

Marquette Law Review

Volume 96
Issue 1 Fall 2012

Article 6

The Wisconsin Consumer Act: When is a Transaction a Consumer Credit Transaction?

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Ralph C. Anzivino, *The Wisconsin Consumer Act: When is a Transaction a Consumer Credit Transaction?*, 96 Marq. L. Rev. 205 (2012).
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THE WISCONSIN CONSUMER ACT: WHEN IS A TRANSACTION A CONSUMER CREDIT TRANSACTION?

RALPH C. ANZIVINO*

The Wisconsin Consumer Act applies to all consumer credit transactions. A consumer credit transaction is a defined term under the Wisconsin Consumer Act. It has six essential elements that have been carefully interpreted by Wisconsin courts. First, the transaction must be a consumer transaction that can be a cash or credit transaction. Second, the transaction must involve a consumer that is contracting for property, services, or credit for personal, family, or household purposes. Third, the transaction must be between a customer and a merchant. The Wisconsin Consumer Act definition of a merchant is significantly different than the UCC definition of a merchant. Fourth, the subject matter of the transaction must be real or personal property, services, or money. The definitions and interpretations of personal property and services subject to the Wisconsin Consumer Act are so broad as to be nearly limitless. Fifth, the transaction must involve a grant of credit by the merchant to the customer. Significant litigation has evolved over the meaning of that phrase. Sixth, the contract between the merchant and the customer must either permit the customer to pay in installments or permit the merchant to charge a finance charge. There are a number of factors that courts consider in determining whether the parties' contract permits the customer to pay in installments. Although "finance charge" is a defined term, the courts have struggled when distinguishing a finance charge from an additional charge or a late payment fee.

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I. INTRODUCTION

For over forty years, the Wisconsin Consumer Act (WCA or “the Act”) has regulated transactions between consumers and merchants.¹ The WCA consists of seven chapters in the Wisconsin Statutes.² At its heart, the Act has two primary purposes—(1) to require merchants to supply certain disclosures to consumers³ and (2) to regulate merchant debt collection conduct.⁴ A merchant’s failure to comply with the many disclosure requirements, or violate any of the numerous collection limitations, will result in a violation of the Act and a coincidental judgment against the merchant.⁵ A violation of the Act can lead to severe consequences, which include paying the debtor’s attorneys’ fees; forgiving the balance due on the debt; reimbursing the debtor for all monies paid to the merchant; and permitting the debtor to keep the contracted-for item free of charge.⁶ Whether a transaction is subject to the WCA is a critical determination for both the debtor’s attorney and the merchant’s attorney. As one might suspect, the consumer’s attorney is claiming the Act does apply, while the merchant’s attorney asserts the Act does not apply.⁷ Normally, neither attorney is involved in the initial transaction between the consumer and merchant, but the issue comes to a boil when collection activity is initiated.

There are two prerequisites that must be satisfied before a transaction is subject to the WCA. The first is whether the transaction is the type of transaction between the consumer and merchant that causes it to be subject to the Act, and the second is a territorial requirement.⁸ The territorial requirement will be addressed in a subsequent article.⁹ Territorial issues aside, any transaction that qualifies as a consumer credit transaction is subject to all of the chapters of the WCA.¹⁰ There

1. 1971 Wis. Act 239; *see also* WIS. STAT. § 421.102(2) (2009–2010) (providing the underlying purposes and policies under the WCA).

2. *See* WIS. STAT. §§ 421–427.

3. *See id.* § 422.301–.310.

4. *See id.* § 427.104.

5. *See, e.g., id.* §§ 422.201(13), 423.302, 424.203(5).

6. *See id.* § 425.302–.305, .308.

7. *See generally* discussion *infra* Part II.

8. WIS. STAT. § 421.201.

9. Ralph C. Anzivino, *The Wisconsin Consumer Act: Territorial Considerations?*, 96 MARQ. L. REV. (forthcoming Spring 2013).

10. *See* WIS. STAT. §§ 421.201(1), 422.102, 423.201(1)(b), 424.102, 425.102, 426.102(2),

are six elements to a consumer credit transaction, and all must be satisfied to be subject to the Act.¹¹ This article will analyze each of the six elements of a consumer credit transaction.

II. CONSUMER CREDIT TRANSACTION

If a transaction is classified as a consumer credit transaction, essentially all of the chapters of the WCA will apply to the transaction.¹² A consumer credit transaction is a

[A] *consumer transaction* between a [B] *merchant* and a [C] *customer* in which [D] *real or personal property, services or money* is acquired [E] *on credit* and the customer's obligation is [F] *payable in installments* or for which credit a *finance charge* is or may be imposed, whether such transaction is pursuant to an open-end credit plan or is a transaction involving other than open-end credit.¹³

A consumer credit transaction “includes *consumer credit sales, consumer loans, consumer leases* and transactions pursuant to *open-end credit plans*.”¹⁴ There are numerous factors that must be established to qualify a transaction as a consumer credit transaction, and each factor will be analyzed separately.¹⁵ The first requirement is that the transaction must be a consumer transaction.¹⁶

A. Consumer Transaction

The first element of a consumer credit transaction is that the transaction must be a consumer transaction.¹⁷ A consumer transaction is “a transaction in which one or more of the parties is a customer for

427.102. Section 423.201(1)(b) of the Wisconsin Statutes applies if credit is extended. *Id.* § 423.201(1)(b). Because the first element of a consumer credit transaction requires a consumer transaction, *id.* § 421.301(10), any Chapter that applies to a “consumer transaction” must also apply to a consumer credit transaction.

11. WIS. STAT. § 421.301(10).

12. *See supra* note 10 and accompanying text.

13. WIS. STAT. § 421.301(10) (emphasis added).

14. *Id.* (emphasis added). Consumer credit sales, consumer loans, consumer leases, and transactions pursuant to open-end credit plans will be analyzed in a subsequent article.

15. *See discussion infra* Parts II.A–F.

16. *See* WIS. STAT. § 421.301(10).

17. *See id.*

purposes of that transaction.”¹⁸ No credit is required, so a cash transaction can be a consumer transaction.¹⁹ For example, where an individual purchased an automobile from an auto dealer, the court found a consumer transaction, regardless of whether the purchase was made by cash or credit.²⁰

There are two critical components in establishing a consumer transaction:²¹ First, one must be a customer; and second, there must be a transaction.²² A transaction is simply “an agreement between [two] or more persons, whether or not . . . enforceable . . . and includes the making of and the performance pursuant to that agreement.”²³ Generally, the parties’ dispute is not about whether there was an agreement, but rather about the terms of the agreement.²⁴ Most litigation, however, stems from the issue of whether one is a customer.²⁵

B. Customer

Whether one qualifies as a customer under the WCA is an element in determining whether the transaction is a consumer transaction and also a consumer credit transaction.²⁶ In other words, one must be a customer in both types of transactions.²⁷ A customer is an individual, not an organization, “who seeks or acquires real or personal property, services, money or credit for personal, family or household purposes.”²⁸ The WCA also includes an agricultural purpose in the definition of

18. *Id.* § 421.301(13).

19. *See id.* § 421.301(13), .301(17).

20. *See State Farm Mut. Auto. Ins. v. Ford Motor Co.*, 225 Wis. 2d 305, 311–12, 313 n.2, 592 N.W.2d 201, 204 n.2 (1999) (finding that the transaction at issue was a consumer transaction; however, neither party was arguing that the transaction in the case was not a consumer transaction).

21. *See* WIS. STAT. § 421.301(13).

22. *See id.*

23. *Id.* § 421.301(44).

24. *See* discussion *infra* Parts II.B–F.

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

26. *See* WIS. STAT. § 421.301(10), .301(13).

27. *See id.*

28. *Id.* § 421.301(17); *see, e.g., Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1048–49 (W.D. Wis. 2002) (finding that there was sufficient evidence that the timeshare interest purchases at issue were “consumer transactions” and that the plaintiffs were “customers” under the WCA); *Seidling v. Roedl*, No. 2009AP107, 2009 WL 4912570, at *1 (Wis. Ct. App. Dec. 22, 2009) (citing WIS. STAT. § 422.301(17)) (“The Roedls qualify as ‘customers’ because they contracted to acquire real property for personal purposes.”).

customer, but that is expressly limited to coverage under the debt collection chapter (Chapter 427 of the Wisconsin Statutes).²⁹ Despite the statute's clear limitation on coverage for agricultural purposes, some courts have used the agricultural purpose to construe one as a consumer for more than just the debt collection chapter.³⁰

The customer carries the burden of proof to establish that the transaction was for personal, family, or household purposes.³¹ An affidavit can be used to establish the customer's purpose.³² Real property, personal property, services, money, or credit is considered used for personal, family, or household purposes if it is used 50% or more for that purpose.³³ If an individual plaintiff is unable to satisfy the 50% rule, the plaintiff will not be a customer under the WCA.³⁴ For example, where an individual incurs credit to operate his business, that individual is not a customer under the WCA.³⁵ Similarly, where a buyer

29. WIS. STAT. § 421.301(17); *see also* State v. Ralph Hamel Forest Prods., Inc., 110 Wis. 2d 352, 354–55, 328 N.W.2d 884, 886 (Ct. App. 1982) (finding that “agriculture includes forestry”).

