



But see 20 U.S.C.
§ 1091a(b)(1)
enacted after
opinion issued.

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August 7, 1986

ATTORNEY GENERAL OPINION NO. 86- 113

Jean S. Sagan
Associate General Counsel
Kansas Board of Regents
Suite 609, Capitol Tower
400 S.W. Eighth
Topeka, Kansas 66603

Re: Consumer Credit Code -- Consumer Credit
Transactions; Other Charges and Modifications --
Attorney's Fees; National Direct Student Loans

Synopsis: National Direct Student Loans which are
administered by state universities are subject to
the provisions of the Kansas Uniform Consumer
Credit Code which prohibit the assessment of
attorney's fees and other collection costs to the
borrower upon default. Cited herein: K.S.A.
16a-1-102; K.S.A. 1985 Supp. 16a-1-301(13); K.S.A.
16a-2-507; 16a-3-402.

* * *

Dear Ms. Sagan:

As Associate General Counsel for the Kansas Board of Regents, you request our opinion regarding whether the Kansas Consumer Credit Code, K.S.A. 16a-1-101 et seq., applies to National Direct Student Loans (NDSL) made by state universities. Specifically, you question whether universities, through NDSL applications, may legally pass collection costs onto student loan recipients pursuant to Kansas law.

Universities make NDSL's from the federal Department of Education's (DOE) funds. Regulations governing the DOE provide that an NDSL promissory note may state that the borrower must pay all attorney's fees and other loan collection costs and charges. 34 C.F.R. 674.32(j).

The Kansas Uniform Consumer Credit Code (UCCC) specifically prohibits the collection of attorney's fees from the defaulting borrower in a "consumer credit transaction." K.S.A. 16a-2-507. "Consumer loans" are included in the list of consumer credit transactions. K.S.A. 1985 Supp. 16a-1-301(11).

The UCCC further provides that an agreement with respect to a consumer loan may not provide for any charges as a result of default by the consumer other than those specifically authorized by the UCCC. K.S.A. 16a-3-402. The comment to this section states that the creditor "may impose no collection or default charges on a consumer" except those specifically allowed. Costs resulting from the referral of a loan in default to a collection agency are not specifically authorized by the UCCC. Therefore, the answer to the question posed turns upon whether the UCCC applies to state universities in making NDSL's.

The act, by definition, applies to creditors who extend "consumer loans." Consumer loan is defined by K.S.A. 1985 Supp. 16a-1-301(13) as:

"A loan made by a person regularly engaged in the business of making loans in which:

"(i) The Debtor is a person other than an organization;

"(ii) the debt is incurred primarily for a personal, family or household purpose;

"(iii) either the debt is payable in installments or a finance charge is made; and

"(iv) either the amount financed does not exceed \$25,000 or the debt is secured by an interest in land."

It is agreed that NDSL's extended by universities fall within the conditions enumerated in (i), (iii) and (iv)

above. You question, however, whether a NDSL is "incurred primarily for a personal, family or household purpose." In our opinion, use of a loan to further education is a personal, as opposed to a business or commercial, purpose if the education received is in preparation for a career rather than a continuing education requirement to remain up to date in business practices. See 15 U.S.C. §1602(h), and comments thereto (West 1986).

You also question whether universities are "regularly engaged in the business of making loans," as required by K.S.A. 1985 Supp. 16a-1-301(13). Based upon the role of universities in the NDSL process and upon the intent of the legislature in enacting the UCCC, it is clear that the UCCC does apply to state universities. The universities are suppliers of credit. In bankruptcy proceedings, the university is named as the creditor. In the federal regulations implementing the NDSL program, the university receiving the federal funds is referred to as the lender. Further, the promissory note signed by the borrower refers to the university as the lending institution.

This threshold requirement for the UCCC is low. K.S.A. 1985 Supp. 16a-1-301(13) does not require that the institution has a "principle purpose" of making loans; simply that it is "regularly engaged in the business" of making loans. Universities are in the business of supplying an education for a fee. To help provide that service they regularly make loans of the kind defined in K.S.A. 1985 Supp. 16a-1-301(13). K.S.A. 16a-1-102 says that the provisions of the UCCC "shall be construed liberally." In so doing, we conclude that the UCCC does apply to universities which provide NDSL's within this state.

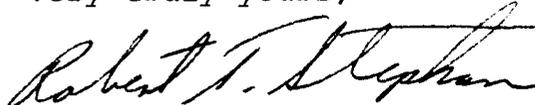
A final analysis should be made regarding whether the federal regulation governing NDSL's, or the state statutes governing consumer credit practices should control in this particular instance. As noted previously, federal regulations governing NDSL's state that "[t]he promissory note may state that the borrower must pay all attorney's fees and other loan collection costs and charges," [34 C.F.R. §674.32(j)] while the UCCC provides that "[w]ith respect to a consumer credit transaction, the agreement may not provide for the payment by the consumer of attorney's fees," K.S.A. 16a-2-507, and that the agreement "may not provide for any charges as a result of default by the consumer" other than those authorized by the UCCC. K.S.A. 16a-3-402. Apparently, the federal government is willing to extend to universities which

administer student loans a collection advantage not allowed by the UCCC to lenders in general.

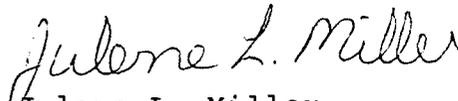
The language of 34 C.F.R. §674.32(j) is permissive only; it does not require institutions to place a provision for attorney's fees and other collection costs in the NDSL application or promissory note. There is nothing in the federal statutes authorizing this regulation which would indicate such a requirement. See 20 U.S.C. §§425(b)(2)(D), 1087dd. Thus, the federal regulations and statutes are not in direct conflict with the state laws. In addition, the federal statutes do not directly preempt state action on this particular point. Finally, 20 U.S.C. §1087gg provides other assistance to universities attempting to collect NDSL's which are in default. For these reasons, it is our opinion that the mandatory state statutes, rather than the federal permissive regulation, are controlling in this instance.

In conclusion, National Direct Student Loans which are administered by the state universities are subject to the provisions of the Kansas Uniform Consumer Credit Code which prohibit the assessment of attorney's fees and other collection costs to the borrower upon default.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm