



Community Development

Planning & Zoning, Building Inspections,
Business Licensing, and CDBG Administration

MEETING NOTICE OF THE CLEARFIELD CITY PLANNING COMMISSION

Notice is hereby given that the Clearfield City Planning Commission will hold a regularly scheduled meeting at **7:00 P.M., Wednesday, January 8, 2014** on the 3rd floor in the **City Council Chambers** of the Clearfield City Municipal Building, 55 S. State, Clearfield, Utah.

7:00 PM CALL TO ORDER-- PLEDGE OF ALLEGIANCE

1. ROLL CALL
2. APPROVAL OF THE AGENDA
(Items may be removed, continued to a later date, or addressed out of sequence)
3. APPROVAL OF MINUTES
 - A. December 4, 2013
4. ELECTIONS FOR A CHAIR and VICE-CHAIR FOR THE 2014 YEAR
5. APPROVAL OF 2014 MEETING SCHEDULE

PUBLIC HEARINGS:

6. Discussion and Possible Action on **CUP 1312-0001**: A request by Lisa Bitton for a Conditional Use Permit for a home daycare service, located at 1080 South 1500 East, Apt. 13 (TIN: 09-020-0018), a multi-family property which lies in the R-3 (Residential) zoning district.
7. Discussion and Possible Action on **CUP 1312-0002**: A request by Lori Laws for a Conditional Use Permit for a Pet Grooming Service, located at 513 North 1000 West (TIN: 14-065-0112), a 0.20 acre parcel which lies in the B-1 (Buffer) zoning district.
8. Discussion and Possible Action on continued Public Hearing **CUP 1304-0011**: A request by Scott Hart for a Conditional Use Permit for an automotive repair, outdoor storage use, and motor vehicle sales located at 1181 South State Street (TIN: 12-067-0081), a 0.56-acre parcel which lies in the C-2 (Commercial) zoning district.

SCHEDULED ITEMS:

9. Discussion and possible action on Clearfield Planning Commission 2013 Year End Review and 2014 Planning Commission Work Program and goals.

10. Discussion about standards regulating all non-depository institutions within Clearfield City, and potential amendments to City Code 11-13-29 Payday Lending Establishments. This zoning text amendment would be effective across all Commercial Zones in Clearfield City.

COMMUNICATION ITEMS:

11. Staff Communications
12. Planning Commissioners' Minute

****PLANNING COMMISSION MEETING ADJOURNED****

Dated this 3rd day of January, 2014

/s/Scott A. Hess, Development Services Manager



The City of Clearfield, in accordance with the 'Americans with Disabilities Act', provides accommodations and auxiliary communicative aids and services for all those citizens needing assistance. Persons requesting accommodations for City sponsored public meetings, service programs, or events, should call Christine Horrocks at 525-2780, giving her 48 hours notice.

CLEARFIELD PLANNING COMMISSION MEETING

December 4, 2013

7:00 P.M. - Regular Session

PRESIDING: Nike Peterson Chair

PRESENT: Norah Baron Commissioner
Keri Benson Commissioner
Becky Brooks Commissioner
Randy Butcher Commissioner
Joel Gaerte Commissioner
Ron Jones Commissioner
Timothy Roper Alternate Commissioner
Michael LeBaron Council Liaison

STAFF PRESENT: Adam Lenhard City Manager
Brian Brower City Attorney
JJ Allen Assistant City Manager
Scott Hess Development Services Manager
Christine Horrocks Building Permits Specialist

VISITORS: Jean Reyes, B. Reyes, B. S. Reyes, Karol Vasquez, Anthony Vasquez,
David Harper, Bruce Baird, Chris Ryan, Dale Kruitbosch, Blake Hazen,
Tom Checketts, Dallin Checketts, Eric Hazen

Pledge of Allegiance was led by Chair Peterson

APPROVAL OF AGENDA

Commissioner Jones moved to approve the agenda as written. Seconded by Commissioner Benson. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NO: None.

APPROVAL OF MINUTES FROM NOVEMBER 6, 2013 PLANNING COMMISSION MEETING

Commissioner Gaerte moved to approve as written the minutes from the November 6, 2013 Planning Commission meeting. Seconded by Commissioner Baron. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NO: None.

PRESENTATION FROM BEAUTIFICATION COMMITTEE

Adam Lenhard, City Manager, said a beautification committee was formed and assigned to review the City's property maintenance ordinances for strengths and weaknesses, perform area-specific assessments of all City neighborhoods for condition and needs, identify possible

landscaping, signage and other elements for implementation, and prepare lists of prioritized projects and needs. Mr. Lenhard presented the findings of the committee. He said the City needed to set the standard.

Chair Peterson asked if the City had a prioritized list of properties that needed cleanup. Mr. Lenhard said the City was working on a redevelopment plan for the CDRA areas and would look at all areas focusing on the areas with the greatest need. Commissioner Butcher said businesses were fined if graffiti wasn't cleaned up in a certain time frame. He asked if the City could help the businesses with graffiti removal. Mr. Lenhard stated the City provides the materials needed for removal. Chair Peterson asked who to contact for help with graffiti removal. Mr. Lenhard told her the Public Works Department distributed the materials.

DISCUSSION ON SP 1310-0004, A REQUEST BY TITLE MAX FOR SITE PLAN APPROVAL OF A TITLE LOAN BUSINESS LOCATED AT 450 SOUTH STATE STREET

Scott Hess, Development Services Manager, said the property should be addressed 445 South State. He said the building was abandoned in 2007 and code required site plan approval for use of the property. Mr. Hess said payday lending establishments and title lending establishments were defined independently in City and State code. He said the site did not meet the 10 percent landscaping requirement and was approximately 700 square feet short of landscaping and was a condition of approval. Mr. Hess said the storm drain system was existing and the dumpster enclosure needed repairs before it was used or it could be vacated. Bruce Baird, Counsel for Title Max, said Title Max would comply with all the conditions in the staff report. He stated Title Max did not do payday lending.

Chair Peterson asked Mr. Baird if their intent for the additional landscaping was to establish an escrow and have the work done in the spring. Mr. Baird said yes, that was the plan. Chair Peterson asked the commissioners if there were any concerns with the design standards, parking, landscaping or the dumpster. The commissioners did not have any concerns. Mr. Baird said the dumpster would be rescreened. Commissioner Butcher had a question about the lighting plan. Mr. Hess said there were no additional pole lights in the parking area. He said for lights on the building, City Code Title 11-14-5 D states: Lighting: Lighting used to illuminate an off-site parking area shall be so arranged as to reflect the light away from adjoining premises in any residential district.

APPROVAL OF SP 1310-0004, SITE PLAN FOR A TITLE LOAN BUSINESS LOCATED AT 450 SOUTH STATE STREET

Commissioner Butcher moved to approve as conditioned, SP 1310-0004, Site Plan approval for a Title Max, located at 450 South State Street, based on the findings and discussion in the staff report. Seconded by Commissioner Jones. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NO: None.

DISCUSSION ON SP 1311-0001, SITE PLAN APPROVAL FOR A COFFEE SHOP LOCATED AT 331 EAST 200 SOUTH

Scott Hess said the property owner had been cleaning up the interior of the building for a year. He said the business meets the definition of a restaurant. Mr. Hess said he didn't foresee an issue with parking. He said there was existing surface drainage on the site and additional landscaping would be placed along the east and front of property. Mr. Hess said they could establish an escrow for the landscaping to be installed within six months of the site plan approval. He said aerial photo of the rear asphalt parking made the parking area look in worse repair than it actually was. He said the asphalt should be fixed and the parking lot striped prior to the issuance of the business license. He requested to add to condition of approval 1d) that asphalt in disrepair needed correcting. Commissioner Butcher referred to "Comprehensive Plan and Zoning" on page four and asked what was required by the statement "bring the site to compliance with minimum City code." Mr. Hess said any interior remodel work would be inspected by the building official and meet building code. Chair Peterson asked if there was a representative from the business present at the meeting. Jean Reyes, owner, came to the podium, however, the commissioners did not have any questions for her. Chair Peterson asked the commissioners if they had questions on any of the conditions of approval. Commissioner Benson asked about the fence. Mr. Hess said the existing fence was a six foot wooden fence and was located on the east side of the property.

APPROVAL OF SP 1311-0001, SITE PLAN FOR TEX MEX COFFEE SHOP LOCATED AT 331 EAST 200 SOUTH

Commissioner Jones moved to approve as conditioned SP 1311-0001, Site Plan approval for Tex Mex coffee shop located at 331 East 200 South, based on the findings and discussion in the staff report. Seconded by Commissioner Benson. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NO: None.

DISCUSSION ON SP 1311-0003, REQUEST FOR SITE PLAN APPROVAL FOR A NEW OFFICE BUILDING LOCATED AT 215 EAST 700 SOUTH

Scott Hess said site plan approval was received in 2007 for two structures on this site. He said the first building was constructed in 2007 then the SR193 expansion required changes to the layout for the south portion of the lot. Mr. Hess said the drainage plan shows the parcel to be used for drainage and the ten percent landscaping requirement would be met. He said the new site plan had ten fewer parking spaces but met the requirement for a manufacturing building. Mr. Hess said a higher intensity use would require a review of the site plan for additional parking. He said the garbage dumpster was visible from SR193 and code required the dumpster to be screened.

Commissioner Baron asked how to get to the property. Mr. Hess said the property was at the bottom of the bridge and the frontage road provided access. Commissioner Butcher asked if something in writing would be required from Utah Department of Transportation (UDOT). Mr. Hess said the only concern would be the recording of the plat which included the land swap to provide the detention area. Brian Brower stated UDOT took a portion of the property owned by

Mr. Kruitbosch and gave him some in return. Chair Peterson asked the commissioners if they had any questions from Mr. Kruitbosch. Commissioner Butcher disclosed his friendship with Mr. Kruitbosch but stated he had no financial involvement with the business and it would not impact his vote. Chair Peterson reviewed the conditions of approval and asked if the commissioners had any concerns. There were none voiced.

APPROVAL OF SP 1311-0003, SITE PLAN FOR A NEW OFFICE BUILDING LOCATED AT 215 EAST 700 SOUTH

Commissioner Brooks moved to approve as conditioned SP 1311-0003 Site Plan approval for Kruitbosch Building 2, located at 215 East 700 South, based on the findings and discussion in the staff report. Seconded by Commissioner Gaerte The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NO: None.

PUBLIC HEARING FOR ZTA 1311-0002, A REQUEST FOR A ZONING TEXT AMENDMENT TO THE CLEARFIELD CITY CODE TITLE 11 CHAPTER 15 SIGN REGULATIONS TO ALLOW MODIFICATIONS TO FREEWAY ORIENTED SIGNS NEAR INTERSTATE 15 INTERCHANGES

Chair Peterson declared the public hearing open at 7:50 p.m.

PUBLIC COMMENT:

Tom Checketts said he was in favor of the zoning text amendment. He suggested the maximum allowable height and surface area of the sign be increased, the height to 100 feet and the surface area to 300 feet per side. He said there were eight corners with the Interstate-15 intersections and four cannot be used for commercial. Mr. Checketts said the taller sign had more visibility which allowed more time for a vehicle to move over and exit the freeway.

Blake Hazen said his concerns were timing and safety. He said timing was critical for a driver to make the decision to change lane and safely leave the freeway. Mr. Hazen said there were some trees that would not allow visibility of 45 foot tall sign and requested the sign height be allowed at 90 to 110 feet.

Commissioner Butcher moved to close the public hearing at 7:56 p.m. Seconded by Commissioner Jones. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NAY: None.

Scott Hess said the application was received to utilize an existing legal non-conforming pole sign. He stated most signage in the City was oriented to State Street and Main Street; the exceptions were the two interstate freeway exits. Mr. Hess said the request included expansion of the legal non-conforming sign with the addition of an electronic reader board. He said City Code does not allow the expansion of a non-conforming sign. He said the existing Arby's pole sign was 57 feet tall and other signs in the area were taller. Mr. Hess said the previous sign code allowed the sign

height of 30 feet and the sign area was 150 square feet per side. Brian Brower stated if the sign was considered legal non-conforming, it was legal at some point in time. Mr. Hess said the Zoning Text Amendment (ZTA) proposal was for 45 feet in height to be similar to other cities and the sign area at 150 square feet per side for a total of 300 square feet of sign area. He said the code had been that since the 1980's. Mr. Hess reviewed the sign requirements from some cities in the area. He showed the suggested area that would be included which was 650 square foot radius from the center point of the intersections for property within commercial zones.

Commissioner Benson asked what the sign height regulation was for Layton City. Mr. Hess said most restaurants were at the top of the power poles which would be about 35 feet. Some commissioners were concerned with the impact the tall, bright signs would have on the residential areas. Mr. Hess said it was up to the sign company to guarantee the light wasn't going into the residential properties. Chair Peterson requested standards be established on the lumen output but stated it could be handled at a later date. Mr. Hess said it should be applied to all signage. Commissioner Benson said a concern she had was with the brightness along the freeway and didn't want a distraction to the drivers.

David Harper with Burger King said they want the greatest chance for success. He said sign codes had changed since 1980 and most locations did not have digital reader boards. Mr. Harper said the codes from 1980 would not cover the Burger King logo sign. He said they were asking for 300 square feet per side. Mr. Harper said the sign code of Farr West allowed for 350 square feet per side and 80 feet in height. He said Burger King was at an extreme disadvantage with the size of the McDonalds sign next door. Mr. Hess said discussion about the McDonald's sign brought up questions of how the square footage of the sign was calculated. Mr. Harper said the signs they were requesting were approximately 220 square feet for the logo sign and approximately 100 square feet for the electronic reader board.

Chair Peterson said other Burger King signs in the area were smaller and asked why the sign for the Clearfield location was significantly larger. Mr. Harper said the signs installed now were larger, but most are not this large. He said there was a sign in Rawlins, Wyoming that was similar in size to this sign and it can be seen when approaching the freeway exit. Chair Peterson said the sign would be dramatically larger and was close to the size of a billboard. Mr. Harper said their intent was to set the business up for success and the freeway traffic was needed to make the site work. Commissioner Brooks said when she came to the meeting she was against the change, but after listening to feedback and public comment she said it made sense. Mr. Harper said the reader board was important to the business. Commissioner Jones asked if a traffic study had been done. Mr. Harper said they have done a traffic count to meet the requirements of Burger King. Commissioner Jones said he didn't feel the size and height of the sign was necessary however he liked the uniformity the change could make to the signs in the area. Scott Hess said the sign was 57 feet tall and staff needed direction on the total size of the signs and the height that would be allowed. Mr. Harper said Burger King wanted to draw traffic from the freeway. Commissioner Butcher said he preferred signs that were high enough to be seen and draw people to the City and he liked the reader board. Commissioner Jones said the reader board was a good idea and based on the fact there would not be a 100 foot tall sign he was in favor of the change. Chair Peterson was concerned with the size and didn't want one large sign. Scott Hess said current sign code

allowed monument signs to have 50 percent of the sign to be readable and 50 percent static.

Chair Peterson asked the commissioners for a recommendation on the height of the sign. After some discussion the commissioners agreed the maximum height for the signs would be 60 feet. The commissioners then discussed the surface area that would be allowed for the sign. The Commission decided that the maximum square footage for the sign would be 300 square feet per side, 600 square foot maximum. The reader board could be no larger than one-third (33 percent) of the total copy area of the sign. The commissioners were concerned that the signs could be too bright for the surrounding residential areas. Chair Peterson asked staff to check on lumen regulations and requested the information be included in the ordinance presented to City Council. Mr. Hess said all recommendations for change made with this ordinance applied only to the areas around the interstate intersections. He asked if the distance of 650 foot radius was acceptable. Chair Peterson requested the distance be increased to include an existing restaurant. Brian Brower asked about the placement of the reader board sign on the pole. Mr. Hess said placement was not regulated and would be determined by the size and height of the sign.

RECOMMENDATION FOR ZTA 1311-0002, A ZONING TEXT AMENDMENT TO THE CLEARFIELD CITY CODE TITLE 11 CHAPTER 15 SIGN REGULATIONS TO ALLOW MODIFICATIONS TO FREEWAY ORIENTED SIGNS NEAR INTERSTATE 15 INTERCHANGES

Commissioner Gaerte moved to recommend approval of ZTA 1311-0002, an amendment to the Land Use Ordinance Title 11 Chapter 15 Sign regulations for the inclusion of an overlay zone for Freeway Oriented Signs based on the findings and discussions in the staff report noting the changes to Exhibit A in the Location Designation: increasing the 650 foot radius to 675; in Standards and Requirements: the maximum height would be 60 feet, the sign area would be 300 square feet total cabinet size with the possibility of having double sided sign for a total of 600 square feet and the sign reader board would not exceed 33 percent of the total sign area, in addition staff would include lumen standards or output maximums related to the electronic signs. Seconded by Commissioner Benson. The motion carried on the following vote: Voting AYE: Commissioners Baron, Benson, Brooks, Butcher, Gaerte, and Jones. Voting NAY: None.

STAFF REPORTS

Scott Hess said at the January 8, 2014 meeting the 2014 meeting schedule would be on the agenda for approval. He said there would also be some conditional use permits on the agenda including Jim's Tires and a dog grooming business. He suggested holding training in March when new commissioners had been appointed.

PLANNING COMMISSIONERS' MINUTE

Commissioner Butcher – Merry Christmas to everyone.

Commissioner Jones – Nothing

Commissioner Brooks – said the commission dropped ball when the ordinance on payday lending was revised and asked to have a discussion on title loan lending at the next meeting. She did not want any more of this type of business in the City. Scott Hess said Valerie Claussen had an open case file on non-depository institutions. He said it was easy to regulate payday lending because it was predatory; title lending was different if the interest rate charged was comparable to a credit union or bank. Mr. Hess said current code allowed one payday lending establishment per 10,000 residents. He said the Commission needed to determine the total number it was willing to accept in the City. Commissioner Brooks thought the title loan businesses were included with payday lending. Brian Brower said the Commission needed to be cautious on regulating title lending or non-depository lending. He encouraged the Commission to ensure due diligence so any action could be defended. Chair Peterson asked to have title lending and non-depository on the agenda for discussion at the January meeting.

Councilmember LeBaron – Said payday lending was proven predatory. Merry Christmas.

Commissioner Gaerte – Nothing

Commissioner Baron – Congratulations to Commissioner Benson, she would be missed. Merry Christmas.

Commissioner Benson – Said the next meeting was on her birthday and she would bring treats. She said she had learned a lot from each commissioner. She said she would be back so she could continue learning. Merry Christmas.

Commissioner Peterson – Merry Christmas to everyone. Thanked the commissioners for their hard work this past year. She said congratulations to Commissioner Benson and wished her luck on the City Council.

There being no further business to come before the Planning Commission, **Commissioner Benson moved to adjourn at 9:15 p.m. Seconded by Commissioner Gaerte.**



PLANNING COMMISSION STAFF REPORT

AGENDA
ITEM
#6

TO: Planning Commission

FROM: Scott A. Hess
Development Services Manager
scott.hess@clearfieldcity.org (801) 525-2785

MEETING DATE: January 8, 2014

SUBJECT: Public Hearing, Discussion and Possible Action on **CUP 1312-0001**: A request by Lisa Bitton for a Conditional Use Permit for a home daycare service, located at 1080 South 1500 East, Apt. 13 (TIN: 09-020-0018), a multi-family property which lies in the R-3 (Residential) zoning district.

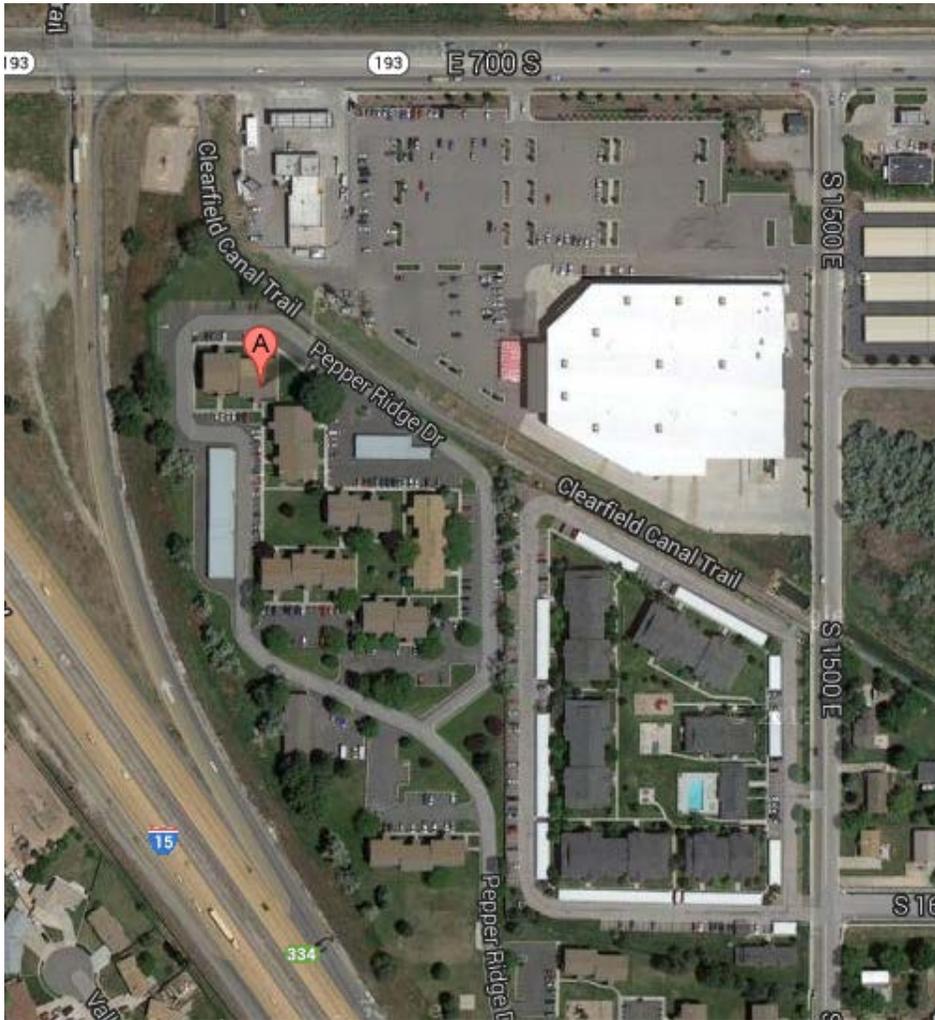
RECOMMENDATION

Move to **approve as conditioned**, CUP 1312-0001, a Conditional Use Permit for Lisa's Daycare, a home occupation daycare facility in the R-3 (Residential Zone) zoning district located at 1080 South 1500 East Apartment 13, based on the findings and discussion in the Staff Report.

PROJECT SUMMARY

Project Information	
Project Name	Lisa's Daycare
Site Location	1080 S 1500 E, Apt. 13
Tax ID Number	09-020-0018
Applicant	Lisa Bitton Western Region Construction
Property Owner	Pepper Ridge Apartments, LLC
Proposed Actions	Home Occupation Conditional Use Permit
Current Zoning	R-3 (Multi-Family Residential)
Master Plan Land Use	Commercial
Gross Site Area	Single Apartment within Pepper Ridge Apartment Complex

Vicinity Map



	Surrounding Properties and Uses:	Current Zoning District	Comprehensive Plan Land Use Classification
North	1350 East 700 South, Chevron Gas Station	Commercial	Commercial
East	900 South 1500 East, Wing Point	R-3 (Multi-Family Zone)	Residential
South	Interstate-15	N/A	N/A
West	Interstate-15	N/A	N/A

HISTORY

The Pepper Ridge multi-family housing location has been host to numerous home occupations such as internet sales, book keeping, and cleaning services. City records include a day care service at Pepper Ridge in unit #35 that was approved in August of 2002. The former day care is no longer active. Due to tenants coming and going within rental complexes, there is a steady stream of business licenses that are approved and/or cancelled within these apartment homes at any given time.

ANALYSIS

Comprehensive Plan and Zoning

The property is currently zoned R-2 (Multi-Family Residential) and Master Planned Commercial. The property is flanked by Interstate 15 to the west and south, and is located directly behind the Chevron service station to the North. The east side of the property is adjacent to multi-family housing apartment homes. The Master Plan shows the property surrounded by Commercial with the apartment complex to the east remaining Residential.

Conditional Use Permit Review

The purpose of the CUP is to allow a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, *may* be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

The request for a Conditional Use Permit (CUP) for a daycare facility is consistent with the City's Land Use Ordinance as this use is permitted with an approved CUP in the R-3 zoning district. The use is primarily operated during normal daytime business hours and does not generate objectionable noise, odors, dust or fumes that would make it incompatible with the adjacent residential uses. The applicant indicates that the facility is anticipated to care up to eight children total, with approximately four children at a time. The specific impact that will need review is site circulation for an additional use on this property.

Parking, Circulation, and Access

The property provides a variety of parking for guests and residents of the apartment homes. There is an access road that surrounds the building of Apartment 13. Circulation on the site consists of primarily private roads within the Pepper Ridge Apartment Complex. Public access to the site is off of 1500 East.

A very small daycare will have limited impact on an already high intensity use such as multi-family apartments. Staff would encourage the applicant to stagger drop off and pick up times in order to minimize impacts on the private roadways within the Pepper Ridge Apartment Complex.

Outdoor Play Area and Proposed Fencing

Pepper Ridge Apartment Complex playground area is not fenced. Ms. Bitton has indicated that she will not be taking children outside with the cold weather. Once the weather warms, she may take the children outside. This would require a walk from her apartment unit to the playground.

The playground is surrounded by apartment buildings, and is pulled back away from 1500 East. Though there is no fence, this poses limited risk as traffic typically moves slowly within apartment complexes, and there will be limited numbers of children to keep an eye on. The State of Utah has approved Ms. Bitton's daycare plan, and Pepper Ridge has approved the use as well.

Public Comment

No public comment has been received to date.

GENERAL STANDARDS

Conditional Use Permit Review

Clearfield Land Use Ordinance Section 11-4-3 establishes the general standards and determination the Planning Commission shall make to approve Conditional Use Permits. The findings and staff's evaluation are outlined below:

General Standard	Staff Analysis
<p>DETERMINATION: A Conditional Use Permit shall be approved if conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with the standards set forth [in the Land Use Code]. If the reasonably anticipated detrimental impacts or effects of the proposed conditional use cannot be substantially mitigated or eliminated by the proposal or the imposition of conditions to achieve compliance with the standards set forth [in the Land Use Code], the Conditional Use Permit may be denied.</p>	
<p>1) <i>Equivalent to Permitted Use:</i> Any detrimental impacts or effects from the proposed use on any of the following shall not exceed those which could reasonably be expected to arise from a use that is permitted in the zone:</p> <ul style="list-style-type: none"> a. The health, safety, and welfare of the City and its present and future inhabitants and businesses; b. The prosperity of the City and its present and future inhabitants and businesses; c. The peace and good order, comfort, convenience and aesthetics of the City and its present and future inhabitants and businesses; d. The tax base; e. Economy in governmental expenditures; f. The State's agricultural and other industries; g. The urban and nonurban development; h. Access to sunlight for solar energy devices; or i. Property values. 	<p>The requested daycare facility is proposed to be in an existing multi-family residential building, a use that is compatible with adjacent residential properties, once the impacts are property mitigated.</p>

2)	<p><i>Impact Burden:</i> Any cost of mitigating or eliminating detrimental impacts or effects in excess of those which could be reasonably expected to arise from a permitted use shall become a charge against the development so as not to constitute a burden on the municipality, surrounding neighbors, or adjacent land uses.</p>	<p>Daycare centers have a unique traffic and circulation impact, as there is a tendency for peak uses in the morning and the evening during rush hour times where the roads are also in much heavier use. The limited number of children for this home daycare will create very limited impact. The applicant is encouraged to stagger drop off and pick up times in order to reduce any possible detrimental effects from increase traffic.</p>
3)	<p><i>Conform to the Objectives of the General Plan:</i> The proposed conditional use shall not limit the effectiveness of land use controls, imperil the success of the General Plan for the community, promote blight or injure property values.</p>	<p>The proposed use does not limit the effectiveness of land use controls or the success of the General Plan. The proposed use is not anticipated to promote blight or injure property values. It is a daycare facility in the R-3 zoning district. Conditions of approval are proposed to mitigate impact to the surrounding properties.</p>

CONDITIONS OF APPROVAL

- 1) This Conditional Use Permit is for a daycare center located at 1080 South 1500 East, Apt. 13.
 - a. The applicant will submit a drop off and pick up schedule with staggered times proposed in order to mitigate traffic flow problems.
- 2) The applicant shall provide proof of having obtained and of having maintained, as may be periodically requested by the City, all applicable local, state, and federal permits.

ATTACHMENTS



PLANNING COMMISSION STAFF REPORT

AGENDA
ITEM
#7

TO: Planning Commission

FROM: Scott A. Hess
Development Services Manager
scott.hess@clearfieldcity.org (801) 525-2785

MEETING DATE: January 8, 2014

SUBJECT: Discussion and Possible Action on **CUP 1312-0002**: A request by Lori Laws for a Conditional Use Permit for a Pet Grooming Service, located at 513 North 1000 West (TIN: 14-065-0112), a 0.20 acre parcel which lies in the B-1 (Buffer) zoning district.

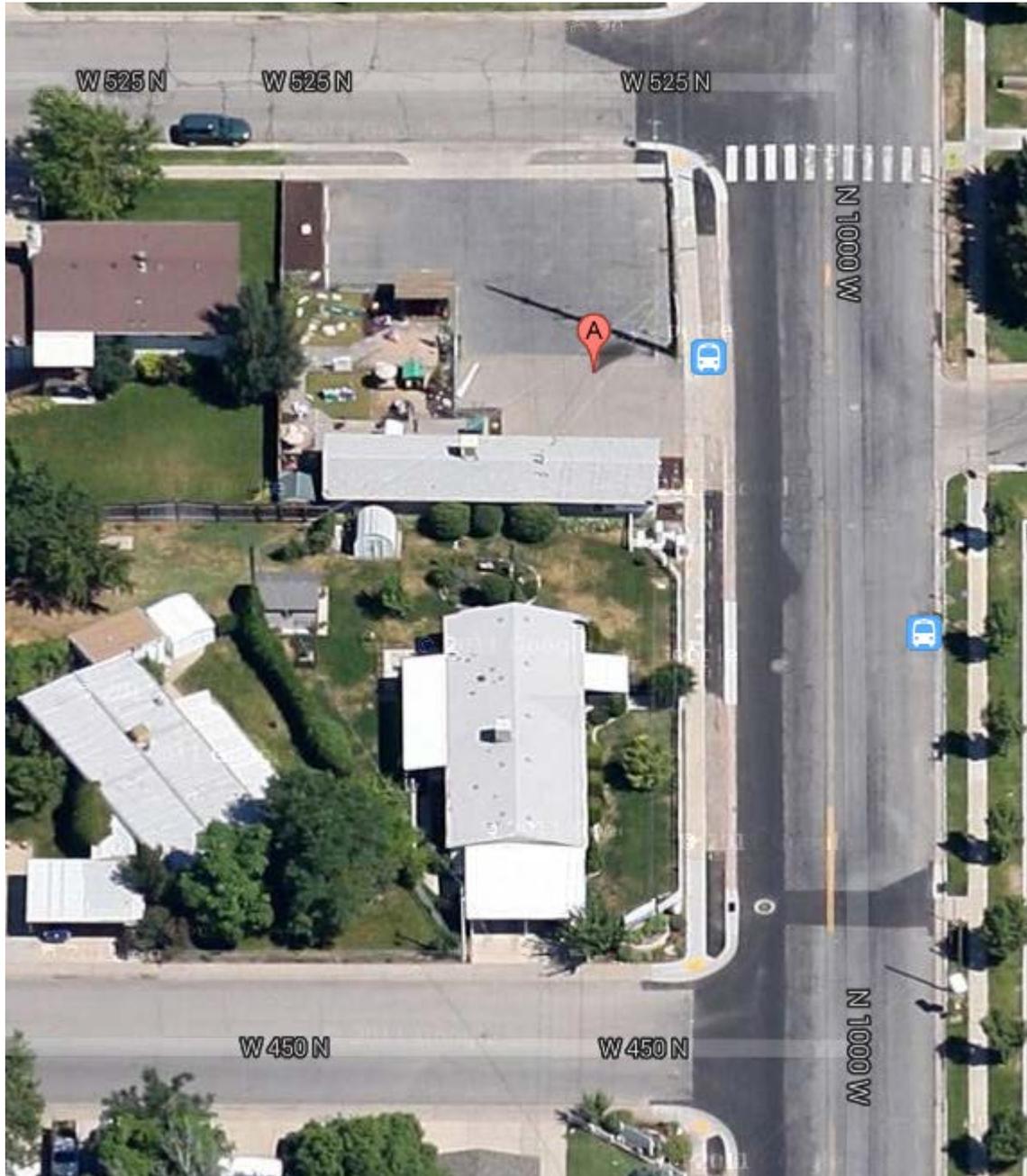
RECOMMENDATION

Move to **approve as conditioned**, CUP 1312-0002, a Conditional Use Permit for Riverside Grooming and Pet Spa, a commercial facility in the B-1 (Buffer Zone) zoning district located at 513 North 1000 West, based on the findings and discussion in the Staff Report.

PROJECT SUMMARY

Project Information	
Project Name	Riverside Grooming and Pet Spa
Site Location	513 N. 1000 W.
Tax ID Number	14-065-0112
Applicant	Lori Laws
Property Owner	Reed Thurgood
Proposed Actions	Conditional Use Permit
Current Zoning	B-1 (Buffer Zone)
Master Plan Land Use	Commercial
Gross Site Area	0.20 Acres

Vicinity Map



Surrounding Properties and Uses:		Current Zoning District	Comprehensive Plan Land Use Classification
North	539 N. 1000 W. Single Family Home	B-1 (Buffer Zone)	Commercial
East	448 N. 1000 W. Davis School District	A-1 (Agriculture)	Residential

South	Sundown Mobile Home Community	R-M (Mobile Home Residential)	Residential
West	1025 W. 525 N. Single Family Home	R-1-8 (Residential)	Residential

HISTORY

The building at 513 N. 1000 W. has held a variety of uses. Most notably it was used as a small Barber Shop. In 2007, Reed Thurgood went through a Site Plan and Conditional Use process to convert the structure to a day care facility. At that time, landscaping was brought up to the current 10% code requirement. The current request is for a pet grooming service as a conditional use permit as allowed under the definition of Veterinary Services.

ANALYSIS

Comprehensive Plan and Zoning

The property is currently zoned B-1 (Buffer) and Master Planned Commercial. The Buffer Zone was created to act as a pseudo-commercial zone that would allow low impact commercial services that are compatible uses adjacent to residential zones. The City's Master Plan shows this area of 1000 West to remain in some form of Commercial use, with the surrounding properties to the west to remain Residential.

For this review, staff has not considered this a "change of use" as per City Code due to the property moving from a previously approved commercial use, Nana's Daycare, to another conditionally approved commercial use, pet grooming facility. The review for the Conditional Use Permit relies on the 2007 Site Plan review that Nana's Daycare operated under, and Staff does not see a reason to require the current applicant to undergo another Site Plan review at this time.

Conditional Use Permit Review

The purpose of the CUP is to allow a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, *may* be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

The current request is for a Conditional Use Permit (CUP) for a pet grooming business. The B-1 zone allows Veterinary Services. The definition of Veterinary Services states: "An establishment for the care, treatment, and grooming of animals, including household pets, livestock and commercial poultry. All facilities are to be within completely enclosed buildings, except exercising runs." The applicant is requesting a household pet grooming facility under this definition. The use is primarily operated during normal business hours, with no pets that would be kept overnight or for long term care. There is an enclosed fenced area to the west and north of the structure that would be used for animal potty breaks. The animals and grooming services would be kept indoors. The specific impact that will need review is for noise mitigation for surrounding residential uses.

Noise Mitigation

The applicant will be required to perform all grooming services indoors and keep all animals indoors in order to reduce noise associated with having multiple animals on one property. If animals are let outside for potty breaks, staff would recommend that this be done one at a time in order to avoid multiple barking dogs that could become a noise nuisance. For the most part, this use is consistent with residential uses and people owning pets of their own. So long as this use does not become an obnoxious barking noise generator, it will seamlessly fit into the existing fabric of the residential neighborhood.

Parking, Circulation, and Access

The property currently has twelve parking spaces with at least one indicated as ADA accessible parking spot provided. This far exceeds the required 2 spaces per 1,000 square feet as required by Personal Services. The property is flanked by 1000 West and 525 North with drive approaches on either street. Traffic in this area is consistent, but not heavy. Morning and evening commuters contribute to the highest traffic loads. A low impact commercial business such as a pet grooming will not create an additional obnoxious traffic burden.

Proposed Fencing

The property has an existing fence between the B-1 zone and all residential zones. This includes a fenced yard area on the north and west sides of the property. Portions of the fenced yard area make up the 10% landscaping requirement with additional landscaping being provided as a buffer on the west edge of the property between the B-1 and R-1-8 zones.

Public Comment

No public comment has been received to date.

GENERAL STANDARDS

Conditional Use Permit Review

Clearfield Land Use Ordinance Section 11-4-3 establishes the general standards and determination the Planning Commission shall make to approve Conditional Use Permits. The findings and staff’s evaluation are outlined below:

General Standard		Staff Analysis
<p>DETERMINATION: A Conditional Use Permit shall be approved if conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with the standards set forth [in the Land Use Code]. If the reasonably anticipated detrimental impacts or effects of the proposed conditional use cannot be substantially mitigated or eliminated by the proposal or the imposition of conditions to achieve compliance with the standards set forth [in the Land Use Code], the Conditional Use Permit may be denied.</p>		
1)	<p><i>Equivalent to Permitted Use:</i> Any detrimental impacts or effects from the proposed use on any of the following shall not exceed those which could reasonably be expected to arise from a use that is permitted in the zone:</p>	<p>The requested pet grooming facility is proposed to be in an existing building within the B-1 (Buffer) Zone, a use that is compatible with adjacent residential properties, once the impacts are property mitigated.</p>

	<ul style="list-style-type: none"> a. The health, safety, and welfare of the City and its present and future inhabitants and businesses; b. The prosperity of the City and its present and future inhabitants and businesses; c. The peace and good order, comfort, convenience and aesthetics of the City and its present and future inhabitants and businesses; d. The tax base; e. Economy in governmental expenditures; f. The State's agricultural and other industries; g. The urban and nonurban development; h. Access to sunlight for solar energy devices; or i. Property values. 	
<p>2)</p>	<p><i>Impact Burden:</i> Any cost of mitigating or eliminating detrimental impacts or effects in excess of those which could be reasonably expected to arise from a permitted use shall become a charge against the development so as not to constitute a burden on the municipality, surrounding neighbors, or adjacent land uses.</p>	<p>The noise associated with the keeping of multiple animals can be mitigated by keeping animals indoors, and only letting them out one and a time, or in a manner that limits their ability to bark uncontrollably. All grooming services must be kept indoors. The roads adjacent to the proposed grooming facility have a tendency for peak uses in the morning and the evening during rush hour times where the roads are also in much heavier use.</p>
<p>3)</p>	<p><i>Conform to the Objectives of the General Plan:</i> The proposed conditional use shall not limit the effectiveness of land use controls, imperil the success of the General Plan for the community, promote blight or injure property values.</p>	<p>The proposed use does not limit the effectiveness of land use controls or the success of the General Plan. The proposed use is not anticipated to promote blight or injure property values. It is a pet grooming facility in the B-1 zoning district. Conditions of approval are proposed to mitigate impact to the surrounding properties.</p>

CONDITIONS OF APPROVAL

- 1) This Conditional Use Permit is for a pet grooming facility located at 513 N. 1000 W.
 - a. The applicant will be required to perform all grooming services within the structure.
 - b. Any animals let outside for potty breaks must be done so one at a time or in a manner that will limit obnoxious noise and or barking.
 - c. Fencing on the south and west side of the property must be in good repair in order to limit the ability for any animals to escape the enclosed fenced area.

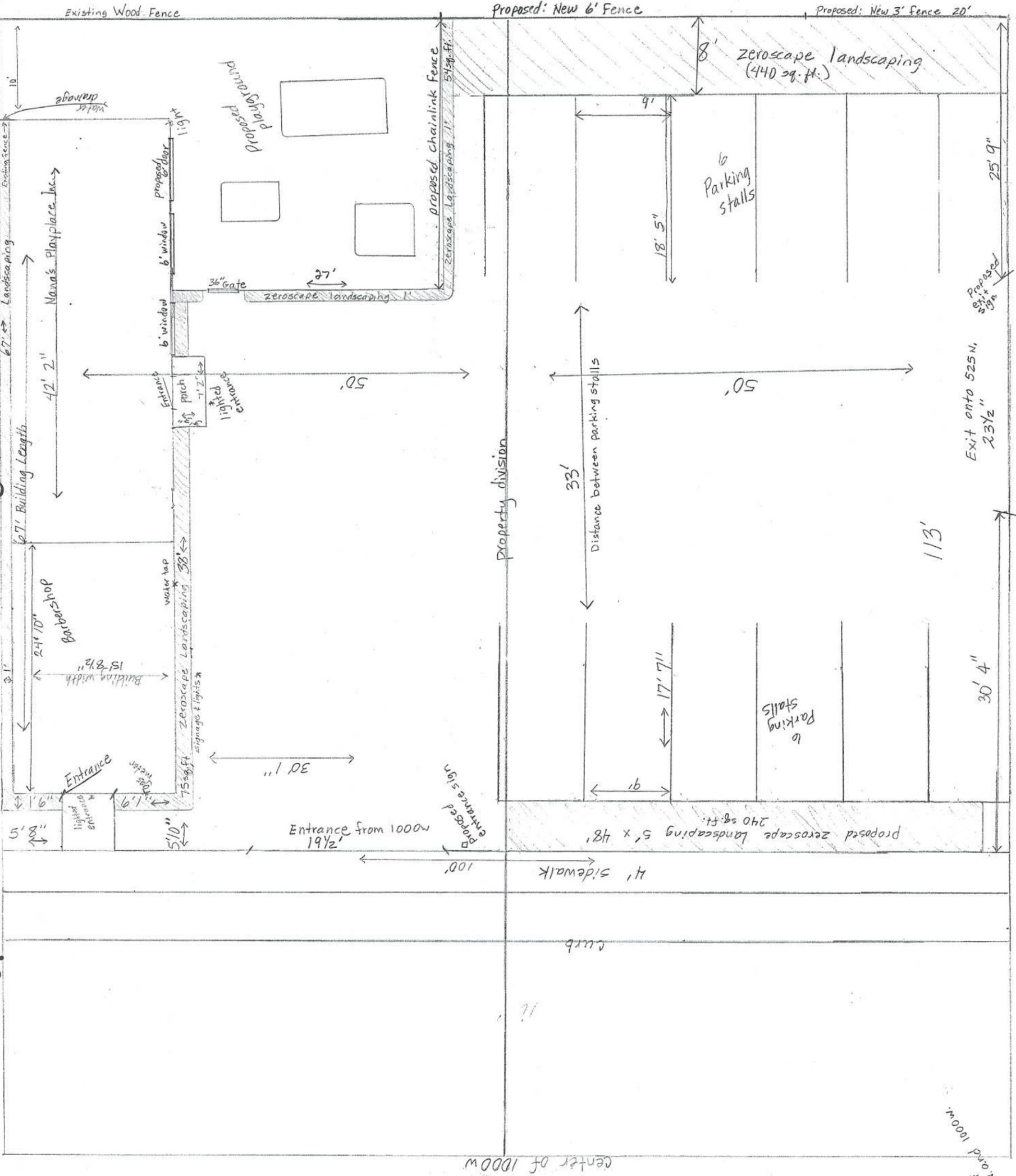
- 2) The applicant shall provide proof of having obtained and of having maintained, as may be periodically requested by the City, all applicable local, state, and federal permits.

ATTACHMENTS

- 2007 Site Plan for Nana's Playplace – representing existing conditions.

Nana's Playplace Inc., Daycare and Learning Center 513N 1000W.

Proposed Landscape
876 sq. ft



DR. Regie Clelland and Kandy Borup
801-540-6807
801-725-7529



Corner of 525 N and 1000 W



Planning Commission

STAFF REPORT

AGENDA ITEM
#8

TO: Clearfield City Planning Commission

FROM: Scott A. Hess
Development Services Manager
scott.hess@clearfieldcity.org (801) 525-2785

MEETING DATE: January 8, 2014

SUBJECT: Public Hearing, Discussion and Possible Action on **CUP 1304-0011**, a request by Scott Hart for a Conditional Use Permit for an automotive repair use and possible outdoor storage, Jim's Tires, located at 1181 South State Street (TIN: 12-067-0081) which property lies in the C-2 (Commercial) zoning district.

RECOMMENDATIONS

Move to **approve as conditioned**, CUP 1304-0011, a Conditional Use Permit for an automotive repair use and possible outdoor storage, Jim's Tires, located at 1181 South State Street (TIN: 12-067-0081) which property lies in the C-2 (Commercial) zoning district would be issued, based on the findings and discussion in the staff report.

THE SITE

The site is developed with a building that consists of 5,056 square feet, two offices, a glass shop and four service bays. There are currently four businesses that are operating at this location. They are shown in the table below. The property owner is Brian Allred, who is also associated with A&B Glass.

Business Name	Type of Business	Address	Primary Owner
A AND B GLASS INC.	Glass repair	1181 S STATE ST	Brian Allred
EL CHAMO AUTO REPAIR, L.L.C.	Safety, emissions & inspection	1181 S STATE ST	Jose Criollo Jr
JIMS CARS	Used car sales	1181 S STATE ST	Scott Hart
JIMS USED TIRES LLC	Used tire sales	1181 S STATE ST	Scott Hart

PROJECT SUMMARY

Project Information	
Project Name	Jim's Tires
Site Location	1181 S. State Street
Tax ID Number	12-067-0081
Applicant	Scott Hart
Property Owner	Brian Allred
Proposed Actions	Conditional Use Permit
Current Zoning	C-2 (Commercial)
Master Plan Land Use	Commercial
Gross Site Area	0.56 acres (24,394 SF)
Jim's Tires	2,520 SF ¹ (Minus El Chamo Service Bay Space)
Jim's Used Cars Office	360 SF
A&B Glass	1,744 SF
Other Office Space	432 SF
Accessory Outdoor Storage	+/- 2,500 SF for tires; +/- 800 SF for vehicles awaiting repair

Development Standards:	Proposed	Required
Lot Size	0.56 acres	No minimum
Lot Width	168 feet	35 feet
Setbacks		
Front	>5 feet	5 feet
Side	>0 feet	0 feet
Rear	>0 feet	0 feet
Landscaping	600 square feet	10%
Parking Spaces	Unknown	18 spaces

¹ Information obtained from Davis County Assessor's Office

Vicinity Map



	Surrounding Properties and Uses:	Current Zoning District	Comprehensive Plan Land Use Classification
North	Almosta Junction and Pratts Subdivision (residential homes)	C-2 (Commercial Zone) and R-3 (Multiple Family Residential)	Commercial
East	Existing residential home (owned by same property owner as 1181 South State)	C-2 (Commercial Zone)	Commercial
South	Vacant, undeveloped commercial property	C-2 (Commercial Zone)	Commercial
West	State Street, then UTA Clearfield Station Site	C-2 (Commercial Zone) and M-1 (Manufacturing Zone)	Mixed-Use

BACKGROUND

The project site is a 0.56-acre parcel located on the east side of State Street just north of the intersection at 1000 E. The property is master planned commercial with corresponding C-2 zoning.

