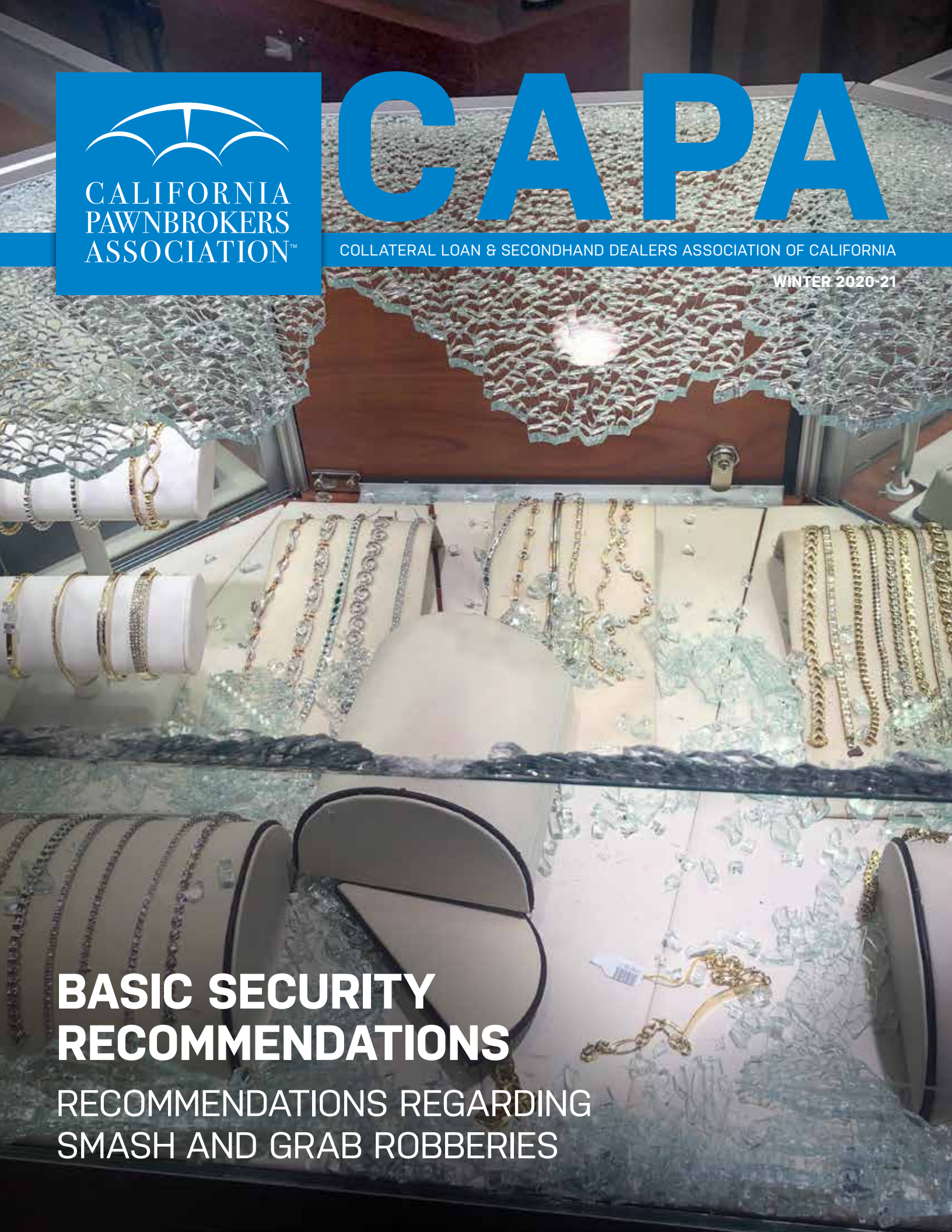


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# CAPA

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WINTER 2020-21

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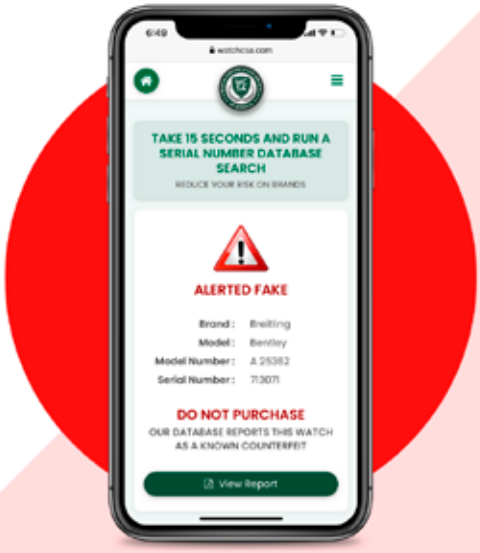
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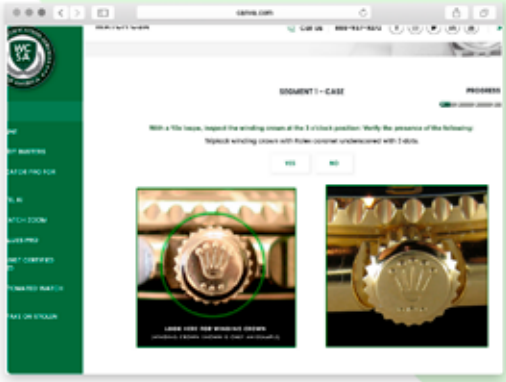



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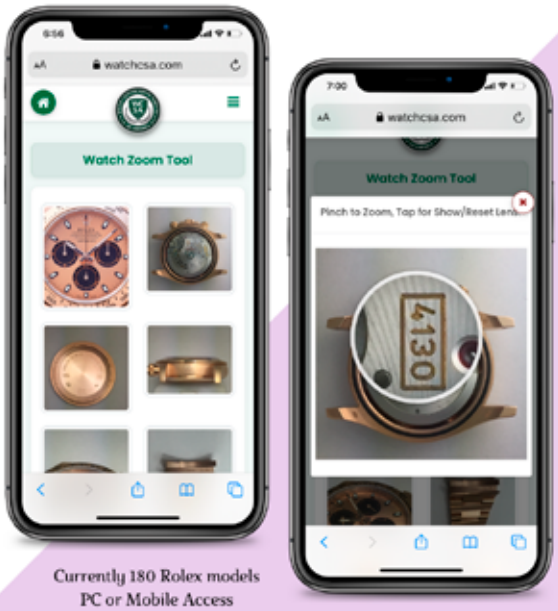


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# Is 2020 Over Yet?!

What a crazy year it has been so far! Covid, business closures, sheltering in place, looting, protests and an insane election. It's been a lot to navigate while trying to keep our families, employees and shops safe. And despite all of this, CAPA has kept working for our beloved industry here in California.

As you will read in Tony DeMarco's Legislative Report, CAPA has a new lobbyist. The executive committee spent the better part of two weeks reading proposals from eight lobbying firms, interviewing every one of those firms, discussing our impressions and then whittling the list down to the top three candidates. We then did a second round of interviews with those three and, after much discussion and debate, made our final selection.

Our new CAPA lobbyist, Jerry Desmond, has written his first article for this edition of our newsletter, and I know as you all get to know him that you will be as impressed with him as the executive committee is.

In October, CAPA had its' first virtual conference. I have to admit that I was skeptical, but it was great! While there is no replacement for meeting face to face, I was very impressed with how much I and my employees got out this conference. I was especially impressed with how focused the educational seminars were. It was very easy to concentrate on the subject matter and still have the ability to ask questions and interact with the presenters. The presentations were very timely and addressed so many of the issues we are facing in our businesses today.

My favorite part, aside from the virtual cocktail hour of course, was the "virtual vendor hall". Normally at our conferences, it can be a little challenging to spend the time with a vendor to really get a good idea of their product offerings. The vendor hall is crowded and the booths are busy. The virtual presentations were fantastic and I learned so much.

And I would be remiss in not mentioning our keynote speaker, Yigal Adato of Pawn Leaders. It was so inspiring to have a former member of our own industry kick-off the conference. If anyone has not had the experience of listening to Yigal speak, you are missing out. He gave us so many tips to improve not only our business, but ourselves. He was fantastic!

Our virtual conference was so successful that we are planning to make these types of events a permanent tool for offering educational opportunities to CAPA members. With that said, we all look forward to being together live and in person in 2021.

Your CAPA Board of Directors welcomed two new members. Elsa Palazuelos of California Loan and Jewelry in




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Sacramento and Steve Jacobson of Mr. Steve's Pawn Shop in Los Angeles took their seats as CAPA Directors in October and I am very excited to work with them both. Steve has been actively contributing his time and knowledge for many years and took a lead role working with us when LA County shut down all of the shops there. He brought in several new members during that time as well. Elsa has attended several board meetings and "walk the halls" legislative days in Sacramento. She has conducted tours of her shop for legislators and others. They will be great additions to our board.

As you can see, in spite of all that we have endured this year, your CAPA Board of Directors and CAPA staff continue to work on your behalf for the betterment and advancement of the pawn industry in California.

Please continue to stay safe and I wish you all happy, peaceful and prosperous holidays.

