



State of Wisconsin
Department of Financial Institutions

Tony Evers, **Governor**

Kathy Blumenfeld, **Secretary**

April 13, 2020

EMERGENCY GUIDANCE ON PROHIBITED DEBT COLLECTION PRACTICES

The Wisconsin Department of Financial Institutions administers the Wisconsin Consumer Act, which has governed consumer credit transactions in this State for the past 49 years. At the time of its enactment, the Act was heralded as going “further to protect consumer interests than any other such legislation in the country.”¹

Chapter 427 of the Act specifies prohibited practices when attempting to collect payments under consumer credit transactions, including any “conduct which can reasonably be expected to threaten or harass the customer or a person related to the customer.” Wis. Stat. § 427.104(1)(h). The drafters of the Act did not define “harass,” but dictionaries at the time of its enactment² defined it as “to annoy continually”³ or “disturb persistently.”⁴ This broad, context-dependent meaning allows flexibility for courts and this Department to account for new economic conditions.

Those new conditions have arrived. More than 100 countries and billions of people are living under full or partial lockdown⁵ in a global effort to cage a new threat to our species. Many consumers who made pre-pandemic credit purchases were planning to make payments with revenue earned this spring. For millions, that work has now been cancelled or indefinitely postponed. Affected families are rationing financial resources until this crisis abates, reserving them for food, medicine, and other essentials. They’re going to miss payments on consumer credit transactions, through no fault of their own, because that is the rational thing for them to do.

Debt collectors aren’t going to be able to talk people into behaving irrationally, no matter how many times they call. To repeatedly “disturb” or “annoy” them anyway is the definition of harassment. Further, during this public health emergency, telephone communications are far too

¹ JEFFREY DAVIS, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3, 6 (1973).

² Unless otherwise defined in the statute itself, Wisconsin courts (and this Department) give statutory language “its common, ordinary, and accepted meaning,” which can be “ascertainable by reference to the dictionary definition.” *State ex rel. Kalal v. Circuit Ct. for Dane County*, 2004 WI 58, §§ 45, 53, 271 Wis. 2d 633, 681 N.W.2d 110.

³ Webster’s New Collegiate Dictionary 379 (7th ed. 1971).

⁴ AMERICAN COLLEGE DICTIONARY 550 (1967); *see also* 1 FUNK & WAGNALL’S STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 574 (Int’l ed. 1968) (“to trouble or worry persistently with cares, annoyances, etc.; to torment”).

⁵ [BBC News, Coronavirus: A visual guide to the world in lockdown](#) (Apr. 7, 2020).

vital to be wasted on futile debt-collection calls—a practice that leads people to ignore calls from unfamiliar numbers, missing some that may be critical.

The Wisconsin Consumer Act cannot solve a global economic problem, but it can deter pointlessly harmful responses to it. Debt collectors who routinely rely on telephone calls as a debt-collection tactic should be forewarned: whether conduct “can reasonably be expected to threaten or harass a consumer” depends on the context, and the worldwide context just shifted dramatically. Practices that may have been typical or customary under normal conditions may be deemed harassment under conditions of a global pandemic.

We cannot draw a precise boundary between permitted or prohibited communications with debtors, because each must “be considered in context.”⁶ Solicited follow-up communications are different than unsolicited threats to sue, and calls made in a good faith effort to compromise a debt are different than efforts to be the “squeakiest wheel” among a debtor’s creditors.

But debt collectors who assume that business as usual will be acceptable during this public health emergency do needless harm to both consumers and themselves. Juries can impose severe consequences against those who engage in prohibited debt practices under the Wisconsin Consumer Act, including punitive damages and damages for mental anguish and emotional distress.⁷ Jurors too will have lived through this crisis, and will judge debt collection practices through the lens of this period of shared global hardship and sacrifice. Debt collectors who fail to respect those hardships should expect to be judged harshly.

To provide further guidance, the Department has also attached an interpretive letter issued today regarding impermissible pre-crisis calls to a debtor’s friends and family, as well as a full copy of the Wisconsin Consumer Act chapter governing debt-collection practices.