30. *See* Grand River Coop. v. Terbeest, 145 Wis. 2d 173, 175, 178, 426 N.W.2d 68, 69–70 (Ct. App. 1988) (finding that a contract between the appellant and an agricultural cooperative caused the appellant to be a “customer” for purposes of Section 422.305(1) of the Wisconsin Statutes); *see also* Ixonia State Bank v. Ingersoll (*In re* Ingersoll), 8 B.R. 912, 916 (Bankr. W.D. Wis. 1981) (finding that Ingersoll's agreement with respect to a farm caused Ingersoll to be a customer for purposes of Chapter 425 of the Wisconsin Statutes). *But see* Ehle v. Detlor, No. 98-0806, 1998 Wisc. App. LEXIS 985, at *11–12 (Aug. 27, 1998) (buyer's wholesale purchase of trees did not fall within “personal, family, household or agricultural purposes”).

31. *See* Heath v. Avco Fin. Servs. of Wis., Inc., No. 97-3836, 1998 WL 710606, at *4 (Wis. Ct. App. Oct. 13, 1998) (noting that the consumer who claims the WCA violation carries the burden of proof of the violation); *Ehle*, 1998 Wisc. App. LEXIS 985, at *11–12 (denying venue change where a consumer claimed a particular venue due to the “consumer transaction”).

32. *See* Hartman, 191 F. Supp. 2d at 1048–49 (finding that affidavits submitted averring that purchasing interest in timeshare condominiums was for personal, family, or household—not business—use constituted sufficient evidence to determine plaintiffs' purpose).

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

34. *See id.*

35. *See* Waukesha State Bank v. Bell, No. 84-1393, 1985 Wisc. App. LEXIS 3318, at *5 (May 15, 1985) (holding that where the defendant acquired credit from the bank for business purposes—despite the fact that his home was used as collateral—there was no consumer credit transaction); *see also* N. Cent. Forklift, Inc. v. Brownson, No. 99-2331-FT, 2000 WL 665729, at *3 (Wis. Ct. App. May 23, 2000) (noting that in an installment purchase agreement between the manufacturer and a construction company for a skidsteer, the WCA may apply where commercial parties agree to treat the transaction as being under the WCA); Horst Distrib., Inc. v. Timm, No. 78-081, 1979 WL 30580, at *1 (Wis. Ct. App. July 27, 1979) (holding, in a dispute between a snowmobile distributor and its dealer, that the dealer was not

made a bulk purchase of trees for planting on his property but did not establish the purpose of his purchase, the buyer was not considered a customer.³⁶ On the other hand, in *Zehetner v. Chrysler Financial Co.*,³⁷ the plaintiff cosigned various documents to assist her fiancé in purchasing an automobile, but she never signed the retail installment contract.³⁸ Chrysler argued that because the plaintiff never signed the contract of sale she did not qualify as a customer and thus had no standing to sue under the WCA.³⁹ The court disagreed.⁴⁰ The court reasoned that one could be a customer if one simply seeks credit or personal property.⁴¹ The court held that in light of the plaintiff and her fiancé's relationship, "their connection through their child, their apparent intention to marry and the need for support of the child," the plaintiff was "arguably seeking both personal property and credit for 'personal, family or household purposes.'"⁴² As such, the plaintiff was a customer under the WCA.⁴³

In making the determination whether a transaction satisfies the 50% rule, courts examine the total circumstances surrounding the contracted-for property or services.⁴⁴ Most often, the final determination involves weighing a number of conflicting factors.⁴⁵ Merchants should be wary of concluding the transaction is not subject to the WCA simply because the contract provides that the transaction is for a business purpose. For instance, in *Seeger v. AFNI, Inc.*,⁴⁶ the plaintiff entered into a contract for cell phone service.⁴⁷ Thereafter, the plaintiff sued AFNI—who had purchased the account from Cingular⁴⁸—and claimed that AFNI

a customer under the Act except if he had agreed to be governed under the WCA).

36. See *Ehle*, 1998 Wisc. App. LEXIS 985, at *11–12.

37. *Zehetner v. Chrysler Fin. Co.*, 2004 WI App 80, 272 Wis. 2d 628, 679 N.W.2d 919.

38. *Id.* ¶¶ 2–5 (discussing documents that the plaintiff signed).

39. *Id.* ¶ 10.

40. See *id.* ¶ 21 (holding that plaintiff was a "customer" under the WCA).

41. *Id.* ¶ 15.

42. *Id.* ¶ 16.

43. See *id.* ¶ 15.

44. See, e.g., *Seeger v. AFNI, Inc.*, No. 05-C-714, 2007 WL 1598618, at *7–8 (E.D. Wis. June 1, 2007); *Duston v. Badger Lease*, No. 93-1402, 1994 WL 51638, at *2 (Wis. Ct. App. Feb. 22, 1994).

45. See *Seeger*, 2007 WL 1598618, at *7–8; *Duston*, 1994 WL 51638, at *2.

46. *Seeger*, 2007 WL 1598618.

47. *Id.* at *1.

48. *Id.* at *2.

committed various WCA violations.⁴⁹ AFNI defended on the ground that the plaintiff was not a customer under the WCA.⁵⁰ During deposition, the plaintiff admitted that he entered into the cell phone contract primarily for business purposes and that he used the phone primarily for business.⁵¹ Despite the plaintiff's admissions, however, the court held that the plaintiff qualified as a customer under the WCA.⁵² The court reasoned that because the contract was in the plaintiff's individual name,⁵³ the payments on the account were made with the plaintiff's personal credit card, and the plaintiff's wife used the phone for personal reasons—on balance—the cell phone service was found to be for personal, family, and household purposes.⁵⁴ Similarly, in *Duston v. Badger Lease*,⁵⁵ an individual leased an automobile under a lease captioned “Equipment Lease.”⁵⁶ The lease specifically provided that the automobile was to be used solely in the lessee's business.⁵⁷ As a result, the lessor asserted that the lessee did not qualify as a customer under the WCA.⁵⁸ The evidence indicated that at the time of execution of the lease, the lessee told the lessor that she intended to use the car to visit her sister up north and to commute to her job but not to use the car in her employment.⁵⁹ The evidence further showed that the address on the lease was the lessee's home address, and the lease was not labeled as a commercial lease.⁶⁰ On balance, the court concluded the lease was for personal, family, or household purposes despite the statement in the lease that it was for business purposes.⁶¹

49. *Id.* at *5.

50. *Id.* at *8.

51. *Id.* at *7.

52. *Id.* at *8.

53. *Id.* For another example of a court considering the fact that the contract was in the individual's name see *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1049 (W.D. Wis. 2002) (considering fact that customers entered into contracts for timeshare interest in condominiums in their own, individual names).

54. See *Seeger*, 2007 WL 1598618, at *8.

55. *Duston v. Badger Lease*, No. 93-1402, 1994 WL 51638 (Wis. Ct. App. Feb. 22, 1994).

56. *Id.* at *2.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (holding that the trial court's finding that the lease at issue was a consumer lease was not clearly erroneous).

Where there are multiple transactions between the same parties, some transactions may be deemed for a business purpose and others for a personal purpose.⁶² The courts, however, have divergent approaches on how to distinguish a business purpose from a personal one when there is more than one transaction between the parties. In *Ixonia State Bank v. Ingersoll (In re Ingersoll)*,⁶³ an individual sod farmer entered into a series of loans with a bank.⁶⁴ Upon default by the farmer, the characterization of the loans under the WCA became an issue.⁶⁵ The court held that the loans could be separately categorized depending upon whether each loan was primarily for a business purpose or a personal one.⁶⁶

On the other hand, in *Parent v. Citibank (S.D.) N.A.*,⁶⁷ the Parents were the sole owners of a limited liability company (LLC) that was in the business of constructing log cabins.⁶⁸ An entrepreneur contracted with the Parents' LLC for the construction of a log cabin.⁶⁹ The purpose of the contract was speculation in that after the LLC constructed the log cabin, the entrepreneur intended to sell it for a profit.⁷⁰ The log cabin material was purchased at Home Depot and placed on the entrepreneur's credit card.⁷¹ Thereafter, a dispute arose between the entrepreneur and the LLC, and the entrepreneur decided not to go forward with the contract.⁷² As a result, the entrepreneur directed Home Depot to transfer the account balance for the log cabin material from the entrepreneur's credit card to the Parents' personal credit

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

63. *Id.*

64. *Id.* at 914.

65. *Id.*

66. *Id.* at 916 (“The Ixonia and Co-op loans were for agricultural purposes, so as to them Ingersoll was a ‘customer’ and the loans are ‘consumer credit transactions’ within the meaning of the Wisconsin Consumer Act (WCA). . . . As to loans Ingersoll procured for business purposes, he would not be a ‘customer’ under the WCA’s definition and the loans therefore could not be ‘consumer credit transactions.’”).

