

Disaster Legal Services In Wisconsin

STATE BAR OF WISCONSIN

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INTRODUCTION

This manual is intended as a resource for volunteer attorneys providing legal services to disaster victims in Wisconsin. The manual outlines rights of disaster victims under Wisconsin law in the areas of Housing, Landlord/Tenant, Insurance, Employment Law, Consumer Issues, and Debtor/Creditor Law. While this manual references aspects of certain federal laws and federal disaster relief programs, it is not intended to be a comprehensive treatise on federal law or federal disaster relief programs; rather, it was prepared as a Wisconsin supplement to the broader disaster legal services manuals and treatises available through the American Bar Association and other groups. This manual, along with “The Wisconsin Disaster Legal Services Manual” prepared simultaneously for Wisconsin residents by the Young Lawyers Division of the State Bar of Wisconsin, is intended to assist and train those volunteer lawyers who have graciously agreed to help disaster victims in Wisconsin.

DISCLAIMER: This manual provides general information as of the date of this manual. The law is constantly changing and specific situations require individual review and analysis. Wisconsin residents should consult an attorney to obtain advice and counsel specific to the facts and circumstances of their case. Lawyers should consult the local rules and the Wisconsin Statutes to thoroughly analyze the specific legal issues facing their clients or the victims that they are assisting on a volunteer basis.

CONTRIBUTORS. This manual was prepared with the assistance of attorneys in the Milwaukee, Wisconsin office of Foley & Lardner LLP, with particular contributions by Frank W. DiCatri, Michael D. Flanagan, David Froiland, Matthew D. Lee, Ethan Lenz, Tanya C. O’Neill, Sarah A. Slack and Julie Solmer Stine. We thank them for their time and the use of their skills to help the greater community.

SECTION I: HOUSING AND LANDLORD/TENANTS

A. INTRODUCTION

This Section addresses a tenant's rights under Wisconsin law when a rental unit is damaged or destroyed, as well as rights and remedies available to a homeowner when the homeowner's primary residence is destroyed or damaged by a natural disaster. Please note that this section addresses Wisconsin law; additional issues are presented and assistance may be available under the Federal Emergency Management Agency ("FEMA") Housing Assistance Program. Additional information regarding the FEMA Housing Assistance Program is available at www.fema.gov.

B. TENANTS

When handling a situation where a tenant's unit is damaged or destroyed by fire, water or other casualty, the primary issue is the tenant's rights. While the landlord has a duty to repair the premises, under Wisconsin law (Wis. Stat. § 704.07(4)), if the premises is untenantable, the tenant may move out and not pay rent or stay and pay a reduced rent, depending upon the extent of the damage. See Acme Ground Rent Co. v. Werner, 139 N.W. 314 (Wis. 1912); see also, Insurance Section at II.C.4 regarding renters insurance coverage.

The following are some questions/answers to ask to assist a tenant in determining their options:

1. Are the premises untenantable due to :
 - a. fire, water, or other disaster/casualty?
 - b. a condition that is hazardous to their health? or
 - c. landlord's failure to make repairs that materially affect their health or safety?

2. If the premises are untenantable AND tenant wants to leave:
 - a. The tenant may remove from the property, UNLESS the landlord proceeds to promptly repair, rebuild or otherwise eliminate the health hazard. Wis. Stat. § 704.07(04).
 - b. The tenant may remove from the premises if the inconvenience to the tenant due to the nature or period of repair would impose an undue hardship on the tenant. Wis. Stat. § 704.07(04).

If the tenant removes from the premises due to untenantability, it is not liable for rent after the premises became untenantable and the landlord must refund any rent paid in advance from when the premises became untenantable. Id.; see also Acme Ground Rent Co. v. Werner, 139 N.W. 314 (Wis. 1912); and Miller v. Kohanski, 125 Wis. 2d 574, No. 84-2223, 1985 Wisc. App. LEXIS 3463 (Wis. Ct. App., June 1, 1985) (unreported).

While not required by Wisconsin law, it is advisable for a tenant that wants to leave an untenable premises to provide written notice to the landlord of their decision to terminate the lease as well as the basis for tenant's determination that the premises is untenable. *See Zehner v. Village of Marshall*, 709 N.W.2d 64 (Wis Ct. App. 2005). To the extent it is possible to take pictures of the premises that evidences the conditions which make the premises untenable, that would be recommended. The tenant should keep a copy of both the letter and the pictures. Should the tenant decide to vacate the untenable premises, the landlord is obligated to return the security deposit consistent with the lease and Wisconsin law.

3. If the premises are untenable AND tenant wants to stay the tenant can abate the rent to the extent the tenant is deprived of the full normal use of the premises. A tenant can not abate all the rent AND remain in possession. While not required by Wisconsin law, it is advisable for a tenant that wants to stay on the premise and abate a portion of the rent, to provide written notice to the landlord of their decision to stay and a description of how the reduction in rent was calculated. To the extent it is possible to take pictures of the defects, that would be recommended. The tenant should keep a copy of both the letter and the pictures. *Id.*; *see also Denham v. Madole*, 217 N.W. 423 (Wis. 1928); *Ledvina v. Puksich*, No. 04-0696, 2004 WL1846224 (Wis. Ct. App. Aug. 18, 2004).
4. If the premises are not untenable the tenant is obligated by the terms of the lease and may provide notice under the terms of the lease if they would like to leave but remains obligated to the extent specified in the lease. The landlord is responsible to make any repairs necessary to comply with the local building code and to keep the premises safe. Wis. Stat. § 704.07(2)(a). If the premises is damaged and the landlord does not repair the damage, the premises may become untenable, in which case, go back to question Number 1. *See* Wis. Stat. § 704.07(4).

C. HOMEOWNER

If the primary residence is destroyed or damaged by a natural disaster, unless the homeowner(s) receive a forbearance agreement from their lender, they must continue to pay their mortgage. However, there are various forms of assistance available to help homeowners make the payments on their homes, as well as pay for any necessary repairs. *See Insurance* Section for information regarding potential insurance coverage options.

First, the mortgagee should contact their lender. Many lenders will offer a grace period of several months before seeking a foreclosure for homeowners affected by a natural disaster.

If the mortgagee has an FHA-insured mortgage and their home is in a Presidential declared Disaster Area, they may qualify for a 90-day foreclosure moratorium. This is not a payment moratorium, a foreclosure moratorium merely prevents the bank from foreclosing during that period of time. If they believe they are an affected borrower, it is very important that they notify their lender to be sure that the lender agrees. The lender may request supporting documentation and use it to determine if they meet the relief criteria.

If mortgagees are having a hard time with their mortgage lender, they may call the HUD-approved counseling agency toll free at (800) 569-4287 or call HUD's National Servicing Center at (888) 297-8685.

If they have received a foreclosure notice and are not able to make the payments, they may be able to obtain assistance with payments from FEMA. Residents and business owners can begin the disaster application process by registering online with the Federal Emergency Management Agency at www.fema.gov, or by calling FEMA at 1-800-621-FEMA (3362).

D. FINANCIAL ASSISTANCE/LOANS (APPLICABLE TO BOTH HOMEOWNERS AND RENTERS)

1. **SBA Loan.** Homeowners and renters in declared disaster areas may apply for up to \$40,000 in SBA loans to pay costs to repair or replace clothing, furniture, cars or appliances damaged or destroyed in the disaster. Homeowners may apply for up to \$200,000 to repair or replace their primary residence to its pre-disaster condition. The loans may not be used to upgrade homes or make additions unless required by local building authority/code. Loans may be increased up to 20 percent to make improvements that lessen the risk of property damage by future disasters of the same kind. Secondary homes or vacation properties are not eligible for these loans. The amount the SBA will lend depends on the cost of repairing or replacing your home and/or personal property, minus any insurance settlements or grants. SBA will send an inspector to estimate the cost of your damage once you have completed and returned your loan application. See www.sba.gov/services/disasterassistance.

For further information about SBA disaster assistance for business, call toll-free 1-800-659-2955 or www.sba.gov.

2. **Farm Assistance.** USDA's Farm Service Agency provides emergency loans to help farmers recover from production and physical losses due to natural disasters. In order to qualify for the loans, farmers must own or operate an established family farm operation in a county declared by the President or Secretary of Agriculture as a disaster area. They must have suffered at least 30-percent loss in crop production or a physical loss to livestock, livestock products, real estate, or chattel property. Emergency loan funds may be used to repair or replace essential property, pay production costs associated with the disaster and essential family living expenses.

Farm Service Agency loans are different than standard loans. Some of the more significant requirements include keeping acceptable farm records, operating in accordance with an approved farm plan and participating in financial management training. Applications for emergency loans must be received within 8 months of the county's disaster designation date. See www.fsa.usda.gov.

For more information on USDA loans, farmers can call, visit, or email their local Wisconsin office at:

USDA Rural Development – Wisconsin
4949 Kirschling Ct.
Stevens Point, WI 54481
Phone: (715) 345-7615
FAX: (715) 345-7669
TTY: (715) 345-7614

SECTION II: INSURANCE

A. INTRODUCTION

This section is designed to assist a volunteer attorney in providing general information about insurance issues that may be faced by disaster victims. In most instances, given the potential complexity of the individual insurance issues, disaster victims should also be advised to seek the advice of an attorney experienced in insurance law.

