When Is Assignment of an Income Tax Refund a Consumer Loan?

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Case Note: Income Tax Buyers, Inc. v. Hamm: When is Assignment of an Income Tax Refund a Consumer Loan?

By Alvin C. Harrell

I. Introduction — The Hamm Case

A recent case from South Carolina, Income Tax Buyers, Inc. v. Hamm, is the latest in a long line of cases dating back to the 19th century that deal with the question of whether a consumer loan is a consumer loan and, if not, whether the assignment of a consumer loan is a consumer loan. The case of Hamm v. Hamm is characterized by a 100-year-old law precedent that suggests that such an assignment should be treated as a consumer loan even though it is in form and does not secure an obligation to repay.

Hamm arose from the Consumer Affairs of the South Carolina Department of Consumer Affairs ("SCDA") and, ultimately, the Court of Common Pleas for the County of Anderson, South Carolina, concluded that these transactions were consumer loans that violated the SCDA's mortgage law. The case of Hamm v. Hamm is characterized by a 100-year-old law precedent that suggests that such an assignment should be treated as a consumer loan even though it is in form and does not secure an obligation to repay.

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The regulatory scheme the legislation establishes is far more dangerous to the banking industry than the laws adopted as part of the New Deal. The restrictions in the laws of the 1930s were accompanied by protections and guarantees for banks that, for many years, offset the negative effects of the restrictions. In many ways, banking was protected from competition.

The recent legislation goes in the opposite direction. It protects other financial services providers from competition by banks. The only thing that it protects bankers from is themselves.

Now, I'm no fan of protection as public policy. And I would never defend it. But my point is that the New Deal protections showed that the lawmakers of the 1930s at least had the idea that bankers operate in a real world, within a market economy, and against the competition.

The lawmakers of 1991, on the other hand, seem to have thought that banks operate in a vacuum where the most important goal of public policy is to limit the exposure of the bank insurance fund.

The reality is that bankers face competition -- domestic and international competition -- and moreover, every day. The only products that depository institutions can claim as their own these days are federally-insured deposits and access to the payments system.

Oddly enough, securities firms under the new legislation will have access to the Fed's discount window while banks will have their use of it severely restricted. Can direct access to the payment systems be that far behind? If that occurs, is federal deposit insurance enough of an attraction to keep the banking industry afloat? I'm afraid the answer to that question can be found in the mass exodus of deposits from your banks into the uninsured money market funds operated by securities firms.

When it comes to banking, the competition couldn't be more clear. When it comes to banking, Congress's contribution has been a mountain of restrictive policies.

For more than 50 years, the decisions made in Washington have affected your institutions just as much as the decisions made in your board rooms and on your officers' platforms. Today that is more true than ever. Tomorrow it will be even more so.

In the meantime, however, all of us are going to have to get accustomed to closer regulation and supervision. And when those tough new regulations appear in the Federal Register, don't blame it on the regulators. It isn't a matter of policy or individual preference -- it's the law. And the law is going to make life a lot harder for both the regulated and the regulator.

One purpose of this symposium is to help describe the resulting legal environment for banking in the 1990s.

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the parties intended. In addition, earlier in its opinion the court cited the following contractual provision as evidence that the assignments were in fact credit transactions:

[In the event the refund due for the tax period just ended is not paid by the Federal or State government within six weeks of the submission of my returns, I hereby agree to pay the buyer [ITC] the amount of the refund due within 10 days of notification.]

The Hamm court cited this paragraph as evidence that ITB "does not view the refund as a chose in action because the borrower owes it as a sum of money whether the refund or 'chose' is valuable to ITB or not. This is a debt." Finally, the court specifically rejected Cullen v. Bragg and its holding that an absolute assignment of the right to a tax refund is the sale of a chose in action and not a credit transaction. 8

II. Is an Absolute Assignment of a Chose in Action a Credit Transaction?

The contractual provision in Hamm (quoted supra) may or may not evidence an obligation to repay, sufficient to characterize that transaction as a debt. If it does evidence a debt, Hamm is distinguishable from those cases involving an absolute assignment of a chose in action with no right of recourse against the assignor (save an action for breach of good faith or a possible action for breach of a sales warranty). Unfortunately, the Hamm court did not seem to recognize this distinction and instead painted with a broad brush in rejecting established precedent from other jurisdictions relating to the nature and assignability of choses in action. As a result the Hamm analysis raises more questions than it answers. This case note will address some of these questions and other fundamental issues that may arise in the context of tax refund assignment transactions.

