



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

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Tony Evers, **Governor**

Kathy Blumenfeld, **Secretary**

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,<sup>1</sup> while the WCA arguably goes "further to protect consumer interests than any other such legislation in the country."<sup>2</sup> 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."<sup>3</sup>

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.<sup>4</sup> 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.

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<sup>1</sup> 15 U.S.C. § 1692c(b).

<sup>2</sup> 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).

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

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

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## 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.<sup>5</sup>

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.<sup>6</sup> At the time of its 1971 enactment, the Wisconsin Consumer Act was "probably the most sweeping consumer credit legislation yet enacted in any state"<sup>7</sup> and went "further to protect consumer interests than any other such legislation in the country."<sup>8</sup> 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.<sup>9</sup>

"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.<sup>10</sup> 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."<sup>11</sup> 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

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

<sup>6</sup> WIS. STAT. § 421.102(2)(b).

<sup>7</sup> HEISER, *supra* note 1, at 389.

<sup>8</sup> 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).

<sup>9</sup> WIS. STAT. § 421.102(1).

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

<sup>11</sup> 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.<sup>12</sup>

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).<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup> 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

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<sup>12</sup> *Hornik*, 114 Wis. 2d at 169.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> *Hornik*, 114 Wis. 2d at 170.

<sup>16</sup> *Id.* at 169.

<sup>17</sup> *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."<sup>18</sup>

**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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> Therefore, we evaluate whether the debt collector's disclosures in their full context would have a tendency to affect a customer's reputation.

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<sup>18</sup> Department of Financial Institutions, *Wisconsin Consumer Act: Debt Collection Practices FAQs*, at h <https://dfi.wi.gov/Pages/ConsumerAct/DebtCollectionGeneralPractices.aspx>, cited with approval in *Sec. Fin. v. Kirsch*, 2019 WI 42, ¶ 13 n.4, 386 Wis. 2d 388, 926 N.W.2d 167.

<sup>19</sup> WIS. STAT. § 427.104(1)(e).

<sup>20</sup> *Assocs. Fin. Servs. Co. v. Hornik*, 114 Wis. 2d 163, 167-168, 336 N.W.2d 395 (Ct. App. 1983). 21 *Id.* at 168.

<sup>21</sup> *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,”<sup>22</sup> but disclosing that a debtor had gambling loans probably would.<sup>23</sup> 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,<sup>24</sup> 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,<sup>25</sup> 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

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

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

<sup>24</sup> 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).

<sup>25</sup> 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)*