

By: Carona S.B. No. 1143
(In the Senate - Filed March 8, 2005; March 21, 2005, read first time and referred to Committee on Business and Commerce; April 18, 2005, reported adversely, with favorable Committee Substitute by the following vote: Yeas 9, Nays 0; April 18, 2005, sent to printer.)

COMMITTEE SUBSTITUTE FOR S.B. No. 1143 By: Carona

A BILL TO BE ENTITLED
AN ACT

relating to a loan secured by personal property with limited recourse against the borrower.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle B, Title 4, Finance Code, is amended by adding Chapter 344 to read as follows:

CHAPTER 344. LIMITED RECOURSE SECURED LOAN

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 344.001. DEFINITIONS. In this chapter:

(1) "Borrower" means an owner of personal property who pledges a security interest in the property to a lender in exchange for a loan of money.

(2) "Lender" means a person who:

(A) makes, offers to make, transacts, negotiates, or originates a limited recourse secured loan;

(B) arranges a limited recourse secured loan for another person; or

(C) acts as an agent for or assists another person in the origination or collection of a limited recourse secured loan.

(3) "Limited recourse secured loan" means a loan of money from a lender to a borrower in which the borrower has limited personal liability to repay the lender as provided by this chapter.

(4) "Pledged property" means the personal property pledged by a borrower under a limited recourse secured loan.

Sec. 344.002. APPLICABILITY OF OTHER LAW. (a) A provision of this code other than this chapter applies to a limited recourse secured loan only if this chapter specifically makes the provision applicable.

(b) Chapter 14 and Subchapter L, Chapter 342, apply to this chapter.

[Sections 344.003-344.050 reserved for expansion]

SUBCHAPTER B. LICENSE AND REGULATION

Sec. 344.051. LICENSE REQUIRED. (a) A person must hold a license issued under this chapter to act as a lender.

(b) A person may not use any device, subterfuge, or pretense to evade the application of this section.

Sec. 344.052. ISSUANCE OF MORE THAN ONE LICENSE FOR A LENDER. (a) The commissioner may issue more than one license to a lender on compliance with this chapter for each license.

(b) A lender who is required to hold a license under this chapter must hold a separate license for each office at which loans are made, offered, transacted, negotiated, originated, arranged, serviced, held, or collected under this chapter.

(c) A license is not required under this chapter for a place of business:

(1) devoted to accounting or other recordkeeping; and

(2) at which loans are not made, offered, transacted, negotiated, originated, arranged, serviced, held, or collected under this chapter.

[Sections 344.053-344.100 reserved for expansion]

SUBCHAPTER C. APPLICATION FOR AND ISSUANCE OF LICENSE

Sec. 344.101. APPLICATION REQUIREMENTS. (a) The application for a license under this chapter must:

(1) be under oath;

(2) give the approximate location from which business is to be conducted;

(3) identify the business's principal parties in interest; and

(4) contain other relevant information that the commissioner requires for the findings required under Section 344.104.

(b) On the filing of one or more license applications, the applicant shall pay to the commissioner an investigation fee of \$500.

(c) On the filing of each license application, the applicant shall pay to the commissioner for the license's year of issuance a license fee in an amount determined as provided by Section 14.107.

Sec. 344.102. BOND. (a) An applicant for a license under this chapter shall file with the application a bond that:

(1) is in an amount not to exceed the total of \$50,000 for each license, not to exceed a total of \$1 million;

(2) is satisfactory to the commissioner; and

(3) is issued by a surety company qualified to do business as a surety in this state.

(b) The bond must be in favor of this state for the use of this state and the use of a person who has a cause of action under this chapter against the license holder.

(c) The bond must be conditioned on:

(1) the license holder's faithful performance under this chapter and rules adopted under this chapter; and

(2) the payment of all amounts that become due to the state or another person under this chapter during the calendar year for which the bond is given.

(d) The aggregate liability of a surety to all persons damaged by the license holder's violation of this chapter may not exceed the amount of the bond.

Sec. 344.103. INVESTIGATION OF APPLICATION. On the filing of an application and a bond and on payment of the required fees, the commissioner shall conduct an investigation to determine whether to issue the license.