A site plan was approved for a car lot at this address on May 6, 2009. Conditions of that site plan approval included:

- Removal of the tire rack
- Removal of the carport
- Finished landscaping along the south edge of the property
- Enclosing the dumpster
- Removing the pole sign (only if Mr. Mauris took over the lot, which was not the case)
- No off-premise signage

Compliance with these conditions has unfortunately been less than complete, resulting in a Notice of Non-Compliance being issued earlier this year. Enforcement efforts will continue on an administrative level with the property owner and the businesses on site.

One outcome of recent enforcement efforts is that the applicant now seeks the requisite Conditional Use Permit that would allow him to conduct automotive repair on the site. Any conditions approved pursuant to this application would be in addition to the conditions already placed on the site plan. The site would be monitored regularly for compliance with the conditions.

The applicant went in front of the Planning Commission in September 2013 for CUP Review, and asked that the item be continued to a later date. The applicant has prepared a site plan with limited detail outlining their proposal for storage and striping of parking as it relates to the entire site.

ANALYSIS

The purpose of the CUP is to allow a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, *may* be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

AUTOMOTIVE REPAIR

"Automotive repair," as defined by the City's land use ordinance, on this site has not been a use that has obtained previous approvals through the Conditional Use Permit process, though the building appears to have been constructed for this type of use. Chapter 3 of the Land Use Ordinance defines Automobile Repair as "*Any activity that involves the repair of any passenger auto, pickup truck, trailer, semitrailer, recreational vehicle or other vehicle where the repair includes, but is not limited to, bodywork and collision repair; the rebuilding of engines, transmissions, or differentials; electrostatic or air gun spray painting of vehicles; inspections; tune ups; oil changes; glass, tire, or brake work; or similar repairs.*"

Tire sales and installation, the primary business of Jim's Used Tires, falls under this definition, and requires a Conditional Use Permit. However, more extensive repair work is also being performed on the site. The applicant has stated that he repairs cars that he has purchased in order to then be able to sell them through Jim's Used Autos. In addition, there is a sign on the building advertising "Jim's Total Car Care," with general mechanic services available to the public.

One type of impact of automotive repair that could warrant conditions is environmental. For example, oil and other hazardous material should be stored and disposed of properly. To prevent contamination of the storm drainage system, fluids should not be allowed to leak onto the ground, and automotive parts/scrap should be disposed of in enclosed containers. Also, the business' used tire inventory must be stored per Clearfield City Code 11-13-12 (not visible from the street, behind a fence, and on an *impermeable surface*).

From an aesthetic standpoint, there may be a concern with having inoperable vehicles (awaiting repair) stored in locations visible from the Street. Perhaps conditions should be considered that limit the location and/or number of vehicles. (See also "Outdoor Storage.")

Another option for the Planning Commission's consideration is to limit the time a vehicle awaiting repairs may sit on the property before being considered outdoor storage. In a recent CUP review of the Rey Auto Emissions site, a timeframe of 48 hours was imposed. Inoperable Vehicles that must be parked in wait for longer than 48 hours would be considered outdoor storage and must be parked on hard surface and screened according to City Code. No long term outdoor storage for vehicles is being proposed by the applicant, so it is Staff's hope that the applicant can comply with this request and not leave vehicles parked in the front parking lot for extended periods of time awaiting repairs.

OUTDOOR STORAGE

There appears to be about 2,500 square feet of outdoor storage of tires behind the building. There also appear to be several parking spaces being used for storage of vehicles awaiting repair. The entire building, consisting of four businesses combined, is 5,056 square feet. Jim's Tires occupies about 2,520 square feet. Outdoor storage in the C-2 zoning district is only permitted as an ancillary use, not as a principal or primary use. **The Commission will need to determine if the proposed amount of outdoor storage is consistent with C-2 zoning.**

As defined in Chapter 3 of the Land Use Ordinance an accessory use is "*a use which is incidental and subordinate to the prescribed permitted use within any respective zoning provisions.*" Typically, in an analysis of principal use versus accessory use, the principal use is determined to be the use that is predominate and usually quantified by calculating square footage. In this instance, it appears the square footage of the outdoor storage area is similar in size to the square footage of the shop space occupied by Jim's Tires. Code does not define if there is a percentage that cannot be exceeded when having an accessory use on site.

A condition of approval is proposed later in this report that does permit the accessory use of an outdoor storage area, but limits the tire storage area to 2,500 square feet, and the vehicle storage to 800 square feet (more or less the existing condition).

The applicant has requested that surface improvement for the tire storage not be required. Staff made an inquiry into the costs associated with paving the rear storage. Depending on asphalt surface depths and the preparation of the existing compacted base material it is estimated that the cost would be \$1,500 to \$3,000 to bring this item into compliance. Staff would recommend

giving the applicant until July 1, 2014 to complete this item in order to reduce the immediate burden.

The Planning Commission may or may not agree with this finding and may choose to alter the Condition of Approval, or not permit outdoor storage altogether.

FENCING

One measure of mitigation of the use and the related storage needs is the requirement for fencing. Pursuant to the Land Use Ordinance 11-11B-12(C) *Walls or fences may be required along all property lines which are adjacent to a residential zone or use or public right of way. The exact location, height and type of materials of the wall or fence shall be approved by the planning commission as part of the site plan approval process.*

The applicant had previously indicated a desire to erect a new fence behind the building, but that is apparently no longer the plan. Currently in place is a 6' tall chain link fence, with barbed wire at the top. The adjacent property to the east (a single-family residence, zoned C-2) belongs to the same owner as the business property (Brian Allred). A condition of approval is proposed later in this staff report that would allow the existing fence to remain, as long as slats are inserted into it.

Screening on the fence is currently being accomplished with vinyl banner material that has been affixed to the fence. This is a short term solution at best, and staff is concerned with the lifespan of this screening material. Staff would recommend fence slats or a solid fence be constructed. Staff would recommend giving the applicant until July 1, 2014 to complete this item in order to reduce the immediate burden. **The Commission may or may not agree with this finding, and may choose to alter the condition of approval.**

PARKING

Parking on the site is somewhat confusing, due to the combination of four business—one being car sales. Striping would probably help to identify customer and ADA parking versus cars on the lot for sale. Striping would also help to ensure that the access drives are kept unobstructed.

According to information provided by the County Assessor's office, there is approximately 5,056 square footage of commercial use on the site. At 3.5 spaces per 1,000 square feet of floor area (based on intensive commercial use), a minimum of 18 stalls for the combination of businesses, and at least one ADA compliant stall, must be clearly marked. (This ratio is intended to also account for employee parking.) If the use is considered to be less intensive, the ratio would be as low as 1.5 spaces per 1,000 square feet of floor area (8 stalls).

In the September Planning Commission meeting, a compromise of 12 stalls was reached. The spaces must meet the required 9'x20' dimension, and at least one space must be ADA accessible. These spaces are not to be used by vehicles for sale, or those awaiting repairs. The 12 spaces represent employee and customer parking.

A condition of approval for parking is included in this staff report. **The Commission may or may not agree with the finding, and may choose to alter the condition of approval.**

DESIGN STANDARDS

Since no exterior changes are being proposed to the building, the design standards requirements of Title 11, Chapter 18 do not come into play.

LANDSCAPING

The site plan approved in May 2009 required that landscaping be installed along the south edge of the property. That was completed, but the landscaping is not being adequately maintained.

GENERAL STANDARDS

Clearfield Land Use Ordinance Section 11-4-3 establishes the general standards and determination the Planning Commission shall make to approve Conditional Use Permits. The findings and staff's evaluation are outlined below:

General Standard		Staff Analysis
<p>DETERMINATION: A Conditional Use Permit shall be approved if conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with the standards set forth [in the Land Use Code]. If the reasonably anticipated detrimental impacts or effects of the proposed conditional use cannot be substantially mitigated or eliminated by the proposal or the imposition of conditions to achieve compliance with the standards set forth [in the Land Use Code], the Conditional Use Permit may be denied.</p>		
1)	<p><i>Equivalent to Permitted Use:</i> Any detrimental impacts or effects from the proposed use on any of the following shall not exceed those which could reasonably be expected to arise from a use that is permitted in the zone:</p> <ul style="list-style-type: none"> a. The health, safety, and welfare of the City and its present and future inhabitants and businesses; b. The prosperity of the City and its present and future inhabitants and businesses; c. The peace and good order, comfort, convenience and aesthetics of the City and its present and future inhabitants and businesses; d. The tax base; e. Economy in governmental expenditures; f. The State's agricultural and other industries; g. The urban and nonurban development; h. Access to sunlight for solar energy devices; or i. Property values. 	Refer to text in report.
2)	<p><i>Impact Burden:</i> Any cost of mitigating or eliminating detrimental impacts or effects in excess of those which could be reasonably expected to arise from a permitted use shall become a charge against the development so as not to constitute a</p>	Refer to text in report.

	burden on the municipality, surrounding neighbors, or adjacent land uses.	
3)	<i>Conform to the Objectives of the General Plan:</i> The proposed conditional use shall not limit the effectiveness of land use controls, imperil the success of the General Plan for the community, promote blight or injure property values.	Refer to text in report.

PROPOSED CONDITIONS OF APPROVAL

- 1) This Conditional Use Permit is for an automobile repair use and limited ancillary outdoor storage.
- 2) Absolutely no automotive repair services shall be conducted outside of the building's service bays.
- 3) The outdoor storage area for tires shall not exceed 2,500 square feet (approximately 50 percent of the square footage of the principal building). No visibility or stacking of materials that exceed six feet high or the height of the lowest portion of the fence shall be permitted. At all times this storage must remain in compliance with the International Fire Code and other environmental regulations (County, State, or Federal). The fencing material shall consist of slatted chain link. In accordance with City Code 11-13-12, the storage surface shall be impermeable. Applicant has until July 1, 2014 to comply.
- 4) Screening for fencing shall be kept in good repair. This may include providing slats in the chain link to facilitate a more permanent screening option than is currently being utilized by the applicant. Applicant has until July 1, 2014 to comply.
- 5) The outdoor storage area for vehicles awaiting repair shall not exceed 800 square feet and shall be located on a paved surface along the south edge of the property.
- 6) Vehicles awaiting repairs may not be located on site for longer than 48 hours. If vehicles for repair must wait longer than 48 hours the vehicles shall be kept on an impermeable surface and screened as required by City Code 11-13-12.
- 7) Exclusive of spaces used to display vehicles for sale and for vehicles awaiting repair, a minimum of twelve (12) parking spaces (for employees and customers) shall be provided and maintained at all times. Parking stalls shall meet the minimum dimensions of City Code. The stalls shall be paved and signed, as appropriate. The parking lot shall be striped in a manner consistent with the site plan approval of May 2009, and Clearfield City Code, and shall clearly identify customer parking for all businesses on site, as well as ADA parking. At least one stall shall be ADA compliant. Striping shall also be made for car sales, and to delineate adequate ingress/egress from both drive access points. The striping plan shall provide for reasonable vehicular circulation through the site.
- 8) The site shall be maintained in a neat and orderly manner and have no abandoned or leaking automotive parts except in a closed container for disposal.
- 9) The oil separator shall be cleaned and proper working order verified by the Public Works Department. It may be necessary to install a cap on top of the sewer line.
- 10) The applicant shall provide proof of having obtained and of having maintained, as may be periodically requested by the City, all applicable local, state, and federal permits.

- 11) There shall be no overflow parking offsite (on the lots to the south or east, on the street, or otherwise).
- 12) This CUP shall be reviewed by the Planning Commission for compliance six months from the date of initial approval, and then again at one year from date of approval. At that time the Planning Commission will determine if annual reviews will still be required.
- 13) For this Conditional Use Permit to be in full force and effect, the Conditions of Approval shall be acknowledged and accepted in writing by both the tenant/business owner and the property owner, as joint applicants.

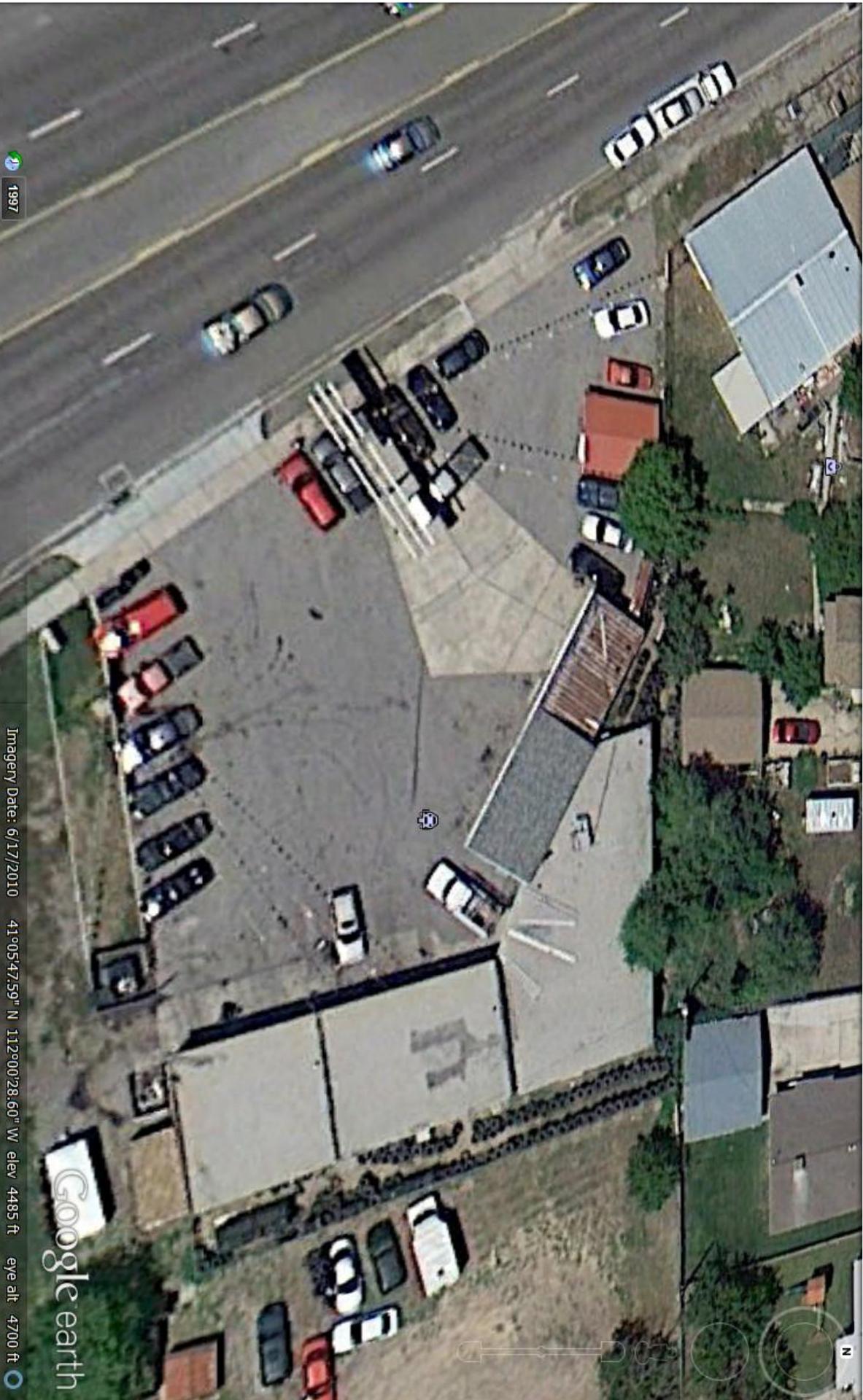
ALTERNATIVES

Other than approving the CUP and conditioning it as necessary, the Commission has the following alternatives:

- Continue the item to a future date, specifying the information needed before considering the item again.
- Deny the conditional use permit, but only if the detrimental impacts cannot be substantially mitigated or eliminated.

ATTACHMENTS

1. Applicant provided parking plan
2. Applicant provided hand drawn Site Plan
3. North Davis Fire Letter – May 14, 2013



1997

Imagery Date: 6/17/2010 41°05'47.59" N 112°00'28.60" W elev 4485 ft eye alt 4700 ft

Google earth

Site Plan- JIMS Tires 1181 S. State St. c/fld

W

State St.

1510
1510

Grass

Dumpster

Striped Parking Stalls (Minimum of 12)



out door Storage (Road Base-Gravel)

6' Fence

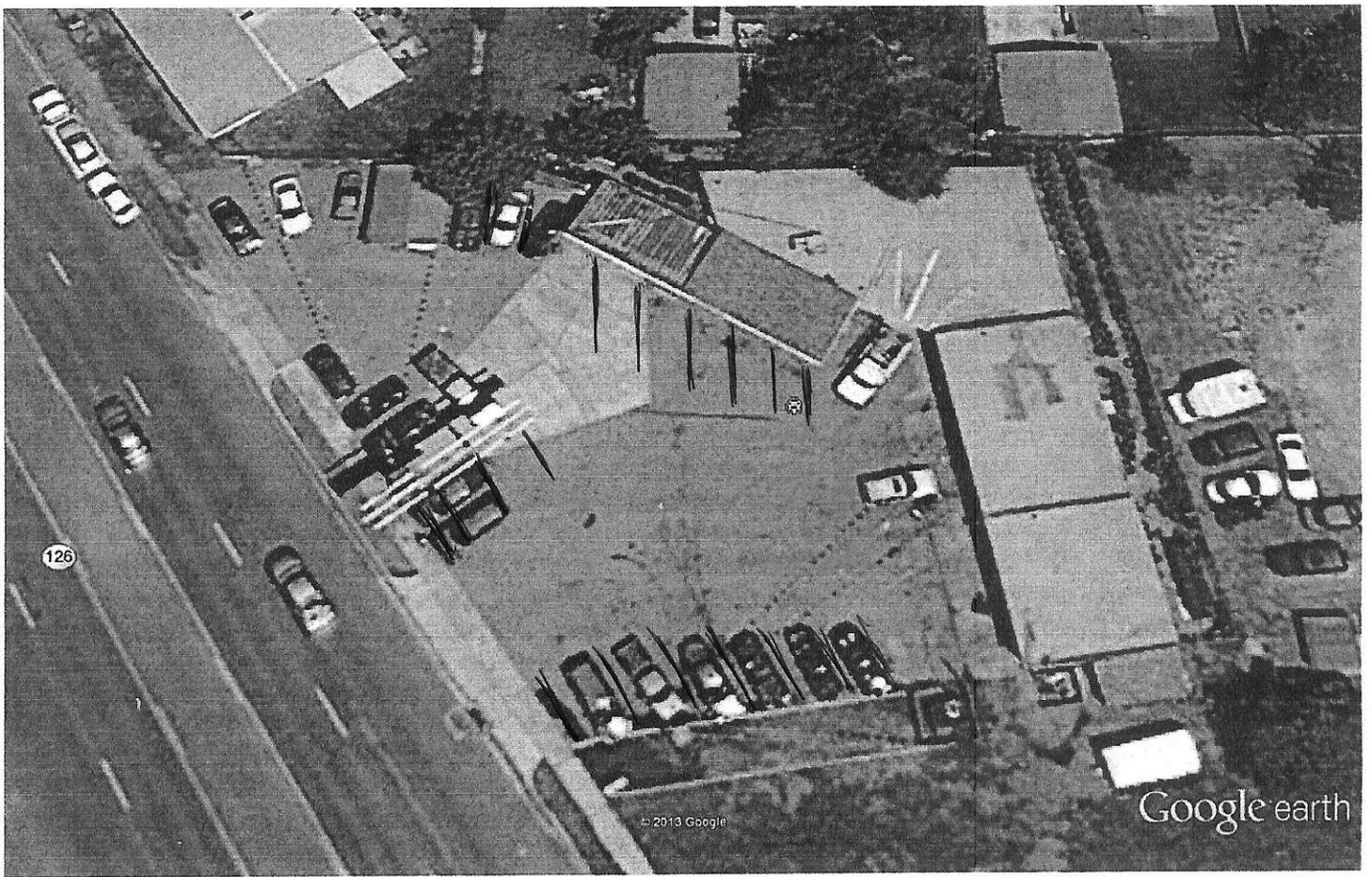
6' Fence

Screened from Public View

Screened from Public View

S

E



Google earth

feet
meters



1181 S State

Jims Tires



*From the Desk of
Chief Becraft*

NORTH DAVIS FIRE DISTRICT
381 NORTH 3150 WEST
OFFICE: (801) 525-2850
FAX: (801) 525-6935
EMAIL: MABECRAFT@NOFIRES.ORG

To : Valerie Claussen
From: Chief Becraft
Subject: CUP 1304-0011 Jim's Tires
Date: May 14, 2013

The International Fire Code specifically addresses outdoor storage of tires in section 2505, chapter 25. Listed below are the requirements; The North Davis Fire District requires site plan submittal that included tire storage height, width, distance from lot lines, building etc. This will ensure proper commodity storage is within fire code. If you have any questions, please feel free to contact me.

2505.1 Individual piles. Tire storage shall be restricted to individual piles not exceeding 5,000 square feet (464.5 m²) of continuous area. Piles shall not exceed 50,000 cubic feet (1416m³) in volume or 10 feet (3048 mm) in height.

2505.2 Separation of piles. Individual tire storage piles shall be separated from other piles by a clear space of at least 40 feet (12 192 mm).

2505.3 Distance between piles of other stored products. Tire storage piles shall be separated by a clear space of at least 40 feet (12 192 mm) from piles of other stored product.

2505.4 Distance from lot lines and buildings. Tire storage piles shall be located at least 50 feet (15 240 mm) from *lot lines* and buildings.

2505.5 Fire breaks. Storage yards shall be maintained free from combustible ground vegetation for a distance of 40 feet (12 192 mm) from the stored material to grass and weeds; and for a distance of 100 feet (30 480 mm) from the stored product to brush and forested areas.

2505.6 Volume more than 150,000 cubic feet. Where the bulk volume of stored product is more than 150,000 cubic feet (4248 m³), storage arrangement shall be in accordance with the following:

1. Individual storage piles shall comply with size and separation requirements in Sections 2505.1 through 2505.5.
2. Adjacent storage piles shall be considered a group, and the aggregate volume of storage piles in a group shall not exceed 150,000 cubic feet (4248 m³). Separation between groups shall be at least 75 feet (22 860 m) wide.

Sincerely

Mark Becraft

2505.7 Location of storage. Outdoor waste tire storage shall not be located under bridges, elevated trestles, elevated roadways or elevated railroads.

SECTION 2506 FIRE DEPARTMENT ACCESS

2506.1 Required access. New tire storage yards shall be provided with fire apparatus access roads in accordance with Section 503 and Section 2506.2. Existing tire storage yards shall be provided with fire apparatus access roads where required in Chapter 46.

2506.2 Location. Fire apparatus access roads shall be located within all pile clearances identified in Section 2505.4 and within all fire breaks required in Section 2505.5. Access roadways shall be within 150 feet (45 720 mm) of any point in the storage yard where storage piles are located, at least 20 feet (6096 mm) from any storage pile.

SECTION 2507 FENCING

2507.1 Where required. Where the bulk volume of stored material is more than 20,000 cubic feet (566 m³), a firmly anchored fence or other *approved* method of security that controls unauthorized access to the storage yard shall surround the storage yard.

2507.2 Construction. The fence shall be constructed of *approved* materials and shall be at least 6 feet (1829 mm) high

and provided with gates at least 20 feet (6096 mm) wide.

2507.3 Locking. All gates to the storage yard shall be locked when the storage yard is not staffed.

2507.4 Unobstructed. Gateways shall be kept clear of obstructions and be fully openable at all times.



Planning Commission

STAFF REPORT

AGENDA ITEM
#10

TO: Clearfield City Planning Commission

FROM: Scott A. Hess
Development Services Manager
scott.hess@clearfieldcity.org (801) 525-2785

MEETING DATE: January 8, 2014

SUBJECT: Discussion and Recommendation for Action on Zoning Text Amendments related to Non-Depository Institutions

RECOMMENDATIONS

Consider staff provided information and provide direction and next steps for staff.

BACKGROUND

In January 2012, Clearfield City adopted 11-13-29 regulating Payday Lending Establishments. Payday Lending Establishments are specifically defined by the State of Utah, and Clearfield Code identifies only Utah Code Annotated title 7, chapter 23 in its regulations.

In an attempt to provide a fair business environment while limiting uses that may have detrimental effects to the community, the Planning Commission asked staff to consider regulations for all types of non-depository institutions.

ANALYSIS

Utah State Department of Financial Institutions is the regulating agency for banks, credit unions, and other non-depository institutions. The term non-depository institution is used to define lending agencies whose primary service is providing financial products, and not operating as a federally insured deposit institution.

The State requests these institutions to fill out a self-reported aggregate of information. This report does not specify information for title lending, payday lending, or any other type of lending in particular, but acts as an aggregate for the entire lending sector.

The report completed for 2012 has been included in this packet, and contains information from 78 institutions. The average loan amount extended was \$358, the average annual interest rate was 473.52%, and the average payment for loans was \$393. There is little to no comparison to be made between these types of lending products and those offered at a bank or credit union. These loan rates are clearly much higher.

In an attempt to collect information about title lending, I researched various academic articles written on the subject. The information available specific to title lending is fairly slim compared to payday lending, but there are journal articles and academic pieces that are beginning to build the literature base. I have included three articles for your consideration. These are probably overkill, and you do not need to read them all. It would be worth your time to look through them and make your own observations on the practice of title lending.

To help understand exactly what title lending is about, I will provide a description from the Missouri Law Review, "A title loan is a high-interest, deeply over-secured consumer loan, in which the consumer uses as unencumbered automobile as collateral for a non-purchase money loan." The term "deeply over-secured" related to the fact that many title lenders will offer only 25-40% of the value of a vehicle in order to reduce financial liability, and becoming upside down in a car they have loaned money on. This practice is very different from that of a local credit union or bank who will often offer up to 115% of the value of an automobile in order to cover purchase price, taxes, and sales fees.

An example of a title loan in process is provided by one article. A customer uses a \$10,000 vehicle as collateral for a \$4,000 loan. The loan payment amount is \$581.47 for eighteen months. That equates to a total payout of \$10,466.46 on a \$4,000 loan. As cited in the Grand Theft Auto Loans article, the title lender often has no interest in the loan applicant's ability to financially pay the loan back. Although the average default rate on these loans is difficult to know, it is easy to see that the lender is in a good position to recoup any loses through the sale of these vehicles due only loaning a fraction of the vehicle's value.

One interesting article speaks to the fact that these types of lenders prey on military personnel, and attempt to locate near bases and military institutions. Hill Air Force Base is a major economic driver for Clearfield City and the region, and it is clear that our area has a higher than average percentage of military personnel living in the area. Military families are often made up of young families beginning careers and their lives. They often have limited financial means, and may be in need of quick and easy financial resources to cover debts or family needs. Military personnel are also typically a captive clientele who are stationed at bases for 24 months or more at a time which guarantees for the title lending agency that the person will not be skipping town to avoid their debts.

Another interesting item noted by these articles is that non-depository lending businesses are one of the fastest growing segments in the business arena. One article states that there are more non-depository institutions than McDonald's and Starbucks combined in some states. The prolific nature of these businesses would suggest to me that they would not be burdened by one community's regulations or limitations.

I believe that the literature shows the predatory nature of the title lending business. For Clearfield City, we must consider how many of these types of businesses are equitable to have in our City. If we want to limit their numbers, I believe we need to be specific for the reasons, and have defensible code language drafted to back up the negative aspects we can show for our community.

ATTACHMENTS

1. Grand Theft Auto Loans - Article
2. Protecting our Protectors - Article
3. Credit on Wheels – Article

Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending

Nathalie Martin*
Ozymandias Adams**

This Article analyzes empirical data on one of America's fastest growing credit products, the title loan. A title loan is a high-interest, deeply over-secured, consumer loan, in which the consumer uses an unencumbered automobile as collateral for a non-purchase money loan. Title loans are made based solely on equity in a car. If a customer has insufficient income to pay the payments under the loan, typically interest-only payments at 300% per annum or more, the lender repossesses the vehicle, many of which have GPS trackers installed for this purpose. Not surprisingly, the repossession rates for title loans are higher than regular auto repossession rates, as well as home foreclosure rates. Prior to repossession, lenders recover their principal many times over. For example, one customer paid over \$10,000 on her \$4000 loan. Another paid over \$11,000 on a loan of \$1500. Despite these realities, title loans have garnered little interest in the scholarly world. While legislatures around the nation struggle with how to regulate home loans, credit cards, and other middle class products, title loans go largely unnoticed and unregulated. This Article reports on data about who uses these loans and how often, as well as on repossession rates. It concludes that, given the protections we have provided to middle class consumer credit users, we also should regulate the consumer credit products used primarily by the lower and working classes.

I. INTRODUCTION

Susan Price was recently in a legal aid office, looking for an easy answer to a complex problem.¹ She filed for bankruptcy in 2005 after she be-

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1. Ms. Price is a client in the University of New Mexico Clinical Law Program. Her name has been changed, but the numbers recounted here reflect her actual loan.

came disabled. She now receives \$980 a month in disability payments and her rent is \$550. Not so bad unless you consider her last move to make ends meet. She borrowed \$4000 to make it through the holidays and pay off some bills, using her \$10,000 Jeep as collateral.² The Jeep was the last vestige of her formerly middle class life.

Under the terms of her eighteen-month loan, she pays \$581.47 a month and will pay over \$10,466.46 to pay off the \$4000 loan.³ Another client, Sean, paid \$11,516 total on a \$1500 loan. He renewed his loan forty times before the borrower buried his pride and asked his parents to pay off the \$1500 in principal.⁴ As Sean later explained, "I was too embarrassed to ask my parents for the initial loan money, ended up borrowing money from them to make some of the payments and ultimately had to ask them to pay off the whole loan, after losing tons of money along the way."⁵

Welcome to the world of auto title lending. A title loan is a high-interest, deeply over-secured consumer loan, in which the consumer uses an unencumbered automobile as collateral for a non-purchase money loan.⁶ To qualify for a title loan, a borrower must own his or her vehicle outright and also must live in one of the thirty-six states that has no general interest rate or usury cap on consumer loans.⁷

Ms. Price's loan demonstrates one unique feature of title loans. We assert that of all the consumer loan products in existence, this product is the only one that is completely asset-based. With few exceptions, title lenders have no interest in whether the consumer borrowing the money can afford to pay back the loan or make the monthly interest payments.⁸ Ability to repay is not part of the underwriting process.⁹ Nor need it be in order for lenders to collect their loan and then some. Since some lenders lend at 40% of value or less,¹⁰ they can rely on the car if the borrower stops making the monthly payments. These practices also explain why some title lenders sell used cars

2. Loan contract between lender and Susan Price (May 17, 2010) (on file with Missouri Law Review).

3. *Id.*

4. Telephone interview with Sean (Mar. 25, 2010). Confidential University of New Mexico Clinical Law Program interview notes remain on file with authors.

5. *Id.*

6. See Christopher Neiger, *Why Car Title Loans are a Bad Idea*, CNN LIVING (Dec. 8, 2008), http://articles.cnn.com/2008-10-08/living/aa.car.title.loans_1_car-title-loan-interest-rates-responsible-lending-for-title-loans?_s=PM:LIVING.

7. See *infra* notes 75-90 and accompanying text.

8. See Todd J. Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 LOY. CONSUMER L. REV. 425, 433 (2010) [hereinafter *Consumer Use*].

9. See *id.*

10. See *The Harsh Reality of Car Title Loans*, TOTAL BANKRUPTCY BLOG (June 1, 2011, 9:51 AM), <http://www.totalbankruptcy.com/blog/the-harsh-reality-of-car-title-loans/>.

as well.¹¹ Only in this context would a lender loan \$4000 to someone who makes just \$980 a month. By structuring a loan with \$580 monthly payments from a person who makes less than \$1,000 a month, a lender can assure that he or she will end up with the payments for some period, and then the car.

Title lenders insist that they rarely repossess borrowers' cars.¹² They also claim that consumers understand the terms of these loans before they take out the loans¹³ and that their clientele is largely middle class.¹⁴ This Article, and the empirical data contained in it, challenges these statements and concludes that none of these claims are true.

Title loans have garnered little interest in the scholarly world,¹⁵ particularly compared to payday loans, a subject about which scholars have written dozens of articles.¹⁶ Up until now, only one scholar has studied the title loan

11. *See id.* Some lender parking lots are full of used cars and their signs read, "Buy here, pay here." *See, e.g.,* Title Cash of New Mexico, 2900 Eubank, NE, Albuquerque, New Mexico (Mar. 25, 2011).

12. *See Consumer Use, supra* note 8, at 435.

13. *See id.*

14. *See id.* at 441-42.

15. We have identified only one author who has written a scholarly article specifically about title loans, which is discussed below. *See Consumer Use, supra* note 8. For a discussion of this article, see *infra* notes 17-27 and accompanying text. A few scholars have written about title lending in the context of the broader topic of high-interest loans. *See* Lynn Drysdale & Kathleen E. Keest, *The Two Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589 (2000); Mark S. Edelman, Robert A. Aitken & Raechelle C. Yballe, *The Road Ahead: Emerging Trends in Personal Property Finance*, 63 BUS. LAW. 597, 597 (2008); Jean Ann Fox, *Fringe Bankers: Economic Predators or A New Financial Services Model?*, 30 W. NEW ENG. L. REV. 135 (2007); Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1394 (2011); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 166 (2010); Jessie Lundberg, Comment, *Big Interest Rates Under the Big Sky: The Case for Payday and Title Lending Reform in Montana*, 68 MONT. L. REV. 181 (2007). There also have been a few practitioner-oriented articles written that discuss title lending as part of the broader topic of consumer finance. *See* Frank Burt et al., *Journey to the Fringe: A Survey of Select Fringe Lending Products in 11TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE* 365-75 (PLI Corp. L. and Prac. Course, Handbook Series No. 8565, 2006) WL 1532 PLI/Corp. 349; Annesley H. DeGaris, *Car Title Lending*, 2 AMERICAN ASSOCIATION FOR JUSTICE: AAJ ANNUAL CONVENTION REFERENCE MATERIALS (July 2007); Daniel A. Edleman, *Fringe Lending in 11TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE* 416-17 (PLI Corp. L. and Prac. Course, Handbook Series No. 8565, 2006) WL 1532 PLI/Corp. 409.

16. *See* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004); Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 997 (2006); Carmen M. Butler & Niloufar A. Park, *Mayday Payday: Can Corporate Social Responsi-*

industry in any depth, and this scholar reached the following conclusions: 1) that title loans are better for consumers than payday loans, 2) that few customers have their cars repossessed when taking out title loans, 3) that the terms of title loans are transparent and easy for customers to understand, and 4) that most payday loan customers make \$50,000 or more a year.¹⁷ This scholar claimed to use New Mexico data to reach these conclusions.¹⁸

bility Save Payday Lenders?, 3 RUTGERS J.L. & URB. POL'Y 119 (2005); Daniel A. Edelman, *Payday Loans: Big Interest Rates and Little Regulation*, 11 LOY. CONSUMER L. REV. 174, 174-75 (1999); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 23-97 (2002); Ronald J. Mann & Jim Hawkins, *Just until Payday*, 54 UCLA L. REV. 855 (2007); Nathalie Martin, *1,000% Interest – Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010); Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 SW. L. REV. 785 (2010); Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSPECTIVES 169 (2007); Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 8 (2003); Therese Wilson, *The Inadequacy of the Current Regulatory Response to Payday Lending*, 32 AUSTL. BUS. L. REV. 193, 198-206 (2004); Michael Bertics, Note, *Fixing Payday Lending: The Potential of Greater Bank Involvement*, 9 N.C. BANKING INST. 133 (2005); Charles A. Bruch, Comment, *Taking the Pay out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1257 (2001); Diane Hellwig, Note, *Exposing the Loansharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567 (2005); Lisa Blaylock Moss, Commentary, *Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation*, 51 ALA. L. REV. 1725 (2000). For information on the general issue of fringe lending, see Barr, *supra*; Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005); Brooks, *supra*; Johnson, *supra* note 15; Angela Littwin, *Beyond Usury: A Study of Credit Card Use and Preferences Among Low-income Consumers*, 86 TEX. L. REV. 451 (2008); Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. the Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385 (1997); Moss, *supra*, at 1731-33.

17. See *Consumer Use*, *supra* note 8, at 427-43. A shorter version of this article appears in Todd Zywicki, *Money to Go*, 33 REGULATION 32 (2010), available at <http://www.cato.org/pubs/regulation/regv33n2/regv33n2-7.pdf> [hereinafter *Money to Go*]. See also Todd Zywicki & Gabriel Okolski, *Potential Restrictions on Title Lending*, 62 MERCATUS ON POL'Y 1, 1-2 (2009). Zywicki's three scholarly articles on the subject, all similar in content and all published in 2009 and 2010, can be wrapped up in one thought: title lending is useful to many consumers and should not be regulated. See *Consumer Use*, *supra* note 8, at 441-42; *Money to Go*, *supra*, at 37; Zywicki & Okolski, *supra*, at 3. Without any documentation, all of the articles insist that the typical customer of title lenders make about \$50,000 annually. See *Consumer Use*, *supra* note 8, at 442; *Money to Go*, *supra*, at 34; Zywicki & Okolski, *supra*, at 2. Zywicki and his co-authors rely almost exclusively on industry interviews to support their numbers, see, for example, *Consumer Use*, *supra* note 8, at 434 n.27, 442 n.59; *Money to Go*, *supra*, at 1 n.5; Zywicki & Okolski, *supra*, at 2 n.10, interviews that

The actual data from New Mexico, as well as from a number of other states, show that none of these facts are likely true. Co-author Ozymandias Adams interviewed each title lender in Albuquerque in business in October of 2011 to determine various industry practices and analyzed data collected by the state of New Mexico. This Article reflects the results of this comparison, along with other conclusions and insights into the typical terms of a title loan, the actual repossession rates nationwide, and the demographics of users.¹⁹ The Article also discusses the national problems with enforcement of licensing laws and describes the strictly asset-based nature (as opposed to borrower income-based nature) of this form of lending.²⁰

This Article also describes the reality of repossession. Lenders frequently repossess.²¹ In fact, our research shows that as many as 71% of the title loan customers have their vehicles repossessed.²² Once reclamation rates are taken into account, as many as 60% of customers lose their vehicles permanently. This rate is over ten times higher than the current home foreclosure rate in the United States,²³ and for the demographic that uses title loans, the loss of the car is similar in gravity. The customers are, for the most part, from the working classes,²⁴ and having a paid-off car can be one of their

were turned into a report and used to influence the New Mexico legislature. Most of the information in this report appears to have been provided to the New Mexico Legislature by industry insider Robert Reich, the current president of Texas Car Title Loan Services and Community Loans of America. *See* William J. Verant, *Consumer Lending Study Committee Report for the Forty Fourth Session of the New Mexico State Legislature*, Submitted by the Financial Institutions Division Director, as requested by House Memorial 36 (Jan. 2000) [hereinafter INDUSTRY REPORT TO NEW MEXICO LEGISLATURE] (on file with author).

18. *See Money to Go*, *supra* note 17, at 34.

19. *See infra* notes 193-216 and accompanying text.

20. *See infra* notes 217-18 and accompanying text.

21. Burt et al., *supra* note 15, at 370 (quoting repossession rates of between 5% and 20%); *see also* JEAN ANN FOX & ELIZABETH GUY, CONSUMER FED’N OF AM., DRIVEN INTO DEBT: CFA CAR TITLE LOAN STORE & ON-LINE SURVEY 5 (2005), available at http://www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf; AMANDA QUESTER & JEAN ANN FOX, CTR. FOR RESPONSIBLE LENDING & CONSUMER FED’N OF AM., CAR TITLE LENDING: DRIVING BORROWERS TO FINANCIAL RUIN 7 (2005), available at http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/rr008-Car_Title_Lending-0405.pdf.

22. *See* Table 14.2, *infra*.

23. Ryan M. Goodstein et al., *Are Foreclosures Contagious?* 26 fig.1(FDIC Ctr. for Fin. Research, Working Paper No. 2011-4, 2011) (finding the foreclosure rate in 2008 to be a little over 3%); *see* Gaurav Singh & Kelly Bruning, *The Mortgage Crisis Its Impact and Banking Restructure*, 10 ACAD. BANKING STUD. J. 23, 31 (2011). According to Singh and Bruning “[b]y August 2008, 9.2% of all U.S. mortgages outstanding were either delinquent or in foreclosure,” and the average national foreclosure rate was 1.84%. *Id.*

24. *See* FOX & GUY, *supra* note 21, at 3. According to these authors,

greatest financial accomplishments. The loans are designed not to be repaid, so in a sense, repossession rates are surprisingly low.²⁵ Repossession rates this high are unlike any other in the secured lending world. Additionally, this Article also shows how large profits can be in this industry, as well as how large the industry is overall.

The Article concludes that, while the interest rates for title loans typically are lower than the interest rates for payday loans (100-300% versus 400-600%), title loans generally are more harmful to consumers than payday loans.²⁶ Finally, this Article concludes that, because we regulate consumer credit products the middle class uses,²⁷ we also should do so for credit products the lower class uses.²⁸ To do otherwise leaves those people most in need of protection, unprotected.

[a] few state regulators provide information on title loan borrowers. Missouri's Auditor reported that 70 percent of payday and title loan customers earned less than \$25,000 per year. Illinois title loan users had average salaries of less than \$20,000 according to a Department of Financial Institutions study in 1999. New Mexico regulators report that the average income of title loan borrowers, as reported by licensees for 2004, was \$21,818.50.

Id. (footnotes omitted); see also Gregory Elliehausen, *Consumers' Use of High-Price Credit Products: Do They Know What They are Doing?* 19 *tbl.5* (Networks Fin. Inst. at Ind. State Univ., Working Paper No. 2006-WP-02, 2006) (stating in a fascinating table that the total household – not individual – income of persons taking out auto title loans as: less than \$15,000 (11.9%), \$15,000-24,999 (17.4%), \$25,000-49,999 (40.8%), \$50,000 or more (30.2%), and clarifying that payday loan customers are better off financially than title loan customers).

25. QUESTER & FOX, *supra* note 21, at 6. According to these authors, [t]itle lenders often make their short-term, high-interest loans with little or no regard to their borrowers' ability to repay the loans. Because a car secures each loan, the lender is protected even if the borrower defaults. Lenders frequently advertise that they do not perform credit checks, that loans can be completed on the spot, and that the application will take only a few minutes. For instance, a recent online advertisement stated: "If you own a car, you qualify!"

Unfortunately, title lenders also often target borrowers who can ill afford such high-cost short-term balloon loans, virtually guaranteeing that many of the loans will fail.

Id. (footnotes omitted).

26. See *infra* notes 220-23 and accompanying text.

27. See, e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (regulating credit cards).

28. See *infra* note 224 and accompanying text.

II. THE BACKGROUND, CONTEXT, AND REGULATION OF TITLE LENDING

This Part describes the nuts and bolts of title lending, the place of title lending in the overall milieu of high-interest consumer credit products, and the regulation of title lending in the United States.²⁹

A. Title Loans: How They Work (or Don't Work)

Just as the late-night advertising suggests, getting a title loan is quick and easy. As one internet advertiser proclaims:

Need Cash Today? Have a Clear Car Title?

Apply for an Auto Title Loan Today and Get up to \$50,000 Cash

No Credit Checks | Flexible Terms | Keep Your Car | Cash in 30
Minutes

Just complete our Application Below or Call . . . to get Pre-
Approved Now!³⁰

Securing a title loan is easy, as our phone interview data show. All one needs is a clear title to his or her car and an extra set of keys. Once the customer has filled out the basic paperwork, the borrower gives the actual title to the

29. Very little has been written about the history of title lending, though some scholars suggest that title loans grew out of the pawn industry. *See* Drysdale & Keest, *supra* note 15, at 598. As they claim:

The auto and auto-title pawn loans were designed to take advantage of this special treatment afforded pawn transactions while enjoying the security afforded by taking the consumer's transportation as collateral for a very small cash loan. While a few auto pawnbrokers demand physical possession of the vehicle, such practice obviously creates greater sales resistance. Thus was born the auto-title pawn, or "title loan." The first incarnation echoed the sale/leaseback schemes that have long been used to dodge usury laws. The borrower pledges the title, and the pawnbroker "leases" the vehicle back to the consumer. Some lenders require the customer to turn over a key to the car to facilitate repossession. They commonly limit the loan amount to one-third of the book value of the car, making the loans more than fully secured. While some transactions may involve weekly installments, the typical title loan is a one month, single payment loan.

Id. (footnotes omitted).

30. 1 STOP AUTO TITLE LOANS, http://www.1stopautotitleloans.com/title_loans.html (last visited Sept. 26, 2011).

lender, who holds on to the title until the loan is paid.³¹ Some lenders do not perfect their lien in the vehicle by filing in the motor vehicle division of the state. In some states, such as Nevada, the law provides that the lender may perfect by holding the title.³²

Thereafter, in a prototypical loan,³³ the borrower is to return in one month with the loan amount he or she borrowed plus the finance charge,³⁴ which can be any amount but is typically 300% per annum or 25% per month.³⁵ Thus, although terms can vary, if a borrower borrows \$2000, the borrower typically would owe \$2500 in one month's time. The borrower usually can renew the loan each month by paying the finance charge,³⁶ which in this example is \$500. However, the loans are not necessarily small.³⁷ One internet company offers loans of up to \$50,000,³⁸ and the New Mexico state data reflect loans up to \$42,000.³⁹ Moreover, the amount of each loan is unrelated to a person's income; the amount is based solely upon the value of the vehicle used as collateral.

If a borrower does not pay the monthly loan payment, which is usually an interest-only payment,⁴⁰ a lender can add the monthly payment to the loan, then charging interest on interest, or 300% on 300%. If this is done, the amount of the loan can balloon into a huge debt. Repossessions are rampant

31. See Drysdale & Keest, *supra* note 15, at 598.

32. See NEV. REV. STAT. ANN. § 604A.050 (West, Westlaw through 2009 75th Reg. Sess. and 2010 26th Spec. Sess. of the Nev. Legis. and technical corrections received from the Legis. Council Bureau (2010)).

33. These are the most common terms, but as Part II.B.2 of this Article shows, the loan terms vary, certainly far more than we anticipated.

34. See Drysdale & Keest, *supra* note 15, at 598-99.

35. See *id.* (referring to title loan interest rates between 200% and nearly 1000%).

36. See *id.* at 599.

37. Conversely, Professor Hawkins claims that “[t]wo important characteristics set pawn and auto title loans apart from other sources of credit – the amounts of the loans are usually quite small and customers have an escape hatch if they cannot pay off the loan.” See Hawkins, *supra* note 15, at 1388. He further claims that “[t]hese two characteristics cast serious doubt on the assertion that pawnbroking and auto title lending cause financial distress.” *Id.* The loans we see, however, are neither small nor non-recourse.

38. See Burt et al., *supra* note 15, at 369. To get an internet title loan, a customer fills out the paperwork online, *id.* at 368-69, then goes to a store. Internet title loans are allowed in many states, including South Carolina, California, Texas, Arizona, New Mexico, Nevada, or Utah. See *id.* 369.

39. See *infra* Table 1.

40. See *Questions and Answers*, TITLE LOAN ADVOCATES, http://titleloanadvocates.org/Questions_and_Answers.html (last visited Nov. 8, 2011) (describing most title loans as “interest only payments”).

and to aid in the process, lenders usually request copies of car keys,⁴¹ and some lenders install a GPS tracking device so they can find and repossess the car.⁴²

B. Title Lending in Context

Title lending is one way the working poor, lower-middle class, or any American experiencing financial difficulties, can make ends meet and smooth consumption.⁴³ Other options include payday loans, refund anticipation loans, pawn loans, and rent to own.⁴⁴

1. Payday Loans⁴⁵

Payday loans are small, short-term, triple-digit interest rate loans, typically in the range of \$200 to \$500 dollars, secured by the consumer's post-dated check or debit authorization.⁴⁶ Originally, these loans were designed to get a consumer through payday and thus be paid back in one lump sum.⁴⁷ A typical short-term loan product in today's market allows a customer to borrow \$400, for fourteen days or less, for a \$100 fee.⁴⁸ Most commonly, the loan is an interest-only loan, with the interest payment, here \$100, due every two weeks thereafter.⁴⁹ The principal stays out indefinitely, and after two months, the lender has recouped the principal.⁵⁰ Americans owe several billion dollars in title loans.⁵¹ Payday and other short-term loan outlets tripled in number from 1999 to 2006⁵² and now outnumber McDonald's, Burger Kings,

41. See *Consumer Groups Call Car Title Loans Predatory*, MSNBC.COM (Mar. 2, 2008, 6:38:09 PM), http://www.msnbc.msn.com/id/23436573/ns/business-consumer_news/t/consumer-groups-call-car-title-loans-predatory/.

42. See, e.g., Neiger, *supra* note 6 (discussing a title loan utilizing GPS).

43. See Hawkins, *supra* note 15, at 1370. Personally, we think less overall spending would help far more than very expensive smoothing, and we also find smoothing itself to be an urban myth. See *infra* Part IV.E.

44. See Patrick M. Aul, Note, *Federal Usury Law for Service Members: The Talent-Nelson Amendment*, 12 N.C. BANKING INST. 163, 164-65 (2008).

45. The content of this paragraph was taken from articles previously published by the author. Martin, *supra* note 16, at 564; Martin & Koo, *supra* note 16, at 785-86.

46. Martin & Koo, *supra* note 16, at 785.

47. *Id.*

48. Kept out for one year, this loan would earn interest of \$2,600, and the borrower would still owe the \$400.

49. Martin & Koo, *supra* note 16, at 785.

50. *Id.*

51. *Id.*

52. Aul, *supra* note 44, at 165. One customer noted that a shop with one employee in 2003 now has 6 employees. See Martin, *supra* note 16, at 564 n.4 (citing to interview with study participant no. SB11).

and Starbucks combined.⁵³ The author's previous research suggests payday lending is the fastest growing segment of the consumer-credit industry.⁵⁴ These loans vary in design. For example, in one form of New Mexico installment loan, the customer borrows \$100, "to be repaid in twenty-six bi-weekly installments of \$40.16 each, plus a final installment of \$55.34."⁵⁵ Additionally, the loan payments may pay off very little of the loan principal. The borrower in this example would pay \$100 in principal and \$999.71 in interest, for an annual percentage rate (APR) of 1147%.⁵⁶

2. Refund Anticipation Loans

Refund anticipation loans (RALs) are "short-term loans extended to consumers in anticipation of their tax refunds."⁵⁷ Commercial tax preparers market these loans as quick refunds, which allow taxpayers to immediately access their refund.⁵⁸ "In actuality, RALs are loans extended by banks through a contractual arrangement with the tax preparer."⁵⁹ Typically, "[w]hen the [bank makes the] loan[, it] prepares to collect on the loan by opening a temporary bank account for the borrower to receive electronic deposit of the refund."⁶⁰ The borrower signs documents that "instruct the IRS to direct deposit the refund into that account."⁶¹

53. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1111 (2008) (stating that by 2002, there were more payday-loan stores in the United States than McDonald's, Burger King, Sears, J.C. Penney, and Target stores combined).

54. Martin, *supra* note 16, at 564.

55. Felix Salmon, *Loan Sharking Datapoints of the Day*, REUTERS (Jan. 6, 2010, 19:37 EST), <http://blogs.reuters.com/felix-salmon/2010/01/07/loan-sharking-datapoints-of-the-day>.

56. *Id.* This assumes the lender is not able to convince the borrower to re-borrow the principal before the loan is paid back. See Martin, *supra* note 16, at 573-76 (referring to Part I.C of article).

57. Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 578 (2004).

58. *Id.*

59. *Id.* at 578.

60. *Id.* at 579 (quoting CHI CHI WU, JEAN ANN FOX, & ELIZABETH RENUART, CONSUMER FED'N OF AM. & NAT'L CONSUMER LAW CTR., REFUND ANTICIPATION LOAN REPORT 18-19 (2002)).

61. *Id.* As Professor Schiltz explains,

[t]he contract usually contains a right of setoff, so the lender is repaid when the refund appears in the bank's account. The consumer is liable for the full amount of the loan if the refund is disallowed in whole or in part. The refund amount would be affected if, for example, [the] IRS disallows

Normally, a consumer pays “three fees in connection with RALs[:] a tax preparation fee to the tax preparer, an electronic filing fee to the tax preparer, and a loan fee to the bank making the loan.”⁶² The bank pays a portion of the loan fee to the tax preparer.⁶³ The loan fees vary “based on the size of the refund, translating into [APRs] ranging from 67% to 608%.”⁶⁴ To get around any interest rate caps states impose, “the loans are extended by banks chartered in states with no restrictions on interest charges.”⁶⁵ Until recently, two of the largest tax preparers, H&R Block and Jackson Hewitt, offered RALs.⁶⁶

The availability of RALs is diminishing now that the IRS no longer gives tax preparers and financial institutions a debt report that indicates whether a tax refund will be reduced to pay past-due student loans, child support payments, or other debt.⁶⁷ H&R Block, a company based in Kansas

a deduction or if there is an intercept of the refund for child support or a student loan debt.

Id. (alteration in original).

62. *Id.*

63. *Id.*

64. *Id.* at 579.

65. *See id.*

66. *Id.*; *see also* John Malseed, *Costly Tax Refund Loans Dwindle in Availability*, WCF COURIER (Iowa), Mar. 21, 2011, <http://wfcourier.com/business/local/3ab10ed0-517f-11e0-8722-001cc4c03286.html>. According to Malseed,

[m]ore than 7 million people used RALs in 2009. They paid about \$606 million in fees and another \$58 million in add-on charges, according to a study issued by the National Consumer Law Center and the Consumer Federation of America. That compares to 8.4 million, who paid \$738 million in fees, in 2008, according to the same organization.

Id.

67. *See id.*; *see also* Danielle Douglas, *End of the RALs?*, WASH. POST, Mar. 27, 2011, http://www.washingtonpost.com/capital_business/end-of-the-rals/2011/03/25/AFQJVkb_story.html. According to the Douglas article, a more rigorous regulatory climate created the end to RALs, a controversial product that consumer advocates lambasted as predatory because of its proliferation in low-income communities. *Id.* The article goes on to say that

[y]ears of petitioning state and federal officials to rein in RALs yielded substantial results in 2010 that have crippled the market in a matter of months. Under pressure from consumer groups, J.P. Morgan Chase, one of the three largest lenders underwriting refund loans, pulled out of the market in April. The Internal Revenue Service then announced in August it would no longer provide tax preparers and financial institutions a key credit check on taxpayers for RALs. And by December, H&R Block bowed out when its banking partner HSBC terminated their agreement, thanks to a directive from the Office of the Comptroller of the Currency. As a result of the departure of J.P. Morgan and the actions of the OCC, only three community banks are originating RALs this year: Louisville-based Republic Bank & Trust, River City Bank in the same city, and Ohio

City, Missouri, was one of the largest providers of RALs until it decided to stop offering them during the 2012 tax season.⁶⁸ Moreover, “[t]he Federal Deposit Insurance Corporation (FDIC) is seeking a \$2 million fine against Republic Bank & Trust of Kentucky,” the only lender still offering RALs.⁶⁹ “The FDIC’s investigation of Republic’s RAL [loans] uncovered numerous violations by tax preparers, acting as agents of Republic, of various consumer protection laws.”⁷⁰

3. Pawn Loans

Many observers believe that title lending grew out of the pawn business.⁷¹ “[I]n pawn transactions, the customer gives the pawnshop some form

Valley Bank in Gallipolis, Ohio, according to the National Consumer Law Center.

Id.

68. See Press Release, H&R Block, H&R Block Decides Not to Offer Refund Anticipation Loans in 2012 (Sept. 13, 2011), available at <http://www.hrblock.com/press/Article.jsp?articleid=52784>. According to the company,

“[w]e evaluated our options to determine what was best for our clients, the business and our shareholders,” said Bill Cobb, H&R Block[P]resident and CEO. “Knowing we had a strong 2011 tax season without RALs, our analysis did not present a compelling reason to bring back the product in 2012.”

Id. H&R Block also said that it would offer refund anticipation checks (RAC) instead, which are not loans but rather a pre-paid debit card onto which a refund is loaded. *Id.* See also CHI CHI WU & JEAN ANN FOX, NAT’L CONSUMER LAW CTR. & CONSUMER FED’N OF AM., MAJOR CHANGES IN THE QUICK TAX REFUND LOAN INDUSTRY 2-6 (2010), available at <http://www.consumerfed.org/elements/www.consumerfed.org/file/RAL%202010%20Report%20final.pdf>. According to this source, “tax preparers and their bank partners made approximately 8.4 million RALs during the 2008 tax-filing season.” *Id.* at 2. H&R Block “had about 3.9 million RAL customers in 2008, or 46% of the RAL market.” *Id.* at 6. The second largest provider, Santa Barbara Bank and Trust, “had about 2.3 million RAL customers in 2008, and Republic [Bank & Trust] had about half a million.” See *id.* at 7.

69. See *FDIC Seeks \$2 Million Fine Against Republic Bank of Kentucky: Probe Found Numerous Violations in Bank’s Refund Anticipation Loan Program*, CONSUMERAFFAIRS.COM (May 10, 2011), <http://www.consumeraffairs.com/news04/2011/05/fdic-seeks-2-million-fine-against-republic-bank-of-kentucky.html>.

70. *Id.* “The FDIC charged that Republic ‘is unable to appropriately manage, monitor, and control third-party risk at its [tax preparers] in many aspects.’” *Id.* (alteration in original). The FDIC also alleges “inadequate management, monitoring and controlling [preparers] and third-party risk include a deficient training program; inadequate security for customer information and cash equivalents, including debit cards, inadequate computer safeguards, and [preparers’] failure to comply with law and regulation.” *Id.* (internal quotation marks omitted) (alterations in original).

71. See, e.g., Barr, *supra* note 16, at 165 (stating that “[t]he title industry grew out of pawnbrokers’ efforts to lend larger amounts than televisions or jewelry could

of personal property that the pawnshop holds as collateral for the loan given to the customer.”⁷²

As fringe banking products go, pawn loans are among the least harmful. As Professor Jim Hawkins notes:

[e]ven those very critical of fringe banking recognize the benefit of this structure: “One positive feature of pawn credit is its tendency to be naturally short-term and terminal. Unlike payday loans where consumers often are forced to repay their loans over relatively long periods, a defaulting pawn debtor simply forfeits the personal item left with the pawnbroker as collateral.” Thus, for those who associate financial distress with having unmanageable debt, pawn broking [conclusively] can never directly cause financial distress because the debt is self-liquidating.⁷³

While Professor Hawkins equates title loans with pawn loans in declaring the relative harmlessness of each,⁷⁴ title loans are more harmful than pawn loans, at least in New Mexico.

C. Title Loan Regulation: There’s No “There There”

A majority of states have not enacted legislation or otherwise regulated the title loan industry by capping fees at less than 100% of the amount borrowed.⁷⁵ As of the date of this publication, it appears that only twenty-one

collateralize”); *Consumer Use*, *supra* note 8, at 433 (stating that “[t]itle pledge lending grew out of traditional pawnbroker operations, mainly to enable making larger loans than traditional pawnshop loans backed by items such as consumer electronics, musical instruments, and jewelry”); *see also* Burt et al., *supra* note 15, at 366. Though numerous scholars have stated that title lending is an offshoot of the pawn industry, they offer no evidence of this. Currently, there is little connection between making pawn loans and making title loans in New Mexico, where only three small lenders authorized to make title loans are also pawn brokers. *See* Jessica J. Randall, *Pawnbroking in New Mexico: An Industry Misunderstood* 26 (Dec. 10, 2010) (unpublished paper, University of New Mexico) (on file with author).

72. Hawkins, *supra* note 15, at 1388. For an excellent history of the pawn industry, *see* JOHN P. CASKEY, *FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR* 1 (1994) [hereinafter *FRINGE BANKING*]; *see also* Jarret C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 FLA. ST. U. L. REV. 995, 996-98 (1996); *see generally* John P. Caskey, *Explaining the Boom in Check-Cashing Outlets and Pawnshops*, 49 CONSUMER FIN. L. Q. REP. 4, 4-5 (1995) [hereinafter *Explaining the Boom*] (providing additional background information on the pawn industry).

73. Hawkins, *supra* note 15, at 1389 (footnote omitted).

74. *Id.* at 1393.

75. Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31 app. A, at 56-63 (2011) [hereinafter Plunkett & Hur-

states appear to attempt to regulate title lending, and most states enable high interest, short-term loans.⁷⁶ Idaho's statute⁷⁷ merely requires title lenders to obtain a license,⁷⁸ give customers a written contract disclosing the cost of the

tado, *Small-Dollar Loans*] (citing LEAH A. PLUNKETT, EMILY CAPLAN & NATHANAEL PLAYER, NAT'L CONSUMER L. CTR., SMALL DOLLAR LOAN PRODUCTS SCORECARD-UPDATED 14-20 (2010)); see also Edelman et al., *supra* note 15, at 598-99 (2008) (stating that "[c]urrently, sixteen states have enacted laws regulating title loans" and that the laws sometimes "set limits on loan terms, such as maximum loan amounts, interest rate caps, and costs, and regulate the frequency of renewals or extensions"). For prior history on state specific title loan laws, see Burt et al., *supra* note 15, at 371-73.

76. See Plunkett & Hurtado, *Small-Dollar Loans*, *supra* note 75, at app. A 56-63 (citing SCORECARD 2010, *supra* note 75, at 14-20); see also Alabama, Pawn Shop Act, ALA. CODE §§ 5-19A-1 to -20 (Westlaw through End of 2011 Reg. Sess.); Arizona, Motor Vehicle Time Sales Disclosure Act, ARIZ. REV. STAT. ANN. §§ 44-281 to -295 (Westlaw through 1st Reg. Sess. and 3d Spec. Sess. of the 50th Legis. (2011)); Florida, Title Loans, FLA. STAT. §§ 537.001, .018 (2010); Georgia, GA. CODE ANN. §§ 44-12-130 to -138 (LEXIS through 2011 Extraordinary. Sess.); Idaho, Title Loan Act, IDAHO CODE ANN. §§ 28-46-501 to -509 (LEXIS through 2011 Reg. Sess.); Illinois, Consumer Installment Loan Act, ILL. ADMIN. CODE tit. 38, §§ 110.300, .350, .390 (West, Westlaw through July 29, 2011); IOWA CODE § 537.2403 (Supp. 2011); Kentucky, KY. REV. STAT. ANN. §§ 286.10-260 to -530 (West, Westlaw through end of 2011 Legis.); Minnesota, MINN. ANN. STAT. ANN. § 325J.07 (West, Westlaw through end of the 2011 Reg. Sess.); Mississippi, MISS. CODE ANN. § 75-67-413 (LEXIS through 2011 Reg. Sess. and 1st Extraordinary Sess.); Missouri, MO. REV. STAT. § 367.515 (Supp. 2010); Montana, MONT. CODE ANN. §§ 31-1-816 to -817 (Westlaw through all 2011 laws, and 2010 ballot measures); Nevada, NEV. REV. STAT. ANN. § 604A.105 (West, Westlaw through 2009 75th Reg. Sess. and the 2010 26th Spec. Sess. of the Nev. Legis. and technical corrections received from the Legis. Council Bureau (2010)); New Hampshire, N.H. REV. STAT. ANN. § 399-A:14 (Westlaw through Ch. 268 of 2011 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legis. Svcs.); New Jersey, N.J. ADMIN. CODE § 3:24-1.3 (West, Westlaw through Aug. 15, 2011; 43 N.J. Reg. No. 16); 2010 Or. Laws 1st. Spec. Sess. c. 23, § 20 (Westlaw through End of the 2011 Reg. Sess. and ballot measures approved at the Nov. 2, 2010 election, pending classification and text revision by the Oregon Reviser); South Carolina, S.C. CODE ANN. §§ 34-29-140, 37-3-201, and 37-3-413 (Westlaw through End of 2010 Reg. Sess.); Tennessee, TENN. CODE ANN. § 45-15-111 (LEXIS through 2011 Reg. Sess.); Utah, Title Lending Registration Act, UTAH CODE ANN. §§ 7-24-101 to -305 (West, Westlaw through 2011 2d Spec. Sess.); Vermont, VT. STAT. ANN. tit. 9, §41a(b)(4) (LEXIS through 2011 Sess.).

77. Title Loan Act, 2006 Idaho Sess. Laws ch. 323 (H. 784) (July 1, 2006) (codified at IDAHO CODE ANN. §§ 28-46-501 to -509).

78. See IDAHO CODE ANN. § 28-46-503. A title loan made by an unlicensed lender is void under Idaho law, and the lender forfeits the right to collect any monies including principal, interest, and other fees paid by the debtor in connection with the title loan agreement. *Id.*

loan over its initial term,⁷⁹ and not loan more than the vehicle's value.⁸⁰ Loans can be no longer than thirty days.⁸¹ The statute does not cap interest rates, limit fees, or limit the number of loan renewals.⁸² After the third renewal, the borrower must pay at least 10% of the outstanding principal amount in addition to any finance charges due.⁸³ This loan is an interest-only loan for three months, followed by many more months of interest, at a rate up to 300%.⁸⁴

Oregon and Montana have amended their laws to impose a 36% interest rate cap on all consumer loans, including title loans.⁸⁵ In Oregon, a title lender can charge a one-time origination fee that does not exceed \$10 per \$100 of the loan amount or \$30, whichever is less.⁸⁶ A lender also can collect one fee per loan transaction for dishonored or insufficient funds checks, but the fee cannot exceed \$20.⁸⁷ In addition, the Oregon statute prohibits the making or renewing of title loans for a term of less than thirty-one days.⁸⁸ Statutes also prohibit title lenders from renewing an existing title loan secured by the same certificate of title more than two times after the loan is first made.⁸⁹ For the

79. *See id.* § 28-46-504. "The Idaho statute requires the lender and borrower to execute a title lending agreement that must include statutorily required terms and disclosures." Edelman et al., *supra* note 15, at 599 (citing IDAHO CODE ANN. § 28-46-504(1)(2)).

80. IDAHO CODE ANN. § 28-46-508(3). We do not think this provision is needed to protect lenders or borrowers, since it is our understanding that it is industry practice to lend no more than 40% of value, and many lenders typically lend a far lesser percentage. QUESTER & FOX, *supra* note 21, at 5 ("Most title loans are also made for much less than the value of the car that secures the loan. The amount extended is usually based on how much the car is worth and typically does not exceed 33% of the car's value."). *See also infra* notes 119-21 and accompanying text.

81. IDAHO CODE ANN. § 28-46-506(1). Title loans cannot be renewed if: (1) "[t]he debtor has paid all principal and finance charges due in accordance with the title loan agreement;" (2) "[t]he debtor has surrendered possession, title and all other interest in and to the titled personal property to the title lender; or" (3) "[t]he title lender has notified the debtor in writing that the title loan agreement is not to be renewed." *Id.* Moreover, a lender cannot "[c]apitalize or add any accrued interest or fee to the original principal." *Id.* § 28-46-508(8).

82. *See id.* § 28-46-506(3).

83. *Id.*

84. *Consumer Use*, *supra* note 8, at 434. Our own study data confirm that 300% is a common interest rate for a title loan. *See infra* Appendix A.

85. MONT. CODE ANN. § 31-1-241 (West, Westlaw through all 2011 laws, and 2010 ballot measures); 2010 Or. Laws 1st. Spec. Sess. c. 23, § 20 (Westlaw through End of the 2011 Reg. Sess. and ballot measures approved at the Nov. 2, 2010 election, pending classification and text revision by the Oregon Reviser).

86. 2010 Or. Laws 1st. Spec. Sess. c. 23, § 20(2). The 36% interest rate cap excludes this origination fee. *Id.* § 20(1).

87. *Id.* § 19(1).

88. *Id.* § 20(3).

89. *Id.* § 20(9).

most part, other than rate caps for all loans at 36%, most states that have passed title lending legislation have authorized the types of triple-digit interest, industry-friendly, loan transactions described here.⁹⁰

III. TITLE LOANS IN NEW MEXICO: THE DEVIL OR THE DEEP BLUE SEA?

This Part reports on the specific data in Albuquerque, New Mexico, as gathered by calling or visiting all lenders in the city and on data the state collected. A list of all lenders in our phone survey can be found in Appendix A and B. All lenders that offered title loans in Albuquerque in the fall of 2010 were contacted in order to determine their terms and practices. If a lender had more than one location, the authors assumed that locations owned by the same company had the same practices and terms.

Title lenders in Albuquerque, as in New Mexico generally, include a number of national lenders and very few locally-owned businesses. The line between local and national lenders, however, often is blurred. The only lender in New Mexico to offer only title loans is New Mexico Title Loans, which a Georgia company owns.⁹¹

90. PLUNKETT, KAPLAN & PLAYER, *supra* note 75, at 14-20 (identifying 25 states that prohibit auto title loans, 8 of which set caps between 104% and 304% and 11 of which have no APR caps). Certain federal laws, such as the National Defense Authorization Act of 2006, attempt to curtail title lending in order to protect military personnel and their family against certain lending practices. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 579, 119 Stat. 3136, 3276-77 (2006) (codified at 10 U.S.C. § 992 (2006 & Supp. IV 2010)) (requiring the DOD to issue the Report). These laws leave the rest of us to fend for ourselves, however. Moreover, anecdotally, we have heard that many military personnel are told to avoid payday loans. *See* Scott E. Carrell & Jonathan Inman, *In Harms Way? Payday-Loan Access and Military Personnel Performance* 3 & n.3 (Research Dep't, Fed. Reserve Bank of Phila., Working Paper No. 08-18, 2008). We have heard anecdotally that at one time, servicemen and women were subject to serious penalties for even entering such establishments, along with "massage parlors" and other businesses of ill repute.

91. *See* Stephen Franklin, *Car Title Loans Snare Victims at 300% Rate*, KANSAS CITY STAR, Aug. 10, 2008, at D4; *Corporations Division*, NEW MEXICO PUB. REL. COMMISSION, [http://web.prc.newmexico.gov/Corplookup/\(S\(e3mvr1trd4t1hnendvvihrk\)\)/CorpsSearch.aspx](http://web.prc.newmexico.gov/Corplookup/(S(e3mvr1trd4t1hnendvvihrk))/CorpsSearch.aspx) (last visited Nov. 10, 2011); *see also* *New Mexico Title Loans*, POWERPROFILES.COM, <http://www.powerprofiles.com/profile/00005153539887/COMMUNITY+LOANS+OF+AMERICA,+INC.-SANTA+FE-NM> (last visited Jan. 18, 2012) (stating that New Mexico Title Loans is a branch of Community Loans of America). The president of New Mexico Title Loans, Robert Reich, is also president of many title lending companies nationwide. *See* Franklin, *supra*; *Corporations Division*, *supra*. Mr. Reich's company, Community Loans of America, is the largest title lender in America. *See* Franklin, *supra*. Mr. Reich is also the source of the report cited by Zywicki in *Money to Go*, *supra* note 17, at 34.

The State of New Mexico Financial Institutions Division (FID) gathers title loan data directly provided by lenders through self-reporting questionnaires.⁹² From the time the state began requiring that title lenders file year-end reports in 2004⁹³ until the present, interest rates on title loans made in New Mexico have been reported in the range of 10,000% to 0%.⁹⁴ As Appendix A shows, the average interest charged over the five years was above 300%.⁹⁵ The zero percentage rate reflects the practice of offering consumers the first loan free, which is a common marketing tactic in the Albuquerque area. Some lenders also consider all their charges “fees.” Thus, if a consumer asks the interest rate, they may say that there is none and may report a zero percentage rate to the FID.⁹⁶

The FID requires that all entities that make title loans obtain an FID license,⁹⁷ and it maintains a database of all such licensed lenders. All of these licensed lenders must report annually various data to the FID.⁹⁸ The FID records these data in an annual Summary of Title Lending report.⁹⁹ In order for any given percentage interest rate to be included in the Summary of Title Lending report FID creates, the rate need only be offered to and accepted by a single customer, so aggregated numbers can be skewed easily.¹⁰⁰

92. See N.M. STAT. ANN. §§ 58-15-10, -10.1 (West, Westlaw through 1st Reg. Sess. 2011).

93. See N.M. CODE R. § 12.8.6.5 (West, Westlaw current through all new rules amendments and appeals effective prior to Oct. 1, 2011) (showing effective date of Jan. 1, 2004).

94. See *infra* Appendix A.

95. See *infra* Appendix A.

96. A representative with the New Mexico FID told us that “[s]ome companies do report that they charge 0%, which has also been questioned by our department. The companies who have reported 0% say that in some cases they have charged 0%, but rarely does that happen.” Telephone Interview with Representative, N.M. Fin. Insts. Div. (Oct. 27, 2010).

97. See N.M. STAT. ANN. § 58-15-3; Telephone Interview with Representative, *supra* note 96.

98. See N.M. CODE R. § 12.8.6.6, .8.

99. See N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2008) [hereinafter SUMMARY OF TITLE LOANS 2008] (on file with authors); N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2007) [hereinafter SUMMARY OF TITLE LOANS 2007] (on file with authors); N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2006) [hereinafter SUMMARY OF TITLE LOANS 2006] (on file with authors); N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2005) [hereinafter SUMMARY OF TITLE LOANS 2005] (on file with authors); N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2004) [hereinafter SUMMARY OF TITLE LOANS 2004] (on file with authors).

100. See sources cited *supra* note 99.

A. Telephone Survey of Lenders

The purpose of the telephonic portion of our survey was to find out how businesses offering auto title loans in New Mexico operate. We were most interested in the fees and interest rates charged as well as the terms of the loans. We also were interested in how title lenders present themselves to the public. Our survey was limited to businesses making auto title loans in Albuquerque, the largest city in New Mexico. We operated under the assumption that business practices in the city would give a fair idea of how these companies operate in New Mexico as a whole. Moreover, as the introduction to this Part indicates, most of the lenders are national; thus, these data may reflect how this business operates nationwide.¹⁰¹

1. Methodology

Identifying lenders making title loans in a particular market can be tricky. Not all lenders advertise in the Yellow Pages or on the Internet, as some lenders rely on drive-by business. Additionally, lenders come and go and move in and out of this segment of the consumer finance world. We made several attempts to capture all of the lenders in our data, but for reasons explained in this section, we feel certain that we missed a few lenders.

We attempted to identify all the title lenders in Albuquerque by creating a list of businesses that advertised title loans in Albuquerque. We first tried to use web searches, a general Google, and white pages search. This approach was not fruitful for several reasons. There is no web yellow page heading for auto title loans, few businesses have “auto title” in their names, and most of the web pages returned were owned by a limited number of businesses, only one of which was located in Albuquerque. We wanted to limit our survey to businesses that had at least one brick and mortar location in Albuquerque, so that we could call an actual local location and visit it. The sheer volume of items returned when we broadened our search to include all “loans” frustrated our search.

We next turned to the 2010-11 DEX yellow pages. Again, the advertisements had no heading for “Auto Title Loans” or “Title Loans,” so we broadened our search to “Loans.” Although few businesses had “Auto Title” in their name, loan companies appeared to have a lot of competition, and many advertisements in the yellow pages listed title loans as one of the products offered. The yellow pages gave us an initial list of twelve businesses, with a total of thirty-nine locations in Albuquerque. After calling these twelve to interview them, we discovered that one did not offer title loans, despite the Yellow Pages advertisement, which gave us a list of eleven businesses representing thirty-four separate locations.

101. See *supra* note 91 and accompanying text.

We then began by driving up and down several large streets in Albuquerque,¹⁰² looking for businesses advertising title loans. Our vehicle search discovered an additional ten companies, bringing our list to a total of twenty-one title loan companies representing sixty-six locations within the city limits of Albuquerque.¹⁰³

After identifying the lenders, we turned to the FID database to identify all small lenders who were authorized to make title loans in New Mexico as of fall 2010.¹⁰⁴ From this data, we compiled Appendix B, which shows twenty lenders in fifty-eight locations authorized to make title loans.¹⁰⁵ When compared to Appendix A, one can see that not all of the lenders in our survey were authorized to make title loans in New Mexico, nor were all of the licensed companies making title loans in New Mexico.¹⁰⁶

Next, we called the businesses on our list, first asking if they offered title loans and then asking for information about the loans. We were seeking information on interest rates, fees charged, and the term of loans offered. We also made notes during the calls as to the professionalism and demeanor of the employees with whom we spoke. We asked for information on a loan of \$200. We made it clear that we were just getting information and were not prepared to take out a loan at this time. If they insisted on having personal information, we gave them a fictitious name, Brian Russell, and claimed to have no home phone. If they asked for vehicle information in order to give us a quote, we gave the information on a 1997 Ford F-150XL crew cab with a short bed, a V6 engine, and an automatic transmission. We stated the truck had about 250,000 miles on the odometer and was in “fair” condition, with a Kelley Blue Book¹⁰⁷ trade in value of about \$950.00.

2. Results of the Title Lending Phone Survey

a. Annual Percentage Rate (APR)

One thing became apparent within the first few calls. Asking for the APR of the loans was not helpful. Most of the employees with whom we spoke were not able to convert the daily or monthly interest rate into an annual percentage rate. Some knew only the daily rate. As title loans typically have a monthly term, the interest rates that loan companies use are given as

102. The streets were Central Avenue (the old Route 66, and a major Albuquerque thoroughfare), Juan Tabo Boulevard, Eubank, Menaul, and San Mateo.

103. See *infra* Appendix A.

104. See *Facility Search*, N.M. REG. & LICENSING DEP’T, <http://rldverification.rld.state.nm.us/Verification/Search.aspx?facility=Y> (last visited Jan. 19, 2012) (search results were obtained by selecting Profession: Financial Institutions and License Type: small loan company).

105. See *infra* Appendix B.

106. See *infra* Appendix A.

107. See KELLEY BLUE BOOK, <http://www.kbb.com> (last visited Oct. 19, 2011).

monthly or daily rates.¹⁰⁸ While we report the APR here, we calculated these from the monthly or daily percentage rate the employee of the lender provided. While employees of lenders sometimes provided us with an accurate APR, this accuracy was the exception rather than the rule.

The lowest APR we found was a 0% introductory rate from Quick Cash extended to first-time customers. Their normal annual interest rate is 300%. The next lowest rate was 88% from Shamrock Finance,¹⁰⁹ followed by 228% at Checkmate.¹¹⁰ We have some doubts about the reliability of these numbers. The first location we called refused to provide any interest rate, and the employee at the second location said she thought the rate was “like 228% a year,”¹¹¹ but hung up the phone before we could get clarification. The next lowest annual percentage rate available in Albuquerque appears to be 240%, which Money Train and New Mexico Title Loans offer.¹¹² New Mexico Title Loans offers this rate only on “new cars”; their regular rate is 360%.¹¹³ Post-survey, we learned that Lighthouse Financial regularly makes title loans at 148-160% per annum.¹¹⁴

The highest annual percentage rate recorded was 520%, from Check 'n Go.¹¹⁵ The manager gave us this rate while trying to talk me into taking out a 260% installment loan instead. We found this conversation confusing at first, but after further research, we surmised that not all of the Check-n-Go locations made title loans. We probably called a non-title loan location and, rather than refer our business elsewhere, the manager attempted to sell us another product. As of this writing, we have not been able to confirm the APR for this lender. Approved Finance also charged a rate of 520%, and the next

108. It is untrue that the APR is irrelevant for shorter term loans. First, not all these loans are actually short term. *See infra* note 149 and accompanying text. Moreover, just because a person drives less than a mile does not mean miles per hour is an irrelevant measure. Disclosure of the APR would at least in theory still allow customers to compare the cost of credit between different providers.

109. *See infra* Appendix A. While Shamrock is a licensed small lender, and while it makes title loans, it is not authorized by the New Mexico Financial Institutions Division to make them. *See Facility Search*, N.M. REG. & LICENSING DEP'T, <http://rldverification.rld.state.nm.us/Verification/Search.aspx?facility=Y> (search Facility Name: “Shamrock”) (last visited Jan. 19, 2012) (returning five results, none of which is licensed to make title loans). Shamrock appears to have a complex system of fees and interest rates that vary between 88% and 260%, depending on the amount and term of the loan contract. *See infra* Appendix A. The employee we spoke with was unwilling to explain how their system worked in detail. Telephone Interview with Shamrock Finance Clerk (Oct. 16, 2011).

110. *See infra* Appendix A.

111. Telephone interview with Checkmate Clerk (Oct. 17, 2011).

112. *See infra* Appendix A.

113. Mr. Adams saw this printed on a small sign attached to the counter while visiting the New Mexico Title Loans *supra* location on Montgomery Boulevard.

114. *See, e.g.*, Loan contract, *supra* note 2.

115. *See infra* Appendix A.

highest APR was 450% from Ace Cash Express.¹¹⁶ The average APR from our survey was 388%,¹¹⁷ which equals a monthly interest rate of 32.33%. This figure was obtained by multiplying the number of locations of each title lender by the interest rate offered, then dividing the sum by the total number of title lenders in our survey.¹¹⁸

b. Loan to Value Ratios

Title loans are deeply over-secured. In other words, the value of the collateral used to secure the loan is far greater than the amount of the loan. While some lenders claimed that they lend “up to 50% the value of your car,” those rates are for new, highly desirable cars, which few people own outright. Our phone survey data indicate that lenders typically lend between 25 and 40 % of a vehicle’s value. In reality, even these values appear to be far higher than what is loaned. Lenders calculate the percentage of the vehicle’s value to be loaned by looking at the wholesale, or trade-in value, of the car.¹¹⁹ Wholesale values are significantly lower than the retail value. As an example, the lender valued Ms. Price’s car at \$10,000. Its Kelley Blue Book value at the time was \$14,715, so the \$4000 loan was 27.1% of the value of a relatively new car.¹²⁰ Other scholars have estimated the loan to retail value of the vehicle to be 30%.¹²¹

Exact data on the loan to value ratio from each lender was impossible to obtain. Clerks did not grasp the question and said it did not matter anyway. They said all they do is put the information into the computer and the computer tells them how much to lend.

c. Length of Loans

Our phone survey indicated that most loans are one month loans that can be rolled over as many times as a customer wishes. Rollovers are what make these loans so profitable for lenders and so harmful for borrowers. After three rollovers, customers have paid as much in interest as they borrowed, frequently without paying off any of the principal. There were a few lenders in our survey who did not use this lending model. For example, American Cash Loan gives fourteen-day loans, much like payday loans. Ace Cash Ex-

116. See *infra* Appendix A.

117. See *infra* Appendix A.

118. See *infra* Appendix A.

119. This figure can come from several different sources. See BLACK BOOK, <http://www.blackbookusa.com> (last visited Oct. 12, 2011) (a subscription only service); KELLEY BLUE BOOK, <http://kbb.com> (last visited Oct. 12, 2011); NATIONAL AUTO DEALERS ASSOCIATION, <http://www.nada.org/ProductServices/NADAGuides> (last visited Oct. 12, 2011) (“yellow” or “orange” guides).

120. See Loan contract, *supra* note 2.

121. See Lundberg, *supra* note 15, at 191.

press structures its loans as ten equal installments paid every two weeks for five months, and Lighthouse Financial Services spreads its loan over eighteen equal monthly payments. While all lenders claimed to charge “no fee for early repayment,” they define this clause ambiguously. The result of paying off the loan early varies between charging a flat daily interest on the principal borrowed until the loan is repaid, and repayment of all interest that would have been owed if the loan was completed under the original agreement.

d. Fees

In addition to interest, nine of the twenty-one lenders surveyed charged a “lien” fee, though few appear to record liens with the New Mexico Department of Motor Vehicles (DMV). Not surprisingly, the “lien” fees do not correlate to the amount the DMV charges to file a lien.¹²²

e. Income Requirements

Income requirements in the analyzed loans were lenient to non-existent. Most lenders only require that the customer show some kind of income from some source, including Social Security or student loans. Some lenders would accept that you have a bank account with money in it. The Lighthouse Financial branches with which we spoke did not require information about income at all. The clerk with whom we spoke said point blank, “I don’t care about income. As long as you have a clean title, I will give you a loan.”¹²³ Only FastBucks requires a complete job history and proof of ability to repay the loan. These data confirm that the auto title lending industry is an asset-based business. Lenders rely on the vehicle for repayment, not the customer’s ability to pay.¹²⁴

122. The New Mexico Department of Motor Vehicles charges \$5.00 to place a lien on a car title. Telephone Interview with N.M. Dep’t of Motor Vehicles Representative (Dec. 5, 2011). Of the nine lenders who charge an additional fee, six are simply passing along the \$5.00 fee. Checkmate charges \$8.00, and Money Train charges \$8.50. New Mexico Title Loans charges a fee of \$19.50, which they still refer to as the lien fee, but the fee is large enough to actually change the functional interest on a short term loan. It should be kept in mind that the New Mexico Department of Motor Vehicles charges an additional \$5.00 to issue a new “clear” title. *Id.*

123. Interview with Lighthouse Financial Clerk in Albuquerque, New Mexico, October 17, 2010.

124. QUESTER & FOX, *supra* note 21, at 6 (stating that these loans are typically made without regard to borrowers’ ability to repay) ; *Comments of the National Consumer Law Center on Behalf of Its Low Income Clients Regarding Petition for Rulemaking to Preempt Certain State Laws Federal Deposit Insurance Corporation*, NAT’L CONSUMER L. CENTER, 13 (May 16, 2005), http://www.nclc.org/images/pdf/preemption/archive/fdic_comments-05.pdf (stating that these “loans are typically made without regard to borrowers’ ability to repay”).

f. Demeanor

With only two exceptions, Checkmate and New Mexico Title Loans, every title lender employee with whom we spoke was courteous and professional. Most employees were downright friendly. They did not act like they were trying to trick us or hide relevant information, and when the monthly and annual percentage rates did not add up, it seemed as though they made an honest mistake. Compared to traditional banks, these lenders wanted our business and went out of their way to be as helpful as possible. We feel certain that this enthusiasm is one of the reasons that people use title lenders and use them often. As long as the customer is paying, the title lenders are pleasant.

g. Ownership

Lenders argue that they should not be regulated because regulation will hurt local (New Mexico) businesses.¹²⁵ Our survey showed that of the sixty-one authorized title lenders in Albuquerque, only four are incorporated in New Mexico and owned by New Mexicans. Thus, most of their profits are leaving the local economy.¹²⁶

B. In-Store Survey of Title Loan Businesses in Albuquerque

In addition to these phone surveys, we visited ten stores at random in order to see what the process of obtaining a loan would be and to determine if the stores complied with signage laws. The signage law requires that all title and payday loan companies display in each licensed place of business a prominent sign, readily visible to borrowers, disclosing the schedule of charges in twenty-four point font or larger.¹²⁷ “The prominent sign in a reduced form, with font, no smaller than 10 point, must also be displayed at every workstation where loans are originated.”¹²⁸

In 2002, New Mexico Public Interest Research Groups (NMPIRG) did a statewide study of lender compliance with the signage and pamphlet provisions.¹²⁹ The study found that only one-third of the lenders were compliant

125. See INDUSTRY REPORT TO NEW MEXICO LEGISLATURE, *supra* note 9, at Resources and Materials 29.

126. It is not possible to have access to the data collections since all data collected or generated by the FID is protected by statute. All companies engaging in title loan activities are required to obtain a small loan license. See N.M. STAT. ANN. § 58-15-3 (West, Westlaw current through 1st Reg. Sess. of the 50th Legis. (2011)).

127. N.M. CODE R. § 12.18.4.8 (West, Westlaw current through all new rules, amendments and appeals effective prior to Oct. 1, 2011).

128. *Id.*

129. See RAY PRUSHNOK, NMPIRG EDUCATION FUND PAYDAY HEYDAY!: MEASURING GROWTH IN NEW MEXICO’S SMALL LOAN INDUSTRY 1990-2001 (2002),

with the brochure and signage laws.¹³⁰ In our ten visits, only one store was compliant with both the pamphlet and signage regulations.

C. State Data from Title Loan Companies

As indicated above, the FID requires that all title lenders register with the state and then report each year certain data about the loans they make to the FID.¹³¹ This section reports on these industry-generated data. Given that these data involve industry self-reporting, that some lenders make loans without being registered, and that others do business without filing the reports, the data will contain inaccuracies.¹³² Nevertheless, they provide useful insight into the title lending business. The reports are due each year when the lender applies to have its license renewed. The data are collected through a FID questionnaire, and then the FID creates a report of all such data each year.¹³³ We have summarized all of these annual reports and added line numbers so that the data can be analyzed. Our summary of 2004-2008 is attached as Appendix C. The data for 2009 is attached as Appendix D.

One problem with the yearly summaries is that they average all of the data, including obvious outliers.¹³⁴ While knowing the mode or median in addition to the mean would have been useful, having the raw data to work with would have been ideal.¹³⁵ A greater problem with the summaries is that they do not contain many basic data points, such as the total number of loans made for the year, the total number of customers served, the total principal loaned, the average lien fees charged, and the average time customers took to repay loans compared to original loan terms during the calendar year. We have attempted to create these data points ourselves.

available at http://cdn.publicinterestnetwork.org/assets/qK5fOHM_o87IR4-f64ibPw/paydayheyday.pdf.

130. *Id.* at 6.

131. See N.M. CODE R. § 12.8.6.6, .8; N.M. STAT. ANN. § 58-15-3.

132. We have reported and analyzed various data from these reports in this Article. See, e.g., Tables 1-4.1. We know, however, that the reports do not reflect the entire industry in New Mexico, due to a failure of some lenders to make annual reports and a failure of some lenders to become licensed. The reports also do not reflect loans made by licensed companies who go out of business in the reporting year, because such lenders are not required to turn in an annual report. Moreover, it is unclear whether companies that have made title loans for the reporting year, but do not intend to continue making title loans, are required to complete the questionnaire.

133. According to the FID, a small loan examiner does an annual examination of the licensed companies. Telephone Interview with Representative, *supra* note 110. For any of the small loan companies to do title lending in New Mexico, they must get approval from the Director of the FID, but it is not clear what is being examined. *Id.*

134. Since statistical outliers are not removed or accounted for before averaging, the data is skewed for several line items.

135. The FID has declined to provide us with this raw data, allegedly because of privacy concerns.

Below is the data from the five of the six years of summaries currently available – 2004 through 2008.¹³⁶ While the questions are consistent for each year, the original summaries do not have line numbers. We have added line numbers for easier reference. The first table beneath each numbered question is the original data; the rest is our analysis. We have kept the numbers the same as those numbers from the form, though the data at the end is in some ways the most interesting.

The topics on which the data relate are as follows, for each of the five calendar years: 1) the total dollar amount of all title loans originated, 2) the total dollar amount of all title loans outstanding, 3) the total number of all title loans outstanding 4) the total dollar amount of new title loans originated, 5) the annual percentage rate disclosed on all new title loans, 6) the number of days until maturity for each loan originated, 7) the average number of new title loans made to the same customer, 8) the number of times each title loan was renewed, refinanced, or extended, 9) the number of title loans charged off, 10) the dollar amount of title loans charged off, 11) the amount lenders collected on past due accounts, 12) the gross yearly income disclosed by title loan borrowers to lenders, 13) the number of borrowers sued by title lenders, 14) the total number of repossessions, 15) the total number of vehicles reclaimed by the borrower after repossession but before sale of the vehicle, 16) the total number of vehicles sold by the lender following repossession, 17) the total amount of excess proceeds from sales of repossessed vehicles, returned to borrowers, and finally, 18) the number of lenders reporting.

1. The Size of the Industry

This section assesses the size of the title loan industry in New Mexico. As a point of reference, the state has a population of approximately 2,000,000.¹³⁷ Its largest city, Albuquerque, has a population of approximately 535,000.¹³⁸ The median income in the state, at the time of this writing, is \$34,585 for a single person, \$46,907 for a family of two and \$53,938 for a family of four.¹³⁹ Demographically, approximately 46% of the state identifies

136. See sources cited *supra* note 99. The report for 2009 became available during the edit process, but given how few lenders actually reported, these data are not useful. See N.M. FIN. INST. DIV., SUMMARY OF TITLE LOANS (2009) [hereinafter SUMMARY OF TITLE LOANS 2009] (on file with authors); *supra* Table 18.1.

137. Dan McKay, *N.M. Hispanics Overtake Anglos*, ALBUQUERQUE JOURNAL, Mar. 16, 2011, at A1, available at <http://www.abqjournal.com/news/state/162346134362newsstate03-16-11.htm>.

138. *Albuquerque Quick Facts*, ALBUQUERQUE – OFFICIAL CITY WEBSITE, <http://www.cabq.gov/econdev/whyabqquickfacts.htm> (last visited on Oct. 16, 2011).

139. *U.S. Trustee Program*, U.S. DEP'T. JUST., http://www.justice.gov/ust/eo/bapcpa/20081001/bci_data/edian_income_table.htm (last visited Oct. 16, 2011). Moreover, income has been flat in the state. See *Flat Income Relatively Good News*

as Hispanic, 41% Anglo or white, 8.5% Native American, and 1.7% African American.¹⁴⁰ It has the fifth largest population living below the poverty line¹⁴¹ and has the second largest percentage of homes that are mobile homes.¹⁴² These demographics and poverty levels make it likely that the industry is larger per capita in New Mexico than in most other states.¹⁴³ With this backdrop, this section assesses the size of the industry in New Mexico.

a. Dollar Amount of all Title Loans Originated During the Calendar Year

The data on loan size was indeterminate. The data show that title loans vary in size between \$0 and \$42,000 for the period in question.¹⁴⁴ Also, if zeroes are included in any averages, at least some of the results will be made unreliable. In 2007, for example, at least one reporting lender claims to have made a loan for \$0 or no loans at all, and another lender made one loan for \$42,000.¹⁴⁵ As mentioned earlier, outliers like these make averaging misleading.¹⁴⁶

for NM, KRQE.COM, Oct. 1, 2010, <http://www.krqe.com/dpp/news/business/flat-in-come-relatively-good-news-for-nm>.

140. McKay, *supra* note 137.

141. Behind Mississippi, Louisiana, Kentucky, and Arkansas, according to 2008 Census Bureau data. *Persons Living Below Poverty Level 2008*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2011/ranks/rank34.html> (last visited Oct. 16, 2011).

142. *Mobile Homes, Percent of Total Housing Units, 2008*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2011/ranks/rank38.html> (last visited Oct. 16, 2011) (reporting on percentage of homes that are mobile homes in each state).

143. One set of data shows that New Mexico has the highest number of payday lenders per capita of any U.S. state, and we are suggesting that the same may be true of title lenders. Steven M. Graves, *Think Payday Lending Isn't out of Control in the United States?*, CAL. ST. U., NORTHRIDGE, http://www.csun.edu/~sg4002/research/mcdonalds_by_state.htm (last visited Nov. 6, 2011).

144. *See infra* Table 1. We wondered, "What kind of a vehicle warrants a \$42,000 loan?" Assuming a loan at 40% of wholesale value, this vehicle would have to be worth in excess of \$105,000!

145. *See* SUMMARY OF TITLE LOANS 2007, *supra* note 99; *infra* Table 1. We were curious to know if the FID receives averages from the lenders, or whether it instead receives an actual list of all title loans made for the year, which is then reduced to the numbers in the report.

146. One can also question who would take out an auto title loan for \$16, or \$10. *See* SUMMARY OF TITLE LOANS 2005, *supra* note 99; SUMMARY OF TITLE LOANS 2004, *supra* note 99.

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Table 1: Dollar Amount of Individual Loans Made During the Calendar Year

	2004	2005	2006	2007	2008
Min. Loan Reported by Any One Lender	\$16.00	\$10.00	\$10.00	\$0.00	\$0.00
Max. Loan Reported by Any One Lender	\$11,800.00	\$10,167.00	\$11,335.00	\$42,000.00	\$10,172.00

b. Total Principal Dollar Amount of all Title Loans Outstanding at End of Calendar Year

Table 2 reflects line two on the reporting form, which reports the total principal amount outstanding on all loans as of the end of each reporting year, as well as a per lender average.

Table 2: Total Principal Amount Outstanding on All Loans at End of Calendar Year

	2004	2005	2006	2007	2008
Total Principal All Lenders Reporting	\$8,062,049.06	\$8,472,918.13	\$8,560,710.03	\$9,010,027.27	\$9,058,839.67
Avg. Principal Per Lender Reporting	\$54,473.30	\$59,251.18	\$73,799.22	\$70,390.84	\$105,335.35

c. Total Number of all Title Loans Outstanding at the end of the Calendar Year

Table 3 shows the total of all loans outstanding at the end of the year. Again, end of year is not as useful as a yearly total, but it is a starting point for making further calculations.

Table 3: Total of All Loans Outstanding at the End of the Year

	2004	2005	2006	2007	2008
Total No. Loans Outstanding at Yr. End	19,271	14,993	13,902	15,098	13,740

As a point of comparison, Tennessee also keeps data on title loans, as do several other states. In 2006, Tennessee reported \$40 million in outstanding title loans, with 206 companies at 645 locations around the state.¹⁴⁷ The number of loans extended was 92,489.¹⁴⁸ Tennessee had an estimated population of 6,038,803 at the time.¹⁴⁹

d. Total Dollar Amount of New Title Loans Originated
During the Calendar Year.

**Table 4: Total Principal for All Loans Originated
During the Calendar Year**

	2004	2005	2006	2007	2008
Total Principal All Lenders Reporting	\$18,320,348.60	\$14,108,143.91	\$12,527,018.76	\$12,059,283.47	\$9,465,855.35

We compared these numbers to the numbers in Table 2, the “Total Principal Dollar Amount Outstanding on All Loans at End of Calendar Year”¹⁵⁰ to get the average size of each loan. We also took 365 days of the year divided by the average term from Table 6, and multiplied the result by the princi-

147. TENN. DEP’T OF FIN. INSTS., REPORT ON THE TITLE PLEDGE INDUSTRY: A SUPPLEMENT TO THE 2006 REPORT TO THE TENNESSEE GENERAL ASSEMBLY 7 (2007), available at <http://www.tennessee.gov/tdfi/compliance/TPLSupplementalReport-FINAL.pdf> [hereinafter REPORT ON THE TITLE PLEDGE INDUSTRY].

148. *Id.*

149. See *List of Tennessee Counties by Population*, GOVREGISTRY.US, <http://www.govregistry.us/states/tennessee.html> (last visited Nov. 11, 2011).

150. Compare Table 2, with Table 4. Because these are allegedly short-term loans, one would expect the total loans for the year to be much greater than the outstanding loans at the end of the year. In fact, with loans of 30 days duration, on average, one would expect to see a total of loans for the year of approximately 12 times greater than the loans outstanding at the end of the year. Other curiosities abound. For example, how could the dollar amount of new title loans originated during the calendar year decline by 100% over five years while the value of loans outstanding at the end of each year remains fairly constant, and actually increases slightly? Compare Table 2, with Table 4. Even more puzzling, it is impossible for the total of outstanding loans at the end of 2008 to be only slightly less than the total dollar amount of new title loans originated for the year. Compare Table 2, with Table 4. The 2008 Title loan Lenders Annual Summary Report indicates that 87 companies reported. SUMMARY OF TITLE LOANS 2008, *supra* note 99. It does not report the total number of auto title lenders, so the percentage of title lenders that reported in 2008 cannot be demonstrated by simply referring to the 2008 Annual Summary Report. See *id.*

pal outstanding at the end of the year. This calculation helps us begin to calculate the size of the title lending industry in New Mexico.

Table 4.1: Estimated Industry Profits Per Year

	2004	2005	2006	2007	2008
Total \$ Lent Per Yr.	\$18,320,348.60	\$14,108,143.91	\$12,527,018.76	\$12,059,283.00	\$9,465,855.35
Avg. APR	322.64	309.14	309.99	293.8	261.56
Avg. Daily Interest Rate	0.883945205	0.846958904	0.849287671	0.804931507	0.71660274
Avg. Term	40	36.59	33.23	35.10	72.27
Min. Estimated Gross	\$647,767,372	\$437,214,572	\$353,535,385	\$340,712,079	\$490,226,047
Avg. Time Renewed, Extended, Refinanced	3.37	3.96	3.53	3.33	2.66
Max. Est. Gross Profits	\$2,182,976,045	\$1,731,369,707	\$1,247,979,910	\$1,134,571,223	\$1,304,001,285

This Table illustrates that, assuming customers paid off their first loan without defaulting or rolling over, at the very least, title lenders grossed over \$647 million in New Mexico in 2004. They grossed over \$437 million in 2005, over \$353 million in 2006, over \$340 million in 2007, and over \$490 million in 2008. These dollar values represent the minimum returns on investment that the lenders could have made under these assumptions, based upon their own self-reporting, without taking into consideration any rollovers, refinances, additional fees, or other charges. It is strictly the yearly amount loaned times the average daily rate times the average term, as reported by the lenders. The maximum numbers on the last line of Table 4.1 above suggest that, when considering rollovers, these numbers could triple. We doubt that these maximums are ever reached, given the inevitable defaults. On the other hand, we believe that the minimum estimates above are too low and that industry claims that profits are low considering risk and default rates¹⁵¹ are dubious.

2. The Interest Rate on the Loans

Interest rates on fringe banking products can be steep. Payday loans in New Mexico and their new incarnation, the installment loan, frequently run from 100% to 560%, and some interest rates are over 1000%.¹⁵² Many ob-

151. See Drysdale & Keest, *supra* note 15, at 599-600.

152. Martin, *supra* note 16, at 606 n.211.

servers think that an average rate for payday loans is around 500-600%¹⁵³ and that title loans typically cost up to 300% per annum.¹⁵⁴ Our data from the phone interviews, as well as through the state data reports, confirm these results.

Regulation Z of the Truth in Lending Act of 1968 (TILA)¹⁵⁵ requires that lenders disclose all interest rates and fees.¹⁵⁶ “TILA was a prototype consumer-protection statute and became the ‘template’ for most consumer-credit legislation.”¹⁵⁷ It requires that lenders “disclose all of a contract’s terms and highlight, in a uniform way, critical terms like [APRs] and fees.”¹⁵⁸ TILA governs the title lending industry as well.¹⁵⁹

Whether lenders reported the interest rate for all loans made, or whether only their maximum and minimum loans were reported and then averaged by the state, is unclear. Currently, the average title loan interest rate in Albuquerque is 388%, and 300% is the most common interest rate, as reported from the phone survey.¹⁶⁰ The following chart illustrates the FID report data, showing the average APR converted into a daily interest rate, which is then multiplied by the average term from line six of the reports. By taking the estimated principal amount loaned for the year and multiplying it by the functional rate, we get an estimate of the return on the principal loaned for the year. Despite less than half the principal being loaned in 2008, as compared with 2006 and 2007, actual returns were very much the same.¹⁶¹

153. See, e.g., *PBS Newshour, What Will Financial Reform Mean for the Poorest?* (PBS television broadcast July 19, 2010) (transcript available at http://www.pbs.org/newshour/bb/business/july-dec10/usabroke_07-19.html).

154. *Consumer Use*, *supra* note 8, at 443.

155. See Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-67 (2006 & Supp. IV 2010)).

156. See Truth in Lending, Regulation Z, 12 C.F.R. §§ 226.6, .17 (2011).

157. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 653 (2011).

158. *Id.* at 653-54.

159. See *Pendleton v. Am. Title Brokers*, 754 F. Supp. 860, 864-65 (S.D. Ala. 1991); Hawkins, *supra* note 15, at 1388.

160. See *infra* Appendix A. This illustrates, once again, how averaging outliers can skew results. This is the functional interest rate, or the one the customer actually pays on their loan, based on the number of days the loan is outstanding, as well as the rate of return the lender will make on his investment of capital or principal.

161. Some of the numbers reported seem impossible, such as an annual interest rate of 10,250.66%, or of 9,125.00%. SUMMARY OF TITLE LOANS 2005, *supra* note 99; SUMMARY OF TITLE LOANS 2004, *supra* note 99. Our data simply reflects the reality that one lender has reported these interest rates shown. Keep in mind that even the numbers that appear more plausible reflect only an estimate of the return on principal loaned, not profits. This figure does not take into account any additional fees, rollovers, or refinances, all which will increase the amount collected, nor does it take into account lender expenses.

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Table 5: Minimum, Maximum, and Average APRs Reported

	2004	2005	2006	2007	2008
Min. APR	0.00%	0.00%	0.00%	0.00%	0.00%
Max. APR	10,250.66%	9125.00%	2281.00%	689.00%	630.00%
Avg. APR	322.64%	309.14%	309.99%	293.80%	261.56%

Table 5.1: Daily Interest Rates (Avg. APR/365)

	2004	2005	2006	2007	2008
Avg. APR	322.64%	309.14%	309.99%	293.80%	261.56%
Daily Interest Rate	0.88%	0.85%	0.85%	0.80%	0.72%

3. The Length of the Loans

The common lore is that title loans have an initial one-month term.¹⁶² While thirty days was the most common loan period, some loans were for longer or shorter periods. Table 6 reflects the number of days for which each loan was taken. The low end does not make sense, because some lenders report making loans for zero days or one day. The high end is more helpful, though alarming. At the long end, loans range from 1095 days in 2008 to 730 days in 2004, with the range for the other years falling somewhere in between.¹⁶³ These longest terms are startling. If these were three-year loans with an APR of 300% or more, the borrowers could have paid \$10,000 to borrow \$1000. Disturbingly, the initial loan term more than doubled between 2007 and 2008, from thirty-five days to seventy-two days, frequently at an effective interest rate of 300% or more.¹⁶⁴

Table 6: Number of Days for the Initial Maturity Term on New Loans

	2004	2005	2006	2007	2008
Min. Length of Loan Reported	1	1	1	0	0
Max. Length of Loan Reported	730	900	910	970	1095
Avg. Length of Loan Reported	40	36.59	33.23	35.10	72.27

162. See Burt et al., *supra* note 15, at 367.

163. See SUMMARY OF TITLE LOANS 2008, *supra* note 99; SUMMARY OF TITLE LOANS 2004, *supra* note 99.

164. See SUMMARY OF TITLE LOANS 2008, *supra* note 99; SUMMARY OF TITLE LOANS 2007, *supra* note 99.

4. Lather, Rinse, and Repeat: Are the Loans Frequently Renewed?

This section discusses whether borrowers use these loans frequently or infrequently. Lenders claim these loans are money sources of last resort and are necessary to help consumers in emergencies.¹⁶⁵ Consumer groups insist that consumers frequently use these loans for regular or even luxury purchases, after which consumers are in a more dire financial situation than before. The data below describe the average number of loans per customer in New Mexico for the years in question, as well as the average times that borrowers roll over or renew their original loans. Together, these two sets of statistics paint a grim picture of almost constant indebtedness for consumers who use these loans.

a. Average Number of New Title Loans Made to the Same Customer Originated During Calendar Year

Table 7 reflects the number of loans made to individual customers in one year. This table refutes industry claims that these loans are used infrequently for emergencies¹⁶⁶ by showing that the average customer takes out

165. *Consumer Use*, *supra* note 8, at 431-32. While Professor Zywicki is not himself a lender, his work is the go-to source for title lenders when reporting official data. See *Hearing on S.B. 251, S.B. 253, and S.B. 254 Before the Tex. Senate Committee on Business & Commerce*, 82nd Reg. Sess. (2011) (testimony of Robert Reich, President of Tex. Car Title Loan Servs. and Cmty. Loans of Am.).

166. For industry claims, see Gregory Elliehausen & Edward C. Lawrence, *Payday Advance Credit in America: An Analysis of Customer Demand* 47 (Credit Research Ctr., McDonough Sch. of Bus., Georgetown Univ., Monograph #35, 2001) available at <http://faculty.msb.edu/prog/CRC/pdf/Mono35.pdf> (stating that 65.7 % of borrowers use the payday loans for “emergencies,” 11.9 % for “planned expenses,” and 22.5 % for “other” discretionary uses); Todd J. Zywicki, *Consumer Welfare and the Regulation of Title Pledge Lending* 12, 31-32 (Mercatus Center, George Mason Univ., Working Paper No. 09-36, 2009), available at <http://mercatus.org/publication/consumer-welfare-and-regulation-title-pledge-lending> (claiming that “studies of similar products [like payday loans show] that consumers generally use nontraditional lending products to address short term needs for cash and to meet emergencies”). For consumer groups and one scholar claiming that the loans are not used primarily for emergencies, see QUESTER & FOX, *supra* note 21, at 2 (stating that “like payday loans, car title loans are marketed as small emergency loans, but in reality these loans trap borrowers in a cycle of debt”); Jim Hawkins, *Credit on Wheels: The Law and Business of Auto Title Lending*, 4-5 69 WASH. & LEE L. REV. (forthcoming 2012) (manuscript at 5) (available at <http://ssrn.com/abstract=1952084>) (stating that according to an FDIC source, 14.2-29.6% of people use title loans for emergencies, and 38% use them for regular expenses).

between 3.15 and 5 loans per year, *not* taking into account any rollovers.¹⁶⁷ If the *average* customer is taking out three to five title loans a year, one wonders how many times the frequent users make these loans. Could it be that most of the time a customer has one of these loans out? These data suggest a serious debt cycle on the part of consumers, rather than an occasional use for emergencies only. Consumers caught in such a debt cycle also are least likely to be able to afford these loans.

Table 7: Average Number of New Loans Per Customer

	2004	2005	2006	2007	2008
Avg. No. of Separate Loans Per Customer	5	3.9	4.4	3.22	3.15

These data allow us to estimate the number of loans made per year by dividing the amount of principal from Table 4 by the average loan amount from Table 1. The number of customers who use title loans in a given year can be estimated by dividing the result by the average from Table 7. Apparently, between 22,000 and 38,289 people use these products per year in New Mexico. Note the drastic drop in the number of customers in 2008.

167. The advertising also belies that the loans are used, or intended to be used, for emergencies only. For example, a company called Cupertino Title Loans tells this story of a “customer” in order to sell loans:

Cupertino Title Loans helped me with an auto title loan when I really needed one a few weeks ago to help with my bills. I just got back from a crazy bachelor party in Las Vegas for one of my oldest friends from high school at the end of last month. I ended up spending too much money that [sic] my budget allowed, and I didn’t have enough money for my end of the month bills when I got back home. I needed help paying my bills so that I could afford it later on . . . I decided that a car title loan from Cupertino Title Loans would be the best decision for me. I got approved for my title loan on their website <http://www.cupertinoitleloans.com> thanks to their online help agents. Then I just had to go to Cupertino Title Loans to pick up my title loan whenever I was ready. I went that afternoon, and sure enough they had a check for my pink slip loan, and was able to keep my car too. They just kept my car’s title for collateral, so that I could keep my car while I have the loan.

Title Loan in Cupertino for Expensive Vacation, SAN JOSE AUTO TITLE LOANS (Aug. 20, 2009), <http://www.sanjoseautotitleloans.com/blog/title-loan/title-loan-in-cupertino-for-expensive-vacation/>.

Table 7.1: Estimated Number of Title Loan Customers Per Year

	2004	2005	2006	2007	2008
Total Lent	\$18,320,348.60	\$14,108,143.91	\$12,527,018.76	\$12,059,283	\$9,465,855.35
Avg. Loan Amount	\$529.91	\$507.31	\$544.16	\$648.23	\$753.31
Avg. No. of Loans	34,572	27,809	23,020	18,603	12,565
Avg. Loans Per Customer	5	3.9	4.4	3.22	3.15
Est. No. of Customers	6914	7130	5231	5777	3988

b. Number of Times any Title Loan was Renewed, Refinanced, or Extended During the Calendar Year

Table 8 indicates the average number of rollovers on existing loans, which ranges from 2.66 to 3.53. This average suggests a high rate of rollovers, renewals, or refinances, and is further evidence that customers are unable to pay off the loans and thus frequently pay interest only, especially when combined with the data in Table 7.1. These data suggest that on average, title loan users take out 3.9 loans¹⁶⁸ and renew on average 3.3 times. Or, if all loans were one month old, these people have the loans out twelve months out of twelve months.¹⁶⁹ We know not all loans are a full month long. Nevertheless, customers who use these products appear to use them frequently and repetitively. It seems that the product design of title loans makes it more likely that they create a debt cycle than even payday loans at higher interest. This situation occurs because title loans are larger, and the ability to pay back the whole loan is smaller.

Table 8: Average Number of Rollovers Per Loan

	2004	2005	2006	2007	2008
Min. No. of Renewals	0	0	0	0	0
Max. No. of Renewals	32	75	120	78	39
Avg. No. of Renewals	3.37	3.96	3.53	3.33	2.66

168. This number was arrived at by averaging the rate for all five years and is thus not 100% accurate, as it would over count the rate in years in which there were more loans and undercount the rate for years in which there were fewer loans.

169. This actually comes out to 12.87, or more than all of the year. Since we do not know the length of a given extension, we cannot use this number to calculate anything further, but these data alone are indicative of a significant debt cycle.

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5. Profits and Losses, Winners and Losers

a. Number of Title Loans Charged off During the Calendar Year

Table 9 records the number of charged-off loans in each year.¹⁷⁰

Table 9: Total Number of Charged-off Loans Per Year

	2004	2005	2006	2007	2008
Total No. of Loans Charged Off Per Year	3808	6391	3925	3397	2509

b. Dollar Amount of Title Loans Charged off During the Year

Table 10 reflects the dollar amount of all loans charged off. This number is not, however, an actual loss of capital. Looking at the renewal rates from Table 8, we see that borrowers often refinance and continue to pay on their loans far past the original term. These payments exceed the principal amount of the loan, generating a profit for the lender without reducing the amount owed.¹⁷¹

Table 10: Dollar Amount of Loans Charged off Per Year

	2004	2005	2006	2007	2008
Total \$ Amts. of All Loans Charged Off	\$1,556,397.45	\$1,827,509.32	\$2,180,380.92	\$1,896,165.59	\$1,481,212.97

170. The phrase “charged-off loans” does not mean that the lender has given up trying to collect on the loan. This is simply the number of loans that were written off the books as a loss at the end of the year. This number includes past due loans in the active collections process and those on which the lender has stopped collecting at the moment. This does not mean that the lender has given up, of course; he or she can and does continue to attempt to collect for up to six years, and interest continues to accrue and can be written off as a loss for tax purposes by the lender. Moreover, these debts can be sold to debt collectors.

171. The potential profit that the lender would make is what is written off if the customer paid the interest due, meaning principal and interests, not just what was borrowed. All of this potential profit, which continues to grow every day a borrower does not make any payments, is considered a loss for tax purposes. Moreover, interest continues to accrue, even after a loan is charged off for tax purposes.

c. Dollar Amount of Recoveries on Title Loans During the Calendar Year

Table 11 reflects the total amount that lenders reported they collected on past due accounts charged off in previous years, further demonstrating that write-offs do not reflect losses.

Table 11: Amounts Collected on Charged-off Debts

	2004	2005	2006	2007	2008
Total Collected by Lenders on Charged-off Debts Per Yr.	\$482,451.19	\$670,783.10	\$382,217.53	\$931,490.23	\$640,673.45

6. Borrower Demographics

Table 12 reflects the minimum and maximum gross income for all borrowers, as disclosed by the lenders.

Table 12: Minimum and Maximum Gross Income for all Borrowers Reported On

	2004	2005	2006	2007	2008
Min. Gross Income of Borrowers	\$500.00	\$0.00	\$10.00	\$0.00	\$0.00
Max. Gross Income of Borrowers	\$619,944.00	\$439,000.92	\$576,000.00	\$2,080,000.00	\$730,000.00
Avg. Gross Income of Borrowers	\$21,962.73	\$22,861.78	\$24,678.65	\$27,719.36	\$20,116.00

These income data show an income range of borrowers from zero income to \$2,080,000. If we assume that the reported numbers are the average of all reported income, outliers will affect the result, (for instance, \$0 and \$2 million). Thus, these data seem questionable and raise a number of questions, including why someone with such a large income would use such overpriced credit products, or why a lender would make a loan to someone without income.

Perhaps these data suggest that if the data does not matter to the lender, recording it accurately is not a priority. The law does not require lenders to get proof of income from borrowers, nor do their own underwriting rules

seem to warrant doing so.¹⁷² Also, the yearly averages are not representative of the population, because some data points, such as an income of \$2,080,000, skew the entire database for that year. Regardless, this data set is all that is available so we will take it at face value. In Table 12.1 below, we compare the averages for each year to the Federal Health and Human Resources Poverty Guidelines for a family of four.

Table 12.1: Comparison of Borrower Income to Federal Poverty Guidelines

	2004	2005	2006	2007	2008
Avg. Gross Income of Title Loan Borrowers	\$21,962.73	\$22,861.78	\$24,678.65	\$27,719.36	\$20,116.00
Poverty Line for Family of 4	\$18,850.00 ¹⁷³	\$19,350.00 ¹⁷⁴	\$20,000.00 ¹⁷⁵	\$20,650.00 ¹⁷⁶	\$21,200.00 ¹⁷⁷

While the industry and its proponents claim that a majority of their customers are middle class,¹⁷⁸ the data tell a different story in New Mexico. We see that most borrowers are near or below the poverty line. This data applies for all years except for 2007, where one customer reporting an income of over two million dollars skewed the data.¹⁷⁹

In Table 12.2 below, we compare the average gross income of borrowers to the median incomes of families of all sizes in New Mexico.¹⁸⁰

172. The alleged “income requirements,” if you can call them that, vary greatly between lenders. Some require proof of regular employment, some will accommodate part-time or irregular employment, some will accept student loans and social security (which are not “income” for tax purposes), some will accept that the borrower has money in the bank, and some will make loans simply against the value of the vehicle, with no concern for income. Since income information is not used in making the loan, these numbers may be unreliable.

173. *The 2004 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/04poverty.shtml> (last visited Nov. 11, 2011).

174. *The 2005 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/05poverty.shtml> (last visited Nov. 11, 2011).

175. *The 2006 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/06poverty.shtml> (last visited Nov. 11, 2011).

176. *The 2007 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/07poverty.shtml> (last visited Nov. 11, 2011).

177. *The 2008 HHS Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://aspe.hhs.gov/poverty/08poverty.shtml> (last visited Nov. 11, 2011).

178. See *Consumer Use*, *supra* note 8, at 435.

179. See SUMMARY OF TITLE LOANS 2007, *supra* note 99.

180. This information was gathered from the United States Trustee’s median incomes data, used for means test purposes in bankruptcy cases. *Census Bureau, IRS Data and Administrative Expenses Multipliers*, U.S. DEP’T. JUST., <http://www.justice>.

Table 12.2: Comparison of Average Gross Income of Borrowers to the Median Incomes of Families of All Sizes in New Mexico¹⁸¹

	2005	2006	2007	2008
Avg. Gross Income of Title Loan Borrowers	\$22,861.00	\$24,678.65	\$27,719.36	\$20,116.00
Median Income for Family of One in New Mexico	\$38,947.00	\$40,028.00	\$44,356.00	\$42,102.00

As Table 12.2 shows, compared to families of all sizes in New Mexico, the average incomes of all title loan customers is far below the median or average income of the rest of the state.

7. Lawsuits and Repossessions

Both Professor Todd Zywicki and, to some extent, Professor Jim Hawkins claim that lenders usually do not repossess the vehicles pledged as collateral for title loans.¹⁸² Whether this claim is correct or not depends upon the meaning of the word “usually.” Data obtained from the self-reported records show that between 20% and 71% of the title loan customers have their vehicles repossessed.¹⁸³ Once reclamation rates are taken into account, between 13% and 60% of customers permanently lose their vehicles.¹⁸⁴

a. Number of Individual Title Loan Borrowers Against whom Lawsuits were Instituted

Table 13 reports on borrowers sued by their title lenders in connection with their title loans. While these data show that lenders infrequently utilize lawsuits, there is no indication that in New Mexico the loans are non-recourse. In the dozen or so contracts that we have seen, all allow the lender to sue for deficiencies, and some lenders do so.¹⁸⁵

gov/ust/eo/bapcpa/meanstesting.htm (use dropdown for Data Required for Completing Form 22A and Form 22C by date) (last visited Nov. 6, 2011).

181. See *Median Household Income by State – Single-Year Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/income/data/statemedian/>.

182. See Hawkins, *supra* note 15, at 1392-93; *Consumer Use*, *supra* note 8, at 435.

183. See sources cited *supra* note 99; *infra* Table 14.2.

184. See sources cited *supra* note 99; *infra* Table 15.1.

185. See *infra* Table 13. Additionally, as we understand it, interest will still accrue at the contract rate on any balance owed. If a judgment is reached in favor of the borrower, the court has discretion to set a new interest rate, or to allow the contract rate to remain in effect. We speculate that one reason that lenders seldom take bor-

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Table 13: Number of Suits Against Borrowers for Deficiencies

	2004	2005	2006	2007	2008
Total No. of Suits Filed by Lenders Against Borrowers	113	151	151	167	71

b. Total Number of Title Loan Repossessions During the Calendar Year

Table 14 reflects the total number of repossessions reported each year. Despite the fact that the number of loans made has decreased recently, the number of repossessions has increased.

Table 14: Total Number of Repossessions Reported

	2004	2005	2006	2007	2008
Total No. of Repossessions Per Yr.	1984	1441	2779	2745	2841

If we divide the number of reported repossessions for a given year by the number of loans made that year, we get the percentage of loans repossessed for the year.

Table 14.1: Repossession Rate by Loan

	2004	2005	2006	2007	2008
Total Lent	\$18,320,348.60	\$14,108,143.91	\$12,527,018.76	\$12,059,283.47	\$9,465,855.35
Avg. Loan Amt.	\$529.91	\$507.31	\$544.16	\$648.23	\$753.31
Avg. No. of Loans	34572	27809	23020	18603	12565
Total Repossessions	1984	1441	2779	2745	2841
% of Loans Repossessed	5.74%	5.18%	12.07%	14.76%	22.61%

While these rates are higher than we contemplated, they do not paint a complete picture. We must go further and divide the number of repossessions per year by the estimated number of customers we calculated in Table 7.1. This calculation provides an estimate of the yearly repossession rate per customer.

rowers to court is that is in their best interest not to allow the courts the chance to find their interest rates legally unconscionable.

Table 14.2: Repossession Rate by Customer

	2004	2005	2006	2007	2008
Avg. No. of Loans Per Yr.	34572	27809	23020	18603	12565
Avg. New Loans Per Customer Per Yr.	5	3.9	4.4	3.22	3.15
Total No. of Customers	6914	7130	5231	5777	3988
Total Repossessions	1984	1441	2779	2745	2841
% of Customers with Vehicles Repossessed	28.70%	20.21%	53.13%	47.52%	71.24%

As Table 14.2 shows, once we adjust the numbers to reflect the number of loans per customer, we find that the actual number of customers who get their cars repossessed jumps alarmingly. For example, in 2006, 53% of customers had their autos repossessed. To illustrate the magnitude of this repossession rate, we compare this rate to the current home foreclosure rate. In the fourth quarter of 2008 Nevada led the nation with a foreclosure rate between 2.574% and 4%, described by the New York Times as “dangerously widespread.”¹⁸⁶ If that foreclosure rate is a crisis, what is 53%? Not only is a vehicle repossession a loss of a major asset, it is the loss of vital transportation.

Table 15: Number of Reclamations by Borrowers after Repossession

	2004	2005	2006	2007	2008
Total Reclamations	972	511	633	608	446

Table 15.1: Vehicle Loss Rate by Customer

	2004	2005	2006	2007	2008
Total Reclamations	972	511	633	608	446
Percentage of Loans	48.99%	35.46%	22.78%	22.15%	15.70%
Number of Autos Lost	1012	930	2146	2137	2395
% of Customers Who Lost Vehicles	14.64%	13.04%	41.02%	36.99%	60.06%

186. Catherine Rampell, *Foreclosure Rates Really Aren't that High . . .*, N.Y. TIMES ECONOMIX BLOG, (Mar. 2, 2009, 5:59 PM), <http://economix.blogs.nytimes.com/2009/03/02/foreclosure-rates-arent-really-that-high/>.

To say an auto is repossessed does not mean that it was lost permanently, only that a customer fell behind in the payments and the repossession process was at least started. This is reflected in Table 15, which shows the number of customers who reclaimed their autos after repossession. To find out how many customers actually lost their vehicles after repossession, we subtract the number of customers who reclaimed their autos after repossession, as shown in Table 15, from the number of repossessions. We divided the number of autos lost by the total number of customers, as calculated in Table 14.2. These numbers show actual loss rates of 14.64% for 2004, 13.04% for 2005, 41.02% for 2006, 36.99% for 2007, and 60.06% for 2008. These figures are alarming under any standard.

c. Total Number of Motor Vehicles Disposed of by the Lender
During the Calendar Year

Table 16 reflects the total number of motor vehicles sold after repossession by the lender during the calendar year. This number should equal the Number of Autos Lost found in Table 15.1, which is calculated by subtracting the Number of Repossessions Reported from Table 14 from the Number of Reclamations by Borrowers After Repossession from Table 15. For some unknown reasons, it does not. This may be the result of vehicles being repossessed in one year and disposed of in another, but without more detailed data this is impossible to confirm.

Table 16: Total Number of Motor Vehicles Disposed of by the Lender

	2004	2005	2006	2007	2008
Total No. of Repossessed Cars Disposed of by Lender During Calendar Yr.	833	745	1277	1237	1325

d. Total Dollar Amount of Title Loan Excess Proceeds from Sale of Repossessed Vehicles Returned to the Borrowers During the Calendar Year

Table 17 reflects the difference in the selling price of repossessed vehicles as compared to how much the borrowers owe, or the total amount that all vehicle sales proceeds exceeded all loan amounts. New Mexico law requires lenders to return these overages to the borrower.¹⁸⁷

187. N.M. STAT. ANN. § 55-9-615(d)(1) (West, Westlaw through the 1st Reg. Sess. of the 50th Legis. (2011)).

Table 17: Comparison of Sales Price of Repossessed Cars to Amount of Loan

	2004	2005	2006	2007	2008
Total Amt. Realized in Auto Sales Over Loan Amt.	\$56,239.00	\$35,156.00	\$66,895.00	\$36,185.00	\$15,984.00

Below, we divided the amounts in Table 17 by the number of disposed vehicles to determine an estimate of the amount returned to the average customer. Surely some vehicles sell for more than the average and others sell for amounts insufficient to cover the outstanding loan. The data above indicate that the *average* amount returned is small and getting smaller every year. Since the lenders have to return any overage, the lenders are not motivated to sell vehicles for any more than they are owed.¹⁸⁸ It is most economical for them to sell the vehicles as quickly as possible, as shown in table 17.1.

Table 17.1: Average Amount Returned to Each Borrower Following Sale

	2004	2005	2006	2007	2008
Total Amt. Realized in Auto Sales Over and Above Loan Amount	\$56,239.00	\$35,156.00	\$66,895.00	\$36,185.00	\$15,984.00
Total No. of Repossessed Cars Disposed of by Lender During Calendar Yr.	833	745	1277	1237	1325
Avg. Amt. Returned to Each Borrower Following Sale	\$67.51	\$47.19	\$52.38	\$29.25	\$12.06

188. We recognize that in some cases, vehicles may have actually sold at a loss to the lender, but would imagine that those are somewhat rare instances, given that loans are generally made at 25-40% of wholesale value.

8. Reporting Woes

One theme quickly developed while analyzing these data. Lenders do not report and there are no ramifications. They do not lose their licenses or suffer any other consequences in response to their inaccurate reporting. We hope our paper will bring attention to and help remedy these practices. Table 18 shows a 32% decrease in lenders reporting between 2007 and 2008.¹⁸⁹ We carefully searched the New Mexico Regulation and Licensing Database for a count of all licensed small lenders authorized to make title loans from 2004 to 2008, data which is reflected in Table 18.1.

Table 18: Number of Licensees Reporting

	2004	2005	2006	2007	2008
Total Small Lenders Authorized to Make Title Loans who Reported to the FID	148	143	116	128	87

Table 18.1 Percentage comparison of lenders who filed reports to lenders authorized to make title loans.

Table 18.1 Number of Licensed Lenders Filing Reports

	2004	2005	2006	2007	2008	2009
No. of Lenders Reporting	148	143	116	128	87	65
No. of Lenders Licensed	157	155	145	137	138	165
% of Licensed Lenders Reporting	94.27%	92.26%	80.00%	93.43%	63.04%	39.39%

As the table above shows, in 2004, 94.27% of lenders responded, but in 2009 only about 40% of title lenders completed their FID required questionnaires. FID apparently has all but stopped enforcing its reporting requirements. Given what was reported, pursuant to N.M. Statutes Annotated § 58-15-10.1D(2), there should have been forty-eight more expired or revoked licenses in 2009.¹⁹⁰ In summary, while the reporting has never been perfect,

189. See SUMMARY OF TITLE LOANS 2008, *supra* note 99; SUMMARY OF TITLE LOANS 2007, *supra* note 99.

190. See N.M. STAT. ANN. § 58-15-10.1D. There have been numerous violations of the requirement that small lenders be authorized by the FID before making title loans. Under TILA, small loan companies are also required to disclose all fees and interest rates to the consumer in terms of APR, but it is not clear that this is being

the situation seems to be getting worse each year except for 2007, with no explanation for the drop. In 2008, the percentage of lenders reporting was abysmal.¹⁹¹ By 2009, fewer than half the lenders complied with the reporting requirements.¹⁹² This lack of compliance makes the 2009 data all but worthless.

IV. SOME CONCLUSIONS ABOUT TITLE LOAN CUSTOMERS, REPOSSESSION RATES, AND THE UTILITY OF THESE LOANS

This Part draws various conclusions about title lending from the data discussed in Part III above. In so doing, it challenges many of the myths about title lending. It discusses the demographics of title loan customers, the repossession rates on title loans, the legal implications of the data on surplus returns to customers, and finally, the utility of these loans to borrowers. This utility is discussed in the context of other loan products such as payday loans, as well as in light of industry claims that title loans smooth consumption for low-end borrowers with little access to other credit.

A. Title Loan Demographics: Who Uses Them?

Payday lenders have been claiming for years that they serve a primarily middle class population.¹⁹³ Some industry scholars have made this claim, ever since a 2001 industry-funded study found that most payday customers make between \$25,000 and \$50,000.¹⁹⁴ This claim is critical to the payday lending industry's assertion that it does not take advantage of the poor.¹⁹⁵

done. See Truth in Lending, Regulation Z, 12 C.F.R. §§ 226.6, .17 (2011). This lack of enforcement on the part of the FID has been an issue for as long as the FID has been responsible for monitoring title lenders, as indicated above in the section on compliance with signage laws. See *supra* Part II.2.B.

191. See SUMMARY OF TITLE LOANS 2008, *supra* note 99.

192. SUMMARY OF TITLE LOANS 2009, *supra* note 136.

193. See *Consumer Use*, *supra* note 8, at 458-59 & n.141.

194. Elliehausen, *supra* note 24, at 19.

195. For a few of the many statements made on payday lending websites, see *Payday Loan Myths*, USPAYDAYCENTER, <http://uspaydaycenter.com/payday-loan-myths> (last visited Dec. 11, 2011) (stating that "most people receiving such loans make between \$25,000 and \$50,000 a year"); *Your OnLine Payday Center*, PCA PERSONAL CASH ADVANCE, <http://www.personalcashadvance.com/payday-loans.html> (last visited on December 11, 2011) (stating that it is "debunking" payday loan myths and that "[m]ost cash advance borrowers earn \$25,000-\$50,000 annually"); see also Dick Hughes, *Advance America Banks on Surprise*, JOURNAL WATCHDOG, (Oct. 30, 2011, 8:18 PM), <http://www.journalwatchdog.com/business/1290-advance-america-banks-on-surprise> (quoting an industry study as saying that "[t]he Community Financial Services Association (CFSA), which represents payday lenders, cites research showing that two-thirds of payday customers are under 45, 41 percent earn \$25,000-\$50,000 and 39 percent more than \$40,000"); Larry Meyers, *Payday Loans v. In-*

Lenders repeat this assertion over and over again, though never with any supporting data other than that created by the industry.¹⁹⁶

The title lending industry has been far less vocal on this subject, but it still relies on faulty data to conclude that, based upon a New Mexico “study,” title loan borrowers make on average \$50,000 a year.¹⁹⁷ Our data, reported directly by lenders to the State of New Mexico Financial Institutions Division, prove otherwise. Our data show that the average borrower makes between \$20,116 and \$27,719, even when you include in the one borrower with an alleged income of over two million dollars.¹⁹⁸ This data is in a state where the median income for even a single person household is far above any of these income numbers. Data from other states similarly show gross incomes between \$22,000 and \$26,000.¹⁹⁹ Finally we can discard this middle class urban legend.

B. Repossession Rate: Another National Financial Crisis

Table 14.2 shows a repossession rate of between 20% and 71% per customer.²⁰⁰ Once reclamation rates are taken into account, between 13% and 60% of customers permanently lose their vehicles.²⁰¹ Other states report the following repossession rates: 10% for South Carolina,²⁰² and 9% for Tennessee.²⁰³ These rates appear to be as much as ten times higher than the reposses-

stallment Loans, PAYDAYLOAN FACTS BLOG (Jan. 1, 2011), <http://www.paydayloanfacts.com/blog/credit-options/payday-loans-vs-installment-loans/> (stating that 63% of payday loan borrowers “have annual household incomes of more than \$25,000, with 46% earning \$25,000 to \$50,000 a year”).

196. In the context of title lending, see all three of Zywicki’s articles. See *generally Consumer Use*, *supra* note 8; *Money to Go*, *supra* note 17; Zywicki & Okolski, *supra* note 17; see also *INDUSTRY REPORT TO NEW MEXICO LEGISLATURE*, *supra* note 17, at Resources and Materials 25-49.

197. See *Money to Go*, *supra* note 17, at 34.

198. See *supra* Tables 12-12.1.

199. According to Illinois data from 1999, the average title loan consumer has an income of less than \$20,000, and in Missouri, less than \$25,000, as of 2006. See FOX & GUY, *supra* note 21, at 3.

200. Numerically, based upon Table 14.2, this is between 1400 and 2800 repossessions per year. We suspect that the rate is even higher, but assuming this self-reported data is correct, the rate is still very significant.

201. See *supra* Tables 15-15.1. Keep in mind that the 2008 reporting rate was so low as to call these 2008 figures into serious question.

202. See also DeGaris, *supra* note 15, at 1839 (reporting on South Carolina).

203. In Tennessee, 14,832 cars were repossessed in 2008 while 161,417 loans were originated, giving us an estimated 9% repossession rate. *The 2010 Report on the Title Pledge Industry*, Tennessee Department of Financial Institutions (March 2010).

sion rate for regular auto loans.²⁰⁴ While we realize that one could quibble with the results of a calculation that divides the average of two variables to reach a third average,²⁰⁵ by any measure, this number represents a significant percentage of lost vehicles. Moreover, this rate is dozens of times higher than the current home foreclosure rate nationwide, which many consider to be a nationwide emergency and tragedy of nearly unprecedented proportion. Title loans are the secured auto loan equivalent of a home mortgage. Both types of loans lead to the loss of a significant asset for the person involved. Both forms of loss lead to displacement, and in the case of loss of a vehicle, an inability to function in the modern world.²⁰⁶

Also, building on the past section on demographics, for the borrowers involved, a vehicle likely is the most valuable asset they have. Though we have no actual data to support this, we believe they are unlikely to be homeowners as a general rule. Having an unencumbered vehicle is an important feat to most borrowers, and subsequent loss of that car is as much of an important negative financial event to these borrowers as losing a home has to the more affluent borrower. This reality is particularly true given that all of the repossessed cars would appear to have equity, and many of the foreclosed homes do not. The loss of these vehicles is indeed a forfeiture.

C. Article 9 and Title Loans: The Ultimate Contradiction

Article 9 of the Uniform Commercial Code applies to title loans and requires that once a lender has repossessed collateral, the lender must give notice to the owner and then sell the collateral in a commercially reasonable way.²⁰⁷ Following such a sale, the lender must return to the borrower any surplus from sale, over and above the loan amount and the costs of sale.²⁰⁸

204. See, e.g., Joseph B. Cahill, *License to Owe, Title Loan Firms Offer Car Owners a Solution that Often Backfires*, WALL ST. J., Mar. 3, 1999, at A1 (stating the general rate of repossession at General Motors is one to two percent).

205. Professor Hawkins has noted when reviewing these data that calculating the numbers in this way leads to error. Hawkins, *supra* note 15, at 1392 n.173. We acknowledge at note 146, *supra*, that the problem with the yearly summaries is that they average all of the data, including obvious outliers. Professor Hawkins notes that this creates unknown error rates in each original average. See Hawkins, *supra* note 15, at 1392 n.173. Once two such averages are combined to perform a calculation, the error rate is compounded. We also perform our computations under the assumption that dividing the averages of two variables results in a third average – the average of the divided variables, which is not true. Unfortunately, given the lack of backup data, we have no choice. This does not change the fact that even at their lowest, these repossession rates are astronomical.

206. See Drysdale & Keest, *supra* note 15, at 600.

207. See U.C.C. §§ 9-608-14 (2010). The law also requires that, in some cases, the lender advertise the sale in the newspaper. *Id.*

208. *Id.* § 9-615.

The point of these provisions, which form the bedrock of the Article 9 remedies, is to avoid a forfeiture of borrower property at the hands of lenders. In essence, Article 9 forbids such forfeiture.²⁰⁹

We know from our phone interviews and from data other scholars have collected that lenders loan at somewhere between 20 and 55% of a vehicle's value.²¹⁰ We know from the self-reported data that lenders return somewhere between \$12 and \$68 in surplus per loan to customers.²¹¹ So where is the rest of the value in these vehicles? Case law suggests that a sale is commercially reasonable if all of the notice requirements of Article 9 are met and the lender's sale brings between 57 and 70% of the fair market value of the collateral.²¹² How can lenders be so over-secured but return so little surplus to foreclosed borrowers? Is it that lenders do not hold commercially reasonable sales? Is it that they sell back to themselves, or to a sister corporation, then resell the cars on the adjoining lot through a private sale that does not comply with Article 9? Is it that lenders do not, even by their own admission, return the surplus to borrowers? Or, is it that lenders wait to sell following repossession until the fees have increased enough to eat up whatever equity there was? All of these questions need to be explored in further research, but if lenders are accomplishing forfeiture by waiting to sell until the fees have eaten up the equity, there would be far more significant implications than anything else reported in this piece. The implication is that Article 9 provisions to prevent forfeitures of collateral do not work on secured personal property loans with interest rates this high. Article 9's anti-forfeiture provisions are insufficient to achieve their anti-forfeiture goal in the case of title loans.

D. Strictly Asset-Based Lending Leads to More Forfeiture

When a lender makes a loan based exclusively on the value of the collateral underlying the loan, rather than also on ability to repay, forfeiture is more likely. This fact is well-recognized in the commercial as well as the consumer context.²¹³ When your target population for a consumer product also has low income and low cash flow, the loans are likely to lead to forfei-

209. See Michael Korybut, *Searching for Commercial Reasonableness*, 87 IOWA L. REV. 1383, 1395 (2002).

210. FOX & GUY, *supra* note 21, at 2 (noting the "most frequent loan-to-value set at 50 to 55 percent of the car's value"). We believe that some title lenders appraise the car at the lowest possible value (the wholesale price in bad condition) and then offer 50% or 33% of that value.

211. See *supra* Table 17.1.

212. See Andrea Coles-Bjerre, *Trusting the Process and Mistrusting the Results: A Structural Perspective on Article 9's Low-Price Foreclosure Rule*, 9 AM. BANKR. INST. L. REV. 351, 365, 383 (2001).

213. See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1261-62 (2002).

ture. Some commentators might say lenders designed the loans to lead to forfeiture. Commentators have criticized asset-based lending in other consumer law contexts, such as home mortgage lending.²¹⁴ Moreover, title loans are often huge compared to the borrower's income, as we saw with Ms. Price. In this context, more than any other, the law should require lenders to lend no more than what a consumer might be able to repay. Otherwise, we are condoning proven forfeiture, as shown here.

E. Frequent Rollover Rates Make Smoothing Consumption a Myth

Industry advocates and a small group of scholars argue that forcing fringe lenders like title lenders and payday lenders to charge more reasonable interest rates will put them out of business, which will in turn harm consumers who need these loans.²¹⁵ Consumers with low income, so the argument goes, need loans like these to "smooth consumption" during difficult financial situations.²¹⁶

Smoothing consumption is a myth, however, when rollover and renewal rates are high, because even if the initial loan achieves this goal, the costs of the loan hamper the consumer's ability to smooth consumption in the future.

214. See, e.g., Kathleen C. Engel, Patricia A. McCoy, *Revisiting A Tale of Three Markets: The Law and Economics of Predatory Lending*, 82 TEX. L. REV. 439, 442 n.15 (2003) (stating that the authors are concerned about "asset-based lending, something that both we and Ms. Renuart assiduously oppose in residential mortgage lending")

215. Hawkins, *supra* note 15, at 1363; *Consumer Use*, *supra* note 8, at 431-33.

216. Hawkins, *supra* note 15, at 1370. For example, in his recent article, *Money to Go*, Professor Todd Zywicki concludes that outlawing title loans would be bad for consumers and that title loans are cheaper and better for consumers than their likely alternatives. See *Money to Go*, *supra* note 17, at 35-37. Many statements in the article seem questionable, including that: competition in the title loan business is "fierce," which keeps the interest rates low; title loan interest rates are strictly regulated by all but four states; title loan pricing is transparent and easy to understand, making it easy for customers to shop around for price; a large percentage of title loan customers use them to keep small businesses afloat; and 70% of borrowers have more than one car anyway, and most of the rest have access to public transportation. *Id.* at 32-33, 37.

