CHAPTER 426

CONSUMER TRANSACTIONS — ADMINISTRATION

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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.

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 administrator 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−WCA 1.80 and 1.82, 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−WCA 1.85, 1.86, 1.87, and 1.88, 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 violation 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.