## Consumer Law

### Repossession – UCC – Wisconsin Consumer Act

***Birge v. Simplicity Credit Union*, 2025 WI App 62 (filed Sept. 18, 2025) (ordered published Oct. 29, 2025)**

**HOLDING:** Pre- and post-sale notices in a repossession action were legally sufficient.

**SUMMARY:** The Birges took out an auto loan and entered into a security agreement with Simplicity Credit Union. The loan was secured by the car. The Birges defaulted almost immediately, so Simplicity repossessed the car and sold it, but there remained a deficiency of over $4,000.

The pre-sale notice used the "safe-harbor" language found in the Uniform Commercial Code (UCC) at Wis. Stat. section 409.614(3): "The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you will still owe us the difference .... If we get more money than you owe, you will get the extra money, unless we must pay it to someone else" (¶ 6).

The Birges alleged that the pre- and post-sale notices were legally insufficient. "Specifically, the Birges alleged that, consistent with § 425.210 [of the Wisconsin Consumer Act], the notices were required to describe the deficiency as the difference between the loan balance and the fair market value of the vehicle, rather than as the difference between the loan balance and the vehicle's sale price" (¶ 2).

The circuit court granted summary judgment in favor of Simplicity and dismissed the Birges' complaint.

The court of appeals affirmed in an opinion authored by Judge Nashold. The opinion carefully reviewed the pertinent UCC provisions, particularly the pre- and post-sale notices and the safe-harbor provision (*see* ¶ 15). The court separately addressed and rejected the Birges' contentions as to each notice (pre- and post-sale) (*see* ¶ 18).

As to the pre-sale notice, the court found no conflict between the UCC statutes and Wisconsin Consumer Act (WCA) provisions. "Although the Birges argue that their reading is necessary to harmonize §§ 409.614 and 425.210, their reading of the relevant statutes in fact creates conflict where none exists. When, consistent with its language, § 425.210 is properly confined to the calculation of a deficiency judgment in a judicial action to recover the same, both § 409.614 (particularly its safe-harbor language) and § 425.210 can be given full effect" (¶ 28).

Turning to the Birges' arguments regarding the post-sale notice, the court found them underdeveloped and lacking but proceeded as best it could. "We reject this argument regarding Simplicity's post-sale notice for the same reason we reject the Birges' argument regarding the pre-sale notice: namely, because we conclude that § 425.210 governs judicial actions brought to recover deficiency judgments after the collateral has been disposed of, but does not alter the UCC's safe-harbor provision" (¶ 31).

The court also considered and rejected an argument directed at a statutory duty to assign a specific dollar amount relating to the deficiency in the post-sale notice: "the Birges' interpretation would make compliance with § 409.616 impossible because it would require the creditor to enter a potentially unknown number into the post-sale notice rather than the sale price" (¶ 32).

## Criminal Procedure

### Not Guilty by Reason of Mental Disease or Defect – Recommitment Following Conditional Release – Proof of Dangerousness Required

***State v. Wilhite*, 2025 WI App 64 (filed Sept. 25, 2025) (ordered published Oct. 29, 2025)**

**HOLDING:** Wis. Stat. section 971.17(3)(e) is unconstitutional to the extent that it permits a circuit court to revoke the conditional release of a person found not guilty by reason of mental disease or defect and commit the person to institutional care without a finding of dangerousness.

**SUMMARY:** In September 2022, defendant Wilhite was committed to the care of the Wisconsin Department of Health Services (the department) as a person found not guilty by reason of mental disease or defect (an "NGI acquittee") on a charge of threat to a law enforcement officer. The circuit court granted Wilhite conditional release from institutional care in February 2023.

In February 2024, the court issued an order revoking Wilhite's conditional release and committing him to institutional care pursuant to Wis. Stat. section 971.17(3)(e). Under this provision, a circuit court may revoke an NGI acquittee's conditional release and commit the acquittee to institutional care based on 1) the acquittee's violation of either a condition of release set by the court or a rule of the department, or 2) the acquittee's current dangerousness (*see* ¶ 1). In this case the revocation was based on proof that Wilhite had violated a rule or condition of release (*see* ¶ 11).

On appeal, Wilhite argued that Wis. Stat. section 971.17(3)(e) is facially unconstitutional to the extent that it permits a circuit court to revoke an NGI acquittee's conditional release and to commit the acquittee to institutional care based solely on the violation of a court-ordered condition or department rule without proof of current dangerousness. In an opinion authored by Judge Kloppenburg, the court of appeals agreed.