⁶ *Assocs. Fin. Servs. Co. v. Hornik*, 114 Wis. 2d 163, 167, 336 N.W.2d 395 (Ct. App. 1983).

⁷ Wis. Stat. §§ 425.301(1), 427.105(1).



State of Wisconsin
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Tony Evers, **Governor**

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April 13, 2020

Via email

[REDACTED]

Re: Prohibited debt-collection practices under WIS. STAT. § 427.104

Dear Attorney [REDACTED]

The Department of Financial Institutions has alleged that your client, an auto loan servicer, violated the Wisconsin Consumer Act (WCA) by making nearly two dozen calls to a customer's family and friends after the customer missed payments on a loan. You wrote me to dispute this Department's interpretation of the WCA, asserting that the practice of contacting a debtor's family, friends, and other references after a missed payment "is a customary part of debt collection and has been for decades."

It shouldn't be. The federal Fair Debt Collection Practices Act places strict limits on communications with third parties,¹ while the WCA arguably goes "further to protect consumer interests than any other such legislation in the country."² Section 427.104(1) of the Consumer Act specifies 13 prohibited debt-collection practices, many aimed at preventing debt collectors from "communicating with third parties in an attempt to force the customer to pay the overdue indebtedness through embarrassment in front of friends or neighbors, or fear of reprisal from his employer."³

We recognize that others may share your client's misconceptions about the limits imposed by Section 427.104(1), and that "Wisconsin courts have not provided much guidance on what sorts of behavior do give rise to violations" under that statute.⁴ Therefore, we'll provide this response as a public guidance document to better explain how the Department of Financial Institutions applies the relevant law and why it concluded that violations likely occurred here.

¹ 15 U.S.C. § 1692c(b).

² JEFFREY DAVIS, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3, 6 (1973).

³ EDWARD J. HEISER JR., *Wisconsin Consumer Act: A Critical Analysis*, 57 MARQ. L. REV. 389, 454-455 (1974).

⁴ *Maloney v. Alliance Collection Agencies, Inc.*, No. 17-CV-1610, 2018 U.S. Dist. LEXIS 189649, at *15 (E.D. Wis. Nov. 6, 2018).

Office of the Secretary

Mail: PO Box 8861 Madison, WI 53708-8861

Courier: 4822 Madison Yards Way, Madison, WI 53705

Voice: (608) 264-7800 Fax: (608) 261-4334 Web: www.wdfi.org

I. BACKGROUND

A customer financed the purchase of a used Chevy Impala and made nine biweekly loan repayments of \$225 each. His tenth was due on August 2, 2019.⁵

Your client, the servicer of the customer's auto loan (the "loan servicer"), called the customer at 9:15 on the morning of the 2nd. When he didn't pick up the phone, the loan servicer tried to call his mother. When the customer declined a second call, the loan servicer began contacting other family members and friends. By noon on August 3, the loan servicer had contacted the customer's mother (twice), his stepmother (twice), a friend (twice), and his godmother, directing each of them to tell the customer to return the loan servicer's calls. The loan servicer called two other friends of the customer in the two weeks that followed, before the customer resumed making payments in mid-August.

The customer was late on another payment in October 2019, and the pattern repeated itself. In all, the loan servicer made 23 calls to the customer's family and friends as part of its effort to collect the two delinquent payments.

