

VOLUME NO. 37

OPINION NO. 50

BILLS AND NOTES - Delinquency charges on overdue monthly installment payments; DEPARTMENT OF AGRICULTURE - Delinquency charges on overdue monthly installment payments on loans made by the department; EDUCATIONAL INSTITUTIONS - Delinquency charges on overdue monthly installment payments on federally insured student loans; REVISED CODES OF MONTANA, 1947 - Sections 87A-3-106, 87A-3-122, 87A-3-805.

HELD: The Montana Department of Agriculture can assess delinquency charges on overdue monthly installment payments as provided in notes evidencing loans taken by that department.

26 July 1977

Eldon R. Fastrup, Acting Director
Department of Agriculture
1300 Block Cedar Street
Airport Way Building West
Helena, Montana 59601

Dear Mr. Fastrup:

You have requested my opinion concerning the following question:

Can the Montana Department of Agriculture assess delinquency charges on overdue monthly installment payments as provided in notes evidencing loans which:

- (1) bear simple or compound interest and;
- (2) are nonfederally insured loans or federally insured student loans?

It is my understanding that the question arose when you were informed that officers of some commercial banks in Montana did not believe they were authorized under the Montana Uniform Commercial Code-Commercial Paper (hereinafter UCC) to assess delinquency charges on overdue monthly installment payments. However, the UCC does authorize the assessment of delinquent charges on negotiable instruments.

A negotiable instrument is a writing signed by the maker or drawer, which contains an unconditional promise or order to pay a sum certain in money, and is payable on demand or at a definite time to order or to bearer. Section 87A-3-104, R.C.M. 1947. The chapter concerning negotiable paper applies to an instrument which is otherwise negotiable but which is not payable to order or bearer, except that there can be no holder in due course of such an instrument. Section 87A-3-805, R.C.M. 1947.

A delinquency charge provision in a note does not destroy its negotiability since "[t]he sum payable is a sum certain even though it is to be paid ... (b) with stated different rates of interest before and after default or a specified date" Section 87A-3-106(1), R.C.M. 1947. Most loans made by the department thus will be subject to the UCC provision that "[a] cause of action against a maker ... accrues (a) in the case of a time instrument on the day after maturity ...," section 87A-3-122(1), R.C.M. 1947; and

"[u]nless an instrument provides otherwise, interest runs at the rate provided by law for a judgment ... (b) ... from the date of accrual of the cause of action." (Emphasis added.) Section 87A-3-122, R.C.M. 1947.

By excepting those instruments which establish a rate of interest other than that provided by law for a judgment, section 87A-3-122 impliedly upholds the validity of a contractual promise to pay delinquency charges. The UCC makes no distinction on the basis of whether a note bears simple or compound interest.

In addition, since 1872, a provision for interest after the maturity of a promissory note can be enforced in Montana as an agreement between the parties to liquidate damages for a breach of contract. Davis v. Hendrie, 1 Mont. 499 (1872). Accord, Copek v. Monahan, 117 Colo. 131, 184 P.2d 501, 502 (1947); Hays v. Underwood, 196 Kan. 265, 411 P.2d 717, 723 (1966). Under this rule the negotiability of the note appears to be irrelevant.

Federally insured student loans may provide for delinquency charges under express authority of 45 CFR 177.6(c). A charge may be assessed for failure of the borrower to pay all or any part of an installment within 10 days after its due date in an amount not to exceed five cents for each dollar of each installment due or \$5 for each installment, whichever is less. Id.

A delinquency charge cannot be attacked for usury. State usury laws do not apply to federally insured student loans. 20 U.S.C.A. 1078(d); and in any event, a delinquency charge provision does not render a note usurious. Union Bank v. Kruger, 1 Wash. App. 622, 463 P.2d 273 (1969); United Am. Life Ins. Co. v. Willey, 444 P.2d 755, 21 Utah 2d 279 (1968).

THEREFORE, IT IS MY OPINION:

The Montana Department of Agriculture can assess delinquency charges on overdue monthly installment payments as provided in notes evidencing loans taken by that department.

Very truly yours,

MIKE GREELY
Attorney General