

Opinion No. 87-40

July 31, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Scott D. Spencer, Assistant Attorney General

TO: Ms. Paula Tackett, Deputy Director, New Mexico Legislative Council, State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

Whether maintaining a post office box in New Mexico is sufficient for the purpose of maintaining "an agent" in New Mexico pursuant to Laws 1987, chapter 343.

CONCLUSIONS

No.

ANALYSIS

Laws 1987, chapter 343, provides as follows:

MORTGAGE SERVICING -- SERVICING ENTITY TO HAVE OFFICE OR AGENT FOR SERVICING PURPOSES IN NEW MEXICO -- Any business, organization or similar entity which services single unit residential mortgages on New Mexico real property shall either maintain its principle office, a branch office or an agent in New Mexico for the purpose of providing information, including but not limited to, providing answers to inquiries from mortgagors or their designated agents pertaining to data about their mortgage. Response to the mortgagor's inquiry shall be made within 10 working days from the date of inquiry.

Your question raises the issue whether the term "agent" contained in that law could include the renting of a post office box. An agent is defined as a **person** authorized by another to act on his behalf and under his control. (Emphasis added) **Western Electric Company v. New Mexico Bureau of Revenue**, 90 N.M. 164, 167, 561 P.2d 26, 28 (Ct. App. 1976). The renting of a storage space has been held not to constitute a "person" within the definition of agent. **Johnson Freight Lines v. Davis**, 170 Tenn. 177, 178, 93 S.W.2d 637, 639 (1936). It is the opinion of this office that a rented post office box is not a person capable of acting as an agent under Laws 1987, chapter 343.

An agency relationship is a consensual relationship between two persons, whereby one of the persons agrees to act for and on behalf of the other and remains subject to the other person's control. **Aetna Life Ins. Company v. McIver**, Tex. Civ. App. 65 S.W.2d 817, 819 (1933). To constitute an agency relation there must be an agreement between

the principal and the agent. Id. It is well established that there can be an agency relationship only where the purported principal has control or the right of control over the actions of his purported agent. **First Nat. Bank of Mineola, Tx. v. Farmer's and Merchant's State Bank of Athens, Ga.**, Tex. Civ. App., 417 S.W.2d 317 (1967). An individual or corporation renting a post office box does not control the details, manner or particular method by which the post office performs its tasks.

Agency may also be defined as the relation which results where the principal authorizes his agent to act for him, with discretionary power, in business dealings with third persons. **Workman v. City of San Diego**, 267 Cal. App. 2d 36, 72 Cal. Rptr. 509 (1968). The term agent does not extend to subordinate employees without discretion but includes only regularly employed persons having some degree or measure of control over the corporate functions entrusted to him. **MacDonald Services Co. v. Peoples Nat. Bank of Rock Hill**, 216 N.C. 533, 534, 11 S.E.2d 556, 558 (1940). The term agent does not include employees or servants who perform simple ministerial functions. Id. It is the opinion of this office that the receipt of incoming mail is a ministerial function, not a discretionary exercise of corporate functions.

Considering the definition of agent and the purposes for having an agent as stated in Laws 1987, chapter 343, it is our conclusion that a post office box would not fall within the definition of "agent" and would not be available to provide information or answers to inquiries from mortgagors. It is therefore our opinion that maintaining a post office box in New Mexico is not sufficient for the purpose of maintaining an agent in New Mexico pursuant to that law.

ATTORNEY GENERAL

HAL STRATTON Attorney General