*Jan Schneider* ■

## A Note from Sharon Duplissea



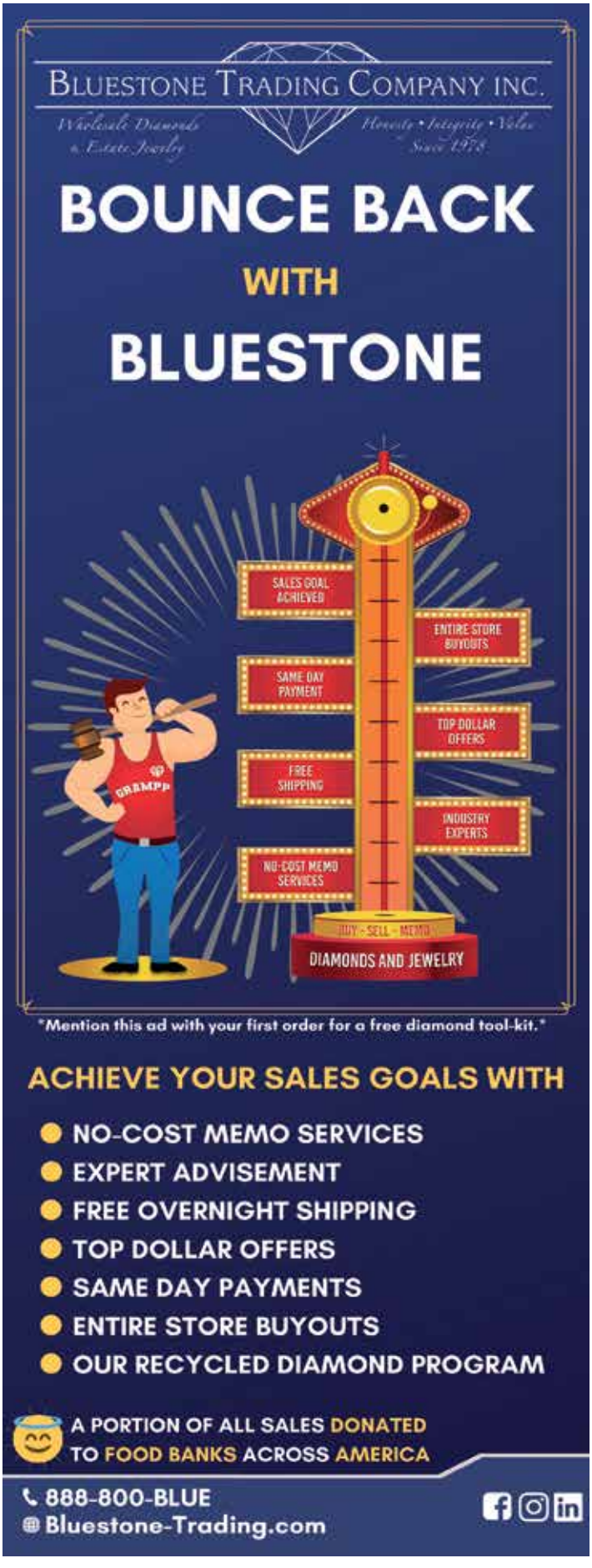
I asked Jan and Kim if it would be appropriate for me to write a little something for your newsletter and they were kind enough to indulge me. I think of this as a "love letter" to CAPA, my late husband Bill Duplissea's favorite and beloved client.

Bill had a successful lobbying business and a number of clients. He enjoyed working with all his clients and always passionately represented them. He loved the process of taking an issue, working closely with the client and through his governmental relationships and friendships delivering what the client needed. Bill especially loved developing the specific strategies he needed for each issue. I can remember many times when he would be given some bad news about an issue and he'd be quiet for a while. I'd eventually ask, "Are you okay?" He ALWAYS responded, I'll figure out something." And he always seemed to.

The passion with which he did all this was never more present than when he worked with CAPA. God, he loved you guys. Most of our friends thought CAPA was his only client because you're the client he talked about all the time. Bill loved the organization, the issues, but most importantly the individuals who make up your organization. He would return from a CAPA convention or board meeting with stories about seeing good friends, eating great food and being allowed to go to bed early. Perhaps the highlight for him was the board meeting in Sacramento when he was honored as The Godfather. He loved sharing with me every single detail. In his perfect world Bill would have semi-retired in a few years with CAPA as his only client.

Sometimes, lost in my own grief, I forget the many people who are also heartbroken with his death. He had so many wonderful friends in your organization. I know what a difficult time this is for your industry but you have knowledgeable leadership that has been trained well and somehow I think there might be a bit of divine intervention.

Sincerely,
*Sharon Duplissea*





Tony DeMarco

# Protecting Our Clients

I am excited to announce the hiring of our new lobbyist, Mr. Jerry Desmond. He is well connected and has decades of experience in Sacramento. I have to say, it was a tough choice for the Executive Committee since many well-established lobby firms wanted to represent "The Pawnbrokers". In the end, Mr. Desmond was clearly at the top of the list and will fit our CAPA mission and direction. He is very personable, approachable and very knowledgeable. I can't wait for every member to meet him….someday soon!

I know a lot of members are struggling and frustrated with this pandemic. We all have our own opinions, political or not, about these unprecedented economic times, the political outcome of our recent election, and what lies ahead for CA Pawnbrokers. But I feel we cannot sit still and do nothing. Bill would expect us to march on legislatively. And we are. Our slate going forward is very ambitious. I will briefly generalize our legislative agenda.

One is to extend our sunset period on foreclosed loans with the BOE. This is a must this year since the sunset is due to expire on Dec 31st 2021. Remember, this has to do with the original pledgor returning for their forfeited items and being able to purchase them back without a taxable event occurring.

Second is "item only" reporting. Bill always instilled into us the notion of opportunity. If we have an opportunity and it is achievable, we should take it. Since AB1969 was signed into law allowing us to remove the customer info and financial info in the CAPSS report for clients using the Martricular Consular, shouldn't all clients have this protection? In the Sacramento landscape on Privacy, this idea, more than at any time in the past, is very much achievable. Item only reporting, while on the surface, may not be advantageous to our bottom line. But it protects all of our clients personal data. This will, in the long term, have significant value to our Association and all of its members. We will be limiting the opportunity for LE to profile our clients. This will protect our clients against profiling! Just a note on this. Third party, for profit companies, are gaining access to our clients' information. This if very bad for business and for our reputation. We still will have to collect and maintain the information. If any member wants to talk with me about this, please give me a call.

Third is Bankruptcy. We have yet to figure out how to remove our exposure to a client filing bankruptcy. But, CAPA is determined to find some protections in our State laws. The problem is that the bankruptcy statute follows Federal law, not State law. Somehow, we must find a way to change our pawn procedures so not to expose our transactions to the bankruptcy federal mandates. This is a complicated situation, but CAPA is not giving up on protecting our members against clients filing bankruptcy.

Fourth is 'fix it' legislation. This may be moved up if opportunity arises. There are many areas in our code that don't make sense or are no longer needed. This is primarily due to CAPA changing code sections and not rewriting the entire provision. We do this because rewriting entire sections of code brings out opposition at times. There are also unintended consequences. I will give you an example. Why does our statue differentiate from someone sending in a money order to someone paying electronically through a pay service? Here is another example. Several places in statute still refer to reporting to the Chiefs of Police. There are many areas that need to be amended, changed, properly clarified or stricken. CAPA, additionally, should look for ways to help our members function during these times of Covid. Remotely and safely.

Fifth is CE (Continued Education). CAPA needs to spearhead a direction of education and training for all pawnbrokers in the State. We have long sought a way for our organization to help maintain a high professional level. Like in other industries, this will help with our collective credibility and respectability. We are all licensed with zero education requirements. As a member or CAPA, this bar has been raised for our members. Our members do get education and are trained, and get the guidance needed to perform at one's maximum capacity. The Pawn "bar" needs to be raised for all CA pawnbrokers, not just for CAPA members.

I know there is a lot here, please let me know your thoughts on any matter pertaining to legislation or other procedural issues. I am here for you.

*Tony DeMarco* ■





Jerry Desmond, Desmond & Desmond LLC

# November 3 Elections Provide "Something for Everyone" in Democrat-controlled California

As the final outcomes of state ballot intiatives and legislative races become clear, the results provide something for everyone in California – a state where Democrats continue to dominate with all statewide officeholders and super-majorities in each house of the State Legislature. Of note:

- Business interests successfully opposed two ballot initiatives and obtained passage of both an initiative and a referendum.
- California Republicans are projected to: pick up 3 seats in the House of Representatives, pick up 1 seat in the state Assembly; and lose 2 seats in the state Senate.

As this is written, the election results are not yet final. County elections officials must report final official results for presidential electors to the Secretary of State by December 1, and all other state contests by December 4. Results will be certified by December 11.

## Voter Registrations and Participation

The build-up to November 3 led to a significant increase in voter registrations. According to Political Data, Inc.:

- There were 21 million registered voters in California, the highest rate of registrations since the election of 1940. 83% of eligible Californians were registered to vote.
- Nearly two-thirds of the new registrations were millennials or Generation Y, born after 1996. Young voters represented about 37% of total registrants, and baby boomers represented only 29% of total registrations.