II. ANALYSIS

The Wisconsin Consumer Act is remedial legislation designed to "protect customers against unfair, deceptive, false, misleading and unconscionable practices" in connection with consumer transactions.⁶ At the time of its 1971 enactment, the Wisconsin Consumer Act was "probably the most sweeping consumer credit legislation yet enacted in any state"⁷ and went "further to protect consumer interests than any other such legislation in the country."⁸ The drafters sought to keep it that way, expressly mandating that the Act's provisions must be "liberally construed" to achieve its consumer-protective purposes.⁹

"Creditors have a duty to act reasonably when collecting debts from their debtors," and Section 427.104 of the Act codifies that duty of care.¹⁰ The statute specifies 13 debt-collection practices that are prohibited in this state. The loan servicer's conduct implicates at least two of them: Sections 427.104(1)(h) (calls to third parties) and (1)(e) (disclosures to third parties).

a. Calls to third parties – Section 427.104(1)(h)

In attempting to collect a debt from a consumer transaction, a debt collector cannot act in a manner that "can reasonably be expected to threaten or harass the customer or a person related to the customer."¹¹ Whether a given call or series of calls constitutes harassment depends on the totality of the circumstances, rather than the sheer quantity of contacts. "Because calls must be

⁵ The contract specified that the form of payment was "[b]i-weekly beginning 3/15/2019."

⁶ WIS. STAT. § 421.102(2)(b).

⁷ HEISER, *supra* note 1, at 389.

⁸ JEFFREY DAVIS, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3, 6 (1973).

⁹ WIS. STAT. § 421.102(1).

¹⁰ *Assocs. Fin. Servs. Co. v. Hornik*, 114 Wis. 2d 163, 167, 336 N.W.2d 395 (Ct. App. 1983).

¹¹ WIS. STAT. § 427.104(1)(h).

considered in context, a holding that three calls is harassment” in one case “is not inconsistent with a holding that fourteen calls is not harassment” in another.¹²

Here, the loan servicer made almost two dozen calls to people “related to the customer,” either by blood (four calls to his mother, two to his father), by marriage (four calls to his stepmother), by faith (three calls to his godmother), or by social ties (10 calls to three different friends).¹³ Each one of those calls demanded the recipient’s attention, disrupting them from something else. Each one directed the recipient to deliver the loan servicer’s message to the customer, effectively enlisting the customer’s friends and family to help collect the debt. And each call carried an emotional toll. *Why is a debt collector trying to track down a loved one? What could be so pressing that they’re calling me to reach him?* The only logical answers are worrisome.

The degree of distress may vary from call to call, from momentary annoyance or fleeting concern to the total preoccupation of an anxious parent’s mind. But each call inflicts *some* harm. (Indeed, the stresses these calls induce are what make them effective in pressuring a debtor to pay one creditor ahead of another.) While this tactic may help the debt collector’s bottom line, that is no justification for harming innocent bystanders. The third parties here did not sign up to be participants in the debt-collection process. They were not co-borrowers or guarantors on the loan, and in Wisconsin—unlike some jurisdictions—the debtor cannot consent to these calls on their behalf.¹⁴ The loan servicer’s interests in collecting two \$225 payments do not trump those of third parties, and calling them 23 times for that purpose violates the duty of care they are owed under Section 427.104(1)(h).

Would fewer calls change that outcome? Not necessarily. In evaluating whether a given set of calls constitutes harassment, “the manner of calls is not entirely separable from frequency; however, manner by itself may harass.”¹⁵ For that reason, “[s]uggestions of a wholly quantified standard seem artificial, because the effect of repeated telephone calls is colored by their tone and purpose.”¹⁶ Some very limited purposes, such as bona fide efforts to locate a debtor whose phone number and address have changed, are considered acceptable grounds for a third-party call.¹⁷ But a few unreturned calls from a customer, as occurred here, cannot serve as a pretext for a friends-and-family calling campaign.

On that point, the Department can provide further guidance to businesses seeking to comply with the Consumer Act: *don’t call a debtor’s friends and family to try to collect a debt.* Unless they are co-borrowers, co-signers, or otherwise obligated under the loan, the only

¹² *Hornik*, 114 Wis. 2d at 169.

¹³ The legislature did not specify whether it meant “person related to the customer” broadly (to mean people who have a direct relationship with the customer) or narrowly (to mean only blood relatives). Given our duty to construe the Wisconsin Consumer Act liberally to promote its consumer-protective policies, WIS. STAT. § 421.102, we must assume it intended the broader meaning.

