



STATE OF KANSAS

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Attorney General

March 30, 1976

ATTORNEY GENERAL OPINION NO. 76- 114

Honorable John M. Simpson
Senator District 24
P. O. Box 1403
Salina, Kansas 67401

Re: Colleges & Universities--Statute of Limitations--
National Defense Student Loan

Synopsis: A cause of action for collection of a delinquent installment must be instituted within five years of the time the delinquent installment first became due. An action commenced within the five-year period must include all delinquent installments arising prior to the time the action is instituted.

* * *

Dear Senator Simpson:

K.S.A. 60-501 provides in pertinent part:

"The following actions shall be brought within five (5) years: (1) An action upon any agreement, contract or promise in writing."

On behalf of Kansas Wesleyan, you have requested an opinion as to the relationship of the above statute to the collection of delinquent student loans granted under the National Defense Student Loan Program of 1958 (NDSL).

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By way of background, the NDSL program was first enacted by Congress in 1958. Under its provisions, colleges and universities are allotted specified amounts of federal money for the purpose of providing loans to eligible students to assist in the financing of their education. By accepting these federal grants, the university or college becomes obligated to administer the program in accordance with the Congressional mandate and the regulations promulgated by the Department of Health, Education and Welfare pursuant to that enactment. Although the federal government periodically grants additional monies to each school under the terms of this program, the bulk of the funds employed are used in a manner most analogous to a revolving charge arrangement. More specifically, monies in the college's NDSL fund are continuously being loaned. The money and interest collected through repayment is then funneled back into the NDSL fund administered by each school. The school then re-lends these same funds plus the accrued interest collected thereon to other students. Although the federal government has reserved the option to terminate the program and gradually phase it out through repayment by the school of all monies advanced, the school for all intents and purposes, has plenary responsibility for all administrative obligations of the program, including both investment and disbursement of all funds. In administering this program, the "lending" colleges and universities are vested with the authority pursuant to HEW guidelines to determine the eligibility of recipients. Furthermore, these universities and colleges are primarily responsible for assuring repayment and instituting procedures necessary for collection.

The NDSL program, and its present successor-in-interest, have been in continuous operation since the initiation of the program in 1958. During that time span, I am informed that the terms of the various promissory notes utilized have undergone significant changes in both form and content. In answering the narrow question posed by this request, it will be necessary to consider the various types of clauses which have been utilized during the pendency of the NDSL program relative to the repayment procedure. Commencing on June 23, 1972, the effective date of Public Law 72-318, more commonly referred to as the Educational Amendments of 1972, all promissory notes evidencing a loan transaction under the NDSL program are required to contain clauses similar to the following:

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"If default be made in the payment of any installment of either principal or interest when it becomes due according to the terms of the Promissory Note and repayment schedule and that default is not cured within twenty (20) days after the institution gives notice to the maker of the right to cure default in the manner provided by law, then all of the remaining unpaid principal and accumulated interest shall immediately become due and payable without further notice."

"Notwithstanding the repayment schedule otherwise calculable to Part II, the maker shall repay the total principal amount of this loan at the rate of not less than \$30 per month. In the event the maker receives or has received other National Direct Student Loans from other funds authorized by the Act at one or more other lending institutions, he/she shall repay this note at a monthly rate equal to not less than the amount by which \$30 exceeds the total monthly rate or principal repayment on all such other loans."
[Emphasis added.]

The importance of this provision lies simply in the fact that upon the failure to meet a scheduled payment or to cure a default within the terms provided by the agreement or the applicable governing law, the entire outstanding balance plus accrued interest to date thereon becomes immediately due and payable at the option of the lender. In other words, the failure to meet the first payment would entitle the university to declare the entire remaining outstanding balance due and payable. The only other potential form of repayment which bears consideration there is in those instances prior to June 23, 1972, where the recipient borrower, at his option, agreed only to pay in installments the amount borrowed plus accrued interest or in a lump sum at any time prior to the end of the ten-year nine-month loan period. Both options will be considered in the text of this opinion.

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The promissory note reserves to the lending institutions the option to call the entire remaining outstanding balance due and payable upon the borrower's failure to meet any scheduled payment and cure the default through compliance with the applicable law. On the other hand, the lender may decline to exercise his option and wait until the end of the loan period before declaring a default. The promissory note utilized in this arrangement may be most appropriately characterized as an "installment contract". An installment contract is one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piecemeal at different times or different places. The transaction is a credit transaction, not only in the sense that each party puts faith and credit in the other, but also in the sense that one of the parties evidences that faith and credit by rendering in advance part or all of his performance. Corbin on Contracts, § 950 (1 Vol. ed.).

The breach of a contract may be classified as either a "partial" or "total" breach. The term "partial breach" is defined by the Restatement on Contracts at Section 313 as:

" . . . a breach where remedial rights provided by law can be substituted by the injured party for only a part of the existing contractually rights."