The breakdown of party registrations just prior to election day was: Democrats – 46.1%, Republicans - 24.2%, No Party Preference - 24%, and Other - 5.7%.

## Statewide Ballot Initiatives

Business interests were successful in appealing to voters to overcome two laws that had been passed by the State Legislature and had been signed into law. They:

- Established a special category of gig-economy workers as independent contractors rather than employees [Proposition 22] – with over $200 million spent to obtain this result.
- Obtained voter approval to reverse the elimination of cash bail [Proposition 25].

Business interests also successfully defeated measures that would have:

- Established new requirements for kidney dialysis clinics, including a requirement that there be a physician, nurse practitioner or physician assistant on site during dialysis treatment [Proposition 23].
- Authorized local governments to establish rent control on residential properties over 15 years old [Proposition 21].

Non-business interests also achieved some successes:

- Voters approved the enhancement of recently-enacted consumer protections with an expanded right to privacy together with a new state enforcement agency [Proposition 24].
- Voters also approved $5.5 billion in state bonds for stem cell and other medical research [Proposition 14].

On other public policy issues, the opinions of California voters were mixed.

***On social justice issues,*** voters rejected the reestablishment of affirmative action [Proposition 16], but also rejected an increase in penalties such as longer jail terms for individuals who commit certain theft-related crimes such as repeat shoplifting [Proposition 20].

***On the ability to vote,*** voters restored the right to vote after completion of a prison term [Proposition 17], but rejected the expansion of the right to vote in primaries to 17-year olds who will be 18 by the date of the general election [Proposition 18].



## House of Representatives – Republicans Pick up 3 Seats

California currently has 53 California seats in the US House of Representatives, and there is some expectation that the state may lose one seat after the completion of the once-per-decade census as the state has lost residents.

Prior to November 3, the breakdown was: 45

Democrats, 7 Republicans and 1 Vacancy in the 50th District [El Cajon, Duncan Hunter's seat].

It is projected that the breakdown in 2021 will be: 42 Democrats and 11 Republicans. The 3 seats that are expected to flip from Democrat to Republican are:

***Fresno*** [CA 21] - David Valadao reclaiming his seat by defeating incumbent TJ Cox

***Anaheim*** [CA 39] - Young Kim defeating incumbent Gil Cisneros

***Newport Beach*** [CA 48] - Michelle Steel defeating incumbent Harley Rouda

**In addition – in Santa Clarita** [CA 25] – incumbent Republican Mike Garcia has a very narrow, 104 vote margin over Democrat Christy Smith in the bid to replace Democrat Katie Hill following her resignation.

## California Senate – Democrats pick up 2 Seats

One-half of the 40-member State Senate were up for election, and prior to November 3 there were 29 Democrats and 11 Republicans. 27 votes are necessary for a super-majority in the upper house.

In 2021, it is expected that there will be 30 Democrats, 9 Republicans and 1 vacancy that should remain Democrat [Los Angeles, SD 30 where Holly Mitchell has been elected to the County Board of Supervisors].

The 2 Seats that are projected to flip are:

***Diamond Bar*** [SD 29] – Democrat Josh Newman defeating incumbent Republican Ling Ling Chang. He becomes the first recalled legislator to be re-elected.

***Newport Beach*** [SD 37] – Democrat Dave Min defeating incumbent Republican John Moorlach.

## California Assembly – Republicans pick up 1 Seat

All 80 Assembly Members were up for election on November 3.

Prior to November 3, there were 61 Democrats, 18 Republicans and 1 No Party Preference [former Republican Leader Chad Mayes of Yucca Valley].

In 2021, it is projected that there will be 60 Democrats, 19 Republicans, and 1 No Party Preference. The Democrats would retain more than the 54 seats needed to comprise a supermajority.

The 1 seat that is projected to flip is:

***Santa Clarita*** [AD 38] – Republican Suzette Martinez Valladares defeating fellow Republican Lucie Volotzky. The seat was previously held by Democrat Christy Smith who ran for Congress.

Also of note are:

- The election of the youngest legislator in 80 years: 25 year-old Democrat Alex Lee [San Jose, AD 25].
- The defeat of an incumbent in a primary, in a district that the same party won on November 3 [Republican Tyler Diep in Seal Beach [AD 72].

## Looking Forward to 2021 - Challenges for a One-Party State

The Democratic party is in control, dominating state-level politics in California during a period of ongoing challenges on many fronts.

Recent events include wildfires of unprecedented number and size, as well as a pandemic that continues to devastate the state economy, jobs, the health, and the lives of hundreds of thousands of residents. A housing affordability crisis and a growing homeless population persist.

The plans of the majority party to address these issues and others will demand focused attention, effective governance, and significant financial resources.

In July of this year, it was projected that the state faced $53 billion in increased costs due to the pandemic. The state has taken some steps to reduce costs with a combination of furloughs, salary decreases, and other measures.

In 2021, a renewed push to increase state revenues is anticipated, especially with the failure of Prop 15 that would have provided up to $12 billion per year in annual revenues.

Proposals have included wealth taxes [such as one that passed in San Francisco on November 3], taxes on services, and increased taxes on specific products. However, the state is already heavily reliant on the income taxes being paid by the top 1% of our residents. They pay over one-third of the revenues that the state can use for unrestricted purposes.

The appropriate roles and responsibilities of the legislative and executive branches of state government have also become an interesting and developing issue. Republican Assembly Members recently challenged Governor Newsom's COVID-19 Executive Order N-67-20 in Sutter County Superior Court [James Gallagher and Kevin Kiley vs. Governor Newsom].

On November 2, Judge Sarah Heckman issued a ruling that the California Emergency Services Act does not grant the Governor the power to amend or make new statutory law:

"Executive Order N-67-20 issued by the Governor on June 3, 2020 is void as an unconstitutional exercise of legislative power and shall be of no further force or effect. The California Emergency Services Act [CA Government Code §8550 et seq,] does not authorize or empower the Governor of the State of California to amend statutory law or to make new statutory law, which is exclusively a legislative function not delegated to the Governor under the CESA."

"Gavin Newsom, in his official capacity as Governor of the State of California is enjoined and prohibited from exercising any power under the California Emergency Services Act (Government Code $ 8550 et seq.) which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy."

An appeal is anticipated. ■

# THE BENEFITS OF A CAPA MEMBERSHIP

Dear Member:

I know that being a part of an Association means different things to different people. There is no better way to stay on top of industry needs, ever-changing laws, and networking opportunities than to be a member of CAPA!

It has been a very busy year and we have an even busier one coming in 2021. Your association's elected leadership and staff are aggressively working to directly benefit you and your business. And, most of all, you know that as a member of CAPA, you are not by yourself.

One of the greatest things about our association is the networking and expertise available to all of us. If you have a question or are unsure when making a business decision, there is always someone to ask. Members have access to our industry-expert attorney as part of your complimentary member benefits. Don't take this expertise for granted – this is a huge benefit!

Ask yourself: Are you compliant with current regulations? Would you like a heads-up as new regulations come? Would you like to have some say in those new regulations? Would you like to be alerted to recent scams or security issues? Our member's online group is the best place to discuss issues like these and receive timely, extensive input from your pawn-broking peers and vendors who specialize in our industry.

Our Annual CAPA Convention is one of the best attended conventions in the Country! We provide education by professional speakers, our vendors show the latest products available to our industry and lifelong friends are made! What an incredible opportunity to develop new ways to help your business grow!

With your support, CAPA has retained one of the best lobbyist Sacramento has to offer. Jerry Desmond, Jr. will continue to work incredibly hard to ensure our industry keeps the clout we enjoy today with members of the California legislature. Building relationships and untilizing the access to our lobbyists' political savvy has catapulted "The Pawnbrokers" to such high regard with the California legislature, representatives come to us to verify that any legislation they are working on will not adversely affect us. Now that's something!

We must continue to band together to not only protect our industry, but to ensure our continued success!

**If you are not a current member of CAPA, please call today for special new member rates and details about all the incredibly member benefits. Call Evan Wise, CAPA Membership Manager at 916-669-5322 or email him a ewise@amgroup.us.**

CALIFORNIA PAWNBROKERS ASSOCIATION™

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# SDN LOOKUPS: WHAT DO I NEED TO DO?

*Dave Griffiths*

**This is another installment in a series of articles meant to keep members from making the same mistakes that have proven costly to their competitors. This article will deal primarily with SDN lookups and everything that entails.**

The Office of Foreign Asset Control, or OFAC, is a financial intelligence and enforcement agency of the Treasury Department. They identify individuals, entities, and vessels across the world that US citizens are not to provide assistance to for whatever reason. There are a myriad of lists that have been generated over the last many years and collectively the names of the individuals, entities, and vessels included therein are referred to as Specifically Designated Nationals or SDN's for short. The SDN list at any given time has 15,000 or more names included on it and it has been updated or changed at least 120 times in each of the last two years. This means roughly once every 3 days.

The idea is that you are not allowed to give money to anyone that appears on the list. Period. It doesn't matter how much money we are talking about. How does one know if someone is on the list? Well, you have to check! How? Well,



first of all, that all depends on what software company you hitched your wagon to. If they can provide the search then you are half way there. If they can't, well then you have a problem. Most can, and most do, but there are nuances.