67. *Parent v. Citibank (S.D.) N.A.*, No. 09 C 951, 2010 WL 2425943 (E.D. Wis. June 11, 2010), *aff’d sub nom. Parent v. Home Depot U.S.A., Inc.*, No. 11-3665 (7th Cir. Sept. 24, 2012).

68. *Id.* at *1.

69. *Id.*

70. *Id.* at *3.

71. *Id.* at *1.

72. *Id.*

card.⁷³ Home Depot complied and directed Citibank to transfer the balance from the entrepreneur's credit card to the Parents personal credit card.⁷⁴ Subsequently, litigation ensued between the Parents and Citibank regarding their credit card balance.⁷⁵ As part of the litigation, the Parents asserted that Citibank violated the WCA.⁷⁶ The central issue in the case was "whether the transaction at issue was a consumer transaction . . . or a business transaction."⁷⁷ The court held that the dispute between Citibank and the Parents was subject to the WCA.⁷⁸ The initial transaction, the log cabin purchase, was a business transaction; however, this transaction was between only the entrepreneur and Home Depot—neither Parent nor their LLC was a party to the transaction.⁷⁹ The second transaction, however, between the Parents and Citibank was held to be a personal transaction.⁸⁰ The court reasoned that the definition of "transaction" includes the concept of "performance pursuant to [an] agreement."⁸¹ Because the credit card agreement between the Parents and Citibank was premised on purchases for personal, family, and household purposes, the payment of the debt transferred to the card anticipated performance pursuant to that particular agreement.⁸² The fact that the specific charge originally had a business purpose was not significant to the court.⁸³ Therefore, the court concluded that the Parents were customers for purposes of that transaction.⁸⁴

The *Parent* decision is difficult to reconcile with the 50% rule, which provides that real property, personal property, services, money, or credit is considered used for personal, family, or household purposes if it is used 50% or more for that purpose.⁸⁵ In *Parent*, the entire purpose of

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *2.

77. *Id.* at *3.

78. *Id.* at *4.

79. *Id.* at *3.

80. *See id.* at *4.

81. *Id.* at *3 (internal quotations omitted).

82. *Id.* at *4.

83. *See id.* at *3.

84. *Id.* at *4.

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

purchasing the log cabin material was for business purposes, but when the balance was transferred to a personal credit card, the court concluded that the debt was for personal, family, and household purposes.⁸⁶ Because the purchase of the log cabin kit was 100% for business reasons, the *Parent* decision seems to be in conflict with the 50% rule. Stated simply, the *Parent* decision stands for the proposition that when a credit card is established as one for personal, family, or household purposes, any debt charged (or transferred) to that card will be considered a consumer debt, notwithstanding the fact that the debt may have originally been for a business purpose.⁸⁷

The better approach is reflected in the *Ingersoll* case. *Ingersoll* indicates that the court should look at the basic purpose for each transaction, which would suggest that where an individual charges both personal and business purchases to a credit card, the court needs to distinguish the business from the personal purchases for purposes of applying the WCA.⁸⁸ Thus, litigation revolving around a single credit card balance could involve WCA violations (for actions taken involving personal debts on the card), even though the card balance may also contain business debts.⁸⁹

Although no court has suggested it, another approach would be to use the Uniform Commercial Code (UCC) “predominate test,” which would require the court to determine whether the charges on the credit card are predominately business or personal ones, and proceed accordingly.⁹⁰ The WCA expressly provides that unless superseded by the WCA, the provisions of the UCC (Chapters 401–411 of the

86. *Parent*, 2010 WL 2425943, at *4.

87. *Id.*

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

89. *See id.*

90. *Van Sistine v. Tollard*, 95 Wis. 2d 678, 684, 291 N.W.2d 636, 639 (Ct. App. 1980) (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

In determining whether a mixed contract for goods and services is a sale of goods under the code, “The test for inclusion or exclusion [within the code] is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, installation of a water heater in a bathroom.”

Id.

Wisconsin Statutes) shall supplement the WCA.⁹¹

C. Merchant

A consumer credit transaction requires that the transaction involve a customer and a merchant. Although the concept of merchant is a legal term of art,⁹² the WCA substantially expands its meaning. The WCA defines a merchant as a natural person or organization

who regularly advertises, distributes, offers, supplies or deals in real or personal property, services, money or credit in a manner which directly or indirectly results in or is intended . . . to result in . . . a consumer transaction. The term includes, but is not limited to a seller, lessor, manufacturer, creditor, arranger of credit and any assignee of or successor to such person. The term also includes a person who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to such practices or to whom such knowledge or skill may be attributed by his or her employment as an agent, broker or other intermediary.⁹³

Although the WCA provides a substantial definition of merchant, “the legislature has failed to define the outer limits of the term merchant.”⁹⁴ It has been suggested, however, that the courts examine the purpose to be served by the definition in order to determine its meaning.⁹⁵ In that regard, it has been determined that the general legislative intent of the WCA is to govern the relationship between consumers and retail merchants who operate a business for profit.⁹⁶ As a result, the merchant definition has been held to apply to retail merchants in the businesses of regularly extending credit and also to private commercial businesses that operate for profit.⁹⁷ The definition does not include governmental

91. WIS. STAT. § 421.103(1) (2009–2010). Hereinafter, all provisions of the UCC are cited according to the applicable section of the Wisconsin Statutes that has enacted the UCC.

92. *Molzof v. United States*, 502 U.S. 301, 306 (1992) (noting that a legal term of art is one that has a widely accepted common-law meaning).

93. WIS. STAT. § 421.301(25).

94. *Bd. of Regents of Univ. of Wis. Sys. v. Mussallem*, 94 Wis. 2d 657, 668, 289 N.W.2d 801, 806 (1980).

95. *Id.*

96. *Id.* at 667, 289 N.W.2d at 806.

97. *Id.* at 668, 289 N.W.2d at 806–07.

operations.⁹⁸ For example, the Wisconsin Department of Revenue is not considered to be a merchant.⁹⁹

The merchant definition in the WCA is significantly different than the merchant definition contained in the UCC.¹⁰⁰ The UCC definition anticipates two types of merchants.¹⁰¹ One is a merchant who deals in goods of the kind and is called a goods merchant.¹⁰² The other merchant is one who is familiar with the practices of the particular business or trade and is called a practices merchant.¹⁰³ Both the UCC and the WCA use the same definition for a practices merchant.¹⁰⁴ However, with one minor exception,¹⁰⁵ the merchant definition under the WCA is much broader than the goods merchant under the UCC.¹⁰⁶ For example, the WCA definition includes sellers of real property, services, and credit that are not covered by the UCC.¹⁰⁷ Also, the WCA definition applies to transactions in personal property; whereas, the UCC covers only transactions in goods.¹⁰⁸ “Personal property” is a much broader term than “goods.”¹⁰⁹ Personal property includes not only movable property (goods) but also intangible things.¹¹⁰ The difference between the two definitions is rational in light of the purpose of each definition.¹¹¹ The

98. *Id.* at 668, 289 N.W.2d at 807.

99. *Ludwig v. Geise (In re Geise)*, 132 B.R. 908, 913 (Bankr. E.D. Wis. 1991).

100. *Compare* WIS. STAT. § 421.301(25) (WCA definition of merchant), *with id.* § 402.104(3) (UCC definition of merchant).

101. *Id.* § 402.104(3). Some consider a merchant who meets both types of “merchant” to be an independent third type of merchant. *See* U.C.C. § 2-104 cmt. 2 (2010).

102. *See* U.C.C. § 2-104 cmt. 2 (2010).

103. *See id.*

104. *Compare* WIS. STAT. § 402.104(3), *with id.* § 421.301(25).

105. *See infra* text accompanying notes 114–18.

106. *Bd. of Regents of Univ. of Wis. Sys. v. Mussallem*, 94 Wis. 2d 657, 667, 289 N.W.2d 801, 806 (1980) (“The legislature has given the term *merchant* a broader meaning than usually attributed to the term . . .”).

107. *Compare* WIS. STAT. § 421.301(25) (a WCA merchant deals in real or personal property, services, money or credit), *with id.* § 402.104 (3) (a UCC merchant deals only in goods).

108. *Compare id.* § 402.104(3), *and* U.C.C. § 2-104(1) (2010), *with* WIS. STAT. § 421.301(25).

109. *Compare* BLACK’S LAW DICTIONARY 1335–36 (9th ed. 2009) (defining property), *with id.* at 762 (defining goods).

110. *Id.* at 1335–36 (defining property).

111. *Compare* U.C.C. § 2-104 cmt. 1 (“This section lays the foundation of this policy by defining . . . professionals or ‘merchants’ and by stating when a transaction is . . . ‘between merchants.’”), *with* WIS. STAT. § 421.102(1) (“Chapters . . . shall be liberally construed and

UCC definition is a limiting term intended to identify certain transactions that involve professionals, and thereby, is intended to apply special rules to that particular transaction.¹¹² Conversely, the WCA definition is an expansive term designed “to protect consumers [from] unfair, deceptive, false, misleading and unconscionable practices by merchants.”¹¹³

The one minor exception where the WCA definition of a merchant is narrower than the UCC definition relates to educational institutions.¹¹⁴ The UCC does apply to universities.¹¹⁵ Whereas, “public and private[] nonprofit institutions of higher learning are not” considered to be merchants under the WCA,¹¹⁶ despite the fact that educational services are expressly covered by the WCA.¹¹⁷ However, courts have concluded that private profit-making business colleges or trade schools that provide credit or loans to their students are covered by the WCA.¹¹⁸

Courts have been consistent in applying the broad WCA merchant definition to private commercial businesses.¹¹⁹ A bank, for example, is a merchant.¹²⁰ Also, one who “regularly advertises or deals in real property” is a merchant.¹²¹ For example, the court concluded that an individual who advertised in a local newspaper every week for four months that financing was available for the sale of mobile homes is a

applied to promote their underlying purposes and policies.”).

