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Recent Wisconsin Supreme Court Decision Clarifies Parameters for Self-Help Repossessions

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Key points:

The Wisconsin Supreme Court's recent decision in *Duncan v. Asset Recovery Specialists*, 2022 WI 1, provides a clarifying interpretation of provisions of the Wisconsin Consumer Act (WCA) relating to repossessions and statutory unconscionability.

This decision expands the potential exposure of lenders engaging in self-help repossession in Wisconsin by affirming the lower court's decision that under the WCA a garage attached to a residential building is included in the definition of a dwelling used by the customer.

In light of this decision, lenders may wish to consider adjusting their repossession practices and/or work with their repossession companies to ensure compliance with this development.

In a positive development for lenders, the Court also concluded that WCA unconscionability may be asserted only *in response* to an action brought by a creditor to enforce rights arising from consumer credit transactions—resolving the longstanding question of when the WCA's unconscionability statute may be raised.

Husch Blackwell attorneys Lisa Lawless (Milwaukee), Marci Kawski (Madison), and Lauren Capitini (Madison) represented creditors' interests in

Duncan, filing an amicus brief on behalf of The Wisconsin Credit Union League and the American Financial Services Association.

Prohibition of entering customer's dwelling to repossess

WCA § 425.206(2)(b) prohibits repossession of a vehicle by "[e]ntering a dwelling used by the consumer as a residence" except at the customer's voluntary request. In *Duncan* the repossessor entered an open garage attached to the customer's multi-unit apartment building to repossess the customer's vehicle. In a 4 to 3 decision, the Court held that "dwelling used by the customer as a residence" "includes a garage attached to the residential building in which the customer lives."

WCA unconscionability is only a shield, not a sword

Duncan also answers a question that had long been unaddressed by Wisconsin appellate courts: may a customer bring an independent claim for unconscionability under WCA § 425.107(1), or can unconscionability only be raised in response to a creditor's enforcement action? Citing federal decisions, the Court noted that WCA unconscionability claims are available only in limited circumstances, in "response" to a creditor enforcement action, which "limitations are in line with the common law doctrine of unconscionability, which is a defense to contract enforcement, not an affirmative claim available outside a contract-enforcement or breach-of-contract action." Thus, the Court held that it may be asserted only in response to a creditor's lawsuit to enforce rights arising from consumer credit transactions.

What this means to you

We believe that this decision expands the potential exposure of lenders engaging in self-help repossession by broadening the universe of repossessions that violate the statute. Such exposure is significant because the remedy for improper repossessions under the WCA is the "jackpot remedy" (requiring refund of monies paid, waiver of any remaining balance, and release of the lender's lien interest in the vehicle). Therefore, repossession providers and lenders who take security interests in vehicles and order repossessions should consider adjusting their practices in light of *Duncan*.

The decision also aligns Wisconsin law with federal courts that rejected independent unconscionability claims and confined unconscionability to a defense to creditor actions. This means that a customer may not bring an affirmative claim of WCA unconscionability against a lender as has frequently been done in the past.

Contact us

Husch Blackwell's Wisconsin-based Consumer Financial Services team stands ready to assist lenders in thinking through the implications of *Duncan*. If you have questions, please contact Marci Kawski, Lauren Capitini, Lisa Lawless, or your Husch Blackwell attorney for assistance.