



**State of Wisconsin**  
*Department of Financial Institutions*

Tony Evers, **Governor**

Kathy Blumenfeld, **Secretary**

October 9, 2020

**VIA EMAIL**

[REDACTED]  
[REDACTED]

Dear Attorney [REDACTED]:

Earlier this year, this Department was asked to opine whether certain contractual provisions violated Section 422.411(1) of the Wisconsin Statutes, which states that “no term” of an agreement governed by the Wisconsin Consumer Act “may provide for the payment by the customer of attorney fees.” This Department [responded in writing on July 7](#). It noted that while Section 422.411(2) barred lenders from attempting to create contractual rights to reimbursement of attorney fees from borrowers, it did not purport to eliminate any statutory, inherent, or other rights to fee-shifting that exist independent of the contract itself. Because the provisions in question merely referenced non-contractual sources of fee-shifting and/or disclaimed any attempt to shift fees contractually in transactions governed by the Act,<sup>1</sup> the Department concluded that they did not violate Section 422.411(1).

Following the issuance of that opinion letter, you wrote the Department to inquire about the permissibility of another provision concerning attorney fees that appears in a contract allegedly governed by the Act. This provision states:

**BORROWER shall bear the entire risk of loss of property or damage to the vehicle while it is in BORROWER’S possession and agrees to indemnify and hold LENDER harmless for any and all claims for property damages or personal**

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<sup>1</sup> The three provisions were as follows:

- “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.”

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*Division of Banking*

Mail: PO Box 7876 Madison, WI 53707-7876  
Courier: 4822 Madison Yards Way, Madison, WI 53705-9100  
Voice: (608) 261-7578 Fax: (608) 267-6889 Web: [dfi.wi.gov](http://dfi.wi.gov)

injury arising from the operation of the vehicle, including but not limited to all judgments, attorney fees, court costs and any incurred expenses[.]

This provision, unlike those at issue in the July 7 letter, is not a mere warning that the lender may exercise statutory, equitable, or other rights to fee-shifting arising from non-contractual sources. Instead, it purports to create a *contractual* right to fee-shifting—asking the borrower to “agree[] to indemnify” the lender for all “attorney fees” upon the occurrence of certain events. And unlike one of the terms at issue in the July 7 letter, this provision does not include a “savings clause” disclaiming its applicability to transactions governed by the Act.

For these reasons and those set forth in the [July 7 letter](#), the language of this provision does not appear to conform to the requirements of Section 422.411(1).

Sincerely,

/s/ Matthew Lynch

Matthew Lynch  
Chief Legal Counsel  
Wisconsin Department of Financial Institutions  
[Matthew.Lynch@dfi.wisconsin.gov](mailto:Matthew.Lynch@dfi.wisconsin.gov)