# CHAPTER 428

## FIRST LIEN REAL ESTATE AND OTHER MORTGAGE LOANS

SUBCHAPTER I
FIRST LIEN REAL ESTATE LOANS
428.101 Applicability.
428.102 Definitions.
428.103 Limitations.
428.104 Receipts, accounting.
428.105 Pleadings.
428.106 Remedies.
SUBCHAPTER II
RESPONSIBLE HIGH COST MORTGAGE LENDING
428.202 Definitions.
428.203 Prohibitions on and requirements of lenders and assignees.
428.204 False statements.
428.206 Recommending default.
428.207 Prepayment.
428.208 Disclosure to customers.
428.209 Exclusive state regulation authority.
428.2095 Property exempt from debt collection.
428.210 Administration and penalties.
428.211 Exemption for depository institutions.

### SUBCHAPTER I

### FIRST LIEN REAL ESTATE LOANS

**428.101 Applicability.** This subchapter applies to:

**(1)** Loans made on or after April 6, 1980 and prior to November 1, 1981, by a creditor other than a savings and loan association to a customer and which are secured by a first lien real estate mortgage or equivalent security interest if the amount financed is $25,000 or less.

**(2)** Loans made prior to April 6, 1980, by a creditor other than a savings and loan association and loans made before November 1, 1981, by a savings and loan association to a customer and which are secured by a first lien real estate mortgage or equivalent security interest if the annual percentage rate does not exceed 12 percent per year and the amount financed is $25,000 or less.

**(3)** Loans made on or after November 1, 1981, by a creditor to a customer and which are secured by a first lien real estate mortgage or equivalent security interest if the amount financed is $25,000 or less.

**History:** 1973 c. 18; 1979 c. 110 s. 60 (13); 1979 c. 168; 1981 c. 45; 2003 a. 257; 2005 a. 215.

A second mortgage constitutes an equivalent security interest under this section when held by a savings and loan association that holds the first mortgage and there are no intervening liens. 63 Atty. Gen. 557.

**428.102 Definitions.** In this subchapter:

**(1)** "Amount financed" means that term as defined in the federal consumer credit protection act, as defined in s. 421.301 (19).

**(2)** "Creditor" means a person who regularly engages in, arranges for or procures from 3rd persons, loans within the scope of this subchapter.

**(3)** "Customer" means a person other than an organization who seeks or acquires credit financing secured by a first lien real estate mortgage, or equivalent security interest, for personal, family, household or agricultural purposes.

**(4)** "Loan" means the creation of debt by the creditor's payment of or agreement to pay money to the customer or to a 3rd party for the account of the customer, or a forbearance by a lender of a debt arising from a loan.

**(5)** "Organization" means organization as defined in s. 421.301 (28).

**(6)** "Person" means person as defined in s. 421.301 (31).

**History:** 1973 c. 18, 232; 2003 a. 257.

A sale of a time−share on credit constituted a loan within the meaning of ch. 428 although the seller did not advance funds to the buyer. The seller's forbearance of the balance of the purchase price at the time of closing comes within the sub. (4) definition of a loan. Ott v. Peppertree Resort Villas, Inc., 2006 WI App 77, 292 Wis. 2d 173, 716 N.W.2d 127, 04−1226.

**428.103 Limitations. (1)** The following limitations shall apply to all loans subject to this subchapter:

(a) No delinquency charge may be collected on an installment which is paid in full on or before the 10th day after its scheduled due date even though an earlier maturing installment may not have been paid in full. For purposes of this section payments are applied first to current installments and then to delinquent installments.

(b) Any cosigner, other than the spouse of the customer, shall be given a notice substantially the same as that required by s. 422.305, and the cosigner shall be entitled to a copy of any document evidencing the obligation to pay the debt.

(c) With respect to debt collection:

1. No creditor shall engage in conduct of the type prohibited by s. 427.104 (1) (a) to (L).

2. The exemptions specified in s. 425.106 (1) (a) and (b), with respect to earnings and personal clothing and furnishings except as to fixtures, shall apply.

(d) No creditor may take a security interest in the household goods or furnishings, other than fixtures, of a customer.

(e) The creditor shall not contract for or charge its attorney fees to the customer except as follows:

1. Reasonable fees for opinions of title.

2. In foreclosure cases, 5 percent of the amount adjudged due the creditor; or if the dispute is settled prior to judgment, a reasonable fee based on the time, nature and extent of the work involved, but not to exceed 2−1/2 percent of the unpaid principal balance of the loan.

