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ADMINISTRATIVE INTERPRETATION NO. 1.202-9401

PAWNBROKERS WHO DO NOT TAKE PHYSICAL POSSESSION AND DELIVERY OF TANGIBLE PERSONAL PROPERTY, INCLUDING AUTOMOBILES, DO NOT QUALIFY FOR EXEMPTION FROM THE COLORADO UNIFORM CONSUMER CREDIT CODE AND MUST COMPLY WITH ITS LICENSURE PROVISIONS AND RESTRICTIONS ON FEES AND CHARGES.

A question has arisen concerning a relatively new practice among pawnbrokers. Pawnbrokers advance funds for a fee similar to interest. However, unlike other lenders, they take physical possession of collateral to secure the loan rather than only a security interest in the property. The fee amounts charged by licensed pawnbrokers and disclosure of those fees are exempt from the Colorado Uniform Consumer Credit Code ("UCCC"). Section 5-1-202(4), C.R.S. (1992).[1] Instead, the fees and the licensing provisions applicable to pawnbrokers are set forth in § 12-56-101 et seq.[2]

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[1] Colorado's UCCC is based on the 1968 draft of the Uniform Consumer Credit Code from the National Conference of Commissioners on Uniform State Laws. The 1974 draft modified that section by giving the administrator authority to enforce the Truth in Lending Act's disclosure requirements against pawnbrokers. Section 1.202(5) and comment, 1974 draft. Colorado did not adopt the 1974 provision. Pawnbrokers are not exempt from the federal Truth in Lending Act and its requirement of disclosure of the cost of credit (annual percentage rate, finance charge, etc.), nor has the Federal Reserve Board exempted pawnbrokers from these disclosures. 15 U.S.C. §§ 1604 & 1605(a).

[2] Licensing of pawnbrokers is left to municipalities, cities and counties who may, but need not, implement licensure. Sections 12-56-101(5) and 12-56-102, C.R.S. (1991). The fee a pawnbroker may charge is 10% per month if the money advanced is $50 or more and 20% per month if the money advanced is less than $50. Sections 12-56-101(1) and (2), C.R.S. (1991). Violations of the pawnbroker statutes are misdemeanors, or felonies if repeated, subject to

Several years ago, pawnbrokers in Colorado began accepting automobiles in pawn transactions. This practice is apparently acceptable unless prohibited by local licensing requirements. A motor vehicle dealer license is probably required in the event the pawn transaction is not cancelled, i.e., the automobile is not redeemed. It has come to the Administrator's attention that some pawnbrokers are now conducting "auto pawn" or "title pawn" transactions without retaining the automobile. These transactions may not be pawns at all, but rather secured loans. If this is so, certain terms and disclosures related to these secured loans may not be in compliance with the UCCC. This administrative interpretation addresses the Administrator's position in reference to these particular transactions.

The typical auto pawn transaction is structured as follows. The pawnbroker advertises that he will loan money against an automobile title. The consumer brings in a car owned free and clear and is usually given the option of either leaving the car with the pawnbroker or simply leaving the title and paying some form of rent in exchange for retaining possession of the car. Not surprisingly, most consumers opt to retain possession of their automobiles. The rental fee may be referred to as anything from "storage costs" (even though the car is not being stored) to a "use charge" or "rent."

The consumer signs a pawn agreement which sets forth the specific terms of the transaction. In addition, the pawnbroker may have the consumer execute a security agreement pursuant to Article 9 of the Uniform Commercial Code. The pawnbroker may record his security interest on the certificate of title or he may have the consumer sign the title in blank as seller or execute a power of attorney in his favor. Generally, the consumer will be required by the pawn agreement to maintain insurance on the vehicle and to list the pawnbroker as loss payee. Often the pawnbroker will keep a photograph of the vehicle on file. The security agreement will allow for repossession of the vehicle upon default.

The pawn agreement is drafted as a typical "contract for purchase" as defined by § 12-56-101(1), C.R.S. (1991). However, as stated previously, the consumer may simply deliver the title to his

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prosecution by the various district attorneys. Section 12-56-104, C.R.S. (1991).

An interesting situation arises since licensing is permissive rather than mandatory. "Local licensing authorities may license pawnbrokers and require that pawnbrokers be bonded and insured and may enact regulations governing pawnbrokers..." Section 12-56-102, C.R.S. (1991) (emphasis added). A number of municipalities and counties have not implemented licensure. Consequently, the UCCC exemption, applicable only to "licensed pawnbrokers," does not apply in such areas and these pawnbrokers must comply with the UCCC including its rates and supervised lender licensing.

car to the pawnbroker rather than the vehicle itself. The agreement sets a fixed price to cancel the contract within a specific period of time. By statute, the fee of 10% per month of the purchase price (the amount advanced to the consumer) may be imposed for a period not to exceed ninety days. Section 12-56-101-(2)(a), C.R.S. (1991). In addition to the customary 10% charge, the Administrator has seen a variety of other charges including rent, depreciation fees and credit disability insurance. It is questionable whether any fee in addition to the 10% charge is permitted under the pawnbroker statutes. Due to such fees, however, monthly payments may more than double the allowable 10% with no reduction in the principal obligation. Again, whether or not permissible by law, some pawn transactions are rewritten or extended in practice for additional ninety day periods.

The question presented is whether the typical auto pawn transaction described above can be characterized as a pawn or whether it should be more accurately characterized as a loan. The question arises due to the fact that the consumer retains possession of the automobile itself. The pawnbroker statute defines a "contract for purchase" as "a contract entered into between a pawnbroker and a customer pursuant to which money is advanced to the customer by the pawnbroker on the delivery of *tangible personal property* by the customer on the condition that the customer, for a fixed price and within a fixed period of time, not to exceed ninety days, has the option to cancel said contract." Section 12-56-101(1), C.R.S. (1991) (emphasis added). Therefore, the initial question to be addressed is whether the certificate of title given to the pawnbroker is "tangible personal property."

