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opportunity to present additional evidence, and should provide specific findings supporting its decision, we reverse the circuit court's order.

Loan Max proposed to operate its title loan business in an existing building located in a zoning district that permits such a special use. The City's professional staff recommended to the Board that it grant the special use application. At the public hearing on the application, however, the alderman representing the district where the building was located stated that while he had no land-use objection to the application, he was politically and philosophically opposed to the title loan business and did not want another outlet in his district. The Board denied the application and the circuit court affirmed the Board's decision.

A decision by a local zoning board of appeals to grant or deny a special use application must be supported by substantial evidence. *See* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). "Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board." ***Id.*** A decision that is not supported by substantial evidence is arbitrary and capricious. *See* ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). We owe no deference to a decision that is not supported by findings explaining the decision. *See* ***Ledger v. City of Waupaca Bd. of Appeals***, 146 Wis. 2d 256, 262, 430 N.W.2d 370 (Ct. App. 1988).

Here, because the common council determined that a title loan business is a generally acceptable use of the property at issue, the Board was confined to determining whether the proposed use reflected in the application met the criteria in the special use ordinance,

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MILWAUKEE, WI., CODE § 295-59-5.5-c.[2] The evidence submitted to the Board came from two sources—the City's professional staff and the alderman who testified at the hearing.

A "Hearing Summary" prepared by the city's professional staff offered the following relevant evidence:

> The Department of Neighborhood Services noted: "DNS believes that this use can be developed in a manner that will be consistent with the Milwaukee Building Code. The plan of operation appears to be enforceable."
>
> The Department of Public Works noted: "Provided the proposed use is developed and operated according to the plans submitted, DPW believes the use can be operated in a manner which will not have a significant adverse impact on traffic circulation, parking or any use of the public right-of-way."
>
> The Department of City Development noted: "Based on a review of the information submitted by the appellant relative to this proposal and without benefit of any testimony which may be presented at the Board of Zoning Appeals hearing, the Department of City Development finds that the criteria for a special use ... have been met...."

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[2] This municipal ordinance directs the board to make the following findings to grant a special use application:

> c-1. Protection of Public Health, Safety and Welfare. The use will be designed, located and operated in a manner so that the public health, safety and welfare is protected.
>
> c-2. Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use.
>
> c-3. Traffic and Pedestrian Safety. Adequate measures have been or will be taken to provide safe pedestrian and vehicular access.
>
> c-4. Consistency with Comprehensive Plan. The special use will be designed, located and operated in a manner consistent with the city's comprehensive plan.

The Board's own staff concluded:

> Based on the evidence submitted by the applicant, the information received from the departments and the case summary, the [Board] staff recommends that the proposed use be granted based on the criteria being met and recommends that this use be approved for a period of ten (10) years, provided the applicant complies with any and all conditions listed below.

The alderman testified that he had no objection to the application on land-use grounds:

> Mr. Chairman, let me be perfectly clear that, first of all, from a land use standpoint, I don't have an objection to the - - to what Loan Max is attempting to do, and I don't think it would have a detrimental impact from a land use perspective, ...

He then testified, however, that he was strongly opposed on philosophical grounds because "the interest rates they charge are so exorbitant." He also opposed the application because he already has a title loan company, a "pay day loan store," and two check-cashing stores within his district.

Loan Max argues that the alderman's political and philosophical views do not constitute substantial evidence on which the Board could base its denial of the special use permit. MILWAUKEE, WI., CODE § 295-59-5.5-c-2, however, provides: "Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use." The alderman's views, particularly regarding the impact of similar enterprises in the district, could be relevant to those criteria.

Still, from the limited evidentiary record developed before the Board, and from the Board's limited findings and explanation for its decision, it is not possible to determine whether the Board's decision was supported by substantial evidence. *See* ***Ledger***, 146 Wis. 2d at 262.

Accordingly, we reverse the circuit court's order and direct that the case be remanded to the Board for the parties to be given the opportunity to present additional evidence, for the Board to make specific findings under the criteria of MILWAUKEE, WI., CODE § 295-59-5.5-c, and for the Board to render its decision in accordance with its findings.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's order is summarily reversed pursuant to WIS. STAT. RULE 809.21(1).

Cornelia G. Clark
Clerk of Court of Appeals

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1082-2004-9400

JW

P. 4

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TITLE LENDERS, INC., d/b/a USA PAYDAY LOANS,

Plaintiffs,

vs.

BOARD OF ZONING APPEALS,

Defendant.

DECISION and ORDER

Case No. 04-CV-000115

Plaintiff, Title Lenders, Inc., d/b/a USA PAYDAY LOANS ("Title Lenders"), seeks judicial review of the decision of the City of Milwaukee Board of Zoning Appeals ("Board") denying an application for a special use permit. Plaintiff contends that the decision was without evidentiary support and was arbitrary and unreasonable. This Court, having reviewed the record along with the submissions by the parties and for the reasons stated herein, affirms the decision of the Board.

STANDARD OF REVIEW

This action is an appeal by way of certiorari under Wis. Stat. §62.23(7)(e)10. Review by certiorari is narrow in scope and limited to the record made before the administrative body. Ledger v. City of Waupaca Board of Appeals, 146 Wis. 2d 256, 261 (Ct. App. 1988). Under traditional standards of common law certiorari review, judicial review is limited to:

(1) whether the Board kept within its jurisdiction;
(2) whether it proceeded on a correct theory of law;
(3) whether its action was arbitrary, oppressive or unreasonable and

represented its will and not its judgment; and

(4) whether the Board might reasonably make the order or determination in question, based on the evidence.

State v. Outagamie County Board of Adjustment, 244 Wis. 2d 613, 630 (2001)

A board's determination will be found arbitrary or capricious if it is unreasonable or without any rational basis. Snyder v. Waukesha County Zoning Board of Adjustment, 74 Wis.2d 468, 476 (1976). However, there is a presumption of correctness and validity to decisions made by the board. State ex rel. Spinner v. Kenosha County Board of Adjustments, 223 Wis.2d 99, 104 (Ct. App. 1998). The board's decision is to be upheld if it is supported by substantial evidence in the record. See Clark v. Waupaca County Board of Adjustment, 186 Wis.2d 300, 304 (Ct. App. 1994). In other words, the board's decisions should be upheld if any reasonable view of the evidence sustains such findings. Snyder, 74 Wis.2d at 476. The Court may not substitute its own decision for that given to the board by the legislature. Id.

ANALYSIS

Title Lenders is a licensed loan agency pursuant to Wis. Stat. §138.09 and is the leaseholder of property located at 714 North Broadway in the City of Milwaukee. (the "Property") The Property is zoned C9F(B) which allows a payday loan agency as a special use according to Milwaukee zoning ordinances. Plaintiff submitted an application ("Application") for a special use permit on June 19, 2002. On October 17, 2002, after proper notice, the Board held a hearing on the Application. At this hearing two Board members, initially stated that they believed the criteria for a special use permit had been met. In addition, the Department of Public Works ("DPW"), the Department of City Development ("DCD"), and the Department of

Neighborhood Services ("DNS") did not file objections to the Application. The Board decided to adjourn the hearing to obtain more information regarding Title Lenders.

Another hearing was held on December 12, 2002, and the Board decided to adjourn the hearing again because they had received an objection from a property owner, Towne Realty, and wanted more time to investigate this complaint. In addition, Attorney Walrath from the Legal Aid Society ("Legal Aid") asked for time to present evidence to substantiate Legal Aid's basis for opposing the Application. Subsequently, Legal Aid submitted extensive materials and testimony concerning the payday loan industry and Title Lenders.

A third public hearing was held on October 16, 2003. Testimony was taken from a number of persons including neighboring property owners. At this hearing, DCD changed its previous opinion of the Application and stated that they now believed that Title Lenders would have a negative impact on the development of this area of downtown Milwaukee. On November 6, 2003, the Board held a final hearing and denied the Application. A written decision was issued on December 10, 2003.

Title Lenders contends that the Board made a determination that was unsupported by the evidence. Title Lenders contrasts the evidence it submitted regarding their specific operations with the generalizations about other loan agencies submitted by Legal Aid. Title Lenders denies that it has the same practices and experience that was cited by Legal Aid. For example, Title Lenders is a member of the Community Financial Services Association of America ("CFSA") and has adopted the CFSA Best Practices. Customers of Title Lenders rarely defaulted on their loans. Title Lenders contends that the Board failed to evaluate its application based on its particular location, not on some generalized evidence of other loan agencies' practices. In

addition, despite the unsubstantiated arguments by adjacent property owners, their expert testified that the payday loan agency would have no adverse impact on property values.

Title Lenders also argues that the decision by the Board was arbitrary and unreasonable. The Board did not take all the evidence into consideration, but simply voted based on their preconceived notions of the payday loan industry.

The Board contends that the denial of the Application was premised on its evaluation that Title Lenders business in this particular location, in the heart of downtown Milwaukee, was not appropriate. It notes that a number of immediate neighbors to the Property appeared and opposed the Application. Their opposition indicated concern as to the impact that Title Lenders' proposed use would have upon property values in the affected area of Downtown Milwaukee as well as upon the public health, safety, and welfare generally.

The Board was presented with a difficult case. The Board held several hearings on this matter and took all of the evidence into consideration. At the end of all the testimony, the Board concluded that a payday loan agency: (1) attracts clientele that are in financial trouble or unable to manage money; (2) may attract robbers and other criminals to the area; and (3) did not comport with the efforts of the DCD to develop this area. The Board was also concerned with that there was another payday loan agency in the immediate area. The Board considered all the evidence and found that this location was not appropriate for Title Lenders.

The City of Milwaukee Zoning Code provides that no special use permit shall be granted unless the board, after due notice to the parties of interest, finds that the following facts and conditions exist, and so indicates in the minutes of its proceedings or it decision:

> (1) Protection of Public Health, Safety and Welfare. The use will be designed, located and operated in a manner so that the public health, safety, and welfare is protected;

(2) Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use;

(3) Traffic and Pedestrian Safety. Adequate measures have been or will be taken to provide safe pedestrian and vehicular access; and

(4) Consistency with Comprehensive Plan. The special use will be designed, located and operated in a manner consistent with the city's comprehensive plan.

§§295-311-2-d and 295-311-2-d-1 through d-4, Milwaukee Code of Ordinances.

The factors that the Board focused on were protection of health, safety and welfare, protection of property and consistency with comprehensive plan. There was substantial testimony on both sides of these issues. The record demonstrates that the Board was aware of its obligation to decide each application on a case-by-case basis. It recognized that payday loans are a lawful commercial business. But the Board also took into account negative information submitted from those objecting to the Application. After taking into account the relevant factors the Board determined that the granting of this Application would have a negative impact on property values and on the efforts to revitalize this area of downtown Milwaukee.

A board's decision is arbitrary if it is unreasonable or lacks a rational basis. Snyder, 74 Wis.2d at 476. The Board took all the testimony into consideration and made a determination based on the information provided. There was no unreasonableness or lack of a rational basis simply because the Board gave some evidence more weight. It is apparent that the Board found of great significance the opinion of DCD as stated at the October 13, 2003, hearing that the approval of the Application would have a negative effect on the development of downtown. This opinion was shared by a number of immediate neighbors of the Property. The Court may not substitute its own decision for that of the Board if any reasonable view of the evidence would

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support the Board's findings. Based on the presumption of validity and correctness the Court upholds the Board's determination.

CONCLUSION

THEREFORE, IT IS HEREBY ORDERED that the decision of the Board of Zoning Appeals is hereby affirmed and this action is dismissed.

Dated at Milwaukee, Wisconsin this 29th day of July, 2004.

BY THE COURT:

/s/ HON. PATRICIA D. McMAHON

Honorable Patricia McMahon
Circuit Court Judge
Branch 18

*333 F. Supp. 2d 800, *; 2004 U.S. Dist. LEXIS 17577, **

THE **PAYDAY LOAN** STORE OF WISCONSIN, INC. d/b/a MADISON'S CASH EXPRESS, Plaintiff, v. CITY OF MADISON, Defendant.

04-C-0365-C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

333 F. Supp. 2d 800; 2004 U.S. Dist. LEXIS 17577

August 31, 2004, Decided

PRIOR HISTORY: Payday Loan Store of Wis., Inc. v. City of Madison, 339 F. Supp. 2d 1058, 2004 U.S. Dist. LEXIS 15830 (W.D. Wis., Aug. 5, 2004)

DISPOSITION: [1]** Defendant City of Madison's motion for summary judgment granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a **payday loan** store owner, brought an action against defendant city pursuant to 42 U.S.C.S. § 1983, alleging that the city had enacted an ordinance that violated the owner's rights to equal protection and due process, was unconstitutionally vague, and was preempted by state law. The city filed a motion for summary judgment.

OVERVIEW: The owner operated a 24-hour store that provided a number of services, including short-term licensed **payday loans,** a state-licensed currency exchange and check cashing operation, notary services, bill paying, and facsimile and copy services. The city passed an ordinance that provided that no **payday loan** business or currency exchange operation could be open between the hours of 9 p.m. and 6 a.m. The court held that there was no equal protection violation because the owner could not show that the city lacked any rational basis for legislating the nighttime closing of **payday loan** stores. The court held that the city council could speculate rationally that people emerging from a **payday loan** store with large amounts of money in their pockets would be involved in crime, either as victims of robbery or as customers for illegal drugs or prostitution. The court held that there was no due process violation because the claim rested on the same ground as the equal protection claim. The court also held that the city ordinance was not vague because persons of ordinary intelligence could understand the ordinance's prohibition and there was no danger of arbitrary or discriminatory enforcement.

OUTCOME: The court granted the city's motion for summary judgment.

CORE TERMS: payday, ordinance, currency, nighttime, customer, licensed, equal protection, regulation, state law, summary judgment, preempted, night, preliminary injunction, economic regulation, savings, neighborhood, legitimately, intelligence, unsupported, discovery, traffic, common council, rational basis, lighting, lending, succeed, supplemental jurisdiction, unconstitutionally vague, equal protection claim, similarly situated

LexisNexis(R) Headnotes

Constitutional Law > Equal Protection > Scope of Protection

HN1 To succeed on a claim that a legislative decision is violative of equal protection rights, a plaintiff must show that the legislation burdens a suspect class, affects

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fundamental rights, or is not rationally related to any legitimate goal of government.

Constitutional Law > Equal Protection > Scope of Protection

HN2 When dealing with economic regulation, any conceivable basis for the classification is sufficient to justify it. Parties challenging legislation under the equal protection clause cannot succeed so long as it is evident from all the considerations presented to the legislature, and those of which the court can take judicial notice, that the question is at least debatable.

Constitutional Law > Equal Protection > Scope of Protection

HN3 When the legislature has or could have had some evidence before it that reasonably supports a classification, challengers cannot prevail merely by tendering evidence in court that the legislature was mistaken.

Constitutional Law > Fundamental Freedoms > Overbreadth & Vagueness
Governments > Legislation > Overbreadth & Vagueness

HN4 Vague laws present two kinds of problems. The first is that persons of ordinary intelligence will not know how to conform their conduct to the law. The second is the lack of explicit standards for application of the law, with the consequence that persons charged with enforcement of the law may act arbitrarily and discriminatorily. The vagueness doctrine is enforced most strictly when the law interferes with free expression or the exercise of other constitutional rights. Economic regulation is subject to a less stringent analysis because such regulation usually deals with a narrower subject and those affected by it are more likely to consult the law, seeking clarification if necessary, in order to plan their behavior. Moreover, legislation that has civil rather than criminal penalties is given great leeway because the consequences of imprecision are qualitatively less severe.

Constitutional Law > Equal Protection > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection

HN5 The various freedoms preserved by Wis. Const. art. I, § 1, are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the United States Constitution.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

HN6 When deciding to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.

Governments > Local Governments > Duties & Powers

HN7 Municipalities have the power to act for the government and good order of the city and for the health, safety and welfare of the public, Wis. Stat. § 62.11(5), only when dealing with the local affairs and government of municipalities, Wis. Const. art. XI, § 3, and they lack the power to legislate with regard to matters of statewide concern.

COUNSEL: For City of Madison, DEFENDANT: Michael P May, City Attorney, Madison, WI USA.

JUDGES: BARBARA B. CRABB, District Judge.

OPINIONBY: BARBARA B. CRABB

OPINION: [*802] OPINION AND ORDER

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff The **Payday Loan** Store of Wisconsin contends that defendant City of Madison has enacted an ordinance that violates plaintiff's rights to equal protection and due process and is unconstitutionally vague. In addition, plaintiff contends that the ordinance is preempted by state law.

