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DATE: June 19, 1998

SUBJECT: Possession Requirements Under Nebraska Pawnbroker Statutes

REQUESTED BY: James A. Hansen, Director
Department of Banking and Finance

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion of the Attorney General relating to the "possession" requirements for pawnbroking transactions under Nebraska Statutes. Reportedly, the transaction you have inquired about involves a lending arrangement with an automobile pledged as security for the underlying loan. The lender has not taken actual and physical possession of the automobile but has taken possession of the automobile certificate of title. The specific question you pose is whether a pawnbroker must "have physical possession of an automobile to fulfill the requirements of 'possession' under Neb. Rev. Stat. § 69-201, or may a pawnbroker maintain 'possession' by simply holding an automobile title and nothing more?"

Under the limited facts you describe, we believe that a pawnbroker is required to have actual possession of the automobile in order for the lending arrangement to constitute a pawnbroking transaction under Nebraska law. The term "pawnbroker" is defined under Neb. Rev. Stat. § 69-201 (1996) to mean:

> Any person engaged in the business of lending money upon chattel property for security and requiring possession of the property so mortgaged on condition of returning the same upon payment of a stipulated amount of money, or purchasing property on condition of selling it back at a stipulated price, is declared to be a pawnbroker for the purpose of sections 69-201 to 69-210. (Emphasis added).

In the first instance, the express language of the statute is looked to in order to determine its meaning. The language of § 69-201 is direct and clear, that a pawnbroker is a person engaged in the business of lending money upon chattel property and requiring possession of the mortgaged property. In construing a statute, a court determines and gives effect to the purpose and intent of the legislature as ascertained from the language of the statute, considered in its plain, ordinary, and popular sense. ***Nickel v. Saline County School District No. 163***, 251 Neb. 762, 559 N.W.2d 480 (1997); ***Becker v. Nebraska Accountability and Disclosure Comm.***, 249 Neb. 28, 541 N.W.2d 36 (1995). Thus, application of the statutory language, taken in its plain, ordinary, and popular sense, establishes that possession of the mortgaged property is a requirement of a pawnbroking transaction.

Further, the very nature of a "pawn" transaction is the delivery of personal property to another in pledge, or as security for a debt or sum borrowed. And, such transactions are generally viewed as that sort of bailment when goods or chattels are delivered to another as security for money borrowed by the bailor. Delivery and possession of the personal property securing the loan or debt is the essence of a pawnbroking transaction. While the courts in Nebraska have not had occasion to consider the question you have raised, other jurisdictions for the most part are in unanimity that a pawn transaction requires possession of the property pledged as security for the loon. ***See***, i.e., ***Cash Inn of Dade, Inc. v. Metropolitan Dade County***, 706 F. Supp. 844 (S.D.Fla. 1986) (Defining a pawnbroker as one that loans money on the security of property pledged in his keeping).

You have noted that in one particular case, ***Blackman v. Downey***, 624 So. 2d 1374 (Ala.1993), the court concluded that money-lending transactions involving the transfer of automobile certificates of title for the purpose of giving security are pawn transactions. This conclusion was reached because the Alabama Pawnshop Act, Ala. Code 1975 §§ 5-19A-1 to 5-20 (Supp. 1992), did not exclude automobile certificates of title from the definition of "pledged goods" under the provisions of the Act. We do not think the holding of this case is applicable to pawnbroking transactions in this state. The Nebraska statutes, §§ 69-201 to 69-210, require possession of the property pledged in a pawnbroker transaction. Further, the Nebraska statutes do not define the terms "property" or "pledged goods" so as to include automobile certificates within the meaning of property for purposes of pawn transactions.

We have noted that the United States District Court for the Southern District of Alabama has had occasion to consider the question whether holding automobile certificates of title in lending transactions constitutes pawn transaction under the Alabama Pawnshop Act. In ***Pendleton v. American Title Brokers, Inc.***, 754 F. Supp. 860 (S.D.Ala. 1991), the U.S. District Court found that holding automobile certificates of title as collateral for loans did not constitute a pawnbroker transaction. The ***Pendleton*** court noted that the defendant in the case did not retain possession of the collateral as security for its loans but rather makes its money by renting its customers their own vehicles. Thus, the court found that the activity engaged in was not that of a bona fide pawnbroker.

In view of the statutory provisions and case authorities set out above, it is our opinion that the possession requirements of § 69-201 necessitate actual possession of the chattel property, the automobile, that constitutes the mortgaged property in a pawnbroker transaction.

Sincerely,

DON STENBERG
Attorney General

Fredrick F. Reid
Assistant Attorney General

Approved:

DON STENBERG, Attorney General

21-41-16