"Tangible personal property" is defined in the pawnbroker statutes as "all personal property other than chooses in action, securities, or printed evidences of indebtedness, which property is deposited with or otherwise actually delivered into the possession of a pawnbroker in the course of his business in connection with a contract for purchase or purchase transaction." Section 12-56-101(9), C.R.S. (1991). "Tangible property is that which is capable of being handled, touched, or physically possessed." Hommel v. George, 802 P.2d 1156, 1157 (Colo. App. 1990). It may be either real or personal. BLACK'S LAW DICTIONARY 1306 (5th ed. 1979). Personal property is generally all property other than real estate. *Id.* at 1096.

According to Black's Law Dictionary, tangible personal property is "[p]roperty such as a chair or watch which may be touched or felt in contrast to a contract. [It is a] [t]erm commonly used in statutes which provide for taxation of personal property." *Id.* at 1306. A certificate of title is not subject to personal property taxes. It is a document which reflects ownership of personal property. It has no intrinsic value in and of itself. Floyd v. Title Exchange and Pawn of Anniston, Inc., 620 So.2d 576, 578 (Ala. 1993)(holding that an automobile title is not a chose in

action but that it is questionable whether an automobile title is tangible personal property). Clearly, a certificate of title is not tangible personal property (other than as a piece of paper) but is merely representative of tangible personal property.

Assuming arguendo that a certificate of title is tangible personal property, the question remains whether it is a chose in action, a security or a printed evidence of indebtedness and thus exempted from the class of personal property which may be the subject of a pawn transaction. A certificate of title is prima facie evidence of all matters therein contained and that the person in whose name the certificate is registered is the lawful owner of the vehicle therein described. Section 42-6-107(2), C.R.S. The information contained in a certificate of title includes among other things the make and model of the motor vehicle, its serial number and a description of every lien and encumbrance to which the motor vehicle is subject. One of the purposes behind the Certificate of Title Act is to provide a means by which prior interests can be ascertained and protected. Sifuentes v. Weed, 525 P.2d 1157 (Colo. 1974).

Given this definition of a certificate of title, a title is arguably a printed evidence of indebtedness when it is held by someone other than the person in whose name the vehicle is registered and who is in possession of the vehicle. This argument is especially convincing when the holder of the title has recorded his lien or the registered owner has signed off as seller in blank. If the registered owner has executed a power of attorney in favor of the holder then the two documents, the certificate of title and the power of attorney, taken together are evidence of indebtedness. Therefore, in the case of an "auto-pawn" transaction as previously described, the certificate of title will reflect to any interested third party that the automobile is encumbered by the debt to the pawnbroker.

If a certificate of title is evidence of indebtedness, it is explicitly excluded from the definition of "tangible personal property" in § 12-56-101(9), C.R.S. (1991). Consequently, a pawnbroker who takes possession of a certificate of title in exchange for advancing funds to the consumer is not engaging in bona fide pawnbroking activity as defined by § 12-56-101, C.R.S. (1991). *See* Pendleton v. American Title Brokers, Inc., 754 F. Supp. 860 (S.D. Ala. 1991) (holding that lender engaged in leasing cars back to borrowers after he obtained a security interest was not a "bona fide pawnbroker" and, therefore, was required by the Alabama Small Loan Act to have a license). Thus "auto-pawn" transactions described above are more accurately loans collateralized by automobiles.

In concluding that these auto pawn transactions are loans, serious concerns arise regarding compliance with consumer credit laws. If the amounts advanced are less than $25,000 and made to

individuals primarily for personal, family or household purposes, they fit the definition of a consumer loan under § 5-3-104, C.R.S. (1992) and are subject to regulation under the Colorado Uniform Consumer Credit Code. The UCCC regulates, among other things, the maximum interest rates that can be charged on a consumer loan, limitations on additional charges, the ability to repossess an automobile on default without one right to cure, and the standard disclosures that must be made to the consumer in connection with the extension of credit.

The most serious concern in regard to these "auto-pawn" transactions is that the effective annual percentage rate (A.P.R.) is often in excess of 200%, well above the ceilings allowed by the UCCC. In arriving at this figure, all charges are taken into account including the ten percent monthly fee and the other rental costs. Under the UCCC, supervised lenders[3] are permitted to receive a finance charge not in excess of 36% per year on unpaid balances of $630 or less; 21% per year on unpaid balances greater than $630 but less than or equal to $2,100; and 15% per year on unpaid balances greater than $2,100; or, alternatively 21% per year. Aside from violating the UCCC, a 200% A.P.R. is a criminally usurious rate under § 18-15-104, C.R.S. (1986 & 1994 Supp). The Administrator is aware of at least two criminal usury cases filed by district attorney offices against auto pawnbrokers.

It is the position of the Administrator of the Colorado Uniform Consumer Credit Code that "auto-pawn" transactions are in fact secured loans when the pawnbroker does not retain possession of the vehicle. In instances where these loans fit the definition of a consumer loan under § 5-3-104, C.R.S. (1992), compliance with the UCCC is mandatory. This includes the disclosures required by the UCCC and the Federal Truth in Lending Act. In addition, lenders charging in excess of 12% per year on consumer debt must be licensed by the Administrator. If licensed pawnbrokers take physical possession of the automobiles in these transactions, the UCCC does not apply.

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[3] A supervised loan is loan on which the finance charge is in excess of 12% per year. Supervised lenders must be licensed by the Administrator of the UCCC. Sections 5-3-501 and 5-3-503, C.R.S. (1992).