Putting aside for a moment the question whether the contract in Hamm created a debt because of the assignor's obligation to repay any shortfall in the tax refund, it seems clear that an absolute assignment of a chose in action is not, on its face, a credit transaction. The Hamm court expressed concern that recognizing this basic point might open the door to evasion of the UCC consumer protection rules. However, the court did not discuss the equivalent implications of extending the consumer credit code to transactions involving a purely cash sale of personal property. Under the Hamm standard, every consumer sale of personal property could be judicially scrutinized to see if the disparity between the price paid and the value of the property sold exceeds an annualized 18%. There is no basis in the

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that the current thrift and bank crisis is not repeated in the future. In some cases, these legislative initiatives significantly expand existing legal obligations and responsibilities, but in many cases they do not. By making even existing legal obligations of directors and officers of depository institutions the subject of federal legislation, however, Congress has effectively forced those directors and officers to focus on the discharge of their obligations to a significantly greater degree than in the past, and in a manner that will both materially increase the costs associated with regulatory compliance, and perhaps effect fundamental changes in the relationships between directors of insured depository institutions on the one hand, and the management whose conduct they are obliged to oversee on the other.

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U3C for such an extension of the law's scope.

Of course, a transaction that appears on its face to be an absolute sale, may, in fact, be a credit transaction. There are well accepted principles for determining whether this is the case. Unfortunately, the Hamm court did not discuss these issues in its opinion. This raises the question whether an assignment of a tax refund by a consumer at a discounted price is inherently a transaction that is in substance a loan even though it is in form a sale. Various analogies may be argued as a basis for making this determination.

III. Analogy to the Absolute Deed/Equitable Mortgage Cases

Generally an assignment or conveyance that is absolute on its face creates no debt and is not treated as a credit transaction. However, a court of equity may treat a deed absolute on its face as an equitable mortgage, where the parties intended the deed as security for a debt. While this equitable doctrine has potential applicability in almost any consensual transaction, it is inherently fact-specific and has not been used to recharacterize an entire class of unconditional sales transactions, absent specific evidence as to the parties' intent. In Hamm the court seemed to suggest that it did not consider evidence of the parties' actual intent to be relevant to the inquiry.

In contrast to Hamm, the doctrine of equitable mortgage has generally been applied on a case-by-case factual basis as an equitable exception to an otherwise applicable rule of law, based on the expressed intent of the parties to a specific transaction. It has not been used to reverse the plain meaning of an entire range of legal transactions where the parties' agreement is clear on its face and is uncontradicted by other evidence. Indeed to do so would violate the dividing line between law and equity that has been recognized for over 300 years. Furthermore, the doctrine has never been used to create a debt where none exists.

The typical equitable mortgage case involves a deed that was intended as security for a debt that has been clearly established by other evidence. As an equitable remedy, the doctrine of equitable mortgage is used only in exceptional cases where there is extraordinary factual evidence to justify overriding the normal rule of law. No court of equity has ever claimed that the doctrine of equitable mortgage inherently converts all deeds into mortgages, and it would be inconsistent to do so with regard to assignments of choses in action.

An interesting, related analogy might be the contract for deed, which has been treated as a substitute for, and the legal equivalent of, a note and mortgage. In effect such contracts have been treated as evidencing a debt despite being labeled as sales contracts. However, these cases differ from the assignment of a tax refund in two important ways: First, unlike many tax refund assignments, the contract for deed purchaser has a contractual obligation to pay (a debt); and second, there is a long and consistent judicial history equating contracts for deeds to a mortgage transaction. Therefore, it cannot be concluded that either the equitable mortgage cases or the contract for deed cases support the proposition that an assignment of a tax refund is inherently a credit transaction.