Most of the major software providers in the market today provide the SDN lookup as part of their package with the exception of one. Several not only include it in the package at no extra cost, they actually turn the function on so it is useful. Sadly, several do not understand the importance of keeping you compliant, so they push that way to the bottom of the priority list.

For you to have full confidence in your software, you will need the following things:

1. A query is done by the software of the OFAC SDN list on a regular basis (remember it changes on average every three days). The updated version is then either:
   - **a.** Downloaded and installed by a staff member in a timely fashion, OR
   - **b.** Automatically updated by the software (invisible)
2. Entering a customer's name in your system will then trigger one of the following:
   - **a.** Nothing which means your customer is not on the list, OR
   - **b.** Flagging the account that your customer could be a "potential match".
3. Flagged accounts will need to be either cleared (99.99% of the time) by a staff person or they will require further direction at which point in time you will likely not be doing business with that customer.
4. A report should be run routinely that identifies the potential matches that were done in the period you query. The report should include:
   - **a.** The date of the potential match
   - **b.** The name of your customer
   - **c.** The name of the SDN in question
   - **d.** The status (cleared or not)

Effectively, you need to prove that you have a system that works. The report is the single most important piece and few software providers offer an option. A few let you know on a daily closeout. That is great, but what if an IRS examiner asks you to prove that your system is working. You would then have to go through countless daily reports to find the last actual potential match you had. Hardly efficient. In light of the fact that you may be asked, "how many SDN hits do you get in a year?" it would be helpful to have a report to immediately hand someone instead of spending the next twenty to thirty minutes frantically looking for data. Let's get right to it. If the system can flag the account, then it can track the event. If it can track the event, then it can run a report. Easy Peasy.

Effectively, you need to prove that you have a system that works. The report is the single most important piece and few software providers offer an option.

Two more things. Assuming your system does include the SDN lookup feature, and assuming it is always turned on, how do you know it is working if you never get any 'hits'? You need to ask your software company what the minimum name score is set to. The industry standard is 85%. The higher the number, the more closely the name must match the list. I have found software set at 100% match in the last year. It is highly unlikely that you would ever get a potential match with your score set at 100%. At 85% you will get hits. This proves that your system is working.

If your system is working, and you know this because you are getting potential matches, but it won't give you reports, then print out any potential matches and keep them in a file. In this series we have talked about the importance of creating an illusion. By printing out your potential matches, you will cover two items. One is that you will identify the frequency (or lack thereof) of potential matches. The other is that you have proven that your system is working. Both bases need to be covered for the regulator asking the question. If you only have a couple a year, well that shows you are a low risk and it is well worth printing two sheets of paper a year to prove that point to someone who thinks first of all you don't even do this stuff, and second that you probably do 100's of these things. Data doesn't lie.

If your software does not provide the option to do a free automatic SDN lookup, ask them why not. After you decide whether you are staying with them, you will then have to look at the probability of manually checking all your new customers against the SDN list on the OFAC website. This is not as onerous as it sounds, but is an extra step that will add 30 seconds to your loan process. In this instance, you really should print all of these and retain them for a month or so and then start systematically shredding them, being careful to retain any potential matches for a year. Again, this shows you have a system in place, and it shows the frequency of the potential matches. This is the goal.

The law requires you do not give money to anyone on the SDN list. If you perform a proper 'front-end' check, you will have complied. If you electronically report to CAPSS, you will find that they may or may not check the list, but it is irrelevant since that is what is referred to as a 'back-end' check. You already gave the money out and now you are tattling on yourself.

Bottom line here is that you need to identify your risk tolerance and act accordingly. The chance of a potential match is not that good. The chance of getting an actual match is astronomical. The chance of getting a Title 31 audit where they ask you questions about your system? Pretty darned good. ■

# CONVENIENCE OR A BURDEN?

## BUSINESS TEXT MESSAGE COMPLIANCE

*Brett D. Beyler, Mastagni Holstedt, A.P.C.*

In today's world, technology has enabled businesses to communicate and market to their customers in efficient ways, including sending mass text messages. However, with every convenience, there comes a catch.

The Telephone Consumer Protection Act ("TCPA") is a federal statute that restricts certain telemarketing communication via voice calls, text messages, and fax[1]. Congress originally enacted the TCPA in 1991 to address unwanted advertising via telephone and fax. Currently, the law prohibits any person or entity from "using any automatic telephone dialing system" to make a call "to any cellular telephone service… for which the called party is charged for the call." A person or entity can only do so with "the prior express consent of the called party" unless the call is made for "emergency purposes."

Now that technology has advanced, the strict standard of the TCPA was confirmed in 2015 that it does in fact apply to text messages. This article will provide a basic overview of TCPA including compliance recommendations moving forward.

The TCPA focuses heavily on controlling telemarketing communications—the purpose is to deter businesses from providing unsolicited advertisements to its customers. Unsolicited advertisements include any material promotion or quality of any property, goods, or services which is sent to any person *without the recipient's prior express consent.* This means, securing the customer's consent to receive these types of messages is vital and one of the many mandatory conditions of the TCPA.

Many pawnbrokers and second-hand dealers utilize mass text messaging for either promotional purposes or even to provide business notice to the customers such as the term of their loan is ending. Prior to sending any mass text communications, business owners must familiarize themselves with the TCPA regulations, or else they will face severe statutory penalties and potential lawsuits.

### Customer's Prior Consent, Recordkeeping, and Opt-Out Procedure

One of the most critical aspects a business must do prior to sending a text message, is to obtain actual written consent and keeping written record of the consent. The written consent can be in the form of a physical signature, a digitally signed agreement, an SMS opt-in, or even a website form to ensure that your business acquires and retains the customer's consent. It is advised to maintain each customer's consent for at least four years from that date in which it was given—four years is the federal statute of limitations for bringing an action under the TCPA. This will allow a business to defend any potential actions and demonstrate that the customer did opt-in to receiving text messages, either for promotional, informational, or other purposes.

In addition to obtaining the consent, business should also ensure that the terms and conditions state the following: 1) by acknowledging or signing the agreement, the customer is authorizing the company



to send specific type of content via messages; and 2) consent is not a condition to buy an goods, services, or property. What we mean by "specific type of conduct" is specify whether the text messages will be promotional, informational, etc., that way your business is not limited in the types of messages you may send your customers. This in turn will allow a customer to opt-out of a certain type of messages, think promotional messages, but keep their consent as to text messages alerting them their loan term is expiring.

After a customer opts-in, your business will need to respond with a confirmation text message that includes the following information: 1) your company name; 2) the content offered when the customer chose to opt-in, i.e., promotional, informational, etc.; 3) the frequency of messages to expect; 4) disclose possible cellular carrier and fees; 5) a URL displaying the complete terms and conditions including your privacy policy, help, and opt-out information; and 6) a keyword option for the customer to opt-out of the text messages i.e., STOP, CANCEL, END, QUIT, etc. The TCPA requires that your contacts should have the ability to opt-out at any time. Should the customer opt-out, the customer should then be placed into a "stopped" group and removed from all other groups and specially marked so that any outbound message attempts are blocked. Furthermore, the TCPA requires text messages may only be sent between 8:00 a.m. and 9:00 p.m. in the time zone your recipient is in.

## Liability

There are three modes of "enforcement" of the TCPA: 1) a private right of action, civil lawsuits brought by state attorneys general, and monetary forfeiture penalties assed by the Federal Communications Commission ("FCC"). For each violation, the TCPA provides a statutory fine of $500 per violation and a statutory fine of $1,500 fine per willful violation. As such, liability exposure in individual actions can be high and in a single class action lawsuit, liability can quickly reach tens of millions of dollars or higher. This is why it is vital that business owners become familiar with the nuances of the TCPA and its requirements. TCPA violation lawsuits are generally regarded as "nuisance" lawsuit because they are often awarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and potential financial exposure for a bad result is a great risk for a company to carry.

As a business, it is the conservative approach to strictly adhere to the TCPA requirements. Please keep in mind, even if there are minor violations, a business is always facing potential fines and suit—even if there is little to no merit to the case, this does not stop consumers from bringing forth a lawsuit.

For example, in 2013, Papa John's pizza chain agreed to pay up to $16.335 million to settle a nationwide class action for allegedly advertising pizza promotions via text message. Papa John's failed to obtain express written consent and instead argued that consumers provided consent by solely providing their mobile number to the company when ordering a pizza. As we have learned, that is not the consent the TCPA requires—consumers must provide their express written consent to receive promotional text messages.