When plaintiff filed its complaint, it sought a preliminary injunction to prevent defendant from enforcing the allegedly unconstitutional ordinance. Defendant responded to the motion and submitted a motion for summary judgment at the same time, asserting that the legal principles determining the motions were the same. Defendant asked that its motion for summary judgment be addressed without allowing plaintiff time for discovery, arguing that any discovery would be unnecessary. I agreed that discovery would not assist plaintiff (because legislative decisions are "not subject to courtroom **[**2]** factfinding and may be based on rational speculation unsupported by evidence or empirical data," FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)), and gave its counsel an opportunity to advise the court whether he wanted an opportunity for additional briefing; he wrote to the court on August 12, 2004, to say that additional briefing would not be necessary and that the court should proceed to decide the motion.

I conclude that defendant's motion for summary judgment must be granted because plaintiff cannot show that defendant lacked any rational basis for legislating the nighttime closing of **payday loan** stores. Without such a showing, plaintiff cannot succeed on its claim that it was denied equal protection or that it was denied substantive due process. The clear wording of the ordinance defeats plaintiff's claim that it is unconstitutionally vague. Finally, plaintiff lacks any support for its contention that the ordinance is preempted by state law.

For the purpose of deciding this motion, I find from the findings of fact proposed by the parties in connection with the two motions that the following facts are material and undisputed. **[**3]**

UNDISPUTED FACTS

Plaintiff The **Payday Loan** Store of Wisconsin, Inc., d/b/a Madison's Cash Express, is a Wisconsin corporation with its principal place of business in Chicago, Illinois. Defendant City of Madison is a body corporate and politic that may sue and be sued.

Plaintiff is a financial services company that operates five branches in Madison, Wisconsin. On November 7, 2003, it opened a new facility at 2722 East Washington Avenue. As of the time of the hearing on the motion for preliminary injunction, the facility was open 24 hours a day, seven days a week and was the only 24-hour business of its type in Madison.

All of plaintiff's **payday loan** customers have checking accounts and a large percentage of its check cashing customers have bank accounts. Plaintiff provides a number of services, including short-term licensed loans known as "**payday loans,**" a currency exchange and check cashing operation, notary services, bill paying and facsimile and copy services. Plaintiff sells stamps, envelopes and bus passes and maintains a stand-alone ATM in its lobby.

[*803] Plaintiff is licensed by the Wisconsin Department of Financial Institutions to make short-term licensed loans. In a typical **[**4]** transaction, a borrower presents a paycheck stub, photo identification and a recent bank statement, completes a loan application and submits a post-dated check. Plaintiff completes a note and other loan documents and makes certain disclosures to the customer. It holds the post-dated check until the loan comes due and thereafter applies the check to pay off the loan unless the customer pays the loan in full before it has come due. Plaintiff charges $ 22 for each $ 100 borrowed for a two-week licensed loan.

Plaintiff is licensed by the Wisconsin Department of Financial Institutions to operate a

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community currency exchange business. In return for a fee, it agrees to cash payroll checks, insurance proceed checks, government checks and other third-party checks.

When plaintiff invested in the East Washington facility, it did so in anticipation that it would be able to operate 24 hours a day. When it began its planning, the business was a permitted use under defendant's zoning ordinance.

Plaintiff takes a number of steps to maintain security for its operation, including proper lighting, the use of safes and hourly sweeps and surveillance of all of its stores. The lighting inside and outside **[**5]** the store make the parking lot and store open to view.

On November 4, 2003, defendant's Common Council proposed a new ordinance, entitled "Hours of Operation for **Payday Loan** Businesses." Section (2) of the ordinance provided that no **payday loan** business could be open between the hours of 9 pm and 6 am. At a public meeting held on January 6, 2004, the council voted to adopt the ordinance with one dissenting vote. The mayor approved the ordinance on January 9, 2004 and it became effective fifteen days later.

On or about February 10, 2004, defendant agreed not to enforce the payday lending ordinance against plaintiff's currency exchange business pending a review of the language of the ordinance and plaintiff agreed not to make **payday loans** during the prohibited hours. On February 24, 2004, Alderperson Markle presented amendments to the ordinance to broaden the definition of **payday loan** business to include community currency exchange businesses. The Common Council adopted the amendments on May 18, 2004; the mayor approved them on May 24, 2004; and they took effect on June 8, 2004.

The ordinance does not prohibit ATM's, supermarkets, convenience stores and other similar businesses from **[**6]** disbursing cash between 9 pm and 6 am. Some ATM's allow eligible customers to take cash advances on their credit cards 24 hours a day.

OPINION

A. Equal Protection

*HN1*To succeed on a claim that a legislative decision is violative of equal protection rights, a plaintiff must show that the legislation burdens a suspect class, affects fundamental rights or is not rationally related to any legitimate goal of government. Johnson v. Daley, 339 F.3d 582, 585 (7th Cir. 2003). Plaintiff does not suggest that it is a member of a suspect class or that it has a fundamental right to run a **payday loan** operation 24 hours a day. Its entire case rests on its contention that the **payday loan** ordinance treats similarly situated entities differently. It allows the nighttime operation of ATM's and retailers that provide cash back from purchases while requiring **payday loan** stores to close at night. Moreover, it allows many businesses **[*804]** to operate between 9 pm and 6 am although they have the potential to affect residential neighborhoods through excessive noise and lights, while requiring payday stores to close during those hours. Plaintiff maintains that these distinctions are discriminatory **[**7]** and unsupported by a rational basis.

Plaintiff argues that it makes no sense to force it to close while allowing other businesses and ATM's to dispense cash throughout the night. If it is dangerous for individuals to leave its facility with large sums of case, it is equally dangerous for them to leave an ATM or a store that returns cash back on purchases. Defendant denies that ATM's and grocery stores are similarly situated to plaintiff because both of these facilities limit to well under $ 2000 the amount of cash that they will allow customers to withdraw or that they will give back on a purchase. Defendant argues that it had at least six reasons for differentiating between **payday loan** stores and other commercial establishments and ATMS: (1) Closing a cash-based business that advertises loans of up to $ 2,000 that can be obtained in minutes will

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deter nighttime crime activity; (2) persons who want to borrow money at 3 am may use that money to buy illegal drugs or engage in prostitution; (3) exiting a **payday loan** store at 3 am may make a person a target for criminal activity; (4) if police calls to payday stores are unnecessary, limited police resources can be devoted to other needs; **[**8]** (5) the presence of a 24-hour **payday loan** store sends a message that the neighborhood is of low quality; and (6) prohibiting **payday loan** stores from operating overnight will reduce the influx of non-residents traveling into a given neighborhood late at night to obtain cash.

It is not necessary (or permissible) to decide whether plaintiff's reasons for the ordinance are compelling or whether there is objective evidence to support them. HN2 When dealing with economic regulation, any "conceivable basis" for the classification is sufficient to justify it. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973). Parties challenging legislation under the equal protection clause cannot succeed so long as "it is evident from all the considerations presented to [the legislature], and those of which [the court can] take judicial notice, that the question is at least debatable.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981) (quoting United States v. Carolene Products Co., 304 U.S. 144, 153-54, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)).

HN3 When the legislature has or could have had some evidence before **[**9]** it that reasonably supports a classification, challengers cannot prevail "merely by tendering evidence in court that the legislature was mistaken." Clover Leaf Creamery, 449 U.S. at 464. For this reason, it is irrelevant whether plaintiff's proposed facts show that serious crime is not a problem in the area of its East Washington Avenue store, that the actual number of police calls to plaintiff's stores is low, that plaintiff has taken steps to ensure the security of its employees and customers and that defendant had no evidence before it that plaintiff's stores are more apt to disturb nearby residences than are other businesses in the same area. It is irrelevant that Dr. Rick Lovell, an expert in the study of crime, crime patterns and crime deterrence and suppression, adduced evidence purporting to show that defendant's ordinance was based on misapprehensions about the relation of crime to the **payday loan** business and about the effectiveness of legislating against the nighttime operation of **payday loan** businesses in deterring crime. Legislative decisions "may be based on rational **[*805]** speculation unsupported by evidence or empirical data." Beach Communications, 508 U.S. at 315. **[**10]**

As I noted in the order denying plaintiff's motion for a preliminary injunction, "the city council could speculate rationally that people emerging from a **payday loan** store with large amounts of money in their pockets would be involved in crime, either as victims of robbery or as customers for illegal drugs or prostitution." Aug. 5, 2004 Order, dkt. # 33, at 3. It goes without saying that communities have an interest in preventing crime. Whether the **payday loan** ordinance is the best method of prevention is not the issue. It is the legislative body's prerogative to choose the steps it wishes to take to advance its goals. National Paint & Coatings v. City of Chicago, 45 F.3d 1124, 1127 (7th Cir. 1995).

It is not relevant that the legislation leaves unregulated other conduct that seems equally undesirable. Legislatures are permitted to legislate in small increments and deal with the problems they deem most acute. Johnson, 339 F.3d at 586-87 (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1995)). Thus, it does not matter whether plaintiff has evidence that users of ATM machines are just as likely **[**11]** targets for robbers as are customers of **payday loan** stores, or whether other commercial establishments on East Washington Avenue are noisier, have brighter lighting or attract more nighttime traffic. The common council could have believed that closing **payday loan** stores at night would help reduce crime and help reduce the total amount of nighttime traffic, noise and bright lights in the area. The legislature need not address all 24-hour operations at one time. "Scope-of-coverage provisions" are virtually unreviewable" because the government "must be allowed leeway to approach a perceived problem incrementally."

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Beach Communications, 508 U.S. at 316. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 275, 84 L. Ed. 744, 60 S. Ct. 523 (1940). Because plaintiff cannot show that the council could not have believed that the **Payday loan** ordinance would help reduce crime, nighttime traffic and noise, it has failed to show that the regulation violates its equal protection rights.

B. Due Process **[**12]**

Plaintiff asserted a claim of violation of due process, but it rests on the same ground as his equal protection claim that the ordinance has no rational basis. Plaintiff is not asserting that it was denied any procedural rights to which it was entitled. Therefore, its due process claim falls with its equal protection claim. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 459, 470 n.12, 66 L. Ed. 2d 659 (1981) ("From our conclusion under equal protection, however, it follows *a fortiori* that the [ban on plastic nonreturnable milk containers] does not violate the Fourteenth Amendment's Due Process Clause: National Paint, 45 F.3d at 1129 (refusing to consider claim that ordinance violates substantive due process rights; "economic regulation must be evaluated under equal protection principles"); see also Albright v. Oliver, 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) ("Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. **[**13]** '")

[*806] C. Vagueness

Plaintiff argues that the ordinance does not give the "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). It contends that the ordinance does not provide fair notice of the extent to which it may operate between 9 pm and 6 am because it does not make clear whether plaintiff can continue to offer services other than currency exchange and **payday loans** during the nighttime hours.

*HN4*Vague laws present two kinds of problems. The first is the one just noted, which is that persons of ordinary intelligence will not know how to conform their conduct to the law. The second is the lack of explicit standards for application of the law, with the consequence that persons charged with enforcement of the law may act arbitrarily and discriminatorily. Grayned, 408 U.S. at 108-09.

The vagueness doctrine is enforced most strictly when the law interferes with free expression or the exercise of other constitutional rights. Brockert v. Skornicka, 711 F.2d 1376, 1381 (7th Cir. 1983). Economic regulation **[**14]** is subject to a less stringent analysis because such "regulation usually deals with a narrower subject and those affected by it are more likely to consult the law, seeking clarification if necessary, in order to plan their behavior." Id. (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)). Moreover, legislation that has civil rather than criminal penalties is given great leeway "because the consequences of imprecision are qualitatively less severe." Id. at 498-99.

The **payday loan** ordinance is economic regulation that imposes only civil sanctions. Therefore, it does not require the high degree of clarity that would be necessary for an ordinance that impinged on free speech or another constitutional right. Nevertheless, it is clear both on its face and as applied. It prohibits any **payday loan** business from being open between 9 pm and 6 am. Plaintiff operates a **payday loan** business that cannot be open during the prohibited hours, even if plaintiff is not engaging in the business of making **payday loans** or operating a currency exchange during that time. The ordinance does not prohibit "engaging **[**15]** in **payday loan** activities" during nighttime hours; it says that

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the business cannot be open. Persons of ordinary intelligence can understand the ordinance's prohibition. Law enforcement personnel can enforce the ordinance: if a **payday loan** business is open after 9 pm or before 6 am, it is in violation of the ordinance and subject to a civil fine. The ordinance poses no danger of arbitrary or discriminatory enforcement.

D. Wisconsin Constitution

It is not necessary to address plaintiff's allegations of violations under the equal protection and due process violations of the Wisconsin Constitution. Plaintiff concedes that there is no substantial difference between the federal and the state provisions. Plt.'s Reply Br., dkt. # 27, at 3. State ex rel. Briggs & Stratton v. Noll, 100 Wis. 2d 650, 657, 302 N.W.2d 487 (1981) ("'It is well settled by Wisconsin case law that HN5 the various freedoms preserved by sec. 1, art. I, Wis. Const., are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment to the United States constitution.'" (quoting Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 876 (1963)). **[**16]**

Therefore, the conclusions I have reached concerning plaintiff's federal constitutional **[*807]** claims are equally applicable to its state constitutional claims.

E. Preemption by State Law

For its last argument, plaintiff contends that the ordinance is preempted by state law. Like plaintiff's state constitutional issues, this argument does not implicate any federal issue and it would be permissible to dismiss it on that ground, rather than exercise supplemental jurisdiction over it. 28 U.S.C. § 1367(c)(3). However, I believe it would advance judicial efficiency to decide it along with the federal questions. Burrell v. City of Mattoon 378 F.3d 642 (7th Cir. 2004); see also City of Chicago v. International College of Surgeons, 522 U.S. 156, 173, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997) ("HN6 When deciding to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'") (quoting Carnegie-Mellon University. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)). I will address the preemption issue for the sake of judicial **[**17]** economy because it does not raise any novel, complex or unsettled issue of state law.

It is undisputed that HN7 municipalities have the power to act for the government and good order of the city and for the health, safety and welfare of the public, Wis. Stat. § 62.11(5), only when dealing with the local affairs and government of municipalities, Wis. Const. Art. XI, § 3, and that they lack the power to legislate with regard to matters of statewide concern. Plaintiff argues that the ordinance oversteps defendant's authority in two respects. First, it provides that a **payday loan** operation and a currency exchange operation cannot be operated together in Madison and must be at least 5,000 feet from each other, in direct violation of the express provision in Wis. Stat. § 138.09(3)(e) le that such businesses may be run out of the same building. Second, the state regulates **payday loan** businesses and community currency exchange businesses and defendant's ordinance violates the spirit of the state regulatory system by disallowing legitimately licensed businesses from operating.

As to the first challenge, plaintiff has failed to show that it has **[**18]** any standing to raise it. The provision requiring 5,000 feet of separation between **payday loan** businesses does not apply to any of plaintiff's businesses now in operation in Madison (and it is highly doubtful that the ordinance prohibits the operation of **payday loan** and currency exchange businesses on the same premises). If and when plaintiff is denied permission to open another such business because of this restriction, it may be able to satisfy the elements of standing, which require an injury in fact, a causal relation between the injury and the challenged conduct and a likelihood that the injury will be redressed by a favorable decision, Lee v. City

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of Chicago, 330 F.3d 456, 468 (7th Cir. 2003) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). At this time, when plaintiff has not shown that it is suffering or about to suffer "an invasion of a legally protected interest that is concrete and particularized," id., this court lacks jurisdiction to entertain plaintiff's challenge to the ordinance as preempted by state law.

As to the second challenge, plaintiff has not established any conflict between the state's **[**19]** regulations of plaintiff's **payday loan** and currency exchange operations and the ordinance. The state regulations concern licensing and the regulation of consumer transactions, including record keeping and limitations on advertising. They have nothing to do with hours of operation or location of businesses.

[*808] Plaintiff maintains that the ordinance "violates the spirit of the state regulatory system by disallowing legitimately licensed businesses from operating." Plt.'s Br., dkt. # 4, at 46. Plaintiff misstates the effect of the ordinance. It does not prevent legitimately licensed businesses from operating; it merely says where they can operate and during what hours. It does not violate the spirit of the state regulatory system.

