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SMALL LOAN ACT:

1. EXPENSES—REPAIRS, TOWING OR STORAGE OF MOTOR VEHICLE OR OTHER CHATTEL—INCURRED BY BORROWER—PAID BY LICENSEE TO REPOSSESS CHATTEL—DEDUCTED BY LICENSEE FROM PROCEEDS OF SALE—CONSTITUTE "CHARGES"—SPECIFICALLY PROHIBITED BY SECTION 8624-62b G. C.

2. WHERE BORROWER INDEBTED FOR REPAIRS, TOWING OR STORAGE OF MOTOR VEHICLE OR OTHER CHATTEL MORTGAGED AS SECURITY FOR A LOAN AND GARAGEMAN OR WAREHOUSEMAN REFUSED TO RELEASE MORTGAGED CHATTEL TO LICENSEE UNTIL BILL PAID, LICENSEE TO REPOSSESS CHATTEL MAY NOT PAY CHARGES DUE AND DEDUCT THEM FROM PROCEEDS OF SALE.

3. BORROWER MAY NOT GIVE VALID AUTHORITY TO A LICENSEE TO DEDUCT FROM PROCEEDS OF SALE OF REPOSSESSED CHATTEL AN INDEBTEDNESS INCURRED BY THE BORROWER WHICH LICENSEE PAID IN ORDER TO REPOSSESS CHATTEL.

4. EXPENSES FOR REPAIRS—NO BASIS TO MAKE DISTINCTION BETWEEN EXPENDITURES BY LICENSEE FOR REPAIRS TO REPOSSESS CHATTEL OR FACILITATE ITS SALE.

5. BORROWER MAY NOT GIVE VALID AUTHORITY TO LICENSEE TO INCUR INDEBTEDNESS FOR REPAIRS TO A REPOSSESSED CHATTEL.

SYLLABUS:

1. Expenses for repairs, towing or storage of a motor vehicle or other chattel, incurred by the borrower but paid by the licensee in order to repossess the chattel, and deducted from the proceeds of the sale thereof by the licensee, constitute "charges" for purposes of the Small Loan Act. Such charges are not provided for in the act and therefore are specifically prohibited by Section 8624-62(b) thereof.

2. Where a borrower has incurred an indebtedness for repairs, towing or storage of a motor vehicle or other chattel mortgaged as security for a loan under the Small Loan Act and the garageman or warehouseman refuses to release the mortgaged chattel to the licensee until his bill has been paid, the licensee in order to repossess the chattel may not pay the charges due and deduct them from the proceeds of the sale of the chattel.

3. In view of the inequality between the borrower and the moneylender and the purpose and intent of the Small Loan Act, a borrower may not give valid authority to a licensee to deduct from the proceeds of a sale of a repossessed chattel an indebtedness incurred by the borrower which the licensee paid in order to repossess the chattel.

4. A licensee may not incur expenses for repairs against a repossessed chattel and deduct such expenditure from the proceeds of the sale of the chattel even though the amount of the expenditure is more than offset by the increase in value or selling price of the chattel. There is no basis under the Small Loan Act for making a distinction between expenditures by the licensee for repairs which are more than offset by a corresponding increase in value of the chattel and expenditures for other repairs which are deemed necessary either to repossess the chattel or to facilitate the sale thereof.

5. A borrower may not give valid authority to a licensee to incur an indebtedness for repairs to a repossessed chattel even though such repairs would result in an increase in value to the chattel beyond the cost of repairs. To sanction such an agreement between the borrower and the licensee would authorize to be done indirectly that which may not be done directly.

