

# FLORIDA PAWNBROKING: AN INDUSTRY IN TRANSITION

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## I. INTRODUCTION

Pawnbroking is a profession frequently misunderstood. While the majority of today's pawnshops are clean, attractively maintained establishments, the industry has difficulty shaking the "pawnbroker stigma." The composite image of the pawnbroker is that of a shady, unkempt, overweight character working out of a filthy, run-down, back street hock shop with barred windows—a person who is involved in morally questionable practices, such as providing continuing support to "druggies" and other "low lifes" in exchange for pawns of stolen goods. Even the words "pawnshop" and "pawnbroking" are frequently associated with such concepts as "fenced property," "sleaziness," "shylocking," and "usury." Many a consumer has considered visiting a pawnshop but then hesitated to do so because of this pervasive stereotype. While public perception may continue to identify pawnbrokers with the antiquated image of sleazy accomplices to criminal activity, industry data show that less than one-tenth of one per-

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cent of all pawned property turns out to be stolen.<sup>1</sup> The risk of buying stolen property from a pawnbroker has been nearly eliminated through strict reporting requirements and other laws governing stolen property, as well as through the cooperative determination of members of the pawnbroking profession to upgrade their image.<sup>2</sup>

This Article is an attempt to inform the reader about the rejuvenated and changing pawnbroking industry, its regulation, its problems and concerns, and the continuing controversies that surround it, through presentation of anecdotes, data, legislative history, and statutory and case law. In particular, Florida pawnbroking is highlighted.

## II. AND THEN THERE WERE PAWNSHOPS

Historically, pawnbroking is one of the oldest methods of lending money. No recorded time in history exists when a loan of money on a pledge has not been available.<sup>3</sup> Its prevalence and importance is underscored by the assertion that “[i]f Queen Isabella of Spain had not ‘hocked’ her jewels in 1492, it is unlikely that Columbus would have made his historic voyage to discover America.”<sup>4</sup>

By definition, a “pledge” and a “pawn” are virtually identical: a bailment of personal property as security for payment of a debt for which the holders of the property have an implied power of sale on default.<sup>5</sup> In common business practice, the main differences are that “pawns” are limited to

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1. Barry Newman, *New Kids on the Block*, FLA. PAWNBROKER, Fall 1994, at 22, 22.

2. Statutes such as FLA. STAT. §§ 538.04, .05 (1995) require pawnbrokers to pay close attention to the sources of the pawns. Barry Newman, a fourth-generation pawnbroker in Jacksonville, Florida, exemplifies the attempt to dispel the stereotype:

Any hint of wrong and I sent [sic] the customer home without a transaction. Occasionally the customer is insulted, but the result is a very high reputation, no police citations and a very low rate of property seizures. Integrity is something you should strive for . . . . You can bet that if you are charged with a crime as a pawnbroker, it will be front page news. Remember, your customers will never forget.

Newman, *supra* note 1, at 22; see Mindy Steiner & Dev Strischek, *Lending to Pawnshops*, J. COM. LENDING, Apr. 1992, at 43, 43.

3. PETER SCHWED, GOD BLESS PAWNBROKERS 21 (1975).

4. Equitable Securities Research, Purchase Recommendation, Cash America International, Inc., Oct. 5, 1993, at 2. And for the rest of the story, “Alfred Hardaker . . . relates that one nineteenth century author facetiously remarked, ‘If Americans had duly reflected on this incident . . . they certainly, with the stars and stripes had quartered the three balls in their national flag.’ Although colorful, the story of Isabella pawning her jewels . . . is apparently historically inaccurate . . . .” JOHN P. CASKEY, FRINGE BANKING, CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR 15 (1994) (citations omitted).

5. See 54 AM. JUR. 2D *Money Lenders and Pawnbrokers* 1 (1971 & Supp. 1995); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 864, 903 (1989) (defining “pledge” and “pawn”). Under Article 9 of the Uniform Commercial Code, “pledge” could also be security for performance of an obligation (as opposed to a loan). See FLA. STAT. §§ 538.04, 538.05, 671.201(37), 679.102, 679.305 (1995).

tangible personal property, *i.e.*, goods;<sup>6</sup> whereas “pledges” may be either tangible or intangible personal property, *e.g.*, goods or commercial paper and securities. On default, if the proceeds from the sale of a pledge are not equal to the debt, the pledgee (creditor) may recover the sales deficiency from the pledgor (debtor); if there is a sales surplus, the pledgor may recover that from the pledgee.<sup>7</sup> By contrast, a pawn is neither liable for any deficiency nor entitled to any surplus.<sup>8</sup>

The universal symbol representing a pawnshop, that of three golden globes (or brass balls, depending on one’s outlook), is of debated origin,<sup>9</sup> but the word “pawn” is derived from the French “pan,” which means the skirt of a gown.<sup>10</sup> Pan, in turn, is derived from the Latin word for cloth, “pannum.”<sup>11</sup> In fact, it has been reported that as recently as 1828, more than one-half of the pawns in New York City were of articles of clothing.<sup>12</sup> Based on casual personal surveys, most pawnshops today would seem to have little relation to their lexicographical namesake. “Times have changed,” according to a fourth-generation pawnbroker, “the on-premises tailors have been long replaced by jewelers, gemologists and watchmakers. All of the clothes are gone . . . .”<sup>13</sup> The uniquely Floridian exception would be the several pawnshops in the Daytona Beach area which, during the spring of each year, are reputed to be loaded with pawned “biker” regalia such as the “requisite” black leather motorcycle jackets.<sup>14</sup>

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6. As reported by Empire Loan Jewelers and Pawnbrokers of Boston, the “top ten” most commonly pawned items are, in order of rank, gold rings, gold chains and bracelets, earrings, VCRs, cameras, guitars and other musical instruments, gold watches, TVs, computers, and fine art. *Empire Pawn Lists “Top Ten,”* TODAY’S PAWNBROKER, Summer 1994, at 48, 48.

7. FLA. STAT. § 679.504(2) (1995).

8. That is to say that the pawn is not personally liable for repayment of the amount received for the pawn. While the pawn also loses, upon failure to repay the loan, the difference between the loan and the value of the goods, only the pawned goods are at risk.

9. See a discussion of the origin of the globes and a collection of authorities in Jarret C. Oeltjen, *Pawnbroking on Parade*, 37 BUFF. L. REV. 751, 757 (1989) [hereinafter Oeltjen, *Parade*].

10. J. SHIPLEY, *DICTIONARY OF WORD ORIGINS* 263 (2d ed. 1945).

11. *Id.*

12. CASKEY, *supra* note 4, at 17.

13. Barry Newman, *Rambblings of a Fourth-Generation Pawnbroker!*, FLA. PAWNBROKER, Fall 1994, at 15, 15. “The times have changed. My store is much different than my grandpa’s and my dad’s. . . . I don’t sell or pawn clothes, hats and shoes. We specialize in fine jewelry although we always try to keep a few clean electronic items as well as an array of weaponry.” *Id.*

In an informal survey in 1994 of the 441 pawnshop ads in the Tallahassee, Jacksonville, St. Augustine, Tampa, Miami, and Orlando telephone directories, 248 of those ads specified a particular type of property to be pawned. Of these 248, 206 advertised for jewelry, 86 for guns, and 60 for electronics. See Natalie Nice, *Survey of Florida Pawn Shop Advertising* (Apr. 1995) (unpublished Florida State University College of Law student survey, on file with author).

14. Daytona Beach residents inform me that this is particularly the case following the nationally famous “Bikers’ Week,” which is held in Daytona during the first week in March of each year.

Although philanthropically inclined individuals have long pooled their funds to operate successful charitable pawnshops,<sup>15</sup> most pawnshops are operated with a profit motive in mind, even if it does not always work out that way. Among the “for profits,” “ma and pa” pawnshop ownership is the model, but this model is being challenged by the publicly held pawnshop chains. Of the four publicly traded pawnshop companies, Cash America International<sup>16</sup> is the industry’s pioneer and leader. As of June 30, 1995, Cash America operated a total of 369 pawnshops: 325 in 14 states of the U.S., 34 in the United Kingdom, and 10 in Sweden.<sup>17</sup> The second largest pawnshop chain, EZCorp, has approximately 250 shops in nine states.<sup>18</sup> Another, Super Pawn, has become the first foreign (non-Mexican) pawnshop to receive permission to set up shop in Mexico.<sup>19</sup>

With modernization of business practices<sup>20</sup> and organizations, pawnshops have become a growth industry, especially in the southern United

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15. Jarret C. Oeltjen, *Pawnbroking: An Historical, Comparative Perspective*, 8 ARIZ. J. INT’L & COMP. L. 53, 68 (1991). Two examples cited are the Massachusetts Pawnners’ Bank of Boston, later named the Collateral Loan Company, and New York’s Provident Loan Society. *Id.* at 68-69.

16. What is now Cash America International, Inc. (Cash America) was founded in 1983 by Jack R. Daugherty, who had owned and operated pawnshops since 1971. His private company, begun with one pawnshop in 1983, was incorporated in 1984 and went public in 1987. Mr. Daugherty has been Chairman of the Board and Chief Executive Officer of Cash America since its founding. From that humble beginning, Cash America “proudly loaned its billionth dollar in June 1994 . . . .” CASH AMERICA INTERNATIONAL, INC., 1994 ANNUAL REPORT 6 (1995). See RAYMOND JAMES & ASSOCIATES, SOUTHEAST/FLORIDA RESEARCH BUREAU, SUMMARY UPDATE REPORT (June 5, 1995).

17. CASH AMERICA INTERNATIONAL, INC., THIRD QUARTER REPORT (1995). Of these outlets, 49 are in Florida. *Id.*

18. JAMES & ASSOCIATES, *supra* note 16, at 4; 60 STANDARD & POOR’S, STANDARD NASDAQ STOCK REPORTS §16, No. 109 (9/23/94, 3769K).

19. Until the new ventures open, the Mexican government has a pawnshop monopoly; all the stores are government-owned and run. Super Pawn, which has been extended a \$10 million line of credit by a Mexican bank, has put expansion plans on hold because of the devaluation of the peso. *Super Pawn Still North of the Border*, TODAY’S PAWNBROKER, Summer 1995, at 42, 42.

20. For example, as a leader in pawnbroking technology, Cash America International, Inc. utilizes a computer network to value pawns, track merchandise inventory levels, and trace borrowers’ repayment histories. Interview with Mary Jackson, Public Relations Officer, Cash America International, Inc., in Fort Worth, Tex. (Jan. 19, 1996).

States.<sup>21</sup> Contemporary estimates are that as many as one of every ten adult Americans borrows money from a pawnshop each year.<sup>22</sup>

### III. PAWNBROKING SUFFERS AN IDENTITY CRISIS

Pawnbroking has long suffered from the negative image pictured in literature, the movies, and the media.<sup>23</sup> Without a pictorial history or other survey of a diverse sample of pawnbroking outlets, one is left with the less than savory images generated from the various anecdotal accounts. The only positive accounts are those that feature relieved pawners redeeming their pawns from bondage after their personal crises have passed. There are no images of pawners who are pleased that they have an instant source of credit, nor of buyers reveling in the bargains they have found among forfeited goods. Images of happy, well-adjusted pawnbrokers interacting with their families have yet to be portrayed.<sup>24</sup>

Contemporary industry literature, such as *Today's Pawnbroker*,<sup>25</sup> *National Pawnbroker*,<sup>26</sup> and various state association journals,<sup>27</sup> stresses the advantages of, and necessity for, positive public relations<sup>28</sup> to help achieve

21. According to data from a spring 1990 report authored for the Federal Reserve Bank of Kansas City (FRB Report) (Spring 1990), in 1911, there were 1976 licensed pawnshops in the U.S., one for every 47,000 Americans. In 1988, there were 6900 licensed pawnshops, one for every 35,700 persons. Today, there are approximately 9000 pawnshops, which is about one for every 28,400 residents. CASKEY, *supra* note 4, at 47. The FRB Report also noted that the number of pawnshops in the urban Northeast declined, while the South, Southeast, and Central Mountain states were responsible for most of the growth. The growth of pawnbroking in these areas was attributed to less restrictive usury laws, increased poverty, and below-average levels of education. *Id.* (Professor Caskey was also one of the authors of the FRB Report).

22. Annetta Miller, *Pawnshops Make a Comeback*, NEWSWEEK, Dec. 1990, at 44, 44.

23. It would be interesting to study what the economic impact of this "negative image" has been. One could posit that this image—so in contrast with the stuffiness of the more "conventional" financial institutions—could have been an asset in times prior to the coming of the financial institutions' "consumer relations" departments.

24. Walt Disney *could* have sent Mary Poppins to the home of a pawnbroker to bring harmony to that household.

25. Published by BKB Publications, Inc.

26. The official publication of the National Pawnbrokers Association.

27. *E.g.*, *The Florida Pawnbroker*, the official publication of the Florida Pawnbrokers Ass'n, Inc. At the time of publication, there are at least 41 state pawnbroker associations. For a current list with references to a contact person for each, see *State Ass'n Contacts*, NAT'L PAWNBROKER, Fall 1995, at 63, 63.

28. "It's time to take the next step in changing our image, by hiring a public relations firm. With the superior service we have in our staff, . . . as well as by hiring additional public relations professionals to help us, we can truly change our image around." Bob Stogner, *Message from the President . . . Professional Public Relations*, NAT'L PAWNBROKER, Fall 1993, at 3, 3.

"At this point, the pawn industry has no credibility. This must change immediately. Tell the pawnbroker story. Get a copy of the NPA's new public relations slide presentation, '20th Century Pawnbroker,' and show it to your city councilors, law enforcement officials, civic clubs and congressional representatives." Charles Jones, *Chairman's Message*, NAT'L PAWNBROKER, Summer 1994, at 6, 6.

recognition of industry respectability<sup>29</sup> and to shed the negative stereotype. To improve the pawnbroking image, much energy is being spent by the state and national pawnbroking associations as well as the national chains and the local stores. Numerous articles in trade association journals discuss ideas and proffer recommendations for improvement: working with the local media to foster understanding;<sup>30</sup> taking an active role in community affairs;<sup>31</sup> creating a local business advisory board<sup>32</sup> or a newsletter;<sup>33</sup> upscaling store image with improved lighting,<sup>34</sup> attractive interior<sup>35</sup> and exterior<sup>36</sup> signs, and an absence of bars.<sup>37</sup> For at least one

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29. "Right now, 85 percent of my business is with women between the ages of 21 and 42. This is something that has surprised me and I believe it is because the pawn industry is gaining more and more recognition as being an honorable business." *People 'n Pawn: Jim Starnes, American Loan Exchange, Greenville, S.C.*, NAT'L PAWNBROKER, Fall 1993, at 38, 38.

30. In Crown Point, Indiana, the arrest of a pawnshop patron who later admitted to 40 burglaries could have been a public relations disaster, but the pawnbroker called the local newspaper and asked whether it would like to know the rest of the story and how a pawnshop operates. After an affirmative response and the scheduling of interviews, a front-page story, *Police and Pawn Brokers on Same Side of the Law*, was published. *Media Watch*, TODAY'S PAWNBROKER, Spring 1995, at 35, 35 [hereinafter *Media Watch*].

On the other hand, a pawnbroker in Rifle, Colorado (on the west slope of the Colorado Rockies), whose shop hosted "Psycho Brain Food," a live, swap-shop radio program, may be using the media to perpetuate the pawnshop stereotype. "I tell people, 'Drive by, flip me the bird, let me know you're alive.' And they do," says disc jockey Doug Lauderdale. "Everybody wants to flip somebody the bird, and they hear this guy on the radio telling them to come by and flip him." R.G. Edmonson, *Pawnshop on the Air*, TODAY'S PAWNBROKER, Fall 1995, at 34, 34.

31. "One of the most effective ways that all pawnshops can proactively overcome preconceived images of the industry is to give back to and take an active role in the communities where they make their living." Nancy Michaels, *Creating a Connection in Your Community*, NAT'L PAWNBROKER, Summer 1995, at 16, 16 (Nancy Michaels is President of Impression Impact, a marketing consulting firm).

32. Nancy Michaels, *Self-Made in America*, NAT'L PAWNBROKER, Fall 1995, at 14, 14.

33. Nancy Michaels, *Creating a Newsletter with Impact*, NAT'L PAWNBROKER, Winter 1995, at 40, 40.

34. "There are also pawnbrokers who haven't heard the word—there are still nasty-looking, dimly-lit stores. Same goes for friendly service: the store that gave me the surliest service also was one of the most slovenly-looking. I don't think the two were unrelated." R.G. Edmonson, *Pawnbrokers Spruce Up To Change Their Image*, TODAY'S PAWNBROKER, Winter 1994, at 6, 9 [hereinafter Edmonson, *Spruce*].

35. *Id.* at 9:

Somewhere back in the Dark Ages, some printer made a fortune selling pawnbrokers a package of signs that contain every negative in the book: No Refunds, No Personal Checks, No Layaways, etc.

.....

The message [sent by these signs] reminds me of the old joke: "No drinking, no eating, no loud music, no dancing. Now, you all have a good time." These signs have so many negatives in them, I think the real message is clear: "No customers."

36. *Id.* at 10:

"We have this penchant for seeing how large we can make the word 'pawn,'" White said. [Bill White, Vice President for Public Affairs, Cash America International]. He said any neighborhood quickly learns whether the new business down the street is a pawnshop, but some stores have signs the size of highway billboards to advertise the fact. "It's an affront to the community."

pawnbroker, these lessons paid off; Pacific Pawnbrokers was named 1993 Business of the Year by the Sparks, Nevada Chamber of Commerce.<sup>38</sup>

Yet, in spite of extensive public relations efforts, the negative portrait lingers; pawnshops continue to be cast as "nuisance businesses,"<sup>39</sup> in the company of tattoo shops and massage parlors,<sup>40</sup> and somewhere in rank between liquor stores and houses of prostitution.<sup>41</sup> A recent Eleventh Circuit case reported that "pawnshops do facilitate the disposition of stolen property . . . ."<sup>42</sup> An Aurora, Colorado City Council bill relating to the location and licensing of pawnbrokers presents this summation: pawnshops " 'have deleterious or blighting effects which pose a danger to the public health, safety and welfare. . . . ' "<sup>43</sup>

Pawnshops also continue to fall prey to local development and zoning authorities.<sup>44</sup> Limitation of proliferation is a common ordinance theme

37. Both interior and exterior security is possible without the traditional iron bars. For exterior security, several solutions are available: glass laminated with plastic, roll-down shutters or small windows through which a person could not squeeze. See *id.* at 6. A recent innovation, Safetell, Security Corporation's rising security screen, has made interior bars and even the bulletproof cages obsolete.