Sec. 344.104. APPROVAL OR DENIAL OF APPLICATION. (a) The commissioner shall approve the application and issue to the applicant a license to make loans under this chapter if the commissioner finds that:

(1) the financial responsibility, experience, character, and general fitness of the applicant are sufficient to:

(A) command the confidence of the public; and

(B) warrant the belief that the business will be operated lawfully and fairly, within the purposes of this chapter; and

(2) the applicant has net assets of at least \$50,000 available for the operation of each licensed location.

(b) If the commissioner does not find the eligibility requirements of Subsection (a), the commissioner shall notify the applicant.

(c) If an applicant requests a hearing on the application not later than the 30th day after the date of notification under Subsection (b), the applicant is entitled to a hearing not later than the 60th day after the date of the request.

(d) The commissioner shall approve or deny the application not later than the 60th day after the date of the filing of a completed application with payment of the required fees or, if a hearing is held, after the date of the completion of the hearing on the application. The commissioner and the applicant may agree to a later date in writing.

Sec. 344.105. DISPOSITION OF FEES ON DENIAL OF APPLICATION. If the commissioner denies the application, the commissioner shall retain the investigation fee and shall return to the applicant the license fee submitted with the application.

[Sections 344.106-344.150 reserved for expansion]

SUBCHAPTER D. LICENSE

Sec. 344.151. NAME AND PLACE ON LICENSE. (a) A license must state:

(1) the name of the license holder; and
 (2) the address of the office from which the business is to be conducted.

(b) A license holder may not conduct business under this chapter under a name or at a place of business in this state other than the name or office stated on the license.

Sec. 344.152. LICENSE DISPLAY. A license holder shall display a license at the place of business provided on the license.

Sec. 344.153. MINIMUM ASSETS FOR LICENSE. A license holder shall maintain for each office for which a license is held net assets of at least \$50,000.

Sec. 344.154. ANNUAL LICENSE FEE. Not later than December 1, a license holder shall pay to the commissioner for each license held an annual fee for the year beginning the next January 1, in an amount determined as provided by Section 14.107.

Sec. 344.155. EXPIRATION OF LICENSE ON FAILURE TO PAY ANNUAL FEE. If the annual fee for a license is not paid before the 16th day after the date on which the written notice of delinquency of payment has been given to the license holder, the license expires on the later of:

(1) that day; or
 (2) December 31 of the last year for which an annual fee was paid.

Sec. 344.156. LICENSE SUSPENSION OR REVOCATION. After notice and a hearing, the commissioner may suspend or revoke a license if the commissioner finds that:

(1) the license holder failed to pay the annual license fee, an examination fee, an investigation fee, or another charge imposed by the commissioner under this chapter;

(2) the license holder, knowingly or without the exercise of due care, violated this chapter or a rule adopted or order issued under this chapter; or

(3) a fact or condition exists that, if it had existed or had been known to exist at the time of the original application for the license, clearly would have justified the commissioner's denial of the application.

Sec. 344.157. CORPORATE CHARTER FORFEITURE. (a) A license holder who violates this chapter is subject to revocation of the holder's license and, if the license holder is a corporation, forfeiture of its charter.

(b) When the attorney general is notified of a violation of this chapter and revocation of a license, the attorney general shall file suit in a district court in Travis County, if the license holder is a corporation, for forfeiture of the license holder's charter.

Sec. 344.158. LICENSE SUSPENSION OR REVOCATION FILED WITH PUBLIC RECORDS. The decision of the commissioner on the suspension or revocation of a license and the evidence considered by the commissioner in making the decision shall be filed in the public records of the commissioner.

Sec. 344.159. REINSTATEMENT OF SUSPENDED LICENSE; ISSUANCE OF NEW LICENSE AFTER REVOCATION. The commissioner may reinstate a suspended license or issue a new license on application to a person whose license has been revoked if at the time of the reinstatement or issuance no fact or condition exists that clearly would have justified the commissioner's denial of an original application for the license.

Sec. 344.160. SURRENDER OF LICENSE. A license holder may surrender a license issued under this chapter by delivering to the commissioner:

(1) the license; and
 (2) a written notice of the license's surrender.

Sec. 344.161. EFFECT OF LICENSE SUSPENSION, REVOCATION, OR SURRENDER. (a) The suspension, revocation, or surrender of a license issued under this chapter does not affect the obligation of a contract between the license holder and a debtor entered into before the revocation, suspension, or surrender.

(b) Surrender of a license does not affect the license holder's civil or criminal liability for an act committed before

surrender.

Sec. 344.162. MOVING AN OFFICE. (a) A license holder shall give written notice to the commissioner before the 30th day preceding the date the license holder moves an office from the location provided on the license.

