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## The Wisconsin Consumer Act: Consumer Credit Sales, Consumer Leases, Open-End Credit Plans, and Exclusions

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# THE WISCONSIN CONSUMER ACT: CONSUMER CREDIT SALES, CONSUMER LEASES, OPEN-END CREDIT PLANS, AND EXCLUSIONS

RALPH C. ANZIVINO\*

*The Wisconsin Consumer Act (WCA) is a complex statute with very significant sanctions for creditors that fail to comply with its requirements. Debtors' attorneys seek to claim that a transaction is subject to the WCA's mandates, and of course, creditors' attorneys seek to deny coverage. This Article addresses the coverage issue by focusing on the three consumer credit transactions that are expressly subject to WCA coverage, and on the two most common transactions excluded from WCA coverage. The three transactions expressly subject to WCA coverage are consumer sales, consumer leases, and open-ended credit plans. Each distinct transaction has its own unique interpretation issues that will determine WCA coverage of the transaction depending upon the court's interpretation of the transaction. The two most common exclusions under the WCA are consumer credit transactions that exceed \$25,000, and the first lien real estate mortgage. There are actually three different transactions that qualify under the \$25,000 exclusion and each one is separately identified and explained. Finally, the first lien real estate mortgage exclusion is analyzed with particular attention focused on identifying those types of interests that qualify as an "equivalent security interest."*

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## I. INTRODUCTION

The Wisconsin Consumer Act (WCA) is a complex statute designed to protect consumers from sharp practices by merchants.<sup>1</sup> At its heart, it is a disclosure statute. It mandates stiff penalties against merchants who fail to comply with its many statutory requirements.<sup>2</sup> The primary transaction that triggers mandated compliance with the WCA is the consumer credit transaction.<sup>3</sup>

There are three credit transactions that are specifically identified by the WCA as consumer credit transactions—consumer credit sales, consumer leases, and open-end credit plans.<sup>4</sup> Each one of these consumer credit transactions has presented interpretation problems that have perplexed the courts.<sup>5</sup> For consumer credit sales, the problem is distinguishing true leases or bailments, which are not subject to the WCA, from disguised sales, which are covered by the WCA. The WCA only partially addresses this problem. For consumer leases, the problem is distinguishing commercial leases from consumer leases. And finally, open-end credit plans have enhanced disclosure requirements under the WCA.<sup>6</sup> But, it is not an easy task to distinguish an open-end credit plan, with its enhanced disclosure requirements, from an ordinary credit transaction, which has less disclosure requirements, from a “cash transaction,” which has no disclosure requirements. The first part of this Article will provide a comprehensive analysis of each one of these consumer credit transactions.

The second part of this Article will focus on the two most common exclusions under the WCA—consumer transactions that exceed \$25,000 and the first lien real estate mortgage exclusion. There are actually three exclusionary clauses that are part of the \$25,000 exclusion: (1) consumer credit transactions where the amount financed exceeds \$25,000;<sup>7</sup> (2) motor vehicle consumer leases where the total lease

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1. WIS. STAT. § 421.102(2)(b) (2011–2012).

2. *See* WIS. STAT. Ch. 425.

3. *See* WIS. STAT. § 421.102(2)(d).

4. WIS. STAT. § 421.301(10).

5. *See* *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 763 (E.D. Wis. 1996) (deciding “whether [] rent-to-own contracts are consumer credit sales under the WCA”); *DeGrave v. Door Cnty. Coop.*, No. 96-1606, 1996 Wisc. App. LEXIS 1607, at \*1 (Dec. 17, 1996) (deciding whether the co-op’s transactions constituted an open-end credit plan or ordinary credit transaction); *Duston v. Badger Lease*, No. 93-1402, 1994 Wisc. App. LEXIS 202, at \*3 (Feb. 22, 1994) (deciding whether a car lease is a commercial or consumer lease).

6. *See* WIS. STAT. § 422.308.

7. WIS. STAT. § 421.202(6).

obligation exceeds \$25,000;<sup>8</sup> and (3) any other consumer transaction where the cash price exceeds \$25,000.<sup>9</sup> Each clause has its own unique interpretation issues. For the first exclusionary clause, courts have struggled with determining whether a charge should be considered a finance charge, an additional charge, or part of the amount financed.<sup>10</sup> In addition, when there are multiple advances between the parties, should the \$25,000 cap be applied against each individual advance or simply the total of the advances? Also, can a single advance become subject to the WCA even though it is greater than \$25,000? A number of issues have arisen with reference to the motor vehicle consumer lease exclusion. How to calculate the four-month lease period, and how to calculate the total lease obligation are common issues.<sup>11</sup> Finally, with regard to the third exclusionary clause, the two primary issues are what transactions are covered by “any other consumer transaction,” and how should the “cash price” be calculated.

As a final matter, the scope of the first lien real estate mortgage exclusion is examined. There are a number of issues considered under this exclusion. One primary issue is what kind of interests qualify as an “equivalent security interest” to a first lien on real estate. Also, when the first lien holder makes future advances, particularly difficult priority issues arise between the first and second lien holders.

#### A. Consumer Credit Sale

A consumer credit sale is one of the four types of consumer credit transactions expressly identified in the WCA.<sup>12</sup> In fact, most consumer transactions would qualify as both a consumer credit sale and a consumer credit transaction.<sup>13</sup> The elements of a consumer credit transaction and a consumer credit sale are essentially the same with one noted addition. A consumer credit sale is defined as “a sale of goods, services or an interest in land to a customer on credit where the debt is

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8. *Id.*

9. *Id.*

10. See discussion *infra* Part II.B.

11. See *LeBakken Rent-To-Own v. Warnell*, 223 Wis. 2d 582, 594, 589 N.W.2d 425, 430 (Ct. App. 1998); see also *Raneda v. Bank of Am., N.A.*, No. 02-2149, 2003 Wisc. App. LEXIS 616, at \*\*1213 (July 1, 2003).

12. WIS. STAT. § 421.301(10).

13. See, e.g., *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 Wis. 2d 79, 87, 365 N.W.2d 882, 886 (Ct. App. 1985) (“[A] consumer credit sale is also a consumer credit transaction. . . . The former is a species of the latter because the legislature so provided.”).

payable in installments or a finance charge is imposed.”<sup>14</sup> All the basic elements of a consumer credit sale (goods, services, or an interest in land; credit; payable in installments; and finance charge) were analyzed in an earlier article.<sup>15</sup> However, the definition of consumer credit sale expands the coverage of the WCA by including within it bailments and leases where the bailee or lessee pays or agrees to pay the agreed price and can become or has the option to become the owner of the leased or bailed property for no additional or nominal consideration.<sup>16</sup> If the transaction does not provide that the lessee or bailee has the opportunity to become the owner of the property, the transaction cannot be a consumer credit sale.<sup>17</sup>

The expansion of the coverage of the WCA through the noted addition to the consumer credit sale definition was designed to address the issue of whether a lease or bailment transaction is a true lease or bailment or a credit transaction disguised as a lease or bailment.<sup>18</sup> The drafters of the WCA obviously wanted to include within its scope not only all traditional consumer credit transactions, but also disguised ones as well.<sup>19</sup> This issue was first encountered in the Uniform Commercial Code<sup>20</sup> (UCC) where statutory guidelines are prescribed for

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14. WIS. STAT. § 421.301(9).

15. See Ralph C. Anzivino, *The Wisconsin Consumer Act: When Is a Transaction a Consumer Credit Transaction?*, 96 MARQ. L. REV. 205, 221–29 (2012).

16. WIS. STAT. § 421.301(9).

17. See *Am. Indus. Leasing Co. v. Moderow*, 147 Wis. 2d 64, 70–71, 432 N.W.2d 617, 619–20 (Ct. App. 1988) (finding that the bailment agreement at issue created a lease agreement rather than a consumer credit sale).

18. See WIS. STAT. § 421.102 (1)–(2) (explaining that the provisions and definitions of the WCA should be construed broadly and liberally so as to comport with the underlying purpose of protecting consumers); see also *LeBakken Rent-To-Own v. Warnell*, 223 Wis. 2d 582, 592–93, 589 N.W.2d 425, 430 (Ct. App. 1998) (noting that the WCA shall be read liberally “to promote the underlying purposes of the Act and [to] look[] beyond the transaction’s form to its substance,” and, accordingly, to include disguised transactions).

19. See WIS. STAT. § 421.102 (1)–(2) (explaining that the provisions and definitions of the WCA should be construed broadly and liberally so as to comport with the underlying purpose of protecting consumers); see also *LeBakken*, 223 Wis. 2d at 592–93 (noting that the WCA shall be read liberally “to promote the underlying purposes of the Act and [to] look[] beyond the transaction’s form to its substance,” and, accordingly, to include disguised transactions).

20. See Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of UCC Article 2A*, 25 U. MEM. L. REV. 873, 879 (1995) (noting the drafters recognition of “the confused state of the opinions dealing with the distinction between leases and sales involving disguised security interests”); see also U.C.C. § 1–201 cmt. 37 (2012–2013) (explaining that common law rules on disguised security interests were not sufficient to resolve the conflict and that the 1978 Official UCC Text was an attempt to remedy this

distinguishing a lease<sup>21</sup> from a security interest.<sup>22</sup>

One of the more difficult issues when confronted with determining whether a transaction is a disguised consumer credit sale (subject to the WCA) or a true lease or bailment (not subject to the WCA) is whether the contract provides that the bailee or lessee can become the owner of the property by paying a nominal option price either during or at the end of the term of the contract. Wisconsin courts use four tests when determining whether a customer's option price is nominal.<sup>23</sup> In *Burney v. Thorn Americas, Inc.*, the issue arose of "whether rent-to-own contracts are consumer credit sales under the WCA."<sup>24</sup> Rent-A-Center argued that since "the customer has no obligation to renew [under the rent-to-own] agreement, there is no debt, and the WCA cannot apply."<sup>25</sup> The court, however, noted that the WCA covers transactions where the customer pays or agrees to pay money under the rental or bailment agreement.<sup>26</sup> As a result, a transaction could be a consumer credit sale whether the customer has paid or agrees to pay under the agreement.<sup>27</sup> The court also addressed the applicability of the UCC to similar statutory language in the WCA.<sup>28</sup> The court concluded that the language in the UCC should not be used when interpreting the WCA because the language used in each statute is different, and because the UCC was primarily designed to deal with commercial transactions, not consumer transactions.<sup>29</sup> Further, the court noted that Wisconsin courts use four tests when determining whether a customer's option price is nominal.<sup>30</sup> Those four tests are as follows: (1) "the option price's relation to the item's fair market value"; (2) "the option price's relation to the total payments" under the contract; (3) "the option price's

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problem).

