

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Committee Substitute

for

Senate Bill 33

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STOLLINGS, ROMANO, HAMILTON, AND RUCKER

[Originating in the Committee on the Judiciary;

reported on February 10, 2022]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §46A-6O-1, §46A-6O-2, §46A-6O-3, §46A-6O-4, §46A-6O-5, and §46A-6O-6,
3 all relating to automatic purchase renewal offers and continuous service offers; stating
4 legislative intent; defining terms; setting notice and disclosure requirements for automatic
5 purchase renewal offers and continuous service offers; providing that a business may not
6 charge the consumer for an automatic renewal or continuous services without first
7 obtaining the consumer's affirmative consent; providing acknowledgement requirements;
8 providing that a business shall disclose how to cancel the automatic renewal or continuous
9 service before the consumer pays, if the offer includes a free gift or trial; providing that a
10 business shall provide certain mechanisms for cancellation of the automatic renewal or
11 continuous offer in the acknowledgement; requiring a business to provide contact
12 information to the consumer; providing means for terminating the automatic renewal or
13 continuous service offer online; providing notice requirements in the case of material
14 changes in the terms of the automatic renewal or continuous service; providing that a
15 business shall provide to the consumer a reminder of the recurring charge and information
16 on how the consumer may cancel at least 30 days prior to the charge in the case of
17 automatic renewal or continuous service offers of certain frequency; providing a period of
18 application; providing that goods, wares, merchandise, or products shall be deemed an
19 unconditional gift to the consumer when the business sends any goods, wares,
20 merchandise, or products to a consumer without first obtaining the consumer's affirmative
21 consent under a continuous service agreement or automatic renewal of a purchase;
22 providing a civil cause of action; providing statutory penalties; providing that no action may
23 be brought until written notice is provided by the consumer, or his or her representative,
24 to the business; providing written notice requirements; providing mailing requirements;
25 providing the business an opportunity to cure the alleged violation; providing for expiration
26 of the cure offer and cure period; providing a period for the business to remit payment, if

27 any, as specified in the accepted cure offer; providing that a claim may be brought for
28 failure of the business to timely effect the accepted cure offer; providing that the written
29 notice is a jurisdictional prerequisite to bringing a cause of action; prohibiting certification
30 of certain class action litigation; providing the court discretion to award plaintiff costs of the
31 action, including reasonable attorney's fees; providing that plaintiff is not entitled to costs
32 and attorney's fees under certain circumstances; providing a statute of limitations;
33 providing for tolling of the statute of limitations; and providing exemptions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 60. AUTOMATIC PURCHASE RENEWALS.

§46A-60-1. Legislative intent.

1 It is the intent of the Legislature to end the practice of ongoing charging of a consumer's
2 credit or debit card or third-party payment account without the consumer's explicit consent for
3 ongoing shipments of a product or ongoing deliveries of service.

§46A-60-2. Definitions.

1 As used in this article:

2 (1) "Automatic renewal" means a plan or arrangement in which a paid subscription or
3 purchasing agreement is automatically renewed at the end of a definite term for a specified period
4 of more than one month.

5 (2) "Automatic renewal offer terms" means the following clear and conspicuous
6 disclosures:

7 (A) That the subscription or purchasing agreement shall continue until the consumer
8 cancels;

9 (B) The description of the cancellation policy that applies to the offer;

10 (C) The recurring charges that shall be charged to the consumer's credit or debit card or
11 payment account with a third-party as part of the automatic renewal plan or arrangement, and

12 that the amount of the charge may change, and the amount to which the charge shall change, if
13 known;

14 (D) The length of the automatic renewal term or that the service is continuous, unless the
15 length of the term is chosen by the consumer; and

16 (E) The minimum purchase obligation, if any.

17 (3) "Clear and conspicuous" or "clearly and conspicuously" means in larger type than the
18 surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or
19 set off from the surrounding text of the same size by symbols or other marks, in a manner that
20 clearly calls attention to the language. In the case of an audio disclosure, "clear and conspicuous"
21 and "clearly and conspicuously" means in a volume and cadence sufficient to be readily audible
22 and understandable.