¹⁴ That is because the Wisconsin Consumer Act creates a legal remedy for any “person” injured by a violation of Section 427.104, not just the debtor. Wis. Stat. § 427.105(1). While the debtor can waive his own legal rights under certain circumstances, *see, e.g.*, Wis. Stat. § 421.106(4), he has no power to waive legal rights that don’t belong to him.

¹⁵ *Hornik*, 114 Wis. 2d at 170.

¹⁶ *Id.* at 169.

¹⁷ *See* 15 U.S.C. § 1692b.

legitimate reason to contact a customer's family members or friends is when there is a bona fide reason to believe that:

- (1) the customer's contact information has changed, such that the debt collector's messages are no longer reaching the right person (not just that they're being ignored); and
- (2) there are no readily available, less-intrusive means to obtain updated contact information for the customer, such as querying public records databases or checking social media accounts.

When those extraordinary circumstances apply, a debt collector may contact a friend or family member for the sole purpose of seeking updated contact information for the customer. "Any further discussion between a third party and a collector is prohibited in Wisconsin."¹⁸

b. Disclosures to third parties – Section 427.104(1)(e)

The loan servicer's calling campaign caused harm to the customer, too. In attempting to collect a debt from a consumer transaction, a debt collector cannot:

- (e) Disclose or threaten to disclose to a person other than the customer or the customer's spouse information affecting the customer's reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information, but this paragraph does not prohibit the disclosure to another person of information permitted to be disclosed to that person by statute.¹⁹

Here, the calls to the customer's family and friends disclosed, at a minimum, that a loan servicer was trying to track down the customer. Those third parties had no apparent "business need" for that information, and the loan servicer has not identified any statute that would otherwise permit disclosure of that information to them.

The only remaining question is whether your client's disclosures conveyed "information affecting the customer's reputation" within the meaning of Section 427.104(1)(e). That inquiry is determined not by whether the disclosure caused actual reputational harm to an individual debtor, but rather by whether the debt collector's actions breached "the duty of care debt collectors owe to debtors" generally.²⁰ While the "application of a duty of care to a given set of facts will generally remain within the province of the trier of fact," the standard itself is an objective one.²¹ Therefore, we evaluate whether the debt collector's disclosures in their full context would have a tendency to affect a customer's reputation.

¹⁸ Department of Financial Institutions, *Wisconsin Consumer Act: Debt Collection Practices FAQs*, at http://www.wdfi.org/wca/business_guidance/creditors/debt_collection/faq.htm, cited with approval in *Sec. Fin. v. Kirsch*, 2019 WI 42, ¶ 13 n.4, 386 Wis. 2d 388, 926 N.W.2d 167.

¹⁹ WIS. STAT. § 427.104(1)(e).

²⁰ *Assocs. Fin. Servs. Co. v. Hornik*, 114 Wis. 2d 163, 167-168, 336 N.W.2d 395 (Ct. App. 1983).

²¹ *Id.* at 168.

The reputational effect depends on the context. Disclosing that a debtor had “taken out student loans from the government,” without more, may not cause a “stain on one’s reputation,”²² but disclosing that a debtor had gambling loans probably would.²³ Regardless of loan type, suggesting to third parties that a customer is in default on such loans is plainly “information affecting the customer’s reputation.” True or not,²⁴ that information cannot be disclosed to third parties absent a “business need” or express statutory permission.

Here, the loan servicer did not expressly disclose to the customer’s friends and family that he was delinquent in his payments, but it directly engaged them to use their influence with the debtor to get him to return the servicer’s calls. It intended for the debtor’s friends and family to contact him, and surely anticipated that they would inquire about (or simply presume) the reasons for the loan servicer’s urgent message. The loan servicer’s disclosure of the customer’s loan delinquency may be indirect, but it was hardly unintended,²⁵ and no less harmful to one’s reputation.

III. CONCLUSION

For the reasons stated herein, the loan servicer’s debt-collection practices violated the Wisconsin Consumer Act. To the extent they are a “customary part of debt collection and ha[ve] been for decades,” as you allege, those customs must change to ensure compliance with the Act.