The court of appeals concluded, pursuant to the holdings in *Jones v. United States,* 463 U.S. 354 (1983), and *Foucha v. Louisiana,* 504 U.S. 71 (1992), that "Wis. Stat. § 971.17(3)(e) is unconstitutional to the extent that it permits a circuit court to revoke an NGI acquittee's conditional release and commit the NGI acquittee to institutional care without a finding of dangerousness" (¶ 3). The appellate court also concluded that the unconstitutional provisions in Wis. Stat. section 971.17(3)(e) are severable, and, therefore, it left in place and deemed operative the remainder of the statute, which requires a finding of dangerousness before a conditionally released NGI acquittee may be committed to institutional care (*see* ¶ 64).

BLINKA

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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Because the circuit court order in this case revoked Wilhite's conditional release and committed him to institutional care without a finding of dangerousness, in violation of due process, the court of appeals reversed and remanded the matter to the circuit court with directions to vacate the order (*see* ¶ 3).

As a procedural matter in this case, the appellate court addressed and rejected the state's arguments that 1) Wilhite forfeited his facial constitutional challenge, and 2) the court of appeals lacked competency to hear that challenge (*see* ¶¶ 13-23).

## Overlapping Statutes – Prosecutorial Charging Discretion

***State v. Kenyon*, 2025 WI App 60 (filed Sept. 16, 2025) (ordered published Oct. 29, 2025)**

**HOLDING:** The statutory scheme in this case involving overlapping criminal statutes with different minimum penalties did not violate due-process, equal-protection, or separation-of-powers protections for defendants.

**SUMMARY:** This case involved two overlapping criminal statutes. Wis. Stat. section 948.02(1)(b) provides "[w]hoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony." Wis. Stat. section 948.02(1)(e) states "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." Both statutes are classified as Class B felonies and carry a maximum of 60 years of imprisonment, but only Wis. Stat. section 948.02(1)(b) imposes a mandatory minimum sentence, specifically, a mandatory minimum of 25 years of initial confinement. *See* Wis. Stat. § 939.616(1r).

Defendant Kenyon was charged in an information with violating Wis. Stat. section 948.02(1)(b). Therefore, he faced a mandatory 25 years of initial confinement if convicted, even though his alleged conduct necessarily violated Wis. Stat. section 948.02(1)(e), which carries no mandatory minimum. He moved to dismiss the information, arguing that the statutory scheme violated due-process, equal-protection, and separation-of-powers principles because the statutes unconstitutionally allow prosecutors to determine the defendant's sentence and enable the arbitrary enforcement of the law.

The circuit court agreed and dismissed the case (*see* ¶ 2). The circuit court believed that the decision to charge the defendant under Wis. Stat. section 948.02(1)(b) was made exclusively because he insisted on going to trial and was not motivated by legitimate concerns for the public welfare (*see* ¶ 3).

In an opinion authored by Judge Geenen, the court of appeals reversed. Said the court: "Examining other instances of overlapping and identical criminal statutes with different penalty schemes, the United States Supreme Court, the Wisconsin Supreme Court, and this court have rejected arguments identical to those Kenyon makes now, and we are bound to apply those cases here" (¶ 3).

Significant decisions in this line of cases include *United States v. Batchelder,* 442 U.S. 114 (1979), which held 1) so long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied; 2) when an act violates more than one criminal statute, the government can prosecute under either

so long as it does not discriminate on an unjustifiable standard such as race, religion, or other arbitrary classification; and 3) a statutory scheme like that under review in the present case does not involve an impermissible delegation of the legislature's responsibility to the executive branch (*see* ¶¶ 16-18).

The court of appeals also cited *State v. Cissell,* 127 Wis. 2d 205, 378 N.W.2d 691 (1985) (making clear that overlapping criminal statutes with different penalty schemes do not violate constitutional principles unless the prosecutor selectively bases the charging decision upon an unjustifiable standard such as race, religion, or other arbitrary classification) (*see* ¶ 28).

The record in the present case contained no evidence of discriminatory prosecution (*see id.*).

## Environmental Law

### State Parks – Master Plans – Contested Case Hearings

***Friends of Blue Mound State Park v. Wisconsin Dep't of Nat. Res.*, 2025 WI App 63 (filed Sept. 23, 2025) (ordered published Oct. 29, 2025)**

**HOLDING:** The Wisconsin Department of Natural Resources (DNR) properly denied the request of the Friends of Blue Mound State Park (Friends) for a contested case hearing on the DNR's master plan for the park.

