

CHAPTER 426

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 in this state:

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

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

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.

426.103 Administrator. "Administrator" means the commissioner of banking (s. 220.02).

History: 1971 c. 239.

426.104 Powers of administrator; duty to report. (1) In addition to other powers granted by this act, the administrator within the limitations provided by law shall:

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

(b) Counsel persons and groups on their rights and duties under this act;

(c) Make studies appropriate to effectuate the purposes and policies of this act and make the results available to the public;

(d) Hold such public or private hearings as he deems necessary or proper to effectuate the purposes and policies of this act;

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

(2) In addition to reporting biennially in accordance with s. 15.04 (1) (d), 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 this act. For the purpose of making the report, the administrator may conduct research and make appropriate studies. The report shall include:

(a) A description of the examination and investigation procedures and policies of his office;

(b) A statement of policies followed in deciding whether to investigate or examine the offices of persons subject to this act;

(c) A statement of policies followed in deciding whether to bring any action authorized under this act;

(d) Such recommendations for modifications or additions to this act 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 this act.

(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 this act or of any statute to which this act refers 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.

(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 30 days after its submission to him shall not be deemed to be a violation of this act or any other statute to which this act refers notwithstanding that such approval of the administrator or nondisapproval by the administrator may be subsequently amended or rescinded to be determined by judicial or other authority to be invalid for any reason.

History: 1971 c. 239; 1977 c. 196 s. 131.

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 this act shall be exercised by him with respect to a supervised financial organization.

(2) If the administrator receives a complaint or other information concerning noncompliance with this act by a supervised financial organization, he 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 this act. 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.

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 his

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 he 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 his costs of making the investigation if he 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, he shall immediately commence an investigation pursuant to sub. (1).

(3) If the person's records are located outside this state, the person at his 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 his 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 his 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.

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 this act. Notwithstanding s. 227.15, the decisions of the administrator are subject to judicial review as provided in ch. 227.

History: 1971 c. 239.

426.108 Unconscionable conduct. The administrator shall promulgate rules declaring specific conduct in consumer credit transactions and the collection of debts arising therefrom to be unconscionable and prohibiting the use thereof. In promulgating such rules, the administrator shall consider, among other things:

(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) The fact 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 thereunder.

(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; and

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

History: 1971 c. 239.

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 this act 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 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 this act or rules or regulations promulgated pursuant to this act, 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.

426.110 Class actions; injunctions; declaratory relief.

(1) Either the administrator, or any customer affected by a violation of this act 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 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's fees and other relief to which such persons are entitled under this act. Such customer filing such an 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, 425.107, 426.108 or 427.104 (1) (h) unless such conduct has been found to constitute a violation of this act at least 30 days prior to the occurrence of the conduct involved in such class action by an appellate court of this state or by a regulation issued 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 office of the secretary of state of this state.

(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 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 him from the class if he 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 he desires, enter an appearance through his 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, a) an action may be brought or maintained as a class action with respect to particular issues, or b) 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: 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 similar procedural matters. The orders may be altered or amended as may be desirable from time to time.

(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 (ss. 425.302 (1) (a), 425.303 (1), 425.304 (1), 425.305 (1)) for which it would be liable in individual actions by reason of violations of this act or of conduct prescribed in sub. (2) unless it is shown by a preponderance of the evidence that the violation was a wilful and knowing violation of this act. 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 he may recover such costs from the defendant as provided in sub. (11).

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

426.111 Debtors' remedies not affected.

The grant of powers to the administrator in this chapter does not affect remedies available to customers under this act or under other principles of law or equity.

History: 1971 c. 239.

SUBCHAPTER II

NOTIFICATION AND FEES

426.201 Notification. (1) This subchapter applies to persons who in this state:

(a) Make or solicit consumer credit transactions in which a finance charge at a rate in excess of that permitted under s. 138.05 is imposed as part of the initial transaction, or modifications thereof, except a person who engages in consumer credit transactions solely through honoring credit cards issued by 3rd parties not related to such person; or

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

(2) Each person subject to this subchapter shall file notification with the administrator within 30 days after commencing business in

this state, and thereafter, on or before December 1 of each year. The notification shall state:

- (a) Name of the person;
- (b) Name in which business is transacted if different from par. (a);
- (c) Address of principal office, which may be outside this state;
- (d) Address of all 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) Address of designated agent upon whom service of process may be made in this state; and
- (g) Such other similar information as the administrator may from time to time require to effectuate the purposes and policies of this act.

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

(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 s. 180.99;
- (b) Duly licensed real estate brokers and real estate salesmen; 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. 421.301 (20) (b).

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

426.202 Fees. (1) (a) Except for licensees under s. 218.04, persons required to file notification shall on or before December 1 of each year pay to the administrator an annual fee on the amounts financed on which the annual percentage rate exceeds the rates permitted by s. 138.05 (1) (a) or (b), and which arise from consumer credit transactions made in this state, other than those made pursuant to an open-end credit plan, within the preceding calendar year, or any 12-month period ending subsequent thereto and prior to December 1, and held by the merchant for more than 30 days after the inception of the transaction giving rise to the obligations, or by

an assignee who has not filed notification, according to the following schedule:

1. Where the total volume of such amounts financed exceeds \$10,000 but does not exceed \$25,000, a fee of \$25;
2. Where the total volume of such amounts financed exceeds \$25,000 but does not exceed \$100,000, an additional fee of \$40; or
3. Where the total volume of such amounts exceeds \$100,000, an additional fee of \$40 plus \$10 on each \$100,000 or fraction thereof over \$100,000.

(b) A refinancing of a consumer credit transaction resulting in an increase in the amount of an obligation is considered a new transaction to the extent of the amount of the increase.

(2) With respect to consumer credit transactions made pursuant to an open-end credit plan on which any applicable periodic rate exceeds the rate permitted by s. 138.05 (1) (a) persons required to file notification shall calculate the total amount of credit outstanding for each month in their reporting period, subject to the exclusion provided in this subsection, divide the sum of those amounts by the number of months in the reporting period and pay a fee on the resulting average monthly outstanding credit balance according to the schedule set forth for amounts financed in sub. (1). The filing date and reporting period shall be determined in the same manner as required for all other merchants by sub. (1) and rules issued by the administrator. In determining the average monthly outstanding credit balance the merchant may exclude that amount which is equal to the amount of all monthly outstanding credit balances paid by customers within any grace period offered by the merchant and upon which no finance charge is assessed. However, the amount so excluded shall in no event exceed 20% of the average monthly outstanding credit balance calculated without application of this exclusion.

(3) A licensee under ss. 138.09, 138.12, 218.01, 218.04 and 218.11 and ch. 186 shall receive a credit for the amount of fees paid to the commissioner of banking or the commissioner of credit unions under each of those sections for the fees in sub. (1).

(4) A person required to file notification shall submit such financial and other data as the administrator may require which will support the computation of the amount of the fee.

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

History: 1971 c. 239; 1973 c. 116 s. 6; 1975 c. 407.

SUBCHAPTER III

VIOLATIONS AND ENFORCEMENT

426.301 Violations and enforcement. (1) The administrator may recover in a civil action from a person who violates this act or any rule made pursuant to any authority granted in this act, 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 he shall be entitled under sub. (1), the administrator may recover in a civil action from a person who knowingly or wilfully violates this act or any rule made pursuant to any authority granted in this act, a civil penalty of not less than \$1,000 and not more than \$10,000 for each violation.

History: 1971 c. 239.