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March 8, 2004

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Substitute Amendment 1 to Senate Bill 486 and Assembly Substitute Amendment 1 to Assembly Bill 898: Regulation of Rental-Purchase Agreements Under the Wisconsin Consumer Act

Senate Substitute Amendment 1, as amended by Senate Amendment 1, to Senate Bill 486 and Assembly Substitute Amendment 1 to Assembly Bill 898 are identical pieces of legislation that would modify the regulation of rental-purchase agreements under the Wisconsin Consumer Act. SB 486 was introduced on February 24, 2004, and was referred to the Senate Committee on Agriculture, Financial Institutions, and Insurance. On March 3, 2004, SSA 1 to SB 486, along with SA 1 to SSA 1 to SB 486, were recommended for adoption by that Committee (in each case, on a vote of 5 to 0). The bill was referred to the Joint Committee on Finance on March 4, 2004. AB 898 was introduced on February 24, 2004, and was referred to the Assembly Committee on Financial Institutions. On March 4, 2004, that Committee recommended ASA 1 to AB 898 for adoption on a vote of 12 to 3. The bill was referred to the Joint Committee on Finance on March 4, 2004.

CURRENT LAW

Under current law, a consumer credit transaction entered into for personal, family, or household purposes is generally subject to the Wisconsin Consumer Act (WCA), which includes Chapters 421 through 427 of the state statutes. The consumer act grants consumers certain rights and remedies and contains notice and disclosure requirements and prohibitions relating to consumer credit transactions. Currently, a consumer lease that has a term of more than four months is among the consumer credit transactions that are subject to the consumer act. In addition, the consumer act applies to any other consumer lease, if the lessee pays or agrees to pay at least an amount that is substantially equal to the value of the leased property and if the lessee will become, or for not more than a nominal additional payment has the option to become, the owner of the leased property.

SUMMARY OF SUBSTITUTE AMENDMENTS

SSA 1 to SB 486, as amended, and ASA 1 to AB 898, would specify that certain of the WCA provisions under current law would not apply in the case of rental-purchase companies and rental-purchase agreements, and would, instead, create new provisions specific to such companies and agreements. The substitute amendments would specify that it is the responsibility of the Division of Banking (Division) in the Department of Financial Institutions (DFI) to enforce laws relating to the supervision and control of rental-purchase companies registered in this state. In addition, the substitute amendments would specify that Chapter 409, relating to the Uniform Commercial Code for secured transactions, does not apply in the case of a transfer of an interest under a rental-purchase agreement (as defined under the substitute amendments in Chapter 421, which governs consumer transactions generally). Additional provisions under the substitute amendments are described according to the chapter of the statutes that would be modified by these provisions.

General Provisions and Definitions of Consumer Transactions (Chapter 421)

Currently, the provisions of WCA apply to consumer transactions made in this state and to modifications including refinancings, consolidations, and deferrals (made in this state) of consumer credit transactions wherever made. The substitute amendments would specify that, for the purpose of these provisions, a rental-purchase agreement is considered as having been entered in this state if any of the following applies: (a) a writing signed by a lessee and evidencing the obligation under the rental-purchase agreement or an offer of a lessee is received by a rental-purchase company in this state; or (b) the rental-purchase company induces a lessee who is a resident of this state to enter into the rental-purchase agreement by face-to-face solicitation or by mail or telephone solicitation directed to the particular lessee in this state.

Under these provisions, if a rental-purchase agreement were made or modified in another state with a lessee who was a resident of this state at the time that the agreement or modification was made, the following would apply as though the agreement or modification occurred in this state: (a) a rental-purchase company, or an assignee of its rights, could collect through actions or other proceedings charges only to the extent permitted under Chapter 421; and (b) a rental-purchase company could not enforce any right against a lessee if the enforcement of that right would violate provisions that prohibit certain items from being included in a rental purchase agreement (as provided under the substitute amendments).

The substitute amendments would specify that, with the exception of rental-purchase agreements meeting the criteria described above, a rental-purchase agreement made or modified in another state with an individual who was not a resident of this state at the time that the agreement or modification was made, would be valid and enforceable under the laws of the state applicable to the transaction. For purposes of rental-purchase agreements, the residence of a lessee would be the address given by the lessee as his or her residence in any writing signed by the lessee in connection with a rental-purchase agreement. The given address would be presumed to be unchanged until the rental-purchase company knew or had reason to know of a new or different address.

The substitute amendments would provide that definitions of the following terms that generally apply under the WCA would not apply with respect to rental-purchase agreements (or associated services or property interests), a rental-purchase company, or rental property: (a) cash price; (b) consumer credit sale; (c) consumer credit transaction; (d) consumer lease; (e) consumer loan; (f) consumer transaction; (g) customer; (h) finance charge; (i) goods; (j) merchant; (k) personal property; (l) sale of services; and (m) security interest.

The substitute amendments would also create new definitions for rental property, a rental-purchase company, and a rental-purchase agreement that would generally be applicable for purposes of Chapters 421 through 427. “Rental property” would be defined as property rented under a rental-purchase agreement. A "rental-purchase company" would mean a person engaged in the business of entering into rental-purchase agreements in this state or acquiring or servicing rental-purchase agreements that are entered into in this state. A "rental-purchase agreement" would be defined as an agreement between a rental-purchase company and a lessee for the use of rental property if all of the following apply:

a. The rental property is to be used primarily for personal, family, or household purposes;

b. The agreement has an initial term of four months or less and is automatically renewable with each payment after the initial term;

c. The agreement does not obligate or require the lessee to renew the agreement beyond the initial term; and

d. The agreement permits, but does not obligate, the lessee to acquire ownership of the rental property.

