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Department of Justice

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BY FAX: *****

RE: Electronic "On-Time Payment System"
 ICCC Informal Advisory # 90

Dear *****:

Our office has received your inquiry as to whether an electronic "on-time payment system" is a permissible device for a lien-holder to use to effectuate an actual repossession or its functional equivalent in the event of a default in a loan secured by an automobile, or otherwise as a collection device.

Summary: We do not believe that this device is permissible in view of the requirements of the right to cure provisions of the Iowa Consumer Credit Code, §§ 537.5110, 537.5111, and other provisions of the ICCC.¹

Analysis: The "on-time payment system" is an electronic device installed in a motor vehicle which is serving as collateral for a purchase-money loan. It is a controversial device which is currently being used by a large Detroit-based dealer. The device permits the creditor/collector

¹ Moreover, while Administrator of the Iowa Credit Code has no enforcement role regarding product safety, we note that there has been at least one report of a malfunction of such a device while the vehicle was in moving traffic. While there might be an argument for potential liability for a malfunctioning device under the Iowa Fair Debt Collection Practices Act, Iowa Code § 537.7103, if, for example, it triggered in the absence of default, the scope of that potential liability would pale in comparison to the potential liability faced by the dealer in the event personal injury occurred as a result of a malfunction in the wrong place at the wrong time.

to freeze the car, so that it will not start when payments are not timely made.

As you note, under Iowa Code § 537.1107(1), a consumer cannot agree to waive or forego rights and benefits granted under the Iowa Consumer Credit Code (ICCC). The ICCC includes a definition of default, § 537.5109.² It also requires a 20-day notice of right to cure before acceleration, demand for or repossession of collateral. ICCC § 537.5110(4).³ The ICCC also

² Default is defined as a payment more than 10 days late, or a failure to observe another term which materially impairs the collateral or the prospect of payment. If the latter condition of "default" is invoked, the burden of establishing material impairment is on the creditor.

³ There is an ambiguity in Iowa Code § 537.5110 concerning the interplay between a "voluntary surrender" and the right to a cure provision. While it is perhaps unnecessary to delve in depth into the ambiguity, it may be helpful, for a look at § 537.5110(5) in isolation may leave what we believe is an erroneous impression that a prior consent to installation of such a device is permissible despite ICCC § 537.1107.

Considering the intent and purpose of the ICCC, and the mandate to construe it liberally to promote its purposes, § 537.1102(1), and to give full effect to all the provisions of §§ 537.5110(3), (4), and (5) without rendering any of them superfluous, our office interprets and harmonizes those three provisions in this way:

§ 537.5110(3): This section mandates a mutual waiver of certain rights: for a voluntary surrender to eliminate the consumer's right to a cure notice and 20-day cure period, the creditor must agree to forego its right to collect a deficiency. The precondition regarding the creditors accepting the voluntarily surrendered collateral in "full satisfaction of any debt owing on the transaction in default" is a non-uniform provision, not present in the UCCC. The Comment to the UCCC provision which permits voluntary surrender explains that the exclusion is there because "if a default is coupled with a voluntary surrender of possession of goods that are collateral for the debt, it is considered that the consumer regards a continuing relationship at an end, and no notice is provided for." Comment 1 to 1974 UCCC § 5-110. However, the Iowa legislature added the reciprocity prong, presumably understanding that a great many consumers believe that turning in the car indeed completely ends the matter, and do not understand that they may still face a deficiency. The nature of repossession sales which means that the consumer's account may not get credited for the fair market value of the resold car is even more of a shock to many consumers. Since waivers, as a general rule, must be knowing, voluntary, and understanding, the reciprocity provision prevents surprise.

§ 537.5110(4)(a): This provision requires that the creditor make **no demand** for collateral or repossess until 20 days has passed after a proper notice of right to cure has been given. However, the creditor could accept voluntary surrender within the 20-day period **following** a proper notice of right to cure. In other words, if the consumer brought the car back in 5 days after receipt of a proper notice of cure, the creditor can accept that without waiting another 15 days. In that situation, the creditor has not foregone its right to collect a deficiency by accepting a post-notice voluntary surrender within the cure-period.

§ 537.5110(5): This provision parallels UCCC § 5.111(3) [1974], the comment to which states that the cure provision imposes no limitation on the creditor's proceeding against voluntarily surrendered goods. Comment 4, § 5.110 (referencing § 5.111) [1974]. However, that must be read in the context of Iowa's non-uniform provision of § 537.5110(3) which mandates that accepting a pre-notice "voluntary surrender" can only deprive the consumers of a cure right if it is accompanied by the creditor's waiver of its right to a deficiency. To harmonize § 537.5110(3) and 537.5110(5), as required by principles of statutory construction, we interpret § 537.5110(5) as follows: if the required notice of right to cure is given, and the consumer voluntarily surrenders the goods, the creditor can then proceed with the Article 9 procedure to realize upon the collateral, including collecting on a deficiency; if the

incorporates the provisions of Article 9 of the UCC, §§ 537.1103, 537.5103. The right granted to secured parties under Article 9 of the UCC to self-help repossession is not unlimited; force is not permitted, nor is breach of the peace, physical entry into closed premises, at least under certain conditions. It is certainly easy to predict any number of situations in which ill-timed use of this device would be likely to trigger a breach of the peace. For example, if a wired car died at a stop sign on a hill in Dubuque in a winter snow, and would not restart because of the device, traffic back-ups or fender-benders would affect not only the borrower, but other citizens as well. As noted in note 1, the possibility of a malfunction while the car was in moving traffic could present a safety hazard to the consumer and to others. The ICCC also includes the Iowa Fair Debt Collection Practices Act, which prohibits coercive, oppressive, harassing, or abusive practices in collecting a debt. ICCC § 537.5103. The Iowa Act applies to creditors collecting their own debts, as well as to third-party collectors, and thus would apply to lien-holders.

The legal protections for the consumer which provide some limitations on the secured parties' right to self-help repossession are significant, since the use of an extra-judicial process assumes that there was a legal default, and there is no valid claim or defense to the creditor's claim. It is not always the case that repossession occurs when it is legally warranted: for example, some dealers have improperly resorted to repossession in the spot delivery context, when there was no legal right for the dealer to retake the vehicle.

In addition, use of such a device could constitute an unfair practice pursuant to the Iowa Consumer Fraud Act, Iowa Code §§ 714.16(2)(a), subjecting the violator to a civil action by the Attorney General for injunctive relief, civil penalties, consumer restitution and attorneys fees and costs.

Conclusion: Looking at the sum of the ICCC provisions which relate to default, cure, repossession, and debt collection, we do not believe that this electronic device can be used in Iowa, and would likely bring an enforcement action in the event of its use.

Sincerely,

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Deputy Administrator, Iowa
Consumer Credit Code

consumer voluntarily surrendered the collateral prior to demand and prior to notice of right to cure, the creditor may proceed with the Article 9 disposition, but, to give effect to subsection 3, that must be deemed "full satisfaction of any debt."

While this may seem a lengthy digression, we believe it explains why we do not believe why § 537.5110(5) would provide a justification for a creditor's using boilerplate contract language at the time of sale to circumvent § 537.1107 as it would apply to this device.