Installed into the counter-tops of businesses, the rising barrier allows for a friendly, open customer service counter. Yet, in the event of a threatening robbery, the cashier can activate a screen that rises to the ceiling in less than half a second

. . . . [T]he Safetell rising security screen is constructed of carbon steel and anti-ricochet, high-density composite armor. It can withstand close range firings from a .44 magnum, officials say.

. . . . The screen, although new to the U.S., has been installed in more than 2,500 locations across the U.K. and Australia.

*New Products: Security System Starts Counter Revolution*, TODAY'S PAWNBROKER, Summer 1995, at 36, 36.

38. "The chamber of commerce award may have been a first for a pawnshop, but Schlader [the owner] was not there to receive it . . . . [Because he] didn't suspect his business could possibly win, . . . he was out of town on a golfing weekend." *News Notes: Pacific Pawnbrokers Local "Business of Year,"* TODAY'S PAWNBROKER, Summer 1994, at 37, 38.

39. "Philadelphia has begun to crack down on 'nuisance businesses,' pawnshops and check-cashing stores included, by more aggressive enforcement of zoning laws by the city's Department of Licensing and Inspection." *News Notes: Pawnshops Called "Nuisance,"* TODAY'S PAWNBROKER, Fall 1995, at 42, 42.

40. A few months after an Indiana newspaper printed a news story about a pawnshop patron's arrest and confession to multiple burglaries, a letter to the editor of the newspaper warned "that the presence of a pawnshop was the precursor to an invasion of all kinds of unsavory businesses: tattoo shops and massage parlors." *Media Watch*, TODAY'S PAWNBROKER, Spring 1995, at 35, 35.

41. "A move is afoot within the Anchorage Assembly to punish pawnbrokers by creating rules that would render their social status to a level somewhere between liquor stores and houses of prostitution." *State Association News*, NAT'L PAWNBROKER, Fall 1993, at 55, 55.

42. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1242 (11th Cir. 1991).

43. *State Association News: Warning, Warning*, NAT'L PAWNBROKER, Summer 1994, at 63, 63.

44. The general power to affect pawnshops and other real estate and business entities is under FLA. STAT. § 538.17 (1995) ("Nothing in this chapter shall preclude political subdivi-

from Las Vegas to Baltimore.<sup>45</sup> The justification, when made, often rests on the burden that pawnshops are said to place on law enforcement.<sup>46</sup> In addition to density limits, pawnshops are often zoned out of upscale neighborhoods<sup>47</sup> or areas frequented by people the regulators fear may be *victimized* by pawnbrokers, e.g., gamblers in the vicinity of casinos.<sup>48</sup>

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sions of the state and municipalities from enacting laws more restrictive than the provisions of this chapter.”).

45. In 1994, the city of Baltimore drafted a new ordinance that would limit pawnshops to 42, the current number; it also increased the bond requirement from \$10,000 to \$50,000. *New Pawnshop Laws Passed Around Country*, TODAY'S PAWNBROKER, Fall 1994, at 36, 36 [hereinafter *New Laws*]. “[Officials are] concerned that Baltimore County will be overrun with pawnshops since an ordinance last year limited the number of stores in the city of Baltimore.” *County Moves To Curtail Pawnshops*, TODAY'S PAWNBROKER, Summer 1995, at 40, 41. “In February the county council imposed a six-month moratorium on new pawnshops [in the city of Baltimore], and solicited recommendations from the county planning board.” *Id.* at 40.

46. “The Fairfax, Virginia City Council has voted to limit the number of pawnshops to one; there is one store in the city now.” *New Laws*, *supra* note 45, at 36. The burden placed on police department resources is cited as the reason for the limit. *Id.*

On the other hand, some police officers state that pawnshops make their job easier.

“It’s meeting a need,” says Sgt. Raymond Henry, of the Tallahassee Police Department’s burglary unit. “If they all closed down, I think the crime rate would go up as far as racketeering and fencing, because there would be no legitimate means for these people to get money and they would use these illicit means to get money.”

Averil Guiste, *Pawns in the Game of Commerce*, TALL. DEM., Jan. 2, 1994, at C2.

47. *News Notes: Relocation Bid Rejected*, TODAY'S PAWNBROKER, Winter 1994, at 41, 41:

City commissioners in Royal Oak, Mich., . . . turned down a bid by [a pawnshop dealing only in jewelry] to relocate in their city.

. . . . The main opposition came from a neighborhood association led by one of the commissioners. That city official lived two blocks from the proposed store, and [was said to have stated that] she was determined not to have a pawnshop in her neighborhood.

48. *News Notes: Casino Gambling Produces Pawnshop Boom*, TODAY'S PAWNBROKER, Winter 1994, at 40, 40-41:

Casinos and pawnshops in Louisiana are becoming good neighbors, since casino gambling recently was legalized. In Bossier City, La., pawn transactions increased 72 percent between May and August according to police records, said the Shreveport (La.) *Times*. Individual pawnbrokers reported business up 10 to 30 percent.

. . . . [It was noted by one pawnshop owner] that most of his patrons are from Texas.

*News Notes: Big Easy Hard on Pawnbrokers*, TODAY'S PAWNBROKER, Summer 1995, at 41, 41:

New Orleans . . . is trying to restrict pawnshops, to keep them away from gambling casinos and the tourists who patronize them. According to newspaper reports, city officials have imposed a moratorium on new stores in the central business district, and proposed an ordinance that would exclude new stores from the tourist-portions of downtown, including the French Quarter.

“If the city fathers are concerned about a penniless patron who leaves a casino to pawn his watch, they also should be as concerned about that patron withdrawing his bank account from an ATM.” *Id.* at 42.

“Clark County commissioners banned pawnshop advertising along the Las Vegas Strip. The commission also turned down a pawnshop application by a jewelry store already in business on

Contemporary “service” expansions may continue to taint the public’s perceptions of pawnshops. Two recent entrepreneurial variations on existing themes, designed to increase customers and profitability, bring new controversy to pawnbroking: automobile title pawns<sup>49</sup> and advancing money on personal checks under the guise of check cashing.<sup>50</sup> Much of

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the Strip.” *News Notes: Give and Take in Las Vegas*, TODAY’S PAWNBROKER, Fall 1995, at 41, 41.

49. The very term “title pawn” is an anomaly. The basic notion of pawn is that of a pledge of personal property, the result of which is to transfer the possession of that property to the pledgee or pawnbroker. In the traditional sense, if an automobile is pawned, both the automobile and its title are going to be in the possession of the pawnbroker.

As title pawns have developed,

[i]n exchange for a loan, the borrower signs over his title and hands over a set of keys. The borrower then pays a monthly fee of as much as 22 percent [the Florida statutory maximum] until the loan amount is repaid. Say you need \$500. You would pay a fee of \$110 a month until you repaid the loan. If you kept the loan six months, the fees alone would total \$660. None of that money would be earmarked to pay off the underlying loan; you would still owe the initial \$500. If you can’t make your payments, the lender eventually can repossess your car.

Tim Gray, *Title Lenders Get Keys To Drive a Hard Bargain*, ST. PETE. TIMES, Oct. 29, 1995, at H2.

[In a true car pawn situation], you would no more let [the owner of the automobile] drive as you would let him wear his [pawned] watch. . . . [T]he possessory aspect of our industry allows us to charge the rates we do. Unlike a bank, our overhead costs must include storage, insurance and handling of the items we pawn, not to mention the credibility of our customers in general.

. . . .  
 . . . By allowing the customer to hold onto the item, or to drive it, we may damage our ability to earn these rates . . . .

. . . .  
 To put it simply, you can’t pawn a title.

. . . .  
 . . . Those of you who do not pawn cars are still at risk from those calling themselves pawnbrokers and acting like loansharks.

Cameron Swanson, *Can’t You Just Hold the Title?*, NAT’L PAWNBROKER, Summer 1994, at 30, 30.

A “title pawn” is indistinguishable from an Article 9 secured transaction. Should Article 9 apply or the exceptions found in the pawnbroker statute? The distinctive differences in treatment is discussed, *infra* notes 60-72 and accompanying text.

50. Ric Blum, *Check-Cashers . . . Friend or Foe?*, NAT’L PAWNBROKER, Summer 1994, at 16, 16 (Ric Blum is president of the Ohio Pawnbrokers Ass’n):

Lately a new twist has developed. [C]heck-cashers are getting into the loan business. . . . A [traditional] check-casher derives most of his income from fees charged for cashing checks.

. . . .  
 Check-cashers are [now] making loans on *personal checks*. There are many names for this—check-holding, cashing postdated checks, payday loans. . . . Check-cashers around the country find this very profitable.

. . . .  
 A check-casher might ask you to write a check for \$125 in order for you to receive \$100 in cash. They agree to hold your check for a period of time (often two weeks), until you can cover it. At the end of two weeks, the check is cashed at a bank.

To obtain such a loan is simple. Usually you must show your last two pay stubs, your last two months’ bank statements, and personal identification. Many require a “loan” application and

the industry eschews these "innovations" and the revenues and ill will they generate.<sup>51</sup>

Title loans have been prohibited in a few states<sup>52</sup> and authorized in others.<sup>53</sup> In Florida, where such loans have recently been authorized,<sup>54</sup> pawnbrokers have actively sought to divorce themselves from the title "pawn lenders"<sup>55</sup> and with good cause; a recent newspaper article commented,

some even run a credit check at the customer's expense. To the consumer, this may be an attractive alternative to pawning goods. Here the customer receives the loan and does not have to give up any property. That is probably worth the slightly higher fees involved. *Id.*

One big difference between this transaction and a pawn, is, if you default on a pawn, there will be no legal recourse (except forfeiture of your item). What happens if you make a deposit and the checks won't clear? Fines, penalties, warrants, jail, lawyer fees, ruined credit ratings.

*Id.* Generally pawners do not harbor ill will against a pawnbroker when goods are forfeited for failure to redeem. Such would not be the case if the held check bounced and collection procedures and the possible civil and criminal penalties were levied. *Id.* at 18.

51. See *supra* notes 49-51. Of the two, the title "pawn" (loan) is the most worrisome to pawnbrokers because it is immediately identified with them. In Florida, when the title loan industry sought to be legitimized, pawnbrokers insisted that the title loan industry *be prohibited* from using the pawn, pawner, pawnshop, pawnbroker lingo. See *infra* note 56; FLA. STAT. § 538.15(5) (1995).

On the other hand, check cashing in whatever form is not limited to pawnshops. Even your friendly neighborhood grocery store cashes checks. Nor do the vast majority of check cashers engage in questionable activities.

52. See, e.g., *Auto Pawn vs. Title Pawn*, NAT'L PAWNBROKER, Winter 1995, at 18, 18 (discussing a 1994 Colorado Attorney General opinion); La. Acts 1062, § 1801 (1995); Steven M. Geary, *Missouri's Pawnshop Law*, J. MO. B., July-Aug. 1994, at 201 (discussing changes to the laws affecting pawnshops in Missouri).

53. Title loans have been authorized or permitted in a number of jurisdictions. See, e.g., *Floyd v. Title Exch. & Pawn of Anniston, Inc.*, 620 So. 2d 576 (Ala. 1993); 1995, Fla. Laws ch. 95-287; O.C.G.A. § 44-12-131 (Supp. 1995) (Georgia); TENN. REV. STAT. § 45-15-101 (1995); NEV. REV. STAT. §244.348 (1993). Most states have not yet considered this issue.

54. 1995, Fla. Laws ch. 95-287; see also *infra* notes 141-43, 201-08 and accompanying text.

55. *News Notes: Title Loans Come to Florida*, TODAY'S PAWNBROKER, Fall 1995, at 37, 37: "We fought it, but we knew title loans were going to come in," said Ruth Barnett, executive director of the Florida Pawnbrokers Association [FPA]. The group turned back an effort to legalize title pawns in 1993. This year [1995] FPA helped write the bill and imposed some restrictions on vehicle loans.

[The 1995 enactment] prohibits title loan businesses from using the term "pawn," "pawnbroker," or any of the pawn symbols in their names, advertising or any other presentation to the public. . . . "That separated the title loan people from the pawnbrokers," Barnett said . . . . "There are a number of government agencies that are watching [title loans] very closely."

In Georgia, where the term "title pawns" is freely used, the entire pawn industry is painted with the stigma created by the title loan segment of the industry. For example, "a growing number of dissatisfied customers . . . have filed lawsuits against an industry that has grown so lucrative it has spawned pawn chains. Two of them [EZ Cash and Cash America] are listed on the New York Stock Exchange." Shelly Emling, *More Borrowers Challenge Car-Title Pawn Practices*, ATLANTA CONST., Sept. 24, 1994, at C9. Cash America does not make automobile title loans. Interview with Hugh Simpson, General Counsel, Cash America International, Inc., in Tallahassee, Fla. (Nov. 13, 1995).

“Like a B-movie monster, car-title lenders just won’t go away.”<sup>56</sup> Automobile title loans are just that: loans secured by possession of the automobile title and *not* the automobile.<sup>57</sup> Two clarifications need to be made. First, there can be, and still is, a *true* auto pawn, in which possession of a vehicle is delivered to a pawnbroker;<sup>58</sup> in fact, some pawnshops are specializing in automobiles.<sup>59</sup> Second, in many respects, a title loan is virtually indistinguishable from a more traditional loan using an automobile as collateral, *i.e.*, a “secured transaction.”<sup>60</sup> In the traditional setting, as in the title loan arena, the customer/borrower retains possession, and the lender notes its security interest on the title and retains possession of that title.<sup>61</sup> However, these two forms of the same type of title transaction are also very different in cost to the borrower and degree of protection of the borrower’s interest.<sup>62</sup>

A conventional loan using an automobile as collateral would be subject to the Florida usury law and its eighteen percent *per annum* interest ceil-

56. Gray, *supra* note 49, at H1. With emphasis on the up to 300% per annum service charge authorized by the Legislature, the reporter refers to title lenders as “vacuum lenders” and “predators.” *Id.* The bill that successfully authorized title loans was introduced by Representative Ed Healey, a West Palm Beach Democrat who “calls his measure pro-consumer.” *Id.*

57. “‘Title loan’ means a loan of money secured by bailment of a certificate of title to a motor vehicle. A title loan is not a pawn if the secondhand dealer does not maintain physical possession of the vehicle throughout the term of the transaction.” FLA. STAT. § 583.03(1)(i) (1995).

It is unlawful to “[u]se the word ‘pawn’ or ‘pawnbroker’ in any transaction, documentation, advertising or promotional materials, signs, displays, banners, or other materials of any nature relating to the secondhand dealer’s business if the secondhand dealer engages in title loan transactions.” *Id.* § 538.15(5).

58. In Florida, if the pawnbroker retains possession of the automobile, it is not a “title loan” subject to the title loan rules. *Id.* §§ 538.03(i), .06(5)(a). Indeed, one cannot “[e]ngage in both pawn transactions and title loan transactions from the same secondhand dealer location.” *Id.* § 538.15(4).

59. Jeff Kramer, *Loaner Cars, A Pawnshop Where the Owners Drive In, but Usually Walk Out*, L.A. TIMES, June 17, 1993, at J1 (“If it has wheels and an engine, we’ll take it.”); Kelly Kroeninger, *Denver-Based U.S. PAWN Leads Trend Toward Pawning Cars for Cash Loans*, DENVER BUS. J., Dec. 11, 1989, at V41 n.12, § 1.

60. *Cf.* FLA. STAT. §§ 679.104, 671.201(37) (1995).

61. Section 679.203, *Florida Statutes*, requires a security agreement; section 679.302(3)(b), *Florida Statutes*, requires the security interest to be “perfected” by compliance with the automobile certificate of title statute, which requires notation of the creditor’s interest on the automobile title, *id.* § 319.27(1), and possession of the title by the lienholder, *id.* § 319.24(3).

Chapter 538, *Florida Statutes*, has no express requirement of an agreement for title loans. However, by implication, a “[customer] shall sign a statement verifying that [the customer] is the rightful owner of the goods or is entitled to . . . pledge the goods,” *id.* § 538.04(3), and reasonableness would dictate that requirement. Likewise, the title lender would want its interest noted on the title in accordance with section 319.27(1), and it must have possession of the title, although it cannot have possession of the automobile. *Id.* § 538.06(5)(a), (b).