Columbus, Ohio, March 29, 1949

Hon. Ernest Cornell, Chief, Division of Securities
Columbus, Ohio

Dear Sir:

Your letter of recent date reads as follows:

"This Division has been repeatedly faced with the question of the legality of certain charges against borrowers, or deductions from the proceeds of sales of repossessed chattels, made by licensees under the Ohio Small Loan Act, Sections 8624-50 to 8624-72, inclusive, General Code of Ohio. The question arises under several types of circumstances, which are set forth below. Desiring to aid you, we attach our own arguments on the subject. The particular questions are:

"1. Where a borrower has incurred an indebtedness for repairs, towing or storage on a motor vehicle or other chattel mortgaged as security for his loan with a licensee and the garageman or warehouseman refuses to release the mortgaged chattel to the licensee until his bill for repairs, etc., has been paid, may the licensee, in order to repossess the chattel, pay these charges and deduct them from the proceeds of a sale of the chattel by the licensee?

"2. May a borrower give a valid authority to a licensee to deduct such charges from the proceeds of a sale of a repossessed chattel?

"3. May a licensee, having repossessed a chattel, incur expenses for repairs to the chattel and deduct them from the proceeds of a sale of the chattel, even though the making of such repairs results in an increase in value or selling price, in excess of the cost of the repairs?

"4. May a borrower authorize such repairs and the deduction of them from the proceeds of a sale of the chattel?

"Your opinion on the above questions is respectfully requested."

In your memorandum accompanying the above letter you maintain that each of the questions should be answered in the negative. You cite the following provisions of the Ohio Small Loan Act, Sections 8624-50 to 8624-72, General Code, as applicable:

"Section 8624-62(b). * * * In addition to the charges herein provided for, no further or other charges, consideration or amount shall be directly or indirectly charged or received by any licensee under this act for any loan made under this act, * * *."

"Section 8624-65(b). Any profit or advantage of any kind whatsoever that any licensee or other person may contract for, collect, receive or in any wise obtain by any collateral sale, purchase or agreement, in connection with the negotiating, arranging, making or otherwise in connection with any loan made pursuant to this act * * * shall be deemed to be charges for the purpose of regulation under this act, and shall be governed by and subject to the provisions of this act. * * *"

I believe you will agree that the following definition of "charges", contained in Section 8624-50(a), General Code, and the penalty provision for excessive charges contained in Section 8624-62(c), General Code, are also pertinent:

"Section 8624-50a:

"The word 'charges' shall include interest and all manner of compensation for any examination, service, brokerage, commissions, bonus, or other thing and reimbursement of any expense incurred that may be paid by a borrower to a lender or in anywise on his behalf or any benefit the lender may receive from a collateral contract with the borrower or his or her spouse except insurance commissions when the lender is a duly licensed insurance

broker or agent as hereinafter provided and except the fees actually paid out by a licensee to any public official for filing or recording in a public office any instrument securing the loan."

"Section 8624-62c:

"If any charges in excess of those permitted by this act shall be charged or received, except as the result of an unintentional error of computation, the contract of loan and all papers in connection therewith shall be void and the licensee and any assignee of such contract shall have no right to collect or receive any principal or charges whatsoever."

As part of your argument you point out that the basic theory of the Small Loan Act is to afford protection to the necessitous borrowers who are not in position to bargain equally with their lenders. In this connection I believe it appropriate to refer to the following quotation from 40 Am. Jur. 696, explaining the necessity for regulation of money lenders:

"It is well known that in large cities and in urban communities in particular there are many persons engaged in the business of making small loans to persons in necessitous circumstances who, as a rule, are able to borrow only from such moneylenders; frequently and even customarily such moneylenders exact exorbitant and oppressive interest rates of these borrowers. This in many states has created such a deplorable situation as not only to justify but to demand regulatory legislation. As has been judicially observed, there are men whose business it is to prey upon the necessities of the improvident and the unfortunate by lending money at exorbitant rates of interest, with the effect that in many instances the borrower becomes the bondslave of the lender, if, indeed, he possesses enough character to prevent his desperation from driving him into overt acts of crime. These lendings and borrowings are usually so small in amount that the banking institutions make no pretense of engaging in the business, and hence arises the duty of the state to protect the unfortunate victim of rapacity so far as it is practicable. The state owes a duty in this regard, just as clearly as it does to protect the ignorant and the unwary from the machinations of the confidence man or the extortion of the highwayman."