**(2)** A person who commits a violation of this section is liable to the customer in an amount equal to the greater of:

(a) Twice the amount of the interest to be charged on the transaction, except that the liability under this subsection shall not be less than $100 nor greater than $1,000; or

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

**History:** 1973 c. 18; Sup. Ct. Order, 67 Wis. 2d 585, 767 (1975); 1983 a. 92; 1991 a. 316; 1993 a. 80, 490; 2003 a. 257.

**428.104 Receipts, accounting. (1)** Any time a payment is made in cash, or any other time the method of payment does not itself provide evidence of payment, the creditor shall furnish the customer, without request, a written receipt, evidencing such payment. The customer shall be entitled upon request, free of charge, to an annual statement of account showing receipts and disbursements. Subject to s. 708.15, upon payment in full of the customer's obligation, the creditor shall release any mortgage by either recording the necessary instrument and forwarding the same to the customer, or by forwarding a satisfaction of such debt to the purchaser of the real property subject to such satisfied mortgage, or the creditor of such purchaser.

**(2)** A person who commits a violation of this section 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.

**History:** 1973 c. 18; 2013 a. 66.

**428.105 Pleadings.** A complaint by a creditor to enforce a cause of action shall set forth specifically the facts constituting the alleged default of the customer, the amount to which the creditor is allegedly entitled and a summary of the figures necessary for computation of such amount, and shall be accompanied by an accurate copy of the writing evidencing the transaction.

**History:** 1973 c. 18.

The requirements that a creditor attach an accurate copy of the writing evidencing a transaction with the complaint is a pleading requirement. The appropriate remedy for a creditor's failure to comply with this procedural requirement is dismissal of the creditor's action. Beal v. Wyndham Vacation Resorts, Inc. 956 F. Supp. 2d 962 (2013).

**428.106 Remedies. (1)** Violations of this subchapter may be enforced by a customer subject to this section and ss. 425.308 to 425.311.

**(2)** With respect to a loan subject to this subchapter, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer, by the creditor, or any result of the transaction is unconscionable, the court shall, in addition to the remedies and penalties set forth in this subchapter, and a penalty not to exceed that specified in s. 428.103 (2), refuse to enforce the unconscionable aspect of the transaction or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

**(3)** Notwithstanding other provisions of this subchapter, a customer shall not be entitled to recover the specific penalties provided in ss. 428.103 (2) (a) and 428.104 (2) (a) if the person violating this subchapter 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 such error.

**(4)** Any action brought by a customer to enforce rights under sub. (1) shall be commenced within one year after the date of the last violation of this subchapter, 2 years after consummation of the agreement or one year after the last payment, whichever is later. But in no event shall an action be commenced more than 6 years after the date of the last violation.

**(5)** The administrator specified in s. 426.103, solely through the department of justice, may on behalf of any customer institute an action to enforce this subchapter and to recover the damages and penalties provided for this subchapter. In such action the administrator may obtain an order restraining by temporary or permanent injunctions any violation of this subchapter. This subsection shall not be construed to incorporate or grant to the administrator with respect to the enforcement of this subchapter, any of the provisions of ch. 426.

**History:** 1973 c. 18; 1991 a. 316; 2003 a. 257.

## SUBCHAPTER II

## RESPONSIBLE HIGH COST MORTGAGE LENDING

**Cross–reference:** See also ch. DFI–Bkg 46, Wis. adm. code.

**428.202 Definitions.** In this subchapter:

**(1)** "Bridge loan" means a loan with a maturity of less than 18 months which requires only payments of interest until the time that the unpaid balance is due.

**(1m)** "Business day" has the meaning that is specified under 12 CFR 226.2 (a) (6) for purposes of 12 CFR 226.31.

**(2)** "Covered loan" means a consumer credit mortgage loan transaction other than an open–end credit plan or reverse mortgage in which all of the following apply:

(a) The customer is a natural person.

(b) The debt is incurred by the customer primarily for personal, family, or household purposes.

(c) The loan is secured by a mortgage on, or an equivalent security interest in, residential real property, and the residential real property is or will be occupied by the customer as the customer's principal dwelling.

(d) The terms of the loan provide any of the following:

1. That the loan transaction, at the time that the loan is consummated, is considered a mortgage under 15 USC 1602 (aa) and regulations adopted thereunder, including 12 CFR 226.32.

2. That total points and fees payable by the customer at or before the loan closing exceed 6 percent of the total loan amount. For purposes of this subdivision, "total points and fees" does not include reasonable fees paid to affiliates or nonaffiliates of the lender for bona fide services listed in 12 CFR 226.4 (c) (7).