B. OVERVIEW

Because most insurance coverage is time-sensitive, it is wise to encourage victims who have insurance to:

1. File a written claim with their carrier immediately, even if their insurer or insurance agent has already told them that coverage will be denied. This will help to avert an insurer from taking the position that it did not receive timely notice if it is later discovered that portions of the loss may be covered by insurance;
2. File a claim with ALL POSSIBLE SOURCES OF COVERAGE/BENEFITS (this could include their homeowner's insurer, business insurer, farmowner's insurer, automobile insurer, insurance held by a landlord, and/or the National Flood Insurance Program, and any other entities from which they might hold insurance policies);
3. Immediately photograph, videotape, and inventory their damage; and
4. Preserve as much evidence of their damage/loss as possible. In some instances due to health, structural concerns, etc., this may be a practical impossibility. If, however, any items must be destroyed or disposed of immediately, you should again encourage the individual to take photographs and otherwise preserve as much evidence of the loss as practical.

C. COMMON INSURANCE ISSUES

1. Initial Advice Following a Disaster

Volunteer attorneys will likely only be able to give general advice, due to the complicated nature of most insurance policies. With this in mind, volunteer attorneys should always advise disaster victims to:

- a. Read their policy;
- b. Contact their agent immediately;
- c. Preserve evidence of their damage with pictures, videotapes, and written inventories; and

- d. Pay particular attention to the policy's requirements for timely filing of claims and file proofs of claim under all applicable insurance policies.

2. Additional Issues After Initial Advice is Given

If the victim cannot locate the policy because it is lost or destroyed, tell the victim to contact his/her insurer (often insurers set up special hotlines for this very purpose). It is important to have the victim ask for *the entire policy, including all endorsements*.

3. Types of Insurance Policies and Basic Features

- a. Homeowners Insurance

Homeowners often purchase this insurance to cover both damage to their homes, the personal property inside their homes, and their liability should a third party be injured on their property. Among other things, however, the typical homeowners policy usually does not cover floods and earthquakes, unless the policyholder purchased a rider for such a purpose.

Flood damage may also be covered under a specific flood insurance policy purchased by the insured through the National Flood Insurance Program ("NFIP"). NFIP is not part of a homeowners policy, it is separate and distinct coverage that is only available in certain communities. If the disaster victim thinks they purchased a flood policy, they should contact their agent to begin the claims process. If they cannot locate their policy, they can call 1-800-427-4661 to speak with a NFIP insurance specialist. Additionally, if the victim has internet access you should encourage them to visit www.FloodSmart.gov as the federal government posts information on this site to assist victims in filing and processing their claims.

- (1) **Potential Coverage Under Homeowners Insurance for "flood-related" items.** Some damage that may at first blush appear to be excluded by typical flood exclusions may actually be covered under the typical Homeowners Insurance policy. These include:

- (a) **Windstorm Damage.** This is damage caused by rain entering a structure through doors, holes in the outside of a home, or wind-damaged windows that results in standing water inside the home. It can often be characterized as windstorm damage as opposed to flood damage. Accordingly, this damage often can be covered under homeowners policies instead of flood insurance.

- (b) **Sewer Back-up Coverage.** Some insurers offer endorsements to their policies covering damage arising from sewer back-up. Often times the endorsements provide separate sublimits of coverage (e.g. \$5,000, as opposed to the full policy limit), but if the victim has any damages arising from sewer back-up, they

should be encouraged to determine if they have coverage under their policy for such damage.

- (2) **Other Types of Coverage Included Under Most Homeowners Insurance Policies.** In addition to the preceding, most Homeowners Insurance policies provide coverage for losses caused by a wide variety of perils, such as:
- a. Fire/lightning (note that in some cases, fire will be covered even if the fire initially results from an uncovered cause such as flood or earthquake);
 - b. Explosion;
 - c. Riots;
 - d. Vehicles;
 - e. Smoke;
 - f. Weight of ice, sleet, or snow;
 - g. Vandalism/malicious mischief;
 - h. Theft;
 - i. Accidental discharge or overflow of water; and
 - j. Attempted theft or loss of property.
- (3) **Typical Exclusions in Homeowners Insurance Policies.** There are, of course, also a number of exclusions found in most Homeowners insurance policies. Some of the more common ones are for losses caused by such things as:
- a. Flood;
 - b. Earthquake;
 - c. Birds, vermin, rodents or insects;
 - d. Smog, rust/other corrosion, rot (whether dry or wet);
 - e. Vandalism if the home has been vacant for more than thirty (30) consecutive days;
 - f. Pressure or weight of water damaging a fence, pavement, patio, swimming pool, foundation, bulkhead, or dock;

- g. Theft in and to a dwelling under construction and of materials and supplies used in construction;
- h. Constant or repeated seepage or leakage of water over weeks, months, or years from plumbing, heating, or air conditioning system. This means a slow leak over a long period of time; sudden water loss from such fixtures usually is covered;
- i. Ordinary wear and tear and deterioration are not covered, damage for failure to maintain the home is not covered;
- j. Settling, shrinking, bulging, or expansion, including where the result is cracking of pavements, foundation walls, floors, roofs or ceilings;
- k. Mechanical defects; and
- l. Latent defects.

b. Business Insurance

Business policies, like most homeowners policies, often do not cover floods unless the policyholder has purchased a rider. Business policies may, however, provide for business interruption coverage (i.e., coverage for loss of income while the business is shut down) and inventory protection coverage. Such coverage may help a damaged business recoup some of its losses and a claim should almost always be filed under such policies in order to determine the extent of any coverage. Coverage can, however, vary widely from one business policy to another. Therefore, victims should be advised to review their actual policy carefully and to consult with their insurance agent and an attorney to determine the full scope of potential coverage.

c. Vehicle Insurance

The typical vehicle insurance policy provides three major types of coverage:

- (1) Liability: covers damage to third parties.
- (2) Comprehensive: covers damage to the insured's vehicle from causes other than an accident while in motion, and will typically cover physical damage to the vehicle caused by a natural disaster.
- (3) Collision: covers damage to the insured's vehicle arising from an accident while in motion.

d. Condominium and Renter Insurance

Condominium owners and renters generally face the most complicated situation with their insurance claims after a disaster.

For condominium owners, it is of vital importance that they review both their personal insurance policy and any policy maintained by their condominium association to determine what portions of their claim might be covered under each policy (depending on the exact circumstances and the coverage terms of each policy, there may be some coverage under both).

For renters it is important to purchase personal possessions coverage. If the renter has such coverage, he or she is in a similar situation to the condominium owner, as the tenant might also have some coverage under his or her landlord's policy. If a renter does not have personal possessions coverage, however, he/she is unlikely to be able to obtain coverage for those possessions under the landlord's policy (unless the landlord is in some way liable for the loss). Regardless of this fact, the renter should still identify and file claims with all potential insurers in order to try to recover from all possible sources of coverage.

4. The Standard Insurance Policy

An insurance policy lays out the rights and duties of both the insured and the insurer. Again, it is highly important for the insured to ensure that they have a complete copy of their policy after any loss. Generally, the policy will contain: (1) a Declaration page, (2) the policy form itself, and (3) endorsements.

D. THE ANATOMY OF AN INSURANCE POLICY

1. Declaration Page

This is usually the first page (or pages) of the policy, and it may likely be the only part of the policy that the victim has. If so, urge the victim to make every effort to locate the rest of the policy. The declaration page typically provides the name and address of the insurer and insured, and a general description of the limits of insurance and deductibles for the policy.

2. Policy Form

This makes up the body of the policy. This section is where the INSURING AGREEMENTS, CONDITIONS (which typically contain the claim notice requirements), LIMITATIONS, and EXCLUSIONS of coverage are found. Often this section, like many contracts, is confusing to a layman because there may be a number of cross-references to other sections of the policy and there are typically a number of defined terms.

3. Endorsement

Endorsements are generally found (there are often several of them) at the end of the policy. They often may add, modify, or take away coverage that is noted in the standard

policy form. Often perils such as flood and earthquake, if covered by the policy, are only listed in an endorsement, so it is vital to review this section in every case.

4. Claim Process

Different insurers require different procedures to receive benefits under their policies; usually the requirements for proper claim filing are found in the policy form under a section entitled “Conditions.” The one standard step is that the insured must generally contact the insurance carrier. Often, in situations of major disasters, the carrier will set up a hotline for their policyholders. The victim should ALWAYS be encouraged to contact the agent who sold them the policy, as the agent will often be very helpful in assisting them in filling out required claim forms and otherwise guiding them through the claims process.

Disaster victims must ALWAYS file claims, even if they are told not to by their insurance agent. This allows them to later contest a denial of benefits under their policy, if necessary. There are often different procedures to follow depending on what type of claim the victim is making.