21. WIS. STAT. § 411.102 (noting that a true lease is subject to Chapter 411 of the Wisconsin Statutes); U.C.C. § 1-203 cmt. 2 (noting that a true lease is subject to Article 2A of the UCC).

22. See WIS. STAT. § 401.203; WIS. STAT. § 409.109 (noting that a credit transaction is subject to Chapter 409 of the Wisconsin Statutes); U.C.C. § 2A-103 cmt. (noting that a credit transaction is subject to Article 9 of the UCC).

23. *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 770 (E.D. Wis. 1996).

24. *Id.* at 763.

25. *Id.* at 767.

26. *Id.*

27. *Id.*

28. See *id.* at 767-68 (discussing defendants' attempt to analogize the WCA with the UCC).

29. *Id.* at 768.

30. *Id.* at 770.

relation to the original price”; and (4) whether paying the option price is the most sensible alternative under the circumstances.<sup>31</sup> Whether the customer has the option to pay the option price in a lump sum payment or installments does not affect the fact that it must be determined whether the option price is nominal.<sup>32</sup>

Several tests discussed in *Burney* were used by the court in *Rent-A-Center, Inc. v. Hall*.<sup>33</sup> In *Hall*, the customer signed a rental agreement to rent a new washer and dryer on a monthly basis.<sup>34</sup> Pursuant to the agreement, the customer had “the option to purchase the appliances after 19 months of successive renewals at [the] then fair market value not to exceed \$161.91.”<sup>35</sup> The agreement also had a cap of \$1643.15.<sup>36</sup> In a subsequent dispute between the parties, the merchant asserted that the rental agreement “was not a ‘consumer credit sale’ subject to the [WCA].”<sup>37</sup> The court noted that there are two prerequisites that must be satisfied before a lease or bailment becomes a consumer credit sale.<sup>38</sup> The customer “must have either paid or agreed to pay a sum [equal] to or in excess of the . . . value of the goods.”<sup>39</sup> Also, “the agreement must provide that [the customer] . . . will become, or for no other or a nominal consideration has the option to become, the owner of the goods . . . upon full compliance with the terms of the agreement.”<sup>40</sup> With regard to the second prerequisite, the merchant asserted that the UCC, which provides a detailed analysis to determine when a lease is intended as security,<sup>41</sup> should be applied by analogy to the consumer credit sale determination.<sup>42</sup> The court, however, refused to apply the UCC statutory standards to the WCA because the court believed it might narrow the broad scope of the WCA.<sup>43</sup> In addition, the court indicated that the UCC statutory standards are useful when applied to large

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31. *Id.* (citing *Rent-A-Ctr., Inc. v. Hall*, 181 Wis. 2d 243, 255, 510 N.W.2d 789, 794 (Ct. App. 1993)).

32. *Burney v. Thorn Ams., Inc.*, 970 F. Supp. 668, 674 (E.D. Wis. 1997).

33. *Hall*, 181 Wis. 2d 243.

34. *Id.* at 246.

35. *Id.* (internal quotations omitted).

36. *Id.*

37. *Id.* at 249.

38. *Id.* at 249–50.

39. *Id.* at 250 (internal quotations omitted).

40. *Id.* (internal quotations omitted).

41. *Id.* at 253.

42. *Hall*, 181 Wis. 2d at 253–55 & n.8.

43. *Id.*

commercial transactions but do not apply particularly well to small consumer transactions.<sup>44</sup> Even though the court indicated that the UCC statutory standards do not translate very well to small consumer transactions, the primary means by which a bailee or lessee becomes the owner of the goods or property are exactly the same under both the UCC and the WCA—whether the bailee or lessee can become the owner of the goods for no additional or nominal consideration.<sup>45</sup> Nevertheless, the court concluded that the payment of \$161.91 at the end of the lease term was nominal.<sup>46</sup> The court compared the amount the lessee would have paid under the agreement for the appliances over the term of the agreement (\$1,481.42) with \$161.19, which was the final purchase price, and concluded it was a nominal sum.<sup>47</sup> In addition, the court noted that anyone who had already paid \$1,481.42 would have “no sensible” alternative other than to pay the option price and become the owner.<sup>48</sup> As a result, the court held the rental agreement to be a consumer credit sale.<sup>49</sup>

The “no sensible alternative” test is further illustrated in *LeBakken Rent-To-Own v. Warnell*.<sup>50</sup> In *LeBakken*, a customer entered into a rent-to-own agreement for a refrigerator.<sup>51</sup> The agreement contained an option price whereby the customer had the option to purchase the refrigerator.<sup>52</sup> The merchant argued that the transaction was not a consumer credit sale, but rather the agreement anticipated two transactions.<sup>53</sup> The first transaction is a “true rental agreement” between the merchant and customer, and the second transaction, if the customer “exercises the option to purchase,” is a sale.<sup>54</sup> The court

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44. *Id.*

45. Compare WIS. STAT. § 421.301(9) (2011–2012) (“[T]he bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods or real property upon full compliance with the terms of the agreement.”), with WIS. STAT. § 401.203(2)(d) (“The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.”).

46. *Hall*, 181 Wis. 2d at 256.

47. *Id.*

48. *Id.*

49. *Id.* at 255–56.

50. *LeBakken Rent-To-Own v. Warnell*, 223 Wis. 2d 582, 593, 589 N.W.2d 425, 430 (Ct. App. 1998).

51. *Id.* at 585–86.

52. *Id.* at 586.

53. *Id.* at 590.

54. *Id.*



disagreed with the merchant's analysis.<sup>55</sup> Rather, the court decided to analyze the two prerequisites to a consumer credit sale when a lease or bailment is involved.<sup>56</sup> The first prerequisite is that the customer must have either paid or agreed to pay a sum equal to or in excess of the value of the goods.<sup>57</sup> The court noted that the customer had two options during the term of the rental agreement to purchase the refrigerator.<sup>58</sup> Under the first option, after one month, the customer could pay \$526.95 for a refrigerator that was worth \$551.08.<sup>59</sup> Under the second option, at the end of the lease term, if all the customer's payments totaled \$1,102.15, the customer could become the owner of the refrigerator.<sup>60</sup> Under both options, it was clear to the court that the customer could pay a sum equal to or in excess of the value of the goods.<sup>61</sup> The first prerequisite was satisfied.<sup>62</sup> The second prerequisite is that the customer has the option to become the owner of the property for no additional or nominal consideration.<sup>63</sup> The agreement provided that at the end of the lease term the customer could become the owner of the refrigerator by paying an additional \$179.95.<sup>64</sup> The court indicated that a reasonable person "who had already paid \$922.50 for a refrigerator would have 'no sensible alternative' [but] to pay \$179.95 [to] become the owner of the goods."<sup>65</sup> Therefore, the court concluded that the option price was nominal, and the transaction was a consumer credit sale.<sup>66</sup>

A lease or bailment transaction can also become a consumer credit sale if the lessee or bailee can become the owner of the goods at the end of the agreed term for no additional consideration.<sup>67</sup> A case of no additional consideration, as opposed to nominal consideration, is illustrated by *Snowbank v. Bradwell*.<sup>68</sup> In *Snowbank*, a customer

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55. *Id.* (finding that the transaction was a consumer credit transaction).

56. *Id.* at 591.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 592.

61. *Id.* at 591–92.

62. *Id.* at 592.

63. *Id.*

64. *Id.*

65. *Id.* at 593.

66. *Id.*

67. *Snowbank v. Bradwell*, No. 2007AP2308, 2008 Wisc. App. LEXIS 274, at \*5–6 (Apr. 8, 2008).

68. *Id.* at \*1.

entered into a contract to purchase a trailer.<sup>69</sup> The parties completed a receipt indicating the buyer paid \$520 down and had a balance of \$89.97 due within seven days.<sup>70</sup> The buyer took immediate possession of the trailer, but the seller did not transfer title at that time.<sup>71</sup> Subsequently, the buyer did not pay the balance due, and the seller took the trailer from the buyer without notice to or consent of the buyer.<sup>72</sup> In subsequent litigation between the parties, the issue became whether the transaction was a consumer credit sale.<sup>73</sup> The court noted that a consumer credit sale includes a bailment “if the bailee . . . pays or agrees to pay an amount . . . equivalent to or in excess of the . . . value of the goods, and . . . for no [additional] or a nominal consideration has the option to become . . . the owner of the goods.”<sup>74</sup> The court concluded that this transaction fell squarely within the coverage of the WCA.<sup>75</sup> The buyer had clearly taken possession of the property, which constitutes a bailment.<sup>76</sup> The receipt clearly indicated that the buyer had a balance due to the seller.<sup>77</sup> And, the buyer could become the owner of the property by paying “the remainder of the balance” due.<sup>78</sup> The agreement, therefore, was subject to the WCA.<sup>79</sup>

Finally, the lease or bailment agreement may still qualify as a consumer credit transaction even though the agreement includes a termination clause in favor of the bailee or lessee, or the bailee or lessee is not contractually required to make all the payments under the contract.<sup>80</sup> For example, in *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, a customer entered into a rent-to-own agreement with a merchant for a television whereby the customer would become the

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69. *Id.* at \*1–2.

70. *Id.*

71. *Id.* at \*2.

72. *Id.*

73. *Id.* at \*4–5 (explaining that the question of whether the agreement at issue was a consumer credit transaction “is a mixed question of fact and law” (citing *LeBakken Rent-To-Own v. Warnell*, 223 Wis. 2d 582, 589, 589 N.W.2d 425, 428 (Ct. App. 1998))).

74. *Id.* at \*5–6 (quoting *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 Wis. 2d 79, 84, 365 N.W.2d 882, 885 (Ct. App. 1985)).

