

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990



ENROLLED

Com. Sub. for
HOUSE BILL No. 4066

(By ~~the~~ Delegates Phillips + Rutledge)



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.

§46A-1-102. General definitions.

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

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

16 (3) "Agricultural purpose" means a purpose related to
17 the production, harvest, exhibition, marketing, trans-
18 portation, processing or manufacture of agricultural
19 products by a natural person who cultivates, plants,
20 propagates or nurtures the agricultural products.
21 "Agricultural products" includes agricultural, horticul-
22 tural, viticultural and dairy products, livestock, wildlife,
23 poultry, bees, forest products, fish and shellfish, and any
24 products thereof, including processed and manufactured
25 products, and any and all products raised or produced
26 on farms and any processed or manufactured products
27 thereof.

28 (4) "Amount financed" means the total of the follow-
29 ing items to the extent that payment is deferred:

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

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

37 (c) If not included in the cash price:

38 (i) Any applicable sales, use, privilege, excise or
39 documentary stamp taxes;

40 (ii) Amounts actually paid or to be paid by the seller
41 for registration, certificate of title or license fees; and

42 (iii) Additional charges permitted by this chapter.

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

52 (6) The "cash price" of goods, services or an interest
53 in land means the price at which the goods, services or
54 interest in land are offered for sale by the seller to cash
55 buyers in the ordinary course of business, and may
56 include (a) applicable sales, use, privilege, and excise
57 and documentary stamp taxes, (b) the cash price of
58 accessories or related services such as delivery, instal-
59 lation, servicing, repairs, alterations and improvements,
60 and (c) amounts actually paid or to be paid by the seller
61 for registration, certificate of title, or license fees.

62 (7) "Closing costs" with respect to a debt secured by
63 an interest in land include:

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

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

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

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

72 (e) Appraisal fees; and

73 (f) Credit reports.

74 (8) "Code" means the official code of West Virginia,
75 one thousand nine hundred thirty-one, as amended.

76 (9) "Commercial facsimile transmission" means the
77 electronic or telephonic transmission in the state to a
78 facsimile device to encourage a person to purchase
79 goods, realty or services.

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

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

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

90 (13) (a) Except as provided in paragraph (b), "con-
91 sumer credit sale" is a sale of goods, services or an interest
92 in land in which:

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

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

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

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

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

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

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

110 (i) Which a lessor regularly engaged in the business
111 of leasing makes to a person, other than an organization,

112 who takes under the lease primarily for a personal,
113 family, household or agricultural purpose;

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

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

117 (b) "Consumer lease" does not include a lease made
118 pursuant to a lender credit card or similar
119 arrangement.

120 (15) "Consumer loan" is a loan made by a person
121 regularly engaged in the business of making loans in
122 which:

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

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

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

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

131 (16) "Cosigner" means a natural person who assumes
132 liability for the obligation on a consumer credit sale or
133 consumer loan without receiving goods, services or
134 money in return for the obligation or, in the case of a
135 revolving charge account or revolving loan account of a
136 consumer, without receiving the contractual right to
137 obtain extensions of credit under the account. The term
138 cosigner includes any person whose signature is re-
139 quested as a condition to granting credit to a consumer
140 or as a condition for forbearance on collection of a
141 consumer's obligation that is in default. The term
142 cosigner does not include a spouse whose signature is
143 required to perfect a security interest. A person who
144 meets the definition in this paragraph is a "cosigner,"
145 whether or not the person is designated as such on the
146 credit obligation.

147 (17) "Credit" means the privilege granted by a
148 creditor to a debtor to defer payment of debt or to incur

149 debt and defer its payment.

150 (18) "Earnings" means compensation paid or payable
151 to an individual or for his account for personal services
152 rendered or to be rendered by him, whether denomi-
153 nated as wages, salary, commission, bonus or otherwise,
154 and includes periodic payments pursuant to a pension,
155 retirement or disability program.

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

160 (20) "Federal Consumer Credit Protection Act" means
161 the "Consumer Credit Protection Act" (Public Law 90-
162 321; 82 Stat. 146), as amended, and includes regulations
163 issued pursuant to that act.

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

168 (22) "Home solicitation sale" means a consumer credit
169 sale in excess of twenty-five dollars in which the buyer
170 receives a solicitation of the sale at a place other than
171 the seller's business establishment at a fixed location
172 and the buyer's agreement or offer to purchase is there
173 given to the seller or a person acting for the seller. The
174 term does not include a sale made pursuant to a
175 preexisting open-end credit account with the seller in
176 existence for at least three months prior to the transac-
177 tion, a sale made pursuant to prior negotiations between
178 the parties at the seller's business establishment at a
179 fixed location, a sale of motor vehicles, mobile homes or
180 farm equipment or a sale which may be rescinded under
181 the Federal Truth in Lending Act (being Title I of the
182 Federal Consumer Credit Protection Act). A sale which
183 would be a home solicitation sale if credit were extended
184 by the seller is a home solicitation sale although the
185 goods or services are paid for in whole or in part by a
186 consumer loan in which the creditor is subject to claims
187 and defenses arising from the sale.