Consumer Credit Transactions (Chapter 422)

The substitute amendments would specify that the existing five subchapters under Chapter 422 (relating to maximum charges, disclosure, and limitations on agreements and practices) would no longer apply to rental-purchase agreements. Instead, a new subchapter, Subchapter VI, would govern rental-purchase agreements. The following sections describe the proposed provisions.

General Requirements of Disclosure

The substitute amendments would require that the information required to be disclosed in a rental-purchase agreement (described below) would have to satisfy the following requirements with respect to form, location, size, and time of disclosure.

a. The information must be clearly and conspicuously disclosed;

b. The information must be disclosed in writing;

c. The information must be disclosed on the face of the rental-purchase agreement above the line for the lessee's signature;

d. The information must be disclosed in not less than 8-point standard type;

e. The information must be disclosed before the time that the lessee becomes legally obligated under the rental-purchase agreement;

f. The disclosures related to cash price, rental payments to acquire ownership, the cost of rental services, and rental payment must be printed in at least 10-point boldface type, and must be grouped together in a box, in the form and order prescribed by the Division.

The substitute amendments would also provide that the information required to be disclosed in a rental-purchase agreement would have to be accurate as of the time of disclosure to the lessee. If any information were to subsequently become inaccurate as a result of any act, occurrence, or agreement by the lessee, the resulting inaccuracy would not be a violation of any provision of the WCA relating to rental-purchase agreements.

The rental-purchase company would be required to provide the lessee with a copy of the completed rental-purchase agreement signed by the lessee. If more than one lessee were legally obligated under the same rental-purchase agreement, delivery of a copy of the completed rental-purchase agreement to one of the lessees would satisfy the general requirements of disclosure.

Finally, in a rental-purchase agreement, the lessee's rental payment obligations would have to be evidenced by a single instrument, which would have to include the signature of the rental-purchase company, the signature of the lessee, and the date on which the instrument was signed.

Required Provisions of Rental-Purchase Agreement

The substitute amendments would require a rental-purchase company to include all of the following information, to the extent applicable, in every rental-purchase agreement:

a. *Description*. A brief description of the rental property, sufficient to identify the property to the lessee and the rental-purchase company, including any identification number, and a statement indicating whether the property is new or used.

b. *Cash Price.* The price at which the rental-purchase company would sell the rental property to the lessee if the lessee were to pay for the property in full on the date on which the purchase agreement is executed, along with a statement that, if the lessee intends to acquire ownership of the property and is able to pay for the property in full or is able to obtain credit to finance the purchase, the lessee may be able to purchase similar property from a retailer at a lower cost.

c. *Rental Payments to Acquire Ownership.* The total number, total dollar amount, and timing of all rental payments necessary to acquire ownership of the rental property.

d. *Cost of Rental Services.* The difference between the total dollar amount of payments necessary to acquire ownership of the rental property and the cash price of the property. The rental-purchase company would also be required to include a statement substantially similar to the following: "The cost of rental services is the amount you will pay in addition to the cash price if you acquire ownership of the rented goods by making all payments necessary to acquire ownership."

e. *Rental Payment.* The rental payment for the rental property.

f. *Up-Front Payment.* Any payment required of the lessee at the time that the agreement is executed or the rental property is delivered, including the initial rental payment, any application or processing charge, any delivery fee, and any charge for a liability damage waiver or for other optional services agreed to by the lessee.

g. *Other Charges and Fees to Acquire Ownership.* The dollar amount, both itemized and in total, of all taxes, liability damage waiver fees, fees for optional services, processing fees, application fees, and delivery charges that the lessee would incur if the lessee were to rent the rental property until the lessee acquires ownership, assuming that the lessee does not add or decline the liability damage waiver or optional services after signing the rental-purchase agreement.

h. *Total Payments to Acquire Ownership.* The total of all charges to be paid by the lessee to acquire ownership of the rental property, which would consist of the total dollar amount of all rental payments (as disclosed under the agreement) and the total dollar amount of all other charges and fees (as disclosed under the agreement), along with a statement that this is the amount a lessee will pay to acquire ownership of the rental property if the tax rates do not change and if the lessee does not add or decline the liability damage waiver or optional services after signing the rental-purchase agreement. The information required under this provision would have to be printed in at least 10-point boldface type.

i. *Other Charges.* An itemized description of any other charges or fees that the rental-purchase company may charge the lessee that are not otherwise disclosed in the rental-purchase agreement.

j. *Summary of Early-Purchase Option.* A statement summarizing the terms of the lessee's options to acquire ownership of the rental property.

k. *Responsibility for Theft or Damage.* A statement that, unless otherwise agreed, the lessee is responsible for the fair market value of the rental property, determined according to the early-purchase option formula under (j), if the rental property is stolen, damaged, or destroyed while in the possession of or subject to the control of the lessee. The substitute amendments would also

provide that the statement must indicate that the fair market value will be determined as of the date on which the rental property is stolen, damaged, or destroyed.

