

## Opinion No. 71-69

May 20, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. Guthrie Bennett Assistant to Commissioner of Banking Department of Banking  
Lew Wallace Building Santa Fe, N.M. 87501

### QUESTIONS

#### FACTS

A foreign corporation authorized to do business in New Mexico actively solicits delinquent accounts for collection. The company sells to creditors a series of letters, which the company mails to the debtor. The letters instruct the debtor to pay the creditor directly; the company does not handle any of the money. The company charges a fixed price for the series of letters rather than a percentage of the money collected. The company does not contact the debtor personally. Its only contacts with New Mexico are its agents who solicit accounts from creditors.

#### QUESTIONS

1. Must the foreign corporation obtain a license as a collection agency?
2. Can a licensed collection agency buy a franchise under the foreign corporation's name?
3. Must the foreign corporation be licensed as a collection agency in order to sell a franchise?

#### CONCLUSION

1. Yes.
2. Yes, but see analysis.
3. No.

### OPINION

#### {\*101} ANALYSIS

The activities of the foreign corporation place it within the ambit of the Collection Agency Act, Section 67-15-22 et seq., N.M.S.A., 1953 Comp. Section 67-15-31, **supra**, dictates this conclusion. That section provides:

"No person shall conduct within this state a collection agency or engage within the state in the business of collecting claims for others or of soliciting the right to collect or receive payment from another of any claim, or advertise, or solicit either in print, by letter in person or otherwise, the right to collect or receive payment for any other of any claim, or seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license."

The section declares it unlawful to seek to "obtain payment of any claim on behalf of another." The section makes no distinction between payment of the claim to the collector and payment to the creditor nor should it do so. One of the act's principal purposes is to protect the public from deceptive and oppressive collection practices. The fact that a collector does not touch the money he is trying to collect has no relevance to this purpose. His methods might still be oppressive and deceptive. We reached the same conclusion in Attorney General Opinion 62-14 regarding a business employing collection practices similar to those in question. We concluded in that opinion:

"One compelling reason for the State regulation of this general type of business is to prevent improper or illegal collection methods. And if, by the simple expedient of advising debtors to pay directly to their creditors the public protection features of the Collection Agency Act could be evaded, the Act would lose much of its effectiveness."

The fact that the company is a foreign corporation can have no effect on this determination. Even if we assume that the company's activities are interstate commerce, they would still be subject to state regulation. The states' power to regulate local aspects of interstate commerce is a well established principle of the commerce clause. We have recently discussed the scope of this power in Attorney General Opinion 71-65. Further discussion of those general principles is unnecessary, for state power to regulate foreign corporations collecting delinquent accounts has been affirmed by a state Supreme Court.

In **Meyers v. Matthews**, 270 Wis. 453, 71 N.W.2d 368, plaintiffs protested the application of the state's collection agency law to them. They were nonresidents of Wisconsin who solicited offers of assignments of accounts from creditors in the state. The solicitors did no collecting. They considered themselves independent contractors working under a contract with a Missouri finance company to procure offers of assignments. The solicitors claimed the state's collection agency act unduly burdened interstate commerce.

The court held that the solicitors were agents of the Missouri finance company and that their activities were subject to the collection agency statute. The state upheld all the requirements of the statute including requirements for licenses, fees, inspection of records, and reports to the banking commissioner. The court gave the following summary of the commerce clause law on state regulation as a rationale for its holding:

"The more recent cases of the U.S. Supreme Court have abandoned the rule seemingly imposed by earlier cases, requiring states to maintain a 'hands off' policy with respect to attempted state regulation if it even so much as touched interstate commerce. The more recent cases adopt the rule that in the absence of discrimination or undue burden resulting from state regulation, where Congress has not already legislated, a state may exact licenses and reasonable fees as well as conformance with provisions designed to assure the responsibility of out-of-state concerns and their integrity in dealing with the residents of the state, even where such concerns are engaged in interstate commerce."  
**Meyers v. Matthews, supra.**

The United States Supreme Court dismissed {*\*102*} the solicitors' appeal from this judgment for lack of a substantial federal question. **Meyers v. Matthews**, 350 U.S. 927, 76 S. Ct. 303, 100 L. Ed. 811. Whatever the interstate nature of the foreign corporation's business, it clearly is not exempt from New Mexico's Collection Agency Act.

The Collection Agency Act does not prevent the foreign corporation from selling a franchise to a licensed collection agency. The Act's purposes are achieved so long as the collection activities are conducted by a licensed agency. Similarly, the foreign corporation does not need a license to sell a franchise. That is an activity whose regulation is not contemplated by the Collection Agency Act.

Two notes of caution regarding the sale of a franchise are in order, however. First the franchise must be a true franchise agreement. It cannot be a shield for a mere principal-agent relationship. This office will look to the substance, not the form, of any such agreement to determine its true character. Second, a person cannot operate two collection businesses under one license, nor can one individual manage two collection businesses at once. Section 67-15-68, **supra** requires a separate license for each branch office of the same business. In view of this provision, it is clear that Section 67-15-31, **supra**, requires a separate license for each collection business. An established agency cannot operate the franchise under the foreign corporation's name as well as conduct its own business without a separate license for each business. Section 67-15-69, **supra** requires that each licensed office "shall be under the active charge of a qualified person." Consequently any established collection agency which desires to operate a franchise and its own business must hire a "qualified person" to operate the franchise. See Section 67-15-39, **supra**; Attorney General Opinion No. 71-67.

By: Thomas Patrick Whelan, Jr.

Assistant Attorney General