

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF THE
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Attorney General TITLE NUMBER: 142

RULE TYPE: Legislative; CITE AUTHORITY Code 46A-7-102(1)(e)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 11

TITLE OF RULE BEING PROPOSED: Proposed legislative rule prohibiting certain unfair or unconscionable or fraudulent, deceptive, or misleading means of debt collection.

DATE OF PUBLIC HEARING: September 15, 1988 TIME: 11:00 a.m.

LOCATION OF PUBLIC HEARING: Office of the Attorney General
Consumer Protection Division
812 Quarrier Street, L&S Bldg., Sixth Floor
Conference Room
Charleston, West Virginia 25301

(11:00 a.m. to 11:45 a.m.)

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Office of the Attorney
General
Consumer Protection Div
812 Quarrier St. 6th Fl
Charleston, WV 25301

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Robert Wm. Schenkling III

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-6 AND 46A-7
SERIES 11

Title: Proposed legislative rule prohibiting certain unfair or unconscionable or fraudulent, deceptive, or misleading means of debt collection.

SUMMARY OF PROPOSED RULE

The purpose of this rule is to protect consumers from unfair, fraudulent, or unconscionable debt collection practices. This rule is also designed to determine consumer liability for attorney fees and collection costs arising from delinquent higher educational loans.

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WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 46A-7
SERIES 11

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SECRETARY OF STATE

Title:

Proposed legislative rule prohibiting certain unfair or unconscionable or fraudulent, deceptive, or misleading means of debt collection.

Section 1. General Provisions.

- 1.1 Rule Designation - This rule is legislative.
- 1.2 Scope - This rule prohibits certain means of debt collection in West Virginia, its counties, and all political subdivisions.
- 1.3 Authority - W. Va. Code Chapter 46A, Article 7, Section 102(1)(e).
- 1.4 Filing Date -
- 1.5 Effective Date -
- 1.6 Repeal of Former Rule - Not applicable.
- 1.7 Penalties - Except as indicated, a violation of this rule constitutes a violation of Chapter 46A, Article 2, Section 127 and Chapter 46A, Article 2, Section 128 of the Code and any person violating the provisions of this rule or the provisions of the Consumer Credit and Protection Act shall be subject to a civil penalty in the amount of Five Thousand Dollars for each transaction or occurrence of a repeated and willful violation.
- 1.8 Construction - This rule shall be deemed to be remedial and, therefore, shall be liberally construed to effectuate the purposes of the West Virginia Consumer Credit and Protection Act.
- 1.9 Severability - If, for any reason, any section, subsection, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other

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sections, subsections, sentences, clauses, phrases, or provisions or its application to any other person or circumstance, and to this end, each and every section, subsection, sentence, clause, phrase, or provision of this rule is hereby declared severable.

Section 2. Definitions.

2.1 For the purposes of this rule, the definitions contained within Chapter 46A, Article 2, Section 122 of the Code shall apply.

2.2 For the purposes of this rule and the Consumer Credit and Protection Act, an act or practice is "repeated and willful" when such act or practice occurs on more than one occasion and the act or practice is designed to achieve or attain any goal or objective regardless of any specific knowledge of the requirements of the law.

Section 3. Fraudulent, Deceptive, or Misleading Conduct.

It shall be a fraudulent, deceptive, or misleading means of debt collection in violation of Chapter 46A, Article 2, Section 127 for any debt collector to

3.1 Violate any provision of the following statutes, or regulations promulgated in connection with those statutes, but only to the extent that such statutes or regulations provide greater protection than the West Virginia Consumer Credit and Protection Act and the rules promulgated thereunder:

3.1.1 The Fair Debt Collection Practices Act, 15 U.S.C. Sections 1692 et seq., when applicable to a debt collector defined thereunder;

3.1.2 The Communications Act of 1934, 47 U.S.C. Section 223; or

3.1.3 The Fair Credit Reporting Act, 15 U.S.C. Section 1681 et seq.

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Series 11, Section 3

3.2 When engaged in both the business of a consumer reporting agency (as defined by 15 U.S.C. Section 1681a) and as a debt collector (as defined under 15 U.S.C. Section 1692a), engage in any debt collection activity when the consumer desires to review and comment upon any file maintained by such consumer reporting agency.