l. *Service and Warranty.* A statement that during the term of the rental-purchase agreement, the rental-purchase company is required to service the rental property and maintain it in good working condition, as long as no other person has serviced the rental property. The substitute amendments would provide that, in lieu of servicing the rental property, the rental-purchase company could, at its option, replace the rental property. In addition, the rental-purchase company's obligation to provide service would be limited to defects in the property not caused by improper use or neglect by the lessee or harmful conditions outside the control of the rental-purchase company or manufacturer.

m. *Termination at Option of Lessee.* A statement that the lessee may terminate the agreement at any time without penalty by voluntarily surrendering or returning the rental property in good repair.

n. *Right to Reinstate.* A brief explanation of the lessee's right to reinstate a rental-purchase agreement.

o. *Rental Rather Than Purchase.* A statement that the lessee will not own the rental property until the lessee has made all payments necessary to acquire ownership or has exercised the lessee's early-purchase option. The rental-purchase company would also be required to include a notice reading substantially as follows: "You are renting this property. You will not own the property until you make all payments necessary to acquire ownership or until you exercise your early-purchase option. If you do not make your payments as scheduled or exercise your early-purchase option, the rental-purchase company may repossess the property."

p. *Information About Rental-Purchase Company and Lessee.* The names of the rental-purchase company and the lessee, the rental-purchase company's business address and telephone number, the lessee's address, and the date on which the rental-purchase agreement is executed.

q. *Optional Services.* Space for a specific, separately signed, affirmative written indication of the lessee's desire for any optional service for which a charge is assessed. The substitute amendments would specify that a lessee's request must be obtained after a written disclosure of the cost of the optional service is made, and the cost and term of such service must be listed at or near the signature space.

Prohibited Provisions of Rental-Purchase Agreements

The substitute amendments would prohibit a rental-purchase agreement from containing any of the following:

a. A confession of judgment;

b. A provision granting the rental-purchase company a security interest in any property, except rental property delivered by the rental-purchase company under the rental-purchase agreement;

c. A provision authorizing a rental-purchase company, or an agent of the rental-purchase company, to enter the lessee's premises without the lessee's contemporaneous permission, or to commit a breach of the peace in the repossession of rental property provided by the rental-purchase company under the rental-purchase agreement;

d. A waiver of a defense or counterclaim, a waiver of any right to assert any claim that the lessee may have against the rental-purchase company or an agent of the rental-purchase company, or a waiver of any provision of Chapters 421 to 427 relating to rental-purchase agreements;

e. A provision requiring rental payments totaling more than the total dollar amount of all rental payments necessary to acquire ownership, as disclosed in the rental-purchase agreement;

f. A provision requiring the lessee to purchase insurance from the rental-purchase company to insure the rental property;

g. A provision requiring the lessee to pay any attorney fees.

Liability Waiver

The substitute amendments would authorize a rental-purchase company to offer a liability waiver to the lessee. The terms of the waiver would have to be provided to the lessee in writing, incorporated into the rental-purchase agreement or on a separate document. The face of the writing would have to clearly disclose that the lessee is not required to purchase the waiver. The fee for the waiver could not exceed 10% of the rental payment due under the rental-purchase agreement, and the lessee would be entitled to cancel the waiver at the end of any rental term.

Lessee's Right to Acquire Ownership

The substitute amendments would provide that, at any time after the initial rental period, a lessee could acquire ownership of the property that is the subject of the rental-purchase agreement. To do so, the lessee would have to tender an amount not to exceed an amount equal to the cash price of the rental property multiplied by a fraction that has as its numerator the number of periodic rental payments remaining under the rental-purchase agreement and that has as its denominator the total number of periodic rental payments. A rental-purchase company could also require the lessee to pay any accrued unpaid rental payments and fees.

However, limits would be placed on the cash price and the cost of rental services under these provisions. The cash price for rental property could not exceed an amount equal to twice the actual purchase price of the rental property, including any applicable freight charges, paid by the rental-purchase company to a manufacturer or wholesaler. With respect to the amount charged by the rental-purchase company for the cost of rental services in a rental-purchase transaction, the total amount could not exceed the cash price of the property.

Unconscionable Conduct

The administrator of the Division of Banking in DFI would be required to promulgate rules declaring specific conduct in rental-purchase agreements and the collection of accounts and property arising therefrom to be unconscionable and prohibiting the use thereof. In promulgating such rules, the administrator would be required to consider, among other things:

a. That the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of lessees.

b. That those engaging in the practice know of the inability of lessees to receive benefits properly anticipated from the goods or services involved.

c. The fact that the practice may enable rental-purchase companies to take advantage of the inability of lessees reasonably to protect their interests by reason of physical or mental infirmities, illiteracy, or inability to understand the language of the agreement, ignorance or lack of education, or similar factors.

d. That the terms of the transaction require lessees to waive legal rights.

e. That the terms of the transaction require lessees to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction.

f. That the natural effect of the practice is to cause or aid in causing lessees to misunderstand the true nature of the transaction or their rights and duties thereunder.

g. That the writing purporting to evidence the obligation of the lessees in the transaction contains terms or provisions or authorizes practices prohibited by law.

h. Definitions of unconscionability in statutes, rules, rulings and decisions of legislative, administrative, or judicial bodies.

Receipts and Statements

A rental-purchase company would be required to provide a written receipt to the lessee for any payment made by the lessee in cash or, upon the request of the lessee, for any other type of

payment. Subject to provisions under the substitute amendments regarding fees for statements, upon the request of a lessee, a rental-purchase company would have to provide a written statement to the lessee showing the lessee's payment history on each rental-purchase agreement between the lessee and the rental-purchase company. A rental-purchase company would not be required to provide a statement covering any rental-purchase agreement that was terminated more than one year prior to the date of the lessee's request. A rental-purchase company could provide a single statement covering all rental-purchase agreements or separate statements for each rental-purchase agreement, at the company's option.

Upon the written request of a lessee (and also subject to the provisions regarding fees for statements) made during the term of, or no later than one year after the termination of, a rental-purchase agreement, a rental-purchase company would be required to provide a written statement to any person designated by the lessee, showing the lessee's payment history under the rental-purchase agreement.

Under the substitute amendments, a lessee or, if appropriate, a lessee's designee, would be entitled to receive one statement as described above without charge once every 12 months. A rental-purchase company would have to provide an additional statement if the lessee paid the rental-purchase company's reasonable costs of preparing and furnishing the statement.

Advertising

Under these provisions, if an advertisement for a rental-purchase agreement referred to or stated the amount of a payment for a specific item of property, the advertisement would generally also have to clearly and conspicuously state all of the following:

a. That the transaction advertised is a rental-purchase agreement;

b. The total number and total dollar amount of all rental payments necessary to acquire ownership of the property; and

c. That the lessee does not acquire ownership of the property if the lessee fails to make all rental payments or other payments necessary to acquire ownership of the property.

However, these advertising disclosure provisions would not apply to any in-store display or any advertisement that is published in the yellow pages of a telephone directory or in any similar directory of businesses.

Price Cards Displayed

The substitute amendments would specify that a card or tag that clearly and conspicuously states all of the following must be displayed on or next to any property displayed or offered by a rental-purchase company for rent under a rental-purchase agreement: (a) the cash price that a lessee

would pay to purchase the property; (b) the amount and timing of the rental payments; (c) the total number and total amount of all rental payments necessary to acquire ownership of the property under a rental-purchase agreement; (d) the cost of rental services under a rental-purchase agreement; and (e) whether the property is new or used.

However, if the property were offered for rent under a rental-purchase agreement through a catalog, or if the size of the property were such that displaying a card or tag on or next to the property would be impractical, a rental-purchase company could make the required disclosures in a catalog or list, if the catalog or list were readily available to prospective lessees.

Referral Transactions

The substitute amendments would prohibit a rental-purchase company from inducing any individual to enter into a rental-purchase agreement by giving or offering to give a rebate or discount to the individual in consideration of the individual's giving to the rental-purchase company the names of prospective lessees, as long as the earning of the rebate or discount was made contingent upon the occurrence of any event that took place after the time that the individual entered into the rental-purchase agreement.

However, after entering into a rental-purchase agreement, a rental-purchase company would be permitted to give or offer to give a rebate or discount to a lessee under the agreement in consideration of the lessee's giving to the company the names of prospective lessees. A rebate or discount under this provision could be contingent upon the occurrence of any event taking place after the time that the names were given to the rental-purchase company.

Termination of Rental-Purchase Agreement, Late Payment, Grace Period, and Late Fees

The substitute amendments would specify that the termination date of a rental-purchase agreement is the earlier of the following: (a) the day specified in the rental-purchase agreement as the day on which the rental term ends, unless a different day has been established under the agreement; or (b) the date on which the lessee voluntarily surrenders the rental property.

If a lessee failed to make any payment when due under a rental-purchase agreement or if, at the end of any rental term, the lessee failed to return the rental property or to renew the rental-purchase agreement for an additional term, the rental-purchase company could require the lessee to pay a late fee. This provision would not generally apply if the lessee's failure to return rental property or failure to renew the rental-purchase agreement at the end of the rental term were due to the lessee's exercise of an early-purchase option under the rental-purchase agreement or were due to the lessee's making all payments necessary to acquire ownership of the rental property. However, in the case of a transfer of ownership, a rental-purchase company could require payment of any outstanding late fees before transferring the ownership of rental property to a lessee.

The substitute amendments would provide the following grace periods for rental payments made with respect to a rental-purchase agreement: (a) for an agreement that is renewed on a weekly basis, no late fee could be assessed for a payment that is made within two days after the date on which the scheduled payment is due, and (b) for an agreement that is renewed for a term that is longer than one week, no late fee could be assessed for a payment that is made within seven days after the date on which the scheduled payment is due. Late fees would be subject to all of the following:

a. A late fee could not exceed $5 for each past-due rental payment;

b. A late fee could be collected only once on each rental payment due, regardless of how long the payment remains past due;

c. Payments received would be applied first to the payment of any rent that is due and then to late fees and any other charges; and

d. A late fee could be collected at the time that the late fee accrues or at any time afterward.

