WEST VIRGINIA CODE CHAPTER 46a ARTICLE 7

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§46A-7-101. Division of consumer protection created; purpose.

There is hereby created, under the authority of the Attorney General of the State of West Virginia, a division of consumer protection for the purposes set forth in this article.

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§46A-7-102. Power of Attorney General; reliance on rules of Attorney General or commissioner of banking; duty to report.

(1) In addition to other powers granted by this chapter, the Attorney General within the limitations provided by law may:

(a) Receive and act on complaints, take action designed to obtain voluntary compliance with this chapter or commence proceedings on his own initiative;

(b) Counsel persons and groups on their rights and duties under this chapter;

(c) Establish programs for the education of consumers with respect to credit and leasing practices and problems;

(d) Make studies appropriate to effectuate the purposes and policies of this chapter and make the results available to the public;

(e) Adopt, amend and repeal such reasonable rules and regulations, in accordance with the provisions of chapter twenty-nine-a of this code, as are necessary and proper to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof; and

(f) Delegate his powers and duties under this chapter to qualified personnel in his office, who shall act under the direction and supervision of the Attorney General and for whose acts he shall be responsible.

(2) Except for refund of an excess charge, no liability is imposed under this chapter for an act done or omitted in conformity with a rule of the Attorney General or commissioner, notwithstanding that after the act or omission the rule may be amended or repealed or be determined by judicial or other authority to be invalid for any reason. Any form or procedure which has been submitted to the commissioner and the Attorney General in writing and approved in writing by them shall not be deemed a violation of the penalty provisions of this chapter notwithstanding that such approval may be subsequently amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(3) Except for refund of an excess charge, in any action brought pursuant to the provisions of this chapter, it shall be a defense that the act or omission complained of was in conformity with a published opinion of the Attorney General issued in compliance with section one, article three, chapter five of this code or in conformity with an examination report issued by the commissioner to the person against whom the action is brought pursuant to section six, article two, chapter thirty-one-a of this code, or a declaratory ruling issued to the person against whom the action is brought pursuant to subdivision (9), subsection (c), section four of said article.

(4) On or before December 1, of each year, the Attorney General and commissioner shall jointly or separately submit a report or reports to the Governor and to the Legislature on the operation of their offices, on the use of consumer credit and on consumer protection

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problems in the state, and on the problems of persons of small means obtaining credit from persons regularly engaged in extending sales or loan credit. For the purpose of making such report or reports, the Attorney General and commissioner are authorized to conduct research and make appropriate studies. The report or reports shall include a description of the examination and investigation procedures and policies of their offices, a statement of policies followed in deciding whether to investigate or examine the offices of credit suppliers subject to this chapter, a statement of the number and percentages of offices which are periodically investigated or examined, a statement of the types of consumer credit and consumer protection problems of both creditors and consumers which have come to their attention through their examinations and investigations and the disposition of them under existing law, and a general statement of the activities of their offices and of others to promote the purposes of this chapter.

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§46A-7-103. Division of administrative powers; investigation and administration.

(1) With respect to regulated consumer lenders and other supervised financial organizations, the powers of examination and investigation and administrative enforcement shall be exercised by the official or agency to whose supervision the organization is subject. All other powers of the Attorney General under this chapter may be exercised by him with respect to any financial organization whether or not a supervised financial organization. Notwithstanding the first sentence of this subsection and notwithstanding subsection (3) of this section, the Attorney General may pursue any investigation, prosecute any suit and take any other proper action relating to the enforcement of any consumer protection provision in this chapter.

(2) If the Attorney General receives a complaint or other information concerning noncompliance with this chapter by any supervised financial organization, he shall inform the official or agency having supervisory authority over the organization concerned. The Attorney General may request information about financial organizations from the officials or agencies supervising them.

(3) The Attorney General and any official or agency of this state having supervisory authority over a financial organization are authorized and directed to consult and assist one another in maintaining compliance with this chapter. They may jointly pursue investigations, prosecute actions and take other official actions, as they deem appropriate, if either of them otherwise is empowered to take the action.

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§46A-7-104. Investigatory powers.

(1) If the Attorney General has probable cause to believe that a person has engaged in an act which is subject to action by the Attorney General, he may, and shall upon request of the commissioner, make an investigation to determine if the act has been committed and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, records, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(2) If the person's records are located outside this state, the person at his option shall either make them available to the Attorney General at a convenient location within this state or pay the reasonable and necessary expenses for the Attorney General or his representative to examine them at the place where they are maintained. The Attorney General may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(3) Upon failure of a person without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the Attorney General may apply to the circuit court of the county in which the hearing is to be held for an order compelling compliance.

