

N.D.A.G. Letter to Lindgren (May 10, 1989)

May 10, 1989

Honorable Jay Lindgren
State Representative
District 13
P.O. Box 603
West Fargo, ND 58078

Dear Representative Lindgren:

Thank you for your March 16, 1989, letter requesting an opinion concerning the applicability of North Dakota law concerning debt adjusting to companies which provide types of mortgage acceleration services. I apologize for the delay in responding to you.

The subject of debt adjusting is addressed by N.D.C.C. ch. 13-06. N.D.C.C. § 13-06-02 provides a class A misdemeanor offense for persons engaging in the business of debt adjusting unless otherwise exempted under N.D.C.C. § 13-06-03. Thus, the determination of whether a mortgage acceleration service constitutes debt adjusting would have considerable impact on a determination of whether a criminal offense has occurred where such a business operates in North Dakota.

Traditionally and historically, the Attorney General has refused to issue formal Attorney General's opinions on matters relating to the possible occurrence of a criminal offense. In North Dakota, the state's attorneys are primarily responsible for the enforcement of violations of criminal laws. To that end, the state's attorneys enjoy prosecutorial discretion in determining whether a criminal violation has occurred and whether an enforcement action should be instituted. An Attorney General's opinion essentially concluding a criminal offense has or has not occurred would prevent the utilization of prosecutorial discretion and review. Thus, this office's policy has been not to issue opinions on issues which might be viewed as a determination of whether a criminal offense has occurred in a particular factual situation. In such a case, my best suggestion is to contact the state's attorney of a county wherein the business may operate to obtain the state's attorney's position on this matter.

For this reason, I am unable to provide you with a formal opinion on your question. However, I can provide you with the following general discussion concerning this issue.

N.D.C.C. § 13-06-01 defines "debt adjusting" as follows:

"Debt adjusting" means the making of a contract, express or implied, with a debtor whereby the debtor agrees to pay a certain amount of money or other thing of value periodically to the person engaged in the debt adjusting business who shall, for a consideration, distribute the same among certain

specified creditors in accordance with a plan agreed upon. The term includes debt adjustment, budget counseling, debt management, or debt pooling service of the holding of oneself out, by words of similar import, as providing services to debtors in the management of their debts and contracting with the debtor for a fee to (a) effect the adjustment, compromise, or discharge of any account, note, or other indebtedness, of the debtor, or (b) receive from the debtor and disperse to his creditors any money or other thing of value.

An agreement to provide the service described in your letter could technically be considered to be a "contract[]" with the debtor for a fee to . . . effect the . . . discharge of any account, note, or indebtedness, of the debtor, or . . . receive from the debtor and disperse to his creditors any money or other thing of value."

However, reading N.D.C.C. ch. 13-06 as a whole and considering other sources discussing the nature of "debt adjusting," it appears that the debt adjusting statute would not be applicable to the situation you describe.

The term "debt adjusting" under N.D.C.C. § 13-06-01 contemplates a method of helping financially distressed debtors in the settlement of obligations with creditors through an alteration or modification of their indebtedness agreements. This "plan" agreed upon between the creditors and the debtor is for the purpose of assisting a debtor unable to make regular payments, and allows for the distribution among the various creditors of collected sums from the debtor in excess of the debtor's living expenses. This has been described in Annot. 95 A.L.R. 2d 1354 (1964) as follows:

The business, which goes by the name of debt adjusting, budget planning, debt pooling, pro rating, or credit counseling, operates in this way: the debt adjustor, for a consideration and pursuant to a contract entered into between himself and the debtor, regularly collects certain sums of money from the debtor in excess of his living expenses, and distributes the same among his various creditors according to an agreed plan of modification or extension entered into between the adjustor and the creditors. By this arrangement, the debtor who is unable to meet his regular installment payments is spared from mortgage foreclosure or bankruptcy proceedings through the services of the adjustor, and the creditors, banking on the influence of the adjustor, usually agree to the modification instead of resorting to collection or foreclosure suits which in the end may prove to be more costly.

The elements described in your letter show a mortgage acceleration service probably outside of the normal elements necessary to apply the description of "debt adjustor." The services you describe are only provided to clients if the terms of their mortgages and the mortgage notes already permit the acceleration of payments. There is no "plan" agreed upon between the client's various creditors and the client as a result of the actions of the company. The company's actions in accelerating mortgage payments would not "effect

the adjustment, compromise, or discharge of any account, note or other indebtedness," as envisioned under N.D.C.C. § 13-06-01.

Based upon the specific facts outlined in your letter, it is my informal conclusion that such a mortgage acceleration service probably would not constitute debt adjusting. Again, my conclusion does not take the form of a formal Attorney General's opinion. I must defer the final judgment on this determination to the appropriate state's attorney.

I hope this general discussion has been helpful to you

Sincerely,

Nicholas J. Spaeth

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