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2005 APR 21 P 3:49

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
*Regular Session, 2005*

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**ENROLLED**

*Committee Substitute for*  
**SENATE BILL NO. 456**

(By Senator *Tomblin, Mr. President, and Sprouse,* )  
*By Request of the Executive*

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**PASSED April 8, 2005**

**In Effect ninety days from Passage**

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COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 456**

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,  
BY REQUEST OF THE EXECUTIVE)

[Passed April 8, 2005; in effect ninety days from passage.]

AN ACT to amend and reenact §46A-6-102 and §46A-6-106 of the Code of West Virginia, 1931, as amended, all relating to cure offers; definitions; requiring notice of violation prior to initiation of law suits; authorizing and limiting awards for inconvenience; tolling of statute of limitation during twenty-day period for consideration of cure offer proposal or during cure period; inadmissability of cure offers; exceptions; and authorizing attorneys fees and costs where seller or lessor sued after performing agreed upon cure.

*Be it enacted by the Legislature of West Virginia:*

That §46A-6-102 and §46A-6-106 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 6. GENERAL CONSUMER PROTECTION.**

**§46A-6-102. Definitions.**

1 When used in this article, the following words, terms and  
2 phrases, and any variations thereof required by the  
3 context, shall have the meaning ascribed to them in this  
4 article, except where the context indicates a different  
5 meaning:

6 (1) "Advertisement" means the publication, dissemina-  
7 tion or circulation of any matter, oral or written, including  
8 labeling, which tends to induce, directly or indirectly, any  
9 person to enter into any obligation, sign any contract or  
10 acquire any title or interest in any goods or services and  
11 includes every word device to disguise any form of busi-  
12 ness solicitation by using such terms as "renewal",  
13 "invoice", "bill", "statement" or "reminder" to create an  
14 impression of existing obligation when there is none or  
15 other language to mislead any person in relation to any  
16 sought-after commercial transaction.

17 (2) "Consumer" means a natural person to whom a sale  
18 or lease is made in a consumer transaction and a "con-  
19 sumer transaction" means a sale or lease to a natural  
20 person or persons for a personal, family, household or  
21 agricultural purpose.

22 (3) "Cure offer" means a written offer of one or more  
23 things of value, including, but not limited to, the payment  
24 of money, that is made by a merchant or seller and that is  
25 delivered by certified mail to a consumer claiming to have  
26 suffered a loss as a result of a consumer transaction or to  
27 the attorney for such person.

28 (4) "Merchantable" means, in addition to the qualities  
29 prescribed in section three hundred fourteen, article two,  
30 chapter forty-six of this code, that the goods conform in all  
31 material respects to applicable state and federal statutes  
32 and regulations establishing standards of quality and  
33 safety of goods and, in the case of goods with mechanical,  
34 electrical or thermal components, that the goods are in

35 good working order and will operate properly in normal  
36 usage for a reasonable period of time.

37 (5) "Sale" includes any sale, offer for sale or attempt to  
38 sell any goods for cash or credit or any services or offer for  
39 services for cash or credit.

40 (6) "Trade" or "commerce" means the advertising,  
41 offering for sale, sale or distribution of any goods or  
42 services and shall include any trade or commerce, directly  
43 or indirectly, affecting the people of this state.

44 (7) "Unfair methods of competition and unfair or  
45 deceptive acts or practices" means and includes, but is not  
46 limited to, any one or more of the following:

47 (A) Passing off goods or services as those of another;

48 (B) Causing likelihood of confusion or of misunderstand-  
49 ing as to the source, sponsorship, approval or certification  
50 of goods or services;

51 (C) Causing likelihood of confusion or of misunderstand-  
52 ing as to affiliation, connection or association with or  
53 certification by another;

54 (D) Using deceptive representations or designations of  
55 geographic origin in connection with goods or services;

56 (E) Representing that goods or services have sponsorship,  
57 approval, characteristics, ingredients, uses, benefits or  
58 quantities that they do not have or that a person has a  
59 sponsorship, approval, status, affiliation or connection  
60 that he does not have;

61 (F) Representing that goods are original or new if they  
62 are deteriorated, altered, reconditioned, reclaimed, used or  
63 secondhand;

64 (G) Representing that goods or services are of a particu-  
65 lar standard, quality or grade, or that goods are of a  
66 particular style or model if they are of another;

67 (H) Disparaging the goods, services or business of  
68 another by false or misleading representation of fact;

69 (I) Advertising goods or services with intent not to sell  
70 them as advertised;

71 (J) Advertising goods or services with intent not to  
72 supply reasonably expectable public demand, unless the  
73 advertisement discloses a limitation of quantity;

74 (K) Making false or misleading statements of fact  
75 concerning the reasons for, existence of or amounts of  
76 price reductions;

77 (L) Engaging in any other conduct which similarly  
78 creates a likelihood of confusion or of misunderstanding;

79 (M) The act, use or employment by any person of any  
80 deception, fraud, false pretense, false promise or misrep-  
81 sentation, or the concealment, suppression or omission of  
82 any material fact with intent that others rely upon such  
83 concealment, suppression or omission, in connection with  
84 the sale or advertisement of any goods or services, whether  
85 or not any person has in fact been misled, deceived or  
86 damaged thereby;