Since contracts to pay money in installments, similar to NDSL promissory note arrangement, require a series of separate performances of measurable amounts at intervals of time, these contracts are capable of a series of "partial" breaches, as well as of a single total breach by repudiation. For each "partial" breach a separate cause of action is maintainable. 4 Corbin on Contracts, § 956. See, Kansas and Color, P. R. Co. v. Curry, 6 Kan. App. 561, 51 P. 576 (1897). The failure to meet any one of the installments when it is due is presently regarded as a breach of contract for which an action will lie.

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See, Kennedy v. Gibson, 68 Kan. 612, 75 P. 1044 (1904);
4 Corbin on Contracts, § 949.

It is fundamental that a promissory note contains all the necessary legal requisites to constitute a valid contract. It is an equally fundamental rule of contracts that the law of the state where the contract is entered into governs as to all matters affecting its validity. Denny v. Faulkner, 22 Kan. 89 (1879). In Kansas, the applicable statute of limitations does not commence to run on a contractual agreement until the right to institute the action accrues. In Re State of Clover, 171 Kan. 697, 237 P. 2d 391 (1951). Contracts for NDSL loans are entered into in this state by virtue of the fact that the promissory note agreement is not viewed as completed until approved and accepted by the appropriate office of the university or college located in this state which proposes to make the loan. The question becomes simply when under Kansas law does the cause of action accrue on those loans.

There is much authority for the statement that where separate actions would lie for each of a series of partial breaches, the statute operates against each one separately as of the time when each one could have been brought, and that this rule is not affected by the fact that after two or more such breaches have occurred, the plaintiff must join them all in one action. Heery v. Reed, 80 Kan. 380, 102 P. 846 (1909). K.S.A. 60-511 mandates that an action or any written agreement must be commenced within five years of the date of action accrues. Thus, the lending institution, as a party to the agreement, must institute proceedings to recover any past due installments within five years of the default upon that particular installment.

Although an action matures for failure to render a single installment payment as promised and a second action for each similar failure thereafter, if no action is brought until after there have been two such failures only one action can thereafter be maintained for the two. One judgment bars any further action for breaches that existed at the time suit was brought and that might then have been included in a single action. 4 Corbin on Contracts, § 950. Accordingly, if a borrower fails to meet the first scheduled payment and several

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payments subsequent thereto, a separate cause of action accrues with each failure to meet a schedule payment. However, a suit to collect the first installment must commence within five years of the first breach. An action to collect the first partial breach must also include all other separate breaches arising between the first breach and the time the action is instituted. The failure to include all subsequent breaches in the first action prohibits the injured party from later attempting to collect them.

Where a contract contains an acceleration clause making all installments payable in case of failure to pay any one installment when due, the creditor is not required to join subsequent installments in his action for the first installment, if the acceleration clause is regarded as giving him an option. In such case, the statute does not begin to run against later installments until each falls due in regular course. 4 Corbin on Contracts, § 951. Thus, although the lender has reserved the right to call the entire balance due, the failure to exercise the option in a suit for prior defaults in no way bars the lending institution from seeking legal action for those installments falling due subsequent to institution of legal action.

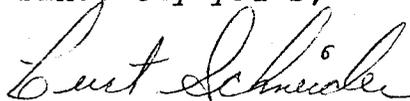
Thus, the following rules governing the relationship of K.S.A. 60-511, and the collection of delinquent NDSL loans may be elicited from the above discussion:

- 1) A separate cause of action accrues each time the student borrower defaults in the payment of a scheduled monthly installment.
- 2) A cause of action for collection of a delinquent installment must be instituted within five years of the time the delinquent installment first became due.
- 3) An action commenced within the five year period must include all delinquent installments arising prior to the time the action is instituted. The failure to include those installments prohibits the lender under the associated principal of res judicata called the "doctrine of merger" from thereafter attempting to collect those non-joined delinquent installments.

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- 4) The lending institution may, at its own option, seek to collect the entire balance due on a promissory note upon the failure of the borrower to meet a single scheduled payment and cure the default within the terms of the agreement.
- 5) The failure to exercise the option and sue for the entire amount upon the failure to meet a single payment does not preclude the lending institution from later seeking collection of those installments falling due subsequent to the filing of the first cause of action.
- 6) If the promissory note specifies that the borrower may, at his option, elect to pay in monthly installments or in a lump sum prior to the end of the ten-year nine-month period, the cause of action does not accrue until the end of the ten-year nine-month period. Thus, the statute of limitations would not run until five years later.
- 7) If the lending institution does not attempt to collect delinquent installments within five years of the date the installment first became due, the statute of limitations prohibits the institution from thereafter collecting that particular installment.

Sincerely yours,



CURT T. SCHNEIDER
Attorney General

CTS:HTW:bv