Reinstatement of Terminated Rental-Purchase Agreement

A lessee would be permitted to reinstate a terminated rental-purchase agreement without losing any rights or options previously acquired if: (a) the lessee returned or surrendered the rental property within seven days after the termination of the rental-purchase agreement; and (b) not more than 60 days had passed after the date on which the rental property was returned to the rental-purchase company or, if the lessee had paid two-thirds or more of the total number of rental payments necessary to acquire ownership of the property, not more than 120 days had passed since the date on which the property was returned.

As a condition of reinstatement, the rental-purchase company could require the payment of all past-due rental charges, any applicable late fees, a reinstatement fee not to exceed $5, and the rental payment for the next term. Nothing in these provisions would prohibit a rental-purchase company from attempting to repossess rental property upon termination of a rental-purchase agreement. However, such efforts would not affect the lessee's right to reinstate as long as the rental property was repossessed, voluntarily returned, or surrendered within seven days after the termination of the agreement.

Upon reinstatement, the rental-purchase company would be required to provide the lessee with the same rental property, if the property were available and in the same condition as when it was returned to the rental-purchase company, or with substitute property of comparable quality and condition.

Default and Right to Cure

A lessee would be in default under a rental-purchase agreement if: (a) the lessee failed to return rental property within seven days after the date on which the last rental term for which a rental payment was made expired, unless the lessee had exercised an early-purchase option or had made all rental payments necessary to acquire ownership of the rental property; or (b) the lessee materially breached any other provision of the rental-purchase agreement. No cause of action would accrue against a lessee with respect to the lessee's obligations under a rental-purchase agreement except upon default and the expiration of any applicable period of time allowed for cure of the default.

With the exceptions described below, as a condition precedent to bringing an action against a lessee arising out of the lessee's default, a rental-purchase company would be required to provide a written notice of the default and of the right to cure the default to the lessee. The notice would have to specify the default and the action required to cure the default and to inform the lessee that if the default is not cured within 15 days after the notice is given the rental-purchase company may bring an action against the lessee.

However, a rental-purchase company would not be required to provide a notice of default and right to cure as a condition precedent to bringing an action against a lessee if the lessee breached the agreement and, in so doing, could or would materially impair the condition, value, or protection of the rental property. In addition, a written notice of default prior to bringing an action against a lessee would not be required if each of the following occurred twice during the 12 months before the date of the current default with respect to the same rental-purchase agreement: (a) the lessee was in default; (b) the rental-purchase company gave the lessee written notice of the default and of the lessee's right to cure; and (c) the lessee cured the default.

A rental-purchase company could request the voluntary return or surrender of rental property prior to the declaration of a default and the sending of written notice of default and right to cure. However, such a request would be subject to provisions (described below) regarding direct contact for purposes of repossession and to the general provisions under WCA regarding prohibited practices with respect to consumer transactions and debt collection.

With respect to "direct contact for purposes of repossession," a rental-purchase company could not generally take or attempt to take possession of rental property under a rental-purchase agreement by any means other than the legal process specified under these provisions or by return or voluntary surrender of the rental property by the lessee until at least 48 hours had lapsed after the rental-purchase company made a reasonable effort to contact the lessee and request the return or voluntary surrender of the property. However, if the rental-purchase company had attempted to engage in a telephone conversation with the lessee and the telephone number at the lessee's address had been disconnected, the 48-hour requirement would not apply. For purposes of these provisions, "reasonable effort" would mean any of the following:

a. Provided written notice, by certified mail, to the last known address of the lessee;

b. Engaged in a telephone conversation with the lessee; or

c. Attempted at least once on each of two consecutive days occurring after the most recent rental payment due date to engage in a telephone conversation with the lessee. Each attempt would have to be made to the last known telephone number at the lessee's address. If the rental-purchase company attempted to engage in such a telephone conversation and discovered that the telephone number was disconnected, the company would only have to have made the initial attempt to engage in a telephone conversation with the lessee.

The substitute amendments would require a rental-purchase company to maintain all necessary records to verify compliance with these provisions.

Consumer Approval Transactions and Other Consumer Rights (Chapter 423)

Based on the revised definitions under the substitute amendment described above under "Applicability of WCA to Rental-Purchase Agreements," the substitute amendments would generally exclude rental-purchase agreements from coverage under Chapter 423 of the statutes. However, the substitute amendments would specify that the subchapter of Chapter 423 concerning advertising would continue to apply to rental-purchase agreements. Such provisions refer to false, misleading, or deceptive advertising as well as remedies and penalty therefor.

Consumer Transactions -- Remedies and Penalties (Chapter 425)

Similarly, the substitute amendments would generally specify that current law provisions under Chapter 425 would no longer apply to rental-purchase agreements. However, the provisions under Chapter 425 regarding transactions that are void would apply with respect to a lessee to a rental-purchase agreement. In addition, a new subchapter would be created specifically on penalties, civil actions, limitations, and venue relating only to rental-purchase agreements. The new subchapter would include the following provisions.

Civil Actions and Defenses

The substitute amendments would provide that, in general, a rental-purchase company that violates any provision of the statutes relating to rental-purchase companies and rent-to-own agreements would be liable to a lessee damaged as a result of that violation for the costs of the action and for reasonable attorney fees as determined by the court, plus an amount equal to the sum of: (a) the actual damages, including any incidental and consequential damages, sustained by the lessee as a result of the violation; or (b) an amount equal to 25% of the total amount of payments necessary to acquire ownership of the property under the lessee's agreement, but not less than $100 nor more than $1,000. If more than one lessee were a party to the same rental-purchase agreement,

all of the lessees would be joined as plaintiffs in any action under these provisions, and the lessees would be entitled to only a single recovery.