75. *Snowbank*, 2008 Wisc. App. LEXIS 274, at \*6.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 Wis. 2d 79, 81, 88, 365 N.W.2d 882, 884, 887 (Ct. App. 1985).

owner of the goods after making seventy-eight consecutive weekly payments of \$23 per week.<sup>81</sup> The lease agreement contained a termination clause.<sup>82</sup> When litigation ensued between the parties, the merchant argued that the transaction was not covered by the WCA because it was not a consumer credit sale.<sup>83</sup> Essentially the merchant's argument was that there was no consumer credit transaction because the customer was not obligated by the lease agreement to make installment payments.<sup>84</sup> The court, however, had a different view. The court reasoned that a consumer credit transaction occurs when a "debt is payable in installments or a finance charge is imposed."<sup>85</sup> The lease agreement between the parties did include a time-price differential (the difference between the cash sales price and the total price through the installments), and as such, qualified as a consumer credit transaction.<sup>86</sup> Therefore, the court held that there is no requirement that there be an obligation to make payments in order for a transaction to qualify as a consumer credit sale.<sup>87</sup> The rental agreement was held to be a consumer credit sale.<sup>88</sup>

If the intent of the legislature was to increase the protection of the WCA by including all leases and bailments disguised as sales into the definition of consumer credit sales, the legislature significantly missed the mark. The only lease or bailment that falls within the definition of a consumer credit sale is one where the bailee or lessee will become or has the option to become the owner of the bailed or leased item for no additional or nominal consideration.<sup>89</sup> What about the lease or bailment that contains an option price that is not a nominal one, but yet the economics of the transaction are such that exercising the option is the only reasonable decision? The proposed transaction is clearly not a true bailment or lease but rather a disguised sale. These cases are entirely missed by the WCA's definition of a consumer credit sale. For example, in *In re Grubbs Construction Co.*, Grubbs entered into a Master Lease

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81. *Id.* at 81.

82. *Id.*

83. *Id.* at 85.

84. *Id.*

85. WIS. STAT. § 421.301(9) (2011–2012); *see also Palacios*, 123 Wis. 2d at 87 (citing WIS. STAT. § 421.301(9)).

86. *Palacios*, 123 Wis. 2d at 87–88.

87. *Id.* at 88.

88. *Id.*

89. WIS. STAT. § 421.301(9).

Agreement for the lease of several pieces of equipment, and during Grubbs' Chapter 11 bankruptcy case it became important to determine if the leases were true leases or disguised sales.<sup>90</sup> Four of the leases contained "Early Buyout Options" that Grubbs could exercise.<sup>91</sup> There were actually three options that were available to Grubbs.<sup>92</sup> The first option, which was available upon the sixty-sixth month of the lease, provided for an option price of \$163,327.50, which together with the prior monthly lease payments, would total \$637,687.32.<sup>93</sup> The second option, which was available upon the seventy-second month of the lease, provided for an option price of \$131,250.00, which together with the prior monthly lease payments, would total \$648,733.44.<sup>94</sup> And finally, the third option was to renew the leases at the end of the lease term for an additional fourteen months at a cost of \$134,020.32, which would result in total lease payments of \$659,020.32.<sup>95</sup> Clearly, none of the option prices were nominal since they ranged from a low of \$131,250.00 to a high of \$163,327.50. Based on the economics of the transaction, the court reasoned that Grubbs had no choice but to purchase the equipment.<sup>96</sup> As a result, the court concluded that the lease agreements were in fact disguised sales, not true leases.<sup>97</sup> Obviously the *Grubbs* transaction is not a consumer transaction, but the point is that not all disguised consumer credit sales are anticipated by the nominal consideration standard. In those consumer cases where the option price is not nominal, the courts will need to consider the economic realities of the transaction as the court did in *Grubbs* to catch all the disguised consumer credit sale transactions.

### *B. Consumer Lease*

A consumer credit transaction also includes consumer leases.<sup>98</sup> A consumer lease is "a lease of goods [by] a merchant . . . to a customer for a term exceeding 4 months."<sup>99</sup> A consumer lease does not include a

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90. *In re Grubbs Constr. Co.*, 319 B.R. 698, 703 (Bankr. M.D. Fla. 2005).

91. *Id.* at 704.

92. *Id.*

93. *Id.* at 705.

94. *Id.*

95. *Id.* at 706.

96. *Id.* at 720–21.

97. *Id.* at 724.

98. WIS. STAT. § 421.301(10) (2011–2012).

99. *Id.* § 421.301(11).

lease of real property.<sup>100</sup>

There are a number of issues that arise under the WCA's definition of consumer leases. First, it must be determined whether the lease is a consumer or commercial lease. A recital in the lease that the lease is a commercial or business lease is not controlling.<sup>101</sup> Rather, the courts consider a number of factors in reaching a determination.<sup>102</sup> Second, if the lessee has the option to purchase the goods at any time, does the option convert the lease into one for a term less than four months? And, third, for leases that are expressly agreed to be less than four months, if the lessee's payments actually exceed four months, does that fact convert the lease into one for a term greater than four months?

The leading case addressing the distinction between a commercial or business lease and a consumer lease is *Duston v. Badger Lease*.<sup>103</sup> In *Duston*, a customer leased a used car from a merchant.<sup>104</sup> The lease agreement required the customer to make forty-two bi-weekly payments of \$50, and after the forty-two payments were made, the customer could purchase the car for an additional \$4.<sup>105</sup> Subsequently, the merchant repossessed the car without complying with the WCA's statutory requirements.<sup>106</sup> When litigation ensued, the issue before the court was whether the car lease was a commercial or consumer lease.<sup>107</sup> The lease specifically provided that the car should be used solely in the conduct of the lessee's business.<sup>108</sup> Based on that contract language, the merchant argued that "the lease was unambiguous and must be read as a commercial lease."<sup>109</sup> The trial court, however, did not rely on the recital in the lease but rather analyzed a number of factors in reaching its decision.<sup>110</sup> First, the court noted that the lease was titled "Equipment Lease."<sup>111</sup> Second, the lease did not state whether it was a commercial or

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100. WIS. ADMIN. CODE DFI-WCA § 1.05 (July 2007).

101. *Duston v. Badger Lease*, No. 93-1402, 1994 Wisc. App. LEXIS 202, at \*4 (Feb. 22, 1994).

102. *Id.* at \*4-6.

103. *Id.* at \*2.

104. *Id.* at \*1.

105. *Id.* at \*1-2.

106. *Id.* at \*2-3.

107. *Id.* at \*3 (explaining that Badger argued that the lease was a "commercial lease" not subject to the WCA).

108. *Id.* at \*4.

109. *Id.*

110. *See id.* at \*4-6 (discussing considerations taken into account by the trial court).

111. *Id.* at \*4.

consumer lease.<sup>112</sup> Third, the evidence indicated that the consumer had told the merchant at the time of contracting that she wanted to use the car to visit her sister.<sup>113</sup> Fourth, the address of the customer on the lease agreement was the customer's home address, not a business address.<sup>114</sup> Fifth, the evidence indicated that the merchant knew at the time of contracting that the customer was not going to use the vehicle in her course of employment, but rather simply to commute to her place of employment.<sup>115</sup> And finally, the court noted that in cases of ambiguity, the court should construe the document against the drafter, which was the merchant.<sup>116</sup> As a result of those factors, the court held that despite the contract recital, the lease was a consumer lease and the merchant should have followed the WCA's procedures when the merchant repossessed the vehicle.<sup>117</sup>

The WCA requirement that the lease exceed four months has created a couple of interesting issues. First, if the lease grants the lessee the option to purchase the goods at any time, does that convert the lease into a term for less than four months? Second, if the lease is for an expressed term less than four months, but payments actually exceed the four-month period, does that convert the lease into one for a term greater than four months? The option to purchase issue was addressed in *LeBakken Rent-To-Own v. Warnell*.<sup>118</sup> In *LeBakken*, a customer entered into a lease transaction with a merchant.<sup>119</sup> In subsequent litigation between the parties, the issue became whether the lease between the parties was a consumer lease for a term exceeding four months.<sup>120</sup> The merchant argued that "the lease was not for a period exceeding four months because [the customer] could exercise [an] . . . option [to] purchase the refrigerator" prior to that time.<sup>121</sup> The

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112. *Id.*

113. *Id.* at \*5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at \*6.

118. *LeBakken Rent-To-Own v. Warnell*, 223 Wis. 2d 582, 589, 589 N.W.2d 425, 428 (Ct. App. 1998).

119. *Id.* at 585–86.

120. *Id.* at 590 (explaining that the merchant claimed compliance with the WCA was not required because the agreement was not a consumer credit transaction, which includes within its definition a "consumer lease" (citing WIS. STAT. § 421.301(10))).

121. *Id.* at 594.

court first noted that the term “lease” is not defined by the WCA.<sup>122</sup> The court further noted that the WCA provides that if it does not define a term, that term shall have the meaning given to it in the UCC.<sup>123</sup> Therefore, the court adopted the definition of a lease under Chapter 411 of the Wisconsin Statutes, which provides that “a lease is a transfer of the right to possession and use of goods for a term in return for consideration.”<sup>124</sup> Next, the court addressed whether the consumer’s contractual right to purchase the refrigerator prior to the end of the four-month period disqualified the lease from being a consumer lease.<sup>125</sup> The court noted that the customer had the right under the lease to use the refrigerator for up to twenty months.<sup>126</sup> The merchant, on the other hand, “could only terminate the [lease] if [the customer] did not make his payments or otherwise breached the agreement.”<sup>127</sup> Therefore, the court reasoned that the merchant was bound to the lease agreement for twenty months unless the customer breached the agreement.<sup>128</sup> Based on those facts, the court held that the merchant’s lease to the customer was for a term that exceeded four months.<sup>129</sup>

The issue of whether a lease for less than four months is converted into one for greater than four months when the payments extend beyond the agreed payment period was addressed in *Ron Jensen Chevrolet-Olds, Inc. v. Poulton*.<sup>130</sup> In *Ron Jensen*, a consumer leased an automobile for ninety days, but the payments actually exceeded the four-month period.<sup>131</sup> The court, however, held that the fact that the payments exceeded the four-month period did not cause the lease to be subject to the WCA.<sup>132</sup> The court reasoned that the fact that the lessee’s payments exceeded the four-month period was “analogous to . . . a tenant who holds over beyond the expiration of [a] lease.”<sup>133</sup> The tenant holdover does not extend the term of the lease, nor did the late

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122. *Id.* at 594 n.8.

123. *Id.* (citing WIS. STAT. § 421.103(2)).

124. *Id.* (citing WIS. STAT. § 411.103(1)(j)).

125. *Id.* at 594–95.

126. *Id.* at 594.

127. *Id.* at 595.

128. *Id.*

129. *Id.*

130. *Ron Jensen Chevrolet-Olds, Inc. v. Poulton*, No. 92-1770, 1993 Wisc. App. LEXIS 82, at \*2 (Jan. 26, 1993).