(4) The Attorney General shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this chapter.

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§46A-7-105. Application of Administrative Procedures Act.

Except as otherwise provided, the provisions of chapter twenty-nine-a of this code apply to and govern all administrative action taken by the Attorney General pursuant to this chapter.

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§46A-7-106. Administrative enforcement orders; judicial review.

(1) After notice and hearing the Attorney General may order a creditor or other person to cease and desist from engaging in violations of this chapter.

(2) A respondent aggrieved by an order of the Attorney General may obtain judicial review of the order in accordance with the provisions of chapter twenty-nine-a of this code, except as herein otherwise provided. The proceeding for review must be initiated by the filing of a petition in the court within thirty days after a copy of the order of the Attorney General is received. Copies of the petition shall be served upon all parties of record.

(3) Within thirty days after service of the petition for review upon the Attorney General, or within any further time the court may allow, the Attorney General shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including any transcript of testimony, which need not be printed. By stipulation of all parties to the review proceeding, the record may be shortened. After hearing, the court may (a) reverse or modify the order if the findings of fact of the Attorney General are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, (b) grant any temporary relief or restraining order it deems just, or (c) enter an order affirming, enforcing, modifying and enforcing as modified, or setting aside in whole or in part, the order of the Attorney General, or remanding the case to the Attorney General for further proceedings.

(4) An objection not urged at the administrative hearing shall not be considered by the court unless the failure to urge the objection is excused for good cause shown. A party may move the court to remand the case to the Attorney General in the interest of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon upon good cause shown for the failure to adduce this evidence before the Attorney General.

(5) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals of this state in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code. The Attorney General's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(6) If no proceeding for judicial review is initiated, the Attorney General may obtain an order of a circuit court for enforcement of his order upon a showing that the order was issued in compliance with this section, that no proceeding for review was initiated within thirty days after a copy of the order was received and that the respondent is subject to the jurisdiction of the court. If no proceeding for judicial review is initiated, the proceeding for enforcement of any order of the Attorney General shall be initiated by the filing of a petition in the court. Copies of the petition shall be served upon all parties of record.

(7) With respect to unconscionable agreements or fraudulent or unconscionable conduct by the respondent, the Attorney General may not issue an order pursuant to this section but may bring a civil action for an injunction.

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§46A-7-107. Assurance of discontinuance.

If it is claimed that a person has engaged in conduct which could be subject to an order by the Attorney General or by a court, the Attorney General may accept an assurance in writing that the person will not engage in the conduct in the future. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose, except that if a person giving such assurance fails to comply with its terms, the assurance is prima facie evidence that prior to such assurance he engaged in the conduct described in such assurance.

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§46A-7-108. Injunctions against violations of chapter.

The Attorney General may bring a civil action to restrain a person from violating this chapter and for other appropriate relief.

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§46A-7-109. Injunctions against unconscionable agreements and fraudulent or unconscionable conduct.

(1) The Attorney General may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of:

(a) Making or enforcing unconscionable terms or provisions of consumer credit sales, consumer leases or consumer loans;

(b) Fraudulent or unconscionable conduct in inducing consumers to enter into consumer credit sales, consumer leases or consumer loans; or

(c) Fraudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases or consumer loans.

(2) In an action brought pursuant to this section the court may grant relief only if it finds:

(a) That the respondent has made unconscionable agreements or has engaged or is likely to engage in a course of fraudulent or unconscionable conduct;

(b) That the agreements or conduct of the respondent have caused or are likely to cause injury to consumers; and

(c) That the respondent has been able to cause or will be able to cause the injury primarily because the transactions involved are credit or lease transactions.

(3) In applying this section, consideration shall be given to each of the following factors, among others:

(a) Belief by the creditor at the time consumer credit sales, consumer leases or consumer loans are made that there was no reasonable probability of payment in full of the obligation by the debtor;

(b) In the case of consumer credit sales, knowledge by the seller at the time of the sale of the inability of the buyer to receive substantial benefits from the property or services sold;

(c) In the case of consumer credit sales, gross disparity between the price of the property or services sold and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers;

(d) The fact that the creditor contracted for or received separate charges for insurance with respect to consumer credit sales, consumer leases or consumer loans with the effect of making the sales or loans, considered as a whole, unconscionable; and

(e) The fact that the respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance,

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illiteracy or inability to understand the language of the agreement, or similar factors.