- a. First Party Claim: This is where the insured makes a claim for damage that he or she has suffered (e.g., structural damage to their home or damage to personal possessions).
- b. Third Party Claim: This is where a third party makes a claim on another’s policy (e.g., a claim by a renter against a landlord for damages arising from an allegedly unsafe premises). Third party claims often involve complicated litigation. The volunteer attorney should refer potential third party claimants to an attorney who is well-versed in insurance law.

After the victim files a claim, the insurer will usually send a claims adjuster to inspect the damage. The claims adjuster will make an initial decision on how much the insurance company will pay.

5. Late Claims

Always instruct the victim to file his or her claim, even if he or she would be doing this “late” according to the terms of the policy. If the victim files his or her claim within one year of the date required by the policy, the insurer cannot invalidate or reduce the victim’s claim unless it can prove: (1) it was prejudiced by the victim’s tardiness in filing and (2) it was reasonably possible for the victim to meet the time limit contained in the policy. See Wis. Stat. § 631.81. Furthermore, inform the victim that, if still possible, it is imperative that they file any claim, and possibly even commence legal action, within one year of the date of any property losses, as many property-insurance-related claims are subject to a one-year statute of limitations pursuant to Wis. Stat. § 631.83.

6. Potential Trouble Areas

a. Bad Faith, Misrepresentation, and Denial of Claims

Should any question arise under these areas, urge the victim to seek advice from an attorney experienced in these areas.

b. Cancellation/Non-Renewal

In the event that a victim's insurer cancels or refuses to renew his or her insurance policy following a disaster, encourage the victim to contact the Office of the Commissioner of Insurance about their rights, as such a cancellation or non-renewal may be prohibited or otherwise restricted under the Wisconsin Insurance Code.

c. Additional Legal Advice

The attorney should inform the victim of the scope of representation that he/she is providing. Since many questions that the volunteer attorney will field will be highly technical in nature, and neither the volunteer attorney nor the victim may have the policy in hand, it is often best to refer the victim to another attorney. Urge the victim to call the Wisconsin State Bar Lawyer Referral and Information Service (800.362.9082 outside of Madison, or 608.257.4666 in Madison or outside Wisconsin). The hours of this hotline are 8:00 am - 5:30 pm Monday-Thursday and 8:00 am - 5:00 pm on Friday. The victim should also be told that he or she may call the complaints and information line for the Office of the Commissioner of Insurance at 800.236.8517, Monday - Friday 7:45 am - 4:30 pm. Also, the Office of the Commissioner of Insurance maintains a web site at www.oci.wi.gov.

E. INSURANCE CLAIM PROCESS

In general, you should try to ensure that a disaster victim is aware of and attempts to follow the below process in pursuing any insurance claim.

1. Contact their agent, broker, or insurance company.

The victim should begin the claims process as soon as possible. This is true regardless of whether the victim thinks there is coverage, and no matter what the agent says about coverage.

2. Make sure that they are reachable by their agent.

This is even more vital where the victim has been displaced. Suggest that the victim offer to call the agent frequently until the victim has a contact number at which he/she can be reached, or make sure that the agent has the victim's cell phone number.

3. Keep a record of all damage.

The victim should take pictures or video of all damage, as well as detailed written notes of what was lost or damaged. Despite the natural reaction to clean up following a disaster, urge the victim not to do so until they have captured all damage/losses on film and in writing and have given the insurance company notice of the loss and an opportunity to view the damage (unless that is impractical due to health, structural, or other concerns).

4. Follow up all discussions with the agent, broker, or insurance company with a letter.

The victim should confirm all oral discussions regarding the claim in a written letter to the agent, broker, or insurance company. This letter should contain a copy of the written list of damaged/lost/destroyed property. It is absolutely crucial that the victim note on each letter that the list the victim provides is **ONLY A PARTIAL LIST OF LOSSES** and that the victim will send on any additional claims when they are discovered. Advise the victim to retain a copy of the letter.

5. Protect their property from further damage/loss.

6. Seek estimates of costs to repair their damaged property and keep all of their receipts. Advise the victim to also keep their receipts for any additional living expenses (hotels, meals, etc.), as there is often coverage for these items under a homeowners insurance policy.

7. Tell the victim to make sure the adjuster inspection occurs before the victim makes any repairs or destroys any evidence of loss to property (again unless this is impractical due to health, structural, or other concerns).

8. Obtain an advance on insurance proceeds, if possible.

9. **DO NOT SIGN ANY TYPE OF RELEASE, WAIVER, OR OTHER AGREEMENT WITH THE INSURANCE COMPANY WITHOUT SPEAKING WITH AN EXPERIENCED ATTORNEY.**

10. Call the insurance company if the victim's claim gets denied in full or in part and obtain a complete explanation of the reason for denial.

Tell the victim to ask for the reasons for denial in writing. Then refer the victim to an attorney, or the above-mentioned referral line if they have any further questions about the legitimacy of the denial.

Provide the client with the Office of the Commissioner of Insurance Complaints and Information line at 800.236.8517 or, if they have internet access, direct them to the web site at www.oci.wi.gov.

SECTION III: EMPLOYMENT LAW

A. INTRODUCTION

This Section is designed to assist a volunteer attorney in providing preliminary guidance about employment issues faced by disaster victims.

There is no “silver bullet” law that necessarily protects the employment of employees who are affected by a natural disaster. For example, if an employee’s home is destroyed in a flood or tornado, there is no law stating that the employee is entitled to any amount of protected leave time. Unless there is a labor contract or employment agreement stating otherwise, employment is “at will,” which means that an employee may be terminated for a good reason, a bad reason, or no reason at all – so long as there is no illegal reason (for example, based upon the protections of anti-discrimination and anti-retaliation laws).

Even though no law is designed specifically to protect the employment of natural disaster victims, some employment-related laws may nevertheless come into play. For example, if the employee-victim becomes injured, or if a family member of the employee-victim becomes injured, then Wisconsin and federal family and medical leave laws may create an entitlement to leave.

Before an employee resorts to remedies and solutions existing under the law, the employee may be well advised to exhaust all non-legal avenues, especially open communication with Human Resources. Even though Companies are not required to permit a leave of absence, such leaves may very well be authorized in exigent circumstances. For planning purposes, employers need to know how long an employee may be absent from work, how the work can be performed in the meantime, and whether the need for employee leave is sincerely urgent (i.e., what the employee will be using this leave time for). In the event that such leave time is granted, employers have a right to expect regular and good faith communication from an employee during a time of absence.

This chapter deals with employment issues relating to victims of natural disasters. The first section below applies to employee-victims who remain employed. The second section deals with questions about terminations of employment in the aftermath of a natural disaster. The third section deals with benefits which employee-victims may become entitled to after their employment is terminated.

B. LEGAL ANALYSIS

1. While The Employee Remains Employed

Even though there is no law that specifically protects the employment of disaster victims in Wisconsin, there are a handful of employment laws that may nevertheless protect such employees.

If the employee or a family member is injured in the natural disaster (physically or psychologically), the federal Family and Medical Leave Act (“FMLA”) may require the

employer to provide the employee with a leave of absence. The FMLA provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if the employees continued to work instead of taking leave. The leave applies when the employee is unable to work because of a “serious health condition,” or alternatively, to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition.¹ Under the law, leave may also be available on an intermittent basis. To be eligible for FMLA leave, employees must have worked for the employer for at least twelve months, and have worked at least 1250 hours during the twelve months prior to the start of the FMLA leave. More information about the federal FMLA may be found at <http://www.dol.gov/esa/regs/compliance/whd/1421.htm>. (See Ex. A)

In addition to the federal FMLA, Wisconsin has its own family and medical leave law. This provision requires employers with 50 or more permanent employees to allow employees up to two weeks of leave in a twelve-month period for the care of a child, spouse or parent with a serious health condition, and up to two weeks of leave in a twelve-month period for the employee's own serious health condition. Because the contours of the federal and state laws are different, one law may be applicable even when the other is not. More information about Wisconsin Family and Medical Leave Act can be found at the following website: http://www.dwd.state.wi.us/er/family_and_medical_leave/ (See Ex. B)

2. Issues Regarding The Termination Of Employment Of A Disaster Victim

Even though “disaster victims” do not constitute a legally protected category in Wisconsin, other fair employment laws may be implicated where the employment of a disaster victim is terminated. For example, if a female employee-victim is terminated for her absences following a natural disaster, but similarly-situated male victims are not terminated despite their absences, then the question arises whether the Company was using the natural disaster as a pretext to discriminate based upon sex. The federal Age Discrimination in Employment Act, Americans with Disabilities Act, and Title VII protect employees from discrimination based upon their age, disability, and other protected categories such as race, sex, and religion. Proving discrimination requires employee-victims to establish that they were treated less favorably than similarly-situated employees. The following website contains information regarding how to file a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”): http://www.eeoc.gov/charge/overview_charge_filing.html (See Ex. C)

¹ Establishing a “serious health condition” is not usually an onerous burden. For example, one way to establish a serious health condition is to show any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay in a hospital). Another way of establishing a “serious health condition” is having a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider. For example, a common cold can qualify as a serious health condition when an antibiotic is prescribed.