3.3 Communicate with any consumer at his or her place of employment or any other location when

3.3.1 The debt collector knows or should know that the consumer's employer prohibits such communication;

3.3.2 The debt collector knows or should know that, by the nature of the consumer's employment, the consumer will be unable to receive communications from the debt collector; or

3.3.3 The debt collector knows or should know that any such communication may cause embarrassment to the consumer.

3.4 Solicit or require disclosure of the identity of any person on any instrument of obligation when such information is intended to be used in debt collection.

3.5 Communicate with any consumer after being notified that the consumer wishes the debt collector to cease any communication except to

3.5.1 Advise the consumer in writing that the debt collector's efforts are being terminated; or

3.5.2 Advise the consumer in writing that a lawsuit has been initiated.

3.6 Communicate with any consumer by postcard or other transmittal device, or require response by any transmittal device, which

3.6.1 Contains any printing, symbol, item, word, or phrase on the outside of the envelope other than the name and address of the debt collector; or

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3.6.2 Indicates that the person from whom the communication is received is engaged in the business of debt collection as defined by Chapter 46A, Article 2, Section 122.

3.7 Assign, transfer, sell, or refer any claim to any other debt collector (except to the original creditor or previous debt collector) upon discovery that the consumer had a valid defense to any portion of the claim.

3.8 Assign, transfer, sell, or refer any claim to any other debt collector without informing such debt collector, in writing, that a valid defense to any portion of the claim has been discovered and, further, setting forth such valid claim or defense.

3.9 Fail to validate any consumer defense to any claim.

3.10 Collect or attempt to collect any portion of any claim to which the consumer has a valid defense.

3.11 Make any in-person, direct contact with any consumer or family member of any consumer for the purpose of collecting a claim or ascertaining information about a consumer except as may be required to

3.11.1 Conduct any lawful judicial proceedings;

3.11.2 Conduct any voluntary surrender of any property where a valid security interest exists; or

3.11.3 Conduct any judicially ordered surrender of property.

For the purpose of this section, an "in-person, direct contact" shall specifically exclude any voluntary appearance of any consumer or family member of any consumer at the debt collector's place of business. An appearance shall not be voluntary, however, when the appearance is prompted by any allegation of further action unless an appearance is made.

3.12 Successfully initiate any communication with any consumer or family member of any consumer more frequently than two times within any thirty-day period, or fail to

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maintain records of the dates, times, and identity of any person with whom the communication was directed when such communication relates to the collection of any claim.

3.13 Solicit, hold, accept, or deposit, after the effective date of this rule, any negotiable instrument or check postdated by more than ten days or use any postdated check for the purpose of instituting any criminal action.

3.14 Allege that any action will be taken to collect a claim when, at the time of the allegation,

3.14.1 Such action has not been specifically authorized by the person to whom the obligation is owing in writing, with a copy of such authorization, signed and dated, retained by the debt collector; and

3.14.2 Such action is not intended.

For the purpose of this section, it shall be presumed that an action is not authorized where no written notice in compliance with subsection 3.14.1 exists. For the purpose of this section, it shall be presumed that an action is not intended when the action does not occur within two weeks of the date of mailing of such notification, unless the consumer engages in an activity which legitimately delays the institution of such activity by the debt collector.

3.15 Assess or attempt to assess any returned check fee which exceeds Ten Dollars or the maximum amount permitted by West Virginia law.

3.16 Take or threaten to take any nonjudicial action to gain possession of any property (including disablement of any property) when

3.16.1 No present right to take possession of (or effect disablement of) such property exists pursuant to a valid security interest;

3.16.2 No present intention exists to undertake the nonjudicial action;

3.16.3 The property is exemptible from dispossession;

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3.16.4 The property may only be dispossessed (or disabled) as a result of violence, breach of peace, or threat of violence or breach of peace; or

3.16.5 The debt collector has failed to give any notice of right to cure default, notice of acceleration, notice of demand, or other similar notice required by any statute or regulation.

3.17 Set-off or threaten to set-off any money or property of any consumer where

3.17.1 No valid security interest exists in the account, money, or property subject to the set-off;

3.17.2 Any source of deposits for the account in question is an exempt source, including, but not limited to, unemployment compensation, worker's compensation, social security compensation, or any other exempt source; or

3.17.3 The debt collector has failed to give any notice of right to cure default, notice of acceleration, notice of demand, or other similar notice required by any statute or regulation.

3.18 Institute any legal proceedings in any judicial district other than the judicial district where

3.18.1 The consumer currently resides; or

3.18.2 The consumer executed the underlying obligation.

However, a debt collector who has a security interest in land may arrange for the institution of legal proceedings in any judicial district where such land is located for the purpose of realizing on the security interest in the land.