Virtually all of the harms Zywicki identifies if these loans disappear are unsubstantiated. He claims that if a customer could not get a title loan, she would need to sell her car or use payday loans. *Id.* at 32. It seems untenable that anyone would need to sell her car rather than taking out a title loan, at least if they could go get an endlessly-available payday loan instead. Moreover, many people do have family or friends, even if they'll only lend, as Zywicki claims, in an emergency. *Id.* at 36. Zywicki also claims that where high cost credit is eliminated completely, loan sharking returns. *Id.* at 37. But is this true? Has this happened in Massachusetts and other places where they have eliminated payday and title loans? We have seen no study suggesting as much.

In Price's case, that extra bill, her title loan payment, was 60% of her monthly net income. Moreover, even if smoothing were achieved in some percentage of these loans, the price paid for it is not worth the cost, given that in a high percentage of these loans, customers lose their vehicles, and arguably, their jobs.

*F. Regulation of Title Lending is Warranted
Despite Obvious Paternalism*

The low-income demographic, combined with the over-collateralized, asset-based lending, as well as the high repossession rates, all point to the need to regulate title lending. Some people will argue that not allowing people to borrow and lend at these rates is paternalistic and interferes with freedom of contract.²¹⁷ As a society, we have rejected these arguments in the context of many middle-class consumer lending products, including, most recently, credit cards and home loans.²¹⁸ Title loans, used most frequently by the lower and working classes, remain largely unregulated. Yet paternalism may be more justified among people with lower incomes and less assets and earning power than among the general population. People with lower income pay a higher percentage of their income and cash assets than wealthier people when they pay 300% interest on a loan. Moreover, people who take out title loans have smaller safety nets, if any, and thus live closer to the financial edge. Regulating products such people use is more justified than regulating products used by wealthier people, because the working poor have so much more to lose.

*G. Comparing Title Loans to Payday Loans:
Which is Better for Consumers?*

Other scholars have argued that title loans are better for consumers than payday loans.²¹⁹ While both are generally harmful to consumers, we feel title loans are far worse for consumers than payday loans. The answer, however, can vary depending on the consumer's financial situation, namely whether the consumer feels able to pay the loan back. Interest rates are lower for title loans. Rates for title loans in New Mexico range from 88-300%.²²⁰ This rate is roughly half the APR of a payday loan (or their new replacement, the in-

217. See Hawkins, *supra* note 15, at 1404-07.

218. See, e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2010) (regulating credit cards).

219. See *Consumer Use*, *supra* note 8, at 443-44; see also Hawkins, *supra* note 15, at 1392-94.

220. See Appendix A.

stallment loan), which in the New Mexico market typically runs from 417-560%.²²¹

If a customer is sure she can pay the money back and not borrow more, the title loan likely would be better. You can only get one title loan, whereas it is common for people to have several payday loans totaling more than their entire paychecks. In fact, one woman in a recent study of bankruptcy debtors had over thirty payday loans.²²² Thus, a title loan is best if one is sure one will pay it back in a cycle or two, but finding such a consumer would be difficult.

In our view, for the average borrower, the disadvantages of title loans far outweigh the advantages. Title lenders can and do repossess. As one woman in a survey reported: "title loans are worse [than payday loans]. They make you take their mandatory local AAA service, and if you are even one day late, they take your car. They took mine and I lost my job."²²³ In sum, title loans are worse than payday loans because of the low loan-to-value ratio. Moreover, their completely asset-based nature typically makes it impossible for customers to ever pay back the large loans, and some customers cannot afford to pay the interest payments. This reality makes repossession and forfeiture likely.

V. CONCLUSION

This Article uncovers some stark realities about title lending, including triple-digit interest rates, no attempt by lenders to determine if customers can afford to pay back the loans, and high repossession rates. Title lending has gone unregulated in most states, which remains mysterious, given the demographic that uses title loans and the strong possibility of forfeiture of a vehicle, which could be the customer's most valuable asset. Some of the regulation that could help fix these problems might include absolute interest rate caps of 36% on all consumer loans,²²⁴ more stringent and better enforced

221. See Martin, *supra* note 16, at 584-85 (stating that a new law capped rates at 417% but that lenders quickly found ways around the new laws and continued to charge 500% and more).

222. Martin & Tong, *supra* note 16, at 804.

223. Interview with Payday Loan Customer in Albuquerque, N.M. (June 5, 2009) (outside payday lender's storefront). This consumer was a participant in author Nathalie Martin's curbside study, reported about in Martin, *supra* note 16. Although the payday lending study was only about payday loans, some consumers also reported on title loans at the end of their interviews, when asked if they had any other comments.

224. While it is not clear why 36% seems to be the cap that many states choose when capping interest, this does seem to be the case. Montana just capped interest on consumer loans at 36% and numerous other states have chosen this same number. See Plunkett & Hurtado, *Small-Dollar Loans*, *supra* note 75, app. A, at 56-63. Plunkett and Hurtado also propose a national federal interest rate cap of 36%. *Id.* at 50. In

licensing procedures, and restrictions on rolling over title loans. Other things that also might be useful are better disclosures to consumers about the total cost of the loans over the life of the loan, disclosures about the fact that the loan is an interest-only loan, procedures for enforcing requirements that sales be commercially reasonable, procedures for ensuring that surpluses are returned to customers, a requirement that interest stop accruing after repossession, a prohibition against pre-payment penalties, and a requirement that lenders consider a borrower's ability to repay when lending. Non-compliance could result in forfeiture of the loan and security agreement.

It is up to the states to decide which of these provisions to adopt. But consciously or not, we are legislating differently for lower and working class people than for middle class people. We protect the middle class through a great web of legislation on the products they use, such as credit cards and home mortgages. Yet with products that the lower and working classes use, we do nothing. We do nothing if the Article 9 remedies do nothing to protect consumers, due to the enormous interest rates. We do nothing about the loss of one of life's largest assets for the people involved. It is unclear why this is the case. Is it that the working classes have no political clout? Are the lower classes hidden enough that this issue does not matter much to the rest of us? The people who most need protection are not receiving it. While legislatures around the nation, both federal and state, struggle with how to regulate home loans, credit cards, and other middle class products, title loans have gone unnoticed and unregulated. Given the protections we have provided to middle class consumer credit users, we also should consider regulating the consumer credit products used primarily by the lower and working classes.

2006, recognizing the troubling implications of payday lenders clustering around military installations, Congress adopted a 36% interest-rate cap on loans to all military personnel and their dependents. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083, 2266 (2006) (codified at 10 U.S.C. § 987) ("A creditor . . . may not impose an annual percentage rate of interest greater than 36 percent with respect to the consumer credit extended to a covered member or a dependent of a covered member."), cited in Christopher L. Peterson, *supra* note 53, at 1128 & n.88. As Professor Peterson notes, culturally, for whatever reason, we perceive certain interest-rate percentages as ethical and others as unethical. *Id.* at 1149-50. Peterson believes that the range of interest rates perceived as ethical ranges from 6 to 36%. See *id.* at 1150.

APPENDIX A: ALBUQUERQUE LENDERS PHONE SURVEY

Name	Address	Phone	Loc	APR	Fees
Shamrock Finance	3151 San Mateo	889-8979	1	88%-260%	
-----+New Mexico Title Loans	5260 Montgomery	830-1808	4	240%-360%	\$19.50
Check 'n Go	6211 4 th	344-1669	4	520.00%	
Approved Finance	3400 San Mateo	888-1777	1	510%	
Ace Cash Express	4001 San Mateo	889-8084	17	450%	
American Cash Loan	2928 Carlisle	796-6212	1	416%	
Allied Cash Advance	3621 Menaul	888-0025	7	328%	\$5.00
Dash 4 Cash	3244 San Mateo	888-7503	1	328%	\$5.00
Fast Bucks	4000 Menaul	830-2277	8	306%	
Title Cash of New Mexico	2900 Eubank	275-7745	1	306.60%	\$5.00
Cash 2 Go	5617 Menaul	883-0053	3	304.17%	
Express Cash Pawn	4710 San Mateo	888-9799	1	302.00%	
Cash Store	2010 Wyoming	349-0923	2	300.00%	\$5.00
Quick Cash	5727 Central	839-2280	9	300.00%	
Speedy Cash	2108 Juan Tabo	277-8083	2	300.00%	\$5.00
CNC Financial	6001 San Mateo	884-0560	1	300.00%	
Loan Max	3905 San Mateo	888-7611	2	292.00%	\$5.00
Money Now	3500 San Mateo	830-9281	1	270.00%	
Lighthouse Financial	9320 Menaul	293-4883	1	254.00%	
Money Train	5717 Menaul	338-2580	2	240.00%	\$8.50
Checkmate	1145 San Mateo	262-4914	6	228.00%	\$8.00
		Total	66		
			Avg	388.18%	

2012]

GRAND THEFT AUTO LOANS

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APPENDIX B: STATE OF INCORPORATION OF TITLE LENDERS
OPERATING IN ALBUQUERQUE

Name	No. Locations	Owner State
Ace Cash Express, Inc	17	Texas
Cashmax	1	Illinois
The Cash Store	1	Delaware
Money Train Title Loans	2	Utah
CNC Financial Services	1	Texas
Speedy Loan	4	Delaware
Express Cash Loan, Inc	1	New Mexico
FastBucks	9	Texas
Speedy Bucks	2	New Mexico
Fast Cash Loan, Inc.	1	New Mexico
Lighthouse Financial	1	Florida
Money Network Auto Title	1	Colorado
New Mexico Title Loans	4	Georgia
LoanMax	2	Georgia
Nationwide Budget Finance	1	Missouri
Wild Bill's Fast Cash	1	Nevada
Check N' Go	4	Ohio
Title Cash of New Mexico	1	Alabama
FastBucks	2	Idaho
Ready Money	2	Wisconsin
Total Albuquerque Lenders	61	
Number of New Mexico Owners	4	
Percent New Mexico Owners	6.56%	

APPENDIX C: SUMMARY OF TITLE LOANS
ANNUAL DATA COLLECTION FOR TITLE LOANS ISSUED BY SMALL
LOAN LICENSEES DURING CALENDAR YEAR 2009

Dollar Amt. of all New Title Loans Originated During the Calendar Yr.	Min: \$50.00 Max: \$10,000.00 Avg: \$855.52
Total Principal Dollar Amt. of all Title Loans Outstanding	Total: \$5,586,432.51 Avg: \$85,945.12
Total No. of all Title Loans Outstanding at End of Calendar Yr.	Total: 7184 Avg per Co.: 110.52
Total \$ Amt. of all New Title Loans Originated During Calendar Yr.	Total: \$10,785,123.44 Avg per Co: \$165,924.98
Annual % Disclosed (pursuant to Fed. Reg. Z) on New Title Loans Originated During Calendar Yr.	Min: 0% Max: 426% Avg: 266.35%
No. of Days for the Licensee's Initial Maturity Term of New Title Loans Originated During the Calendar Yr.	Min: 1 Max: 910 Avg: 55.17
Avg. No. of New Title Loans Made to the Same Customer Originated During the Calendar Yr.	Avg: 1.9
No. of Times Any Title Loan was Renewed, Refinanced, or Extended During the Calendar Yr.	Min: 0 Max: 28 Avg: 2.31
No. of Title Loans Charged Off During the Calendar Yr.	Total: 1180
\$ Amt. of Title Loans Charged Off During the Calendar Yr.	Total: \$908,703.33
\$ Amt. of Recoveries of Title Loans During the Calendar Yr.	Total: \$1,008,510.88
Gross Yearly Income for any Title Loan Borrower, as Disclosed to Licensee During the Calendar Yr.	Min: \$2400 Max: \$390,000.00 Avg: \$24,492.53
No. of Title Loan Borrowers Against Whom Lawsuits Were Instituted	Total: 70
Total No. of Title Loan Repossessions During the Calendar Yr.	Total: 975
Total Number of Title Loan Repossessions Reclaimed by Borrower During the Calendar Yr.	Total: 337
Total Number of Title Loan Repossessions Disposed of By Lender During the Calendar Year	Total: 473
Total \$ Amt. of Title Loan Excess Proceeds from Sale of Repossessed Vehicles Returned to Borrowers During the Calendar Yr.	Total: \$23,079.00
Companies Reported	Total: 65

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STUDENT ARTICLE

Protecting Our Protectors: The Defense Department's New Rules to Prevent Predatory Lending to Military Personnel

By Dawn Goulet*

I. Introduction

Navy Air Traffic Controller Matthew Hubbell is like many Americans. His income, although steady, is sometimes not enough to guard against the unexpected. When his wife began a battle with breast cancer, he needed a loan to make ends meet.¹ He thought a short-term payday loan, the kind promoted through advertisements like “\$500 instant cash – no credit check,” or “[m]ake your next payday today,” was the answer.² However, the payday lender required the \$500 he borrowed be paid in full just two weeks later.³ The same financial troubles that prompted him to take out the loan prevented Hubbell from paying it off on time, so he rolled the loan over for another two week period, and another.⁴ Eventually he found

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¹ Chris Cuomo, Mary Harris & Lara Setrakian, *Are Predatory Lenders Ripping Off Our Nation's Finest?*, ABC WORLD NEWS, Aug. 22, 2006, available at <http://abcnews.go.com/WNT/story?id=2343457&page=1> (last visited Oct. 17, 2007).

² *Id.*

³ *Id.*

⁴ *Id.*

himself paying a 390% annual interest rate, trapped in a spiral of high-interest debt.⁵

Mr. Hubbel is not alone. Within 30 miles of his naval base are over 117 short-term lenders catering to military personnel.⁶ Active-duty military personnel are three times more likely than their civilian counterparts to take out payday loans⁷, and one in five service members are payday borrowers.⁸ The Department of Defense (“DOD”) has identified payday lending as one of its 10 key “quality of life” concerns for military families⁹, stating that “[p]redatory lending undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all volunteer fighting force.”¹⁰

The discussion below will examine predatory lending practices, the ways in which predatory lenders target military personnel, why military personnel make such easy targets, and why past efforts to protect them have failed. Finally, the article will examine the rationale behind recent federal legislation enacted to protect service members, and will consider whether the DOD’s new rules for implementing this legislation do all that they should to protect this country’s protectors.

⁵ *Id.*

⁶ Cuomo, Harris & Setrakian, *supra* note 1.

⁷ Ozlem Tanik, *Payday Lenders Target the Military*, CRL ISSUE PAPER NO. 11 (Ctr. for Responsible Lending, Durham, NC), Sep. 29, 2005, at 1, available at <http://www.responsiblelending.org/pdfs/ip011-PaydayMilitary-0905.pdf> (last visited Oct. 17, 2007).

⁸ U.S. Dep’t of Def., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, at 12, Aug. 9, 2006, available at http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf#search+%22%20Department%20of%20Defense%20Report%20on%20Predatory%20Lending%20Practices%20%22 (last visited Oct. 17, 2007) [hereinafter REPORT ON PREDATORY LENDING].

⁹ Peter Geier, *Cash Now, Suits Later: ‘Payday Lending,’ A Military Concern, Stirs Up Litigation*, 28 NAT’L L.J. 1, 1 (2006).

¹⁰ REPORT ON PREDATORY LENDING, *supra* note 8, at 53.

II. Predatory Lending and Its Effects on Military Personnel

A. Predatory Lending Practices

The term “predatory lending” describes a wide variety of unfair or abusive loan or credit transactions and collection methods.¹¹ Such practices include charging high interest rates and high fees, repeated renewals or “loan flipping” that creates a profit for the lender without ever significantly reducing principal, packing loans with high cost ancillary products, fraud or deception, waivers of rights to legal redress, and operations outside state usury laws.¹² Predatory lending is a process that begins with misleading sales tactics directed at borrowers who may not fully understand all the provisions of the contracts they are signing. It ends with borrowers unable to repay the loans they have taken due to excessive fees and interest.¹³

Payday loans—one prevalent form of predatory lending—are transactions in which the borrower obtains a minimal cash advance, typically between \$100 and \$500, on his salary for two weeks.¹⁴ The borrower writes a post-dated check for the amount of the loan, plus a fee of between \$15 and \$35, representing an annual interest rate of 300-400%.¹⁵ Because partial payments are not allowed, often the borrower cannot repay the entire loan amount at the end of the two weeks, and must pay a fee to extend or rollover the loan to prevent the lender from cashing the check and triggering overdraft fees or bounced check penalties.¹⁶ A borrower can become trapped in a cycle of rollover after rollover, in which high renewal fees are paid while little, if any, of the principal balance is reduced.¹⁷ Rollover extensions of existing loans, called “loan flipping,” are what makes

¹¹ *Id.* at 2.

¹² *Id.* at 2-3.

¹³ Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits?*, 12 FORDHAM J. CORP. & FIN. L. 203, 208 (2007).

¹⁴ Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U.L. REV. 1217, 1222 (2004).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

payday lending profitable.¹⁸ Ninety percent of the industry's revenue growth stems from more frequent and larger loans to existing customers.¹⁹

In addition to payday loans, predatory lenders offer consumers car title loans (in which a loan for a fraction of the value of the borrower's vehicle is secured by title to the vehicle, and can result in repossession upon failure to pay),²⁰ tax refund anticipation loans (expensive short-term loans secured by a taxpayer's expected tax refund that are often granted to the lowest earners, those receiving the Earned Income Tax Credit),²¹ and rent-to-own operations (in which the lender typically charges several times the value of an item in rental fees without disclosing the true cost of the eventual purchase).²²

B. Military Targeting

Military personnel make easy targets for predatory lenders offering any of these services. Almost 73% of active-duty military personnel make salaries between \$20,000 and \$30,000 a year.²³ Military personnel are attractive customers for predatory lenders because a great number of them are financially unsophisticated, young, and away from home for the first time.²⁴ They are largely married couples with young children, and many are under intense pressure to pay bills and meet everyday living expenses.²⁵ Unlike many other consumers, however, service members can count on government paychecks to be issued like clockwork, are not in any danger of being laid off from their jobs, and are easy to track for collection purposes through their commanding officers.²⁶ In addition, they are required to maintain financial stability as part of the

¹⁸ REPORT ON PREDATORY LENDING, *supra* note 8, at 14.

¹⁹ *Id.*

²⁰ *Id.* at 16.

²¹ *Id.* at 20.

²² *Id.* at 19.

²³ Stuart Rossman & Hellen Papavizas, *When the Military Paycheck is Prey*, 42-SEP TRIAL 43, 43 (2006).

²⁴ *Id.* at 47.

²⁵ *Id.*

²⁶ *Id.*

military's enforced good-conduct codes.²⁷ In short, they are a predatory lender's dream.

Targeting military families for predatory loans is particularly heinous because it preys on financial vulnerabilities stemming directly from a service member's commitment to defend his country.²⁸ Military personnel often face unexpected expenditures leading up to deployment, and often must leave financial matters in the hands of spouses not accustomed to managing them.²⁹

Payday lenders target military personnel by setting up shop around bases, and by employing "affinity marketing" tactics designed to mislead service members into believing their loans are sanctioned by the United States government. Payday lenders are located in areas near military bases in significantly higher densities than in other areas of the country.³⁰ For example, 31 of the 33 payday lenders in a 1,000-square mile radius of the Fort Bragg and Pope Air Force Bases in North Carolina are located within five miles of the bases.³¹ These lenders place ads for easy loans and fast cash in publications like *Army Times*, *Navy Times*, *Air Force Times*, and *Marine Corps Times*, independently published newspapers that many service members believe are official military publications.³² Such "affinity marketing" tactics lend a misleading air of credibility to the claims made, as if they have been vetted by the military to screen out any undesirable lenders.³³ Online searches for terms like "military payday loans"

²⁷ *Id.* Although financial problems rarely trigger military discipline, payday lenders use these unlikely measures as threats when lending to service members. One payday loan "Repayment Agreement" states: "If I fail to provide these funds, I understand that this will be a violation of Articles 123a and 134 of the UCMJ [Uniform Code of Military Justice], punishable by up to six months' confinement, forfeiture of all pay and allowances, and a bad-conduct discharge ... I authorize the [creditor] to contact my military supervisors in these matters." Rossman & Papavizas, *supra* note 23, at 47.

²⁸ *Id.* at 43.

²⁹ *Id.* at 49.

³⁰ Tanik, *supra* note 7, at 3.

³¹ *Id.* at 2-3 (relying upon a 2005 study by Christopher Peterson, assistant professor, Levin College of Law, University of Florida, and Steven Graves, assistant professor, California State University-Northridge. The study analyzed 20 states and almost 15,000 payday shops. Payday lenders were found in greater concentrations near military bases in 19 of the 20 states studied).

³² Rossman & Papavizas, *supra* note 23, at 48.

³³ *Id.*

result in numerous paid, sponsored links to sites purporting to offer special loans for military personnel, utilizing official-looking military seals, and promising, "If you're serving . . . you're pre-approved!"³⁴ Retired military personnel are even sometimes recruited to pitch loans and other services to service members, giving the impression that the military has actually endorsed their products.³⁵

C. Failure of Prior Efforts to Protect Military Personnel

Traditionally the payday lending industry has been regulated primarily by state law.³⁶ Some states have developed regulatory efforts limiting predatory lending practices and capping interest rates, while others have declined to do so.³⁷ Although the Armed Forces Disciplinary Control Board has the authority to declare a lender off-limits to military personnel, it cannot do so if the lender is not breaking applicable state laws.³⁸ Furthermore, numerous states have failed to enforce their laws when they are broken by lenders targeting only non-resident service members stationed within the state.³⁹ Many lenders have effectively circumvented those few state laws by affiliating via the internet with out-of-state banks based in states like Delaware or Nevada that do not cap rates for loans.⁴⁰

Persistent lenders have found loopholes around outright bans on payday lending, masking the true nature of the services they offer. For example, in New York, where payday lending is illegal, a local business called N.Y. Catalog Sales, located in a mall near a military base, allowed customers to "purchase" \$90 dollars worth of coupons for merchandise in an old catalog chained to the store's counter.⁴¹ A customer simply had to write a check for \$390, which the catalog

³⁴ REPORT ON PREDATORY LENDING, *supra* note 8, at 3.

³⁵ Diana B. Henriques, *Lenders At the Gate: Debtors in the Barracks: Seeing Quick Loans, Soldiers Race Into High Interest-Rate Traps*, N.Y. TIMES, Dec. 7, 2004, at A1.

³⁶ Sandra Jontz, *Pentagon Backs Effort to Cap Interest Rate On 'Payday Loans'*, STARS AND STRIPES, Aug. 15, 2006, available at <http://stripes.com/article.asp?section=104&article=38428&archive=true> (last visited Oct. 17, 2007).

³⁷ *Id.*

³⁸ *Id.*

³⁹ REPORT ON PREDATORY LENDING, *supra* note 8, at 46.

⁴⁰ *Id.* at 47, app. 3.

⁴¹ Henriques, *supra* note 35, at A1.

sales shop would hold until payday, and he would receive the coupons and \$300 in cash.⁴² The scheme was obviously a thinly-disguised attempt to make high-interest loans look like legitimate sales. One military wife who used this service said of the coupons, “We just threw them out . . . [o]bviously, you go there to get a loan.”⁴³

In its own attempt to address the concerns regarding payday lending to military personnel, the payday-advance industry’s national trade association, the Community Financial Services Association (“CFSA”), issued its “Military Best Practices.”⁴⁴ But the guidelines are merely voluntary, providing no penalties or sanctions for CFSA members who do not comply.⁴⁵ Although these guidelines claim to “limit rollovers to four (4) or the State limit, whichever is less,” loan flipping has continued through back-to-back transactions, in which the lender allows the customer to close out the old loan and then immediately re-open a new loan to bypass the rollover limitation.⁴⁶ As Major General Steve Siegfried, a retired Army officer who helped draft the code has said, “enforcement is the key . . . If you don’t enforce it, it’s just a pretty plaque on the wall.”⁴⁷ The industry guidelines also fail to offer any limitation on the interest rates charged for payday loans.⁴⁸

In the past, federal efforts to protect military personnel from predatory lending have met with little success. A longstanding federal law, updated in 2003, the Servicemembers’ Civil Relief Act (“SCRA”), requires interest rates on any debt a service member acquires prior to enlistment be reduced to 6% upon attaining active duty status.⁴⁹ Unfortunately the law creates no such limit on the rates a service member can be charged *after* enlisting.⁵⁰ With little legislation available to enforce, the military has traditionally relied on educating troops through finance literacy classes, but even the DOD

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Tanik, *supra* note 7, at 8.

⁴⁵ *Id.*

⁴⁶ *Id.* at n.27.

⁴⁷ Henriques, *supra* note 35, at A1.

⁴⁸ Tanik, *supra* note 7, at 8.

⁴⁹ Henriques, *supra* note 35, at A1.

⁵⁰ *Id.*

admits that “educational efforts . . . can only go so far.”⁵¹ Lastly, while alternatives to payday loans like those available through the Military Aid Societies are potential solutions for military personnel that are not readily available to civilian consumers, service members are often reluctant to inquire or take advantage of them, due to the social stigma associated with not having one’s finances under control.⁵²

D. Effects on Military Readiness

Predatory lending affects the quality of life and morale of service members, and has demonstrably undermined troop readiness.⁵³ The DOD’s investigation reveals that 80% of Navy personnel security clearance denials and revocations are due to financial issues.⁵⁴ As part of their military duties, many service members must obtain and maintain security clearances that “demand complete and unquestionable integrity.”⁵⁵ The fear and stress that accompanies the burden of unmanageable debt can cause job performance to suffer and can compromise such integrity.⁵⁶ A service member who loses his security clearance can be temporarily removed from his assignment.⁵⁷ Captain Mark D. Patton, USN Commanding Officer at the Navy’s Point Loma, California Naval Base and head of the task force on predatory lending reports that “[b]etween 2000 and 2005, revoked or denied security clearances for Sailors and Marines due to financial problems have increased 1600 percent.”⁵⁸ He believes that now especially, when the country is at war, “this is an unacceptable loss of valuable talent and resources.”⁵⁹

⁵¹ REPORT ON PREDATORY LENDING, *supra* note 8, at 27.

⁵² *Id.* at 29.

⁵³ *Id.* at 45.

⁵⁴ *Id.*

⁵⁵ *Id.* at 86.

⁵⁶ REPORT ON PREDATORY LENDING, *supra* note 8, at 86.

⁵⁷ *Id.* at 87.

⁵⁸ *Id.* (Emphasis added).

⁵⁹ *Id.*

III. The New Federal Legislation and the Defense Department's Enforcement Regulations

Upon reviewing the issue of predatory lending to military personnel, Congress's Armed Service Committee included §670 in the John Warner National Defense Authorization Act.⁶⁰ The resulting statute, titled "Terms of Consumer Credit Extended to Service Members and Dependents: limitations" became effective October 1, 2007.⁶¹ Divided in seven sections, it sets forth the new limitations on lenders who provide loans to military personnel and their dependants ("covered members").⁶² The law also required that the Secretary of Defense to prescribe regulations for the enforcement of these limitations by October 1, 2007.⁶³

In accordance with the modern practice of electronic rulemaking,⁶⁴ the DOD posted its proposed regulations online and opened up a comment period, allowing any individual or organization to review and submit comments on the proposed rules until June 11, 2007.⁶⁵ On August 31, 2007 the final regulations were codified at 32 C.F.R. 232. The following discussion will comment on the law's provisions and the added regulations, each within the context of the seven categories set forth in the statute.

A. Interest

The new federal statute and the DOD regulations limit the interest required on extensions of credit to military personnel and their dependants to: 1) what is agreed to under the credit agreement;

⁶⁰ Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 18, 157 (April 11, 2007) (to be codified at 32 C.F.R. pt. 232), available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-1780.pdf> (last visited Oct. 17, 2007) [hereinafter Limitations].

⁶¹ 10 U.S.C. §987 (2006).

⁶² *Id.* at §987(e).

⁶³ *Id.* at §987(h)(1).

⁶⁴ Michael Hertz, *E-Rulemaking*, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2002-2003 (Jeffrey S. Lubbers, ed., A.B.A. Sec. of Admin. L. & Reg. Prac., (2004)), available at http://www.ksg.harvard.edu/m-rcbg/rpp/erulemaking/papers_reports/Herz_E_Rulemaking.pdf (last visited Oct. 17, 2007).

⁶⁵ Limitations, *supra* note 60.

2) what is authorized by applicable State or Federal law; and 3) what is not specifically prohibited by the law itself.⁶⁶

B. Annual Percentage Rate

One of the most radical limitations the new statute sets forth is a cap of 36% on annual percentage rates for credit extended to covered members.⁶⁷ In addition, the DOD regulations specifically define a military annual percentage rate (“MAPR”) to include the following cost elements that are deducted from the proceeds of the credit extended to covered members: “interest, fees, credit service charges, credit renewal charges, credit insurance premiums including charges for single premium credit insurance, fees for debt cancellation or debt suspension agreements, and fees for credit-related ancillary products sold in connection with and either at or before consummation of the credit transaction.”⁶⁸ The regulations, however, provide that the MAPR is not to include fees imposed for actual unanticipated late payments, default or delinquency, because these are fees imposed as a result of contingent events occurring after the loan is consummated.⁶⁹

C. Mandatory Loan Disclosures

The new statute requires that any extension of credit to a covered member, including those extended through the internet, shall provide adequate disclosures of the applicable annual percentage rate, any disclosures already required under the Truth in Lending Act,⁷⁰ and “a clear description of the payment obligations.”⁷¹ Such disclosures are to be made orally *and* in writing, and shall be in accordance with the regulations implementing the Truth in Lending Act,⁷² which require “a separate written itemization of the amount

⁶⁶ 10 U.S.C. §987(a) (2006); 32 C.F.R. §232.4(a) (2007).

⁶⁷ 10 U.S.C. §987(b) (2006); 32 C.F.R. §232.4(b) (2007).

⁶⁸ 32 C.F.R. §232.3(h)(1) (2007).

⁶⁹ *Id.* at §232.3(h)(2).

⁷⁰ 15 U.S.C. 1601 et seq.

⁷¹ 10 U.S.C. §987 (2006).

⁷² *Id.*

financed,” unless the consumer is made aware that he is entitled to such an itemization and declines it.⁷³

The DOD proposed regulations further specify that the following disclosures must be made “clearly and conspicuously” prior to completion of the credit transaction: 1) the applicable MAPR and its corresponding total dollar amount; 2) a clear description of the payment obligations; and 3) a statement expressly identifying the special protections provided and alternatives available to military personnel under the Army Emergency Relief, Navy and Marine Corps Relief Society, Air Force Aid Society or Coast Guard Mutual Aid, including free legal advice upon request.⁷⁴ The regulations clarify that written disclosures must be made in a form the covered borrower can retain a copy of, and that oral disclosure requirements may be met in the case of internet or mail transactions by providing a toll-free telephone number.⁷⁵

D. Preemption

Both the new statute and the DOD regulations clearly state that they preempt any state or federal law, rule, or regulation that conflicts with their provisions, but do nothing to change existing laws that provide additional protections to service members.⁷⁶ They forbid the different treatment under existing state law of military personnel stationed within a state based on their non-resident status.⁷⁷

E. Limitations

The law provides for several restrictions on the terms that can appear in loans to covered members and the way in which they can be maintained.⁷⁸ First, in an apparent attempt to abolish “loan flipping,” the law bans the rollover, renewal, refinancing, or consolidation of loans extended to covered members with the proceeds of other credit.⁷⁹ Loans to covered members may not

⁷³ 12 C.F.R. §226.18 (2007).

⁷⁴ 32 C.F.R. §232.6 (2007).

⁷⁵ *Id.*

⁷⁶ 10 U.S.C. §987(d)(1) (2006); 32 C.F.R. §232.7(a) (2007).

⁷⁷ 10 U.S.C. §987(d)(2) (2006); 32 C.F.R. §232.7(b) (2007).

⁷⁸ 10 U.S.C. §987(e) (2006).

⁷⁹ *Id.*

require them to waive any of the rights to legal recourse they enjoy as service members.⁸⁰ Likewise, the statute bans the use of mandatory arbitration clauses in such loans.⁸¹ It bans the use of checks, access to deposit accounts, allotments, savings, or the title of vehicles as security for loans extended to covered members.⁸² Finally, the statute states that covered members will be given the chance to pay off their loans early, without incurring prepayment penalties.⁸³

The DOD regulations clarify that loan renewals *will* be allowed in cases where they result in more favorable terms to covered borrowers, such as lower MAPRs.⁸⁴ The regulations also make exceptions for the means of securing applicable loans, providing that creditors may: 1) require electronic fund transfers to pay consumer credit transactions; 2) require direct deposit of the covered member's salary as a condition of eligibility for consumer credit; and 3) may take a security interest in funds deposited after the extension of the credit in an account established in connection with the credit transaction.⁸⁵

F. Penalties and Remedies

Both the statute,⁸⁶ and the DOD regulations,⁸⁷ state that a creditor who knowingly violates these provisions can be charged with a misdemeanor, and the credit agreement resulting from such prohibited actions will be void from inception. The statute provides that no agreement to arbitrate a dispute over the extension of consumer credit will be enforceable against any covered member.⁸⁸ Neither the statute,⁸⁹ nor the regulations,⁹⁰ preclude other civil

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at §987(e)(5).

⁸³ 10 U.S.C. §987(e)(7) (2006).

⁸⁴ 32 C.F.R. §232.8(a)(1) (2007).

⁸⁵ *Id.* at §232.8(5).

⁸⁶ 10 U.S.C. §987(f) (2006).

⁸⁷ 32 C.F.R. §232.9 (2007).

⁸⁸ 10 U.S.C. §987(f)(4) (2006).

⁸⁹ *Id.* at §987(f)(2).

⁹⁰ 32 C.F.R. §232.9(b) (2007).

remedies available to service members, including their right to seek punitive damages.

G. Servicemembers Civil Relief Act Protections Unaffected

Neither the statute,⁹¹ nor the DOD regulations,⁹² do anything to limit remedies already available to covered members under the Servicemembers Civil Relief Act, which limits the interest rate that can be charged on any debt a service member incurs prior to entering military service to 6% during the period of military service.⁹³

H. Regulations

In this section, the new statute indicates how the DOD's regulations are meant to flesh out the statutory requirements. It provides that the Secretary of Defense will address 1) what disclosures will be required; 2) the method for calculating the applicable annual percentage rate; 3) the maximum number and types of allowable fees; 4) the full definitions of "creditor" and "consumer credit"; and 5) "[s]uch other criteria or limitations as the Secretary of Defense determines appropriate."⁹⁴ In formulating such regulations, the DOD is to consult with the Federal Trade Commission ("FTC"), Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation ("FDIC"), and Office of Thrift Supervision, National Credit Union Administration, and the Treasury Department.⁹⁵ Broad latitude is given to the DOD to determine the scope and impact of the regulations, consistent with the legislative goal of "protecting Service members and their families from potentially abusive lending practices and products."⁹⁶

I. Definitions

In its definition section, the new statute spells out who it will apply to: active duty military personnel under a call or order of 30

⁹¹ 10 U.S.C. §987(g) (2006).

⁹² 32 C.F.R. §232.10 (2007).

⁹³ 50 U.S.C. app. §527(a)(1).

⁹⁴ 10 U.S.C. §987(h) (2006).

⁹⁵ *Id.*

⁹⁶ Limitations, *supra* note 60, at 18, 162.

days or more, and active Guard and Reserve Duty service members and their dependants, including spouses and children.⁹⁷ The term “annual percentage rate” is defined as it is in the Truth in Lending Act,⁹⁸ and the term “interest” is to be construed so as to include “all cost elements associated with the extension of credit, including fees, service charges, renewal charges, credit insurance premiums [and] any ancillary product[s] sold with any extension of credit.”⁹⁹

The statute begins to define “creditor” as a person (or that person’s assignee) who “is engaged in the business of extending consumer credit,” but leaves the definition open to further detail under the DOD’s regulations.¹⁰⁰ The DOD regulations elaborate, stating that the term “person” shall include organizations, corporations, partnerships . . . associations, . . . and any other business entit[ies] who otherwise meet[] the definition given in the Truth in Lending Act.¹⁰¹

Similarly, the law leaves the term “consumer credit” to be defined by the DOD regulations, although it specifically states that the term is not to include residential mortgages or loans made to finance cars or personal property where the purchase is secured by that same personal property.¹⁰² The DOD regulations flesh out this definition, providing that “consumer credit” shall mean credit extended to a covered borrower “primarily for personal, family or household purposes,” and shall include payday loans, vehicle title loans, and tax refund anticipation loans.¹⁰³

IV. Critical Analysis of the new Regulations

A. “Doomsday” Predictions

Proponents of payday loans criticize the new legislation and enforcement regulations, claiming they will prevent payday lenders from turning a profit on covered transactions, and will in turn

⁹⁷ 10 U.S.C. §987(i) (2006).

⁹⁸ 15 U.S.C. §1606.

⁹⁹ 10 U.S.C. §987(i) (2006).

¹⁰⁰ *Id.*

¹⁰¹ 32 C.F.R. §232.3(e) (2007).

¹⁰² 10 U.S.C. §987(i) (2006).

¹⁰³ 32 C.F.R. §232.3(b) (2007).

discourage lenders from loaning to military personnel.¹⁰⁴ They predict that military borrowers will be forced to turn to unregulated internet lenders,¹⁰⁵ pawn shops, or loan sharks.¹⁰⁶ In response to the DOD investigations, Advance America Cash Advance Centers, the nation's biggest payday loan company, actually announced last September that it would no longer offer payday loans to active-duty troops or their families.¹⁰⁷ A representative of the payday industry group CFSA stated that he expected the entire industry to follow suit.¹⁰⁸

Despite these dire predictions, critics of payday loans argue that military personnel will simply be steered toward the more appropriate and beneficial alternatives that are uniquely available to them, like the assistance provided by the Navy-Marine Corps Relief Society or the Army Emergency Relief Program.¹⁰⁹ They argue that although payday lending and other short-term loan options appear to meet a valid consumer need, so do loan sharks, and they've been made illegal.¹¹⁰ Professor Christopher Peterson of the University of Florida, in a comment posted to the e-docket for the DOD proposed regulations, says he believes these "doomsday" predictions are unwarranted threats by the payday lending industry.¹¹¹ He observes that "[e]very time a major change [in] consumer credit law is contemplated, a significant number of creditors and creditor trade association[s] predict that lenders will simply stop making loans, that creditors will go bankrupt, or even that the economy will collapse," and all of these dire predictions have proven wrong.¹¹² He points out that those military personnel will still have plenty of attractive

¹⁰⁴ Jontz, *supra* note 36.

¹⁰⁵ *Id.*

¹⁰⁶ Leo Shane III, *Senators Consider Payday Loan Limits, Criticize Industry*, STARS AND STRIPES, Sept. 16, 2006, available at <http://www.estripes.com/article.asp?section=104&article=39453&archive=true> (last visited Oct. 17, 2007).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Jontz, *supra* note 36.

¹¹⁰ Shane III, *supra* note 106.

¹¹¹ Posting from Christopher L. Peterson to <http://www.regulations.gov/> (Click "Search for Documents;" In the "Document ID" box enter DOD-2006-OS-0216-0040.1; Click Submit), (Feb. 6, 2007) (last visited Oct. 17, 2007) [hereinafter Peterson].

¹¹² *Id.*

alternatives available to them, and the only options likely to be limited are those that borrowers are better off without.¹¹³

B. Potential Loopholes and Unintended Consequences

In light of the demonstrated ability of predatory lenders to circumvent existing state laws, commentators like the Navy-Marine Corps Relief Society have urged the DOD to extend its regulations to all types of lenders and all types of loans, without excluding segments of the banking industry like credit cards and checking overdraft advances.¹¹⁴ The Society argues this is necessary to close any loopholes that might allow predatory lenders to bypass and thereby undermine the protections provided by the regulations.¹¹⁵ Professor Peterson agrees, predicting that “[a]llowing one group of lenders an exemption, will allow the market to flank the entire statute.”¹¹⁶

Alternatively, commentators like the Navy Federal Credit Union (“NFCU”) warn that too broad a definition of “creditor” could overreach the legislative intent and have unintended consequences, such as the reduced availability of beneficial and reasonably priced products and services.¹¹⁷ However, as the U.S. Public Interest Research Group and FDIC Chairman Shelia Bair have stated, “any legitimate inadvertent problems [discovered] in th[e] rulemaking can easily be ironed out in [the DOD] regulations without Congress reopening the law.”¹¹⁸ This argument is a compelling reason for the DOD regulations to begin with a broad scope that can later be trimmed down as their effects are measured.

¹¹³ *Id.*

¹¹⁴ Posting from Steve Abbot to <http://www.regulations.gov/> (Click “Search for Documents;” In the “Document ID” box enter DOD-2006-OS-0216-0018; Click Submit), (Feb. 5, 2007) (last visited Oct. 17, 2007) [hereinafter Abbot].

¹¹⁵ *Id.*

¹¹⁶ Peterson, *supra* note 111.

¹¹⁷ Posting from Cutler Dawson to <http://www.regulations.gov/> (Click “Search for Documents;” In the “Document ID” box enter DOD-2006-OS-0216-0129; Click Submit), (Feb. 12, 2007) (last visited Oct. 17, 2007)[hereinafter Dawson].

¹¹⁸ Posting from Edmund Mierzwinski to <http://www.regulations.gov/> (Click “Search for Documents;” In the “Document ID” box enter DOD-2006-OS-0216-0043.1; Click Submit), (Feb. 6, 2007) (last visited Oct. 17, 2007).

C. Meaningful Disclosures

Other comments on the new regulations express concerns not with how the regulations themselves are drafted, but with how they will be implemented. For example, the NFCU has emphasized the need for meaningful disclosures to military personnel, not simply technical compliance with the specifics set forth in the law and regulations: “In many cases, consumers do not take the time to read and understand the content of the information overload . . . they may not understand their responsibilities and obligations or the impact of their decisions on their future finances.”¹¹⁹ Disclosures must be developed that are effective for the specific consumers they are meant to protect, and should truly inform, rather than obscure.¹²⁰ The NFCU makes a very credible recommendation, asking that the regulations provide mechanisms for testing the effectiveness of such disclosures in an effort to continually modify and strengthen them.¹²¹

V. Consumer Impact

As discussed, “doomsday” predictions that the new regulations will leave military personnel without any real alternatives for short-term loans are as unfounded as predictions that the restrictions will wreak havoc on the lending industry and put payday lenders out of business. Military personnel do not choose predatory offerings like payday loans because they are the best financial option, but because they are convenient, fast, and allow them to hide their financial troubles and the accompanying social stigmas involved. Military families will be better off facing the realities of their financial situations and seeking real help from military aid organizations. As Kimberly Warden, Vice President for Federal Affairs at the Center for Responsible Lending has said, “[t]he sooner these products are away from bases, the better.”¹²²

In fact, the new regulations are likely to encourage service members to take advantage of existing short-term loans at lower interest rates provided by credit unions. The NCFU believes the regulations will help them compete in this market. The NFCU stated, “given reasonable time to make those changes, we see no significant

¹¹⁹ Dawson, *supra* note 117.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Shane III, *supra* note 106.

or lasting adverse impact on the credit union . . . [c]onversely, this law may be very positive for credit unions and their members by encouraging persons who use predatory lenders to seek loans for provident purposes from their credit unions. . . .”¹²³

Finally, extending these protections only to service members at this point makes sense, not only because these borrowers have been specifically targeted by predatory lenders, but because states have not adequately enforced their laws when it comes to non-resident service members stationed within their borders. Service members have a safety net of programs developed specifically for them to fall back on that the general population of civilian payday borrowers currently does not. However, the experience of implementing these regulations and tracking their success is bound to have some trickle-down effect on consumers in general. If the critics’ “doomsday” predictions subside after the regulations go into effect, there may be less resistance to the extension of important protections against predatory lending for all consumers.

VI. Conclusion

In conclusion, the predatory lending industry, including payday lenders, car title lenders, tax refund advance lenders, and rent-to-own operations, have blatantly targeted military personnel whose low pay and service obligations make them already vulnerable to short-term, high interest loans. They have done so through strategic geographic placement around military bases and misleading affinity marketing techniques that lead borrowers to believe their services are sanctioned by the military. Military borrowers can easily become trapped in a spiral of debt that affects military readiness in general, while wreaking havoc on their personal and financial lives in particular. Past efforts to protect service members, including various state laws, education efforts, and limited federal legislation have proven ineffective.

The new federal statute, adopted in October 2006 and effective as of October 1, 2007, provides real protections for this country’s military personnel. Although accompanying regulations may need subsequent fine-tuning, and although their effectiveness should continue to be monitored upon implementation, the comments provided during the e-rulemaking process demonstrate the value

¹²³ Dawson, *supra* note 117.

these regulations can provide to service members, members of the lending industry that offer truly beneficial services, and consumers in general. The approved regulations should be strictly enforced to preserve their intended benefits, and their effects monitored to allow lawmakers to make informed decisions concerning the potential effectiveness of similar laws governing lending practices to civilians.

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Credit on Wheels: The Law and Business of Auto-Title Lending

Jim Hawkins*

Abstract

Despite the fact that they are used by millions of Americans, auto-title loans have received little attention in the legal literature about consumer credit. Friends and foes of title lending make confident statements about their net welfare effects, but we still lack empirical data on many of the central policy questions that title lending raises. This Article offers new evidence about the title lending transaction, paying special attention to the risks borrowers face when they use their vehicles as collateral for the loan. I gathered this evidence by obtaining new reports from state regulators about the title lending industry, examining public disclosure statements by title lenders, interviewing title lenders, and surveying a small group of title lending customers. Additionally, the Article organizes the different legal responses to title lending, creating a taxonomy of regulatory approaches. Based on the new data uncovered by my research, I offer tentative evaluations of these diverse regulatory strategies.

* Assistant Professor of Law, University of Houston Law Center. I am grateful for comments from Ann Baddour, Ronald Mann, Robert Reich, and the participants of the *Regulation in the Fringe Economy Symposium* at Washington and Lee University School of Law, Columbia Law School's Payday Lending Roundtable, the University of Houston Law Center's Faculty Workshop Series, and a presentation at the University of Alabama School of Law. I am also grateful for the title lenders who participated in interviews. For excellent research assistance, I thank Adam Nalley, Matthew Ezell, Drew Knowles, Joseph Guajardo, and Rebekah Smith. My special thanks go to Mallory Sullivan and Christine Shepard for their hard work organizing a superb symposium. This Article is dedicated with love to Samuel Hawkins, who kept me up from 3 a.m. to 6 a.m. every night for many months, allowing me to complete it.

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I. Introduction

As traditional sources of credit have become scarcer, more and more Americans are turning to alternative financial service providers when they need or want money.¹ Some of these fringe banking firms take personal property as collateral for high-interest loans, while others tie small-dollar loan amounts to the borrower's next paycheck. Another common fringe banking transaction, the

1. See FEDERAL DEPOSIT INSURANCE CORPORATION, FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 10 (2009), available at http://www.fdic.gov/householdsurvey/executive_summary.pdf (finding that 25.6% of U.S. households are unbanked or underbanked) [hereinafter FDIC SURVEY].

auto-title loan, is a source of credit for millions of Americans but has not generated the same scholarly interest as pawn and payday loans.

In an auto-title loan, a borrower typically takes out a one-month loan at a high interest rate and gives a security interest to the lender in a vehicle that has no other liens on it.² If the borrower defaults on the loan, the lender has the right to repossess and sell the collateral. It is not surprising that this transaction creates concern among policymakers because it involves people who are outside of the mainstream banking system, risking what is potentially their most valuable asset and their only means of transportation.

