



State of Wisconsin
Department of Financial Institutions

Tony Evers, **Governor**

Kathy Blumenfeld, **Secretary**

July 7, 2020

VIA EMAIL

[REDACTED]

Dear Attorney [REDACTED]:

For most transactions governed by the Wisconsin Consumer Act, “no term of a writing may provide for the payment by the customer of attorney fees.” WIS. STAT. § 422.411(1). You asked this agency whether the following three contractual provisions, which appear in different contracts allegedly governed by the Act, violate Section 422.411:

- “If Lender obtains a court judgment against Borrower for default under this agreement, the Lender may request an award of statutory costs and statutory attorney’s fees pursuant to Section 814.04 of the Wisconsin Statutes. If Lender’s request is granted, Borrower will be required to pay these fees.”
- “Upon the occurrence of any event of default, and after any required notice to cure, LENDER may . . . recover from BORROWER all charges, costs and expenses, including statutory attorney fees allowed by law.”
- “Upon the occurrence of [an] Event[] of Default . . . Seller may recover from me and the proceeds of disposition any expenses incurred in taking possession, holding, preparing for disposition and disposing of the Collateral, including reasonable attorneys’ fees and court costs, to the extent not prohibited by the Wisconsin Consumer Act.”

When applying Section 422.411(1), this agency distinguishes between terms that purport to *create* a right to payment of attorney fees by contract, on the one hand, and those that merely *mention* a statutory or other pre-existing right to payment of attorney fees, on the other. The former are terms that “provide for the payment by the customer of attorney fees” by agreement, and thus are restricted by Section 422.411(1). The latter are references to rights created by non-

Division of Banking

Mail: PO Box 7876 Madison, WI 53707-7876
Courier: 4822 Madison Yards Way, Madison, WI 53705
Voice: (608) 261-7578 Fax: (608) 267-6889 Web: www.wdfi.org

contractual sources, which exist regardless of whether they are mentioned in a “term of writing” subject to Section 422.411(1). To the extent these provisions serve any function, it is merely to remind the parties to the contract of what the law already provides.

The three provisions at issue fall into this latter category. The first two refer to “statutory attorney fees.” In those cases, it is the statutes that “provide for the payment by the customer of attorney fees,” WIS. STAT. § 422.411(1); the contract terms note those statutes’ existence but do not create any payment obligations of their own. The third provision purports to create a contractual right to recover attorney fees, but only “to the extent not prohibited by the Wisconsin Consumer Act.” By the bare terms of this “savings clause,” the provision does not provide for anything the Act prohibits.¹

Savings clauses like this one can create risks to consumers. Rather than informing them of their legal rights in the transaction, savings clauses require consumers to review the Act for themselves. But the Act includes a powerful disincentive for creditors to who would try to take advantage of any perceived lack of consumer knowledge about their rights: a separate section makes it an independent violation of the Act to “[c]laim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist.” WIS. STAT. § 427.104(1)(j). Thus, if a creditor were to assert a contractual right to recover fees from consumers in transactions governed by Section 422.411(1), it would not only lose that argument as a matter of contract interpretation, but also affirmatively create new liability for itself under the Act. That potential outcome deters overreach and alleviates the saving clause’s risk to consumers here.

Conclusion

Section 422.411(1) of the Wisconsin Statutes restricts efforts to contractually shift attorney fees to the consumer in transactions governed by the Wisconsin Consumer Act. None of the above-quoted contractual provisions attempts to do so. They do not create any contractual rights to recover attorney fees, and consumers who agree to them have no greater obligation to pay those fees than they would in the absence of such provisions. Their inclusion in contracts governed by the Act is needless but harmless to consumers, particularly given that a separate section of the Act bars creditors from claiming any contractual rights to recover fees in transactions governed by Section 422.411(1). *See* WIS. STAT. § 427.104(1)(j).

Sincerely,

/s/ Matthew Lynch

Matthew Lynch
Chief Legal Counsel
Wisconsin Department of Financial Institutions
Matthew.Lynch@dfi.wisconsin.gov

¹ This provision appears in the contract of an auto dealer that presumably uses the same form contract for transactions that are not governed by the Act.

CERTIFICATION

I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

/s/Matthew Lynch

Chief Legal Counsel

Department of Financial Institutions

Authorized delegate for guidance document certifications pursuant to Wis. Stat. § 15.02(4)