## Bottom Line

Overall, it is vital that businesses familiarize themselves with the nuances of the TCPA to avoid statutory penalties for easily avoidable mistakes. At the bare minimum business should be implementing the following: 1) acquiring consent from the customer *before* sending any text messages; 2) connect the consent to a specific subject matter—this allows a customer to opt-out of one type of messaging, but still having the opportunity to receive messages for a different subject matter; 3) keep an internal database of all customer's opt-ins and opt-outs; 4) store the history of all text messages sent; and 5) if an individual does opt-out, keep a database that will block the individual from receiving further text messages. Most importantly, we recommend self-auditing the opt-in and opt-out list for any potential mistakes—this will allow the business to ensure the messages are being sent to an appropriate party and will provide the business a potential self-harbor defense should someone allege they opted-out but continue to receive messages. ■

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1. The purpose of this article is to provide a general overview of the main features of the TCPA. It is in no means an exhaustive analysis. For an in-depth analysis, individual businesses are encouraged to retain an attorney to review the specific business practices employed by each business. Moreover, while it is beyond the scope of this article, future articles will discuss the application of additional federal and state statutes, such as FDCPA (15 U.S.C. §§ 1692 et seq.) and the Rosenthal Act (Cal. Civ. Code § 1788 et seq.).

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| DRC Techno | J Detect 9000 | 85.40% | $9,999 |
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# STOLEN AND LOOTED PROPERTY:

## A DISTINCTION WITHOUT LEGAL SIGNIFICANCE BUT AN OPPORTUNITY FOR PRACTICAL CHANGE

*Brett D. Beyler, Mastagni Holstedt, A.P.C.*

Last year I wrote an article for the CAPA newsletter discussing the legal procedure for members in regards to stolen property. Recently, several members have asked for a follow-up article to address looted property and how members ought to address it.

For the sake of brevity, this article will presume that the member has followed all statutory requirements to purchase or pawn on an item of personal property (i.e. CAPSS, etc.) This article will jump ahead. Imagine, you are at your shop and a peace officer enters your store. The officer asks to see a specific item. You retrieve the item for the officer. The officer then asks to see your documentation on this item. You provide it. The officer then says he believes this item was stolen and is subject to a criminal investigation. **What do you do?**

### Stolen Property.

**First**, comply with the peace officers demands.

It may potentially be a criminal



violation to interfere with an officer in the performance of the officer's duties. (*See* Cal. Pen. Code § 148; *see also* Cal. Bus. & Prof. Code § 21465.) A peace officer may inspect anything in plain view as well as inspect pawnbroker's records of loans and pledge property **without a warrant**. (*See* Cal. Fin. Code § 21206; *see also Wolfenbarger v. Williams II*, 826 F.2d 930 (10th Cir. 1987); *G&G Jewelry, Inc. v. City of Oakland*, 989 F.2d 1093 (9th Cir. 1993); *Zeltser v. City of Oakland*, 325 F.3d 1141 (9th Cir. 2003); *Sanders v. City of San Diego*, 93 F.3d 1423 (9th Cir. 1996); *Chait v. City of San Francisco*, 528 Fed.Appx. 760 (9th Cir. 2013).)

That being said, as a pawnbroker you are a victim as well. As such, you have rights. Moreover, you will very likely have more experience than the peace officer in regards to how this procedure works. For example, you should determine whether the officer intends to place a hold or seize the property. If the officer is unsure or indicates an intent to "seize", it is advisable to explain how the 90-day hold works and why it would benefit the peace officer to use the hold over seizure option.

The benefits of using the hold (from the peace officer's perspective) is:

- Less paperwork for the peace officer
- Can be easily renewed
- Easily produced by the pawnbroker to the peace officer if ever need for the criminal prosecution
- Provides an easy opportunity for the purported victim and the pawnbroker to resolve the ownership dispute without further taxing the legal system

The peace officer must do the following within two-days of the hold and/or seizure:

- Provide a "receipt and inventory" of all items seized or placed on hold. (*See* Cal. Bus. & Prof. Code § 216471(a)(2)(A); *see also* Cal. Fin. Code § 21206.7.)
- The name, address, and telephone number of the pawnbroker who reported the acquisition of the property.
- That the law neither requires nor prohibits payment of a fee or any other condition in return for the surrender of the property, except that when the person who reported the property lost, stolen, or embezzled does not choose to participate in the prosecution of an identified alleged thief, the person shall pay the pawnbroker the "out-of-pocket" expenses paid in the acquisition of the property in return for the surrender of the property.
- That if the person who reported the property as lost, stolen, or embezzled takes no action to recover the property from pawnbroker within 60 days of the mailing of the notice, the pawnbroker may treat the property as other property received in the ordinary course of business. During the 60-day notice period, the pawnbroker may not release the property



to any other person.

- That a copy of the notice, with the address of the person who reported the property as lost, stolen, or embezzled deleted, will be mailed the licensed pawnbroker or secondhand dealer who is in possession of the property.

(*See* Cal. Bus. & Prof. Code § 21647(c)(1)-(4); Cal. Fin. Code § 21206.7.)

Keep in mind, however, that a peace officer may decide to seize the property. After all, a peace officer's only concern is to first make sure it is available for any related criminal prosecution. After that, absent a court order, the status quo should be maintained, leaving the owner and pawnbroker to either reach some sort of agreement between themselves or to litigate the issue in the courts. (*See G & G Jewelry, Inc. v. City of Oakland*, *supra*, at pp. 1096, 1098; *Zeltser*, *supra*.) To that end, it may be a good idea to remind the peace officer that he or she does not have **any** authority to return the property to the purported victim. (*See* Cal. Fin. Code § 21206.8(a); see Wolfenbarger, supra, at pp. 931-934.)

**Second**, promptly make a claim of ownership. (*See* Cal. Fin. Code § 21206.8.) Often, the peace officer will provide a department form. If they do not have a form, that does not obviate your responsibility to make a timely claim. If you fail to make a timely claim of ownership, you may waive your ownership interest claims in the property.

**Third**, whenever the property is no longer needed for purposes of criminal investigation, the person with superior right to title and possession must be determined. As noted above, this cannot be done by the peace officer. Moreover, case law is clear that unless the pawnbroker is afforded a hearing, the pawnbroker's due process rights will be violated. (*See Sanders*, *supra*, 93 F.3d 1423; *see also Zeltser*, *supra*, 325 F.3d 1141.)

Here, it is important to keep in mind two factors which complicate the determination of who has superior title to the property (*i.e.* purported "original" victim vs. pawnbroker victim).

**(1)** Whether the peace officer placed a hold OR seized the property?

**a.** If the peace officer seized the property, (Cal. Bus. & Prof. Code § 21647(a)(2)(D); *see also* Cal. Fin. Code § 21206.7) then the "super lien" created for the pawnbroker in Cal. Bus. & Prof. Code § 21647(c)(2) does **not** apply, but the analysis under Cal. Financial Code § 21206.8 and Cal. Penal Code 1407 *et seq*.

**b.** If the peace officer placed a hold on the property, then Cal. Bus. & Prof. Code § 21647(c)(2) does apply, but the pawnbroker only gets the "super lien" on the property **IF** the purported victim "participates in the prosecution of an identified alleged thief."

> ...as a pawnbroker you are a victim as well. As such, you have rights. Moreover, you will very likely have more experience than the peace officer in regards to how this procedure works.

**(2)** Whether charges are actually brought against the thief.

**a.** This obviously complicates the analysis of whether or not the purported victim "participated" in the prosecution.

**b.** If criminal charges are brought against the thief and that individual is convicted, then the criminal court will determine title to the property. (See Cal. Bus. & Prof. Code § 21647(j), Cal. Fin. Code § 21206.8.)

**c.** However, if no criminal charges are brought, and the property ownership is disputed, often the clerk of the property division will determine ownership. (*See Sanders*, *supra*, at pp. 1430-1431; *see also Zeltser*, *supra*, at pp. 1144-1145.)

Now, if a pawnbroker receives property which later turns out to have been "looted", the analysis on disposal of the "looted" property sh ould be treated no different than that of "stolen" property. In short, there is no practical legal difference between the terms "looted property" and "stolen property".

If a pawnbroker's store is "looted" and the property housed therein is "looted" or "stolen", it is advisable that the pawnbroker do the following:

- Make a detailed police report
- Make a detailed property loss and business interruption claim through your business' insurance carrier[1]
- Consider contacting your local pawnbroker members about your store's loss

## Looted Property.

Now, if a pawnbroker receives property which was looted from another pawnbroker, the analysis would still fall under the "stolen property" procedure outlined above. The primary difference is the number of claimants to the stolen property.

If, however, you are a pawnbroker and your store gets "looted", immediately take an inventory and submit a police report. Additionally, file a claim with your own business insurance coverage.

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1. If you have not done so recently, consider contacting your insurance agent to discuss coverages.