3.19 Engage in any conduct which may create a false sense of urgency in the mind of the consumer.

3.20 Misrepresent the impact of any adverse credit report on the credit worthiness of any consumer.

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3.21 Represent in any communication that the debt collector has a legal department whose function is to collect claims when no attorneys are regularly employed by the debt collector within such legal department for such purpose.

3.22 Fail to register as a debt collector when required to do so by Chapter 47, Article 16, Section 1 et seq. of the Code.

3.23 In connection with the collection of any claim, agree with any consumer to any repayment plan, or take any claim for collection which was subject to such a plan, and subsequently revoke the plan absent noncompliance by the consumer; and

3.23.1 Refer the claim to any other debt collector;

3.23.2 Institute any proceedings to collect the claim; or

3.23.3 Engage in any other means of debt collection.

3.24 Tape or record by any means any oral or electronic communications without the consumer's express permission.

3.25 In any secured transaction in which collateral is repossessed, fail to sell or offer for sale any collateral in a commercially reasonable manner as required by Chapter 46, Article 9, Section 501 et seq. of the Code or collect or attempt to collect any deficiency if any sale was commercially unreasonable.

3.26 In any consumer transaction where collateral is repossessed, fail to credit the consumer's obligation with an amount equal to the fair market value of the collateral, in retail sale, when the person repossessing the collateral is a lender or agent, employee, servant, or independent contractor of the lender, and, in the case of a lender, the collateral is transferred to the actual seller of the collateral. For the purpose of this subsection a seller is the actual seller of the collateral who is closely connected

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to the lender. A seller is closely connected with the lender when such seller has engaged in any of the following conduct:

3.26.1 The lender and the seller have arranged for a commission, brokerage, or referral fee for the extension of credit by the lender;

3.26.2 The lender is a person related to the seller unless the relationship is remote or not a factor in the transaction;

3.26.3 The seller guarantees the loan or otherwise assumes the risk of loss by the lender upon the loan other than the risk of loss resulting from the seller's failure to perfect a security interest in the property securing the loan;

3.26.4 The lender supplies the seller with documents used by the consumer to evidence the transaction or the seller directly supplies the lender with the documents used by the consumer to evidence the transaction;

3.26.5 The loan is conditioned upon the borrower's purchase of the goods or services from the particular seller, but the lender's payment of the proceeds of the loan to the seller does not in itself establish that the loan was so conditioned;

3.26.6 The seller has specifically recommended such lender by name to the consumer and the lender has made five or more loans to borrowers within a period of twelve months which were used in consumer credit sales with the seller or a person related to the seller, if in connection with such other five or more loans, the seller also specifically recommended such lender to the borrowers involved; or

3.26.7 The lender was the issuer of a credit card other than a lender credit card which may be used by the borrower in the sale transaction as a result of a prior agreement between the issuer and the seller.

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3.27 Collect or attempt to collect any claim arising from a supervised loan, as defined by Chapter 46A, Article 1, Section 102(46) of the Code, unless such debt collector has obtained a license from the commissioner of banking to make supervised loans.

Section 4. Unfair or Unconscionable Means.

It shall be an unfair or unconscionable means of debt collection in violation of Chapter 46A, Article 2, Section 128 for any debt collector to

4.1 With regard to any delinquent educational loan made by any institution of higher education within this state,

4.1.1 Notwithstanding the date of such loan, to collect or attempt to collect any attorney fees, costs of collection, or other similar costs when the documents underlying such loan do not contain any provision for recovery of attorney fees, costs of collection, or other similar costs; or

4.1.2 To collect or attempt to collect any attorney fees, costs of collection, or other similar costs when the documents underlying the loan were executed prior to the effective date of Chapter 46A, Article 2, Section 128 of the Code, as amended in 1983.

4.2 With regard to any delinquent educational loan made by any institution of higher education within this state, to

4.2.1 Collect or attempt to collect from any consumer any attorney fees or costs of collection [when permitted by the provisions of Chapter 46A, Article 2, Section 128(c), as amended in 1983] which exceed twenty percent of the sum of the delinquent principal amount plus any earned finance charges owing the institution of higher education; or

4.2.2 Contract with any person, organization, or entity, including any government agency, for the recovery of any amount which, when calculated, exceeds twenty-five

percent of the sum of delinquent principal amount plus any earned finance charges owing the institution of higher education upon any delinquent education loan.