Despite the important concerns that title lending raises, little empirical work has been done to understand the central questions policymakers need answered in order to craft optimal title lending laws.³ Additionally, states regulate title loans through many diverse approaches, but there are few legal analyses of the different mechanisms states use to govern title loans.

This Article hopes to contribute to the research on title loans by tackling these two issues. First, in Part II, I offer new empirical evidence about the title lending transaction, paying special attention to the risks borrowers face when they use their vehicles as collateral for the loan. I gathered this evidence by obtaining new reports from state regulators about the title lending industry, examining public disclosure statements by title lenders, interviewing title lenders, and surveying a small group of title lending customers.

Second, I organize the different legal responses to title lending in Part III, creating a taxonomy of regulatory approaches. States govern title loans by banning them, permitting them to operate despite usury limits through legal carve-outs such as pawnshop laws, and explicitly authorizing and regulating them through statutes geared directly at title lenders.

2. See *infra* Part II.B.

3. Only two law review articles extensively take up the question of title lending. See Todd Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 LOY. CONSUMER L. REV. 425, 426 (2010); Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41 (forthcoming 2012).

In light of the business realities of title lending and current regulatory strategies, Part III argues that the best approach to regulating title lending is for states to adopt laws specifically aimed at authorizing and regulating title loans. I offer several tentative suggestions for laws that are particularly important to protect consumers using title loans. For example, I urge states to adopt laws that require lenders to return surpluses from sales of collateral but restrict lenders from pursuing deficiencies. Also, I suggest laws that require plain disclosures of the cost of title loans and the risks of repossession and costly rollovers. In contrast, I find that laws aimed at setting limits on the amount a lender can loan or capping the amount a lender can charge as an interest rate likely harm the customers who are most vulnerable to injury from title lending. The main policy goal underlying many of my suggestions is to encourage lenders to offer higher loan amounts in exchange for the collateral pledged, thus protecting those borrowers who lose vehicles through repossession and risk losing the equity they have accumulated in their cars. The suggestions are tentative because many of the important empirical questions about title lending still require research.

II. The Title Lending Business

Many of the questions at the heart of the debate over title lending policy are empirical. This Part introduces new data about these pivotal issues. After discussing my research approach, I introduce new evidence about the transaction itself and the use of vehicles as collateral.

A. Research Approach

To gather new information on the title lending industry, I first collected and compiled data from state regulators who obtain information from title lenders pursuant to licensing laws. Some of these state reports are publicly available. The reports from Tennessee have been discussed in the past,⁴ but I also discovered

4. See, e.g., Zywicki, *supra* note 3, at 434 (discussing the size of title loans across the country); Martin & Adams, *supra* note 3, at 68.

public reports from Virginia and Oregon, which have been overlooked in prior research. In addition to these publicly available reports, I obtained reports from Illinois through a request under the Illinois Freedom of Information Act, and from Montana and Idaho through informal requests to the individuals responsible for generating those states' reports.⁵

Second, I reviewed public disclosure filings by title lenders. Although there are few public companies doing title lending, I examined the bankruptcy filings and security re-characterization filings of TitleMax, one of the nation's largest lenders, and also reviewed another public firm's annual report.

Third, I interviewed title lenders. I spoke with lenders from a variety of types of businesses—large lenders who do only title loans, large multi-line lenders, and small lenders. These interviews were conducted in person or over the phone.

Finally, I attempted to survey title loan customers. I designed a survey instrument, reproduced in Appendix A, and trained two research assistants in administering the survey. These two research assistants spent more than fifty hours waiting for customers to enter stores at title lending locations throughout Houston, Texas. The research assistants varied the times and days of the week that they were at stores.

When customers exited the title lending store, the research assistants approached them, explained the survey, and offered a \$10 Target gift card as a thank you for completing the survey. Everyone approached was given an informed consent handout, and the study was approved by the University of Houston's Committee for the Protection of Human Subjects. The response rate was 64.82%, but overall only thirty-five people completed the survey.

Several things prevented a larger number of customers from participating in the survey. Importantly, most stores did not have many customers come in each day. Some stores had only one or two people over a three-hour time period. Others had no customers during a three-hour period. Additionally, it was difficult to determine when the stores would be busy because, unlike payday

5. New Mexico also produces a report about title lending, but Martin and Adams present this data in extensive detail so I do not discuss it here other than to highlight my different interpretations of those reports. See *generally* Martin & Adams, *supra* note 3.

loans that are tied to a pay period,⁶ title loans can be originated on any day of the month. We had the most success at a single store, Lone Star Title Loans, simply because it was a much busier store than any other location. A full 85.71% of the completed surveys came from this location, while the others came from a variety of other stores across Houston.⁷

The survey results are obviously not representative of title lending customers generally, title lending customers in Texas, or even those in Houston. And, even if the results were representative, the sample size is problematically small. Thus, I present the information I obtained from the surveys merely as anecdotal evidence about title-lending customers, and I hope lessons learned from this survey attempt can inform future customer-based research about title lending. My only claim about the survey is that it represents the actual people we surveyed.

B. The Title Loan Transaction

Some of the important policy questions surrounding title lending relate to the transaction itself. In the traditional version of the product, title loans are one-month long loans, with the entire balance—principal and interest—due at the end of the month.⁸ If the borrower cannot pay the principal, the lender will allow an interest-only payment to roll the loan over for another month.⁹

6. Nathalie Martin surveyed payday lending customers using the same approach with more success by waiting outside stores on Fridays. She obtained results from 109 people. See Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 597 (2010).

7. See JIM HAWKINS, SURVEY REPORT ON AUTO TITLE LENDING [hereinafter HAWKINS SURVEY] (on file with the Washington and Lee Law Review).

8. See Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 164–65 (2004) (discussing the title loan process).

9. See Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 598–600 (2000) (“Because auto-title loans routinely require repayment soon after the transaction is completed, many customers cannot make the full principal and interest payment when it comes due. As a result, the loan is often extended for another fee (some contracts allow the lender to do so unilaterally).”).

To obtain the loan, the lender usually requires the borrower to bring a clear title to the vehicle, the actual vehicle, identification, names of references, and sometimes proof of income.¹⁰ In a process that takes twenty to forty minutes, the lender evaluates the value of the vehicle, often through the use of commercial guides or proprietary software.¹¹

1. Why Do People Take out Title Loans?

The reasons people use title loans have enormous policy implications. If a significant percentage of title loans fuel small business growth, banning the transaction could hamper job creation in the midst of a recession. Also, if title loans allow lower income Americans to overcome emergency situations like unexpected medical expenses or car repairs, they serve an important social function. However, a trenchant argument against title lending has been that it only delays inevitable financial breakdowns because people use the loan to pay for normal expenses.¹² As it turns out, there is evidence of each of these uses: business expenses, emergency expenses, and normal expenses.

A couple of studies have documented the reasons people take out title loans. An FDIC survey of unbanked and underbanked households asked individuals about why they use fringe credit products, including pawn loans, payday loans, and rent-to-own.¹³ Although it did not ask about title loans, the results are still relevant because the customer base is similar. The FDIC found that 38% of people used credit from alternative financial service providers for basic living expenses, 15.4% used it to make up for

10. For one example of these requirements, see Advantage Finance, LLC, *Application For Title Loan in Houston, TX*, <http://www.cartitleloans.houston.com/pages/faqs.html> (last visited Apr. 8, 2012) (discussing criteria the company will consider in assessing loan applications) (on file with the Washington and Lee Law Review).

11. See TMX Finance, LLC (Form S-4) (Apr. 19, 2011) at 29 (discussing valuation formulae using the Black Book) [hereinafter TMX Finance]; *id.* at 43 (noting the average time to complete a loan transaction).

12. See Drysdale & Keest, *supra* note 9, at 599 (observing that title lending “can create a ‘debt treadmill’ or downward spiral effect that is at the root of much of the concern about cash lending in the fringe market”).

13. See FDIC SURVEY, *supra* note 1, at 42 (providing empirical evidence for the reasons consumers use fringe credit products).

lost income, 7.4% used it for house repairs or purchasing an appliance, 6.2% used it for special gifts or luxuries, 4.5% used it for car repairs, 2.3% used it for medical expenses, and 26.3% used it for other reasons.¹⁴

I did uncover one survey specifically aimed at title lending customers, prepared by a large title lender who provided it to me on condition of anonymity. In 2007, the lender's customers in New Hampshire, New Mexico, Kansas, Virginia, and Oregon completed surveys in conjunction with taking out loans.¹⁵ The lender gave participants a \$20 loan coupon in exchange for completing the survey. The lender compiled the data by state into a report.¹⁶ In Table 1, I aggregate that data and summarize the results when the lender asked what the "[n]eed for loan was caused by."

Table 1: Title Lender Survey on Reasons Customers Took Out Loan

Reason	Percentage of Borrowers ¹⁷	Number
Car maintenance/repair	29.18%	314
Unusually high utility bill	19.33%	208
Help with mortgage/rent	28.90%	311
Unexpected medical emergency	14.87%	160
Delay in payment of expected income/missed paycheck	29.55%	318
Other	8.74%	94

These lists of reasons include both emergency expenses (roughly 14.2%–29.6% in the FDIC's survey¹⁸ and 92.93% in the

14. *Id.*

15. See ANONYMOUS LENDER SURVEY 1 (2007) (on file with the Washington and Lee Law Review) [hereinafter LENDER SURVEY].

16. I obviously am taking this data at face value. I was not involved in designing or administering the survey, so I do not have information about its research design, how it was conducted, or the response rate, beyond the details I have presented here.

17. To calculate the percentage of borrowers citing a reason, I added up all of the responses to another question about the borrower's occupation and divided the reason for the loan by that number. The number of responses to the question about what need led to the loan was 1,405, but the total number of people providing an occupation was 1,076. Thus, it appears that some people listed multiple reasons for needing the loan, which explains why my percentages add up to more than 100%.

18. These numbers represent those stating their reasons as "house repairs," "car repairs," and "medical expenses" (equaling 14.2%) plus those

lender's survey¹⁹) and regular expenses (roughly 38% in the FDIC's survey²⁰ and 28.09% in the lender's survey²¹). Thus, the policy question is more difficult than just labeling the use of title loans as either purely emergency or purely routine spending. It appears to involve both.

Another factor complicating any analysis of loan use is that people may report that they used the loan for one purpose when they in fact used it as spending money for other purposes. For instance, someone may claim to be using a loan to pay rent, but the person may only need the money because of gambling losses from earlier in the month. Without a comprehensive budget, survey data about loan use is difficult to assess.

A similar ambiguity exists about whether a significant portion of loans is taken out for business reasons. Todd Zywicki reports from his interviews with industry members that title loans help small business owners who do not have ready access to traditional sources of credit and who plan to repay the debt quickly.²² Zywicki estimates that 25% to 30% of title lending customers fit into this category.²³ People within the industry confirm that many title loan customers are small business owners who use their vehicles as a source of capital to operate their businesses.²⁴ TitleMax's securities

stating their reason was "lost income" (15.4%), depending on whether one considers this to be an emergency expense or not. *See* FDIC SURVEY, *supra* note 1, at 43, 67 (compiling survey responses into Table A-20: Reasons Underbanked Households Use AFS Credit).

19. This number represents those stating their reasons as "car maintenance/repair," "unusually high utility bill," "unexpected medical emergency," or "delay in payment of expected income/missed paycheck." *See* LENDER SURVEY, *supra* note 15.

20. This number represents those stating that they needed the loan for "basic living expenses." *See* FDIC SURVEY, *supra* note 1, at 43, 67.

21. This number represents those stating that they needed the loan for "help with mortgage/rent." LENDER SURVEY, *supra* note 15, at 1.

22. *See* Zywicki, *supra* note 3, at 449 ("Many such businesses do not have access to small business loans and rely on consumer credit, such as credit cards, home equity loans, auto title loans, and other sources of consumer lending to finance their business operations.").

23. *Id.*

24. *See* Interview with Anonymous Director of Government Affairs, Large Title Lending Company (Dec. 14, 2010) [hereinafter Anonymous Interview] (noting that the company only makes consumer loans but that "a significant percentage of our customer base owns their own business") (on file with the Washington and Lee Law Review); *see also* Interview with Tommy Davis,

filing states that customers are often “self-employed small business owners with an immediate need for short-term working capital.”²⁵ Even a member of Congress has claimed that title loans can help save small businesses from failing.²⁶

In the anonymous title lender survey, 19.70% (n = 212) of customers identified themselves as self-employed.²⁷ The lender, however, did not ask customers whether the loan was for business-related or personal needs, so it is not clear whether these self-employed customers were using the loan for business purposes. In listing the need that prompted the loan, very few customers listed expenses that look like business expenses. Four responses in the “Other Reasons” category were explicitly business-related: “Starting a new business,” “Down payment for new work truck,” “New business,” and “Purchase of Semi.” Additionally, other categories could have included business-related reasons, such as “Car maintenance/repair,” “Unusually high utility bill,” “Help with mortgage/rent,” and “Delay in payment of expected income/missed paycheck.”²⁸

In my survey, I asked borrowers whether they were taking out the title loan for “Business Expenses,” “Personal Expenses,” or a combination of the two. I clarified that “Personal Expenses” would include buying gas to get to work. Among those we surveyed,

President & Justin Davis, Vice-President, TJD Financial Services, Inc. (Aug. 24, 2011) [hereinafter Davis & Davis Interview] (estimating that 10% of their loans are for business purposes) (on file with the Washington and Lee Law Review); Interview with Thomas Cone, General Manager, Magnolia Title Loans (Sept. 20, 2011) [hereinafter Cone Interview] (estimating that 20% of his company’s loans are for business purposes) (on file with the Washington and Lee Law Review); Dena Potter, *Va. Car Title Lending Law Takes Effect Friday*, BLOOMBERG BUSINESS WEEK (Sept. 29, 2010), <http://www.businessweek.com/ap/financialnews/D9IHLNUO1.htm> (last visited Apr. 8, 2012) (“Scott Johnson, a lobbyist for title lender Community Loans of America, said . . . many borrowers are small business owners who rely on their vehicle for capitol [sic] in order to run their businesses.”) (on file with the Washington and Lee Law Review).

25. See TMX Finance, *supra* note 11, at 40.

26. See 146 CONG. REC. H5179-02 (daily ed. June 27, 2000) (statement of Rep. McCollum) (“This emergency credit can keep a small businessman from going under, or cover immediate needs at the end of the month.”).

27. See LENDER SURVEY, *supra* note 15, at 1.

28. *Id.*

25.71% (n = 9) said they were using the loan at least in part to run their own business.²⁹

2. How Much Money Do Stores Lend to Customers?

How much money stores lend to borrowers plays an important role in several of the policy issues surrounding title lending. One concern is that title lending causes financial distress in allowing borrowers to take on excessive debt loads. Another perception is that title lenders strip equity from borrowers by lending them only a small percentage of the value of their vehicles. We can measure how much title lenders give to customers in a variety of ways: (1) the amount lent in absolute dollars, (2) the amount lent relative to the value of the vehicle, or (3) the amount lent relative to the borrower's income. This section evaluates the data for each of these three measurements.

a. Absolute Dollar Amounts

There are several data points that reveal how much, in absolute dollars, title loan companies lend to customers. An earlier academic study reports that the average advance is \$275.³⁰ EZCORP, a public company that does title lending, states in its annual report that \$700 is its average loan amount;³¹ TitleMax states in a securities filing that “[o]ur customers borrow on average approximately \$1,100 and \$850 at our TitleMax and TitleBucks stores, respectively”;³² and one smaller Texas-based firm reported its average loan was for \$1,000.³³ State regulators report averages of \$793.80 in Illinois,³⁴ \$562 in Montana,³⁵ \$847

29. See HAWKINS SURVEY, *supra* note 7, at 1.

30. See JOHN P. CASKEY, LOWER INCOME AMERICANS, HIGHER COST FINANCIAL SERVICES 46 (1997).

31. See EZCORP, Inc., Annual Report (Form 10-K), at 6 (Dec. 14, 2009) [hereinafter EZCORP, Inc.].

32. See TMX Finance, *supra* note 11, at 41.

33. See Davis & Davis Interview, *supra* note 24, at 1.

34. See ILL. DEPT. OF FIN. & PROF. REG., PAYDAY LOAN CONSUMER REPORTING SERVICE, TITLE LOAN AGGREGATE DATA: OCTOBER 2009 THROUGH JUNE 2011 2 [hereinafter ILLINOIS REPORT] (on file with the Washington and Lee Law

in Virginia,³⁶ and \$243 in Oregon.³⁷ The modal amount of a title loan (representing 40% of agreements) in Tennessee was \$251–\$500.³⁸

Each of these data points reflects the laws in the jurisdictions reporting them. Oregon, for instance, limits lenders to charging an annual percentage rate (APR) of 36% but allows them to charge a one-time fee of \$30, which appears to cause lenders to lend close to \$300.³⁹ Tennessee caps loans at \$2,500,⁴⁰ resulting in lower averages. I do not have data from California, but we would expect much higher loan averages there because lenders lend more than \$2,500 to avoid usury limits.⁴¹ Thus, not only is a national average impossible, it is meaningless without the context of the state's laws.

While we may not be able to fix an exact amount as the standard title loan, the data does suggest that title loans are generally for small amounts. Martin and Adams have argued, however, that title “loans are by no means small.”⁴² As evidence, they point out that “[o]ne internet company offers loans of up to \$50,000, and the New Mexico state data reflect loans up to

Review).

35. See MONT. DIV. OF BANKING & FIN. INSTS., COMPOSITE REPORT OF OPERATIONS OF MONTANA TITLE LOAN LICENSEES: CALENDAR YEAR 2009 1 [hereinafter 2009 MONTANA REPORT] (on file with the Washington and Lee Law Review).

36. See VA. STATE CORP. COMM., BUREAU OF FIN. INSTS., THE 2010 ANNUAL REPORT OF THE PAYDAY LENDER LICENSEES, CHECK CASHERS, MOTOR VEHICLE TITLE LENDER LICENSEES 84, available at <http://www.scc.virginia.gov/bfi/annual/ar04-10.pdf> [hereinafter VIRGINIA REPORT].

37. See OR. DEPT OF CONSUMER AND BUS. SERVS., DIV. OF FIN. AND CORP. SEC., OREGON LICENSED CONSUMER FINANCE COMPANIES 2 (2009), available at http://www.cbs.state.or.us/external/dfcs/cf/annual_reports/2009.pdf [hereinafter 2009 OREGON REPORT].

38. See TENN. DEPT OF FIN. INST., 2010 REPORT ON THE TITLE PLEDGE INDUSTRY 6, available at <http://www.tennessee.gov/tdfi/compliance/tpl/TPLReport2009Final.pdf> [hereinafter 2010 TENN. REPORT].

39. See OR. REV. STAT. § 725.622(1) (2007), repealed by Or. Laws Spec. Sess., ch. 23, § 34 (2010) (maintaining the 36% interest rate and allowing a one-time fee for a new loan).

40. See TENN. CODE ANN. § 45-15-115(3) (2005) (setting limitations on title lenders).

41. See CAL FIN. CODE § 22303 (1995) (making interest rate restrictions inapplicable to any “bona fide principal amount” of \$2,500 or more).

42. Martin & Adams, *supra* note 3, at 48 n.37.

\$42,000.”⁴³ These single examples are hardly representative and, thus, provide poor evidence of what standard amounts may be. Aggregate data from Montana, for instance, indicates that only 0.42% of loans in 2009 were for more than \$4,000,⁴⁴ while 97.41% of loans were for less than \$2,000.⁴⁵ In Tennessee, in 2008, “only 3% were made for amounts between \$2,251 and \$2,500 which is the maximum loan amount permitted by law.”⁴⁶ Thus, while it is difficult to make generalizations, it appears that title loans are often for low amounts.

b. Money Lent Relative to the Value of the Vehicle

In addition to measuring the absolute amount of title loans, we can also measure the amount lent in relation to the value of the vehicle. Again, different sources cite very different ratios, ranging from “about 25% of the wholesale value of the car”⁴⁷ to 80% of the value of the vehicle.⁴⁸

Similarly, lenders I interviewed gave me a range of percentages for how much they will lend. One said it typically lends 50% of the wholesale value of the car;⁴⁹ another said it lends 33% to 80% of the Black Book⁵⁰ value of the vehicle depending on the year and condition of the car;⁵¹ and yet another reported that it

43. *Id.*

44. This represents 53 loans of 12,727. 2009 MONTANA REPORT, *supra* note 35, at 1.

45. This represents 12,397 of 12,727 loans. *Id.*

46. 2010 TENN. REPORT, *supra* note 38, at 6.

47. CASKEY, *supra* note 30, at 44.

48. See Webinar: *Baby, You Can Take My Car: The Dangers of Auto Title Loans*, NAT'L CONSUMER L. CTR. (July 15, 2010), http://www.nclc.org/images/pdf/conferences_and_webinars/auto_webinars/recordings/recording_july15.wmv (last visited Apr. 8, 2012) [hereinafter NCLC Webinar] (remarks of Leslie Parrish, Senior Researcher for the Center of Responsible Lending) (reporting that she has seen loan-to-value ratios of 80%) (on file with the Washington and Lee Law Review).

49. Anonymous Interview, *supra* note 24.

50. The Black Book is a regularly published guide that provides the value of cars sold at auctions. See Black Book, *Overview*, <http://www.blackbookusa.com/home.aspx?m=2&s=1&t=D&i=20> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

51. Interview with Robert Reich, President, Community Loans of America (Jan. 18, 2011) [hereinafter Reich Interview] (on file with the Washington and

lends 40% to 70% of the Kelly Bluebook wholesale value of a vehicle.⁵² Industry giant TitleMax went through a Chapter 11 bankruptcy recently and, in a disclosure statement sent to creditors, stated, “Using the appraised value of the Vehicle, and based upon the customer’s need, the Debtors will lend up to 80% of the appraised value of a Vehicle.”⁵³ TitleMax’s recent Form S-4 goes into greater detail:

Store managers appraise the wholesale value of the customer’s vehicle based on the following characteristics of the vehicle: year, make, model, exterior, interior and mechanical condition and mileage. One factor our managers consider in determining asset value is the most conservative wholesale value of the customer’s automobile listed in the Black Book, as opposed to the higher retail value listed in the Black Book (for the year ended December 31, 2010, the “rough” wholesale value amount was on average 64% less than the retail value amount). This reduces the overall risk of our title loans receivable by having more conservative loan to value ratios (at origination, our receivables had an approximately 69% weighted average loan to appraised wholesale value and an approximately 25% weighted average loan to Black Book retail value), which results in more security for each loan and less overall risk for our company.⁵⁴

Two puzzles emerge when we consider the relationship between the vehicle’s value and the loan’s amount. First, it is difficult to assess whether lenders are giving loans that are “too high” or “too low.” On the one hand, those concerned with borrowers’ ability to repay the loans complain that loan amounts are too high.⁵⁵ On the other hand, those worried that borrowers lose equity when title lenders repossess consumers’ vehicles and do not return the surpluses argue that lenders do not lend sufficiently

Lee Law Review).

52. See Interview with Alex Vaughn, Vice-President of Government Relations, Cash America, Inc., and Shawn Bourns, Director in Operations Development of Retail Service, Cash America, Inc. (Nov. 22, 2010) [hereinafter Vaughn & Bourns Interview] (on file with the Washington and Lee Law Review).

53. Disclosure Statement for Plan of Reorganization of Titlemax Holdings, L.L.C., at 4–5, *In re Titlemax Holdings, L.L.C.*, 447 B.R. 896 (Bankr. S.D. Ga. 2010) (09–40805), ECF No. 390 [hereinafter Titlemax Disclosure Statement].

54. TMX Finance, *supra* note 11, at 42; see also *id.* at 29 (“At origination, our weighted average loan amount is approximately 69% of appraised wholesale value and approximately 25% of the Black Book retail value.”).

55. See *infra* Part III.A.1.c.

high percentages of the vehicles' value.⁵⁶ Moreover, research indicates that higher loan amounts may actually decrease the likelihood of default.⁵⁷

The second puzzle that emerges from considering the amount of the loan in relation to the vehicle is whether title loans are oversecured or undersecured. The common wisdom is that title loans are oversecured, or at least fully secured, so lenders are taking essentially no risk in lending money.⁵⁸ More pointedly, members of Congress and others claim that lenders benefit when they repossess and sell vehicles because they retain the surplus from the transaction.⁵⁹ Yet another common charge against title

56. See 146 CONG. REC. H5179-02 (daily ed. June 27, 2000) (statement of Rep. Mascara).

57. See Will Dobbie & Paige Marta Skiba, *Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending 2* (Vanderbilt Univ. Sch. of Law & Econ., Working Paper No. 11-05, 2011) ("Our regression discontinuity estimates suggest that a \$100 increase in loan size decreases the probability that a borrower defaults by 2.8 to 3.8 percentage points. This is a 22 to 35 percent decrease from the mean default rate.") (on file with the Washington and Lee Law Review); see also Colleen Creamer, *Payday Loans: Taking the Good with the Bad*, 35 NASHVILLE LEDGER 33 (2011) ("I think that raising the limit actually may be a good thing for borrowers [W]hen people are allowed to borrow larger amounts, it actually helps them to repay the loan rather than renewing it a bunch of times and then eventually defaulting." (internal quotation marks omitted)).

58. See Annesley H. DeGaris, *Car Title Lending*, 2 AMERICAN ASSOCIATION FOR JUSTICE: AAJ ANNUAL CONVENTION REFERENCE MATERIALS 1 (July 2007) (arguing that high rates "cannot be justified by the amount of risk assumed by the lender or business-related expenses, as the loans are fully secured and the lender does not store the pledged item while the debt is outstanding"); see also Martin & Adams, *supra* note 3, at 41 ("A title loan is a high-interest, deeply over-secured, consumer loan"); see also Kristin Arnold, *Car Title Lending: Short-Term Fix with Long-Term Expense*, BANKRATE.COM (Nov. 18, 2005), <http://www.bankrate.com/finance/auto/car-title-lending-short-term-fix-with-long-term-expense-1.aspx> (last visited Apr. 8, 2012) ("The loan-to-value ratio is rarely greater than 33 percent, making it a win-win situation for the lender if the borrower defaults.") (on file with the Washington and Lee Law Review).

59. See 146 CONG. REC. S167-05 (daily ed. Feb. 1, 2000) (statement of Sen. Wellstone) ("Someone can take out a \$100 loan, and the car might be worth \$2,000, and these companies that we don't do a darn thing about You repossess their car. You sell the car. You don't even give them back the additional money you make beyond what they owed you."); see also 146 CONG. REC. H5179-02 (daily ed. June 27, 2000) (statement of Rep. Mascara) ("When these loans are structured as a title pawn transaction, the title pawn broker sells the automobile and retains transfer to the pawn broker. The consumer loses all of his or her equity in the automobile and typically has little or no recourse to regain the automobile."); see also DeGaris, *supra* note 58, at 2

lenders is that lenders seek deficiencies from borrowers. Martin and Adams argue that title loans are recourse loans and that lenders do sometimes seek deficiencies from borrowers.⁶⁰

So which are they—oversecured or undersecured? The data on the issue is as muddled as the claims made by opponents of title lending, seeming to support both sides. Data from state regulators suggest that either most loans are not oversecured, at least in the technical sense of that word, or that title lenders are violating the Uniform Commercial Code on a massive scale. In Tennessee, in 2008, for instance, title lenders returned only \$251,047 to borrowers as surpluses, but they wrote off \$13.6 million in unrecoverable principal.⁶¹ While it is possible the unrecovered principal is partially derived from situations where something prevented the lender from recovering the vehicle at all, such as theft or the destruction of the vehicle, the fact that unrecovered principal was roughly fifty-two times the amount of surpluses suggests that the loans generally were undersecured.

The notion that lenders repossess vehicles to generate significant profits is almost certainly wrong. Repossessing, storing, and selling vehicles are expensive relative to the value of most pledged vehicles. One operator estimated the costs at around \$500 for his company—\$250 to pay a company to repossess the vehicle and \$250 to pay for the sale;⁶² another confirmed that “[r]epossessions, at best, are a breakeven process and most often simply mitigate our loss.”⁶³ Tennessee’s report from 2007 found

(“Because . . . [they] are usually over-secured, these lenders face no risk from default. In fact, consumer advocates argue that title lenders *benefit* when a debtor defaults, thus allowing the lender to confiscate and resell the vehicle.”).

60. See Martin & Adams, *supra* note 3, at 32.

61. See 2010 TENN. REPORT, *supra* note 38, at 8. Other years in Tennessee are similar. See TENN. DEP’T OF FIN. INSTS., 2008 REPORT ON THE TITLE PLEDGE INDUSTRY 7–12, available at <http://www.state.tn.us/tdfi/compliance/tpl/TPLReport2008FinalFinal.pdf> [hereinafter 2008 TENN. REPORT] (noting that, in 2006, Tennessee lenders returned \$1,256,068 to customers but had \$11,394,220 in unrecovered principal); TENN. DEP’T OF FIN. INSTS., REPORT ON THE TITLE PLEDGE INDUSTRY: A SUPPLEMENT TO THE 2006 REPORT TO THE TENNESSEE GENERAL ASSEMBLY 7, available at <http://www.tn.gov/tdfi/compliance/tpl/2007TPLSupplementalReport-FINAL.pdf> [hereinafter 2006 TENN. REPORT SUPP.] (reporting that, in 2007, title lenders returned \$171,579 to customers but had \$5.1 million in unrecovered principal).

62. Reich Interview, *supra* note 51, at 1.

63. Anonymous Interview, *supra* note 24, at 5–6.

firms spent, on average, \$92.10 for repossession, \$72.05 for storing vehicles until sale, and \$4.02 for advertisements.⁶⁴ These costs do not include collection costs and legal fees which lenders are probably entitled to under the title lending contracts. If we assume these sales generate half the vehicles' value for the lender, the lender only makes money on cars that are on the higher end of the spectrum. As one lender pointed out to me, the proceeds from interest and fees are much more profitable than the proceeds from repossession, so lenders have little incentive to repossess cars to generate revenue.⁶⁵

Thus, it appears that most loans are not, under the technical definition of the word, oversecured. But, on the other hand, lenders rarely seek deficiencies from customers. In Oregon, 0.06% of loans in 2005⁶⁶ and 0.20% of loans in 2006⁶⁷ resulted in lenders obtaining a money judgment against a borrower. Lenders⁶⁸ and even consumer advocates⁶⁹ maintain that lenders generally do not pursue deficiencies even when it is legal to do so.

64. See TENN. DEP'T OF FIN. INSTS., 2006 REPORT TO THE TENNESSEE GENERAL ASSEMBLY 7–9, available at <http://www.tn.gov/tdfi/compliance/tpl/2006GeneralAssemblyReportTitlePledge.pdf> [hereinafter 2006 TENN. REPORT].

65. See Davis & Davis Interview, *supra* note 24, at 2.

66. See OR. DEP'T OF CONSUMER AND BUS. SERVS., DIV. OF FIN. AND CORP. SEC., OREGON LICENSED CONSUMER FINANCE COMPANIES 2005 SHORT-TERM LOANS 2, available at http://cbs.state.or.us/external/dfcs/cf/annual_reports/2005.pdf (reporting that 12 title loan transactions out of 17,801 resulted in the lender obtaining a money judgment).

67. See OR. DEP'T OF CONSUMER AND BUS. SERVS., DIV. OF FIN. AND CORP. SEC., OREGON LICENSED CONSUMER FINANCE COMPANIES 2006 SHORT-TERM LOANS, available at http://cbs.state.or.us/external/dfcs/cf/annual_reports/2006.pdf [hereinafter 2006 OREGON REPORT] (reporting that lenders obtained money judgments on only 31 of 15,726 title loans).

68. For instance, although Texas law permits it to seek deficiencies, TDJ Financial Services never has in its eleven years operating in the state. See Davis & Davis Interview, *supra* note 24, at 2. The American Association of Responsible Auto Lenders (AARAL) also claims its members will not seek deficiencies. See AARAL, *AARAL Best Practices Safeguard Consumers*, <http://www.responsibleautolenders.org/bestpractices/> (last visited Jan. 10, 2012) (“Repossession of a consumer’s vehicle is rare and occurs only as a last resort. Should repossession occur, all proceeds from the sale of the vehicle in excess of the loan balance are returned to the consumer.”) (on file with the Washington and Lee Law Review).

69. See NCLC Webinar, *supra* note 48 (remarks of Jay Speer, Executive Director, Virginia Poverty Law Center & Sarah Mattson, Policy Director/NH Health Law Collaborative Director, New Hampshire Legal Assistance) (noting that, generally, after a title lender repossesses a car, “that is it”).

Based on this data, a disturbing asymmetry of title lending emerges. Even though, from the lenders' perspective, they do not have much to gain from repossessing a car (because the loans are not technically oversecured), borrowers have a lot to lose, because their equity in the vehicle is consumed by the costs of repossession and resale.⁷⁰ Regulation needs to account for this lack of symmetry.

More importantly, the customers at the greatest risk are those who are probably in the weakest economic position—people with less valuable vehicles as collateral. If a customer's car is only worth \$400, but the customer gets a loan for \$200 and defaults, the transaction will almost certainly generate a deficiency because the customer's small amount of equity will be quickly used up by repossession costs. The less expensive the car, the more likely the lender will be unable to recoup the principal from repossession alone.

c. Money Lent Relative to Income

Opponents of title lending repeatedly argue that one of the chief predatory features of title lending is that lenders do not consider customers' abilities to repay the loans.⁷¹ This argument

70. See Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 GEO. L.J. 2225, 2244–45 (1999) (describing this asymmetry as a common feature in collateralized loans). Mann notes:

[L]enders might take a lien on collateral expecting that the disastrous losses from repossession and liquidation by the lender would induce the borrower to repay the loan even if repayment alone is not value-increasing for the borrower at the time payment comes due. Although different scholars have different perspectives on the question, some scholars believe that much of the force of secured credit comes from the leverage that the lender holds in that transaction: repossession and liquidation cost the borrower much more than they aid the lender.

Id. (citation omitted).

71. See, e.g., NCLC Webinar, *supra* note 48 (remarks of Sarah Mattson) (asserting that title loans are predatory because they are asset-based and indifferent to a borrower's ability to repay); David Ress, *Draft Regulations for Car-Title Loans Draw Lenders' Fire*, RICHMOND TIMES-DISPATCH, Nov. 4, 2009, at B3 ("Banning car-title loans on cars already being financed 'would reduce the opportunity for aggressive lenders to lure borrowers into loans which they are not capable of repaying,' the [consumer] group's lawyer, David W. Clarke, added."); Jean Ann Fox & Elizabeth Guy, *Driven into Debt: CFA Car Title Loan*

has had traction with policymakers,⁷² and title loan customers have sued because title lenders do not consider ability to repay.⁷³

On the other hand, the title lenders assert that they try to make repayment manageable. The lenders I interviewed all said that they consider customers' ability to repay,⁷⁴ and some lenders' websites tell customers to bring proof of income, which suggests they consider ability to repay.⁷⁵ EZCORP's annual report tells

Store and Online Survey, CONSUMER FED. OF AM. 2 (2005), available at http://www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf ("Lenders don't run credit checks or base loans on the borrower's ability to repay. Loans are generally due in one month, with interest only renewals available."); Martin & Adams, *supra* note 3, at 48 ("[T]he amount of each loan is unrelated to a person's income; the amount is based solely upon the value of the vehicle used as collateral.").

72. See Press Release, Governor Lynch's Veto Message Regarding SB 57 (July 6, 2011), <http://www.governor.nh.gov/media/news/2011/070611-sb57.htm> (last visited Apr. 8, 2012) [hereinafter Lynch Press Release] ("At the same time, companies would be allowed to loan without any inquiry into a borrower's ability to repay the loan and would even be allowed to loan to people receiving local welfare assistance.") (on file with the Washington and Lee Law Review).

73. See *Lester v. TitleMax, Inc. (In re TitleMax Holdings, LLC)*, 447 B.R. 896, 903 (Bankr. S.D. Ga. 2010) (remanding to state Court of Common Pleas). Before remanding, the bankruptcy court briefly noted the thrust of the suit:

The essential allegations were that the Defendant had violated South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-108, which provides that if a loan is unconscionable or is induced by unconscionable conduct the court may strike the entire agreement or the unconscionable terms within it. Plaintiffs allege that the unconscionability is evidenced by their belief that the Defendant knew or should have known that the borrower was unable to make the scheduled loan payments, and that it had failed to ascertain the ability to repay through a loan credit check and an evaluation of the borrower's debt to income ratio.

Id. at 898 (citations omitted).

74. See Reich Interview, *supra* note 51, at 2. (stating that his company asks about income to make sure the customer can pay the monthly installment); Anonymous Interview, *supra* note 24, at 2 ("We always consider the customer's ability to repay at the time of [the] loan, as we try to ensure that the customer's payment obligation to us will be something that fits comfortably into his/her budget. An applicant must provide information about their monthly income as well as other indebtedness."); Davis & Davis Interview, *supra* note 24, at 1 (emphasizing the central importance the company places on the customer's ability to repay); Vaugh & Bourns Interview, *supra* note 52, at 1 (asserting that Cash America's product was designed to ensure that the customer could pay off the loan).

75. See Auto Cash, USA, *Car Title Loan Required Items*, <http://www.autocashusa.com/title-loan-required-items.php> (last visited Apr. 8, 2012) ("When you

investors that “[l]oan amounts are established based on customers’ income levels, an inspection of the automobile and title and reference to market values of used automobiles.”⁷⁶ An industry trade organization, the American Association of Responsible Auto Lenders, states on its “Best Practices” webpage that its members “keep consumers’ payments low enough so they are able to successfully pay off the loan”⁷⁷ Texas-based TJD Financial Services goes farther than most lenders, by requiring a four-page application that lists not only income but also all liabilities, so the lender can ensure that customers can repay their obligations.⁷⁸

Ultimately, it is impossible to know whether title lenders are actually evaluating borrowers’ ability to repay, without data from lenders that show customers’ income, loan amounts, and other debt obligations. A less direct approach involves looking at whether people pay off their loans or sacrifice payments to other creditors to repay their title loans. These questions are taken up in Parts I.C.1 and I.C.4.

3. Are Title Borrowers Overly Optimistic About Rollovers?

One important concern about title lending is whether borrowers are overly optimistic when they begin the title loan transaction about how many times they will roll over or renew the loan. If borrowers are making poor decisions because they misjudge their future conditions, regulators could intervene to correct these errors. Academics make the claim that borrowers do not understand “the consequences of their lending arrangement.”⁷⁹

visit one of our licensed vendors’ title loan stores, please bring the following: Clear Car Title; Driver’s license or state-issued I.D. card; Proof of Income; Vehicle for an inspection.”) (on file with the Washington and Lee Law Review).

76. EZCORP, Inc., *supra* note 31, at 6.

77. See AARAL, *supra* note 68 (“AARAL member companies keep consumers’ payments low enough so they are able to successfully pay off the loan and get their title back.”).

78. See The Loan Depot, *Apply for a Loan*, http://www.yourloandepot.com/apply_for_a_loan.php (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

79. Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 *BANKING L.J.* 483, 491 (2005). One news story pointed out that title-lending customers operate on a “false hope.” Arnold, *supra* note 58. In the context of payday lending, however, scholars have expressly stated that borrowers are overly

The optimism bias is one of the most robustly established biases in the literature on behavioral economics.⁸⁰ It would not be surprising if people are overly optimistic about the likelihood they will pay off their title loans with few rollovers. Social scientists use a variety of methods to establish that people are overly optimistic in specific situations; one method is to ask people about their expected outcomes in a situation and compare their expected outcomes to the actual outcomes of people in the same situation.⁸¹

In the title lending survey, we asked customers: “How many months total do you anticipate it taking you to completely pay off this loan (after all renewals/rollovers)?”⁸² Since we spoke to people who were just taking out a loan that day, as well as people who had been rolling over for some time, I report here only the people who had just completed taking out a loan or had had it out just one month, which amounted to eighteen customers. Of those, 33.33% (n = 6) predicted taking one month to pay off the loan, 27.78% (n = 5) predicted taking 2 months, 22.22% (n = 4) predicted taking 3 months, 11.11% (n = 2) predicted taking 4 months, and 5.56% (n = 1) predicted taking 5 months.⁸³ Because virtually all accounts suggest higher numbers of rollovers among actual borrowers in similar situations,⁸⁴ the people we surveyed were overly optimistic about the likelihood they would pay off their loan quickly.

optimistic about how many times they will roll over their loans. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 44–45 (2008) (“A customer who misestimates her ability to repay the loan in fourteen days will likely roll the loan over for another fourteen days. Payday lenders target such customers, amassing 90% of their profits from borrowers who roll over their loans five or more times during a year.”); Alan White, *Behavior and Contract*, 27 LAW & INEQ. 135, 161–62 (2007) (“The payday lenders, even by naming their product, actively seek to encourage the consumer’s mistaken idea that the loan is very short-term and low-cost.”).

80. *See, e.g.*, Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQ. L. 431, 434 (2006) (discussing optimism bias in the context of student loans).

81. *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (“Respondents’ predictions for the permanence of their own marriages and the consequences should they be divorced were much more optimistic than their perceptions of the likelihood and effects of divorce for others.”).

82. *See* HAWKINS SURVEY, *supra* note 7, at 1.

83. *Id.*

84. Industry insiders and state regulators report a variety of different

4. Costs of Title Loans

The high cost of title lending is a central concern of policymakers, judges, opponents of title lending, and anyone attempting to understand how to regulate the product.⁸⁵ Information about the average of title loan interest rates is frequently reported. Jean Ann Fox and Elizabeth Guy report a median rate of “25 percent per month finance charge, which translates to 300 percent annual interest, plus \$25 per loan.”⁸⁶ Without a doubt, interest rates are high.

Members of Congress have expressed concern that title borrowers “are unaware of applicable rates,”⁸⁷ but one study of title lending argues that title loans “have highly transparent and easily understood pricing schemes.”⁸⁸ The people we surveyed did not exhibit an understanding of the high relative cost of title loans compared to credit card debt. Only 25.71% (n = 9) recognized that a title loan is a lot more expensive than credit card debt, while 17.14% (n = 6) thought a title loan is a lot less expensive than credit card debt. 5.71% (n = 2) thought a title loan was a little less expensive than credit card debt, and 31.43% (n = 11) thought the two were about the same cost.⁸⁹ While this small sample of people may not be indicative of borrowers generally, it is disturbing how few people understood the relative cost of their title loan.

lengths of payoff time. *See, e.g.*, 2008 TENN. REPORT, *supra* note 61, at 6 (reporting seven rollovers on average in Tennessee); NCLC Webinar, *supra* note 48 (recounting the TitleMax CEO’s observation that customers renew eight times on average); AARAL, *supra* note 68 (“Most loans are paid back in six months or less.”). *But see* Anonymous Interview, *supra* note 24, at 3 (“Most customers have paid off their loan within 90 days.”).

85. *See, e.g.*, *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 179 (Wis. 2006) (Butler, J., concurring) (“Predatory lenders exploit borrowers through excessively high interest rates.”); *TMX Finance*, *supra* note 11, at 21 (“The consumer advocacy groups and media reports generally focus on the cost to a consumer for this type of loan”); Lynch Press Release, *supra* note 72 (“I am vetoing this legislation [which would raise the interest rate above 36% for title loans] because legalizing excessive interest rates for title loans—rates of 300 percent APR—would be detrimental to our families, our communities, and to our economy.”).

86. Fox & Guy, *supra* note 71, at 2.

87. H.R. Con. Res. 312, 106th Cong. (2000).

88. Zywicki, *supra* note 3, at 437.

89. *See* HAWKINS SURVEY, *supra* note 7.

While customers might not understand the cost of title loans relative to credit cards, it appears firms do compete for business based on price. It is often repeated that fringe banking companies compete on nonfinancial bases such as convenience and friendliness.⁹⁰ Title lenders themselves note the important role nonfinancial issues such as staffing, location, and the cleanliness of facilities play in capturing business.⁹¹ Some academics go further to claim that there is virtually no price competition in fringe lending markets like payday lending.⁹²

The truism that borrowers are insensitive to price, however, does not appear to apply to title lending because price seems to play a key role in obtaining business. TitleMax publicly disclosed to its creditors that its success is due in part to the fact it “charge[s] as much as fifty percent (50%) below the interest rates charged by its competitors.”⁹³ Similarly, EZCORP tells investors that competitive pricing is a “primary element[] of competition.”⁹⁴

90. See, e.g., Zywicki, *supra* note 3, at 391 (“[N]ontraditional lenders compete intensely on nonfinancial margins: As noted, they offer longer hours, provide highly-personalized customer service, and have many more storefronts than traditional lenders, competing on convenience.”); Robin A. Prager, *Determinants of the Locations of Payday Lenders, Pawnshops and Check-Cashing Outlets* 15 (Fed. Res. Bd., Div. of Research & Statistics, FEDS Working Paper No. 2009-33, 2009); available at <http://www.federalreserve.gov/pubs/feds/2009/200933/200933pap.pdf> (observing that alternative financial service providers locate near customers based on a variety of sociological factors).

91. See, e.g., Reich Interview, *supra* note 51, at 5 (noting the importance of having a visible location and treating customers well); Anonymous Interview, *supra* note 24, at 7 (“We rely on television and radio marketing, friendly and trust-worthy service, [and] attractive locations in accessible parts of town.”); EZCORP, Inc., *supra* note 31, at 11 (“We believe that the primary elements of competition are the quality of customer service and relationship management, store location and the ability to loan competitive amounts at competitive rates.”); Titlemax Disclosure Statement, *supra* note 53, at 5 (“The success of the Debtors’ business is attributable to several factors including, but not limited to . . . employ[ing] a highly-motivated and well-trained sales force that accurately judge [sic] the appropriate amount of the Customer Loan [and] the Debtors have highly visible locations and brand recognition.”).

92. See ROBERT MAYER, QUICK CASH: THE STORY OF THE LOAN SHARK 54–56 (2010) (attributing the lack of competition in fringe lending to “information failure,” due to lenders’ concealment of charges and borrowers’ failure to search for the lowest prices).

93. Titlemax Disclosure Statement, *supra* note 53, at 5.

94. EZCORP, Inc., *supra* note 31, at 11.

Title lenders' advertisements confirm the importance of price in competition. Some lenders emphasize cost in their advertisements: "[Y]ou're also certain you're getting the lowest guaranteed interest rates anywhere in Texas on your car title loans! To go from a high-interest short period to a low-interest long period, you can always have your car title loan refinanced with us."⁹⁵ Some companies even make cost comparisons for customers between themselves and other companies.⁹⁶

Different companies appear to offer different rates. In Tennessee, regulators determined that 53% of companies charged 22% a month, the maximum rate allowed by law, while the other 47% of companies charged between 10% and 21% a month.⁹⁷ In Oregon, in 2006, before interest rates were capped at 36%, the maximum rate charged was 663%, but the average rate was 318%.⁹⁸ As a local example, companies in Houston charge rates ranging from 217.7%,⁹⁹ to 144.95%,¹⁰⁰ to 114.0%.¹⁰¹

95. Sugar Land Car Title Loans, <http://www.sugarlandtitleloans.com/index.html> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review); see also Magnolia Loans & Insurance, *Title Loan FAQs*, <http://www.magnolia-loans.com/faqs/title-loan-faqs/> (last visited Apr. 8, 2012) (advertising its ability to offer cheaper loans than its competitors because Magnolia has "fewer expenses" and is "honest and straightforward and believe[s] in making quality loans that people can afford to pay back") (on file with the Washington and Lee Law Review).