On a state level, the Wisconsin Fair Employment Act (“WFEA”) also prohibits discrimination based upon a similar (although not identical) grouping of protected categories. In most cases, the analysis of a discrimination claim under the WFEA is similar to the analysis under federal discrimination laws. Information about the WFEA and filing a charge of discrimination in Wisconsin’s Equal Rights Division can be found at the following website: http://dwd.wisconsin.gov/er/discrimination_civil_rights/fair_employment_law.htm (See Ex. D)

Federal and Wisconsin employment laws also prohibit retaliation against employees for availing themselves of their rights under the non-discrimination laws. For example, an employer may not terminate or discipline an employee for any of the following:

- a. Asking for leave under the state or federal FMLA;
- b. Complaining about discrimination against any employee;
- c. Filing a charge of discrimination;
- d. Assisting in a discrimination investigation
- e. Testifying in a discrimination proceeding

Oftentimes, attorneys for terminated employees will send a letter to the employer demanding reinstatement (or lump sum settlement) before escalating the dispute and formally filing a charge of discrimination.

3. Benefits That May Be Available After The Termination Of Employment

- a. ***Unemployment Insurance.*** Employees who are terminated from their employment may be eligible for Wisconsin Unemployment Insurance, which is a form of income replacement for terminated employees. Unemployment Insurance (“UI”) benefits are regulated by chapter 108 of the Wisconsin Statutes. The Wisconsin Department of Workforce Development (“DWD”) administers chapter 108.

To the extent there is a dispute about the employee’s entitlement to UI benefits, most disputes relate to subsections of Section 108.04, which disqualify an otherwise eligible claimant. For example, UI benefits will not be awarded when the employee is terminated for “misconduct.” Likewise, UI benefits will not be awarded when employment is voluntarily terminated by the employee. However, a voluntary termination does not disqualify the claimant if the reason for quitting is related to the health of either the claimant or an immediate family member. Under section 108.04(7)(c) the claimant must have no reasonable alternative to quitting.

A website entitled “How to Apply for Unemployment Benefits” may be found at <http://www.dwd.state.wi.us/uiben/apply.htm>. (See Ex. E) The phone number is (800) 822-5246. Self-employed workers are generally ineligible for UI benefits on grounds that they do not pay into the UI system.

- b. ***(Disaster Unemployment Assistance.*** Disaster Unemployment Assistance (“DUA”) may be made available to anyone who has become unemployed as a result of the disaster but who is not eligible for ordinary UI. Section

108.145 of the Wisconsin Statutes requires the Wisconsin Department of Workforce Development to administer DUA benefits. Legal aid advocates should check whether there is a “Declaration of Disaster,” and if so, whether DUA was designated as a disaster benefit.² Disaster declarations are listed at the following website: <http://www.dwd.state.wi.us/ui/dua/>. (See Ex. F)

Disaster Unemployment Assistance is available to individuals for weeks of unemployment beginning with the first week following the date the major disaster began and for up to 26 weeks after the major disaster was declared by the President, as long as their unemployment continues to be a result of the major disaster. Benefits are based on a person’s earnings for the most recent tax year. As a result, applicants will be asked to furnish earnings data from their prior federal tax returns when filing a claim. At the time of flooding that affected counties in western Wisconsin, the unemployment benefit ranged from \$132 to \$355 per week. An overview of DUA can be found at the following website: <http://workforcesecurity.doleta.gov/unemploy/disaster.asp> (See Ex. G)

To the extent that a Disaster Declaration has been issued for the relevant counties, and to the extent DUA has been designated as one of the disaster relief benefits, DUA may be available to unemployed workers who worked or were self employed if they:

- (1) lost their job or their self-employment (including a job they were scheduled to begin work or self employment in) in one of the affected counties as a direct result of the natural disaster;
- (2) were unable to reach their employment due to the natural disaster because they must travel through the affected area;
- (3) can no longer work or perform services because of physical damage to the place of employment as a direct result of the disaster;
- (4) cannot perform work or self-employment because of an injury or because they were incapacitated as a direct result of the disaster;
- (5) became the breadwinner or major financial supporter of a household because of the death of the head of the household due to the natural disaster;
- (6) cannot work or perform self-employment due to closure of a facility by the federal government following the natural disaster; or

² If DUA is not designated, then staff should begin gathering information to establish the need for these benefits. If such need is found, a request should be submitted to the governor for such assistance to be authorized.

- (7) lost a majority of income or revenue because the employer or self-employed business was damaged, destroyed, or closed by the federal government following the natural disaster.

Affected employees and self-employed individuals must apply for benefits within 30 days of the announcement of the disaster declaration. Workers must apply for DUA benefits by calling one of the following numbers:

- (1) Madison 608-232-0678
- (2) Milwaukee 414-438-7700
- (3) Toll-free 1-800-822-5246

Additional information regarding disaster-related benefits may be found at <http://www.fema.gov/>. The federal regulation governing Disaster Unemployment Assistance is 20 CFR 625.

- c. ***Re-employment assistance.*** Victims of natural disasters may qualify as “dislocated workers” under the Workforce Investment Act for purposes of obtaining reemployment assistance. An employee may qualify as a dislocated worker to the extent the employee has been permanently laid off, or if the employee received a notice of termination or layoff from employment.³ Dislocated workers are eligible to receive certain benefits

³ The definition of “dislocated worker” may be found in the U.S. Code, 29 USC. Sec. 2801(9), which states, in relevant part as follows:

- (9) Dislocated worker
The term "dislocated worker" means an individual who -
- (A) (i) has been terminated or laid off, or who has received a notice of termination or layoff, from employment;
(ii)(I) is eligible for or exhausted entitlement to unemployment compensation; or
(II) has been employed for a duration sufficient to demonstrate, to the appropriate entity at a one-stop center referred to in section 2864(c) of this title, attachment to the workforce, but is not eligible for unemployment compensation due to insufficient earnings or having performed services for an employer that were not covered under a State unemployment compensation law; and
(iii) is unlikely to return to a previous industry or occupation;
 - (B) (i) has been terminated or laid off, or has received a notice of termination or layoff, from employment as a result of any permanent closure of, or any substantial layoff at, a plant, facility, or enterprise;
(ii) is employed at a facility at which the employer has made a general announcement that such facility will close within 180 days; or
(iii) for purposes of eligibility to receive services other than training services described in section 2864(d)(4) of this title, intensive services described in section 2864(d)(3) of

including orientation, initial assessment of skills, job search and placement, career counseling, job vacancies information, and assistance with eligibility for other programs. More information is available regarding dislocated workers at the following website. http://dwd.wisconsin.gov/dislocatedworker/worker_info.htm#natural_disaster. (See Ex. H) This website directs employees to contact a Wisconsin Job Center for further information. Wisconsin Job Center information may be found at <http://www.wisconsinjobcenter.org/directory/>. (See Ex. I) The phone number is (888) 258-9966. The employee should inform the Wisconsin Job Center that (1) they are no longer employed, (2) that the termination of their employment is due to the natural disaster, and (3) that they are seeking dislocated worker services.

Even if the employee does not qualify as a bona fide “dislocated worker” within the meaning of the law, the worker may nevertheless qualify for reemployment assistance if the employee is unemployed because of a natural disaster. Under 20 CFR 625.3, state governments are expected to provide re-employment assistance to workers directly affected by natural disasters. That regulation provides as follows:

(a) State assistance. . . . [T]he applicable State shall provide, without reimbursement from any funds provided under the Act, reemployment assistance services under any other law administered by the State to individuals applying for DUA and all other individuals who are unemployed because of a major disaster. Such services shall include, but are not limited to, counseling, referrals to suitable work opportunities, and suitable training, to assist the individuals in obtaining reemployment in suitable positions as soon as possible.

As with Dislocated Worker Assistance, reemployment benefits under DUA are funneled through the Wisconsin Job Center, which can be found at <http://www.wisconsinjobcenter.org/directory/> (See Ex. I)

d. **Health Insurance.** If employees lose their jobs but the employer still continues to maintain a group health plan, the employees are eligible – under a federal law called COBRA – to remain in their group health insurance plan for up to 18 months following the termination of employment. The “catch” is that employees must pay 100% of their own premiums if they elect to remain in the employer-sponsored group plan,

his title, or supportive services, is employed at a facility at which the employer has made a general announcement that such facility will close;

(C) was self-employed (including employment as a farmer, a rancher, or a fisherman) but is unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters; or

(D) is a displaced homemaker.

and this can be expensive. Following any employment termination, an employer is required to send a notice to each employee about the employee's right to elect COBRA, and the employee then has 60 days in which to make the COBRA election. (For employees who experience an involuntary termination of employment between September 1, 2008 through December 31, 2009, the American Recovery and Reinvestment Act ("ARRA") may provide additional benefits in the form of partial premium subsidies.)

In cases where an employer terminates the employees' group health plan but continues to sponsor another group health plan, the employer must permit the terminated employees to join a group health plan that is continuing. COBRA Sec. 602(2)(b) (Within the 18-month COBRA period, the employer must permit the employee to elect (and pay for) continued coverage until "the date on which the employer ceases to provide any group health plan to any employee.")