IV. Analogy to an Assignment of Wages

The Hamm court suggested that the cases construing assignments of wages offer a useful analogy to the assignment of a tax refund. Although useful to some extent, such an analogy has its limits. Moreover, to the extent relevant, an analysis of the cases outside South Carolina suggests that the sale of a chose in action is not inherently a credit transaction.

The wage assignment can be divided into two categories. Roughly half of the cases recognize outright that an absolute assignment of wages represents the sale of a chose in action and is not a credit transaction. The language in Tollison v. George is typical:

[The transaction was not a loan, nor a partial assignment of an account, but was an absolute and unconditional sale of the Attorney's salary or wages earned up to a certain date.]

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The [usury laws] never intended to interfere with the right of the citizen

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9. The Truth in Lending Act § 103(a); 15 U.S.C. § 1607(b); defines credit as the "right to defer payment of a debt." See also America Express v. Koenig, 453 U.S. 235, 241 (1981), and supra note 6.

10. See, e.g., Countess v. Microfinance, 592 F.3d 265 (Ct. 1994). This is a basic loanbook law. See e.g., D. DORRIS, A HANDBOOK ON THE LAW OF REMEDIES 38-39, 268-250 (1973).

11. See Hamm, slip op., at 10.


15. 112 S.E. 866 (Ga. 1922).

16. 112 S.E. at 867.
It seems to me that this is the heart of the problem for many individuals who engage in bank fraud: to some degree, in their own minds, they rely upon the facts "as [they wish] ... they were, rather than as they in fact are." That may be a temptation, in many situations, for attorneys too, who are advising persons and institutions in connection with banking law matters.

Accordingly, a final "word to the wise" may be in order, taken from an article written by two attorneys who were counsel with the Fraud Section of the Criminal Division, United States Department of Justice. Those authors assert that there is a growing emphasis upon prosecution of key participants, urging prosecutors to resist the notion that obtaining a large number of indictments is the most effective way in which to pursue a case. They write:

Leading participants in bank fraud schemes typically include high-level insiders at financial institutions, such as senior officers and directors. More recently, prosecutors have devoted more attention to the vital roles that attorneys, accountants, and appraisers play in these schemes. Whether or not such professionals are the primary beneficiaries of a bank fraud, their active connivance may cloak its activities and ensure its success.116

And so in closing I address any potential "leading participants" such as attorneys, accountants, appraisers, senior officers and directors, and any other "high-level insiders" in financial institutions, and urge you not to rely upon the facts as you wish they were, rather than as they in fact are, as you go about your business and professional work. Hopefully, as the old saying has it, "A word to the wise [will be] sufficient." The penalty for ignoring those words today probably far exceeds what their author ever contemplated.


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to make a bona fide contract for such [a] ... sale ... 17

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It is nowhere alleged ... that the transaction ... was merely colorable, that it was only a pretended sale ...; but the papers constituting the transaction are left to speak for themselves, and show, as said above, an absolute sale.18

Another line of cases holds that where the wage assignment is made for purposes of securing a debt it should be treated as a credit transaction rather than a sale.19 Much like the equitable mortgage cases, these cases are fact-intensive and focus on the existence of a debt (demonstrated by other means) that was being secured by the assignment of wages. For example, in Spillman v. Central Purchasing Co., the consumer drew funds from the "Assignee" and then returned on payday to repay the debt with interest.20 This was part of a continuing series of transactions that clearly constituted a debtor-creditor relationship. In Rosenbusch v. Fry, the court noted that the funds constituted "money due from a solvent debtor."21 In Tennessee Finance Co. v. Thompson, the "almost invariable practice was for the bankrupt to draw the money and himself pay his debts to the Brokerage companies."22 While the assignor's contractual duty to repay in Hamm suggests a possible analogy, none of these "debt" cases compare factually with the sale of a chose in action contemplating a single transaction in the form of an absolute assignment, with no subsequent debtor-creditor relationship between the parties and no liability of the assignor to repay the funds advanced.