96. See, e.g., Advantage Finance, *Houston Car Title Loans From Advantage Finance LLC*, <http://www.cartitleloanshouston.com/> (last visited Apr. 8, 2012) (comparing itself to two other types of title loan products) (on file with the Washington and Lee Law Review).

97. 2010 TENN. REPORT, *supra* note 38, at 10–11.

98. 2006 OREGON REPORT, *supra* note 67, at 1.

99. See Texas Title Loans, <http://txtitleloans.net/> (last visited Apr. 8, 2012) (comparing its rates to those of competitors with an amortization table) (on file with the Washington and Lee Law Review).

100. EZCORP has a store at 8502 Main St. #D, Houston, Texas that, on September 1, 2011, was publicly advertising title loans at "12%" (per month, presumably).

101. See Advantage Finance, *Houston Car Title Loans From Advantage Finance LLC*, <http://www.cartitleloanshouston.com/> (last visited Apr. 8, 2012) (comparing its rates to those of competitors with an amortization table) (on file with the Washington and Lee Law Review).

C. Cars as Collateral

The central objection to title lending relates to the use of the consumer's vehicle as collateral for the loan. This subpart explores some of the factual issues underlying this objection.

1. How Often Do Lenders Repossess Vehicles?

There is a lot of questionable or unclear data about how often title lenders repossess cars. Many sources, including members of Congress,¹⁰² assert without offering any proof that lenders "often" repossess people's cars.¹⁰³ Even some of those interpreting evidence about repossessions have reported misguided information about how often lenders repossess vehicles.

For instance, in a 2007 law review article, Jean Ann Fox claims, based on reports generated by Tennessee's Department of Financial Institutions, that from 35% to over 50% of loans in Tennessee result in the title lender repossessing the vehicle.¹⁰⁴ To come up with this figure, she took the total number of title loan agreements reported in Tennessee and divided it by the number of times customers roll over or renew the loans on average. She compared that figure to the number of repossessions and concluded that the repossession rate is between 35% and 50%, depending on

102. See 146 CONG. REC. 12,524 (2000) ("At such a high interest rate, *many* of these [title loan] borrowers are unable to pay off their loan and their vehicles are repossessed." (emphasis added)).

103. See, e.g., DeGaris, *supra* note 58, at 2 ("A title loan *often* ends in repossession." (emphasis added)); Arnold, *supra* note 58 ("Fox [of the CFA] . . . says . . . , 'They purposely target borrowers who cannot afford the high-cost, short-term balloon loans, virtually guaranteeing that *many* of the loans will fail . . .'" (emphasis added)); *Newest Form of Predatory Lending Strikes*, NEWS & ADVANCE (Lynchburg, VA), Dec. 10, 2008, http://www2.newsadvance.com/news/2008/dec/10/newest_form_of_predatory_lending_strikes-ar-220374/ (last visited Apr. 8, 2012) ("Another consequence of car title loans is a high repossession rate.") (on file with the Washington and Lee Law Review); Silverman, *supra* note 79, at 491 ("In cases of default, lenders are quick to repossess and sell the car . . .").

104. See Jean Ann Fox, *Fringe Bankers: Economic Predators or New Financial Services Model?*, 30 W. NEW ENGL. L. REV. 135, 140 (2007) ("Consumers who pledge car titles as security for small loans run the risk of losing their vehicle.").

whether we assume borrowers roll over their loans three or seven times.¹⁰⁵

The problem with this analysis is that the Department of Financial Institutions considers the “total number of title loan agreements” to mean only new agreements, not renewals or rollovers. Although later reports make it explicit,¹⁰⁶ the report Fox was using is unclear on this point, so her confusion is understandable.¹⁰⁷ The employee responsible for creating the report in Tennessee, however, confirmed to me that the number of agreements did not include rollovers in that report either.¹⁰⁸ Thus, in determining the repossession rate, we should not divide the number of loans by the average rollovers. Fox’s repossession rates are inflated three to seven times the real amount.

Similarly, an influential report from the Woodstock Institute finds 18% of title loans in Illinois end in repossession.¹⁰⁹ The actual repossession rate is higher, the report argues, because this figure does not include “repossessions that occur immediately after default where a court case is not filed by the lender.”¹¹⁰ The problem, however, is that this repossession rate is not calculated based on all the title loans in Illinois but merely reflects the repossession rate in cases where the lender sued to collect money

105. *Id.* Fox notes:

Tennessee regulators reported that 10,933 vehicles were repossessed for nonpayment in 2005 out of a total 92,489 loan agreements. If every Tennessee borrower renews a loan just three times, that is a 35% repossession rate. If every loan is renewed seven times, as indicated by an earlier Tennessee Department of Financial Institutions report, more than half of the cars pledged for loans are eventually lost by borrowers.

Id.

106. The report generated in 2008 concerning data from 2006 explicitly states that the “total number of [title pledge] agreements” “reflects new agreements made and does not include renewals of these initial agreements.” 2008 TENN. REPORT, *supra* note 61, at 4.

107. See 2006 TENN. REPORT SUPP., *supra* note 61, at 7 (stating the total title pledge agreement figure without explaining whether it incorporates rollovers into that figure or not).

108. E-mail from Steve Henley, Tenn. Dep’t of Fin. Insts., to Jim Hawkins (Aug. 4, 2011, 14:33 CST) (on file with the Washington and Lee Law Review).

109. See WOODSTOCK INST. & PUB. ACTION FOUND., DEBT DETOUR: THE AUTOMOBILE TITLE LENDING INDUSTRY IN ILLINOIS 5 (2007).

110. *Id.*

from the borrower.¹¹¹ Cases in collection likely have a different repossession rate than cases outside collection. Moreover, cases with loans that have sufficiently high values to encourage a suit likely have different repossession rates than the general population of title loans. Thus, the Woodstock Institute report does not provide any evidence of the repossession rate for all title loan agreements.

Nathalie Martin and Ozymandias Adams state in a new paper, based on reports from New Mexico, that “between 20% and 71% of the title loan customers have their vehicles repossessed.”¹¹² Martin and Adams’s calculations rely on the summary data in the New Mexico reports, and they use this data to calculate various averages. Important here, they calculate the average amount of each loan by comparing the total principal for all loans originated during the calendar year to the total principal amount outstanding on all loans at the end of the calendar year.¹¹³ They calculate the number of loans per year (a number omitted from the New Mexico report but present in almost all other state reports) by dividing the total amount of principal by the average loan amount.¹¹⁴ Finally, they use the average times a person took out a new title loan that the state generates.

To calculate how often people lose their vehicles, Martin and Adams divide the total number of loans (a figure generated through computing the average size of each loan) by the average number of times a person took out a new loan. Then, they divide the quotient by the number of repossessions in the year.¹¹⁵

Beginning with such estimated data leads to two fundamental computational problems. First, as Martin and Adams note, “[o]ne problem with the yearly summaries is that they average all of the data, including obvious outliers.”¹¹⁶ This introduces some unknown

111. See *id.* at 2 (explaining that the statistics generated in the report are based on an analysis of cases filed against title borrowers).

112. Martin & Adams, *supra* note 3, at 45. In another article, Martin suggests that one-third of borrowers lose their cars. See Nathalie Martin, *Regulating Payday Loans: Why This Should Make the CFPB's Short List*, 2 HARV. BUS. L. REV. 1446 (2011), available at <http://www.hblr.org/wp-content/uploads/2011/07/Martin-Payday-Loans.pdf>.

113. Martin & Adams, *supra* note 3, at tbl.4.

114. *Id.* at 80.

115. *Id.* at 64.

116. *Id.*

error rate into each original average. Once two such averages are combined to perform a calculation, the error rate is compounded.

Second, Martin and Adams perform their computations under the assumption that dividing the averages of two variables results in a third average—the average of the divided variables. This is not true.¹¹⁷ As a result of beginning with averaged data, Martin and Adams have no choice but to reverse the correct order of arithmetic in averaging, resulting in potentially skewed final numbers.

Finally, Todd Zywicki finds that around 8% of loans lead to repossession based on state reports and interviews with title lending companies.¹¹⁸ Based on his discussion of this repossession rate, however, it is unclear if Zywicki is reporting the number of new title loan agreements that led to repossession or the number of renewals or rollovers that led to repossession.¹¹⁹ Based on the data I report below, it appears that Zywicki is reporting repossessions per new loan agreement, but it is not entirely clear.

To attempt to understand how often customers lose their vehicles, I interviewed title lenders and evaluated reports generated by state regulators. One title lender informed me that its database tracks repossession rates per customer,¹²⁰ and that 5% to 6% of customers lose their vehicles.¹²¹ News stories report the nation's largest lender stating that the repossession rate per

117. For instance, say Variable A has data points {1, 3, 5} and Variable B has data points {2, 4, 6}. The average of Variable A is 3 and the average of Variable B is 4. Thus (the average of Variable A) divided by (the average of Variable B) is $3/4$ or $27/36$. This is not the same as the average of (Variable A divided by Variable B). (Variable A divided by Variable B) results in the set $\{1/2, 3/4, 5/6\}$ with an average of $25/36$. The former method is the one employed by Martin and Adams, while the latter is the more mathematically sound.

118. See Zywicki, *supra* note 3, at 435.

119. See Adam Levitin, *Auto Title Lending Data*, CREDIT SLIPS (Jan. 14, 2011 11:50 PM), <http://www.creditslips.org/creditslips/2011/01/auto-title-lending-data.html> (last visited Apr. 8, 2012) (“[Zywicki’s data] also seemed highly skewed by the fact they were counting loans rather than borrowers. Title loans are 30-day loans that can be rolled over, but a roll-over counts as a new roll, which effectively inflates the denominator for default rates.”) (on file with the Washington and Lee Law Review).

120. Anonymous Interview, *supra* note 24, at 5.

121. See E-mail from Anonymous Title Lender to Jim Hawkins (Jan. 1, 2011, 15:13 CST) (“Our average national repossession rate is between 5 and 6%. This is based on a ratio of repossession per customer not loans.”) (on file with the Washington and Lee Law Review).

customer is 7%.¹²² A smaller operator in Texas told me that they repossess around 10% of customers vehicles but that customers redeem the vehicles 6–7% of the time, resulting in 3–4% of people losing their vehicles.¹²³ Similarly, another Texas lender with two stores indicated that 7.2% of its loans result in repossession, meaning roughly 10% of borrowers lost their vehicles.¹²⁴

I have combined the data from the six states' reports in Table 2 below. None of the states report how many new loan agreements a customer takes out on average a year, so it is impossible to know how many customers lose their vehicles from title lending. But these figures do not include rollovers or renewals under the "number of title loans," so the repossession rates reported below are rates per new title lending agreement.¹²⁵

Because some customers take out more than one new loan a year, the repossession rate per customer could be higher. We do know, however, that the repossession rate per customer is not

122. See Richard Locker, *No Progress on Title-Lending Bill: Coalition, Industry Pitch Sides, but Panel OKs Nothing*, KNOXVILLE NEWS SENTINEL, July 23, 2008, available at <http://www.knoxnews.com/news/2008/jul/23/no-progress-on-title-lending-bill/?printer=1/> ("The . . . vice president of Atlanta-based Community Loans of America . . . said 'only 7 percent of customers had their cars seized . . .'"). For another report not based on repossessions per customer, see Sue Kirchhoff, *Some Consumers Run into Big Problems with Auto Title Lending*, USA TODAY, Dec. 27, 2006, available at http://www.usa.today.com/money/perfi/general/2006-12-26-title-loans-usat_x.htm ("Rod Aycox, president of LoanMax auto title and its affiliated companies throughout the country, made about half a million loans this year and repossessed cars in 5% of the cases, or 25,000 autos, according to a statement from his firm.").

123. Davis & Davis Interview, *supra* note 24.

124. Cone Interview, *supra* note 24.

125. I have e-mails from regulators in Tennessee and Montana that confirm the number of loan agreements does not include rollovers or renewals. See E-mail from Steve Henley, Tenn. Dep't of Fin. Insts., to Jim Hawkins (Aug. 4, 2011, 14:33 CST) (on file with the Washington and Lee Law Review); E-mail from Linda Leffler, Mont. Div. of Banking & Fin. Insts., to Jim Hawkins (Aug. 5, 2011, 16:57 CST) (on file with the Washington and Lee Law Review). The Illinois report plainly does not count renewals as different loans because it states that the average length of time the borrower had a loan was over 300 days, which reflects multiple renewals of a single loan. The Oregon report lists rollovers separately from total loan agreements, indicating the former does not include the latter. See 2009 OREGON REPORT, *supra* note 37, at 2. And, for some years in Oregon, rollovers were prohibited, so the total number of loans could not include rollovers. The Virginia report says the average number of days customers had loans was 305, which indicates the loan number includes rollovers. See VIRGINIA REPORT, *supra* note 36, at 84.

much higher than the repossession rate per new loan because the lengths of loans reported in different states are all quite high. Few customers could have more than one loan out during the year.

Table 2: Repossession Rates on New Title Loans

<u>State</u>	<u>Year</u> ¹²⁶	<u>Number of New Title Loan Agreements</u>	<u>Number of Repossessions</u> ¹²⁷	<u>Repossession Rate</u>
Tennessee ¹²⁸	2008	161,417	14,832	9.18%
	2007	139,319	18,199	13.06%
	Nov. 2005–June 2006	92,489	10,933	11.82%
Oregon ¹²⁹	2004	250,593	17,313	6.91%
	2009	17,820	2	0.01%
	2008	10,136	1	0.00%
	2007	8,568	32	0.37%
	2006	15,726	125	0.80%
Idaho ¹³⁰	2005	17,801	114	0.64%
	2010	34,247	2382	6.96%
Illinois ¹³¹	Oct. 2009–June 2011	155,094	7,334	4.73%
Montana ¹³²	2009	12,727	599	4.71%
Virginia ¹³³	Oct. 2010–Dec. 2010	24,975	194 ¹³⁴	0.78%

Based on the information in Table 2, the repossession rates in these six states are much lower than previous research has indicated.

126. The year noted in Table 2 represents the year the data were gathered, not the year the data were reported.

127. These figures exclude cases in which customers redeemed repossessed collateral because in those cases customers did not in fact lose their vehicles.

128. To view these reports, see TENN. DEP'T OF FIN. INSTS., *Title Pledge Reports*, <http://www.tn.gov/tdfi/compliance/tpl/TPLreports.html> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

129. To view these reports, see OR. DIV. OF FIN. AND CORP. SEC., *Consumer Finance, Payday, and Title Lending Annual Activity*, http://www.cbs.state.or.us/external/dfcs/activity_reports/consumer_finance.html (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

130. On file with the Washington and Lee Law Review.

131. On file with the Washington and Lee Law Review.

132. On file with the Washington and Lee Law Review.

133. See generally VIRGINIA REPORT, *supra* note 36.

134. This number likely overstates the number of vehicles consumers lost because the report states that only two vehicles were sold by lenders, indicating customers redeemed some repossessed vehicles. *Id.* at 84.

2. *Are Borrowers Overly Optimistic About the Chances Their Vehicle Will Be Repossessed?*

It is possible that lenders frame the transaction to minimize customers' awareness of the potential loss of their vehicles.¹³⁵ Borrowers might think the risk of losing their car is lower than it really is, so they undervalue the risk when making the decision whether to enter into the transaction. Put another way, borrowers might be "operating on false hopes" regarding whether their car will be repossessed.¹³⁶ The facts that borrowers do not have to turn over their vehicle or even their title to the vehicle in some cases has led some commentators to theorize that borrowers do not feel the potential loss at the time of the transaction.¹³⁷ Legislators have even argued that title lenders deceive borrowers about the likelihood their car will be repossessed: "These pay-day loans, title loans, where you come in and hand the title of your car over and they give you a basic loan and say: We are not going to take your car away. The next thing you know, interest rates are going up, you refinance the loan, and pretty soon you may lose your car."¹³⁸

To test whether borrowers are overly optimistic about the likelihood their car would be repossessed, I asked them, "What do you think is the percentage chance the lender will repossess your vehicle?" Unlike my analysis of optimism for rollovers, I include all responses here, regardless of how long the customer had had the

135. See Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 731 (2005) ("[P]redatory lenders go to extreme lengths to frame their loans as gains and to obscure potential losses.").

136. Arnold, *supra* note 58.

137. See Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQUIRIES L. 323, 332 (2006) ("Title 'pawn' loans allow consumers to get non-purchase-money secured auto loans, without the cautionary event of a transfer of possession but with the risk of losing a car used to get to work."); see also Dave Ress, *Proposed Regulations for Car-Title Loans Draw Fire*, RICHMOND TIMES-DISPATCH, Nov. 4, 2009, available at http://www2.timesdispatch.com/business/2009/nov/04/b-payd04_20091103-211405-ar-15441/ ("A borrower . . . should be fully aware that he has given the lender a lien on his vehicle and that he may lose his vehicle if he doesn't repay This will not necessarily be clear to the borrower unless he is required to surrender his title." (quoting James W. Speer, executive director of the Virginia Poverty Law Center) (internal quotation marks omitted)).

138. 156 CONG. REC. S3021 (daily ed. May 3, 2010) (statement of Sen. Durbin).

loan out. 54.29% (n = 19) of those we surveyed predicted a 0% chance that the lender would repossess their vehicle, 2.86% (n = 1) predicted a 5% chance, while 40% (n = 14) predicted a 10% or greater chance their vehicle would be repossessed.¹³⁹ For borrowers taking out a loan the date they were surveyed, 75% (n = 6) predicted a 0% chance they would lose their vehicle. Regardless of which state's or lender's data we use, most of the people we surveyed exhibited too optimistic a view of whether the lender would repossess their vehicle.

3. Do Lenders Use Collateral as a Terror Mechanism to Encourage Repayment?

Even if lenders do not actually repossess borrowers' vehicles, some commentary on title lending suggests that the mere threat of repossession is sufficient to cause borrowers to continue to make payments on the title loan. More specifically, opponents argue that using vehicles as collateral causes borrowers to prioritize their title loan payments over other bills¹⁴⁰ and gives lenders substantial bargaining leverage over borrowers.¹⁴¹ It is not the value of the

139. Four people predicted a 10% chance, one person predicted a 15% chance, two people predicted a 20% chance, one person predicted a 30% chance, two people predicted a 50% chance, one person predicted a 70% chance, and two people mysteriously predicted a 100% chance. Two people did not answer this question. See HAWKINS SURVEY, *supra* note 7.

140. See, e.g., DEP'T OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 7, 44 (2006) [hereinafter DOD REPORT], available at http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf (“[Car title pawns] provide undue and coercive pressure on military borrowers and allow lenders more latitude in making loans without proper regard for the Service member’s ability to repay. . . . The use of . . . car titles pressure[s] the borrower to consider loan payments as being their top priority.”); NCLC Webinar, *supra* note 48 (remarks of Leslie Parrish) (arguing that title loans cause borrowers to drop their other bills to make sure they pay on their title loan); *Id.* (remarks of Jay Speer) (reporting that two people seeking legal help claimed they would pay down their title loan before they paid their rent).

141. See DOD REPORT, *supra* note 140, at 7; see also NCLC Webinar, *supra* note 48 (remarks of Sarah Mattson) (asserting that title lenders use the powerful leverage of repossession over consumers in negotiations to set up repayment plans).

vehicle that compels repayment but, instead, the cost of purchasing a replacement.¹⁴²

The fact that some lenders in Virginia used to take out a second lien on a vehicle, which would not allow them to actually recover anything, provides some evidence of the role terror could pay in title loan transactions.¹⁴³ Yet, the value of the vehicle sets the amount of the loan in most cases. Thus, lenders must not view the collateral merely as a means of forcing repayment, because they use it as a baseline for how much to lend.

To test the coercive force of using a vehicle as collateral, I asked customers, "If you couldn't pay off all your bills one month, which bills would you NOT pay so you could pay on this loan?" We provided various categories of bills. Table 3 reports the results.

Table 3: Bills Borrowers Would Not Pay in Order to Pay Title Loan

Bill	Percentage	Number
Rent or Mortgage Payment	5.71%	2
Utilities	5.71%	2
Credit card debt	62.86%	22
Groceries	11.43%	4
Medical	11.43%	4
Other: Including pet bill, cable bill, internet service, cellular phone bill	22.86%	8

Table 3 indicates that the people we surveyed would not prioritize their title loan payments over their basic necessities such as rent, utilities, groceries, or medical expenses. The survey does suggest the people we surveyed prioritize paying the title lender before their credit card company, but this preference does not indicate that title borrowers are terrorized into prioritizing their title loan payments.

4. Do Customers Have Other Transportation to Work?

A central factual question in the policy debates about title lending is whether people taking out title loans have other means

142. See NCLC Webinar, *supra* note 48 (remarks of Jay Speer).

143. See *id.* (asserting that some lenders in Virginia, like Advance America, do title loans with a second lien on the vehicle to make borrowers think the lender can take the car and sell it, even though Virginia law does not allow lenders to take a second lien on a vehicle).

of transportation. This issue is important because, if title loans cause people to lose their jobs or fail to show up to doctors' appointments, it is much easier to link title lending to other social ills.

It is hard to overstate how important this issue is to policymakers considering title lending. Consumer advocates make this argument the center of their strategy against title lending.¹⁴⁴ Academic papers¹⁴⁵ and press reports¹⁴⁶ have also taken up the theme, reporting the argument that title loans are "more

144. See, e.g., *Payday and Title Loans, Hearing Before the Illinois Senate Fin. Comm.* (1999) (statement of Daniel A. Edelman, on behalf of the Illinois Consumer Justice Council), available at <http://www.edcombs.com/CM/News/news20.asp> ("No collateral should be permitted on these high-interest loans. There is no justification for 200 or 300% fully secured loans. Consumers who need automobiles to get to work and stay off welfare should not be losing their cars to 'title lenders.'"); NCLC Webinar, *supra* note 48 (remarks of Jessica Hiemenz) (noting the main concern with auto title lending is the risk of repossession); Barry Yeoman, *Sudden Debt?*, AARP THE MAGAZINE, Sep./Oct. 2006, at 129 ("They're really devastating for elderly people who need their cars."); *Loans Secured by Car Titles Trap Borrowers in Cycle of Debt*, CONSUMER AFFAIRS (Apr. 18, 2005), http://www.consumeraffairs.com/news04/2005/car_loans.html (last visited Apr. 8, 2012) (noting that the loans in "many cases" end in the repossession of the car "after the borrower has made substantial payments" and that this is "devastating because a car is often the borrower's largest asset and his or her only way to get to work") (on file with the Washington and Lee Law Review).

145. See, e.g., Fox, *supra* note 104, at 140 (noting the risk to "vital transportation"); Braucher, *supra* note 137, at 332 (pointing out that title loans expose borrowers to "the risk of losing a car used to get to work"); Barr, *supra* note 8, at 166 ("With title lending . . . the borrower risks losing her car, which may be her regular way to get to work, and to transport children to and from school or child care.").

146. See, e.g., Elinat Paz-Frankel, *Opponents of Auto Title Lending Industry Hope Legislature Limits 'Outrageous' Fees*, MEMPHIS BUS. J., Aug. 22, 2008 (noting that "[c]ars are used as collateral for title loans" and that "when vehicles are repossessed, borrowers often are left with no means of driving to work"); Kirchhoff, *supra* note 122 ("If borrowers can't pay back the loans, often due in 30 days, they often roll them over, with multiplying fees. If they still fall behind, their cars can be repossessed. That contributes to a downward spiral, with people unable to get to work, a doctor or drive their kids to school."); *Newest Form of Predatory Lending Strikes*, *supra* note 103 ("A lobbyist for . . . LoanMax . . . said that reducing the rate to 36 percent would effectively put the company out of business. So be it. Such an alternative is far preferable to preying on the poor at the ultimate expense of depriving them of their only means of transportation.").

damaging than payday loans because borrowers who cannot pay the required fees lose their transportation to and from work.”¹⁴⁷

Most importantly, government officials have placed tremendous stock in the argument that people will lose their only way to get to work. One Congressman asserted that repossessions by title lenders “often” result in the loss of a job.¹⁴⁸ The House of Representatives itself passed a resolution calling on states to intervene in title lending markets because “title loans and title pawns threaten the ability of consumers to hold a job since default on the loan or pawn will result in repossession and sale of their car, which is often their only means of transportation to and from work”¹⁴⁹ The Department of Defense, in its report urging Congress to take action to prohibit high cost loans to service members, stated that title loans endanger “essential transportation.”¹⁵⁰ Even judges have expressed concern that if “a payment is missed, the lender can start the process of taking the borrower’s vehicle, resulting in a loss of transportation to work and to obtain health care.”¹⁵¹

Officials’ concerns about the risk of losing transportation have resulted in real-world consequences. The governor of New Hampshire recently vetoed a law that would have permitted title lending in the state because “[f]ailure to repay a loan could lead to seizure of the family car, which is often essential for family

147. JEFF PETERSON, ARIZ. RURAL POLICY INST., *PREDATORY LENDING: PROFILE AND ANALYSIS 5* (2007); see also Frank Burt et al., *Refund Anticipation, Payday, and Auto Title Loans: A Survey of Select Fringe Lending Products*, JORDEN BURT LLP, May 2006, at 21, available at <http://www.jordenburt.com/attachments/489.pdf> (“Unlike the loss of a television or other electronic good, the loss of a car because of a default on a loan can have extensive ramifications for a person who needs the car for work, grocery shopping, care of children, and other daily necessities.”).

148. 146 CONG. REC. 12,524 (2000) (“As is the case for most Americans, these consumers depend on their automobiles and trucks for transportation to their jobs, vital medical appointments, and school for their children. So the loss of a vehicle through an unfair foreclosure often results in the loss of a job or other serious consequences.”).

149. H.R. Con. Res. 312, 106th Cong., 146 CONG. REC. 12,523 (2000) (enacted).

150. DOD REPORT, *supra* note 140, at 16 (“The high cost and risk of car title loans traps borrowers in repeated loan renewals in order to keep from losing essential transportation and key family assets.”).

151. *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 179 (Wis. 2006) (Butler, J., concurring).

members to maintain employment.”¹⁵² Wisconsin Governor Jim Doyle used his veto power to outlaw title lending in Wisconsin because “[a]uto title loans can result in individuals losing their vehicles due to failure to make timely payments on relatively small loan amounts, putting at high risk an asset that is essential to the well-being of working families.”¹⁵³ The most common regulatory response, as demonstrated in the cases of Wisconsin and New Hampshire, is to ban title lending. In 2009, a Wisconsin state legislator supported a ban on title lending because “most folks need that car for work, family, etc.”¹⁵⁴

Yet, despite the frequency of this claim, there is absolutely no data, except for that generated by the industry discussed below, about whether people using title loans have more than one vehicle. Consumer advocates arguing against title loans concede that we have no information about what vehicles people use to get to work.¹⁵⁵ The one data point that is public is from an internal survey of TitleMax customers, which found that “[a]pproximately 70% of our customers own two or more vehicles.”¹⁵⁶ However, TitleMax has only released the conclusions of its survey, not any of the underlying methodology or data. Thus, this central question of title lending policy remains entirely unaddressed.¹⁵⁷

152. Lynch Press Release, *supra* note 72.

153. *Doyle's Veto Pen Is a Sword for Consumers*, CAPITAL TIMES (Madison, Wis.), May 26, 2010, at 29. For an explanation of how the governor outlawed title lending through his veto power, see *Auto Title Lenders Decry Doyle Veto*, ST. PAUL PIONEER PRESS, May 19, 2010 (“Doyle on Tuesday used his partial veto power to cross out parts of several sections to create a new sentence declaring, ‘No licensed lender may make a title loan.’”).

154. Press Release, *Zepnick Proposes Consumer Lending Reforms*, WIS. POLIT., July 24, 2009, available at http://www.wispolitics.com/1006/090305_Payday_Lending.pdf.

155. See, e.g., NCLC Webinar, *supra* note 48 (remarks of Leslie Parrish).

156. TMX Finance, *supra* note 11, at 43.

157. Another important policy question that needs research is whether most of the cars that lenders repossess actually work. Title lenders claim that most vehicles they repossess are essentially worthless. See, e.g., Davis & Davis Interview, *supra* note 24 (estimating 90% of the vehicles TDJ Financial repossesses are worthless); Zywicki, *supra* note 3, at 455 (“[M]any of these cars have mechanical failures or other damage that makes it not worthwhile to expend the cost of repossession.”); Locker, *supra* note 122 (“[The] vice president of Atlanta-based Community Loans of America . . . said . . . that some customers who default have cars so worthless that they tell lenders to come get them.”). It is important to know whether the repossessed vehicles still function because, if

In my survey, I asked, “Considering only people living in your same house, how many working vehicles does your family have?” Among those we surveyed, 20% (n = 7) had only one vehicle in their household. The remaining 80% had two or more vehicles, with the modal number (representing 62.86% of surveys) being two vehicles. If these results were representative—I do not suggest they are—and the repossession rates presented in Part II.C.1 were representative, then the number of people losing their only way to work is small: around 2%. Because of the limitations on the data I acquired, this remains a question of central importance for title lending policy. My findings, however, cast doubt on the oft-repeated claim that title lending results in customers being unable to get to work.

States have had to craft regulatory policy for title lending despite the uncertainties that surround the fundamentals of this business. The next Part explains how different states have responded to title lending.

III. Title Lending Law

Several well-known federal laws govern title lending. One is the Truth in Lending Act, which, among other things, requires that title lenders disclose the cost of loans as an APR.¹⁵⁸ Another is the Talent-Nelson Amendment, which essentially forbids title loans to members of the armed service.¹⁵⁹ More recently, the new Dodd-Frank Wall Street Reform and Consumer Protection Act forbids lenders from engaging “in any unfair, deceptive, or abusive act or practice,” and empowers the Bureau of Consumer Financial Protection to develop regulations for title lenders.¹⁶⁰

most do not, the claim that people are losing a means of transportation is obviously false. But it is hard to believe that lenders would spend the money to repossess nonfunctioning cars, suggesting people *are* losing a means of transportation.

158. 15 U.S.C. § 1664 (2006).

159. 10 U.S.C. § 987 (2006).

160. Consumer Financial Protection (Dodd-Frank) Act of 2010 § 1036, Pub. L. No. 111-203, 124 Stat. 2010 (to be codified at 12 U.S.C. § 5536). For a more extensive discussion of the importance of the Act for fringe creditors, see Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 CHAP. L. REV. 23 (2011).

Less explored and recognized are state statutes regulating title lending. States have adopted a wide variety of methods for regulating title lending. These cover an enormous range, from banning the transaction to formally authorizing it with very few restrictions. This Part categorizes current regulatory approaches and analyzes these disparate schemes and their relationship to other laws not specifically governing title lending.

Creating categories of different state regulations is significant because, while other articles have discussed title lending law generally,¹⁶¹ no other articles have established such a taxonomy of existing title lending laws. Creating a taxonomy allows us to see the options available to regulators when confronting the problems and the opportunities created by title lending. This Part sets the groundwork for Part IV, which evaluates these different approaches.

A. *Effective Bans*

Although federal legislation has been introduced in an attempt to ban title loans across the nation,¹⁶² it is difficult to find any states that explicitly ban title lending. However, a strong majority of states effectively ban title lending by setting usury rates low enough that no one will offer title loans within their borders. Alaska provides one of many examples.¹⁶³ Alaska has a small loan law that applies for any loan under \$25,000.¹⁶⁴ The statute caps loans under \$25,000 at a maximum of 3% a month,¹⁶⁵ which works out to roughly 42.5% APR. No statute in Alaska

161. See Zywicki, *supra* note 3, at 434–35 (summarizing state laws at a high level); Martin & Adams, *supra* note 3, at 54–56 (discussing several individual state statutes without placing them into a broad conceptual framework).

162. A federal ban on auto title lending was introduced by Arizona Congresswoman Gabrielle Giffords. See Press Release, Rep. Gabrielle Giffords, *U.S. Rep. Gabrielle Giffords Acts to Ban Payday Lending Nationwide* (June 30, 2010), available at <http://www.votesmart.org/public-statement/526382/us-rep-gabrielle-giffords-acts-to-ban-payday-lending-nationwide>. The text of the bill is available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-5689>.

163. For a few other examples, see COLO. REV. STAT. § 5-2-201(2)(a)(I) (2010) (capping loans under \$1,000 at 36% APR); VT. STAT. ANN., tit. 9, § 41a(b)(4) (West 2011) (capping loans secured by vehicles at 20% APR).

164. ALASKA STAT. §§ 06.20.010–.920 (2010).

165. *Id.* § 06.20.230(a).

explicitly exempts title lenders from this cap,¹⁶⁶ and Alaska does not allow title lenders to offer title loans structured as open-ended credit agreements to evade the cap.¹⁶⁷ Thus, if a business wants to make a title loan, it is subject to the 42.5% APR cap.

Title lenders refuse to offer title loans at 40% APR, so this rate cap effectively bans title lenders from Alaska and other states with similar laws. As one example, EZCORP's annual report explains that its stores do not lend to active duty military personnel because the federal government caps the interest rate on such loans at 36%.¹⁶⁸ Evidence from states enacting interest-rate caps on payday loans after allowing higher rates makes it plain that lenders will not continue offering loans in these environments.¹⁶⁹ One consumer advocate has found that title lenders will generally only operate if they are permitted to charge above 200% APR.¹⁷⁰ Thus, when states enact caps at lower amounts, the effect is a complete ban.¹⁷¹

166. Alaska does exempt pawnbrokers from this statute, so it is possible that a business could make a title loan as a pawnbroker for less than \$500. *See id.* § 06.20.330(b) ("This chapter does not apply to individual loans by pawnbrokers . . . or loan shops where separate and individual loans do not exceed \$500.").

167. *See id.* § 06.20.285(a) ("A licensee may make open-end loans not exceeding an aggregate total of \$25,000 and may contract for and receive interest on open-end loans as provided in AS 06.20.230 [setting 3% monthly rate maximums], and for other charges permitted under this chapter.").

168. *See* EZCORP, Inc., *supra* note 31, at 14 ("This 36% annual percentage rate cap applies to a variety of loan products, including signature loans, though it does not apply to pawn loans. We do not make signature loans to active duty military personnel . . . because it is not economically feasible for us to do so at these rates.").

169. Zywicki uses a report from Policis, THE EFFECT OF INTEREST RATE CONTROLS IN OTHER COUNTRIES 16 (Policis 2004), to make the point that after Florida capped interest rates for title loans at 30%, "the number of auto title lenders operating in the state dropped from 600 before the legislation was enacted to 58 the year following." Zywicki, *supra* note 3, at 432 n.17.

170. *See* NCLC Webinar, *supra* note 48 (remarks of Leslie Parrish).

171. Indeed, a consumer advocate recently pointed out that one of the best ways to ban title lending is to place a cap on interest rates. *See id.* (remarks of Jay Speer).

B. Title Lenders Operating in States with Strict Price Controls

Despite the fact that interest rate caps should effectively ban title lenders from offering loans in a state, it is very difficult to determine whether any given interest rate ceiling is effective in preventing title lending. The National Consumer Law Center produced a “Scorecard” on small-dollar loan products in 2010 that lists which states prohibit title loans or set interest rates below 36%.¹⁷² The Scorecard reports that thirty states fall within this category and should therefore have no title lenders.¹⁷³ Twenty states permit rates above 36%, but only seventeen permit rates above 200%,¹⁷⁴ the rate generally required to allow title lending to exist.¹⁷⁵ Yet, the American Association of Responsible Auto Lenders reports that its members alone operate in twenty-two states,¹⁷⁶ so determining which states effectively ban title lending is not as simple as merely looking at usury caps.

There are several states that have rate caps that should prevent title lending but fail to do so because title lenders use creative legal moves to avoid the rate cap. Lenders have avoided caps in Kansas by offering loans as open-ended credit arrangements, in Texas by operating as Credit Service Organizations, and in California by offering loans at amounts just above the amount covered by the rate cap. The following sections explain how these transactions work despite laws that appear to effectively ban them. In some cases, lenders operate in the midst of uncertainty, realizing that courts may vitiate their loophole through a different interpretation of the law enabling their creative practice.

172. See LEAH A. PUCKETT ET AL., NAT’L CONSUMER LAW CTR., SMALL DOLLAR LOAN PRODUCTS SCORECARD—UPDATED 14–20 (May 2010), available at http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/cu-small-dollar-scorecard-2010.pdf.

173. *Id.* at 14–20.

174. *Id.*

175. See NCLC Webinar, *supra* note 48 (remarks of Leslie Parrish).

176. Am. Assoc. of Responsible Auto Lenders, *About the AARAL*, <http://www.responsibleautolenders.org/about/> (last visited Jan. 10, 2012).

1. Open-Ended Credit

Kansas is a state with a 36% interest rate cap,¹⁷⁷ but it has active title lending within its borders.¹⁷⁸ To avoid the cap and operate within Kansas, lenders structure title loans in Kansas as open-ended credit arrangements. In an open-ended credit plan, like those used by credit card companies, the lender sets a credit limit, and the borrower can access any amount of money within that limit over a period of time, pay it off, and access it again, and the lender only charges a finance charge on the actual amount borrowed.¹⁷⁹ Title lenders in Kansas structure loans just like credit cards. One advertisement explains, “The title loan is an open-end line of credit that can be used as needed and paid back in full at any time”¹⁸⁰

Unlike normal loans, Kansas exempts open-ended credit from any cap: “For any consumer loan incurred pursuant to open end credit, including, without limitation, a loan pursuant to a lender credit card, a lender may charge a finance charge at any rate agreed to by the parties”¹⁸¹ By simply restructuring the transaction, title lenders obviate the rate cap.

Lenders in Kansas are not alone in this practice. Up until recently, Virginia’s Finance Act¹⁸² had a similar loophole that resulted in title lenders offering open-ended credit plans.¹⁸³

177. See KAN. STAT. ANN. § 16a-2-401(2) (2009)

For any consumer loan incurred pursuant to closed end credit, a lender may charge a periodic finance charge, calculated accordingly to the actuarial method, not to exceed: (a) 36% per annum on the portion of the unpaid balance which is \$860 or less, and (b) 21% per annum on the portion of the unpaid balance which exceeds \$860

178. See, e.g., Speedy Cash, *Kansas Store Locations*, <http://www.speedycash.com/payday-loans/kansas/locations/> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review); Speedy Cash, *Auto Equity Loans*, <http://www.speedycash.com/auto-equity-loans/> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

179. For a legal definition, see Truth in Lending Act of 1968, 15 U.S.C. § 1602(i) (2006); 12 C.F.R. § 226.2(a)(20) (2010).

180. Speedy Cash, *Auto Equity Loans*, <http://www.speedycash.com/auto-equity-loans/> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

181. KAN. STAT. ANN. § 16a-2-401(1) (2009).

182. VA. CODE ANN. tit. 15-2, subtit. II, ch. 26 (West 2011).

183. See *Attorney General Files Lawsuit Against Local Auto Title Dealer*,

Similarly, reports indicate lenders in Iowa operated this way as well.¹⁸⁴ Finally, lenders hoping to avoid the 36% rate cap on loans to military personnel are now offering open-ended “payday advances.”¹⁸⁵

2. Credit Service Organizations

Title lenders operating in Texas face a similar interest rate cap of 30% for loans under \$1,800.¹⁸⁶ Instead of offering loans directly to borrowers and thus being subject to this cap, most lenders operate as Credit Service Organizations (CSOs). A CSO is defined in the Texas Finance Code as a person who provides services to improve a consumer’s credit history or rating or to obtain an extension of consumer credit for a consumer.¹⁸⁷ The statute does not limit the fees a CSO can charge for these services.¹⁸⁸

The purpose of this CSO statute was to protect consumers from fraud when they employ credit repair organizations to fix distressed credit.¹⁸⁹ The language of the statute defining the organizations that repair credit, however, is very broad, including in the definition of a CSO a person who obtains an extension of

DAILY PRESS (Hampton Roads, Va.), May 19, 2010, available at http://articles.dailypress.com/2010-05-19/news/dp-nws-cash-lawsuit-20100518_1_open-end-credit-loans-subject-borrowers (explaining that Virginia title lenders are subject to the state’s 12% rate cap if they do not offer credit as an open-ended credit plan).

184. See, e.g., Kirchhoff, *supra* note 122.

185. See *DoD Shares Loan Blame*, AIR FORCE TIMES, Apr. 26, 2010, at 4 (“But blame the Pentagon [for] limiting the law’s protections to just . . . payday loans, vehicle title loans and refund anticipation loans. These ‘advances,’ on the other hand, qualify as ‘open-ended lines of credit,’ a definition that allows the banks to completely ignore the law’s 36 percent interest rate cap.”).

186. TEX. FIN. CODE ANN. § 342.201 (West 2009).

187. *Id.* § 393.001.

188. *Id.* §§ 393.001–.628.

189. See Letter from Kymberly K. Oltrogge, Ass’t Att’y Gen., to Hon. Mark W. Stiles, Chair of Calendars Comm. (Mar. 24, 1994), available at <http://www.oag.state.tx.us/opinions/lo48morales/lo94-029.txt>; see also Eugene J. Kelley, Jr. et al., *The Credit Repair Organization Act: The “Next Big Thing?”*, 57 CON. FIN. L.Q. 49, 56 (2003) (reporting that states enacted CSO statutes to regulate entities that attempt to improve a consumer’s credit rating).

consumer credit by another for the consumer.¹⁹⁰ The Attorney General of Texas¹⁹¹ and the Fifth Circuit¹⁹² have both opined that companies acting as CSOs are not bound by state usury limits on loan fees.

EZCORP's Annual Report summarizes how EZCORP generates fees as a CSO:

In our Texas stores, we do not offer signature loan or auto title loan products themselves, but offer fee-based credit services to customers seeking loans. In these locations, we act as a credit services organization (or "CSO") on behalf of customers in accordance with applicable state laws, and offer advice and assistance to customers in obtaining loans from unaffiliated lenders. Our services include arranging loans with independent third-party lenders, assisting in the preparation of loan applications and loan documents, and accepting loan payments for the lenders. We do not make, fund or participate in the loans made by the lenders, but we assist customers in obtaining credit and enhance their creditworthiness by issuing a letter of credit to guarantee the customer's payment obligations to the independent third-party lender.¹⁹³

The Texas legislature recently changed the CSO law to specifically address title lenders and payday lenders who operate as CSOs,¹⁹⁴ but for years, the CSO model of operation allowed lenders in Texas to operate with few substantive restrictions in a state with a strict usury law.

3. Higher Loan Amounts

A final way title lenders have avoided rate caps is by offering loans at amounts just above the rate cap. In California, small loans

190. TEX. FIN. CODE ANN. § 393.001(3) (West 2009).

191. See Letter from Barry R. McBee, First Ass't. Att'y Gen., to Leslie Pettijohn, Comm'r, Office of the Consumer Credit Comm. (Jan. 12, 2006) (on file with the Washington and Lee Law Review).

192. See *Lovick v. Ritemoney, Ltd.*, 378 F.3d 433, 442–43 (5th Cir. 2004).

193. EZCORP, Inc., *supra* note 31, at 6; see also Mary Spector, *Taming the Beast: Payday Loans, Regulatory Efforts, and Unintended Consequences*, 57 DEPAUL L. REV. 961, 983–95 (2008).

194. See H.B. 2592, 82nd Leg., Reg. Sess. (Tex. 2011) (requiring payday and title lenders to make certain disclosures); see also H.B. 2594, 82nd Leg., Reg. Sess. (Tex. 2011) (requiring payday and title lenders to be licensed by the state).

are capped at 2.5%, but loans over \$2,500 are not covered by the cap.¹⁹⁵ Thus, title lenders offer loans for \$2,501 at any rate they agree on with the borrower.¹⁹⁶

One predictable effect of avoiding the rate cap by offering higher loan amounts is that more loans are undersecured. Given that, in other states, lenders' loan averages are less than \$1,000, setting \$2,500 as a minimum loan amount either drives many customers out of the title lending market or drives lenders to offer higher percentages of the value of the vehicle, which in turn likely leads to more lenders seeking deficiency judgments from borrowers who default. California offers an example of lawmakers choosing a side in the debate over whether consumers are better off with higher loan amounts, even if they did so unintentionally.

C. Authorized but Effectively Unregulated

In several states, title lenders do not operate with legal uncertainty from obviating usury laws or operate under the weight of significant regulation because the states explicitly authorize title lending without any significant regulation. For instance, Arizona has a statute that authorizes title lending by recognizing the different forms the loan can take as legal transactions.¹⁹⁷ The

195. CAL. FIN. CODE § 22303 (2009).

196. See Fast Auto & Payday Loans, *Fast Auto and Payday Loans, Inc. Is Helping People Just Like You Get the Extra Cash You Need*, <http://www.clacal.com/> (last visited Apr. 8, 2012) ("Need a California title loan? \$2,501 to \$10,000 Available Now!") (on file with the Washington and Lee Law Review). Similarly, in Illinois, title lenders began offering sixty-one-day loans when the legislature attempted to regulate title loans by passing a statute covering loans under sixty days. See Stephen Franklin, *Loophole Lets Lender Skirt Law, Group Says*, CHI. TRIB., Apr. 25, 2008, at B1, available at http://articles.chicagotribune.com/2008-04-25/business/0804241039_1_payday-loans-cash-strapped-borrowers-annual-interest (suggesting that circumvention of loan term limits is "not new" to Illinois lenders).

197. ARIZ. REV. STAT. ANN. § 44-281(13) (2010). The statute governs "secondary motor vehicle finance transactions." The definition in the statute reveals that it regulates title lending because it includes both traditional title lending and the sale-leaseback agreements some lenders employ:

"Secondary motor vehicle finance transaction"

(a) Means any contract that includes provisions for either:

(i) Obtaining a security interest in or lien on a motor vehicle other than in connection with the sale of that motor vehicle.

only specific regulation of these loans, however, is a relatively high limit on the monthly interest rates lenders may charge borrowers, ranging from 17% per month (which is around 205% annually) for loans under \$500 to 10% per month (which is 120% annually) for loans over \$5,000.¹⁹⁸ Otherwise, the U.C.C. governs these loans as secured transactions.¹⁹⁹

Other states authorize title lending in a slightly less direct form by simply authorizing small loans, which capture almost all title loans, but not placing any restrictions on the interest rate for these loans. New Mexico, as an example, authorizes small-dollar loans through a specific statute,²⁰⁰ and even makes it a violation of the small-loan statute to charge a usurious rate based on other state law.²⁰¹ However, the small-loan statute does not have a usury cap,²⁰² and the state does not have a general usury cap.²⁰³ The only provisions governing title loans are the generic ones in the U.C.C.

(ii) The sale or conditional sale of a motor vehicle and the seller's right to retain use of the motor vehicle after the sale or conditional sale.

(b) Includes any conditional sales contract or contract for the bailment or leasing of a motor vehicle in which the bailee or lessee agrees to pay for use of the motor vehicle and the bailee or lessee is required to become or has the option of becoming the owner of the vehicle for any or no compensation.

Id.

198. *Id.* § 44-291(G).

199. *See generally* U.C.C. art. 9 (1977).

200. N.M. STAT. ANN. §§ 58-15-1 to -39 (2010).

201. *Id.* § 58-15-23.

202. *See id.* §§ 58-15-1 to -39.

203. Section 56-8-3 states that interest rates, "in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually," but it does not restrict the rate of interest if the parties agree to one in a written contract. In a similar context, the New Mexico Supreme Court has held that a statute like this one does not cap interest rates. *See Superior Concrete Pumping Inc. v. David Montoya Constr., Inc.*, 773 P.2d 346, 348-49 (N.M. 1989) (holding that the default interest rate set out in New Mexico's statute governing the unpaid balance of an open account was not a cap on interest rates if the parties agreed on a higher rate).

