

THEFT

IS SUCH AN UGLY WORD
THE YIN AND YANG OF STATE
THEFT STATUTES AND RTO
BY ED WINN III

THEFT IS AN UGLY WORD, probably because it stands for such an ugly act. One might suppose that everybody, except maybe the thieves themselves, would be of one mind about theft and thieving. But this is not the case, at least insofar as the RTO industry is concerned. Rental dealers disagree about theft. The police disagree. Prosecuting attorneys and district attorneys disagree. Judges and juries disagree. This article makes no effort to synthesize these disagreements. There is no reconciliation of these divergent views on the horizon. This piece chronicles recent developments that highlight these acute and often fervently held differences of opinion.



Theft is one of the family of crimes against property. In legal parlance, theft is the fraudulent taking of personal property belonging to another without consent and with the intent of depriving the owner of the value of the property. Theft includes larceny, swindling, embezzlement and also includes the circumstance of obtaining possession of property by lawful means and thereafter appropriating the property to the taker's own use.

- ▶ Larceny is often synonymous with theft, but is often subcategorized as single or compound, grand or petit, depending on the value of the property stolen and other variants. Larceny may involve an element of trickery or subterfuge.
- ▶ Robbery is the taking of personal property in the possession of another, from his person or immediate presence, and against the person's will by means of force or fear. Robbery is larceny with the use of force, actual or constructive.
- ▶ Embezzlement is the fraudulent taking of the property of another when that property has been entrusted to the taker by the owner. Embezzlement is a particular kind of theft.
- ▶ Burglary is the breaking and entering into the dwelling of another at night with the intent of committing a felony (a serious crime). Burglary carries the death penalty in some states.

Rental dealers view the theft of their rental property in decidedly different ways. Some dealers never have—and never would—file criminal charges against a rental customer for running off with a television. They view such losses as part of the cost of doing business and they do not want their employees spending their time playing cops and robbers when they could be renting more televisions (especially when playing cops and robbers is so much more fun than running a rental store, albeit far less profitable). These dealers are concerned about the image of the industry they are in and they understand that putting too many customers in jail can add to the negative impression of the business held by many.

Other rental dealers have less sanguine attitudes toward rental thieves. They want their proverbial pound of flesh from customers who steal. These dealers regularly file criminal charges against customers and are unrepentant about hounding such customers with any and all means at their disposal. One dealer stood up at an association meeting years ago to announce loudly and proudly that if a customer stole one of his televisions, the dealer wanted to see that customer “breaking rocks in the hot sun.” These dealers want justice against rental thieves and they want to make sure that everybody knows what happens to people who try to steal rental merchandise from their stores.

It is not only the rental dealer community that is of two minds about criminalizing the failure to return rental property—so is the criminal justice system. There are district attorneys, prosecuting attorneys, magistrates, judges and police officers who will gladly participate in the pur-

suit of a rental thief and will work to throw customers in jail for stealing televisions. In other jurisdictions, those charged with administering the criminal law do not think that failing to return a TV obtained under an RTO plan is a crime at all. They view it more akin to not paying a bill. There is no debtor's prison in the U.S. and it is not a crime to not pay bills in this country.

There are civil remedies, to be sure, but being a debtor, under most circumstances, has not been criminalized. Some prosecutors and some judges who would take a car rental theft case or a back-hoe digger or a party tent rental theft case and pursue it, will not take RTO cases because they understand the hybrid nature of the transaction and focus more on the ownership aspect of RTO than the rental aspect. This view is in keeping with how the industry markets itself to the public.

From these diametrically opposed views of RTO and theft statutes, there is recent good news and bad news, depending upon your point of view on the issue.

In October 2005 an Ohio court of appeals affirmed the conviction of an RTO customer for theft in a case, *State v. Marshall*, 2005 Ohio 5585 (Montgomery Cnty, Ct. of App. 2005). The customer had rented a dryer and a stereo, paid less than two months and then quit paying. The store had periodic contacts with the customer thereafter. The customer did not move, did not pawn the merchandise, did not do anything, in fact. He continued using the dryer and stereo at this house without paying. Finally, a year later, the rental company filed a civil suit and also filed criminal charges. Testimony at the criminal trial was that the rental company had lost \$1500 in rental income and that the value of the purloined merchandise was \$400 for the dryer and \$1200 for the stereo. The customer did return the merchandise to the rental company a year later, but in a trial before the judge, the customer was found guilty of theft and sentenced to five years of community control sanctions.