23 (4) "Consumer" means any individual who seeks or acquires, by purchase or lease, any
24 goods, services, money, or credit for personal, family, or household purposes.

25 (5) "Continuous service" means a plan or arrangement for a specified period of more than
26 one month in which a subscription or purchasing agreement continues until the consumer cancels
27 the service.

§46A-60-3. Automatic renewal or continuous service offers; prohibited activities;
cancellation mechanism; notice of material change in terms; application of
requirements.

1 (a) It is unlawful for any business that makes an automatic renewal offer or continuous
2 service offer to a consumer in this state to do any of the following:

3 (1) Fail to present the automatic renewal offer terms or continuous service offer terms in
4 a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and
5 in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the
6 request for consent to the offer: *Provided*, That if the offer also includes a free gift or trial, the offer
7 shall include a clear and conspicuous explanation of the price that shall be charged after the trial

8 ends or the manner in which the subscription or purchasing agreement pricing shall change upon
9 conclusion of the trial;

10 (2) Charge the consumer's credit or debit card, or the consumer's account with a third-
11 party, for an automatic renewal or continuous service without first obtaining the consumer's
12 affirmative consent to the agreement containing the automatic renewal offer terms or continuous
13 service offer terms, including the terms of an automatic renewal offer or continuous service offer
14 that is made at a promotional or discounted price for a limited period of time; or

15 (3) Fail to provide an acknowledgment that includes the automatic renewal offer terms or
16 continuous service offer terms, cancellation policy, and information regarding how to cancel in a
17 manner that is capable of being retained by the consumer: *Provided*, That if the automatic renewal
18 offer or continuous service offer includes a free gift or trial, the business shall also disclose in the
19 acknowledgment how to cancel and allow the consumer to cancel the automatic renewal or
20 continuous service before the consumer pays for the goods or services.

21 (b) A business that makes an automatic renewal offer or continuous service offer shall
22 provide a toll-free telephone number, electronic mail address, a postal address if the seller directly
23 bills the consumer, or it shall provide another mechanism for cancellation that shall be described
24 in the acknowledgment specified in subdivision (3), subsection (a) of this section.

25 (c) In addition to the requirements of subsection (b) of this section, a consumer who
26 accepts an automatic renewal or continuous service offer online may terminate the automatic
27 renewal or continuous service exclusively online, which may include a termination email formatted
28 and provided by the business that a consumer can send to the business without additional
29 information.

30 (d) If there is a material change in the terms of the automatic renewal or continuous service
31 that has been accepted by a consumer in this state, the business shall provide the consumer with
32 a clear and conspicuous notice of the material change and provide information regarding how to
33 cancel in a manner that is capable of being retained by the consumer.

34 (e) If there is an automatic renewal or continuous service offer that charges once a year
35 or less frequently, the business shall provide to the consumer a reminder of the recurring charge
36 and information on how the consumer may cancel at least 30 days prior to the charge.

37 (f) The requirements of this section apply only prior to the completion of the initial order
38 for the automatic renewal or continuous service, except as follows:

39 (1) The requirement in subdivision (3), subsection (a) of this section may be fulfilled after
40 completion of the initial order;

41 (2) The requirement in subsection (d) of this section shall be fulfilled prior to
42 implementation of the material change; and

43 (3) The requirement of subsection (e) shall apply at least 30 days prior to any charge for
44 automatic renewal or continuous service.

§46A-6O-4. Goods sent without affirmative consent as unconditional gifts.

1 If a business sends any goods, wares, merchandise, or products to a consumer, under a
2 continuous service agreement or automatic renewal of a purchase, without first obtaining the
3 consumer's affirmative consent as described in this article, the goods, wares, merchandise, or
4 products shall, for all purposes, be considered an unconditional gift to the consumer, who may
5 use or dispose of the gift in any manner he or she sees fit without any obligation on the consumer's
6 part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping
7 any goods, wares, merchandise, or products to the business.

§46A-6O-5. Civil action permitted.

