct with the publisher thereof, the buyer may cancel and terminate such contract at any time by mailing a notice of cancellation by first class United States mail to the person to whom the indebtedness is owed, or with whom the contract was made, or his assignee, which notice shall forthwith terminate and cancel any financial obligation for goods or services not received by the buyer prior to the mailing of such notice of cancellation. The indebtedness for correspondence course materials received and not returned shall not exceed the reasonable store purchase price of such materials. In addition thereto, in regard to a correspondence course contract (in part or wholly by correspondence) the state Board of Education is hereby empowered and directed to promulgate rules and regulations setting forth policy for the refund of tuition fees or other indebtedness and cancellation in whole or in part of such a contract by a buyer, with regard to goods and services not fully delivered. Such rules and regulations shall include, but not be limited to, provisions for allowing such cancellation by a buyer by mailing notice of intent to cancel and returning all materials received, and that the seller shall return any moneys due buyer within twenty days upon receipt of the notice of cancellation.

(b) Any buyer not receiving a refund of all moneys paid and due within twenty days of cancellation of any contract under this section has a direct cause of action upon any bond filed with the Department of Education or board of regents to secure performance of legal obligation pursuant to the provisions of section ten, article two, chapter eighteen of this code.

(c) Notwithstanding any other provision of law to the contrary, with respect to contracts which are the subject of or are intended to become the subject of a transaction as provided for in this section, no seller shall:

(1) Exclude, modify or otherwise attempt to limit any provision addressed under this section; or

(2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available under this section.

Any such exclusion, modification or attempted limitation shall be void.

WV Legislature

## §46A-2-139. Unlawful commercial facsimile transmission; right of action for injunction, damages.

(a) No person or organization may initiate an unsolicited commercial facsimile transmission from within this state to another person or organization within this state after the initiator has been given notice that the recipient does not wish to receive such unsolicited commercial facsimile transmissions.

(b) A recipient of an unsolicited commercial facsimile transmission initiated in violation of subsection (a) of this section may bring an action to recover actual damages for any injury sustained by the receipt of unsolicited commercial facsimile transmissions. In lieu of actual damages, a minimum damage assessment of $300 may be recovered for violations of this section. Punitive damages may be awarded for the willful failure to cease initiating unsolicited commercial facsimile transmissions. Court costs and reasonable attorney fees may be awarded for violations of this section.

(c) A recipient of an unsolicited commercial facsimile transmission initiated in violation of subsection (a) of this section may bring an action to enjoin the initiator from sending any further unsolicited commercial facsimile transmissions to the recipient. Any court costs or other costs incident to such action including reasonable attorney fees may be awarded.

(d) In any proceeding under this section, an unsolicited commercial facsimile transmission may be deemed to have been committed either at the place of initiation or at the place of receipt of such transmission.

(e) For purposes of this section, notice shall be sufficient which conveys to the initiator of the unsolicited commercial transmission a desire on the part of the recipient to receive no further unsolicited commercial facsimile transmissions and shall be served by certified mail, return receipt requested, or by facsimile transmission.

WV Legislature

**§46A-2-140. Pleadings not to be the basis of a cause of action.**

Nothing contained in or omitted from a pleading filed in a court of this state shall be the basis of a cause of action under this chapter, nor shall the act of filing a civil action be the basis of a cause of action under this chapter unless the pleading or the filing of the civil action constitutes a material violation of sections 124(f), 127(d), 128(c), or 128(d) of this article: Provided, That demand in a pleading to award costs authorized by the applicable rules of civil procedure shall not be the basis of a cause of action under this chapter. For purposes of this section, a pleading shall have the same definition as provided in the Rules of Civil Procedure applicable in the court where the action is filed. Further, nothing contained in this section is intended to abrogate or abolish common law causes of action for malicious prosecution, abuse of process, harassment or frivolity, but in no case shall the contents of pleadings in a civil action nor the institution of a civil action in any court be the basis for a claim of a violation of the West Virginia Consumer Credit and Protection Act except as set forth above.

WV Legislature