In contrast to this well-established distinction, the Hamm court relied on a 1931 South Carolina case, Martin v. Pacific Mills,23 holding that an assignment of wages, absolute on its face, was a usurious loan despite contractual language to the contrary.24 The analysis in Martin is somewhat skeletal, consisting primarily of a description of the assignment contract and the following conclusion:

[The] only inference that can reasonably be drawn from an inspection of the instruments ... is that the scheme of the [assignee] was cunningly devised, but thinly veiled, to make what was plainly a loan a bill of sale -- an attempted evasion of the usury law.25

While this language clearly conveys the court's conclusion, it leaves the reader with little in the way of guidance as to the standards applied by the Martin court in reaching this conclusion. It appears that this decision may simply reflect a perception by that court that wage assignments are not favored as a matter of public policy. Unfortunately the parameters of that policy are left undefined in the Martin court's brief opinion.

Nonetheless it should be noted that wages are inherently distinguishable from other types of property, and this limits the value of any comparison between wage assignment cases and other types of assignments. The special nature of wages has been consistently recognized by the United States Supreme Court in the context of bankruptcy and with

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bank was not in the strongest position to complain because of the bank's failure to take full advantage of the procedures made available to it. The court stated:

There is no limit on what a bank can say in its response. The bank did not take full advantage of its opportunity to respond. Nor did it challenge any of the data provided it, including the report of examination. Needless to say, its failure to take such opportunity is not due to an inherent deficiency in the procedures.65

In reaching its conclusions about the constitutionality of the process, the court tested the instant case against the three factor test created by the Supreme Court in *Matthews v. Eldridge*, where it held that "some form of hearing is required before an individual is finally deprived of a property interest."66 The three factors are: (1) whether a private interest will be affected by official action; (2) the risk of erroneous deprivation of interests versus the value of additional or substitute safeguards; and (3) the relationship between the government's interest and the cost and burdens of additional procedural requirements.

With respect to the three factors, the court found as follows:

First, a substantial private interest was affected, as the capital directive required a capital infusion of $725,000.

Second, the court did not think that the risk of an erroneous deprivation of the bank's interest would be more than minimal. The court was presented with no evidence that the bank might have offered something at a hearing that could not have been submitted in its response to the notice. The court again referred to the "several deliberative steps and thorough documentation" only after which a directive is issued. "While there is obvious advantage to the presence, and participation, of a neutral decision maker and examination of witnesses, especially cross examination, it is not significant enough here to warrant a hearing prior to issuance of a directive."67

Finally, the court was clearly influenced by the significance of the government's interest in promptly and efficiently implementing capital directives. "The benefits from a directive would be weakened greatly, if not lost, if additional procedures, including a hearing, were necessary."68

XIV. Conclusion

The *Bank of Coushetta* case confirmed that the federal banking agencies enjoy persuasive judicial approval of their discretionary right to issue capital directives and to cause them to become effective and enforced swiftly and without the necessity of a hearing on the record or opportunity for judicial review. It is those two factors that make capital directives so potent and would seem to suggest that (at least when addressing capital issues by themselves) the federal banking agencies will increasingly elect a capital directive as the enforcement mechanism of choice in the 1990s.

65. Id. at 1131.
67. See Bank of Coushetta, 930 F.2d at 1131.
68. Id.

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regard to other issues.26 It is also reflected in the special statutory treatment of wage assignments.27 The lack of similar judicial and statutory treatment for assignments of other choses in action (including tax refunds) suggests a lack of any broad-based public policy that would bar such assignments or treat them as credit transactions per se.

V. Analogy to a Non-Recourse Loan

It might be argued that the assignment of a tax refund is similar to a nonrecourse mortgage loan, in the sense that the latter is a debt transaction even though the borrower has no personal liability. However, a nonrecourse loan is clearly a debt transaction for reasons unrelated to the absence of recourse. Similar elements are totally lacking in tax refund assignments and as a result the two types of transactions are not sufficiently similar to serve as a basis for analogy.