Sincerely,

/s/ Matthew Lynch

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

²² *Weber v. Great Lakes Educ. Loan Serv's, Inc.*, 2013 U.S. Dist. LEXIS 106266, at *15 (W.D. Wis. July 30, 2013).

²³ *Rumpf v. Quorum Fed. Cred. Union*, 2018 U.S. Dist. LEXIS 203150, at *16 (Nov. 30, 2018).

²⁴ Other provisions of Section 427.104(1) bar the disclosure of false or incomplete information relating to the debt or the debt collector’s authority. Wis. Stat. §§ 427.104(1)(c, f, j, k).

²⁵ Making direct telephonic contact with relatives and urging them to call the customer lies on a far different end of the spectrum sending them a passive letter seeking his contact information for “important updates,” which can be permissible. *See Meyer v. Navient Solutions, LLC*, No. 18-CV-916-JPS, 2019 U.S. Dist. LEXIS 90562, at *8 (E.D. Wis. May 30, 2019).

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 R. Lynch

Chief Legal Counsel

Department of Financial Institutions

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

CHAPTER 427

CONSUMER TRANSACTIONS — DEBT COLLECTION

427.101 Short title.
 427.102 Scope.
 427.103 Definitions: “claim”; “debt collection”; “debt collector”.

427.104 Prohibited practices.
 427.105 Remedies.

Cross-reference: See definitions in s. 421.301.

427.101 Short title. This chapter shall be known and may be cited as Wisconsin consumer act — debt collection.

History: 1971 c. 239.

427.102 Scope. This chapter applies to conduct and practices in connection with the collection of obligations arising from consumer transactions, including transactions that are primarily for an agricultural purpose.

History: 1971 c. 239; 1997 a. 302.

427.103 Definitions: “claim”; “debt collection”; “debt collector”. (1) “Claim” means any obligation or alleged obligation arising from a consumer transaction, including a transaction that is primarily for an agricultural purpose.

(2) “Debt collection” means any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due a merchant by a customer.

(3) “Debt collector” means any person engaging, directly or indirectly, in debt collection, and includes any person who sells, or offers to sell, forms represented to be a collection system, device or scheme, intended or calculated to be used to collect claims. The term does not include a printing company engaging in the printing and sale of forms.

History: 1971 c. 239; 1997 a. 302.

427.104 Prohibited practices. (1) In attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction, including a transaction primarily for an agricultural purpose, where there is an agreement to defer payment, a debt collector may not:

(a) Use or threaten force or violence to cause physical harm to the customer or the customer’s dependents or property;

(b) Threaten criminal prosecution;

(c) Disclose or threaten to disclose information adversely affecting the customer’s reputation for credit worthiness with knowledge or reason to know that the information is false;

(d) Initiate or threaten to initiate communication with the customer’s employer prior to obtaining final judgment against the customer, except as permitted by statute including specifically s. 422.404, but this paragraph does not prohibit a debt collector from communicating with the customer’s employer solely to verify employment status or earnings or where an employer has an established debt counseling service or procedure;

(e) Disclose or threaten to disclose to a person other than the customer or the customer’s spouse information affecting the customer’s reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information, but this paragraph does not prohibit the disclosure to another person of information permitted to be disclosed to that person by statute;

(f) Disclose or threaten to disclose information concerning the existence of a debt known to be reasonably disputed by the customer without disclosing the fact that the customer disputes the debt;

(g) Communicate with the customer or a person related to the customer with such frequency or at such unusual hours or in such

a manner as can reasonably be expected to threaten or harass the customer;

(h) Engage in other conduct which can reasonably be expected to threaten or harass the customer or a person related to the customer;

(i) Use obscene or threatening language in communicating with the customer or a person related to the customer;

(j) Claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist;

(k) Use a communication which simulates legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency or attorney-at-law when it is not;

(L) Threaten action against the customer unless like action is taken in regular course or is intended with respect to the particular debt; or

(m) Engage in conduct in violation of a rule adopted by the administrator after like conduct has been restrained or enjoined by a court in a civil action by the administrator against any person pursuant to the provisions on injunctions against false, misleading, deceptive or unconscionable agreements or conduct (ss. 426.109 and 426.110).

