WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

Com. Sub. for
HOUSE BILL No. 4066

(By Delegate Phillip Rutledge)

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Passed March 10, 1990

In Effect 90 Days from Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 4066
(BY DELEGATES PHILLIPS and RUTLEDGE)

[Passed March 10, 1990; in effect ninety days from passage.]

AN ACT to amend and reenact section one hundred two, article one, chapter forty-six-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend article two of said chapter by adding thereto a new section, designated section one hundred thirty-nine, all relating to providing a mechanism by which persons may recover damages from and prohibit unsolicited commercial telefacsimile transmissions; notice to initiator of transmission; and defining “facsimile device” and “commercial facsimile transmission.”

Be it enacted by the Legislature of West Virginia:

That section one hundred two, article one, chapter forty-six-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that article two of said chapter be amended by adding thereto a new section, designated section one hundred thirty-nine, all to read as follows:

ARTICLE 1. SHORT TITLE, DEFINITIONS AND GENERAL PROVISIONS.

In addition to definitions appearing in subsequent articles, in this chapter: (1) "Actuarial method" means the method, defined by rules adopted by the commissioner, of allocating payments made on a debt between principal or amount financed and loan finance charge or sales finance charge pursuant to which a payment is applied first to the accumulated loan finance charge or sales finance charge and the balance is applied to the unpaid principal or unpaid amount financed.

(2) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. A "consumer credit agreement" is an agreement where credit is granted.

(3) "Agricultural purpose" means a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a natural person who cultivates, plants, propagates or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(4) "Amount financed" means the total of the following items to the extent that payment is deferred:

(a) The cash price of the goods, services or interest in land, less the amount of any down payment whether made in cash or in property traded in;

(b) The amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest in or a lien on property traded in; and

(c) If not included in the cash price:

(i) Any applicable sales, use, privilege, excise or documentary stamp taxes;
(ii) Amounts actually paid or to be paid by the seller for registration, certificate of title or license fees; and

(iii) Additional charges permitted by this chapter.

(5) “Average daily balance” in a billing cycle for which a sales finance charge or loan finance charge is made is the sum of the amount unpaid each day during that cycle divided by the number of days in that cycle. The amount unpaid on a day is determined by adding to the balance, if any, unpaid as of the beginning of that day all purchases and other debits and deducting all payments and other credits made or received as of that day.

(6) The “cash price” of goods, services or an interest in land means the price at which the goods, services or interest in land are offered for sale by the seller to cash buyers in the ordinary course of business, and may include (a) applicable sales, use, privilege, and excise and documentary stamp taxes, (b) the cash price of accessories or related services such as delivery, installation, servicing, repairs, alterations and improvements, and (c) amounts actually paid or to be paid by the seller for registration, certificate of title, or license fees.

(7) “Closing costs” with respect to a debt secured by an interest in land include:

(a) Fees or premiums for title examination, title insurance or similar purposes including surveys;

(b) Fees for preparation of a deed, deed of trust, mortgage, settlement statement or other documents;

(c) Escrows for future payments of taxes and insurance;

(d) Official fees and fees for notarizing deeds and other documents;

(e) Appraisal fees; and

(f) Credit reports.

(8) “Code” means the official code of West Virginia, one thousand nine hundred thirty-one, as amended.
(9) "Commercial facsimile transmission" means the electronic or telephonic transmission in the state to a facsimile device to encourage a person to purchase goods, realty or services.

(10) "Commissioner" means the commissioner of banking of West Virginia.

(11) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. Whether a term or clause is conspicuous or not is for decision by the court.

(12) "Consumer" means a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan.

(13) (a) Except as provided in paragraph (b), "consumer credit sale" is a sale of goods, services or an interest in land in which:

(i) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card;

(ii) The buyer is a person other than an organization;

(iii) The goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose;

(iv) Either the debt is payable in installments or a sales finance charge is made; and

(v) With respect to a sale of goods or services, the amount financed does not exceed twenty-five thousand dollars.

(b) "Consumer credit sale" does not include a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement.

(14) (a) "Consumer lease" means a lease of goods:

(i) Which a lessor regularly engaged in the business of leasing makes to a person, other than an organization,
who takes under the lease primarily for a personal, family, household or agricultural purpose;

(ii) In which the amount payable under the lease does not exceed twenty-five thousand dollars; and

(iii) Which is for a term exceeding four months.

(b) “Consumer lease” does not include a lease made pursuant to a lender credit card or similar arrangement.

(15) “Consumer loan” is a loan made by a person regularly engaged in the business of making loans in which:

(a) The debtor is a person other than an organization;

(b) The debt is incurred primarily for a personal, family, household or agricultural purpose;

(c) Either the debt is payable in installments or a loan finance charge is made; and

(d) Either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land.