62. Mark Canning, an official in the Florida Department of Banking and Finance, has stated that Department personnel are investigating ways to make the title loan act more consumer-friendly. Gray, *supra* note 49, at H2.

ing.<sup>63</sup> A title loan is subject to a twenty-two ceiling, that is, *twenty-two percent per month*.<sup>64</sup>

If the debtor defaults on either its secured loan or on its title loan, the respective lender has repossession of the collateral as an available remedy.<sup>65</sup> But here the similarity ends. First, the repossession of secured loan collateral is expressly subject to the “no breach of the peace rule,”<sup>66</sup> which the repossession of title loan collateral is not.<sup>67</sup> Second, the secured loan collateral can be sold only at a commercially reasonable sale after reasonable notification to the debtor,<sup>68</sup> while the only restriction on the sale of title loan collateral is that it be sold through a licensed motor vehicle dealer,<sup>69</sup> an illusory protection at best.<sup>70</sup> Finally, upon sale of secured loan collateral, the debtor is entitled to any surplus of the sales proceeds over the loan balance plus expenses of sale and repossession, but the debtor is also liable for any deficiency.<sup>71</sup> After repossession of title loan collateral, the debtor is neither entitled to a sales surplus nor liable for a sales deficiency.<sup>72</sup>

An additional relationship that is *not* likely to earn positive “points” in a public relations game is that which the pawn industry has with the gun industry. “There are more than 15,000 pawnshops in the United States (of these, more than 12,000 are federal firearms licensees).”<sup>73</sup>

63. FLA. STAT. § 687.03 (1995). The most significant exception to this limit is for lenders licensed under the Consumer Finance Act, chapter 516, *Florida Statutes*. This exception permits a 30% per annum charge for the first \$1000 loaned; 24% for an amount exceeding \$1000 but not exceeding \$2000; and 18% for those amounts exceeding \$2000 but not exceeding \$25,000 (the most a licensee may lend under the usury exceptions created by the statute). *Id.* § 516.031(1).

64. *Id.* § 538.06(5)(e).

65. Compare *id.* § 679.503(1) with *id.* § 538.06(d).

66. *Id.* § 679.503.

67. See *id.* § 679.501(2), (3).

68. *Id.* § 679.504(3).

69. *Id.* § 538.06(d). The licensing requirements for a motor vehicle dealer are not particularly onerous, but they do offer *some* measure of protection to those who have transactions with the dealer. See *id.* § 320.27.

70. *Id.* § 538.16. Compare the title loan redemption (with its absolute 60- or 90-day cut-off) with the secured transactions redemption rights, which grant the debtor the right to redeem the property until it is sold, a contract is made for its sale, the debtor signs a written waiver after default, or the creditor has taken the property, *without objection from the debtor*, as payment in full for the obligation. *Id.* § 679.506. But any protection that this “limitation” is to the defaulting debtor is purely illusory. At the time the dealer is to sell the automobile, *the debtor has already given up her rights to redeem*. See *id.* § 538.16.

71. *Id.* § 679.504(2).

72. *Id.* § 538.16.

73. Jones, *supra* note 28, at 6. “Pawnshops make most of their money from jewelry and guns . . . .” Edmonson, *Spruce*, *supra* note 34, at 10 (noting that the pawnbroker who was to be interviewed “even thought about where the newspaper’s photographer should make a picture: not standing in front of the gun display, because that would be projecting the wrong image”); see also *Media Watch*, *supra* note 30, at 57. When gun control legislation was passed that mistakenly, it was argued, governed pawns of guns, Bill White, discussing the possibility of litigation, stated:

Still, standard check-cashing services<sup>74</sup> and new ventures, such as electronic tax filing and the ancillary refund anticipation loan,<sup>75</sup> have significant earning potential for the pawnbroker,<sup>76</sup> and they are viewed as valuable consumer services that pose little, if any, downside public relations risk.

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Can you conceive of a scenario where guns and pawnshops in court against a federal agency would do anything but damage our image further? Being right doesn't mean you're going to win. If you win, you must determine what you won. You didn't win any friends. It is rare that someone gets beat and doesn't want retribution. Many Brady proponents serve on other committees that could create serious grief for the industry.

Bill White, *The Brady Report—A Wake-up Call*, NAT'L PAWNBROKER, Summer 1994, at 52, 53.

74. "Customers do repeatedly mention convenience, not cost, in conversations about the pros and cons of check cashers." Tim Gray, *Cashing In on Checks*, ST. PETE. TIMES, Nov. 26, 1995, at H6. Conveniences such as free money orders, longer office hours than banks (including all day Saturday and part of Sunday), and cashing the checks of almost any customer are mentioned as drawing cards. *Id.*

At least one check casher has a mobile check-cashing unit. "In addition to serving employees near the job site, the armored car [mobile check-cashing unit] also goes into three public housing neighborhoods at the first of the month to cash checks for residents . . . [who] feel belittled if they go to a bank because they don't have much money." *Rolling Bank in Macon Cashes Checks on the Go*, ATLANTA CONST., Aug. 23, 1993, at State News.

By virtue of legislation effective July 1, 1994, Florida check cashers are to register with the Florida Department of Banking and Finance. FLA. STAT. §§ 560.302-.310 (1995). As of October 30, 1995, only 284 applications had been received. It is perceived that there are "a lot" of unregistered businesses still operating in Florida. Telephone Interview with Marilyn Meyers, Florida Department of Banking and Finance (Nov. 15, 1995) (informal interview conducted by Florida State University Law School student Josette Chack-On, notes on file with author).

75. It was estimated that there would be 25 million electronic filers in 1995. "What drives most electronic filing is the next-day 'refund' that people get. That refund actually is a loan that some banks make against the IRS's promise that a refund is due. When taxpayers qualify for earned income credit, that refund can total \$1,000, \$1,200, or more." R.G. Edmonson, *Pawnbrokers May Find the Future Is Spelled "ETF,"* TODAY'S PAWNBROKER, Fall 1994, at 14, 14. If the pawnbroker has the ability to cash the refund check, the customer may spend a portion of it for merchandise in the pawnshop. *Id.*

A Lightning Tax Service representative opines that

Every pawnbroker should be in the tax business. . . . It's easy to get started. "Our company and software cover all the bases to get a pawnbroker going in the fast refund business. We have excellent customer service, so when someone has questions, he or she can easily get them answered. Our software does the tax preparation by basically walking the operator through the return, then prints the federal and state returns, electronically files the tax report and provides a *Refund Anticipation Loan*. Almost all of our checks are back in one day. The client of a pawnbroker wants his refund fast, just like everybody else. A pawnbroker has an advantage, because he has a built-in customer base that he deals with year-round, whereas a tax service is closed most of the year."

Tracet Raule, *Vendors in Pawn*, NAT'L PAWNBROKER, Winter 1995, at 62, 62.

76. In Florida, check cashers may charge the greater of five dollars or three percent of the face amount of public assistance checks (four percent without identification); the greater of five dollars or five percent of the face amount of other payment instruments (six percent without identification); and the greater of five dollars or ten percent of the face amount of personal checks or money orders. FLA. STAT. § 560.309 (1995).

#### IV. PAWNBROKERS: IMPORTANT PLAYERS IN THE CONSUMER CREDIT ECONOMY<sup>77</sup>

Pawnshops usually offer small, secured loans that average sixty dollars and have a short maturation period; the customer's personal property serves as the collateral.<sup>78</sup> Pawnshops provide a vital service to an increasingly growing segment of the population: those whose questionable credit histories exclude them from such mainstream credit institutions as banks and credit unions. Most pawnshop customers do not have the option to acquire instant cash advances from the ATM machine with their credit cards, checking account overdraft loans from banks or credit unions, or loans from a consumer finance company.

But, while pawnshops have typically been the "bankers" for lower-income individuals, they are now offering assistance to an increasing number of middle-class customers. These "new" customers, perhaps hard hit by recession-related layoffs, bankruptcies, and foreclosures, have found pawnshops to be very convenient "lender[s] of last resort."<sup>79</sup> Pawnbrokers state that their customers feel compelled to tell them why they are pawning their possessions and that, instead of borrowing to finance luxuries such as vacations, "[t]hey're borrowing \$500 for food on the table"<sup>80</sup> or "to satisfy an unexpected need, pay bills or buy groceries."<sup>81</sup> Another pawnbroker commented, "We have a lot of people come in here with sick kids and they need a prescription or food or Pampers, and where are they going to get it?"<sup>82</sup>

In addition, a minority of pawnshops across the country cater to high-income clients who hold high status jobs and good credit ratings, but who need an immediate (and, many times, discreet) infusion of cash.<sup>83</sup> A Texas pawnbroker testifies, "Most of my customers are real estate people, oilmen, retailers, restaurant owners. . . . I'm dealing with a businessman who needs cash flow for say, ten days. . . ."<sup>84</sup> As a Nashville lender further explains, "When they need extra cash—it may be for just a week or a month or two

77. In his recent book, Professor Caskey notes that in total dollars, pawnbrokers provide less than one percent of consumer credit in the United States. However, since the median loans are quite small (about \$60), pawnshops serve millions of customers each year. Caskey estimates this to be "perhaps as much as 10 percent of the adult population." CASKEY, *supra* note 4, at 49.

78. *Id.*; *Pawns in the Game of Recession*, JEWELERS' CIRCULAR-KEYSTONE, May 1991, at 28.

79. Nick Ravo, *Upscale Down-and-Outers Try Pawning*, N.Y. TIMES, Sept. 11, 1991, at C1.

80. Patrice Apodaca, *Recession Leaves Mark in Over-the-Counter Lending*, L.A. TIMES, Dec. 22, 1991, at D3.

81. CASH AMERICA INTERNATIONAL, INC., 1994 ANNUAL REPORT 4 (1995).

82. Averil Guiste, *Pawns in the Game of Commerce*, TALL. DEM., Jan. 2, 1994, at C2.

83. Christie Brown, *Pawnbrokers to the Stars*, FORBES, July 8, 1991, at 104.

84. *Wealthy Flock To Hock in Posh Pawnshop*, HOUSTON BUS. J., Aug. 10, 1987, at 1.

months—but the last guy they want to have know is their banker. They don't want him frightened."<sup>85</sup>

The pledged goods are as diverse as the reasons for the loan. As one roams the aisles of a pawnshop and gazes at the variety of articles, it takes little creativity to imagine the life stories represented there. O.J. Simpson's trophies from his years with the Buffalo Bills,<sup>86</sup> oriental carpets,<sup>87</sup> a gold bracelet owned by the pawnbroker's wife,<sup>88</sup> an automobile trunk lid,<sup>89</sup> and a Virginia country-cured ham<sup>90</sup> are among the many props for interesting stories about items that have been presented as pawns.

## V. OVERVIEW OF FLORIDA PAWNSHOPS

It was recently estimated that Florida had 1270 pawnshops.<sup>91</sup> In January 1996, the Florida counties with the highest number of pawnshop dealers registered with the Florida Department of Revenue were Broward, Pinellas, Hillsborough, Duval, and Palm Beach, with eighty-eight, seventy, sixty-six, fifty-nine, and fifty respectively.<sup>92</sup>

85. Brayton, *Upscale Clientele Targeted by Pawn Shop*, NASHVILLE BUS. J., Sept. 26, 1988, at 16.

86. Dan Herbeck, *2 O.J. Trophies, Seized by Police; Focus of Dispute Pawnshop Wants Them Back*, BUFFALO NEWS, Feb. 2, 1995, at B1.

Two trophies won by O.J. Simpson during his early career with the Buffalo Bills may remain in the possession of a Buffalo pawnshop that bought them last year, the *Buffalo News* reported. A supreme court judge persuaded Buffalo police to return the trophies to [the shop]. . . . However, [the judge] also barred the store from selling the trophies for 60 days, giving Simpson's attorney time to file suit to reclaim them . . . .

*Pawnshop Wins O.J. Trophies*, TODAY'S PAWNBROKER, Fall 1995, at 42, 42.

87. Richard Weatherington, *Pawnshop Keeps Oriental Carpets After Owner Loses Rights*, TODAY'S PAWNBROKER, Winter 1994, at 14.

88. A custom-made gold bracelet had been given to Mrs. Bridges by her pawnbroker husband. The bracelet was stolen from a motel room in which she was staying. Later, when the thief tried to pawn the bracelet, he had the misfortune to choose Mr. Bridges as his pawnbroker. When questioned, the thief fled with Mr. Bridges in hot pursuit. After a considerable run about town, the thief cleared a fence into a parking lot where "Bridges saw his friend Crider and [shouted for his help]. Crider joined the chase and shortly caught the man . . . . The thief may not have had a chance. Crider is a former marathon runner." *Crime News*, TODAY'S PAWNBROKER, Winter 1994, at 43, 60.

89. The pawnbroker at Jack's Gun & Pawn Shop was curious about what a fellow in the parking lot was doing to his own car. In a few minutes, the object of the curiosity came into the shop to pawn the lid off the trunk of the very car he had driven to the shop. *Media Watch*, TODAY'S PAWNBROKER, Summer 1994, at 36, 36.

90. "A Virginia Country Cured Ham was pawned [and] at the end of 60 days it was not picked up so my employees and I enjoyed a very good lunch." Under the Internal Revenue Code, is this imputed income? *Pawn Humor*, FLA. PAWNBROKER, Summer 1995, at 33, 33.

91. CASKEY, *supra* note 4, at 41.

92. As of January 16, 1996, the State of Florida had 828 pawnshop dealers actively registered with the Department of Revenue. This number does not account for the total number of pawnshops operating in Florida; it includes only the pawnshop dealers registered with the Department of Revenue. See STATE OF FLORIDA, DEPARTMENT OF REVENUE SALES TAX

Since 1985, Florida pawnshops have enjoyed a steady and, in some years, impressive increase in *gross sales*.<sup>93</sup> The sales revenue generated through pawnshops provided Florida with a total of \$5,116,002 in state sales taxes and local option taxes just for calendar year 1994.<sup>94</sup> From 1990 through 1994, the total amount was \$18,824,948.<sup>95</sup>

The viability and resulting number of pawnshops in a particular state is directly related to economic factors such as interest rates, pawnshop operating costs, and the regulations governing pawnbrokers in that state.<sup>96</sup> The economic growth of the Florida pawn industry, as illustrated by the sales tax base of the pawnbroking industry, can be attributed, in part, to the nature of Florida's state pawnbroking regulations.<sup>97</sup>

## VI. GOVERNMENTAL REGULATION OF FLORIDA PAWNBROKING

### A. *An Historical Perspective*

The United States has never had either nationally operated pawnshops or national regulation of pawnbrokers. It was not until the early 1880s

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REGISTRATION DATA (Jan. 16, 1996) (department computer printout on file with author) (listing the active pawn shop dealers registered in Florida).

93. The Department of Revenue collects only *sales* figures because, in their role as collector of the state sales tax, loans are of little or no interest.

The following table lists the gross sales by fiscal year and is based on yearly statistics for Florida Department of Revenue (DOR) sales tax return data on DOR-administered taxes/DOR accounts.

TABLE I	
Gross Sales for State of Florida Pawnshops	
Fiscal Year	Gross Sales
1995	\$113,528,275 [through Oct. 9, 1995]
1994	107,669,725
1993	90,634,773
1992	75,900,229
1991	66,596,080
1990	66,004,549
1989	65,112,456
1988	56,781,116
1987	43,752,702
1986	35,083,086
1985	29,235,105

*Id.*

94. State of Florida, DOR-validated tax receipts data on DOR-administered taxes/DOR accounts.

*Id.*

95. *Id.* The complete data for 1995 was available only for sales through October 9, 1995. As of October 9, total 1995 sales and use tax collections already exceeded the entire twelve months of 1994. *Id.*

96. Steiner & Strischek, *supra* note 2, at 45; see Oeltjen, *Parade*, *supra* note 9, at 761-67; Jarret C. Oeltjen, *Usury: Utilitarian or Useless?*, 3 FLA. ST. U. L. REV. 167, 214 (1975) (discussing the question "Who is protected by the rate ceilings?") [hereinafter Oeltjen, *Usury*].

97. And, if Professor Caskey's regression analysis is correct, to the relative poverty and lack of education of my fellow Floridians. CASKEY, *supra* note 4, at 50.

that the first state legislation specifically regulating pawnbrokers was enacted.<sup>98</sup>

Pawnbroking has a rather lengthy legislative history in Florida. The common thread running through the myriad of pawnshop regulations is nonimpedence of the conduct of pawnshop businesses. This is especially apparent when Florida pawnbrokers are compared to other Florida lenders.<sup>99</sup> Early Florida legislation focused on registration, crime prevention, and the raising of revenue.<sup>100</sup> These statutes mandated state licensure (merely registration) and established procedures for documenting pawn transactions to assist law enforcement officials in tracing stolen property.<sup>101</sup> This regulatory focus remains unchanged. Current statutory provisions still regulate pawnbrokers little beyond the extent necessary to assist law enforcement in recovering stolen property and in solving other theft-related crimes.<sup>102</sup> Florida has never had legislation expressly limiting interest rates or other charges on pawn transactions. In contrast to many other states and the District of Columbia,<sup>103</sup> Florida does not impose economically significant state licensing requirements<sup>104</sup> on operating pawnshops.<sup>105</sup>

To date, the Florida Legislature has allowed pawnshops to operate without intrusive and burdening restrictions and has thereby helped foster the economic growth of this important—yet still questioned and maligned—business.<sup>106</sup> Recently, however, some federal and Florida court decisions, industry innovations and expansion, and local regulations have somewhat unsettled placid waters. Perhaps the time for the Florida Legislature to consider a comprehensive regulatory scheme has arrived.

At the time Florida adopted the common law of England, the common law included regulations that required pawnbrokers both to record the identity of the goods pledged, the amount loaned, and the name and address of the pledgor and also to give the pledgor a copy of the record.<sup>107</sup>

98. See Oeltjen, *Parade*, *supra* note 9, at 759.

99. See *infra* notes 141-60.

100. See *infra* notes 108-10.

101. See *infra* notes 108-10.

102. See *infra* notes 119-26.

103. *E.g.*, District of Columbia (minimum capital, "convenience and advantage"), Pennsylvania ("convenience and advantage," both state and local licenses), Vermont ("convenience and advantage"). Jarret C. Oeltjen, *Pawnbroking: Coming to America, Observations of Statutory Non-Uniformity and a Call for Uniform Legislation*, 38 BUFF. L. REV. 223, 233-87 (1990) [hereinafter Oeltjen, *America*].

104. Section 538.17, *Florida Statutes*, expressly authorizes local regulation that does include licensing. FLA. STAT. § 538.17 (1995).

105. Florida has not required a state pawnbroker's occupational license since 1971. See *id.* § 205.434; 1972, Fla. Laws ch. 72-306, § 1, at 1142 (repealing FLA. STAT. § 205.434 (1971)).