1 (a) Any violation of §46A-6O-3 of this code shall be an unfair act or deceptive practice.
2 Any person who alleges that he or she has been harmed by a violation of this article may bring a
3 civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both:
4 Provided, That: (i) An action may not be brought pursuant to this section until the consumer, or a
5 representative of the consumer, has notified the business of the alleged violation and the factual
6 basis for the violation, in writing and by certified mail, return receipt requested, to the business'

7 registered agent identified by it at the office of the West Virginia Secretary of State or, if not
8 registered with the West Virginia Secretary of State, then to its principal place of business; (ii) the
9 business has made a cure offer within 30 days from receipt of the notice of the alleged violation
10 by its agent or at its principal place of business and the cure offer has been provided to the
11 consumer's counsel or, if unrepresented, to the consumer by certified mail, return receipt
12 requested; and (iii) the consumer accepted or refused the cure offer within 20 days of receipt:
13 *Provided, however,* That cure offers not accepted within 20 days of receipt shall be considered
14 refused and withdrawn. If a cure offer is accepted, unless otherwise agreed to by the parties, the
15 business has 20 days to remit payment, if any, as specified in the cure offer. Nothing in this section
16 prevents a consumer that has accepted a cure offer from bringing an action under this section
17 against a business for failing to timely effect the cure offer.

18 (b) Any person who engages, has engaged, or proposes to engage in an unfair act or
19 deceptive practice is liable for a civil penalty not to exceed \$1,000 for each violation, which shall
20 be assessed and recovered in a civil action brought in the name of the people of the State of West
21 Virginia by the Attorney General in any court of competent jurisdiction. The court shall impose a
22 civil penalty for each violation of this article. In determining the amount of the civil penalty, the
23 court shall consider any one or more of the relevant circumstances presented by any of the parties
24 to the case, including: The nature and seriousness of the misconduct, the number of violations as
25 to that consumer, the persistence of the misconduct, the length of time over which the misconduct
26 occurred, the willfulness of the defendant's misconduct, and the defendant's good-faith efforts in
27 resolving the dispute.

28 (c) A state court may not issue an order granting certification of a class action seeking
29 monetary, injunctive, or other relief under this section.

30 (d) The court in any action brought under this section may, if any judgment is awarded to
31 the plaintiff, assess costs of the action, including reasonable attorney's fees, against the
32 defendant: *Provided,* That the plaintiff may not be awarded costs and attorney's fees if the plaintiff

33 rejected the business' cure offer and judgment is awarded to the plaintiff in an amount not more
34 than 105 percent of the amount offered in the cure offer.

35 (e) An action may not be brought under this section more than two years after the date
36 upon which the violation occurred: *Provided*, That any applicable statute of limitations is tolled for
37 a 20-day period beginning the day the business or its agent receives the notice of the alleged
38 violation under §46A-6O-5(a) of this code, or for the period the effectuation of the cure offer is
39 being performed, whichever is longer.

40 (f) A business which makes a good-faith effort to comply with the requirements of this
41 article shall not be subject to the civil penalties provided by this section.

§46A-6O-6. Exemptions.

1 The following are exempt from the requirements of this article:

2 (1) Any service provided by a business or its affiliate where either the business or its
3 affiliate is doing business pursuant to a franchise issued by a political subdivision of the state or
4 a license, franchise, certificate, or other authorization issued by the Public Service Commission;

5 (2) Any service provided by a business or its affiliate where either the business or its
6 affiliate is licensed or regulated by the Public Service Commission, the Federal Communications
7 Commission, or the Federal Energy Regulatory Commission;

8 (3) Any entity or one of its affiliates regulated by the Insurance Commission;

9 (4) A bank, bank holding company, or the subsidiary or affiliate of either, or a credit union
10 or other financial institution, licensed under state or federal law; and

11 (5) A contract that is cancellable by the consumer at any time with a pro rata refund of any
12 unearned amounts provided to the consumer upon cancellation. Such contract may include a
13 cancellation fee but such fee may not exceed 10 percent of the purchase price or \$50, whichever
14 is less.