(4) In an action brought pursuant to this chapter, a charge or practice expressly permitted by this chapter is not unconscionable.

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§46A-7-110. Temporary relief.

With respect to an action brought to enjoin violations of this chapter or unconscionable agreements or fraudulent or unconscionable conduct, the Attorney General may apply to the court for appropriate temporary relief against a respondent, pending final determination of the proceedings. If the court finds after a hearing held upon notice to the respondent that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate.

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§46A-7-111. Civil actions by Attorney General.

(1) After demand, the Attorney General may bring a civil action against a creditor for making or collecting charges in excess of those permitted by this chapter. If it is found that an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge. If a creditor has made an excess charge in a deliberate violation of or in reckless disregard for this chapter, or if a creditor has refused to refund an excess charge within a reasonable time after demand by the consumer or the Attorney General, the court may also order the respondent to pay to the consumer a civil penalty in an amount determined by the court not in excess of the greater of either the amount of the sales finance charge or loan finance charge or ten times the amount of the excess charge. Refunds and penalties to which the consumer is entitled pursuant to this subsection may be set off against the consumer's obligation. If a consumer brings an action against a creditor to recover an excess charge or civil penalty, an action by the Attorney General to recover for the same excess charge shall be stayed while the consumer's action is pending and shall be dismissed if the consumer's action is dismissed with prejudice or results in a final judgment granting or denying the consumer's claim. With respect to excess charges arising from consumer credit sales made pursuant to revolving charge accounts or from consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection may be brought more than four years after the time the excess charge was made. With respect to excess charges arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was made. If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error, no liability to pay a penalty shall be imposed under this subsection.

(2) The Attorney General may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter, it may assess a civil penalty of no more than $5,000 for each violation of this chapter. No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought.

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§46A-7-112. Jury trial.

In an action brought by the Attorney General under this chapter, he has no right to trial by jury.

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§46A-7-113. Consumer's remedies not affected.

The grant of powers to the Attorney General in this chapter does not affect remedies available to consumers under this chapter or under other principles of law or equity.

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§46A-7-114. Venue.

The Attorney General may bring actions or proceedings under this chapter in the circuit court of any county in which an act on which the action or proceeding is based occurred, or in any county in which the respondent or defendant resides or transacts business.

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§46A-7-115. Notification.

(1) Every person engaged in this state in making consumer credit sales or consumer loans, including any person subject to the provisions of section five-a, article twenty-three, chapter eleven of this code, as a result of their consumer lending or any person who regularly purchases retail installment contracts or other consumer paper from a business with which it is affiliated, and every person having an office or place of business in this state who takes assignments of and undertakes direct collection of payments from or enforcement of rights against debtors arising from such sales or loans, shall file notification with the State Tax Department within thirty days after commencing business in this state, and, thereafter, on or before the thirty-first day of January of each year. A notification shall be deemed to be in compliance with this section if the information hereinafter required is given in an application for a business registration certificate provided for in section four, article twelve, chapter eleven of this code. The State Tax Commissioner shall make any information required by this section available to the Attorney General or commissioner upon request. The notification shall state:

(a) Name of the person;

(b) Name in which business is transacted if different from subdivision (a) of this subsection;

(c) Address of principal office, which may be outside this state;

(d) Address of all of its offices, if any, in this state at which consumer loans are made, or in the case of a lender credit card, a description of its affiliation to any store chain, or national or regional credit card acceptance system, or in the case of a person taking assignments of obligations, the offices or places of business within this state at which business is transacted;

(e) If consumer credit sales or consumer loans, including loans secured by real property, are made otherwise than at its retail store or office in this state, a brief description of the manner in which they are made;

(f) Address of designated agent upon whom service of process may be made in this state; and

(g) Whether regulated consumer loans are made.

(2) If information in a notification becomes inaccurate after filing, accurate information must be filed within thirty days.

(3) The provisions of this section are not applicable to a seller whose credit sales consist entirely of sales made pursuant to a seller's credit card so long as the issuer of the card has fully complied with the provisions of this section, nor are the provisions of this section applicable to a person whose consumer lending in West Virginia is incidental and confined to access through a nonproprietary automatic teller machine or similar electronic communication terminal.

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§46A-7-116.

Repealed.

Acts, 1990 Reg. Sess., Ch. 51.

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