106. Pawnbrokers are sure to identify with the memorable words of comedian Rodney Dangerfield, "I don't get no respect."

107. Ch. 24, Laws of Eng. (1757).

The first Florida statute specifically addressing pawnbrokers was chapter 5106, *Laws of Florida*, enacted in 1903.<sup>108</sup> It appears to have been modeled after the common law. The statute required pawnbrokers to keep "a complete and true record of all their transactions" and to make these records available for inspection by law enforcement personnel.<sup>109</sup> Each pawnbroker was required to pay a license tax of \$100 to the state for each place of business.<sup>110</sup> A penalty of one to six months' imprisonment was imposed for violation of the law.<sup>111</sup>

In 1913, the Legislature increased the license fee to \$150 for those pawnbrokers in cities with populations of 10,000 or more. The record-keeping requirements for all pawnbrokers were amended to require data "showing from whom each article of their stock was purchased and the date of purchase, and the date and to whom each article was sold."<sup>112</sup>

In 1941, the 1913 provisions, with minor changes in the amount and structure of the licensure requirements, were recodified under the chapter regulating license taxes.<sup>113</sup>

In 1957, the Florida Legislature enacted legislation that expressly gave the pawnbroker the right to sell the pawn if no principal or interest were paid within six months of the pledge; the sale terminated all liability of the pawnbroker to the pledgor, and all rights and interests of both the pawnbroker and pledgor vested in the purchaser at sale.<sup>114</sup> These provisions, which had to be printed on the pawn ticket, constituted notice of intent to sell and consent by the pledgor.<sup>115</sup> No penalty was created for violation of this statute.

In 1959, the Legislature imposed on the pawnbroker an affirmative duty to make monthly reports to the local sheriff of all pawn transactions recorded pursuant to statute.<sup>116</sup>

In 1971, the statute was slightly modified to reflect a change in criminal penalties for violation of the licensure statute.<sup>117</sup> Also, under a larceny

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108. FLA. S. COMM. ON COM., 1984-85 INTERIM REPORT: REVIEW OF PAWNBROKING IN FLORIDA TO DETERMINE IF THE TRANSACTION SHOULD BE REGULATED AS AN "INTEREST" OR "BUY-BACK" TRANSACTION 11 (1985) (on file with comm.).

109. 1903, Fla. Laws ch. 5106, § 34, at 13.

110. *Id.*

111. *Id.*

112. 1913, Fla. Laws ch. 6424, § 42, at 40.

113. FLA. STAT. § 205.51 (1941).

114. FLA. STAT. § 715.04 (1957) (repealed 1989). In a number of jurisdictions (*e.g.*, Indiana, Maine, Massachusetts, and Michigan), the pawnbroker is required to sell the pawn and apply the proceeds to the loan and service charges. Any surplus must be returned to the debtor. See Oeltjen, *America*, *supra* note 103, at 233-87.

115. FLA. STAT. § 715.04 (1957) (repealed 1989).

116. FLA. STAT. § 205.511 (1959). Section 205.51, *Florida Statutes*, required the pawnbroker to "keep a complete and true record of all transactions, showing from whom each article of stock was purchased, the date of purchase, and the date and to whom each article was sold." In 1967, sections 205.51 and 205.511 were repealed and recodified with minor changes as sections 205.434 and 205.442, *Florida Statutes*.

statute, pawnbrokers were required to keep records of all merchandise bought and sold and to make these records available to law enforcement personnel.<sup>118</sup>

The state licensure provisions underwent major surgery in 1972 when most of the occupational licensing sections were repealed.<sup>119</sup> State licensure of many businesses was abolished and local governments were granted the authority to issue occupational licenses.<sup>120</sup> The language specifically regulating pawnbrokers was repealed, including the requirements to keep transaction records and to report these to local sheriffs. This revision, when coupled with the deletion of pawnbrokers from the larceny statute in 1975,<sup>121</sup> meant that by the end of 1975, the only Florida statute governing pawnbrokers controlled the redemption period and sale of the pawn.<sup>122</sup> There were no licensing or record-keeping requirements, nor were there any penalties for violation of the remaining redemption/sale provisions.

In 1979, the void was partially filled with legislative reinstatement of the record-keeping requirements.<sup>123</sup> The required records had to be available to police personnel upon request.<sup>124</sup> The statute articulated that a lawful owner of stolen property, upon furnishing proof of ownership, was entitled to recover that property through police processes<sup>125</sup> at no personal expense (that is, without either judicial process or reimbursement of the

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117. FLA. STAT. § 205.434 (1967).

118. FLA. STAT. § 811.165 (1971). In *Newman v. Carlson*, 280 So. 2d 426 (Fla. 1973), these record-keeping requirements survived a constitutional challenge. The court held that it was not a violation of the equal protection clause to require persons or firms regularly buying and selling junk or secondhand goods to keep records. It was a valid exercise of the state's police power. "The act before us which indeed frustrates the sale of stolen merchandise and greatly enhances the possibility of return of these items to their rightful owners is in the interest of public welfare and strikes at the basic evil of disposal by sale of illegally obtained merchandise." *Id.* at 428-29.

This statute was substantially rewritten in 1975 and all references to pawnbrokers were deleted. 1975, Fla. Laws ch. 75-118 (codified at FLA. STAT. §§ 812.049, .051 (1975)).

119. Local Occupational License Tax Act, ch. 72-306, § 1, at 1142, Laws of Fla. (codified at FLA. STAT. §§ 205.013-.062 (1972)).

120. As discussed *infra* in part IX, this grant of authority to local regulators is, at best, problematic.

121. 1975, Fla. Laws ch. 75-298, § 28, at 1092 (codified at FLA. STAT. § 812.051 (1975)).

122. FLA. STAT. § 715.04 (1975).

123. FLA. STAT. § 715.041 (1979). This statute required pawnbrokers to demand identification from the pledgor, record the identity of the pledgor, record the transaction date, and have the pledgor sign the record. *Id.*

124. Note that under the laws repealed in 1972, the pawnbroker had the duty not only to keep records but to also to make periodic reports to the sheriff. FLA. STAT. §§ 205.434-.442 (1971) (repealed by 1972, Fla. Laws ch. 72-306, § 1, at 1142).

125. For a discussion of problems created by such police procedures, see discussion *infra* part XI.

pawnbroker for the loan), unless the pawnbroker could produce evidence that the pledgor had provided proof of ownership of the pawn.<sup>126</sup>

Currently, Florida pawnbroking is governed by chapter 538, as enacted in 1989. The main impetus behind the law was to confront the problem of property theft and drug-related crimes by facilitating recovery of stolen goods and apprehending those criminals who may turn to secondhand dealers for cash.<sup>127</sup> Due to requests by the Florida Law Enforcement Recovery Unit, this comprehensive statute was enacted to group pawnbrokers and others under the category of "second-hand dealers" and to repeal all extant statutes relating to pawnbrokers, precious metals dealers, and junk dealers.<sup>128</sup> By carefully examining the operative terms and their definitions, one could probably construct an interesting example of effective lobbying and legislative negotiation and compromise.

The statute applies to "transactions," which means "any purchase, consignment, or pawn of secondhand goods by a secondhand dealer."<sup>129</sup> "Secondhand dealer" is then defined as including all those "engaged in the business of purchasing, consigning, or pawning secondhand goods or entering into title loan transactions," including "pawnbrokers, jewelers, precious metals dealers, garage sale operators, secondhand stores, and consignment shops."<sup>130</sup> This broad definition is subject to numerous ex-

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126. FLA. STAT. § 715.041(2) (1979). For a discussion of recovery of "stolen" property from pawnbrokers and their customers, see text *infra* part XI.

127. Fla. H.R. Comm. on Crim. Just., SB 16-B (1989) Staff Analysis 6 (final June 22, 1989) (on file with Comm.).

Not surprisingly, the information customers provide pawnbrokers is being used by authorities who have access to it for law enforcement purposes other than the recovery of stolen property (such as collecting unpaid parking or traffic tickets). Some pawnbrokers express fear that such practices may make some people reluctant to patronize pawnbrokers. *On Top of Many Issues*, TODAY'S PAWNBROKER, Spring 1994, at 48, 48.

128. 1989, Fla. Laws ch. 533 (codified at FLA. STAT. §§ 538.03-.26 (1989)).

129. FLA. STAT. § 538.03(1)(h) (1995).

130. *Id.* § 538.03(1)(a) (emphasis added). The italicized language was added to the statute during the 1995 legislative session. 1995, Fla. Laws ch. 95-287, § 1, at 2697 (codified at FLA. STAT. §§ 538.03, .06, .15, .16 (1995)).

clusions.<sup>131</sup> One of the exclusions, flea markets, was the subject of an unsuccessful constitutional challenge.<sup>132</sup>

"Pawnbroker" is then defined as "any person, corporation, or other business organization or entity which is regularly engaged in the business of making pawns, but does not include a financial institution as defined [by statute] or any person who regularly loans money or any other thing of value on stocks, bonds, or other securities."<sup>133</sup> A "pawn" transaction can be either a "[l]oan of money . . . [with a] bailment of personal property as security"<sup>134</sup> or a "[b]uy-sell agreement . . . whereby a purchaser agrees to hold property for a specified period of time to allow the seller the exclusive right to repurchase the property."<sup>135</sup> When the statute explicitly states that "[a] buy-sell agreement is not a loan of money,"<sup>136</sup> the not-so-hidden intent is that a transaction so designed should not be subject to the usury statute.<sup>137</sup>

The "new" statute, covering specified secondhand sales, secondhand dealers, and secondary metal recyclers, first became effective October 2, 1989,<sup>138</sup> and has been amended in each legislative session since its creation.<sup>139</sup> Although most of the subsequent amendments were minor clarifi-

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131. Among the exclusions: "an organization or entity registered with the state as a non-profit, religious, or charitable organization or any school-sponsored association or organization," "a law enforcement officer acting in an official capacity," "any garage sale operator who holds garage sales less than ten weekends per year," "any person at antique, coin, or collectible shows or sales," "any person purchasing, consigning, or pawning secondhand goods at a flea market regardless of whether at a temporary or permanent business location at the flea market," "any auction business . . . unless the business deals in secondhand goods," "any person purchasing, consigning, or pawning secondhand goods ordered by mail, computer-assisted shopping, media-assisted, media-facilitated, or media-solicited shopping or shopping by other means of media communication, including, but not limited to, direct mail advertising, unsolicited distribution of catalogues, television, radio, or other electronic media, telephone, magazine, or newspaper advertising, so long as such person is in this state at the time of the order," "a motor vehicle dealer." FLA. STAT. § 538.03(2) (1995).

132. *State v. Hodges*, 614 So. 2d 653 (Fla. 5th DCA 1993). The court held both that the term "flea market" did not render the statute unconstitutionally vague and that the exclusion of flea markets from record-keeping requirements imposed upon other dealers in secondhand goods did not violate equal protection. "[I]t would be more difficult to conduct illicit activities [at a flea market than at a] sole proprietorship or business with only one vendor . . ." *Id.* at 655.

133. FLA. STAT. § 538.03(1)(c) (1995).

134. *Id.* § 538.03(1)(d)1.

135. *Id.* § 538.03(1)(d)2. For a discussion of this distinction, see *infra* part VII.

136. FLA. STAT. § 538.03(1)(d) (1995).

137. Section 687.02, *Florida Statutes*, defines "usurious contracts" as "[a]ll contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest . . ." *Id.* § 687.02; see also PRACTICE UNDER FLORIDA USURY LAW § 1.11 (2d ed. 1993) [hereinafter FLORIDA USURY LAW].

138. 1989, Fla. Laws ch. 89-533, § 6, at 2739 (codified at FLA. STAT. §§ 538.03-.26 (1989)).

139. See chs. 90-192, 90-318, 91-429, 92-79, 92-303, 93-37, 93-97, 94-353, 95-287, Laws of Fla.

cations,<sup>140</sup> some notable additions to chapter 538 have been enacted. One amendment made explicit the requirement that a secondhand dealer maintain actual physical possession of all secondhand goods throughout a transaction; title or any other form of security in secondhand goods could not be accepted in lieu of actual physical possession.<sup>141</sup> This blow to the title pawn (loan) industry was unsuccessfully challenged in the Florida Legislature in both 1993 and 1994.<sup>142</sup> In 1995, title loans were explicitly authorized, but the legislation divorced the "new" title loan industry from that of the pawnshops.<sup>143</sup>

Another statutory addition provided that if a secondhand dealer contests the identification or ownership claims of particular property in possession of the dealer, the person alleging ownership may bring an action for replevin in the county or circuit court.<sup>144</sup> A universally common provision in pawnbroker regulation schemes<sup>145</sup> (omitted from the original

140. For example, "pawnbroker" was redefined from "a secondhand dealer who is regularly engaged in the business of making pawns . . . [,]" FLA. STAT. § 538.03(1)(c) (1989), to "any person, corporation, or other business organization or entity which is regularly engaged in the business of making pawns . . . ." FLA. STAT. § 538.03(1)(c) (1995). The definition was altered even though a "secondhand dealer" was already defined as "any person, corporation, or other business organization or entity . . . ." FLA. STAT. § 538.03(1)(a) (1989).

The supplemental changes have maintained the same holding periods and inspection of records and premises procedures. The amendments to these sections clarified which items were subject to the holding periods and the jurisdiction of the inspecting law enforcement office. Compare FLA. STAT. § 538.05, .06 (1995) with *id.* § 538.05, .06.

141. FLA. STAT. § 538.06 (1993). This amendment was designed to eliminate the practice of pawning automobile titles for cash, a practice by which the possession of the auto remained in the seller/debtor, as contrasted with the procedures of the conventional pawn in which part of the essence of the transaction was to surrender possession of the subject tangible property to the pawnbroker. See *supra* notes 52-72, *infra* notes 201-08 and accompanying text for additional information on the title loan industry.

142. Earlier legislative attempts to authorize title loans were unsuccessful. In 1993, instead of authorizing title loans as lobbied, language was added to chapter 538 to prohibit title loans. 1993, Fla. Laws ch. 93-97, § 3, at 514 (codified at FLA. STAT. § 538.06 (1993)); see Ericks, *1994 Legislative Update*, FLA. PAWNBROKER, Summer 1994, at 9. In 1994, a title loan authorization bill passed both the Florida Senate and Florida House of Representatives without opposition, only to be vetoed by the Governor. Veto of Fla. SB 2208 (1994) (letter from Gov. Chiles to Sec'y of State Jim Smith, May 26, 1994) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.).

143. 1995, Fla. Laws ch. 95-287, § 3, at 2698 (codified at FLA. STAT. § 538.15 (1995) (title lenders may not use pawn terminology)).

144. FLA. STAT. § 538.08 (1995). As a prerequisite to this right of replevin, the statute requires that the person alleging ownership file a timely report of the theft of the goods to the proper authorities. *Id.* The following is part of the suggested form complaint included in the statute: "3. Plaintiff is entitled to the possession of the property under a security agreement dated \_\_\_\_\_, 19\_\_\_\_, a copy of which is attached." *Id.* The use of this provision suggests that the statute was enacted to protect lending institutions when debtors pawn goods covered by a security agreement and not necessarily when the original owner of the goods was relieved of possession by a thief.

145. See the survey of pawnbroker laws in Oeltjen, *America*, *supra* note 103, at 233-87.

1989 enactment but added in 1990)<sup>146</sup> is the statutory provision that mandates the minimum length of time that a pawnbroker must keep a pawned article before selling it.<sup>147</sup> The cutoff time distinguishes between a pawn that is “a loan of money” and a pawn that is “a buy-sell agreement.”<sup>148</sup> If the pawn is a loan of money and the property has not been redeemed or there has been no payment on the account for a period of *ninety days*, the pawn is subject to sale or disposal.<sup>149</sup> However, a pawn that is a buy-sell agreement is subject to sale or disposal in a shorter period of time, when the property has not been repurchased from the pawnbroker or there has been no payment on the account within *sixty days*.<sup>150</sup>

The current chapter includes requirements for registration,<sup>151</sup> record keeping,<sup>152</sup> delivering copies of the records to law enforcement authori-

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146. 1990, Fla. Laws ch. 90-192, § 4, at 865 (codified at FLA. STAT. § 215.475 (1990) (amended by 1991, Fla. Laws ch. 91-429, § 4(2)(a), at 93-97).

147. FLA. STAT. § 538.16 (1995).

148. *Id.*

149. *Id.*

150. *Id.* This section also requires that every pawn ticket and receipt for a pawn have printed on it notice of these provisions. The ticket and receipt must also include notice of sale or disposal, notice of intention to sell or dispose without further notice, and consent to sale or disposal. All liability of the pawnbroker terminates with such sale or disposal and vests in the purchaser the right, title, and interest of the seller or borrower and the pawnbroker. *Id.*

151. *Id.* § 538.09. Interestingly, registration is not with a department that regulates banking, finance, or secured transactions but rather is with the Florida Department of Revenue. For registration purposes, a secondhand dealer must now pay the Department of Revenue a nominal fee per location and an annual renewal fee, in addition to the initial application fee. *Id.*

In contrast, section 5-19A-11(a) of the Alabama Pawnshop Act requires that pawnbrokers obtain initial licenses at a cost of \$100 for each location and then pay additional annual renewal fees of \$100 per license. 1995 Ala. Acts ch. 19A, § 5-19A-11(a). Furthermore, pawnbrokers must pay a license tax of \$250 for each place of business and an additional tax if they sell pistols, sawed-off shotguns, or revolvers. 1995 Ala. Acts ch. 12, art. 2, § 40-12-138; *see also* Oeltjen, *America*, *supra* note 103, at 238-87 (comparing licensing (registration) fees charged in the various jurisdictions).