The Secretary of DFI would be authorized to bring a civil action to restrain, by temporary or permanent injunction, a merchant from violating any provision relating to rental-purchase agreements, or from engaging in false, misleading, deceptive, or unconscionable conduct, in rental-purchase transactions.

If a rental-purchase company violated the statutes regarding prohibited provisions of a rent-to-own agreement, the lessee could retain the rental property without obligation to pay any amount and could recover any amounts paid to the rental-purchase company under the agreement.

However, in the case of a class action, a rental-purchase company that violated any provision of the statutes relating to rent-to-own agreements would be liable to the members of the class in an amount equal to the actual damages of the class, except that the total recovery for all lessees whose recovery is computed under item (b) above could not exceed $500,000 plus the costs of the action and reasonable attorney fees. In determining the amount to award in a class action, the court would have to consider, among other relevant factors, the amount of actual damages sustained by the members of the class, the frequency and persistence of the violations by the rental-purchase company, the resources of the company, the number of persons damaged by the violation, the presence or absence of good faith on the part of the rental-purchase company, and the extent to which the violation was intentional.

Notwithstanding these provisions, a class action could not be maintained with respect to unconscionable conduct, false, misleading, or deceptive advertising, or prohibited debt collection practices unless the conduct had been found to violate provisions on such conduct at least 30 days prior to the occurrence of the conduct involved in the class action by an appellate court of this state or by a rule promulgated by the Division, specifying with particularity the act or practice in question.

At least 30 days before commencing a class action for damages, a party would be required to: (a) notify the rental-purchase company against whom an alleged cause of action is asserted of the alleged claim or violation; and (b) demand that the rental-purchase company correct, or otherwise remedy, the basis for the alleged claim. The notice would have to be in writing and be sent by certified or registered mail, return receipt requested, to the rental-purchase company at the place where the transaction occurred, the company's principal place of business within the state, or, if neither would effect actual notice, the Department of Financial Institutions.

Generally, no action for damages could be maintained under these provisions if an appropriate remedy (which would include actual damages and could include penalties) were given, or agreed to be given within a reasonable time, to such party within 30 days after receipt of such notice. In addition, no action for damages could be maintained upon a showing by a rental-purchase company against whom the alleged claim or violation was asserted that all of the following existed:

a. All lessees similarly situated had been identified, or a reasonable effort to identify such other lessees had been made.

b. All lessees so identified had been notified that, upon their request, the rental-purchase company would make the appropriate remedy.

c. The remedy requested by the lessees had been or in a reasonable time would be given.

d. The rental-purchase company had ceased from engaging, or if immediate cessation were impossible under the circumstances, the rental-purchase company would, within a reasonable time, cease to engage in any acts on which the alleged claim was based.

An action for injunctive relief would be permitted without compliance with the 30-day notice provisions. Not less than 30 days after the commencement of such an action, and after compliance with 30-day notice provisions, the lessee could amend his or her complaint without leave of court to include a request for damages. The provisions outlined above regarding damages would apply if the complaint for injunctive relief were amended to request damages.

As soon as practicable after the commencement of an action brought as a class action, the court would be required to determine by order whether it is to be so maintained. An order could be conditional, and could be altered or amended before the decision on the merits. If the court determined that the action could not be maintained as a class action, it would have to allow the action to proceed on behalf of the parties appearing in the action.

In any class action, the court would be required to direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who could be identified through reasonable effort. The notice would have to inform each class member that: (a) the court will exclude him or her from the class if he or she so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may enter an appearance through his or her counsel.

The judgment in an action maintained as a class action, whether or not favorable to the class, would have to include and describe those whom the court found to be members of the class. The judgment in an action maintained as a class action, whether or not favorable to the class, would also have to include and specify or describe those to whom the notice provided was directed, and who had not requested exclusion, and whom the court found to be members of the class.

When appropriate, an action could be brought or maintained as a class action with respect to particular issues, or a class could be divided into subclasses and each subclass treated as a class. If judgment was for a class of plaintiffs, the court would be required to render judgment in favor of the Secretary of DFI and against the defendants for all costs of notice incurred by the Secreatry in such action.

In the conduct of actions to which the class action provisions applied, the court could make, alter, or amend orders that do any of the following:

a. Determine the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

b. Require, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

c. Impose conditions on the representative parties or on intervenors.

d. Require that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

e. Deal with similar procedural matters.

Once certified by the court under these provisions, a class action could not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise would have to be given to all members of the class in such manner as the court directed. A rental-purchase company would not be liable in a class action for statutory damages computed under such provisions unless it were shown by a preponderance of the evidence that the violation was a willful and knowing violation of Chapter 425.

Reasonable attorneys' fees in a class action would be determined by the value of the time reasonably expended by the attorney rather than by the amount of recovery on behalf of the class. A legal aid society or legal services program that represented a class would be awarded a reasonable service fee in lieu of reasonable attorneys' fees, equal in amount to the amount of the attorneys' fees as measured under these provisions. The Secretary of DFI, whether or not a party to an action, would bear the costs of notice except that such costs could be recovered from the defendant if the judgment were for a class of plaintiffs.