112. U.C.C. § 2-104 cmt. 1.

113. WIS. STAT. § 421.102(2)(b).

114. *Compare* U.C.C. § 2-104 cmt. 3 (“[E]ven persons such as universities . . . can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.”), *with* Bd. of Regents of Univ. of Wis. Sys. v. *Mussallem*, 94 Wis. 2d 657, 669–70, 289 N.W. 2d 801, 807 (1980) (holding that the WCA does not apply to “public and private, nonprofit institutions of higher learning”).

115. *See* U.C.C. § 2-104 cmt. 3.

116. *Mussallem*, 94 Wis. 2d at 669–70, 289 N.W. 2d at 807.

117. WIS. STAT. § 421.301(42)(a)(2).

118. *See* *Patzka v. Viterbo Coll.*, 917 F. Supp. 654, 657 (W.D. Wis. 1996); *Mussallem*, 94 Wis. 2d at 669–70, 289 N.W. 2d at 807.

119. *See* *Seidling v. Roedl*, No. 2009AP107, 2009 WL 4912570, at *1 (Wis. Ct. App. Dec. 22, 2009); *Nelson v. Union Nat’l Bank*, 111 Wis. 2d 313, 315 n.3, 330 N.W.2d 225, 226 n.3 (Ct. App. 1983); *see also* *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1049 (W.D. Wis. 2002).

120. *Nelson*, 111 Wis. 2d at 315 n.3, 330 N.W.2d at 226 n.3.

121. *Seidling*, 2009 WL 4912570, at *1; *see also* *Hartman*, 191 F. Supp. 2d at 1049.

merchant.¹²² An assignee of a merchant is also a merchant under the WCA, even though the assignee may not have a profit motive.¹²³ On the other hand, where an individual loaned money to another individual to enable the borrower to purchase an automobile, no merchant was found.¹²⁴ Also, if one was not originally a merchant, one does not become a merchant simply by applying interest charges to an overdue account.¹²⁵

D. Real or Personal Property, Services or Money

The subject matter of a consumer credit transaction must be “real or personal property, services or money.”¹²⁶ In that subject matter group, personal property and services are the only terms defined in the WCA.¹²⁷ The Act makes clear that personal property “includes but is not limited to goods.”¹²⁸ Although not included in the statutory definition, courts have concluded that real property includes a fractional interest of real estate—such as a time-share.¹²⁹

Determining what types of services are covered by the WCA is challenging. The types of services specified by the WCA are very broadly defined, and the exclusions are very narrowly defined.¹³⁰ Based

122. *Mathews v. Ertz*, No. 87-1513, 1988 WL 126440, at *2 (Wis. Ct. App. Sept. 8, 1988). The court also considered the fact that the individual was nongovernmental and operated for profit. *Id.* at *4 n.3.

123. *Barrows v. Petrie & Stocking, S.C.*, No. 08-cv-65-bbc, 2008 WL 3540405, at *6 (W.D. Wis. Aug. 13, 2008) (“I do not agree . . . that the absence of any profit motive on the Association’s part means that it cannot be a ‘successor’ to a merchant under the Act.”).

124. *Radtke v. Levin*, No. 01-2616, 2002 WL 772750, at *2 (Wis. Ct. App. Apr. 30, 2002) (holding that, in a dispute between two cohabitants over \$1500 loaned for a down payment on a truck, neither was a merchant, and the dispute was “akin to that encountered in divorce proceedings”); *Bruns v. Frederick*, No. 91-2776, 1992 WL 211153, at *2 (Wis. Ct. App. June 9, 1992) (barring an action for replevin under Section 425.205 of the Wisconsin Statutes where the plaintiff conceded that she was not a creditor under that section or the WCA).

125. *Greve v. Laufenberg*, No. 93-1549, 1994 WL 513710, at *2 (Wis. Ct. App. Sept. 22, 1994) (finding that where the plaintiff charged interest on a debt only after several years in order to motivate the debtor to pay, he was not a merchant where the parties “never agreed to deferred or installment payments on credit”).

126. WIS. STAT. § 421.301(10) (2009–2010).

127. *See id.* § 421.301(34), .301(42).

128. *Id.* § 421.301(34).

129. *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1049 (W.D. Wis. 2002).

130. *See* WIS. STAT. § 421.301(42). The WCA reads as follows:

(a) “Services” includes:

on the scope of the statutory definitions, courts have interpreted the definition of services inclusively. The leading case defining the scope of services covered by the WCA is *Seeger v. AFNI, Inc.*¹³¹ As discussed above, in *Seeger*, a number of individuals entered into cell phone contracts with Cingular.¹³² When litigation ensued between the parties, the customers claimed that AFNI—who had purchased the accounts from Cingular¹³³—violated the WCA by charging a collection fee.¹³⁴ In their defense, AFNI asserted that cell phone contracts were not the type of service covered by the WCA, and further, that the plaintiffs admitted in their deposition that the cell phone contracts did not meet the definition of “services” in the Act.¹³⁵ First, the court noted that the plaintiffs’ beliefs regarding the definition of services were irrelevant because the meaning of the definition “is an issue of law rather than a question of fact.”¹³⁶ In particular, the court indicated that “judicial admissions are only applicable to questions of fact, and not to questions of law.”¹³⁷ Second, the court noted that the type of services listed in the services definition are very “general and broad” and are unrelated to each other.¹³⁸ For example, the court illustrated the diversity of services by citing “education, recreation, [and] cemetery accommodations” as a few of the listed services.¹³⁹ In fact, the court candidly admitted that with such a broad and diverse list of services, “it is not entirely clear” how to

1. Work, labor and other personal services;

2. Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and

3. Insurance provided in connection with a consumer credit transaction.

(b) “Services” does not include any services of common carriers if the tariffs, rates, charges, costs or expenses of such common carriers are required by law to be filed with or approved by the federal government or any official, department, division, commission or agency of the United States.

Id. § 421.301(42).

131. *Seeger v. AFNI, Inc.*, No. 05-C-714, 2007 WL 1598618 (E.D. Wis. June 1, 2007).

132. *Id.* at *2.

133. *Id.*

134. *Id.* at *5.

135. *Id.* at *8.

136. *Id.* at *9.

137. *Id.* (citing *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 682 (7th Cir. 2002)).

138. *Id.* at *10.

139. *Id.*

distinguish those services that are included from those that are not.¹⁴⁰ The court further found the phrase “and the like” contained in the service definition “not especially limiting . . . in light of the divergent categories of services listed.”¹⁴¹ As a result, the court held that cellular services are a type of service that would fit within the broad definition of services contained in the WCA.¹⁴²

E. Credit

1. The Elements of Granting Credit

Credit is “the right granted by a creditor to a customer [1] to defer payment of debt, [2] to incur debt and defer its payment or [3] to purchase goods, services or interests in land on a time price basis.”¹⁴³ The term “time price basis” anticipates a process whereby a customer pays its contractual obligation over a period of time resulting in a higher overall price because finance charges are applied.¹⁴⁴ An agreement to pay annual maintenance fees, however, is not a time price basis contract.¹⁴⁵

If no credit is extended there can be no consumer credit transaction or consumer approval transaction.¹⁴⁶ One who buys delinquent accounts for collection is not one who supplies credit.¹⁴⁷ Rather, the credit is extended by other entities before the account became delinquent.¹⁴⁸ A

140. *Id.*

141. *Id.*

142. *Id.*

143. WIS. STAT. § 421.301(14) (2009–2010).

144. *Berndt v. Fairfield Resorts, Inc.*, 337 F. Supp. 2d 1120, 1134 (W.D. Wis. 2004).

145. *Id.* (holding the WCA inapplicable to a transaction between a couple owning a condominium timeshare and the condominium owner’s association because “time price basis” is a “process in which a consumer pays portions of the total amount owed over a fixed period of time and agrees to a higher overall price after finance charges are applied” and not after “plaintiffs’ agreement to pay annual maintenance fees”).

146. *See Bechstein v. Brandenburger & Davis*, 474 F. Supp. 971, 973 (E.D. Wis. 1979) (finding the transaction at issue was not a “consumer credit transaction” as defined in the WCA because “[t]he plaintiff’s obligation to the defendant in this case involved neither the payment of installments nor credit for which a finance charge might be imposed”).

147. *See Rsidue, LLC v. Michaud*, 2006 WI App 164, ¶ 13, 295 Wis. 2d 585, 721 N.W.2d 718 (holding that a corporation that purchased an overdue credit card account and attempted to collect on the debt is not a creditor because the decision to extend credit was made by its predecessors in interest).