Plaintiff cites a Wisconsin case, Anchor Savings & Loan Ass'n Co. v. Madison Equal Opportunities Comm'n, 120 Wis. 2d 391, 355 N.W. 2d 234 (1984), in support of its position, but that case is nothing like this one. In Anchor Savings, the issue was whether a state-chartered savings and loan had acted properly in denying a loan to a divorced man. The savings and loan had considered the applicant's court-ordered support and maintenance payments **[**20]** as fixed expenses, disqualifying him for a loan, whereas if he had been married, the same money would have deemed flexible expenses and he would have been granted a loan. The applicant complained to the Madison Equal Opportunities Commission, which held that Anchor had violated a local ordinance prohibiting creditors from discriminating on the basis of marital status. Anchor appealed, contending that the City lacked authority to regulate its lending practices. The Supreme Court of Wisconsin agreed, holding that the commission's decision conflicted with the comprehensive legislative scheme governing all aspects of credit and lending.

Telling a state-chartered savings and loan association how to calculate a loan applicant's qualifications for a loan is a far cry from telling a state-licensed **payday loan** operation where it may locate its business and what hours it may operate. These latter matters have nothing to do with the state's legislation and regulations regarding the loans themselves and the licensing and responsibilities of loan providers.

I conclude that defendant has shown that it is entitled to summary judgment on all of the claims raised by plaintiff in its complaint. **[**21]**

ORDER

IT IS ORDERED that defendant City of Madison's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant City and close this case.

Entered this 31st day of August, 2004.

BY THE COURT:

BARBARA B. CRABB

District Judge

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CITY OF MILWAUKEE

Form CA-43

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May 7, 2003

Craig Zetley, Chairman
Board of Zoning Appeals
809 North Broadway, 1st Floor
Milwaukee, WI 53202

RECEIVED
MAY 7 2003
BOARD OF ZONING APPEALS
CITY OF MILWAUKEE

Re: Payday Loan or Title Loan Agencies
BOZA Case Numbers 24480, 24481, and 24482

Dear Mr. Zetley:

In your letter of February 27, 2003, you have requested the advice of this office concerning the range of information that can be considered by the Board of Zoning Appeals ("Board") when interpreting and applying the criteria set forth in the Zoning Code ("Code") for issuance of special-use permits to "payday loan" or "title loan" agencies (sometimes collectively referred to in this opinion as the "payday loan" industry). Section 295-311-2-d-1 of the Code, sets forth the following as one of the criteria applicable to evaluation of any application for a special-use permit:

> Protection of Public Health, Safety, and Welfare. The use will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected.

The question concerning the scope of the Board's authority has arisen as a consequence of certain business practices associated with the operation of "payday loan" or "title loan" agencies, which have engendered controversy. These include such matters as lending practices, interest rates, and loan "rollovers." Your question is directed at whether such matters may be considered by the Board as factors governing its determination on special-use permit applications submitted by such businesses. We have additionally reviewed correspondence that has been transmitted to you by counsel for Payday Loan Store of Wisconsin, Inc., an applicant for three special-use permits that are now pending before the Board, and for Legal Action of Wisconsin, Inc., an opponent of the pending applications. Given that these permit applications refer to "payday loan" agencies, our discussion will focus upon that line of business; we note, however, that we are not aware of any distinction between "payday loan" and "title loan" agencies with respect to the specific issue raised by your letter of February 27, 2003.

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A "payday loan" agency (more precisely entitled a "deferred deposit" agency) is a business that provides short-term loans to individuals at very high rates of interest. Typically, in a "payday loan" arrangement, the following steps occur:

1. The borrower will provide to the lender items such as a paycheck stub, photo identification, and/or a recent bank statement;

2. The borrower then completes a loan application and submits a post-dated check to the lender and in return receives cash proceeds of the loan, which will be less than the face amount of the check;

3. The post-dated check is then held by the lender until the loan is due—usually a period of two weeks or thereabouts reflecting the fact that such loans are generally intended to get the borrower through the period until his or her next payday (hence the term "payday loan"); and

4. At the due date, the lender will deposit the check unless the borrower is able to pay the loan in full (generally the face amount of the check) at that time or unless the lender and the borrower agree to "roll over" the loan for an additional period.

The "payday loan" industry is regulated by the Wisconsin Department of Financial Institutions under § 138.09, *Wis. Stats.* and other applicable statutes, particularly the Wisconsin Consumer Act (chs. 421-427, *Wis. Stats.*) and its implementing regulations, which may be found at Wis. Adm. Code ch. DFI-Bkg 80. One noteworthy feature of this regulatory scheme is that loans made thereunder that are either "precomputed" or "based upon the actuarial method," after October 31, 1984, are not subject to any maximum interest-rate limit. § 138.09(7)(bp), *Wis. Stats.*

With the foregoing in mind, we now turn to a discussion of the applicable legal principles. The pending permit applications request the issuance of a special-use permit. A "special use" is defined in § 295-102-619 of the Code as follows:

> SPECIAL USE means a use which is generally acceptable in a particular zoning district but which, because of its characteristics and the characteristics of the zoning district in which it would be located, requires review on a case-by-case

basis to determine whether it should be permitted, conditionally permitted, or denied.

Thus, a "payday loan" agency is a lawful use, the operation of which both the State and the City have seen fit to permit. Whether such a use will, in fact, be permitted to operate at any particular location is subject to case-by-case review by the Board, in accordance with the special-use permit criteria set forth in § 295-311-2-d of the Code. The key in this respect is case-by-case review. If a type of use is designated as a "special use" in a particular zoning district, the Board cannot simply permit or ban all such uses on a blanket basis, but must instead perform that review with respect to each application, as directed by the Code.

The extent of the Board's discretion in evaluating special-use permit applications submitted by "payday loan" agencies and similar businesses is governed by the measure of the City's "police power." The Code (ch. 295, Milwaukee Code of Ordinances) represents a traditional and extremely well-established vehicle for the exercise of police powers vested in the City. *See* § 62.11(5), *Wis. Stats.*; *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 235 Wis.2d 409, 611 N.W.2d 693; *State ex rel. American Oil Company v. Bessent*, 27 Wis.2d 537, 135 N.W.2d 317 (1965). Indeed, the adoption of a comprehensive zoning code represents the primary vehicle by which a municipality promotes the public health, safety, and welfare through regulation of the use of land within its jurisdiction. *Village of Euclid, OH v. Ambler Realty Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *City of Milwaukee v. Leavitt*, 31 Wis.2d 72, 142 N.W.2d 169 (1966). Notably, the literal text of § 295-311-2-d-1 of the Code, setting forth the special-use criterion referenced in your letter of February 27, 2003 is stated in explicit police-power terms—*i.e.*, whether the use in question "will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected." The Board has broad discretion to hear testimony and apply this criterion to the full extent necessary to assure protection of the public health, safety, and welfare. The City, in the exercise of its police-power, has delegated this authority to the Board.

The question before us thus concerns the legitimate extent of the Board's authority to regulate the operations of the "payday loan" industry as an exercise of its delegated police powers and under the "public welfare" criterion of the special-use permit ordinance, § 295-311-2-d-1 of the Code. We have found no cases directly relevant to this inquiry, but we can provide some guidance through the application of well-established principles.

It cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. acknowledges) that the Board may exercise such regulatory authority over traditional land-use criteria, including (but not necessarily limited to) those enumerated in the special-use conditions set forth by §§ 295-311-2-d-2 through 2-d-4 and 295-311-e of the Code. It also cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. also acknowledges) that the definition of a "special use" set forth in § 295-201-619 of the Code authorizes the Board "to conduct a location specific inquiry to see if the proposed special use creates conflicts with the characteristics of the location and surrounding neighborhood."

The difficulty is that your inquiry reaches beyond consideration of traditional land-use criteria or other site-specific considerations. It implicates the broader question of whether (and if so, to what extent) the Board may exercise its delegated police powers to regulate the lending practices and other business conduct of the "payday loan" industry—and, if it disapproves of that conduct, whether it may consequently deny or limit the issuance of special-use permits to applicants from that industry. This question is far more problematic, particularly as this industry is, as earlier noted, a lawful enterprise that the State has not chosen to prohibit or (in the case of interest rates charged on loans made after October 31, 1984) even to limit. Thus, we must consider whether the Board may intervene in an area where the State has chosen not to.

The available case law provides no reliable guidance applicable to this specific context. We have found two Wisconsin cases supporting a broad construction of the type of "public welfare" criterion implicated here. In those cases, however, the secondary impacts of the land use in question were significantly more tangible and directly applicable to the general public than the comparable adverse secondary impacts here (*i.e.*, the risk of loan defaults by "payday loan" customers and the resultant financial distress and potential bankruptcies).

First, we consider the decision of the Wisconsin Supreme Court in *Edward Kraemer & Sons, Inc. v. Sauk County Board of Adjustment*, 183 Wis.2d 1, 515 N.W.2d 256 (1994). In that case, the Court upheld the board's broad discretion to consider generalized effects on public welfare in its evaluation of an application submitted by a mining corporation for a "special exception" that would authorize it to extract minerals on land zoned for agricultural use. The Court specifically rejected the contention that the board's discretion was limited to consideration of only the specific standards enumerated in the zoning ordinance applicable to "mining extraction" activities and ruled that the board may also consider standards of general applicability that may be pertinent to consideration of the impact of a proposed use upon the "public welfare." In this respect, the Court stated as follows:

> . . . [T]he "public health, safety and welfare" standard, is a general standard that provides the Board with flexibility and discretion to consider how a proposed special exception could affect the public welfare. The standard allows the Board to consider potential harm to individuals living near the proposed mineral extraction site, including exposure to health hazards from the dust and threats to safety posed by blasting. The public health, safety and welfare standard is also broad enough to enable the Board to consider the generalized effects on the public welfare that concern the Board in this case—harm to the public that would result from partial destruction of a natural area that both permit supporters and opponents agree is of great geologic importance.

183 Wis.2d at 11, 515 N.W.2d at 260. The court also rejected the contention that the application of the "public welfare" standard by the board constituted an impermissible delegation of legislative authority. *Id.*, 183 Wis.2d at 14-15, 515 N.W.2d at 261-262. The environmental harm described by the Court, however, was more directly related to the proposed land use and more likely to affect the general public in the vicinity of the mine, than the risks of harm posed by the grant of a special-use permit to a "payday loan" agency.

In a more recent case the Wisconsin Court of Appeals confirmed that the "general welfare" component of the criteria applicable to special use permits may be broadly construed by boards of appeal to include consideration of positive, community-wide secondary impacts of a proposed use. *Sills v. Walworth County Land Management Committee*, 2002 WI 111, 254 Wis. 2d 538, 648 N.W.2d 878 [petition for review denied 2002 WI 109, 254 Wis. 2d 261 648 N.W.2d 477] dealt with the review of the grant of a conditional use permit by the Walworth County Land Management Committee. The facts in that case involve a request to permit the creation and operation of a public museum at a historic estate located on Geneva Lake. In reaching its decision to grant the conditional use permit, the Walworth County Land Management Committee considered not only traditional zoning factors such as traffic and impact upon property values but also the historic benefit of preserving the site as a public museum.

The Court of Appeals, in upholding the Committee's decision concluded that "the phrase general welfare" has a broad meaning encompassing a wide range of areas." 648 N.W.2d at 883. The Court went on to say that it was " . . . persuaded that the general welfare is promoted by the preservation of historical sites and maintenance of museums to educate the public and to inspire patriotism and respect for our history." 648 N.W.2d at 884. As is the case with the Code, the

Walworth County ordinance set forth as its stated purpose the promotion of the general welfare of Walworth County, including comfort, health, safety, prosperity and aesthetics. 648 N.W.2d at 883. The decision supports a broad interpretation of the general welfare and acknowledges that "the weight to be accorded all of this evidence was within the discretion of the Committee." 648 N.W.2d at 885, citing *Delta Biological Resources Inc. v. Bd. of Zoning Appeals*, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

Similarly, zoning boards of appeal have been accorded considerable discretion to regulate matters that influence the physical and visual environment, such as aesthetics and architectural design. *See, e.g., Gabriel v. Village of Wind Point*, 157 Wis.2d 668, 460 N.W.2d 800 (Ct. App. 1990); *Racine County v. Plourde*, 38 Wis.2d 403, 157 N.W.2d 591 (1968); *State ex rel. Saveland P.A. Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); McQuillin, *The Law of Municipal Corporations* (2000 rev.), Vol. 8 at §§ 25.29-25.31. And, in a few contexts, zoning regulations excluding certain businesses from particular zoning districts or sections of a local jurisdiction have been upheld on the basis of proven adverse secondary impacts upon the general public in those specific geographical areas. Such situations most frequently arise with respect to regulation of the location of adult bookstores and movie houses or other adult businesses. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); however, the permissible scope of such regulation may not extend so far as to ban an adult or other lawful use from locating anywhere within a jurisdiction. *Town of Wayne v. Bishop*, 210 Wis. 218, 565 N.W.2d 201 (Ct. App. 1997).

Thus, while the available case law seems to accord significant discretion to the Board in applying the "public welfare" component of the special-use permit criteria contained in § 295-311-2-d-1 of the Code, it does not indicate that that discretion is unlimited or that it might extend to regulation of a "payday loan" agency's lending and other business practices. Such matters have no bearing upon the appearance or physical environment of the locations in which "payday loan" agencies choose to operate; nor do they affect the compatibility between those agencies and neighboring land uses. Nor does this situation resemble the adult-use context in the sense of implicating proven adverse secondary impacts upon the general public arising from the very nature of the business and resulting from its location in particular zoning districts or areas of the jurisdiction. While adverse secondary impacts may certainly be felt by that segment of the "payday loan" industry's customer base that falls into default on their loan-repayment obligations, there is, to our knowledge, no proof demonstrating that the existence or operation of the industry, in and of itself, is somehow inimical to the interests of the general public. Indeed, it can be argued to the contrary—*i.e.*, that the "payday loan" industry fills a needed market niche in

providing short-term credit to a class of borrowers who, for a variety of reasons, find such credit to be necessary or useful, even at very high rates of interest and other loan charges.

A second item of concern is the significant possibility that a reviewing court would find State preemption of regulation of the "payday loan" industry's business practices. The police power does not extend to matters preempted by State statute or regulation. Municipalities may not pass ordinances or make regulations that "infringe the spirit of a state law or are repugnant to the general power of the state." *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission*, 120 Wis.2d 391, 396, 355 N.W.2d 234, 237 (1984); *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937). Further, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox v. City of Racine, supra*, 225 Wis. at 545, 275 N.W. at 514; *DeRosso Landfill Company, Inc. v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996); *Wisconsin's Environmental Decade v. Department of Natural Resources*, 85 Wis.2d 518, 529, 271 N.W.2d 69, 74 (1978).

In this instance, the legislature has passed a comprehensive statutory scheme for the regulation of all branches of the credit industry (including its "payday loan" component), including provisions for regulation of rates of interest (ch. 138, *Wis. Stats.*) and of the industry's consumer-lending practices (chs. 421-427, *Wis. Stats.*). Significantly, in § 138.09(7)(bp), *Wis. Stats.*, the legislature made, and consciously expressed, its choice not to impose any fixed maximum rate of interest upon the precise categories of loans most commonly offered by "payday loan" agencies. This statutory scheme is supplemented by a regulatory regime under the auspices of the Department of Financial Institutions. In *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission, supra*, the Wisconsin Supreme Court ruled that the City of Madison did not have the power to regulate the credit practices of a state-chartered savings and loan association, invalidating an ordinance barring discrimination in mortgage lending on the basis of marital status on the grounds that it was pre-empted by state legislation. Notably, this included the legislature's adoption of "a complex and comprehensive statutory structure dealing with all aspects of credit and lending in ch. 138, Stats., which governs rates of interest, variable rate contracts, federal rate parity, residential mortgages and credit discrimination." 120 Wis.2d at 397-398, 355 N.W.2d at 238. The Supreme Court also specifically rejected the contention that the Madison ordinance came within the City's "home-rule" powers under Art. XI § 3(1). Not coincidentally, the subject matter of the *Anchor Savings & Loan* case is closely related to that encompassed by this opinion, and the source of the State preemption in that case is one of the

very same chapters of the Wisconsin Statutes (ch. 138) implicated in the regulation of the credit practices of the "payday loan" industry.