131. *Id.*

132. *Id.*

133. *Id.*

payments extend the term of the auto lease.<sup>134</sup>

### *C. Open-End Credit Plan*

There are actually three types of transactions that can occur when a customer owes money to a merchant. The transaction could be one that was anticipated to be a cash transaction, but the customer did not pay as agreed; the transaction could be a simple credit transaction,<sup>135</sup> or the transaction could be one that arose from an open-end credit plan.<sup>136</sup> The credit and open-end credit transactions are subject to the WCA while the cash transaction is not.<sup>137</sup> It is important to distinguish the simple credit transaction from the open-end credit transaction because the open-end credit transaction has more disclosure requirements and those enhanced disclosures must occur prior to contracting.<sup>138</sup>

An open-end credit plan is one of the specified types of a consumer credit transaction.<sup>139</sup> An open-end credit plan is “consumer credit extended on an account pursuant to a plan under which” all of the following apply: (1) “[t]he creditor . . . permit[s] the customer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check or other device, as the plan may provide;” (2) the customer may “[pay] the balance in full or in installments;” (3) “[a] finance charge may be computed by the creditor from time to time on an outstanding unpaid balance;” and (4) “[t]he creditor has treated the transaction as open-end consumer credit for purposes of any disclosures required under the federal consumer credit protection act.”<sup>140</sup> A credit plan will “not be considered an open-end credit plan, even though it [otherwise] meets the criteria” for an open-end credit plan, if the creditor treats the transaction as an ordinary credit transaction.<sup>141</sup>

“In order to obligate a [customer for any liability] arising out of an open-end credit plan, the merchant must . . . obtain the signature of [the

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134. *Id.*

135. WIS. STAT. § 421.301(10) (2011–2012).

136. *Id.*

137. *Id.* (defining credit and open-end credit transactions as consumer credit transactions, while a cash transaction is not defined as such).

138. *See id.* § 422.308(1) (setting forth numerous disclosure requirements for open-end credit transactions).

139. *Id.* § 421.301(10).

140. *Id.* § 421.301(27)(a).

141. *Id.* § 421.301(27)(c).



customer] on the writing evidencing the consumer credit transaction.”<sup>142</sup> The signature requirement can be accomplished in one of three ways.<sup>143</sup> First, the customer can sign the “open-end credit agreement setting forth all of the terms of the . . . plan including the [required] credit disclosures.”<sup>144</sup> Second, the customer can sign

[a] credit application which expressly states that each [customer] signing the application will be obligated according to the terms of the open-end credit agreement . . . provided the creditor mails or delivers to each customer who signs the application a copy of the open-end credit agreement before that customer makes any charges on the account.<sup>145</sup>

Or, third, the customer signs

[a] transaction receipt which expressly states that each [customer] signing the receipt will be obligated according to the terms of the open-end credit agreement . . . provided the creditor has mailed or delivered a copy of the open-end credit agreement to that customer before that customer makes any charges on the account.<sup>146</sup>

The critical factor when distinguishing between an open-end credit plan and an ordinary credit transaction is the creditor’s conduct when the debt is not paid in full.

[W]hen a merchant’s billings are not paid in full within a stipulated time period and . . . the merchant does not, in fact, regard such accounts [to be] in default (For example, by customarily failing to institute collection activity or by continuing to extend credit) and imposes charges periodically for [the] delay[ed] payment of such accounts . . . until paid [in full], the charge so imposed [is] . . . a finance charge and the credit so extended comes within the definition of [an] open-end credit [plan].<sup>147</sup>

The traditional open-end credit plan is illustrated by *Patzka v. Viterbo*

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142. WIS. ADMIN. CODE DFI-WCA § 1.351 (July 2007).

143. *See id.* § 1.351(1)–(3).

144. *Id.* § 1.351(1).

145. *Id.* § 1.351(2).

146. *Id.* § 1.351(3).

147. *Id.* § 1.07.

*College*.<sup>148</sup> In *Patzka*,<sup>149</sup> a student received a loan from a college for tuition.<sup>149</sup> At the time of her registration, the college did not provide any information regarding the terms of her loan.<sup>150</sup> In subsequent litigation between the parties, both parties agreed that her financial arrangement with the college was an open-end credit plan.<sup>151</sup>

The test used by the courts when distinguishing an open-end credit plan from an ordinary credit transaction is an objective one.<sup>152</sup> In *DeGrave v. Door County Cooperative*, customers were members of a co-op and periodically made purchases for their farm on credit.<sup>153</sup> The co-op's invoices provided that all purchases were due within the following month and that a finance charge of 1.5% per month would be assessed on the outstanding balance less credits and payments.<sup>154</sup> When litigation ensued between the parties, the issue became whether the transaction was an open-end credit plan subject to enhanced disclosures prior to contracting.<sup>155</sup> The court noted that in order to qualify as an open-end credit plan, the co-op's plan must satisfy four required elements.<sup>156</sup> The co-op asserted that one element was missing in that the co-op never extended the privilege of paying the balance in installments to the customers.<sup>157</sup> The narrow issue before the court was whether the agreement between the parties permitted the customers to pay in installments.<sup>158</sup> The court used an objective test and inquired whether "a reasonable person reading [the] terms could believe [that] the co-op permitted payments after the due date."<sup>159</sup> The court concluded that the terms contained in the co-op's invoices impliedly permitted the member to pay in installments, and the only consequence of such payments after the due date would be the imposition of a finance charge.<sup>160</sup> Thus, the

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148. *Patzka v. Viterbo Coll.*, 917 F. Supp. 654, 659 (W.D. Wis. 1996).

149. *Id.* at 657.

150. *Id.*

151. *Id.* at 659.

152. *DeGrave v. Door Cnty. Coop.*, No. 96-1606, 1996 Wisc. App. LEXIS 1607, at \*7 (Dec. 17, 1996).

153. *Id.* at \*2.

154. *Id.*

155. *Id.* at \*1 (explaining that the customers alleged that the merchant violated the WCA by charging interest and repossessing the customers' stock and dividends).

156. *Id.* at \*5.

157. *Id.*

158. *Id.* at \*7.

159. *Id.*

160. *Id.*

transaction was an open-end credit plan and subject to the WCA.<sup>161</sup>

Application of the objective test has resulted in courts finding that the parties' relationship was simply an ordinary credit transaction and not an open-end credit plan.<sup>162</sup> In *Huser Implement, Inc. v. Wendt*, a customer "purchased a four-wheel-drive . . . tractor and some other farm machinery from [the merchant] . . . with financing from John Deere Credit Services."<sup>163</sup> For several years, the merchant extended credit to the customer for other goods and services and imposed a finance charge on the customer on the unpaid balance from time to time, but did not disclose the percentage rate charged.<sup>164</sup> When litigation ensued between the parties, the customer claimed that the merchant violated the WCA by failing to provide the necessary disclosures pursuant to an open-end credit plan.<sup>165</sup> The merchant "dispute[d] that the parties had an open-end credit plan," and instead characterized their relationship as an "ordinary credit transaction[]." <sup>166</sup> The court concluded that the parties did not have an open-end credit plan because the merchant "billed [the customer] on monthly invoices for all goods and services provided and . . . no written credit plan existed" between the parties.<sup>167</sup>

Finally, the objective test has been used by courts to find that a transaction was a cash transaction and not a credit transaction.<sup>168</sup> In *Alaskan Fireplace, Inc. v. Everett*, the customers entered into a contract for the installation of two fireplaces.<sup>169</sup> Financing terms were never discussed, and the contracts signed by the customers indicated that payment was to be made "net 30 days [with a 1.5%] monthly service charge for overdue invoices."<sup>170</sup> When litigation ensued between the parties, the issue became whether the customers had an open-end credit plan.<sup>171</sup> The court noted that the 1.5% service charge was imposed for

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161. *Id.* at \*7-8 (holding that "the transactions constituted an open-end credit plan").

162. *See Huser Implement, Inc. v. Wendt*, No. 98-1066-FT, 1998 Wisc. App. LEXIS 1136, at \*7 (Oct. 1, 1998) (holding that "the parties did not have an open-ended credit plan").

163. *Id.* at \*1-2.

164. *Id.* at \*2.

165. *Id.* at \*6.

166. *Id.* at \*7.

167. *Id.*

168. *See Alaskan Fireplace, Inc. v. Everett*, No. 02-3016-FT, 2003 Wisc. App. LEXIS 581, at \*\*13 (June 18, 2003) (agreeing with the trial court in holding that the transaction that took place was a cash transaction and did not constitute a credit transaction).

169. *Id.* at \*\*2.

170. *Id.*

171. *Id.* at \*\*12 (explaining that the customers argued that the transaction was an "open-

late payments,<sup>172</sup> and also that the merchant viewed the account to be in default.<sup>173</sup> Further, the court concluded that the customers did not have “the privilege of paying the balance in full or in installments,” but rather “payment was required [to be made] in full within thirty days.”<sup>174</sup> As a result of the foregoing, the court concluded that the transaction was not a consumer credit transaction subject to the WCA.<sup>175</sup>

## II. WISCONSIN CONSUMER ACT EXCLUSIONS

### *A. In General*

There are ten enumerated exclusions in the WCA.<sup>176</sup> The WCA does not apply to extensions of credit to organizations<sup>177</sup> or to transactions in which all parties to the transaction are organizations.<sup>178</sup> The WCA does not apply to motor vehicle leases unless the lease is for personal, family, household, or agricultural use.<sup>179</sup> For a mixed-use vehicle, 50% or more of the use must be for personal, family, household, agricultural use, or some combination thereof.<sup>180</sup> There are also specified exclusions for transactions involving public utilities,<sup>181</sup> common carriers,<sup>182</sup> electric cooperatives,<sup>183</sup> pawnbrokers,<sup>184</sup> the sale of insurance,<sup>185</sup> and the sale of securities.<sup>186</sup>

The WCA states that it does not apply to transactions that are primarily for an agricultural purpose, but that can be misleading.<sup>187</sup> The

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end credit plan”).

172. *Id.* at \*\*11.

173. *Id.*

174. *Id.* at \*\*12.

175. *Id.* at \*\*13.

176. WIS. STAT. § 421.202 (2011–2012).

177. *See* WIS. STAT. § 421.202(1); *see also* WIS. STAT. § 421.301(28) (“‘Organization[s]’ [include] a corporation, government or governmental subdivision or agency, trust, estate, limited liability company, partnership, cooperative or association other than a cooperative organized under ch. 185 or 193 which has gross annual revenues not exceeding \$5 million.”).

178. WIS. STAT. § 421.202(2).

179. *Id.* § 421.202(9).

180. WIS. ADMIN. CODE § DFI-WCA 1.06 (July 2007).

181. WIS. STAT. § 421.202(3).

182. *Id.*

183. *Id.*

184. *Id.* § 421.202(4).

185. *Id.* § 421.202(5).

186. *Id.* § 421.202(8).

187. *Id.* § 421.202(10).