Even when a business is closed entirely and the group health plan is eliminated, employees may have some the right to continued coverage. Under Wis. Stats. 632.897(2)(b) an employee who has been covered under a group policy for at least three months may have the right to convert the group coverage into individual coverage. Of course, paying premiums on individual coverage can be very expensive. Nevertheless, if the employee anticipates having high medical bills in the next several months, paying the premiums for individual coverage for these months may be preferable than paying much higher medical bills. Converting to individual coverage may also have some advantages for employees that have a pre-existing condition and who do not want to switch to a new policy that will raise the rates to cover such condition.

Finally, for employees who have difficulty affording COBRA premiums, two lower cost alternatives should be considered: Medicaid and BadgerCare. Eligibility information may be found at <http://covertheuninsured.org/stateguides/english/WI.pdf>. (See Ex. J) Because the rules relating to income limits are complicated under Medicaid and BadgerCare, employees who have lost their job should be encouraged to apply for these benefits rather than trying to guess whether they are eligible.

Information about BadgerCare can be found at the following website: <http://dhfs.wisconsin.gov/badgercare/index.htm>. (See Ex. K)

To learn more about Medicaid, contact the Wisconsin Medicaid program at (800) 362-3002. To learn more about children's health care coverage, call (877) KIDS-NOW or visit www.insurekidsnow.gov. (See Ex. L)

- e. ***Low-income and seasonal farm workers.*** Following a federal state or local emergency or disaster, the Secretary of Agriculture may make grants to provide emergency services to low-income migrant and seasonal farm workers. 42 U.S.C. 5177a(a). The grants must be awarded to public agencies or private non-profit organizations that have experience in providing emergency services to low-income migrant and seasonal farm workers. Before awarding grants, the Agriculture Department must first

determine that an emergency or disaster has caused low-income migrant or seasonal farm workers either (1) to lose income, (2) to be unable to work, or (3) to stay home or return home in anticipation of work shortages.

“Low-income migrant or seasonal farm workers” are people who (i) performed farm work for wages during any consecutive 12-month period during the past 2 years, (ii) had an annual family income during those 12 consecutive months less than the poverty level or 70 percent of the lower living standard income level, whichever is higher; and (iii) received at least half of their income or worked at least half-time in farm work.

Appendix Exhibits

- A. Federal FMLA
<http://www.dol.gov/esa/regs/compliance/whd/1421.htm>.
- B. Wisconsin Family and Medical Leave Act
http://www.dwd.state.wi.us/er/family_and_medical_leave/
- C. Filing a Charge of Employment Discrimination
http://www.eeoc.gov/charge/overview_charge_filing.html
- D. Wisconsin Fair Employment Law
http://dwd.wisconsin.gov/er/discrimination_civil_rights/fair_employment_law.htm
- E. How to Apply for Unemployment Benefits
<http://www.dwd.state.wi.us/uiben/apply.htm>
- F. Disaster Unemployment Assistance (Wisconsin site)
<http://www.dwd.state.wi.us/ui/dua/>
- G. Disaster Unemployment Assistance (Federal site)
<http://workforcesecurity.doleta.gov/unemploy/disaster.asp>
- H. Wisconsin Assistance for Workers
http://dwd.wisconsin.gov/dislocatedworker/worker_info.htm#natural_disaster
- I. Wisconsin Job Center Directory
<http://www.wisconsinjobcenter.org/directory/>
- J. Cover the Uninsured/Guide to Finding Health Insurance Coverage
<http://covertheuninsured.org/stateguides/english/WI.pdf>
- K. Wisconsin Badger Care
<http://dhfs.wisconsin.gov/badgercare/index.htm>
- L. U.S. Department of Health & Human Service/Insure Kids Now!
www.insurekidsnow.gov.

SECTION IV: CONSUMER ISSUES AFTER A DISASTER

A. INTRODUCTION

This section is designed to help a volunteer attorney provide preliminary guidance on consumer issues that may be faced by disaster victims. Because of the complicated nature of such cases, disaster victims should be advised to seek the advice of an attorney experienced in consumer issues.

B. CAVEAT EMPTOR

1. General Rule - Let the Buyer Beware. The common law rule of *caveat emptor* is that purchasers buy at their own risk. The legal maxim, *caveat emptor, qui ignorare non debuit quod jus alienum emit*, translates to “let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.” The rule presumes that the buyer is in a better position than the seller to determine whether the condition of the property fully satisfies the buyer’s particular needs, tastes, and plans.
2. Modern Limitation - Protections Available to Consumers. The rule of *caveat emptor* has been greatly limited by modern cases and statutes such that purchasers now have many protections available to them. For example:
 - a. The Wisconsin Consumer Act (Wis. Stat. chs. 421-429) provides purchasers with numerous protections, including: required disclosures and other limitations on consumer credit transactions; restrictions on credit services organizations; the right to cancel consumer approval transactions; and regulations governing insurance, mortgage lending, motor vehicle leases, and debt collection. This statute provides consumers with remedies including filing an action for civil penalties and damages, voiding the transaction, and recovering attorney fees. *See* Wis. Stat. §§ 425.301-311.
 - b. Sellers are prohibited from making any advertisement, announcement, statement, or representation which “contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.” Wis. Stat. § 100.18(1).
 - c. Other statutory provisions provide consumers with protections in the context of specific transactions including, but not limited to: mail order sales, Wis. Stat. § 100.174; fitness center contracts, § 100.177; sales of products containing hazardous substances, § 100.37; transactions involving antique dealers, § 134.695; transactions involving pawnbrokers, § 134.71; and future service contracts, § 136.
 - d. Pursuant to the Uniform Commercial Code, a warranty of merchantability is implied in a contract for a sale of goods if the seller is a merchant with

respect to goods of that kind, Wis. Stat. § 402.314; and a warranty of fitness is implied if the seller has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select suitable goods, Wis. Stat. § 402.315.

- e. In certain situations, the purchaser may have a tort claim against the manufacturer or seller pursuant to products liability doctrine.
- f. The seller may be under a common law duty to disclose information to the purchaser. Although it is beyond the scope of this manual to provide an exhaustive review of caselaw, the following are some examples of situations where courts have relaxed the general rule of *caveat emptor* and imposed a duty to disclose: where seller actively conceals a defect or prevents investigation; where the seller has told a half-truth or made an ambiguous statement, if the intent is to create a false impression and he does so; where there is a fiduciary relationship between the parties; where facts are peculiarly and exclusively within the knowledge of one party to the transaction, and the other party is not in a position to discover the facts for himself; or where the purchaser relies on the skill of the vendor in a real estate transaction to disclose latent, material facts. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 30-31, 41-42 (1980).

C. PRICE GOUGING

- 1. No manufacturer, producer, supplier, wholesaler, distributor, or retailer may sell or offer to sell consumer goods or services at “unreasonably excessive prices” if the governor has declared that the state or a part of the state is in a “period of abnormal economic disruption” due to an emergency. Wis. Stat. § 100.305(2).
- 2. The Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) has promulgated regulations to define “unreasonably excessive prices.” These regulations prohibit selling a consumer good or service during an emergency period “at a price that is more than 15% above the highest price at which the seller sold like consumer goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration.” Wis. Admin. Code ATCP § 106.02(1). The regulations also include several exemptions, and authorize the DATCP to require sellers to provide certain information upon receipt of written notice. ATCP §§ 106.02, 106.03.

D. HOME EQUITY FRAUD

- 1. Home equity fraud is any attempt to steal the equity in someone's home. There are many variations of home equity scams, for example:
 - a. Equity stripping. The lender makes a home equity loan based on the amount of equity in the home, rather than the borrower's ability to repay.

When the borrower is unable to make the payments, the lender forecloses, stripping the homeowner of the equity.

- b. “Home repair” scams. These scams involve door-to-door salespeople who offer easy financing for home improvements and repairs that may not be needed at all, and they often do a poor job. The loans are secured by the home, and often the required monthly payment is so far out of line with the borrower’s ability to pay that foreclosure is inevitable.
- c. “Foreclosure rescue” scams. These scams come in many different varieties. In a “phantom help” scam, the rescuer charges substantial fees for phone calls and paperwork that the homeowner could easily have performed, or for help that never materializes. In a “bailout” scam, the homeowner surrenders title to the house with the belief that he or she will remain as a renter, and buy the house back over the next few years, but the terms of the deal are so onerous that the buyback becomes impossible. In a “bait-and-switch” scam, the homeowner does not realize that he or she is signing over ownership of the home in exchange for a “rescue.”

2. Available protections under Wisconsin Law:

- a. Regulation of Foreclosure Reconveyances. Wis. Stat. § 846.40.
 - (1) A “foreclosure reconveyance” is defined as a transaction in which a foreclosure purchaser obtains title from a foreclosed homeowner, and then reconveys an interest in the property back to the foreclosed homeowner that allows the foreclosed homeowner to remain in possession. § 846.40(1)(d).
 - (2) Contracts for foreclosure reconveyances must be in writing, and must include specified terms including notice of the foreclosed homeowner’s right to cancel within five business days. Any attempt to waive the right to cancel is void and unenforceable as contrary to public policy. § 846.40(3), (6).
 - (3) A foreclosure purchaser may not enter into a foreclosure reconveyance without first verifying that the foreclosed homeowner has a reasonable ability to pay for the subsequent reconveyance, completing a closing with the foreclosed homeowner in which the foreclosure purchaser obtains a deed or mortgage, and obtaining the written consent of the foreclosed homeowner prior to granting any interest in the property. § 846.40(a).
 - (4) The foreclosure purchaser must either ensure title is reconveyed to the foreclosed homeowner, or make a payment to the foreclosed homeowner in an amount of at least 82% of the fair market value

within 150 days after the foreclosed homeowner loses possession. § 846.40(8)(b).