A nonrecourse loan is unquestionably and by definition a loan transaction. In the typical example the borrower mortgages real property, which the mortgagor continues to own, as security for a debt. The debtor is obligated to repay the debt as a condition to retaining the collateral, but is not otherwise personally liable. This is entirely different from the absolute assignment of an income tax refund (or any other property), in which the consumer makes an unconditional conveyance of title, with no retention of a property interest, no contractual right to redeem, and no contractual right or obligation to repay the funds advanced.

In short the distinguishing characteristics of a nonrecourse loan (the granting of a mortgage on property retained by the debtor, and the right to retain the mortgaged property by payment of a debt) are entirely absent in an absolute assignment of a chose in action.

VI. Analogy to a Sale of Accounts

It might be argued that the sale of a chose in action is similar to a sale of accounts,

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Finally, in New York the state banking department has determined that state-chartered banks in New York have the authority to sell annuity contracts as agents for insurance companies. The insurance industry sued over that determination, and on July 8, 1992, the state trial court held that the "incidental powers" of state chartered banks are only those that are necessary for a bank to carry out one or more of its express powers. Annuity licenses do not fit within that definition. The case is important since the National Bank Act's incidental powers clause was patterned after (and almost identical to) New York's statute. The court acknowledged that there is federal authority for construing the incidental powers clause more broadly, but refused to do so in favor of state chartered banks. An appeal is anticipated.

IV. Conclusion

One important trend may be gleaned from the cases described above: the banking industry almost always wins them in the end. Usually the competitor industry files the lawsuit to keep the banks out of their business, and usually against the banking regulator, in which case the regulator prevails. Sometimes the bankers end up suing a regulator in order to get into a competitor business, in which case the regulator loses. Litigation is not an unmotivated blessing but it has provided to the banking industry an entree into new and expanded business opportunities the industry might not otherwise have achieved by awaiting Congressional action.

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which may be treated in substance as a secured loan under Uniform Commercial Code ("UCC") Article 9 because a sale of accounts is a traditional and common form of commercial financing arrangement. This is not true of the sale of other choses in action, and as a result such sales are not treated as credit transactions or included within Article 9.

There are, of course, some similarities between an assignment of accounts and assignments of other choses in actions (both represent assignment of a property right in the form of a claim to future payment from a third party). But aside from the disparate Article 9 treatment (and the valid reasons for that disparate treatment, as noted above), any resulting analogy generally supports the view that an absolute assignment of a chose in action (including a tax refund) is not a debt.

Article 9 recognizes that a commercial sale of accounts is likely to involve a financing (or debt) arrangement only in the context of a bulk or continuing sale of accounts by a retail merchant. Therefore Article 9 generally does not apply to other sales of accounts or treat them as a credit transaction. For example, Article 9 specifically excludes from its coverage (or its filing requirements) those sales of accounts involving isolated or casual assignments.

While differences between the nature of a commercial assignment of accounts and the assignment of a single chose in action make direct comparisons impossible, to the extent that such a comparison is made the latter more closely resembles the isolated or casual transactions excluded from Article 9. In short, the sale of a chose in action is unlike the continuing bulk assignments of accounts (often with recourse) that are treated as credit transactions under Article 9. The failure to include assignments of other choses in action in Article 9, and the exclusion for isolated sales of accounts, evidences an intent that such assignments not be treated as credit transactions.

VII. Is the Assignment a Sham?

Clearly it was intended (at least by ITB) that the transaction in Hamm not be considered a credit transaction for purposes of the scope of the Truth In Lending Act and the South Carolina U3C. Just as clearly this intent alone is not dispositive of the legal issues, as mere intent to avoid the impact of a consumer protection statute is not sufficient to accomplish that purpose. At the same time, however, it also does not follow that the parties are barred from structuring a transaction so as to be within or outside the scope of a particular law. The parties to any negotiations are confronted with a range of alternative types of transactions, each with specific advantages and disadvantages. The options often include a choice between a sale and a credit transaction. Any consumer who owns any personal property and desires to use it as a source of cash has the option of either selling it or borrowing against it. This is true whether that property is an automobile or a chose in action. It does not follow that a resulting cash sale is inherently a credit transaction subject to Truth-in-Lending and the U3C.

