

STATE OF COLORADO

Department of Law

COLLECTION AGENCY BOARD

110 16th Street, 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4601
FAX (303) 620-4130



December 19, 1990

Laura E. Udis
Executive Director
Jack L. Kinkel
Deputy Administrator

**RE: Creditor's Use of a Registered Trade Name in the
Collection of its Own Debts**

Dear _____,

The purpose of this letter is to provide an opinion on whether the provisions of the Colorado Fair Debt Collection Practices Act ("Colorado Act") apply to a creditor who collects its own debts under a registered trade name. This letter is an informal opinion and should not be considered a formal advisory opinion pursuant to section 12-14-113(5), C.R.S. (1985).

As I understand the facts you have provided to the Executive Director of the Colorado Collection Agency Board, _____ collects its own accounts using one of its trade names, _____ is not a separate corporate entity; it is the collection department of _____. _____ does not collect the debts of any other creditors. Presumably, any correspondence with consumers who have past-due accounts reflects only the name of _____.

Definition of a "Collection Agency"

The Colorado Act defines a collection agency as,

any person, firm, corporation, or partnership which engages in any business, the principal purpose of which is the collection of any debts, or any person, firm, corporation, or partnership which regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another, or which takes assignment of claims for the purposes of collecting such claims, or which, directly or indirectly, solicits claims for the collection of debts owed or due or asserted to be owed or due another.

Section 12-14-103(2)(a), C.R.S. (1985 & 1990 Supp.).

A collection agency does not include:

(I) Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(II) Any person while acting as a collection agency for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a collection agency does so only for creditors to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

. . . .

(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:

(A) Such activity is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(B) Such activity concerns a debt which was extended by such person;

(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; or

(D) Such activity concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor;

Sections 12-14-103(2)(b)(I)(II) & (VII), C.R.S. (1985) (emphasis added).¹

¹ The substance of the Federal Fair Debt Collection Practices Act is almost identical to the Colorado Act. It states in part:

The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed

A creditor in certain instances may be deemed a "collection agency." Section 12-14-103(2)(c), C.R.S. (1985), states:

(c) Notwithstanding the provision of subparagraph (VII) of paragraph (b) of this subsection (2), "collection agency" includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause [F] of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. . . . The term does not include -

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

. . . .

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. 1692(a)(6) (1990).

(Emphasis added).

Interpretation of the Federal Act

Both the Colorado Act and the Federal Fair Debt Collection Practices Act ("Federal Act") are ambiguous as to whether or not a creditor who uses a registered trade name to collect its own debts is covered by the provisions of the Fair Debt Collection Practices Act. The issue ultimately requires a determination of whether a registered trade name is a "name other than [the creditor's] own." The legislative history of the Colorado Act and the Federal Act is silent on this issue, and no Colorado case law resolves the issue.

Three federal cases and one state court case were located which generally discuss a creditor's use of a name other than its own to collect debts. In Mallen v. Town & Country Charge, 545 F.Supp. 1014, 1015 n.3 (N.D. Ill. 1982), the court noted that use of a second name by the creditor can make a creditor a "debt collector" within the meaning of the Federal Act). See also Phillips v. Periodical Publishers' Service Bureau, Inc., 369 S.E.2d 154 (S.C. Ct.App. 1988) (corporate subsidiary of the creditor which used the name National Collection Agency on the envelopes of its dunning letters was covered by the Federal Act even though the enclosed dunning letter disclosed that the name on the envelope was a division of the subsidiary); Torres v. American Telephone & Telegraph Co., No. 88 C2030 (N.D. Ill. 1988) (unpublished) (telephone company is a debt collector if it uses a false name in some of its correspondence indicating that a third party is involved in the collection activities).² The court in Meads v. Citicorp Credit Services, Inc., 686 F.Supp. 330, 333 (S.D. Ga. 1988), reached a similar conclusion in dicta. However, the Meads court held that a corporate subsidiary of Citibank was exempt from the provisions of the Federal Act, even though it and its collection division performed collection activities for Citicorp affiliates, because of the affiliate exclusion from the definition

² A creditor or its employee may be "debt collectors" even if they do not use an assumed name. They may be subject to the Federal Act if they deny that they are working on behalf of the creditor while attempting to collect a debt, since the presence of a third party is implicit in that denial. Kempf v. Famous Barr Co., 676 F.Supp. 937, 938-39 (E.D. Mo. 1988). Further, a creditor may become a debt collector if someone acting on behalf of the creditor uses a name other than the creditor's to collect the creditor's accounts. See Horne v. Farrell, 560 F.Supp. 219, 223-24 (M.D. Pa. 1983) (constable used a name other than the creditor to collect a debt owed to Commercial Credit; supposedly creditor becomes a debt collector because of constable's use of another name).

of a "debt collector" found in 15 U.S.C. Section 1692(a)(6)(B) (1990). See Id. at 334.

The FTC's interpretation of the Federal Act is in accord with this case law. The FTC has indicated in its Official Staff Commentary that a creditor's use of a registered trade name would subject the creditor to the Federal Act:

Creditors are generally excluded from the definition of "debt collector" to the extent that they collect their own debts in their own name. However, the term specifically applies to any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is involved in the collection.

A creditor is a debt collector for purposes of [the Federal Act] if:

- He uses a name other than his own to collect his debts, including a fictitious name.

- His salaried attorney employees who collect debts use stationary that indicates that attorneys are employed by someone other than the creditor or are independent or separate from the creditor (e.g., ABC Corp. sends collection letters on stationary of "John Jones, Attorney-at-Law").

- He regularly collects debts for another creditor; however, he is a debt collector only for purposes of collecting these debts, not when he collect his own debt in his own name.

- The creditor's collection division or related corporate collector is not clearly designated as being affiliated with the creditor; however, the creditor is not a debt collector if the creditor's correspondence is clearly labeled as being from the "collection unit of the (creditor's name)," since the creditor is not using a "name other than his own" in that instance.

FTC Official Staff Commentary, 53 Fed.Reg. 50097, 50102 (December 13, 1988) (emphasis added).³

³ A commentator has provided the following advice to consumers for purposes of discovering whether a creditor is using a fictitious name to collect its debts:

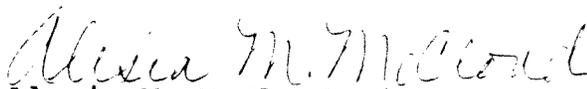
Detecting a creditor's use of a fictitious name may present difficulties. In states where business names or

Conclusions

Although a plain reading of the statute arguably might support a strict interpretation of the Colorado Act, there is no persuasive reason not to adopt the interpretation applied to the Federal Act. As such, a creditor who collects its own debts using a registered trade name is a "collection agency" if it does not clearly indicate in all consumer communications (written and oral) that the registered trade name represents a collection division of the creditor. Consequently, in order for _____ to remain exempt from the definition of a "collection agency", _____ must either collect using its true name or identify _____ (or any other trade name entity utilized) as being a collection division of _____ in all consumer communications (written and oral).

If you have any questions regarding this matter, please feel free to contact me at your convenience.

Sincerely,



Alesia M. McCloud
Assistant Attorney General
Consumer Credit Unit
Enforcement Section

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fictitious names must be registered with a state office, an attorney can check with the office to determine whether a name used in a collection process belongs to a company separate from the creditor.

National Consumer Law Center, Fair Debt Collection (1987 & 1990 Supp.).