

## THOUGHT LEADERSHIP

LEGAL UPDATES

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# Creditors' Liability Under WCA Limited by Wisconsin Supreme Court

### What This Means

An additional independent cause of action is not automatically created under the debt collection statute when there is non-compliance with other provisions of the WCA, such as filing a collection action or repossessing a vehicle without first sending a proper statutory notice, including a notice of right to cure.

The debt collection statute prohibits identified instances of “egregious behavior.” To establish liability under the statute, there must be conduct falling within one of the statute’s specific prohibitions. Sending an improper notice of right to cure does not constitute egregious behavior.

If a creditor fails to send a proper notice of right to cure before suit, the customer is entitled to dismissal of the action without prejudice (which dismissal the creditor may initiate), but likely nothing more. The loan agreement can be subsequently enforced in a collection lawsuit if a proper notice of right to cure is sent.

**Background.** In the creditor’s collection action, the defendant borrower counterclaimed, alleging that the creditor failed to send a proper notice of right to cure under Wis. Stat. §§ 425.104 and 425.105 before commencing the lawsuit. The borrower claimed that such failure not only violated those sections, but also violated the WCA’s debt collection statute, Wis. Stat. § 427.104(1), which prohibits “debt collectors” (defined to include first-party creditors) from engaging in certain practices in collecting debts owed by a consumer. The trial court dismissed the counterclaim and the borrower appealed.

With increasing regularity, consumer lawyers have alleged that violations of one section of the WCA also automatically results in a violation of the WCA debt collection statute. By asserting a claim under the debt collection statute, consumer lawyers hope to raise the stakes: the damages permitted under it are broader, allowing for the recovery of emotional distress in addition to the normal WCA remedies of actual damages, specified penalties and attorneys' fees.

**Question decided by the court.** Based on the borrower's petition for review, the only question presented to the Supreme Court was whether filing a collection action before sending a proper notice of right to cure violates two provisions in Wis. Stat. § 427.104(1), namely whether commencement of the lawsuit:

- (1)(g) was a communication with the customer in "a manner as can reasonably be expected to threaten or harass the customer" and/or
- (1)(j) was an "attempt...to enforce a right with knowledge or reason to know that the right does not exist."

**Decision.** The Supreme Court held that failing to send a proper notice of right to cure is a procedural defect ("miscue") that can result in dismissal of the collection action without prejudice, but does *not* result in a violation of the WCA debt collection statute.

**Reasoning.** The court rejected the first allegation under § 427.104(1)(g), holding that filing suit before sending a proper notice of right to cure is a procedural misstep, but that it is not "a communication with the customer... in such a manner as can reasonably be expected to threaten or harass the customer."

It concluded the borrower's claim was void of any allegation of threatening or harassing behavior, which is required by the plain language of the statute. For example, there were no allegations of "obscene or threatening language," "calling the consumer names, demeaning the consumer's occupation, or questioning the decisions that led to the consumer's account being placed with a collection agency."

Additionally, the court rejected the claim under § 427.104(1)(j). The borrower had argued that the creditor had no "right" to enforce the loan agreement until it sent the notice of cure. The court resoundingly rejected this assertion holding that the word "right" in attempting to enforce a "right" that "does not exist" refers to the rights in the loan agreement (contractual rights).

The court found that the creditor, in filing the lawsuit, was attempting to enforce its contractual rights to collect the loan obligation. The contractual right existed when the suit was filed (so there can be no

assertion that a right did not exist), but sending a proper notice of right to cure is a procedural step that must occur before suit is filed. The remedy, the court held, was dismissal of the lawsuit without prejudice. Thus, the creditor can correct the procedural misstep by sending a proper notice to cure before commencing a new collection action.

### **Contact Us**

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