We have also searched for non-Wisconsin cases that might provide guidance on the issue of the application of zoning regulations to the "payday loan" industry, and have found two such cases, both from Missouri. The decisions in these cases, however, are not directed to the specific inquiry raised by your letter and are thus of limited value. In *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of the City of St. Ann*, 64 S.W.3d 210 (Mo. Sup. Ct. 2002), the Missouri Supreme Court invalidated a local zoning ordinance prohibiting the location of "short-term loan establishments" anywhere within the City of St. Ann, on the grounds that it conflicted with a state statute classifying "personal services" businesses and financial institutions as "permitted uses" within "general commercial districts." Although Wisconsin appears to have not adopted a comparable statute, this decision is consistent with the general principle, noted above, that "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required." In *Missouri Title Loans, Inc. v. City of St. Louis Board of Adjustment*, 62 S.W.3d 408 (Mo. Ct. App. E.D. 2001), the Missouri Court of Appeals upheld a determination by the board to deny a conditional-use permit to a "title loan" agency on the basis of an evidentiary record indicating that the grant of that permit would decrease neighborhood property values, increase traffic, and attract undesirable business invitees. Such a determination, however, was not premised upon a general "public welfare" conditional-use criterion comparable to § 295-311-2-d-1 of the Code and would be more akin to an application of a protection-of-property criterion such as that found in § 295-311-2-d-2 of the Code.

Thus, while we do not necessarily agree with the suggestion of counsel for Payday Loan Store of Wisconsin, Inc. that the "public welfare" criterion set forth in § 295-311-2-d-1 of the Code refers only to matters related to "land use," we do not believe that the scope of that criterion is unlimited. The text of the Zoning Code states that a special-use permit shall not be granted unless the Board makes a finding that the proposed use will be "operated in a manner that the public health, safety, and welfare is protected." That text does encompass not only "land use" issues, but also those matters within the traditional reach of the City's police powers under § 62.11(5) *Wis. Stats.* We caution, however, that there is a significant risk that it would not encompass any attempt to regulate the lending or other business practices of the "payday loan" industry, and that the courts may very well invalidate any determination by the Board upon an application submitted by a "payday loan" agency based in whole or in part upon any such attempt. Further, we believe that any such attempt may be preempted by existing State

legislation and administrative regulation applicable to regulation of the credit practices and related operations of the "payday loan" industry.

If you have any further questions concerning this matter, please contact this office for further guidance.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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Assistant City Attorney

Stuart S. Mukamal

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September 24, 2003

Mr. Craig Zetley
Chairperson
Board of Zoning Appeals for the City of Milwaukee
809 North Broadway, 1st Floor
Milwaukee, WI 53202

Alderman Don Richards
City of Milwaukee Common Council
200 East Wells Street
Milwaukee, WI 53202

RE: Item No. 25065, Variance Application of First Payday Loans of Wisconsin for Payday Loan Operation at 6902 North 76th Street

Dear Chairman Zetley and Alderman Richards:

This letter is submitted in opposition to the pending variance request from First Payday Loans of Wisconsin, an Illinois company, to operate a payday loan store at 6902 North 76th Street, Milwaukee. Legal Aid opposes the pending application because of the adverse effects expanded payday lending operations will have in the City of Milwaukee--effects that would be inconsistent with the "public interest." The City Attorney's Office has ruled that BOZA, according to available case law, is accorded "significant discretion...in applying the 'public welfare' component of the special-use permit criteria contained in § 295-311-2-d-1 of the [Zoning] Code." (May 7, 2003 letter from the Office of the City Attorney to BOZA.) A variance request must meet a similar "public interest" standard.

Legal Aid, accordingly, submits three concrete bases for the Board of Zoning Appeals to deny the pending application based on appropriate "public interest" discretionary factors.[1]

[1] Materials referenced in this letter will be offered at scheduled hearings as attachments. The expert report of Professor Christopher Lewis Peterson is, however, enclosed.

1. **Adverse Impact Resulting From the "Clustering" of Payday Lending Operations: The Oversaturation of 76th Street**

The proposed location at 6902 North 76th Street will likely overload northwest neighborhoods of the City of Milwaukee with clusters of high-cost, long-term debt pushers. As of February 2003, Legal Aid determined that, of the 69 payday lending locations in Milwaukee County, 61% were located within city limits. Other "fringe banking" businesses follow the same pattern: 86% of the check cashers or currency exchanges in the Milwaukee County are located within the city; and 100% of the pawnbrokers in Milwaukee County are located within the city. These operations have not just "clustered" within the City of Milwaukee, as opposed to outlying areas, the easily observable fact is that these businesses tend to cluster in certain areas or neighborhoods of the city. As of February 2003, 61% of the payday loan store locations in the City of Milwaukee were located on just three thoroughfares.

The one City of Milwaukee street that contains more payday lending than any other is 76th Street, which already has eleven outlets on that street, and another five within ten blocks. Along 76th Street, there was one cluster at 3906, 4750, 4760 and 4847 North 76th Street, plus 7600 W. Capitol Drive. Another cluster was found at 5910, 6404, 6520, 6863 and 6864 North 76th Street. A final cluster was found at 7941 and 8066 North 76th Street.

The obvious fact is that First Payday loans now intends to add to this payday loan imbalance on North 76th Street, by adding a location at 6902 North 76th Street. Circumstances will only worsen if the payday loan applicant, QC Financial, is allowed to open up an outlet at 6454 North 76th Street.

The oversaturation or clustering of other payday loan and fringe banking operations in city neighborhoods predictably has negative consequences for other businesses in the area. This clustering effect tends to suggest to visitors, and other prospective business developers, that these particular neighborhoods are troubled by high numbers of credit-risk residents. Of course, the clustering effect ends up denigrating the quality of these neighborhoods, when the truth is that they have viable economies with large numbers of hardworking, income-producing, asset-building families. The clustering effect of fringe banking businesses (including payday lenders), in short, sends the wrong message--certainly, a message that is contrary to the economic development interests of the city and the public welfare. These adverse impacts are detailed by Christopher Lewis Peterson, University of Florida, Levin College of Law, in his expert report to BOZA.

Given the tendency of these businesses to oversaturate these areas and to cluster on particular thoroughfares, many municipalities are now turning to licensing maximums and per capita formulas. St. Joseph, Missouri, for example, has proposed to limit payday lending operations to one outlet for every 15,000 residents. If that formula were used in the City of Milwaukee, the city would welcome no more than 40 payday loan outlets. However, as of February 2003, the city had already exceeded that number, and now First Payday Loans and others plan to make the numbers even higher.

2. Adverse Impact of Payday Lending on Nonprofit Services: The Increased Burden on Consumer Counseling Nonprofits

It is fairly predictable that expanded payday loan operations in the City of Milwaukee will lead to an increasing burden on the resources of nonprofits, such as Consumer Credit Counseling Services (CCCS). These charitable entities, usually funded by local United Way campaigns with every limited dollars, have reported serious increases in client numbers and problems directly attributable to payday lending excesses. For example, the following newspaper accounts are relevant:

> July 9, 2000, The Record: "It's been a real problem," said Sue Becerra, Executive Director of the Consumer Credit Counseling Service of Mid-Counties, a Stockton-based non-profit that helps people overcome debt. 'The number of clients we've seen who've gotten in trouble over payday loans has increased 500% over the last year.'"
>
> January 31, 2000, Akron Beacon Journal: Bob Frazer of Dayton Consumer Credit Counseling Services said "His surveys show that the average CCCS client has 4 open, or unpaid, payday loans and that some have up to 30. Said Frazer, 'It's a trap.'"
>
> September 19, 1999, Dayton Daily News: "Officials from the Consumer Credit Counseling Services of Miami Valley as well as the Legal Aid Society of Dayton, said that they are serving more clients who try to bale themselves out of financial waterfalls with payday loans only to see them eventually file for bankruptcy."
>
> February 21, 1999, Indianapolis Star: Melinda Wright of Consumer Credit Counseling Service "noted a sharp increase in clients with payday loans in the past 6 months."

Payday lending has had a similar effect on the nonprofit services offered by the Legal Aid Society of Milwaukee. The City of Milwaukee should be concerned about the negative impact that may result from expanded payday lending operations insofar as they draw down the limited nonprofit resources available to assist financially-stressed families.

Likewise, the City of Milwaukee should be concerned about the drain that will result on the court systems, state and local consumer protection agencies, as well as the effects that will follow for other local businesses, such as landlords, telephone companies, utilities, and medical providers. Typically, payday lenders, with their far more aggressive collection efforts, nose out these vital service industries when "short-term" payday loans overwhelm their customers with spiraling long-term debt. These adverse impacts are also detailed by Assistant Professor Christopher Lewis Peterson of the University of Florida, Levin College of Law, in his expert report for BOZA.

3. First Payday Loans' Misleading Operation Plan: The Long-Term Debt Coverup

First Payday's "plan of operation" which was filed with BOZA on June 20, 2003, deliberately misstates, in our view, the nature of the operation and its goals. First Payday (at page 1) states:

> "Our goal is to ensure that individuals have an opportunity to receive *short-term*, small personal loans, typically under $500, when an emergency arises. The loans that we offer are not offered by other lending institutions because of the administrative costs and burden. Our lending office is specialized to assist people who typically have a difficult time obtaining emergency funds."

(Emphasis added.)

There are at least three fundamental flaws in this "plan of operation" description. First, it has been firmly established through scholarly research that payday lenders cannot operate as profitable businesses if their customers were to receive just single installment loans for one, short, single loan term. By representing their product to be "short-term" loans, First Payday misrepresents the true "long-term" debt consequences of its business. Indeed, the payday lending business model requires that customers become chronic borrowers, burdened with *long-term* debt through the process of repeated "rollovers" or renewals of their short-term loans. Payday lenders, such as First Payday, make money by getting desperate consumers to take out multiple short-term loans so that they can be rolled over into long-term debt. This point is well-documented in the article by Dr. Michael A. Stegman, MacRae Professor of Public Policy and Business as the University of North Carolina at Chapel Hill, in his *Economic Development Quarterly* article,

February, 2003 entitled, *Payday Lending: A Business Model that Encourages Chronic Borrowing*.

In another study, Professor John P. Caskey, Professor of Economics at Swarthmore College, reviewed raw data gathered by the Wisconsin Department of Financial Institutions specific to payday loan customers in the State of Wisconsin. His conclusions directly contradict the claims of First Payday. Caskey concludes in his April 2002 report, *The Economics of Payday Lending*, at page 25:

> "[T]he data are consistent with the charge that more payday loan customers are frequent borrowers who may well be trapped in a persistent and costly debt cycle. Over 40% of the longer-term payday loan customers in Wisconsin, for example, had 20 or more loan transactions over the course of a year. Assuming that they borrowed the average amount for Wisconsin customers ($245) and that they paid an average finance charge ($49) with each transaction, they would have each spent at least $980 in finance charges in order to keep a $245 loan outstanding for most of a year."

Second, First Payday represents that it is offering loan products that "are not offered by other lending institutions...." However, as explained in greater detail above, the City of Milwaukee has been inundated with payday lending and auto title lending outlets. There simply is no shortage of alternative financial service institutions, especially in the geographic area proposed to be served by First Payday on North 76th Street.

Third, payday lenders, such as First Payday, do not provide debt counseling services or any other service that is "specialized to assist people" in the best ways to deal with their needs for emergency funds. In fact, the payday lending business model requires that lenders offer their products for the undisclosed, yet paramount purpose of dragging customers into chronic, long-term, high-cost debt. This paramount purpose completely negates any business purpose to provide "specialized" assistance in the form of debt counseling or debt management services. The Board of Zoning Appeals should note that First Payday's plan of operation materials noticeably omit any reference to the annual interest rate, annual percentage rate, the finance charges, the return check charges, the delinquency charges, and other costs or charges that it plans to impose on its customers. Inasmuch as it is the applicant's burden to establish that its operations will be run consistent with the public welfare, and given First Payday's history of excessive loan charges, more information should be disclosed.

CONCLUSION

For the foregoing reasons, the Legal Aid Society of Milwaukee submits that the proposed expansion of payday loan outlets to include the First Payday location at 6902 North 76th Street is contrary to the public interest. Further, we doubt that First Payday can establish either the "exceptional circumstances" or "hardship" elements that must also be proven to obtain a zoning variance.

Very truly yours,

LEGAL AID SOCIETY OF MILWAUKEE, INC.

JAMES A. WALRATH
Executive Director

JAW/vlv
Enc.

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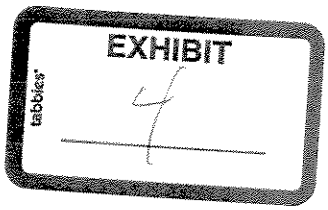

Payday Loans: Everything You Need to Know, or More

Wisconsin Payday Loan Forum
Madison, WI
September 22, 2005

Jean Ann Fox, CFA

- jafox@erols.com
- 757-867-7523
- www.consumerfed.org
- Consumer Federation of America is a non-profit association of 300 consumer groups, established in 1968 to advance the consumer interest through research, education and advocacy.

Payday Loans: Quick Cash for Cold Checks or Debits

- Borrower writes a check for loan amount and fees/authorizes debit
- Lender gives cash loan and holds check/debit authorization until payday
- On due date, borrower redeems the check with cash, lets lender deposit check, or pays the finance charge to roll over loan

Payday Loan Market

- Industry claims 100 million loans, $6 billion paid to borrow about $40 billion 2004, 22,000 retail payday loan outlets, growing 15% a year
- Payday loan stores, pawn shops, check cashers, other storefronts
- Payday loans via Internet, telephone
- Industry:Consolidating/Cashing In

What makes payday lending predatory?

- Extremely expensive
- Little or no underwriting
- Risks a valuable asset
- Fosters coercive collection tactics
- Unaffordable repayment terms
- Ruses to evade consumer protections
- Lack of recourse for consumers, mandatory arbitration clauses

High Cost and Short Terms

- ☐ Payday loans cost from $15 to $30 to borrow $100. Average APR 470%
- ☐ Loans are for $100 to $1,000, typically around $350 plus finance charge
- ☐ Loan term averages 14 to 15 days, due in full on next payday
- ☐ NSF fees for returned checks extra

Low Risk to Lenders

- ☐ ACE report to SEC 3.97% loan loss as % of matured loan volume
- ☐ AA IPO 1.5% loaned in 2003 not recovered, not counting NSF fees
- ☐ Motley Fool says 2% PDL default rate
- ☐ Missouri 5.4% loans charged off
- ☐ Colorado annual report 4% write off
- ☐ Florida reports 2% default

Who Uses Payday Loans?

- ☐ Have a job or steady income/benefits
- ☐ Have a bank account
- ☐ Have ID
- ☐ Clear TeleTrack or other database inquiry
- ☐ Younger
- ☐ Female
- ☐ Low to middle income
- ☐ Credit constrained
- ☐ Low/no savings
- ☐ Convenience driven

Vulnerable Groups of Consumers Targeted

- African American communities are twice or three times more likely to have payday lenders than predominantly white communities
- Military bases are targeted by payday lenders
- Women make up 64% of customers, industry funded study
- Hispanic consumers targeted in Pima County Study

Wisconsin DFI Study 2001

- 54% women, 46% men, age 39
- 64% renters, 22% home owners
- Average net income $18,675, average gross income $24,673
- 14 day loans, 542% APR, $246 average loan amount with $49.73 finance charge
- 53% loans were rolled over
- 22% rolled twice, 17% rolled >5x

Repeat Borrowing Life Blood of Payday Loan Industry

- 91% of all payday loans made to repeat borrowers with five or more loans per year (CRL)
- 79% of loans made to long-time customers are same day renewals or new loans before payday (WI Caskey)
- Average Iowa borrower had over 12 loans per year at single lender
- FastBucks: 80% of customers buy back checks before loan is due

Check Holding Leads to Coercive Collection Tactics

- ☐ Check bounces, two NSF fees added
- ☐ Bad credit rating on check databases
- ☐ Default reported to credit bureaus
- ☐ Lender sues to collect on "bad" check
- ☐ Some threaten criminal prosecution
- ☐ Some threaten court martial
- ☐ Repeat ACH attempts rack up fees

Signing Away Your Rights

- ☐ Mandatory arbitration clauses
- ☐ Agree not to file for bankruptcy
- ☐ Agree not to join or bring a class action lawsuit
- ☐ Voluntary wage assignment
- ☐ Agree to leave bank account open until loan repaid

Legal Status of Payday Lending

- ☐ 35 states and DC authorize payday lending with safe harbor from usury
- ☐ 2 states have no usury caps or substantive payday loan regulations
- ☐ 13 states prohibit through usury and small loan laws (counting Arkansas)

Ruses and Scams to Evade Laws

- ☐ Thinly-veiled retail transactions with a rebate, phone card sales, Internet access with a rebate
- ☐ Sham lease arrangements, sale-leaseback, cash "leasing"
- ☐ Rent-a-bank payday lending
- ☐ Rent a lender from SD or MO
- ☐ Credit Services Organization

FDIC and Rent-a-Bank Lending

- ☐ Issued revised guideline that more than three months of loans in last 12 months unsafe for bank partners. Big hit on publicly traded lenders.
- ☐ Issued cease and desist order to County Bank of Rehoboth Beach, DE to improve unsafe and unsound banking practices
- ☐ First Fidelity Bank pulled out of NC

2005 Legislative Battles

- Industry bill killed in Texas, Maine, NC
- Bills pending in Michigan, Pennsylvania, South Carolina
- Compromise bills enacted in Illinois and Nevada
- Industry amendments passed in Ohio, North Dakota, Kansas, Rhode Island; stopped in KY
- Advocates' bills defeated in Virginia, Washington, New Mexico, Iowa, Arkansas, Oklahoma, Utah, West Virginia, Missouri

Legislative Trends

- Industry bills advance in MI and PA
- "No Limit" states, NV, IL, new laws
- Higher loan limits in WA, OH, IL, RI
- VA and ND clarify that state law applies to Internet loans
- "Military Protections" for GA enacted in VA, WA, TX
- Database added in ND

Local Ordinances

- Pima County/Tucson zoning ordinances proposed
- Jacksonville, FL/Duval County ordinance, rate cap for loans to military
- National City, CA proposed local ordinance

New Mexico AG Proposed Regs

- ☐ Rates above 54% APR pawn unfair
- ☐ Term less than four months unfair
- ☐ Loan for more than 25% monthly income unfair, must underwrite
- ☐ Paying one loan with another unfair
- ☐ High risk of loss of collateral unfair

State and Local Enforcement

- ☐ DC AG stopped debits to pay loans
- ☐ NC Banking Commissioner case on Advance America, bank pull-out
- ☐ WA AG and DFI case against payday lender threats of criminal action
- ☐ NY, CO, KS, MA cases against unlicensed Internet lenders
- ☐ IN and AR cases on Internet access with a rebate ruse

Questions?