WCA debt collection provisions in Chapter 427 do apply to transactions that are for an agricultural purpose.<sup>188</sup> Also, any motor vehicle leased for an agricultural purpose is subject to the WCA.<sup>189</sup> And finally, any credit transaction that is primarily for an agricultural purpose is subject to section 422.210, which states that a creditor must clearly disclose in writing any finance charge or fee to be able to collect the charge or fee.<sup>190</sup>

### *B. The \$25,000 Cap*

Certain other consumer transactions are also excluded from coverage under the WCA. There are three consumer transactions that exceed \$25,000 that are excluded from WCA coverage.<sup>191</sup> The theory underlying the \$25,000 exclusion is that “consumers entering transactions involving \$25,000 or less” need the protection of the WCA, but that “consumers entering transactions involving larger amounts are . . . able to protect themselves.”<sup>192</sup> However, in those cases where the transaction exceeds \$25,000, the lender can opt to provide WCA protections.<sup>193</sup>

The first \$25,000 exclusion is any consumer credit transaction where the “amount financed” is greater than \$25,000.<sup>194</sup> The amount financed is a different amount depending upon whether the consumer credit transaction is a consumer credit sale or a consumer loan. For a consumer credit sale, the amount financed is the cash price of the real or personal property or services,<sup>195</sup> less the amount of any down payment whether made in cash or in property traded in,<sup>196</sup> plus the “amount actually paid or to be paid by the creditor pursuant to an agreement with the customer to discharge a security interest in or a lien on [the] property traded in” by the customer.<sup>197</sup> For a consumer loan, the

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188. *Id.*

189. *See* WIS. STAT. §§ 421.301(25m), 429.104(9).

190. WIS. STAT. §§ 421.202(10), 422.210(1).

191. WIS. STAT. § 421.202(6).

192. *Am. Indus. Leasing Co. v. Geiger*, 118 Wis. 2d 140, 145, 345 N.W.2d 527, 529–30 (Ct. App. 1984).

193. *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 455–56, 485 N.W.2d 426, 432 (Ct. App. 1992).

194. WIS. STAT. § 421.202(6); *Valley W. Bank v. Bennett*, No. 85-1816, 1986 Wisc. App. LEXIS 3865, at \*2 (Sept. 9, 1986).

195. WIS. STAT. § 421.301(5)(a).

196. *Id.*

197. *Id.* § 421.301(5)(b).

amount financed is the amount paid to or receivable by the customer or another person on the customer's behalf.<sup>198</sup> To the extent that the charges are not already included in the prior amounts, the amount financed for both consumer credit sales and consumer loans should also include any taxes,<sup>199</sup> any amounts paid or to be paid by the creditor for registration, certificate of title or license fees,<sup>200</sup> and any other charges permitted under section 422.202.<sup>201</sup>

As noted above, the amount financed includes additional charges, but not finance charges. Therefore, it is very important to distinguish the two different types of charges. In *Burney v. Thorn Americas, Inc.*, the court had to calculate the amount financed and also to distinguish additional charges from finance charges.<sup>202</sup> In *Burney*, the court was first faced with the issue of whether rent-to-own transactions were consumer credit sales under the WCA.<sup>203</sup> After the court concluded that the transactions were covered by the WCA, the court held that Rent-A-Center had violated the WCA and must pay damages.<sup>204</sup> The damage calculation under the WCA required the court to calculate the finance charges in the transaction.<sup>205</sup> The larger the finance charges, the larger the damages payable by Rent-A-Center.<sup>206</sup> In its effort to reduce the calculation of finance charges, Rent-A-Center argued that it provides various services to its customers (delivery, maintenance, and terminability), whose costs should have been included in the amount financed, and not treated as part of the finance charges.<sup>207</sup> The court noted that "a finance charge [is] any charge that is a condition of the extension of credit."<sup>208</sup> On the other hand, the amount financed for a consumer credit sale is the cash price plus other allowable additional charges.<sup>209</sup> As a result, the court concluded that if a customer "can buy the service by paying cash," the item is properly a part of the amount

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198. *Id.* § 421.301(5)(a).

199. *Id.* § 421.301(5)(c)1.

200. *Id.* § 421.301(5)(c)2.

201. *Id.* § 421.301(5)(c)3.

202. *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 773–76 (E.D. Wis. 1996).

203. *Id.* at 763.

204. *Id.* at 773.

205. *Id.*

206. *See id.* at 773 (noting that to calculate the precise amount of damages it is first necessary to determine what the finance charge was in the transactions).

207. *Id.* at 774.

208. *Id.*

209. *Id.* at 775.

financed; whereas “if [the] service is available only to those [paying] over time,” the cost should be “part of the finance charge.”<sup>210</sup> Further, the court indicated that “[f]or an additional charge to be part of the amount financed, the customer must have the [opportunity] to refuse the service.”<sup>211</sup> Thus, “[i]f the customer . . . has no alternative but to take the additional service and pay the additional cost, such a charge is a condition of the extension of credit and [thereby a] finance charge.”<sup>212</sup>

Both parties in *Burney* agreed that the retail price of the item being sold was part of the amount financed.<sup>213</sup> They disagreed on the treatment of delivery charges, maintenance, and terminability. Rent-A-Center argued that the cost of delivery should be added to the amount financed.<sup>214</sup> However, the court concluded that Rent-A-Center factored the cost of delivery into every retail price, and as such, it would be double counting to add it to the amount financed.<sup>215</sup> Rent-A-Center made a similar argument with regard to its maintenance costs.<sup>216</sup> However, the court reasoned that the maintenance service is not an extra service for sale for cash, and as such, could not be added to the amount financed.<sup>217</sup> Finally, the court analyzed the cost of terminability. Terminability is the cost associated with permitting the customers to return goods without penalty at the end of any period.<sup>218</sup> Rent-A-Center argued that the cost of terminability should not be part of the finance charge because it is a cost incurred when goods are returned and credit is not extended to a customer.<sup>219</sup> The court disagreed.<sup>220</sup> The court reasoned that the cost of terminability is the price the customer pays for not buying an item outright, and as such, is the equivalent of interest, which is akin to a finance charge.<sup>221</sup> Further, the costs of terminability only arise when an item is purchased over time as opposed to an outright cash sale.<sup>222</sup> Thus, the court concluded that the “amount

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 775–76.

219. *Id.* at 775.

220. *Id.*

221. *Id.* at 776.

222. *Id.*

financed include[d] only the retail price” of each item.<sup>223</sup>

Once the amount financed is determined by the court on a single loan, it is a simple matter to decide if that amount is greater than \$25,000, and if so, the transaction is not subject to the WCA.<sup>224</sup> However, perplexing issues arise when there is more than one loan or advance between the parties. In *In re Ingersoll*, Mr. Ingersoll obtained loans from a number of banks while engaged in sod farming and other businesses.<sup>225</sup> During Mr. Ingersoll’s subsequent bankruptcy, the applicability of the WCA to Mr. Ingersoll’s numerous loans became an issue.<sup>226</sup> Mr. Ingersoll procured the loans as an individual, but there was a dispute as to the nature of the loans.<sup>227</sup> The court ruled that the loans procured for commercial or business purposes were not subject to the WCA, but those procured for an agricultural purpose<sup>228</sup> were subject to the WCA.<sup>229</sup> Specifically, the court held that the Ixonia bank loans were consumer credit transactions within the purview of the WCA.<sup>230</sup> Although the Ixonia loan balance was approximately \$140,000, the advances comprising that amount “were made at various times [and] in varying amounts.”<sup>231</sup> Only one advance, however, was in an amount of less than \$25,000.<sup>232</sup> For that advance, the court held that the WCA was applicable.<sup>233</sup> For those advances in excess of the \$25,000 exclusion, the court concluded that the WCA was not applicable.<sup>234</sup>

Despite the \$25,000 exclusion, advances in excess of \$25,000 can become subject to the WCA either by express statement or implication.

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223. *Id.*

224. *Sec’y of Veterans Affairs v. Sawyer*, No. 2006AP1829, 2007 Wisc. App. LEXIS 900, at \*5 (Oct. 16, 2007); *Hauer v. Union State Bank of Wautoma*, 192 Wis. 2d 576, 604 n.13, 532 N.W.2d 456, 467 n.13 (Ct. App. 1995); *Meas v. Young*, 142 Wis. 2d 95, 107, 417 N.W.2d 55, 59 (Ct. App. 1987); *First Wis. Nat’l Bank of Sheboygan v. Kielisch*, No. 86-2334, 1987 Wisc. App. LEXIS 4151, at \*3 (Oct. 14, 1987); *Valley W. Bank v. Bennett*, No. 85-1816, 1986 Wisc. App. LEXIS 3865, at \*2 (Sept. 9, 1986).

225. *Ixonia State Bank v. Ingersoll (In re Ingersoll)*, 8 B.R. 912, 914 (Bankr. W.D. Wis. 1981).

226. *Id.* at 916.

227. *Id.*

228. WIS. STAT. § 421.202(10) (2011–2012); *see also* 1997 Wis. Act 302 (restricting the WCA coverage for agricultural transactions to more limited requirements under the WCA).

229. *Ingersoll*, 8 B.R. at 916.

230. *Id.*

231. *Id.*

232. *Id.* at 916–17.

233. *Id.* at 917.

234. *Id.*



In *Bank of Barron v. Gieseke*, the debtors executed a Consumer Real Estate Security Agreement (CRESA) in 1979 that secured the original loan and granted the Bank of Barron a continuing lien on the debtors' real property for any credit granted in the future.<sup>235</sup> In 1986, the debtors executed a second mortgage to a second lender.<sup>236</sup> After the second mortgage was recorded, the Bank of Barron made a series of five advances to the debtors.<sup>237</sup> Two of the advances exceeded the \$25,000 cap and the other three did not.<sup>238</sup> For the two advances that exceeded the \$25,000 cap, the second mortgage holder argued that those advances could not relate back to the 1979 CRESA because the WCA does not apply to transactions that exceed \$25,000.<sup>239</sup> The court reasoned, however, that a security agreement containing a future advance clause should be given effect according to its own terms.<sup>240</sup> In the court's opinion, the security agreement was clear that the lien on their property would secure all current and future debt between the parties.<sup>241</sup> Further, the security agreement did not limit future advances to \$25,000 or less.<sup>242</sup> Therefore, the court held that the Bank of Barron had opted for WCA coverage for the one advance that exceeded the \$25,000 cap where the loan documents evidencing the advance referred back to the 1979 CRESA.<sup>243</sup> The simple reference to the CRESA in the loan documents was deemed sufficient to cause WCA coverage despite the WCA exclusion.<sup>244</sup> As a result, the advance related back to the priority date of the CRESA and was superior to the second lender.<sup>245</sup> The WCA does expressly provide that a merchant can agree to be covered by the WCA when a transaction is not otherwise subject to the WCA.<sup>246</sup> Apparently, a lender's agreement can be inferred by the simple use of the CRESA loan documents.

