

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990



# ENROLLED

HOUSE BILL No. 4577

(By ~~the~~ Delegates Rowe & Shepherd)



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  
2 instruments, contracts or other writings, other than  
3 negotiable instruments, evidencing an obligation arising  
4 from a consumer credit sale or consumer lease, other  
5 than a sale or lease primarily for an agricultural  
6 purpose: (1) Notwithstanding any term or agreement to

7 the contrary or the provisions of article two, chapter  
8 forty-six of this code or section two hundred six, article  
9 nine of said chapter forty-six, an assignee of any such  
10 instrument, contract or other writing shall take and  
11 hold such instrument, contract or other writing subject  
12 to all claims and defenses of the buyer or lessee against  
13 the seller or lessor arising from that specific consumer  
14 credit sale or consumer lease of goods or services but  
15 the total of all claims and defenses which may be  
16 asserted against the assignee under this subsection or  
17 subsection (3) or subsection (4) of this section shall not  
18 exceed the amount owing to the assignee at the time of  
19 such assignment except (i) as to any claim or defense  
20 founded in fraud: *Provided*, That as to any claim or  
21 defense founded in fraud arising on or after the first day  
22 of July, one thousand nine hundred ninety, the total  
23 sought shall not exceed the amount of the original  
24 obligation under the instrument, contract or other  
25 writing and (ii) for any excess charges and penalties  
26 recoverable under section one hundred one, article five  
27 of this chapter.

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

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

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

45 (3) A claim or defense which a buyer or lessee may  
46 assert against an assignee of such instrument, contract

47 or other writing under the provisions of this section may  
48 be asserted only as a matter of defense to or setoff  
49 against a claim by the assignee: *Provided*, That if a  
50 buyer or lessee shall have a claim or defense which could  
51 be asserted under the provisions of this section as a  
52 matter of defense to or setoff against a claim by the  
53 assignee were such assignee to assert such claim against  
54 the buyer or lessee, then such buyer or lessee shall have  
55 the right to institute and maintain an action or  
56 proceeding seeking to obtain the cancellation, in whole  
57 or in part, of the indebtedness evidenced by such  
58 instrument, contract or other writing or the release, in  
59 whole or in part, of any lien upon real or personal  
60 property securing the payment thereof: *Provided*,  
61 *however*, That any claim or defense founded in fraud,  
62 lack or failure of consideration or a violation of the  
63 provisions of this chapter as specified in section one  
64 hundred one, article five of this chapter, may be  
65 asserted by a buyer or lessee at any time, subject to the  
66 provisions of this code relating to limitation of actions.

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

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

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

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

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

1 (a) The following provisions shall be applicable to  
2 claims and defenses of borrowers, arising from consu-

3 mer sales, with respect to consumer loans:

4 A lender, other than the issuer of a lender credit card,  
5 who, with respect to a particular transaction, makes a  
6 consumer loan for the purpose of enabling a borrower  
7 to buy goods or services, other than primarily for an  
8 agricultural purpose, is subject to all claims and  
9 defenses of the borrower against the seller arising from  
10 that specific sale of goods or services if the lender  
11 participates in or is connected with the sales transaction.  
12 A lender is considered to be connected with such sales  
13 transaction if:

14 (i) The lender and the seller have arranged for a  
15 commission or brokerage or referral fee for the exten-  
16 sion of credit by the lender;

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

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

24 (iv) The lender directly supplies the seller with  
25 documents used by the borrower to evidence the  
26 transaction or the seller directly supplies the lender  
27 with documents used by the borrower to evidence the  
28 transaction;

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

34 (vi) The seller in such sale has specifically recom-  
35 mended such lender by name to the borrower and the  
36 lender has made ten or more loans to borrowers within  
37 a period of twelve months within which period the loan  
38 in question was made, the proceeds of which other ten  
39 or more loans were used in consumer credit sales with  
40 the seller or a person related to the seller, if in  
41 connection with such other ten or more loans, the seller

42 also specifically recommended such lender by name to  
43 the borrowers involved; or

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

48 (b) The total of all claims and defenses which a  
49 borrower is permitted to assert against a lender under  
50 the provisions of this section shall not exceed that  
51 portion of the loan used for that sale, except (1) as to  
52 any claim or defense founded in fraud: *Provided*, That  
53 as to any claim or defense founded in fraud arising on  
54 or after the first day of July, one thousand nine hundred  
55 ninety, the total sought shall not exceed the original  
56 amount of the sale and (2) for any excess charges and  
57 penalties recoverable under section one hundred one,  
58 article five of this chapter.

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

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

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

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

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

76 (e) A claim or defense which a borrower may assert  
77 against a lender under the provisions of this section may  
78 be asserted only as a defense to or setoff against a claim  
79 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.

*Frederick Z. Peters*  
Chairman Senate Committee

*Bernard V. Kelly*  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

*Harold E. Adams*  
Clerk of the Senate

*Donald J. Kopp*  
Clerk of the House of Delegates

*Kelly Sundette*  
President of the Senate

*Pat Carroll*  
Speaker of the House of Delegates

The within *is approved* this the *30<sup>th</sup>* day of *March* 1990.

*Winston Caperton*  
Governor



PRESENTED TO THE

GOVERNOR

Date 3/29/90

Time 11:59am

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OFFICE OF THE GOVERNOR  
STATE OF NEW YORK