In order to register, a “secondhand dealer” must 1) be a natural person who has reached the age of 18 years; 2) submit a fee; and 3) furnish a certified, complete set of fingerprints and a “recent fullface photographic identification card of himself.” FLA. STAT. § 538.09(1), (2) (1995). Registration may be denied (or revoked, suspended, or restricted) if the registrant has 1) violated chapter 538 or any rule or order thereunder; 2) made a material false statement in the registration application; 3) been guilty of a fraudulent act relating to any purchase or sale; 4) made a misrepresentation or false statement to, or concealed any material fact from, any purchaser or seller; 5) made purchases or sales through any nonregistered associate; 6) within the preceding five years been convicted of, or entered a *nolo* plea regarding, statutorily enumerated property offenses, felony drug offenses, or any fraudulent or dishonest dealing; 7) had a final judgment rendered against him or her in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit; or 8) has failed to pay any owed Florida sales tax. *Id.* § 538.09(5).

152. *Id.* § 538.04. This section requires pawnbrokers to maintain records of *all* transactions on the premises and deliver the records of *any acquisition* of secondhand goods to local law enforcement within 24 hours of acquisition. The record is to contain (a) the time, date, and place of the transaction; (b) a complete and accurate description of the goods acquired; (c) a description of the person from whom the goods were acquired (including full name, address, workplace, home

ties,<sup>153</sup> goods holding periods,<sup>154</sup> and inspection by the authorities.<sup>155</sup> The chapter also includes a listing of prohibited business practices;<sup>156</sup> procedures for the return of stolen goods to the rightful owner and for restitution to the secondhand dealer by the convicted thief;<sup>157</sup> penalties for violation of the Act;<sup>158</sup> explicit permission for local governments to enact ordinances governing the operation of pawnshops;<sup>159</sup> but no mandate regarding service charges, interest rates, or sale/purchase differential or similar charges. Yet, pawn transactions involving loans can still be subject to the maximum interest rates specified under Florida's usury statute, as well as other statutes.<sup>160</sup>

Various historical schemes illustrate the unique regulatory treatment afforded pawnbrokers. Still, pawnbrokers are heavily regulated, but many of these regulations are not strictly adhered to by the industry, in most instances because of a misunderstanding of the regulation or its applicability.<sup>161</sup>

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and work phone numbers, height, weight, date of birth, race, gender, hair color, eye color, and any other identifying marks), and (d) any other information required by the form approved by the Department of Law Enforcement. The "transaction records" must be maintained for five years. *Id.* § 538.06(4).

153. *Id.* § 538.04(1).

154. *Id.* § 538.06. The statutory holding period to be observed by "secondhand dealers" is 15 days *unless the goods are being pawned*. *Id.* § 538.06(1). This holding period may be "extended to 60 days by a law enforcement officer upon probable cause that the goods are stolen and that further holding is necessary . . . . A court of competent jurisdiction may extend the holding period even further." *Id.* § 538.06(3).

155. *Id.* § 538.05 ("The premises and required records . . . are subject to inspection during regular business hours . . . by any state law enforcement officer who [has] jurisdiction over the dealer.").

156. *Id.* § 538.15 (listing forbidden acts including failure to pay sales tax or have a sales tax registration number; knowingly transacting business with a minor, someone under the influence of alcohol or other drugs, or someone using an alias; or transacting business between 10 p.m. and 8 a.m. or at a "drive-through window").

157. *Id.* §§ 538.08, .07(2).

158. "[A] person who knowingly violates any provision of this chapter commits a misdemeanor of the first degree, punishable [by imprisonment not exceeding one year] and by a fine not to exceed \$10,000." *Id.* § 538.07(1).

For each violation of the registration requirements, the Department of Revenue may impose a civil fine up to \$10,000. If the fine is not paid within 60 days, the Department may bring a civil action under section 120.69, *Florida Statutes*, to recover the fine. *Id.* § 538.09(4).

159. *Id.* § 538.17. As will be discussed *infra*, multilevel regulation schemes are, at best, problematic. *See also Association in Membership Push*, TODAY'S PAWNBROKER, Spring 1994, at 48, 48 (The Maryland Pawnbrokers "[A]ssociation is considering backing new state legislation to standardize the situation and eliminate the necessity of dealing with myriad laws from different strata of government.").

160. *See infra* notes 171-200 and accompanying text (discussing recent Florida case law addressing this issue).

161. *See, e.g.,* Ron Stempkowski, *Old Law Is New to Many Pawnbrokers*, TODAY'S PAWNBROKER, Summer 1995, at 9, 9 (discussing Truth-in-Lending and its applicability to pawnbrokers); Richard Weatherington, *New Money Laundering Law Affects Some Pawnbrokers*, TODAY'S PAWNBROKER, Summer 1995, at 16, 16 (stating that check-cashing and money transmission services may well bring pawnbrokers within the scope of the Money Laundering

### B. Pawnbrokers, Here Comes the Judge

Over the years, a limited number of cases involving pawnbrokers and the provisions and decisions that regulate them have found their way into the Florida supreme and other appellate courts. Some cases constitutionally challenged the statutes for vagueness of terms such as “junk or secondhand goods” and “flea markets.”<sup>162</sup> Other constitutional challengers unsuccessfully claimed that the regulation of certain types of dealers without regulation of others was a denial of equal protection.<sup>163</sup> However, the Florida Supreme Court has held that “the law-making authority may, under its police power, enact regulations that are not all-embracing. It may legislate with reference to degrees of evil and to situations in which the evil is demonstrably more harmful, without denying equal protection of the law.”<sup>164</sup>

In at least one decision, a Florida pawnbroker successfully invoked constitutional protection. In *City of Miami Beach v. Mr. Samuel's, Inc.*,<sup>165</sup> the Florida Third District Court of Appeals affirmed the trial court's finding that refusal to issue a pawnbroker license was arbitrary, unreasonable, and unjust.<sup>166</sup> Mr. Samuel's, Inc. applied for a license in a C-4 zone, which was a “highly concentrated business core.”<sup>167</sup> The City argued that because the ordinance did not expressly name pawnbrokers as a lawful business in that zone, denial was justified.<sup>168</sup> The court rejected this argument on the ground that a fair reading of the ordinance, with respect to the businesses enumerated, showed that C-4 was a clearly applicable zone contemplating businesses such as Mr. Samuel's, Inc.<sup>169</sup> The City, there-

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Suppression Act of 1994); Richard Weatherington, *Broker Loses Truck for Violating Pawnbrokers Act, UCC*, TODAY'S PAWNBROKER, Summer 1995, at 22, 45 (“While most brokers generally understand their state's pawn laws, other laws like the UCC, truth-in-lending and bankruptcy can get very complicated.”); *Beware the Dangers of Truth in Lending*, NAT'L PAWNBROKER, Summer 1995, at 32, 32 (“[T]he courts have consistently ruled that Truth in Lending applies to pawn shops and failure to comply with its requirements could cost you your business.”).

162. A statute that requires certain people or firms to keep records regularly, when they buy and sell junk or secondhand goods, was found not to be vague and ambiguous. See *Newman v. Carson*, 280 So. 2d 426, 426 (1973). The term “flea market,” as an exception to statutory reporting requirements, was held not to render the statute unconstitutionally vague. See *State v. Hodges*, 614 So. 2d 653, 653 (1993).

163. Record-keeping requirements statutorily imposed on those who regularly buy and sell junk and secondhand goods but not on other retail merchants was found not to violate equal protection requirements in *Newman*, 280 So. 2d at 426. Nor does excluding “flea markets” from such requirements violate equal protection requirements. *Hodges*, 614 So. 2d at 653.

164. *Newman*, 280 So. 2d at 429.

165. 334 So. 2d 47, 47 (Fla. 3d DCA 1976).

166. *Id.* at 48.

167. *Id.* at 47.

168. The City argued that because pawnshops were not specifically mentioned in the ordinance, it had discretion as to where to put them. *Id.* at 48. This contention suspiciously smacks of a perpetuation of the *stigma* discussed within part III of this Article.

169. *City of Miami Beach*, 334 So. 2d at 48.

fore, upon receiving a valid application, had a clear legal duty to issue the pawnbroker's license.<sup>170</sup>

While precedent regarding pawnbrokers in Florida is comparatively sparse, the appellate courts in the First and Second Districts have recently decided cases that could greatly impact pawnbrokers in the future. In June, 1992, the Second District Court of Appeal affirmed a lower court decision finding that the pawn involved in a particular transaction was a "sale" and not a "loan."<sup>171</sup> The appellate court found that under Florida law,<sup>172</sup> the ninety-day statutory period after which a pawnbroker may sell or dispose of a pawned item applies to a "loan" from the pawnbroker to the customer, and the sixty-day statutory period applies to a customer-to-pawnbroker "sale" in which the customer retains the right to repurchase the item.<sup>173</sup> Because the pawn ticket referred to a "Buy-Back" and also listed the amount that the customer had to pay to get the ring back as the "Repurchase Price," the court found that "competent substantial evidence" existed from which the trial court could have determined that the pawned ring involved a sale and had not been given as security for a loan.<sup>174</sup> In so holding, the court implicitly held that the usury statute and its limit on interest did not apply.<sup>175</sup>

Additionally, both the First and Second District Courts of Appeal have recently highlighted the extent of regulation of Florida pawnbrokers. These cases focused on pawnbroker regulation with respect to two different questions: 1) whether the Department of Agriculture's Division of Consumer Services has jurisdiction to sue pawnshops/pawnbrokers or move for injunctive action for alleged statutory violations, and 2) what statutory restrictions, other than chapter 538, may apply to pawnbrokers.<sup>176</sup>

In *Quick Cash of Clearwater, Inc. v. Department of Agriculture & Consumer Services*,<sup>177</sup> the Second District Court of Appeal held that the Legislature had given the Division of Consumer Services authority to seek an injunction, on three days notice, against the pawnbroker's alleged violation of the Florida Deceptive and Unfair Trade Practices Act (DUTA).<sup>178</sup> The Division argued that its authority went beyond the bounds

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170. *Id.*

171. See *Isaac v. Brave*, 600 So. 2d 1258, 1259 (Fla. 2d DCA 1992).

172. FLA. STAT. § 538.16(1) (1991).

173. *Issac*, 600 So. 2d at 1259-60. Much of the confusion in interpreting this provision was eliminated by the 1993 legislative amendments, which added clarifying language to section 538.16, *Florida Statutes*. See FLA. STAT. § 538.16 (1995).

174. *Issac*, 600 So. 2d at 1259.

175. See FLA. STAT. § 687.02 (1991).

176. See *infra* notes 177-200 and accompanying text.

177. 605 So. 2d 898, 901 (Fla. 2d DCA 1992).

178. *Id.* (citing FLA. STAT. § 501.201 (1995)). Subsection 570.544 (11), *Florida Statutes*, created by chapter 90-323, *Laws of Florida*, states the following:

of the DUTA and that, “if read literally, the statute might allow the Division to seek an emergency injunction whenever the Division ‘has reason to believe . . . that the interests of the consumers of this state . . . are being damaged . . . .’”<sup>179</sup> Since the court found that the alleged violations came within DUTA, it never reached the expansive jurisdiction question.<sup>180</sup> In dicta, however, the court expressed doubt as to whether the Florida Legislature had intended to grant the Division such an “expansive grant of authority.”<sup>181</sup>

The court carefully pointed out that its determination applied merely to the issue of whether the Division has authority to file an action to enjoin violations of DUTA and not to the issue of “whether the transactions may result in illegal usury or whether they are otherwise an appropriate subject for criminal prosecution.”<sup>182</sup> The court found that the particular pawn agreement was a “loan of money”<sup>183</sup> and subject to regulation under chapter 538, it also found “nothing in [the debtor’s] agreements or in the Florida Statutes that would exempt [the debtor’s] agreement from laws regulating usury.”<sup>184</sup> In dicta, the court remarked that some pawn agreements, especially those structured as buy-sell agreements, may not be loans subject to usury regulation.<sup>185</sup> The court also was careful to emphasize that the provisions of chapter 538, *Florida Statutes*, “are not a comprehensive regulation of pawnbrokers.”<sup>186</sup> Overall, the court noted, there is confusion about which statutes are applicable in regulating pawnbrokers.<sup>187</sup> The

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If the division by its own inquiry, or as a result of complaints, has reason to believe that a violation of the laws of the state relating to consumer protection has occurred or is occurring, that the interests of the consumers of this state have been damaged or are being damaged, or that the public health, safety, or welfare is endangered or is likely to be endangered by any consumer product or service, the division may commence legal proceedings in circuit court to enjoin the act or practices or the sale of the product or service and may seek appropriate relief on behalf of the consumers. *Upon application by the division, a hearing shall be held within 3 days after the commencement of the proceedings.*

FLA. STAT. § 570.544 (11) (1990) (emphasis added).

179. *Quick Cash of Clearwater, Inc.*, 605 So. 2d at 901.

180. *Id.*

181. *Id.*

182. *Id.* at 900.

183. *Id.* at 902 (citing FLA. STAT. § 538.03(1)(d)1 (1991)).

184. *Id.*

185. *Id.*

186. *Id.*

187. For example, the court noted that chapter 516, *Florida Statutes*, regulates consumer finance, yet it does not apply to “any bona fide pawnbroking business transacted under a pawnbroker’s license.” *Id.* (quoting FLA. STAT. § 516.02(4) (1991)). The court went on to question what the Legislature meant by this phrase since chapter 538 is only a registration statute, and the State of Florida does not otherwise provide for issuance of pawnbrokers’ licenses. *Id.* at 902 n.4.

The court’s confusion was compounded because the case involved the attempted pawn and leaseback of an automobile. *Id.* at 901-02. Automobiles were not included within the extensive

court then encouraged "the legislature, at its earliest opportunity, to review . . . its overall regulation of both buy-sell agreements and loan transactions by pawnbrokers."<sup>188</sup>

The court did hold that if the Division could prove that Quick Cash unlawfully conducted business as a consumer finance company or that Quick Cash engaged in a business method violative of criminal usury regulations, the Division could establish either an "unfair method of competition" or an "unfair or deceptive act" under the DUTA.<sup>189</sup> The trial court could then properly enjoin further violation.<sup>190</sup>

In *Department of Agriculture & Consumer Services v. Quick Cash of Tallahassee, Inc.*,<sup>191</sup> decided only a little over three months later by the First District Court of Appeal, the scope of the Division's jurisdiction was again addressed.<sup>192</sup> At the trial level, "[b]ecause the Division had conceded that 'the instant case does not involve [c]hapter 501,' the trial court . . . granted Quick Cash's motion for summary judgment."<sup>193</sup> The First District reversed the summary judgment and remanded the case.<sup>194</sup> Without the hesitation expressed by the Second District, the court found that the Division had standing to bring an action for injunctive relief and damages based on alleged violations of state usury laws, pawnbroker laws, consumer finance laws, motor vehicle retail sales finance laws, and motor vehicle sales laws, and that the Division was not limited to claims of unfair and deceptive trade practices.<sup>195</sup> In holding that the Division had jurisdiction, the court focused on the plain meaning of the words of the relevant statute and found them to be "clear and unambiguous."<sup>196</sup> The court concluded that the Legislature intended to empower the Division "to act as the protector of consumer interests" and "to sue on behalf of the state's consumers."<sup>197</sup> The court expressed no opinion as to the constitutionality of the legislative delegation because an issue had not been raised in the trial court.<sup>198</sup>

The court cautioned that its decision could lead to future disputes over whether the Division or some other department of the executive branch

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listing of types of property subject to chapter 538 regulation. *Id.* at 902; *see also* FLA. STAT. § 538.03(1)(g) (1991).

188. *Quick Cash of Clearwater, Inc.*, 605 So. 2d at 902-03.

189. *Id.* at 902. As yet, the Department of Agriculture has not proceeded in any further litigation under either of these theories.

190. *Id.*

191. 609 So. 2d 735 (Fla. 1st DCA 1992).

192. *Id.* at 735.

193. *Id.* at 738.

194. *Id.* at 740.

195. *Id.* at 736, 740.

196. *Id.* at 738.

197. *Id.* (construing FLA. STAT. § 570.544(11) (1991)).

198. *Id.* at 735, 740.

should handle a particular consumer complaint.<sup>199</sup> Also, those parties charged with violating laws somehow related to "consumer protection" could be investigated and subjected to legal prosecution by more than one governmental authority. The court concluded, "Whether what it has passed is wise or not is for the legislature to decide."<sup>200</sup>

As an epilogue, the underlying transactions in the two cases, the pawning and leaseback of automobiles, no longer present the same type of problem for the Division. By amending chapter 538 in 1993, the Legislature prohibited automobile pawn/leaseback transactions.<sup>201</sup> An attempt in the 1994 legislative session to legalize reinstatement of the practice was rebuffed.<sup>202</sup> However, during the 1995 legislative session, statutory amendments approving "title loans" were enacted.<sup>203</sup> The newly approved lenders are specifically outlawed from engaging in the loan/leaseback type of transaction challenged by the Department of Agriculture's Division of Consumer Services and expressly prohibited from using of the term "pawn or pawnbroker" in title loan transactions.<sup>204</sup> But title lenders are accorded an all-inclusive twenty-two percent per month<sup>205</sup> service charge/interest ceiling for such loans even though the debtor is permitted to retain possession of the automobile.<sup>206</sup> To alert the borrower, title loan "charges shall be fully disclosed, conspicuously in writing, and initialed by the motor vehicle owner at the initiation of the transaction."<sup>207</sup> Consumer complaints generated through the activities of the title loan industry continue to concern government regulators.<sup>208</sup>

## VII. LOAN VS. BUY-SELL AGREEMENTS: A PRIMER

Though the governing statute includes, within the definition of "pawn," both buy-sell agreements and loans collateralized with pledges of

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199. *Id.* at 739. The Second District Court had predicted that "there [would] be chronic problems determining the authority of the Division and that of other departments of the executive branch unless section 570.544, Florida Statutes (1991), is clarified." *Quick Cash of Clearwater, Inc. v. Department of Agric. & Consumer Servs.*, 605 So. 2d 898, 903 (Fla. 2d DCA 1992).

200. *Quick Cash of Tallahassee, Inc.*, 609 So. 2d at 739.