87 (N) Advertising, printing, displaying, publishing, distrib-  
88 uting or broadcasting, or causing to be advertised, printed,  
89 displayed, published, distributed or broadcast in any  
90 manner, any statement or representation with regard to  
91 the sale of goods or the extension of consumer credit  
92 including the rates, terms or conditions for the sale of such  
93 goods or the extension of such credit, which is false,  
94 misleading or deceptive or which omits to state material  
95 information which is necessary to make the statements  
96 therein not false, misleading or deceptive;

97 (O) Representing that any person has won a prize, one of  
98 a group of prizes or any other thing of value if receipt of  
99 the prize or thing of value is contingent upon any payment  
100 of a service charge, mailing charge, handling charge or any

101 other similar charge by the person or upon mandatory  
102 attendance by the person at a promotion or sales presenta-  
103 tion at the seller's place of business or any other location:  
104 *Provided*, That a person may be offered one item or the  
105 choice of several items conditioned on the person listening  
106 to a sales promotion or entering a consumer transaction if  
107 the true retail value and an accurate description of the  
108 item or items are clearly and conspicuously disclosed along  
109 with the person's obligations upon accepting the item or  
110 items; such description and disclosure shall be typewritten  
111 or printed in at least eight point regular type, in upper or  
112 lower case, where appropriate; or

113 (P) Violating any provision or requirement of article  
114 six-b of this chapter.

115 (8) "Warranty" means express and implied warranties  
116 described and defined in sections three hundred thirteen,  
117 three hundred fourteen and three hundred fifteen, article  
118 two, chapter forty-six of this code and expressions or  
119 actions of a merchant which assure the consumer that the  
120 goods have described qualities or will perform in a de-  
121 scribed manner.

**§46A-6-106. Actions by consumers.**

1 (a) Any person who purchases or leases goods or services  
2 and thereby suffers any ascertainable loss of money or  
3 property, real or personal, as a result of the use or employ-  
4 ment by another person of a method, act or practice  
5 prohibited or declared to be unlawful by the provisions of  
6 this article may bring an action in the circuit court of the  
7 county in which the seller or lessor resides or has his  
8 principal place of business or is doing business, or as  
9 provided for in sections one and two, article one, chapter  
10 fifty-six of this code, to recover actual damages or two  
11 hundred dollars, whichever is greater. The court may, in  
12 its discretion, provide such equitable relief as it deems  
13 necessary or proper.

14 (b) Notwithstanding the provisions of subsection (a) of  
15 this section, no action may be brought pursuant to the  
16 provisions of this section until the consumer has informed  
17 the seller or lessor in writing and by certified mail of the  
18 alleged violation and provided the seller or lessor twenty  
19 days from receipt of the notice of violation to make a cure  
20 offer: *Provided*, That the consumer shall have ten days  
21 from receipt of the cure offer to accept the cure offer or it  
22 is deemed refused and withdrawn.

23 (c) If a cure offer is accepted, the seller or lessor shall  
24 have ten days to begin effectuating the agreed upon cure  
25 and such must be completed within a reasonable time.

26 (d) Any applicable statute of limitations shall be tolled  
27 for the twenty-day period set forth in subsection (b) of this  
28 section or for the period of time the effectuation of the  
29 cure offer is being performed, whichever is longer.

30 (e) Nothing in this section shall be construed to prevent  
31 a consumer that has accepted a cure offer from bringing a  
32 civil action against a seller or lessor for failing to timely  
33 effect such cure offer.

34 (f) Any permanent injunction, judgment or order of the  
35 court under section one hundred eight, article seven of this  
36 chapter for a violation of section one hundred four of this  
37 article shall be prima facie evidence in an action brought  
38 pursuant to the provisions of this section that the respon-  
39 dent used or employed a method, act or practice declared  
40 unlawful by section one hundred four of this article.

41 (g) Where an action is brought pursuant to the provisions  
42 of this section, it shall be a complete defense that a cure  
43 offer was made, accepted and the agreed upon cure was  
44 performed. If the finder of fact determines that the cure  
45 offer was accepted and the agreed upon cure performed,  
46 the seller or lessor shall be entitled to reasonable attor-  
47 ney's fees and costs attendant to defending the action.

48 (h) No cure offer shall be admissible in any proceeding  
49 initiated pursuant to the provisions of this article unless  
50 the cure offer is delivered by a seller or lessor to the person  
51 claiming loss or to any attorney representing such person  
52 prior to the filing of the seller or lessee's initial responsive  
53 pleading in such proceeding. If the cure offer is timely  
54 delivered by the seller or lessor, then the seller or lessee  
55 may introduce the cure offer into evidence at trial. The  
56 seller or lessor shall not be liable for such person's attor-  
57 ney's fees and court costs incurred following delivery of  
58 the cure offer unless the actual damages found to have  
59 been sustained and awarded, without consideration of  
60 attorney's fees and court costs, exceed the value of the cure  
61 offer.



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

*Nandy White*  
.....  
Chairman Senate Committee

*Orin Brun*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Russell Ebelness*  
.....  
Clerk of the Senate

*Bryce W. Bond*  
.....  
Clerk of the House of Delegates

*Carl Ray Tomblin*  
.....  
President of the Senate

*[Signature]*  
.....  
Speaker House of Delegates

The within *is approved* ..... this the *21st*  
Day of *April* ....., 2005.

*[Signature]*  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

APR 15 2005

Time 4:00 pm