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CHAPTER 424

CONSUMER TRANSACTIONS — INSURANCE

Cross−reference: See definitions in s. 421.301.

SUBCHAPTER I

GENERAL PROVISIONS

424.101 Short title. This chapter shall be known and may be cited as Wisconsin consumer act−−insurance.
History: 1971 c. 239.

424.102 Scope. This chapter applies to agreements between a creditor and a debtor under which insurance is provided or is to be provided in relation to consumer credit transactions.
History: 1971 c. 239; 1973 c. 3.
Wisconsin consumer act—a critical analysis. Heiser, 57 MLR 389.
Wisconsin consumer act−−a freak out? Barrett, Jones, 57 MLR 483.

424.103 Application of general definitions. The definitions in s. 421.301 shall apply to this chapter.
History: 1973 c. 3; 1981 c. 390 s. 252.

SUBCHAPTER II

CONSUMER CREDIT INSURANCE

424.201 Definition "consumer credit insurance". "Consumer credit insurance" means insurance, other than insurance on property, by which the satisfaction of debt in whole or in part is a benefit provided, but does not include:

(1) Insurance issued as an isolated transaction on the part of the insurer not related to an agreement or plan for insuring customers of the creditor;

(2) Insurance indemnifying the creditor against loss due to the customer's default; or

(3) With respect to a motor vehicle consumer lease, a lessor's waiver of its contractual right to hold the lessee liable for any or all of the gap amount, as defined in s. 429.104 (12), if the waiver is granted without a separate charge.
History: 1971 c. 239; 1973 c. 3; 1985 a. 256; 1995 a. 329.

424.202 Charge for insurance. (1) Except as otherwise provided in this chapter and subject to the provisions on additional charges (s. 422.202), and maximum charges (s. 422.201) a creditor may agree to provide insurance, and may contract for and receive a charge for insurance separate from and in addition to other charges. A creditor need not make a separate charge for insurance provided or required by the creditor.

(2) This chapter does not authorize the issuance of any insurance prohibited under any statute, or rule thereunder, governing the business of insurance.
History: 1971 c. 239; 1991 a. 316.

424.203 Conditions applying to insurance to be provided by creditor. (1) When the parties agree that consumer credit insurance shall be provided, at the time the indebtedness is incurred there shall be delivered to the customer the individual policy, a group certificate of insurance, a copy of the application for such insurance or a notice of proposed insurance.

(2) The evidence of insurance provided pursuant to sub. (1) shall set forth the name and home office address of the insurer, the name or names of the customers, the premium or amount of payment by the customer, if any, separately for credit life insurance and credit accident and sickness insurance, the amount, term and a brief description of the coverage provided, including all exclusions and exceptions.

(3) Within 30 days of the date upon which the indebtedness is incurred, the insurer shall cause the individual policy or group certificate of insurance to be delivered to the customer if it is not delivered at the time the indebtedness is incurred.

(4) Within 10 days from the date the indebtedness is incurred, the customer shall be permitted to return the policy, certificate of insurance or the notice of proposed insurance to the creditor and to receive a refund of any premium paid for the insurance if the customer is not satisfied with the insurance for any reason. Such insurance shall then be void and the parties will be in the same position as if no certificate, policy or notice of proposed insurance had been issued. Conspicuous notice of the right to return the policy, certificate of insurance or notice of proposed insurance shall be furnished with or in the policy, certificate or notice of proposed insurance.

(5) A violation of this section is subject to s. 425.303.
History: 1971 c. 239; 1973 c. 3 ss. 59, 69; 1991 a. 316.

424.204 Maximum charge by creditor for insurance. (1) Except as provided in sub. (2), if a creditor contracts for or receives a charge for insurance, the amount charged for the insurance may not exceed the premium to be charged by the insurer, as computed at the time the charge to the customer is determined, conforming to any rate filings required by law and made by the insurer with the commissioner of insurance.

CHAPTER 425

CONSUMER TRANSACTIONS — REMEDIES AND PENALTIES

Cross–reference: See definitions in s. 421.301.

SUBCHAPTER I

CREDITORS' REMEDIES

425.101 Short title. This chapter shall be known and may be cited as the Wisconsin consumer act—remedies and penalties.

History: 1971 c. 239.

425.102 Scope. This subchapter applies to actions or other proceedings brought by a creditor to enforce rights arising from consumer credit transactions and to extortionate extensions of credit under s. 425.108.

History: 1971 c. 239.

Wisconsin consumer act—a critical analysis. Heiser, 57 MLR 389.

Wisconsin consumer act—a freak out? Barrett, Jones, 57 MLR 483.

425.103 Accrual of cause of action; "default". (1) Notwithstanding any term or agreement to the contrary, no cause of action with respect to the obligation of a customer in a consumer credit transaction shall accrue in favor of a creditor except by reason of a default, as defined in sub. (2).

(2) "Default", with respect to a consumer credit transaction, means without justification under any law:

(a) With respect to a transaction other than one pursuant to an open–end plan; if the interval between scheduled payments is 2 months or less, to have outstanding an amount exceeding one full payment which has remained unpaid for more than 10 days after the scheduled or deferred due dates, or the failure to pay the first payment or the last payment, within 40 days of its scheduled or deferred due date; if the interval between scheduled payments is more than 2 months, to have all or any part of one scheduled payment unpaid for more than 60 days after its scheduled or deferred due date; or, if the transaction is scheduled to be repaid in a single payment, to have all or any part of the payment unpaid for more than 40 days after its scheduled or deferred due date. For purposes of this paragraph the amount outstanding shall not include any delinquency or deferral charges and shall be computed by applying each payment first to the installment most delinquent and then to subsequent installments in the order they come due;

(b) With respect to an open–end plan, failure to pay when due on 2 occasions within any 12–month period; or

(c) To observe any other covenant of the transaction, breach of which materially impairs the condition, value or protection of or the merchant's right in any collateral securing the transaction or goods subject to a consumer lease, or materially impairs the customer's ability to pay amounts due under the transaction.

(3) A cause of action with respect to the obligation of a customer in a consumer credit transaction shall be subject to this subchapter, including the provisions relating to cure of default (ss. 425.104 and 425.105).

(4) A cause of action arising from a transaction which resulted in the creation of a security interest in personal property shall also be subject to the limitations provided in subch. II.

History: 1971 c. 239; 1973 c. 3; 1975 c. 407; 1979 c. 10; 1995 a. 225; 1997 a. 302.

When a lender was promptly informed that a borrower had a valid disability insurance claim that would cover payments, it was an unconscionable practice to include an unpaid monthly charge that would be covered by the disability insurance in computing the unpaid balance for purposes of establishing default. Bank One Milwaukee, N.A. v. Harris, 209 Wis. 2d 412, 563 N.W.2d 543 (Ct. App. 1997), 96–0903.

Creditor's remedies under the Wisconsin consumer act. 1973 WBB No. 6.

425.104 Notice of customer's right to cure default. (1) A merchant who believes that a customer is in default may give the customer written notice of the alleged default and, if applicable, of the customer's right to cure any such default (s. 425.105).

(2) Any notice given under this section shall contain the name, address and telephone number of the creditor, a brief identification of the consumer credit transaction, a statement of the nature of the alleged default and a clear statement of the total payment, including an itemization of any delinquency charges, or other performance necessary to cure the alleged default, the exact date by which the amount must be paid or performance tendered and the name, address and telephone number of the person to whom any payment must be made, if other than the creditor.

History: 1971 c. 239.

Notice need not be given if the obligation is entirely past due and fully owed, making it impossible for the customer to restore the loan to current status. Rosendale State Bank v. Schultz, 123 Wis. 2d 195, 365 N.W.2d 911 (Ct. App. 1985).

425.105 Cure of default. (1) A merchant may not accelerate the maturity of a consumer credit transaction, commence any action except as provided in s. 425.205 (6), or demand or take possession of collateral or goods subject to a consumer lease other than by accepting a voluntary surrender thereof (s. 425.204), unless the merchant believes the customer to be in default (s. 425.103), and then only upon the expiration of 15 days after a

notice is given pursuant to s. 425.104 if the customer has the right to cure under this section.

(2) Except as provided in sub. (3), for 15 days after such notice is given, a customer may cure a default under a consumer credit transaction by tendering the amount of all unpaid installments due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges, and by tendering performance necessary to cure any default other than nonpayment of amounts due. The act of curing a default restores to the customer the customer's rights under the agreement as though no default had occurred.

(3) A right to cure shall not exist if the following occurred twice during the preceding 12 months:

(a) The customer was in default on the same transaction or open–end credit plan;

(b) The creditor gave the customer notice of the right to cure such previous default in accordance with s. 425.104; and

(c) The customer cured the previous default.

(4) With respect to consumer credit transactions in which the creditor has a security interest in, and possession of, instruments or documents, as each is defined in s. 409.102 (1), which threaten to decline speedily in value, this section does not restrict the creditor's rights to dispose of such property pursuant to subch. VI of ch. 409 and the terms of the creditor's security agreement.

History: 1971 c. 239; 1975 c. 407, 421; 1991 a. 316; 2001 a. 10.

425.106 Exempt property. (1) Except to the extent that the merchant has a valid security interest which is permitted by chs. 421 to 427 and 429 or has a lien under ch. 779 in such property, or where the transaction is for medical or legal services and there has been no finance charge actually imposed, the following property of the customer shall be exempt from levy, execution, sale, and other similar process in satisfaction of a judgment for an obligation arising from a consumer credit transaction:

(a) Unpaid earnings to the extent provided in s. 812.34.

(b) Clothing of the customer or his or her dependents, and the following: dining table and chairs, refrigerator, heating stove, cooking stove, radio, beds and bedding, couch and chairs, cooking utensils and kitchenware and household goods as defined in 12 CFR 227.13 (d), 12 CFR 535.1 (g) or 16 CFR 444.1 (i) consisting of furniture, appliances, one television, linens, china, crockery and personal effects including wedding rings, except works of art, electronic entertainment equipment, antiques and jewelry, to the extent a nonpossessory security interest in these household goods is prohibited under 12 CFR 227.13 (d), 12 CFR 535.2 (a) (4) or 16 CFR 444.2 (a) (4);

(c) Real property used as the principal residence of the customer or the customer's dependents, to the extent that the fair market value of such property, less all amounts secured by mortgages and liens outstanding against it, is $15,000 or less; and

(d) Earnings or other assets of the customer which are required to be paid by the customer as restitution under s. 973.20.

(2) With respect to process against marital property in satisfaction of a judgment for an obligation described under s. 766.55 (2) (b) arising from a consumer credit transaction, each spouse is entitled to and may claim the exemptions under sub. (1). Each spouse is entitled to one exemption under sub. (1) (c). That exemption is limited to the specified maximum dollar amount, which may be combined with the other spouse's exemption in the same property or applied to different property included under the same exemption.

(3) Nothing in this section shall be construed to displace other provisions of law which afford additional or greater protection to the customer.

(4) An order or process in violation of this section is void.

History: 1971 c. 239; 1973 c. 2, 3; 1979 c. 32 s. 92 (9); 1979 c. 89, 177, 221; 1983 a. 36; 1985 a. 37, 256; 1987 a. 398; 1991 a. 316; 1993 a. 80; 1995 a. 329.

NOTE: As to sub. (2), see notes in 1985 Wis. Act 37, marital property trailer bill.

A proposal for monitoring the impact of increased wage garnishment exemptions under the Wisconsin consumer act. 1974 WLR 466.

425.107 Unconscionability. (1) With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the remedy and penalty authorized in sub. (5), either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

(2) Specific practices forbidden by the administrator in rules promulgated pursuant to s. 426.108 shall be presumed to be unconscionable.

(3) Without limiting the scope of sub. (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability:

(a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers;

(b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;

(c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;

(d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

(e) That the terms of the transaction require customers to waive legal rights;

(f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;

(g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder;

(h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and

(i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

(4) Any charge or practice expressly permitted by chs. 421 to 427 and 429 is not in itself unconscionable but even though a practice or charge is authorized by chs. 421 to 427 and 429, the totality of a creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct.

(5) In addition to the protections afforded in sub. (1), the customer shall be entitled upon a finding of unconscionability to recover from the creditor or the person responsible for the unconscionable conduct a remedy and penalty in accordance with s. 425.303.

History: 1971 c. 239; 1979 c. 89; 1995 a. 329.

When a lender was promptly informed that a borrower had a valid disability insurance claim that would cover payments, it was an unconscionable practice to include an unpaid monthly charge that would be covered by the disability insurance in computing the unpaid balance for purposes of establishing default. Bank One Milwaukee, N.A. v. Harris, 209 Wis. 2d 412, 563 N.W.2d 543 (Ct. App. 1997), 96–0903.

425.108 Extortionate extensions of credit. (1) If it is the understanding of the creditor and the customer during any time that an extension of credit is outstanding, that delay in making repayment could result in the use of violence to cause harm to the person or property of any person, the extension of credit shall be unenforceable in accordance with s. 425.305 and the customer shall additionally recover triple the penalty provided in s. 425.304 (1).

(2) If it is shown that an extension of credit was made at an annual rate exceeding that permitted by or referred to in s. 422.201 on maximum charges and that the creditor had a reputation for the use or threat of use of violence to cause harm to the person or property of any person to collect extensions of credit or to punish the nonrepayment thereof, it shall be presumed that the extension of credit was a violation under chs. 421 to 427 under sub. (1).

History: 1971 c. 239; 1979 c. 89.

425.109 Pleadings. (1) A complaint by a creditor to enforce any cause of action arising from a consumer credit transaction shall include all of the following:

(a) An identification of the consumer credit transaction.

(b) A description of the collateral or leased goods, if any, which the creditor seeks to recover or has recovered.

(c) A specification of the facts constituting the alleged default by the customer.

(d) The actual or estimated amount of U.S. dollars or of a named foreign currency that the creditor alleges he or she is entitled to recover and the figures necessary for computation of the amount, including any amount received from the sale of any collateral.

(e) Except in an action to recover goods subject to a consumer lease, a statement that the customer has the right to redeem any collateral as provided in s. 425.208 (1) (intro.) and the actual or estimated amount of U.S. dollars or of a named foreign currency required for redemption, itemized in accordance with s. 425.208 (1) (a) to (d).

(f) Except in an action to recover goods subject to a consumer lease, the estimated amount of U.S. dollars or of a named foreign currency of any deficiency claim which may be available to the creditor following the disposition of any collateral recovered subject to the limitations of s. 425.209 or which the creditor seeks to recover and which the creditor intends to assert subject to the limitations of s. 425.210 if the customer fails to redeem the collateral.