Notwithstanding any other provisions of Chapter 425, no customer would be entitled, in an individual or class action, to recover any penalties from civil actions and defenses if the rental-purchase company violating Chapter 425 showed by a preponderance of the evidence that the violation was not intentional, and that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid these errors.

The liability of a rental-purchase company under these provisions would be in lieu of any liability under the federal Consumer Credit Protection Act and state statutes concerning

precomputed loan law. An action by a person alleging a violation under Chapter 425 could not be maintained if a final judgment had been rendered for or against that person with respect to the same violation under the federal Consumer Credit Protection Act or under the state's precomputed loan law. If a final judgment were entered against any rental-purchase company under Chapter 425 and the federal Consumer Credit Protection Act or the state's precomputed loan law for the same violation, the merchant would have a cause of action for appropriate relief to the extent necessary to avoid double liability.

Limitation on Actions

An action brought by a lessee under these provisions would have to be commenced within one year after the date on which the alleged violation occurred, two years after the date on which the rent-to-own agreement was entered into, or one year after the date on which the last payment was made under the agreement, whichever is later.

Venue

In general, the venue for a claim arising out of a rental-purchase agreement would be any of the following counties: (a) where the lessee resides or is personally served; (b) where the rental property is located; or (c) where the lessee sought or acquired the property or signed the document evidencing his or her obligation under the terms of the agreement.

When it appeared from the return of service of a summons or otherwise that the county in which an action was pending under the above provisions was not a proper place of trial for the action, unless the defendant appeared and waived the improper venue, the court would be required to transfer the action to any county that was a proper place of trial.

If there were several defendants in an action arising out of a rental-purchase agreement, and if venue was based on residence, venue could be in the county of residence of any of the defendants.

Consumer Transactions -- Administration (Chapter 426)

The substitute amendments would specify that Subchapter III of Chapter 426, related to violations and enforcement, would continue to apply to rental-purchase agreements. In addition, a new subchapter would be created related to the licensure and oversight of rental-purchase companies by the Division of Banking. The provisions under the new subchapter are described below.

License Requirement

No person would be permitted to operate as a rental-purchase company without a valid license issued by the Division of Banking within the Department of Financial Institutions. A written application for a rental-purchase company license would have to be made to the Division in the

form prescribed by the Division. In addition to any other information that might be required by the Division, the form would have to include the applicant's social security number (for individuals) or federal employer identification number (for business entities). The Division could only disclose this information to the Department of Revenue (DOR) for the sole purpose of denying a license for delinquent taxes or to the Department of Workforce Development (DWD) for the purpose of denying a license for nonpayment of support. Applicants would be required to pay an application fee specified by rule. The Division could also require any applicant or licensee to file and maintain in force a bond, in a form prescribed by and acceptable to the Division, and in an amount determined by the Division.

Upon the filing of an application, the Division would be required to perform an investigation. In general, if the Division found that the character, general fitness, and financial responsibility of the applicant, its members (for partnerships, limited liability companies, and associations) and its officers and directors (for corporations) warranted the belief that the business would be operated in compliance with these provisions, the Division would be required to issue a license to the applicant. The Division could deny an application by providing written notice to the applicant stating the grounds for the denial. A person whose application was denied could request a hearing within 30 days. The Division could appoint a hearing examiner to conduct the hearing.

The Division would be prohibited from issuing a license if: (a) the applicant failed to provide a social security number or employer identification number; (b) DOR certified that the applicant was liable for delinquent taxes; or (c) the applicant failed to comply, after appropriate notice, with a subpoena or warrant issued by DWD or a county child support agency related to paternity or child support proceedings or was delinquent in making court-ordered support payments.

The license would have to identify the location at which the licensee was permitted to conduct business. A separate license would be required for each place of business maintained by the licensee, and the license would have to be posted in a conspicuous place at the business location. Licenses would not be assignable.

Licenses would remain in force until suspended or revoked by the Division or surrendered by the licensee. By June 1 of each year, each licensee would be required to pay to the Division an annual license fee specified by rule and provide a rider or endorsement to increase the amount of any required bond required by the Division.

Unless authorized to do so, in writing, by the Division, licensees could not conduct business as a rental-purchase company within any office, room, or place of business in which any other business is solicited or engaged in. The Division would be prohibited from unreasonably withholding such an authorization

The Division would be authorized, but not required, to issue an order suspending or revoking any license if the Division found that any of the following applied: (a) the licensee had violated any of the statutory provisions regarding rental-purchase companies and rental-purchase agreements,

any rules promulgated by the Division under these statutes, or any lawful order of the Division; (b) a fact or condition existed that, if it had existed at the time of the original application for the license, would have warranted the Division in refusing to issue the license; (c) the licensee had made a material misstatement in a license application or in information furnished to the Division; (d) the licensee had failed to pay the annual license fee or failed to maintain in effect any required bond; (e) the licensee has failed to timely provide any additional information, data, or records required by the Division; or (f) the licensee had failed to pay any penalties due under these provisions within 30 days after receiving notice that the penalties were due

The Division would be required to restrict or suspend a license if the Division found that the licensee was an individual who failed to comply, after appropriate notice, with a subpoena or warrant issued by DWD or a county child support agency related to paternity or child support proceedings or who was delinquent in making court-ordered support payments. The Division would also be required to revoke a license if DOR certified that the licensee was liable for delinquent taxes. Licensees would be entitled to notice and a hearing under the child support and tax delinquency license revocation provisions. No other notice or hearing would be provided.