However, *Bank of Barron* indicates that the opposite can also

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235. *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 447, 485 N.W.2d 426, 428–29 (Ct. App. 1992).

236. *Id.*

237. *Id.*

238. *Id.* at 447–49.

239. *Id.* at 452–53.

240. *Id.* at 456.

241. *Id.* at 456–57.

242. *Id.* at 457.

243. *Id.* at 458.

244. *Id.* at 457–58.

245. *Id.* at 459–61.

246. WIS. STAT. § 421.301(17) (2011–2012).

occur.<sup>247</sup> Another advance by the Bank of Barron also exceeded the \$25,000 cap, but the loan documents evidencing this advance were prepared in a different fashion.<sup>248</sup> The loan documents for this advance specifically provided that it was “not governed by the Wisconsin Consumer Act.”<sup>249</sup> As a result, the court concluded that the lender did not opt into WCA coverage.<sup>250</sup> Thus, the advance did not relate back to the 1979 CRESA priority date, and as a result, was ruled subordinate to the second mortgage holder.<sup>251</sup> Obviously, great care should be taken when using CRESA forms and non-CRESA forms when documenting advances.

The second exclusion that involves the \$25,000 cap is a motor vehicle consumer lease where the total lease obligation exceeds \$25,000.<sup>252</sup> A “motor vehicle consumer lease” is a lease entered into in Wisconsin by a natural person primarily for personal, family, household, or agricultural purposes for a period of time exceeding four months.<sup>253</sup> In *Wehrenberg v. Toyota Motor Credit Corp.*, Wehrenberg signed a consumer lease in California while she was a Wisconsin resident.<sup>254</sup> Wehrenberg argued that her lease “was entered into in Wisconsin because she considered Wisconsin to be her primary and permanent residence when she signed the lease.”<sup>255</sup> The court did not agree with her interpretation.<sup>256</sup> The court reasoned that her “subjective belief that Wisconsin was her permanent residence [did] not transform a lease she signed in California, on which she listed a California address, into a lease entered into in . . . Wisconsin.”<sup>257</sup>

Further, the \$25,000 cap applies to the “total lease obligation.”<sup>258</sup> The total lease obligation is the sum of all scheduled payments under the lease, plus any capitalized costs.<sup>259</sup> An illustration of the calculation

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247. See *Bank of Barron*, 169 Wis. 2d at 458–59.

248. *Id.*

249. *Id.*

250. *Id.* at 459.

251. *Id.*

252. WIS. STAT. § 421.202(6) (2011–2012).

253. *Id.* § 429.104(9); see also discussion *supra* Part I.B.

254. *Wehrenberg v. Toyota Motor Credit Corp.*, No. 01-0985, 2002 Wisc. App. LEXIS 24, at \*4–5 (Jan. 10, 2002).

255. *Id.* at \*4.

256. *Id.*

257. *Id.* (internal quotations omitted).

258. WIS. STAT. § 429.104(9).

259. *Id.* §§ 421.301(43m), 429.104(6) (defining capitalized costs).

is provided in *Raneda v. Bank of America, N.A.*<sup>260</sup> In *Raneda*, a customer leased an SUV, and under the terms of the lease the customer was required to pay thirty-nine payments of \$733.91.<sup>261</sup> Upon nonpayment by the customer, the car was repossessed, and the customer alleged that the repossession action violated the WCA.<sup>262</sup> The issue before the court was whether the total lease obligation exceeded the \$25,000 cap.<sup>263</sup> The customer argued that the total lease obligation is calculated by looking at “the value of the vehicle at the beginning of the lease [term] . . . minus the option to purchase at the end of the lease [term].”<sup>264</sup> Applying that formula, the value of the vehicle would have been valued at just under \$16,000 and subject to the WCA.<sup>265</sup> The court, however, disagreed with the customer’s method of calculating the total lease obligation.<sup>266</sup> Rather, the court concluded that “[a]ccording to the WCA, [the] total lease obligation for a motor vehicle consumer lease is . . . the sum of all [the] scheduled periodic payments under the lease plus the down payment.”<sup>267</sup> Under that formula, the total lease obligation was \$28,622.49.<sup>268</sup> As a result, the court concluded that the motor vehicle consumer lease was not subject to the WCA.<sup>269</sup>

The third exclusion that involves the \$25,000 cap is “[any] other consumer transaction[]” where the cash price exceeds \$25,000.<sup>270</sup> An interesting issue that the courts have faced is when there are multiple debts owed by the consumer, should each debt be considered separately, or should the debts be combined and considered as one larger debt for cap purposes? In *Dorr v. Sacred Heart Hospital*, the debtors owed \$27,051.65 to the hospital for two hospitalizations.<sup>271</sup> The hospital filed a

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260. *Raneda v. Bank of Am., N.A.*, No. 02-2149, 2003 Wisc. App. LEXIS 616, at \*\*12–13 (July 1, 2003).

261. *Id.* at \*\*13.

262. *Id.* at \*\*12–13.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at \*\*13.

267. *Id.*; see also WIS. STAT. §§ 421.301(43m), 429.104(26) (2011–2012) (internal quotations omitted).

268. *Raneda*, 2003 Wisc. App. LEXIS 616, at \*\*13.

269. *Id.* at \*\*12.

270. WIS. STAT. § 421.202(6).

271. *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 447, 597 N.W.2d 462, 474 (Ct. App. 1999).

hospital lien against the Dorrs,<sup>272</sup> and the Dorrs claimed that such activity was a violation of the WCA.<sup>273</sup> The hospital combined the two charges into a single charge, which exceeded the \$25,000 cap.<sup>274</sup> As a result, the hospital asserted that the matter fell within the WCA's exclusionary clause.<sup>275</sup> Each individual claim was less than \$25,000.<sup>276</sup> The issue before the court was whether the claims could be combined into a single claim, or whether they should be treated as individual claims.<sup>277</sup> The court noted that "[t]he evidence before the court was insufficient to determine whether the two hospitalizations represent[ed] a single transaction or [were distinctly] separate transactions."<sup>278</sup> The court noted that "[i]f the [debtors could] demonstrate that the hospitalizations [were] separate and independent transactions under the [WCA], each claim must be treated independently and both [claims would be] under the statutory maximum."<sup>279</sup> Similarly, where multiple notes exist between the debtor and creditor, each individual note will be considered separate from the other notes and not combined for a total debt that could exceed the \$25,000 limit.<sup>280</sup>

In addition to the multiple claims issue, there is also some disagreement over the type of consumer transactions covered by this third exclusionary clause.<sup>281</sup> For example, the treatment of consumer leases for property, other than motor vehicles (which clearly fall within the coverage of the second exclusionary clause), has led to conflicting results. In *American Industrial Leasing Co. v. Geiger*, American Industrial leased two tractors to the Geigers for a term of sixty months with a monthly payment of \$816.31 for a total lease obligation of \$48,978.60.<sup>282</sup> American had purchased the two tractors for \$29,050.<sup>283</sup>

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272. *Id.* at 430.

273. *Id.* at 447.

274. *Id.* at 447–48.

275. *Id.* at 447.

276. *Id.*

277. *See id.* at 448.

278. *Id.*

279. *Id.* at 448–49.

280. *Ixonia State Bank v. Ingersoll (In re Ingersoll)*, 8 B.R. 912, 916–17 (Bankr. W.D. Wis. 1981).

281. Compare discussion *infra* notes 282–94 and accompanying text, with discussion *infra* notes 295–304 and accompanying text.

282. *Am. Indus. Leasing Co. v. Geiger*, 118 Wis. 2d 140, 142, 345 N.W.2d 527, 528 (Ct. App. 1984).

283. *Id.*

Upon the Geigers' default, litigation ensued between the parties, and the Geigers argued that the WCA exclusions did not apply to consumer leases.<sup>284</sup> In other words, the Geigers proposed that all consumer leases were subject to WCA.<sup>285</sup> The court noted that the Geigers' lease was a consumer credit transaction and as such was a consumer transaction subject to the WCA.<sup>286</sup> The issue, however, was whether the transaction was subject to one of the \$25,000 exclusionary clauses provided in the WCA.<sup>287</sup> The Geigers argued that because the first exclusionary rule defines amount financed in terms of consumer credit sales and consumer loans, and the third exclusionary rule in terms of cash price, the legislature must have intended consumer leases not to be included in the exclusionary clauses.<sup>288</sup> The court, however, disagreed with the Geigers' interpretation of the WCA.<sup>289</sup> The court reasoned that the purpose behind the \$25,000 exclusion is that transactions under \$25,000 should be given protection under the WCA, but the transactions over \$25,000 will likely involve the assistance of counsel.<sup>290</sup> Therefore, the court concluded it would be logical to apply the \$25,000 exclusion to all consumer transactions, including consumer leases.<sup>291</sup> The court chose to apply the first exclusionary clause and proceeded to determine the amount financed under the lease.<sup>292</sup> The court reasoned that the amount financed is that amount to which an interest rate is charged.<sup>293</sup> The court held the amount financed was the purchase price by American, or \$29,050, and as a result, the WCA was not applicable to the transaction.<sup>294</sup>

A contrary analysis is presented in *American Industrial Leasing Co. v. Moderow*.<sup>295</sup> In *Moderow*, the Moderows agreed to make eighty-four lease payments of \$619.22 (\$52,014.48) to American for a mono-slope hog confinement building that was to be placed on the Moderows'

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284. *Id.* at 144–45.

285. *Id.*

286. *Id.* at 143–44.

287. *Id.* at 144.

288. *Id.* at 144, 146.

289. *Id.* at 146.

290. *See id.* at 145.

291. *Id.*

292. *Id.* at 146.

293. *Id.* at 148.