(g) If the customer still has the right to cure a default under s. 425.105 pursuant to a notice given under s. 425.104, the total payment or other performance necessary to cure the alleged default and the exact date by which it must be made.

(h) An accurate copy of the writings, if any, evidencing the transaction, except that with respect to claims arising under open−end credit plans, a statement that the creditor will submit accurate copies of the writings evidencing the customer's obligation to the court and the customer upon receipt of the customer's written request therefor on or before the return date or the date on which the customer's answer is due.

(2) Upon the written request of the customer, the creditor shall submit accurate copies to the court and the customer of writings evidencing any transaction pursuant to an open−end credit plan upon which the creditor's claim is made and judgment may not be entered for the creditor unless the creditor does so.

(3) A judgment may not be entered upon a complaint which fails to comply with this section.

History: 1971 c. 239; 1983 a. 389; 1991 a. 236.

A stated amount owed as of a specific date with a per diem interest figure is not a sufficient statement of "the figures necessary for computation of the amount" as required by sub. (1) (d). A complaint is not sufficient under this section because it meets the general rules of notice pleading. Household Finance Corp. v. Kohl, 173 Wis. 2d 798, 496 N.W.2d 768 (Ct. App. 1993). See also Bank One v. Ofojebe, 2005 WI App 151, ___ Wis. 2d ___, ___ N.W.2d ___, 04−0902.

425.110 No discharge from employment for garnishment. (1) No employer shall discharge an employee because a merchant has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a consumer credit transaction.

(2) If an employer violates this section, an employee shall recover back wages and be reinstated, if the employee files an action for such relief within 90 days of the employee's discharge.

History: 1971 c. 239.

425.111 Levy before judgment. (1) Prior to entry of judgment in an action subject to this subchapter, no process, other than a restraining order to protect collateral (s. 425.207), shall issue with respect to amounts that are owing or are claimed to be owing or may be owing to the customer by any 3rd person, whether by way of attachment, garnishment or other process.

(2) With respect to property of the customer other than that described in sub. (1), process may issue in accordance with ch. 811 to establish a lien, except that such process shall not be effective to take, or to divest the customer of possession of, the property until final judgment is entered.

(3) If the court finds that the creditor probably will recover on the action, and that the customer is acting, or is about to act, with respect to property of the customer upon which a lien has been established under sub. (2), in a manner which substantially impairs the creditor's prospects for satisfying the judgment against such property (s. 811.03), the court may issue an order restraining the customer from so acting with respect to that property until final judgment is entered.

History: 1971 c. 239; 1973 c. 2; Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975).

Legislative Council Note, 1973: Clarifies applicability of this subsection. Section 425.111 (1) refers to property of the customer subject to garnishment, and prescribes limitations on creditors' actions in relation to it. Sub. (2) refers to other property of the customer; however, the language struck by this amendment appears to make sub. (2) refer back to the same property dealt with by sub. (1), so it is deleted. [Bill 355−A]

425.112 Stay of execution. At the time of or at any time after the entry of a judgment in favor of a creditor against a customer in an action arising from a consumer transaction, the court, for cause and upon motion of a party or on its own motion, may stay enforcement of the judgment by order upon just and equitable conditions, and continue, modify or revoke the order as the interests of justice may require.

History: 1971 c. 239.

425.113 Body attachments. (1) No merchant shall cause or permit a warrant against the person of a customer to issue under ch. 816 with respect to a claim arising from a consumer credit transaction. Any process issued in violation of this section is void.

(2) A violation of this section is subject to s. 425.305.

History: 1971 c. 239; Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975).

Cross Reference: See also s. DFI−Bkg 80.66, Wis. adm. code.

If s. 425.113 were to be interpreted to remove a court's power to issue a body attachment for one who chooses to ignore its orders, the interpretation would cause the statute to be unconstitutional as a violation of the principle of separation of powers. Smith v. Burns, 65 Wis. 2d 638, 223 N.W.2d 562 (1974).

SUBCHAPTER II

ENFORCEMENT OF SECURITY INTERESTS IN COLLATERAL

425.201 Scope. This subchapter applies to the enforcement by a creditor of security interests in collateral.

History: 1971 c. 239.

425.202 Definition: "collateral". For purposes of this chapter, "collateral" means goods subject to a security interest in favor of a merchant which secures a customer's obligations under a consumer credit transaction.

History: 1971 c. 239; 1975 c. 407.

425.203 Enforcement of merchant's rights in collateral and leased goods. (1) At any time after default (s. 425.103) and the expiration of the period for cure of default (s. 425.105), if applicable, a merchant may commence an action to recover collateral or goods subject to a consumer lease pursuant to s. 425.205, or reduce the claim to a judgment by any available judicial procedure.

(2) In any action for a judgment under sub. (1) other than an action pursuant to s. 425.205, the judgment may provide for the right to possession of the collateral or leased goods by the merchant and for a deficiency, if the merchant would not be precluded from a deficiency judgment under s. 425.209 had the merchant

initially proceeded against the collateral and if the judgment includes a finding that the merchant has the right to possession of any collateral securing the consumer credit transaction or goods subject to a consumer lease. Upon determining such judgment under this subsection the merchant shall have the right to:

(a) Have execution issue to require the sheriff in the county where the collateral or leased goods may be to take the same from the defendant and deliver it to the plaintiff; or

(b) Immediately exercise the right to nonjudicial recovery of the collateral or leased goods, subject to s. 425.206.

(3) Following recovery of collateral pursuant to a judgment under sub. (2), the merchant may either retain the collateral in full satisfaction of the customer's obligation pursuant to ss. 409.620 to 409.624, in which event the merchant shall satisfy the judgment obtained pursuant to sub. (2); or shall dispose of the collateral pursuant to subch. VI of ch. 409, in which event:

(a) The merchant shall apply to the court which entered the judgment pursuant to sub. (2) to confirm the sale or other disposition of the collateral upon 8 days' notice to all parties named in such action, either personally or by certified or registered mail directed to the last–known address of the parties. Such notice shall state, in addition to any other matter required by law, the time and place of the hearing, the amount of the judgment, the proceeds received upon disposition of the collateral, the fair market value of the collateral claimed by the merchant if such standard is applicable under s. 425.210, the reasonable expenses incurred in disposition of collateral, the net amount proposed to be credited against the judgment, and any deficiency remaining. In addition, the notice directed to the customer shall conspicuously advise the customer of the right to appear at such hearing and to contest any matter set forth in the notice.

(b) At such a hearing on confirmation, the court shall determine on the basis of the evidence presented by the parties, by affidavit or otherwise, the commercial reasonableness of the merchant's disposition of the collateral, the reasonable expenses incurred by the merchant in disposition of the collateral, the compliance with s. 425.210 if applicable, the resulting amount to be credited against the judgment and the remaining deficiency. Following such hearing and determinations, the court shall enter an appropriate order to satisfy the judgment and provide such other relief as may be appropriate. Where the underlying transaction is a consumer credit sale of goods or services or a consumer loan in which the lender is subject to defenses arising from s. 422.408, this hearing shall be considered a proceeding for a deficiency judgment pursuant to s. 425.209 (1).

(4) Following recovery of goods subject to a consumer lease pursuant to a judgment under sub. (2), no deficiency shall be allowable unless the merchant disposes of the leased goods and applies the proceeds to the customer's obligation, in which event:

(a) The merchant shall apply to the court which entered the judgment pursuant to sub. (2) to confirm the sale or other disposition of the leased goods upon 8 days' notice to all parties named in the action, either personally or by certified or registered mail directed to the last–known address of the parties. Such notice shall state, in addition to any other matter required by law, the time and place of the hearing, the amount of the judgment, the proceeds received upon disposition of the leased goods, the reasonable expenses incurred in disposition of the leased goods, the net amount proposed to be credited against the judgment, and any deficiency remaining. In addition, the notice directed to the customer shall conspicuously advise the customer of the right to appear at such hearing and to contest any matter set forth in the notice.

(b) At such a hearing on confirmation, the court shall determine on the basis of evidence presented by the parties, by affidavit or otherwise, the commercial reasonableness of the merchant's disposition of the leased goods, the reasonable expenses incurred by the merchant in disposition of the leased goods, and the resulting amount to be credited against the judgment entered pursuant to sub. (2). Following such hearing and determinations, the court shall enter an appropriate order to satisfy the judgment and provide such other relief as may be appropriate.

History: 1971 c. 239; 1975 c. 407, 421; 2001 a. 10.

425.204 Voluntary surrender of collateral. (1) Notwithstanding a waiver by the creditor of the security interest in collateral under s. 425.203 (2) or any other law, the customer shall have the right at any time to voluntarily surrender all of the customer's rights and interests in the collateral to the merchant.

(2) The rights and obligations of the merchant and customer with respect to collateral voluntarily surrendered as defined in this section shall be governed by subch. VI of ch. 409, and are not subject to this subchapter.

(3) The surrender of collateral by a customer is not a voluntary surrender if it is made pursuant to a request or demand by the merchant for the surrender of the collateral, or if it is made pursuant to a threat, statement or notice by the merchant that the merchant intends to take possession of the collateral.

History: 1971 c. 239; 1991 a. 316; 2001 a. 10.

Cross Reference: See also s. DFI–Bkg 80.67, Wis. adm. code.

Under the facts of the case, the customer did not "voluntarily surrender" collateral under sub. (3). Wachal v. Ketterhagen Motor Sales, Inc. 81 Wis. 2d 605, 260 N.W.2d 770 (1978).

425.205 Action to recover collateral. (1) Except as provided in s. 425.206, a creditor seeking to obtain possession of collateral or goods subject to a consumer lease shall commence an action for replevin of the collateral or leased goods. Those actions shall be conducted in accordance with ch. 799, notwithstanding s. 799.01 (1) (c) and the value of the collateral or leased goods sought to be recovered, except that:

(a) Notwithstanding ss. 799.05 (2) and 799.06 (2), process shall be issued by the clerk of court, and such action shall be commenced upon the request of an officer or employee of a merchant on the merchant's behalf;

(b) The summons shall be in the form prescribed in sub. (2), and a complaint in the form described in sub. (3) shall be served with the summons;

(c) When service is made pursuant to s. 799.12 (3) certified mail with return receipt requested shall be employed;

(d) On the return date of the summons or any adjournment date thereof the customer shall have the right to a hearing on the issue of default or other matter which questions the validity of the merchant's claim to the collateral or leased goods, and the customer may answer, move to dismiss under s. 802.06 (2) or otherwise plead to the complaint orally, but if the customer fails to appear on the return day, judgment may be entered by the clerk or judge in accordance with the demands of the verified complaint, or upon an affidavit of the facts, or sworn testimony or other evidence to the clerk or judge; and

(e) Judgment in such action shall determine only the right to possession of the collateral or leased goods, but such judgment shall not bar any subsequent action for damages or deficiency to the extent permitted by this subchapter.

(2) The summons in such actions shall be in the following form:

State of Wisconsin
Circuit Court
.... County
A. B. Plaintiff
v.
C. D. Defendant

SUMMONS (Small Claim)

THE STATE OF WISCONSIN
To said Defendant:

The Plaintiff named above has commenced an action to recover possession of the following property:

[Description of Collateral or Leased Goods]

This claim arises under a consumer credit transaction under which you are alleged to be in default, as described in the attached complaint.

IF YOU ARE NOT IN DEFAULT OR HAVE AN OBJECTION TO THE PLAINTIFF'S TAKING THE PROPERTY LISTED ABOVE, YOU MAY ARRANGE FOR A HEARING ON THESE ISSUES BY APPEARING IN THE CIRCUIT COURT OF .... COUNTY, IN THE COURTHOUSE LOCATED IN ...., (municipality), BEFORE JUDGE .... OR ANY OTHER JUDGE TO WHOM THE ACTION MAY BE ASSIGNED, ON .... (date), AT .... (time). IF YOU DO NOT APPEAR AT THAT TIME, JUDGMENT WILL BE RENDERED AGAINST YOU FOR DELIVERY OF THE PROPERTY TO THE PLAINTIFF.

DATED ...., ... (year)

E.F.
Clerk of Circuit Court
[or]
Plaintiff's Attorney

Plaintiff's P. O. Address
....
....
Plaintiff's Attorney (if any)
....
....
Defendant's P. O. Address
....
....

(3) The complaint in such action shall conform with the requirements of s. 425.109.

(4) Upon the written request of the customer, the merchant shall produce an accurate copy of writings evidencing any transactions pursuant to an open−end credit plan upon which the merchant's claim is made, and judgment shall not be entered for the merchant until the merchant does so.

(5) Upon entry of judgment for the plaintiff, the plaintiff shall have the right to:

(a) Have execution issue to require the sheriff of the county where the collateral or leased goods may be to take the same from the defendant and deliver it to the plaintiff; or

(b) Immediately exercise the right to nonjudicial recovery of the collateral or leased goods, subject to s. 425.206.

(6) Action pursuant to this section may be commenced at any time after the customer is in default, but the return day of process may not be set prior to the expiration of the period for cure of the default by the customer (s. 425.105), if applicable.

History: 1971 c. 239; Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975); 1975 c. 407, 421; 1977 c. 449 s. 497; 1979 c. 32 s. 92 (16); 1981 c. 317; 1981 c. 391 s. 210; 1983 a. 389; 1989 a. 31; 1993 a. 246; 1997 a. 250.

425.206 Nonjudicial enforcement limited. (1) Notwithstanding any other provision of law, no merchant may take possession of collateral or goods subject to a consumer lease in this state by means other than legal process in accordance with this subchapter except when:

(a) The customer has surrendered the collateral or leased goods;

(b) Judgment for the merchant has been entered in a proceeding for recovery of collateral or leased goods under s. 425.205, or for possession of the collateral or leased goods under s. 425.203 (2); or

(c) The merchant has taken possession of collateral or leased goods pursuant to s. 425.207 (2).

(2) In taking possession of collateral or leased goods, no merchant may do any of the following:

(a) Commit a breach of the peace.

(b) Enter a dwelling used by the customer as a residence except at the voluntary request of a customer.

(3) A violation of this section is subject to s. 425.305.

History: 1971 c. 239; 1975 c. 94 s. 3; 1975 c. 407; 1979 c. 10; 1995 a. 225; 1997 a. 302.

Under the facts of the case, the customer did not "voluntarily surrender" collateral sub. (1) (a). Wachal v. Ketterhagen Motor Sales, Inc. 81 Wis. 2d 605, 260 N.W.2d 770 (1978).

Notwithstanding s. 421.201 (5), this section governed repossessions outside the state when the contract provided for enforcement under the "internal law" of Wisconsin. First Wisconsin National Bank of Madison v. Nicolaou, 85 Wis. 2d 393, 270 N.W.2d 582 (Ct. App. 1978).

A "breach of the peace" under sub. (2) has the same meaning as in s. 409.503. Repossession in disregard of the debtor's oral protest is a breach of the peace. Punitive damages may be appropriate as the result of the breach of the peace. Hollibush v. Ford Motor Company, 179 Wis. 2d 799, 508 N.W.2d 449 (Ct. App. 1993).

Repossession under an invalid judgment violates this section. Kett v. Community Credit Plan, Inc. 228 Wis. 2d 1, 596 N.W.2d 786 (1999), 97−3620.

The abolition of self−help repossession; the poor pay even more. White, 1973 WLR 503.

The impact of denying self−help repossession of automobiles: a case study of the Wisconsin consumer act. Whitford, Laufer, 1975 WLR 607.

425.207 Restraining order to protect collateral or leased goods; abandoned property. (1) If the court finds that the merchant probably will recover possession of the collateral or goods subject to a consumer lease, and the customer is acting, or is about to act, with respect to the collateral or leased goods in a manner which substantially impairs the merchant's prospect for realization of the merchant's security interest or the merchant's interest in the leased goods, the court may issue an order pursuant to s. 813.02 restraining the customer from so acting with respect to the collateral or leased goods, and need not require a bond by the merchant, notwithstanding s. 813.06.