**(3)** "Customer" means an individual to whom a covered loan is offered or made. "Customer" does not include a surety, guarantor, cosigner, or endorser.

**(4)** "Department" means the department of financial institutions.

**(5)** "Lender" means any person who originates a covered loan and to whom the covered loan is initially payable, except that "lender" does not include an assignee of a covered loan or any person who, for at least 12 consecutive months, has failed to originate any covered loans.

**(5m)** "Licensed lender" means a person licensed under s. 138.09.

**(6m)** "Local governmental unit" has the meaning given in s. 16.97 (7).

**(7)** "Mortgage banker" has the meaning given in s. 224.71 (3).

**(8)** "Mortgage broker" has the meaning given in s. 224.71 (4).

**(9)** "Mortgage loan originator" has the meaning given in s. 224.71 (6).

**(10)** "Servicer" has the meaning given in 12 USC 2605 (i) (2).

**History:** 2003 a. 257; 2009 a. 2.

**428.203 Prohibitions on and requirements of lenders and assignees. (1)** BALLOON PAYMENTS. Except as otherwise provided in this subsection, no lender may make a covered loan to a customer that requires, or that permits the lender to require, a payment that is more than twice as large as the average of all earlier scheduled payments. This subsection does not apply to a loan under which the payment schedule is adjusted to account for seasonal or irregular income of the customer or to a bridge loan with a maturity of less than one year that the customer obtains for the purpose of facilitating the acquisition or construction of a dwelling as the customer's principal dwelling.

**(2)** CALL PROVISION. No lender may make a covered loan to a customer that permits the lender or an assignee of the loan to demand payment of the outstanding balance before the original maturity date, except that a covered loan may permit a lender or assignee to so demand as a result of any of the following:

(a) The customer's failure to make payments required under the loan.

(b) A provision in the loan agreement permitting the lender or assignee to make such a demand after the sale of real property that is pledged as security for the loan.

(c) Fraud or material misrepresentation by the customer in connection with the loan.

(d) Any act or omission by the customer that adversely affects the lender's or assignee's security for the loan or any right of the lender or assignee in such security.

**(3)** NEGATIVE AMORTIZATION. No lender may make a covered loan to a customer with a payment schedule that causes the principal balance to increase, except that this subsection does not prohibit such a payment schedule as a result of a temporary forbearance or loan restructuring consented to by the customer.

**(4)** INCREASED INTEREST RATE. No lender may make a covered loan to a customer that imposes or permits the lender or an assignee of the loan to impose an increase in the interest rate as a result of the customer's default.

**(5)** ADVANCE PAYMENTS. No lender may make a covered loan to a customer that includes a payment schedule that consolidates more than 2 scheduled payments and pays them in advance out of the proceeds of the loan.

**(6)** REPAYMENT ABILITY. No lender may make covered loans to customers based on the customer's collateral without regard to the customer's ability to repay, including the customer's current or expected income, current obligations, and employment. A lender is presumed to have violated this subsection if the lender engages in a pattern or practice of making covered loans without verifying and documenting the customer's repayment ability.

**(7)** REFINANCING OF EXISTING COVERED LOAN. No lender may make a covered loan that refinances an existing covered loan that the lender made to the same customer, unless the refinancing takes place at least one year after the date on which the loan being refinanced was made or the refinancing is in the interest of the customer. No assignee or servicer of a covered loan may make a covered loan that refinances the covered loan, unless the refinancing takes place at least one year after the date on which the loan being refinanced was made or the refinancing is in the interest of the customer. No lender, assignee of a covered loan, or servicer may engage in a pattern or practice of arranging for the refinancing of covered loans by affiliates or unaffiliated creditors, modifying covered loans, or any other acts for the purpose of evading this subsection. This subsection does not apply to bridge loans.

**(8)** PAYMENTS TO HOME IMPROVEMENT CONTRACTORS. No lender under a covered loan made to a customer may pay proceeds of the loan to a person who is under contract to make improvements to an existing dwelling, unless the payment is made by an instrument that is payable to the customer or jointly to the customer and the person who is under contract or, with the consent of the customer, the payment is made through a 3rd party in accordance with a written agreement signed by the customer, the lender, and the person under contract.

**(8g)** SINGLE PREMIUM CREDIT INSURANCE PRODUCTS. A lender may not finance, directly or indirectly, through a covered loan, or finance to the same customer within 30 days of making a covered loan, any individual or group credit life, credit accident and health, credit disability, or credit unemployment insurance product on a prepaid single premium basis sold in conjunction with a covered loan. This prohibition does not include contracts issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a customer's default and does not apply to individual or group credit life, credit accident and health, credit disability, or credit unemployment insurance premium calculated and paid on a monthly or other periodic basis.