201. 1993, Fla. Laws ch. 93-97, § 3, at 514 (codified at FLA. STAT. § 538.06 (2), (3) (1993)); see also *supra* note 134.

202. Veto of Fla. SB 2208 (1994) (letter from Gov. Chiles to Sec'y of State Jim Smith, May 26, 1994) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.); see also *supra* note 135.

203. 1995, Fla. Laws ch. 95-287, § 1, at 2697 (codified at FLA. STAT. § 538.03(1)(a), (h), (i) (1995)).

204. FLA. STAT. § 538.15(4), (5) (1995).

205. "No charges other than those charges permitted in paragraph (e) [the 22% per month] shall be allowed . . . ." *Id.* § 538.06(5)(e), (f).

206. *Id.* § 538.06(5)(b), (e).

207. *Id.* § 538.06(5)(f).

208. See Gray, *supra* note 49, at H2.

personal property,<sup>209</sup> constructing the transaction to be one or the other can have a multitude of legal consequences. As a general rule,<sup>210</sup> the buy-sell agreement would be the industry-favored characterization; any transaction that would be characterized as a loan would probably have resulted from carelessness or misinformation. The main reasons to avoid loan/pledge status for pawns are that a pawn loan is subject to the technical requirements and priorities set forth in chapter 679, *Florida Statutes*, governing secured transactions;<sup>211</sup> lenders (loan/pledge) fare less well in bankruptcy;<sup>212</sup> and the usury statute with its interest rate limitations applies to loans but not to true buy-sell agreements.<sup>213</sup> In times past, further justification for the buy-sell preference could be found in the belief that buy-sell agreements were not subject to the federal Truth-in-Lending requirements<sup>214</sup> and in possible avoidance of the record-keeping and holding period requirements imposed on pawn loans.

Using the buy-sell agreement method rather than a pawn loan, the pawnbroker will purchase an item of personal property (the "pawn") from an individual seller (the "pawner") through an agreement that gives the seller the exclusive right to repurchase the item within a specified period of time—a minimum of sixty days in Florida. The repurchase price is, of course, higher than the original "sales" price, and a markup of twenty-five percent is not unusual.<sup>215</sup> But since this is a purchase and not a loan, the state usury limits should not apply.<sup>216</sup> There is some danger to the pawnbroker that, in a court of law, this sales agreement may be held to be

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209. FLA. STAT. § 538.03(1)(d) (1995).

210. One is hard-pressed even to think of a reasonable exception to the "general rule."

211. "'Security interest' means an interest in personal property . . . which secures payment . . . of an obligation." FLA. STAT. § 671.201(37) (1995). Chapter 679 "applies . . . [t]o any transaction (regardless of its form) which is intended to create a security interest in personal property . . . including goods." *Id.* § 679.102(1)(a).

212. *E.g., compare In re Lopez*, 163 B.R. 189 (Bankr. D. Colo. 1994) (stating that a pawn transaction that is a secured transaction can be modified by a chapter 13 debtor's plan) with *In re Jackson*, 133 B.R. 541 (Bankr. W.D. Okla. 1991) (stating that when a period for redemption has expired, neither the debt nor the property pawned can be a part of the debtor's chapter 13 plan).

213. FLA. STAT. § 687.03(1) (1995). The usury limit applies to "any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation." *Id.* Generally, a buy-sell agreement would not be regarded as a loan. See Oeltjen, *Usury*, *supra* note 96, at 187-88; FLORIDA USURY LAW, *supra* note 137, §§ 1.14, 1.15; *Quick Cash of Clearwater, Inc. v. Department of Agric. & Consumer Servs.*, 605 So. 2d 898, 902 (Fla. 2d DCA 1992). *Contra Mears v. Mayblum*, 96 So. 2d 223, 226 (Fla. 1957) (stating that a sale of property for cash plus a right to repurchase for some higher amount may be held to be a loan).

214. See Oeltjen, *Parade*, *supra* note 9, at 767-69; see also *Burnett v. Ala Mona Pawn Shop*, 3 F.3d 1261 (9th Cir. 1993) (finding pawn transactions subject to the Truth-in-Lending Act); *Chapes, Ltd. v. Anderson*, 825 F.2d 357 (11th Cir. 1987) (discussing applicability of the Truth-in-Lending Act to pawns).

215. Informal surveys have revealed rates of 25% for a 30-day transaction to be common in Tallahassee and West Palm Beach.

216. FLA. STAT. § 687.02(1) (1995).

a disguised loan.<sup>217</sup> If found to be a loan, the magnitude of the "sales price differential"<sup>218</sup> may subject the pawnbroker to usury or other penalties. Usually, the legal risk to the pawnbroker is minimal, both because of the way the transaction is structured and also because those utilizing pawnbroking services are concerned about maintaining their source for needed funds. If pushed too far, however, the consumer may file a complaint; a mounting number of complaints could prompt the Department of Agriculture and Consumer Services to take action.

The historical use of buy-sell agreements to reduce the necessity for record keeping and to avoid required holding periods is no longer an effective avenue; buy-sell agreements are now expressly included in the definition of "pawn."<sup>219</sup> That definition makes it clear that buy-sell agreements are pawn transactions subject to pawn and pawnbroker regulations.

Under the Florida Uniform Commercial Code, if a pawn is a loan, it is a secured transaction,<sup>220</sup> the pawnbroker would have a security interest.<sup>221</sup> The pawnbroker's priority vis-à-vis others who have interests in the pawned goods depends on the pawnbroker's status as a secured lender. If there were no special rules for pawn transactions that trumped the Code provisions, under chapter 679, the parties could agree for the secured party to forgo any deficiency there may be between the amount of the loan with accrued service charges and the sales proceeds of the pawn.<sup>222</sup> The parties, however, could not ignore, or otherwise waive,<sup>223</sup> the notice of sale required by chapter 679<sup>224</sup> and the requirement that the debtor must be paid any surplus generated by the sale of the pawn.<sup>225</sup>

The Code *does* resolve this issue; it states that the pawnbroker laws of chapter 538 "are specifically not repealed and shall take precedence over

217. See *supra* notes 177-208 (discussing the *Quick Cash* cases); see also *In re Held*, 34 B.R. 151 (Bankr. M.D. Fla. 1983), *aff'd*, 734 F.2d 628 (11th Cir. 1984).

218. This is the difference between the price received by the pawner/borrower and the amount required to redeem the pawn.

219. FLA. STAT. § 538.03(1)(d) (1995).

220. *Id.* § 679.102.

221. *Id.* § 671.201(37) (defining "security interest" as "an interest in personal property . . . which secures payment or performance of an obligation"). Even though it may be argued that the pawner/debtor has no obligation because only the pledged good is at stake, there being no personal liability, such argument should be rejected. The pawner/debtor has an equity of redemption that is being held by the pawnbroker, return being conditioned upon payment of an agreed upon sum (loan plus service charges); to recover in equity, the debtor must first settle this "obligation." Furthermore, by reading the entire definition of "security interest," it becomes obvious that "obligation" is used in a very broad sense (e.g., to include seller's title retention in a sales setting and the buyer's interest in a purchase of accounts or chattel paper). See *id.*

222. *Id.* § 679.504(2).

223. *Id.* § 679.501(3)(a), (b).

224. *Id.* § 679.504(3).

225. *Id.* § 679.504(2).

any provisions of this code which may be inconsistent or in conflict therewith."<sup>226</sup> Since the pawnbroker rules apply and take precedence, the pawnbroker is entitled, on the pawner's default and once the period of redemption has expired, to retain the collateral as payment in full for the debt,<sup>227</sup> notwithstanding the Code provisions on redemption, compulsory disposition of collateral, and sale of collateral by the secured party.<sup>228</sup> No notice is required except that printed on the pawn ticket.<sup>229</sup> No surplus is due the debtor and no deficiency is owing from the debtor.

If a pawn is a buy-sell, it is a purchase transaction. It is the pawnbroker's position as a purchaser that is the basis for the pawnbroker's rights. If the pawner does not buy back the pawn, the pawnbroker is free to sell it. Whether the pawnbroker realized from the sale more or less than the pawner received from the pawnbroker is of no relevance because the transaction was characterized as a sale with an option to repurchase, which option has expired.<sup>230</sup>

Since the restrictions and requirements imposed on pawnbroking increase the pawnbroker's cost for each transaction, pawnbrokers have attempted simply to purchase the items and sell them at retail, becoming dealers in secondhand goods. Under the current Florida regulatory scheme, this dodge would not be entirely successful. Dealers in secondhand goods are governed by many of the same regulations that "guide" pawnbrokers.<sup>231</sup> Pawnshops usually engage in both pawnbroking and general retailing of both used and new goods.

## IX. THE LOCAL SCENE: EVEN MORE REGULATION

Nothing in this chapter shall preclude political subdivisions of the state and municipalities from enacting laws more restrictive than the provisions of this chapter.<sup>232</sup>

This Florida statute and similar ones in other jurisdictions<sup>233</sup> declare on pawnbrokers open season, free from requirements of sportsmanship by the local regulators. Nor should pawnbrokers expect any favorable judicial intervention, especially in light of judicial attitudes such as the following:

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226. *Id.* § 671.304(2)(i).

227. *Id.* § 538.16.

228. *Id.* §§ 679.504, .505, .506.

229. *Id.*

230. *See generally* FLORIDA USURY LAW, *supra* note 137, § 3.18-3.21.

231. *See generally* FLA. STAT. §§ 538.03-.17 (1995).

232. *Id.* § 538.17.

233. *But cf. State Association News*, NAT'L PAWNBROKER, Summer 1994, at 60, 62 (stating that Ohio's new Pawnbrokers Act includes "pre-emption from local licensure and regulation. The state will now have sole authority over pawnshops").

[L]imiting the number of hours that pawnshops are open may make the police surveillance of pawnshop operations easier. Limiting the operation to the normal working day [8 a.m. to 5 p.m.] may also make the operation of the pawnshop more easily observed as more police may be available at that time. In addition, police observation may be more effective during the daylight hours and arguably less detectable because more people are on the streets. For these reasons, the Ordinance could conceivably serve to chill the use of the pawnshop as a means to dispose of stolen goods.<sup>234</sup>

On appeal, the trial court decision from which the above is quoted was upheld and the Eleventh Circuit Court of Appeals clarified the tenuous position in which pawnbrokers are placed when local regulators are given what appears to be nearly free rein. As the appellate court pointed out:

Business regulations such as these are reviewed under the rational basis test. . . . This test is generally easily met. A searching inquiry into the validity of legislative judgments concerning economic regulation is not required. . . . To put it another way, the legislation must be sustained if there is any conceivable basis for the legislature to believe that the means they have selected will tend to accomplish the desired end. *Even if the court is convinced that the political branch has made an improvident, ill-advised, or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose.*<sup>235</sup>

To further understand how a problem arises from legislative encouragement of local regulation, note several findings that the appellate court espoused or endorsed:

The Dade County Commission concluded that despite pervasive regulation of the pawnshop industry, such businesses continued to serve as a viable outlet for stolen property.<sup>236</sup>

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234. *Cash Inn of Dade, Inc., v. Metropolitan Dade County*, 706 F. Supp. 844, 847 (S.D. Fla. 1989). Could that same logic be applied to the pawnshop "Blue Law" (no pawnshop business on Sunday)? It was not until May 1994 that the Jacksonville, Florida, City Council approved an ordinance to repeal its remaining "Blue Law" aimed at Jacksonville pawnbrokers. Bob Meadows, *District News*, FLA. PAWNBROKER, Spring 1994, at 33, 33.

235. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1241 (11th Cir. 1991) (emphasis added).

236. *Id.* at 1242. Is this "logical" in light of the following observations?

When a pawnbroker takes in a stolen item, he loses on three levels. First, he could lose his license. Second, chances are good that the police will confiscate the item and the broker ends up with neither the item nor the money he paid out on it. And third, it undermines the relationship the shop has with the local law enforcement agency.

George White, *Corporate Security: Eliminating Loss from the Industry*, NAT'L PAWNBROKER, Summer 1994, at 22, 24.

A recent academic study would confirm these observations and go one step further. It is not in the interest of pawnbrokers

to make loans on stolen goods because the police can seize the goods, and the broker would lose the collateral and the money loaned. Given the police report requirement, . . . it would not be in the interest of a thief to pawn stolen goods, and many

. . . The county commission . . . is not required to support its conclusions with empirical data as long as the assumptions its [sic] makes are logical.<sup>237</sup>

. . . [T]he county admitted that the amount of stolen property discovered through these means [reviewing pawnshop transactions] represented less than one percent of the property stolen within the county.<sup>238</sup>

. . . Even if the admission by the County accurately reflects the amount of stolen goods discoverable through this method of record keeping, it by no means suggests that this is the actual percentage of stolen goods which pass through pawnshops.<sup>239</sup>

. . . The question is not whether the legislation will *in fact* accomplish its goals, but whether the legislative body could rationally have concluded that it would.<sup>240</sup>

To bolster its position and the logic behind the ordinance and the trial decision, the appellate court retreated into the case law.

The only three cases to address this precise issue [citing a 1943 Tennessee state court case, a 1913 Kentucky state court case, and a 1904 Montana state court case] have all determined that municipal efforts to curb the hours of operation for pawnshops are a rational means of attempting to limit the sale of stolen goods. The fact that other similar statutes [regulating adult bookstores, massage parlors, and bars] have been adopted and sustained supports the finding that this ordinance is reasonable.<sup>241</sup>

Because of this ubiquitous assumption that pawnshops are one of the mainstays of crime and immorality, it is no small wonder that Dade County pawnshops were given cause to celebrate when, in 1994, their mandatory closing hour was extended from 5 p.m. to 7 p.m.<sup>242</sup>

It is not only the hours that are of "grave" local concern but the location of pawnshops and their number and density as well. Local governments attempt to regulate these concerns with license requirements and zoning regulations. By scanning news items from the past few years, it was found that: when officials in Baltimore, Maryland, limited the num-

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charge[] that stolen goods are far more commonly channelled through unregulated flea markets.

CASKEY, *supra* note 4, at 38.

237. *Cash Inn of Dade*, 938 F.2d at 1242. The question really becomes, logical to whom and based on what information?

238. *Id.* at 1244.

239. *Id.* The court also pointed out that "[d]uring the hearing before the commission, one of the pawnshop owners estimated that up to five percent of all items purchased by pawnshops are stolen. In a multimillion dollar industry that figure is not insubstantial." *Id.* Such assertions are not substantiated by fact.

240. *Id.*

241. *Id.* at 1244-45 (citations omitted).

242. *President's Corner*, FLA. PAWNBROKER, Fall 1994, at 4, 4.

ber of pawnshops in the city to forty-two (the extant number),<sup>243</sup> Baltimore County officials became concerned that the suburbs would be overrun with pawnshops so they were attempting to limit density in the county area surrounding the city of Baltimore;<sup>244</sup> the City Council of Fairfax, Virginia, voted to limit the number of pawnshops to one;<sup>245</sup> New Orleans was attempting to exclude new pawnshops from the tourist areas of the city;<sup>246</sup> in Marborough, Missouri, a pawnbroker withdrew his business license application after it was tabled by the village Board of Trustees because the Board was opposed to the business (there was no ordinance banning pawnshops) and, at about the same time, the Breckenridge Hills, Missouri City Council refused to remove pawn shops from its list of prohibited businesses;<sup>247</sup> Philadelphia had begun more aggressively to enforce zoning laws to crack down on "nuisance businesses" such as pawnshops;<sup>248</sup> in the wake of growth in the number of pawnshops, a near doubling in three years, the Aurora, Colorado City Council imposed a six-month moratorium on new pawnbroker licenses<sup>249</sup> and then drafted an ordinance that would prevent any new pawnshop from opening within a two-mile radius of an existing shop.<sup>250</sup> Assuredly, such local decisions hamper, if not destroy, local competition and thereby encourage monopoly practices. The local citizens are not well served by such regulation.

Capital or asset requirements, bond and license fee impositions, and demonstration of either a showing of need or of "convenience and advantage" are the various methods used by local governments to restrict pawnshop numbers. Contemporary examples abound. Baltimore's new pawnshop ordinance increased the bond requirement from \$10,000 to \$50,000;<sup>251</sup> Jacksonville, Florida pawnbrokers ask "Why does the occupational license for pawnbrokers cost 8 to 10 times more than [sic] nearly every other occupational license in Jacksonville?";<sup>252</sup> Wheat Ridge, Colorado city

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243. See *News Notes*, TODAY'S PAWNBROKER, Fall 1994, at 36, 36. Baltimore's pawn ordinance was spurred by the growth of the number of pawnshops in the city; their numbers tripled in five years. *News Notes*, TODAY'S PAWNBROKER, Summer 1994, at 37, 40.

244. See *News Notes*, TODAY'S PAWNBROKER, Summer 1995, at 38, 40-41; see also *News Notes*, TODAY'S PAWNBROKER, Fall 1994, at 36, 36.

245. The burden placed on police department resources was cited as the reason. *News Notes*, TODAY'S PAWNBROKER, Fall 1994, at 36, 36.

246. *News Notes*, TODAY'S PAWNBROKER, Summer 1995, at 38, 41.

247. *News Notes*, TODAY'S PAWNBROKER, Fall 1995, at 36, 40. Both communities are St. Louis, Missouri, suburbs.

248. *Id.* at 42.

249. *News Notes*, TODAY'S PAWNBROKER, Summer 1994, at 37, 46.

250. "Supporters say they want to avoid a 'pawnshop row.'" "[S]ome city pawnbrokers support the ordinance because it would limit competition." *News Notes*, TODAY'S PAWNBROKER, Fall 1994, at 36, 36.