188 (23) Except as otherwise provided, "lender" includes
189 an assignee of the lender's right to payment but use of
190 the term does not in itself impose on an assignee any
191 obligation of the lender.

192 (24) "Lender credit card or similar arrangement"
193 means an arrangement or loan agreement, other than
194 a seller credit card, pursuant to which a lender gives
195 a debtor the privilege of using a credit card, letter of
196 credit, or other credit confirmation or identification in
197 transactions out of which debt arises:

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

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

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

205 (25) "Loan" includes:

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

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

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

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

216 (26) (a) "Loan finance charge" means the sum of (i) all
217 charges payable directly or indirectly by the debtor and
218 imposed directly or indirectly by the lender as an
219 incident to the extension of credit, including any of the
220 following types of charges which are applicable: Interest
221 or any amount payable under a point, discount, or other
222 system of charges, however denominated, premium or
223 other charge for any guarantee or insurance protecting
224 the lender against the consumer's default or other credit

225 loss; and (ii) charges incurred for investigating the
226 collateral or credit worthiness of the consumer or for
227 commissions or brokerage for obtaining the credit,
228 irrespective of the person to whom the charges are paid
229 or payable, unless the lender had no notice of the
230 charges when the loan was made. The term does not
231 include charges as a result of default, additional
232 charges, delinquency charges or deferral charges.

233 (b) If a lender makes a loan to a consumer by
234 purchasing or satisfying obligations of the consumer
235 pursuant to a lender credit card or similar arrange-
236 ment, and the purchase or satisfaction is made at less
237 than the face amount of the obligation, the discount is
238 not part of the loan finance charge.

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

244 (28) "Official fees" means:

245 (a) Fees and charges prescribed by law which actu-
246 ally are or will be paid to public officials for determin-
247 ing the existence of or for perfecting, releasing,
248 terminating or satisfying a security interest related to
249 a consumer credit sale or consumer loan; or

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

257 (29) "Organization" means a corporation, government
258 or governmental subdivision or agency, trust, estate,
259 partnership, cooperative or association.

260 (30) "Payable in installments" means that payment is
261 required or permitted by agreement to be made in (a)
262 two or more periodic payments, excluding a down
263 payment, with respect to a debt arising from a consumer

264 credit sale pursuant to which a sales finance charge is
265 made, (b) four or more periodic payments, excluding a
266 down payment, with respect to a debt arising from a
267 consumer credit sale pursuant to which no sales finance
268 charge is made, or (c) two or more periodic payments
269 with respect to a debt arising from a consumer loan. If
270 any periodic payment other than the down payment
271 under an agreement requiring or permitting two or
272 more periodic payments is more than twice the amount
273 of any other periodic payment, excluding the down
274 payment, the consumer credit sale or consumer loan is
275 “payable in installments.”

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

278 (32) “Person related to” with respect to an individual
279 means (a) the spouse of the individual, (b) a brother,
280 brother-in-law, sister or sister-in-law of the individual,
281 (c) an ancestor or lineal descendant of the individual or
282 his spouse, and (d) any other relative, by blood or
283 marriage, of the individual or his spouse who shares the
284 same home with the individual. “Person related to” with
285 respect to an organization means (a) a person directly
286 or indirectly controlling, controlled by or under common
287 control with the organization, (b) an officer or director
288 of the organization or a person performing similar
289 functions with respect to the organization or to a person
290 related to the organization, (c) the spouse of a person
291 related to the organization, and (d) a relative by blood
292 or marriage of a person related to the organization who
293 shares the same home with him.

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

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

303 (35) “Presumed” or “presumption” means that the

304 trier of fact must find the existence of the fact presumed
305 unless and until evidence is introduced which would
306 support a finding of its nonexistence.

307 (36) "Principal" of a loan means the total of:

308 (a) The net amount paid to, receivable by or paid or
309 payable for the account of the debtor;

310 (b) The amount of any discount excluded from the
311 loan finance charge; and

312 (c) To the extent that payment is deferred:

313 (i) Amounts actually paid or to be paid by the lender
314 for registration, certificate of title, or license fees if not
315 included in (a); and

316 (ii) Additional charges permitted by this chapter.

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

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

338 (39) "Sale of goods" includes any agreement in the
339 form of a bailment or lease of goods if the bailee or
340 lessee agrees to pay as compensation for use a sum
341 substantially equivalent to or in excess of the aggregate

342 value of the goods involved and it is agreed that the
343 bailee or lessee will become, or for no other or a nominal
344 consideration has the option to become, the owner of the
345 goods upon full compliance with his obligations under
346 the agreement.

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

352 (41) "Sale of services" means furnishing or agreeing
353 to furnish services and includes making arrangements
354 to have services furnished by another.