148. *Id.*

creditor's withdrawal of funds from an individual's account to cover a nonsufficient funds (NSF) check¹⁴⁹ is also not considered a credit transaction.¹⁵⁰

The concept of "agreement" is critical when analyzing whether credit has been granted in a particular transaction. Before the debt is incurred, there must be an agreement to extend credit.¹⁵¹ The WCA defines agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."¹⁵² "Course of dealing" is used to describe the practices under past contracts between the parties;¹⁵³ "course of performance" describes the practices under the current contract between the parties;¹⁵⁴ and "trade practice" is the general practices in the particular industry that is the subject matter of the transaction.¹⁵⁵ In other words, in deciding whether the merchant has granted credit to the customer, the courts analyze the contract between the parties, their course of dealing, their course of performance and trade practices, as well as any implications from other circumstances relevant to the transaction.¹⁵⁶ A classic example of extending credit is where the parties' agreement includes the loan and financing terms of the transaction—an agreement to incur debt and defer payment.¹⁵⁷ However, charging interest after a debt is due does not involve extending credit.¹⁵⁸

2. Judicial Interpretation of Granting Credit

There are a number of principles that can be garnered from the

149. *Endo Steel, Inc. v. Janas (In re JWJ Contracting Co.)*, 371 F.3d 1079, 1081 (9th Cir. 2004) (noting that a NSF check is one that has been dishonored due to insufficient funds).

150. *Co-op Credit Union v. Bement*, No. 02-2403, 2003 WL 21027264, at *2 (Wis. Ct. App. May 8, 2003).

151. *See* WIS. STAT. § 421.301(14) (2009–2010).

152. *Id.* § 421.301(3).

153. RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

154. *See id.* § 202 cmt. g.

155. *Id.* § 222.

156. *See, e.g., Seeger v. AFNI, Inc.*, No. 05-C-714, 2007 WL 1598618, at *5–16 (E.D. Wis. June 1, 2007); *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1048–49 (W.D. Wis. 2002).

157. *See, e.g., Hartman*, 191 F. Supp. 2d at 1049.

158. *Greve v. Laufenberg*, No. 93-1549, 1994 WL 513710, at *2 (Wis. Ct. App. Sept. 22, 1994).

various decisions by the courts. First, if the agreement between the merchant and customer has a fixed term, the court will likely conclude that the merchant granted credit.¹⁵⁹ Second, in the absence of a fixed-term contract, the courts use a balancing test to determine if the merchant granted credit.¹⁶⁰ Third, in applying the balancing test, courts consider “other circumstances” such as course of dealing, course of performance, and trade practice.¹⁶¹ Fourth, courts do not consider credit granted simply because a debt is “paid over time.”¹⁶² And finally, a merchant’s grant of a thirty-day grace period for payment does not appear to be a grant of credit by the merchant.¹⁶³

First, several cases have focused on fixed-term contracts that permit a customer to incur debt and pay it over time.¹⁶⁴ In *Seeger v. AFNI, Inc.*,¹⁶⁵ the plaintiffs entered into cell phone contracts with Cingular for a fixed term.¹⁶⁶ When litigation ensued between the parties, the plaintiffs asserted that the cell phone contracts involved the extension of credit under the WCA.¹⁶⁷ The plaintiffs argued that their cellular plan allowed them to exceed “their monthly allotment of minutes and pay later,” which, they argued, is tantamount to an extension of credit.¹⁶⁸ On the other hand, AFNI—who had purchased the accounts from Cingular¹⁶⁹—argued that the cell phone contracts should be considered either a prepaid or pay-as-you-go service.¹⁷⁰ The court noted that “purchasers of cell phone services receive their services prior to paying for them, which

159. See *Seeger*, 2007 WL 1598618, at *12; *Milwaukee Alarm Co. v. Chaney*, No. 97-0866, 1998 WL 60976, at *2 (Wis. Ct. App. Feb. 17, 1998).

160. See *Degrave v. Door Cnty. Coop.*, No. 96-1606, 1996 WL 722828, at *2 (Wis. Ct. App. Dec. 17, 1996).

161. See *id.*; see also WIS. STAT. § 421.301(3).

162. *Dean Med. Ctr., S.C. v. Conners*, 2000 WI App 202, ¶ 12, 238 Wis. 2d 636, 618 N.W.2d 194; *Langheim v. Kasch*, No. 93-1603-FT, 1993 Wisc. App. LEXIS 1339, at *7–8 (Oct. 21, 1993).

163. *Alaskan Fireplace, Inc. v. Everett*, No. 02-3016-FT, 2003 WL 21397747, at *1, *4 (Wis. Ct. App. June 18, 2003); *Hooven v. Truck Country*, No. 97-2215, 1998 Wisc. App. LEXIS 655, at *5 (June 9, 1998).

164. See *Seeger*, 2007 WL 1598618, at *3, *14; *Milwaukee Alarm Co.*, 1998 WL 60976, at *1.

165. *Seeger*, 2007 WL 1598618.

166. *Id.* at *3.

167. *Id.* at *10.

168. *Id.*

169. *Id.* at *2.

170. *Id.* at *10.

technically amounts to a deferment of payment.”¹⁷¹ Further, the court reasoned that when one signs a service contract, he or she has a continuing obligation to pay money to that service provider and thereby has incurred debt.¹⁷² Furthermore, the court noted that the plaintiffs were allowed to defer payment of their contractual debt by making payment after they received the service.¹⁷³ Therefore, the court concluded that the cell phone contracts satisfied the definition of credit because the contracts “allowed the plaintiffs to incur debt and defer its payment.”¹⁷⁴ Interestingly, during the litigation, Cingular obtained a written opinion from the Secretary of the Department of Financial Institutions stating that cell phone contracts are not an extension of credit.¹⁷⁵ Based on that opinion, Cingular asserted that the WCA’s safe harbor provision¹⁷⁶—which protects companies from liability when they rely upon a written opinion of the administrator—should apply.¹⁷⁷ The court concluded, however, that Cingular’s informal e-mail to the administrator did not comply with the procedures necessary under the safe harbor provision, that Cingular was attempting to obtain a ruling from an entity other than the court, and that any such ruling would not be binding on the court.¹⁷⁸

Similarly, in *Milwaukee Alarm Co. v. Chaney*,¹⁷⁹ a customer signed a five-year alarm service contract for \$19 per month, billed quarterly, with a termination fee if the customer canceled the contract before the end of the five-year term.¹⁸⁰ During litigation between the parties, the issue became whether the alarm service contract was an extension of credit.¹⁸¹ Milwaukee Alarm argued that the service contract was a payment for a services-as-rendered agreement, so the customer had no obligation to

171. *Id.* at *12.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. WIS. STAT. § 426.104(4)(a) (2009–2010).

177. *Seeger*, 2007 WL 1598618, at *13.

178. *Id.*

179. *Milwaukee Alarm Co. v. Chaney*, No. 97-0866, 1998 WL 60976 (Wis. Ct. App. Feb. 17, 1998).

180. *Id.* at *1.

181. *Id.*

pay unless the customer received services.¹⁸² The court disagreed. The court reasoned that the customer incurred debt the moment he signed the contract and was permitted to defer its payment over the five-year period.¹⁸³ As a result, this transaction was found to be an extension of credit.¹⁸⁴

Second, if the agreement between the parties does not have a fixed term, the courts use an objective test when considering the other circumstances relevant to the transaction, including course of dealing, course of performance, and trade practice.¹⁸⁵ In *DeGrave v. Door County Cooperative*,¹⁸⁶ consumers—who were members of a co-op—periodically made purchases for their farm from the co-op.¹⁸⁷ Purchases were made on credit and cash.¹⁸⁸ Each invoice sent to the consumers provided that “all purchases [were] due within the following month,” and “[a] finance charge of 1.5% per month . . . [would] be assessed” on all outstanding balances.¹⁸⁹ The issue before the court was whether the purchases that were due within the following month were a credit transaction.¹⁹⁰ Upon viewing the terms of the invoice, the court concluded that the terms “implic[d] permission for [the co-op] member[s] to pay in multiple payments, including payments after the designated due date.”¹⁹¹ Despite the co-op’s insistence that “the invoices unambiguously required payment by a certain date,” the court concluded that “a reasonable person reading [the invoice] terms could believe that the co-op permitted payments after the due date.”¹⁹² The court considered it significant that the consequence of making a payment after the due date was the imposition of a finance charge.¹⁹³

182. *Id.* at *2.

183. *Id.*

184. *Id.*

185. *DeGrave v. Door Cnty. Coop.*, No. 96-1606, 1996 WL 722828, at *2 (Wis. Ct. App. Dec. 17, 1996) (applying a reasonable person standard to determine whether the invoice terms unambiguously required payment by a specific date); *see also* WIS. STAT. § 421.301(3).

186. *DeGrave*, 1996 WL 722828, at *1.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at *2.