(b) The commissioner shall amend a license holder's license accordingly.

Sec. 344.163. TRANSFER OR ASSIGNMENT OF LICENSE. A license may be transferred or assigned only with the approval of the commissioner.

[Sections 344.164-344.200 reserved for expansion]

SUBCHAPTER E. LOAN TERMS; DEFAULT

Sec. 344.201. COMPLIANCE WITH CHAPTER. A license holder may not make, offer to make, transact, negotiate, originate, arrange, service, hold, or collect a limited recourse secured loan that does not meet all requirements and conditions of this chapter.

Sec. 344.202. PLEDGED PROPERTY. Any personal property may be used to secure a limited recourse secured loan if:

(1) the property is currently owned by the borrower and is not encumbered by any other outstanding encumbrance;

(2) ownership of the property is evidenced by a state-issued certificate of title; and

(3) the borrower is allowed possession and use of the property while the loan is outstanding.

Sec. 344.203. MAXIMUM AMOUNT OF LOAN AND LOAN TERM. (a) The maximum loan amount under this chapter may not exceed the lesser of \$2,000 or the fair market retail value of the pledged property.

(b) A loan under this chapter must have an original term of not less than seven days or more than 30 days.

(c) A lender may renew a limited recourse secured loan for not more than four additional periods if:

(1) the term of each renewal period is within the limits contained in Subsection (b);

(2) no interest, fees, or charges from prior loan or renewal periods are capitalized or added to the principal amount in any renewal; and

(3) any interest or fees charged in the renewal period are not greater than charged in previous periods.

Sec. 344.204. MAXIMUM INTEREST AND FEE. (a) Notwithstanding any law to the contrary, a lender making a loan under this chapter may charge:

(1) an administrative fee that is not more than the amount equal to three percent of the amount of the cash advance; and

(2) a rate of interest not to exceed:
(A) nine percent a month, on a cash advance of \$1,000 or less; or

(B) nine percent a month, on the amount of cash advance that is \$1,000 or less and three percent a month, on the amount of cash advance that is more than \$1,000 and less than or equal to \$2,000.

(b) The interest and fee under Subsection (a) may be charged during the loan period and the same amount may be charged during any renewal of the loan.

(c) The administrative fee under Subsection (a)(1) is considered to be earned at the time a loan is made and is not subject to refund.

(d) On prepayment of a loan under this chapter, the lender is entitled to earn the interest authorized under Subsection (a)(2) at a daily rate for the term that the loan is outstanding. The lender shall repay any unearned interest received.

Sec. 344.205. COST OF LIEN RECORDATION. A contract for a loan under this chapter may include a charge for any fees paid to a governmental agency in connection with the loan, including any fee charged to record the lender's security interest in the pledged property.

Sec. 344.206. SECURITY INTEREST AND DEFAULT. (a) The lender may contract for a security interest under Chapter 9, Business & Commerce Code, in the pledged property and record the

interest pursuant to law applicable to the property.

(b) The lender may, on a default by the borrower and after the waiting period provided by Section 344.207, seek possession and sale of the pledged property pursuant to Chapter 9, Business & Commerce Code.

(c) The lender shall return to the borrower any surplus from the sale, after the lender deducts the amount of principal and interest outstanding on the loan plus any cost incurred as a result of the repossession and sale.

Sec. 344.207. NOTICE AND WAITING PERIOD BEFORE REPOSSESSION. (a) Before taking possession of pledged property under Section 344.206, a lender shall send a notice to the borrower notifying the borrower:

(1) of the existence of the default;

(2) that the borrower has 10 days to cure the default; and

(3) of the action that must be taken to cure the default.

(b) The lender may take possession of the pledged property only if the borrower does not cure the default as stated in the notice before the 11th day after the date of the notice.

Sec. 344.208. LIMITED RECOURSE. (a) A limited recourse secured loan is made without personal recourse against the borrower unless the borrower:

(1) engages in fraud against the lender in connection with the loan;

(2) conceals a prior unreleased encumbrance on the pledged property;

(3) encumbers the pledged property in violation of the loan agreement after receiving the loan; or

(4) intentionally conceals or damages the pledged property.

(b) If the borrower engages in an activity listed in Subsection (a), the lender is entitled to pursue the borrower personally for all outstanding principal and interest owed under the loan.