355 (42) "Sales finance charge" means the sum of (a) all
356 charges payable directly or indirectly by the buyer and
357 imposed directly or indirectly by the seller or issuer of
358 a seller credit card as an incident to the extension of
359 credit, including any of the following types of charges
360 which are applicable: Time-price differential, however
361 denominated, including service, carrying or other
362 charge, premium or other charge for any guarantee or
363 insurance protecting the seller against the buyer's
364 default or other credit loss, and (b) charges incurred for
365 investigating the collateral or credit worthiness of the
366 buyer or for commissions or brokerage for obtaining the
367 credit, irrespective of the person to whom the charges
368 are paid or payable; unless the seller had no notice of
369 the charges when the credit was granted. The term does
370 not include charges as a result of default, additional
371 charges, delinquency charges or deferral charges. If the
372 seller or issuer of a seller credit card purchases or
373 satisfies obligations of the consumer and the purchase
374 or satisfaction is made at less than the face amount of
375 the obligation, the discount is not part of the sales
376 finance charge.

377 (43) Except as otherwise provided, "seller" includes
378 an assignee of the seller's right to payment but use of
379 the term does not in itself impose on an assignee any
380 obligation of the seller.

381 (44) "Seller credit card" means an arrangement

382 pursuant to which a person gives to a buyer or lessee
383 the privilege of using a credit card, letter of credit, or
384 other credit confirmation or identification primarily for
385 the purpose of purchasing or leasing goods or services
386 from that person, that person and any other person or
387 persons, a person related to that person, or others
388 licensed or franchised or permitted to do business under
389 his business name or trade name or designation or on
390 his behalf.

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

397 (46) "Supervised financial organization" means a
398 person, other than a supervised lender or an insurance
399 company or other organization primarily engaged in an
400 insurance business:

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

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

408 (47) "Supervised lender" means a person authorized to
409 make or take assignments of supervised loans.

410 (48) "Supervised loan" means a consumer loan made
411 by other than a supervised financial organization,
412 including a loan made pursuant to a revolving loan
413 account, where the principal does not exceed two
414 thousand dollars, and in which the rate of the loan
415 finance charge exceeds eight percent per year as
416 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.**

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

7 (b) A recipient of an unsolicited commercial facsimile
8 transmission initiated in violation of subsection (a) of
9 this section may bring an action to recover actual
10 damages for any injury sustained by the receipt of
11 unsolicited commercial facsimile transmissions. In lieu
12 of actual damages, a minimum damage assessment of
13 three hundred dollars may be recovered for violations
14 of this section. Punitive damages may be awarded for
15 the willful failure to cease initiating unsolicited
16 commercial facsimile transmissions. Court costs and
17 reasonable attorney fees may be awarded for violations
18 of this section.

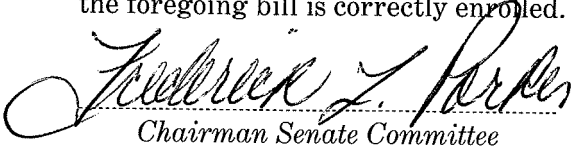
19 (c) A recipient of an unsolicited commercial facsimile
20 transmission initiated in violation of subsection (a) of
21 this section may bring an action to enjoin the initiator
22 from sending any further unsolicited commercial
23 facsimile transmissions to the recipient. Any court costs
24 or other costs incident to such action including reasona-
25 ble attorney fees may be awarded;

26 (d) In any proceeding under this section, an unsoli-
27 cated commercial facsimile transmission may be deemed
28 to have been committed either at the place of initiation
29 or at the place of receipt of such transmission.

30 (e) For purposes of this section, notice shall be
31 sufficient which conveys to the initiator of the unsoli-
32 cated commercial transmission a desire on the part of
33 the recipient to receive no further unsolicited commer-
34 cial facsimile transmissions and shall be served by
35 certified mail, return receipt requested, or by facsimile
36 transmission.

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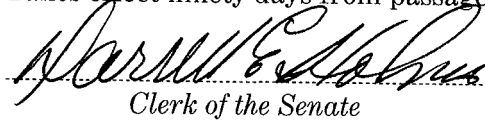
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

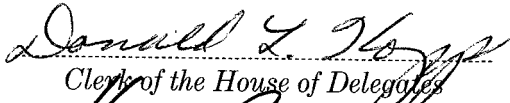

Chairman Senate Committee

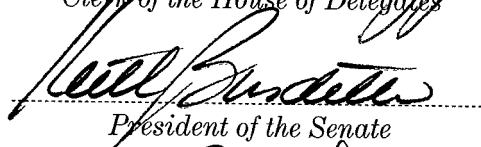

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

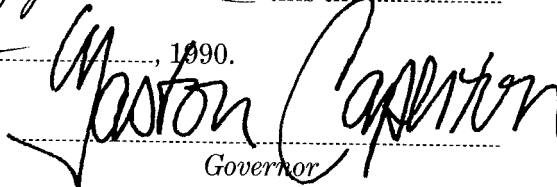

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

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


Governor

PRESENTED TO THE
GOVERNOR

Date 3/22/90

Time 4:07 pm

RECEIVED

1950 MAR 29 PM 3:15

OFFICE OF THE DIRECTOR
FEDERAL BUREAU OF INVESTIGATION