Your first question is, in essence, may a licensee under the Ohio Small Loan Act in order to repossess an automobile mortgaged to him pay an indebtedness incurred by the borrower for repairs, towing or storage and deduct the payment from the proceeds of the sale of the car. It is my opinion that the charging back against the debtor of the payment made to effect the release of the vehicle is clearly a "charge" within the language

of the definition and of the provisions of Section 8624-65(b), quoted above. Such charges are not provided for in the act and therefore are specifically prohibited under the quoted provision of Section 8624-62(b).

My conclusion is reinforced by the decision of the Supreme Court of Ohio in Capital Loan & Savings Company v. Biery, et al., 134 O. S., 333, where it was held under the old statute that a note and chattel mortgage were void which authorized the mortgagee to take possession of the chattel upon default of the note, dispose of it at public or private sale, and out of the proceeds to pay first the cost and expense of taking, keeping and selling the chattel. At pages 336 and 337 of the reported opinion the court found that costs of taking, keeping and selling a chattel are "charges" beyond the provisions of the statute, as follows:

> "It will be observed that the chattel mortgage authorized the mortgagee, under certain circumstances, to enter into any building, seize the property without process of law, sell it at public or private sale, and out of the proceeds pay first the cost of taking, keeping and selling the same. This was making a sheriff out of the mortgagee. Costs incurred in a foreclosure action are within the law and authorized by law. Such costs follow a judgment in court and do not violate the terms of the two statutes mentioned. Upon foreclosure proceedings in court on the note and chattel mortgage, the debtors know that the court costs will be fixed by law. If, however, under this chattel mortgage, the property is seized and stored by the mortgagee, the debtors have no means of knowing what the 'seizing' and 'storage' charges will be; nor could anyone else know by examination of the note and mortgage. They are costs and charges made by the mortgagee. *Such charges are beyond the provisions of the statute here under consideration. They are charges beyond the inspection fee and the total charge of three per cent per month allowed to licensed dealers under the law.* London Realty Co. v. Riordan, 207 N. Y. 264, 100 N. E. 800; Colonial Plan Co. v. Tartaglione, 50 R. I. 342, 147 A., 880; Smetal Corp. v. Family Loan Co., 119 Fla., 497, 161 So., 436; Cash Service Co. v. Ward, 118 W. Va., 703, 192 S. E. 344; Ideal Financing Assn. v. La Bonte, 120 Conn., 190, 180 A., 300." (Emphasis supplied.)

In Porter v. Interstate Securities Company, 37 O. O. 194, the court cites the Capital Loan Company case and notes that while the decision was made under the earlier statute, Section 6346-5, General Code, it has been substantially reenacted in Section 8624-62, General Code, so that the rights and liabilities of the parties remain the same.

See also the decision of the Municipal Court of Cleveland rendered by Judge Lausche in Northern Finance Corporation v. Weiss, et al., 31 O. N. P. (N. S.) 196, where it is stated in the syllabus that:

> "1. Where, by the terms of a mortgage securing a note given for the payment of a loan within the operation of Section 6346-5, General Code, provision is made for charging the borrower with attorney's fees, repair and storage expenses, and all other expenses incurred by the lender in repossessing the chattel mortgage, such charges are in violation of and specifically prohibited by the statute.
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> "2. The intention of the Legislature was to declare null and void all papers made in connection with a contract for a usurious loan, and any charges in excess of those allowed, whether received or contracted for, and regardless of how disguised, must be held to have that effect."