(2) A merchant who reasonably believes that a customer has abandoned collateral or goods subject to a consumer lease may take possession of such collateral or leased goods and preserve it. However, the customer may recover such collateral or leased goods upon request unless at the time of request the customer has surrendered the collateral or leased goods, or judgment for the merchant has been entered in a proceeding for recovery of collateral or leased goods under s. 425.205 or in a judgment described in s. 425.203 (2). A merchant taking possession of collateral or leased goods pursuant to this section shall promptly send notification to the customer's last−known address of such action and of the customer's right to recover such collateral or leased goods under this section. If the collateral or leased goods are recovered by the customer pursuant to this section, it shall be returned to the customer at the location where the merchant took possession of such collateral or leased goods pursuant to this section or, at the option of the merchant, at such other location designated by the customer; and any expense incurred by the merchant in taking possession of, holding and returning the collateral or leased goods to the customer shall be borne by the merchant. If after taking possession of collateral or leased goods pursuant to this subsection, the merchant perfects the right to possession through a surrender by the customer or a judgment under s. 425.203 (2) or 425.205, the customer is liable for the expenses set forth in s. 409.615 (1). In determining such expenses, leased goods shall be considered collateral under s. 409.615 (1). However, a customer is not liable for expenses of holding the collateral or leased goods from the time the merchant takes possession until the merchant perfects the right to possession in the manner provided in this subsection.

History: 1971 c. 239; Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975); 1975 c. 407, 421, 422; 1979 c. 10; 1981 c. 314 s. 146; 1997 a. 302; 2001 a. 10.

425.208 Customer's right to redeem. (1) For a period of 15 days following exercise by the creditor of nonjudicial enforcement rights (s. 425.206) or issuance of process (s. 425.205) with regard to the collateral, the customer shall be entitled to redeem the goods by tendering:

(a) The total of all unpaid amounts, including any unpaid delinquency or deferral charges due at the time of tender, without acceleration; plus

(b) Performance necessary to cure any default other than nonpayment of amounts due; plus

(c) Any court costs, filing and service fees, and bond premium charges incurred by the creditor; plus

(cm) If a writing evidencing the consumer credit transaction so provides, expenses the creditor is entitled to recover under s. 422.413 (2g) (a) and (b); plus

(d) Whichever of the following is less:

1. A performance deposit, in the amount of 3 scheduled installments, or minimum payments in the case of an open−end credit plan.

2. One−third of the total obligation remaining unpaid with respect to the consumer credit transaction.

(2) Tender of the payment and performance pursuant to sub. (1) restores to the customer the customer's rights under the agreement as though all payments and performance had been made as scheduled.

(3) Upon such redemption, any process under which the collateral has been held shall be vacated, any pending action shall be dismissed, and the collateral shall be returned to the customer.

(4) The performance deposit shall be held by the merchant to secure, and may be applied at any time to, the remaining obligations of the customer under the consumer transaction.

(5) The existence of the deposit does not cure any subsequent default of the customer, and the deposit need not be credited to the customer's account until the remaining unpaid balance of the transaction becomes equal to the deposit. In the event of a subsequent default, prepayment, or other occurrence (except deferral) which requires the computation under chs. 421 to 427 of the outstanding obligation of the customer, the deposit shall be credited to the amount paid for the purposes of such computation.

(6) The creditor shall not dispose of the collateral or enter into a contract for the disposition of the collateral, until the expiration of the period for redemption provided in this section, unless the collateral is perishable or threatens to decline speedily in value. Upon the expiration of such period any disposition of the collateral shall be subject to subch. VI of ch. 409, except that the customer may be liable for a deficiency only to the extent provided in ss. 425.209 and 425.210.

History: 1971 c. 239; 1979 c. 10, 89; 1983 a. 389; 1991 a. 316; 1997 a. 302; 1999 a. 85; 2001 a. 10.

425.209 Restrictions on deficiency judgments. **(1)** This section applies to a deficiency on a consumer credit sale of goods or services and on a consumer loan in which the lender is subject to defenses arising from sales (s. 422.408); a customer is not liable for a deficiency unless the merchant has disposed of the goods in good faith and in a commercially reasonable manner.

(2) If the merchant repossesses or accepts voluntary surrender of goods which were the subject of the sale and in which the merchant has a security interest, the customer is not personally liable to the merchant for the unpaid balance of the debt arising from the sale of a commercial unit of the goods of which the amount owing at the time of default was $1,000 or less, and the merchant is not obligated to resell the collateral unless the customer has paid 60% or more of the cash price and has not signed after default a statement renouncing the customer's rights in the collateral.

(3) If the merchant repossesses or accepts voluntary surrender of goods which were not the subject of the sale but in which the merchant has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the amount owing at the time of default was $1,000 or less, the customer is not personally liable to the merchant for the unpaid balance of the debt arising from the sale, and the merchant's duty to dispose of the collateral is governed by the provisions on disposition of collateral under chs. 401 to 411.

(4) If the lender takes possession or accepts voluntary surrender of goods in which the lender has a security interest to secure a debt arising from a consumer loan in which the lender is subject to defenses arising from sales (s. 422.408) and the amount owing at the time of default of the loan paid to or for the benefit of the customer were $1,000 or less, the customer is not personally liable to the lender for the unpaid balance of the debt arising from the loan and the lender's duty to dispose of the collateral is governed by the provisions on disposition of collateral under chs. 401 to 411.

(5) The customer may be liable in damages to the merchant if the customer has wrongfully damaged the collateral or if, after judgment for the creditor has been entered in a proceeding for recovery of collateral under s. 425.205, the customer has wrongfully failed to make the collateral available to the merchant.

(6) If the merchant elects to bring an action against the customer for a debt arising from a consumer credit sale of goods or services or from a consumer loan in which the lender is subject to defenses arising from sales (s. 422.408), when under this section the merchant would not be entitled to a deficiency judgment if the merchant took possession of the collateral, and obtains judgment:

(a) The merchant may not take possession of the collateral; and

(b) The collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

History: 1971 c. 239; 1973 c. 2, 3; 1991 a. 148, 304, 315, 316.

Cross Reference: See also ss. DFI−Bkg 80.70 and 80.71, Wis. adm. code.

Proof of disposal of goods in accordance with sub. (1) must be made by a merchant to obtain a deficiency judgment. Failure to do so need not be asserted as an affirmative defense. Shoeder's Auto Center, Inc. v. Teschner, 166 Wis. 2d 198, 479 N.W.2d 203 (Ct. App. 1991).

425.210 Computation of deficiency. If the creditor is entitled to a deficiency judgment pursuant to s. 425.209 (1), the creditor shall be entitled to recover from the customer the deficiency, if any, remaining after deducting the fair market value of the collateral from the unpaid balance.

History: 1971 c. 239.

SUBCHAPTER III

CUSTOMER'S REMEDIES

425.301 Remedies to be liberally administered. **(1)** The remedies provided by this subchapter shall be liberally administered to the end that the customer as the aggrieved party shall be put in at least as good a position as if the creditor had fully complied with chs. 421 to 427.Recoveries under chs. 421 to 427 shall not in themselves preclude the award of punitive damages in appropriate cases.

(2) Any right or obligation declared by chs. 421 to 427 is enforceable by action unless the provision declaring it specifies a different and limited effect.

(3) Notwithstanding any other section of chs. 421 to 427, a customer shall not be entitled to recover specific penalties provided in s. 425.302 (1) (a), 425.303 (1), 425.304 (1) or 425.305 (1) if the person violating chs. 421 to 427 shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(4) The liability of a merchant under chs. 421 to 427 is in lieu of and not in addition to any liability under the federal consumer credit protection act and ss. 138.09 or 218.0101 to 218.0163. An action by a person alleging a violation under chs. 421 to 427 may not be maintained if a final judgment has been rendered for or against that person with respect to the same violation under the federal consumer credit protection act or ss. 138.09 or 218.0101 to 218.0163. If a final judgment is entered against any merchant under chs. 421 to 427 and the federal consumer credit protection act or ss. 138.09 or 218.0101 to 218.0163 for the same violation, the merchant has a cause of action for appropriate relief to the extent necessary to avoid double liability.

(5) If there are multiple obligors in the same consumer credit transaction or consumer lease, there may be no more than one recovery of civil penalties for each violation of chs. 421 to 427.

History: 1971 c. 239; 1975 c. 407; 1979 c. 89; 1985 a. 256; 1999 a. 31.

An error of law is not a bona fide error under sub. (3). First Wisconsin National Bank v. Nicolaou, 113 Wis. 2d 524, 335 N.W.2d 390 (1983).

425.302 Remedy and penalty for certain violations. **(1)** A person who commits a violation to which this section applies is liable to the customer in an amount equal to:

(a) Twenty–five dollars; and

(b) The actual damages, including any incidental and consequential damages, sustained by the customer by reason of the violation.

(2) This section also applies to all violations for which no other remedy is specifically provided.

History: 1971 c. 239.

425.303 Remedy and penalty for certain violations. A person who commits a violation to which this section applies is liable to the customer in an amount equal to:

(1) One hundred dollars; and

(2) The actual damages, including any incidental and consequential damages, sustained by the customer by reason of the violation.

History: 1971 c. 239.

425.304 Remedy and penalty for certain violations. A person who commits a violation to which this section applies is liable to the customer in an amount equal to the greater of:

(1) Twice the amount of the finance charge in connection with the transaction, except that the liability under this subsection shall not be less than $100 nor greater than $1,000; or

(2) The actual damages, including any incidental and consequential damages, sustained by the customer by reason of the violation.

History: 1971 c. 239.

425.305 Transactions which are void. **(1)** In a transaction to which this section applies, the customer shall be entitled to retain the goods, services or money received pursuant to the transaction without obligation to pay any amount.

(2) In addition, the customer shall be entitled to recover any sums paid to the merchant pursuant to the transaction.

History: 1971 c. 239; 1973 c. 2.

425.306 Unenforceable obligations. **(1)** Any charge, practice, term, clause, provision, security interest or other action or conduct in violation of chs. 421 to 427, to the extent that the same is in violation of chs. 421 to 427, shall confer no rights or obligations enforceable by action.

(2) This section shall not affect the enforcement of any provision that is not prohibited by chs. 421 to 427.

History: 1971 c. 239; 1979 c. 89.

425.307 Limitation of action. **(1)** Any action brought by a customer to enforce rights pursuant to chs. 421 to 427 shall be commenced within one year after the date of the last violation of chs. 421 to 427, 2 years after consummation of the agreement or one year after last payment, whichever is later, except with respect to transactions pursuant to open–end credit plans which shall be commenced within 2 years after the date of the last violation; but no action may be commenced more than 6 years after the date of the last violation.

(2) Rights under chs. 421 to 427 may be asserted as a defense, setoff or counterclaim to an action against the customer without regard to this time limitation.

History: 1971 c. 239; 1979 c. 89.

425.308 Reasonable attorney fees. **(1)** If the customer prevails in an action arising from a consumer transaction, the customer shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on the customer's behalf in connection with the prosecution or defense of such action, together with a reasonable amount for attorney fees.

(2) The award of attorney fees shall be in an amount sufficient to compensate attorneys representing customers in actions arising from consumer transactions. In determining the amount of the fee, the court may consider:

(a) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;

(b) The customary charges of the bar for similar services;

(c) The amount involved in the controversy and the benefits resulting to the client or clients from the services;

(d) The contingency or the certainty of the compensation;

(e) The character of the employment, whether casual or for an established and constant client; and

(f) The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

History: 1971 c. 239; 1991 a. 316; 1993 a. 490.

Attorney fees awarded under this section often far exceed the amount of recovery. First Wisconsin National Bank v. Nicolaou, 113 Wis. 2d 524, 335 N.W.2d 390 (1983).

Awards of attorney fees and costs are limited to instances in which a customer has shown that a creditor has not "fully complied with chs. 421 to 427." Suburban State Bank v. Squires, 145 Wis. 2d 445, 427 N.W.2d 393 (Ct. App. 1988).

A prevailing party is one who succeeds on any significant issue and is entitled to recover fees relating to successfully litigated issues. Footville State Bank v. Harvell, 146 Wis. 2d 524, 432 N.W.2d 122 (Ct. App. 1988).

Although voluntarily dismissed, prosecution of improperly venued actions violated the consumer act, and the defendants were prevailing parties under s. 425.308 entitled to attorney fees. Community Credit Plan, Inc. v. Johnson, 228 Wis. 2d 30, 596 N.W.2d 799 (1999), 97–0574.

425.309 Class actions. Class actions are governed by s. 426.110.

History: 1971 c. 239.

425.310 Liability of corporate officers. Damages or penalties awarded to a customer or the administrator for a violation of chs. 421 to 427 which cannot be collected from a corporation by reason of its insolvency or dissolution shall be recoverable against the principal agents of the corporation including, but not limited to, officers, managers and assistant managers who knew of, should have known of or willfully participated in such a violation, if a meaningful part of the corporation's activities were in violation of chs. 421 to 427.

History: 1971 c. 239; 1979 c. 89.

425.311 Evidence of violation. Sections 402.202 and 411.202 and any other statute restricting admissibility of parol evidence shall be inoperative to exclude or limit the admissibility of evidence of an act or practice in violation of chs. 421 to 427.

History: 1971 c. 239; 1979 c. 89; 1991 a. 148.

SUBCHAPTER IV

CRIMINAL PENALTIES

425.401 Willful violations: misdemeanor. A person who willfully and knowingly engages in any conduct or practice in violation of chs. 421 to 427 may be fined not more than $2,000.

History: 1971 c. 239; 1979 c. 89.

CHAPTER 426

CONSUMER TRANSACTIONS — ADMINISTRATION

Cross−reference: See definitions in s. 421.301.

SUBCHAPTER I

POWERS AND FUNCTIONS OF ADMINISTRATOR

426.101 Short title. This chapter shall be known and may be cited as Wisconsin consumer act−−administration.
History: 1971 c. 239.

426.102 Applicability. This chapter applies to persons who do any of the following in this state:

(1) Make or solicit consumer approval transactions (s. 423.201) or consumer credit transactions or modifications thereof.

(2) Directly collect payments from or enforce rights against customers arising from consumer approval transactions or consumer credit transactions, wherever made.

(3) Act as a credit services organization, as defined in s. 422.501 (2).
History: 1971 c. 239; 1991 a. 244.
Wisconsin consumer act−−a critical analysis. Heiser, 57 MLR 389.
Wisconsin consumer act−−a freak out? Barrett, Jones, 57 MLR 483.

426.103 Administrator. "Administrator" means the secretary of financial institutions.
History: 1971 c. 239; 1995 a. 27, 216.

426.104 Powers of administrator; duty to report. (1) In addition to other powers granted by chs. 421 to 427 and 429, the administrator within the limitations provided by law shall:

(a) Receive and act on complaints, take action designed to obtain voluntary compliance with chs. 421 to 427 and 429, commence administrative proceedings on his or her own initiative and commence civil actions solely through the department of justice;

(b) Counsel persons and groups on their rights and duties under chs. 421 to 427 and 429;

(c) Make studies appropriate to effectuate the purposes and policies of chs. 421 to 427 and 429 and make the results available to the public;

(d) Hold such public or private hearings as the administrator deems necessary or proper to effectuate the purposes and policies of chs. 421 to 427 and 429;

(e) Adopt, amend and repeal rules to carry out the purposes and policies of chs. 421 to 427 and 429, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(2) The administrator shall report annually on practices in consumer transactions, on the use of consumer credit in the state, on problems attending the collection of debts, on the problems of persons of limited means in consumer transactions, and on the operation of chs. 421 to 427 and 429.For the purpose of making the report, the administrator may conduct research and make appropriate studies. The report shall be given to the division of banking for inclusion in the report of the division of banking under s. 220.14 and shall include:

(a) A description of the examination and investigation procedures and policies of the administrator's office;

(b) A statement of policies followed in deciding whether to investigate or examine the offices of persons subject to chs. 421 to 427 and 429;

(c) A statement of policies followed in deciding whether to bring any action authorized under chs. 421 to 427 and 429;

(d) Such recommendations for modifications or additions to chs. 421 to 427 and 429 as in the experience and judgment of the administrator are necessary; and

(e) Such other statements as are necessary or proper to achieve the purposes or policies of this section or to effectuate the purposes or policies of chs. 421 to 427 and 429.

(3) The administrator shall make available upon request a list of all persons against whom complaints have been filed and the results of all investigations completed or not being actively pursued along with a brief description of the facts of each case and the action taken in each.

(4) (a) No provision of chs. 421 to 427 and 429 or of any statute to which chs. 421 to 427 and 429 refer which imposes any penalty shall apply to any act done or omitted to be done in conformity with any rule or order of the administrator or any written opinion, interpretation or statement of the administrator, notwithstanding that such rule, order, opinion, interpretation or statement may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(ab) 1. Upon the request of any person, the administrator shall review any act, practice, procedure or form that has been submitted to the administrator in writing to determine whether the act, practice, procedure or form is consistent with chs. 421 to 427 and 429.

2. The administrator may charge the person making a request under subd. 1. for necessary expenses incurred in conducting the review, except the administrator may not charge any of the following persons:

a. A person registered under s. 426.201.

b. A trade organization, if a majority of the members of the trade organization are registered under s. 426.201.