**SUMMARY:** The DNR manages state parks and makes plans for the development of those parks through what is known as the master planning process (*see* ¶ 18). In 2021, the DNR adopted a master plan for Blue Mound State Park that, among other things, provided for a snowmobile trail through the park (*see* ¶ 4). The Friends, a small nonprofit organization dedicated to supporting and assisting the DNR in providing visitor services to enhance the park, opposed the trail because of its concerns over the environmental impact the trail would have on the park and on "silent sport" recreational activities, such as snowshoeing (¶ 5).

The Friends sought a contested case hearing on the master plan, which was denied by the DNR. The Friends then petitioned for judicial review of the DNR's denial of a hearing. The circuit court concluded that the Friends had no right to seek a contested case hearing, and it upheld the DNR's decision denying the hearing.

In an opinion authored by Judge Colón, the court of appeals affirmed. It concluded that "the Friends did not have the right to seek a contested case hearing pursuant to Wis. Stat. § 227.42. DNR's master planning regulations require public participation in the master planning process, with the form of that public participation being within DNR's discretion, whether it be open meetings, public hearings, or another form of public participation in the master planning process. The Friends' reliance on Wisconsin's Environmental Procedure Act (WEPA), Wis. Stat. § 1.11, does not change this result. Rather, through the master planning process, members of the public are afforded the ability to present their positions and supporting materials to DNR as part of the master planning process. Granting a contested case hearing to allow for the continued presentation of information to DNR is redundant of what is already afforded as part of the master planning process. Thus, we conclude that DNR properly denied the Friends' request for a contested case hearing" (¶ 2; *see* Wis. Stat. § 227.42(3)).

The Friends' separate petition for judicial review, which raises substantive challenges to the master plan, remains pending in the circuit court. Thus, the conclusion in this decision that the Friends has no right to a contested case hearing under Wis. Stat. section 227.42 does not end this matter; the Friends will still have the benefit of judicial review of the master plan (*see* ¶ 24).

## Real Property

### Federal Priority Statute – Liens – Surplus Proceeds

***Bank of Am. NA v. Estate of Nelson*, 2025 WI App 61 (filed Sept. 17, 2025) (ordered published Oct. 29, 2025)**

**HOLDING:** The federal government had priority over the state to surplus proceeds from a foreclosure.

**SUMMARY:** Nelson died owing unpaid taxes to the United States and to the Wisconsin Department of Revenue (DOR). A bank also foreclosed on a mortgage on Nelson's real property, naming the U.S. and the DOR as defendants because both held tax liens. As a result of the foreclosure proceedings, a surplus of about $54,000 remained. Both the U.S. and the DOR filed claims. The U.S. asserted it had priority under 31 U.S.C. § 3713. The DOR argued that the federal priority statute did not apply here. The circuit court ruled in favor of the U.S.

The court of appeals affirmed in an opinion authored by Judge Neubauer that reviewed de novo the application of 31 U.S.C. § 3713 (*see* ¶ 4). The federal statute has "roots" that go back to the 1790s (¶ 5). As relevant here, the statute gives the federal government's claim priority if "the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor" (¶ 1).

The parties agreed on two points: 1) the surplus was not an asset that belonged to Nelson's estate, and 2) the clerk who held the money was not an "executor" within the statute's meaning. The parties disagreed, however, over whether the clerk was an "administrator" for purposes of 31 U.S.C. § 3713.

"The interpretation and application of the statute is governed by federal law," the text of which "'is virtually unchanged since its enactment' in the late 1700s" (¶ 16). Controlling federal case law "instruct[s] that we must construe the statute broadly and not in a manner that limits its reach to 'the literal and technical meaning' of its terms" (¶ 17).

The appellate court agreed with the U.S. that the priority statute applies to the foreclosure surplus. "Though the clerk of court may not, as the current custodian of the surplus, exercise all of the powers granted to an administrator or personal representative appointed by a court to settle a decedent's estate, the clerk nonetheless exercises significant control over the disposition of the surplus. The clerk has exclusive custody of the surplus and no claimant may receive any portion of it unless and until the clerk disburses it as directed by the circuit court. We agree with the circuit court that, in these circumstances, the clerk functions as the equivalent of an 'administrator' for the purpose of 31 U.S.C. § 3713(a)(1)(B). The control exercised by the clerk over the surplus suffices to bring the clerk within the scope of the statute" (¶ 18).

The DOR raised a second argument to the effect that the U.S. had to show that Nelson was insolvent, that is, unable to pay his debtors. The parties sparred over which one had the burden of proof under 31 U.S.C. § 3713. The court found it unnecessary to resolve that issue because court records indicate that "the estate was insolvent" regardless (¶ 21). **WL**