

W.Va. Consumer Law Changes Offer Help For Finance Cos.

By **Andrew Narod and Jared Searls** (May 5, 2021)

On March 29, in a development that provides some measure of relief to businesses operating in West Virginia, particularly within the financial services industry, Gov. Jim Justice signed into law amendments to the West Virginia Consumer Credit and Protection Act, or WVCCPA.

These amendments come as part of a legislative trend in West Virginia since 2015 to provide more certainty and greater defensive rights to businesses, in light of a statute that was previously one of the most impactful state consumer protection statutes nationwide.

In short, the newest amendments appear to provide clarity on certain attorney fees provisions in the WVCCPA, to better define the process for a presuit notice to cure and offer in response, and to provide new limitations on recovery of attorney fees in the instance of an offer of judgment or a written offer to settle.

And most notably, this legislation provides an avenue for defendants to recover attorney fees from plaintiffs in the event that a frivolous or bad faith claim is made against them, or in the event that a settlement offer was rejected without justification.

To be sure, significant litigation risk remains for businesses — especially those in the financial services industry — conducting commerce in West Virginia. But all told, these amendments should work to help provide additional certainty to businesses operating in the state, and additional tools for combatting litigation under this statute.

A Pro-Business Trend?

From a historical perspective, it is hardly insignificant that West Virginia continues to add more business-friendly provisions to the WVCCPA. The law was initially enacted in 1974, and has historically been notoriously consumer-friendly in practice.

Its scope includes consumer loans, credit sales and leases, as well as general consumer protection against unfair, deceptive and fraudulent acts or practices. Claims under the WVCCPA are routinely significant, because some of its civil liability provisions provide for an award of actual damages and attorney fees, as in many other states, and statutory penalties of \$1,000 per violation as increased for inflation.

In past years, prior to recent amendments, statutory penalties even reached as much as \$4,800 per violation. These amounts, and particularly the statutory penalties, add up very quickly for business defendants.

In many ways, this statute is unique among peer states in its potential severity due to the penalty provisions. As a result, it is often uniquely challenging for businesses to defend claims brought under this statute.

Previous amendments to the WVCCPA, beginning in 2015, began a trend away from the vastly pro-consumer tilt of this statute that had stood for more than 40 years. Some of the



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more notable amendments to the WVCCPA since that time included the reduction of statutory penalties to \$1,000 per violation, adjusted for inflation; the imposition of a presuit notice requirement providing potential defendants an opportunity to cure; the creation of an overall cap on penalties; and a reduction of the applicable limitations period.

Some of these amendments provided immediate relief to defendants — particularly with respect to the changes to statutory penalties. But others, such as the presuit notice and opportunity to cure, were often more helpful to business defendants in theory than in practice.

Notable Changes to the WVCCPA

The newest WVCCPA amendments appear to continue the trend of attempting to level the playing field for businesses, particularly creditors and debt collectors, in WVCCPA litigation. These changes, which become effective in June, include the following.

Recovery for Frivolous Claims and Defenses, or Other Positions Without Substantial Justification

Under newly enacted provisions of this law, a party prevailing after a verdict or judgment is entered may move the court to determine whether the opposing party presented a frivolous claim or defense, or took an "other position" that lacks substantial justification. As part of that request, the party may seek reasonable attorney fees and litigation expenses.

A frivolous claim is defined as one that lacks substantial justification, is not made in good faith, is made in the absence of any reasonable belief that a court would accept the claim, or is made for the purposes of delay or harassment of another party. It is currently unclear as to what would constitute an "other position" — which is not a claim or defense — under this amendment.

When a party raises the assertion that a claim or defense is frivolous, it is particularly notable that the court now "shall" hold a separate bifurcated hearing in which it makes this determination and awards damages if appropriate. The damages to be awarded may include reasonable attorneys fees and expenses of litigation.

In practice, both plaintiffs and defendants will now need to think twice before asserting claims or defenses, or taking certain positions, in cases that invoke the WVCCPA. For plaintiffs in particular, presuit investigation of factual claims will be critical — especially as there was previously less of an incentive to conduct a thorough presuit investigation before filing suit. For defendants, the selection of affirmative defenses will also need to perhaps be more thoughtful than in prior years.