3. Any charge assessed under subd. 2. shall be paid within 30 days after the date on which the administrator assesses the charge.

(b) Any act, practice or procedure which has been submitted to the administrator in writing and either approved in writing by the administrator or not disapproved by the administrator within 60 days after its submission to the administrator shall not be deemed to be a violation of chs. 421 to 427 and 429 or any other statute to which chs. 421 to 427 and 429 refer notwithstanding that the approval of the administrator or nondisapproval by the admin-

istrator may be subsequently amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

History: 1971 c. 239; 1977 c. 196 s. 131; 1979 c. 89; 1983 a. 524; 1985 a. 256; 1991 a. 316; 1995 a. 27, 216, 329; 1997 a. 35.

Power and duties of the administrator under the Wisconsin consumer act. Mildenberg, 1973 WBB No. 1.

426.105 Administrative powers with respect to supervised financial organizations. **(1)** All powers and duties of the administrator under chs. 421 to 427 and 429 shall be exercised by the administrator with respect to a supervised financial organization.

(2) If the administrator receives a complaint or other information concerning noncompliance with chs. 421 to 427 and 429 by a supervised financial organization, the administrator shall inform the official or agency having supervisory authority over the organization concerned. The administrator may request information about supervised financial organizations from the officials or agencies supervising them.

(3) The administrator and any official or agency of this state having supervisory authority over a supervised financial organization shall consult and assist one another in maintaining compliance with chs. 421 to 427 and 429.They may jointly pursue investigations, prosecute suits and take other official action, as they deem appropriate, if either of them otherwise is empowered to take the action.

History: 1971 c. 239; 1979 c. 89; 1995 a. 329.

426.106 Investigatory powers. **(1)** At any time that the administrator has reason to believe that a person has engaged in or is about to engage in an act which is subject to action by the administrator, the administrator may make an investigation and, with respect thereto, may administer oaths or affirmations, and, upon the administrator's own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence, and the administrator shall have the right of access to and of examination of such books, documents or other tangible things. In any civil action brought on behalf of the administrator following such an investigation, the administrator may recover the administrator's costs of making the investigation if the administrator prevails in the action.

(2) If 5 or more persons file a verified complaint with the administrator alleging that a person has engaged in an act which is subject to action by the administrator, the administrator shall immediately commence an investigation pursuant to sub. (1).

(3) If the person's records are located outside this state, the person at the person's option shall either make them available to the administrator at a convenient location within this state or pay the reasonable and necessary expenses for the administrator or the administrator's representative to examine them at the place where they are maintained. The administrator may designate representatives, including comparable officials of the state in which the records are located, to inspect them on the administrator's behalf.

(4) Upon failure without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the administrator may apply to any court of record for an order compelling compliance.

History: 1971 c. 239; 1991 a. 316.

Cross Reference: See also ss. DFI–Bkg 80.80 and 80.82, Wis. adm. code.

426.107 Application of chapter 227. Except as otherwise provided, ch. 227 applies to and governs all administrative action taken by the administrator pursuant to chs. 421 to 427 and 429.Notwithstanding s. 227.52, the decisions of the administrator are subject to judicial review as provided in ch. 227.

History: 1971 c. 239; 1979 c. 89; 1985 a. 182 s. 57; 1995 a. 329.

426.108 Unconscionable conduct. The administrator shall promulgate rules declaring specific conduct in consumer credit transactions and the collection of debts arising from consumer credit transactions to be unconscionable and prohibiting the use of those unconscionable acts. In promulgating rules under this section, the administrator shall consider, among other things, all of the following:

(1) That the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of customers.

(2) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved.

(3) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value.

(4) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors.

(5) That the terms of the transaction require customers to waive legal rights.

(6) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction.

(7) That the natural effect of the practice is to cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties under the transaction.

(8) That the writing purporting to evidence the obligation of the customers in the transaction contains terms or provisions or authorizes practices prohibited by law.

(9) Definitions of unconscionability in statutes, rules, rulings and decisions of legislative, administrative or judicial bodies.

History: 1971 c. 239; 1999 a. 85.

Cross Reference: See also ss. DFI–Bkg 80.85, 80.86, 80.87, and 80.88, Wis. adm. code.

426.109 Temporary relief; injunctions. **(1)** The administrator or any customer may bring a civil action to restrain by temporary or permanent injunction a person from violating chs. 421 to 427 and 429 or the rules promulgated pursuant thereto, or to so restrain a merchant or a person acting on behalf of a merchant from engaging in false, misleading, deceptive, or unconscionable conduct in consumer credit transactions. It shall not be a defense to an action brought under this section that there exists an adequate remedy at law.

(2) The administrator or customer may seek a temporary restraining order without written or oral notice to the adverse party or his or her attorney. If the court finds that there is reasonable cause to believe that the respondent is engaged in the conduct sought to be restrained and that such conduct violates chs. 421 to 427 and 429 or rules promulgated under chs. 421 to 427 and 429, it may grant a temporary restraining order or any temporary relief it deems appropriate. A temporary restraining order granted without notice shall expire by its terms within a stated time after entry, not to exceed 30 days, as the court fixes, unless within this time it is extended by the court, or unless the party against whom the order is directed consents that it may be extended for a longer period. When a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for a hearing at the earliest possible time. Upon notice to the party who obtained the temporary restraining order without notice, the adverse party may appear and move its dissolution or modification, and in this event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

History: 1971 c. 239; 1979 c. 89; 1995 a. 329.

426.110 Class actions; injunctions; declaratory relief. **(1)** Either the administrator, or any customer affected by a viola-

tion of chs. 421 to 427 and 429 or of the rules promulgated pursuant thereto or by a violation of the federal consumer credit protection act, or by conduct of a kind described in sub. (2), may bring a civil action on behalf of himself or herself and all persons similarly situated, for actual damages by reason of such conduct or violation, together with penalties as provided in sub. (14), reasonable attorney fees and other relief to which such persons are entitled under chs. 421 to 427 and 429.The customer filing the action must give prompt notice thereof to the administrator, who shall be permitted, upon application within 30 days, to join as a party plaintiff. For purposes of apportionment of cost, the administrator need not be a party to the action.

(2) Actions may be maintained under this section against any person who in making, soliciting or enforcing consumer credit transactions engages in any of the following kinds of conduct:

(a) Making or enforcing unconscionable terms or provisions of consumer credit transactions;

(b) False, misleading, deceptive, or unconscionable conduct in inducing customers to enter into consumer credit transactions; or

(c) False, misleading, deceptive, or unconscionable conduct in enforcing debts or security interests arising from consumer credit transactions.

(3) Notwithstanding this chapter, no class action may be maintained for conduct proscribed in sub. (2) or for a violation of s. 423.301, 424.501, 425.107, 426.108 or 427.104 (1) (h) unless the conduct has been found to constitute a violation of chs. 421 to 427 and 429 at least 30 days prior to the occurrence of the conduct involved in the class action by an appellate court of this state or by a rule promulgated by the administrator as provided in ss. 426.104 (1) (e) and 426.108 specifying with particularity the act or practice in question.

(4) (a) At least 30 days or more prior to the commencement of a class action for damages pursuant to the provisions of this section, any party must:

1. Notify the person against whom an alleged cause of action is asserted of the particular alleged claim or violation; and

2. Demand that such person correct, or otherwise remedy the basis for the alleged claim.

(b) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to such person at the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the department of financial institutions.

(c) Except as provided in par. (e), no action for damages may be maintained under this section if an appropriate remedy, which shall include actual damages and may include penalties, is given, or agreed to be given within a reasonable time, to such party within 30 days after receipt of such notice.

(d) Except as provided in par. (e), no action for damages may be maintained under this section upon a showing by a person against whom the alleged claim or violation is asserted that all of the following exist:

1. All customers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made;

2. All customers so identified have been notified that upon their request such person shall make the appropriate remedy;

3. The remedy requested by such customers has been or in a reasonable time will be given; and

4. Such person has ceased from engaging, or if immediate cessation is impossible under the circumstances, such person will, within a reasonable time, cease to engage in any acts on which the alleged claim is based.

(e) An action for injunctive relief may be commenced without compliance with par. (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with par. (a) the customer may amend his or her complaint without leave of court to include a request for damages. The appropriate provisions of par. (c) or (d) shall be applicable if the complaint for injunctive relief is amended to request damages.

(5) The court shall permit the suit to be maintained on behalf of all members of the represented class only if:

(a) The class is so numerous that joinder of all members, if permissible, would be impracticable;

(b) There are questions of law and fact common to the class;

(c) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. This paragraph shall not apply if the administrator is a representative plaintiff;

(d) The representative parties will fairly and adequately protect the interests of the class.

(6) An action may be maintained as a class action if the prerequisites of sub. (5) are satisfied, and in addition:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of:

1. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

2. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

4. The difficulties likely to be encountered in the management of a class action.

(7) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits. If the court determines that the action may not be maintained as a class action, it shall allow the action to proceed on behalf of the parties appearing in the action.

(8) In any class action maintained under sub. (6) (c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) The court will exclude a class member from the class if the member so requests by a specified date;

(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) Any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel.

(9) The judgment in an action maintained as a class action under sub. (6) (a) or (b), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under sub. (6) (c), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in sub. (8) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(10) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and this section shall then be construed and applied accordingly.

(11) If the judgment is for a class of plaintiffs, the court shall render judgment in favor of the administrator and against the defendants for all costs of notice incurred by the administrator in such action.

(12) In the conduct of actions to which this section applies, the court may make appropriate orders, which may be altered or amended as may be desirable from time to time, for any of the following purposes:

(a) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

(b) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

(c) Imposing conditions on the representative parties or on intervenors.

(d) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

(e) Dealing with procedural matters similar to those under pars. (a) to (d).

(13) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(14) A merchant shall not be liable in a class action for specific penalties under s. 425.302 (1) (a), 425.303 (1), 425.304 (1), 425.305 (1) or 429.301 (1) for which it would be liable in individual actions by reason of violations of chs. 421 to 427 and 429 or of conduct prescribed in sub. (2) unless it is shown by a preponderance of the evidence that the violation was a willful and knowing violation of chs. 421 to 427 and 429.No recovery in an action under this subsection may exceed $100,000.

(15) A plaintiff who prevails shall be awarded a reasonable attorney's fee. Notwithstanding s. 425.308 (2), reasonable attorney's fees in a class action shall be determined by the value of the time reasonably expended by the attorney rather than by the amount of the recovery on behalf of the class. A legal aid society or legal services program which represents a class shall be awarded a reasonable service fee in lieu of reasonable attorney's fees, equal in amount to the amount of the attorney's fees as measured by this subsection.

(16) The administrator, whether or not a party to an action, shall bear the costs of notice except that the administrator may recover such costs from the defendant as provided in sub. (11).

History: 1971 c. 239; 1975 c. 407; 1979 c. 89; 1985 a. 256; 1991 a. 316; 1995 a. 27, 225, 329; 1999 a. 85.

Sub. (4) (c) is procedural and not substantive as it does not grant or deny the substantive right to sue. Mace v. Van Ru Credit Corp. 109 F.3d 338 (1997).

426.111 Debtors' remedies not affected. The grant of powers to the administrator in this chapter does not affect remedies available to customers under chs. 421 to 427 and 429 or under other principles of law or equity.

History: 1971 c. 239; 1979 c. 89; 1995 a. 329.

SUBCHAPTER II

REGISTRATION AND FEES

426.201 Registration. (1) The registration requirements of this section apply to persons who do any of the following in this state:

(a) Make or solicit consumer credit transactions, except a person who engages in consumer credit transactions solely through honoring credit cards issued by 3rd parties not related to such person.

(b) Directly collect payments from or enforce rights against customers arising from such transactions, wherever made.

(2) Each person subject to the registration requirements under sub. (1) shall file a registration statement with the administrator within 30 days after commencing business in this state. The registration statement shall include all of the following information:

(a) The name of the person.

(b) The name under which the person transacts business if different from par. (a).

(c) The address of the person's principal office, which may be outside this state.

(d) The addresses of all of the person's offices or retail stores, if any, in this state.

(e) If consumer transactions or other business subject to this chapter are made otherwise than at an office or retail store in this state, a brief description of the manner in which they are made.

(f) The address of the person's designated agent upon whom service of process may be made in this state.

(fm) The year–end balance of all consumer credit transactions held by the person. In this paragraph, "year–end balance" has the meaning given under s. 426.202 (1m) (a).

(g) Such other similar information as the administrator may require to effectuate the purposes and policies of chs. 421 to 427 and 429.

(2m) (a) Except as provided in par. (b), each person subject to the registration requirements under sub. (1) shall file a registration statement containing the information under sub. (2) (a) to (g) no later than February 28 of each year following the year of the person's initial registration under sub. (2).

(b) 1. In this paragraph, "year–end balance" has the meaning given in s. 426.202 (1m) (a).

2. Paragraph (a) does not apply if the person's year–end balance is not more than $250,000.

(3) The administrator shall adopt rules governing the filing of changes, additions, or modifications of the registration statement required by this section, and shall adopt rules pertaining to form, verification, fees, and similar matters pertaining to the registration.

(4) The following persons shall not be subject to this section solely by reason of their debt collection activities unless they are licensed debt collectors under s. 218.04:

(a) Attorneys authorized to practice law in this state or professional service corporations composed of licensed attorneys formed pursuant to ss. 180.1901 to 180.1921;

(b) Duly licensed real estate brokers and real estate salespersons; and

(c) Duly licensed insurance companies subject to the supervision of the office of the commissioner of insurance.

(5) No person is subject to this section solely by reason of offering the discount described in s. 422.201 (8).

History: 1971 c. 239; 1975 c. 407; 1979 c. 10 s. 24; 1979 c. 89; 1979 c. 162 s. 38 (3); 1979 c. 168 s. 21; 1979 c. 341 s. 12 (2); 1989 a. 303; 1995 a. 27, 328, 329; 2001 a. 16.

426.202 Fees. (1m) AMOUNT OF REGISTRATION FEE. (a) *Definitions.* In this subsection:

2. "Reporting period" means, for any registration statement, the last full calendar year preceding the date on which the registration statement is due.

3. "Year–end balance" means, for any reporting period, the outstanding balance of all consumer credit transactions that a person has entered into or has obtained by assignment, and that originated in this state, as of December 31 preceding the annual registration filing date under s. 426.201 (2m) (a).

(b) *Registration fee requirement.* Any person required to register under s. 426.201 shall pay a registration fee to the administrator when the person files the registration statement required under s. 426.201.

(c) *Amount of registration fee.* The amount of the registration fee shall be determined in accordance with rates set by the administrator. In setting these rates, the administrator shall consider the costs of administering chs. 421 to 427 and 429, including the costs of enforcement, education and seeking voluntary compliance with chs. 421 to 427 and 429. The registration fee for a person shall be based on the person's year–end balance for the reporting period.

(4) SUBMISSION OF DATA FOR CALCULATING THE AMOUNT OF FEE. A person required to register under s. 426.201 shall submit such financial and other data as the administrator may require which will support the computation of the amount of the fee.

(5) RECOVERY OF FEES. The administrator shall bring an action in any court of record to recover any fees that the administrator determines are due and owing under this section.

History: 1971 c. 239; 1973 c. 116 s. 6; 1975 c. 407; 1979 c. 168 s. 21; 1991 a. 316; 1995 a. 27, 329; 2001 a. 16.

426.203 Penalties. Whoever fails to comply with the registration requirements under s. 426.201 or fails to pay a fee required under s. 426.202 may be required to forfeit not more than $50. Each day that this failure continues constitutes a separate offense. Forfeitures received by the administrator under this section shall be credited to the appropriation account under s. 20.144 (1) (h) and may be expended from the account only for consumer or merchant education programs.

History: 1995 a. 27.

SUBCHAPTER III
VIOLATIONS AND ENFORCEMENT

426.301 Violations and enforcement. (1) The administrator may recover in a civil action from a person who violates chs. 421 to 427 and 429 or any rule made pursuant to any authority granted in chs. 421 to 427 and 429, a civil penalty of not less than $100 and not more than $1,000 for each violation.

(2) In addition to the amount to which the administrator shall be entitled under sub. (1), the administrator may recover in a civil action from a person who knowingly or willfully violates chs. 421 to 427 and 429 or any rule made pursuant to any authority granted in chs. 421 to 427 and 429, a civil penalty of not less than $1,000 and not more than $10,000 for each violation.

History: 1971 c. 239; 1979 c. 89; 1995 a. 329.