STATE OF COLORADO

Department of Law

COLLECTION AGENCY BOARD
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Laura E. Udis
Executive Director
Jack L. Kinkel
Deputy Administrator

October 16, 1991

RE: Loan Servicing

Dear :

You asked whether your company must be licensed as a collection agency in Colorado in connection with its loan servicing activities. It is my opinion that because your company services delinquent mortgage loans, it must be licensed as a Colorado collection agency for the reasons described below.

Your company services first mortgage loans for lenders or the holders of mortgage loans. Some of the first mortgage loans are delinquent (non-performing) at the time they are transferred or assigned. In such instances, you attempt to contact the consumer (mortgagor) to bring the loan current. This may include payment arrangements. If you are successful, the file may continue to be serviced by your company or returned to the holder depending on the nature of your servicing arrangement. If you fail to bring the loan current, your company may arrange with the consumer to voluntarily sell the property, negotiate a deed in lieu of foreclosure, or refer the file to an attorney for foreclosure proceedings. Payments to bring an account current are made directly to the holder. Your company charges a flat fee not dependent on results. No commission is received.

The federal Fair Debt Collection Practices Act excludes from the definition of "debt collector" companies which collect debts for others to the extent the debts are not in default at the time they were obtained. 15 U.S.C. § 1692a(6)(F)(iii). The U.S. Senate made it clear that the exemption refers to loan servicing companies "... who service outstanding debts for others, so long as the debts were not in default when taken for servicing ...." S. Rep. No. 382, 95th Cong., 1st Sess. at 3-4; 1977 U.S. Code Cong. & Ad. News 1698 (emphasis added). See also Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985); FTC Informal Staff Letter to K. Cranmer (4/25/89).

The Colorado Fair Debt Collection Practices Act provides an

almost identical exemption from its definition of "collection agency." It states that a "collection agency" does not include:

> (VII) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent that:
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> . . . .
>
> (C) Such activity concerns a debt which was not in default at the time it was obtained by such person; except that, such person, in the instance of a person collecting or attempting to collect a debt which was not obtained by him when it was in default and which is now in default, shall be exempt only from the provisions of section 12-14-115;....

Section 12-14-103(2)(b)(VII)(C), C.R.S. It is clear that if your company regularly collects loans in default when obtained for collection, the business must comply with the Colorado Act and apply for a Colorado collection agency license with regard to those debts.**1

A question arises as to how to treat debts which were current when obtained and are now in default. The federal Fair Debt Collection Practices Act does not address this question. However, the Colorado Act states that "...in the instance of a person collecting or attempting to collect a debt which was not obtained by him when it was in default and which is now in default, {such person} shall be exempt only from the {licensure} provisions of section 12-14-115 ...." Section 12-14-103(2)(b)(VII)(C), C.R.S. (emphasis added). In other words, a business which collects debts not in default when obtained need not be licensed as a Colorado collection agency and need not comply with the consumer

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1**As noted by the Federal Trade Commission staff, a loan servicer should not "overcomply" with the law by inserting consumer warnings on notices or letters sent out on current loans. The inclusion of such language on current accounts could be misleading and should be used only on delinquent accounts. Cranmer letter, supra.

protection provisions of the Colorado Act. However, if those once-current debts are now in default, the company must still comply with the non-licensure provisions of the Colorado Act with regard to those debts. These include the prohibitions on improper communication, harassment or abuse, false and misleading representations, unfair practices, and the requirement of validation of debts.

The Colorado Act provides an additional exemption for a particular group of loan servicers - mortgage servicers whose principal business is the servicing of current mortgages. Section 12-14-103(2)(b)(VIII), C.R.S. provides that:

> (2)(b) "Collection agency" does not include:
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> . . .
>
> (VIII) Any person whose principal business is the making of loans or the servicing of debt not in default and who acts as a loan correspondent, or seller and servicer for the owner, or holder of a debt which is secured by a deed of trust on real property whether or not such debt is also secured by an interest in personal property.

Section 12-14-103(2)(b)(VIII), C.R.S. Thus, if a person's principal business is servicing mortgages secured by deeds of trust held by others and not in default, that person apparently need not become licensed nor comply with the consumer protection provisions of the Colorado Act.

The determination of what constitutes a person's principal business is a factual question specific to each case. There is no definition of "principal business" in the Colorado Act. However, both the federal and Colorado acts use the phrases "principal purpose" and "regularly collects" almost synonymously in defining "debt collector" and "collection agency." Compare 15 U.S.C. § 1692a(5) with § 12-14-103(2)(a), C.R.S.

I cannot conclusively determine your company's principal business from your letter. You state that your company has two primary business activities: (1) first loan mortgage servicing, and; (2) managing, leasing, and disposing of real estate owned by lending

institutions, mortgage insurers, and governmental agencies. Both activities from time to time include servicing of mortgages in default. Because your company engages in default mortgage servicing on some sort of regular basis, you probably would not fit within the exemption of § 12-14-103(2)(b)(VIII), C.R.S. In my opinion, that exemption applies to a business which regularly services current mortgages or whose principal business is the servicing of current mortgages. To the extent that you regularly service or one of your principal businesses is servicing mortgages in default, you would need to obtain a Colorado collection agency license.**2

Please feel free to contact me if you have any questions about these matters. This letter does not constitute an official administrative opinion of the Collection Agency Board pursuant to § 12-14-113(5), C.R.S. It does, however, reflect our current enforcement policy.

Sincerely,

Laura E. Udis

LAURA E. UDIS
Executive Director

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2**If payments on all delinquent accounts are made directly to the holder, your company need not maintain a trust account. Collection Agency Board Rule 3.01(2), 4 CCR 903-1 at 7 (11-90).

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