(16) “Cosigner” means a natural person who assumes liability for the obligation on a consumer credit sale or consumer loan without receiving goods, services or money in return for the obligation or, in the case of a revolving charge account or revolving loan account of a consumer, without receiving the contractual right to obtain extensions of credit under the account. The term cosigner includes any person whose signature is requested as a condition to granting credit to a consumer or as a condition for forbearance on collection of a consumer’s obligation that is in default. The term cosigner does not include a spouse whose signature is required to perfect a security interest. A person who meets the definition in this paragraph is a “cosigner,” whether or not the person is designated as such on the credit obligation.

(17) “Credit” means the privilege granted by a creditor to a debtor to defer payment of debt or to incur
(18) "Earnings" means compensation paid or payable to an individual or for his account for personal services rendered or to be rendered by him, whether denominated as wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension, retirement or disability program.

(19) "Facsimile device" means a machine that receives and copies reproductions or facsimiles of documents or photographs that have been transmitted electronically or telephonically over telecommunications lines.

(20) "Federal Consumer Credit Protection Act" means the "Consumer Credit Protection Act" (Public Law 90-321; 82 Stat. 146), as amended, and includes regulations issued pursuant to that act.

(21) "Goods" includes goods not in existence at the time the transaction is entered into and gift and merchandise certificates, but excludes money, chattel paper, documents of title and instruments.

(22) "Home solicitation sale" means a consumer credit sale in excess of twenty-five dollars in which the buyer receives a solicitation of the sale at a place other than the seller's business establishment at a fixed location and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller. The term does not include a sale made pursuant to a preexisting open-end credit account with the seller in existence for at least three months prior to the transaction, a sale made pursuant to prior negotiations between the parties at the seller's business establishment at a fixed location, a sale of motor vehicles, mobile homes or farm equipment or a sale which may be rescinded under the Federal Truth in Lending Act (being Title I of the Federal Consumer Credit Protection Act). A sale which would be a home solicitation sale if credit were extended by the seller is a home solicitation sale although the goods or services are paid for in whole or in part by a consumer loan in which the creditor is subject to claims and defenses arising from the sale.
Except as otherwise provided, "lender" includes an assignee of the lender's right to payment but use of the term does not in itself impose on an assignee any obligation of the lender.

"Lender credit card or similar arrangement" means an arrangement or loan agreement, other than a seller credit card, pursuant to which a lender gives a debtor the privilege of using a credit card, letter of credit, or other credit confirmation or identification in transactions out of which debt arises:

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

(b) By the lender's payment or agreement to pay the consumer's obligations; or

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

"Loan" includes:

(a) The creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer other than debts created pursuant to a seller credit card;

(b) The creation of debt by a credit to an account with the lender upon which the consumer is entitled to draw immediately;

(c) The creation of debt pursuant to a lender credit card or similar arrangement; and

(d) The forbearance of debt arising from a loan.

"Loan finance charge" means the sum of (i) all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit, including any of the following types of charges which are applicable: Interest or any amount payable under a point, discount, or other system of charges, however denominated, premium or other charge for any guarantee or insurance protecting the lender against the consumer's default or other credit
loss; and (ii) charges incurred for investigating the collateral or credit worthiness of the consumer or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the lender had no notice of the charges when the loan was made. The term does not include charges as a result of default, additional charges, delinquency charges or deferral charges.

(b) If a lender makes a loan to a consumer by purchasing or satisfying obligations of the consumer pursuant to a lender credit card or similar arrangement, and the purchase or satisfaction is made at less than the face amount of the obligation, the discount is not part of the loan finance charge.

(27) “Merchandise certificate” or “gift certificate” means a writing issued by a seller or issuer of a seller credit card, not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods or services.

(28) “Official fees” means:

(a) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, terminating or satisfying a security interest related to a consumer credit sale or consumer loan; or

(b) Premiums payable for insurance or fees escrowed in a special account for the purpose of funding self-insurance or its equivalent in lieu of perfecting a security interest otherwise required by the creditor in connection with the sale, lease or loan, if such premium or fee does not exceed the fees and charges described in paragraph (a) which would otherwise be payable.

(29) “Organization” means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association.

(30) “Payable in installments” means that payment is required or permitted by agreement to be made in two or more periodic payments, excluding a down payment, with respect to a debt arising from a consumer
credit sale pursuant to which a sales finance charge is made, (b) four or more periodic payments, excluding a down payment, with respect to a debt arising from a consumer credit sale pursuant to which no sales finance charge is made, or (c) two or more periodic payments with respect to a debt arising from a consumer loan. If any periodic payment other than the down payment under an agreement requiring or permitting two or more periodic payments is more than twice the amount of any other periodic payment, excluding the down payment, the consumer credit sale or consumer loan is “payable in installments.”

(31) “Person” or “party” includes a natural person or an individual, and an organization.

(32) “Person related to” with respect to an individual means (a) the spouse of the individual, (b) a brother, brother-in-law, sister or sister-in-law of the individual, (c) an ancestor or lineal descendant of the individual or his spouse, and (d) any other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual. “Person related to” with respect to an organization means (a) a person directly or indirectly controlling, controlled by or under common control with the organization, (b) an officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization, (c) the spouse of a person related to the organization, and (d) a relative by blood or marriage of a person related to the organization who shares the same home with him.