If a South Carolina consumer decides to sell rather than mortgage his or her property, the
incurred or reasonably anticipated to be incurred by the FDIC in connection with a sister bank’s closing or receipt of open bank assistance. In addition, the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA)7 added a new section 38 to the Federal Deposit Insurance Act. Section 38(e) requires any under-capitalized insured depository institution to submit an acceptable capital restoration plan to the appropriate federal banking agency. Section 38(e)(2)(C) goes on to provide that the agency shall not accept the capital restoration plan unless, among other things, each company having control of the institution has (1) guaranteed that the institution will comply with the plan until the institution has been adequately capitalized for one year, and (2) provided appropriate assurances of performance. Under section 38(e)(2)(E) this guaranty liability for all companies having control of an institution is the lesser of five percent of the institution’s total assets at the time the institution became undercapitalized, or an amount necessary to bring the institution into compliance with all applicable capital standards. It remains to be seen how this section will work in practice, but it seems clear that a bank holding company may be required to guarantee at least a portion of its subsidiary’s capital. However, a regulatory agency’s attempt to enforce that guarantee against a bank holding company which is in bankruptcy may pose the same questions as those raised in the MCorp case, but with a different outcome.

VI. Conclusion

In MCorp the United States Supreme Court confirmed that section 1818(i) does not preclude judicial review of an administrative proceeding under section 1818 which is not final, except where such review is specifically provided for in section 1818. However, the Supreme Court failed to provide even a scintilla of guidance as to whether the Board’s source of strength regulation exceeds its statutory authority. While FIRREA and FDICIA have given regulators other means to tap the assets of affiliates of troubled or failed institutions, the question remains relevant for many bank holding companies. Ironically, if enforcement of the third temporary cease and desist order (which ordered MCorp to provide capital to its subsidiaries) had not been suspended by agreement, MCorp could have attacked the source of strength regulation in a review of that order, and the question the Supreme Court left unanswered might have been resolved.

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consumer gives up certain benefits, including the right to retain or redeem the property and the protections of Truth-In-Lending and the UCC. The latter will help protect the consumer against making a bad credit deal (if, for example, the consumer borrows money on his or her car), but offers the consumer no equivalent protection against making a bad deal if he or she sells the car instead.

On the other hand the sales option offers the consumer comparative benefits as well. Chief among these is the lack of personal liability for a debt: The cash sale option typically offers the consumer an opportunity to walk away from the transaction and the property without any lingering obligations or commitments, leaving any remaining problems relating to the property firmly in the buyer’s hands (subject only to liability for breach of warranty or the duty of good faith).

Absent any contractual obligation on the part of the seller to repay the cash advanced, this suggests that a plain and absolute assignment of the right to a tax refund should be treated like any other sale, and absent other factors should not be considered a credit transaction. This assumes that the consumer seller has no post-transaction repayment obligations (again excluding the inherent obligation of good faith that is a part of every contract and possible liability for breach of a sales warranty). In effect the seller gets his or her money and leaves the buyer with a host of potential problems relating to the value or collection of the property sold.

Whether the assignment is valid and enforceable by the buyer against the third party obligor is typically not relevant to this inquiry or of any concern to the seller. Enforceability or collectability of the chose in action may determine whether the assignee has made a good deal, but has nothing to do with whether the transaction between the assignor and assignee is a sale or credit transaction. Therefore, in the case of an absolute assignment, it does not matter whether the assignee of the tax refund obtains a legally enforceable claim against the Internal Revenue Service.

The parties should be free to choose to enter either a sale or credit transaction, depending on their preferences, and if the buyer purchases an unenforceable chose in action this does not convert the sale into a credit transaction. Credit laws and vague public policy notions should not foreclose this option or be used to convert every sale of a consumer chose in action into a credit transaction. On the other hand, this analysis also suggests that where there is a contractual obligation of the assignor to repay, the transaction should be treated as a loan. This seems to be the focus of most of the cases.