Sec. 344.209. LIMITED RECOURSE SECURED LOAN AGREEMENTS--REQUIRED DISCLOSURES. Each limited recourse secured loan agreement must include:

(1) all disclosures required to be made under the Truth in Lending Act (15 U.S.C. Section 1601 et seq.);

(2) a statement that the loan is a limited recourse secured loan governed by this chapter; and

(3) the following disclosure, which must appear conspicuously in at least 10-point boldfaced type above the borrower's signature:

"THIS IS A SHORT-TERM, HIGHER-COST LOAN. DO NOT BORROW FROM THIS LENDER IF YOU CAN BORROW MONEY AT A LOWER COST. DO NOT BORROW FROM THIS LENDER UNLESS YOU HAVE AN URGENT NEED FOR CASH.

"YOU RISK THE LOSS OF THE PERSONAL PROPERTY PLEDGED AS COLLATERAL FOR THIS LOAN IF YOU DO NOT PAY ACCORDING TO THE LOAN AGREEMENT.

"YOU SHOULD PAY OFF THIS LOAN AS QUICKLY AS POSSIBLE TO AVOID PAYING EXCESSIVE CHARGES.

"YOU ARE NOT PERSONALLY LIABLE FOR ANY AMOUNT BORROWED IF YOU DO NOT DAMAGE, CONCEAL, OR ENCUMBER THE PLEDGED PROPERTY OR DEFRAUD THE LENDER. IF YOU DO NOT WISH TO REPAY THE LOAN OR CANNOT REPAY THE LOAN, YOU NEED ONLY SURRENDER THE PLEDGED PROPERTY TO THE LENDER. IF YOU DO SURRENDER THE PROPERTY, THE LENDER CANNOT DEMAND ANY FURTHER PAYMENTS.

"YOU HAVE THE RIGHT TO CANCEL THIS LOAN WITHOUT PAYING ANY INTEREST BY REPAYING TO THE LENDER THE FULL PRINCIPAL AMOUNT BORROWED NO LATER THAN THE CLOSE OF THE LENDER'S NEXT BUSINESS DAY FOLLOWING THE DATE OF THIS AGREEMENT."

[Sections 344.210-344.250 reserved for expansion]

SUBCHAPTER F. PROHIBITED ACTS AND PENALTIES

Sec. 344.251. PROHIBITED ACTS. (a) A lender may not:

(1) enter into a limited recourse secured loan with a borrower under 18 years of age;

(2) make a limited recourse secured loan giving the lender any recourse against the borrower other than the rights granted under this chapter;

(3) charge any interest or fee other than as permitted by this chapter;

(4) enter into a limited recourse secured loan that does not provide the borrower the right to rescind the loan without cost by repaying the full principal amount borrowed by the close of the next business day after the loan was executed;

(5) threaten to use criminal process or use any other unfair or deceptive practice in making or collecting a loan under this chapter; or

(6) include any of the following in any limited recourse secured loan agreement:

(A) a hold harmless clause, except that a lender is not liable to the borrower or any other person for an injury or damages sustained by the borrower or other person as a result of use of the pledged property still in the possession of the borrower;

(B) a confession of judgment clause; or

(C) a waiver of any provision of this chapter.

(b) A lender who violates Subsection (a) forfeits all interest contracted for on the limited recourse secured loan.

Sec. 344.252. PRIVATE REMEDY FOR UNDISCLOSED, IMPROPERLY DISCLOSED, OR EXCESSIVE CHARGES. (a) Any interest, fees, or charges collected that are undisclosed, improperly disclosed, or in excess of those allowed by this chapter may be recovered by the borrower in an action at law or as otherwise agreed between the parties. A borrower who prevails in a proceeding under this subsection is entitled to reasonable attorney's fees and court costs.

(b) Before pursuing a proceeding under Subsection (a), the borrower shall provide the lender with a written notice of the intended proceeding by certified mail, return receipt requested. The notice must specifically identify the interest, fees, or charges that the borrower contends were undisclosed, improperly disclosed, or excessive. If before the 31st day after the date of receipt of the notice the lender tenders to the borrower the undisclosed, improperly disclosed, or excessive interest, fees, or charges, the tender is a defense to any further proceedings. If the lender does not make the tender and in the proceeding the borrower prevails and establishes that the interest, fees, or charges were undisclosed, improperly disclosed, or excessive, the borrower is entitled to recover from the lender two times the amount of undisclosed, improperly disclosed, or excessive interest, fees, or charges.

