JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
OFFICE OF FINANCIAL AND INSURANCE SERVICES
DEPARTMENT OF LABOR & ECONOMIC GROWTH
DAVID C. HOLLISTER, DIRECTOR

LINDA A. WATTERS
COMMISSIONER

December 12, 2003

Dear Mr.

On behalf of , you have raised two issues with respect to Chapter 16 of the Michigan Insurance Code, MCL 500.1601 *et seq*., which governs creditor-placed insurance. You seek my concurrence in two interpretations you have made of Chapter 16:

- Chapter 16 does not apply to a credit transaction entered into before March 23, 2003, the date Chapter 16 took effect.

- A debtor's failure to select a payment option for a creditor-placed insurance premium may constitute the debtor's specific agreement to a balloon payment if the debtor agrees to that at the inception of the credit transaction.

As to a credit transaction before March 23, 2003, except where the Legislature has expressly made a statute retroactive, there is scant room for any retroactivity. Nonetheless, rather than making a blanket determination as to Chapter 16, it would be more appropriate to decide particular matters as they may arise.

Having said that, I do assure you that OFIS will be guided in its actions by *Lynch v. Fleck Technologies*, 463 Mich 578 (2001). Contracts are at issue here, as they were in *Lynch* (at 587):

> In that regard, we agree with the *Landgraf* Court that a requirement that the Legislature make its intention clear "helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, *supra* at 268. This is especially true when a new statutory provision affects contractual rights, an area "in which predictability and stability are of prime importance." *Id*. at 271. n6

Moreover, the Court concluded its opinion as follows (at 588):

> Retroactive application of the SRCA [Sales Representatives' Commissions Act] would substantially alter the nature of agreements concerning payment of sales commissions that were entered into before the act's effective date. Absent a clear legislative intent that the act be so applied, we hold that the SRCA must be given prospective effect only. Accordingly, we overrule *Flynn*, reverse in part the Court of Appeals decision, and reemphasize the strong presumption against the

> retroactive application of statutes in the absence of a clear expression by the Legislature that the act be so applied….

With regard to balloon payments, it does not appear that a debtor's failure to select a payment option for a creditor-placed insurance premium may constitute the debtor's specific agreement to a balloon payment if the debtor agrees to that at the inception of a credit transaction. MCL 500.1609(3) provides:

> A method of billing insurance charges to the debtor on closed-end credit transactions that creates a balloon payment at the end of the credit transaction or extends the credit transaction's maturity date is prohibited, unless specifically disclosed at the time of the origination of the credit agreement and specifically agreed to by the debtor at the time the charge is added to the outstanding credit balance.

First, looking at the language of the statute itself, a "failure to select" a balloon payment does not equate to "specifically agreed" to a balloon payment.

Second, your arrangement would allow for a balloon payment by default "if the debtor agrees to that at the inception of a credit transaction note." However, section 1609(3) requires that the agreement arise "at the time the charge is added to the outstanding credit balance." Thus, your arrangement would have the agreement occur before the time specified by section 1609(3).

Third, the contract law principle that silence is not acceptance applies to insurance transactions. In *Gorham v Peerless Life Ins Co*, 368 Mich 335, 341 (1962), the Michigan Supreme Court stated:

> Based on the doctrine that an application for insurance is a mere offer which must be accepted before a contract of insurance can come into existence, and that silence and inaction do not amount to an acceptance of an offer, the overwhelming weight of authority is to the effect that, at least in the absence of additional circumstances, no inference or presumption of acceptance which would support an action *ex contractu* can be drawn from mere delay or inaction by the insurer in passing on the application….

The Court went on to find that additional circumstances existed in the case before it, but the general principal stands.

Thank you for bringing these issues to the attention of this agency.

Sincerely,

Linda A. Watters
Commissioner