192. *Id.*

193. *Id.*

Third, although not discussed in the *DeGrave* decision, it is likely that the course of dealing between the co-op and the DeGraves (and the other co-op members), as well as the general trade practice of co-ops, were other circumstances relevant to the determination of whether credit was granted. For instance, in *Dean Medical Center, S.C. v. Conners*,¹⁹⁴ where the Medical Center provided services to a patient, the court considered other circumstances relevant to whether credit was granted.¹⁹⁵ Upon nonpayment by the patient, the Medical Center initiated a collection action.¹⁹⁶ The issue before the court was whether the transaction between the parties was a consumer credit transaction.¹⁹⁷ More specifically, the issue was whether the Medical Center had agreed to extend credit to the patient by permitting the patient to pay for the medical services through installment payments.¹⁹⁸ The Medical Center argued that there were no circumstances that would suggest that credit was being extended to the patient.¹⁹⁹ The patient argued that the Medical Center's "practice of regularly allowing customers to pay their bills over time" indicated that credit was regularly extended by the Center.²⁰⁰ The court looked at a number of factors in reaching its decision.²⁰¹ First, there was no evidence that would indicate that there was an agreement between the parties for the extension of credit.²⁰² Second, credit is not extended or created simply by not paying a debt.²⁰³ Third, it was the Medical Center's "customary business practice" not to offer credit or to permit the patient to pay in installments at the time the

194. *Dean Med. Ctr., S.C. v. Conners*, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194.

195. *Id.* ¶ 2.

196. *Id.* ¶ 3.

197. *Id.* ¶ 5 (explaining that the issue of "[w]hether a particular transaction is a consumer credit transaction subject to the WCA is a mixed question of fact and law").

198. *Id.* ¶ 8.

199. *Id.* (explaining that the Medical Center argued that no facts showed that "payment for the services could be made either in installments or be subject to the imposition of a finance charge").

200. *Id.*

201. *Id.* ¶ 12.

202. *See id.* ("[W]e would have to re-write the agreement under which services had already been provided were we to allow those services to create a consumer debt simply by virtue of nonpayment.").

203. *Id.* ¶ 13.

services were rendered.²⁰⁴ The court noted that the only time patients were permitted to pay their bill over time was when the patient had failed to pay the bill in full within thirty days²⁰⁵ after the services were rendered.²⁰⁶ Based on the foregoing, the court concluded that “permitting a debtor to pay over time only after attempts at collecting the bill . . . have failed” is not an extension of credit.²⁰⁷

Similarly, in *Langheim v. Kasch*,²⁰⁸ a doctor provided medical services to a patient on ten occasions.²⁰⁹ In a subsequent collection dispute between the parties, the sole issue before the court was whether the contract between the doctor and patient was a consumer credit transaction.²¹⁰ The court concluded that the patient was unable to show that the doctor’s services were rendered on credit.²¹¹ The evidence indicated that when services were first provided to the patient, the doctor required the patient to fill out an information sheet, which would include his insurance reimbursement number.²¹² Unfortunately, the patient provided an incorrect insurance reimbursement number, which caused the debt to accrue.²¹³ The court reasoned that the inference drawn from the doctor requesting the insurance reimbursement number was that the doctor was not providing services on a credit basis.²¹⁴ Again, the course of dealing between the parties and the general trade practice in the medical service industry likely had an impact on the court’s decision.

Fourth, and finally, there are the curious cases where payment is due within thirty days, and the courts find no extension of credit. In *Alaskan Fireplace, Inc. v. Everett*,²¹⁵ consumers contracted for the installation of

204. *Id.* ¶ 12.

205. *See id.* ¶ 11 (“When payment is not made on the date of service, patients are told that Dean will send them a bill that is due in full within thirty days of receipt.”).

206. *Id.* ¶ 13.

207. *Id.*

208. *Langheim v. Kasch*, No. 93-1603-FT, 1993 Wis. App. LEXIS 1339 (Oct. 21, 1993).

209. *Id.* at *6.

210. *Id.* at *1.

211. *Id.* at *6–7.

212. *Id.* at *2.

213. *Id.*

214. *Id.* at *7–8.

215. *Alaskan Fireplace, Inc. v. Everett*, No. 02-3016-FT, 2003 WL 21397747 (Wis. Ct. App. June 18, 1998).

two fireplaces.²¹⁶ The customers “never discussed financing terms with Alaskan Fireplace.”²¹⁷ The contract signed by the parties provided that payment was to be made “net 30 days [with a] 1.5% monthly service charge for overdue invoices.”²¹⁸ In a subsequent dispute between the parties, the court had to decide whether the transaction was a consumer credit transaction.²¹⁹ The court held that the transaction was a cash transaction, not a consumer credit transaction.²²⁰ The court reasoned that the contract terms did not anticipate the extension of credit.²²¹ The court interpreted the contract terms to mean that “Alaskan Fireplace did not grant the [customer] permission to defer payment of their debt.”²²² In sum, the court found “[t]here was never any intent by Alaskan Fireplace to extend any credit.”²²³ Similarly, in *Hooven v. Truck Country*,²²⁴ a truck repair business failed to successfully repair a customer’s truck, and the customer did not pay the bill.²²⁵ The invoice sent by the truck repair business indicated that payment was due thirty days after services were rendered, and in the event of failure to pay, an 18% finance charge would be assessed.²²⁶ The court had to decide whether the customer’s failure to pay the repair bill amounted to an extension of credit.²²⁷ The court held that the truck repair business did not extend credit to the customer.²²⁸ The court reasoned that the trucking company expected payment in full when it completed its repairs.²²⁹

Despite what the cases hold, under any reasonable interpretation of the term credit, the merchant is granting credit—if only, for only a thirty-day period. The statute does not specify any minimum time

216. *Id.* at *1.

217. *Id.*

218. *Id.*

219. *Id.* at *4.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Hooven v. Truck Country*, No. 97-2215, 1998 Wisc. App. LEXIS 655 (June 9, 1998).

225. *Id.* at *1.

226. *Id.* at *5.

227. *Id.* at *4.

228. *Id.*

229. *Id.*

period for the extension of credit,²³⁰ and the creditor has given the customer the right to defer payment for thirty days. On the other hand, although unstated, it is possible that the courts recognize a general industry practice to treat a thirty-day payment the same as a cash payment. However, that is not in accord with at least one court's decision, which held that a cash transaction occurs when the customer pays before the services are rendered.²³¹

F. Payable in Installments or Finance Charge Imposed

In order to qualify as a consumer credit transaction, the customer's obligation must be either payable in "installments" or provide that "a finance charge is or may be imposed."²³² This Part analyzes both elements.

1. Payable in Installments

Payable in installments is a precisely defined term:

[M]ean[ing] that payment is required or permitted by agreement to be made in [one of three ways]:

- (a) Two or more installments, excluding the down payment in a consumer credit sale, with respect to an obligation arising from a consumer credit transaction for which a finance charge is or may be imposed;
- (b) More than 4 installments, excluding the down payment in a consumer credit sale, in any other consumer credit transaction; or
- (c) Two or more installments if any installment other than the down payment is more than twice the amount of any other installment, excluding the down payment.²³³

The definition of payable in installments provides that installments are

230. See WIS. STAT. § 421.301(10) (2009–2010) (defining "consumer credit transaction"); *id.* § 421.301(14) (defining "credit").

231. See *Berndt v. Fairfield Resorts, Inc.*, 337 F. Supp. 2d 1120, 1134 (W.D. Wis. 2004) (holding that a bill sent to condo timeshare owners by a condo owners association amounted to a cash transaction because the owners were to pay their bill before the services were rendered).

232. WIS. STAT. § 421.301(10).

233. *Id.* § 421.301(30).

“required or permitted by agreement.”²³⁴ The WCA defines agreement as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.”²³⁵ Other circumstances relevant to the transaction include (1) whether the amount payable under the parties’ agreement was subject to any variable, such as usage, and (2) whether the merchant took any action to indicate that the account was overdue.²³⁶ Course of dealing means the parties’ practices under past contracts.²³⁷ Course of performance means the parties’ practices under the current contract between them.²³⁸ Trade practice means the general practices in the particular industry that is the subject matter of the transaction.²³⁹ In sum, in deciding whether the agreement permits the customer to pay in installments, courts analyze the contract between the parties, their prior course of dealing, their current course of performance, and trade practices—as well as any implications from other circumstances relevant to the transaction.²⁴⁰ The courts appear to be using an objective test when considering the various circumstances.

An example of the application of the objective test is *DeGrave v. Door County Cooperative*.²⁴¹ As previously discussed, in *DeGrave*, customers purchased farm supplies on credit from a co-op.²⁴² The co-op’s invoice, which was sent to the customers each month, provided that “all purchases [were] due within the following month. A finance charge of 1.5% per month, or 18% per year [would] be assessed on the previous balance less credits and payments.”²⁴³ In a subsequent dispute between the parties, the customers argued that their obligation to the co-op was

234. *Id.*

235. *Id.* § 421.301(3).

236. *See, e.g.,* *Seeger v. AFNI, Inc.*, No. 05-C-714, 2007 WL 1598618, at *12 (E.D. Wis. June 1, 2007); *Dean Med. Ctr., S.C. v. Conners*, 2000 WI App 202, ¶ 12, 238 Wis. 2d 636, 618 N.W.2d 194; *Degrave v. Door Cnty. Coop.*, No. 96-1606, 1996 WL 722828, at *2 (Wis. Ct. App. Dec. 17, 1996).

237. RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

238. *Id.* § 202 cmt. g.

239. *Id.* § 222.

240. *See Seeger*, 2007 WL 1598618; *Dean Med. Ctr.*, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194; *Degrave*, 1996 WL 722828.

241. *Degrave*, 1996 WL 722828.

242. *Id.* at *1.

243. *Id.*

payable in installments.²⁴⁴ On the other hand, the co-op argued that the invoices clearly required the customers to pay “by a certain date and that therefore the [customers] were not granted the privilege of paying in installments.”²⁴⁵ The court held that the terms of the contract “implied permission for a [co-op] member to pay in multiple payments, including payments after the designated due date.”²⁴⁶ The court noted that “[t]he only consequence of making [a] payment[] after the due date [was] the addition of a finance charge.”²⁴⁷ The court indicated that a reasonable person reading the invoice terms “could believe the co-op permitted payments after the due date.”²⁴⁸ Interestingly, the invoice terms provided no set number of installment payments, yet the court found the incurred debt to be payable in installments.²⁴⁹

Another important factor regarding payable by installments was considered by the court in *Dean Medical Center, S.C. v. Conners*.²⁵⁰ As discussed earlier, in *Dean*, a medical center provided services to a patient.²⁵¹ Upon nonpayment by the patient, the Medical Center initiated a collection action against the former patient.²⁵² The court determined that there was not a consumer credit transaction. Important in the court’s holding, was the determination that the contract between the Medical Center and the patient did not allow for payment by installments, notwithstanding the fact that the defendant was allowed to pay after payment was due.²⁵³ The court noted that to establish that a debt was payable by installment the patients must be given “the option of paying in installments at the time the services are provided.”²⁵⁴ In *Dean*, there was no indication that the patient was aware of the Medical Center’s policies that allowed for credit payments after payment was

244. *Id.* at *2.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *See id.* at *1.

250. *Dean Med. Ctr., S.C. v. Conners*, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194.

251. *Id.* ¶ 2.

252. *Id.* ¶ 3.

253. *Id.* ¶ 13.

254. *Id.* ¶ 12.

due.²⁵⁵ The court, closely scrutinized the Medical Center's method of collection:

The bill requests payment in full within thirty days. If no payment is received, a second bill is sent showing a past due balance. If Dean receives no response to that bill, a third statement is sent, and a phone call is made to try and collect the debt. If the debt still is not paid, a fourth bill is sent with a notice that the debt is being referred to a collection agency.

. . . [I]f a patient responds to any of the billing statements by claiming an inability to pay in full, Dean will permit the debt to be paid over time. [F]inance charges are never imposed on any [of these] payments made over time.

. . . [A]t the time services are provided, patients are not informed that they can pay the bill in installments, nor are they informed about payment plans. When payment is not made on the date of service, patients are told that Dean will send them a bill that is due in full within thirty days of receipt.²⁵⁶

Thus, as the court held, at the time the Medical Center rendered the services, it neither offered credit nor allowed the patient to pay in installments.²⁵⁷ Based on the foregoing, the court concluded, "permitting a debtor to pay over time only after attempts at collecting the bill have failed does not . . . [create] a consumer credit transaction."²⁵⁸

Another critical factor in determining whether a series of payments is payable in installments is whether the amount payable under the parties' agreement is subject to any variable, such as usage.²⁵⁹ In *Seeger v. AFNI, Inc.*,²⁶⁰ as previously discussed, the plaintiffs entered into cell phone agreements with Cingular.²⁶¹ In a subsequent dispute between the parties, the issue before the court was whether entering into the cell

255. *Id.* ¶ 10–12.

256. *Id.* ¶ 3.

257. *Id.*

258. *Id.*

259. See *Seeger v. AFNI, Inc.*, No. 05-C-714, 2007 WL 1598618, at *14 (E.D. Wis. June 1, 2007).

260. *Id.* at *1.

261. *Id.*

phone agreement was a consumer credit transaction.²⁶² More specifically, the issue was whether a cell phone contract was the type of obligation that was payable in installments.²⁶³ A typical cellular contract provides a minimum fee each month for a certain amount of cellular minutes but also allows the customer to pay extra for minutes used beyond their allotted amount.²⁶⁴ Each month the invoice requires payment for the cell-phone services specifically provided in the prior month.²⁶⁵ The court concluded that even though the cell phone contract is a form of credit, it is not credit that is payable in installments.²⁶⁶ The court reasoned that the contract does not permit the customer to pay bills in installments, but rather the customer is obligated to pay the entire bill for the prior month's use.²⁶⁷ In its analysis, the court compared a cell phone contract with an alarm service contract.²⁶⁸ The court noted that an alarm service contract is for a fixed-year service length and is billed at a specified cost per month.²⁶⁹ The total cost of the service is determined by multiplying the monthly cost by the total number of months in the contract.²⁷⁰ The monthly cost is not dependent on the customer's use of the alarm service.²⁷¹ Most importantly, the customer is not being charged monthly or quarterly "for services specifically provided for that [period]," but rather is paying off the total contract price in installments over a predetermined period.²⁷² The critical factor appears to be that the alarm service contract has no variable, whereas the cellular contract is subject to the customer's usage.

2. Finance Charge Imposed

In order to qualify as a consumer credit transaction, a customer's obligation must be either "payable in installments or for which . . . a

262. *Id.* at *5.

263. *Id.* at *14.

264. *Id.* at *15.

265. *Id.*

266. *Id.* at *16.

267. *Id.* at *15.

268. *Id.* at *14–15.

269. *Id.* at *15.

270. *Id.*

271. *Id.*

272. *Id.*

finance charge is or may be imposed.”²⁷³ This section analyzes what constitutes a finance charge. A finance charge is

[T]he sum of all charges, payable directly or indirectly by the customer as an incident to or as a condition of the extension of credit The term does not include any charge with respect to a motor vehicle consumer lease. The term includes the following types of charges to the extent they are not permitted additional charges[,] . . . delinquency charges . . . or deferral charges . . . :

- (a) Interest, time price differential and any amount payable under a discount or other system of additional charges;
- (b) Service, transaction, activity or carrying charge;
- (c) Loan fee, points, finder’s fee or similar charge;
- (d) Fee for an appraisal, investigation or credit report;
- (e) Any charge imposed by a creditor upon another creditor for purchasing or accepting an obligation of a customer if the customer is required to pay any part of that charge . . . ;
- (f) Premium or other charge for guarantee or insurance protecting the creditor against the customer’s default or other credit loss;
- (g) Charges or premiums for credit life, accident or health insurance, written in connection with any consumer credit transaction to the extent they are not permitted as additional charges . . . ;
- (h) Charges or premiums for insurance written in connection with any action against loss of or damage to property or against liability arising out of the ownership or use of property to the extent they are not permitted as additional charges . . . ; and
- (i) Refund anticipation loans fees.²⁷⁴

For example, in *Patzka v. Viterbo College*,²⁷⁵ a student enrolled in a college.²⁷⁶ The school provided the student with a student loan, but at the time of her enrollment, the school did not provide her with a student

273. WIS. STAT. § 421.301(10) (2009–2010).

274. *Id.* § 421.301(20); *see also id.* § 422.202 (defining additional charges); *id.* § 422.203 (defining delinquency charges); *id.* § 422.204 (defining deferral charges).

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

276. *Id.* at 657.

handbook that contained the financing terms for the loan.²⁷⁷ The loan did provide for interest on the outstanding balance and a collection fee.²⁷⁸ In subsequent litigation between the parties, the court indicated that the interest charges are specifically part of the finance charge and should have been disclosed to the student at the time of contracting.²⁷⁹ Furthermore, in *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*,²⁸⁰ a customer entered into a contract for the use and possession of a color television that the customer had the option to purchase by making seventy-eight consecutive weekly payments of \$23 per week.²⁸¹ After a period of time, the customer stopped making payments and brought an action against the merchant.²⁸² One issue before the court was whether the transaction included a finance charge.²⁸³ The court noted that a finance charge includes any “time price differential.”²⁸⁴ The court found that “a time-price differential was built into the agreement” between the parties.²⁸⁵ The court reasoned that “[t]he time-price differential was the difference between the fair market value of the television-stereo” and the price the customer would eventually pay by making the seventy-eight payments of \$23 per week.²⁸⁶ Therefore, the agreement between the parties did provide for a finance charge.

There are three types of charges that are not considered finance charges.²⁸⁷ Those are additional charges,²⁸⁸ delinquency charges,²⁸⁹ and deferral charges.²⁹⁰ For disclosure purposes, it is critical to be able to

277. *Id.*

278. *Id.*

279. *Id.* at 662.

280. *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 Wis. 2d 79, 365 N.W.2d 882 (Ct. App. 1985).

281. *Id.* at 81, 365 N.W.2d at 884.