# RECOMMENDATIONS REGARDING SMASH AND GRAB ROBBERIES

1. Do not resist in a smash and grab robbery. In addition to sledgehammers and other dangerous tools, the suspect(s) may be armed with guns.
2. Showcases with burglary-resistant, laminated glass and special frames can withstand many blows with a hammer and can prevent or reduce large losses. JSA has not seen robbers take retaliatory action when laminated glass is used and robbers are unable to enter a showcase or are able to take only a small amount of merchandise from a small hole. Furthermore, robbers frequently cut themselves on small holes and leave behind valuable DNA evidence from blood.
3. Having a audible glass breakage alarm on your showcases can scare smash and grab robbers away, who are trying to remain in a target store for less than a minute.
4. Having buzzers on the door can help to keep out potential robbers.
5. Hiring armed, off-duty police officers in the store is a deterrent to smash and grab robbers.
6. Spreading high end watch and loose diamond merchandise among several showcases, and not concentrated in one showcase, can reduce the amount of the loss in a smash and grab robbery.
7. Surveillance photos from eye-level cameras inside and outside the store provide excellent evidence for police. Ceiling cameras too often capture useless photos of the top of heads or hats.
8. Keeping a log book of suspicious incidents, and putting aside and saving sv urveillance video of suspicious incidents, can be a great help in subsequent investigations.
9. Sharing information and photos among local jewelers and police, and with JSA, regarding casings and suspects can help prevent crime and assist with investigations. ■



# BASIC SECURITY RECOMMENDATIONS WHEN CARRYING JEWELRY OFF PREMISES

1. Never resist in a robbery, and never chase after the robbers. These criminals will not hesitate to use deadly force.
2. Salespersons must take evasive driving action after every sales call, and before returning to their hotel, home, or office. Evasive driving tactics include driving very slowly, driving around the block, making U-turns or pulling into a bank or fast-food parking lot. Are one or more cars following you? Be aware that gangs may be using multiple vehicles.
3. Vary your route and time when traveling between home and your jewelry business. Check occasionally to see if you are being followed.
4. As you drive to a retail location or your home, scout the area. Park as close to the main entrance to your destination as possible. Do not enter or exit by a rear or secluded entrance. Do not remain seated in your parked car for any length of time before or after sales calls.
5. Do not fall for distractions. If someone approaches you for change or directions, consider yourself a crime target and move on swiftly.
6. Do not leave jewelry merchandise in an unattended vehicle.
7. If you are being followed, call 911 and say I am about to be the victim of a robbery. If possible make your call obvious to the suspicious persons. When criminals see you using your cell phone after you have spotted them, they are less likely to pursue.
8. If you experience trouble with your car trunk lock, door lock or ignition key, or have a flat tire, radiator trouble or are bumped by another car, consider yourself a crime target. Immediately get yourself to a place of safety.
9. Jewelers should not take valuable jewelry merchandise to their homes.
10. Even if you are not carrying jewelry merchandise, if you are visiting jewelry premises and are carrying a bag of any sort, you are a target.
11. Gangs have been known to place GPS devices on the autos of salespersons. There are electronic devices available to detect the presence of GPS devices. Salespersons should also regularly inspect underneath their vehicle, and can carefully check their vehicle when a car is on a rack for an oil change.
12. Keep your travel plans confidential, including flights, departure and arrival times, hotels, rental cars and locations to be visited.
13. Do not gas up prior to returning a rental car. Either purchase through the rental car company beforehand, or simply return the car. It is important to limit your exposure to risk as much as possible, whether at rental car companies, restaurants, hotels, parking lots and elsewhere.
14. When you are entering a hotel lobby to check in, be particularly careful you are not being followed.
15. Retailers and traveling salespersons should cooperate, so that when a salesperson leaves a store to drive away, the retailer can keep an eye on the salesperson to make sure the salesperson is not being followed.
16. Have adequate jewelry insurance. One uninsured crime loss can wipe out a lifetime of work. ■

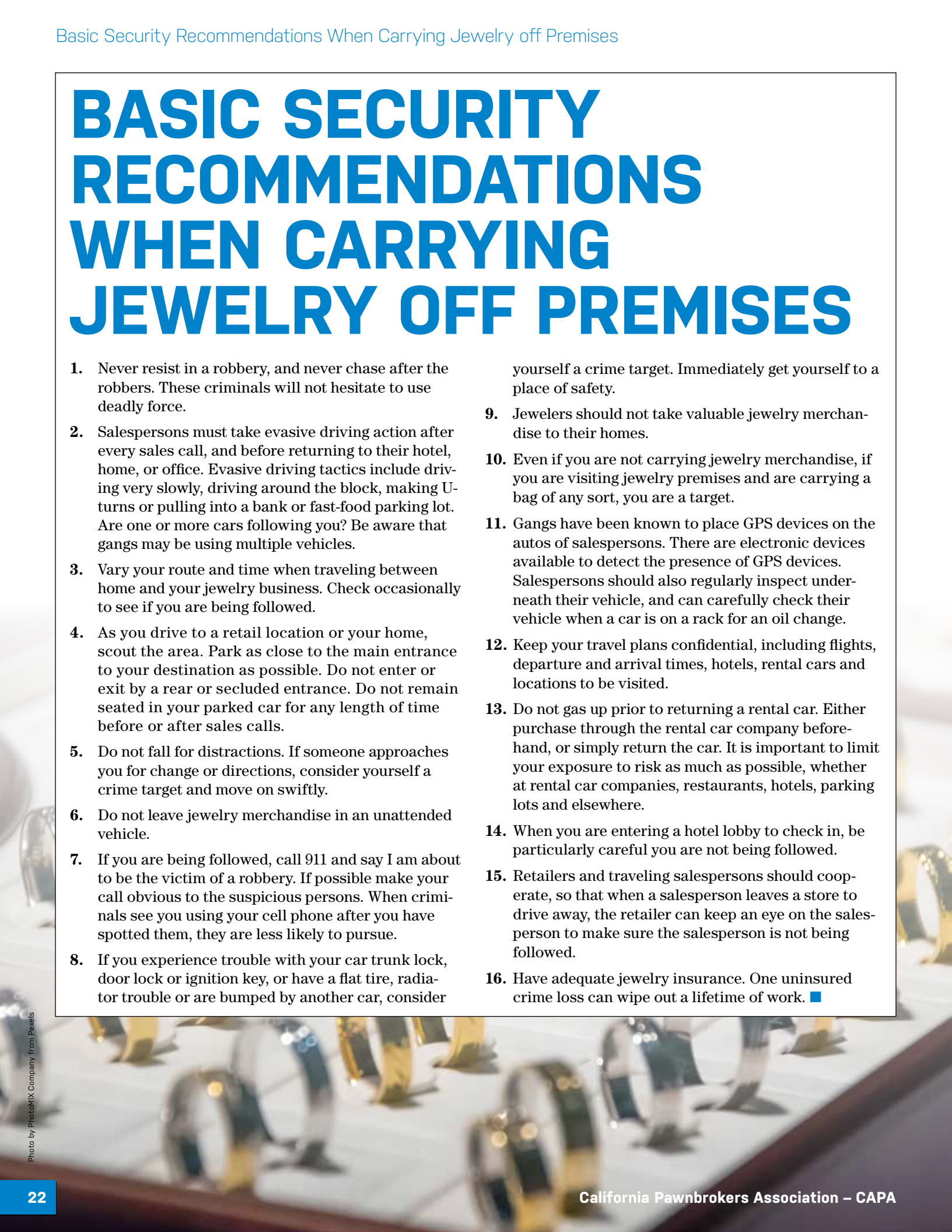


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# GOLD TESTING TECHNIQUES

*Rafael Amador, United Precious Metal Refining, Inc.*

When it comes to testing and buying gold, most pawnshops have already figured out what works best for them. There are a number of options out there for testing gold (and silver) jewelry from the traditional acid test to the more advanced x-ray machines. In this article, we're going to look at a few options currently being used in pawnshops across the country.

## Rare Earth Magnets



Your first line of defense when testing gold should be **a good rare earth magnet**. Using this highly affordable and readily available tool allows you to quickly identify non-gold items in a large gold scrap lot or when testing a single item.

Using the magnet, run it over the piece(s) you're looking at testing. Gold, as an element, has no magnetic properties and as such, you should not feel any pull or see pieces moving when you are running the magnet over them. There are of course some exceptions:

- Many clasps have iron springs in them that will be pulled by the magnet – this is to be expected and really doesn't account for much weight.
- You will also have some hollow earrings that have a metallic rod inserted – be sure to avoid these as you don't want to pay gold prices for a few grams or pennyweights of iron.

Keeping a good rare earth magnet at the counter can help you quickly identify those fake or plated items to avoid wasting valuable time testing them.

## Acid & Stone

Perhaps the most commonly used test for gold testing over the counter is the scratch test. This process allows you to visually identify if a piece, when scratched on the stone, holds utilizing the 10K, 14K, 18K and 22K acid. This is a very popular and affordable option for everyday use with testing scrap gold and silver. The complete kit sells for in the range of $80-100 for three acids, a stone and a nice wooden box to keep them in. Additional bottles of acid are also sold separately for about $3 to $4 per bottle.

**Tricks of the Trade:** A handy tip to testing silver that is quite popular involves using the 18K gold acid. When you scratch sterling on the stone and apply the 18K gold acid, the sterling will turn a milky blue. That's how you know it is in fact Sterling Silver.



