

## Opinion No. 70-60

July 9, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Mr. S.L. Sanders Commissioner of Banking Department of Banking Lew Wallace Building Santa Fe, N.M. 87501

### QUESTIONS

#### FACTS

Business establishments outside of Indian reservations customarily loan money and extend credit on the sale of retail goods to Indians. The money is often secured by a pledge of personal property, usually jewelry. Such business establishments charge in excess of 12 percent per annum and are not specially licensed as pawnbrokers or otherwise.

#### QUESTIONS

Are these establishments exempt from the licensing and other requirements of the Small Loan Act?

#### CONCLUSION

No.

### OPINION

#### {\*100} ANALYSIS

If you take another's cloak as a pledge, you must give it back to him before sunset, it is all the covering he has; it is the cloak he wraps his body in; what else would he sleep in?

Exodus, 22: 25-27; see also, Deuteronomy 24: 12; Job 22: 6; Micah 2:8; Amos 2:8; **cf.** Plato, Laws V; **see generally**, Shakespeare, The Merchant of Venice.

In its narrowest sense, the question posed involves only statutory construction. In its broadest sense, the question involves the problem of regulating the pawnbroker and usury. See generally, Annot. 125 A.L.R. 598 (1940), 55 A.L.R. 242, 249 (1928), (Pawnbrokers); Annot. 149 A.L.R. 1424 {\*101} (1944), 125 A.L.R. 743 (1940), 69 A.L.R. 581 (1930), (Small Loan Legislation).

The Small Loan Act in Section 48-17-32 (A.), N.M.S.A., 1953 Comp. provides that "no person shall engage in the business of lending in amounts of one thousand (\$ 1,000) dollars or less . . . without first having obtained a license from the examiner." Exemptions under the Act include "any bona fide pawnbroking business transacted under a pawnbroker's license . . ." § 48-17-32 (b), N.M.S.A., 1953 Comp.

The exemption of licensed pawnbrokers from Small Loan Acts has been upheld on the theory that one could reasonably classify and independently license and regulate pawnbrokers. See **Ex parte Fuller**, 15 Cal.2d 425, 102 P.2d 321 (1940). However, we are unable to find any New Mexico legislation providing for the licensing of pawnbrokers.

We find no statute, not even the Small Loan Act, which defines a pawnbroker. A dictionary definition of pawnbroker is "one engaged in the business of lending money upon interest on the security of articles of personal property pawned or pledged." 7 Oxford English Dictionary 576 (1933). In the absence of a statutory definition, the use of a dictionary definition of pawnbroker has been recognized by the New Mexico Court of Appeals. **City of Hobbs v. Biswell**, No. 405, N.M. Ct. App., June 26, 1970. See also, **Levison v. Boas**, 150 Cal. 185, 88 P. 825 (1907).

The courts have apparently agreed that the terms "pledge" and "pawn" are synonymous. **Bromley v. Bromley**, 106 Ga. App. 606, 127 S.E.2d 836 (1962); **First Nat'l Bank v. Harkness**, 42 W.Va. 156, 24 S.E. 548 (1896). New Mexico does have two statutes which regulate to some degree the business of pledging or pawning personal property. See the Used Merchandise Act, Sections 49-13-1 to -5, N.M.S.A., 1953 Comp. (1969 Supp.) and "an act relating to Indian traders, pawnbrokers, and other lenders," Sections 50-6-20 to -25, N.M.S.A., 1953 Comp. (1969 Supp.).

In addition, it would appear that the Uniform Commercial Code could apply to transactions by pawnbrokers. See Sections 50A-9-102 (2) & -305, N.M.S.A., 1953 Comp. Finally, although a pawnbroker and especially an Indian trader, might come within the U.C.C. definition of "merchant," Section 50A-2-104, N.M.S.A., 1953 Comp., one cannot buy from a pawnbroker as a "buyer in ordinary course of business," Section 50A-1-201 (9), N.M.S.A., 1953 Comp.

The New Mexico Court of Appeals has held that municipalities may regulate pawnbrokers under the "general welfare" power and "police" power. **City of Hobbs v. Biswell, supra**. In the absence of a state-wide licensing law for pawnbrokers, we assume that the municipalities may also license pawnbrokers. Section 14-37-1, N.M.S.A., 1953 Comp. See Opinion of the Attorney General, No. 69-72, dated July 7, 1969 and Opinion of the Attorney General, No. 65-176, dated September 7, 1965.

Neither the Used Merchandise Act nor the Indian Traders, Pawnbrokers and Other Lenders Act, **supra**, provide for the licensing of the persons regulated by those Acts. The Acts are theoretically enforced by making violation of their provisions a petty misdemeanor.

The Indian Traders Act, **supra**, excludes lenders licensed under the Small Loan Act from its provisions. Section 50-6-25, N.M.S.A., 1953 Comp. (1969 Supp.). It may be that the Legislature intended that the Indian Traders Act would provide regulation of the businesses which are the subject of this question in lieu of licensing under the Small Loan Act. But by failing to provide a licensing provision in the Indian Traders Act, the Legislature failed to exclude these merchants from the requirements of the Small Loan Act. Of course, if the merchants are licensed under the Small Loan Act, then the Indian Traders Act does not apply.

In conclusion, we find that, as a general rule, unlicensed pawnbrokers are not exempt from the provisions of the Small Loan Act. We have made no attempt to completely review that Act and determine each and every transaction *{\*102}* by a pawnbroker which would be included within the provisions of the Act. This opinion is based solely on the short statement of facts above.

By: Mark B. Thompson, III

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