251. *Id.*

252. *District News*, FLA. PAWNBROKER, Spring 1994, at 33, 33.

officials and pawnbrokers *compromised* on licensing and transaction fees.<sup>253</sup> The *compromise* fees will cost the city's two pawnshops about \$38,000.<sup>254</sup> And on the international scene, in the wake of rapid growth in the number of pawnshops, officials in Windsor, Ontario, Canada, sought to have the pawnshop license fee raised from \$100 to \$3,000, security bonds raised from \$2,000 to \$50,000, and photographs and thumbprints required of all pawnshop customers.<sup>255</sup>

## X. HOW MUCH CAN IT COST?<sup>256</sup>

### A. *The Price Is Right*

In most sectors of our economy, we instinctively reject price controls, but not with the price of credit. Early justifications for such price controls were based both on moral and religious grounds and the general theory that capital is nonproductive.<sup>257</sup> Modern justifications for price controls are more reactive; when articulated, they focus on concepts such as "fairness," "conscionability," "bargaining disparity," or "paternalism." One legal commentator emphasizes that "[o]ther loan hybrids . . . often charge similarly outrageous rates . . . . Freed from usury controls . . . rates for more traditional loans have spiraled out of control . . . . These astounding rates evidence that free market control offers borrowers scant protection . . . ." <sup>258</sup> And, as a U.S. Senator thoughtfully asked, "At what point does a rate become so high that society expresses the judgment that it is unconscionable and that the individual must do without the credit rather than pay the unconscionably high rates?" <sup>259</sup> Factors such as the costs of providing the credit, the effects on competition among credit providers, and the resulting credit rationing often get lost in the emotional melee.

Modern "free market" scholars may well suggest that it would be unwise to set any upper limit. But *even if* it could be agreed that regardless

253. *News Notes*, TODAY'S PAWNBROKER, Summer 1994, at 46, 48. The city's original proposal of an annual \$10,000 license fee was reduced to \$5000 and the one dollar per transaction fee was reduced to 60 cents per transaction. *Id.*

254. *Id.*

255. *Id.* at 40.

256. Implicit interest rate ceilings range from 1.5% per month to 25% per month. See Oeltjen, *America*, *supra* note 103, at 233-87.

257. See Oeltjen, *Usury*, *supra* note 96, at 171-80. A recent article, Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Under the Unconscionability Standard*, 31 HOUS. L. REV. 721 (1994), "builds on the argument that the usury solution is flawed and urges a compromise between usury and market control that employs the variable fairness standard of unconscionability to police unfair interest pricing." *Id.* at 725.

258. Bender, *supra* note 257, at 724-25.

259. This framing of the issue as a question of morals was presented by Senator Paul H. Douglas in testimony before the Massachusetts Legislature in 1969. See Oeltjen, *Usury*, *supra* note 96, at 207 n.283.

of the economic consequences, beyond some point the rate of charge is "unconscionable" and should be disallowed, much debate would be needed to determine the magic tipping point. From English and colonial law arose a "six percent myth" that has long affected consumers' expectations and legislators' speeches.<sup>260</sup> Past attempts to set realistic limits have run into severe criticism. On occasion, even social reformers have endorsed a high rate of interest. "[It's] unbelievable . . . that the Russell Sage Foundation was able to sell many legislatures in the United States [as part of the Uniform Small Loan Act proposal] an interest rate of 3 1/2% per month, or 42% per annum, as a reasonable rate of interest."<sup>261</sup> A somewhat lower interest rate drew outrage from one judge: "To give persons a right to charge 36 percent-plus interest [or finance charge] shocks at least my conscience and I do not believe that I am unduly sensitive."<sup>262</sup>

Largely ignored is the fact that pawnbrokers must charge high rates in order to survive in the business. The rates charged cannot be assumed invariably to create profits. As in any risky, market-driven business, pawnbroking profits are dependent on a variety of factors, many of which are out of the control of the pawnshop owner. The high security-related costs as well as insurance coverage prevent pawnshops from making exorbitant profits.<sup>263</sup> Also, the pawnbroker's inventory of goods is susceptible to obsolescence and consequent loss of demand; this is especially true for high-tech electronic devices. Such unpredictability in market demand only contributes to the risk a pawnbroker takes in accepting pawned items. Furthermore, pawnshops can flourish only when customer demand increases.

Under some circumstances, economic justification for price regulation might be argued. Two plausible economic rationales for controls on the price of credit are that (1) the credit market is sufficiently imperfect that consumers seldom pay a negotiated (bargain-generated) price for their use of credit; and (2) within a given credit market, suppliers may have mo-

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260. See Oeltjen, *Parade*, *supra* note 9, at 771. Influenced by English law, many of the colonies in the eighteenth century established a lawful rate of six percent. Thus arose a prevailing view that six percent was a proper rate. See Oeltjen, *Usury*, *supra* note 96, at 174. "A '6% myth' is found by many investigators to be the basis of consumers' expectations about the normal charge for credit. . . . [T]he type of state legislator who is always ready to defend motherhood and the American flag has a field day with any effort to breach visibly the 6% ceiling." Homer Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 447 (1968).

261. Allen McReynolds, *Legislative Remedies Possible Under the Missouri Constitution of 1945*, 16 MO. L. REV. 292, 295 (1951). The Russell Sage Foundation was incorporated in New York in 1907 for the purpose of improving social conditions. *Id.* at 294.

262. Oeltjen, *Usury*, *supra* note 96, at 208 (quoting The Honorable George Brun, a Berkeley, California municipal court judge).

263. Hudson, *Should Regulators Check Up on Check Cashers?*, BUS. & SOC'Y REV., 1993, at 47.

nopoly power such that, even with perfect knowledge, borrowers may be charged excessive fees for their use of credit.

One of the more troublesome market imperfections is that many consumers do not perceive that they can effectively shop for credit. This misperception is based on ignorance of the variety of alternatives, including lack of knowledge regarding other pawnshops where the rate may be lower, the value of the pawn higher, and the terms less onerous. There may also be other viable alternatives to pawnshop credit. These market imperfections seem not to be influenced by disclosure provisions, such as those required by Truth-in-Lending.<sup>264</sup> Disclosure may raise the consciousness of the debtor, and the information gained may discourage the borrower, but, in general, studies have tended to indicate that consumers have a high degree of insensitivity to the level of credit charges.<sup>265</sup> Disclosure only makes apparent what you are paying, not *what you might have paid, had you shopped elsewhere*. Even if you shop, you may not be shopping for the price of credit.

Interestingly, pawnbrokers also say that most of their customers pay little attention to the interest rate or other fees on the loan. Their concern is the amount that the broker will lend on the collateral. Consequently, brokers say that pawnshops compete among themselves more on the basis of which one will make the largest loan relative to the collateral than they do on the basis of interest rates. Brokers attribute such customer behavior to a necessity to raise a certain amount of cash to meet a particular expenditure and to careless intertemporal budgeting.<sup>266</sup>

Another market imperfection is the tendency of pawnshops to have, or be granted, a local monopoly.<sup>267</sup> For the person seeking to pawn goods, there is no national market, no state market, and, as a practical matter, probably no market outside the pawner's neighborhood.<sup>268</sup> If there is only one local pawnshop, then there is little or no incentive to engage in any form of competition.

There are any number of reasons why there may be a lone pawnshop: the community may be just too small to support more than one pawnshop, or the community may not generate sufficient business if the volume of transactions necessary to survive is kept artificially high by relatively low interest rate ceilings or high license fees, bonding, capital, or net worth

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264. 15 U.S.C. §§ 1601-1693(r) (1994).

265. See Oeltjen, *Parade*, *supra* note 9, at 771-72, and authorities cited therein.

266. CASKEY, *supra* note 4, at 71.

267. Many of the attempts to regulate pawnbroking, and especially those at the local government level, end up creating a situation in which the existing pawnshops can exert monopoly power. See Oeltjen, *America*, *supra* note 103, at 233-87.

268. "Because . . . transactions are quite small, customers tend to patronize the most conveniently located shops even if more distant shops charge slightly less for their services." CASKEY, *supra* note 4, at 114; see also Oeltjen, *Parade*, *supra* note 9, at 772.

requirements.<sup>269</sup> It is also possible that there may be regulatory limitations on pawnshop density or other zoning-type impediments intended to avoid a "pawnshop row." These restrictions are enacted in the name of consumer protection, crime prevention, pawnshop profitability, or neighborhood integrity. The effect is to grant existing or "winning" shops a local monopoly.<sup>270</sup> Solo pawnshops are especially likely to exercise monopoly power when the pawner is a relatively poor credit risk; for such persons, there are few *other* sources of credit.<sup>271</sup>

"Local monopoly, how so? There's another pawnshop in the next county, only a ten- or fifteen-minute ride away." This proffered alternative will not significantly diminish the monopoly power. The availability and cost of transportation now becomes the deterrent to competition: many of those whom the pawnshop serves may not have adequate transportation; the item to be pawned may be bulky and not easily movable even ten miles; the amount of the loan is likely very small, a factor making the *relative* cost of transportation quite high.<sup>272</sup>

If pawners have no other legitimate sources of liquidity, and they probably do not, they will be denied access to the desired credit if rates are set so low or the barriers so high that pawnshops can no longer profitably operate. Potential pawners' "needs and wants" will not be easily moralized or legislated away. It is in such an atmosphere that loan sharks flourish.<sup>273</sup>

If the rates are set just high enough for the pawnshops to survive but not thrive, it is predictable that pawnbrokers will reduce the pawn value, the amount they would otherwise be willing to loan on a given item of

269. For examples of such cost-raising regulations, see Oeltjen, *America*, *supra* note 103, at 233-87.

270. CASKEY, *supra* note 4, at 121-22:

Economically sophisticated pawnbrokers are well aware that the way to raise their long-run profitability is to create barriers to entry into the business. In several states, pawnshop organizations have been lobbying to add clauses to state regulations that would prohibit new shops from opening within a certain distance of existing shops or that would require potential new owners to prove that they possess significant capital. . . . [Also there are regulations under which] the owner must show a public need for and probable profitability of an additional pawnshop. Such barriers to entry are in the interests of pawnbrokers—but not in the public interest.

271. Banks, credit unions, and consumer finance companies may well be unavailable or the application process may take too long.

A related problem that defies workable regulation is one of oversupply or overextension of credit. When borrowers have more obligations than they can afford, their sources for additional credit are quite limited.

272. "[P]awnbroking is characterized by high customer transportation costs relative to the size of the transaction . . . . [T]ransportation costs per dollar of credit are significant, and customers generally patronize the closest shop." CASKEY, *supra* note 4, at 49-50.

273. See Oeltjen, *Usury*, *supra* note 96, at 217-21 (discussing loansharking) (note authorities cited therein).

property.<sup>274</sup> The effects of such an adjustment are that the pawnbroker would then have a lower cost basis in each unredeemed item and could achieve a larger profit margin on resale and those persons unable to redeem would pay proportionally more for their liquidity than those who are able to redeem. Costs of a pawnbroking system that should be borne equally by all pawners are shifted to those persons who can least afford it, the pawners who are unable to redeem. Overall, the uncontrolled variable—assigned pawn value—should come into equilibrium with the regulated variable—the rate of interest—to yield an entrepreneurial return commensurate with risk and costs. This rate of return generally escapes regulation.<sup>275</sup>

### B. *Money Isn't Everything: Nonrate Factors*<sup>276</sup>

Nonrate regulatory factors can also have a significant impact on both the cost of utilizing a pawnbroker and the availability of pawn shops. In those jurisdictions that either have fairly high or no legislative limit on the interest rates that can be charged by pawnbrokers,<sup>277</sup> most nonrate regulatory factors will have limited direct effect on the *availability* of pawnshop-granted credit. To the extent that such regulations increase the cost of business, these costs will be passed on to the pawners. It is unlikely that these potential borrowers will be able to fulfill their credit needs or desires elsewhere because pawnbrokers tend to be lenders of last resort.<sup>278</sup>

There is some price that most borrowers would be unwilling to pay;<sup>279</sup> likewise, there is surely a level of regulation beyond which few entrepreneurs could,<sup>280</sup> or would be willing to, invest in a pawnbroking

274. A side effect of the reduction of pawn value is that as the loan amount, pawn value ratio decreases, the consumer must pawn an increasingly larger proportion of his or her goods for a given amount of credit.

275. Except in those situations where the pawnbroker is regulated like a utility. For a discussion of this possibility, see Oeltjen, *Parade*, *supra* note 9, at 780-83; Oeltjen, *Usury*, *supra* note 96, at 221-22.

276. Some states, such as Iowa, North Dakota and West Virginia, appear to have no state statutory regulation of pawnbrokers. Many other states have enacted "comprehensive" regulatory schemes. See Oeltjen, *America*, *supra* note 103, at 233-87 (note survey).

277. Approximately 15 states have no state statutes regulating pawnbroker interest rates; another 12 states have statutory rates that are comparatively high. *Id.* In many states it may be possible that there are local interest regulations (*e.g.*, Massachusetts). *Id.* at 258. In one state, Utah, local governmental units are statutorily prohibited from engaging in rate setting. *Id.* at 282.

278. Pawnbrokers are at least the last "legal" alternative, and it is highly unlikely that loansharks would resort to *price* competition with legitimate lenders.

279. In most cases, this amount would necessarily generate an *extremely* high Annual Percentage Rate (APR) because, as has been pointed out, the transaction is generally quite small and the period of the credit is quite short so the *dollar amount* that is being assessed does not seem particularly burdensome, *e.g.*, a \$20 service charge for a \$50 loan for one month would generate an APR of approximately 480%.

280. Indeed, such a jurisdiction would be where an aspiring pawnbroker would need to show "convenience and advantage" to be licensed and the regulatory body determined that

operation.<sup>281</sup> The potential irony is that the various types of regulation that would prove quite costly to the affected pawnbrokers could also be of great benefit to *established* pawnbrokers, when the regulations facilitate barriers to entry of their potential pawnbroking competitors. This pawnbrokers' benefit would be at pawners' expense as they encounter monopoly power.

### 1. Licensing<sup>282</sup>

Pawnbrokers may be required to be licensed by the state, by local governmental entities, or both. A majority of the states have statutes that mandate licenses, and a number of these jurisdictions require the licensing function to be carried out by local authorities.<sup>283</sup> Some states have statutes that explicitly empower local agencies to license but do not mandate licensing.<sup>284</sup> Florida both *requires* state licensing (registration) and *permits* local licensing.<sup>285</sup>

To the extent that the licensing statute requires little more than notification to the governmental entity that a person is going to enter into the business of pawnbroking<sup>286</sup> and the payment of a small administrative fee, licensing would have little or no economic or competitive effect. Even when licensing statutes require that licenses be issued only to persons or

additional pawnbroking outlets were not needed. Another example would be where there was a city ordinance establishing a moratorium on new licenses.

281. In those jurisdictions in which extremely low rate ceilings already challenge even the spirit of any pawnbroker, excessively restrictive nonrate regulations would extinguish it.

282. During the drafting of the Uniform Consumer Credit Code, the determination of proper criteria for governing licensees proved to be such a headache that

[a]t one point in the deliberations on the Code the Committee actually voted to junk the licensing concept as a useless and expensive anachronism. Though this action was taken in the heady atmosphere of the concluding minutes of an exhausting three-day meeting and was notably short-lived (its reversal was the first order of business at the next meeting), it is of interest that, in the recollection of the authors, both industry and consumer representatives supported the decision.

Robert L. Jordan & William D. Warran, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 430 (1968).

283. Connecticut (local), Delaware (only in New Castle County), District of Columbia (state), Hawaii (state), Idaho (state), Indiana (state), Kansas (local), Louisiana (state), Maryland (state), Michigan (local), Mississippi (local), Montana (local), Nebraska (state), New Jersey (state), New Mexico (local), New York (local), North Carolina (local), Ohio (state), Oklahoma (state), Oregon (state), Pennsylvania (state), Rhode Island (local), South Carolina (state), South Dakota (local), Tennessee (state), Texas (local), and Vermont (local) all have mandatory licensing. See Oeltjen, *America*, *supra* note 103, at 233-87.

284. This category includes Colorado, Georgia, Illinois, Maine, Massachusetts, New Hampshire, Pennsylvania, Utah, Virginia, and Washington. *Id.*

285. FLA. STAT. § 538.09 (state registration), § 538.17 (local prerogative) (1995).

286. A "notification" type of license application would need to ask little information beyond (a) the name of the owner; (b) the name of the business; (c) the address of the office if different from the place of business; (d) the addresses of all locations at which such business is conducted; and probably (e) the name and address of the designated agent for service of process. Changes in information could be reported at the next annual renewal.

corporations whose officers are free of felony convictions or are of good moral character,<sup>287</sup> the economic or competitive impact would be minimal.

Competitive impact begins when licenses are rationed by a quota system (e.g., one pawnshop per 3000 in population), a moratorium on new shops, a standard such as "convenience and advantage,"<sup>288</sup> or minimum capital or net worth requirements. When and if available, the license becomes much more costly, potential competitors are kept out of the market, and those with licenses have less competitive incentive.<sup>289</sup> Pricing and other excesses would predictably increase the clamor for rate regulation.

## 2. State Bond Requirements

Like onerous licensing or minimum capital requirements, excessive bonding requirements can have anticompetitive effects. An expensive bond premium may sink an otherwise marginal operation. To the extent that bonds are reasonably necessary to ensure that pawnbrokers carry out their agreements with the borrowers and provide a source of recompense if they do not, such bonding requirements might be justifiable or even desirable. But to the extent that, in purpose or amount, bond requirements bear no reasonable relation to this surety function, they would seem to be little more than arbitrary and capricious impediments to profitability or market entry; the size of the required bond is not based on the value of the pawn or other potential loss. Of the states that have bond require-

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287. See FLA. STAT. § 538.09(5) (1995), summarized *supra* note 143.

288. The "convenience and advantage" criteria originated in the fifth draft of the Uniform Small Loan Law in 1932. F.B. Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 17 (1954). The provision was an attempt to curtail excesses resulting from a very competitive market. James M. Sullivan, *Administration of a Regulatory Small Loan Law*, 8 LAW & CONTEMP. PROB. 146, 148 (1941). It was feared that free entry would cause a great influx of lenders into the market, drive lenders to illegal means to make profits, and stabilize rates at the maximum allowable, factors which would actually defeat competition.