- (5) The statute also prevents the foreclosure purchaser from engaging in unfair conduct, making statements or engaging in conduct that is false, deceptive, or misleading, or accepting a conveyance of the property prior to the expiration of the five-day cancellation period. § 846.40(8)(c)-(f).
- (6) Remedies. A foreclosed homeowner against whom any violation is committed may obtain a stay of eviction proceedings, and may bring an action for damages, including punitive damages. § 846.40(9), (10).

b. Regulation of Foreclosure Consultants. Wis. Stat. § 846.45.

- (1) A “foreclosure consultant” is defined as any person who offers to perform for compensation any service that the person represents will stop or postpone a foreclosure, save the residence from foreclosure, or similar statements, but does not include licensed professionals such as real estate brokers, CPAs, and lawyers. § 846.45(1)(c).
- (2) Contracts for foreclosure consultants’ services must be in writing, and must notify the homeowner of certain rights including a right to cancel within three business days. § 846.45(3).
- (3) The statute also includes several prohibitions including collecting any compensation prior to full performance, charging more than 8% on any loan that is made by the foreclosure consultant, taking any security interest in the property, receiving any consideration from any third party in connection with the services rendered unless the consideration is first fully disclosed, and taking any power of attorney from the homeowner. § 846.45(4).
- (4) Remedies. A homeowner who has suffered any loss because of a violation of the above requirements may pursue a civil action for twice the amount of damages incurred, costs, and attorney fees. § 846.45(6).

c. Wisconsin Predatory Lending Act – Wis. Stat. ch. 428. Applies to certain high interest rate, high fee loans, and prohibits certain practices and loan terms including: balloon payments, negative amortization, making a loan without regard to the customer’s ability to repay, direct payments to home improvement contractors, and refinancing a covered loan with another covered loan within one year.

3. Available protections under federal law:

- a. Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639 – parallel to the Wisconsin Predatory Lending Act.
 - b. Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* - provides borrowers with a right to rescind certain credit transactions in which the principal residence is used as collateral within three days of signing the credit contract and receiving a disclosure form and Truth in Lending notice.
4. For legitimate foreclosure prevention assistance, consider contacting the Homeownership Preservation Foundation (HPF) – 888-995-HOPE – www.hopenow.com. HPF is a nonprofit organization that partners with mortgage companies, local governments, and other organizations to help consumers get loan modifications and avoid foreclosures. HPF is a member of the HOPE NOW alliance of mortgage servicers, mortgage market participants, and counselors (www.995hope.org).

E. HOME SOLICITATION SALES/ DOOR-TO-DOOR SALES

- 1. Right to Cancel
 - a. The Wisconsin Consumer Act provides consumers with a three-day right to cancel transactions that are initiated by face-to-face solicitation away from a regular place of business of the merchant, that are consummated away from the regular place of business of the merchant, and that involve an extension of credit or a cash payment of more than \$25 (“consumer approval transactions”). Wis. Stat. §§ 423.201(1), .202(1).
 - b. Merchants must provide two copies of a notice explaining the customer’s right to cancel, using the wording set forth in the statute. § 423.203(1). If the merchant uses a language other than English in the face-to-face solicitation, the notice must be given both in English and such other language. § 423.203(2).
 - c. The customer then has the right to cancel the consumer approval transaction until midnight of the third business day after the merchant has given the notice. § 423.202(1). The customer must mail the notice of cancellation, and notice is considered given when mailed. § 423.202(2).
 - d. Within ten days after a consumer approval transaction has been cancelled, the merchant must return any money paid by the customer, and terminate any security interest created as a result of the transaction. § 423.204(1).
 - e. If the merchant fails to provide the required notice, the customer may pursue a claim for either: (i) twice the amount of the finance charge (subject to a \$100 minimum and \$1000 maximum) in connection with the transaction, or (ii) the actual damages (including incidentals and consequential) sustained by the customer, whichever is greater. § 423.203(4).

2. DATCP Regulations Governing Door-to-Door Sales

- a. Opening Disclosures. A door-to-door salesperson must disclose the following before asking any questions or making any other statements (other than a greeting): (1) name of principal seller; (2) name of door-to-door salesperson; (3) that the seller is offering goods or services; and (4) the nature of those goods or services. The disclosures must be both oral and in writing. Wis. Admin. Code ATCP § 127.62.
- b. Disclosures Prior to Sale. The salesperson must disclose the following in writing and in the language primarily used in the solicitation before a consumer enters into a purchase contract and before the salesperson takes the consumer's credit card number or accepts any payment: (1) nature and quantity of goods or services to be purchased; (2) total cost for the goods or services; (3) all material terms and conditions associated with the sale, receipt or use of the goods or services; (4) name, mailing address, and telephone number of the principal seller; and (5) seller's return, refund, and cancellation policy if seller has a policy that prevents or substantially limits refunds, cancellations, exchanges, or repurchases or the seller makes any representations regarding refunds, cancellations, exchanges, or repurchases. Wis. Admin. Code ATCP § 127.64(1), (3). Copies of any written agreements must be provided to the consumer and, if a language other than English is the language primarily used, such agreements must be provided in English and the primary language. Wis. Admin. Code ATCP § 127.64(2), (3).
- c. Seller Misrepresentations. No seller may do any of the following either directly or by implication in a face-to-face transaction:
 - (1) misrepresent seller's identity, affiliation, location, or characteristics;
 - (2) misrepresent the nature, purpose, or intended length of the solicitation;
 - (3) misrepresent the terms of the solicitation or any related document;
 - (4) misrepresent the cost of goods or services offered or promoted;
 - (5) misrepresent the nature, quantity, material characteristics, performance, or efficacy of the goods or services offered or promoted;
 - (6) misrepresent or fail to disclose material restrictions, limitations, or conditions on the purchase, receipt, use, or return of goods or services offered or promoted;

- (7) misrepresent material terms of seller's refund, cancellation, exchange, repurchase, or warranty policies;
- (8) misrepresent that the seller is offering consumer goods free of charge or at a reduced price;
- (9) misrepresent that the seller is affiliated with or endorsed by any government or third party organization;
- (10) represent that the seller has specially selected the consumer, unless the seller explains the basis for the consumer's selection;
- (11) represent that that the seller is conducting a special sales promotion, making a special offer limited to a few persons or for a limited period of time, or authorized to place the offered goods or services in a limited number of homes, unless it is true and the seller explains the basis;
- (12) represent that the seller is participating in a contest or conducting a survey unless it is true, the seller makes all of the required opening disclosures, gives the name of the contest or survey sponsor and the terms of the contest or survey, and discloses that he or she is attempting to sell goods or services or to obtain information to identify sales prospects;
- (13) misrepresent any material aspect of a personal investment opportunity;
- (14) in connection with every purported offer of free goods or services, fail to disclose any costs the consumer must incur and any conditions the consumer must meet to receive the free goods or services; or
- (15) make any false, deceptive or misleading representation to a consumer.

Wis. Admin. Code ATCP § 127.72.

- d. Prohibited Practices. In addition, no seller may: threaten, intimidate or harass a consumer; fail to leave upon request; request or receive payments for seeking or arranging a loan or extension of credit until the consumer receives that loan or credit, if the seller represents that efforts to obtain such loan or extension of credit would likely be successful; or for a consumer approval transaction, fail to provide the necessary notice and honor the consumer's right to cancel. Wis. Admin. Code ATCP § 127.74.

3. Face-to-Face Solicitation of Home Improvement Transactions

- a. The DATCP has developed regulations to protect consumers against certain unfair home improvement practices including: bait selling; misrepresentations as to the identity of the seller, price, or financing; certain representations with respect to products and materials; performing prior to the formation of a binding contract; and interference with competitors. Wis. Admin. Code ATCP § 110.02.
- b. Home improvements do not include the construction of a new home, but do include any remodeling, altering, repairing, painting, modernizing or constructing additions to any residential or non-commercial property. For example, home improvements include work on driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, garages, basements, fire protection systems, heating and air conditioning, water softeners, heaters and purifiers, and carpets and other attached flooring. Wis. Admin. Code ATCP § 110.01(2).
- c. Home improvement contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller must be in writing. § ATCP 110.05(1)(b). Before a buyer enters into a written home improvement contract, the seller must determine if the buyer is able to read and understand the contract. § ATCP 110.05(6). If not, a third party with no connection to the seller must read and explain the contract to the buyer. *Id.* If another language is used in the contract negotiations, the contract shall be both in English and such other language. *Id.* A copy of the contract must be provided before the seller begins work or receives any payment. § DATCP 110.05(3). The written contract must contain all of the following information:
 - (1) Seller's name and address, and the name and address of seller's sales representative or agent.
 - (2) A description of the work to be done and the principal materials to be used. If the seller promises to install specific products or materials, the contract must describe those products or materials.
 - (3) The total price, including finance charges. If the contract is for time and materials, it must disclose the hourly labor charge.
 - (4) The dates by which or the time period within which, the seller will begin and complete the work.
 - (5) A description of any mortgage or security interest created in connection with the sale or financing of the home improvement.
 - (6) A statement of any guarantee or warranty which the seller makes or is required to furnish.