(33) “Precomputed loan.” A loan, refinancing or consolidation is “precomputed” if the debt is expressed as a sum comprising the principal and the amount of the loan finance charge computed in advance.

(34) “Precomputed sale.” A sale, refinancing or consolidation is “precomputed” if the debt is expressed as a sum comprising the amount financed and the amount of the sales finance charge computed in advance.

(35) “Presumed” or “presumption” means that the
trier of fact must find the existence of the fact presumed
unless and until evidence is introduced which would
support a finding of its nonexistence.

(36) “Principal” of a loan means the total of:
(a) The net amount paid to, receivable by or paid or
payable for the account of the debtor;
(b) The amount of any discount excluded from the
loan finance charge; and
(c) To the extent that payment is deferred:
   (i) Amounts actually paid or to be paid by the lender
      for registration, certificate of title, or license fees if not
      included in (a); and
   (ii) Additional charges permitted by this chapter.

(37) “Revolving charge account” means an agreement
between a seller and a buyer by which (a) the buyer may
purchase goods or services on credit or a seller credit
card, (b) the balances of amounts financed and the sales
finance and other appropriate charges are debited to an
account, (c) a sales finance charge if made is not
precomputed but is computed periodically on the
balances of the account from time to time, and (d) there
is the privilege of paying the balances in installments.

(38) “Revolving loan account” means an arrangement
between a lender and a consumer including, but not
limited to, a lender credit card or similar arrangement,
pursuant to which (a) the lender may permit the
consumer to obtain loans from time to time, (b) the
unpaid balances of principal and the loan finance and
other appropriate charges are debited to an account, (c)
loan finance charge if made is not precomputed but
is computed periodically on the outstanding unpaid
balances of the principal of the consumer's account from
time to time, and (d) there is the privilege of paying the
balances in installments.

(39) “Sale of goods” includes any agreement in the
form of a bailment or lease of goods if the bailee or
lessee agrees to pay as compensation for use a sum
substantially equivalent to or in excess of the aggregate
value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement.

(40) “Sale of an interest in land” includes a lease in which the lessee has an option to purchase the interest and all or a substantial part of the rental or other payments previously made by him are applied to the purchase price.

(41) “Sale of services” means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.

(42) “Sales finance charge” means the sum of (a) all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller or issuer of a seller credit card as an incident to the extension of credit, including any of the following types of charges which are applicable: Time-price differential, however denominated, including service, carrying or other charge, premium or other charge for any guarantee or insurance protecting the seller against the buyer’s default or other credit loss, and (b) charges incurred for investigating the collateral or credit worthiness of the buyer or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable; unless the seller had no notice of the charges when the credit was granted. The term does not include charges as a result of default, additional charges, delinquency charges or deferral charges. If the seller or issuer of a seller credit card purchases or satisfies obligations of the consumer and the purchase or satisfaction is made at less than the face amount of the obligation, the discount is not part of the sales finance charge.

(43) Except as otherwise provided, “seller” includes an assignee of the seller’s right to payment but use of the term does not in itself impose on an assignee any obligation of the seller.

(44) “Seller credit card” means an arrangement
pursuant to which a person gives to a buyer or lessee
the privilege of using a credit card, letter of credit, or
other credit confirmation or identification primarily for
the purpose of purchasing or leasing goods or services
from that person, that person and any other person or
persons, a person related to that person, or others
licensed or franchised or permitted to do business under
his business name or trade name or designation or on
his behalf.

(45) “Services” includes (a) work, labor and other
personal services, (b) privileges with respect to transpor-
tation, use of vehicles, hotel and restaurant accommoda-
tions, education, entertainment, recreation, physical
culture, hospital accommodations, funerals, cemetery
accommodations, and the like, and (c) insurance.

(46) “Supervised financial organization” means a
person, other than a supervised lender or an insurance
company or other organization primarily engaged in an
insurance business:

(a) Organized, chartered or holding an authorization
certificate under the laws of this state or of the United
States which authorizes the person to make consumer
loans; and

(b) Subject to supervision and examination with
respect to such loans by an official or agency of this state
or of the United States.

(47) “Supervised lender” means a person authorized to
make or take assignments of supervised loans.

(48) “Supervised loan” means a consumer loan made
by other than a supervised financial organization,
including a loan made pursuant to a revolving loan
account, where the principal does not exceed two
thousand dollars, and in which the rate of the loan
finance charge exceeds eight percent per year as
determined according to the actuarial method.

ARTICLE 2. CONSUMER CREDIT PROTECTION.

§46A-2-139. Unlawful commercial facsimile transmis-
sion; 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 three hundred dollars 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.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Parks
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Harris E. Kelly
Clerk of the Senate

Donald J. Veazey
Clerk of the House of Delegates

Jeff K. Brown
President of the Senate

Robert C. C. Cole
Speaker of the House of Delegates

The within is approved this the 26th day of March, 1990.

Stephen Caperton
Governor