[Sections 344.253-344.300 reserved for expansion]

SUBCHAPTER G. ADMINISTRATION OF CHAPTER

Sec. 344.301. ADOPTION OF RULES. (a) The finance commission may adopt rules to enforce this chapter.

(b) The commissioner shall recommend proposed rules to the finance commission.

(c) A rule shall be entered in a permanent book. The book is a public record and shall be kept in the office of the commissioner.

Sec. 344.302. EXAMINATION OF LENDERS; ACCESS TO RECORDS. (a) The commissioner or the commissioner's representative shall, at the times the commissioner considers necessary:

(1) examine each place of business of each lender licensed under this chapter; and

(2) investigate the lender's transactions, including loans, and records, including books, accounts, papers, and correspondence, to the extent the transactions and records pertain to the business regulated under this chapter.

(b) The lender shall:

(1) give the commissioner or the commissioner's representative free access to the lender's office, place of business, files, safes, and vaults; and

(2) allow the commissioner or the commissioner's authorized representative to make a copy of an item that may be investigated under Subsection (a)(2).

(c) During an examination the commissioner or the commissioner's representative may administer oaths and examine any person under oath on any subject pertinent to a matter that the commissioner is authorized or required to consider, investigate, or secure information about under this chapter.

(d) Information obtained under this section is confidential.

(e) A lender's violation of Subsection (b) is a ground for the suspension or revocation of the lender's license.

Sec. 344.303. GENERAL INVESTIGATION. To discover a violation of this chapter or to obtain information required under this chapter, the commissioner or the commissioner's representative may investigate the records, including books, accounts, papers, and correspondence, of a person, including a lender, who the commissioner has reasonable cause to believe is violating this chapter regardless of whether the person claims to not be subject to this chapter.

Sec. 344.304. CERTIFICATE; CERTIFIED DOCUMENT. On application by any person and on payment of any associated cost, the commissioner shall furnish, under the commissioner's seal and signed by the commissioner or an assistant of the commissioner:

(1) a certificate of good standing; or

(2) a certified copy of a license, rule, or order.

Sec. 344.305. TRANSCRIPT OF HEARING PUBLIC RECORD. The transcript of a hearing held by the commissioner under this chapter is a public record.

Sec. 344.306. APPOINTMENT OF AGENT. (a) A lender licensed under this chapter shall maintain on file with the commissioner a written appointment of a resident of this state as the lender's agent for service of all judicial or other process or legal notice, unless the lender has appointed an agent under another statute of this state.

(b) If a lender does not comply with this section, service of all judicial or other process or legal notice may be made on the commissioner.

Sec. 344.307. PAYMENT OF EXAMINATION COSTS AND ADMINISTRATION EXPENSES. A lender shall pay to the commissioner an amount assessed by the commissioner to cover the direct and indirect costs of an examination of the lender and a proportionate share of general administrative expense.

Sec. 344.308. LENDER'S RECORDS. (a) A lender shall maintain a record of each loan made under this chapter as is necessary to enable the commissioner to determine whether the lender is complying with this chapter.

(b) A lender shall keep the record and make it available at the lender's principal place of business until the later of:

(1) the fourth anniversary of the date of the loan; or

(2) the second anniversary of the date on which the final entry is made in the record.

(c) A record described by Subsection (a) must be prepared in accordance with accepted accounting practices.

(d) The commissioner shall accept a lender's system of records if the system discloses the information reasonably required under Subsection (a).

(e) A lender shall keep each obligation signed by a borrower at an office in this state designated by the lender unless the obligation is transferred under an agreement that gives the commissioner access to the obligation.

Sec. 344.309. ANNUAL REPORT. (a) Each year, not later than May 1 or a later date set by the commissioner, a lender shall file with the commissioner a report that contains relevant information required by the commissioner concerning the lender's business and operations during the preceding calendar year for each office of the lender in this state in which business is conducted under this chapter.

(b) A report under this section must be:

(1) under oath; and

(2) in the form prescribed by the commissioner.

(c) A report under this section is confidential.

(d) The commissioner shall annually prepare and publish a consolidated analysis and recapitulation of reports filed under this section.

SECTION 2. The requirement that a person hold a license under Chapter 344, Finance Code, as added by this Act, applies only on and after January 1, 2006.

SECTION 3. This Act takes effect September 1, 2005.

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