**(8m)** REFINANCING OF SUBSIDIZED LOW–RATE LOANS. (a) In this subsection, "subsidized low–rate loan" means a loan that carries a current interest rate at least 2 percentage points below the then current yield on treasury securities with a comparable maturity. If the loan's current interest rate is either a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped–up rate, as applicable, shall be used instead of the current rate to determine whether a loan is a subsidized low–rate loan.

(b) A lender may not knowingly replace or consolidate a zero–interest rate or other subsidized low–rate loan made by a governmental or nonprofit lender with a covered loan within the first 10 years of the zero–interest rate or other subsidized low–rate loan unless the current holder of the loan consents in writing to the refinancing.

**(9)** UNLICENSED MORTGAGE BANKERS AND BROKERS. No lender may knowingly contract with any person for the performance of duties in violation of s. 224.72 (1m).

**History:** 2003 a. 257; 2009 a. 2.

**428.204 False statements.** No lender, licensed lender, mortgage loan originator, mortgage banker, or mortgage broker may knowingly make, propose, or solicit fraudulent, false, or misleading statements on any document relating to a covered loan.

**History:** 2003 a. 257; 2009 a. 2.

**428.206 Recommending default.** No lender, licensed lender, mortgage loan originator, mortgage banker, or mortgage broker may recommend or encourage an individual to default on an existing loan or other obligation before and in connection with the making of a covered loan that refinances all or any portion of that existing loan or obligation.

**History:** 2003 a. 257; 2009 a. 2.

**Cross–reference:** See also ch. DFI–Bkg 46, Wis. adm. code.

**428.207 Prepayment. (1)** A customer may prepay a covered loan at any time without penalty if the payment is made in the context of a refinancing of the covered loan and if the covered loan is held by the refinancing lender. This subsection does not prohibit the servicer of a covered loan from imposing a prepayment penalty, unless the servicer is also the lender and holds the loan at the time of the refinancing.

**(2)** Any prepayment penalty under this section is subject to all of the following limitations:

(a) A prepayment penalty is permitted only during the 36 months immediately following the date of consummation of a covered loan.

(b) A lender may not include a prepayment penalty in a covered loan unless the lender offers the customer the option of choosing a loan product without a prepayment penalty. The terms of the offer shall be in writing and initialed by the customer. The offer shall be in a clear and conspicuous format and include the following disclosure:

LOAN PRODUCT CHOICE DISCLOSURE

I was provided with an offer to accept a product both with and without a prepayment penalty provision. I have chosen to accept the product with a prepayment penalty.

(c) A prepayment penalty may not exceed 60 days' interest at the contract rate on the amount prepaid on fixed–rate covered loans over $25,000 if the borrower prepays more than 20 percent of the original loan amount within 36 months immediately following the date of consummation of the covered loan.

(d) A prepayment penalty may not be collected on fixed–rate covered loans of $25,000 or less, on adjustable rate loans, or on those fixed–rate covered loans over $25,000 not specified in par. (c).

**History:** 2003 a. 257.

**428.208 Disclosure to customers.** At least 3 business days before making a covered loan to a customer, a lender shall ensure that the customer has been given the following notice, in writing and in a clear and conspicuous format:

DISCLOSURE TO BORROWER

A. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home and any money that you have put into it if you do not meet your obligations under this loan. Mortgage loan rates and closing costs and fees vary based on many factors, including your particular credit and financial circumstances, your earnings history, your employment status, the loan–to–value ratio of the requested loan, and the type of property that will secure your loan. The loan rate and fees could also vary based on which lender you select.

B. As a consumer you should shop around and compare loan rates and fees. You should also consider consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed.

C. You are not required to complete this loan agreement merely because you have received these disclosures or have signed a loan application. If you proceed with this mortgage loan, you should

also remember that you may face serious financial risks if you use this loan to pay off credit card debts or other debts in connection with this transaction and then subsequently incur significant new debt. If you continue to accumulate debt after this loan is made and then experience financial difficulties, you could lose your home and any equity that you have in it if you do not meet your mortgage loan obligations.

D. Property taxes and homeowner's insurance are your responsibility. Some lenders may require you to escrow money for these payments. However, not all lenders provide escrow services for these payments. You should ask your lender about these services.

E. Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

**History:** 2003 a. 257.

**Cross–reference:** See also ch. DFI–Bkg 46, Wis. adm. code.

**428.209 Exclusive state regulation authority.** The state shall have sole authority, except as provided under federal law, to regulate any matter governed by this subchapter or by a rule promulgated under this subchapter. No local governmental unit may attempt to regulate, directly or indirectly, any matter governed by this subchapter or by a rule promulgated under this subchapter, including enacting an ordinance or adopting a resolution or imposing reporting requirements.

**History:** 2003 a. 257.

**428.2095 Property exempt from debt collection.** Except to the extent that the lender has a valid security interest permitted under this subchapter or has a lien under ch. 779 in the property, all of the following personal property of the customer is exempt from levy, execution, sale, and other similar process in satisfaction of a judgment for an obligation arising from a covered loan:

**(1)** Clothing of the customer or his or her dependents.

**(2)** Dining table and chairs, refrigerator, heating stove, cooking stove, radio, beds and bedding, couch and chairs, cooking utensils, and kitchenware.

**(3)** 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 that 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).

**History:** 2003 a. 257.

**428.210 Administration and penalties. (1)** RULES. The department may promulgate rules for the administration of this subchapter. The rules shall include guidelines for determining a customer's ability to repay a covered loan based upon the customer's debt–to–income ratio.

**(2)** INVESTIGATIONS. (a) At any time that the department has reason to believe that a person has engaged in or is about to engage in an act that violates this subchapter, the department may investigate. In performing an investigation under this paragraph, the department may administer oaths or affirmations, 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. The department may access and examine such books, documents, or other tangible things. In any civil action brought on behalf of the department based on evidence obtained in such an investigation, the department may recover the costs of performing the investigation if the department prevails in the action.

(b) If 5 or more persons file a verified complaint with the department alleging that a person has violated this subchapter, the department shall immediately commence an investigation pursuant to par. (a).

(c) If the records of a person who is subject to an investigation pursuant to par. (a) are located outside of this state, the person at the person's option shall either make them available to the department at a convenient location within this state or pay the reasonable and necessary expenses for the department to examine them at the place where they are located. The department may designate representatives, including comparable officials of the state in which the records are located, to inspect them on the department's behalf.

(d) At the request of the department of financial institutions and upon reasonable notice to all affected persons, the department of justice may apply to any court of record for an order compelling compliance if a person fails to obey a subpoena or to give testimony pursuant to par. (a).

**(3)** ENFORCEMENT AND PENALTIES. (a) The department may serve a notice of a hearing that complies with s. 227.44 (1) and (2) on a person if the department reasonably suspects that the person has violated this subchapter. The department may receive complaints alleging violations of this subchapter. A hearing conducted pursuant to a notice under this paragraph shall be conducted in the manner specified for a contested case, as defined in s. 227.01 (3), under ss. 227.44 to 227.50. Except as provided in sub. (4), if the person fails to appear at the hearing or if upon the record made at the hearing the department finds that a violation has been established, the department may issue and serve on the person an order specifying any of the following:

1. That the person must cease and desist from the violation or practice and make restitution for any actual damages suffered by a customer.

2. That the person must forfeit not more than $1,000 per violation or, if the person willfully or knowingly violated this subchapter, not less than $1,000 nor more than $10,000 per violation.

3. That the person must pay to the department the costs of its investigation.

4. That a license, registration, or certification issued by the department to the person is suspended or revoked or will not be renewed.

5. That any individual who is responsible for the violation must be removed from working in any capacity related to the violation or related to activities regulated by the department.

6. Any additional conditions that the department considers reasonable.

(b) An order under par. (a) is effective upon service on the person and may be appealed under s. 220.035.

(c) The department of justice, at the request of the department of financial institutions, may bring an action to enforce an order issued under par. (a).

**(4)** SAFE HARBOR. It is a defense to any alleged violation of this subchapter if the person alleged to have committed the violation establishes all of the following:

(a) That the person acted in good faith while committing the violation.

(b) That, no later than 60 days after the discovery of the violation and before any investigation or other enforcement action by the department under this section, the person notified the affected customer of the violation and either made appropriate adjustments to the loan to bring the loan into compliance with this subchapter or changed the terms of the loan in a manner beneficial to the customer so that the loan is no longer a covered loan.

**History:** 2003 a. 257.

**428.211 Exemption for depository institutions.** This subchapter does not apply to any state chartered or federally chartered bank, trust company, savings and loan association, savings

bank, or credit union, or to any subsidiary of such a bank, trust company, savings and loan association, savings bank, or credit union.

**History:** 2003 a. 257; 2011 a. 32.