(2) If a debt collector is not otherwise in violation of sub. (1) (j) with respect to a consumer credit transaction with a debtor, it is not a violation of this section to send a billing statement or other notice of account to, or to collect the amount due on the account from, the spouse of that debtor, if notice to the debtor’s spouse is provided under s. 766.56.

History: 1971 c. 239; 1975 c. 407; 1983 a. 186; 1991 a. 316; 1997 a. 302.

Sixty-nine calls to debtor over a 19-month period was not harassment. *Associates Financial Services Co. v. Hornik*, 114 Wis. 2d 163, 336 N.W.2d 395 (Ct. App. 1983).

A circuit court is competent to hear state consumer act claims based upon a creditor’s violation of federal bankruptcy debt collection prohibitions. *Gonzales v. AM Community Credit Union*, 150 Wis. 2d 773, 442 N.W.2d 536 (Ct. App. 1989).

A replevin action is an attempt to collect a debt under this section. *Kett v. Community Credit Plan, Inc.*, 228 Wis. 2d 1, 596 N.W.2d 786 (Ct. App. 1998), 97–3620.

Sub. (1) (f) requires a bank that discloses a disputed debt to a credit bureau to disclose the disputed status of the debt each time that the debt is reported and not just the first time. *Turner v. Gene Dencker Buick–Pontiac, Inc.*, 2001 WI App 28, 240 Wis. 2d 385, 623 N.W.2d 151, 99–3174.

When the parties’ contract plainly required the defendant to obtain a replevin judgment before repossessing a car, and it was undisputed that the defendant did not obtain that judgment, the defendant violated sub. (1) (j) by filing a deficiency action because it knew or had reason to know that it had no right to the deficiency. *Kirk v. Credit Acceptance Corporation*, 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522, 10–2573.

A creditor’s failure to provide a notice of right to cure default under ch. 425 does not constitute a sufficient basis for relief under this chapter. *Security Finance v. Kirsch*, 2019 WI 42, 386 Wis. 2d 388, 926 N.W.2d 167, 17–1408.

Police agencies and district attorneys are not prohibited by sub. (1) (b) from sending letters threatening criminal prosecution to persons who have issued worthless checks. 63 Atty. Gen. 340.

The defendant violated sub. (1) (j) when it attempted to collect debts under a false name. *Hartman v. Meridian Financial Services, Inc.*, 191 F. Supp. 2d 1031 (2002).

Serving a garnishment form on the wrong person cannot reasonably be construed as a violation of sub. (1) (j). *Whitehead v. Discover Bank*, 221 F. Supp. 3d 1055 (2016).

427.105 Remedies. (1) A person injured by violation of this chapter may recover actual damages and the penalty provided in s. 425.304; but notwithstanding any other law actual damages shall include damages caused by emotional distress or mental anguish with or without accompanying physical injury proximately caused by a violation of this chapter.

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(2) If a customer establishes that the customer was induced to surrender collateral, as defined in s. 425.202 (1), by conduct of the merchant which violates this chapter, the customer shall be entitled to a determination of the right to possession of the collateral pursuant to s. 425.205 (1) (e) in any action brought under this subchapter, and if the customer prevails on such issue, in addition to any other damages under this subchapter, the customer shall be entitled to recover possession of the collateral if still in the merchant's possession, together with actual damages for the customer's loss of use of the collateral.

History: 1971 c. 239; 1991 a. 316; 2005 a. 255.

Sub. (1) does not restrict recovery to persons who are customers under s. 421.301 (17). *Zehetner v. Chrysler Financial Company, LLC*, 2004 WI App 80, 272 Wis. 2d 628, 679 N.W.2d 919, 03–1473.