D. Regulated as a Pawn Transaction

Some states regulate title loans as pawn transactions, affording title borrowers the same rights as pawn customers. But determining whether a state's pawn brokering laws apply to title lending is sometimes difficult. Some states specifically include title lending under pawn laws. The Georgia legislature specifically defines "pledged goods," the item covered by the pawn law, as including automobile certificates of title:

"Pledged goods" means tangible personal property, including, without limitation, all types of motor vehicles or any motor vehicle certificate of title, which property is purchased by, deposited with, or otherwise actually delivered into the possession of a pawnbroker in connection with a pawn transaction.²⁰⁴

On the opposite end of the spectrum, Maine specifically states that title lending is not within the pawn-brokering statute. The items covered by Maine's pawn law include "motor vehicles, but do[] not include documents evidencing title to motor vehicles."²⁰⁵ Similarly, Louisiana limits pawnbrokers to accepting vehicles as collateral only if they physically possess the vehicle, and the statute explicitly states: "Under no circumstances shall the practice commonly referred to as motor vehicle 'title only' pawn transactions be allowed in this state."²⁰⁶

In the middle lie states where the statute itself does not make it clear whether title loans come within the definition of pawn transactions. In Alabama, for instance, it does not appear that title loans fall within the definition of pawn transactions because title lenders do not retain possession of the vehicles and the statute defines a pawn transaction as "[a]ny loan on the security of pledged goods or any purchase of pledged goods on condition that the pledged goods are left with the pawnbroker and may be redeemed or repurchased by the seller for a fixed price within a fixed period of time."²⁰⁷ Yet, the Alabama Supreme Court has ruled

204. GA. CODE ANN. § 44-12-130(5) (2010).

205. ME. REV. STAT. tit. 30-A, § 3960(3) (2009). Thus, title loans are not exempt from Maine's usury statute, *id.* tit. 9-A, § 2-401, despite the fact that pawn transactions avoid the rate cap, *id.* tit. 30-A § 3963(1).

206. LA. REV. STAT. ANN. § 37:1801(D) (2010).

207. ALA. CODE § 5-19A-2(3) (2010).

that a certificate of title held by a lender counts as a “pledged good,” making title loans subject to pawn transaction rules.²⁰⁸

The courts have provided certainty that Alabama’s pawn laws apply to title lenders, but this finding is unique among the states that have similarly vague definitions of pawned goods. Other courts have found title lenders are violating usury statutes by guessing incorrectly that title loans are governed by pawnshop laws.²⁰⁹

When title loans are governed by pawn laws, a series of common provisions usually apply:²¹⁰ the law forbids lenders from seeking deficiencies and does not require them to pay surpluses;²¹¹ loan terms are set at thirty days;²¹² interest rates are sometimes capped, but the cap is set at a high amount;²¹³ and lenders must wait for a set period after default before they may sell the collateral.²¹⁴

208. *Floyd v. Title Exch. & Pawn, Inc.*, 620 So. 2d 576, 579 (Ala. 1993).

209. In *Chandler v. Kentucky Title Loan, Inc.*, 16 S.W.3d 312 (Ky. Ct. App. 1999), the court found a title lender was not a pawnbroker under Kentucky law because “we find a significant difference between the Kentucky and Alabama statutes with respect to the breadth of the definition of a pawn transaction.” *Id.* at 314. Because it was not a pawn transaction, “it was not exempt from application of KRS Chapter 288 and it operated its business in violation of [the statute].” *Id.* at 315.

210. Carrie Teegardin, *Title Loan’s Price High*, ATLANTA JOURNAL-CONSTITUTION, Jan. 25, 2009, available at <http://www.ajc.com/ajccars/content/printedition/2009/01/25/titlepawn0125.html> (“[T]he fact that the transaction is technically a pawn means the money comes with the same risks and benefits of taking a diamond ring or stereo to a pawnshop Lenders can sell repossessed cars and retain the entire proceeds . . . even if those far exceed the balance on the loan.”).

211. *See, e.g.*, ALA. CODE § 5-19A-6 (2011).

212. *See, e.g.*, GA. CODE ANN. § 44-12-131(a)(1) (2011).

213. *See, e.g.*, ALA. CODE § 5-19A-7(a) (2011) (setting a 25% per month interest rate cap); GA. CODE ANN. § 44-12-131(a)(4)(A) (2011) (same).

214. *See, e.g.*, ALA. CODE § 5-19A-5(c) (2011) (“All goods purchased by the pawnbroker except for automobiles, trucks, and similar vehicles shall be maintained on the premises . . . at least fifteen business days before the goods may be offered for resale. Automobiles, trucks, and similar vehicles shall be maintained on the premises for 21 calendar days.”); *id.* § 5-19A-4(1) (“Any personal property pledged to a pawnbroker within this state is subject to sale or disposal when there has been no payment made on the account for a period of 30 days past maturity date of the original contract, and no further notice is necessary.”); *id.* § 5-19A-10(b) (“Pledged goods not redeemed on or before the maturity date if fixed and set out in the pawn ticket issued in connection with any transaction shall be held by the pawnbroker for 30 days following that

In addition to these common pawn law provisions, Georgia has added a series of provisions specifically directed at auto title loans that do not apply to other pawn transactions.²¹⁵ These laws appear to supplement the standard pawn statute with provisions that are important to regulating transactions where the debtor retains possession of the collateral. For instance, Georgia prohibits sale-leaseback agreements,²¹⁶ transactions that only arise if the debtor retains possession of the collateral (since possession is the major right granted in leasing a good). Additionally, Georgia's statute gives lenders the right to take possession of vehicles upon default without judicial approval if the lender can do so "without breach of the peace."²¹⁷ Finally, the statute outlines the charges a lender can levy if it takes possession of a vehicle²¹⁸ and requires lenders to disclose these charges to borrowers.²¹⁹ Because it specifically regulates title loans through these provisions, Georgia might also fit within the next categories of laws—laws that directly and extensively regulate title loans.

*E. Regulated Directly and Extensively (Although
not Necessarily Strictly)*

Numerous states have laws that were specifically created to address title lending. This subpart outlines some of the common features of these laws, although individual states may have only some of these requirements. In addition, this subpart is not meant to be an exhaustive exploration of every provision of every state statute; instead, it attempts to highlight the provisions that are most controversial and most important.

date . . .").

215. Similarly, Minnesota governs title loans with its pawn laws supplemented by some additional provisions specific to title loans. See MINN. STAT. § 325J.095 (2011).

216. GA. CODE ANN. § 44-12-131(a)(2) (2011).

217. *Id.* § 44-12-131(a)(3).

218. *Id.* § 44-12-131(a)(4)(C).

219. *Id.* §§ 44-12-138(3),(12)–(15).

1. Licensing Requirements

A primary form of direct regulation of title lenders is licensing requirements.²²⁰ Tennessee's law, for instance, voids any title loan made by an entity that is not licensed by the state.²²¹ To obtain a license, a title lender must, among other requirements, (1) have net assets of \$75,000 per location,²²² (2) pay an \$800 filing fee per location,²²³ (3) submit a balance sheet and income statement prepared by an unaffiliated certified public accountant,²²⁴ and (4) obtain a surety bond of \$25,000 per location (not to exceed \$200,000 per firm).²²⁵ In addition to requirements for obtaining a license, firms must report certain information to the state²²⁶ and make their records available for examination.²²⁷

2. Rollovers

Many states directly regulating title loans have laws addressing the issue of rollovers. Tennessee addresses rollovers by requiring that, after three rollovers, the lenders must begin reducing the principal owed on the loan.²²⁸ Other states specifically limit the number of times a customer can roll over a title loan.

Some laws limiting rollovers likely have no real effect on the business practices of lenders. In Delaware, for instance, rollovers that extend a loan for more than 180 days are formally prohibited.²²⁹ This restriction, however, does not prevent borrowers from paying off a title loan after 180 days and then immediately taking out a new title loan from the same lender because "rollover" under the statute "means the extension of an outstanding and

220. See, e.g., DEL. CODE ANN. tit 5, § 2202 (2011); FLA. STAT. § 537.004 (2011); IDAHO CODE ANN. § 28-46-503 (2011).

221. TENN. CODE ANN. § 45-15-105 (2011).

222. *Id.* § 45-15-106(a)(1).

223. *Id.* § 45-15-106(d)(1).

224. *Id.* § 45-15-106(d)(2).

225. *Id.* § 45-15-106(d)(3).

226. *Id.* § 45-15-109.

227. *Id.* § 45-15-108.

228. *Id.* § 45-15-113(d).

229. DEL. CODE ANN. tit. 5, § 2254 (2011).

unpaid indebtedness beyond the originally stated repayment period.”²³⁰

3. *Repossessions*

States regulating title loans directly often provide rules for lenders attempting to gain possession of vehicles if the borrower defaults. Like Georgia,²³¹ most states incorporate²³²—or at least do not displace²³³—U.C.C. Article 9’s requirement that secured lenders not breach the peace while gaining possession of a vehicle.²³⁴ Illinois goes a few steps farther, requiring lenders to notify borrowers of their intention to take possession, afford “the obligor the opportunity to make the vehicle available to the lender at a place, date and time reasonably convenient to the lender and obligor” and permit the borrower “to remove any personal belongings from the vehicle without charge or additional cost.”²³⁵ Other states forbid lenders from purchasing vehicles they have repossessed,²³⁶ despite the normal rule in secured transactions that permits lenders to purchase goods they have repossessed subject to some restrictions.²³⁷

230. *Id.* § 2202. For an analysis of this same issue in the payday loan context, see Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 *UCLA L. REV.* 855, 897–98 (2007).

231. *See supra* note 218 and accompanying text.

232. *See, e.g.*, DEL. CODE ANN. tit. 5, § 2259 (2011) (“A licensee may take possession of the motor vehicle that is used as security for a title loan only in accordance with procedures specified in part 6 (Default) of Article 9 (Uniform Commercial Code—Secured Transactions) of Title 6.”); IDAHO CODE ANN. § 28-46-507(2) (2011) (“If the debtor does not cure the default within the ten (10) days, the title lender may proceed to exercise its rights under chapter 9, title 28, Idaho Code.”); ILL. ADMIN. CODE tit. 38, § 110.140 (2011) (stating that lenders must follow all applicable provisions of the U.C.C.).

233. *See, e.g.*, NEV. REV. STAT. § 604A.455(1) (2011).

234. U.C.C. § 9-609(b)(2) (1977).

235. ILL. ADM. CODE tit. 38, § 110.390(b) (2011).

236. IDAHO CODE ANN. § 28-46-508(6) (2011).

237. U.C.C. § 9-610(c) (1977).

4. *Deficiencies and Surpluses*

Most states that directly regulate title loans require lenders to pay any surpluses generated by sales of repossessed vehicles and prohibit lenders from seeking anything from borrowers beyond taking possession of the vehicle.²³⁸ Delaware's statute provides a typical example of how the law is formulated:

Notwithstanding any other provision of law, the proceeds of a licensee's sale of a motor vehicle that is used as security for a title loan shall satisfy all outstanding and unpaid indebtedness under that loan, and the borrower on that loan shall not be liable for any deficiency resulting from that sale. The licensee shall nevertheless still be required to pay the borrower any surplus arising from the sale of that motor vehicle as required by part 6 (Default) of Article 9 (Uniform Commercial Code—Secured Transactions) of Title 6.²³⁹

While some states permit lenders to seek payment if the borrower purposefully prevents the lender from repossessing the vehicle or damages the vehicle,²⁴⁰ others, like Delaware, even prevent personal liability in these cases.

5. *Restrictions on Loan Amounts*

Some states restrict the amount of money title lenders can lend to borrowers, but different states use different measuring sticks to set a cap on the loan amount. The simplest caps are fixed dollar amounts, usually \$2,500, that apply to all title loans regardless of the vehicle serving as collateral, the borrower, or the purpose of the loan.²⁴¹ A few cap the loans based on the value of

238. See, e.g., IDAHO CODE ANN. § 28-46-508(2) (2011) (prohibiting lender from seeking any deficiencies from borrower and requiring lender to pay surplus to borrower); MISS. CODE ANN. § 75-67-411(1), (5) (2011) (same); MONT. CODE ANN., §§ 31-1-816(2)(i), -818(8) (2011) (same); NEV. REV. STAT. § 604A.455(1) (2011) (same); S.C. CODE ANN. § 37-3-413(5) (2011) (same); TENN. CODE ANN. §§ 45-15-114(b)(2), 45-15-115(2) (2011) (same); UTAH CODE ANN. § 7-24-204 (2011) (same).

239. DEL. CODE ANN. tit. 5, § 2260 (2011).

240. See IDAHO CODE ANN. § 28-46-508(2) (2011) (forbidding deficiencies except "where the debtor prevented repossession of the vehicle, damaged or committed or permitted waste on the vehicle or committed fraud").

241. See ILL. ADM. CODE, tit. 38, § 110.370(a) (2011) (stating title loans cannot exceed \$4,000); MISS. CODE ANN. § 75-67-415(f) (2011) (forbidding title

the vehicle, sometimes providing appraisal guides as a measuring tool.²⁴² South Carolina's statute provides one example:

A lender may not make a short-term vehicle secured loan in a principal amount greater than the fair market retail value of the motor vehicle securing the loan, as determined by common industry appraisal guides. If the motor vehicle securing the loan is not listed in common appraisal guides, the lender shall use his best judgment to determine the value.²⁴³

Finally, and perhaps of greatest interest, some states require that title lenders base the amount of the loan on the borrower's ability to repay the loan. Several states have general language that requires lenders to assess "the ability of the customer seeking the title loan to repay the title loan, including the customer's current and expected income, obligations and employment."²⁴⁴ Some statutes make clear that determining the consumer's ability to repay the loan does not require a formal credit check but can instead rely on the consumer's reported income and obligations.²⁴⁵ Illinois's statute is more simplistic and easy to apply, prohibiting any loans

loans over \$2,500); MO. REV. STAT. § 367.527(2) (2011) (prohibiting title loans over \$5,000); TENN. CODE ANN. § 45-15-115 (3) (2011) (limiting title loans to \$2,500).

242. See, e.g., UTAH CODE ANN. § 7-24-202(c) (2010) (stating title lenders may not "extend a title loan that exceeds the fair market value of the vehicle securing the title loan"); IDAHO CODE § 28-46-508 (3) (2011); NEV. REV. STAT. ANN. § 604A.450(1) (2010).

243. S.C. CODE ANN. § 37-3-413(4) (2011).

244. NEV. REV. STAT. ANN. § 604A.450(2) (2011); see also ORS § 725.605 (2010) ("A lender may not make a title loan to a consumer without forming a good faith belief that the consumer has the ability to repay the title loan."); S.C. CODE ANN. § 37-3-413(3) (2011) ("Before making a short-term vehicle secured loan, a lender shall form a good faith belief that the borrower has the ability to repay the loan, considering [various factors]."); UTAH CODE ANN. § 7-24-202(3)(d) (2011) ("[A lender] may not extend a title loan without regard to the ability of the person seeking the title loan to repay the title loan, including the person's: (i) current and expected income; (ii) current obligations; and (iii) employment.").

245. S.C. CODE ANN. § 37-3-413(3) (2011) (stating the lender may comply by having the borrower sign a statement on a separate form "that the information the borrower has provided regarding employment, income, and expenses is true and correct and that, given the information, the borrower believes he has the ability to repay the loan"); UTAH CODE ANN. § 7-24-202(4) (2011) (stating that the requirement is met if the borrower "provides the title lender with a signed acknowledgment that: (a) the person has provided the title lender with true and correct information concerning the person's income, obligations, and employment; and (b) the person has the ability to repay the title loan").

that have a single payment that “exceeds 50% of the obligor’s gross monthly income.”²⁴⁶

6. Restrictions on Fees

Many states that directly regulate title lending set limits on the interest rates and other fees that lenders can charge.²⁴⁷ These interest rate caps vary from 18%²⁴⁸ or 30% per year²⁴⁹ to around 206% a year²⁵⁰ or 304% a year.²⁵¹ In addition to limits on interest rates, some statutes limit the amount lenders can charge for noninterest rate charges, such as the fees for dishonored checks²⁵² and the cost of recording a lien.²⁵³

As this Part illustrates, states have taken a variety of approaches even within the framework of directly regulating title lending. In many states, the law is in flux or uncertain; Part IV aims to offer guidance to states that are considering changes in their approach.

IV. Evaluating Title Lending Laws

In light of the different regulatory models discussed in Part III, this Part argues that the best approach to regulating title lending is to enact laws or regulations aimed specifically at title loan transactions. I begin by assessing the case for banning title lending, concluding that while arguments based on cost may compel some to accept a ban, the case is difficult to make. On the other end of the spectrum, states that authorize title lending without any restrictions or regulate title lending as pawn

246. ILL. ADM. CODE tit. 38, §110.340(a) (2011).

247. Of course, some states, like Delaware, have no interest rate limits. See DEL. CODE ANN. tit. 5, §§ 2250–2261 (2011).

248. See VT. STAT. ANN. tit. 9, § 41a(b)(4) (2011).

249. See FLA. STAT. § 537.011(1) (2011).

250. See ARIZ. REV. STAT. § 44-291(g) (2011).

251. See MISS. CODE ANN. § 75-67-413(1) (2011).

252. See OR. REV. STAT. § 725.615(2)(a) (2011) (limiting fees for dishonored checks to \$20).

253. See MONT. CODE ANN. § 31-1-817(2) (2011) (limiting charges for recording a lien to the actual costs to the lender).

transactions offer too little regulation to ensure meaningful protections for customers. Finally, this Part makes the case for industry-specific regulation and suggests laws that are important for policymakers to enforce to ensure a fair marketplace.

A. The Argument for Banning Title Loans

Bans or effective bans on title lending are a popular regulatory choice, but the justifications for these bans are not entirely clear. Based on the data in Part II, we know title-loan borrowers experience a relatively low rate of repossession, and we have no evidence that those who do lose vehicles are losing their own means of transportation. Moreover, in eliminating title loans, bans may undermine the useful functions title loans can have in funding small businesses or in helping borrowers with emergency needs. In light of the weaknesses in the most common arguments for a ban, the best argument opponents have for drastic intervention into title lending markets is to reign in the high cost of the loans.

1. Title Lending's Spurious Connection to Financial Distress

The case for banning title lending would be strong if proponents of bans could demonstrate the negative externalities title lending generates by pushing borrowers into financial distress. In the states for which we have repossession rates, however, the vast majority of borrowers do not lose their vehicles—ranging from over 99% of borrowers retaining their cars to, in only one year, around 87%.²⁵⁴ Of those who do lose their vehicles, many likely do not lose a functioning mode of transportation,²⁵⁵ so it is not clear that title lending is the real cause of the loss. Most importantly, there is little evidence of how many people lose the only vehicle in their household.²⁵⁶

For those who do lose their vehicle to repossession, we know that many lose the equity they have in the vehicle because a lender

254. See *supra* Table 2.

255. See *supra* note 157 and accompanying text.

256. See *supra* note 155 and accompanying text.

can charge the costs of repossessing, storing, and selling it. But, in terms of absolute dollars, the losses are likely small because the average value of the collateral, and thus the possible equity the borrower has, is small.²⁵⁷ Moreover, this same problem of borrowers losing equity exists under Article 9 of the U.C.C., which also permits lenders to charge costs against the borrower.²⁵⁸ Clearly then, the argument against title lending based solely on losses from repossession fees proves too much. At the very least, policymakers who have relied on repossession rates and academics' fears that borrowers are losing their only vehicles should reconsider these positions in light of the new reports state regulators are generating, as well as the fact that no studies have demonstrated that people are losing their only way to work.

2. Bans Prevent Beneficial Uses of Title Loans

Bans are blunt instruments that eliminate beneficial uses of title lending along with harmful uses. Based on my small survey and surveys by the FDIC and a major title lender, some borrowers are using title loans to meet short-term emergency liquidity crises, and others use title loans to finance small business operations.²⁵⁹ While it is true that some borrowers are simply delaying financial breakdown by using title loans for ordinary expenses, a ban also eliminates the loans for those customers using the product rationally.

If borrowers cannot use title loans, some commentary suggests they will turn to other inferior forms of credit or will be denied access to credit altogether.²⁶⁰ The title lender survey I was provided seems to substantiate this view, as shown in Table 4.

257. See *supra* Part II.B.2.b.

258. See U.C.C. § 9-615(a)(1) (1977) (specifying that proceeds of sale of repossessed items are to be applied first to "reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing" of the collateral).

259. See *supra* Table 1 (listing factors motivating borrowers to take out title loans).

260. Zywicki, *supra* note 3, at 427 ("If deprived access to title loans, many consumers would substitute less-preferred sources of credit or risk losing access to legal credit altogether.").

Table 4: Borrowers' Alternatives to Title Loan

Alternative	Number Selecting	Percentage of Customers Selecting
None	774	71.93%
Credit Unions	93	8.64%
Bank Loan	154	14.31%
Credit card cash advance	94	8.73%
Bounced Check	39	3.62%
Pay Late Fee	189	17.57%
Borrowed Money from Relatives/Friends	67	6.23%
Payday Loan	8	0.74%
Sell car	2	0.19%

Among the customers we surveyed in Houston, however, the majority of people said they would just do without if they did not have access to title loans.²⁶¹ Table 5 summarizes these results.

Table 5: What Houston Customers Would Do Without Title Loans

Alternative	Number Selecting	Percentage of Customers Selecting
Get a loan elsewhere	11	31.43%
Sell car	3	8.57%
Not borrow and do without loan	18	51.43%
No answer	3	8.57%

If later research were to show that these results are representative of title lending customers, they suggest that, for many customers, title lending is not an essential source of credit that will necessarily be replaced by an inferior choice. The survey does not reveal, however, what costs go along with forgoing a loan. But, if borrowers can avoid using loans, then title lending is a very expensive form of optional credit. More research is needed to attempt to assess what borrowers would do if states permitting title lending banned it.

At the very least, any ban on title lending should recognize the useful social function title lending can serve for small businesses and should exempt businesses from the ban. Existing state and

261. If nothing else, the different results from the title lender's survey and my survey highlight the importance of what choices the survey instrument gives respondents. I suggest future surveys always include "choose not to borrow" as an option for a question about alternatives to title lending.

federal statutes can act as examples of how to restrict only consumer uses of title loans. The Fair Debt Collection Practices Act,²⁶² for instance, only applies to consumer debt.²⁶³ The purpose of the debt is set at the time the transaction begins, and debt collectors are not bound by the Act's rules if they are collecting business debt.²⁶⁴ Even those supporters of a ban on non-productive or abusive consumer uses for title loans should support productive business uses of the transaction. A ban on title loans could easily look to the borrower's purpose in taking out the loan and exempt business purposes from the ban or rate cap.

3. Price: The Best Case for Bans

Several of the most powerful critiques of title lending are merely different ways of stating the simple argument that title loans are too expensive. For example, the argument that people roll their loans over repeatedly, paying only the interest fee, exhibits concern about the ultimate price of title loans. The critique of the structure of title loans as single lump sum payments really reflects a concern over the price borrowers pay for the loan, because the lump sum often requires multiple payments of fees.

Because the high cost of title loans is well established, for those who are inclined to regulate the cost of services to lower-income Americans, price is a powerful justification for banning title lending. It does not appear that an inexpensive form of this

262. Fair Debt Collection Practices Act, Pub. L. No. 90-321, 91 Stat. 874 (1977).

263. See 15 U.S.C. § 1692a(5) (2006) ("The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes."). Similarly, Texas's Deceptive Trade Practices Act defines "consumers" under the Act and exempts large businesses. See TEX. BUS. & COM. CODE § 17.45(4) (2011):

"Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

264. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 874-75 (7th Cir. 2000).

transaction is possible for the clientele currently served by title lenders, so banning is the only option to deal with this pricey product if the aim is to eliminate the cost. Especially for those regulators and academics who are sanguine about interference with personal decision-making, price seems to be the best justification for banning title lending.

B. Title-Lending-Specific Laws Versus Pawn Laws and Regulatory Uncertainty

Several states allow title lenders to operate by structuring the products to avoid usury limits or by squeezing into laws aimed at other products like pawn transactions, credit cards, or credit service organizations. These schemes present two problems for protecting consumers. First, for states where lenders are not clearly sanctioned, the legal uncertainty prevents a fully competitive marketplace. Second, laws that are not tailored to the title-lending transaction leave customers vulnerable to harm.

1. Uncertainty

When title lenders operate in states without explicit authorization, it creates uncertainty for these businesses because, at any time, a court may find a lender has violated the usury statute. Some states, such as Texas, have clearly indicated that title lenders can operate through laws not specifically tailored for them,²⁶⁵ and in those states, firms operate with confidence.²⁶⁶

In states without case law holding that lenders can operate through other laws, however, the uncertainty is a barrier to entering the market to compete. For instance, until Virginia recently specifically authorized title lending (after years of lending by title lenders through an open-ended credit statute), TitleMax refused to operate in the state. When the law changed, TitleMax

265. *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 442, 444 (5th Cir. 2004).

266. See Don Baylor, Op-Ed, *Loopholes Allow Loan Sharks to Prey on Hardworking Texans*, SAN ANTONIO EXPRESS-NEWS, Feb. 16, 2007, at 9B ("Payday lending is big business in Texas. In 2003, workers took out 1.8 million payday loans.").

began offering loans in Virginia.²⁶⁷ One consumer advocate in Virginia so believed in the power of uncertainty that he said keeping the law uncertain was the best strategy in the fight against title lenders.²⁶⁸

Stock prices can reflect the deleterious effect of uncertainty on alternative financial service providers. Gary Rivlin describes the effects uncertainty had on the stock of Advance America, a large payday lender, when multiple bills in Congress and numerous states were introduced that would affect its business: "Advance America had earned \$30 million in profits in the second half of 2008, and then booked another \$26 million in profits in the first quarter of 2009, yet its stock was down by more than 75 percent from its high because of uncertainty about the payday loan."²⁶⁹ This sort of uncertainty likely stymies growth.

In addition to fewer firms offering loans in these states because of disincentives, it is possible that the companies offering loans in these states are those with the least to lose, because they are thinly capitalized and essentially judgment-proof. TitleMax's refusal to operate in Virginia is instructive: As a large lender with substantial assets, it is subject to suit if it, for instance, wrongfully repossesses and sells a borrower's vehicle. Thus, because uncertainty decreases the number of companies willing to do business in a state and may also result in lower-quality companies operating there, states should enact title-loan specific laws.

267. See TMX Finance, *supra* note 11, at F9

On April 11, 2010, the state of Virginia passed a new law, the Virginia Motor Vehicle Title Loan, that eliminates the extension of credit under the Open-End Credit product and regulates a simple interest secured loan up to 12 months in term. The legislation requires all locations to be licensed through the Virginia Bureau of Financial Institutions. This new law includes a cap on interest rates, but the cap is higher than the rates currently charged by the Company. This new law became effective October 1, 2010 and allows the Company to expand in this state with a product that is now regulated by the Commissioner.

268. See NCLC Webinar, *supra* note 48 (remarks of Jay Speer).

269. GARY RIVLIN, BROKE, USA: FROM PAWNHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUSINESS 313–14 (2010).

2. States Without Title Lending Laws Do Not Adequately Protect Consumers

When a state does not have a law governing title loans, Article 9 of the U.C.C. applies to title loans as secured transactions, empowering lenders to sue borrowers for deficiency judgments. As Part II.B.2.b. argues, this ability to seek deficiencies likely only affects the borrowers with the least valuable vehicles because these vehicles will not have sufficient equity in them to cover the costs of repossession and resale. Because it fails to protect the customers who are likely to be the least advantaged from financial distress, Article 9 is not a good substitute for specifically tailored laws.

A potentially powerful counter-argument against my view is that lenders do not seek many deficiency judgments, so this drawback is not significant. The legal power to do so, however, likely gives lenders leverage over borrowers who are afraid of being sued. Martin and Adams report that lenders in New Mexico routinely include the right to seek a deficiency in their loan agreements,²⁷⁰ suggesting that lenders believe this provision affects the borrower's perception of the lender's power. Even if a debtor is judgment-proof, the threat of a lawsuit may squeeze out additional payments.

Title lenders operating in states governed by pawn laws are not allowed to seek deficiencies, but they are also not required to return surpluses to borrowers. These laws fail to protect those borrowers with more expensive vehicles. Some title loans are oversecured, as demonstrated by the \$251,047 lenders returned to borrowers in Tennessee in 2008,²⁷¹ for instance. Thus, the pawn laws' failure to require surplus payments fails to protect a specific segment of title lending customers.

C. Specific Features Legislators Should Consider

Instead of banning title lending or requiring lenders to fit within existing credit laws, states should enact provisions

270. See Martin & Adams, *supra* note 3, at 78 (stating that all title loan contracts the authors reviewed allowed the lender to sue for deficiencies).

271. 2010 TENN. REPORT, *supra* note 38, at 8.

specifically tailored to title lending. This section outlines my tentative suggestions about what I believe are the most important features title loan laws should include. I argue that states should forbid lenders from seeking deficiencies, require lenders to provide surpluses, and require lenders to make disclosures aimed at overcoming customers' overly optimistic assessments of the transactional risks. Also, it is important that any title lending law provide for flexibility that permits lenders to develop the product. On the other hand, I argue that caps on loan amounts and loan interest rates are likely to produce negative consequences. Yet, because several critical questions remain unanswered, my suggestions are cautious.

1. Deficiencies and Surpluses

As I have argued, laws allowing deficiencies probably hurt the least advantaged title-lending customers, so laws specifically aimed at title lending should account for this risk. In the real estate context, the purpose of anti-deficiency statutes is "to prevent the aggravation of an economic recession which would result if creditors lost their property and were also burdened with personal liability . . ." ²⁷² Similarly, in this context, states should limit liability for those customers who likely have the most to lose.

Forbidding lenders from seeking deficiencies will likely also have the effect of emphasizing to lenders the importance of considering the customer's ability to repay, to ensure that borrowers do not default and leave the lender holding a loan for more than the value of the collateral. If lenders know they will not be able to obtain deficiencies or incentivize repayment with the threat of deficiencies, they should be inclined to make less risky loans.

Finally, allowing lenders to pursue deficiencies may push consumers to stay in disadvantageous title loans for longer than they should. For some borrowers, defaulting on the title loan is a better outcome than continuing to pay high interest rates month after month. The cost of losing one's car might be lower than the cost of keeping it. Allowing the lender to obtain a personal

272. 4 MILLER & STARR, CAL. REAL EST. § 10:214 (3d ed. 2011).

judgment against the borrower, however, decreases the likelihood the borrower will opt to default. As Andra C. Ghent and Marianna Kudlyak have demonstrated in the context of mortgages: “[A]llowing the lender recourse to assets other than the mortgaged property lowers the value of the default option and thus reduces the borrower’s incentive to default.”²⁷³

The negative consequence from limits on deficiencies is that lenders may offer lower loan amounts to ensure the equity in the vehicle will pay both the principal amount and the costs of repossession.²⁷⁴ Requiring lenders to return any surplus from selling the vehicle mitigates the effect of smaller loans to some extent; thus, it is an important companion law (assuming U.C.C. Article 9’s analogous provision is displaced by the title lending law). If lenders have to return surpluses, borrowers will at least be protected to the extent their equity exceeds the costs of repossession. As Part II.B.2 makes clear, however, this protection is still minimal, so borrowers will suffer in states that forbid deficiencies by getting lower loan amounts. However, on balance, the prohibition’s protections probably outweigh the harms.

One legislator has expressed concern over the requirement that lenders return surpluses because lenders are not protected when vehicles are not worth anything after repossession.²⁷⁵ The losses a lender might face, however, are adequately accounted for in the high interest rate on these loans, so requiring surpluses is

273. Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States* 1 (Fed. Reserve Bank of Richmond, Working Paper No. 09-10, 2009), available at http://www.richmondfed.org/publications/research/working_papers/2009/pdf/wp09-10r.pdf.

274. See MILLER & STARR, *supra* note 272, § 10:214 (noting one purpose of anti-deficiency statutes is “to prevent an overvaluation of the security”).

275. See *Title Pawn Industry Warns Legislation Could Hurt the Poor*, ACCESS NORTH GEORGIA (Oct. 25, 2005), <http://new.accessnorthga.com/detail.php?n=136791&c=2> (last visited Apr. 8, 2012).

Rep. James Mills, R-Gainesville, the House banking chairman, said it’s too early to say what the Legislature will do, but added he is having second thoughts about the bill he introduced requiring brokers to rebate any excess to consumers whose cars have been repossessed and sold. He said he’s learned that many of the repossessed cars are junk which do not even cover the cost of the pawn. “If you’re going to make them give back the excess, what about the times the vehicle is not worth the loan?”

(on file with the Washington and Lee Law Review).

not necessary to balance lenders' losses. Moreover, it is unlikely that title lenders would exit a state simply due to a requirement that they return surpluses because some of the largest lenders already return surpluses even though not required by law.²⁷⁶ In a study of pawnbrokers, John Caskey found requiring pawnbrokers to turn over the surplus did not affect the number of pawnshops per million residents.²⁷⁷

2. Disclosures Aimed at Optimism and Cost

My limited survey found that the people we surveyed were overly optimistic about the risks that they would either roll their loans over multiple times or lose their vehicle. More evidence is needed to conclusively establish these claims, but I tentatively recommend that states enact disclosure laws aimed at combating over-optimism. Marianne Bertrand and Adair Morse have tested such disclosures in the context of payday lending rollovers and found that a disclosure informing payday lending customers about the average rollover rates "reduces the take-up of payday loans by about 11 percent in a 4-month window following exposure to the new information."²⁷⁸ Similar measures could be tested or adopted for title-lending laws. Generally, firms tolerate disclosure requirements well,²⁷⁹ so they are unlikely to substantially decrease the number of firms competing for business in a state.

Another tentative conclusion from my survey was that people did not understand the relative cost of title lending because only 25% of the borrowers recognized that title loans were a lot more expensive than credit cards.²⁸⁰ Again, more research is required to understand generally how title-loan customers understand the cost of the transaction, but since price is usually the most important

276. See *id.* (reporting TitleMax returns surpluses to customers in Georgia even though the law does not require it).

277. See Prager, *supra* note 90, at 11 (discussing Caskey's study).

278. Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases and Payday Borrowing 1* (Univ. Chi. Booth Sch. of Bus., Working Paper No. 10-01, 2009), available at <http://ssrn.com/abstract=1532213>.

279. See Anonymous Interview, *supra* note 24, at 10 ("Industry best practices include additional, prominent disclosures that go beyond most state and federal requirements . . .").

280. See *supra* note 90 and accompanying text.

term of a consumer contract, and the price is so high for title loans, requiring clear disclosures seems appropriate.

The best disclosures would show the cost of borrowing per \$100 borrowed, displayed on the windows of the store to foster price competition. Rules about stating loan cost as an APR²⁸¹ should be vigorously enforced because lenders should be able to train staff to discuss APRs. Because most title loans are for one-month terms, it should be easier for title lenders to correctly calculate the APR on a title loan than it is for payday lenders, whose loan terms depend on the length of time until the borrower's next payday.²⁸² Since lenders appear to already compete for customers based on price,²⁸³ clear disclosures should be effective in optimizing competition in the market.

3. Flexibility to Permit Innovation

Some current title-lending laws restrict title lending to its traditional month-long structure.²⁸⁴ In Texas, however, lenders have had the freedom to create innovative alternatives to the traditional title loan. While such innovations have the potential to harm consumers, in Texas, it appears that the flexible CSO format has allowed some firms to develop a more consumer-friendly loan structure in which the title loan is a longer-term, amortizing loan. Unlike the traditional title loan that requires a lump sum payment after a short period, several companies in Texas offer loans that act much more like the ones envisioned by consumer advocates attempting to reform title lending.

281. See Regulation Z, 12 C.F.R. §§ 226.17–226.18 (2012) (setting out Truth in Lending Act requirements for APR disclosures in consumer loans).

282. See Mann & Hawkins, *supra* note 230, at 904

Interest-rate disclosures are misleading because the amount of the fee charged generally does not depend on the number of days until the borrower's payday. An interest-rate disclosure would suggest that the rate changes every day depending on which day in the pay cycle the borrower obtains the loan, when actually the cost is uniform throughout that cycle. This confusion does nothing to help consumers evaluate competing products.

283. See *supra* notes 94–101 and accompanying text.

284. See, e.g., GA. CODE ANN. § 44-12-131(a) (2011) (limiting title loans to thirty-day terms).

Cash America, a large public company, has a product that exemplifies this approach. The company offers twelve- to twenty-four-month loans that are fully amortized and are explicitly based on the customer's credit score and ability to repay, along with the value of the vehicle.²⁸⁵ The cost of Cash America's product is less than for normal title loans, closer to 110% APR.²⁸⁶ The company's goal in creating this product was to reach a different demographic than the typical title loan consumer—customers more like mainstream borrowers who want a product more closely resembling a traditional loan.²⁸⁷

Additionally, several smaller companies in Houston offer amortizing title loans with longer terms, but unlike Cash America, they do not do formal credit checks.²⁸⁸ Texas Title Loans, as one example, advertises:

With our loans your contract length is 9 months. . . . With our loans a portion of each monthly payment is applied to your principal. . . . With [our competitors'] loans you have no ending contract date. With their loans no portion of your monthly payment goes to your principal. With their loans the only way to pay your loan off in full. **YOU MUST PAY ENTIRE LOAN BALANCE IN ONE PAYMENT!**²⁸⁹

285. Vaughn & Bourns Interview, *supra* note 52, at 2.

286. *Id.* at 4.

287. *Id.*

288. *Are You Trapped in a 30-Day Loan?*, THE LOAN DEPOT (Oct. 11, 2010, 10:10 AM), http://www.yourloandepot.com/blog_entries/ai/Corporate-5/are-you-trapped-in-a-30-day-loan.html (last visited Apr. 8, 2012) (“WE CAN GET YOU OUT OF A 30-DAY LOAN AND SET YOU UP ON A TERM LOAN AND GIVE YOU UP TO 12 MONTHS TO PAYOFF!!”) (on file with the Washington and Lee Law Review); Advantage Finance, LLC, *Frequently Asked Questions—What is a Car Title Loan?*, <http://www.cartitleloanshouston.com/pages/faqs.html> (last visited Apr. 8, 2012)

THESE ARE INSTALLMENT LOANS. Portions of your monthly payment goes to principal and a portion of it goes to interest. If you make your monthly installment payments every month when due, your loan will be paid off at the end of the contract term. THESE LOANS ARE NOT INTEREST ONLY LOANS. . . . Depending on the loan amount, you can take up to 24 months to pay off the loan.

(on file with the Washington and Lee Law Review).

289. Texas Title Loans, *Welcome to Texas Title Loans!* (June 29, 2011), <http://txtitleloans.net/> (last visited Apr. 8, 2012) (on file with the Washington

Another lender, TJD Financial Services, offers amortizing loans for the specific purpose of keeping people out of the trap created by large balloon payments.²⁹⁰ Finally, one other small operator in Houston offers customers the choice of a traditional title loan or an installment plan.²⁹¹

Ideally, a statute specifically governing title loans would be flexible enough to bring innovative approaches within its domain. This would encourage firms to compete by offering better loans to customers, and it would restrain firms from developing products that violate the provisions in a title-lending-specific law that protect consumers from abuses.

4. Caps on Loan Amounts

Several states currently limit the amount that title lenders can give to customers, either by setting an absolute dollar limit or limiting the loan to some portion of the value of the collateral (as low as half the value of the vehicle).²⁹²

Based on the data we have, I believe these caps on loan amounts are likely to have negative consequences for borrowers. The law should aim to incentivize lenders to loan the highest percentage of the vehicle's value possible because then borrowers who lose a vehicle will lose the least amount of their equity. Loan caps put the risk of repossession on borrowers because they will

and Lee Law Review).

290. See Davis & Davis Interview, *supra* note 24, at 1.

291. See Magnolia Loans, *Title Loans*, <http://www.magnolia-loans.com/our-services/loan-services/title-loans/> (last visited Apr. 8, 2012)

Your title loan can be structured to fit your preference. If you need a cash advance for a short period of time and don't want to make scheduled payments or commit to a long-term loan, a single payment plan might be right for you. On the other hand, if you like to have your payments scheduled so that you know your loan will be paid off after a certain number of payments, an installment plan is probably a better option.

(on file with the Washington and Lee Law Review). For an example of a smaller company in Arizona that offers a choice between a balloon product and an amortizing product, see Cash-N-Go, *Title Loans, How It Works*, <http://www.azcashngo.com/vehicle-title-loans-online-how-works.php> (last visited Apr. 8, 2012) (on file with the Washington and Lee Law Review).

292. See *supra* notes 243–45 and accompanying text.

walk away from a repossession with no vehicle, less money from the loan, and probably no surplus because the equity cushion is likely consumed by repossession costs.²⁹³

Moreover, caps on loan amounts do nothing to protect the poorest title-loan borrowers with inexpensive cars because lenders will still loan amounts under the loan cap to these borrowers.²⁹⁴ At best, loan caps protect wealthier title-loan customers by preventing loans on high value collateral. But it is unclear why regulators would focus their energy on this group.

The concern with high loan amounts is that borrowers will get in over their heads because lenders will not carefully consider the customer's ability to repay.²⁹⁵ Yet, loan caps based on dollar amounts are an inapt means of dealing with this problem. They only address mismatches at high levels of income, while exhibiting no concern for people who take out smaller loans (e.g., \$2,000) but lack the means of repaying them. Loan caps based on the value of the collateral also ignore the income of the borrower, ensuring the lender is protected by not becoming overextended on the loan, but not protecting the borrower. Finally, loan caps focused on income do attempt to solve the problem of ensuring a borrower's ability to repay the debt, but such caps may result in very small loans being made on valuable collateral as lenders attempt to comply with the law, leaving the borrower with lost equity if the lender ends up repossessing because something unexpected prevents repayment. The better solution is to encourage lenders to evaluate ability to repay through disallowing deficiencies. This approach does not prevent borrowers to get the highest loan amount for their vehicle as possible. It emphasizes lenders actually evaluating the borrower's ability to pay instead of lenders attempting to demonstrate compliance with the law.

293. See *supra* note 70 and accompanying text. Of course, if a state does not prevent deficiency claims, laws encouraging higher loan amounts might lead to lenders seeking personal judgments against borrowers. This is another reason to forbid deficiencies.

294. See, e.g., Anonymous Interview, *supra* note 24, at 9 (stating that Anonymous "believe[s] the consumer is in the best position to make th[e] decision" about the loan amount, so long as the amount does not exceed equity in the vehicle).

295. See *supra* note 71 and accompanying text.

5. Caps on Prices

Some states cap the cost of loans,²⁹⁶ and high interest rates are a concern to members of Congress.²⁹⁷ For those who are concerned about the cost of title loans but do not want to ban the transaction, price caps are a compelling compromise.

Commentators predict, however, that capping the interest rate will result in lenders adjusting other aspects of the transaction. Zywicki has noted that “term re-pricing” is probably less likely in title lending because the loans are “very simple and very transparent loans with a small number of terms.”²⁹⁸

In contrast to Zywicki, I think it is likely that lenders will alter the transaction to account for price caps. The key term in title loans other than price that lenders can adjust, even if other fees are prohibited or other fees are minimal, is the amount they lend to borrowers. If title lenders are constrained in what they can charge, they may lend less money to take on less risk from the transaction. If this occurs, putting a price cap on rates results in borrowers who lose their car forfeiting more money. That these borrowers lose the equity they have amassed in the vehicle is a significant negative for the borrowers who are left worse off from title loans, so policymakers should avoid setting price terms which may decrease loan amounts.

296. See *supra* notes 247–53 (listing states with interest rate and fee restrictions).

297. See, e.g., 155 CONG. REC. S5346-01 (daily ed. May 12, 2009) (statement of Sen. Durbin)

[Y]ou would have to be out of your head to get into that kind of a predicament—a 36-percent annual interest rate. But the fact is Americans right and left are paying much higher interest rates today and don’t know it—payday loans, title loans, installment loans. . . . [I]t is about time we got real here. If we are not going to protect the American consumers when it comes to some of these interest rates, they are going to be very vulnerable to some bad practices.

See also 146 CONG. REC. H5179-02 (daily ed. June 27, 2000) (statement of Rep. Roukema) (“Abuses in title loans and title pawn transactions often include excessively high interest rates and other exploitive lending practices.”).

298. Zywicki, *supra* note 3, at 430.

V. Conclusion

A lot of questions about title lending remain unanswered. Are borrowers overly optimistic about the potential their vehicle will be repossessed or about the likelihood they will repeatedly roll over their loan? Do borrowers have other means of getting to work and doctors' appointments other than the cars they put up as collateral for title loans? Do customers understand the relative cost of title loans?

This Article has offered some preliminary evidence of many of the contested questions involved in title lending by using data from state regulators, public filings, interviews with title lenders, and customer surveys. Based on these data, I argue that states should enact laws specifically directed at title lending that preserve the equity borrowers have in their vehicles.

It is clear that a lot of work remains to be done before policymakers have the information they need to effectively regulate title lending. Designing a strategy to survey title loan customers involves challenges because title lending stores are not generally very busy. Many of the answers to contested empirical questions will require a research approach that elicits information from the people the policies are being designed to protect—title-lending customers.

Appendix A

Survey on Auto Title Lending

Contact: Asst. Professor Jim Hawkins, 713-743-5018

Please circle your answer:

1. Why did you take out this auto title loan?

- A. For personal expenses (such as paying bills, getting gas to drive to work, etc.)
- B. For business expenses (anything related to running your own business)
- C. For both personal and business expenses

2. Considering only people living in your same house, how many working vehicles does your family have? ____

3. How many months total do you anticipate it taking you to completely pay off this loan (after all renewals/rollovers)?

- | | | |
|---|----|--------------|
| 1 | 7 | More than 12 |
| 2 | 8 | |
| 3 | 9 | |
| 4 | 10 | |
| 5 | 11 | |
| 6 | 12 | |

4. If you couldn't pay off all your bills one month, which bills would you NOT pay so you could pay on this loan? (Check ALL that apply.)

- Rent or mortgage payment
- Utilities (water, electricity, etc.)
- Credit card debt
- Groceries
- Medical
- Other: _____

5. Why did you pick this lender? (Check all that apply.)

- Price
- Loan amount
- Location
- Referral from someone
- Lender's reputation
- Have used this lender previously
- Other: _____

6. What do you think is the percentage chance the lender will repossess your vehicle? ____%

7. How does the cost of this title loan compare to the cost of a credit card?

- A. This title loan is a lot *less* expensive
- B. This title loan is a little *less* expensive
- C. They are about the same
- D. This title loan is a little *more* expensive
- E. This title loan is a lot *more* expensive.

8. Is the loan you actually took out more money or less money than the loan you were originally wanting to get before you came to the title lending store?

- A. I got less money than I had originally wanted.
- B. I got more money than I had originally wanted.
- C. I got the same amount as I wanted before I came to the lender.

9. How long have you had your loan?

- A. I took my loan out today.
- B. I have had my loan out ____ months.

10. If you could not get a title loan, what would you do?

- A. Get a loan from somewhere else like friends, family, a pawnshop, or another lender.
 - B. Sell my car.
 - C. Not borrow any money and just make do without a loan.
 - D. Other:
-