Except as provided above in the provisions regarding child support and delinquent taxes, the Division would be prohibited from revoking or suspending a license except after a hearing under the provisions administering such licenses. A complaint stating the grounds for suspension or revocation together with a notice of hearing would have to be delivered to the licensee at least five days in advance of the hearing. In the event the licensee could not be found, the complaint and notice of hearing could be left at the place of business stated in the license, and this would be considered the equivalent of delivering the notice of hearing and complaint to the licensee.

No licensee would be permitted to change its place of business to another location without the Division's prior approval (which the Division would be prohibited from unreasonably withholding). Licensees would have to provide at least 15 days' prior written notice of a proposed change of location and would have to pay any applicable fees specified by rule. Upon approval of the new location, the Division would have to issue an amended license specifying the date on which the amended license was issued and the new location.

Except as provided in the preceding paragraph, a licensee would have to notify the Division of any material change to the information provided in the licensee's original application for a license or provided in a previous notice of change. Licensees would have to provide such notice within 10 days after the change. Licensees would have to provide any additional information, data, and records about the change to the Division within 20 days after the Division requested the information. The Division would be required to determine the cost of investigating and processing the change, and the licensee would be required to pay the cost within 30 days after the Division demanded payment. Any change that was subject to this notice requirement would be subject to Division approval. In reviewing the change, the Division would have to apply the criteria that are used for approval of an original license application.

By March 31 of each year, licensees would be required to file a report with the Division giving such reasonable and relevant information as the Division might require concerning the business and operations conducted by the licensee.

Licensees would be required to keep such books and records in the licensed location as, in the opinion of the Division, will enable the Division to determine whether these provisions were being observed. Licensees would have to preserve their records of a rental-purchase agreement for at least two years after making the final entry with respect to the agreement.

Powers and Duties of the Division of Banking; Administration

The Division of Banking would be authorized to issue any general order or special order in execution of or supplementary to the provisions on rental-purchase agreements, except that the Division could not issue an order that conflicted with these provisions.

For the purpose of discovering violations of these provisions, the Division could investigate or examine the business of a licensee transacted under these provisions. The place of business, books of accounts, papers, records, safes, and vaults of the licensee would be open to the Division for the purpose of an investigation or examination, and the Division would have the authority to examine under oath all persons whose testimony was required for an investigation or examination. The Division would be required to determine the cost of an investigation or examination, which would be paid by the licensee. The licensee would also have to pay the cost of any hearing, including witness fees, unless the Division or a court found that the licensee has not committed a violation. All costs owed to the Division would have to be paid within 30 days after the Division demanded payment. The state could maintain an action for the recovery of any costs owed under this provision.

If five or more persons filed a verified complaint with the Secretary of DFI alleging that a rental-purchase company had engaged in an act that was subject to action by the Secretary, the Secretary would be required to commence an investigation immediately.

The Secretary of DFI would be authorized to promulgate rules for the administration of the provisions regarding rental-purchase companies and rental-purchase agreements. The Division would have the same power to conduct hearings, take testimony and secure evidence as is provided under statutes relating to sellers of checks.

The substitute amendments would specify that "The Division may investigate any provision in chs. 421 to 427 relating to rental-purchase agreements or any lawful orders issued under sub.(1) are being violated." It appears that this provision is intended to authorize the Division to conduct investigations to determine whether any provisions under Chapters 421 through 427 related to rental-purchase agreements or any lawful orders issued under such chapters relating to rental-purchase agreements have been violated. The substitute amendments could be amended to clarify this provision.

Consumer Transactions -- Debt Collection (Chapter 427)

The substitute amendments would specify that the provisions of Chapter 427, which concerns consumer transactions and debt collections, would continue to apply to transactions in connection with rental-purchase agreements.

Applicability and Effective Date

The substitute amendments would take effect on the 90th day after publication, and would first apply to rental-purchase agreements, and conduct pursuant to those agreements, entered into on the effective date.

Senate Amendment 1 to Senate Substitute Amendment 1 to Senate Bill 486

The provisions described above refer to SSA 1 to SB 486 as amended by SA 1. SSA 1 to SB 486 would specify that a rental-purchase company could not generally take or attempt to take possession of rental property under a rental-purchase agreement by any means other than a legal process. The simple amendment (SA 1) specifies that a rental-purchase company could also take possession of rental property by the return or voluntary surrender of the rental property by the lessee. In addition, the amendment replaces four references to "section" with references to "subsection." As noted, SSA 1, as amended by SA 1, to Senate Bill 486 and Assembly Substitute Amendment 1 to Assembly Bill 898, are identical pieces of legislation.

FISCAL EFFECT

The Department of Financial Institutions has estimated it would need 1.5 additional FTE positions and $91,500 of additional program revenue expenditure authority to complete its obligations under these provisions. The Department has also estimated additional program revenue of $92,800 from license fees and examinations.

There would be no additional position or expenditure authority for DFI provided under the substitute amendments. However, the Department could request supplemental authority under sections 16.515 and 16.517 of the statutes.

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