- (7) A description of every document incorporated in the home improvement contract.
- (8) If a representation is made that insurance or some other form of protection will be provided, a description of the terms, conditions, and limitations thereof, as well as the name and address of the insurer.

§ DATCP 110.05(2), (4). In addition, the contract may not include liquidated damages exceeding 10% of the contract price or \$100, whichever is less. § DATCP 110.05(7).

- d. Buyer's Remedies. If a buyer pays a seller for any home improvement materials or services before the seller provides them, and the seller fails to provide them in a timely manner or obtain the buyer's agreement to a new deadline, the buyer may cancel the contract, demand return of all payments that the seller has not yet spent on the home improvements, and demand delivery of any materials purchased by the seller with the buyer's payments. § DATCP 110.07.

SECTION V:
DEBTOR/CREDITOR AND BANKRUPTCY ISSUES

A. INTRODUCTION

This Section is designed to assist volunteer lawyers in connection with basic insolvency and bankruptcy issues likely to arise in counseling individuals who have been adversely affected by natural disasters. Though it includes a summary of some of the main features of bankruptcy and the different types of bankruptcy proceedings, this Section does not contain a complete or exhaustive discussion of bankruptcy, nor should it be a substitute for consulting experienced bankruptcy counsel when the time is right. This Section is intended, rather, to provide brief answers to some of the questions most frequently asked by displaced persons and businesses who are struggling with their debts.

B. I HAVE BEEN ADVERSELY AFFECTED BY A NATURAL DISASTER. WHAT DO I DO ABOUT MY DEBTS?

Displaced individuals should not hide from their creditors. The individual should first contact any bank or financial institution to which he/she owes money (including debts for mortgage payments), and inform them of the displacement. Banks will often waive ATM and overdraft fees for anyone genuinely displaced by a natural disaster.

If the displaced individual can afford to make small monthly payments, he/she should contact the creditor (or collection agency) and try to work out a payment arrangement regarding: 1) the total amount that will be owed, including interest; 2) the amount of each monthly payment; 3) payment due dates; 4) the address where the payments must be mailed; and 5) whether the creditor will remove negative information about the bill from the individual's credit report.

The displaced individual should make a record of each communication with a creditor. For example, the individual should document each phone call regarding the past due bill, including the full names of each participant, the date and time of the call, and a detailed summary of the conversation. Also, if the individual negotiates a payment agreement with a creditor, he/she should send a brief letter to the creditor confirming the terms of that agreement and keep a copy for his/her own records.

C. WHERE CAN I GO FOR FINANCIAL ASSISTANCE?

The Federal Emergency Management Authority (FEMA) can assist individuals who become displaced by a natural disaster. Individuals can receive as much as to \$25,000 in financial assistance per disaster or emergency to cover uninsured or under-insured necessary expenses, such as to repair flood or mold damage not covered by home insurance. If the individual's home is unlivable, FEMA will often provide funds for temporary housing. To apply for FEMA disaster assistance, call (800) 621-3362.

For information on how to obtain government loans to repair property damaged or lost during a natural disaster, see *Section I: Housing and Landlord/Tenants*, section D. For

information on how to obtain Disaster Unemployment Assistance from the State of Wisconsin, see *Section III: Employment Law*, section B-3.

D. WHAT WILL HAPPEN TO MY CREDIT RATING?

Displaced individuals may have concerns about their credit rating. Federal law requires credit bureaus to report credit information fairly and accurately. The best way to verify this is to contact the credit bureaus directly and ask them to send a free credit report. The three primary credit bureaus in the United States are:

- Equifax, 1.800.685.1111
- Experian, 1.888.397.3742
- TransUnion, 1.800.888.4213

E. WHAT RIGHTS DO I HAVE IN DEALING WITH DEBT COLLECTION AGENCIES?

The federal Fair Debt Collection Practices Act (FDCPA) provides to individuals with personal, family or household debts (such as credit card debt, mortgage payments, and medical bills) certain rights and protections against third-party debt collectors (*i.e.*, an agency hired by the creditor to collect on the debt). Under the FDCPA, third-party debt collectors are prohibited from:

- Contacting the individual at an unreasonable time, such as before 8:00 a.m. or after 9:00 p.m.;
- Contacting the individual after he/she has told them in writing to stop, although the collector may contact the individual one more time to say that it will make no further contact or that it will take some specific action with regard to the debt;
- Contacting the individual after he/she has referred them to his/her attorney;
- Contacting other people about the individual's debt, except to seek information about how to contact the individual;
- Engaging in harassment of the individual or third persons, including the use of obscene language or threats of violence, or publishing the individual's debt other than to a credit bureau;
- Making false or misleading statements when collecting a debt;
- Threatening to take the individual's property (unless this can be done legally); or

- Applying any payment to a debt other than the one the individual specified or to a debt that the individual does not owe.

If a debt collector violates the FDCPA, the individual has the right to sue the collector within one year of the violation. The individual can recover his/her actual damages, attorney fees, and additional punitive amounts of up to \$1,000.

If an individual is having problems with a debt collector and is not sure if the collector is violating the FDCPA, the individual may contact the Wisconsin Department of Trade and Consumer Protection at (800) 422-7128 and/or the Federal Trade Commission at (877) 382-4357 to determine his/her rights.

F. WHAT ACTIONS DO I HAVE TO TAKE BEFORE FILING MY PETITION FOR BANKRUPTCY?

An individual contemplating bankruptcy must undergo credit counseling within 180 days before filing a petition for bankruptcy protection. If a natural disaster makes it truly impossible to meet this requirement, the individual may argue that the natural disaster has created “exigent” circumstances meriting a waiver of the counseling requirement for up to 45 days after the bankruptcy filing. A credit counseling certificate must be issued by a provider that is approved for the federal district in which the bankruptcy is filed. For a list of credit counselors approved for the Eastern and Western Districts of Wisconsin, visit the U.S. Trustee’s website at: http://www.justice.gov/ust/eo/bapcpa/ccde/DE_Files/DE_Approved_Agencies_HTML/de_wisconsin/de_wisconsin.htm.

The individual must also: 1) prepare a monthly budget outlining his/her expenses and income; 2) provide a copy of his/her most recently-filed tax return; and 3) gather and produce six months of paycheck stubs. These must be filed as attachments to the petition for bankruptcy. Protected information such as Social Security numbers should be redacted from these documents and any others used in a public filing or evidentiary hearing. There is currently no exception made for individuals displaced by a natural disaster.

G. WHERE SHOULD I FILE MY PETITION FOR BANKRUPTCY?

An individual planning to file a bankruptcy petition must file in the federal bankruptcy court in the district in which, for either the 180-day period preceding the filing or the longer portion of that period than any other location, the individual is domiciled, resides, or maintains its principal place of business or principal assets. Wisconsin has two federal district courts: 1) the U.S. District Court for the Western District of Wisconsin, based in Madison with bankruptcy judges located in Madison and Eau Claire, and 2) the U.S. District Court for the Eastern District of Wisconsin, based in and with bankruptcy judges located in Milwaukee.

In October of 2005, the U.S. Department of Justice, through the U.S. Trustee Program, issued special guidelines for persons affected by Hurricanes Katrina and Rita. The special guidelines provided that the U.S. Trustees would not raise or support objections to filing in a location other than its domicile or residence if the debtor was displaced due to a natural disaster, unless the filing constituted abuse of the bankruptcy process or presented extraordinary

circumstances. It is not clear whether these special guidelines still apply. The U.S. Trustee Program has not issued any press releases or other statements rescinding the special guidelines.

H. CAN MY CREDITORS SUE ME OR CONTINUE TO COLLECT AFTER I FILE A PETITION FOR BANKRUPTCY?

No. The filing of a bankruptcy case under any chapter of the Bankruptcy Code triggers a statutory injunction known as the “automatic stay.” The automatic stay is one of the most important protections afforded a debtor in bankruptcy. It bars the commencement or continuation of most actions against the debtor or the debtor’s property, such as collection actions, repossessions, foreclosures and dunning letters or telephone calls. While there are exceptions to the automatic stay, its primary effect is to allow the debtor to get its financial and bankruptcy strategy in order before addressing individual creditor claims.

I. WHAT ARE THE DIFFERENT TYPES OF BANKRUPTCY?

Victims of natural disasters are likely to file one of four types of bankruptcy petitions. Each is referred to by its corresponding chapter in the Bankruptcy Code: chapter 7, chapter 11, chapter 12, and chapter 13.