282. *Id.*

283. *See id.* at 87–88, 365 N.W.2d at 886–87 (quoting Wis. STAT. § 421.301(10)) (noting that under the WCA, “[a] consumer credit transaction also exists where property is acquired on credit, ‘for which credit a finance charge is or may be imposed’”).

284. *Id.* at 88, 365 N.W.2d at 887 (quoting Wis. STAT. § 421.301(20)(a)).

285. *Id.*

286. *Id.*

287. *See* Wis. STAT. § 421.301(20) (2009–2010).

288. *See id.* § 422.202 (defining additional charges).

289. *See id.* § 422.203 (defining delinquency charges).

290. *See id.* § 422.204 (defining deferral charges).

distinguish a finance charge from these other charges.²⁹¹

The critical distinction between a finance charge and an additional charge is whether the customer has the right to decline the charge.²⁹² If the customer has the right to decline the charge, then it is considered an additional charge.²⁹³ On the other hand, if the charge is required as part of the contract, the charge is a finance charge notwithstanding it may have a different name.²⁹⁴ In *Burney v. Thorn Americas, Inc.*,²⁹⁵ Rent-A-Center became involved in litigation with a number of its customers.²⁹⁶ One of the issues before the court was whether Rent-A-Center's contracts fairly disclosed the finance charge imposed in the transaction.²⁹⁷ Rent-A-Center argued that certain charges, such as delivery, maintenance, and termination charges, should not be considered part of the finance charge.²⁹⁸ The court noted that the purpose of the broad definition of finance charge contained in the WCA is to protect the consumer.²⁹⁹ A merchant should not be permitted to hide the true cost of the financing by designating a charge to be something other than a finance charge.³⁰⁰ The court started with the proposition that "any charge not part of the amount financed . . . is part of the finance charge" unless it qualifies as an additional, delinquency, or deferral charge.³⁰¹ The court offered a rule to follow when distinguishing a finance charge from an additional charge. The rule is that a customer must have the right to refuse the charge or service; otherwise the charge is a finance charge.³⁰² If a customer is purchasing an item over time and has no choice but to take the additional charge or

291. *See id.* § 422.301–310.

292. *See Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 775 (E.D. Wis. 1996). *See generally* WIS. STAT. § 422.202.

293. *Burney*, 944 F. Supp. at 775.

294. *Id.*

295. *Id.* at 762.

296. *Id.* at 764.

297. *Id.* ("The plaintiffs have moved for partial summary judgment on the following issues: . . . whether Rent-A-Center has violated § 422.301 by failing to disclose the finance charge as an interest rate.").

298. *Id.* at 774.

299. *See id.* ("Easily understandable and accessible information is the best protection for consumers.").

300. *Id.*

301. *Id.* at 774–75.

302. *Id.* at 775.

service, the charge is part of the finance charge.³⁰³ The court concluded that for the delivery and maintenance charges that were associated with the goods under contract, Rent-A-Center offered no evidence that the rental customer could decline either charge.³⁰⁴ Therefore, the charges were considered part of the finance charge.³⁰⁵ Similarly, the termination fee was a required part of the rent-to-own contract, and the customer had no option to decline that fee.³⁰⁶ As a result, the termination fee was also considered part of the finance charge.³⁰⁷

One must also be able to distinguish a finance charge from a delinquency or default charge (a late payment fee):

A delinquency or default charge is not a finance charge . . . if imposed for actual unanticipated late payment, delinquency, default or other such occurrence. However, when a merchant's billings are not paid in full within a stipulated time period and . . . the merchant does not . . . regard such accounts [to be] in default . . . and imposes charges periodically for delaying payment of such accounts . . . until paid, the charge so imposed comes within the definition of a finance charge.³⁰⁸

Also, an account is not considered to be in default if the merchant "customarily fail[s] to institute collection activity or . . . continu[es] to extend credit" to the customer.³⁰⁹ The test utilized by the court appears to be whether a reasonable person would conclude the parties' agreement anticipated payment in full by a certain date, or whether the customer could pay over time with the imposition of a finance charge.

A finance charge offers the debtor the option to pay or to "defer payment with interest" being charged if the customer defers payment.³¹⁰ As previously discussed, in *DeGrave v. Door County Cooperative*,³¹¹

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. WIS. ADMIN. CODE DFI-WCA § 1.07 (2007).

309. *Id.*

310. *Hooven v. Truck Country*, No. 97-2215, 1998 Wisc. App. LEXIS 655, at *5 (June 9, 1998).

311. *DeGrave v. Door Cnty. Coop.*, No. 96-1606, 1996 WL 722828 (Wis. Ct. App. Dec. 17, 1996).

members of a co-op were permitted to buy items for use on their farm.³¹² Some purchases were made in cash and others on credit.³¹³ The contract with the co-op provided that “all purchases [were] due within the following month and a finance charge of 1.5% per month . . . [would] be assessed to the previous balance less credits and payments.”³¹⁴ The co-op argued that the contract terms specifically required payment by a certain date, and that the customers were not granted the right to pay after the due date.³¹⁵ The court disagreed and concluded that “a reasonable person reading [the invoice] terms could believe that the co-op permitted payments after the due date.”³¹⁶

A late payment fee, on the other hand, bars deferral by the customer and assesses interest for nonpayment by the due date.³¹⁷ As discussed above, in *Hooven v. Truck Country*,³¹⁸ a truck repair business entered into a contract with a customer to repair the customer’s truck.³¹⁹ The truck company’s invoice provided that payment was due thirty days after the services were rendered, and overdue accounts would be assessed an 18% finance charge.³²⁰ When litigation ensued between the parties, the court had to determine whether the 18% charge was a finance charge or a late payment fee.³²¹ Despite the fact that it was stated to be a finance charge in the invoice, the court construed the fee to be a late payment fee.³²² The court noted that finance charges offer the debtor the option to pay or to “defer payment with interest” being charged if the customer defers payment.³²³ On the other hand, a late payment fee bars deferral by the customer and assesses interest for nonpayment by the due date.³²⁴ The evidence indicated that the truck

312. *Id.* at *1.

313. *Id.*

314. *Id.*

315. *Id.* at *2.

316. *Id.*

317. *Hooven v. Truck Country*, No. 97-2215, 1998 Wisc. App. LEXIS 655, at *5 (June 9, 1998).

318. *Id.*

319. *Id.* at *1.

320. *Id.* at *4.

321. *Id.* at *1–2 (explaining that one claim brought by *Hooven* was a violation of the WCA for “credit finance charges”).

322. *Id.* at *6.

323. *Id.* at *5.

324. *Id.* at *5–6.

repair business “demanded payment in full and charged 18% interest on default after a thirty-day grace period.”³²⁵ Similarly, in *Alaskan Fireplace, Inc. v. Everett*,³²⁶ Alaskan Fireplace entered into a contract with a customer for the installation of two fireplaces.³²⁷ The proposal signed by the parties provided that payment was to be made “net 30 days [with a] 1.5% monthly service charge for overdue invoices.”³²⁸ In a subsequent dispute between the parties, one issue before the court was whether the monthly service charge was a finance charge.³²⁹ The court concluded that the 1.5% monthly service charge was not a finance charge but rather a late payment charge.³³⁰ The court construed the contract between the parties to mean that payment was to be made “within thirty days of the installation of the fireplaces with the 1.5% monthly charge intended to dissuade late payment.”³³¹ Further, the court took note of the fact that the merchant considered the customer’s account to be in default upon failure to make the payment after the thirty days.³³²

III. CONCLUSION

It is difficult to determine whether a particular consumer transaction is one that is subject to the requirements of the WCA. The transaction must be a consumer credit transaction. A consumer credit transaction has six independent elements and each one must be satisfied. Each element has its own unique litigation points. The first element is a consumer transaction, which requires a customer and an agreement between them. The second element is the customer, which requires the consumer to establish the transaction was for personal, family, or household purposes. This issue essentially becomes whether the transaction was a personal or business transaction. The courts are split

325. *Id.* at *6.

326. *Alaskan Fireplace, Inc. v. Everett*, No. 02-3016-FT, 2003 WL 21397747 (Wis. Ct. App. June 18, 2003).

327. *Id.* at *1.

328. *Id.*

329. *Id.* (“The Everetts counterclaimed alleging that Alaskan Fireplace violated the WCA . . . by ‘falsely advertising (through omission) that the agreement for purchase of the fireplace and installation services would subject defendants to a finance charge.’”).

330. *Id.* at *4.

331. *Id.* at *1.

332. *Id.* at *5.

on how to make that determination. The third element is the merchant, which is much different than the merchant definition under the UCC. The fourth element is that the subject matter of the contract must be real or personal property, services, or money. Unfortunately, the courts have not adopted a useful rule for distinguishing the type of services subject to the WCA. The fifth element requires an extension of credit by the merchant. There are a number of useful principles that can be extracted from the cases when analyzing this element, including the fact that the courts use an objective test in making a final decision. Finally, the last element requires proof that the customer's obligation is either payable in installments or subject to a finance charge. The courts analyze a number of factors in deciding whether the merchant granted the customer the right to pay in installments. The finance charge element requires a determination of whether the charge is a finance charge, a late-payment fee, or an additional charge. Each charge has unique characteristics that distinguish it from the others.