294. *Id.*

295. *Am. Indus. Leasing Co. v. Moderow*, 147 Wis. 2d 64, 432 N.W.2d 617 (Ct. App. 1988).

property.<sup>296</sup> American bought the building for \$25,100 for the purpose of leasing it to the Moderows.<sup>297</sup> The “lease provided that [the] title to the building would remain with American and . . . the building would be returned to American [at the] expiration of the lease [term].”<sup>298</sup> The lease agreement required the Moderows to pay three monthly payments (\$1,857.66) prior to installing the building on their property.<sup>299</sup> The initial payment was applied toward satisfaction of the Moderows’ obligation.<sup>300</sup> Thereafter, when litigation ensued, the Moderows argued that the WCA applied to their transaction.<sup>301</sup> Specifically, they asserted that the transaction was less than \$25,000 because the cash price for the building (\$25,100) less the initial payment (\$1,857.66) resulted in a \$23,242.34 transaction.<sup>302</sup> The court, however, concluded that the \$25,100 figure was the cash price for the building, and the initial payment of the three installment payments of the eighty-four month agreement was not a “down payment” intended to reduce the purchase price.<sup>303</sup> Therefore, the cash price exceeded the \$25,000 limit of the Act and was excluded.<sup>304</sup>

The concept of cash price appears in both the first and third exclusionary clause.<sup>305</sup> In the first exclusionary clause, the concept appears in the definition of amount financed, but only with reference to consumer credit sales.<sup>306</sup> The *Moderow* court clearly held that the consumer lease in *Moderow* was not a consumer credit sale, and no mention was ever made of the lease qualifying as a consumer loan.<sup>307</sup> Therefore, the only exclusionary rule that the *Moderow* court could have been applying that contains the concept of cash price is the third exclusionary rule.

The *Moderow* and *Geiger* cases raise two interesting issues. First,

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296. *Id.* at 65.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 66; *see also* 1997 Wis. Act 302 (restricting the WCA coverage for agricultural transactions such that transactions like the Moderows’ lease are subject to more limited requirements under the WCA); WIS. STAT. § 421.202(10) (2011–2012).

302. *Moderow*, 147 Wis. 2d at 67.

303. *Id.* at 69.

304. *Id.*

305. WIS. STAT. § 421.202(6).

306. *Id.*

307. *Moderow*, 147 Wis. 2d at 70–71.

for consumer leases (other than motor vehicle leases consumer leases that are covered by the second exclusionary clause), is the first or third exclusionary clause the correct one to apply? The answer will depend upon the subject matter of the consumer lease.

The first exclusionary clause applies to “[c]onsumer credit transactions” in which the amount financed exceeds \$25,000.<sup>308</sup> “Consumer credit transaction” is a very broad term<sup>309</sup> and specifically includes consumer credit sales, consumer loans, consumer leases, and transactions pursuant to open-end credit plans.<sup>310</sup> A consumer credit sale,<sup>311</sup> consumer lease,<sup>312</sup> and consumer loan<sup>313</sup> are three separate and distinct types of consumer credit transactions. They are mutually exclusive terms. In other words, a consumer credit sale is neither a consumer lease nor a consumer loan, and vice versa.

The consumer lease included within the definition of consumer credit transaction is a consumer lease of goods, not real property.<sup>314</sup> Therefore, the *Geiger* transaction, which involved the lease of two tractors, is a consumer lease, not a consumer credit sale or a consumer loan.

The *Moderow* transaction, on the other hand, involved the lease of a building to be affixed to the Moderows’ real estate.<sup>315</sup> Is the subject matter of that lease goods, fixtures, or real property? If the lease is deemed to be a leasehold interest in real property, the WCA will not apply.<sup>316</sup> The subject matter of the lease is the lease of a building separate and apart from any real estate interest. Thus, the lease is not a leasehold interest in real property. Can the building qualify as a good? “A contract for the sale apart from the land of . . . things attached to [the] realty and capable of severance without material harm . . . is a contract for the sale of goods.”<sup>317</sup> In *Myhre v. Michigan Silo Co.*, the

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308. WIS. STAT. § 421.202(6).

309. See Anzivino, discussion *supra* note 15, at 205, 218, 220–21, 236.

310. WIS. STAT. § 421.301(10).

311. *Id.* § 421.301(9).

312. *Id.* § 421.301(11).

313. *Id.* § 421.301(12).

314. *Id.* § 421.301(10)–(11).

315. *Am. Indus. Leasing Co. v. Moderow*, 147 Wis. 2d 64, 65–66, 432 N.W.2d 617, 618 (Ct. App. 1988).

316. WIS. ADMIN. CODE DFI-WCA § 1.05 (July 2007).

317. WIS. STAT. § 402.107(2); see also *id.* § 402.107(1) (noting that section 402.107(1) applies only to contracts for the sale of a structure to be removed from the realty and as such, contemplates a building that is already affixed to real estate and is to be removed).

Wisconsin Supreme Court held that a lender was entitled to remove a silo from a farm after the farmer defaulted on his loan because there was no material injury to the farm as a result of the removal.<sup>318</sup> Therefore, it appears that the lease of the building is a lease of goods. But, a fixture is a good that has become so related to the real estate that an interest arises in it under real property law.<sup>319</sup> Wisconsin uses three tests to determine whether a good affixed to the real estate has become a fixture or remains personal property.<sup>320</sup> The tests are as follows: “(1) [a]ctual physical annexation to the real estate; (2) application or adaptation to the use or purpose [of] which the realty is devoted”; and (3) whether the person making the annexation intends to make it a permanent accession or not.<sup>321</sup> The main test is the party’s intent at the time of the annexation.<sup>322</sup> In the *Moderow* case, there is no question that the parties’ intent was to return the building to the lessor at the end of the lease term.<sup>323</sup> Therefore, the lease of the building did not involve a fixture but a good. The *Moderow* lease is a consumer lease, not a consumer credit sale or a consumer loan.

The first exclusionary clause is further qualified by referring to consumer credit transactions where the amount financed is greater than \$25,000. The amount financed only applies to transactions that are either a consumer credit sale or a consumer loan.<sup>324</sup> A consumer lease is not a consumer credit sale or a consumer loan. Therefore, consumer leases cannot fall within the coverage of the first exclusionary clause, contrary to the *Geiger* court decision, which analyzed the transaction under the first exclusionary clause.

The third exclusionary clause applies to any “other consumer transaction[]” where the cash price exceeds \$25,000.<sup>325</sup> What are these other consumer transactions? On its face, the third exclusionary clause appears to be the catch-all clause. In other words, what is not included in the first two clauses is logically included in the third clause. As noted

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318. *Myhre v. Mich. Silo Co.*, 220 Wis. 593, 597, 265 N.W. 703, 705 (1936).

319. WIS. STAT. § 409.102(k).

320. *Auto Acceptance & Loan Corp. v. Kelm*, 18 Wis. 2d 178, 182, 118 N.W.2d 175, 178 (1962).

321. *Id.*

322. *Id.*

323. *Am. Indus. Leasing Co. v. Moderow*, 147 Wis. 2d 64, 65, 432 N.W.2d 617, 618 (Ct. App. 1988).

324. WIS. STAT. § 421.301(5)(a).

325. WIS. STAT. § 421.202(6).



above, the first exclusionary clause applies to consumer credit sales and consumer loans, and the second exclusionary clause applies to motor vehicle consumer leases. Necessarily, the third exclusionary clause must apply to any other consumer transaction that does not fall within the first two exclusionary clauses. Therefore, the third exclusionary clause will apply to all consumer leases of goods (other than motor vehicle leases) like *Geiger* and *Moderow*.

Second, how should a court calculate the cash price under the third exclusionary clause for transactions like *Geiger* and *Moderow*? A cursory review of both *Geiger* and *Moderow* indicates that there was no cash price between the lessor and lessee in either case.<sup>326</sup>

The third exclusionary clause excludes other consumer transactions where the cash price exceeds \$25,000.<sup>327</sup> The cash price used by the court in both *Moderow* and *Geiger* was the price the lessor spent to purchase the leased item from some third party.<sup>328</sup> But that is not the cash price of a lease. The WCA defines the cash price as the “price at which property . . . [is] offered, in the ordinary course of business, for sale for cash.”<sup>329</sup> The consumer transaction subject to measure under the WCA is the lease between the lessor and lessee not the lessor’s prior transaction. The current cash value of any future stream of cash payments (the lease payments) is determined by calculating its present value.<sup>330</sup> For both leases, the “cash value” would be the present value of the monthly payments over the term of the lease. Those are the values that should be measured against the \$25,000 cap.

### C. The First Lien Real Estate Mortgage Exclusion

First lien real estate mortgages or their equivalent security interest are excluded from WCA coverage.<sup>331</sup> The reason for the exclusion is that Chapter 428 covers first lien real estate mortgages and their equivalent security interest.<sup>332</sup> The concept of what constitutes an equivalent security interest<sup>333</sup> has been subject to some interpretation.

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326. See discussion *supra* notes 282–304 and accompanying text.

327. WIS. STAT. § 421.202(6).

328. *Moderow*, 147 Wis. 2d at 69; *Am. Indus. Leasing Co. v. Geiger*, 118 Wis. 2d 140, 148, 345 N.W.2d 527, 528-29 (Ct. App. 1984).

329. WIS. STAT. § 421.301(7).

330. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004).

331. WIS. STAT. § 421.202(7).

332. *Id.* § 428.101.

333. *Id.*

For example, in *Ott v. Peppertree Resort Villas, Inc.*, the Otts purchased a time-share ownership interest in a resort in the Wisconsin Dells.<sup>334</sup> The Otts signed a time-share contract that provided for installment payments over eighty-four months, and Peppertree retained title to the time-share unit until all payments were made.<sup>335</sup> In fact, the Otts did make payments for five years before they sought to rescind the time-share purchase.<sup>336</sup> As part of their rescission action, the Otts claimed that Peppertree had violated the WCA during the initial sale.<sup>337</sup> Peppertree, on the other hand, argued that the WCA did not apply because the land contract qualified as a first lien on real estate and was thereby excluded from WCA compliance.<sup>338</sup>

There are, of course, two issues that must be proven before the exclusion can apply. First, the exclusion requires that the lien must be on real estate.<sup>339</sup> Without any analysis, the court held that the sale of a time-share interest was real estate.<sup>340</sup> Second, the interest must be a first lien on real estate.<sup>341</sup> On the second issue, the court reasoned that in order for a transaction to qualify as a first lien on real estate the transaction must involve a loan.<sup>342</sup> The Otts argued that Peppertree never advanced any monies to them, so, therefore, there was no loan involved in the transaction.<sup>343</sup> Peppertree acknowledged that it did not advance any monies to the Otts but claimed that their “forbearance”<sup>344</sup> on the balance of the purchase price constituted a loan.<sup>345</sup> The court held that the forbearance by Peppertree on the balance of the monies due under the time-share contract did constitute a loan.<sup>346</sup> Further, the court concluded that the land contract sale of the time-share interest was analogous to a first lien real estate mortgage or an equivalent

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334. *Ott v. Peppertree Resort Villas, Inc.*, 2006 WI App 77, ¶ 7, 292 Wis. 2d 173, 716 N.W.2d 127.

335. *Id.* ¶ 31.

336. *Id.* ¶ 8.

