WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

HOUSE BILL No. 4377

(By Delegate Lawer Shepherd)

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Passed ........................................... March 10, 1990

In Effect ....................................... 90 Days from Passage
ENROLLED

H. B. 4577

(By Delegates Rowe and Shepherd)

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

AN ACT to amend and reenact sections one hundred two and one hundred three, article two, chapter forty-six-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the West Virginia Consumer Credit and Protection Act provisions rendering certain assignees and lenders subject to claims and defenses; defining the extent of liability of such assignees and lenders; providing that certain limitations on such liability shall apply to claims or defenses founded in fraud arising on or after the first day of July, one thousand nine hundred ninety; and eliminating expired statutory language.

Be it enacted by the Legislature of West Virginia:

That sections one hundred two and one hundred three, article two, chapter forty-six-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 2. CONSUMER CREDIT PROTECTION.

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

1 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 the first day of July, one thousand nine hundred ninety, 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 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.

§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 consu-
mer sales, with respect to consumer loans:

A lender, other than the issuer of a lender credit card, 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 sale 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 claim or defense founded in fraud arising on
or after the first day of July, one thousand nine hundred
ninety, 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
80 a claim or defense which could be asserted under the
81 provisions of this section as a matter of defense to or
82 setoff against a claim by the lender were such lender
83 to assert such claim against the borrower, then the
84 borrower shall have the right to institute and maintain
85 an action or proceeding seeking to obtain the cancella-
86 tion, in whole or in part, of the indebtedness evidenced
87 by a negotiable instrument or other instrument or the
88 release, in whole or in part, of any lien upon real or
89 personal property securing the payment thereof: Pro-
90 vided, however, That any claim or defense founded in
91 fraud, lack or failure of consideration or a violation of
92 the provisions of this chapter as specified in section one
93 hundred one, article five of this chapter, may be
94 asserted by a borrower at any time, subject to the
95 provisions of this code relating to limitation of actions.

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

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

103 (h) Nothing contained in this section shall be
104 construed as affecting any buyer's or lessee's right of
105 action, claim or defense which is otherwise provided for
106 in this code or at common law.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 30th day of March, 1990.

Governor