There is little doubt that this change is a significant one. For many years, defendants facing WVCCPA lawsuits brought on frivolous grounds have been faced with the difficult decision to simply pay a nuisance settlement or spend even more on defending a bogus claim.

Defendants often choose the more certain route in that instance, even when there is no factual basis for a claim to be made against them. After this amendment, defendants can begin to push back a bit more, and demonstrate to plaintiffs that they themselves bear risk if their claims lack reasonable factual or legal merit. It will be fascinating to see this dynamic play out.

Presuit Notices

One previous feature of the WVCCPA was a bifurcated presuit notice system, where certain types of claims were subject to the limitations of Section 46A-5-108, and other types of claims deriving from alleged unfair and deceptive acts or practices were subject to Section 46A-6-106.

The new amendment provides a uniform manner for plaintiffs to transmit their required notices to cure in advance of bringing an action under the WVCCPA, eliminating the latter requirement in the process, and expanding the former requirement to cover unfair or deceptive acts and other sections of the WVCCPA.

One change to the presuit notice scheme is less advantageous to defendants than other amendments. Previously, a defendant was able to present to the jury the fact that it attempted to resolve the case by making a cure offer. The new amendment, while providing a more uniform overall scheme for pre-suit notice and cure, removes that possibility.

The impact of a presuit cure offer for defendants remains essentially unchanged. A cure offer is admissible in a proceeding seeking an award of attorney fees and expenses following entry of judgment. If a cure offer is made, and a plaintiff's recovery in litigation, not including attorney fees and court costs, does not exceed the offer, a defendant is not liable for the plaintiff's attorney fees and costs.

Offers of Settlement or of Judgment

Newly enacted provisions outline a process for transmitting an offer to settle, or an offer of judgment, more than 30 days before trial. If this process is followed and an offer is made to a plaintiff in writing, this mechanism may provide the ability to obtain attorney fee relief for defendants.

The amendment to Section 46A-5-109 provides a series of conditions for an offer to qualify under this rule. The offer must be in writing, must state that it is being made pursuant to Section 46A-5-109, must identify the parties making and receiving the proposal, must identify the claim(s) the proposal attempts to resolve, must state all conditions, must state the total amount of the proposal and must be delivered by specific expedited means.

If a qualifying offer is made more than 30 days before trial, or 20 days in the case of a counteroffer, and rejected by the plaintiff, the plaintiff is not entitled to recover attorney fees or expenses from the date of the offer through the entry of judgment if the final judgment is less than 75% of the offer, subject to certain restrictions. This is a powerful tool for defendants, it appears, as the threat of ongoing accrual of attorney fees through trial might be mitigated in appropriate cases through a thoughtful offer to settle.

The new amendments, though, also go even further to potentially provide recourse for defendants. If an offer is made, and if the subsequent judgment does not exceed 75% of the offer, a defendant may also petition the court for recovery of its own reasonable fees and expenses incurred after the offer was made.

That award is conditioned on the court determining that the plaintiff acted without substantial justification or without good faith in rejecting the offer. This is a significant departure from the offer of judgment rules set forth in West Virginia Rule of Civil Procedure 68 and Federal Rule of Civil Procedure 68, because the potential now exists for recovery of attorney fees in addition to costs.

From a practical perspective, one of the most difficult nuances to litigating WVCCPA claims has historically been the threat of continued attorney fees accruing as a case is litigated. These portions of the recent amendments will provide options for defendants to attempt to counter that threat in appropriate cases.

Conclusion

The most recent amendments to the WVCCPA are not limited to the above items — and other changes, including the manner of calculating attorney fees using a so-called lodestar analysis, will also likely be significant when litigating matters under this statute.

The net result of these amendments is that defendants facing a WVCCPA claim in a West Virginia state or federal court will now have additional tools at their disposal to combat such claims and to control the risk of escalating attorney fees. In fact, these tools might even provide recourse for defendants to recover their own attorney fees and expenses in certain cases.

While these changes are only prospective in nature, and while they apply only to cases filed after the effective date in June, it now appears that the WVCCPA will be slightly more business-friendly going forward. It will be intriguing to see how these new amendments are interpreted, and how aggressively defendants will use these new tools to combat WVCCPA claims in the future.

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