337. *Id.* ¶¶ 8–9.

338. *Id.* ¶ 30 & n.13.

339. WIS. STAT. § 421.202(7) (2011–2012).

340. *Ott*, 2006 WI App 77, ¶ 30.

341. WIS. STAT. § 421.202(7).

342. *See Ott*, 2006 WI App 77, ¶¶ 31–35.

343. *Id.* ¶ 32.

344. WIS. STAT. §§ 428.102(4), 421.301(23)(d).

345. *Ott*, 2006 WI App 77, ¶ 32.

346. *Id.*; *see also* *State v. J.C. Penney Co.*, 48 Wis. 2d 125, 134–35, 139, 179 N.W.2d 641, 646, 648 (1970) (holding forbearance on a debt can constitute a loan).

security interest.<sup>347</sup> As such, the transaction qualified under the WCA exclusion.<sup>348</sup>

In addition to a land contract sale qualifying as an equivalent security interest, a second mortgage also qualifies if there is no intervening lien and the mortgagee holds the first mortgage on the property as well.<sup>349</sup> However, even if there is an intervening lien holder, advances made by the first mortgage holder, after the intervening lien holder, can relate back to the first mortgage holder's priority date.<sup>350</sup> In *Bank of Barron v. Gieseke*, the debtors purchased real estate pursuant to a recorded land contract.<sup>351</sup> Coincidentally, the debtors executed and recorded a CRESA in favor of the Bank of Barron.<sup>352</sup> The purpose of the CRESA was to give the Bank a lien on the debtors' property in the event the Bank made future advances to the debtors.<sup>353</sup> In fact, the Bank did eventually make thirty-six advances to the debtors, of which, five advances were outstanding at the time of the Bank's foreclosure action.<sup>354</sup> All five advances made by the Bank were made after a second mortgage holder recorded an interest in the debtors' property.<sup>355</sup>

Two issues arose with regard to the five advances. First, did the advances have priority over the second mortgage holder since the advances were made after the recording of the second mortgage? The court noted that the law in Wisconsin is fairly well settled that if a first mortgage holder is contractually obligated to make an advance, the advance dates back to the original mortgage recording date and would have priority over an intervening second mortgage holder.<sup>356</sup> Conversely, if the future advance made by the first mortgage holder is optional and the first mortgage holder has actual knowledge of the

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347. *Ott*, 2006 WI App 77, ¶ 35; *see also* *Milbrandt v. Huber*, 149 Wis. 2d 275, 288, 440 N.W.2d 807, 811 (Ct. App. 1989) (“The relationship between vendor and vendee in a land contract is analogous to that of equitable mortgagor and mortgagee.”); WIS. ADMIN. CODE DFI-WCA § 1.261 (July 2007) (providing that “[T]he term ‘equivalent security interest’ as used in WIS. STAT § 422.202(2)(b) . . . include[s] a seller’s interest under a land contract”).

348. *Ott*, 2006 WI App 77, ¶ 35.

349. DFI-WCA § 1.261.

350. *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 464–65, 485 N.W.2d 426, 436 (Ct. App. 1992).

351. *Id.* at 447.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 462.

intervening second mortgage holder at the time of the advance, the second mortgage holder has priority.<sup>357</sup> With regard to the first three advances made by the Bank, the court concluded that the Bank did not have actual knowledge of the existence of the second mortgage holder at the time of the advances, and as such, the advances related back to the original recording date.<sup>358</sup> However, the Bank made the fourth and fifth advances with actual knowledge of the second mortgage holder's position.<sup>359</sup> Both the fourth and fifth advances were made to renew or re-amortize prior notes.<sup>360</sup> The court noted that a new note that renews an old note assumes the priority position of the old note.<sup>361</sup> The court held that the fourth advance was subordinate to the second mortgage holder because the fourth advance did not relate back to the CRESA and it renewed a loan that occurred after the recording of the second mortgage.<sup>362</sup> With regard to the fifth advance, the court held that even though it was made with actual knowledge of the second mortgage holder's position, the fifth advance had priority over the second mortgage holder.<sup>363</sup> The court reasoned that the fifth advance renewed a note issued prior to the second mortgage holder's recorded position and related back to the CRESA recording date despite its actual knowledge at the time of the advance.<sup>364</sup>

The second issue is why did the first lien real estate exclusion not apply since four of the five advances related back to the first mortgage recording date? The first lien real estate mortgage exclusion applies to exclude all first lien real estate mortgages notwithstanding the amount of the loan.<sup>365</sup> However, the WCA does provide that a merchant can agree to be subject to it.<sup>366</sup> As a result, the court reasoned that the lender implicitly agreed to be subject to the WCA because the documentation that evidenced the four advances<sup>367</sup> specifically

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357. *Id.* at 462–63; *see also* Colonial Bank v. Marine Bank, N.A., 152 Wis. 2d 444, 447, 448 N.W.2d 659, 660 (1989).

358. *Bank of Barron*, 169 Wis. 2d at 463.

359. *Id.*

360. *Id.* at 459, 464.

361. *Id.* at 464.

362. *Id.* at 459.

363. *Id.* at 464.

364. *Id.*

365. WIS. STAT. § 421.202(7) (2011–2012).

366. *Id.* § 421.301(17).

367. *Bank of Barron*, 169 Wis. at 460 (noting that the \$68,000 advance (third advance) did not reference the CRESA but was given priority because by paying off the land contract

referenced the prior CRESA loans.<sup>368</sup>

### III. CONCLUSION

The WCA applies to consumer credit transactions.<sup>369</sup> The three most common types of consumer credit transactions are consumer credit sales, consumer leases, and open-end credit plans.<sup>370</sup> It is important to distinguish between these three different types of consumer credit transactions because different parts of the WCA will apply to a transaction depending upon its classification.

A true lease or bailment is not a consumer credit sale.<sup>371</sup> But a disguised lease or bailment is a consumer credit sale.<sup>372</sup> A true lease or bailment is distinguished from a disguised one by determining whether the lessee or bailee can become the owner of the leased or bailed item for no additional or nominal consideration.<sup>373</sup> Wisconsin uses four tests to determine whether a consideration is nominal.<sup>374</sup> However, the WCA did not provide for those leases or bailments where the consideration is not nominal, yet the transaction is a disguised lease or bailment. For those situations, Wisconsin courts should use the economic realities test to determine whether the transaction is a true lease or bailment, or a disguised consumer credit sale.

For consumer leases, there are a number of issues. The primary issue, however, is whether the lease is a consumer lease or a commercial lease. Commercial leases are not subject to the WCA.<sup>375</sup> The courts

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the advance became subrogated to the land contract recording date that was prior to the second mortgage holder).

368. *Id.* at 458.

369. WIS. STAT. § 421.201.

370. *Id.* § 421.301(10).

371. *See id.* § 421.301(9) (omitting true lease or bailment from the definition of “[c]onsumer credit sale”).

372. *See id.* § 421.102(1)–(2) (explaining that the provisions and definitions of the WCA should be construed broadly and liberally so as to comport with the underlying purpose of protecting consumers); *see also* LeBakken Rent-To-Own v. Warnell, 223 Wis. 2d 582, 592–93, 589 N.W.2d 425, 430 (Ct. App. 1998) (noting that the WCA shall be read liberally “to promote the underlying purposes of the Act and [to] look[] beyond the transaction’s form to its substance,” and accordingly to include disguised leases).

373. *See* Am. Indus. Leasing Co. v. Moderow, 147 Wis. 2d 64, 70, 432 N.W.2d 617, 619 (Ct. App. 1988) (finding that the bailment agreement at issue created a lease agreement rather than a consumer credit sale because there was no option to purchase).

374. *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 770 (E.D. Wis. 1996).

375. *Id.* at 768 (explaining that while the UCC was intended to cover complex commercial transactions like commercial leases, the WCA was not intended to cover complex

have developed an objective test that involves considering many factors in deciding the proper classification for a lease.<sup>376</sup>

Open-end credit plans are subject to the most disclosures under the WCA.<sup>377</sup> An ordinary credit transaction also has disclosure requirements, but they are significantly less than an open-end credit plan.<sup>378</sup> A cash transaction, on the other hand, has no disclosure requirements even if the debtor does not make the cash payment as agreed, and a credit relationship ensues.<sup>379</sup> The courts have developed a number of tests for distinguishing the open-end credit plan from the ordinary credit transaction, and for distinguishing the cash transaction, which is not subject to the WCA disclosure requirements, from the two credit transactions.<sup>380</sup>

The article also dealt with the two most common exclusions under the WCA—consumer transactions that exceed \$25,000 and the first lien real estate mortgage. There are actually three different transactions that fall under the \$25,000 exclusion: (1) consumer credit transactions where the amount financed exceeds \$25,000;<sup>381</sup> (2) motor vehicle consumer leases where the total lease obligation exceeds \$25,000;<sup>382</sup> and (3) any other consumer transaction where the cash price exceeds \$25,000.<sup>383</sup> Each exclusion has its own unique legal issues. For example, multiple loans or advances between parties are generally analyzed as individual advances, not one total transaction, when applying the \$25,000 cap.<sup>384</sup> Despite the \$25,000 cap, however, advances that exceed \$25,000 can be covered by WCA depending upon the language used in the documents evidencing the transaction.<sup>385</sup> Also, the calculation of cash price has perplexed the courts, and a proposal is offered to assist in

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commercial transactions, but instead was meant to cover transactions involving “the average consumer”).

376. See *Duston v. Badger Lease*, No. 93-1402, 1994 Wisc. App. LEXIS 202, at \*4–6 (Feb. 22, 1994) (discussing considerations taken into account by the trial court).

377. Compare WIS. STAT. § 422.308, with WIS. STAT. § 422.302.

378. WIS. STAT. § 422.302.

379. See discussion *supra* notes 135–37 and accompanying text.

380. See discussion *supra* Part I.C.

381. WIS. STAT. § 421.202(6).

382. *Id.*

383. *Id.*

384. *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 448, 597 N.W.2d 462, 474 (Ct. App. 1999).

385. See *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 457, 485 N.W.2d 426, 433 (Ct. App. 1992).

that calculation.

Finally, the first lien real estate mortgages exclusion was analyzed.<sup>386</sup> Those interests that qualify as equivalent security interests were identified.<sup>387</sup> Also, guidelines were provided for analyzing the priority dispute between a first lien holder and a second lien holder when the first lien holder makes future advances after the second lien holder is of record.<sup>388</sup>

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386. See discussion *supra* Part II.C.

387. See discussion *supra* Part II.C.

388. See discussion *supra* notes 356–57 and accompanying text.