A few things to be careful of when using the Acid & Stone Scratch Test…

1. Be sure to **clean the stone thoroughly** after every use. I've seen many shops that use gun oil to clean the surface while others just use a damp cloth. A popular method of cleaning is utilizing the 18K or 22K acid which helps clean the surface completely of any remaining scratch samples. Whatever you use, be sure it completely removes the scratches to avoid cross contamination for future testing.
2. Speaking of **cross contamination**, using the acids properly also helps avoid this problem. I've been in a number of shops where I've seen pawnbrokers touching the tip of the bottle to the stone to test metal. You have to consider that little bottle like a turkey baster – when you squeeze, the acid will come out but when you release, it will suck up any liquid (and loose particles) it is in contact with. Having gold particles or acid drawn into your acid bottle will contaminate the acid and may cause your results to be skewed. I always recommend applying the acid by letting a drop fall onto your scratch area from about a half inch to a quarter of an inch above. This allows you to avoid contaminating your acid giving it a longer shelf life.
3. When it comes to shelf life, the jury is still out. While many pawnbrokers will typically go through a bottle within a month, some will use them over the course of a few months. **Knowing when to replenish your acid** is key to ensure proper results. I always recommend writing the date you open a fresh bottle with a sharpie right on the bottle. Doing this will allow you to measure the time it takes you to swap out a new one. This will also help you avoid using old and stale acid which may be less potent and can affect your results. I always recommend tossing out open bottles after 3 months. For the cost of a bottle of acid, it's worth the $3 cost when you're taking in thousands of dollars in gold jewelry.
4. For the best possible result, I recommend **filing into the piece** to get past any surface plating. If you don't file into the piece, you're essentially rubbing the plat-

ing onto your stone and testing that which can give you a false reading. When you scrape off that plating, you have the ability to test the underlying metal which is what you want to reach for accurate results. For chains and heavy link bracelets, be sure to try a few links (not just one) and select links a few inches apart. When chains are repaired or extended, new links are often added. Unfortunately, the new links aren't always the same karat. Testing a few links throughout the chain or bracelet will be your best bet to make sure you are getting what you are paying for. Be sure to test the first link at each end as most new links are added at the clasp.

**Note:** With the reemergence of the heavy Cuban Link Chains, it is always recommended to cut a link and test the middle. These heavy chains can mean thousands of dollars lost when taking in a plated or fake chain.)

Testing using the stone and acid is very subjective and is truly a matter of practice. The more you do this, the better you become at discerning results. Be sure to give it a few seconds (not just a quick test and clean) to really let the acid do its job. Many times, you'll notice the sample begins to fade away quickly while at times it can sit there for a while without any noticeable change.

## Electronic Gold Testers

When it comes to electronic gold testers, you have many choices and with them, come options.

Perhaps the most popularly used tester in the market is the **GemOro AuRACLE-3 Digital Gold and Platinum Tester.** This device gives you two test modes for Fast Test



Yellow & Enhanced Mode and lets you test from 6K to 24K as well as platinum. Calibrating it is easy using a standard for 14K or 18K. The tester runs about $550 with the replacement pens (sold separately) being about $28. This unit's ease of use and versatility is one of the reasons it's so popular. Be sure to follow the instructions to ensure proper use and accurate results.

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Going back a little further, the old school electronic unit is Tri Electronics **GT-3000** (priced at around $230) and the slightly newer **GT-4000** (priced around $350). These units have been around for many years and use no harmful chemicals or acids. The pen is refilled with the GXL Gel Tubes which cost about $24. It's important to keep these refrigerated until use to extend their shelf life. When it comes to using this machine, it is also pretty easy. I always recommend avoiding contact with the gel and the prongs on the machine to avoid false readings.

**SIDE NOTE:** I've used these units myself when I was working at a gold buying company back in 2005-2010 before joining United PMR. We were testing over a million dollars a day in scrap using both the Acid & Stone Test as well as the Tri-Electronic testers and had great results when sending in lots for refining to our refiner (which happened to be United PMR).

As with any test, you want to make sure to scrape the piece at the point you're looking to test then wipe it with a clean, damp cloth to remove any plating particles from the surface. Many folks clean the piece with rubbing alcohol before testing it which also seems to be quite effective.

For bullion testing, there is a great device out now that reads coins and bars with excellent reviews. The **Sigma Precious Metal Verifier** runs about $680 and has been popping up in more and more shops across the country. This unit allows you to:

(a) detect counterfeit coins and bars,

(b) measure underneath the surface, and

(c) read through slabs or numismatic cases.

**NOTE:** We have seen an increase in counterfeit bullion lately. Online sources such as wish.com are selling these fake bars and coins as well as fake jewelry all over the world. Unfortunately, people are using this fake material to deceive others who then end up coming to shops to pawn or sell these items.

You want to make sure you're using your Sigma correctly to avoid any issues. The Sigma has a number of settings depending on the item you're testing. If you fail to use the proper setting, you will get a false reading. Refer to the user manual for proper use and instructions.

## XRF or X-Ray Fluorescence

In recent years and due largely to the gold rush we saw back in September 2011 when gold hit $1920.30 a T/oz., pawnbrokers and gold buyers began looking into more sophisticated


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ways of testing gold. The quest for near perfect results lead to the popularity of the XRF guns which are commonly used today in pawnshops. But how precise are these machines?




Once again, **I must stress the importance of proper care and usage of the machine itself**. While the x-ray gun appears to be a more precise method of testing, it is in fact contingent upon maintaining and using the equipment properly.

First and foremost, I always recommend **having a few standards.** A standard is a small piece of gold you can buy from your metals supplier (like United PMR) which is karated and provides you with a plumb sample to test. Most of the larger table top X-ray machines and some of the smaller hand-held units allow you to program the machine using standards. This is basically educating your x-ray – the more standards you use, the better off your machine will be at identifying the different elements in the pieces you are testing.

Once again, **scraping the surface** most definitely comes into play with the XRF test. This isn't like an X-ray at the doctor's office. This particular device isn't looking deep but rather measuring the surface of the piece. Scraping and properly cleaning the surface is essential to get a true and accurate reading of the metal beneath any possible plating. Once again, the use of rubbing alcohol to clean the surface should help provide a more accurate reading.

When it comes to the piece, be sure to **test a flat surface**. Testing a ring, for example, is difficult because of the rounded nature of the piece. Try and focus the aim onto a flat surface to avoid the X-ray beams sliding off or bouncing off of the curved surface(s) which can in turn provide an incorrect reading.

**Take your time** and don't cut corners. When it comes to testing with XRF, most units come with a set timeframe for each test. Some of the machines are set to 30 seconds while others are pre-set for 60 seconds. Don't rush the test. Let the machine do its job. If you notice a huge change from start to finish, try testing another area.

I recommend **testing various spots, not just one**. On a chain, test various links along the chain and a few near the clasp. With melted bars or buttons, test both sides and test various locations. If you take your time and are precise with your procedures, this tool can be quite useful. However, it is important to note that it is not 100% accurate and is, as noted above, subject to user error.

**SIDE NOTE:** At primary precious metal refineries like United PMR, the XRF analysis is used solely for preliminary analysis. This is for determining and approximate value of your scrap lot for advances and is not utilized for determining final results or payout. Refiners will use a more precise scientific measure called a Fire Assay. ■


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# RIOTS

## A PAWNBROKERS POTENTIAL LIABILITY FOR A CUSTOMER'S PROPERTY THAT IS LOST, STOLEN, DAMAGED, OR DESTROYED.

*Brett Beyler, Mastagni Holstedt, A.P.C.*

## I. Legal Standard.

The area of property law which addresses one's potential liability for the holding personal property on behalf of another is called "bailment" law. Every pawn transaction entered into by a pawnbroker with a customer creates a "bailment" making the customer the "bailor" and the pawnbroker the "bailee." However, for ease of reading, I will refrain from using this archaic terminology of "bailor" and "bailee" and refer to each as customer and pawnbroker, respectively.

Whenever a pawnbroker fails to return or deliver the bailed property in an undamaged condition, the customer may bring an action to recover damages for breach of bailment contract and/or negligence based on proof that the pawnbroker failed to exercise due care to safeguard the bailed property from damage, loss, or theft. Under either theory, the customer's case will hinge on whether or not the pawnbroker has breached a duty to exercise reasonable care of the bailed property. This article explains the relevant law and evaluates the proof of facts necessary to establish a pawnbroker's liability for damage to or loss of bailed property.

Under a bailment theory, the customer does not bear the initial burden of producing evidence of the negligent acts or omissions of the bailee – meaning: in order to file a lawsuit, the customer merely must plead a cognizable action within the statute of limitations. The customer does not have to explain, in detail, everything the pawnbroker did not do and what they should have done. All of that will need to be proved by the customer, but the customer gets the advantage of extensive discovery. However, the customer does bear that burden to prove its cause of action at trial.

In order to establish a prima facie case of breach of bailment contract, the customer must prove:

(1) the existence of a bailment contract;

(2) the delivery of the bailed property to the bailee;

(3) the failure of the pawnbroker to deliver the bailed property undamaged pursuant to the terms of the bailment. No allegation of negligence need be made.

If the customer produces evidence to satisfy the elements of a prima facie case, the pawnbroker has the duty of going forward with evidence accounting for the damage or loss and if the pawnbroker fails to do so, he is liable. It is assumed under those circumstances that the pawnbroker has failed to exercise the duty of care required by the bailment.

On the other hand, should the pawnbroker go forward with evidence showing that the personality was damaged or lost and the manner in which it was damaged or lost, and the evidence does not disclose a lack of due care on his part, **then the burden of proof shifts back to the customer who must prove negligence on the part of the pawnbroker**.