4.3 In any instrument underlying any educational loan made by an institution of higher education in this state, if such instrument contains a provision for the assessment of attorney fees or costs of collection,

4.3.1 Fail to clearly and conspicuously disclose such fact within the instrument; or

4.3.2 Fail to clearly and conspicuously disclose that the maximum liability for attorney fees and costs of collection for which the consumer may be liable shall not exceed twenty percent of the delinquent principal amount of the loan plus any earned finance charges.

4.4 Recover or attempt to recover costs of collection or attorney fees on delinquent educational loans when the loans made by an institution of higher education in this State are assigned to a financial institution or other person prior to the occurrence of any delinquency.

4.5 Recover or attempt to recover costs of collection or attorney fees on delinquent educational loans when such loans are not made by institutions of higher education within this State.

4.6 Include any provision in any note or instrument of obligation any provision for recovery of costs of collection or attorney fees when such fees are not recoverable under West Virginia law or the law of any other state when the obligation was entered into in such other state.

Section 5. Enforcement.

5.1 The attorney general may seek, and the courts or administrative tribunals are hereby empowered to order, any relief which may be just and proper under the circumstances, including, but not limited to, restitution to consumers, mandatory mailings or disclosures to consumers, corrective advertising, dismissal of judgments or cases,

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recalculations of indebtedness, annual reports setting forth compliance or noncompliance with the provisions of this rule and the Consumer Credit and Protection Act, and the posting of a penal, performance, or surety bond with the court or with the attorney general.

5.2 The courts of this state may, in addition to any relief awardable under subsection 5.1 of this rule, award to the attorney general costs, fees, and expenses of investigation and litigation, including attorney fees, any injunctive relief (including any ex-parte injunctive relief), orders freezing bank accounts or assets pending final order, and civil penalties in the amount of Five Thousand Dollars for each transaction or occurrence of a repeated and willful violation of the provisions of this rule or of the Consumer Credit and Protection Act.

5.3 Any violation of the provisions of this rule shall also be considered to be an unfair or deceptive act or practice in violation of Chapter 46A, Article 6, Section 104 of the Code.

FISCAL NOTE FOR PROPOSED RULES

Proposed legislative rule prohibiting certain unfair or
 Rule Title: unconscionable or fraudulent, deceptive, or misleading
means of debt collection.

Type of Rule: Legislative Interpretive Procedural

Agency Attorney General Address 812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301

| 1. Effect of Proposed Rule | ANNUAL | | FISCAL YEAR | | |
|----------------------------|----------|----------|-------------|-------|------------|
| | Increase | Decrease | Current | Next | Thereafter |
| Estimated Total Cost | \$-0- | \$ -0- | \$-0- | \$-0- | \$ -0- |
| Personal Services | -0- | -0- | -0- | -0- | -0- |
| Current Expense | -0- | -0- | -0- | -0- | -0- |
| Repairs and Alterations | -0- | -0- | -0- | -0- | -0- |
| Equipment | -0- | -0- | -0- | -0- | -0- |
| Other | -0- | -0- | -0- | -0- | -0- |

2. Explanation of above estimates. No estimated cost increase or decrease will result from implementation and promulgation of this rule.

3. Objectives of these rules: The objective of this rule is to prohibit certain fraudulent, deceptive, or unconscionable debt collection practices in West Virginia and to determine consumer liability for attorney fees and costs of collection arising from delinquent higher educational loans.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries;
Specific groups of citizens.

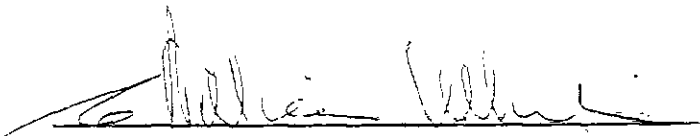
None

C. Economic Impact on Citizens/Public at Large.

None

Date August 12, 1988

Signature of Agency Head or Authorized Representative


CHIEF DEPT/ ARIZONA GEORGE



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
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December 20, 1990

The Honorable Ken Hechler
Secretary of State
Suite 157-K, State Capitol
Charleston, West Virginia 25305

FILED
1991 JAN -2 AM 8:07
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Re: Proposed Legislative Rules,
Title 142, Series 10 and 11

Dear Secretary Hechler:

Our office has decided to withdraw the two above-referenced proposed rules. Both proposed rules were filed with your office on August 12, 1988. This notice of withdrawal is pursuant to West Virginia Code § 29A-3-14(a) and for publication in the State Register.

Sincerely,

Roger W. Tompkins
ROGER W. TOMPKINS
ATTORNEY GENERAL

RWT/lp