The Supreme Court of New Jersey appears to be in accord with the Ohio Supreme Court. This is indicated by the opinion in Howard v. Confidential Loan Plan (1940), 125 N. J. L. 74, 13 A. 2d 492, which follows in full:

> "The plaintiff borrowed $175 from a small loan company. She gave as security a chattel mortgage upon her automobile. Being in default, the defendant seized the car and placed it in a public garage. A few days later, the plaintiff tendered a check to the defendant in the full amount due upon her note. She was, however, obliged to pay the garageman his charges in addition before she could recover her car. Therefore, she brought this action under the admirable provisions of N. J. S. A. 17:10-14, and had judgment for the full amount paid the defendant.
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> The argument seems to be made that the garageman's charge was not an exaction made by the defendant and that, therefore, the drastic provisions of the statute should not apply. The fault with the reasoning is that the legislature has used very general language forbidding its licensees to do certain things deemed not in the public interest. Charges not authorized by the statute are not to be made except in two instances, and that is (1) on actual sale of the security in foreclosure proceedings; or (2) upon the entry of judgment. The garageman in towing the plaintiff's car and storing it at the command of defendant's bailiff was acting for the defendant and the charge for services rendered was an exaction from the plaintiff for the benefit of the defendant. The defendant causing such action has no means to defeat the legislative edict that the plaintiff may recover all sums which she has paid or returned to the lender, if any unauthorized exaction is made. The greed of the money lenders must be curbed."

While authority to the contrary might be cited (see Martorano v. Capital Finance Corporation, 269 N. Y. 21, 43 N. E. (2d) 705, where it was held that the requirement that the borrower take out insurance on the mortgaged chattel was not of such benefit to the lender to render it illegal; see also 143 A. L. R. 1323), I am of the opinion that under the Ohio Small Loan Act a licensee may not pay off an obligation incurred by the debtor against the mortgaged chattel and then deduct the payment from the proceeds of the sale of the chattel.

Your second question is, may the borrower authorize the licensee to deduct such charges from the proceeds of the sale of the repossessed chattel? In considering questions involving agreements between a borrower and a licensee under the Small Loan Act, it is important to bear in mind that there is no equality between the borrower and the money lender and that due to his dire straits the borrower is inclined to agree to anything which will relieve him of his obligation. In this connection I should like to cite a quotation found in Capital Loan & Savings Company v. Biery, supra, 337:

> " 'Usury laws proceed upon the theory that the lender and the borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender. And such laws may be found on the statute books of all the civilized nations of the world, both ancient and modern.' "

I have concluded under question one that expenditures of the nature involved here are charges for purposes of the Small Loan Act and that since such charges are not provided for in the act, they are specifically prohibited. In view of the inequality between borrower and lender, it should follow that an agreement between them authorizing the lender to deduct from the proceeds of the sale of a repossessed chattel charges incurred against the chattel by the borrower would also violate the prohibition against charges not provided for in the act. I am therefore compelled to answer your second question in the negative.

Your third question is, may a licensee incur expenses against a repossessed chattel and deduct them from the proceeds of the sale when the expenditure is more than offset by the increase in value or selling price of the chattel.

As I see it the only difference between this question and question one is that the cost of the repairs is exceeded by the increase in the value of the repossessed chattel resulting therefrom. I have not found any authority which accepts this distinction as authorizing a lender to make repairs on a repossessed chattel. The potential benefit to the borrower from permitting such expenditure is outweighed by the opportunity for abuse inherent in such an authorization.

Under circumstances such as you quote, I should think that the lender would purchase the chattel upon foreclosure and make the necessary repairs on his own, or that the borrower himself would see the advantage in the repairs and realize directly the profit from the increased value of the chattel. Therefore, on the basis of the authorities previously cited and the reasoning above, I must again answer in the negative.

Your fourth and final question is, may the borrower authorize the licensee to make such repairs and deduct payment therefor from the proceeds of the sale of the chattel? This question has the same relation to your third question that question two has to question one. In addition to referring specifically to the discussion under question two, I should like to state that to permit the borrower and the lender to enter into such an agreement would authorize to be done indirectly that which may not be done directly, and would make ineffective the conclusion reached in response to question three. Again the answer is no.

Respectfully,

HERBERT S. DUFFY,
Attorney General.