VIII. The Case Law

Generally the foregoing analogies support the distinction between a sale and a credit transaction, and it should be noted that most authority directly on point (except Hamm) likewise recognizes that an absolute assignment of a chose in action is not per se a credit transaction. For example, the Oklahoma Supreme Court confronted the issue

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ernment program, even if they were not in compliance with the agency's federal appraisal regulations, provided the appraisal conformed to the requirements of the federal insurer or guarantor. (The OTS had previously provided that exemption it its initial regulations.) Similarly, the final regulations issued by the FDIC and the OCC provide that appraisals prepared for 1-4 family residential properties need only comply with the Uniform Standards of Professional Appraisal Practices ("USPAP") and the appraisal standards approved by FNMA or FHLMC, but need not comply with the other appraisal standards set forth in the respective agency regulations. The OTS already had a similar provision authorizing an exemption for appraisals of 1-4 family residential properties which were prepared in accordance with the standards of FNMA or FHLMC. To date, only the OTS has expanded the exception (under which regulated institutions need not comply with all of the appraisal standards) set forth in the appraisal rule to multi-family residential property, provided the appraisal is prepared on FNMA or FHLMC forms in accordance with their appraisal standards. A warning: The National Association of Independent Fee Appraisers ("NAIFA") has commenced an action in the federal district court for the District of Columbia against the FDIC, the OCC and the OTS challenging the authority of those agencies to promulgate regulations which exempt real estate transactions from the appraisal requirements of Title XI. Although NAIFA seeks relief from the recent regulatory amendments which raised the de minimis level to $100,000, the complaint alleges that the agencies' establishment of any exemption categories is without statutory authority and represents an abuse of administrative discretion. NAIFA asks the court to declare that the recent regulatory amendments are contrary to law and to direct each agency to rescind those regulations.

Will Congressional relief be forthcoming? In July the Senate passed its version of the Federal Housing Enterprises Regulatory Reform Act of 1992 (which primarily concerns the federal monitoring of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation). It also contains several mini-banking reform proposals in Titles VII-X. Section 909 of Title IX (of Senate 2733) would effectively amend section 1113 of FIRREA (12 U.S.C., section 3342) to specifically allow each federal agency (including the RTC) to establish a "de minimis" threshold level, below which appraisals per FIRREA requirements would not be required. The probability of the passage of S. 2733 seems doubtful due to differences in the House version of the bill concerning the mortgage companies (H.R. 2900 - "Government Sponsored Housing Enterprises Financial Safety and Soundness Act of 1991"). The House version was passed in September of 1991 and does not contain the mini-banking reform components added to S. 2733.

The FDIC, OCC, OTS and NCUA have also amended their regulations to clarify that the definition of "real property" does not include certain "interests" such as mineral rights and therefore that no appraisal pursuant to the Title XI federal rules is required when a lender is relying on such as collateral. As expected, the NCUA final rules did not provide for a "de minimis" exemption.

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In Cobb v. Baxter, which involved a sale of accounts by a retailer. Having assigned the accounts, the retailer then sought to impeach that sale by claiming that it was in fact a loan at usurious rates. The Oklahoma Supreme Court noted that the "usury statutes of this state do not apply to sales, but only to loans." In this case, the thing sold is a chose in action. The court further explained:

In the transfer by sale of a chose in action, the rights of the seller, as against the third party, pass to the purchaser. As between the seller, the purchaser, and the third party, an assignment is perfected upon the completion of the sale. Such transfer of interest does not impose on the purchaser any greater or less right than the seller had to transfer. No particular mode or form is necessary to affect a valid assignment between the seller and purchaser in such situations as exist in this case, and any acts or words are sufficient which show an intention of transferring or an appropriation ... of, the owner's interest. It is clear from the record that defendant had collected all sums due on the accounts involved in the transactions between plaintiff and defendant. Plaintiff is seeking to recover funds collected by defendant for her in accordance with their agreement for sale of the accounts. If the transaction was a sale, then nothing further need be accomplished between the seller and purchaser, to establish plaintiff as the party in interest, as against the debtor.