The customer's and bailee's respective burdens of proof can be one of the more confusing issues in the law of bailments because the courts have not always made it clear which party bears the ultimate burden of proof with respect to the bailee's liability for damage, loss or theft of the bailed property. Broadly speaking, however, in an action based on breach of contract and predicated on the pawnbroker's (or bailee's) failure to return the property, the pawnbroker has the burden of proving that he exercised due care to prevent the damage or loss, whereas in an action based on the bailee's negligence or containing an express allegation of negligence, the customer has the burden of proof as to the bailee's breach of a duty to exercise care to prevent the damage or loss of the bailed property. These general principles may sometimes be obscured, however, when the court fails to distinguish between actions based on contract and those based on negligence. For example, even without express allegations of negligence, it may be argued that since the pawnbroker's duty to return bailed property is not absolute but qualified by the limits of his duty of care, negligence forms the gravamen of the action and, that the ultimate burden of proof is thus on the customer. Determining which party has the burden of proof may be further confounded by whether a customer's recovery is said to be based on the pawnbroker's default in returning the bailed property or on the bailee's negligence in connection with its damage or loss.

Thus, in a contract action, the burden of persuasion rests with the plaintiff throughout the trial; however, it is merely the burden of showing the bailment contract and the bailee's failure to perform the contract by failing to return the property in an undamaged condition. But when the pawnbroker seeks to defend the contract action by asserting the affirmative defense

that the property was damaged without negligence on his part, the pawnbroker has the burden of proving his own freedom from negligence, or, as otherwise stated, that he exercised due care to prevent the damage or loss. Thus, with respect to the affirmative defense, the pawnbroker has the burden of persuasion.

## II. Best Practices.

INSURANCE! I presume every pawnbroker has a large insurance policy. That being said, you should reach out to your insurance broker and go through what your coverages include. Specifically, look for total limits of coverages and exclusions of coverages. Make sure they are high enough to cover a total loss of merchandise. Many insurance policies have exclusions. Fortunately, most insurance carriers will issue a "rider" for you to provide coverage for an otherwise excluded event. In addition to coverages, you should discuss adding on "legal defense" insurance – that is, if you are sued, the insurance carrier will pay the attorneys' legal fees, costs, and indemnify you for any damages – much like auto insurance.

Review your business policies and practices. What safety features do you have in place to keep the merchandise safe in the event of a riot? What if the store is burned down? Do you have backups for your customers merchandise? Your inventory? If you have a comprehensive business policy and practice that can address what to do in case of a riot? Is it being implemented every day? If not, what does your training look like? Where is your shop located? Is it in a high crime area? Have you had riots before? How did your respond to those in the past? Did you implement new policies and procedures? Were they reasonable? Were they effective?

In bailment lawsuits, the best defense is a comprehensive offense. In legal parlance, that means raising and litigating "affirmative" defenses. As discussed above, if the pawnbroker can show they were not negligent, or an unforeseeable criminal act caused the damage/harm, then the pawnbroker can defend against a lawsuit brought on that basis. However, in order to raise an affirmative defense, the pawnbroker must be able to prove it. You can only prove what you can show or demonstrate as "evidence." That takes the form of showing what caused the event, what you did to anticipate or prevent the event, and so on.

## III. Conclusion.

If you have questions or concerns about your potential exposure and how you can ensure that your business is in the best possible situation for success, give CAPA a call today. As a CAPA member you have instant access to a host of invaluable resources.

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# CLIENT DEATH AFFIDAVIT

*Brett Beyler, Mastagni Holstedt, A.P.C.*

A common issue among the industry is one that cannot be avoided—the death of a customer. You may have experienced a relative of a customer entering your store claiming that their relative who has pledged property to you as a security for the loan has passed. What happens next? The following article will briefly outline the requirements of the affidavit and the required documentation to accompany it.

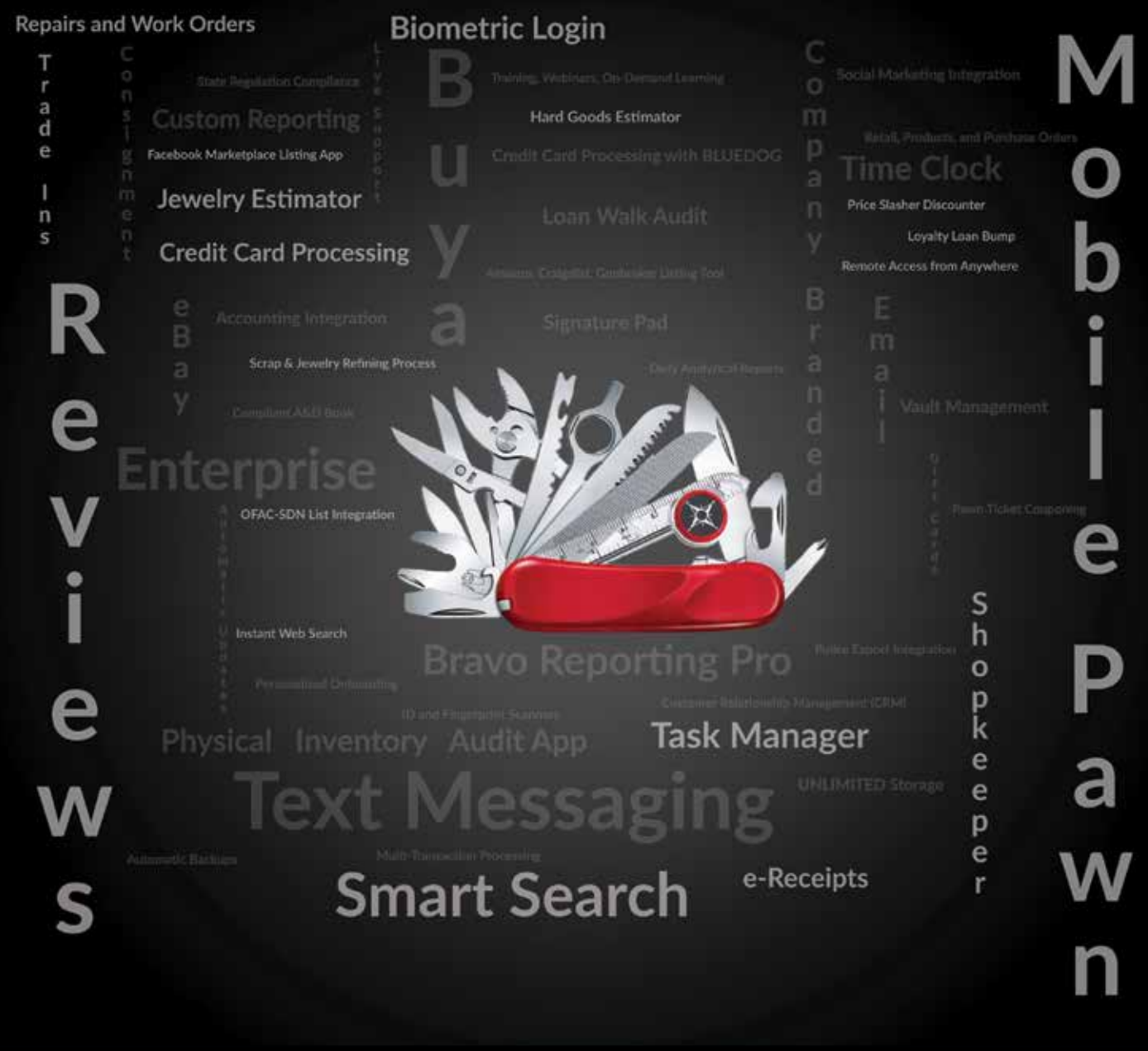
California Probate Code section 13100 allows personal property to be collected for the transfer of personal property of $166,250 or less. Personal property includes jewelry, automobiles, bank accounts, stocks, bonds, and household goods. Under California law, if a minimum of forty days has passed from the customer's death, no one has opened a probate proceeding, and the total amount of the customer's real and personal property assets after death is less than $166,250, a small estate affidavit may be used to transfer personal property. This will allow an individual to transfer real property without formal court proceedings.

In the event the surviving relative enters your store claiming ownership, the surviving relative must provide the following: (1) a certified copy of the decedent's death certificate; 2) the borrower's copies of the pawn contracts which the pledged property acts as security; (3) Copy of consent—if a probate of the decedent's estate is pending, and the decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration, a copy of the consent and the Court Letter of Administration issued to the personal representative must be attached.

Not only will the surviving relative have to provide this proof, they must also sign a "small estate affidavit" attesting under penalty of perjury that what they are providing is true and correct. A California small estate affidavit (i.e., Client Death Affidavit) must include specific information as required by the probate code. While this may seem daunting, this is a relatively simple form that may be utilized assuming there is no probate proceeding and the total amount of the customer's real and personal property is less than $166,250. Once the Company has received their copy of the signed affidavit and the supporting documentation, the surviving relative may take ownership of the property. It is recommended that the Company keep copies of the affidavit and paperwork in the event there are future disputes. If the customer's real and personal property is more than $166,250, we suggest contacting a local probate attorney for assistance. If you would like a copy of the suggested Client Death Affidavit, please reach out to CAPA or reference your CAPA handbook for a copy.

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