On appeal, the defendant made several arguments, including “it is not a criminal matter,” ineffective counsel at trial and others, all of which were rejected by the court of appeals.

In Ohio there is now a reported court of appeals decision affirming the applicability of the Ohio theft statute to RTO transactions. This decision should assist other Ohio rental dealers who want to pursue criminal sanctions against rental thieves in their state.

A Florida court of appeals was less friendly toward an RTO company in a case decided in July 2005, *State v. Sanders*, 905 So.2d 241 (Fla. 2d Dist. Ct. of App. 2005). To begin with, Florida has had a troublesome history with its theft of leased property statute. In 1997, the legislature amended the theft statute specifically to exclude RTO transactions. The genesis of this amendment remains

shrouded in mystery. Florida rental dealers worked with the legislature for several years before finally getting language back into the statute to cover RTO transactions. The new statute requires that rental companies put written notice of the criminal statute in rental agreements if they intend to pursue criminal remedies against customers who refuse to return rented property.

Sanders rented a sofa, a chair and a spider lamp from the rental company under an RTO agreement with a total RTO price of \$1,500. Sanders quit making payments at some point during the agreement and the rental company sent her a certified letter demanding return of the merchandise. The letter was returned undelivered because Sanders had moved away without leaving a forwarding address. The rental company swore out a criminal complaint against her.

The specific issue in the Sanders case involved a con-



stitutional question of due process. The Florida theft of leased property statute has a presumption in it, like many theft statutes around the country. If a customer does not return property within five days of a written demand from the rental company, the law presumes that the customer intended to steal it. If this presumption is a mandatory one (i.e., if a jury must reach that conclusion regardless of any other evidence adduced at trial), the presumption violates due process, which requires that the prosecution in a criminal case prove every element of a crime beyond a reasonable doubt. The statute would be unconstitutional, because instead of having to prove intent—that the customer intended to steal the merchandise—the law attempts to allow a set of circumstantial facts—demand letter and no return of property—to

assume criminal intent.

If, on the other hand, the presumption is merely permissive—i.e., the jury can reach that conclusion from the facts, but is not required to do so and, depending upon the evidence, can reach a contrary conclusion if supported by the evidence—then the statute satisfies due process and can be enforced. The Florida court of appeals in a pair of failure-to-return cases examined this issue in detail and held that the presumption in the Florida statute is permissive, and thus the statute is constitutional. In doing so, however, the court in the Sanders case had harsh words for the rental company and the legislature:

“Why the legislature would want to do this, essentially encouraging the state's attorney to become [the rental company's] repossession and debt collection agent at state expense is a mystery to me, but that appears to be the intent behind the statute...Being poor and unable to pay your debts is still not a crime in Florida...Maybe Ms. Sanders' husband or boyfriend ran off with the furniture and she cannot return it. Maybe her house burned down

THERE ARE DISTRICT ATTORNEYS, PROSECUTING ATTORNEYS, MAGISTRATES, JUDGES AND POLICE OFFICERS WHO WILL GLADLY PARTICIPATE IN THE PURSUIT OF A RENTAL THIEF AND WILL WORK TO THROW CUSTOMERS IN JAIL FOR STEALING TELEVISIONS. IN OTHER JURISDICTIONS, THOSE CHARGED WITH ADMINISTERING THE CRIMINAL LAW DO NOT THINK THAT FAILING TO RETURN A TV OBTAINED UNDER AN RTO PLAN IS A CRIME AT ALL.

and the furniture was destroyed. Maybe the landlord evicted her and kept the furniture. Maybe the furniture was destroyed in a hurricane.”

This case was sent back to the trial court for further proceedings and it is not yet known what will happen to Sanders.

And so the debate about RTO and the criminal law continues throughout the land. When dealers and the public officials involved with the criminal justice system are in agreement about how to interpret theft of rental property statutes, there is peace in those valleys. In those cities and towns where there is disagreement, and those places are legion, the process is frustrating for all involved. For frustrated readers, remember that the decision makers on this issue are all elected officials. If it is important enough to the business, the local or state political process offers a solution—work to have prosecuting attorneys, district attorneys and judges elected who agree with your view of the law. ■

Ed Winn III is APRO's general counsel. His e-mail address is edwinn@e-bylaw.com.