There is similar authority in other jurisdictions. The best known modern case is Cullen v. Bragg, where a tax preparer purchased (by assignment) his client's right to a tax refund, at a discount, for cash. In recognizing that the purchase of a chose in action is not a loan, the court noted:

It is clear from the evidence of record, however, that appellee did not advance the present sum of $296.53 in exchange for appellant's mere promise to repay the sum of $474 in the future. Instead, appellee (Continued on page 241)
paid the money in exchange for the present assignment of appellant’s right to receive an income tax refund. For all practical and legal purposes, this transaction purports to be a “sale” by appellant of his right to claim a tax refund, not a loan of money to him from appellee. "A sale is the transmutation of property from one man to another in consideration of some price and recum- pense in value." [Cit.] "It is a transfer of the absolute or general property in a thing for a price in money." [Cit.] A sale is the passing of the title and possession of any property for money which the buyer pays or promises to pay. [Cit.] Deal v. State, 14 Ga. App. 121, 128, 80 S.E. 537 (1913). The tax refund was, as to appellant, a chose in action. "[A] chose in action includes all rights to personal property not in possession, which may be enforced by action..." Sterling v. Sims, 72 Ga. 51 (1883). Appellant had a right to a fund which consisted of money then in the possession of the United States government. Appellant’s right to this fund could be enforced by taking action in the form of filing a claim for a refund. There appears to be no legal impediment to the sale of such a right. “Except for those situations governed by Code Sections 11-2-210 and 11-9-402 (neither of which is applicable here), a right of action is assignable if it involves, directly or indirectly, a right of property.” OCGA section 44-12-34.

Accordingly, we hold that the underlying transaction in the instant case constituted the “sale” by appellant of a chose in action. It was not a “loan” of money which would be governed by the Georgia ILA. In an outright sale, “the transaction is not rendered usurious because the discount... amounts to more than the maximum lawful rate of interest. [Cit.]” Mutual Canning Co. v. De-Guenther, 23 Ga. App. 746, 747(6), 99 S.E. 319 (1919). If the discounted sale of a tax refund is to be deemed a transaction within the ambit of the Georgia ILA, it can only be accomplished by a specific legislative enactment, not by a broad judicial construction of that statute’s definition of the term “loan.”

Cullen v. Bragg was cited with approval in a well-known treatise by Dean Ralph J. Rohrer, Professor Fred H. Miller, and John J. Mancuso, as follows:

The case seems rightly decided, for any other holding would... subject to TIL coverage myriad “sale” transactions where the seller previously owed some obligation to the transferee. This is not the stuff for which TIL was designed.

This seems clearly to be the better view. However, as noted supra, Hamm specifically rejected Cullen. Instead, the Hamm court cited Baske v. Russell with apparent favor. But Baske begs the question, as in that case there was unquestionably a debt and the question was how to measure the rate of interest. As noted supra, the Hamm court also relied heavily on Martin v. Pacific Mills, a wage assignment case unfortunately vague as to its reasoning. Thus Hamm leaves the reader with very little beyond a sense of the court’s opposition to the idea of a consumer assigning his or her right to an income tax refund outside the scope of the U3C.

IX. Conclusion

The apparent hostility of the Hamm court to assignments of consumer tax refunds, without adequate discussion of the legal issues involved, contrasts with other case law nationwide and is not consistent with the basic common law of assignments or the text of the U3C. Nonetheless, the contractual obligation of the assignor in that case, to repay any short-fall in the tax refund received by the assignee, provides a possible basis for characterizing the transaction as a debt. Thus Hamm may have been correctly decided on its facts despite the court’s use of overbroad, questionable language.

Either way, the Hamm court’s failure to address the relevant issues greatly reduces the precedential value of the decision. Parties analyzing similar issues are therefore left to proceed on the basis of the traditional legal criteria discussed supra. On this basis it appears clear that an absolute assignment of a chose in action (such as the right to a tax refund) should be treated as a sale not subject to consumer credit laws, so long as there is no debt or other direct, contractual obligation of the assignor to repay the cash advanced. Where the assignor assumes other obligations amounting to an assurance that the assignee will receive full payment, the line probably has been crossed and the transaction should be considered a debt. Cases that fall in between (for example, where the assignor makes express sales warranties relating to collectability of the assignment, but no promise to repay) will remain uncertain until the courts provide a better vehicle for analysis than the Hamm case.