1. Chapter 7.

Under chapter 7, the debtor surrenders its assets, existing as of the petition date, to a trustee. Subject to certain exemptions discussed below, these assets comprise the debtor’s “estate” in bankruptcy. The trustee administers the debtor’s estate by collecting, liquidating, and distributing the debtor’s property to creditors. Note that if an individual debtor conducts a business as a sole proprietorship (*e.g.*, as a “d/b/a”), the business will often be part of the debtor’s bankruptcy estate.

Generally speaking, any person can file for bankruptcy under chapter 7, regardless of the amount of their debt. However, since 2005 individuals meeting certain threshold income requirements must file under chapter 13. Under a formula known as the “means test,” for example, the debtor must file under chapter 13 if their monthly income is greater than the median income for the state in which they live (in Wisconsin, the median income for a family of four is \$80,530 as of November 1, 2009).

2. Chapter 11.

Under chapter 11, individuals can reorganize and restructure their affairs while carrying on as a “going concern.” That is, the debtor does not surrender all of its assets to a trustee. The debtor’s relief in chapter 11 may be in the form of restructured debts with modified terms, or a liquidation or sale of certain assets to satisfy creditors. Ultimately, the debtor’s proposal to pay creditors is set forth in a “plan” of reorganization or liquidation which is subject to the court’s approval and a vote from creditors.

Natural disasters can have a deleterious effect on small businesses within the affected areas. Chapter 11 contains special rules for small business debtors. A “small business debtor” is defined as a person engaged in commercial or business activities with aggregate

noncontingent liquidated debts (secured or unsecured) as of the date of the petition or the order for relief in an amount not exceeding \$2,190,000 (excluding amounts owed to affiliates or insiders), and in which either the U.S. Trustee has not appointed a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight to the debtor. A person whose primary activity is the business of owning or operating real property and activities incidental thereto is not eligible to be a small business debtor. If any member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts in an amount greater than \$2,190,000 (excluding debts owed to one or more affiliates or insiders), the entity will not qualify as a small business debtor.

Schedules setting forth the assets, liabilities and financial affairs of the debtor generally must be filed within fifteen (15) days of filing the bankruptcy petition, though an extension may be granted for cause shown and after notifying the U.S. Trustee. A small business debtor may receive an extension of the deadline for filing its schedules of at most 30 days from the date the bankruptcy is filed, but must show “extraordinary and compelling circumstances” warranting a longer extension.

Obviously it can be difficult to prepare bankruptcy schedules if the debtor’s facilities and/or records have been destroyed or rendered inaccessible by a natural disaster. Courts will generally find that cause – and possibly extraordinary and compelling circumstances – exists for an extension of the relevant deadlines in such a situation. Debtors can help themselves by attempting to recreate their pertinent records by, for example, contacting their banks, major suppliers, and other creditors for the necessary information and documentation.

Chapter 11 small business debtors must also file periodic reports regarding their profitability for the current and recent fiscal periods and provide reasonable projections of cash receipts and disbursements compared against actual results and prior projections. The U.S. Trustee is also required to conduct an initial interview with the small business debtor prior to the first meeting of creditors to evaluate the debtor’s viability and to establish a schedule for how the case will proceed. A member of senior management of the debtor is required to attend all meetings scheduled by the court and the U.S. Trustee with counsel. The U.S. Trustee also has the right to inspect the debtor’s premises, books and records.

In addition, the small business debtor is required to attach various financial reports (*e.g.*, most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return) to the bankruptcy petition, or sign and attach a statement under penalty of perjury that such documents do not exist and that no tax return has been filed. Failure to timely file all schedules and statements of financial affairs and other post-petition reports and tax returns may result in the U.S. Trustee filing a motion to convert or dismiss the case.

3. Chapter 12.

Wisconsin’s natural disasters can reap financial havoc on the state’s many farmers. Chapter 12 applies to family farmers who generate most of their regular income from their farming operations, and allows them to reorganize their debts and ultimately to keep their farms. A family farmer is not necessarily limited to chapter 12. Filings under chapters 7, 11,

and 13 remain possible. But Congress enacted chapter 12 because it believed that, for different reasons, these other chapters did not adequately address the needs of family farmers. Family fishermen may also seek protection under chapter 12.

Upon the filing of a chapter 12 petition, a trustee is appointed by the court or the United States Trustee to administer the case. The trustee's primary responsibility is to act as a disbursing agent, receiving payments from debtors and making distributions to creditors. The chapter 12 debtor must file a plan of repayment either with the petition or within 90 days. Upon successful completion of all payments under a chapter 12 plan, the debtor will receive a discharge extinguishing the debtor's obligation to pay any unsecured debts that were included in the plan, even though they may not have been paid in full.

There are four criteria for an individual to qualify as a "family farmer" under chapter 12:

- a. The individual or individual and spouse must be engaged in farming operations.
- b. The total debts (secured and unsecured) of farming operations must not exceed \$3,237,000.
- c. Not less than 50% of the total debts must be related to farming operations (only "fixed" debt, not contingent, non-liquidated, etc.).
- d. The debtor must have more than 50% of his gross income from farming operations in either the tax year prior to filing the chapter 12 petition or in both the second and third tax years prior to filing the chapter 12 petition.

4. Chapter 13.

Chapter 13 protection is only available to individuals with regular income, unsecured debts of less than \$336,900, and secured debts of less than \$1,010,650. In a typical chapter 13 bankruptcy, the debtor proposes a plan to repay all of his or her debtors over a period of three to five years. Wages, income from operation of a business, income from real property, interest, dividends, pension plan, social security, retirement income and unemployment compensation can all count as income for the purposes of a chapter 13 case. Certain types of welfare benefits may also count. However, gifts from relatives and certain types of public assistance payments may not count.

The amount proposed to pay creditors in the plan must be equal to the debtor's disposable income, defined as income not reasonably necessary for the maintenance or support of the debtor and/or the debtor's dependents. Disposable income will be calculated in accordance with a formula established by the U.S. Department of Justice. A person is not able to file chapter 13 if his or her disposable income is zero.

Many people may prefer not to tie up their future income to pay creditors and would prefer to file a chapter 7 bankruptcy in which they are not required to do so. However, as

mentioned above, individuals who have disposable income available to pay creditors may not be eligible to file under chapter 7.

J. ARE ANY OF MY ASSETS EXEMPT IN BANKRUPTCY?

A debtor will not lose assets that, under state or federal law, are excluded from the bankruptcy estate. Examples under current Wisconsin law are listed below; the exemption limits were recently amended with the enactment of 2009 Wisconsin Act 80 and became effective on December 15, 2009:

- The debtor's residence, up to \$75,000 per spouse;
- Business and farm property up to \$15,000 in aggregate value;
- Child support and maintenance payments;
- Personal property held primarily for household or family use, such as jewelry, clothes, appliances, pets, and furnishings, up to \$12,000 in aggregate value;
- Motor vehicles up to \$4,000 in aggregate value; and
- Most insurance benefits, including disability, fire and casualty, and life insurance. (Note that if the insured property was exempted, such as the debtor's residence or a motor vehicle, the debtor should not have to use insurance proceeds to pay creditors. Under Wisconsin law, fire and casualty insurance proceeds are exempt for a period of two years from the date the debtor receives the proceeds.)

For a complete list of property exempted from execution under Wisconsin law and the corresponding exemption limits for each type of property, see Wis. Stat. §§ 815.18, 815.20, 815.205, and 815.21.

Section 522 of the Bankruptcy Code (11 U.S.C. § 522) also includes the above exemptions, although the dollar amounts are different, and also expressly allows the debtor to exempt:

- Professionally prescribed health aids;
- Resources relied on by the debtor in the debtor's trade (i.e. tools, books) up to \$2,025 in aggregate value;
- Social security, disability, veterans', or unemployment benefits; and
- Retirement funds from certain tax exempt accounts.

K. IF I AM IN BANKRUPTCY, WILL I BE EVICTED FROM THE APARTMENT OR OFFICE SPACE I LEASE?

Eviction is possible if the debtor does not timely comply with all obligations under the lease after it files the bankruptcy petition. In such cases, landlords may seek relief from the automatic stay to evict and collect back rent from debtor tenants. However, bankruptcy courts will not enforce lease provisions allowing the landlord to terminate the lease if the tenant is insolvent or files for bankruptcy protection.

A debtor or trustee has the option to “assume” (i.e. keep) or “reject” (i.e. discontinue) any unexpired leases to which it is a party. The decision to keep or discontinue an unexpired lease will be made by the trustee in a chapter 7 case, and, absent unusual circumstances, by the debtor in all other cases. To “assume” the lease is to continue to perform the debtor’s side of the bargain, and requires that the debtor “cure” all pre-bankruptcy defaults, including pre-petition arrearages. To “reject” the lease is to obviate further performance by the debtor under the lease, and the debtor will be compelled to vacate the premises.

A chapter 7 trustee has 60 days from the commencement of the bankruptcy case to decide whether to assume or reject a residential lease. A chapter 11, 12, or 13 debtor must assume a residential lease by the time a plan of reorganization is confirmed, which usually takes considerably longer than 60 days. If a chapter 11 debtor leases nonresidential real property, the debtor will have 120 days from the petition date to decide whether to assume or reject the lease.