289. As stated in the Uniform Consumer Credit Code § 3-503, Comments 1 & 2:

The purpose [of keeping licensing requirements at a minimum] is to facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates [down].

. . . A secondary purpose is to reduce the likelihood of establishing localized monopolies in the granting of cash credit. Such monopolies tend to push rates charged to the maximum permitted levels and to establish conditions under which some share of the anticipated monopoly profits are devoted to direct or indirect pressures to obtain the license.

U.C.C.C. § 3-503 cmt. 1 & 2 (1985). In conjunction with recommendations for increased maximum rate allowances, the National Commission on Consumer Finance recommended "that the only criterion for entry (license) in the finance company segment of the consumer credit market be good character and that the right to market entry not be based on any minimum capital requirements or convenience and advantage regulations." NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 138 (1972).

Though directed toward consumer finance company regulation, the above recommendation would seem even more pertinent to pawnbroker regulation.

ments, Oregon has the highest—\$25,000<sup>290</sup>—with New York in second place—\$10,000.<sup>291</sup> Massachusetts has the smallest—\$300.<sup>292</sup> Of the other jurisdictions, \$1000 and \$5000 bond requirements seem the most popular, with six states each.<sup>293</sup> Three states have bond requirements of \$500 and \$2000; one state requires a \$3,000 bond.<sup>294</sup> With the exception of Oregon and New York, current state bonding requirements would not seem to be unreasonable; they would have minimal influence on the number of pawnbroking outlets. Supplementary local bond requirements could significantly affect this equation.

### 3. *Capital and Net Worth Requirements*

Appropriate capital and net worth requirements arguably insure pawnbroker responsibility and sound business practices. Pawnbrokers who can raise the specified capital or who can show the requisite net worth have proof of their creditworthiness or business acumen; arguably, they have something to lose through inappropriate conduct. A clever operator with intent to bilk can beg, borrow, or steal whatever is needed to satisfy this type of requirement. The question is, when judgment day arrives, do the pawners and other victims of the pawnbroker's wrongdoing have a source from which to receive compensation? The capital or net worth may well have vanished.<sup>295</sup> Capital and net worth requirements are little more than barriers to entry of new competitors. It has been recognized that "[s]uch barriers to entry are in the interests of pawnbrokers—but not in the public interest."<sup>296</sup> Realistic bonding requirements designed to protect the pawnner/customer<sup>297</sup> are significantly preferable.

### 4. *Sales Surplus*

Whenever pawns are not redeemed by the end of the contract or statutory holding period, the pawnbroker is authorized to sell the pawn.<sup>298</sup> Absent contrary agreement, to the extent that the sales proceeds exceed the amount extended on the pawn plus service charges, the pawnbroker has re-

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290. OR. REV. STAT. § 726.070 (1995).

291. N.Y. GEN. BUS. LAW § 41 (McKinney Supp. 1996).

292. MASS. GEN. LAWS ANN. ch. 140, § 79 (West 1996).

293. Oeltjen, *America*, *supra* note 103, at 233-87.

294. *Id.*

295. There would seem to be little difference in theory between the situation under discussion and the automobile problem. Automobile drivers are capable of causing significant damage. Is proof of capital or net worth a prerequisite to automobile registration? In the automobile case, insurance is the answer.

296. CASKEY, *supra* note 4, at 122.

297. In some jurisdictions, the bonds are not for the protection of the pawnner or customer but are to insure the pawnbrokers' faithful performance of the statutory requirements. See Oeltjen, *America*, *supra* note 103, at 233-87.

298. See, e.g., FLA. STAT. § 538.16(1) (1995).

ceived additional income. And, to the extent that the sales proceeds are less than the amount extended on the pawn, there is a deficiency that the pawnbroker must suffer because he or she cannot recover losses from the pawner.<sup>299</sup>

Any legislative scheme to alter this result, *e.g.*, to require the pawnbroker to pay any surplus to the debtor,<sup>300</sup> would detrimentally impact the pawnbroking industry and pawners in general. For example, surplus repayment rules would interact negatively with interest rate ceilings.<sup>301</sup> In jurisdictions that have relatively high or no interest rate ceilings, pawnbrokers would offset the loss of such surplus repayment by charging higher rates of interest to pawners. Fewer pawners would be able to redeem their pawns, sales would proliferate, and purchasers at sales would gain windfalls at the expense of pawners. In jurisdictions with low interest rate ceilings, surplus repayment would foreclose profitability and thereby eliminate the industry; pawners would usually have no alternatives for obtaining loans. In all jurisdictions, bookkeeping, trust accounting, and location of pawners for repayment would be onerous responsibilities. In order to effect repayment with any degree of order, sales would likely take the form of auctions, rather than shop transactions. Auctions, instead of store sales, would necessarily result in lower, and even deficient, prices rather than surpluses. Any such legislative design must be rejected as destructive of the industry and nonbeneficial to borrowers.

### 5. Summary

Pawnshops are accepted by many as valuable financial institutions—sources of credit for those who have no legitimate credit access. For the sake of customers who avail themselves of this service, the temptation to regulate excessively should be resisted. Where pawnshop regulation is already a factor in causing anticompetitive and monopolistic behavior, regulations should be reviewed and selectively revised or repealed.<sup>302</sup>

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299. This fact makes valuing the potential pawn one of the keys to profitability. Too low a valuation and the potential pawner walks away; an excessive valuation and the pawnbroker has the potential to lose capital. Neither alternative fosters employment longevity for the employee making the valuation.

The Mexican National Pawnshop may have the answer. It pays highly trained and skilled pawn appraisers a salary plus a commission on loans they extend. But any tendency to extend large loans to increase the commission from the transaction is negated. "If the appraiser makes a mistake and overvalues the pawn, or is duped, or is so touched by a sad story that he extends too high a loan, he is charged for any difference between the amount of the loan extended and the sale price of the pawn." Oeltjen, *supra* note 15, at 66.

300. "At least fifteen states require the surplus to be made available to the borrower, but there is no corresponding requirement that the borrower be responsible for deficiencies." Oeltjen, *Parade*, *supra* note 9, at 787.

301. *Id.* at 788.

302. See Lewis A. Engman, *How Government Regulation Has Become the Curse of Consumerism*, BARRISTER, Winter 1975, at 58. See generally S. Hugh High, *Consumer Credit Regulation in Texas—A Rejoinder by an Economist*, 50 TEX. L. REV. 463 (1972); Allison Dunham, *Research for Uniform Consumer Credit Legislation*, 20 BUS. LAW. 997 (1965).

## XI. PROPERTY, PAWNBROKERS, AND POLICE

A. *Taking Care of Business: The Record-Keeping Function*

“Policing regulations” also increase the costs of pawnbroker operations. Pawnshops have proverbially been identified as natural candidates for fencing criminal “booty.” This “attribute” certainly led to the policing regulations that virtually every state has enacted.<sup>303</sup> The basic requirement under these regulations is the transaction-recording requirement. In most states, pawnbrokers must keep records of all pawn transactions as to the date, the pawner’s name and address, and a description of the pawned property.<sup>304</sup> Various jurisdictions require expanded information about the terms of the pawn contract and a variety of personal detail about the pawner.<sup>305</sup> In addition to these recording requirements, most states also have provisions authorizing inspection of the records by specified officials<sup>306</sup> and/or provisions requiring transmission of the records to designated officials.<sup>307</sup> These recording, reporting, inspecting, and transmitting requirements have become much easier as a growing percentage of the pawnshop records are computerized.<sup>308</sup>

These regulations seem to work. Professional thieves aware that pawnshops report receipt of goods to the police will fence elsewhere. Likewise, there is little incentive for pawnbrokers to buy “hot” items because they risk prosecution, loss of license, or at least loss of the loan proceeds plus the pawn if the property is impounded and ultimately returned to its rightful owner or sold.

To the extent that the policing regulations facilitate the identification and recovery of stolen property and serve to deter fencing operations, the reporting requirements are reasonable burdens to impose on the pawnshops and their customers. However, when the records are used as a resource for

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303. Oeltjen, *America*, *supra* note 103, at 231.

304. *Id.*

305. *Id.* Arkansas, Connecticut, Delaware, Florida, Georgia, Louisiana, Michigan, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. *Id.*; see, e.g., FLA. STAT. § 538.04(1)(c) (1995).

306. Oeltjen, *America*, *supra* note 103, at 238-87. *E.g.*, in Florida, “[t]he premises and required records of each secondhand dealer are subject to inspection during regular business hours by the police department . . . by the sheriff’s department . . . and by any state law enforcement officer who has jurisdiction over the dealer.” FLA. STAT. § 538.05(1) (1995).

307. Oeltjen, *America*, *supra* note 103, at 238-87. *E.g.*, Florida has the following provision: “Within 24 hours of the acquisition of any secondhand goods by purchase or pledge as security for a loan, a secondhand dealer shall deliver to the police department . . . or . . . the sheriff’s department . . . a record of the transaction . . . .” FLA. STAT. § 538.04(1) (1995).

308. Programs with names such as PAWN POWER, CompuPawn and CompuPawn-LITE, PawnMaster®, Pawn Manager®, MR. PAWN, PAWN PRO II®, LOANArranger™, PAWNDEX®, Auto Pro and PawnMax®, The Pawnshop, QuickPawn, and MUNZ Pawn System have been advertised in the various issues of *Today’s Pawnbroker*, *The Florida Pawnbroker*, and *National Pawnbroker*.

“fishing” by public authorities<sup>309</sup> or made accessible to the pawnbroker’s competitors<sup>310</sup> and others, the record and reporting requirements quickly become intrusive and unreasonable. Such use *should not* be permitted.<sup>311</sup>

### B. Search and Seizure: Pawnbrokers Are Persons Too

Imagine being a legitimate businessperson providing the valuable service of extending credit to individuals in the community who would not customarily receive credit. Further, imagine complying with all state laws regarding the business including a provision that requires you to maintain a detailed record noting all of the inventory of your business. Finally, suppose one day the police seize, retain, and ultimately dispose of a good portion of your inventory without providing you any compensation for the disposition. Life in the former Soviet Union or some Third World country? Unfortunately not. Events such as this are commonplace in many states; the unfortunate victims are pawnbrokers, who before the disposition had merely extended credit in the course of their business in return for taking an interest in the items which the police later seize and sell for their own benefit.<sup>312</sup>

Maybe in other states but surely never in Florida. Hopefully not again but there was a time. . . . In *Florida Pawnbrokers and Secondhand Dealers Association, Inc. v. City of Fort Lauderdale*,<sup>313</sup> a federal district court held unconstitutional a state statute authorizing police officers to seize, without notice and hearing, allegedly stolen property from a pawnbroker.<sup>314</sup>

309. “The guys in Organized Crime frequently use their terminal to run names of suspected felons. When things are slow, they query the pawnshop records database for criminal profiles.” Ric Blum, *George Orwell Was 10 Years Early*, NAT’L PAWNBROKER, Spring 1994, at 50, 52. Also, traffic violation authorities research data banks to update addresses in the Bureau of Motor Vehicles records. *Id.*

310. “There was a case where a pawnbroker went down to the local law enforcement agency and asked to view the pawn records for the entire city. . . . What were they (sic) up to? . . . They were recording the names and addresses of those who made high-dollar loans. Then, they would write the pledgers a letter to try to persuade them to do business with their pawnshop.” *Id.* at 53.

311. See generally FLA. CONST. art. I, § 23.

312. Steve H. Nickels & Edward S. Adams, *Pawnbrokers, Police, and Property Rights—A Proposed Constitutional Balance*, 47 ARK. L. REV. 793 (1994).

313. 699 F. Supp. 888 (S.D. Fla. 1988).

314. *Id.* at 890 (holding unconstitutional FLA. STAT. § 715.041(2) (1987) (repealed by 1989, Fla. Laws ch. 89-533)). The statute read as follows:

(2) The lawful owner of any stolen property in the possession of a pawnbroker may recover such property by informing any law enforcement agency of the location of such property and providing the agency with proof of ownership of the property, provided a timely report of the theft of the property was made to the proper authorities. Upon the receipt of such proof, any law enforcement officer authorized by the police chief or sheriff, or the delegate thereof, in the jurisdiction where the property is found, may recover the property from the pawnbroker, without expense to the lawful owner thereof, unless the pawnbroker presents evidence of having received proof of ownership of such property by the person who sold it to the pawnbroker or pledged the property as security for a loan. Any property recovered from a pawnbroker pursuant to

On several occasions, Fort Lauderdale police officers had seized pawn property in accordance with the challenged statute.<sup>315</sup> The court held that the pawnbroker's possessory interest constituted property,<sup>316</sup> that the police officers' actions constituted state action,<sup>317</sup> and that the pawnbroker was deprived of that property<sup>318</sup> without the procedural safeguards guaranteed by the Fourteenth Amendment.<sup>319</sup> Since the basic action had been brought under section 1983 of the United States Code,<sup>320</sup> the court not only declared the statute unconstitutional but enjoined its enforcement and gave the plaintiffs leave to file a motion for damages, attorney's fees, and costs.<sup>321</sup>

The Florida Legislature quickly repealed the defective statute and replaced it with a provision more likely to pass constitutional muster.<sup>322</sup> The "new" provision, with only clarifying modification, is still in force today.<sup>323</sup> There are no provisions for police seizure, and to recover his or her property, the alleged owner must bring an action in replevin.<sup>324</sup> Though Florida seems to have solved its "problem" in this regard, unconstitutional seizures of property from pawnbrokers are still possible in many jurisdictions.<sup>325</sup>

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this section shall be returned to the lawful owner subject to its use as evidence in any criminal proceeding.

FLA. STAT. § 715.041(2) (1987) (repealed by 1989, Fla. Laws ch. 89-533) (emphasis added).

315. *Florida Pawnbrokers*, 669 F. Supp. at 889.

316. *Id.* at 890 ("It is clear that Florida caselaw [sic] recognizes the bailee's interest as a form of property.").

317. *Id.* at 889.

318. *Id.* at 890-91 ("[E]ven a temporary loss of possessory rights in chattels is a significant abridgement of Fourteenth Amendment rights. . . . The Supreme Court has recognized that mere possessory rights are protected property.").

319. *Id.* at 891-92. "While the defendant may contend that the pawnbroker's opportunity of a 'hearing' before the police officer satisfies due process, few would hold that a police official seizing pawned property is an impartial decisionmaker possessed of the legal training sufficient to resolve conflicting claims to property." *Id.* at 892.

320. 42 U.S.C. § 1983 (1994).

321. *Florida Pawnbrokers*, 699 F. Supp. at 893.

322. 1989, Fla. Laws ch. 89-533. The provision was cleaned up again the next year. 1990, Fla. Laws ch. 90-97.

323. FLA. STAT. § 538.08 (1995).

324. *Id.*

325. See Nickles & Adams, *supra* note 312. As recently as October 1, 1993, a new Montana statute was enacted (the law having been passed by the Legislature with no opposition) to allow law enforcement officials to go into any Montana pawnshop, without a search warrant, and seize anything suspected of being stolen. MONT. CODE ANN. § 46-5-212 (1993).

In the summer of 1994, it was reported that the California pawnbrokers' association encouraged the filing of two lawsuits challenging unconstitutional search and seizures and that it has two additional actions on hold. *State Association News*, NAT'L PAWNBROKER, Summer 1994, at 60, 60. On February 2, 1995, the headlines in Buffalo, N.Y., read: "2 O.J. Trophies, Seized by Police, Focus of Dispute, Pawnshop Wants Them Back." *2 O.J. Trophies, Seized by Police, Focus of Dispute, Pawnshop Wants Them Back*, BUFFALO NEWS, Feb. 2, 1995, at B1. In that summer, a pawnshop bought the Simpson trophies for \$300. In January 1995, police

## XII. TRANSITION

No one would disagree that pawnbrokers have received, and perhaps even earned, a checkered reputation, but it is hoped that those incidents of troubling behavior and attitudes that gave rise to the stereotype are a thing of the past. As pawnshops fill various needs and wants in our economy, pawnbrokers are being accepted as a valuable part of our community. In the future, their businesses should continue to earn respect and be treated by the business community on a par with other retail and financial operations. To expedite this transition, the pawnbroking industry should facilitate organized, scholarly study of the pawnbroking industry as well as discussion, promulgation, and adoption of uniform pawnbroking legislation.

There are few contemporary studies of pawnshops with regard to their legal, economic, sociological, or psychological impact.<sup>326</sup> All forms of reviews, critiques, commentaries, and even "complaints" are sources of valuable feedback the collection of which should be encouraged by the pawnbroking industry. Through the assimilation and analysis of such data, the pawnbroking industry can be encouraged and assisted to develop measures to invalidate the lingering negative perceptions and establish pawnbroking as an essential, consumer-friendly industry. One such measure would be the advancement of uniform legislation.

The extreme jurisdictional diversity of regulations applicable to pawnbroking<sup>327</sup> creates an environment for enormous differences in pawnbroker economic well-being and pawnshop availability.<sup>328</sup> The systematic study of the varying effects of this regulatory diversity could well offer valuable guideposts for model, uniform regulation.

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seized the trophies, claimed they were stolen, and were going to return them to Simpson. *News Notes*, TODAY'S PAWNBROKER, Summer 1995, at 43, 43.

326. The Caskey, Nickels and Adams, and Oeltjen works, cited and quoted *supra*, are the only major pawnbroking studies of the last several decades. See notes 4, 9, 15, 96, 103, and 312, *supra*, for the titles and cites to these studies.

327. See, e.g., Oeltjen, *America*, *supra* note 103, at 233-87 for a collection of state pawnbroker laws.

328. As discussed earlier, economically restrictive pawnbroker regulations result in the rationing or unavailability of pawnbroker services. This unavailability can, in turn, drive borrowers to less desirable sources, e.g., patronizing illegal lenders or writing checks on insufficient funds, the costs for either of which can be significant.